

# THE DANGERS OF FACIAL RECOGNITION TECHNOLOGY IN SUBSIDIZED HOUSING

*Michelle Y. Ewert\**

*The use of facial recognition technology (FRT) in subsidized housing makes life more difficult for subsidized tenants, who are disproportionately women, seniors, and people of color. Conditioning building access on facial recognition is problematic because flaws in the technology make it hard for systems to recognize people with darker skin, women, children, trans and non-binary individuals, and seniors. As a result, tenants are often stranded outside and unable to enter their homes.*

*Perhaps more chilling is the gross invasion of privacy this technology presents, especially when data from facial recognition and surveillance systems are shared with the police. Tenants must surrender their biometric data to third parties with no assurance of its security. Further, landlords and police can use this data to track tenants' movements and activities. Finally, this technology interferes with tenants' personal relationships as it surveils their family and friends and puts tenants at risk of eviction if the systems misidentify visitors as people on ban lists or those with outstanding arrest warrants.*

*This intrusion into subsidized tenants' privacy is yet another example of the hyper-surveillance of means-tested public benefits recipients and of the over-policing in Black and Brown communities. With limited resources and few alternatives for affordable housing, subsidized tenants have no choice but to accept this invasion into their privacy. Because the harms that low-income tenants experience through facial recognition technology and surveillance far outweigh the benefits to the community, this Article calls for the abolition of facial recognition technology in the subsidized housing context, or, at a minimum, heavy regulation on its use. The Article presents workable solutions to protect tenants' privacy, including proposed legislation, agency rules and guidance, contracts with housing providers, and community advisory boards.*

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\* Professor of Law, Washburn University School of Law. J.D., University of Wisconsin. M.P.P., University of Minnesota. I would like to thank Michele Gilman, David Rubenstein, Karen Wabeke, the housing working group at the Clinical Law Review Writers' Workshop, and my parents, Merrill and Priscilla Ewert, for giving me feedback on early drafts; Morgan Lawrence and Emily Lauritsen for their invaluable research assistance and righteous indignation on behalf of tenants; the students of the N.Y.U. Journal of Legislation & Public Policy for selecting the piece and helping make it stronger; and Frédéric Sourgens and his family for the many delicious dinners they hosted while I was working on this project.

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#### INTRODUCTION

Imagine walking up to your apartment building with your arms loaded with bags of groceries. It is raining. All you want is to get inside so your bags do not get wet and break, spilling the contents on the ground. You step up to the scanner that should allow you entrance to the building, but it does not recognize your face. You shift position, moving closer to the scanner. Still nothing. You change the angle of your face in hopes that the scanner will now recognize you. Maybe this time it does. Or maybe this time it does not, and you must wait for someone to enter or exit the building and let you in.

So goes life for Christina Zhang and the other residents at Knickerbocker Village, an affordable housing development on Manhattan's

Lower East Side.<sup>1</sup> Their apartment complex installed facial recognition technology (FRT) in 2013.<sup>2</sup> Unfortunately, the technology is far from perfect. Ms. Zhang and her fellow tenants often find themselves dancing around the building entrance, trying to trigger the security camera into recognizing them and unlocking the door.<sup>3</sup> The FRT that is supposed to allow them access to their home routinely fails to recognize residents, stranding them outside.<sup>4</sup>

This failure in artificial intelligence (AI)<sup>5</sup> is at best an inconvenience. However, FRT in rental housing is often downright dangerous. Errors in design and selective use driven by bias perpetuate historic discrimination and harm low-income Black and Brown tenants. The negative impact of this power and control is particularly egregious in subsidized housing, which is a critical part of the financial safety net.

Housing is a precarious resource for low-income people, especially low-income people of color. A study of renters conducted by The Pew Charitable Trusts found that by 2015, thirty-eight percent of renter households were rent burdened, defined as spending more than thirty percent of their monthly income on rent.<sup>6</sup> The percentage of severely rent burdened households, defined as spending more than fifty percent of monthly income on rent, increased from twelve to seventeen percent between 2001 and 2015.<sup>7</sup> Black households were more likely than white households to be rent burdened or severely rent burdened.<sup>8</sup> Indeed, the percentage of severely rent burdened Black households was almost double the percentage of severely burdened white households by 2015.<sup>9</sup>

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1. Paris Martineau, *Cities Examine Proper—and Improper—Uses of Facial Recognition*, WIRED (Oct. 11, 2019, 10:05 AM), <https://www.wired.com/story/cities-examine-proper-improper-facial-recognition/> [https://perma.cc/J4YS-JPN9].

2. *Id.*

3. *Id.*

4. *Id.*

5. In the National Artificial Intelligence Initiative Act of 2020, Congress defined “artificial intelligence” (AI) as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to: (A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action.” 15 U.S.C. § 9401(3).

6. PEW CHARITABLE TRS., *AMERICAN FAMILIES FACE A GROWING RENT BURDEN* 4-5, 11 (2018) [hereinafter *PEW STUDY*], [https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden\\_report\\_v2.pdf](https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf) [https://perma.cc/US2H-838T].

7. *Id.* at 11.

8. *Id.* at 11-12, fig. 3.

9. In 2015, twenty-three percent of Black households were severely rent burdened, while only thirteen percent of white households were severely rent burdened. *Id.*

For rent burdened households, the risk of eviction due to failure to pay rent is high. Further, with limited financial resources, finding new housing can be extremely difficult.<sup>10</sup> The COVID-19 pandemic and subsequent economic crisis exacerbated existing housing instability, particularly for households of color.<sup>11</sup>

To provide low-income Americans access to affordable housing, the Department of Housing and Urban Development (HUD) provides rental subsidies administered through state and local governments that include public housing<sup>12</sup> and the Housing Choice Voucher Program (HCVP).<sup>13</sup> Rent in federally subsidized housing is capped at thirty percent of a household's monthly income.<sup>14</sup> Because subsidized housing is such an important resource,<sup>15</sup> any practices or policies that un-

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10. The Pew study found that in 2015, sixty-four percent of rent burdened or severely rent burdened households had less than \$400 in savings. Of those families with almost no savings, eighty-four percent were Black. PEW STUDY, *supra* note 6, at 15.

11. Yung Chun, Selina Miller, Savannah Larimore, Stephen Roll, Hedwig Lee & Michal Grinstein-Weiss, *Racial and Ethnic Disparities in Housing Instability During the COVID-19 Pandemic* 4 (Soc. Pol'y Inst. Wash. Univ. St. Louis, Working Paper No. 38, 2020); Yung Chun & Michal Grinstein-Weiss, *Housing Inequality Gets Worse as the COVID-19 Pandemic is Prolonged*, BROOKINGS INST.: UP FRONT (Dec. 18, 2020), <https://www.brookings.edu/blog/up-front/2020/12/18/housing-inequality-gets-worse-as-the-covid-19-pandemic-is-prolonged/> [<https://perma.cc/X6KE-7YTX>]; Bradley L. Hardy & Trevon D. Logan, HAMILTON PROJECT, RACIAL ECONOMIC INEQUALITY AMID THE COVID-19 CRISIS 6 (2020), [https://www.hamiltonproject.org/assets/files/EA\\_HardyLogan\\_LO\\_8.12.pdf](https://www.hamiltonproject.org/assets/files/EA_HardyLogan_LO_8.12.pdf) [<https://perma.cc/A28P-L6VM>].

12. In the public housing program, public housing authorities own and operate rental units using federal funds. The public housing authority is the landlord. See *HUD's Public Housing Program*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited Apr. 1, 2023).

13. In the HCVP (formerly known as "Section 8"), public housing authorities issue vouchers that allow tenants to rent units on the private rental market at a reduced rate. The housing authority administers the federal subsidy while the private landlord provides the housing. See *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Apr. 1, 2023).

14. 42 U.S.C. § 1437a(a)(1)(A).

15. In addition to long-term rental subsidies like public housing and the Housing Choice Voucher Program, the federal government also supports the development of affordable housing through the Low-Income Housing Tax Credit (LIHTC). 26 U.S.C. § 42. Under this program, developers qualify for tax credits by agreeing to rent a set percentage of units in the building to people of low income and to cap rents based on area median income. Currently, developers must maintain affordability of the units for thirty years (unless they qualify for early relief after fifteen years) but can then convert the units to market-rate. For an overview of the LIHTC program, see Corianne Payton Scally, Amanda Gold, Nicole DuBois, *THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES*, URB. INST. (July 2018), [https://www.urban.org/sites/default/files/publication/98758/litc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/litc_how_it_works_and_who_it_serves_final_2.pdf) [<https://perma.cc/KJ3R-4WAL>]. Although the LIHTC program is a critical tool in affordable housing development,

fairly limit access to it or increase the likelihood of termination from it—including the use of FRT—must be discontinued.

Given how pervasive FRT is in contemporary life, limiting the use of FRT or other AI in subsidized rental housing might seem counterintuitive.<sup>16</sup> For example, consumers use FRT to unlock smart phones and authorize online purchases.<sup>17</sup> Law enforcement officers use facial recognition tools to identify and locate minors in exploitative online videos and photos.<sup>18</sup> These are just a handful of the many ways FRT makes life easier and why some people welcome AI surveillance into their everyday life.

However, two concepts, “luxury surveillance” and “imposed surveillance” help explain the difference between how wealthy people and white people experience AI monitoring compared with how poor people and people of color experience AI monitoring. Luxury surveillance is “surveillance that people pay for and whose tracking, monitoring, and quantification features are understood by the user as benefits they are likely to celebrate.”<sup>19</sup> Examples of luxury surveillance include smart watches that many high-income people use to track all kinds of data about their health and activities. Some scholars have noted that “[w]hen people believe (often correctly, as it happens) that social power is on their side, and when they see themselves as the ones doing the watching, they believe that such technology works in their favor and they will gladly pay to wear or install it.”<sup>20</sup>

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this article focuses on long-term rental subsidies, which provide permanent affordability for low-income households.

16. In addition to consumer and law enforcement use of such technology, the medical profession is increasingly using AI to diagnose health problems, such as skin cancer. See, e.g. Kanadpriya Basu, Ritwik Sinha, Aihui Ong & Treena Basu, *Artificial Intelligence: How is It Changing Medical Sciences and Its Future?*, 65 INDIAN J. OF DERMATOLOGY 365 (2020); Daniel Greenfield & Sean Wilson, ARTIFICIAL INTELLIGENCE IN MEDICINE: APPLICATIONS, IMPLICATIONS, AND LIMITATIONS, HARV. UNIV.: SCI. NEWS (June 19, 2019), <https://sitn.hms.harvard.edu/flash/2019/artificial-intelligence-in-medicine-applications-implications-and-limitations/> [<https://perma.cc/8JEZ-KTSE>].

17. Guillaume Dave, Xing Chao & Kishore Sriadibhatla, *Face Recognition in Mobile Phones 1* (2010) (unpublished article) (on file with authors); APPLE, *About Face ID advanced technology*, <https://support.apple.com/en-us/HT208108> (last visited Apr. 1, 2023).

18. Kashmir Hill & Gabriel J.X. Dance, *Clearview’s Facial Recognition App is Identifying Child Victims of Abuse*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/business/clearview-facial-recognition-child-sexual-abuse.html> [<https://perma.cc/TK9V-E8DV>].

19. Chris Gilliard & David Golumbia, *Luxury Surveillance*, REAL LIFE (July 6, 2021), <https://reallifemag.com/luxury-surveillance/> [[perma.cc/A9FT-QL3H](https://perma.cc/A9FT-QL3H)].

20. *Id.*

Conversely, imposed surveillance is “surveillance the subject would prefer not to have but is required to for one reason or another.”<sup>21</sup> An ankle monitor in the criminal law system is a classic example of imposed surveillance. FRT and surveillance technology in rental housing similarly control low-income tenants and tenants of color, who are more at risk of arrest than their wealthy, white counterparts, and who have fewer housing options.<sup>22</sup>

Problems inherent in AI often work against women and people of color by exerting ongoing power and control under the guise of objectivity and fairness. Ruha Benjamin describes this phenomenon as “the New Jim Code,” defined as:

[T]he employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the discriminatory systems of a previous era.<sup>23</sup>

The Algorithmic Justice League (AJL), an organization of academics, artists, and other advocates who “care about making a future where social technologies work well for all of us,”<sup>24</sup> explains the collective social harms that stem from AI in a range of contexts.<sup>25</sup> The AJL divides the collective harms into loss of opportunity (stemming from discrimination in hiring and employment, housing, and education), economic loss (stemming from discriminatory credit and differential prices of goods), and social stigmatization (stemming from increased surveillance, stereotype reinforcement, and dignitary harms).<sup>26</sup> This Article first explores these harms with a particular focus on the subsidized housing context and then argues that given the importance of subsidized rental housing, FRT should be restricted rather than expanded. Indeed, the National Fair Housing Alliance (NFHA) identified tech bias as “the new civil rights frontier.”<sup>27</sup>

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21. *Id.*

22. *Housing Justice and Artificial Intelligence with Erin McElroy*, SANCTUARY FOR INDEP. MEDIA (Sept. 8, 2020), <https://archive.org/details/media-sanctuary-housing-justice-and-artificial-intelligence-with-erin-mcelroy> [<https://perma.cc/8CUF-UG6L>].

23. RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE* 5-6 (2019).

24. *Coded Bias*, 7TH EMPIRE MEDIA, at 57:26 (2020) <https://www.7thempiremedia.com/films-codedbias> (statement by Joy Buolamwini, Algorithmic Just. League, Founder).

25. *Our Mission*, ALGORITHMIC JUSTICE LEAGUE, <https://www.ajl.org/about> [[perma.cc/27WQ-5GA4](https://perma.cc/27WQ-5GA4)].

26. *Id.*

27. NAT’L FAIR HOUS. ALLIANCE, *DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: FAIR HOUSING TRENDS REPORT* 45-54 (2019), <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf> [<https://perma.cc/FR7X-7F9M>].

This Article proceeds in three parts. Part I describes how FRT is currently used in rental housing and focuses on tenant surveillance and building access in neighborhoods of color. Part II discusses the problems with AI in this context. This part explains how facial recognition is less accurate for people with darker skin, women, trans and non-binary individuals, seniors, and children. Additionally, it discusses how even if AI were improved to eliminate functional errors, current applications of AI in surveillance and building access strip low-income tenants of important privacy and property rights. This part further discusses how this intrusive AI is part of a larger system of regulation of low-income people, especially low-income women of color. Part III then examines potential solutions, including legislation, agency regulations and guidance, contract terms, and community advisory boards. These solutions focus primarily on abolition of the use of FRT in subsidized housing, but also include proposals for heightened regulation if abolition does not occur.

## I.

### DISCRIMINATORY USES OF FACIAL RECOGNITION TECHNOLOGY IN RENTAL HOUSING

Landlords use AI in different ways at different stages of the tenancy.<sup>28</sup> Many landlords rely on online platforms to advertise to prospective tenants.<sup>29</sup> Similarly, many landlords use third-party screening

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28. For a summary of the uses of AI in housing, see Michele Gilman, *Poverty Algorithms: A Poverty Lawyer's Guide to Fighting Automated Decision-Making Harms on Low-Income Communities*, DATA & SOC'Y 29-36 (2020), <https://datasociety.net/wp-content/uploads/2020/09/Poverty-Lawgorithms-20200915.pdf> [<https://perma.cc/5MP3-HJBY>].

29. The shift from advertising rental units on billboards, through “for rent” signs, and in newspapers to online platforms has dramatically increased the ability of landlords to reach a large number of potential applicants and to target their advertising. This is extremely helpful for landlords. Unfortunately, this shift in advertising has also increased the sophistication with which landlords can discriminate against prospective tenants. See Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 282-90 (2020); James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Deterring Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 234, 243, 255 (2019). The recent case *National Fair Housing Alliance v. Facebook* illustrates the nature and scope of platform discrimination. In this case, four fair housing non-profit organizations sued Facebook following an investigation into its advertising practices. The plaintiffs found that Facebook’s pre-populated list of demographic characteristics allowed advertisers to exclude online viewers based on characteristics such as race, national origin, sex, disability, and familial status—all protected classes under the federal Fair Housing Act. Complaint at 1, 2, 5, Nat’l Fair Hous. Alliance v. Facebook, Inc., No. 18 Civ. 2689 (S.D.N.Y. Mar. 27, 2018). The case settled. Settlement Agreement and Release, Nat’l Fair Hous. Alliance v.

companies to conduct algorithmic assessments of applicants.<sup>30</sup> Unfortunately, the coding in these algorithms perpetuates historic discrimination.<sup>31</sup>

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Facebook, Inc., No. 18 Civ. 2689 (S.D.N.Y. Mar. 18, 2019). Under the terms of the agreement, Facebook agreed to work with researchers, privacy advocates, and other experts to study the potential for bias in its algorithmic modeling; eliminate certain characteristics from the target viewer selection criteria; require that all advertisers certify that their ads were in compliance with applicable federal, state, and local fair housing laws; and create a housing search portal which all Facebook users could view, regardless of whether the advertisers targeted them for a particular ad. *Id.*; see also Settlement Agreement and Release, Exhibit A., Nat'l Fair Hous. Alliance v. Facebook, Inc., No. 18 Civ. 2689 (S.D.N.Y. Mar. 18, 2019). A subsequent advertising discrimination case by HUD also settled. That settlement agreement included new terms, such as ongoing reporting by Facebook and monitoring by a third-party reviewer with expertise in algorithmic fairness. Settlement Agreement, United States v. Meta Platforms, Inc., No. 22-cv-05187 ¶¶ 6-22 (S.D.N.Y. June 21, 2022).

30. A study by The Markup and The New York Times found that roughly ninety percent of landlords in the United States use third-party tenant screening companies. Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, MARKUP (May 28, 2020), <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters> [<https://perma.cc/VK64-33K2>]. These screening companies can process large amounts of data quickly and save employee time. For a discussion of algorithmic tenant screening, see generally Harold Leiwant, *Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States*, 6 GEO. L. TECH. REV. 1, 7-9 (2022); Schneider, *supra* note 29.

31. Discrimination arises when screening companies use eviction records, criminal records, address history, and other problematic indicators to determinate an applicant's suitability. Because these data points are rooted in historical practices that discriminate on the basis of race and gender related to over-policing in communities of color, exclusionary zoning, discriminatory lending practices, and limited employment opportunities, the algorithms produce discriminatory results. In this system of "engineered inequality," if the raw data used in algorithms is a product of cultural prejudices and structural hierarchies, the output will similarly reflect those prejudices and hierarchies. See generally BENJAMIN, *supra* note 23; CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Leiwant, *supra* note 30, at 7-11; Schneider, *supra* note 29, at 251; Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671, 678, 690 (2016). The case of *Connecticut Fair Housing Center v. Core-Logic Rental Property Solutions* is an example in which a tenant sued a screening company under the Fair Housing Act. She wanted to add her disabled adult son to her lease, but the screening company determined that there were "disqualifying records" on his criminal and background check. As a result of this determination, her landlord rejected her application for her son to move in with her after he was discharged from rehabilitation at a nursing home following a very serious accident which left him unable to speak, walk, or care for himself. Years before his accident, the tenant's son had been charged with one count of minor retail theft—charged like a non-traffic citation, at a level below a misdemeanor—but never convicted. The plaintiffs sued the screening company alleging both intentional discrimination and disparate impact based on race, national origin, and disability as a result of its screening practices. In its decision regarding a motion for summary judgment, the court examined statistics showing that Black and Latinx individuals are more likely to be arrested, convicted, and sentenced for drug crimes than white individuals, even though rates of drug usage



In addition to pre-tenancy algorithmic discrimination in advertising and applicant screening, use of AI during tenancies causes harm to tenants. An increasing number of landlords, including operators of large subsidized housing complexes, are using FRT to surveil tenants and limit building access.<sup>32</sup> Use of AI in this context can infringe on tenants' fundamental privacy and property rights.

One apartment complex that attempted to convert building access from key fobs to FRT was Atlantic Plaza Towers in Brooklyn, New York.<sup>33</sup> This rent-stabilized apartment complex with over seven hundred units is home to mostly Black female tenants, many of whom have lived in the complex for decades.<sup>34</sup> Management claimed that the change to FRT was necessary for security reasons because key fobs could be easily misplaced or duplicated.<sup>35</sup> Tenants found this justification unpersuasive; the building already had 24-hour security in the lobby entrance as well as a functioning security camera system throughout the complex.<sup>36</sup> Indeed, many believed the real motivation behind the proposed change was gentrification—the management

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across groups are similar. The court went on to find that the screening company was an “integral participant in the denial of housing” because it allowed the screening of arrest records and not just convictions. *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 1-4 (D. Conn. 2020). In a more recent case alleging algorithmic discrimination against Black and Hispanic applicants, HUD and the Department of Justice (DOJ) filed a Statement of Interest explaining how the Fair Housing Act applies to tenant screening companies. *Statement of Interest of the United States at 1, 4, 6, 12, 14*, *Louis v. Saferent Sols., LLC*, No. 22cv10800-AK (D. Mass. Jan. 9, 2023).

32. *Housing Justice and Artificial Intelligence with Erin McElroy*, SANCTUARY FOR INDEP. MEDIA (Sept. 8, 2020), <https://archive.org/details/media-sanctuary-housing-justice-and-artificial-intelligence-with-erin-mcelroy>.

33. Ginia Bellafante, *The Landlord Wants Facial Recognition in Its Rent-Stabilized Buildings. Why?* N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html> [<https://perma.cc/C4LY-Q8PM>]; see also IN MACHS. WE TRUST, *No Face . . . No Service*, MIT TECH. REV. (Dec. 2, 2020), <https://www.listennotes.com/podcasts/in-machines-we-trust/no-face-no-service-ouPI7CJEvH8/> [<https://perma.cc/BW65-W42D>].

34. About sixty percent of tenants are Black and about twenty percent are Latinx, with about ninety percent of tenants being BIPOC; eighty percent of tenants are female. Monica Melton, *Lawmaker Who Challenged Facial Recognition In Majority Black Building Introduces New Bill for Public Housing*, FORBES (July 23, 2019), <https://www.forbes.com/sites/monicamelton/2019/07/23/hud-bill-blocking-facial-recognition-wont-stop-landlords-plans-to-install-in-majority-black-building/?sh=3224e05224f8> [<https://perma.cc/LKY4-XLJG>]; see also Rana Novini, *Residents of Brooklyn Building Furious Over Landlord's Attempt to Install Facial Recognition Technology*, NBC NEW YORK (May 1, 2019), <https://www.nbcnewyork.com/news/local/residents-brooklyn-building-fight-landlord-installing-face-recognition/1544349/> [<https://perma.cc/4M2N-G5MC>]; Bellafante, *supra* note 33.

35. Bellafante, *supra* note 33.

36. *Id.*

company was trying to increase surveillance in the hopes of making it easier to evict current (lower-income Black) residents to then rent the units to new (higher-income white) tenants.<sup>37</sup> This was not paranoia on the part of the residents. Already, tech companies are marketing their FRT services to landlords to help them gather evidence to evict tenants and convert rent-controlled units into market-rate units.<sup>38</sup>

The Atlantic Plaza Towers residents filed a complaint against the complex in the New York State Homes & Community Renewal Office of Rent Administration.<sup>39</sup> The tenants alleged that the installation of FRT for building access would “condition[ ] the tenants’ entry into their home (the place where constitutional protections are most robust) on the mandatory surrender of their most sensitive biological data” and would result in “unprecedented amassing of a database with real-time, granular details of every tenants’ movements and associations.”<sup>40</sup>

Researchers who study bias in facial analysis systems also submitted an amicus support letter to the Office of Rent Administration.<sup>41</sup> In response to the tenants’ protest and administrative complaint, the management company decided not to proceed with installation of the FRT.<sup>42</sup>

Other tenants are not so lucky. As discussed above in the Introduction, Christina Zhang and her neighbors in the Knickerbocker Village<sup>43</sup> have been subject to faulty FRT for almost ten years.<sup>44</sup> The

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37. Novini, *supra* note 34; Bellafante, *supra* note 33; *see also* IN MACHS. WE TRUST, *supra* note 33.

38. Nick Keppler, *Meet the Spy Tech Companies Helping Landlords Evict People*, VICE (Jan. 4, 2023), <https://www.vice.com/en/article/xgy9k3/meet-the-spy-tech-companies-helping-landlords-evict-people> [https://perma.cc/Y7U6-5SCZ].

39. Complaint at 1, In the Matter of the Owner’s Application for Modification of Servs., GS2100050D, GS2100080D (Apr. 30, 2019).

40. *Id.* at 3.

41. Letter from Joy Buolamwini, Founder, Algorithmic Just. League, Timnit Gebru, Co-Founder, Black in AI & Inioluwa Deborah Raji, Founder, Project #Include, to N.Y. State Homes and Cmty. Renewal, Off. of Rent Admin./MCI Unit (May 12, 2019) (on file with authors) (writing as amicus curiae *In the Matter of the Owner’s Application for Modification of Servs.*).

42. Elizabeth Kim, *Brooklyn Landlord Does an About Face on Racial Recognition Plan*, GOTHAMIST (Nov. 21, 2019), <https://gothamist.com/news/brooklyn-landlord-does-about-face-facial-recognition-plan> [https://perma.cc/BA7G-FVTF].

43. Knickerbocker Village is a long-term affordable development under New York’s Private Housing Finance Law article IV, which promotes affordable housing through tax incentives. *Knickerbocker Vill. Tenants Ass’n v. Calogero*, 13 Misc. 3d 755, 760 (Sup. Ct. N.Y. Cnty. 2006).

44. Martineau, *supra* note 1; Elizabeth Kim, “*We’re Like Guinea Pigs:*” *How an Affordable Lower East Side Complex Got Facial Recognition*, GOTHAMIST (Sept. 18, 2019), <https://gothamist.com/news/were-guinea-pigs-how-affordable-lower-east-side->

Knickerbocker residents are primarily of Chinese descent, including many older residents who require translators when meetings are conducted in English.<sup>45</sup> The owner of Knickerbocker Village never applied for approval from the New York State Homes & Community Renewal Office before installing the FRT. Unlike the tenants at Atlantic Plaza Towers, the Knickerbocker Village residents did not organize to combat the installation.<sup>46</sup>

The result is a building entrance system that works sporadically.<sup>47</sup> The system has difficulty recognizing faces in sunny or rainy weather, so residents are often stranded outside until a security guard passes by or a neighbor enters or exits the building.<sup>48</sup> Further, tenants cannot give family members or caregivers a spare key, which makes it more difficult for tenants to allow guests to enter the building and more challenging for medically vulnerable tenants to receive care.

Unreliable building access is just one way FRT complicates tenants' lives. A more chilling use of FRT involves constant video surveillance of tenants through apartment-police partnerships. Project Green Light Detroit is the most well-known example of this aggressive police surveillance.

In 2016, the Detroit Police Department (DPD) partnered with eight gas stations to install real-time, high-definition cameras whose video feeds transmit directly to the police.<sup>49</sup> The goal was to deter crime and identify perpetrators.<sup>50</sup> Using FRT, police can identify people using still images from footage streamed through the green light cameras.<sup>51</sup>

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complex-got-facial-recognition [https://perma.cc/9ENS-4RKR]; see also IN MACHS. WE TRUST, *supra* note 33.

45. Kim, *Guinea Pigs*, *supra* note 44.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Project Green Light Detroit*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit#collapse-vbp-accordion-21206-1> [https://perma.cc/TUU9-V9ZH] (last visited Mar. 22, 2023); see also IN MACHS. WE TRUST, *supra* note 33.

50. Melissa Mason & Laura Herberg, *What Are Those Flashing Green Lights Doing on Detroit Businesses?*, WDET (Dec. 22, 2017), <https://wdet.org/2017/12/22/what-are-those-flashing-green-lights-doing-on-detroit-businesses-map-chart/> [https://perma.cc/TUU9-V9ZH].

51. Laura Herberg, *Tracked and Traced: Does Project Green Light in Detroit reduce crime?*, WDET (Feb. 3, 2022), <https://wdet.org/2022/02/03/tracked-and-traced-does-project-green-light-in-detroit-reduce-crime/> [https://perma.cc/H4GF-M232] (confirming with Captain Severy from DPD that the police run still images from the Project Green Light footage through facial recognition software); DETROIT POLICE DEPT., Planning and Deployment Transmittal of Written Directive No. 307.5 (updated July 25, 2019), <https://detroitmi.gov/sites/detroitmi.localhost/files/2019-07/FA->

Since its inception, Project Green Light Detroit has expanded to include hundreds of participating businesses.<sup>52</sup> Participants include churches, community centers, medical buildings, and grocery stores, as well as apartment buildings and public housing.<sup>53</sup> Opponents of Project Green Light allege that the cameras are concentrated in areas or buildings that low-income people frequent.<sup>54</sup> Participating businesses must purchase and install signage, window decals, and green lights to signal they participate in the program.<sup>55</sup> However, given the number of cameras and their locations, for many Detroit residents it is impossible to avoid the cameras as they go about their daily lives.<sup>56</sup>

It is unclear that this extensive surveilling of Detroit residents has resulted in a reduction in crime. Researchers studying the effects of the cameras concluded that although Project Green Light resulted in a decrease in carjackings, data did not show a similar decrease in other types of crime.<sup>57</sup> Some people might feel safer. But whether they actually are safer is another matter.<sup>58</sup> As one news story summarized, “[t]he police will likely continue to applaud the program event [sic] though there’s little documented evidence that it reduces crime over-

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CIAL%20RECOGNITION%20Directive%20307.5\_0.pdf [https://perma.cc/NBD9-AQHG] (documenting how DPD is able to circumvent Directive Number 307.5, which prohibits DPD from using facial recognition software on live streams or recorded videos).

52. *Project Green Light Detroit: Approved Vendors*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit#Approved-Vendors> [https://perma.cc/CPN8-EQ46] (last visited Mar. 22, 2023); see also Clare Garvie & Laura M. Moy, *America Under Watch: Face Surveillance in the U.S.*, GEO. L. CTR. PRIV. & TECH. (May 16, 2019), <https://www.americaunderwatch.com> [https://perma.cc/98MP-46CD].

53. Herberg, *supra* note 51. For a summary of the categories of program participants, see CITY OF DETROIT, *Project Green Light Application*, <https://app.smartsheet.com/b/form/532cce12e0f54948bb8b3a4019f4b223> [https://perma.cc/5NCJ-7QUC] (last visited Apr. 2, 2023); Allie Gross, *Controversial Surveillance Program Coming to Detroit Public Housing*, DETROIT FREE PRESS (Nov. 6, 2018), <https://www.freep.com/story/news/local/michigan/detroit/2018/11/06/project-green-light-detroit-public-housing/1712494002/> [https://perma.cc/P4QB-54YM].

54. IN MACHS. WE TRUST, *supra* note 33.

55. *Costs to Get Involved*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit/costs-get-involved> [https://perma.cc/32NB-EPK8].

56. *Project Green Light Map*, CITY OF DETROIT, <https://detroitmi.gov/webapp/project-green-light-map> [https://perma.cc/YTC4-JVYV] (last visited Apr. 2, 2023).

57. GIOVANNI CIRCO, JUNE WERDLOW ROGERS, EDMUND F. MCGARRELL, JULIE M. KRUPA, ALAINA DE BIASI, JULI LIEBLER, SHANNON CARTWRIGHT, TRAVIS CARTER, MICH. ST. UNIV., SCH. CRIM. JUST., PROJECT GREENLIGHT DETROIT: EVALUATION REPORT (2020), [https://cj.msu.edu/\\_assets/pdfs/mjsc/pgld-report-2192021.pdf](https://cj.msu.edu/_assets/pdfs/mjsc/pgld-report-2192021.pdf) [https://perma.cc/3P8B-3VAU]; see also Herberg, *supra* note 51.

58. Herberg, *supra* note 51.

all. And all the while surveillance will continue to increase in the Blackest city in America.”<sup>59</sup>

The examples of Atlantic Plaza Towers, Knickerbocker Village, and Detroit’s Project Green Light illustrate the new role of AI in the lives of low-income tenants of color. In particular, the expansion of Project Green Light cameras into public housing raises alarm bells since it reflects government adoption of these technologies, whose negative impact falls most heavily on people of color and women.

## II.

### PROBLEMS WITH AI IN THE LANDLORD-TENANT CONTEXT

Some of the problems stemming from FRT will disappear as technology improves. Other problems will persist unless there are radical shifts in how we use AI.

#### A. *Inaccuracies in Facial Recognition*

A significant problem with FRT is that it is not very reliable when it comes to identifying people with darker skin, women, seniors, children, and trans and non-binary people.<sup>60</sup> Indeed, recent studies document the frequency of false positives and false negatives based on race, age, and gender.<sup>61</sup> For example, one study of commercial facial recognition programs created by Microsoft, IBM, and Face+++ found that the error rate for lighter-skinned males was 0.8% at most, while the error rate for darker-skinned females was as high as 34.7%.<sup>62</sup> Another study involving Rekognition, Amazon’s FRT, incorrectly matched twenty-eight members of Congress with mugshots of other

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59. *Id.*

60. Lindsey Barrett, *Ban Facial Recognition Technologies for Children—and for Everyone Else*, 26 B.U.J. SCI. & TECH. L. 223, 247 (2020); BENJAMIN, *supra* note 23, at 76; SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 109-14 (2015).

61. Patrick Grother, Mei Ngan, Kayee Hanaoka, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, NAT’L INST. STANDARDS & TECH. 2 (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/nist.ir.8280.pdf> [<https://perma.cc/SR59-7YT3>]; Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classifications*, 81:1–15 *PROCEEDINGS OF MACH. LEARNING RSCH.* (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> [<https://perma.cc/L4CA-YSYU>]; Os Keyes, *The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition*, 2 *PROC. ACM ON HUM.-COMPUT. INTERACTION* 1, 4 (2019); BENJAMIN, *supra* note 23, at 76.

62. Buolamwini & Gebru, *supra* note 61, at 8, 11.

people.<sup>63</sup> The false matches disproportionately involved senators and representatives of color.<sup>64</sup>

In response to the study that exposed inaccuracies in its facial recognition software, IBM sent a letter to congressional leaders warning about the danger of bias in AI systems and the implications for police use of FRT.<sup>65</sup> IBM said it “no longer offers general purpose IBM facial recognition or analysis software” and that such software should be tested for bias and audited and reported, especially when used by the police.<sup>66</sup> The fact that a private, for-profit company that creates AI systems has concerns over bias in FRT highlights the dangers in its use.

Inaccuracies based on gender, race, and age are especially significant for subsidized housing residents, who are disproportionately women, people of color, and seniors—people most likely to be misidentified by FRT.<sup>67</sup> Consequently, the use of existing FRT for build-

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63. Jacob Snow, *Amazon's Face Recognition Falsely Matched Twenty-eight Members of Congress With Mugshots*, AM. C.L. UNION N. CAL. (July 26, 2018), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28> [<https://perma.cc/ZT73-FCQV>].

64. *Id.*

65. Letter from Arvind Krishna, Chief Exec. Officer, Int'l Bus. Machs. Corp., to Congress (June 8, 2020) (on file with Int'l Bus. Machs. Corp.), <https://www.ibm.com/policy/facial-recognition-sunset-racial-justice-reforms/> [<https://perma.cc/4HHN-DWFY>].

66. *Id.*

67. According to HUD, 43% of public housing heads of household identify as Black alone, whereas only 13.6% of the U.S. population identifies as Black alone. Similarly, while 26% of public housing heads of household identify as Hispanic or Latino, only 18.5% of the U.S. population identifies as Hispanic or Latino. Compare U.S. DEPT. OF HOUS. & URB. DEV., RESIDENT CHARACTERISTICS REPORT FOR PUBLIC HOUSING, [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/systems/pic/50058/rcr](https://www.hud.gov/program_offices/public_indian_housing/systems/pic/50058/rcr) [<https://perma.cc/2PPZ-EGNS>], with U.S. CENSUS BUREAU, POPULATION ESTIMATES (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045221> [<https://perma.cc/J6NG-MPWZ>]. Further, while 32% of public housing households are female-headed with minor children, only about 7% of households nationally are female-headed with minor children. Compare U.S. DEPT. OF HOUS. & URB. DEV., RESIDENT CHARACTERISTICS REPORT FOR PUBLIC HOUSING, [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/systems/pic/50058/rcr](https://www.hud.gov/program_offices/public_indian_housing/systems/pic/50058/rcr) [<https://perma.cc/2PPZ-EGNS>], with U.S. CENSUS BUREAU, POPULATION ESTIMATES, FIG. B11005 (July 1, 2021), <https://data.census.gov/table?q=B11005&tid=ACSDT1Y2021.B11005> [<https://perma.cc/EG7R-G579>]. Finally, while 36% of public housing heads of household are “elderly” (defined by HUD as sixty-two years of age or older), only 22% of the U.S. population is age sixty or older. Compare U.S. DEPT. OF HOUS. & URB. DEV., RESIDENT CHARACTERISTICS REPORT FOR PUBLIC HOUSING, [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/systems/pic/50058/rcr](https://www.hud.gov/program_offices/public_indian_housing/systems/pic/50058/rcr) [<https://perma.cc/2PPZ-EGNS>], with U.S. CENSUS BUREAU, POPULATION ESTIMATES, FIG. S0102 (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045221> [<https://perma.cc/J6NG-MPWZ>]. For more detailed analysis about statistical disparities in public housing, see Michelle Y. Ewert, *One Strike and You're Out of*

ing access or tenant surveillance is unproductive. Researchers studying the accuracy of FRT recommend using more diverse and globally derived data to populate the programs and higher resolution images to reduce false negatives or false positives.<sup>68</sup>

As with other technologies, it is reasonable to assume that facial recognition will improve in functioning as it evolves. Indeed, a study of twenty-nine facial recognition algorithms by the National Institute of Standards and Technology found that for the most accurate algorithms, “error rates are so low that accuracy variations across sex and race are insignificant.”<sup>69</sup> Of course, this study covered only a fraction of facial recognition programs. Further, while improvements in FRT could increase the accuracy of identification of women, people of color, and seniors, other problems with the use of AI in subsidized housing are not as easily fixed.

#### *B. Privacy Invasion and Interference with Property Interests*

Perhaps the most troubling problem stemming from the use of AI in the subsidized housing context is the gross invasion of tenants’ privacy through ongoing surveillance. Throughout the twentieth and early twenty-first centuries, the Supreme Court built an extensive body of caselaw around the fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause. These liberties related to privacy, dignity, and autonomy included the right to marry,<sup>70</sup> engage in intimate contact,<sup>71</sup> and access birth control<sup>72</sup> and abortion,<sup>73</sup> as

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*Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. RACIAL & ETHNIC JUST. 57, 95-101 (2016).

68. Grother, et. al. *supra* note 61, at 10. However, even increasing the diversity of images in FRT pools can have unintended, negative consequences for people of color. For example, the Zimbabwean government contracted with a tech company in China to add images of millions of Zimbabweans to the tech company’s pool of faces to improve the ability of the facial recognition technology to recognize dark-skinned faces. Ruha Benjamin likened this international exporting of images to exploitative natural resources extraction under colonialism, describing it as “neocolonial extraction for the digital age in which the people whose faces populate the database have no rights vis-à-vis the data or systems that are built with their biometric input.” BENJAMIN, *supra* note 23, at 82-83.

69. Grother, et. al. *supra* note 61, at 2.

70. *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

71. *Lawrence v. Texas*, 539 U.S. 558 (2003).

72. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 142 S. Ct. 2228 (2022); *see also Planned Parenthood v.*

well as to make decisions about procreation,<sup>74</sup> childrearing, and education for one's family.<sup>75</sup> The Court has since taken steps to dismantle aspects of the fundamental right to privacy by overturning *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*.<sup>76</sup> However, even before this decision—which has drawn condemnation from constitutional law scholars, civil rights advocates, and medical providers for its impact on women and people of color<sup>77</sup>—the privacy rights of subsidized tenants were already precarious.

Many scholars have written about how constitutional privacy protections are much weaker for low-income people, especially low-income people of color, than for wealthy people.<sup>78</sup> Indeed, many means-tested benefits are conditioned on intrusion by the government in ways similar public benefits for middle- and upper-income people are not.<sup>79</sup> For example, the Court upheld a state requirement that wel-

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Casey, 505 U.S. 833 (1992) (modifying holding of *Roe v. Wade* prior to *Dobbs* overruling *Roe*).

74. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

75. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

76. *Dobbs*, 142 S. Ct. at 2228.

77. See, e.g. Erwin Chemerinsky, *Ending Roe is a Pure Exercise of Republican Power, Wielded to Reduce Women's Freedom and Equality*, L.A. TIMES (June 24, 2022), <https://www.latimes.com/opinion/story/2022-06-24/roe-wade-scotus-supreme-court-dobbs-abortion-end> [<https://perma.cc/E3E2-V7H2>]; Press Release, Legal Defense Fund, Supreme Court Overturns Constitutional Right to Bodily Autonomy in Transgressive Reproductive Rights Decision (June 24, 2022), <https://www.naacpldf.org/press-release/supreme-court-overturns-constitutional-right-to-bodily-autonomy-in-transgressive-reproductive-rights-decision/> [<https://perma.cc/D4JA-GJT7>]; Press Release, American Association of American Medical Colleges, AAMC Statement on Supreme Court Decision in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), <https://www.aamc.org/news-insights/press-releases/aamc-statement-supreme-court-decision-dobbs-v-jackson-women-s-health-organization> [<https://perma.cc/N4MM-9565>].

78. See, e.g. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); DOROTHY ROBERTS, *KILLING THE BLACK BODY RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 226-29 (1997); Michelle Y. Ewert, *Their Home Is Not Their Castle: Subsidized Housing's Intrusion into Family Privacy and Decisional Autonomy*, 99 N.C. L. REV. 869 (2021); Wendy A. Bach, *Poor Support/Rich Support: (Re)viewing the American Social Welfare State*, 20 FL. TAX REV. 495, 366 (2017); Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy and the State*, 47 U.C. DAVIS L. REV. 1539 (2014); Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389 (2012); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012); Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1 (2008).

79. For a discussion of the unconstitutional conditions doctrine relating to means-tested benefits, see generally BRIDGES, *supra* note 78; Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U.L. REV. 971



fare recipients must submit to in-home visits by caseworkers as a condition for receiving assistance, rather than conducting the application and recertification appointments at the welfare office.<sup>80</sup> Courts continue to uphold similar laws today.<sup>81</sup> Subsidized tenants must wait for public housing authority approval—sometimes taking months—before allowing new spouses or other family members to move in.<sup>82</sup> Applicants for prenatal Medicaid can be subjected to invasive questions about diet, whether they plan to have future babies, and what contraception they will use after delivery—questions that are all irrelevant to whether they qualify for health insurance and information that should instead be discussed with their health care provider.<sup>83</sup> Unnecessary privacy invasions are pervasive in the public benefits safety net.

The ongoing surveillance of low-income people of color through programs like Detroit's Project Green Light and application of FRT for building access similarly trample on privacy rights.

### 1. *Loss of Control Over Biometric Data*

First, FRT conditions people's entry into their homes on the surrender of biological data to third parties. The landlord contracts with an AI company to administer the technology and store the biometric data, which could include records of fingerprints, faces, eyes, and voices. In the event of a data breach, the tenants' uniquely identifiable biometric data is compromised and cannot be replaced like a driver's license or Social Security number following identity theft because much biometric data is permanent.<sup>84</sup>

Such breaches with biometric data have already occurred. For example, in 2019, a data breach in the United Kingdom resulted in the fingerprints, facial recognition information, and other personal information of over a million people being made publicly accessible.<sup>85</sup>

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(1995); Julie A. Nice, *No Scrutiny whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629 (2008); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 *FORDHAM URB. L. J.* 1051 (1995).

80. See *Wyman v. James*, 400 U.S. 309 (1971).

81. See *Sanchez v. Cnty. of San Diego*, 464 F.3d 916 (9th Cir. 2006), *cert. denied*, 552 U.S. 1038 (2007).

82. Ewert, *supra* note 78, at 869.

83. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 *HARV. J.L. & GENDER* 113, 124-30 (2011).

84. Claire Gartland, *Biometrics Are a Grave Threat to Privacy*, *N.Y. TIMES* (July 5, 2016), <https://www.nytimes.com/roomfordebate/2016/07/05/biometrics-and-banking/biometrics-are-a-grave-threat-to-privacy> [<https://perma.cc/576H-7GF8>].

85. Josh Taylor, *Major Breach Found in Biometrics System Used by Banks, UK Police and Defence Firms*, *THE GUARDIAN* (Aug. 14, 2019, 3:11 AM), <https://>

Around the same time, a U.S. Customs and Border Protection (CBP) subcontractor experienced a cyber-attack and about 184,000 traveler images from a CBP pilot project were compromised; some ended up on the dark web.<sup>86</sup> This type of risk is unnecessary when keys and key fobs already allow tenants access to their buildings. The loss of a key does not result in people's immutable biometric data being compromised.

## 2. *Chilling Organizing and Increasing Criminal Investigations*

A second privacy concern about FRT and surveillance is that it creates a record of tenants' movements, activities, and associations in and around the housing complex. It provides a tremendous amount of data to landlords, almost like an ankle monitor. Landlords know when tenants leave the building and when they return. Landlords can learn who tenants speak to and whose units they visit.

Digital technology represents the next wave in the long history of race-based surveillance and control. Scholars and advocates have noted that contemporary AI hyper-surveillance of low-income and Black people continues the presumption of Black criminality and surveillance of Black people that started during slavery.<sup>87</sup> This surveillance goes back to the "lantern laws" of the eighteenth century that required Black, mixed-race, and indigenous enslaved people to carry candles and lanterns at night so they could be easily seen and monitored by others.<sup>88</sup> Enslaved people were tracked through branding to document ownership, detailed physical descriptions on runaway ads, and through the *Book of Negroes*, which catalogued enslaved Africans who were loyal to the British seeking passage to the British-controlled territory during the American Revolution.<sup>89</sup> Mobility was dictated by

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[www.theguardian.com/technology/2019/aug/14/major-breach-found-in-biometrics-system-used-by-banks-uk-police-and-defence-firms](https://www.theguardian.com/technology/2019/aug/14/major-breach-found-in-biometrics-system-used-by-banks-uk-police-and-defence-firms) [<https://perma.cc/576H-7GF8>]; Zac Doffman, *New Data Breach Has Exposed Millions of Fingerprint and Facial Recognition Records: Report*, FORBES (Aug. 14, 2019, 4:31 AM), <https://www.forbes.com/sites/zakdoffman/2019/08/14/new-data-breach-has-exposed-millions-of-fingerprint-and-facial-recognition-records-report/?sh=578215d646c6> [<https://perma.cc/52QV-47XA>].

86. OFF. INSPECTOR GEN., REVIEW OF CBP'S MAJOR CYBERSECURITY INCIDENT DURING A 2019 BIOMETRIC PILOT, OIG-20-71 (Sept. 21, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf> [<https://perma.cc/UD6Q-4R4F>].

87. See generally BENJAMIN, *supra* note 23; BROWNE, *supra* note 60; *Community Defense: Sarah T. Hamid on Abolishing Carceral Technologies*, 11 LOGIC (Aug. 31, 2020), <https://logicmag.io/care/community-defense-sarah-t-hamid-on-abolishing-carceral-technologies/> [<https://perma.cc/598L-ECL5>].

88. BROWNE, *supra* note 60, at 76-80; LOGIC, *supra* note 87.

89. BROWNE, *supra* note 60, at 70-76.

face and body and tracking tenants' movements. Conditioning a Black tenant's access to her apartment building based on records of her face conjures such practices. One tenant at Atlantic Plaza Towers invoked the language of dehumanization commonly used during slavery when she explained the tenants' privacy objections to increased surveillance and screening through FRT: "We don't want to be tracked. We are not animals. This is like tagging us through our faces because they can't implant us with a chip."<sup>90</sup>

Besides being degrading, the surveillance of movement and activities is threatening. The Atlantic Plaza Towers complaint described the chilling effect that the video surveillance had on tenant participation in the tenant association and community activities.<sup>91</sup> The landlord would take screenshots of surveillance footage to send tenants to get them to stop their organizing activities.<sup>92</sup> Landlords' possession of such detailed information about tenants' movements and activities is both unnecessary and dangerous.

Further, the possibility of data sharing between landlords and law enforcement agencies increases the risk to tenants that this technology will result in criminal investigation. Indeed, the purpose of Detroit's Project Green Light is for housing providers and other participants to provide law enforcement with information for criminal investigations. Without robust protections, housing providers employing FRT for building access could similarly release information about tenant activities to law enforcement. This "regulatory intersectionality,"<sup>93</sup> in which subsidized housing providers, public benefits agencies, and other social welfare programs exchange information with law enforcement, destabilizes families through additional contact with the criminal law system.<sup>94</sup>

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90. Kim, *Brooklyn Landlord*, *supra* note 42.

91. Complaint at 34, In the Matter of the Owner's Application for Modification of Servs., GS2100050D, GS2100080D (Apr. 30, 2019).

92. *Id.* at 37–38.

93. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J.L. & FEMINISM* 317, 318 (2014) (defining regulatory intersectionality as the way in which "regulatory systems intersect to share information and heighten the adverse consequences of what those systems quite easily deem to be unlawful or noncompliant conduct").

94. The New York City Housing Authority (NYCHA) is an example of a PHA with a formal information-sharing agreement with law enforcement. Mireya Navarro & J. David Goodman, *Report Details "Systemic Failures" in Communication Between New York Police and Housing Authority*, *N.Y. TIMES* (Dec. 8, 2015), <https://www.nytimes.com/2015/12/09/nyregion/report-details-systemic-failures-in-communication-between-police-and-housing-authority.html> [<https://perma.cc/VDW3-WBW2>]. For in-depth discussions of privacy and the intersection of law enforcement and social welfare programs, see Dorothy E. Roberts, *Prison, Foster Care, and the Systemic*

### 3. *Coerced Interference with Personal Relationships*

Interference with tenants' personal relationships is a third privacy concern from the use of FRT and video surveillance. Tenants are not the only people recorded and scanned in affordable housing that uses FRT. Their guests and family members are recorded as well. In their complaint, the Atlantic Plaza Towers tenants expressed concern that friends and family would choose not to visit them as frequently or provide essential care if it meant submitting to the intrusive facial recognition system.<sup>95</sup> For tenants with mobility limitations or other disabilities, the isolation from support systems could be catastrophic.

Already, subsidized housing places pressure on family relationships and friendships through the one-strike eviction policy. This policy authorizes the eviction of tenants due to alleged offsite criminal conduct of family members or guests.<sup>96</sup> In addition to taking away tenants' privacy, the use of FRTs and surveillance increases the risk of wrongful eviction. If AI systems misidentify visitors entering units as people on ban lists or who have allegedly engaged in criminal activity, the tenants risk eviction through the one-strike eviction policy. Further imposition on tenants' important personal relationships weakens the family and community.

The harms from tenant surveillance and control are significant, yet subsidized tenants are not in a position to structure their lives to avoid these harms. If they do not consent, they do not have access to essential housing resources to support their families. They might have to choose between homelessness and subjecting themselves and their families to invasive surveillance. This coercion into "accepting" FRT is in stark contrast to wealthy, white tenants or homeowners who might pay large amounts of money for FRT and surveillance in luxury condo buildings or their neighborhood. These tenants and homeowners choose from many options where to live. They do not fear information being turned over to police, and if they lose their housing, they can easily afford a new place to live.<sup>97</sup>

One of the Algorithmic Justice League's core principles is affirmative consent, the idea that "[e]veryone should have a real choice

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*Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012); KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011); Bridges, *supra* note 83, at 157–168.

95. Complaint at 37-38, In the Matter of the Owner's Application for Modification of Servs., GS2100050D, GS2100080D (Apr. 30, 2019).

96. See Ewert, *One Strike and You're Out*, *supra* note 67, at 68; see generally Ocen, *supra* note 78.

97. *Housing Justice*, *supra* note 32.

in how and whether they interact with AI systems.”<sup>98</sup> That choice does not exist for subsidized tenants whose landlords employ FRT.

### III.

#### STRATEGIES TO PREVENT HARMFUL AI IN SUBSIDIZED RENTAL HOUSING

Because of the potential for errors, perpetuation of historic biases, and impact on important privacy rights, AI is subject to increasing calls for regulation and due process.<sup>99</sup> Early calls for reform focused on errors in AI, suggesting improved design to increase accuracy and algorithmic audits to decrease the likelihood that AI perpetuates historic discrimination.<sup>100</sup> However, even as technology improves, inherent problems related to privacy persist. Increasingly, scholars and advocates are calling for bans of FRT in certain contexts to protect fundamental rights.<sup>101</sup>

In 2022, the Biden Administration issued the Blueprint for an AI Bill of Rights.<sup>102</sup> The Blueprint identified five goals related to AI: first, that people be “protected from unsafe or ineffective systems;”

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98. *Our Mission*, ALGORITHMIC JUSTICE LEAGUE, <https://www.ajl.org/about> [perma.cc/27WQ-5GA4].

99. See generally BENJAMIN, *supra* note 23; O’NEIL, *supra* note 31; Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014).

100. See Allen, *supra* note 29, at 259, 263 (“[W]here algorithms operate to influence key public welfare decisions, such as those in affordable housing, operators should be required to disclose what data sets they used to ‘train’ the artificial intelligence algorithm. Simultaneously, the outputs produced by these algorithms should be audited to assess whether there is a constant bias that repeats time and again, and whether they produce results otherwise adverse to the public interest.”); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 119 (2017) (“[algorithmic] impact statements are designed to force consideration of the problem at an early stage, and to document the process so that the public can learn what is at stake, perhaps as a precursor to further regulation.”); O’NEIL, *supra* note 31, at 176 (“To disarm [harmful algorithms], we also need to measure their impact and conduct algorithmic audits. The first step, before digging into the software code, is to carry out research . . . . By studying these outputs, we could piece together the assumptions behind the model and score them for fairness.”).

101. See, e.g. Barrett, *supra* note 60, at 275 (“Facial recognition technologies should be banned because they corrode privacy and due process, damage free expression, and enable dangerous discrimination, all while being difficult or impossible to avoid.”); Evan Selinger & Woodrow Hartzog, *The Inconsistency of Facial Surveillance*, 66 LOY. L. REV. 33, 37 (2020) (“In all areas where consentability conditions cannot be met, and procedural rules and compliance frameworks for government and industry will facilitate an outsized harm and abuse relative to their gains, facial recognition technology should be outright banned.”).

102. WHITE Hous., OFF. OF SCI. & TECH. POL’Y, BLUEPRINT FOR AN AI BILL OF RIGHTS, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> [https://perma.cc/Q228-EMJW].

second, that algorithmic discrimination be ended and “systems should be used and designed in an equitable way;” third, that people be “protected from abusive data practices” and have agency over how their data is used; fourth, that people have notice of when and how automated systems are being used; and finally, that people be able to opt out of automated systems.<sup>103</sup>

The following proposed solutions present opportunities to address the various harms stemming from FRT in the subsidized housing context.<sup>104</sup> These solutions focus on abolition of FRT in subsidized housing as the best solution, with heightened regulation of FRT as a next best alternative.

### A. Legislation

Advocates have proposed a range of legislative solutions at the federal, state, and local levels to address the harms perpetuated by discriminatory AI. These proposals range from covering consumers broadly to focusing on subsidized tenants in particular. Further, some proposals focus on biometric data protections while others look more generally at data privacy and algorithmic discrimination.

#### 1. Federal Legislation Restricting FRT

The existing proposal that would most protect subsidized housing tenants from privacy invasions through surveillance and facial recognition is the No Biometric Barriers to Housing Act.<sup>105</sup> First proposed in 2019, the No Biometric Barriers to Housing Act would prohibit the use of facial recognition, physical biometric recognition (DNA, fingerprints, palmprints, and iris or retina screening), and remote biometric recognition technology in public housing, Section 811 supportive housing for people with disabilities, Section 202 housing for the elderly, and project-based Section 8.<sup>106</sup> In explaining the need for the

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103. *Id.*

104. In addition to the proposed solutions discussed in this paper, another suggestion is for data scientists to take a programmer oath, rather like the Hippocratic Oath that doctors take to pledge that they won't do harm to patients. A programmer oath could incorporate values of transparency, pledge to not make false statements about accuracy, and emphasize the importance of explaining the assumptions on which the model is based. A team of financial engineers proposed such an oath for their industry following the 2008 market crash. O'NEIL, *supra* note 31, at 174. Of course, a voluntary oath would suffer from self-selection issues, as the most ethical programmers would be the most likely to take it, and the ones who would be least concerned about perpetuating bias would likely not. *Id.*

105. S. 2689, 116th Cong. § 2(a)–(b) (2019); H.R. 4008, 116th Cong. § 2(a)–(b) (2019).

106. S. 2689; H.R. 4008.

legislation, Representative Yvette Clark, one of the sponsors, said “[s]omeone living in public housing should not be the guinea pig for the emerging technology of biometric facial screening just to enter their own home.”<sup>107</sup> Representative Rashida Tlaib, another sponsor whose district includes Detroit and Project Green Light, said, “[w]e cannot allow residents of HUD funded properties to be criminalized and marginalized with the use of biometric products like facial recognition technology.”<sup>108</sup> In a letter to HUD expressing concerns about surveillance and FRT, the House and Senate sponsors focused on privacy implications, saying “[t]hose who cannot afford more do not deserve less in basic privacy and protections. They should not have to compromise their civil rights and liberties nor accept the condition of indiscriminate, sweeping government surveillance to find an affordable place to live.”<sup>109</sup>

The 2019 bill was not enacted. Representatives Yvette Clarke, Ayanna Pressley, and Rashida Tlaib reintroduced the bill in 2021, but the bill did not make it out of committee.<sup>110</sup> In their press release, the sponsors described ongoing misidentification problems with FRT and the privacy concerns implicated by constant surveillance.<sup>111</sup>

While this proposed legislation would offer tremendous protections relating to FRT to certain subsidized tenants, the proposed legislation does not offer protections to tenants with HCVP vouchers, who far outnumber public housing residents.<sup>112</sup> To provide long-term protections to a majority of subsidized tenants, the legislation would need to be expanded to cover additional housing programs. Further, the bill could take years to pass, if it ever does.

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107. Press Release, U.S. House of Representatives, Reps. Clarke, Pressley & Tlaib Announce Bill to Ban Public Housing Usage of Facial Recognition & Biometric Identification Technology (July 25, 2019), <https://clarke.house.gov/nobiometricsbarriers/> [<https://perma.cc/6W8L-MQ43>].

108. *Id.*

109. Letter from Ron Wyden, U.S. Senator, et. al., to Ben Carson, Secretary, U.S. Dep’t of Hous. & Urb. Dev. (Dec. 18, 2019) (on file with Congress).

110. H.R. 4360, 117th Cong. (2021–2022).

111. Press Release, Congresswoman Ayanna Pressley, Massachusetts 7th District, Pressley, Clarke, Tlaib Reintroduce Bill to Ban Facial Recognition Technology in Public Housing (July 7, 2021), <https://pressley.house.gov/media/press-releases/pressley-clarke-tlaib-reintroduce-bill-ban-facial-recognition-technology-public> [<https://perma.cc/L58G-PB9K>].

112. From December 1, 2021 through March 31, 2023, the public housing program assisted 726,259 households and 1,477,265 household members and the HCVP assisted 1,778,588 households and 3,970,494 household members. *Resident Characteristics Report*, U.S. Dep’t of Hous. & Urb. Dev., <https://hudapps.hud.gov/pic/RCRPublic/rcrmain.asp> (choose “Public Housing” from dropdown; then choose “National”; then click on “Household”; then choose “Tenant Based Voucher” from dropdown; then choose “National”; then click on “Household”).

## 2. *Model State and Local Legislation Restricting FRT*

It might be more likely that individual states or municipalities enact biometric data protections that cover all community members, including subsidized tenants. Indeed, a number of states and cities have already passed laws to protect against privacy invasions relating to biometric data broadly or FRT specifically. For example, Illinois passed the Biometric Information Privacy Act (BIPA) in 2008.<sup>113</sup> BIPA requires that private entities doing business in Illinois inform people in writing that biometric information is being collected or stored, obtain written consent from individuals for the collection or storage of that information, store biometric data securely, and destroy it within three years of the last contact with the individual (or when it is no longer needed, if earlier).<sup>114</sup> BIPA does not apply to government entities<sup>115</sup> but offers broad protection to consumers. Notably, the statute creates a private right of action through which offending entities are liable for the greater of actual damages or liquidated damages of \$1,000 for negligent violations; the greater of actual damages or liquidated damages of \$5,000 for intentional or reckless violations; attorneys' fees and costs; and injunctive relief.<sup>116</sup> Already, consumers have brought numerous cases under BIPA for a variety of violations.<sup>117</sup>

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113. Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/15.

114. *Id.*

115. The BIPA applies to private entities, and specifically excludes state and local government agencies from the definition of "private entity." 740 ILL. COMP. STAT. 14/25. Thus, the BIPA would not apply to public housing authorities, although it could apply to privately owned affordable housing that receives public subsidies or tax breaks.

116. 740 ILL. COMP. STAT. 14/20.

117. *E.g.*, *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, 2023 WL 2052410 (Feb. 17, 2023) (describing how a restaurant manager sued the company for the required fingerprint authentication to access paystubs and the computer system without first obtaining her consent); *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, 2023 WL 1458046 (Feb. 2, 2023) (explaining how an employee sued their former employer for practices around fingerprint authentication time clock); *Rosenbach v. Six Flags Ent.*, 2019 IL 123186 (2019) (discussing mother of teenage son who sued Six Flags for requiring her son to scan his thumbprint to utilize his season pass); *Rivera v. Google*, 238 F.Supp.3d 1088 (N.D. Ill. 2017) (alleging that photos taken on a "Google droid device" were automatically uploaded to Google Photos and scanned through facial recognition technology); *Monroy v. Shutterfly*, No. 16-C-10984, 2017 WL 4099846 (N.C. Ill. Sept. 15, 2017) (bringing class action alleging Shutterfly unlawfully used FRT to identify him after another person uploaded a photo of him to the Shutterfly website); *In re Facebook Biometric Info. Privacy Litig.*, 185 F.Supp.3d 1155 (N.D. Cal. 2016) (bringing a class action alleging Facebook unlawfully collected and stored images of users' faces gleaned from their uploaded photos for its Tag Suggestions program).



BIPA later became the model for a proposed biometric protections bill at the federal level, which has not yet been enacted.<sup>118</sup>

A few other states have passed similar biometric information privacy statutes, although they are weaker than the Illinois statute because they do not include a private right of action. A Texas statute went into effect in 2009 and allows a civil penalty up to \$25,000 per violation, but only the attorney general may enforce it.<sup>119</sup> Washington passed a law that went into effect in 2017. The law requires the attorney general to enforce the act.<sup>120</sup> By requiring enforcement by the attorney general, these statutes offer more limited protection to consumers, who must depend on a government official to bring claims.

In addition to state legislation, some municipalities have created privacy protections relating to FRT and surveillance. Most deal with public use. For example, Minneapolis prohibits the use of FRT by the city except in certain limited circumstances.<sup>121</sup> In 2020, the City Council of Jackson, Mississippi, preemptively prohibited the police department from using FRT.<sup>122</sup> Further, a few cities have regulated private use of FRT, in addition to public use. These include Baltimore, Maryland,<sup>123</sup> Portland, Oregon,<sup>124</sup> and New York, New York.<sup>125</sup> While these are important protections, they are still limited compared to the scope of BIPA.

New York's Tenant Data Privacy Act (TDPA)<sup>126</sup> went into effect recently and provides more robust protections to tenants, although it

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118. National Biometric Information Privacy Act, S.4400, 116th Cong. (2019–2020).

119. Capture or Use of Biometric Identifier, TEX. BUS. & COM. CODE ANN. § 503.001 (West 2017).

120. WASH. REV. CODE ANN. §§ 19.375.020, 19.375.030(2) (2017).

121. MINNEAPOLIS, MN CODE TITLE 2 §§ 41.120, 41.130 (2023).

122. Jackson, Miss., Order Prohibiting the Use of Facial Recognition Technology by the Jackson Police Department (Aug. 18, 2020).

123. BALTIMORE CITY, MD., CODE, art. 19 § 18-2, at 48 (2022). This ordinance was set to expire on December 31, 2022, unless the Baltimore City Council extended it for five additional years following a study and public hearings. § 18-6, at 51. The Baltimore City Council did not renew the ordinance. Councilperson Kristerfer Burnett, who advocated for renewal, explained the failure by saying, “There isn’t political will to maintain a permanent ban.” J. Brian Charles, *Baltimore Could See More Surveillance as Facial Recognition Technology Moratorium Ends*, BALT. BEAT (Jan. 10, 2023), <https://baltimorebeat.com/baltimore-could-see-more-surveillance-as-facial-recognition-technology-moratorium-ends/> [https://perma.cc/2PE5-V34W].

124. PORTLAND, OR., CODE ch. 34.10.010 (2023).

125. N.Y.C CODE ch. 12 § 22-1201. New York City law requires commercial establishments to post a sign near the entrance if they collect, retain, convert, store, or share biometric identifier information. § 22-1202. It also includes a private right of action. § 22-1203.

126. *Id.* at § 26-3004.

does not restrict the use of FRT outright. The TDPA requires landlords of certain multifamily dwellings that use “smart access” (keyless entrance systems that include key fobs and biometric identifiers) to provide notice in “plain language” to tenants about the privacy policy and data collected,<sup>127</sup> obtain tenants’ consent to use the smart system,<sup>128</sup> restrict the sharing of that data with third parties,<sup>129</sup> and either anonymize or destroy authentication data within ninety days after collection.<sup>130</sup> The TDPA also establishes a private right of action for the unlawful sale of data.<sup>131</sup>

### 3. *Legislation Protecting Data Privacy More Broadly*

Although some state and local jurisdictions in the United States have enacted limited protections relating to personal data, images, and AI, Europe has set the standard for comprehensive protection for consumers. In 2016, the European Union (EU) adopted the General Data Protection Regulation (GDPR).<sup>132</sup> The GDPR contains extremely specific rules relating to transparency,<sup>133</sup> access to personal data by the subject,<sup>134</sup> the right to erasure of personal data (also known as the “right to be forgotten”),<sup>135</sup> and the right to object to the processing of personal data.<sup>136</sup> Even before enacting the GDPR, the European Union had codified privacy rights in great detail. The Charter of the Fundamental Rights of the European Union includes respect for private and family life,<sup>137</sup> the right to marry and found a family,<sup>138</sup> freedom of arts and scientific research,<sup>139</sup> and freedom to choose an occupation and the right to engage in work.<sup>140</sup> The Charter also includes protection of personal data as a fundamental freedom.<sup>141</sup>

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127. *Id.* at § 26-3004.

128. *Id.* at § 26-3002.

129. *Id.* at § 26-3003.

130. *Id.* at § 26-3002.

131. *Id.* at § 26-3006.

132. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1.

133. Council Regulation 2016/679, art. 12, 2016 O.J. (L 119) 1.

134. *Id.* at art. 15, 2016 O.J. (L 119) 1.

135. *Id.* at art. 17, 2016 O.J. (L 119) 1.

136. *Id.* at art. 21, 2016 O.J. (L 119) 1.

137. Charter of the Fundamental Rights of the E.U., art. 7, 2012 O.J. (C 326) 2.

138. *Id.* at art. 9, 2012 O.J. (C 326) 2.

139. *Id.* at art. 13, 2012 O.J. (C 326) 2.

140. *Id.* at art. 15, 2012 O.J. (C 326) 2.

141. “Everyone has the right to the protection of personal data concerning him or her. . . . Such data must be processed fairly for specified purposes and on the basis of

Scholars and consumer advocates have called for the United States to adopt protections similar to the GDPR.<sup>142</sup> Doing so would help all people, not just subsidized housing tenants, and would codify privacy rights not explicitly listed in the U.S. Constitution or recognized by courts. For years, U.S. companies have been gathering, using, and passing along personal data with few restraints.<sup>143</sup> As the American public becomes increasingly concerned about the safety of personal data,<sup>144</sup> Congress is finally taking steps to protect consumers.

The American Data Privacy and Protection Act (ADPPA), introduced by bipartisan sponsors in June 2022, would create wide-ranging protections for consumers.<sup>145</sup> The ADPPA protects covered data, which it defines as “information that identifies or is linked or reasonably linkable, alone or in combination with other information, to an individual . . . .”<sup>146</sup> It further defines biometric data to include fingerprints, voice prints, iris or retina scans, facial mapping or hand mapping, and gait or personally identifying movements.<sup>147</sup> The ADPPA excludes digital or physical photographs, audio or video recording, and data gathered from those sources that cannot be used to identify a particular individual.<sup>148</sup>

The ADPPA protects personal data in a variety of ways. One of the most important is data minimization—restricting the collection or

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the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. . . . Compliance with these rules shall be subject to control by an independent authority.” *Id.* at art. 8, 2012 O.J. (C 326) 2.

142. See, e.g., Michele E. Gilman, *Five Privacy Principles (from the GDPR) the United States Should Adopt to Advance Economic Justice*, 52 ARIZ. ST. L.J. 368 (2020); O’NEIL, *supra* note 31, at 213–14.

143. Hossein Rahnama & Alex “Sandy” Pentland, *The New Rules of Data Privacy*, HARV. BUS. REV. (February 25, 2022), <https://hbr.org/2022/02/the-new-rules-of-data-privacy> [<https://perma.cc/GQN6-MW98>] (“For most of its existence, the data economy was structured around a ‘digital curtain’ designed to obscure the industry’s practices from lawmakers and the public.”).

144. Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/> [<https://perma.cc/X3ZL-LYAE>] (finding that eighty-one percent of Americans believed that the risks of data collection by private companies outweighed the benefits, and sixty-six percent of Americans said the risks caused by government collection of data outweighed the benefits).

145. H.R. 8152, 117th Cong. (2022).

146. *Id.* at § 2(8).

147. *Id.* at § 2(3)(A).

148. *Id.* at § 2(3)(B).

use of personal data unless it is for an allowed purpose.<sup>149</sup> Allowed purposes include initiating or completing transactions, authenticating users, effectuating product recalls, and conducting public or peer-reviewed research.<sup>150</sup> Targeted advertising that complies with the Act is still allowed under the ADPPA,<sup>151</sup> but entities could not knowingly direct targeted advertising to anyone age seventeen or younger.<sup>152</sup> The ADPPA limits the transfer of covered data to third parties.<sup>153</sup> It promotes transparency by requiring covered entities to make publicly available a privacy policy detailing their data collection, processing and transfer activities.<sup>154</sup> The ADPPA gives individuals the right to access their personal data, correct incomplete or inaccurate data, delete data, and export data to other entities.<sup>155</sup> It also prohibits algorithmic discrimination based on race, color, religion, national origin, sex, and disability,<sup>156</sup> and requires large data holders that use algorithms to conduct algorithmic impact assessments.<sup>157</sup>

The ADPPA contains robust enforcement mechanisms. It allows enforcement actions by the Federal Trade Commission (FTC),<sup>158</sup> state attorneys general,<sup>159</sup> and individuals.<sup>160</sup> Courts could award prevailing plaintiffs actual damages, injunctive relief, and reasonable attorney's fees and costs.<sup>161</sup>

Still, a problem with the ADPPA in the subsidized housing context is that it does not specifically abolish FRT that harms vulnerable tenants. Landlords might argue that building access and surveillance is a permissible purpose under the proposed statute because it relates to building security. The ADPPA allows the use of covered data to "prevent, detect, protect against, or respond to a security incident" and defines security to include intrusion and access control security.<sup>162</sup> As seen in the case of Atlantic Plaza Towers, the landlord claimed FRT was necessary to prevent unauthorized people from accessing the building, even though tenants believed this justification was pretext-

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149. *Id.* at § 101.

150. *Id.* at § 101(b).

151. *Id.* at § 101(b)(16).

152. *Id.* at § 2(11), 101(b)(16).

153. *Id.* at § 102(3).

154. *Id.* at § 202(a).

155. *Id.* at § 203(a).

156. *Id.* at § 207(a)(1).

157. *Id.* at § 207(c)(1).

158. *Id.* at § 401.

159. *Id.* at § 402.

160. *Id.* at § 403.

161. *Id.* at § 403(a)(2).

162. *Id.* at § 101(b)(5).

tual.<sup>163</sup> Although the ADPPA limits what landlords could do with the biometric data once collected, it would not abolish FRT for building access outright. Thus, while the ADPPA, if enacted, would provide important protections to all consumers, it would not address the privacy concerns discussed above.

#### 4. Fair Housing Legislation

Fair housing law offers another potential tool to combat problems with discriminatory AI. The federal Fair Housing Act (FHA) was passed in 1968<sup>164</sup> and amended in 1988 through the Fair Housing Amendments Act.<sup>165</sup> The FHA prohibits housing discrimination based on race, color, religion, sex, national origin, disability, and familial status.<sup>166</sup> Over time, the FHA has been used to combat discriminatory conduct like refusing to show available properties to members of a protected class,<sup>167</sup> steering buyers or renters to different locations based on race,<sup>168</sup> enacting exclusionary zoning ordinances to limit where people of color or people with disabilities can live,<sup>169</sup> and refusing to lend or lending on less favorable terms to members of protected classes.<sup>170</sup>

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163. This Article does not concede that FRT for building access is necessary to protect tenants. As discussed above, the use of keys or fobs and security guards already protects tenants from intrusion. Rather, this Article explains how landlords could use security as a pretext to justify the installation of FRT to tenants who do not want such technology. Technology companies are already marketing FRT to landlords as a way to evict rent-controlled tenants and raise the price of rent. Examples of advertising for these AI services include “You CAN raise rents in NYC!” and “Combine a \$950/mo studio and \$1400/mo one-bedroom into a \$4200/mo DEREGULATED two-bedroom.” Nick Keppler, *Meet the Spy Tech Companies Helping Landlords Evict People*, VICE (Jan. 4, 2023, 9:10 AM), <https://www.vice.com/en/article/xgy9k3/meet-the-spy-tech-companies-helping-landlords-evict-people>. This marketing technique shows that security is not the driving factor behind adoption of the technology, at least for some landlords. *Id.*

164. Pub. L. No. 90-284, 82 Stat. 81 (1968).

165. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

166. 42 U.S.C. § 3604.

167. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990); *Bradley v. John M. Brabham Agency, Inc.*, 463 F. Supp. 27 (D.S.C. 1978).

168. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973).

169. *In re Millcreek Twp. Zoning Ord.*, 4 Pa. D. & C. 4th 449, 462 (Com. Pl. 1989); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd in part sub nom. Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

170. *Conciliation Agreement, Doe v. Bank of Am., N.A.*, F.H.E.O. No. 09-22-7402-8 (Oct. 29, 2021), [https://www.hud.gov/sites/dfiles/FHEO/documents/Bank\\_of\\_America\\_CA\\_CONCAGMT.pdf](https://www.hud.gov/sites/dfiles/FHEO/documents/Bank_of_America_CA_CONCAGMT.pdf) [<https://perma.cc/4436-GRJS>]; *Watson v. Pathway Fin.*, 702 F. Supp. 186 (N.D. Ill. 1988).

Already, there is discussion about how fair housing law can be used to combat discriminatory AI.<sup>171</sup> Some advocates have called for amending the FHA to specifically prohibit algorithmic discrimination and clarify how to establish causality in disparate impact claims.<sup>172</sup> This would clearly address the issues of discriminatory platform advertising and discriminatory tenant screening. However, there are strong arguments that the FHA, as currently written, allows for algorithmic discrimination claims.<sup>173</sup> Indeed, there is recent litigation around this issue in the tenant screening context,<sup>174</sup> despite unsuccessful efforts of the Trump Administration to gut disparate impact causes of action based on algorithmic discrimination.<sup>175</sup>

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171. In early 2022, the National Fair Housing Alliance (NFHA) and National Fair Housing Training Academy hosted a public forum about algorithmic bias in housing. Over five hundred housing partners from across the country attended. *NFHTA Forum: Mining the Data: Algorithmic Bias in Housing Related Transactions*, NFHA (Feb. 20, 2020), <https://nationalfairhousing.org/nfhta-forum-mining-the-data-algorithmic-bias-in-housing-related-transactions/> [<https://perma.cc/L3TK-HA9H>]; see also, NAT'L FAIR HOUS. ALLIANCE, DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 49–54 (2019), <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf> [<https://perma.cc/UZ9N-HFQ7>].

172. Lorena Rodriguez, *All Data Is Not Credit Data: Closing the Gap Between the Fair Housing Act and Algorithmic Decisionmaking in the Lending Industry*, 120 COLUM. L. REV. 1843, 1878–79 (2020).

173. Michael Selmi, *Algorithms, Discrimination and the Law*, 82 OHIO ST. L.J. 611, 618 (2021); Virginia Foggo & John Villasenor, *Algorithms, Housing Discrimination, and the New Disparate Impact Rule*, 22 COLUM. SCI. & TECH. L. REV. 1, 61–62 (2020).

174. The CoreLogic case from Connecticut is pending. Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 1–4 (D. Conn. 2020). Additionally, there have been similar claims of algorithmic discrimination under the Fair Credit Reporting Act (FCRA). See, e.g., Complaint, James, v. Checkr, Inc, No. 1:21-cv-04089-JPB-RGV, 2021WL 4544124 (N.D. Ga Oct. 4, 2021); Wilson v. Corelogic SafeRent, LLC, No. 14-CV-2477 (JPO), 2017 WL 4357568 (S.D.N.Y. Sept. 29, 2017). For an overview of recent algorithmic discrimination cases under the FHA and FCRA, see Cyrus Farivar, *Tenant Screening Software Faces National Reckoning*, NBC (Mar. 14, 2021, 7:00 AM), <https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975> [<https://perma.cc/QH6S-R3P6>].

175. In proposed rules released in 2019, HUD proposed amending current regulations to shield defendants from liability for algorithmic discrimination by third parties on whose data the defendants relied for decision-making. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854, 42857–60 (Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100). In response to tremendous opposition, HUD did not adopt that part of the proposed rule. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288, 60290 (Sept. 24, 2020). Current fair housing regulations clearly allow liability for discriminatory conduct of third parties and agents. 24 C.F.R. § 100.7(a)(iii), (b) (2017).

What has not been explored is whether the FHA could also provide a cause of action based on discriminatory use of FRT. If landlords with multiple properties are installing FRT for building access and tenant surveillance in buildings that are disproportionately occupied by members of protected classes—like Black people and women—but not in other buildings, then this would seem like intentional discrimination under the Fair Housing Act’s section 3604(b). This provision prohibits discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” because of membership in a protected class.<sup>176</sup> Of course, if the landlord were installing such technology in all its buildings, regardless of location or tenant composition, a discrimination claim would likely fail.<sup>177</sup>

If passed, the ADPPA and No Biometric Barriers to Housing Act would offer subsidized tenants protection against discriminatory FRT and improper handling of biometric data. Combined with potential FHA claims, there would then be three significant laws to protect subsidized tenants from harmful AI. However, additional protections through the regulatory process could strengthen tenant rights, even if this legislation does not pass.

### B. Rules, Regulations and Agency Guidance

HUD is well-positioned to create rules or regulations or issue agency guidance to protect subsidized tenants. Other federal agencies have already taken steps to mitigate the harms from discriminatory AI,<sup>178</sup> including FRT. In February 2022, the Internal Revenue Service (IRS) announced it is transitioning away from facial recognition for

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176. 42 U.S.C. § 3604(b).

177. This Article recommends a study of landlords participating in Detroit’s Project Green Light to determine which are installing cameras in all of their rental properties and which are installing cameras only in properties located in predominantly Black areas. This could be done by comparing camera locations (accessible on the Project Green Light website) with demographic data for the city’s census tracts. See *Project Green Light Detroit*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit#collapse-vbp-accordion-21206-1> [https://perma.cc/TUU9-V9ZH] (last visited Mar. 22, 2023).

178. In May 2022, the Department of Justice (DOJ) issued a guidance document and the Equal Employment Opportunity Commission (EEOC) issued a technical assistance document on the dangers of algorithmic discrimination in the employment context. *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, U.S. DEPT. OF JUST., C.R. DIV. (May 12, 2022), <https://www.ada.gov/resources/ai-guidance/> [https://perma.cc/TY6S-HHFP]; U.S. EQUAL EMP. OPP. COMM’N, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, EEOC-NVTA-2022-2 (May 12, 2022), <https://perma.cc/ST7H-QHVS>.

user authentication.<sup>179</sup> The rationale behind this policy change is relevant to HUD's administration of the subsidized housing program.

The use of FRT to gain access to IRS accounts is similar to the use of FRT to gain entrance to apartment buildings. With increased concern about identity theft and fraud, the IRS is looking for ways to secure people's accounts. In 2018, the Government Accountability Office (GAO) issued a report evaluating the IRS's authentication techniques, which included telephone, online, in-person, and correspondence services.<sup>180</sup> In response to the GAO report, the IRS implemented a facial recognition project for user access to the IRS website and phone app.<sup>181</sup> The Department of the Treasury signed a two-year, \$86.1 million contract with a third-party vendor for the ID.me software, which would be used by the IRS and other federal programs.<sup>182</sup>

This IRS pilot project drew swift criticism from data privacy experts and lawmakers. Joy Buolamwini, a leading expert in bias in facial recognition technologies, explained the problem of higher rates of false positives (matching people's faces to accounts that were not theirs) for Black and Asian faces because the technology does not work as well for people of color as it does for white users.<sup>183</sup> This means the IRS accounts of people of color are more likely to be compromised. She also noted the problem of false negatives (incorrectly failing to match people's faces to their own facial scans), in which people could be locked out of their accounts because the system did not recognize them.<sup>184</sup> Additionally, she raised significant privacy concerns, saying "ID.me's tagline is 'Leave no identity behind,' but

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179. Press Release, Internal Revenue Service, IRS Announces Transition Away From Use of Third-Party Verification Involving Facial Recognition (Feb. 7, 2022) [hereinafter Feb. 7, 2022 IRS Press Release], <https://www.irs.gov/newsroom/irs-announces-transition-away-from-use-of-third-party-verification-involving-facial-recognition> [<https://perma.cc/D8QB-4LHW>].

180. U.S. GOV'T ACCOUNTABILITY OFF., IDENTITY THEFT: IRS NEEDS TO STRENGTHEN TAXPAYER AUTHENTICATION EFFORTS, GAO-18-418 (2018), <https://www.gao.gov/assets/gao-18-418.pdf> [<http://perma.cc/4TH5-T339>].

181. U.S. GOV'T ACCOUNTABILITY OFF., FACIAL RECOGNITION TECHNOLOGY: CURRENT AND PLANNED USES BY FEDERAL AGENCIES, GAO-21-526 (2021), <https://www.gao.gov/assets/gao-21-526.pdf> [<https://perma.cc/PTJ5-UQX4>].

182. Blanket Purchase Agreement (BPA) Call, PIID 2032H521F00420, U.S. SPENDING, [https://www.usaspending.gov/award/CONT\\_AWD\\_2032H521F00420\\_2050\\_2032H520A00009\\_2050](https://www.usaspending.gov/award/CONT_AWD_2032H521F00420_2050_2032H520A00009_2050) [<https://perma.cc/33G7-LNRE>] (last visited Mar. 20, 2023) (awarding agency Department of the Treasury).

183. Joy Buolamwini, *The IRS Should Stop Using Facial Recognition*, THE ATLANTIC (Jan. 27, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/irs-should-stop-using-facial-recognition/621386/> [<https://perma.cc/34CM-GLFT>].

184. *Id.*



what may be even more concerning is that the federal government might be leaving behind its mandate to safeguard the civil rights and liberties of its people.”<sup>185</sup>

A few days after Dr. Buolamwini’s article hit the newsstands, Senators Jeff Merkley and Roy Blunt sent a letter to the IRS urging it to implement a ban on the use of biometric data.<sup>186</sup> In their letter, the Senators noted that not all taxpayers had the equipment or “knowhow” to use the facial recognition program.<sup>187</sup> Further, they expressed grave concerns about the risk of misidentification for women and people of color and the invasion of privacy of all users, especially since a third-party vendor held the biometric data.<sup>188</sup>

In response to the bipartisan pushback, the IRS announced it would “transition away from using a third-party service for facial recognition to help authenticate people creating new online accounts.”<sup>189</sup> The IRS further said it would develop an authentication process that did not involve facial recognition<sup>190</sup> and that existing biometric data from taxpayers previously collected would be permanently deleted.<sup>191</sup> The IRS implemented these major policy changes within days.<sup>192</sup>

HUD could similarly respond to privacy and efficacy concerns of tenants by changing how it allows PHAs and other subsidized housing providers to use third-party vendors for FRT. Granted, there are differences between the two scenarios. When the IRS changed its internal policies involving its use of FRT to access online accounts and mobile apps, it had the ability to make those changes immediately. If HUD were to impose rules or regulations<sup>193</sup> to restrict use of FRT by subsi-

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185. *Id.*

186. Letter from Jeffrey A. Merkley & Roy Blunt, U.S. Senate, to Charles Rettig, Internal Revenue Serv., Comm’r (Feb. 3, 2022), [https://www.merkley.senate.gov/imo/media/doc/22.02.03%20Merkley-Blunt%20Letter%20to%20IRS%20on%20Facial%20Recognition%20Technology%20\(002\).pdf](https://www.merkley.senate.gov/imo/media/doc/22.02.03%20Merkley-Blunt%20Letter%20to%20IRS%20on%20Facial%20Recognition%20Technology%20(002).pdf) [https://perma.cc/53PC-8LQT].

187. *Id.*

188. *Id.*

189. Feb. 7, 2022 IRS Press Release, *supra* note 179.

190. *Id.*

191. Press Release, Internal Revenue Service, IRS Statement—New Features Put in Place for IRS Online Account Registration; Process Strengthened to Ensure Privacy and Security (Feb. 21, 2022), <https://www.irs.gov/newsroom/irs-statement-new-features-put-in-place-for-irs-online-account-registration-process-strengthened-to-ensure-privacy-and-security> [https://perma.cc/UX25-ZCPB].

192. *Id.*

193. HUD’s authorizing statute allows the HUD Secretary to enact rules and regulations to carry out HUD functions. 42 U.S.C. § 3535(d) (“The [HUD] Secretary may delegate any of his functions, powers, and duties to such officers and employees of [HUD] as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and *may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.*” (em-

dized housing providers, including PHAs and private landlords participating in subsidy programs, it would likely have to go through public notice and comment.

The Administrative Procedure Act (APA) lays out the process for notice and comment rulemaking by agencies.<sup>194</sup> However, the APA exempts agency rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from this notice and comment requirement.<sup>195</sup> While most of HUD’s actions would fall under this proprietary exemption, HUD voluntarily adopted notice and comment for its rulemaking under its own regulations.<sup>196</sup> HUD omits public notice and comment only if such process would be “impracticable, unnecessary or contrary to the public interest.”<sup>197</sup>

The process for HUD’s voluntary notice and comment involves publication of the proposed rule in the Federal Register, solicitation of public feedback for at least sixty days, and publication of the final rule in the Federal Register at least thirty days before its effective date.<sup>198</sup> If HUD were to go through the notice and comment process to formally enact a rule restricting FRT in subsidized housing, it would take several months to implement the final rule—at a minimum. In all likelihood, the process would take much longer, because many housing providers, tenants, and advocates would likely submit comments to HUD for review.

If HUD did not want to enact a rule or regulation change, it could instead issue agency guidance in support of tenants’ privacy rights and recommend best practices limiting the use of FRT or other biometric data for building access. The APA does not require notice and comment for general statements of policy<sup>199</sup> but still does require that they be published in the Federal Register.<sup>200</sup> HUD has previously issued such forms of guidance to PHAs and other subsidized housing provid-

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phasis added)). Although HUD uses the terms “rule” and “regulation” somewhat interchangeably, regulations are published in the Code of Federal Regulations, 24 C.F.R. § 10.2(a) (2017), and rules are published in the Federal Register, *id.* at § 10.1. 194. 5 U.S.C. §§ 551–559.

195. *Id.* at § 553(a)(2).

196. 24 C.F.R. § 10.1 (2017) (“It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts *even though such matters would not otherwise be subject to rulemaking by law or Executive policy.*” (emphasis added)).

197. *Id.* at § 10.1. The APA similarly contains a “good cause” exemption for public notice and comment if the agency determines it would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B).

198. 24 C.F.R. § 10.1 (2017).

199. 5 U.S.C. § 553(b)(A).

200. *Id.* at § 552(a)(1)(D).

ers relating to marketing practices<sup>201</sup> and the use of arrest records in housing decisions,<sup>202</sup> recommending best practices for housing providers to follow. HUD could do something similar here.

Given that other federal agencies are taking steps to mitigate the harm that AI in general and FRT in particular can inflict on the public, HUD should use its regulatory authority to implement protective rules or to issue guidance to providers. The IRS's swift response to privacy concerns involving FRT demonstrates that this type of agency action is timely.

### C. Housing Provider Contracts

An additional way that HUD could regulate the use of discriminatory facial recognition and surveillance technology in subsidized housing is through its contracts with PHAs and private housing providers. In all of its programs (beyond just public housing and the other programs covered by the No Biometric Barriers to Housing Act), HUD signs contracts for services.<sup>203</sup> These housing assistance payments (HAP) contracts include the terms of the agreement between the housing provider and either HUD or the PHA and are memorialized in HUD-approved forms.<sup>204</sup> The HAP contracts could be revised to include protections about building access and surveillance practices.

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201. U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO) GUIDANCE ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT IN MARKETING AND APPLICATION PROCESSING AT SUBSIDIZED MULTIFAMILY PROPERTIES (2022), [https://www.hud.gov/sites/dfiles/FHEO/documents/ HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Ap plication%20Processing.pdf](https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf) [https://perma.cc/5WAK-LP3D].

202. U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [https://www.hud.gov/sites/documents/ HUD\\_ogcguidappfhastandcr.pdf](https://www.hud.gov/sites/documents/HUD_ogcguidappfhastandcr.pdf) [https://perma.cc/U5F6-L3JL]; U.S. DEP'T OF HOUS. & URB. DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS, PIH-2015-19 (2015), <https://www.hud.gov/sites/documents/PIH2015-19.pdf> [https://perma.cc/7LDC-5U9W].

203. Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 785 (2015).

204. 24 C.F.R. § 880.501 (2022) (covering Project-Based Section 8 HAP contracts); *id.* at § 982.451 (covering HCVP HAP contracts). The approved HCVP HAP contract is contained in form HUD-52641. U.S. DEP'T OF HOUS. & URB. DEV., HAP CONTRACT, OMB Approval No. 2566-0169 (2019), [https://www.hud.gov/sites/dfiles/ OCHCO/documents/52641.pdf](https://www.hud.gov/sites/dfiles/OCHCO/documents/52641.pdf) [https://perma.cc/LLU6-6ZRC].

HUD's HAP contracts are likely also subject to its voluntary notice and comment procedure discussed above.<sup>205</sup> However, if HUD were to find that the seriousness of protecting tenants' biometric data was such that it would be "contrary to the public interest" to go through that process, it could change the HAP contracts without notice and comment.<sup>206</sup>

If HUD were to include specific restrictions or parameters for such use of AI in its contracts, it would also need to change its monitoring scheme to include information related to these issues.<sup>207</sup> It does no good for HUD to require landlords or PHAs to protect tenants' rights but then not confirm that landlords or PHAs are following through. Further, even if HUD were to make its monitoring more robust, it would need to also take enforcement action in response to violations.

Jaime Alison Lee, a scholar who writes about issues related to the privatization of public housing, identified three possible remedies for violations of such protections: judicial enforcement of the contract through specific performance or an injunction, a reduction or termination of the subsidy, and appointment of a receiver to manage the program.<sup>208</sup> The risk of such enforcement is that private providers might choose to withdraw from the subsidized housing program instead of conform their practices to HUD requirements. The loss of units would mean fewer people could receive affordable housing. However, if HUD were to solicit feedback from landlords and PHAs before revising its contracts, it could potentially address some of the concerns and hopefully limit attrition.

#### D. Community Advisory Boards

Community advisory boards provide an opportunity for potentially impacted community members to offer feedback about surveillance and FRT before its implementation.<sup>209</sup> One such example comes

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205. See 24 C.F.R. § 10.1 (2017) (listing contracts as a type of action for which HUD conducts public participation even if not otherwise required by law).

206. *Id.* at § 10.1.

207. See Lee, *Rights at Risk in Privatized Public Housing*, *supra* note 203, at 790.

208. *Id.* at 792.

209. Some subsidized tenants want increased surveillance and use of FRT because they think it would promote safety. For example, when the Detroit Housing Commission held listening sessions about the installation of Project Green Light cameras in public housing as part of a pilot project, several dozen tenants attended and most expressed support. Gross, *supra* note 53 (reporting that almost all fifty to sixty residents that were in attendance were "eager for Project Green Light"). While this was a small percentage of total residents, it showed some support for increased surveillance and use of FRT within the public housing community.

from Oakland, California. In 2016, the City of Oakland established the Privacy Advisory Commission (PAC) to provide advice and technical assistance to the City on best practices related to surveillance technology and other technology that collects or stores people's data.<sup>210</sup> The PAC has nine members, at least six of whom must be Oakland residents.<sup>211</sup> Further, the members must represent diverse interests and experiences, including legal scholars, activists, law enforcement, accountants, technology experts, and members of watchdog groups.<sup>212</sup>

Before seeking funding for new surveillance technology or soliciting proposals to acquire, share, or use surveillance technology from a non-city entity, the City must present information at a PAC meeting about why the funding or technology is necessary.<sup>213</sup> The City must also prepare a surveillance impact report and surveillance use policy for the PAC's review.<sup>214</sup> The surveillance impact report must include detailed information about where the technology can be deployed, what security measures will be in place to protect the data, whether the data will be handled or stored by a third party, and whether the technology could be used in a way that is discriminatory.<sup>215</sup> The surveillance use policy must explain the uses that are authorized, who can access the data, how long it will be retained, and whether data sharing with other entities is allowed.<sup>216</sup>

Following review of these materials, the PAC then votes on whether to recommend that the City adopt, modify, or reject the proposed policy.<sup>217</sup> The matter then goes to the Oakland City Council. Before the City Council approves the surveillance technology, it must determine that "the benefits to the community of the surveillance technology outweigh the costs; that the proposal will safeguard civil liberties and civil rights; and that, in the City Council's judgment, no alternative with a lesser economic cost or impact on civil rights or civil liberties would be as effective."<sup>218</sup>

Not only does Oakland put in place a process for community review before implementing surveillance technology, it specifically prohibits the use of biometric surveillance technology or predictive

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210. Oakland, Cal., Ordinance 13349 § 2(a) (Jan. 19, 2016) (uncodified).

211. *Id.* at § 3(a).

212. *Id.* at § 3(g).

213. OAKLAND, CAL., CODE ch. 9.64.020, § (1)(A) (2022).

214. *Id.* at ch. 9.64.020 § (2)(A).

215. *Id.* at ch. 9.64.020 § (15).

216. *Id.* at ch. 9.64.020 § (16).

217. *Id.* at ch. 9.64.20 § (2).

218. *Id.* at ch. 9.64.030 § (2)(B).

policing technology outside of this framework.<sup>219</sup> Anyone subject to surveillance technology in violation of Oakland's City Code can sue for actual damages (or at least \$1,000 in liquidated damages) or \$100 per day for each day of the violation, whichever is greater.<sup>220</sup> The court can also award the prevailing plaintiff attorneys' fees and the employee who violated the Code can be subject to retraining, suspension, or termination.<sup>221</sup>

This privacy advisory board model could easily be adopted in subsidized housing because structures already exist to provide resident input on PHA decisions that affect living conditions.<sup>222</sup> Federal law requires that PHAs have at least one Resident Advisory Board (RAB) composed of individuals who "adequately reflect and represent the residents assisted by the PHA."<sup>223</sup> PHAs are required to submit five-year plans to HUD that address their mission and goals and annual plans with more specific information about their policies.<sup>224</sup> The purpose of the plans is to provide local accountability and transparency.<sup>225</sup> The RAB is tasked with assisting in the development or modification of the PHA plans.<sup>226</sup>

A second body that could be involved in privacy policy review is the resident council, which tenants of a particular public housing development can elect to represent their interests.<sup>227</sup> HUD regulations provide that the resident council "may actively participate through a working partnership with the [PHA] to advise and assist in *all aspects* of public housing operations."<sup>228</sup> They shall "give advice on matters such as modernization, security, maintenance, resident screening and selection, and recreation."<sup>229</sup>

The individual resident councils from different developments can also come together to form a jurisdiction-wide resident council, which addresses the needs of all residents receiving assistance from a partic-

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219. *Id.* at ch. 9.64.045 § (A).

220. *Id.* at ch. 9.64.050 § (1)(B).

221. *Id.* at ch. 9.64.050 § (1)(C)–(D).

222. Lee, *Rights at Risk in Privatized Public Housing*, *supra* note 203, at 782–83.

223. 24 C.F.R. § 903.13(a) (2022). Unlike resident councils, which are always elected by residents, the PHA selects the members to serve on the RAB if there is no elected resident council. *See id.* § 903.13(b).

224. 42 U.S.C. § 1437c-1.

225. 24 C.F.R. § 903.3(b) (2022).

226. *Id.* at § 903.13(a)(1).

227. *Id.* at § 964.11. The resident council could cover residents in scattered site buildings, contiguous row houses or buildings, a traditional apartment complex, or a combination of these types of housing. *Id.* at § 964.115(a).

228. *Id.* at § 964.100 (emphasis added).

229. *Id.* at § 964.135(b).

ular PHA.<sup>230</sup> These councils of public housing residents create the opportunity for residents to offer input to PHAs on a range of issues, including surveillance technology and other forms of AI.

A weakness in the current RAB and resident council structure is that they do not have veto power over PHA policies. The PHAs “must consider” the RAB recommendations, provide a copy of the recommendations to HUD, and explain how it addressed the recommendations.<sup>231</sup> However, the RAB has no power to force the PHA to adopt its recommendations.<sup>232</sup> Similarly, HUD regulations require that the PHA “work in partnership with the duly elected resident councils,” but there is no mechanism for the resident council to block PHA action with which it disagrees.<sup>233</sup> As Jaime Alison Lee said, “[p]articipation rights must be viewed with some skepticism, as they provide only for communication between residents and decision-makers, and do not guarantee residents any control or power over decisions.”<sup>234</sup> Further, “unfulfilled promises of empowerment and participation are likely to lead to further distrust and only deepen the community’s marginalization.”<sup>235</sup> Still, the RAB and resident council are a starting point for immediate feedback to PHAs about resident concerns over privacy and AI.

Further, HUD could amend its regulations to strengthen these bodies. It could require PHAs to present proposals to the RAB or resident council before pursuing new surveillance or FRT, like what is required with the PAC in Oakland. HUD could also allow people who are not residents but have relevant expertise (such as around data and privacy issues) to assist the RAB or resident council in evaluating PHA policies. It is unlikely all residents on the council or community people serving on RAB (who are supposed to have similar experiences as the tenants) have significant training and expertise in the development or evaluation of AI. Allowing some advocates or experts to provide support to the council or RAB could strengthen the residents’ voices when they advocate with the PHA or HUD.<sup>236</sup> Increasing the

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230. *Id.* at § 964.105.

231. *Id.* at § 903.13(c).

232. *See id.*

233. *Id.* at § 964.135(d).

234. Lee, *Rights at Risk in Privatized Public Housing*, *supra* note 203, at 783.

235. Jaime Alison Lee, “Can You Hear Me Now?: Making Participatory Governance Work for the Poor,” 7 *HARV. L. & POL’Y REV.* 405, 415 (2013).

236. This Article is not suggesting that non-residents should be added as voting members to resident councils or that people who don’t reflect the subsidized housing tenant community should be added as voting members to RABs. It is important that tenants have spaces they control. Rather, this Article proposes that residents be given opportunities to consult with data and privacy experts to better understand the impli-

role of the RAB and tenant council would promote oversight and accountability, two core principles that the Algorithmic Justice League identified to mitigate the harms and biases of AI.<sup>237</sup> If residents wanted increased surveillance and FRT in their particular building or community, they could advocate for these tools. If they did not want that surveillance, there would be a mechanism to oppose it. Either way tenants would have more power and control over policies affecting them.

#### CONCLUSION

As AI permeates modern life, the work needed to be done to disrupt the “ongoing unnatural disaster” of systemic racism<sup>238</sup> must focus on technology and how it impacts subordinated people. Subsidized housing is one critical area in which reforms are both necessary and possible. Although AI serves many useful functions, the harm that FRT and ongoing surveillance inflict on low-income tenants with few other housing options makes AI in this context inappropriate. The strategies proposed above to abolish FRT for building access and surveillance, or at least severely curtail its use and restore autonomy to tenants, provide a blueprint for necessary change.

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cations of proposed or current technologies and advocate more effectively with HUD and the PHA.

237. *Our Mission*, ALGORITHMIC JUSTICE LEAGUE, <https://www.ajl.org/about> [perma.cc/27WQ-5GA4].

238. BENJAMIN, *supra* note 23, at 83.