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**STATEMENT OF  
ALBERT FOX CAHN, ESQ.  
EXECUTIVE DIRECTOR  
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (“S.T.O.P.”)**

**BEFORE  
THE COMMITTEE ON TECHNOLOGY,  
NEW YORK CITY COUNCIL**

**FOR A HEARING ON  
THE ETHICAL IMPLICATIONS OF USING ARTIFICIAL  
INTELLIGENCE AND AUTOMATED DECISION SYSTEMS**

**PRESENTED  
NOVEMBER 13, 2020**

## 1. Introduction

Good morning, my name is Albert Fox Cahn, and I serve as the Executive Director of the Surveillance Technology Oversight Project (“S.T.O.P.”). S.T.O.P. advocates and litigates for New Yorkers’ privacy, fighting discriminatory surveillance. My thanks to Chair Holden and the committee staff for the opportunity to discuss the dangers that artificial intelligence poses to New York’s workers.

## 2. The Danger of Automated Decision Systems in the Workplace

While few New Yorkers fully understand how Automated Decision Systems (“ADS”) impact hiring, promotion, and other employment decisions, thousands of employees are already having their livelihoods decided (at least in part) by these systems. ADS, including Artificial Intelligence and machine learning, is increasingly used by employers big and small. But even as these systems pose a growing threat to workers’ rights, there are relatively few protections against errors, bias, and discrimination.

New York City has some of the strongest legal protections against employment discrimination anywhere in the country. But while these laws have been robustly enforced against human discrimination for years, they have yet to be meaningfully applied to many Automated Employment Systems.

Algorithmic discrimination occurs in numerous ways. One example is Amazon’s attempt to build ADS recruitment tool in 2014.<sup>1</sup> After training the ADS with the CVs from years of successful applicants, the system learned to simply emulate the hiring discrimination of human employers, ranking female-presenting applicants lower for attending all-women’s colleges or listing groups with “women’s” in the title.<sup>2</sup> In another example, a widely-used healthcare algorithm drawing from healthcare cost data – in which less money is spent on Black patients’ healthcare than white patients’ – under-identified Black patients for complex care by more than half.<sup>3</sup>

ADS are sold to the public as “objective” and “scientific”, but they are frequently just as biased as human decision makers, if not more so. Only ADS often discriminate opaquely, leaving victims without any legal redress. Even worse, one biased ADS can impact thousands, even millions of employees and job candidates, having a far larger discriminatory impact than any one human employer could.

These concerns are why we agree with many council members that it is urgent for New York to legislate against ADS discrimination. Unfortunately, we believe the current language of Introduction

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<sup>1</sup> James Vincent, *Amazon reportedly scraps internal AI recruiting tool that was biased against women*, THE VERGE (Oct. 10, 2018), <https://www.theverge.com/2018/10/10/17958784/ai-recruiting-tool-bias-amazon-report>.

<sup>2</sup> *Id.*

<sup>3</sup> Ziad Obermeyer, Brian Powers, Christine Vogeli, Sendhil Mullainathan, *Dissecting racial bias in an algorithm used to manage the health of populations*, SCIENCE (Oct. 25, 2019), <https://science.sciencemag.org/content/366/6464/447>

1894 falls far short of this laudable goal, and we fear that if the bill is passed in its current form, it may have dire unintended consequences.

### **3. Improving Introduction 1894 to Better Protect New York’s Workers**

We urge council members to address several limitations in the current version of Introduction 1894 that dramatically undercut its stated purpose. In these remarks, I outline numerous high-level responses to the existing text, but I would welcome the opportunity to work with council members to draft revised statutory language.

As part of revisions, we urge the Council to dramatically expand the definition of “automated employment decision tool.” The current statutory language is artificially narrow, included only a small subset of the ADS already being marketed to employers. In regulating novel uses of machine learning and other forms of artificial intelligence, we mustn’t ignore the harm inflicted by less cutting-edge, and more commonly-used, forms of ADS.<sup>4</sup>

We believe that ADS should include “any software, system, or process that aims to automate, aid, or replace human decision-making relevant to employment. Automated Employment Decision Tools can include both tools that analyze datasets to generate scores, predictions, classifications, or some recommended action(s) that are used by employers to make decisions regarding employees, contractors, and jobs candidates.”<sup>5</sup> We have already seen a broad consensus from civil society groups here in New York to adopt such a broad definition in response to last year’s ADS Taskforce report.

Similarly, the definition of “employment decision” should also be broadened to include every type of employment decision made by automated employment decision tools. This should include not just hiring decisions, but promotions, scheduling, raises, and more.

The audit process at the heart of this legislation must be better defined to create an enforceable legal standard. Currently, there is no meaningful guidance on how to conduct such an audit with many forms of ADS. Additionally, any audit must be completed by an independent auditing firm, providing ways for workers and other stakeholders to understand how employer ADS operate.

But no matter how audits are conducted, they aren’t enough on their own. Notably, Introduction 1894’s current language fails to do the most crucial thing needed to prevent use of biased ADS: the bill fails to outlaw such systems. Rather, the bill merely requires such systems to be “audited” for bias. But that audit provides no meaningful protections on its own. A company whose audit reveals biased outcomes could freely sell its product by carrying out this *pro forma* step.

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<sup>4</sup> See Rashida Richardson, ed., “Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force,” P. 20, AI NOW INSTITUTE, December 4, 2019, <https://ainowinstitute.org/ads-shadowreport-2019.html>.

<sup>5</sup> *Id.*

Similarly, software firms and employers must not be allowed to hide evidence that their software is biased. Rather than just conducting an audit, firms must be required to report their results (good or bad) to the City’s Commission on Human Rights or another designated agency. Introduction 1894 should be amended to ban any software tool that has reported evidence of bias (as defined in an updated statute) in the prior year.

This legislation should not only require an audit, but it should attach meaningful penalties to any vendor that sells biased ADS and for any employer that uses such a system. Additionally, liability should jointly and severably apply to both vendors and employer. This will help ensure that victims of automated discrimination are able to recover compensation even when their employer or a software vendor is otherwise judgement proof.<sup>6</sup> Additionally, liability under this ordinance must extend to the City itself. New York City’s 325,000 municipal workers must be empowered to bring the same claims as their private sector counterparts.<sup>7</sup>

For those who suffer ADS discrimination, Introduction 1894 puts their rights completely at the whim of enforcement agencies. This simply is not enough to deter misconduct, especially as we see a potential surge in ADS in New Yorkers’ workplace hiring[?]. We urge the Council to supplement agency enforcement under this section with a private right to sue employers and vendors who violate this statute. This “force multiplier” will supplement agency actions,<sup>8</sup> but only if this legislation also provides attorneys’ fees for a prevailing party.<sup>9</sup> Without attorneys’ fees, those most at risk of algorithmic discrimination will be least likely to have their day in court.<sup>10</sup>

Again, we commend the Council for the spirit of Introduction 1894, but we urge you to work with us and other stakeholders to amend the draft. If we fail to pass a revised and strengthened bill, New Yorkers will face increasingly powerful and prevalent ADS without any meaningful legal protections. I look forward to working with the members ensure that Introduction 1894 lives up to the lofty goals that motivated this legislative effort.

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<sup>6</sup> § 1:25. Joint and several liability, 1 Comparative Negligence Manual § 1:25 (3d ed) (“The joint and several liability doctrine, which applies when more than one defendant tortiously contributed to the plaintiff’s injury, allows a nonnegligent plaintiff to recover the full amount of the damages arising from the tortiously caused injury from any one or any combination of the defendants who tortiously contributed to the injury. It has been said that joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.”).

<sup>7</sup> Maria Doullis, *The Growth of NYC Employee Headcount*, CBC (May 18, 2020), <https://cbcnyc.org/research/growth-nyc-employee-headcount>.

<sup>8</sup> Cameron F. Kerry, John B. Morris, Jr., *In privacy legislation, a private right of action is not an all-or-nothing proposition*, BROOKINGS (Jul. 7, 2020), <https://www.brookings.edu/blog/techtank/2020/07/07/in-privacy-legislation-a-private-right-of-action-is-not-an-all-or-nothing-proposition/>.

<sup>9</sup> See: 42 U.S.C. § 1988 (2000).

<sup>10</sup> See: § 973 GUARDING AGAINST EXCESSIVE FEES INCURRED AS PART OF FLSA LAWSUITS, 2014 WL 12883902 (“In this sense, the FLSA provision for attorney’s fees serves an important public policy goal -- empowering those without the means to finance litigation.”).

# **Attachment A**

November 11, 2020

Hon. Laurie A. Cumbo  
New York City Council Majority Leader  
250 Broadway, Suite 1833  
New York, NY 10007  
*via email*

**RE: Int. 1894-2020 - Sale of Automated Employment Decision Tools.**

Dear Council Member Cumbo:

We, the undersigned civil rights, labor, and civil society organizations commend you for your leadership in tackling the discriminatory threat of automated employment decision tools. We urge the Council to require employers and hiring technology vendors to proactively measure and remediate disparate impacts, and consider less discriminatory alternatives. While we are glad to see this issue getting much needed attention, we are quite concerned that the current language of Int. 1894 could prove counterproductive in the fight against algorithmic discrimination.

We have flagged a number of concerns with the existing language below, and we'd welcome the opportunity to meet with you and your staff to discuss potential changes:

- **Definition of “automated employment decision tool”:** Currently, this definition is underinclusive, capturing only a small portion of the technologies and processes that are currently or potentially used in employment settings. We would recommend a more expansive definition that would capture the full range of hiring technologies deployed in New York City, including applicant tracking systems, digital versions of psychological and personality assessments, and other complex procedures that do not fit cleanly within Int. 1894's current scope.
  - One possible formation is: “Automated Employment Decision Tools are any software, system, or process that aims to automate, aid, or replace human decision-making relevant to employment. Automated Employment Decision Tools can include both tools that analyze datasets to generate scores, predictions, classifications, or some recommended action(s) that are used by employers to make decisions regarding employees, contractors, and jobs candidates.”<sup>1</sup>
- **Definition of bias audit:** Today, relatively little is publicly known about hiring technology vendors' auditing processes.<sup>2</sup> Existing law and federal agency guidance also do not provide clear and robust standards for reviewing the discriminatory impacts of hiring tools and

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<sup>1</sup> See Rashida Richardson, ed., “Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force,” P. 20, AI Now Institute, December 4, 2019, <https://ainowinstitute.org/ads-shadowreport-2019.htm>

<sup>2</sup> See Manish Raghavan, et al., “Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices,” [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3408010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408010).

processes.<sup>3</sup> We are concerned that the current language would allow employers and vendors to comply with the law by conducting a pro forma, internal audit, without any meaningful opportunity for third party review. In addition to mandating that annual bias audits be conducted by independent third parties, we recommend that workers be given the opportunity to audit any hiring process for bias. The Committee will need to work, together with a range of stakeholders, to define auditing procedures that include statistical testing, accessibility testing, and proactive consideration of less discriminatory alternatives.

- **Thorough disparate impact audits must involve both vendors and employers:** Compliance with §8-107 cannot be established through a pre-sale audit alone. That law dictates that disparate impacts be measured with respect to the relevant applicant pool or available workforce for a particular job. Such measurement requires data from employers. Similarly, the “business objective” defense turns on its relationship to the particular job and employer.
- **Liability for biased tools:** Currently, no provision of this bill would penalize the sale or use of an Automated Employment Decision Tool that is found to be biased. While such a system may create liability for the vendor and employer under existing New York Human Rights Laws, we urge you to also establish liability here.
- **Definition of “employment decision”:** Currently, this definition is underinclusive, capturing only a small subset of the employment decisions that are made by automated employment decision tools.
- **Private right of action:** We fear that even the best possible automated employment decision tool law will be little more than a dead letter in the absence of a private right of action. In addition to the existing civil penalties, we would urge you to include a private right of action for any employee, contractor, or applicant who is subjected to a biased automated employment decision tool.
- **Attorneys’ fees:** To ensure that all New Yorkers are able to avail themselves of a private right of action under this law, we would also urge you to provide attorneys’ fees for prevailing plaintiffs. This will ensure that low-income employees, contractors, and job applicants will be able to have their day in court.
- **Non-exclusivity:** We urge you to clarify that compliance with Int. 1894 does not preclude a private right of action or agency enforcement action under any other provision of New York City law. In short, compliance with Int. 1894 should be a floor, not a ceiling, for compliance with non-discrimination protections.
- **Reporting:** We urge you to require mandatory reporting to the New York Commission on Human Rights, disclosing the results of any Automated Employment Decision Tool audits.

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<sup>3</sup> For example, the Uniform Guidelines on Employee Selection Procedures (UGESP) suggest using a four-fifths impact ratio as a general rule for measuring disparate impact, both the EEOC and OFCCP use additional measures, such as statistical significance tests, when investigating disparate impacts, and courts have refused to adopt a single arithmetic measure of discrimination, acknowledging that the right measurement depends on the context.

The Commission should provide test results to the public to the full extent possible, as well as maintaining a “banned list” of any Automated Employment Decision Tool found to be biased in the prior year.

- **Government hiring:** We urge you to ensure that this legislation applies with full force to any Automated Employment Decision Tool used by New York City agencies. Government hiring must not be held to a lower standard for fairness than what we require for the private sector.

To reiterate, we are grateful for your leadership on this matter, and we hope that we can work with your office to draft language that ensures the spirit of this legislation is fully realized in the years ahead. Unfortunately, these concerns will also make it impossible for us to support passage of Int. 1894 as currently drafted

Sincerely,

AI Now Institute at NYU  
BetaNYC  
Cryptoharlem  
Data for Black Lives  
The Legal Aid Society of NYC  
NAACP Legal Defense and Educational Fund  
National Employment Law Project  
New York Civil Liberties Union  
New York Communities For Change  
OceanHill Brownsville Alliance  
S.T.O.P. - The Surveillance Technology Oversight Project  
Upturn

CC: Intro. 1894 Co-Sponsors  
New York City Council Technology Committee Members