

**PERSPECTIVES ON TSA'S POLICIES TO PREVENT
UNLAWFUL PROFILING**

HEARING

BEFORE THE

**COMMITTEE ON HOMELAND SECURITY
HOUSE OF REPRESENTATIVES**

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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PERSPECTIVES ON TSA'S POLICIES TO PREVENT UNLAWFUL PROFILING

Tuesday, June 4, 2019

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 310, Cannon House Office Building, Hon. Bennie G. Thompson (Chairman of the committee) presiding.

Present: Representatives Thompson, Jackson Lee, Payne, Correa, Rose, Underwood, Slotkin, Cleaver, Green of Texas, Clarke, Titus, Barragán, Demings, Rogers, King, McCaul, Katko, Walker, Higgins, Lesko, Taylor, Joyce, and Crenshaw.

Chairman THOMPSON. The Committee on Homeland Security will come to order.

The committee is meeting today to receive testimony on perspectives on TSA's process to prevent unlawful profiling.

Good morning. Thank you to our witnesses for joining us today.

We are meeting to examine whether TSA's policies and screening processes allow for unlawful profiling and discrimination.

TSA has a difficult security mission. Terrorists continue to target the transportation sector and would like nothing better than to take a plane out of the sky. Every Member of this committee appreciates the need to protect against that threat.

This committee is focused on ensuring that TSA continues to mature into an effective, professionalized agency that fulfills its security mission in a manner that does not allow unlawful profiling or discrimination.

The report GAO is releasing today shows that TSA's current operations do not meet the mark. GAO found that TSA has antiprofiling policies in place for its behavioral detection program, yet lacks an oversight mechanism to ensure antiprofiling policies are actually followed.

Given the concerns this committee and others have voiced for more than a decade regarding TSA's behavior detection program and the door it opens to unlawful profiling, it is unconscionable that TSA has not developed better oversight procedures.

GAO's new report follows a 2013 report that recommended that Congress limit future funding for TSA's behavior detection activities. It also follows GAO's 2017 finding that TSA lacks valid scientific evidence to support nearly 80 percent of the behaviors it relies upon to identify suspicious travelers for additional screening.

Meanwhile, TSA has not provided sufficient evidence of the security benefits of behavior detection. TSA has scaled back the scope

of its behavior detection program, but the logical conclusion from years of evidence is clear: It is time to end the program entirely.

For today's report, GAO also looked at 3,700 complaints related to civil rights and civil liberties filed against the agency over 2½ years and found over 1,000 complaints with potential indicators of discrimination. These complaints allege a variety of discriminatory incidents and practices encompassing all of TSA's screening operations.

DHS's response to GAO's findings shows the Department does not understand the gravity of the allegations it faces. DHS stated it was "pleased to note" that GAO identified "only 3,700 complaints related to passenger screening alleging civil rights and civil liberties violations" during the relevant time period.

DHS has missed the point entirely. First, 3,700 is not an insignificant number. A single incident where a traveler feels traumatized as a result of allegedly discriminatory treatment is certainly not insignificant to that person and should not be considered insignificant to anyone.

Under my leadership, this committee will not ignore or downplay the significance of any American making a credible allegation of discrimination by their Government. As TSA says: "Not on our watch."

Moreover, incidents are likely unreported, as people who are discriminated against in various ways throughout society may not have the time or resources to lodge formal complaints in every instance.

It is clear from the complaints GAO has documented and recent media reports that TSA's screening processes disproportionately impact minority populations. In particular, Advanced Imaging Technology, or AIT machines, regularly alarm on certain populations, such as Sikh passengers, African American women, and transgender people, leading to increased delays and pat-downs.

AIT machines rely on algorithms that define what TSA considers normal, and religious headwear, hairstyles, or bodies that fall outside that definition are flagged for further inspection.

TSA must improve its technology to address this issue while considering the diversity of the public when it solicits and tests new technology.

Finally, I want to make clear my concerns are not with the TSA work force. TSA's front-line officers have proven their commitment to TSA's mission, despite insufficient pay and during the Government shutdown missed paychecks.

Over and over again TSA has made the news due to a poor passenger screening experience, and after an investigation TSA's statement has almost always noted that officers followed security protocols appropriately. By and large, TSA's problems lie with its procedures, not its officers.

As for the agency, I commend TSA for the work it has done to engage advocacy groups and improve cultural awareness training for officers. The next step is for TSA to ensure it fully considers concerns voiced by multicultural groups when developing technologies and screening procedures.

TSA must provide effective security without disproportionately impacting certain groups of Americans. This is not an "either/or"

proposition. TSA interacts more intimately with the public on a regular basis than any other Government agency, screening over 2 million passengers every day and physically touching many of them. For many, TSA is not just the public face of Government, but its hands, too.

Its success as a security agency depends upon the trust and compliance of a diverse public. I hope to have a productive dialog today about how we can continue to move TSA toward that important goal.

I thank the Members for joining us and look forward to our discussion.

The Chair now recognizes the Ranking Member of the full committee, the gentleman from Alabama, Mr. Rogers, for an opening statement.

[The statement of Chairman Thompson follows:]

STATEMENT OF CHAIRMAN BENNIE G. THOMPSON

JUNE 4, 2019

We are meeting to examine whether TSA's policies and screening processes allow for unlawful profiling and discrimination. TSA has a difficult security mission. Terrorists continue to target the transportation sector and would like nothing better than to take a plane out of the sky. Every Member on this committee appreciates the need to protect against that threat. This committee is focused on ensuring that TSA continues to mature into an effective, professionalized agency that fulfills its security mission in a manner that does not allow unlawful profiling or discrimination.

The report GAO is releasing today shows that TSA's current operations do not meet the mark. GAO found that TSA has anti-profiling policies in place for its behavioral detection program, yet lacks an oversight mechanism to ensure anti-profiling policies are actually followed. Given the concerns this committee and others have voiced for more than a decade regarding TSA's behavior detection program and the door it opens to unlawful profiling, it is unconscionable that TSA has not developed better oversight procedures. GAO's new report follows a 2013 report that recommended that Congress limit future funding for TSA's behavior detection activities. It also follows GAO's 2017 finding that TSA lacks valid scientific evidence to support nearly 80 percent of the behaviors it relies upon to identify suspicious travelers for additional screening.

Meanwhile, TSA has not provided sufficient evidence of the security benefits of behavior detection. TSA has scaled back the scope of its behavior detection program, but the logical conclusion from years of evidence is clear: It is time to end the program entirely. For today's report, GAO also looked at 3,700 complaints related to civil rights and civil liberties filed against the agency over 2½ years and found over 1,000 complaints with potential indicators of discrimination. These complaints allege a variety of discriminatory incidents and practices encompassing all of TSA's screening operations.

DHS's response to GAO's findings shows that the Department does not understand the gravity of the allegations it faces. DHS stated it was "pleased to note" that GAO identified "only 3,700 complaints related to passenger screening alleging civil rights and civil liberties violations" during the relevant time period. DHS has missed the point entirely. First, 3,700 is not an insignificant number. A single incident where a traveler feels traumatized as a result of allegedly discriminatory treatment is certainly not insignificant to that person, and should not be considered insignificant to anyone. Under my leadership, this committee will not ignore or downplay the significance of any American making a credible allegation of discrimination by their Government. As TSA says: "Not On Our Watch."

Moreover, incidents are likely underreported, as people who are discriminated against in various ways throughout society may not have the time or resources to lodge formal complaints in every instance. It is clear from the complaints GAO has documented and recent media reports that TSA's screening processes disproportionately impact minority populations. In particular, Advanced Imaging Technology or "AIT" machines regularly alarm on certain populations—such as Sikh passengers, African American women, and transgender people—leading to increased delays and

pat-downs. AIT machines rely on algorithms that define what TSA considers “normal”—and religious headwear, hairstyles, or bodies that fall outside that definition are flagged for further inspection. TSA must improve its technology to address this issue, while considering the diversity of the public when it solicits and tests new technologies.

Finally, I want to make clear that my concerns are not with the TSA workforce. TSA’s front-line officers have proven their commitment to TSA’s mission, despite insufficient pay and, during the Government shutdown, missed paychecks. Over and over again, TSA has made the news due to a poor passenger screening experience, and after an investigation, TSA’s statement has almost always noted that officers followed security procedures appropriately. By and large, TSA’s problems lie with its procedures—not its officers. As for the agency, I commend TSA for the work it has done to engage advocacy groups and improve cultural awareness training for officers. The next step is for TSA to ensure it fully considers concerns voiced by multicultural groups when developing technologies and screening procedures.

TSA must provide effective security without disproportionately impacting certain groups of Americans. This is not an “either/or” proposition. TSA interacts more intimately with the public on a regular basis than any other Government agency, screening over 2 million passengers every day and physically touching many of them. For many, TSA is not just the “public face” of Government—but its “hands” too. Its success as a security agency depends upon the trust and compliance of a diverse public. I hope to have a productive dialog today about how we can continue to move TSA toward that important goal.

Mr. ROGERS. Thank you, Mr. Chairman.

Unfortunately, allegations of unlawful profiling are nothing new for TSA. Since the agency was created after 9/11, it has faced allegations that its screening practices unfairly target certain populations of travelers.

Some of these allegations have stemmed from TSA’s behavior detection program. Throughout the program’s several iterations, the TSA has faced bipartisan criticism from this committee for its lack of scientific validation in evaluating passengers’ risk to the aviation security.

That is why I am pleased that last Congress the Republican Majority enacted legislation Representative Katko authored to end stand-alone Behavior Detection Officer positions and require them to be integrated into the primary screening functions at checkpoints. This important step has helped alleviate passenger wait times while sending a strong message to TSA about Congress’ dissatisfaction with the behavior detection program.

In the most recent review, GAO issued a single recommendation for TSA to establish an oversight mechanism to better monitor behavior detection activities. TSA should implement this recommendation immediately.

I would note that during the full year period GAO considers part of this report, TSA conducted nearly 3 billion passenger screenings. Of those 3 billion, only 1,066 passengers had allegations of unlawful profiling that were substantiated and resulted in employee retraining. That is an average of one substantiated allegation for every 2.8 million passengers screened.

In no way does this minimize the very real experiences of those who have faced discrimination. Even one incident is too many. However, this context is important.

The vast majority of TSA officers conduct themselves professionally. It would be unfortunate for this committee to send a message to them or the traveling public that unlawful profiling is rampant within the ranks when, according to this data, it is not.

In contrast to the low rates of unlawful profiling, previous media reports have highlighted the very high rates of TSA screeners failing to detect threats at checkpoints. I hope at some point in the near future the Majority will focus on oversight efforts on finding a solution to this tremendous risk to aviation security.

Finally, this is the second hearing concerning TSA in as many weeks where the Majority chose not to invite the agency to testify. I think all Members would agree that it would have been beneficial for the TSA to appear today to respond to the GAO report and the perspectives of other witnesses.

At some point, I hope the Majority will seek input from TSA on these important issues. In the interim, I look forward to this hearing and from our witnesses today.

Thank you. I yield back.

[The statement of Ranking Member Rogers follows:]

STATEMENT OF RANKING MEMBER MIKE ROGERS

JUNE 4, 2019

Thank you, Mr. Chairman.

Unfortunately, allegations of unlawful profiling are nothing new for the TSA. Since the agency was created after September 11, it has faced allegations that its screening practices unfairly target certain populations of travelers.

Some of these allegations have stemmed from TSA's behavior detection program. Throughout the program's several iterations, the TSA has faced bipartisan criticism from this committee for its lack of scientific validation in evaluating passengers' risk to aviation security.

That is why I am pleased that last Congress, the Republican Majority enacted legislation Representative Katko authored to end stand-alone Behavior Detection Officer positions and require them to be integrated into the primary screening functions at checkpoints. This important step has helped alleviate passenger wait times while sending a strong message to TSA about Congress's dissatisfaction with the behavior detection program.

In its most recent review, GAO issued a single recommendation for TSA to establish an oversight mechanism to better monitor behavior detection activities. TSA should implement this recommendation immediately.

I would note that during the 4-year period GAO considered as part of its report, TSA conducted nearly 3 billion passenger screenings. Of that 3 billion, only 1,066 passengers had allegations of unlawful profiling that were substantiated and resulted in employee retraining. That's an average of 1 substantiated allegation for every 2.8 million passengers screened.

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I yield back.

Chairman THOMPSON. Other Members of the committee are reminded that under committee rules opening statements may be submitted for the record.

[The statement of Hon. Jackson Lee follows:]

STATEMENT OF HONORABLE SHEILA JACKSON LEE

JUNE 4, 2019

Thank you, Chairman Thompson for holding today's hearing on "Examining TSA Mechanisms to Prevent Unlawful Profiling."

The United States is a Nation of laws and as such we must be mindful of the reason for the creation of the TSA following the horrific attacks of September 11, 2001.

Today's hearing provides an opportunity for Members of this committee to examine whether TSA's policies and screening processes allow for unlawful profiling and discuss the perspectives of community groups that have worked to improve processes and address potential discrimination by TSA.

The September 11, 2001 was also the date Mr. Balbir Singh Sodhi was murdered because of his religious beliefs.

Mr. Balbir Singh, an Indian Sikh immigrant was gunned down at the gas station that he owned in Mesa, Arizona.

Balbir Singh Sodhi was the oldest of 5 brothers and had immigrated to the United States from India in 1988 to realize the American Dream.

Mr. Balbir Singh Sodhi was a husband and a father of 2 daughters.

Mr. Balbir Singh Sodhi would regularly send money to his family that still lived in India.

Balbir Sodhi's murderer, Frank Roque had stated earlier: "I'm going to go out and shoot some towel heads," and "We should kill their children, too, because they'll grow up to be like their parents."

Four days later, Frank Roque shot Balbir Sodhi in the back 5 times.

Balbir Singh Sodhi was the first murder victim in the post-9/11 backlash.

Balbir Singh Sodhi was targeted simply because he had a beard and wore a turban in accordance with his Sikh faith.

Such senseless acts of violence highlight how important it is for racial profiling and discrimination to be eradicated.

The murder may have killed Balbir Singh Sodhi, but he could not kill his spirit, which lives on in the lives of his children and his relatives, one of whom, Hargun Sodhi is an excellent student at the University of Houston and an intern in my office.

I look forward to hearing from today's witnesses testimony on preventing unlawful profiling:

- Mr. Bill Russell, director, homeland security and justice, Government Accountability Office (GAO);
- Mr. Sim Singh, senior manager of policy & advocacy, The Sikh Coalition; and
- Ms. Janai Nelson, associate director-counsel, NAACP Legal Defense and Educational Fund, Inc.

My admiration and respect for the men and women of the TSA as public servants who are our Nation's first line of defense against terrorism that targets our Nation's transportation is well-known.

Today's hearing is not about the rank and file of the TSA who work under different circumstances than other Federal employees—they have no collective bargaining rights.

TSA employees are essential personnel so during the recent Federal Government shutdown that lasted over a month, they were expected to go to work each day, which most of them did at great personal sacrifice.

TSA professionals work long hours due to insufficient staffing.

Securing our Nation's airports requires efficiency and effectiveness of all aspects of recruitment, training, and retention of TSA professionals.

This hearing is about a policy that they must implement that is void of input from TSA rank-and-file and impacts every traveler boarding a flight originating in the United States are arriving in this country from abroad.

TSA screening protocols should reflect the real threats that exist to our Nation's transportation systems.

In the last decade, domestic terrorism has become an increasing concern in the United States.

In 2018, domestic extremists killed at least 50 people in the United States, a sharp increase from the 37 extremist-related murders documented in 2017, though still lower than the totals for 2015 (70) and 2016 (72).

The 50 deaths made 2018 the fourth-deadliest year on record for domestic extremist-related killings since 1970.

According to an analysis by the *Washington Post*, between 2010 and 2017, right-wing terrorists committed a third of all acts of domestic terrorism in the United States (92 out of 263), more than Islamist terrorists (38 out of 263) and left-wing terrorists (34 out of 263) put together.

Recent unpublished FBI data leaked to the *Washington Post* in early March 2019 reveal that there were more domestic terrorism-related arrests than international terrorism-related arrests in both fiscal year 2017 and fiscal year 2018.

From 2009 to 2018 there were 427 extremist-related killings in the United States. Of those, 73.3 percent were committed by right-wing extremists, 23.4 percent by Islamist extremists, and 3.2 percent by left-wing extremists.

In short, 3 out of 4 killings committed by right-wing extremists in the United States were committed by white supremacists (313 from 2009 to 2018).

The culmination of the 2016 mid-term election was consumed by bombs placed in the mail addressed to Democrats.

TSA interacts more intimately with broad swaths of the public than any other Government agency, screening over 2 million passengers every day.

TSA policies, procedures, and technologies should reflect the diversity of the population it serves, without disproportionately affecting minorities.

The Government Accountability Office conducted a study to review TSA's measures to prevent behavior detection activities from resulting in unlawful profiling.

GAO reviewed TSA policies and procedures; analyzed passenger complaint data received by TSA from October 2015 through February 2018 and actions taken to address them; and interviewed TSA officials.

From its findings, GAO recommends that TSA develop a specific oversight mechanism to monitor behavior detection activities for compliance with policies that prohibit unlawful profiling. DHS concurred with GAO's recommendation.

Some notable statistics:

- From October 2015 through February 2018, TSA received about 3,700 complaints alleging civil rights and civil liberties violations related to passenger screening.
- TSA operates at about 450 airports Nation-wide, but just 10 airports accounted for a full third of all complaints analyzed.
- Approximately 2,250 of 3,663 of the complaints alleged discrimination or profiling based on personal attributes and characteristics.
- For example, the TSA Contact Center (TCC) received complaints alleging discrimination that involved assertions by passengers that they had been selected for pat-downs based on race and ethnicity, among other reasons, when the passengers believed they did not trigger an alarm prompting the pat-downs.
- The TSA TCC received complaints related to passengers' transgender identity alleging selection for additional screening because of their transgender status.
- TCC also received passenger complaints alleging that screening procedures were aggressive or inappropriate for senior citizens.

The American Civil Liberties Union published a report, "BAD TRIP: Debunking the TSA's Behavior Detection Program," based on documents the ACLU obtained in a Freedom of Information Act lawsuit.

The ACLU report reveals that materials in TSA's own files discredit the program.

The report recommends that the TSA implement a rigorous anti-discrimination training program for its workforce.

Specifically, the ACLU found that TSA protocols for behavior screening misunderstand nonverbal behavior due to inadequate understanding of cultural norms and cues.

Further, they found that nonverbal patterns typical for ethnic groups are easily interpreted by Caucasian observers as signs of deception.

Documents in the TSA's files underscore that physiological signs such as blushing, sweating, or trembling have numerous potential causes, including medical conditions.

The fact that the TSA associates those signs with stress, fear, or deception increases the likelihood that officers will more intensively scrutinize travelers with medical conditions.

The topic of today's hearing is important and I thank the Chairman for his foresight in bringing today's witnesses before the committee.

I look forward to the testimony of today's witnesses.

Thank you.

Chairman THOMPSON. Also, we had informed the Minority weeks ago that we intended to hold this hearing today and formal notice of the hearing was made in full compliance with the rules. We, too,

would have wanted TSA to be here. The committee has been engaged with TSA and other stakeholders, and this is just part of what we have to do to look at this situation. So we look forward to getting TSA before the committee at some point.

I would also like to welcome our panel of witnesses today.

Our first witness, Mr. William Russell, is an acting director of the Government Accountability Office, Homeland Security and Justice team, where he is responsible for leading GAO's work on aviation and transportation security. Mr. Russell has over 17 years of experience at GAO and was previously an assistant director in GAO's Contracting and National Security Acquisitions team.

Mr. Sim Singh is a senior manager of policy and advocacy at the Sikh Coalition, where he works on National advocacy issues against hate crimes, school bullying, employer discrimination, and racial profiling. Prior to joining the Sikh Coalition, Mr. Singh developed apps that provide free legal resources for highly-vulnerable communities and worked in governmental affairs through prior positions at Facebook and the U.S. Chamber of Commerce.

Ms. Janai Nelson is associate director-counsel for the NAACP Legal Defense and Educational Fund, Inc., where she helped oversee the operation of LDF's program. Prior to joining LDF in June 2014, Ms. Nelson held senior leadership positions at St. John's University School of Law, where she also was a full professor of law.

Without objection, the witnesses' full statements will be inserted in the record. I now ask each witness to summarize his or her statement for 5 minutes, beginning with Mr. Russell.

**STATEMENT OF W. WILLIAM RUSSELL, ACTING DIRECTOR,
HOMELAND SECURITY AND JUSTICE TEAM, U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. RUSSELL. Good morning, Chairman Thompson, Ranking Member Rogers, and Members of the committee. I am pleased to be here today to discuss perspectives on TSA's policies to prevent unlawful profiling while screening passengers.

In our report issued today, we examined a range of issues related to how TSA implements policies that prohibit unlawful profiling, to include oversight of behavior detection activities, as well as how TSA addressed passenger screening-related complaints that allege profiling and other civil rights and civil liberties issues.

The bottom line is that TSA has policies and procedures in place that prohibit unlawful profiling of passengers, but can improve oversight of its behavior detection activities related to profiling.

Second, based on our review of passenger screening-related complaints, TSA found indications of potential discrimination and unprofessional conduct by screeners that involved race or other factors for more than 1,000 of the complaints reviewed.

In terms of behavior detection oversight, TSA began using behavior detection in a more limited way in 2016 to identify potentially high-risk passengers who exhibit certain behaviors it asserts are indicative of stress, fear, or deception, and refer them for additional screening.

We found that TSA has oversight policies for behavior detection that do prohibit unlawful profiling, but does not specifically assess whether profiling occurs. For example, TSA's Optimized Behavior

Detection Handbook and Oversight Guidance require supervisors to conduct routine checks on behavior detection operations to monitor compliance with standard operating procedures. This includes 7 specific assessments and checklists for managers to document completion of routine oversight.

However, our review of the checklist found that they do not specifically instruct supervisors to monitor for compliance with procedures intended to prohibit unlawful profiling. We recommended that TSA develop a specific oversight mechanism to address compliance in this regard. TSA agreed to do so and plans to implement this recommendation by the end of September 2019.

Second, apart from behavior detection, we also examined civil rights and civil liberty-related passenger screening complaints received by TSA from October 2015 through February 2018 and looked at what TSA did to address those complaints.

In total, TSA received about 3,700 of these types of complaints, the majority of which allege discrimination or profiling based on personal attributes and characteristics, a number of specific complaints related to hair and transgender issues.

TSA's Multicultural Branch, the office responsible for reviewing these types of complaints, assessed over 2,000 of them, and for about half, 1,066 to be exact, found indications of potential discrimination and unprofessional conduct that involved race or other factors.

For example, in one case we reviewed a passenger alleged profiling based on headwear. TSA officials used camera recordings and statements from officers involved in the encounter to substantiate that screening procedures violations had occurred.

In response to these complaints, TSA recommended a range of refresher training across airports or for screeners at individual airports identified in the complaints.

We found that TSA's responses to the complainants included, but were not limited, to apologizing for the screening experience or informing the complainant about next steps, such as agency plans to address the complaint or the underlying conduct that gave rise to it. We also found that TSA reviewed trends in the passenger complaint data and used that information to further inform and update screener training.

In conclusion, TSA can improve how it conducts oversight of behavior detection activities related to profiling and should continue efforts to identify and address passenger screening complaints that allege civil rights and civil liberty issues.

Chairman Thompson, Ranking Member Rogers, this concludes my prepared remarks. I look forward to any questions you may have.

[The prepared statement of Mr. Russell follows:]

PREPARED STATEMENT OF W. WILLIAM RUSSELL

JUNE 4, 2019

AVIATION SECURITY.—TSA HAS POLICIES THAT PROHIBIT UNLAWFUL PROFILING BUT SHOULD IMPROVE ITS OVERSIGHT OF BEHAVIOR DETECTION ACTIVITIES

GAO-19-490T

Chairman Thompson, Ranking Member Rogers, and Members of the committee: I am pleased to be here today to discuss mechanisms the Transportation Security Administration (TSA) uses to prevent unlawful profiling while screening passengers using behavior detection techniques. TSA uses behavior detection to identify potentially high-risk passengers who exhibit certain behaviors it asserts are indicative of stress, fear, or deception, and refer them for additional screening or, when warranted, to law enforcement.¹ Although TSA's policies and procedures prohibit unlawful profiling, and screeners are prohibited from selecting passengers for additional screening based on race, ethnicity, or other factors, allegations of racial profiling have raised questions about TSA's use of behavior detection.

My testimony today discusses: (1) How TSA trains screeners who engage in behavior detection on policies and procedures that prohibit unlawful profiling; (2) TSA's oversight of behavior detection activities; (3) the number of complaints TSA received alleging violations of civil rights and civil liberties related to passenger screening from October 2015 through February 2018, and actions taken by TSA to address them; and (4) how TSA used complaint data to inform screener training.

This statement summarizes our April 2019 report on TSA's measures to prevent behavior detection activities from resulting in unlawful profiling.² For this work, we reviewed TSA policies and procedures; interviewed TSA officials; and analyzed civil rights and civil liberties complaints made by passengers from October 2015 through February 2018 and actions taken by TSA to address them.

Further details on the scope and methodology for the April 2019 report are available within the published product. The work on which this statement is based was conducted in accordance with generally accepted Government auditing standards.

BACKGROUND

TSA's Use of Behavior Detection

The Aviation and Transportation Security Act established TSA as the Federal agency with primary responsibility for securing the Nation's civil aviation system, which includes the screening of all passengers and property transported by commercial passenger aircraft.³ At the approximately 440 TSA-regulated airports in the United States, all passengers, their accessible property, and their checked baggage are to be screened prior to boarding an aircraft or entering the sterile area of an airport pursuant to statutory and regulatory requirements and TSA-established standard operating procedures.⁴ TSA began using behavior detection in 2006 as an added layer of security to identify potentially high-risk passengers.

¹We reported in November 2013 that available evidence did not support whether behavioral indicators can be used to identify persons who may pose a risk to aviation security. We recommended that TSA limit future funding support for the agency's behavior detection activities until TSA could provide scientifically-validated evidence that demonstrates that behavioral indicators can be used to identify passengers who may pose a threat to aviation security. In 2017, we reported that TSA had reduced funding for behavior detection activities and revised its behavioral indicators. We stated that TSA should continue to limit funding for such activities until it can provide valid evidence demonstrating that behavioral indicators can be used to identify passengers who may pose a threat to aviation security. GAO, *Aviation Security: TSA Should Limit Future Funding for Behavior Detection Activities*, GAO-14-159 (Washington, DC: Nov. 8, 2013); and *Aviation Security: TSA Does Not Have Valid Evidence Supporting Most of the Revised Behavioral Indicators Used in Its Behavior Detection Activities*, GAO-17-608R (Washington, DC: July 20, 2017).

²GAO, *Aviation Security: TSA Has Policies that Prohibit Unlawful Profiling But Should Improve Its Oversight of Behavior Detection Activities*, GAO-19-268 (Washington, DC: April 23, 2019).

³See Pub. L. No. 107-71, § 101(a), 115 Stat. 597 (2001); 49 U.S.C. § 114. For purposes of this statement, "commercial passenger aircraft" generally encompasses the scheduled passenger operations of U.S.-flagged air carriers operating in accordance with their TSA-approved security programs and foreign-flagged air carriers operating in accordance with security programs deemed acceptable by TSA. See 49 C.F.R. § 1544 (governing U.S.-flagged air carriers) and 1546 (governing foreign-flagged air carriers).

⁴See 49 C.F.R. § 1540.5 (defining the sterile area of the airport as, in general, an area of an airport that provides passengers access to boarding aircraft and to which access is controlled through the screening of persons and property).

Through the end of fiscal year 2016, TSA's behavior detection screening process was a stand-alone program that used specially-trained Behavior Detection Officers to observe passengers at the screening checkpoint and engage them in brief verbal exchanges. If the Behavior Detection Officers determined during this interaction that a passenger exhibited a certain number of behavioral indicators, the Behavior Detection Officer was to refer the passenger for additional screening or, if circumstances warranted, contact a law enforcement officer. The law enforcement officer then would determine next steps, which could include questioning the passenger or conducting a criminal background check. The law enforcement officer then would determine whether to release the passenger, refer the passenger to another law enforcement agency, or arrest him or her.

In fiscal year 2017, consistent with the Aviation Security Act of 2016, TSA eliminated the stand-alone Behavior Detection Officer position.⁵ TSA transferred the former Behavior Detection Officers to serve as part of the screener workforce and began assigning them to the checkpoint to screen passengers. According to TSA officials, when screeners trained in behavior detection are assigned to a position, TSA policies and procedures permit them to use behavior detection when applicable. Furthermore, some screeners trained in behavior detection work in conjunction with canine teams to observe passenger behavior and identify passenger behaviors that may indicate that a passenger poses a higher risk to the aviation system.⁶

TSA's Oversight of Behavior Detection

TSA's Security Operations is responsible for overseeing the use of behavior detection. TSA's behavior detection policies and procedures prohibit screeners from selecting passengers for additional screening based on race, ethnicity, religion, and other factors, whether through behavior detection or other security measures. This responsibility includes overseeing officers trained in behavior detection to ensure they conduct behavior detection without regard to race/ethnicity, color, gender/sex, gender identity, religion, national origin, sexual orientation, or disability, in accordance with constitutional, statutory, regulatory, and other legal and Department of Homeland Security (DHS) policy requirements to protect the civil rights and civil liberties of individuals. Although the stand-alone Behavior Detection Officer position was eliminated and the program ended in 2017, the requirement to conduct oversight and verify compliance with TSA policies still applies when behavior detection is used, such as when behavior detection is used in conjunction with passenger screening canine teams.

Passenger Complaint Review and Referral Process

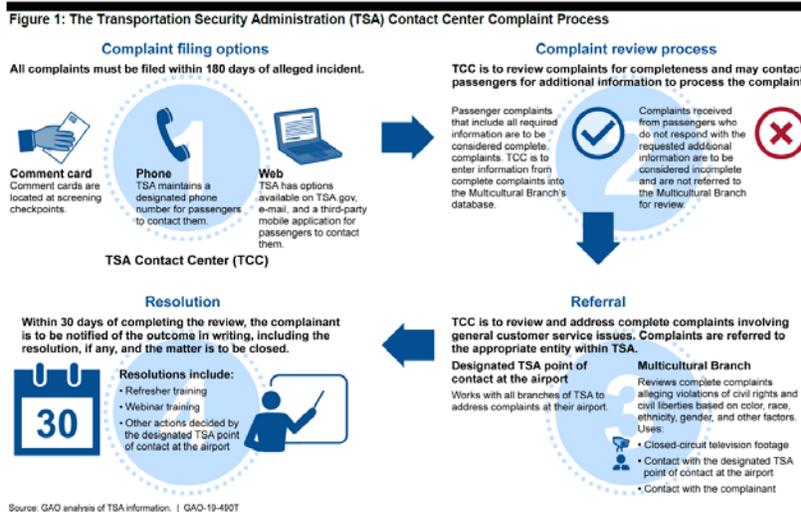
The TSA Contact Center (TCC) is the primary point of contact for collecting, documenting, and responding to public questions, concerns, or complaints regarding passengers' screening experience; reports and claims of lost, stolen, or damaged items; and complaints submitted by TSA employees.⁷ The TCC may refer screening complaints for resolution to other TSA headquarters offices, depending on the specific allegation. For example, complete complaints alleging violations of civil rights and civil liberties, which include allegations implicating color, race, ethnicity, gender, genetic information, national origin, religion, sexual orientation, and parental status,

⁵See Pub. L. No. 114-190, § 3304(a)(1), 130 Stat. 615, 655 (2016) (requiring that TSA, not later than 30 days after enactment (enacted July 15, 2016), utilize Behavior Detection Officers for passenger and baggage security screening, including the verification of traveler documents, particularly at designated TSA PreCheck lanes to ensure that such lanes are operational for use and maximum efficiency).

⁶TSA deploys passenger screening canine teams that are trained to detect explosives being carried by or worn on a person. TSA uses combinations of behavior detection and passenger screening canine teams to help ensure that individuals who have been selected for expedited screening do not exhibit high-risk behaviors or otherwise present a risk to the traveling public. Expedited screening is a process that TSA uses to assess a passenger's risk to aviation security prior to the passenger arriving at an airport checkpoint. GAO, *Aviation Security: TSA's Managed Inclusion Process Expands Passenger Expedited Screening, but TSA Has Not Tested Its Security Effectiveness*, GAO-15-465T (Washington, DC: Mar. 25, 2015).

⁷Questions, concerns, or complaints submitted to the TCC regarding passengers' screening experience may relate to any and all aspects of the screening process and are not necessarily specific or related to behavior detection activities. In this statement, we use "employees" to refer to current and former TSA employees who submitted complaints alleging civil rights and civil liberties violations related to TSA employment to the TCC. The TCC is responsible for receiving these employee complaints and referring them to TSA's Equal Employment Opportunity office for review.

must be referred to the Multicultural Branch.⁸ Figure 1 describes the TCC's complaint review process.



The Multicultural Branch, in consultation with Security Operations, determines whether a screener followed standard operating procedures while screening the complainant by reviewing available video of an incident or interviewing witnesses. Following the outcome of the complaint review and any resulting corrective actions, the TSA headquarters unit or the TSA customer support manager at the airport is to communicate the status of the resolution, if any, to the complainant—such as by using a template letter that explains TSA's policies and procedures or issuing an apology.

SCREENERS CONDUCTING BEHAVIOR DETECTION RECEIVE TRAINING ON TSA'S POLICIES AND PROCEDURES THAT PROHIBIT UNLAWFUL PROFILING

As we reported in April 2019, before screeners are eligible to conduct any behavior detection activities, they must first complete a 5-day Optimized Behavior Detection Basic Training course, and undergo on-the-job training at their local airport. This course includes an overview of DHS and TSA policies that prohibit unlawful profiling, and trains screeners to apply behavioral indicators to passengers without regard to race/ethnicity, color, gender/sex, gender identity, religion, national origin, sexual orientation, or disability.⁹ In addition, TSA's 2018 National Training Plan required behavior detection-trained screeners to complete 4 recurrent technical training courses related to behavior detection, including 2 that contain material reinforcing DHS's and TSA's policies prohibiting unlawful profiling.¹⁰

TSA HAS OVERSIGHT POLICIES FOR BEHAVIOR DETECTION AND PROHIBITS UNLAWFUL PROFILING BUT DOES NOT SPECIFICALLY ASSESS WHETHER PROFILING OCCURS

In April 2019, we reported that TSA policy and guidance requires managers to ensure behavior detection is conducted without regard to race or ethnicity, among other factors. TSA uses 7 oversight checklists to assess whether behavior detection activities are conducted in accordance with TSA policy, such as monitoring whether screeners trained in behavior detection observe and engage passengers correctly. However, our review of these checklists found that they do not instruct supervisors

⁸According to the TCC standard operating procedures, TCC analysts review the complaints to ensure that they contain the necessary information to be considered complete, including the airport, passenger's name, date of the alleged incident, and description of the alleged civil rights and civil liberties violation.

⁹According to TSA policy, screeners may only use discernible traits to screen passengers when 3 conditions are met: (1) They are directed to do so by their Federal Security Director; (2) the directive is based on specific intelligence information; and (3) the directive is time-limited.

¹⁰The National Training Plan, which is developed annually, guides the training requirements for all screeners for a given year.

to monitor for indications of profiling. According to TSA officials, TSA's guidance and checklists do not include this type of monitoring because TSA officials believe that the training screeners receive, adherence to its operating procedures, and general supervisory oversight are sufficient to alert supervisors to situations when unlawful profiling may occur. However, a 2013 DHS memorandum addressing unlawful profiling states that each component, including TSA, should both implement specific policy and procedures on racial profiling, and ensure all personnel are trained and held accountable for meeting the standards set forth in DHS policy.¹¹ For TSA, such a policy or procedure could be an item added to a checklist for supervisors to document, based on their observations, whether screeners selected individuals for additional scrutiny in a manner consistent with policies and procedures related to behavior detection activities and unlawful profiling. Developing a specific mechanism to monitor behavior detection activities for compliance with policies prohibiting unlawful profiling would provide TSA with greater assurance that screeners are adhering to such policies.

In our April 2019 report, we recommended that the TSA administrator direct Security Operations to develop a specific oversight mechanism to monitor the use of behavior detection activities for compliance with DHS and TSA policies that prohibit unlawful profiling. DHS agreed with our recommendation and stated that TSA plans to take additional steps to continue to ensure behavior detection activities adhere to policies that prohibit unlawful profiling. Specifically, TSA plans to modify existing oversight checklists used by managers and supervisors to include specific terminology for monitoring unlawful profiling. DHS estimates that this effort will be completed by September 30, 2019.

TSA RECEIVED 3,663 COMPLAINTS ALLEGING CIVIL RIGHTS AND CIVIL LIBERTIES VIOLATIONS INVOLVING PASSENGER SCREENING IN RECENT YEARS, AND RECOMMENDED TRAINING IN CERTAIN CASES

The TCC Received 3,663 Complaints Related to Passenger Screening and a Majority Alleged Discrimination or Profiling Based on Personal Attributes and Characteristics

In April 2019, we reported that the TCC received 3,663 complaints related to passenger screening alleging violations of civil rights and civil liberties from October 2015 through February 2018. These complaints are not specific to behavior detection activities and generally reflect alleged conduct occurring at the screening checkpoint through the application of screening measures. We analyzed the 3,663 complaints and found that the majority (2,251 of 3,663) of the complaints alleged discrimination or profiling based on personal attributes and characteristics.¹² For example, the TCC received complaints alleging discrimination that involved assertions by passengers that they had been selected for pat-downs based on race and ethnicity, among other reasons, when the passengers believed they did not trigger an alarm prompting the pat-downs.¹³ The TCC also received complaints related to passengers' transgender identity alleging selection for additional screening because of their transgender status. Additionally, the TCC received passenger complaints alleging that screening procedures were aggressive or inappropriate for senior citizens. Table 1 provides a list of complaint types based on our analysis. In addition, our April

¹¹Department of Homeland Security, *Memorandum for Component Heads from Secretary Napolitano: The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities* (Apr. 26, 2013). The DHS memorandum further states that DHS "has explicitly adopted" the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003. According to the DHS memorandum, "[i]t is the policy of DHS to prohibit the consideration of race or ethnicity in [its] daily law enforcement and screening activities in all but the most exceptional instances," as defined in Department of Justice guidance. See United States Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (Washington, DC: June 2003).

¹²These complaints alleged discrimination or profiling based on personal attributes and characteristics related to, among other things, an individual's race, ethnicity, national origin, language, gender, age, and hair.

¹³Standard screening typically includes passing through a walk-through metal detector or advanced imaging technology (AIT) machine, which identifies objects or anomalies on the outside of the body. Passengers may be subject to a pat-down if they are screened by the AIT or walk-through metal detector and the equipment alarms. Pursuant to TSA standard operating procedures for screening at the checkpoint, triggering an alarm is not the only reason why a passenger may be selected for a pat-down or additional screening measures.

2019 report provides additional detail about our content analysis of complaints alleging civil rights and civil liberties violations.¹⁴

TABLE 1.—COMPLAINTS RECEIVED BY THE TRANSPORTATION SECURITY ADMINISTRATION (TSA) CONTACT CENTER (TCC) ALLEGING CIVIL RIGHTS AND CIVIL LIBERTIES VIOLATIONS RELATED TO PASSENGER SCREENING AND CATEGORIZED BY PERSONAL ATTRIBUTES AND CHARACTERISTICS OR BY ALLEGED ADVERSE ACTIONS, OCTOBER 2015 THROUGH FEBRUARY 2018

Category	Frequency	Percentage	General Description
Discrimination/profiling—national origin, language, race/ethnicity.	1,532	42	Questions, concerns, or allegations about profiling or discrimination based on the individual’s national origin, language, race, or ethnicity, or discrimination/profiling in general (no reason specified).
Pat-down	493	13	Questions, concerns, or allegations about a pat-down that was possibly invasive or overly aggressive, including pat-downs that the passenger alleges occurred due to their race/ethnicity.
Hair	279	8	Questions, concerns, or allegations about receiving a hair pat-down.
Sex/gender/gender identity, excluding transgender.	271	7	Questions, concerns, or allegations of discrimination based on gender, including gender identity concerns: e.g., the passenger asserts that a screener of the wrong gender started to conduct the pat-down. Also includes allegations of differential treatment based on their sex/gender. No mention of race/ethnicity.
Religion	200	5	Questions, concerns, or allegations of discrimination based on perceived religion, e.g., a passenger alleges being subjected to additional screening because he or she appears to be part of a religious group or has a name that may make him or her appear to be part of a religious group.
Transgender	169	5	Questions, concerns, or allegations about transgender screening, e.g., a transgender passenger alleges that she always has to undergo a pat-down because TSA’s technology is based on a binary male/female system.
Other—civil rights and civil liberties related.	316	9	Combination of categories such as age, sexual orientation, and Constitutional rights, among others.*

¹⁴GAO–19–268.

TABLE 1.—COMPLAINTS RECEIVED BY THE TRANSPORTATION SECURITY ADMINISTRATION (TSA) CONTACT CENTER (TCC) ALLEGING CIVIL RIGHTS AND CIVIL LIBERTIES VIOLATIONS RELATED TO PASSENGER SCREENING AND CATEGORIZED BY PERSONAL ATTRIBUTES AND CHARACTERISTICS OR BY ALLEGED ADVERSE ACTIONS, OCTOBER 2015 THROUGH FEBRUARY 2018—Continued

Category	Frequency	Percentage	General Description
Other—not related to passenger screening.	403	11	Combination of categories such as employee complaints, or those not related to passenger screening.**
Total	3,663	100	

Source: GAO analysis of TSA complaint data./GAO-19-490T

Note: We use the term “passengers” to refer to individuals—including ticketed passengers, individuals accompanying ticketed passengers, and any other individuals not considered an employee for purposes of this statement—who submitted complaints alleging civil rights and civil liberties violations related to TSA screening procedures to the TCC. In addition, we use “employees” in this table to refer to current and former TSA employees who submitted complaints alleging civil rights and civil liberties violations related to TSA employment to the TCC. The TCC is responsible for receiving these employee complaints and referring them to TSA’s Equal Employment Opportunity office for review.

*Constitutional rights may include questions, concerns, or allegations raising freedom of speech or unreasonable search-and-seizure issues.

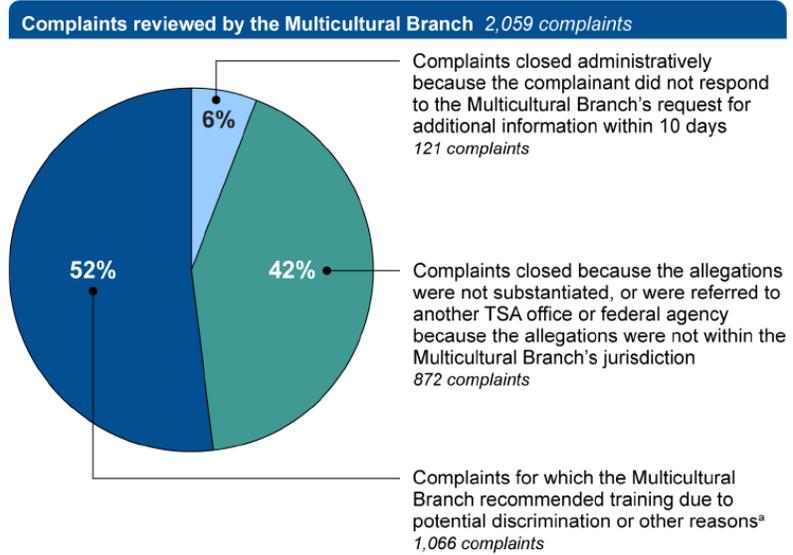
**Matters not related to passenger screening may include information received by the TCC that TSA characterizes as conspiracy theories or other information unrelated to TSA screening processes.

TSA’s Multicultural Branch Reviewed More Than 2,000 Complaints and Recommended a Range of Screener Training

From October 2015 through February 2018, the Multicultural Branch received 2,059 complaints, including approximately 1,900 from the TCC as well as complaints referred from other TSA offices, alleging violations of civil rights and civil liberties, as shown in figure 2.¹⁵

¹⁵TSA’s Multicultural Branch receives complaint referral from multiple sources, including the TCC, DHS’s Office of Civil Rights and Civil Liberties, TSA’s Disability Branch, and TSA personnel at airports.

Figure 2: Complaints Reviewed by the Transportation Security Administration (TSA) Multicultural Branch from October 2015 through February 2018



Source: GAO analysis of TSA's Multicultural Branch passenger complaint data received from October 2015 through February 2018. | GAO-19-490T

Note: TSA's Multicultural Branch is responsible for collecting, monitoring, and adjudicating passenger complaints alleging civil rights and civil liberties violations at the passenger screening checkpoint, including complaints alleging unlawful profiling and discrimination, among other things.

^aAccording to TSA officials, the Multicultural Branch recommends training when standard operating procedures for screening were not followed, or when it determines that the proactive measure of refresher training would be useful.

For about half of the complaints (1,066) the Multicultural Branch reviewed, it found indications of potential discrimination and unprofessional conduct that involved race or other factors and recommended a range of refresher training across airports or for screeners at individual airports identified in the complaints. As we reported in April 2019, Multicultural Branch officials told us that its policy is to recommend refresher training as a proactive measure when, for example, they are unable to determine if the alleged civil rights and civil liberties violations occurred. Multicultural Branch officials said these trainings were provided through National Shift Briefings, which were circulated across TSA, or through training provided at a particular airport.¹⁶

In addition, TSA's office of Human Capital Employee Relations reported that it took a range of disciplinary actions—from letters of reprimand to termination—for 100 screeners from October 2015 through February 2018, in part in response to passenger complaints alleging civil rights and civil liberties violations.¹⁷

TSA'S MULTICULTURAL BRANCH ANALYZES AND SHARES PASSENGER COMPLAINT DATA TO INFORM SCREENER TRAINING

In April 2019, we reported that TSA's Multicultural Branch regularly collects and analyzes data on passenger civil rights and civil liberties and discrimination com-

¹⁶National Shift Briefings provide a reminder to all screening personnel of their role in ensuring that security measures are appropriately applied in accordance with TSA policies and procedures.

¹⁷TSA officials reported that none of the complaints that resulted in the disciplinary actions were specific to behavior detection. TSA's Human Capital Employee Relations officials determined that more than 60 percent of the 100 screeners used inappropriate comments or were engaged in misconduct, including offensive comments or actions based on another's race, national origin, and/or sex, among other factors.

plaints and their resolution status, and shares this information with TSA executive leadership, TSA airport customer service managers, and screeners in the field, among others. According to TSA officials, the Multicultural Branch uses its analysis of passenger complaints and the results of complaint investigations to develop training aids and materials on areas where they determine screeners need more training, such as multicultural awareness or screening of transgender passengers. For example, the Multicultural Branch has developed briefings focusing on unlawful profiling and unconscious bias which reiterated that unlawful profiling is against TSA policy, defined unconscious bias, and provided scenario-based examples. Additionally, members from the Multicultural Branch hold on-site training for screeners at selected airports each year based on complaint data analysis and other factors. These training sessions last 3 days, include topics stemming from complaint data TSA has analyzed, and can include webinars, role-playing, and other forms of instruction.

Chairman Thompson, Ranking Member Rogers, and Members of the committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

Chairman THOMPSON. Thank you very much for your testimony. I now recognize Mr. Singh to summarize his statement for 5 minutes.

**STATEMENT OF SIM J. SINGH, SENIOR MANAGER OF POLICY
AND ADVOCACY, THE SIKH COALITION**

Mr. SINGH. I would like to thank this committee, including Chairman Thompson and Ranking Member Rogers, for their leadership and the opportunity to appear here today.

My name is Sim J. Singh, and I am the senior manager of advocacy and policy at the Sikh Coalition, the Nation's largest Sikh American civil rights organization. We are a nonpartisan nonprofit focused on combating and preventing hate in America.

We recognize the importance of TSA's mission to protect this Nation's transportation systems to ensure freedom of movement for people and commerce. However, if that is TSA's mandate, they must ensure the freedom of movement for all people, regardless of their race, sex, gender identity, national origin, religion, and disability.

In 2019, we continue to receive complaints from Sikh travelers across the Nation reporting troubling incidents of profiling and discrimination. Oftentimes, these incidents involve secondary screening demands without any TSA technology indicating there is a problem.

These discriminatory actions, combined with a lack of clear traveler guidance, has led to Sikh passengers feeling frustrated and singled out because they experience inconsistent TSA security screenings between airports and even within specific airports of frequent travel.

While TSA's increased reliance on technology has come with Government assurances that it would mitigate against the need for pat-downs and searches that violate basic civil rights, this has not solved the discriminatory and invasive screening practices that enable the profiling of Sikhs.

As a Sikh American and frequent traveler who maintains my religious articles of faith, I almost always experience an AIT alarm indicating that my turban is a problem and that I must undergo additional screening, ordinarily by explosive trace detection, a device that we receive many complaints about for false alarms, usually because the TSO failed to change their gloves and/or the ETD swab.

Additional screening and searches for observant Sikhs remains highly probable, reinforcing that current TSA technology, policies, and procedures continue to single out and target our community.

The message at airports across the country to millions of passengers watching: Sikhs are outsiders that somehow pose threats worthy of investigating, regardless of how pretextual that investigation is.

These discriminatory practices continue to shift the focus away from the TSA's top priority of protecting our Nation. The Office of the Inspector General has repeatedly documented threats, such as guns, knives, and explosives, breezing through TSA security checkpoints with ease. As TSA continues to disproportionately focus on discriminatory behaviors, like Sikh religious articles of faith, it takes away from the necessary focus—combating credible threats.

Unlike most Americans, Sikhs are continually asked to pay a price for exercising our Constitutional rights by submitting to routine and frequent searches by TSA. It further perpetuates negative stereotypes and falsely validates the myth of racial and religious communities posing a threat to our country.

TSOs and other passengers witnessing minorities disproportionately receiving these additional screenings leads to the creation of implicit and explicit biases that detrimentally influence security policies and behavior, which justify scrutinizing specific kinds of travelers on racial or religious grounds.

That begs the question: Are we really going to always select a Sikh for additional screening because he or she wears a turban? More importantly, why is this treatment considered acceptable?

We request Members of this committee and Congress to reintroduce and pass the End Racial Profiling Act to comprehensively address bias and limit the harmful impacts of algorithmic bias.

Second, our Government must correct screening policies and procedures that enable profiling, such as TSO abuses of discretion that is often used as a pretext to profile.

Third, any new technology or procedures must reduce the use of pat-downs and ensure that travelers aren't singled out based on their race, religion, or gender. These invasive TSO-administered pat-downs should be an absolute last resort where other screening procedures cannot revolve an alarm.

Last, Congress should mandate independent and regular civil liberties impact assessments and require data collection on secondary screening incidents by the TSA.

It is our sincere hope that this committee and TSA address the need for profiling protections and eliminate discriminatory practices, not just for the religiously observant Sikhs and Muslims, but also for the disability, transgender, and other minority communities.

It is not a coincidence that the American public continues to fear and discriminate against those whom our Government continues to discriminate against. When a turbaned Sikh is routinely subjected to secondary screenings without cause, it further validates every false stereotype that contributes to Sikhs remaining hundreds of times more likely to experience bias, bigotry, or backlash in America.

We are deeply appreciative for the time given today for the Sikh American community to raise our concerns.

[The prepared statement of Mr. Singh follows:]

PREPARED STATEMENT OF SIM J. SINGH

JUNE 4, 2019

Chairman Thompson, Ranking Member Rogers, and Members of the committee: My name is Sim J. Singh, and I am the senior manager of advocacy & policy for the Sikh Coalition. Thank you for the opportunity to testify regarding the efforts of the Transportation Security Administration (TSA) to engage the traveling public. The Sikh Coalition is the Nation's largest Sikh American civil rights organization, non-profit, non-partisan foundation founded in 2001 in response to numerous cases of discrimination against Sikh Americans after 9/11. Our mission has been to work toward a Nation where Sikhs—who have been part of the American fabric for over 125 years—and other religious minorities in America, may freely practice their faith without bias and discrimination.

In addition to conducting public education, pro-bono legal aid, National research, and community empowerment, the Sikh Coalition works with Federal, State, and local agencies on a wide range of issues, and we have engaged with TSA since its inception. My testimony will focus on the challenges facing Sikh travelers, and our engagement with TSA. Please know that, we view these challenges as part of a broader spectrum of privacy and civil rights concerns that affect large segments of the traveling public. Those concerns are acutely amplified by travelers of intersectional identities of race, sex, gender identity, National origin, religion, and disability.

Organizationally, we have worked with TSA to help reduce some of the inequities that travelers face based on their protected characteristics. Since 2001, the Sikh Coalition has trained thousands of Transportation Security Officers (TSOs) and Customs and Border Protection officers at airports across the country in providing cultural competency on the Sikh religious articles of faith. We have also advised TSA's multicultural branch on specific policy considerations, training gaps, and community outreach needs. Over the course of the last 18 years we have created several iterations of a traveler's guide to "Know your Rights", which TSA has vetted and provided feedback for in order to make it as accurate and consistent with TSA policy as possible.¹

In 2012, we made filing complaints against TSA more accessible by introducing a free mobile app called FlyRights. It was the first-of-its-kind mobile app created to combat profiling at airports and is still in use today. The app allows travelers to formally report incidents in real time and have those complaints routed to TSA and DHS so that they will be treated as official and actionable. Our app was adopted not just by Sikh travelers, but travelers of all walks of life with over 10,000 downloads. When it was first launched DHS reported a mere 8 complaints for 2012, while FlyRights documented 157 for the same year.² In total the app helped facilitate approximately 1,000 complaints at 112 airports and provides insights of the issues the traveling public is facing when it comes to TSA engagement on a daily basis.

The Sikh Coalition recognizes the importance of TSA's mission to protect the Nation's transportation systems to ensure freedom of movement for people and commerce. We believe that the agency's mission statement can be more than aspirational. If the agency is going to ensure the freedom of movement for people, it must do so for ALL people, regardless of their race, sex, gender identity, national origin, religion and disability. Sometimes it takes difficult conversations like these to ensure TSA is living up to the standards it has set out for itself, and to uphold the civil liberties of all individuals. I'm sure we can all agree that our Government should not penalize anyone because of their protected characteristics.

To be clear, profiling not only stigmatizes victims but also makes our Nation less safe because it redirects limited security resources away from detecting and preventing actual criminal behavior and security threats. Sikhs, like all other travelers, have the right to be free from profiling based on the wear of our articles of faith. As a concerned citizen and proud American, I am alarmed to hear that the Homeland Security Inspector General revealed that undercover investigators were able to

¹ See Exhibit B and Exhibit C.

² "FlyRights" by the Sikh Coalition, 2012, available at https://www.fly-rights.org/infographic_2013.pdf.

smuggle banned weapons, such as fake guns, knives, and explosives, through checkpoints 70 percent of the time—actions which could have been prevented if TSA had a better implementation of its resources and policies.³ The TSA shouldn't keep their eyes focused on my turban, rather security officials need to keep their eyes on the real threats such as the guns, knives, and explosives that have a 70 percent rate of passing a security checkpoint. With better technology, clearer and more transparent screening standards, increased oversight, and mechanisms in place to ensure civil rights compliance, our security resources can enable the agency to focus on the real threats facing our Nation.

BACKGROUND

Sikhism is the fifth-largest organized world religion, with more than 25 million adherents throughout the world. Sikhs have been in the United States for 125 years and approximately 500,000 followers live here. The core teachings of the Sikh religion are that there is one God and that all human beings are created equal, regardless of distinctions such as their religion, race, sex, or caste. Observant Sikhs are distinguished by visible articles of faith, including uncut hair, which Sikhs, both men and women, will cover with a religiously mandated turban which must be worn at all times.

Although the Sikh turban signifies a commitment to upholding freedom, justice, and dignity for all people, the physical appearance of a Sikh is often ignorantly and negatively conflated with images of foreign terrorists, some of whom also wear turbans and many of whom have received copious publicity in our mainstream media in the post-9/11 environment. More troubling is that our physical appearance has invoked bias against our community. As far back as the early 20th Century, Sikhs have been ridiculed and stereotyped because of their appearance, and continue to be subjected to unusually high rates of discrimination and profiling based on these articles of faith. Today Sikhs continue to face disproportionately higher rates of secondary screening by TSA in comparison to the average traveler.

CHALLENGES FACED BY RELIGIOUSLY OBSERVANT TRAVELERS

TSA was established in the aftermath of Sept. 11, 2001 to help secure weaknesses in existing airport security procedures. In that same time period, hundreds of Sikh Americans were put on the receiving end of backlash attacks, harassment, and discrimination. Not only were Sikhs facing brutal physical assaults, murder, and intimidation within their neighborhoods, but law enforcement was also turning against Sikhs and other racial and religious minorities by subjecting people like us to profiling. At the time, TSA was no exception to profiling Sikhs because of their external appearance, subjecting Sikhs to a 100 percent screening rate at airports across the country.

The removal of the turban—which Sikhs view as an extension of their body—is highly personal and sensitive and is akin to a strip search. Removal of the turban is not just a mere inconvenience for Sikhs, as re-tying a turban can take a significant period of time. It is considered a great dishonor for anyone to violate another's turban by removing it, and it is highly disrespectful to touch it with unwashed hands or by anyone who does not themselves adhere to the tenets of the faith. As you can imagine TSA's security protocol on religious headwear was deeply problematic for religious observance and civil rights, as it was patently similar to frisking an individual without suspicion or probable cause. The reason Sikhs are frisked is plainly stated by TSOs—it is because we wear turbans on our heads, and not that they actually believe we are hiding something underneath it.⁴

Anyone with religious headwear was mandated to remove their article of faith at TSA checkpoint until October 2007. After receiving numerous complaints we worked with TSA to help modify the agency's screening policy to better balance the needs of National security and civil rights. We arrived at a policy that allowed for self-pat-downs of religious headwear and presenting hands for additional screening with Explosive Trace Detection (ETD) devices.⁵ The new procedures, designed to detect

³“TSA Misses 70 percent Of Fake Weapons But That's An Improvement” by Forbes November 9, 2017 available at <https://www.forbes.com/sites/michaelgoldstein/2017/11/09/tsa-misses-70-of-fake-weapons-but-thats-an-improvement/#5a2deb2a38df>.

⁴“Sikh Americans' 'Raw Deal' at Airport Security” by *The Washington Post*, November 29, 2013 available at https://www.washingtonpost.com/opinions/sikh-americans-raw-deal-at-airport-security/2013/11/29/Saab1dc6-5790-11e3-8304-caf30787c0a9_story.html.

⁵“The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts” by the Transportation Security Administration, March 5, 2018 available at www.tsa.gov/news/testimony/2018/02/27/public-face-tsa-examining-agencys-outreach-and-traveler-engagement.

non-metallic objects, allow the Sikh traveler to request a self-pat-down of their turban instead of an officer-conducted pat-down. A Sikh turban or other religious head covering may only be asked to be removed if the traveler wearing it does not successfully clear the additional screening measures that are in place.

For Sikh Americans and other minority groups, biases against travelers are prevalent at every stage of the traveling process. This bias starts with the fact that TSOs do not receive adequate training on TSA policies or cultural competencies, which is evident from the moment many stigmatized groups arrive at the airport and have to go through behavioral detection before reaching security. It continues as these passengers pass through security, proceed past the security screening area, and in many cases even as these individuals are boarding their flights. For example, TSA has employed behavioral detection—a junk science—disproportionately targets segments of the traveling public for additional screening based on their racial or religious characteristics even before they enter the screening area. Once a traveler is within the screening area, inconsistent application of procedures—including the implementation of “local rules” on screening, unfettered TSO discretion, and biased technology single out specific groups of passengers more than others. Profiling continues to reverberate throughout the security landscape even after leaving the screening area with reports of TSOs attempting to haul passengers back for additional screening.⁶ This is often unacceptably exacerbated when the general traveling public expresses discomfort with traveling alongside passengers perceived to be Muslim, Middle-Eastern, Arab, and South Asian.⁷ To be clear, it is the Government’s responsibility to remain above the fray when this type of public hysteria breaks out, and TSA should not be engaging in profiling activities as a result.

TECHNOLOGY REINFORCING BIASES

Not only are minority communities subjected to bias-based profiling by policies and procedures enabling discretion to be used as pretext for profiling, but the technology utilized to dispel bias-based suspicions reinforce negative stereotypes. The technology currently in use does not help reduce incidents of profiling; rather it ensures that secondary screening will transpire more frequently and adds needless delays, unwelcomed humiliation, and frustration as passengers with bulky clothing or certain hairstyles that are not equally subjected to TSA policies. Algorithmic biases like these are dangerous because algorithms are often perceived to be neutral and project greater authority than human expertise. Travelers feel that they cannot complain about the bad results generated by the machine or the TSO operating the device.

In practice new policies adopted to screen religious headwear have not been implemented in a manner that is consistent, respectful, or accurate in threat detection. In many airports, TSOs are not adequately trained on TSA policies and procedures when it comes to screening and searching religious articles of faith. The option of a self-pat-down by a passenger is not proactively offered by the TSO. As such travelers often feel they have no other option than to acquiesce to the TSO’s request to pat-down or removal of their religious garment. Travelers also don’t want to make a TSO’s job any harder than necessary or perpetuate a negative stereotype of an angry minority. Due to the lack of appropriate supervision and ineffective religious sensitivity training, TSA places the onus on travelers to request a self-administered pat-down of their religious headwear and ensure TSOs are following their own security protocol.

⁶“TSA Tells Sikh Man To Remove Turban, Finds Out He’s A Canadian Politician” by HuffPost, May 11, 2018 available at www.huffpost.com/entry/tsa-sikh-canadian-politician_n_5af5dbb3e4b00d7e4c1a643f?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29v-Z2xlLmNubS8&guce_referrer_sig=AQAAAKnknc1sC_AlUNqKhr0UuyHDIqekBXfhAtqy4e5J-18_eK0x_j4kOfiv6_NPMuJD2rqBvt6ZkJAHerdZo9mfbQ-fQHlRFK6yX8HGmEv_D5Cf-LX5Axuc3oU89g-PbTjVJFnuulwz63XRLqHteBhFxGG9SCLqoQhV4IT77w1trZZL.

⁷“Jess Hilarious profiled four Sikhs on a plane. Our government does so every day.” By RNS, March 18, 2019 available at <https://religionnews.com/2019/03/18/jess-hilarious-profiled-four-sikhs-on-a-plane-our-government-does-so-every-day/> and “College Student Is Removed From Flight After Speaking Arabic on Plane” by *The New York Times*, April 17, 2016 available at www.nytimes.com/2016/04/17/us/student-speaking-arabic-removed-southwest-airlines-plane.html and “Four Passengers Removed from Flight at BWI That Was Headed to Chicago” by *The Washington Post*, November 17, 2015 available at www.washingtonpost.com/local/trafficandcommuting/four-passengers-removed-from-flight-at-bwi-that-was-headed-to-chicago/2015/11/17/554cc46a-8d38-11e5-acff-673ae92ddd2b_story.html?utm_term=.26ce2023550d and “Ivy League Professor Kicked Off Plane For Writing ‘Arabic Symbols,’” AKA Math Equations” by Mic, May 7, 2019 available at www.mic.com/articles/142926/ivy-league-professor-kicked-off-plane-for-writing-arabic-symbols-aka-math-equations#.JYhQijNto.

After a pat-down is conducted TSOs often fail to visibly change their gloves or replace ETD swabs in front of a traveler prior to administering the ETD on a traveler. ETDs are sensitive enough to capture chemical compounds by contact from other sources. TSOs come into primary contact with a range of chemical compounds carried by travelers before needing to administer an ETD. Without measures taken to ensure ETD alarms are as accurate as possible, travelers will continue to be subjected to invasive secondary screening by ETD which reduces passenger throughput and credible threat detection. These false alarms adversely impact travelers with religiously mandated headwear as the alarm will accompany a request to remove that religious headwear. We frequently receive reports of false ETD alarms from Sikh community members. Speaking from personal experience, the ETD alarms will not re-occur upon a change of swabs and/or gloves. Unfortunately, ETDs and how they are implemented are not the only screening technology that singles out specific types of passengers for additional screening, Advanced Imaging Technology (AIT) devices are even more problematic.

TSA adopted full-body scanners, amidst promises that these machines would eliminate the need for pat-downs, which we now know not to be true. The technology can apparently filter through clothing, but not thick hair.⁸ What culminates is disproportionate targeting of minorities based on race and religion. According to TSA, the cloth on our heads and/or the accompanying hair are registered as an “anomaly” requiring increased scrutiny. What results is humiliating hair and headwear pat-downs that leave travelers feeling profiled and violated while others watch. In practice, Sikhs are virtually guaranteed to receive secondary screening because of our turbans, and reports also show that African American women and transgender individuals are subjected to higher rates of secondary screening as a result of AIT deficiencies as well.⁹

Despite TSA having knowledge and proof of long-standing issues facing travelers with religious headwear, the agency has failed to publish easily accessible and transparent information on its website to assist this segment of the traveling public. Instead the agency relies on a “Know Before You Go” document that contains ambiguous and unclear language that is confusing for a Sikh traveler. This document also was never published on the agency’s website and it’s unclear how it is even distributed to the public. Ultimately, the agency relies on organizations like ours to develop easy-to-understand publications that are language-accessible and comprehensible to the average traveler, however even then TSA fails to adequately resolve issues that such organizations face when deciphering TSA’s policies by often citing “National Security” as a reason to evade answering questions for clarity.¹⁰

TSA needs to do more to ensure the technologies and procedures in use do not perpetuate biases or otherwise lead to disproportionate screening of minority and marginalized communities. TSA must also convene stakeholders from the community, including organizations like the Sikh Coalition, to provide input and feedback on policy procedures, development, and challenges. We should not accept the fact that specific groups of travelers are guaranteed to receive secondary screening whenever they pass through TSA checkpoints due to their race or religion. Beyond these common-sense approaches, more needs to be done to reduce incidents of bias and recognizing the consequences. Not only are minority communities adversely impacted by biases in technology and its application, but it also inadvertently validates and perpetuates negative stereotypes of the ensnared communities.

The general traveling public also internalizes these biases by witnessing minority communities routinely subjected to secondary screening when passing through security checkpoints. As a result of the negative stereotypes reinforced by TSA’s screening procedures and policies, passengers have a heightened fear of those who are most likely to face secondary screening and equate those individuals (and others who look like them) with “something” dangerous. The deputization of the general traveling public as an integral part of the security landscape via programs like “If you see something, say something”, creates further harm against minority communities. Minorities are therefore increasingly singled out by the general public with reports of suspect behavior based purely on bias.

The result is innocent travelers forcibly removed by airlines as a result of the traveling public citing fears for their safety—fears based on perceptions of an indi-

⁸“How Airport Scanners Discriminate against Passengers of Color.” *Vox*, April 17, 2019 available at www.vox.com/the-goods/2019/4/17/18412450/tsa-airport-full-body-scanners-racist.

⁹“TSA Agents Say They’re Not Discriminating Against Black Women, But Their Body Scanners Might Be” by *ProPublica*, April 22, 2019 available at www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be.

¹⁰“Know Your Rights At the Airport” by the Sikh Coalition, Nov. 19, 2018 available at <https://www.sikhcoalition.org/wp-content/uploads/2018/11/tsa-know-your-rights-2018-1.pdf>.

vidual's appearance, language, or religious appearance. What is apparent from these disturbing events is the need for better passenger protections to mitigate against profiling and the wrongful removal of a passenger from flights for innocuous behavior such as speaking a foreign language.

Proposals to implement any new technology must be carefully scrutinized to ensure that technologies that are touted as "objective" do not have the potential of discriminating against people of color, faith, gender identity, disability, or nationality.

It is not that the technology tools themselves are discriminatory—instead they reinforce human biases and perpetuate disparate treatment. TSA's request for technology vendors to develop solutions that accommodate the diversity of the traveling public travelers is a good first step but not enough. Plans to introduce facial recognition technology by TSA should require more regulatory oversight as such technology has been repeatedly proven to have higher error rates in identifying darker-skinned and female faces.¹¹ Such systems would exacerbate discrimination, encourage intrusive surveillance of marginalized groups, and cases of mistaken identity. It does not appear TSA is providing adequate consideration to the limitations of such technologies and the risk of bias they perpetuate for specific communities. The agency's plans to expand facial recognition technology under the TSA Biometrics Roadmap for Aviation Security and Passenger Experience to all passengers is yet another example of wasteful spending for technologies that are inaccurate and problematic for passengers.¹² As new technologies evolve the Government must do more to ensure harm is not further perpetuated on already historically-marginalized groups.

AMBIGUOUS DISCRETION STANDARDS CONTRIBUTING TO PROFILING

Even where technology says an individual is not a threat, overly-broad discretion is provided to TSOs to screen a traveler. Without a clear and articulable threshold standard required of other law enforcement agencies, travelers often feel profiled without any articulable basis for selection. When questioned, TSOs often claim that the routine selection of Sikhs a for further inspection is random, or plainly state that they are always required to screen headwear.

In my personal experience, due to the wide discretion granted to TSOs, minorities like me have to change our behavior to avoid being singled out any more than we usually would be. I have to engage in a pattern of behavior not expected of my other fellow travelers. Though I have TSA PreCheck®, I take many additional precautions such as wearing light and professional clothing to keep searches minimally invasive, triple checking all my pockets are emptied, ensuring that my bags are compliant with the latest TSA screening guidelines, and arriving at the airport well in advance of the average traveler—because "something" will usually require secondary screening. The less reasons I can provide for security to further delay me for additional screening, the better.

It does not matter how bad of a day I am having—at no point am I allowed to get upset or show my aggravation. I can't commiserate with others who fume and complain throughout the security line. I have to be calm and respectful and answer questions as succinctly and politely as possible oftentimes giving deference to TSOs who I know are acting outside the scope of TSA policy and my civil rights, for fear of creating a scene or worse. Speaking clearly and quietly has the least risk of getting additional screening. For all intents and purposes, I must behave like a second-class citizen or model minority—I am not sure which is worse. The sad reality is that anyone with brown skin or non-Judeo-Christian religious headwear is not going to get through security any quicker by protesting, nor do we have the time and energy to protest about the many injustices faced every time we travel. If anything, we have learned that complaining about the bias of a TSO is only likely to confirm further suspicion and scary stories of being taken to private back rooms for searches.

The Sikh community understands that most TSOs are just trying to do their job. But, wide discretion, inadequate training, and a lack of civil rights oversight will breed problems. When passengers like myself repeatedly experience suspect behavior by TSOs through random selection or additional screening because of clothing or something "other", it is clear that profiling is taking place. Anyone who reads

¹¹"AI Researchers Tell Amazon to Stop Selling 'Flawed' Facial Recognition to the Police" by *The Verge*, April 3, 2019 available at www.theverge.com/2019/4/3/18291995/amazon-facial-recognition-technology-rekognition-police-ai-researchers-ban-flawed. "Facial Recognition Is Accurate, If You're a White Guy." *The New York Times*, February 9, 2018 available at www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.

¹²"How the TSA's Facial Recognition Plan Will Go Far Beyond the Airport." American Civil Liberties Union, October 23, 2018 available at <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/how-tsas-facial-recognition-plan-will-go-far>.

media articles and publicly-available first-person accounts of additional screening will quickly identify a consistent pattern where people of color are routinely “randomly” selected for screening—to the point where it has become a joke.¹³

While traveling for work in 2018 out of DCA I was on the receiving end of this abuse of discretion, despite being a trusted traveler enrolled with TSA PreCheck® and being cleared in the corresponding PreCheck® line. I cleared the Walk-Through Metal Detector without alarm and was informed that I was chosen for random screening. I questioned how I was chosen after observing at least 20 passengers ahead of me not undergo additional screening. What resulted was a conversation with a TSA supervisor informing me that I would require additional screening solely as a result of my wearing a turban. That is unacceptable.

Profiling has repercussions beyond mere inconvenience or delay for travelers. It further perpetuates negative stereotypes and falsely validates the myth of racial and religious minority communities posing a threat to our country. TSOs witnessing minorities disproportionately receiving additional screening leads to the creation of implicit and explicit biases that influence their behavior and TSA policies which serve to justify scrutinizing specific kinds of travelers on racial or religious grounds.

According to TSA documents, there is a substantial focus on using techniques to specifically target Arabs, Muslims, and people of Middle Eastern or South Asian descent when it implemented the Screening Passengers by Observation Techniques.¹⁴ Training materials focused exclusively on examples of Arab or Muslim terrorists and perpetuated demeaning stereotypes about Muslims and women.¹⁵ From early 2008 to late 2009 TSOs routinely looked for Hispanic male travelers to see if they had proper visas and passport stamps. If not, those passengers would be subjected to bag searches, pat-downs, questioning, and referrals to immigration with bogus behaviors invented by screeners to obscure evidence of profiling and to meet alleged quotas.¹⁶ What is clear is that unfettered discretion in screening is being used as a pretext for harassing minorities and disfavored groups.

The implicit and explicit biases of TSOs coupled with a lack of appropriate oversight, high turnover, and inadequate training are all factors that increase the likelihood that a religious or racial minority will be disproportionately selected for additional screening by a TSO. Without explicit and implicit bias training, TSA will continue to erode public trust and harm the civil rights of many travelers. Despite TSA having policies in place to prevent profiling, these policies appear to be enforced only after a complaint has been filed by a traveler and only within the specific airport where the violation occurred.

Despite all the work that TSA has done to establish its Multicultural Division and community outreach, we are extremely disappointed to receive complaints in recent months of airports instituting “local rules” that require TSOs to frisk turbans without cause. We are hard-pressed to understand how a Federal agency governed by Federal law can implement “local” or regional rules, which inevitably lead to major inconsistencies in the application of Federal policies. We know that TSOs across the country are refusing travelers to self-administer a pat-down of their turban. To date, no TSA representatives have informed us of this potential policy change that affects religious headwear travelers nor has any information been published to advise the traveling public about this policy change. What the agency has done is fail to provide adequate guidance for when requests for self-pat-downs of religious headwear may or may not be granted, as our questions regarding that issue were met with the response that TSA could not disclose any information due to “National Security” concerns. It is the Government’s responsibility to provide clarity for all travelers when it comes to the criteria for safely moving through TSA checkpoints. When there is a lack of transparency and failure in communication between TSA and organizations like the Sikh Coalition—which has always sought to work with TSA in providing cultural competency and in deciphering what TSA policy means for Sikhs

¹³“Queer Eye’s Tan France Claims TSA Racially Profiled Him After He Was Stopped 3 Times in a Week” by *People*, December 13 2018, people.com/tv/queer-eyes-tan-france-slams-tsa-racial-profiling/.

¹⁴“TSA Screening Program Risks Racial Profiling amid Shaky Science” by *The Guardian*, February 8, 2017 available at www.theguardian.com/us-news/2017/feb/08/tsa-screening-racial-religious-profiling-aclu-study.

¹⁵“New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable—But Still It Continues” by the American Civil Liberties Union, February 8, 2017 available at www.aclu.org/blog/national-security/discriminatory-profiling/new-documents-show-tsa-program-blamed-profiling.

¹⁶“The Mexican Hunters’: Racial Profiling Team at Newark Airport Targeted Hispanic Passengers” by the *Daily Mail*, June 13 2011 available at www.dailymail.co.uk/news/article-2003174/The-Mexican-Hunters-Racial-profiling-team-Newark-Airport-targeted-Hispanic-passengers.html.

in America—it calls into question the agency’s commitment to ensuring the civil rights of all passengers are protected.

Often individuals do not want to report TSA misconduct due to factors of embarrassment, lack of awareness about one’s rights, hopelessness about change after 18 years of profiling, or lack of time and awareness on how to file a complaint. The Government Accountability Office’s “GAO” recent report on profiling infers most travelers don’t want to further engage with TSA or otherwise relive that traumatic experience. With the GAO’s recent report reviewing approximately 3,700 complaints, what is shocking is that half of the complaints were civil rights and civil liberties violations. It is not surprising that half of those complaints contained inaccessible passenger information or a lack of passenger response.

POLICY RECOMMENDATIONS

The consequences of profiling have far-reaching consequences beyond inconvenience and delays to specific groups of people. Whether implicit or explicit, biases have a detrimental impact on the freedom of movement for people and commerce. This is a damaging distraction from actual credible threats and creates distrust between vulnerable communities and the Federal Government.

When profiling is made permissible by inadequate and inconsistent policies and biased technologies, it amounts to not just delay, inconvenience, and shame for being separated from family, friends, and colleagues for travelers, but it further perpetuates negative stereotypes of entire communities. It is a pronouncement that minorities are outsiders and pose threats worthy of investigation. This also hits home the reality that actual credible threats to our Nation’s security are not TSA’s priority. Without adequate screening procedures and practices, we trivialize the Constitution’s promise of democracy and equality for all.

The thousands of civil-rights-related complaints TSA has received are the tip of the iceberg. Many travelers don’t know where to complain, or that they can complain, especially if TSOs were just following procedure and produces a bad outcome that is perceived as legitimate from technology that is biased. Some travelers have given up filing complaints when the same things happen again and again. What is clear is the need for improvements in TSA’s training, policies, procedures, and implementation of technology.

The Sikh Coalition offers the following recommendations in connection with the committee’s hearing:

- Require TSOs to adhere to consistent and transparent standards of discretionary criteria that reduce the likelihood of profiling. Criteria that requires a clear and articulable suspicion of an individual and imminent security threat permits TSOs to continue thwarting credible security threats and reduces the likelihood of discretionary abuse. Beyond establishing clear discretionary standards, TSA should also be required to log statistical data on secondary screening practices to eliminate inconsistencies, gauge the efficacy of secondary screenings, and identify disproportionate enforcement and TSO non-compliance.
- Any new technology or procedures must reduce the use of pat-downs and ensure travelers aren’t singled out based on their race, religion, or gender. Respectful engagement with religious headwear must be maintained at all times and the use of pat-downs should be an absolute last resort. Travelers with religious grooming requirements, including headwear, should be permitted the right to self-pat-down and avail themselves of readily available non-intrusive screening methods. TSOs should be provided clear guidance and training that travelers with religious headwear must be given the option to self-pat-down. Furthermore, TSA should issue clear guidance and training for all TSOs and staff that “local rules” do not apply to the agency and are not to be used as pretext to discriminate or profile passengers for additional screening.
- Screening policies of ETDs require transparent and standardized application that mitigates the false positive alert rate. When a traveler requires ETD screening, TSOs must be required to change gloves and swabs in the presence of the traveler to eliminate any uncertainty as to the TSO’s adherence to policy standards. Reducing the amount of false positives, otherwise known as nuisance alarms, helps ensure that TSA staff are able to allocate existing resources in a more efficient manner and leads to improved traveler satisfaction and throughput.
- TSA must implement consistent, mandatory anti-discrimination training programs for all TSA employees in promoting systemic, agency-wide change as opposed to its individual approach to training and disciplining TSOs when com-

plaints arise.¹⁷ Such training components must include in-person, interactive cultural competency awareness and periodic recertification on implicit and explicit bias. TSA needs to ensure that bias training is embedded within all courses taught to TSOs to reinforce the agency's commitment and dedication to ensuring the civil rights and liberties of the traveling public is fully respected.

- Congress must mandate regular and independent Civil Liberties Impact Assessments at all airports Nation-wide. Such programs should entail unannounced audits of all airports to document civil liberties compliance. Assessments should be based on reviews of TSO interactions via video footage, the use of undercover agents testing for civil rights violations, and reviewing passenger complaints to reveal the full extent to which TSA is respecting travelers' civil rights and liberties.
- Mandate that TSA implement random TSO screener audits ensuring officers are not engaged in racial profiling and that supervisors are instructed in detecting situations where unlawful profiling occurs. TSA should also adopt GAO's recommendation to monitor "behavior detection" activities for compliance with policies that prohibit unlawful profiling.
- Though AIT and other advanced screening technologies are routinely tested for accuracy in the screening of passenger characteristics, the testing mechanisms and monitoring of screening that occurs in practice must be improved to account for the large diversity of passengers. TSA must routinely develop best practices to reduce biased alarms, and train officers in the operation of these technologies and detection to avoid discriminatory practices with the goal of eliminating profiling.
- Incentivize airport security technology vendors to work collaboratively with community stakeholders in mitigating against profiling. Government contracts for any new technology acquisitions should take into account a vendor's commitment to alleviating bias by considering factors such as: (a) Whether the vendor conducts regular convenings with community stakeholders and profiling experts, (b) issues routine software improvements designed to improve device reliability, and (c) certifies anti-bias initiatives and publishes efficacy rates for variations in traits screened that may be a part of a protected identity (i.e. race, sex, gender identity, national origin, religion, and disability).
- Amend the Airline Passengers' Bill of Rights to establish clear guidelines limiting the ability of airlines to forcibly remove passengers solely based on generalized concerns of personal safety without any specific, objectively concerning information that is not rooted in personal bias. All airline crew must undergo training focusing on behavioral forces like implicit bias and stereotype threats. Barring exigent circumstances, when passengers report an issue, airline crew must be required to investigate the credibility of such concerns to reach an informed decision on the veracity of any threats. Airlines should be held liable for the wrongful removal of a passenger if the removed passenger is not determined to pose an imminent security threat by law enforcement.
- Re-introduce and pass the End Racial Profiling Act to comprehensively address the insidious practice of biased treatment by law enforcement, including TSA. Such legislation is critical to restoring the community's confidence in our Nation's law enforcement and ensuring that scarce security resources are focused on combating actual criminal and suspect behavior. This legislation should add safeguards against the harmful impacts of algorithmic bias against protected identity (i.e. race, sex, gender identity, National origin, religion and disability).
- TSA must publish clear, transparent, and easy-to-understand traveler guidance on its website to better inform the traveling public on what to expect at the security line, and ensure that TSOs adhere to its protocols. This guidance would help reduce traveler frustrations and negative stereotypes of those who are routinely subjected to additional unnecessary screening, and expedite screening procedures for all travelers.

CONCLUSION

Disparate treatment not only undermines cherished Constitutional rights, but also reinforces the perception among TSA and the flying public that members of minority racial and religious communities should be treated with suspicion and caution. This outcome is at direct odds with TSA's responsibility to ensure that its screening procedures and technologies are implemented in a fair and equitable manner. Biased technologies and unstructured discretion lead to longer lines, invasive

¹⁷ See Exhibit A.

and unnecessary pat-downs, traumatic stress and anxiety, missed flights, and unlawful discrimination against minority communities.

We must acknowledge that stereotypical beliefs about certain travelers due to the way they look or their religious articles of faith are not a reasonable basis to subject them to disparate screening. Religious head coverings do not pose any greater threat than other articles of clothing and should not automatically be subjected to additional screening. Similarly, stigmatic beliefs based on perceived ethnicity and nationality do not serve as a basis to subject individuals to disparate screening practices. Thus, we respectfully request that our policy recommendations be considered and implemented.

The Sikh Coalition is grateful for the opportunity to submit this testimony for the hearing record and looks forward to working with the esteemed committee here today along with partners in Government, private industry, civil society, and grassroots communities Nation-wide to foster dignified and respectful treatment of all travelers passing through TSA.

EXHIBIT A

June 12, 2018.

Satjeet Kaur,
Executive Director, The Sikh Collection, 50 Broad Street, Suite 504, New York, NY 10004.

DEAR SATJEET KAUR: Thank you for contacting the Transportation Security Administration (TSA) regarding your concerns about TSA security screening of Sikh travelers at our Nation's airports. We also appreciate your expressing your concerns about the April 2017 screening of Canadian Cabinet Minister Navdeep Bains. This letter serves as follow-up to our May 11, 2018, teleconference attended by members of the Sikh Coalition and my staff.

TSA must ensure that all persons and their accessible property passing through the security checkpoint undergo screening to protect against the introduction of weapons, explosives, and incendiary devices into the sterile area of an airport and on-board an aircraft. To do this work, TSA is committed to treating members of the traveling public in a fair and lawful manner. As we have discussed, travelers may undergo additional screening of their clothing, hair, and/or headwear; however, in performing our screening activities, TSA neither uses nor condones unlawful profiling. Pursuant to TSA's Civil Rights Policy, Transportation Security Officers are prohibited from basing screening decisions on a traveler's protected status. All screening decisions are based on the interests of aviation security.

We regularly engage and conduct outreach with the Sikh American community, through organizations such as Sikh American Legal Defense and Education Fund (SALDEF), United Sikhs, and the Sikh Coalition. Within the past year, TSA has participated in more than 20 SALDEF "Know Your Rights" forums around the country to engage with the Sikh community.

With job aids and other training, we have in the past and continue today to update our front-line workforce regularly on appropriate religious/cultural knowledge and etiquette for engaging with the millions of passengers served by TSA, including the Sikh community. We also developed a *Know Before You Go* publication, which provides useful information for Sikh travelers and is enclosed with this letter.

We look forward to ongoing engagement with Harsimran Kaur, and we have added Sim J. Singh and Julian Darwall to our list of contacts for The Sikh Coalition.

We hope this information is helpful and we appreciate that you took the time to contact TSA. We strongly believe that our work together will continue to provide an improved traveler experience at TSA's security checkpoints.

Sincerely yours,

CHRISTINE GRIGGS,
Acting Assistant Administrator.

Enclosure: Know Before You Go—Sikh Travelers

TRANSPORTATION SECURITY ADMINISTRATION

Multicultural Branch, Office of Civil Rights & Liberties, Ombudsman, and Traveler Engagement

KNOW BEFORE YOU GO

FOR SIKH TRAVELERS

The Transportation Security Administration is committed to ensuring access and serving all persons with dignity and respect.

If you are enrolled in a trusted traveler program (TSA PreCheck, Global Entry, NEXUS, SENTRI), enter your known traveler number or PASS ID when making airline reservations. When you check in for a flight, look for the TSA PreCheck boarding pass indicator.

We are aware and respect that Sikh travelers may wear traditional clothing and/or carry religious items. Observant travelers may be wearing a Dastaar (religious head covering/turban), Kara (metal bracelet), and a Kangha (wooden comb). The Kirpan is considered sharp object and must be in checked baggage, and cannot be worn or carried through the checkpoint. Please view TSA.gov for the list of prohibited items.

WHAT TO KNOW

Signing-Up for TSA PreCheck®

- Apply on-line at TSA.gov.
- You will go through a background check where your identification and citizenship will be verified, among other things. Make sure all of the information on your identification is exactly the same. Inconsistent information can delay the process.
- Then you'll get a Known Traveler Number (KTN). You have to enter in your KTN every single time you make a reservation, otherwise you will not get the benefit of TSA PreCheck®.
- As one of many layers of TSA security, you may, on occasion, be randomly selected to receive additional screening.

Making Reservations:

- TSA requires airlines to collect a traveler's full name, date of birth, gender, and redress number (if applicable) to significantly decrease the likelihood of watch-list misidentification. TSA verifies a traveler's identification through Secure Flight.
- You are encouraged to book your reservation such that the reservation information matches the full name, date of birth, and gender on the Government-issued identification (ID) that you will use for travel, as well as your Known Traveler Number (KTN) if you have signed-up for TSA PreCheck®. For additional information about identification documents, visit the Identification page on TSA.gov here.
- On arrival to the security checkpoint, you must present your Government-issued ID that has the same name as the one on your boarding pass to the TSA Officer who will verify that the names on the ID and boarding pass match, and that the photo on the ID matches you.

TSA Cares:

- TSA Cares is a toll-free helpline, 1-855-787-2227 or Federal Relay #711, available for travelers to ask questions about screening or to request help at the checkpoint. You may call from 8 a.m. to 11 p.m. ET Monday through Friday, and 9 a.m. to 8 p.m. weekends and holidays.
- If you would like to arrange assistance at the checkpoint, TSA recommends that you call at least 72 hours ahead of travel so that TSA Cares has the opportunity to coordinate checkpoint support. Checkpoint support may include coordination with a Passenger Support Specialist (PSS). Each airport has different resources; therefore, the level of assistance you receive at the checkpoint will vary. Some airports have an individual who will call you to gather additional information and arrange a meeting time and place. Other locations notify the checkpoint manager of your itinerary, but no pre-contact is made.
- If you arrive at the checkpoint and have any concerns before, during, or after the screening process, you should immediately request to speak with a Supervisory Transportation Security Officer (STSO) or a PSS for assistance.

Planning Your Trip:

- Arrive early to allow time for security screening.
- Communicate your specific needs (e.g., turban, accommodations, delicate/fragile items, sensitive items or body areas) to the TSA Officer before screening begins to have a smooth airport screening experience.
- The 3-1-1 liquids rule for carry-ons allows each traveler to have liquids, gels, aerosols, creams and pastes in quantities of 3.4 ounces (100 ml) or less per container; in 1 quart-sized, clear, plastic, zip-top bag; and in one bag.
- This rule does not apply to medically-necessary liquids for travelers with disabilities and medical conditions. However, you will need to declare medically-necessary liquids for inspection at the checkpoint, and officers may need to conduct additional screening of these items.

Walk-Through Metal Detectors (WTMD):

- You may be chosen to be screened by a Walk Through Metal Detector (WTMD), most commonly in the TSA PreCheck® lane.
- You cannot request WTMD screening instead of receiving screening via the Advanced Imaging Technology (AIT) or a pat-down.
- Learn more about Walk Through Metal Detectors at [TSA.gov](https://www.tsa.gov).

Advanced Imaging Technology (AIT):

- You are eligible to be screened via Advanced Imaging Technology (AIT) if you are able to stand, walk through the machine, and stand holding your hands above your head for 5 to 7 seconds without support. If there is an alarm, you may need to stand for additional time to resolve the alarm.
- If you do not want to be screened by AIT, or are ineligible, you may request a pat-down. A reminder—you may not request screening using the Walk Through Metal Detector.
- The AIT has software that protects individual privacy, eliminating traveler-specific images by auto-detecting potential threats, which are shown on a generic outline of a person on a screen located after you exit the machine. You can see this as well. The generic outline is identical for all travelers. If there is an alarm indicated on the generic outline, TSA Officers are trained to clear the alarm, not the individual. Additional screening is conducted to determine whether a prohibited item is present.
- You may always request a private screening at any time if a pat-down is needed to resolve an alarm.
- TSA is committed to ensuring effective and efficient security screening, while treating all travelers with dignity and respect.
- Learn more about Advanced Imaging Technology at [TSA.gov](https://www.tsa.gov).

Pat-Downs:

- You may opt-out of the screening technology and receive a pat-down.
- You will undergo a pat-down if any screening technology alarms, or if you are randomly chosen for pat-down screening.
- When conducted, the pat-down will be performed by a TSA Officer of the same gender as you present.
- You can request a private screening at any time and may be accompanied by a companion of your choosing.
- You can request a chair if you need to sit down.
- You may request that the TSA Officer change his or her gloves, prior to conducting the pat-down.
- A pat-down may include inspection of the head, neck, arms, torso, legs, and feet. This includes head coverings such as your turban, hair, and sensitive body areas such as breasts, groin, and the buttocks. You may be required to adjust clothing during the pat-down.
 - The TSA Officer will advise you of the procedure to help you anticipate any actions before you feel them.
- Pat-downs require sufficient pressure to ensure detection.
 - Travelers wearing turbans may be subject to additional security screening, which may include a traveler self-conducted pat-down or officer-conducted pat-down. A swab test for traces of explosives may also take place. Any alarm will require additional screening by a TSA Officer.
 - You may request: Private screening; and that the TSA Officer change gloves prior to conducting the pat-down, and/or change ETD swabs prior to testing.
- The private screening area should have a mirror available, if it is necessary that your turban be removed.

- TSA Officers use the back of the hands for pat-downs over sensitive areas of the body. In limited cases, additional screening involving a sensitive area pat-down with the front of the hand may be needed to determine that a threat does not exist.
- Learn more about pat-downs at [TSA.gov](https://www.tsa.gov).

Explosive Trace Detection (ETD) Screening:

- TSA Officers may swab your personal property or hands, and then use ETD technology to test for explosive particles. This is not a drug test.
- Travelers may request a new swab prior to their hands being sampled.

WHAT TO REMEMBER:

- *Packing.*—Separate medically necessary liquids and equipment from other belongings so they can be quickly identified and accessed for screening.
- *Known Traveler Number (KTN).*—Enter your known traveler number when you book your flight to get TSA PreCheck® (PreCheck) benefits.
- *Companion.*—You can be accompanied by a companion of your choosing to provide assistance during the screening process. However, the companion must be re-screened after providing assistance that involves physical contact.
- *Body Piercing.*—Certain metal body piercings may cause the machines to alarm, which will result in additional screening. If additional screening is required, passengers may be asked to remove their body piercing.
- *Gift Wrapping.*—You should refrain from wrapping gifts until arriving at your final destination. If a TSA Officer needs to inspect a wrapped gift, it may have to be unwrapped.

TSA PreCheck® (PreCheck)	Standard Screening
<p>If you have TSA PreCheck® (PreCheck) on your boarding pass:</p> <ul style="list-style-type: none"> -Proceed to the TSA PreCheck® (PreCheck) line; -Present your boarding pass and Government-issued ID to the TSA travel document checker; -The TSA travel document checker will verify your identification and scan your boarding pass barcode and confirm that you are eligible for this lane. <p>During the screening process:</p> <ul style="list-style-type: none"> -Generally, TSA PreCheck® lines are shorter and have shorter wait times. Find out when TSA PreCheck® lanes are available at your airport at TSA PreCheck® Checkpoint Schedule. -If eligible, you may be screened using Advanced Imaging Technology or Walk Through Metal Detector. If not, you may be screened using a pat-down. <p>You are required to remove:</p> <ul style="list-style-type: none"> -Medically-necessary LGA over 3.4 ounces (from accessible property). <p>You are not required to remove:</p> <ul style="list-style-type: none"> -Shoes -Jackets -3-1-1-compliant bag -Electronics the size of a cell phone and larger; -CPAP/BPAP. <p>It is recommended that you remove items from your pockets to expedite the screening process and minimize the need for additional screening.</p>	<p>If you do not have TSA PreCheck® (PreCheck) on your boarding pass:</p> <ul style="list-style-type: none"> -Proceed to the standard screening line; -Present your boarding pass and Government-issued ID to the TSA travel document checker; -The TSA travel document checker will verify your identity and scan your boarding pass barcode. <p>During the screening process:</p> <ul style="list-style-type: none"> -Generally, travelers experience longer lines depending on the day, date, and time of travel. -If eligible, you may be screened using Advanced Imaging Technology or Walk Through Metal Detector. If not, you may be screened using a pat-down. <p>You are required to remove:</p> <ul style="list-style-type: none"> -Shoes; -Jackets/Coats; and -3-1-1-compliant bag of liquids, gels, and aerosols. <p>You are required to separate:</p> <ul style="list-style-type: none"> -Medically-necessary liquids; -Electronics the size of a cell phone and larger; -CPAP/BPAP. <p>It is recommended that you remove items from your pockets to expedite the screening process and minimize the need for additional screening.</p>

EXHIBIT C.—KNOW YOUR RIGHTS AT THE AIRPORT

If you believe your civil rights have been violated, we encourage you to report TSA screening discrimination directly to the TSA and the Sikh Coalition via our mobile app, FlyRights. Download the app at: <http://flyrights.org/>.

You can also file complaints with the TSA on-line at: <https://www.tsa.gov/contact-center/form/complaints>.

BEFORE TRAVELING

- You may sign up for TSA PreCheck at TSA.gov to expedite the security checkpoint process. A background check will be performed, asking you questions about citizenship, and requesting additional information. If successful, you will be provided with a Known Traveler Number (KTN) for use every time you make a reservation.
- Make sure the details on the airline reservation match the information on your traveler's identification (ID) that will be used during travel.
- The TSA is aware that Sikh travelers may wear traditional clothing and/or carry religious items, such as a dastar, kara, and kangha.
- The kirpan must be checked into baggage and cannot be worn or carried through checkpoints.
- Remember to place salais, dastar pins, or other grooming tools in your carry on or checked luggage as they may set off metal detectors or other screening technology.

AT THE AIRPORT

- Arrive 2 hours early for domestic flights & 3 hours early for international flights for security screening and communicate any specific needs to the TSA Officer prior to screening to ensure a smooth screening experience, including your turban, accommodations, delicate/fragile items, sensitive items, or body areas.
- You have a right to be accompanied by a travel companion of your choice during the screening process. The companion must be rescreened after providing assistance involving physical contact.
- The 3-1-1 liquids rule for carry-ons allows each traveler to have liquids, gels, aerosols, creams, and pastes in quantities of 3.4 ounces (100ml) or less per container; in 1 quart-sized, clear, plastic, zip-top bag; and in one bag. (This rule does not apply to medically-necessary liquids for travelers with disabilities and medical conditions. However, you will need to declare medically-necessary liquids for inspection at the checkpoint, and officers may need to conduct additional screening of these items.)

SCREENING

KNOW YOUR RIGHTS AT THE AIRPORT

1. It is best to thoroughly wash your hands with soap prior to entering TSA checkpoints to avoid any oils or contaminants on your hands. (Please note some soaps may cause false positives due to oils or scents.)

2. You may be chosen for screening through either a Walk-Through Metal Detector (WTMD) or an Advanced Imaging Technology (AIT) machine. Advanced Imaging Technology, a full-body scanner, screens passengers for metallic and/or non-metallic threats, such as guns or explosives, that may be concealed under a person's clothing. Any threats the technology scans will appear on a generic outline of a person on a screen, which is intended to preserve privacy.

3. You have a right to refuse the AIT machine and request a pat-down. You may not request screening through WTMD instead of AIT.

4. You may be required to adjust your clothing during the pat-down. The officer will advise you of procedures to help you anticipate actions that will be taken.

5. Travelers wearing turbans may be subject to additional security screening, including traveler self-conducted pat-downs or officer-conducted pat-downs, and swab tests for traces of explosives. You may request that the officer change their gloves and swabs prior to testing.

6. If either of the screening technologies alarms during the process, you will undergo a pat-down, which will be conducted by an officer of the same gender, as that which you present or declare. Pursuant to TSA's eligibility criteria, you may request a self-pat-down of your turban, and the officer will do a swab test for traces of explosives on your hands, once the self-pat-down is completed. You may also be chosen for a pat-down randomly. Should you decide that a TSA officer conduct the pat-down, you may request that they change gloves and swabs prior to doing so.

7. If you undergo a pat-down, you have a right to a private screening with a companion of your choice. Private screening areas must have a mirror available if removing your turban is necessary. You may request a chair if you need to sit.

8. If TSA requests that your turban be removed for an additional screening, it should only occur after all other screenings have been completed and resulted in positive indications. If you are asked to remove your turban, you have a right to a private screening with a companion of your choice. Private screening areas must have a mirror available if removing your turban is necessary. You may request a chair if you need to sit.

9. Sensitive areas such as breasts, groin, and buttocks are included in the pat-downs and pat-downs require sufficient pressure to ensure detection. TSA Officers use the back of their hands for pat-downs over sensitive areas of the body. In limited cases, additional screening involving a sensitive area pat-down with the front of the hand may be needed to determine that a threat does not exist.

10. If you arrive at a checkpoint & have any concerns before, during, or after the screening process, immediately ask to speak with a Supervisory Transportation Security Officer (STSO) or a Passenger Support Specialist (PSS).

REQUEST DIRECT ASSISTANCE FROM TSA CARES.—Toll-free helpline: 1-855-787-2227, available for all questions about screening or help at checkpoints, from 8 a.m. to 11 p.m. ET., Monday through Friday, & 9 a.m. to 8 p.m. on weekends & holidays. If you would like to arrange assistance at checkpoints, TSA recommends calling at least 72 hours ahead of travel so TSA has the opportunity to coordinate support.

The Sikh Coalition does not endorse these TSA policies, and this document should not be construed as legal advice. It is merely providing information to Sikh travelers on TSA policies during the screening process.

Chairman THOMPSON. Thank you for your testimony.

I now recognize Ms. Nelson to summarize her statement for 5 minutes.

STATEMENT OF JANAI S. NELSON, ASSOCIATE DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Ms. NELSON. Thank you. Good morning, Chairman Thompson, Ranking Member Rogers, and Members of the committee. My name is Janai Nelson. I am the associate director-counsel of the NAACP Legal Defense and Educational Fund. Thank you for the opportunity to testify this morning.

LDF is the Nation's oldest civil and human rights law organization. LDF was founded in 1940 by Thurgood Marshall, and in the 80 years since its inception it has used legal advocacy strategies to promote the full, equal, and active citizenship of Black Americans. That includes litigating the seminal case of *Brown v. Board of Education* and *Newman v. Piggie Park Enterprises*, which is important for our purposes here today because it upheld Title II of the Civil Rights Act of 1964's prohibition on racial discrimination in public accommodations.

For as long as we have been in this country, Black people have faced discrimination that impedes our mobility in public spaces and discrimination in various spheres because of our hair. Indeed, the civil rights movement that ended legal apartheid in the United States was anchored in acts of resistance related to transportation, including the bravery of women like Rosa Parks and children like Claudette Colvin.

The Civil Rights Act of 1964 was built on the foundation that Congress can take action to prohibit racial discrimination that impedes travel and thereby impedes interstate commerce.

Black women's hair has also never ceased to be policed, from forcible head coverings in the Antebellum South to the present-day

denial of employment and other rights based on our hair texture and treatment.

In light of this history, we at LDF are deeply troubled that TSA's full-body scanners disproportionately single out Black women for additional and burdensome security procedures, including invasive and humiliating hair pat-downs. This systematic infringement on the mobility of Black women by a Government agency must be corrected, and we are heartened that this committee is taking up the charge.

Roughly 8 percent of the U.S. adult population of flyers is Black, 17 percent is Latinx, and 6 percent is Asian. However, reports suggest that countless Black travelers have experienced heightened suspicion and profiling as a result of TSA technology that singles out Black people in airports, particularly Black women, simply because the technology is unable to distinguish contraband from natural Black hair.

The false positives produced by TSA's full-body scanners exemplify the impact of purportedly race-neutral technology that nonetheless perpetuates racial profiling. Whether they are high-profile celebrities, business travelers, or general commuters, for Black women TSA scanners are one more assault in a constant barrage of risk assessments to which they are subjected on a daily basis and which reflect deep-rooted biases and historical associations between race and dangerousness.

Moreover, racial discrimination is a proven threat to our National security, yet TSA has not justified that its highly-criticized practice of violative hair pat-downs improves security. To the contrary, security experts have called into question whether these additional screenings are an effective use of TSA personnel's time and resources.

Most disturbing perhaps is that top TSA officials do not seem to recognize that a system that disproportionately singles out Black women is discriminatory. We know that technology is susceptible to biases of the humans who create it. This means that technology that uses White phenotype as a default can easily produce biased outcomes against people of color.

This issue is not new. Not only did this committee hold a hearing on these issues a little over a year ago, TSA has been aware of discriminatory and biased security practices for years. In 2015, it entered a settlement agreement over the very issue of racially profiling Black hair.

To be very clear, we recognize and respect TSA's important security functions at our Nation's airports. However, I want to stress that we can maintain security in our Nation's airports while maintaining the human dignity of our Nation's travelers, we can pursue new technology and not compromise civil and human rights. In fact, these goals cannot only co-exist, by law, they must.

In closing, we acknowledge TSA's important charge to ensure safe travel while meeting its obligation to treat all passengers with dignity. We also appreciate the attention this committee has paid to this important issue and thank you for your consideration and for the opportunity to testify today.

[The prepared statement of Ms. Nelson follows:]

PREPARED STATEMENT OF JANAI S. NELSON

JUNE 4, 2019

I. INTRODUCTION

Good Morning Chairman Thompson, Ranking Member Rogers, and Members of the committee. My name is Janai Nelson and I am the associate director-counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Thank you for the opportunity to testify this morning.

LDF is the Nation's oldest civil and human rights law organization. LDF was founded in 1940 by Thurgood Marshall, who later became the first Black U.S. Supreme Court Justice. Since its inception, LDF has used litigation, legislative, public education, and other advocacy strategies to promote full, equal, and active citizenship for Black Americans. This work has included litigating seminal cases such as *Brown v. Board of Education* and *Newman v. Piggie Park Enterprises*, which upheld Title II of the Civil Rights Act of 1964 and its prohibition on racial discrimination in public accommodations. LDF has also been on the front lines of opposing racial profiling, whether practiced by law enforcement agencies, department stores, airlines, or taxicab drivers. LDF has also challenged policies that have a discriminatory impact on Black people because of specific characteristics, including hair type. We have vigorously opposed hair policies that serve as pretexts or justifications for racial discrimination in schools and in the workplace.¹ In just the past 2 years alone, we challenged a hair policy in a Boston-area charter school that denied Mya and Deanna Cook the right to wear braid extensions at their school, we obtained public records concerning an incident in which Andrew Johnson, a Black high school student in New Jersey, was forced to cut his hair in order to compete in a high school wrestling match,² and we filed an administrative complaint with the Florida Department of Education on behalf of a 6-year-old boy, Clinton Stanley Jr., who was denied entry on his first day of school because he wore his hair in locs that extended past his ears.³ LDF has also been involved in lawsuits combatting hair discrimination in the workplace, including *EEOC v. Catastrophe Management Solutions*, in which LDF petitioned the Supreme Court of the United States to review the case of Chastity Jones, a Black woman whose job offer was rescinded solely because she wore her hair in locs.⁴

We appreciate the opportunity to testify this morning on the important topic of Transportation Security Administration (“TSA”) policies that profile, single out, and disproportionately burden people of color, as well as persons with disabilities, transgender persons, persons of various religions, and particularly Black women. Black people have historically been discriminated against in ways that impede their mobility in public spaces and discriminated against in various spheres because of their hair. In light of the long and on-going history of discrimination rooted in Black hair and continuing barriers to Black mobility, we are deeply troubled that the full-body scanners that TSA employs at airports disproportionately single out Black women for additional and burdensome security procedures, including invasive pat-downs, because of their hair.⁵ LDF's work has long recognized that full citizenship for Black Americans requires the elimination of discrimination in public spaces—schools, transportation, public accommodations—and the transformation of these spaces to protect the dignity of communities of color and their unfettered mobility. As LDF is a National organization, litigating and advocating in States and cities across the country, being able to navigate the Nation's airports without unjustified

¹ See, e.g., Brief of NAACP Legal Def. & Educ. Fund, Inc. et al., as Amici Curiae, *EEOC v. Catastrophe Management Solutions*, 2016 WL 7173828 (11th Cir. Dec. 2, 2016).

² See Press Release, LDF Makes Public Records Request in Response to Hair Discrimination Case Involving Buena Regional High School Wrestler (Jan. 7, 2019), <https://www.naacpldf.org/press-release/ldf-makes-public-records-request-response-hair-discrimination-case-involving-buena-regional-high-school-wrestler/>; Press Release, LDF Sends Letters Over Concerns with Discriminatory Hair Policies Stemming from Incident Involving New Jersey High School Wrestler (Feb. 12, 2019), <https://www.naacpldf.org/press-release/ldf-sends-letters-concerns-discriminatory-hair-policies-stemming-incident-involving-new-jersey-high-school-wrestler/>.

³ Letter to Adam Miller from Angel S. Harris, et al., re: Clinton Stanley Jr. Complaint (Nov. 29, 2018), <https://www.naacpldf.org/wp-content/uploads/11.29.2018-Stanley-Complaint-002.pdf>.

⁴ <https://www.naacpldf.org/files/about-us/CMS%20-%20Cert%20Petition%20FINAL.PDF>.

⁵ See Brenda Medina, *TSA Agents Say They're Not Discriminating Against Black Women, but Their Body Scanners Might Be*, ProPublica (Apr. 17, 2019), <https://www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be>.

burdens is also a matter of personal concern for our racially and ethnically diverse staff.

TSA interacts with millions of people of color each year as they navigate air travel in the United States.⁶ An April 2016 report prepared by Ipsos Public Affairs on the “Status of Air Travel in the USA” indicates that 45 percent of the U.S. adult population traveled by air in 2015. Of those adult flyers, in 2015, 8 percent were Black or African American, 17 percent were Latinx and 6 percent were Asian.⁷ As countless Black people have experienced, the already-heightened suspicion and profiling of Black people by security personnel in this country is compounded by TSA technology that singles out Black people in airports, particularly Black women, for invasive and humiliating searches simply because the technology is unable to distinguish contraband from natural Black hair. What we are seeing is part of an ongoing trend at the intersection of race and technology, and the pattern is becoming depressingly familiar. TSA’s full-body scanners are another new, purportedly race-neutral risk-assessment technology that does not ostensibly classify, discriminate, or use any discretion on the front end—yet, on the back end, it perpetuates racial profiling and Black people are disproportionately harmed. And, in the case of TSA hair pat-downs that result from the false positives produced by TSA scanners, it is Black women, Black trans women, Black women with disabilities, Black Muslim women, and those at the intersection of these and other identities who are disproportionately burdened. The burdens these women bear are too often disregarded as a cost of public safety and denied remedy.

We recognize and respect that the TSA performs important security functions at our Nation’s airports. However, I want to stress in my testimony today that we can maintain security in our Nation’s airports while maintaining human dignity. We can pursue new technology while not compromising civil and human rights. We can be safe in employing best practices for security procedures while also being sound in ensuring that the policies and practices we uphold do not discriminate. In fact, these goals cannot only coexist, by law, they must. Racial discrimination is a threat to our National security and it violates our constitution and civil rights laws. The recently-released ProPublica report, as well as multiple anecdotal news accounts, are evidence that TSA practices needlessly burden specific groups of people, namely Black women, whether they are high-profile celebrities, business travelers, or general commuters. This systematic infringement on the mobility of Black people by a Government agency must be corrected and we are heartened that this committee is taking up the charge.

To be a Black person participating in public life too often means being subjected to a constant barrage of “risk assessments,” whether formal or informal, conscious or beneath the surface. And the results of these assessments inevitably reflect this country’s deeply rooted biases and racism and the automatic associations made between race and dangerousness. As studies have demonstrated, when people see a Black man and a white man of the same size, they perceive the Black man to be both larger and more threatening.⁸ People likewise perceive Black children to be older, less innocent, and a greater threat than their white counterparts.⁹ A criminal justice system premised on treating Black people as higher-risk and more in need of social control has resulted in Black people being 2.5 times more likely to be arrested than white people, and in almost half of all Black men having been arrested at least once by the age of 23.¹⁰ And while Black people comprise only 12.7 percent of the general population, they make up over 41 percent of the Federal and State prison population in the United States. The legacy of using law enforcement and State security apparatuses as tools for racially discriminatory control and subordination continues, including in the implementation of purportedly neutral- and objective-sounding programs as risk assessment tools that incorporate racial biases, including algorithms used to determine pre-trial detention,¹¹ facial recognition security devices, and, indeed, airport full-body scanners.

Of course, the instances of racial bias that Black people endure on a daily basis are not relegated to official State action. Indeed, not a week goes by without a new viral video depicting Black people unable to engage in public life without harass-

⁶ <http://airlines.org/wp-content/uploads/2016/04/2016Survey.pdf>.

⁷ <http://airlines.org/wp-content/uploads/2016/04/2016Survey.pdf>.

⁸ <https://www.apa.org/pubs/journals/releases/psp-psi0000092.pdf>.

⁹ See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 540 (2014).

¹⁰ ANGELA J. DAVIS (ED.), *POLICING THE BLACK MAN XV* (2017).

¹¹ See, e.g., Eric Westervelt, *California’s Bail Overhaul May Do More Harm Than Good, Reformers Say*, NPR (Oct. 2, 2018), <https://www.npr.org/2018/10/02/651959950/californias-bail-overhaul-may-do-more-harm-than-good-reformers-say>.

ment. People have called the police on Black people shopping for prom clothes¹² and office supplies.¹³ Just last week a white person drew a pistol and threatened a black couple who were seeking to have a picnic at a campground.¹⁴ A black guest at a hotel in Portland was presumed to be a trespasser and asked to leave the premises. Hotel staff then called 9–1–1 when he made a phone call in a hotel lobby.¹⁵ Black students have been suspected of and interrogated for trespassing simply for walking around, eating lunch, and taking a nap on their college campus.¹⁶ And, the list goes on and on. These “living while Black” indignities range from humiliating to life-threatening. They transform what should be routine, quotidian acts into fraught and potentially dangerous encounters.

Similarly, discriminatory security procedures in airports create a jarring contradiction, juxtaposing the freedom associated with travel and movement with invasive practices that primarily target historically marginalized groups. For most of this Nation’s history, Black people could not travel between the States freely and without encountering State-sanctioned discrimination. Indeed, the Civil Rights Act of 1964 is built on the foundation that Congress can take action to prohibit the kind of discrimination that would impede Black people from traveling throughout the country and engaging in interstate commerce.¹⁷

People who have been subjected to aggressive and humiliating searches and hair pat-downs by TSA may think twice before traveling by plane unless absolutely necessary. When they were flying out of Los Angeles airport in 2017, Reba Perry-Ufele and her 12-year-old daughter, Egypt, both African American,¹⁸ were pulled aside by Transportation Security Officers (TSOs) after going through the scanning machine. Ms. Perry-Ufele was told that TSA personnel would need to conduct a search of her braids. Ms. Perry-Ufele said she did not consent to the search, but was told by TSA agents that it was mandatory “protocol”. During the search, according to Ms. Perry-Ufele, the agents “literally ripped my braids apart until they were a mess and I had to take them out when I got home.” “I was so embarrassed,” she added, “because not only did she humiliate me but she did it in front of the other people.”¹⁹ Ms. Perry-Ufele’s experience is similar to that of many people who the TSA full-body scanners falsely identified as having an object hidden in their hair.

On 3 of Jazzmen Knoderer’s first 4 air travel experiences, she was pulled aside for full-body and hair pat-downs.²⁰ On at least one of these occasions, Ms. Knoderer had not even gone through a scanner or metal detector before a TSA officer pulled her aside and searched her. Ms. Knoderer aptly noted, “It doesn’t feel random when it happens three times in a row. It doesn’t feel random when you see that all the people around you, who don’t look like you, aren’t asked to step aside . . . I don’t want to change the way my hair grows out of my head.”

As we now know from reporting from Pro Publica and multiple first-hand accounts, experiences like Ms. Perry-Ufele’s and Ms. Knoderer’s are not uncommon. That is why LDF has requested records relating to TSA’s policies and practices regarding full-body scanners and hair pat-downs; to TSA’s August 2018 request for proposals to enhance security, including by “address[ing] capability gaps in civil rights compliance”;²¹ to data and policies regarding “false positives” produced by

¹² <https://money.cnn.com/2018/05/08/news/companies/nordstrom-rack-shoplifting/index.html>.

¹³ <https://www.cnn.com/videos/us/2018/08/14/north-carolina-mom-accused-of-trying-to-shoplift-vpx.hln>.

¹⁴ Kelly Taylor Hayes, *White campground worker fired after pulling gun on black visitors in Mississippi*, Fox 5 DC (May 29, 2019), <http://www.fox5dc.com/news/white-campground-worker-fired-after-pulling-gun-on-black-visitors-in-mississippi>.

¹⁵ Keith Allen, *Hotel employees who asked black guest to leave fired*, CNN (Dec. 29, 2018), <https://www.cnn.com/2018/12/28/us/portland-hotel-police-black-guest-trnd/index.html>.

¹⁶ Holly Yan, *Yale student accused of ‘napping while Black’ wants fellow student disciplined*, CNN (May 14, 2018), <https://www.cnn.com/2018/05/14/us/yale-black-grad-student-interview/index.html>; Katie Mettler, *A Black college student went looking for free food. He ended up pinned down by campus officers*, Wash. Post. (Apr. 14, 2019), https://www.washingtonpost.com/education/2019/04/14/video-shows-black-columbia-student-pinned-by-campus-police-after-failing-show-his-id/?utm_term=.6807cb9b6af3; Nicole Chavez, *Smith College student who was racially profiled while eating says the incident left her so shaken she can’t sleep*, CNN (Aug. 3, 2018), <https://www.cnn.com/2018/08/03/us/smith-college-student-police-trnd/index.html>.

¹⁷ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

¹⁸ See Tatiana Walk-Morris, *Why is the TSA Still Searching Black Women?*, Cosmopolitan (Apr. 24, 2018), <https://www.cosmopolitan.com/lifestyle/a18666534/tsa-black-women-hair-searches/>.

¹⁹ *Id.*

²⁰ Medina, *supra* note 5.

²¹ See Transportation Security Administration, *ITF Innovative Demonstrations for Enterprise Advancement (IDEA) 2018 BAA*, Solicitation Number 70T04018K9NSTD105, <https://www.fbo.gov/index.php?s=opportunity&mode=form&tab=core&id=c64a62edf70b0cbd9297e8aac7->

full-body scanners resulting in hair pat-downs; and to the number of illegal and/or unauthorized objects TSA has recovered as a result of hair pat-downs.

Air travel is also a particular burden for people who wear religious head coverings, particularly Muslims. As one Muslim woman, Nyfees Syed, told the *New York Times*, “I have to go [to the airport] an extra hour before, because it’s not random checking [by TSA]”—and, the majority of the time, she is pulled aside by TSA officers for secondary screenings and for examiners to grip and feel her head through her hijab.²² Airport security can also be extraordinarily difficult and dangerous for transgender passengers, an issue that is only starting to be addressed.²³ In sum, TSA’s policies and practices, specifically the use of scanners, continue a history of discrimination by disproportionately identifying Black women, as well as certain other marginalized groups, as suspicious, subjecting them to demeaning searches and pat-downs, and interfering with their right to travel freely.

There is a long legacy of policing, regulating, and judging natural Black hair in this country. This legacy includes forcing Black women to cover their hair in the antebellum South²⁴ and, in more recent times, the legal approval of hair discrimination, particularly with respect to Black women. In a 1981 case stemming from an airline’s policy, for example, a Federal court in New York upheld the right of employers to categorically prohibit employees from wearing “braided hairstyles,” a policy that disproportionately affected Black, female employees.²⁵ Only recently have we as a society—if not as a legal system—begun to understand and address the interplay between racism and misogyny, and how hair discrimination is a particular point of intersection between these two oppressive forces.

In and out of the workplace, Black people in the United States face barriers or judgments when they display their natural hair. Locs in particular have long been the target of deep-seated negative stereotypes about Black people and their hair—mainly, that Black hair is dirty, unprofessional, or unkempt. In fact, the term “dreadlocks” originated from slave traders who described Africans’ hair that had naturally formed into locs as “dreadful.”²⁶ For Black women in particular, these stereotypes often compel them to undertake costly, time-consuming, and harsh measures to straighten their hair to conform to the predominant white culture and standards of professionalism and beauty. The pressure to take such measures in order to be treated equally in the workplace is deeply lamentable, and it is a pressure exacerbated by TSA’s practices and policies. Dorian Wanzer, for example, a Black woman whose job requires frequent travel and has testified/reported that “almost every time she steps out of an airport body scanner,” she is pulled aside so TSA officers can conduct a hair pat-down.²⁷ This consistent treatment has prompted Ms. Wanzer to query, “When you find yourself in that kind of situation, it makes you wonder, is this for security, or am I being profiled for my race?”²⁸ Black women are too often denied the ability to participate in the workplace equally because of their natural hair, both because of bias in their place of employment, and because of external burdens and discrimination like TSA hair pat-downs making it that much more difficult for Black women like Ms. Wanzer to do their jobs.

The stereotype that Black natural hairstyles are dirty or unkempt and therefore not appropriate for more formal settings remains unfortunately wide-spread. For example, until 2014, the U.S. military banned a number of common Black hairstyles,

²² [e9fc47& cview=0](https://www.fbo.gov/utills/view?id=63a555f1caa4334c21de68cd074502d7) (more information regarding request provided in Attachment A, <https://www.fbo.gov/utills/view?id=63a555f1caa4334c21de68cd074502d7>).

²³ Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. Times (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html>; see also Press Release, *Muslim Advocates and LDF Urge Airlines to Institute Anti-Bias Training*, NAACP Legal Def. & Educ. Fund (Oct. 12, 2017), <https://www.naacpldf.org/press-release/muslim-advocates-and-ldf-urge-airlines-to-institute-anti-bias-training/>.

²⁴ See Alex Marzano-Lesnevich, *Flying While Trans*, N.Y. Times (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/opinion/tsa-transgender.html>.

²⁵ See U.S. Dept of the Interior, Nat’l Park Service, *African American Heritage & Ethnography—Africans in French Americas*, <https://www.nps.gov/ethnography/aah/aaheritage/FrenchAmA.htm> (“[w]omen of color had to wear a scarf or handkerchief over their hair as a visible sign of belonging to the slave class, whether they were enslaved or not. Those women affected by the law did, in fact, cover their hair, but they did it with elaborate fabrics and jewels—an action which technically meant the letter of the law but also allowed them to maintain their standards of fashion and beauty.”).

²⁶ *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981).

²⁷ Brown White, *Releasing the Pursuit of Bouncin’ and Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 Int’l J. Media & Cultural Pol. 295, 296 n.3 (2005).

²⁸ See Medina, supra note 5.

²⁹ Id.

including cornrows and braids.²⁹ School administrators and dress codes also often restrict Black natural hairstyles and punish students for wearing them.³⁰ In one dramatic episode, a school principal reportedly took scissors to a Black student's locs.³¹ More recently, as noted earlier, a high school wrestling referee with a history of making racist comments forced a Black student athlete to cut his locs in order to compete, even though doing so was not required by district policy.³²

While these incidents are particularly troubling and stark examples of hair discrimination, the underlying myths and judgments about Black natural hair are pervasive in both professional and social contexts and in people's attitudes. A 2017 study, for instance, found that white women, on average, show explicit bias against "black women's textured hair," rating it "less professional than smooth hair."³³ This same study, perhaps not surprisingly, found that Black women feel particular pressure to straighten their hair for work.³⁴ In the words of Professor Paulette Caldwell, "I marvel[] with sadness that something as simple as a black woman's hair continues to threaten the social, political, and economic fabric of American life."³⁵

Realizing the pernicious and demonstrably harmful effects of hair discrimination, some States and cities are starting to take action. In February 2019, the New York City Human Rights Commission released Guidance on Race Discrimination on the Basis of Hair, noting that "Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional" and that "[s]uch policies exacerbate anti-Black bias in employment, at school, while playing sports, and in other areas of daily living."³⁶ And the California Senate recently passed a bill, the CROWN Act (SB 188), that would prohibit schools and employers from discriminating against natural hairstyles associated with race.³⁷ According to the sponsor of the bill, Sen. Holly J. Mitchell, "There are still far too many cases of Black employees and applicants denied employment or promotion—even terminated—because of the way they choose to wear their hair. I have heard far too many reports of Black children humiliated and sent home from school because their natural hair was deemed unruly or a distraction to others."³⁸ We commend these jurisdictions for taking action against pervasive discrimination against Black hair and ask TSA to similarly incorporate these principles into its policies and practices.

²⁹David S. Joachim, *Military to Ease Hairstyle Rules After Outcry from Black Recruits*, N.Y. TIMES (Aug. 14, 2014), <https://www.nytimes.com/2014/08/15/us/military-hairstyle-rules-dreadlocks-cornrows.html>.

³⁰See, e.g., Press Release, *Civil Rights Groups Retained to Represent African American Teens Punished for Wearing Braids at Massachusetts Charter School*, NAACP Legal Def. & Educ. Fund (May 22, 2017), <https://www.naacpldf.org/press-release/civil-rights-groups-retained-to-represent-african-american-teens-punished-for-wearing-braids-at-massachusetts-charter-school/>.

³¹David Moye, *Mom Accuses Principal of Cutting Her Son's Hair Without Permission*, HUFF. POST (Mar. 28, 2018), https://www.huffingtonpost.com/entry/mississippi-boy-hair-locs-cut-principal_us_5abbfa33e4b03e2a5c78e34d; see also Kayla Lattimore, *When Black Hair Violates the Dress Code*, NPR (July 17, 2017), <https://www.npr.org/sections/ed/2017/07/17/534448313/when-black-hair-violates-the-dress-code> (describing two Black students punished for wearing braids); Crystal Tate, *16-Year-Old Black Student with Natural Hair Asked by School to "Get Her Hair Done"*, ESSENCE (May 16, 2017), <https://www.essence.com/hair/natural/black-student-natural-hair-asked-to-get-hair-done>.

³²See Press Release, *LDF Makes Public Records Request in Response to Hair Discrimination Case Involving Buena Regional High School Wrestler* (Jan. 7, 2019), <https://www.naacpldf.org/press-release/ldf-makes-public-records-request-response-hair-discrimination-case-involving-buena-regional-high-school-wrestler/>; Press Release, *LDF Sends Letters Over Concerns with Discriminatory Hair Policies Stemming from Incident Involving New Jersey High School Wrestler* (Feb. 12, 2019), <https://www.naacpldf.org/press-release/ldf-sends-letters-concerns-discriminatory-hair-policies-stemming-incident-involving-new-jersey-high-school-wrestler/>.

³³See ALEXIS M. JOHNSON, ET AL., THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 6, PERCEPTION INSTITUTE (Feb. 2017), <https://perception.org/wp-content/uploads/2017/01/TheGoodHairStudyFindingsReport.pdf>.

³⁴Id. at 12.

³⁵Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 367 (Apr. 1991).

³⁶New York City Commission on Human Rights, NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf>.

³⁷See Kristin Lam, *California's CROWN Act seeks to end racial discrimination based on hairstyles*, USA TODAY (Apr. 23, 2019), <https://www.usatoday.com/story/news/nation/2019/04/23/california-bill-end-racial-discrimination-hairstyle/3557231002/>.

³⁸"Senate OKs Sen. Mitchell's bill to protect against discrimination based on hair texture, styles," YouTube.com (Apr. 22, 2019), https://www.youtube.com/watch?time_continue=182&v=Ty69wWU-M7E.

Most disturbing, perhaps, is that top TSA officials do not recognize that a system that singles out and disproportionately targets Black women is discriminatory. In its investigation, ProPublica reported that “[a] senior TSA official said in an interview that hair pat-downs are not discriminatory and are done when a body scanner indicates that a passenger has an object in his or her hair. ‘I get a hair pat-down every time I travel. I’m a white woman,’ said the official, who agreed to be interviewed on the condition that she not be named.”³⁹ The implications here—that supposedly objective technology cannot be discriminatory, and that a system cannot be racially discriminatory if it also affects white people—are misguided. We are past the point of asking whether software, algorithms, machines, and other forms of technology can perpetuate racism. Of the numerous examples of technology-based discrimination, two from Google Images include incidents in which the website featured almost all Black people in response to a query about “unprofessional hairstyles,”⁴⁰ and one in which the website “labeled black people as gorillas, likely because those were the only dark-skinned beings in the training set.”⁴¹ The data that is fed into this kind of technology is susceptible to the biases of the humans who choose that data and shape the development of the technology: “Software is written by humans, who have bias, and training data is also generated by humans who have bias.”⁴² Our focus now should be on studying the disparate outcomes produced by these technologies and ensuring that we are not simply automating human biases while relying on “objective technology” to escape culpability for the racially unequal results. A longer and expanded inquiry is warranted to ensure that this country’s history of discrimination and racial bigotry does not continue to be perpetuated by technology.

Indeed, the compromising of passengers’ civil rights at TSA security points in airports is not new, and TSA has been aware of the problem in various forms for years. In fact, over 4 years ago, TSA entered into an agreement with the ACLU of Northern California over the racial profiling of Black women’s hair.⁴³ Since this agreement, the problems that motivated the initial complaint have reemerged, but are now treated as an issue of technological inefficiency rather than as a violation of passengers’ civil rights. These issues of racial bias in TSA technology must be addressed particularly as TSA moves toward increased reliance on other forms of technology, including facial recognition tools,⁴⁴ which have already been proved to operate in manner that discriminates based on race.⁴⁵

Recent reports and articles on TSA’s policies and procedures related to profiling have been a laudable and much-needed step in understanding the problem, though the problem’s scope is far from understood. One of the ways to bring greater transparency to the issue of racial profiling in TSA technology and TSA’s policies and practices more generally is to promote the complaint process. It is likely that many people about to board a plane may not take the time to file a formal complaint with TSA. And, more troubling, according to ProPublica, “most people [they] heard from said they had not known they could make a complaint.”⁴⁶ We urge TSA to continue studying the scope of this problem, both by reviewing complaints and proactively soliciting feedback from passengers. TSA, particularly its Office for Civil Rights & Liberties, Ombudsman & Traveler Engagement (CRL/OTE), as well as its Innovation Task Force, should be actively engaged in monitoring and collecting data on how the implementation of technology like full-body scanners disproportionately affects certain passengers. Given TSA’s constant contact with the public—contact that at times can be of a highly personal and invasive nature—public engagement and responding to public input is critical.

Further, to the extent that TSA asserts that its current policies and practices regarding full-body scanners and hair pat-downs are necessary as a matter of security, we urge TSA to be transparent in explaining why that is so and to confirm that

³⁹ Medina, *supra* note 5.

⁴⁰ Andrew Leung, *If you Google ‘Unprofessional Hairstyles for Work,’ these are the problematic results*, Mic.com (Apr. 6, 2016), <https://www.mic.com/articles/140092/if-you-google-unprofessional-hairstyles-for-work-these-are-the-problematic-results#.KKA0LXRdd>.

⁴¹ Maya Kosoff, *Alexandria Ocasio-Cortez says algorithms can be racist. Here’s why she’s right.*, LiveScience (Jan. 29, 2019), <https://www.livescience.com/64621-how-algorithms-can-be-racist.html>.

⁴² *Id.*

⁴³ Letter from Bryan W. Hudson, TSA, https://www.aclunc.org/sites/default/files/2015.01.12%20Singleton%20TSA%20resolution_0.pdf.

⁴⁴ <https://www.theverge.com/2018/10/15/17979688/tsa-precheck-facial-recognition-airport-chp-biometric-exit>.

⁴⁵ <https://www.theverge.com/2019/1/25/18197137/amazon-rekognition-facial-recognition-bias-race-gender>.

⁴⁶ Medina, *supra* note 5.

there are no less discriminatory measures. To our knowledge, TSA has not provided any data on the number of weapons or other contraband, if any, it has discovered through the process of hair pat-downs. Against the voluminous evidence that TSA procedures are disproportionately burdening people of color, TSA has failed to adequately show that these procedures are actually necessary, or even helpful, in enhancing security, or that there are no less burdensome alternative procedures. TSA has also not shown that it is effective for TSA officers to spend time tending to the many false positives produced by full-body scanners, which cannot tell the difference between a weapon in a person's hair and a Black woman's locs as opposed to other security measures.

We appreciate TSA's role in maintaining safe travel, as well as its attention to the on-going problems discussed in this testimony and those shared by others today. TSA's obligation to treat all passengers with dignity and to protect their Constitutional and civil rights, as well as their safety is a critical one. LDF looks forward to continuing to engage on these issues and would welcome the opportunity to work with TSA on finding innovative solutions that serve the needs of TSA while protecting the dignity and civil rights of all travelers.

Thank you for your consideration of this important issue and for the opportunity to speak to you today.

Chairman THOMPSON. I thank the witnesses for their testimony. I remind each Member that he or she will have 5 minutes to question the panel.

I now recognize myself for questions.

Let me say from the outset that I think it is clear that every Member of this committee wants to get it right. The traveling public has a duty to be safe, and we have an obligation to make sure that that process by which they get screened is the best system.

Our challenge—and I am speaking for the Chair—is I have had experiences as an African American that perhaps some of my other colleagues haven't when I have had to question why am I being put in secondary screening. It was always not real clear as to why. I hear comments quite often.

So one of the reasons we are trying to have this hearing is to get it right. How can we reduce those numbers down as low as possible? We have invested in technology. We are continuing to invest in technology. We have done away with some of the uses, Behavioral Detection Officers and other things that didn't have real science behind them. But we still have to work at getting it right, because a lot of these instances are still occurring.

One of the things I would like to ask Mr. Russell is, is there a clear traveler's redress available to someone who feels that he or she has been singled out for discrimination?

Mr. RUSSELL. So what we found in our most recent report was that there are three main ways to do that. Basically, you are going to contact the TSA Contact Center, which handles all the complaints; but you could do that via phone, email, or electronic communication. Then there are comment cards at airports that you can fill out as well.

So those are the three main avenues. You have 180 days after the experience to lodge that complaint with TSA.

Chairman THOMPSON. So, to your knowledge, were you able to ascertain whether or not individuals who are going through that process are told that?

Mr. RUSSELL. So there are officials at the airports that can help, customer service representatives that can help steer passengers in the right place if they know to find them, is how we talked about it in the report.

Chairman THOMPSON. Mr. Singh, your experience on the group you are here representing, has that process been clear to those individuals?

Mr. SINGH. It has not really been clear for individuals. In fact, I would say that the word "comment cards" is a deceptive practice. It doesn't really indicate that this is a complaint form for a traveler to use.

Second, travelers who are already delayed and frustrated with the secondary screening procedures have flights to catch. They are not going to try to hang around at the airport to try to ascertain who the appropriate individual is to complain.

So we developed the Fly Rights app to hopefully make it a little bit more accessible. We launched this app in 2012 so that complaints could be officially made through our app and forwarded to TSA.

TSA has done a little bit more in terms of the on-line space allowing for complaints, but I think people are tired of complaining for 18 years and seeing little to no change. The inconsistent application of security procedures and discretion at airports makes the job too big of a problem to always complain about. The entire system really requires an overhaul, as a top-down messaging is not effectively implemented by airports and security officials that kind of govern themselves.

The more sophisticated technology, such as AIT, is also often perceived as superior to human expertise, and people are left to make a generalized complaint about the machine, not necessarily about the TSO or specific airport. They may not even understand that the technology they are using is a problem for them.

Chairman THOMPSON. Thank you very much.

Ms. Nelson, what has been your experience with people making complaints?

Ms. NELSON. Well, my experience has been that, as my co-panelists have described, the process is not clear. It leaves a lot to be desired. Currently, if a complaint is lodged and supplemental information is requested and it is not provided within a 10-day window, the administrative complaint is closed.

So the 3,700 complaints that were identified in the GAO report really does not represent the lion's share of incidences that happen at airports that go unreported and ultimately are later dismissed because they are not fully complete.

One of the 5 recommendations that the Legal Defense Fund is making is that the complaint process be overhauled, that there is greater public education and ad campaigns about the ability to lodge such complaints. When passengers complain to TSOs and complain to airport security personnel, they should be immediately offered an opportunity to file a complaint then or to later do so online.

Chairman THOMPSON. Thank you very much.

I yield to the Ranking Member.

Mr. ROGERS. Thank you, Mr. Chairman.

I would tell Mr. Singh and Ms. Nelson that the AIT machines, I have been a long-time critic of that technology and have worked for years to make sure we don't purchase any more of them. I think

they need to be out of our airports as soon as we can replace them with better technology.

Mr. Russell, TSA has struggled for a long time with screening in a way that treats everybody fairly, but they seem to have been hung up on this behavior detection approach even though we have told them to stop using it.

Why do you think that they continue to lean on this approach to screening, along with using AIT, when there are better technologies available?

Mr. RUSSELL. What they have reported to us is that they just consider behavior detection as one layer of security among many. You have Secure Flight, the technology at the checkpoint, and that that is a useful security measure to help counter threats to aviation.

What we have said in our past report is that there was little valid evidence to support a good number of the indicators that are in use and had recommended that they limit funding until such time that they get that valid support.

As was mentioned, the Aviation Security Act of 2016 helped TSA in the stand-alone behavior detection program, and now those staff trained in that function have been converted to regular transportation security officers.

Mr. ROGERS. But don't you find that they still use that approach in their screening practices, even though they have been told to move on to a different job?

Mr. RUSSELL. Right. What we found is they are still being used in a limited way in support of passenger screening, canine teams, as well as vetting of airport workers as they come to work every day.

Mr. ROGERS. One of the arguments for using Federalized screening personnel as opposed to allowing airports to privatize the screening personnel and let them just be supervised by TSA is that it is supposedly supposed to offer more consistency in the way screening is done. Have you found that to be true? It seems there are a lot of inconsistencies to me.

Mr. RUSSELL. Right. That wasn't something we looked at at this review, that comparison between the SPP airports and a Federalized TSA airport.

Mr. ROGERS. Mr. Singh, I heard you mention a few minutes ago that you had seen some improvements in TSA, not enough, but some improvements.

Ms. Nelson, is that your view?

Ms. NELSON. That there have been some improvements at TSA? Well, we just mentioned that there is a diminished use of behavioral techniques and that is certainly an improvement. But we still have a very long way to go. There are very sound practices that can also keep us safe.

We do not believe, as the Chairman emphasized in his opening remarks, that it is an either/or equation. It is not a zero-sum question. We can protect civil rights, we can protect human rights, and we can protect our National security.

Mr. ROGERS. Thank you.

I yield back.

Chairman THOMPSON. Thank you.

The Chair recognizes the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, first of all, let me thank you for the hearing and thank you for the Ranking Member joining. We have been together on this committee for a very long time and addressed these issues that are extremely important.

I want to take note, Ms. Nelson, because I think it is important that people know what is in your testimony as relates to TSA. You very openly say, we appreciate TSA's role in maintaining safe travel as well as its attention to the on-going problems discussed in the testimony.

So I want it to be known that we understand, I think each and every witness, Members here understand the front-line responsibility of the Transportation Security Administration as well as the TSO officers, and we offer them our gratitude.

But we live in a Nation of laws, and we believe we still live in a Nation that adheres to the rule of law and as well our basic principles of human dignity and due process. So I think this hearing is crucial, because it is important to get things correct on how we balance the aftermath of 9/11, when the naiveté of the United States was breached and we understood that we had the responsibility of security.

So I am going to ask, I think in your report, Mr. Russell, you indicated that a number of these complaints were heavily in about 10 cities, am I correct, on the 3,700 complaints?

Mr. RUSSELL. Right. The top 3 were LAX, JFK, and then Atlanta.

Ms. JACKSON LEE. Do you attribute that to the size of the airports and not necessarily that it is not going on all across the Nation?

Mr. RUSSELL. That is certainly one factor. I mean, those are some of the busiest airports in the country. We just provided that data, but we didn't make a judgment beyond that.

Ms. JACKSON LEE. So the most important point that you want to make out of your recommendation is what?

Mr. RUSSELL. So TSA has a number of oversight mechanisms already in place for the remaining parts of behavior detection that it employs, but we think they need to go one step further and make sure there is a specific mechanism within their oversight checklist and their policies to specifically look for instances of or indications of profiling as they are doing their due diligence.

Ms. JACKSON LEE. So there should be a specific mechanism?

Mr. RUSSELL. Correct.

Ms. JACKSON LEE. To? Say it again.

Mr. RUSSELL. So this is—and this is what TSA agreed to, is to go back, look at the whole process they use for oversight, actually documenting what the supervisor is observing as the behavior detection is being conducted, and to have a specific place to look for indications of profiling, and then to remark whether they are seeing something or not, so that you could go back later.

Ms. JACKSON LEE. So they have to internally do this. They have to set up a structure and do this themselves.

Mr. RUSSELL. Correct.

Ms. JACKSON LEE. Mr. Singh, let me thank you very much.

First of all, we will answer your question. We are in the process in a committee that works very closely with this committee, the Judiciary Committee, to reintroduce the End Racial Profiling, and I look forward to leading that effort. So thank you very much.

I just want to quickly say that I am reminded of an Indian Sikh right after 9/11, Mr. Sodhi, who was killed in Mesa, Arizona, and the person who killed him was Frank Roque, I believe. "I am going to go out and shoot some towel-heads, and we should kill their children too, because they will grow up to be like their parents." The intensity of that hatred is resurging.

I do want to acknowledge and put in the record Hargun Sodhi, who is currently a rising junior at the University of Houston, and he came to my office in Houston from the SikhLEAD Program. He is, in fact, related to Mr. Sodhi, which tells us that when we kill, we may kill one, but the spirit and the strength of our communities will remain strong.

I ask you the question how the community feels, and you sort-of represent others who may be similarly dressed in other religious garb, in terms of what they feel, what it means when they go to an airport and expect to be or are treated that way. I am going to ask that question, because I am going to quickly go to Ms. Nelson so that you can answer the question.

My constituent Ms. Mohammad was treated unfairly in Atlanta, which I am still pursuing. I ask the question to you, what is the most key thing that we will need to do? You said an appeal process or you said a process that captures where they can apply directly at the airport, which I think is extremely important.

So, Mr. Chairman, if you don't mind if they could answer those 2 questions.

Mr. Singh, your answer, and then Ms. Nelson.

Thank you so very much.

Mr. SINGH. First of all, thank you so much for that recognition for the legacy of Mr. Sodhi.

Travelers feel humiliated, they feel ashamed, they feel stigmatized, and they feel left out. In short, they also feel like second-class citizens and sometimes like model minorities that are not helping their own community.

Ms. JACKSON LEE. Ms. Nelson.

Ms. NELSON. You asked about additional recommendations to improve the process. While the GAO report that was released this morning is laudable and it is an insightful assessment, there should be a full audit of TSA practices and policies to determine 2 things. No. 1, whether they, in fact, serve National security interests. No. 2, are they the least discriminatory means of serving those goals?

No one group or several groups of citizens who are already marginalized should bear the responsibility of security procedures that are not effective.

Ms. JACKSON LEE. Thank you very much.

Mr. Chairman, thank you.

Chairman THOMPSON. Thank you very much.

If this gentleman from New York will allow me to recognize, for a point of personal privilege, the other gentleman from New York, the Chair would appreciate it.

Mr. KATKO. This time, sure.

Chairman THOMPSON. I understand you have a special guest in the audience, Mr. Rose, that you might want to introduce to the committee.

Mr. ROSE. Mr. Chairman, thank you very much for that honor. I would like to recognize my mother and my aunt and my wonderful cousin who is out there.

[Applause.]

Mr. ROSE. Please stand up real quickly, mom and Rachel. Stand up. Stand up. Say hello.

All right. OK. I am not repeating that.

Chairman THOMPSON. Does the gentleman yield back?

Mr. ROSE. Yes. Let's strike that from the record, what you just said. All right?

Yes, I yield back. Thank you.

Chairman THOMPSON. The gentleman from New York is recognized for 5 minutes.

Mr. KATKO. Perhaps Mr. Rose owes me a beer now.

Mr. Chairman, I thank you for having this hearing. It is very important. I agree with the sentiments expressed by both yourself and the Ranking Member that even one incident of racial profiling is too much.

So I commend all of you for being here today.

I must say, though, that I am a little concerned with TSA, and it seems to be a problem that is more endemic to the whole administrative Executive branch function of our Government as a whole, and that is sometimes it seems like they dictate the terms by which they appear here, and that shouldn't be. If they are given 12 days notice or we make inquiries about whether we want to have a witness, either in the Majority or us in the Minority, 12 days should be sufficient for them to get their internal approvals done. They signal to us repeatedly that they need more time to prepare their witnesses.

If this recalcitrance continues, I think we should consider using the subpoena process, because TSA should be here to face the fire. TSA is the one we are concerned with, and TSA is the only one not here at the table. So, in my mind, TSA, we should take a little more aggressive approach in the future, if necessary, Mr. Chairman, I respectfully suggest.

Chairman THOMPSON. Duly noted.

Mr. KATKO. Thank you. Plus, I was a prosecutor and I like subpoenas. It tends to get people's attention.

Now, Mr. Russell, we have talked about this behavior detection, but, as the Chairman noted in his opening statement, we passed a bill out of here, one of my bills, that outlawed using Behavior Detection Officers in the line to determine whether they go to PreCheck or not. I want to understand, how exactly are they using these officers now?

Mr. RUSSELL. So over the course of our review they were using them in support of passenger screening canine teams, as well as screening of aviation workers.

Mr. KATKO. So are they stationed at the line when people are coming in or what?

Mr. RUSSELL. So they would be with the actual canine units, wherever they are operating. Then, depending on how the airport is set up to do their screening of workers, they would be positioned there.

Mr. KATKO. Is that your understanding as well, Mr. Singh?

Mr. SINGH. That is probably SSI we are not privileged to, so I couldn't comment on that.

Mr. KATKO. OK. Well, I want to get, Mr. Singh, I want to get some examples from you, some more specific examples of when you think that they have been profiling in a not appropriate manner. Give me specific examples just so I can understand it.

Mr. SINGH. In a not appropriate manner?

Mr. KATKO. Yes.

Mr. SINGH. So I will highlight one of them. A Sikh traveler within the past 2 months flew out of EWR three times, twice from terminal C and once from terminal A. When he flew out of terminal C, in both instances he was told he cannot do a self-pat-down of his turban. The TSO and the manager said that the rules have changed and that they have to do a pat-down. The third flight of EWR from terminal A, he was able to do a self-pat-down like usual.

He mostly goes through the AIT machine, and his turban shows up on alarms 9 times out of 10. This is one of those demonstrations of inconsistent application within just one airport in the last 2 months.

Mr. KATKO. OK, great. Thank you.

Ms. Nelson, you mentioned some possible remedies for this, and could you expound on those a bit? I know you talked about perhaps some sort of a public awareness campaign. But what else would you suggest we do to ameliorate this problem?

I am really concerned, as the Chairman knows, with the use of these officers. I think it is way too nonscientific. Unless you are engaging a passenger for several minutes and getting a feel for whether there is a concern, I don't think in 10 seconds you can make a snap decision.

I will give you an example. I would sit for days talking to people I think committed a murder, and for days I would be absolutely convinced that they were telling me the truth, and then after a while they broke down and told me they did do it. So you are not going to find out in 10 seconds whether someone is a security risk or not.

So with that as a proviso, I want to hear what you have to say, some suggestions.

Ms. NELSON. Sure. So in addition to improving the complaint process and also ensuring that we are, in fact, meeting our National security interest needs in a way that is least burdensome on American travelers, we also recommend three other measures.

One is that in addition to antidiscrimination training for all TSA personnel, that the TSA quickly implement, as Ranking Member Rogers suggested, that it immediately implement the GAO's recommendation, which it has accepted, to monitor compliance with the specific procedures intended to prohibit unlawful profiling. So not just general monitoring, but looking at the specific procedures that are intended to deal with this very issue that we are most concerned about.

In addition, we would add that, in the interest of transparency, it should share the results of that monitoring with the public.

Also, very commendably, it was reported that the TSA requested that vendors last summer provide ideas to improve screening of headwear and hair, in compliance with Title VI of the Civil Rights Act. That is an excellent step in the right direction. We urge the TSA to maintain that demand of vendors and to refuse to contract with vendors using taxpayer funds that cannot ensure that their technology is nondiscriminatory.

So those are just a few additional ways in addition to phasing out completely the use of behavioral detection techniques.

Mr. KATKO. Well, you just gave me a couple ideas for new bills. So thank you very much.

I yield back my time, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Let me assure the gentleman from New York, we will follow up and get TSA here. I am wondering why they are not following the Congressional mandate of your bill. I mean, I don't know how they can—

Mr. KATKO. I don't understand it either, and that is why I would respectfully suggest that we have some follow-up on this.

Chairman THOMPSON. Sure. We will.

Mr. KATKO. If we need to use subpoenas, we need to use subpoenas.

Chairman THOMPSON. Absolutely.

Mr. KATKO. Time should never be an excuse for them not to be here.

Chairman THOMPSON. Thank you.

The Chair recognizes the gentleman from New Jersey, Mr. Payne.

Mr. PAYNE. Thank you, Mr. Chairman, for having this hearing, and the Ranking Member as well.

You know, I think it has kind-of already been mentioned, my line of questioning, but to reiterate the seriousness of the issue, 3,500 complaints in the scope of things may not seem like a significant number, but 3,500 people that took the time to lodge a complaint is probably just the tip of the iceberg in terms of people that are not complaining. They are upset, they are distraught, they didn't like it, but they don't have the time to make the complaint or don't know the procedure of what to do next. That is a serious problem.

So I am asking all the witnesses, do you suspect that travelers underreport civil rights and civil liberty complaints against TSA? Do you think passengers refrain from reporting incidents due to fear of being placed on a watch list that will restrict future travel?

Sir.

Mr. RUSSELL. So in our recent report, we really looked at for those 3,700 complaints with civil right/civil liberties issues, what was the process? One of the things that you note is they don't all really make it to the investigative stage. So almost a third of those dropped out, because there wasn't complete information that the passenger was able to provide for TSA to pursue it further.

So anything along those lines, to make it more evident what you need to file, how you are responsive to a request for more informa-

tion, to have a complete complaint that could be investigated, would be helpful.

Mr. PAYNE. OK.

Mr. Singh.

Mr. SINGH. We believe that there are numerous factors that contribute to underreporting. Sometimes the traveling public, especially if they don't travel frequently, may not know their rights are being violated or that the TSO is not adhering to policies and protocols, because those policies and protocols are not always transparent or easy to understand.

I would refer the committee Members here to our exhibit B and C to show the difference between TSA's guidance for Sikh air travel passengers and the one that we developed with close consultation.

Mr. PAYNE. Thank you.

Ms. NELSON. I will add that we should underscore that of the 3,663 complaints related to passenger screening, TSA's Multicultural Branch found indications of potential discrimination and unprofessional conduct that involved race and other factors in over a thousand complaints. That is a significant number.

That is buttressed by the anecdotal accounts and news reports by African American women, who talk about invasive and humiliating pat-downs at airports. It is buttressed by the accounts of TSOs themselves who talked about racial profiling being pervasive at airports, like Logan National Airport, Newark Liberty International Airport, Honolulu International Airport.

It is something that we know is far more prevalent than the number of complaints suggests, because of the frailties in the complaint process and the very nature of the issue itself, where people are under pressure to get where they need to go and do not often circle back. I can confess to not complaining or lodging a formal complaint to TSA when I have personally been subjected to similar pat-downs.

Mr. PAYNE. I do recall times prior to me becoming a Member of the House of Representatives having issues in airports and not necessarily filing a complaint, but finding myself being very discouraged and frustrated and embarrassed by the pat-downs that TSA formally did in their procedures.

What other reasons might result in underreporting of complaints?

Ms. NELSON. Well, I think with respect to certain populations, and I particularly would like to lift up Muslim Americans on the last day of Ramadan today who often are singled out and concerned that by stepping up and speaking out that they may be subjecting themselves to additional scrutiny and potential danger because of the stereotypes that surround that community and many others.

In addition, transgender individuals are often so deeply humiliated by the very binary lens that the TSA scanners and TSOs use to determine who is appropriate to pass through security that filing a complaint and airing those issues only leads to further exposure and potential humiliation.

So I think those are deterrents, and we need to find a process that allows for a greater opportunity to air those issues.

Mr. PAYNE. Thank you.

I apologize. I yield back.

Chairman THOMPSON. Thank you very much.

The Chair recognizes the gentleman from North Carolina for 5 minutes, Mr. Walker.

Mr. WALKER. Thank you, Mr. Chairman.

Ms. Nelson, I appreciate your perspective on some of the things that you have seen. It has been educating for me and I appreciate you sharing some of the things, specifically with hair and some of the things that the African American females, false signals and some of that. I am going to look more into that and check into that.

I haven't thought about this in probably I guess maybe 15, 16 years, Mr. Singh. I remember my third-grade son coming home one day with a note that he and some friends had made fun of another boy in his class that wore a turban. I just thought about that today. The next day, in trying to teach him a lesson, my son left for school wearing a turban that day to try to get him to understand what it feels like to be picked on or discriminated against.

I do believe that was—I haven't always gotten it right, but I think that day we were able to send a valuable lesson that no Americans—and I know my colleagues on this side of the aisle want to make sure that any kind of discrimination is shut down.

At the same time, I want to make sure—there are many wonderful employees at the TSA who take their job very seriously and do their best. I think with about 2 million passengers each day, I think it comes down to less than 1/1000 of 1 percentage point of some of these actionable claims. Still too many, we want to continue to work on that, but we want to make sure that we stop that.

I do have a couple questions.

Mr. Russell, as the director here, how does the Multicultural Branch review whether a screener followed the protocol in instances of alleged violations?

Mr. RUSSELL. So once they have enough information to review the complaint, typically they go back to the airport involved and try to pull the camera footage, interview the transportation security officers involved, and try to recreate the events and see if they could substantiate any part of the allegation in the complaint.

Mr. WALKER. Can you tell me, are there consistent disciplinary actions that are used if a screener does not follow protocol?

Mr. RUSSELL. Right. Most often there is refresher training of various sorts, either to the employees at the airport or it could be a Nation-wide brief, depending on what the issue may be. Over the course of our review, we also noted there were a hundred instances where disciplinary action was taken in response to some of the passenger screening-related complaints.

Mr. WALKER. I know trends are very important in this line of work. What ways does the TSA check potential trends, concerns that is, increases or decreases related to allegations of unlawful profiling? Do you have some kind of system in place that you are able to monitor that?

Mr. RUSSELL. So TSA does review at a macro level the complaint data to try to look for trends, things that are emerging, and has various mechanisms to report that, both to the leadership within TSA or to make the airport officials, the Federal security directors, others, aware of things that they might be seeing in the data.

Mr. WALKER. Can you unpack that a little bit more? You said they have ways to follow the trends. Can you speak to that, as far as specifically what are being utilized as tracking the changes to reduce profiling in the future?

Mr. RUSSELL. Right. So one of the examples that we were able to look at had to do with headgear and turbans and the way to handle that situation at the checkpoint when an anomaly is present based on the AIT review. Religious wear. If there are particular religious artifacts that groups may be traveling with, how to handle that situation. So we saw sort-of trying to be somewhat proactive and to alerting airports to those situations.

Mr. WALKER. OK. Thank you, Director Russell.

Thank you, panel.

I yield back to the Chairman.

Chairman THOMPSON. Thank you very much.

The Chair recognizes Mr. Correa for 5 minutes.

Mr. CORREA. Thank you, Mr. Chair, and the Ranking Member for holding this most important hearing.

Listening to your testimony here, I do wish TSA would have been here. I hope that either this full committee or our subcommittee on TSA does have a hearing and invites the TSA officials. It is important to hear from them because they do have an important job, very important job.

If you look at, you know, how many flights per day in this country, maybe 2,000 or more, it is a million passengers. How many airports around this country? Their job is to make sure that those planes leave and land safely.

Now, I am going to ask Mr. Russell: Immigration, law enforcement, TSA, three separate functions. When it comes to immigration, before you walk into the TSA inspection, your credentials are checked, correct?

Mr. RUSSELL. That is right.

Mr. CORREA. Many places before you get on that airplane, you are checked again. Yes? No?

Mr. RUSSELL. Right, to go through screening.

Mr. CORREA. So TSA really is there to screen for devices that may cause harm to the passengers, correct?

Mr. RUSSELL. Right.

Mr. CORREA. We are always working to make sure that we attain 100 percent in terms of assuring that those negative things don't get on our planes or get into airports, correct?

Mr. RUSSELL. Right, that is the goal.

Mr. CORREA. So I got to figure TSA, those workers have a very stressful job, and they know zero tolerance is what is expected of them. So what is the policy right now at TSA when it comes to screening for immigration? Is that part of the job?

Mr. RUSSELL. That is not something that we looked at in this review. So I can look in that and see if there is something specific in their standard operating procedures. I can tell that you they are—

Mr. CORREA. I ask you this because, several years ago, we heard reports that Latino passengers were being targeted by the Behavior Detection Officers in Honolulu, Boston, and Newark. Some of these officers actually call themselves "Mexicutioners," which meant they

were really looking for secondary screenings that would yield drug-related offenses, outstanding warrants, and deportations.

Is this part of the TSA mission or goal? Do you know if they are still doing this, or is this something incidental?

Mr. RUSSELL. So that is not something that came up specifically in our review, but in terms of where behavior detection is being used, yes, we saw that. They definitely needed to improve the oversight in terms of checking for compliance with profiling. So, if those—if behavior detection was involved in the incidents that you are referring to, certainly we think our recommendation will help at least have an oversight mechanism to specifically look for those.

Mr. CORREA. Most of us that fly are familiar with the process, but a person who occasionally flies, travels, so to speak, you are going to be nervous as you walk up to a lot of those hi-tech machines. So you on the natural will probably exhibit some kind of nervousness. The detection behavior folks, would they look at this as triggering a secondary inspection?

Mr. RUSSELL. That is what behavior detection is intended to do, is look for signs of fear, stress, using a certain number of indicators; and if you see enough of them, then you refer the person to secondary.

Mr. CORREA. How many of these would be false positives, false negatives?

Mr. RUSSELL. Well, that is where our work has shown big concerns around the usefulness of those indicators. When we looked at the—how many of them had valid support for use in the aviation environment, it was only a few out of the 36 that they currently employ.

Mr. CORREA. So it is not really significant in terms of their job—

Mr. RUSSELL. Right.

Mr. CORREA [continuing]. Performance, effectiveness.

I am running out of time but my—my further thought is, in terms of the reports of abuse, reports from citizens, this is a very diverse country, a very multiethnic country, a lot of religions. So, to me, every time you go through one of these situations, if you feel that you have been discriminated against, racially profiled, I think most passengers will just say: You know what? Let me the heck out of here. I just want to get out of here.

They would not file a complaint.

So I am hoping somehow we get to a process where, if a passenger feels that there is something wrong here, “I have been wronged,” that they can immediately report a situation, as opposed to give me that slip of paper. I have got to go on-line and have to write you a letter to express my concerns.

Any thoughts on that?

Mr. RUSSELL. That is certainly something we saw. You know, about a third of the civil rights, civil liberty complaints that came in did not get further reviewed because they were missing some key piece of information. Someone had to provide, you know—

Mr. CORREA. Those are the ones that are actually reported.

Mr. RUSSELL. These are the rules that are in place to investigate a complaint further at TSA.

Mr. CORREA. Mr. Chairman, I just want to say we need to follow up on this and make sure that there is a robust complaint system so that we get a good picture of what is going on.

I want to thank again our TSA officers for the good job they have done. I just want to make sure that they are focusing on the right job.

Thank you, Mr. Chair.

I yield.

Chairman THOMPSON. Absolutely. I think just about everyone who has commented understands that TSA is missing in action with this hearing and that they knew well in advance of our intent to it have and our interest to have them. So we will go forward and have them come and answer some questions.

I am really concerned, Mr. Russell, that, you know, we spoke very clearly that there was not enough science behind the behavioral detective program, BDO program, and somehow, on one hand, they say, OK, we have done away with it, but from what you have said today, they are still using it.

Mr. RUSSELL. In a more limited way, yes. That is correct.

Chairman THOMPSON. Well, and that is what Mr. Katko was talking about, too, because it was his bill.

Mr. CORREA. Mr. Chair, we need to follow up on this. I want to make sure if there is a validity to this kind of behavior, testing, use, let's hear about it. If not, let's move on to something that makes sense.

Chairman THOMPSON. Absolutely.

Chair recognizes the gentlelady from Arizona, Mrs. Lesko.

Mrs. LESKO. Thank you, Mr. Chair.

Thank all of you for coming today and sharing your insight onto this most important issue.

I have a couple questions. The first one is for Mr. Russell.

From what I have read, there is—and what has been testified—there are 1,066 complaints that TSA recommended additional training due to potential discrimination, and then we got testimony from our other witnesses about different aspects of possible discrimination.

Do you have a breakdown of how many people, how many of these complaints were because of turbans or other headwear or hair so that I get a better idea of the—how many of these—this stuff happens?

Mr. RUSSELL. Sure. So, of the—going back to that larger universe of the 3,700 complaints that dealt with civil rights or civil liberty issues, passenger screening, really, complaints, about 1,500 of those were related just to general discrimination or profiling concerns; 493 had to do with some aspect of pat-downs, so when you are in the secondary screening process; 279 dealt with hair, issues around hair; and just to name a few others, 200 dealt with religion; and then another 169 dealt with transgender issues, just to give you a—

Mrs. LESKO. Yes, that is helpful.

Ms. Nelson, you had—I just want to understand this more. You had said that African American women's hair, sometimes they cannot detect the difference between contraband and the hair. Is that

accurate? That is after they go through the screening, through the X-rays, or the—when does that happen?

Ms. NELSON. So the full body scanner does not always accurately detect or screen Black women's hair. It can be in an Afro. It can be in braids or twists or the locks that I wear on my head. Those scanners cannot properly detect that it is hair and not contraband. So it signals to the TSOs that there should be an additional screening. That then disproportionately affects Black women, who have to go through a more invasive hair pat-down whereas, if someone had straight hair or flattened hair, it is less likely to go off.

Mrs. LESKO. Thank you. Thank you.

My other—I guess I am just kind of confused about this behavioral screening, this specialized behavioral detection training that Mr. Katko, apparently, I don't know if he got rid of it or not, but from what I read, it said that it is integrated now into other TSO officers and especially those that have K-9s.

Now, the airport that I come from, the K-9s are usually at the front of the line. So, how does a K-9 officer that is using this specialized behavioral detection, I mean, how do they then say, "Oh, you need a special pat-down"? Because normally doesn't the pat-down, they take you after you get through, you know, the luggage area, and then the TSO officer there, you know, puts you aside and has you do a pat-down.

So help me understand this. I don't get it.

Mr. RUSSELL. Yes, so, with the passenger screening, K-9 teams, that could be right around the checkpoint. Think about the, you know, in the queue area, depending on the circumstance. Then the Behavior Detection Officers would support the K-9. So, as you are engaging passengers, you can ask them questions and look for some of the indicators. If you see a certain number, then you would refer that person for later to the secondary screening.

Mrs. LESKO. So they walk them over to the screening area and—

Mr. RUSSELL. Right.

Mrs. LESKO [continuing]. Hand them over to another TSA—TSO officer? Is that what you are saying?

Mr. RUSSELL. That is my understanding.

Mrs. LESKO. OK. All right. Yes, that is what I read is that it—they integrated these specialized behavioral detection people into the TSAs, TSOs, and they are usually the ones that deal with K-9s. That is what I read anyway. So I don't know if that was specifically banned in Representative Katko's bill or not. We are going to have to find out.

So thank you very much, all of you. I appreciate the insight.

Chairman THOMPSON. I think that the reason we got to the bill is we could not find the science behind being able to look at somebody and tell that they are terrorists or something like that in a matter of seconds and, because nobody could come back and clarify the issue, we said it is not working, but, again, we will have TSA to come here and tell us why, for whatever reason, the intent of Congress to do away with this program has somehow resurfaced somewhere else.

The Chair recognizes gentlelady from Nevada, Ms. Titus, for 5 minutes.

Ms. TITUS. Thank you, Mr. Chairman.

I represent Las Vegas, and so it distresses me to see McCarran on this list of top airports where you have complaints. We welcome visitors from all over the world, and we want their experience from the minute they land or the minute they leave to always be a good one. So I hate to see us here.

But I do think that this chart really only tells us which airports are the busiest. It doesn't really give us much more information than that, and there may be a smaller airport where you have a much higher percentage of incidents of this. One is too many, but you mentioned Honolulu, for example, that you had heard stories and that is—I don't see that on here. So I think a better chart would give us percentages or break it down by—I don't know what, but this doesn't really give me too much information.

One thing I would ask all of you to maybe address: We have heard you need more technology. You need better training. You also need more accountability. How about more diversity among the TSO staff themselves? If you are coming through an airport and you are a Sikh and there is a Sikh TSO officer, maybe that would be some more understanding. Did you look at the TSO, the TSA staff to see if they are diverse or there is any attempt to hire diversity, not just train people but bring all kinds of people into the professional, where they can then reflect some of these concerns themselves?

Mr. RUSSELL. So that wasn't within the scope of what we looked at for this review.

Then just one note on the airports, so there were a total of 240 that had at least one complaint related to civil rights and civil liberties. But we just listed the top 10.

Ms. TITUS. But go back to the fact that, even if it is not part of the scope, do you think that would be a good thing to look into that with more diversity of hiring or just at least have some idea of who works on the other side?

Mr. RUSSELL. Yes, I would feel uncomfortable to answer for TSA on that, but, you know, certainly a diverse and inclusive work force is always a good thing.

Ms. TITUS. OK. Mr. Singh.

Mr. SINGH. We know of some Sikh TSOs in the field. However, without the appropriate input at the leadership level and at the policymaking level, no matter how diverse, are still going to be implementing problematic procedures and protocols that are not clear and would still unfortunately leave people feeling violated against their own people, it may be, at best or just a more diverse face.

Ms. TITUS. I understand about the technology, but I was hoping maybe there would be some personal connection, but I see your point.

Ms. NELSON. I think a diverse and inclusive work force is always a good thing, and it is something that we should look for in TSA and elsewhere. However, we have found that even African American TSOs will implement a policy that is discriminatory, and it also doesn't account for the technology that itself perpetuates racial profiling and racial bias.

So that can't be solved by just diversifying the work force, although I do think that is an important step. But it does not fully

solve the issue. Anecdotally, you know, there has been some commentary that perhaps people who understand your hair, understand your religious garb better will not engage in as invasive or as humiliating a search, but it doesn't eliminate that disproportionate impact of technology and of these practices and policies.

Ms. TITUS. Thank you.

I note, in the report, you also talked to some members of TSA and some managers. Did you reach out to their union, AFSCME and have any conversations with them? Do you think that would be a good idea? Do you think that could be a vehicle for trying to maybe bring about some of these changes that you all have suggested that we so desperately need?

Mr. RUSSELL. We looked really at the coordination part that TSA's civil rights, civil liberties branch has with community groups and did note that they have a relationship with I believe the Sikh Coalition and others to have a dialog on these issues. That is as far as it went is just to report some of that information.

Ms. TITUS. Mr. Chairman, maybe if you bring TSA in, we could also bring in their union to see how they might be helpful in implementing some of these changes.

Chairman THOMPSON. Absolutely. We look forward to having both.

Ms. TITUS. Thank you.

I yield back.

Chairman THOMPSON. Thank you.

The Chair recognizes the gentleman from Texas, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

I appreciate this hearing. I think this is an important topic. I just wanted to—and I am a new Member of Congress. So I am trying to figure out.

Can you give me like a—Mr. Russell, can you give me a trend of what has transpired here? So it has been—TSA has been around for 18 years, since 9/11. You know, it is in their policies they are not supposed to do profiling. Has that always been in there? Has that changed at some point? Then can you give me some kind of context of the numbers of complaints about racial profiling? Has that gone up? Gone down? I mean, because I think it can be a snapshot in time, which is helpful to know where we are. But where have we been?

Mr. RUSSELL. Yes, a couple of points on that. So some prohibition against profiling, I think, has been around for a long time.

Specifically in 2013, though, the DHS Secretary sent a memo to TSA to really take a second look at that to make sure that they had specific policies in place around profiling and then, where feasible, to try to collect some information to make sure that wasn't happening. So it got reinforced there.

In terms of the complaint data itself, you know, for our review, we looked at the 3,700 that are just civil rights, civil liberties-related complaints. But just to give you some context, I think in 2017, TSA received a total of about 100,000 complaints in one form or fashion. So, 3,700 would be a subset, and that is over, you know, a little bit more extended period of time, if that is helpful.

Mr. TAYLOR. But what was that 10 years ago? I mean, what trend line are we on, or do you know? I am not trying to put you on the spot.

Mr. RUSSELL. Yes, no, I don't have extended data just for civil rights, civil liberties complaints. But I think typically there are half a million to 600,000 comments that come in, in a year based on the TSA data we have seen, and then typically it is around 100,000 that are complaints.

Mr. TAYLOR. OK. Then something that is important to me is mothers who are breastfeeding and trying to take milk through TSA, and that is something that has come up in my townhalls. Mothers have said: Hey, I show up. I show the piece of paper to TSA. This is how I am supposed to be screened, and they do it their own way anyway. They take the piece of paper and throw it away.

It is pretty upsetting to me because, I mean, you want to look out for mothers. So that is a piece of legislation I am working on with committee staff. So it is important to me.

But just going back to that kind of idea of showing up and saying, "Hey, this is your policy," Mr. Singh, have you had a chance to review TSA's policy and how—I see that there is something in our briefing about policy, but it is not very helpful to me anyway. But have you reviewed their policy? There is a specific—is there written documentation somewhere that people can point to and say this is how you are supposed to—you know, go back to the self-inspection for a turban, which seems to be the key question here. Is there something written? Is there a written policy on that? Or is this just catch-as-catch-can, depending on what terminal you show up at Newark?

Mr. SINGH. So they have developed a know-before-you-go document. However, it is not accessible on the TSA's website. So I don't quite know how they are distributing and disseminating, other than working with community organizations like the Sikh Coalition and others, which is kind-of frustrating because we don't have access to every Sikh in America. So the guidance is not clear. Their website, TSA's website, doesn't really have any clear policies and procedures of what a religious headwear traveler can expect and, therefore, when they go to present themselves for screening, they are left wondering, what does this process and procedure look like? Really the onus is on organizations like us and our travelers to know what to generally expect.

There is a lot of deviation and variations as what people can expect. It is not exactly clear. When we try to get clarity from TSA, we are always told that they cannot provide any clarity on guidance in terms of pat-downs, the procedures and process, if you're allowed to do a self-pat-down, or if the TSO will do it because of SSI.

Mr. TAYLOR. Well, it certainly seems reasonable to have clearly-written expectations and that, you know, helps the work force, the people that are actually on the ground, doing it, to actually do whatever it is we want them to do, rather than leaving them out to not know what they are supposed to do, and then the traveler doesn't know what to do either.

Ms. Nelson, do you have any comment on that, on reviewing? Is there anything you have read as you reviewed TSA's policies that you are concerned about? It seems to me that what should be written is correct, but there is just not enough specificity.

Ms. NELSON. Yes, I mean, I talked about the deficiencies in the complaint process, but I also think that transparency in what these guidelines and protocols are is key. They could be posted in airports so that every airline passenger knows his or her rights when traveling and knows what can and cannot happen in a security interaction. There are many ways in which we can create much more transparency and accountability in this process, but right now, it is cloaked in secrecy. The Legal Defense Fund has a FOIA request to get some of this information, but it is far from transparent.

Mr. TAYLOR. OK. Thank you.

Mr. Chairman, I just want to concur with my colleague from New York, Mr. Katko. I mean, it is really imperative TSA come to a hearing like this. Whatever we need to do to make them show up, I am for that.

Chairman THOMPSON. I agree that it is the written guidance. It is the training that goes with it.

I was just talking with the Ranking Member. You know, we have Congressional IDs. Every now and then, if you present it at certain airports, they will ask you if you have a driver's license. So that is—and that picture of the ID is in the manual, but it is the training that goes with the written guidance that is so important that could probably alleviate a number of the problems we are talking about here.

We will—the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN of Texas. Thank you, Mr. Chairman.

Thank the Ranking Member and the witnesses for appearing today.

Mr. Chairman, if I may say so, I concur with what you said about the Congressional ID. I happen to have had that experience. In the interest of full disclosure, I would like to announce that I was a branch President of the NAACP in Houston, Texas, for approximately 10 years.

Now, further disclosure would require that I indicate that the Legal Defense Fund and the NAACP, as we know it, they are separate entities. But they have a special kinship and a special relationship.

Ms. Nelson, I am honored that you are here today—

Ms. NELSON. Thank you.

Mr. GREEN of Texas [continuing]. To speak on behalf of not only an organization but on behalf of millions of people because you make a difference in their lives, and I appreciate you. Thank you.

I am concerned about the deployment of the technology. Was there some exigency that required deployment without the necessity to have proper field testing before it was allowed to become a part of the traveling public's experience? Maybe this was the test.

Mr. Russell, was this the test, or did we test it before deploying?

Mr. RUSSELL. So, back in 2014, we actually took a look at some of the initial AIT deployments, in particular, the body scanners and one of the things that—

Mr. GREEN of Texas. Excuse me. I have to interrupt. I am not sure I understand what “took a look at” means. Did you—

Mr. RUSSELL. We did a report.

Mr. GREEN of Texas. Did you actually do a field testing? Did you actually have live bodies have an experience with the technology before deploying it?

Mr. RUSSELL. We looked at what TSA was doing specifically to test the technologies.

Mr. GREEN of Texas. Did they test this on live bodies at airports?

Mr. RUSSELL. One of the things that we found was that there were issues.

Mr. GREEN of Texas. I am not sure that I understand that answer. Did they test it at airports on live bodies?

Mr. RUSSELL. I don’t—I don’t know for sure if they did that.

Mr. GREEN of Texas. How did we deploy the technology that is defective? There must be protocols that we have to adhere to that would prevent this sort of circumstance from manifesting itself. How did we get here?

Mr. RUSSELL. One of the things from that 2014 review was it was noted that the technology itself had a higher incident of false alarms when it came to transgender wigs, hair type issues, and body mass index.

Mr. GREEN of Texas. But this is after deployment. Is this correct?

Mr. RUSSELL. Right.

Mr. GREEN of Texas. After it was being used in airports.

Mr. RUSSELL. That is right.

Mr. GREEN of Texas. How did we get to this point? Does anybody have some indication as to what was required? What was the protocol that was adhered to, to allow it to be deployed?

Anyone?

Have we bothered to—in your various capacities, have you made an inquiry as to what happened? Because I am just amazed that we deployed this technology. There had to be an exigency or some circumstance that would require deployment without testing it properly. I don’t want anyone to be singled out unnecessarily in this country. We value our privacy, and we value our ability to associate freely and move about without impediments. So how can we find out what happened? Can someone give me some indication, please?

Ms. NELSON. I think that is an excellent question, and there does need to be some historical discovery as to how this technology was acquired and implemented in view of the discriminatory impact that it is now shown to have. But I also think this is an important moment to flag that, before any additional technology is used by TSA—and we have grave concerns about the potential use of facial recognition technology which is already being used in some airports across the country—that we do—we do not repeat the same mistake, that we make sure that we account for the potential discriminatory impact of that technology before we spend millions of dollars implementing and deploying it and at the expense of various American travelers, particularly people of color.

Mr. GREEN of Texas. Thank you.

Do you all agree there should be some deployment protocols that we can access to ascertain what the standard is that is being utilized before deployment? Do we all agree?

Mr. SINGH. Yes.

Mr. GREEN of Texas. Anyone differ?

Ms. NELSON. Absolutely.

Mr. GREEN of Texas. I will try to as best as I can help us achieve this level of perfection, and I thank you for your testimony.

I yield back.

Chairman THOMPSON. Thank you.

The Chair recognizes the gentlelady from Florida, Mrs. Demings.

Mrs. DEMINGS. Thank you so much, Mr. Chairman, to our Ranking Member, and to our witnesses for joining us today.

This is a very important hearing, and I am glad to see us having it.

If we could just go back to, Mr. Russell, the question is for you.

But, Ms. Nelson, you talked about the need for transparency. For example, airports, TSA could post information in the various airports, notifying the traveling public regarding complaints.

Mr. Russell, if you could, please tell me: What steps does the TSA take to ensure that passengers are even aware of the complaint process? I think Mr. Correa from California talked a little bit about this, that many times passengers are just trying to get through the airport. They may have been—their rights may have been violated at the time, but by the time they get through and are home, they have just said, “Let it go.”

What steps do you take to make sure the traveling public knows that if they feel that laws have been violated as it pertains to their civil liberties, that this is the way that they can make a complaint?

Mr. RUSSELL. The main mechanisms that we saw was that there is a portal, a TSA website, where you can file information. There are comment cards that can be utilized at the airports, and then airports have what are called customer service representatives that can assist passengers with that process. But as a traveler, you would have to, you know have the time to engage with the customer service representative to do something at the airport. So, for the most part, there is that 180-day window after the incident occurs where you can phone it in; or you can file it via the website.

Mrs. DEMINGS. They would have to go to the website to—

Mr. RUSSELL. Correct.

Mrs. DEMINGS [continuing]. Get that information about the—

Mr. RUSSELL. That is correct.

Mrs. DEMINGS. OK. All right. How does the TSA use complaint data and trend analysis to change its policies regarding complaints?

Mr. RUSSELL. So the multicultural branch does analysis of the complaints that come in with respect to civil rights and civil liberties issues. They can use that to work with the more operational part of TSA. The security operations, that is really responsible for the checkpoint to inform updates to the standard operating procedures or to send information to particular airports where there has been a spike in certain number of incidents or types of complaints.

Mrs. DEMINGS. So, if a recommendation is made regarding, you know, violation occurs and a recommendation is made regarding additional training.

Mr. RUSSELL. Right.

Mrs. DEMINGS. I am sure it has been. Could you talk a little bit about what kind of training has been recommended to TSA that has actually been implemented?

Mr. RUSSELL. Right. It could go to the individual screener involved in a complaint incident, and they might need refresher training, depending on what the issue was. It could be something that is a National shift brief, is what they call it, where it is information that is provided to all screeners across the 440 airports on a particular issue. Head gear is one. That has happened in the past. Then sometimes it can be just a heads-up awareness: Hey, we are seeing a particular issue in the complaint data. Here is some information around it like religious clothing was one that we saw.

Mrs. DEMINGS. So, if that occurs at a—or that recommendation is made at a particular airport, is that information shared with all airports?

Mr. RUSSELL. It depends on the situation. So it can be shared with all airports. Sometimes it is dedicated to the particular airport that where the incident occurred.

Mrs. DEMINGS. So back to the question about there are about 10 airports that account for, like, a third of the complaints. My colleague from Nevada asked the question about, is this just based on passenger volume, or would you say these particular airports, there is a lack of training—there is a training deficiency or some other bias that may exist? What—is it just passenger volume or more than that?

Mr. RUSSELL. Yes, this is just pure data. When you looked at the 3,700 complaints, where did they happen to occur? That list was the top 10 but—

Mrs. DEMINGS. How do you get a real—an accurate account of where problems exist—

Mr. RUSSELL. Uh-huh.

Mrs. DEMINGS [continuing]. Specifically if you are not looking at percentage of passenger volume and just looking at passenger volume?

Mr. RUSSELL. Right. So but that is what we had in our report is just that data. Our understanding is TSA does look for those types of trends, but that is all I can say. I mean, TSA would have to answer more on that.

Mrs. DEMINGS. Do they generate a report of their conclusions or the results of those evaluations?

Mr. RUSSELL. So what we have is a number of the training materials they have developed based on the complaints, and then we were able to see some of the complaint trends that they monitored. So, for example, there could be a range of complaints related to handling of baggage or PreCheck, as well as civil rights and civil liberty-type complaints.

Mrs. DEMINGS. OK. Thank you, Mr. Chairman.

I yield back.

Chairman THOMPSON. Thank you very much.

The Chair recognizes the gentlelady from New York, Ms. Clarke, for 5 minutes.

Ms. CLARKE. Thank you very much, Mr. Chairman.

I thank our Ranking Member for today's hearing. I thank our expert witnesses for bringing your testimony today, and please excuse the in and out. We have conflicting hearings but wanted to make sure that I had a conversation with this panel.

The TSA screens over 2 million passengers every day, and these passengers are as diverse as America itself. TSA must have policies in place that prevent profiling, ensure each and every passenger is judged solely on their security profile and never based on their race or religion. TSA screenings must rely on science, not prejudice, not bias, and not baked algorithms programmed by individuals who harbor either implicit or explicit bias. So, having said that, my first question is for Ms. Nelson.

If screening machines alarm disproportionately on Black women, it would follow that Black women are also subjected to a disproportionate number of invasive pat-downs. How does TSA pat-downs affect process—process affect African American passengers, given the context in history of policing of African Americans?

Ms. NELSON. Thank you for that question.

The disproportionate number of pat-downs and secondary screening processes reinforces the stereotype that African Americans and African American women in particular are connected with being suspicious individuals or potentially dangerous. It is a public viewing of that selective process. Many accounts by African American women describe being deeply humiliated, being delayed in their travel. There is an additional burden and cost to them personally and professionally often in traveling and being subjected to these processes and procedures.

Again, I underscore that we have yet to receive any indication that this is, in fact, improving our National security.

Ms. CLARKE. Building upon that, that answer, according to the Department of Justice statistics, African American girls and women, 12 and older, experience higher rates of rape, sexual assault than White, Asian, Latina girls and women from 1999 to 2010. How might a survivor of sexual assault react to being pat-down?

Ms. NELSON. It can be an extraordinarily traumatic experience for anyone who has been a victim of sexual assault or who has the fear of potentially being a victim of sexual assault.

We know from our studies that African American girls are often adultified in ways that bring unwarranted scrutiny and criticism and invasive practices to them as they travel and as they just go about their daily lives.

Ms. CLARKE. Screening machines alarm frequently due to thick hair and hairstyles popular among African American women and girls, making African American women more prone to invasive pat-downs. TSA has been trying to be responsive to concerns by African American women about the pat-down process, but the problem won't fully—won't be fully solved until TSA fields better technology.

In the mean time, what recommendations do you have for the TSA for improving the pat-down process for Black hair?

Ms. NELSON. Well, first, the TSA should replace the current technology with technology that can accurately screen Black hair. It is unacceptable to have technology funded by taxpayer dollars that cannot recognize and discern the hair of the people in its population. So, first and foremost, it needs to remove and revise its technology.

In terms of the on-going pat-down, there are ways in which they can be done less invasively. For example, there can be self-pat-downs. There can be ways in which African American travelers are able to have more agency in the process. So there are some near-term improvements, but our longer-term recommendation is that we scrap the technology that perpetuates racial profiling.

Ms. CLARKE. Very well.

A—I am sorry. Mr. Singh, many religious minorities including Muslim Americans and Sikh Americans feel they are targeted for random screening by the TSA. The program is supposed to generate—to operate without regard to ethnicity, color, gender, identity, religion, natural—national origin, sexual orientation, or disability. But how do we ensure that TSA is living up to this promise? Do you have concerns about TSA's use of behavioral detection?

Mr. SINGH. We are extremely concerned about the use of behavioral detection. It is technically a junk science. You know, there is no scientific evidence to support that it is effective. Neither has TSA shown any metrics that validate that it is a useful deterrence mechanism, and also we believe that there needs to be sensible limitations on TSO discretion. It is farfetched and unfettered in terms of any other law enforcement official. They typically have to articulate some kind of standard or basis that warrants the suspicion for a secondary search. TSOs are not subject to such discretion, and that is problematic. As a result, there are many instances of TSOs using their wide discretion for pretextual bases to secondarily screen Sikhs, Muslims, African Americans, and transgender individuals.

Ms. CLARKE. Thank you very much, Mr. Chairman.

I thank our panelists once again.

I yield back.

Chairman THOMPSON. Thank you.

The Chair recognizes the gentleman from Missouri, Mr. Cleaver, for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

Mr. Russell, is there some kind of process that TSA uses when they see a name, a name that is a suspicious name? Is there anything in your policies that would direct attention to people based on their name?

Mr. RUSSELL. If there—it would be through the secure flight process, which happens for every traveler, where you would match the name against different watch lists to determine if someone would need secondary screening based on that process.

Mr. CLEAVER. I was elected to the House in 2004, and I could barely make it to Washington each week and, but for an American Airline Washington bureau chief, I am not sure I would have even wanted to stay. I was stopped every week and harassed because of my last name because I have relatives who are rather famous with

that last name, and I am not one of the famous Cleavers, but there are relatives with that name.

I mean, it was an awful experience that I went through every single week. I mean, they take me there in the back room. You have to undress. Let us go through your hair. Let us tickle you, I mean, what—just about anything, and I was developing a resentment that I have gotten over.

I ran into this American Airline person at an event here in Washington about 3 weeks ago, and she just kind-of jokingly in front of some other folks just said: Are you still having problems?

So, I am still not comfortable, but I had—what I have done is I have TSA. I go through CLEAR, everything, trying to reduce the fact that somebody sees the name Cleaver and, all of a sudden, I am a member of the Black Panthers, and I am harassed. I am not—I haven't gone through that recently, but I don't want anybody else to go through it.

What guarantee, I mean—I mean, my name didn't match. I mean, my name is Emanuel. My cousin's name is Eldridge. They don't even—they are not even spelled alike. I mean, can you help me?

Mr. RUSSELL. Yes.

Mr. CLEAVER. There are 4 children.

Mr. RUSSELL. Right. No, from a GAO perspective, I mean, we have taken a look at some of the secure flight programs over the years that are supposed to be a process to go through redress for these types of situations that the Department of Homeland Security manages.

Mr. CLEAVER. Well, maybe it is because Homeland Security was only a couple of years old at the time. Maybe it is better.

Let me ask another question. My concern is, you know, you say that we have information about the complaints. Are the complaints—this is, Ms. Nelson or Mr. Singh, are the complaints only at the airports that are involved with TSA? I live in Kansas City, Missouri. Our airport is privately contracted. It is not a part of the Federal contract with TSA. So are there records being kept there as well?

Mr. SINGH. I am not aware of non-Federalized complaints. Typically, they tend to be for TSA specifically, and I don't know if TSA subcontracts and those—

Mr. CLEAVER. Two cities, Kansas City and San Francisco.

Mr. SINGH. We can go back and take a look.

Mr. CLEAVER. I would really, really appreciate it because, with the passing of each week, I become more and more inclined to try to begin a movement to force the Kansas City system into the Federal program, and I am trying to collect data, and that is one of the things that is—that has my attention.

Thank you very much. You can get that to my office, or somebody can. Can somebody get that information to me, please?

Ms. NELSON. We will do what we can to supplement the record, yes, thank you.

Mr. CLEAVER. Thank you.

I yield back the balance of my time.

Chairman THOMPSON. Thank you very much.

I thank the witnesses for their valuable testimony and the Members for their questions. I ask unanimous consent to enter into the record a report from the National Center for Transgender Equity without objections.

[The information follows:]

REPORT OF NATIONAL CENTER FOR TRANSGENDER EQUALITY

JUNE 4, 2019

The National Center for Transgender Equality (NCTE) is a Nation-wide, non-profit, non-partisan organization founded in 2003 to promote public understanding, opportunity, and well-being for the nearly 2 million Americans who are transgender. In addition to conducting public education and ground-breaking National survey research, NCTE works with Federal, State, and local agencies on a wide range of issues, and we have been in dialog with the TSA during my entire 9-year tenure at the organization. While NCTE's statement will focus on the challenges facing transgender travelers, we see these concerns as part of a spectrum of civil rights and privacy concerns that affect the traveling public more broadly, including particular problems faced by travelers with disabilities and members of racial and religious minorities.

TSA's important mission of protecting lives can and should be advanced without compromising the dignity, privacy, and personal liberty of the traveling public or our Nation's commitment to civil rights. As Hofstra Law School professor Irina Manta has argued in the *NYU Journal of Legislation and Public Policy*, passenger screening must be based on a robust analysis of the privacy, dignity, and liberty costs and the actual security benefits of particular screening measures.¹ Traveler outreach and engagement should continually inform this analysis and drive improvements. As described extensively in our testimony last year to the Transportation Security Subcommittee NCTE has engaged extensively with TSA for nearly a decade to describe and seek to address the problems faced by transgender travelers.² Unfortunately, we have seen little improvement.

The core of the problem NCTE hears about almost daily from travelers is this: TSA has made it its business to know what's in Americans' pants, every time they fly. It is entirely possible to keep Americans safe without innocent travelers being asked questions about the contents of their underpants by Government officials, or having their private parts touched by uniformed strangers every time they get on a plane. That is not in line with our values or the freedom TSA is charged to protect. The travelers we hear from don't just want to get to their gate more quickly, or make sure TSOs have a heads-up to expect someone whose body may cause an alarm, or have a kinder, gentler conversation with TSOs about their body parts or undergarments—they want to get on a plane without discussing their private parts or having them touched by Government officials, period.

TRANSGENDER TRAVELERS REGULARLY FACE HUMILIATION AT TSA CHECKPOINTS

The current system of passenger training seriously compromises civil rights and privacy, and transgender travelers are affected particularly harshly. As TSA works to pursue innovation in passenger screening—including in screening technology, procedures, and straining—we strongly urge the agency to prioritize the privacy, civil rights, and civil liberties of all passengers, including by ensuring that the use of AIT is gender-neutral and eliminating alarms caused solely by sensitive parts of the body—namely, the chest or genitals—or by undergarments.

An award-winning 2018 essay in MIT's *Journal of Design and Science* used the author's own TSA experiences as an illustration of the need to employing Design Justice principles in advanced technology:

“The TSA agent motions me to step into the millimeter wave scanner. I raise my arms and place my hands in a triangle shape, palms facing forward, above my head. The scanner spins around my body, and then the agent signals for me to step forward out of the machine and wait with my feet on the pad just past the scanner exit. I glance to the left, where a screen displays an abstracted outline of a human body. As I expected, bright fluorescent yellow blocks on the diagram highlight my chest and groin areas. You see, when I entered the scanner, the TSA operator on

¹ Irina D. Manta, *Choosing Privacy*, 20 N.Y.U. J. LEG. & PUB. POL. 649 (2017).

² The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts, Before the House Transportation Security Subcomm., 115th Cong. (2018).

the other side was prompted by the UI to select ‘Male’ or ‘Female.’ . . . If the agent selects ‘male,’ my breasts are large enough, statistically speaking, in comparison to the normative ‘male’ body-shape construct in the database, to trigger an anomalous warning and a highlight around my chest area. If they select ‘female,’ my groin area deviates enough from the statistical ‘female’ norm to trigger the risk alert, and bright yellow pixels highlight my groin, as visible on the flat panel display. In other words, I can’t win. I’m sure to be marked as ‘risky,’ and that will trigger an escalation to the next level in the TSA security protocol.

“This is, in fact, what happens: I’ve been flagged, the screen shows a fluorescent yellow highlight around my groin. Next, the agent asks me to step aside, and (as usual) asks for my consent to a physical body search. Typically at this point, once I am close enough to the agent, they become confused about my gender. This presents a problem, because the next step in the security protocol is for either a male or female TSA agent to conduct a body search by running their hands across my arms and armpits, chest, hips and legs, and inner thighs. The agent is supposed to be male or female, depending on whether I am male or female. . . . Sometimes, the agent will assume I prefer to be searched by a female agent; sometimes, male. Occasionally, they ask whether I prefer a search by a male or female agent. Unfortunately, ‘neither’ is an honest but not an acceptable response. Today, I’m particularly unlucky: A nearby male agent, observing the interaction, loudly states ‘I’ll do it!’ and strides over to me. I say ‘Aren’t you going to ask me what I prefer?’ He pauses, seems angry, and begins to move toward me again, but the female agent stops him. She asks me what I would prefer. Now I’m standing in public, surrounded by two TSA agents, with a line of curious travelers watching the whole interaction.

“Ultimately, the aggressive male agent backs off and the female agent searches me, making a face as if she’s as uncomfortable as I am, and I’m cleared to continue on to my gate.”³

TSA’s current Advanced Imaging Technology (AIT) and screening procedures seriously compromise the privacy and dignity of transgender travelers. In particular, transgender men routinely encounter alarms caused by their chest compression vests or by their chests themselves, while transgender women frequently encounter alarms caused solely by their private parts. These alarms and resulting additional screening—no matter how professionally conducted—are unnecessary, humiliating, and unacceptable, especially for travelers who experience them again and again. That’s true whether you’re a transgender woman like Shadi Petosky, who tearfully live-tweeted her TSA ordeal in Orlando in 2015,⁴ or CNN commentator Angela Rye (who is not transgender), whose video of her genital pat-down in Detroit made for queasy viral viewing in late 2016,⁵ or just a month ago American icon Diana Ross claiming she felt “violated” by an “over the top” screening in New Orleans that according to TSA, “correctly followed all protocols.”⁶ Whether transgender or not, the screening process can be especially harrowing for children, and for survivors of sexual trauma. Some parents of transgender children are quite afraid of air travel because of the humiliation their child could face in the case of an alarm in a sensitive area, a pat-down, or being publicly mis-gendered.

In 2015 NCTE conducted a ground-breaking survey of nearly 28,000 transgender adults across all 50 States, and 53 percent of our respondents had gone through airport security in the previous year.⁷ Of those, 43 percent of transgender travelers reported at least one negative experience with passenger screening related to being transgender in the previous year. These negative experiences included being referred to as the wrong gender or verbally harassed by Transportation Security Officers; receiving additional screening including pat-downs because of gender-related clothing; being subjected to a pat-down by an officer of the wrong gender; being loudly questioned about their gender or their body parts at the checkpoint; and being asked to remove or lift clothing to show an undergarment or sensitive area of the body. Some respondents reported being detained for over an hour or missing

³Sasha Costanza-Chock, “Design Justice, A.I., and Escape from the Matrix of Domination,” *Journal of Design and Science* 3.5 (2018), <https://jods.mitpress.mit.edu/pub/costanza-chock>.

⁴Katie Rogers, *TSA Defends Treatment of Transgender Air Traveler*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/us/shadi-petosky-tsa-transgender.html>.

⁵Angela T. Rye, *Dear TSA: The country is not safer because you grab vaginas*, CNN.com (Dec. 22, 2016), <https://www.cnn.com/2016/12/16/opinions/tsa-invasive-pat-down-rye/index.html>.

⁶Melinda Daffin, *Diana Ross says TSA made her want to cry at the New Orleans airport*, New Orleans Times-Picayune (May 5, 2019), <https://www.nola.com/jazzfest/2019/05/diana-ross-says-tsa-made-her-want-to-cry-at-the-new-orleans-airport.html>.

⁷James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*, 221–22. Washington, DC: National Center for Transgender Equality.

their flight due to gender-related screening issues. Some reported having to go through scanners multiple times; receiving multiple pat-downs; having TSOs refuse to pat them down because they were transgender; being questioned about their gender in front of their children; and leaving the checkpoint in tears. Some said they were simply too afraid to fly, or wracked with nerves every time. Some demanded to speak to supervisors or filed complaints and felt TSA was very responsive to complaints about insensitive or harassing treatment, while others were told nothing could be done because their bad experience was inherent in the current screening procedures.

While the U.S. Transgender Survey did not ask specifically about issues related to AIT, these are the most common issues NCTE hears about from travelers today. The AIT currently in use require TSOs to input a traveler's gender, making it a part of their job to scrutinize and guess, or ask, the gender of every traveler. Many travelers—some who are transgender, and some who are not—find themselves having to correct TSOs and be scanned again. This not only delays travelers, it can be embarrassing.

Even more concerning is the very common problem of alarms based on sensitive body parts, or on sensitive undergarments such as chest binders or personal prostheses that transgender travelers may wear. Alarms lead to pat-downs, which many travelers find inherently humiliating. We have heard from many travelers that they routinely experience alarms in the chest or groin or both, leading to intimate pat-downs and excruciating conversations when they travel. NCTE's own staff, interns, board members, and their friends, colleagues, and family members experience these problems routinely. For example, one of our survey respondents told us the following:

“Going through TSA, I am repeatedly asked to go back through the scan because there is an anomaly with my chest or groin. It is not resolved with a second scan, and I am subjected to a TSA agent's hands on my chest and up in my groin.”⁸

One of NCTE's former board members, who is also a senior citizen, wrote to us the following last year:

“I flew from Baltimore-Washington International Airport (BWI) to San Francisco today for a [business] meeting. After I went through the scanner, TSA screeners pulled me out of line, and said there was an ‘anomaly in the groin area,’ and that they would have to pat me down. I was concerned about making my flight, so I said OK. I was then patted down (or groped) by two women, followed by one man—buttocks, groin and legs. When they had finished, they made no further reference to the ‘anomaly,’ but said they would have to swab my hands; they did that, and after checking the swab, they sent me through.”⁹

A close colleague of the NCTE staff, attorney Carl Charles, published an op-ed in October 2015 describing his traveling experiences as a transgender man.¹⁰ Mr. Charles, then a law student traveling to the District of Columbia for a summer internship, wrote that his excitement over the trip was quickly squelched when he heard a TSO shout, “We have anomalies in the chest and groin area. Private screening, female agent requested.” Now, the agency has been responsive to complaints that about individual officers mis-gendering travelers, and we appreciate that. It has also since retired the term “anomaly” in favor of the term, “alarm”—leading to reports of TSOs stating, “There is something alarming in your groin.” But the problem here is more basic than terminology or even who is conducting a pat-down. The next thing Mr. Charles was asked was told [sic] was, “Sir, we need to know what's in your pants.” The conversation that followed was, inevitably, extremely uncomfortable.

While several of the above incidents were discussed in NCTE's testimony before the Transportation Security Subcommittee in February 2018, little has changed.¹¹ Recent press coverage featuring additional personal stories of transgender and gender non-conforming travelers' problems hardships with passenger screening are appended to this statement.¹²

⁸ Submitted to NCTE by a respondent to the 2015 US Transgender Survey.

⁹ Personal correspondence, Jan. 26, 2018.

¹⁰ Carl Charles, *Dear TSA, My Body Is Not an Anomaly*, *ADVOCATE* (Oct. 1, 2015), <https://www.advocate.com/commentary/2015/10/01/dear-tsa-my-body-not-anomaly>.

¹¹ The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts, Before the House Transportation Security Subcomm., 115th Cong. (2018).

¹² Alex Marzano-Lesnevich, *Flying While Trans*, *N.Y. TIMES* (April 17, 2019), <https://www.nytimes.com/2019/04/17/opinion/tsa-transgender.html>; Allison Hope, *Transgender travel: The complications and tips for dealing with them*, *CNN* (April 12, 2019), <https://www.cnn.com/travel/article/transgender-travel-complications-tips/index.html>; Arjee Restar, *Airlines Are Be-*

We appreciate the intent of some of the initiatives TSA has undertaken in recent years to improve the passenger experience, including the TSA Cares hotline, the use of Passenger Support Specialists, and the TSA Pre-Check programs. We know that these programs have been helpful for some passengers, but they have not addressed the basic concerns transgender travelers have. The travelers we hear from don't just want to get to their gate more quickly, or make sure TSOs have a heads-up to expect someone whose body may cause an alarm, or have a kinder, gentler conversation with TSOs about their body parts or undergarments—they want to get on a plane without discussing their private parts or having them touched by Government officials, period.

GAO'S FINDINGS UNDERSCORE THE NEED FOR REFORM

According to the complaint data in GAO's new report, more than 1 in 6 passenger complaints in recent years has been related to gender-based discrimination.¹³ These are not only transgender travelers but also many others who don't conform to the stereotypes that current procedures and AIT algorithms are based on. Moreover, we know that these complaint numbers are just the tip of the iceberg. Many travelers do not know where or how to file a complaint, or even why it's worth sharing their story. Many travelers have filed a complaint once but don't bother when they have the same bad experience again and again. By any measure, far too many Americans are being singled out and having their privacy invaded simply because of who they are or what their bodies look like.

GAO also found that, while TSA trains screeners on its profiling policy, it does not have systems in place to assess whether discriminatory profiling is actually occurring at checkpoints. We support GAO's recommendations for internal controls to actually monitor whether discriminatory profiling is occurring. However, the combination of screening procedures that are intrusive and explicitly gender-based with broad officer discretion creates too many openings for conscious and unconscious bias. Procedures and technology too must be reformed, including by establishing clear, consistent, and transparent standards for the use of officer discretion.

Similarly, given its reach into the everyday lives of millions of travelers, TSA should go beyond the broad Fourth Amendment standards articulated by Federal courts and require that physical pat-downs or requests to lift or remove clothing be no more intrusive than necessary to clear an alarm. For example, absent any other articulable basis of individual suspicion, an AIT alarm in one area of the body should not generally require a pat-down of a completely different, sensitive area of the body.

SCREENING WITH DIGNITY MEANS REFORMING TECHNOLOGY, PROCEDURES, TRAINING, AND OVERSIGHT

There is abundant evidence that the current screening model imposes a huge burden on passengers based on false alarms while missing a great deal of what it is meant to detect. Before investing millions more taxpayer dollars in new AIT with a lifespan of many years, TSA should explore a larger role for less invasive screening methods such as explosive trace detection, canines, and other emerging technologies. While there may be a role for AIT and pat-downs in screening, they need not be the primary methods for most travelers.

Any new technology for primary or secondary passenger screening should meet two fundamental standards:

- (1) Ensure gender-neutral screening, eliminating not only the infamous pink and blue buttons TSOs must select for each traveler but also gender-based algorithms.
- (2) Substantially reduce false alarms caused by body parts, undergarments, hair, or religious headwear. Alarms caused solely by these factors, no matter how courteously handled by TSOs, invariably lead to intrusive and embarrassing questions and pat-downs. Any technology that does not fix this problem cannot be considered a real improvement.

These basic principles should be part of any new procurement program and standards for passenger screening. Technology that can meet these goals should replace current AIT; technology that doesn't meet these goals shouldn't be procured.

coming Inclusive, But Airports Remain A Mess, ADVOCATE (Mar. 26, 2019), <https://www.advocate.com/commentary/2019/3/26/airlines-are-becoming-inclusive-airports-remain-mess>; Carina Julig, *How Airport Security Makes Travel Traumatic for Butches and Trans Folks*, SLATE (June 25, 2018), <https://slate.com/human-interest/2018/06/gendered-airport-security-makes-travel-traumatic-for-butches-and-trans-folks.html>.

¹³ Government Accountability Office, *Aviation Security: TSA Has Policies that Prohibit Unlawful Profiling But Should Improve Its Oversight of Behavior Detection Activities* (April 2019).

TSA's current exploration of face recognition software for use in airports also raises serious privacy and civil liberties concerns. Such concerns with this technology were highlighted in a recent hearing by the House Committee on Oversight and Government Reform.¹⁴ In addition to many other concerns, face recognition technology is subject to serious inaccuracies with respect to gender, potentially subjecting transgender people and others who do not conform to gender stereotypes to additional discrimination.¹⁵ For this reason, civil rights and civil liberties advocates have called for a Federal moratorium on these technologies in law enforcement contexts.

Recommendations:

NCTE makes the following policy recommendations:

- *Reconsider the reliance on AIT and pat-downs as primary screening methods.*—TSA's goal should be to make it a rare occurrence for uniformed officials to touch passengers' bodies or ask intrusive questions about their body parts or undergarments.
- *Ensure any new procurement program and standards for AIT: (1) ensure gender-neutral screening and (2) substantially reduce false alarms based on body parts, undergarments, hair, or religious headwear.*—Procurement programs and standards will drive the passenger experience for years to come—it would be a serious mistake for them to perpetuate the current ineffective and intrusive gender-based screening process.
- *Ensure any new AIT hardware or software procured by TSA actually meets these two fundamental goals.*
- *Ensure new technology or procedures reduce the use of pat-downs and ensure travelers aren't singled out based on their race, religion, or gender.*
- *Require TSOs to adhere to consistent and transparent standards of discretionary criteria that reduce the likelihood of profiling and ensure secondary screening is no more intrusive than necessary to clear an alarm.*
- *Mandate regular and independent Civil Liberties Impact Assessments at all airports Nation-wide.*
- *Mandate random TSO screener audits to prevent and detect discriminatory profiling and harassment and ensure effective responses by supervisors.*
- *Congress should re-introduce and pass the End Racial Profiling Act to comprehensively address discriminatory law enforcement practices, including in TSA. This bill would explicitly prohibit discriminatory law enforcement practices based on race, color, national origin, religion, or sex (including on the basis of gender identity or sexual orientation). These protections are critical to address profiling and other biased practices and build public trust.*
- *Congress should re-introduce and pass the Screening with Dignity Act to codify existing passenger protections and require TSA to improve its technology, procedures, and training.*—This legislation should be strengthened to provide a definite time line for phasing out gender-based AIT screening.
- *Congress should adopt a Federal moratorium on the use of face recognition technology for law enforcement, immigration, or security purposes.*

NCTE will, of course, continue to engage with TSA and encourage travelers to share their experiences and their complaints. We urge this committee to take decisive action through oversight and legislation to ensure that no traveler must sacrifice their dignity, privacy, or civil rights in order to travel.

Chairman THOMPSON. The Members of the committee may have additional questions for the witnesses, and we ask that you respond expeditiously in writing to those questions.

Without objection, the committee record shall be kept open for a 10 days.

Hearing no further business, the committee stands adjourned.

[Whereupon, at 11:48 a.m., the committee was adjourned.]

¹⁴ Facial Recognition Technology (Part 1): Its Impact on our Civil Rights and Liberties Before the House Oversight and Reform Comm., 116th Cong. (2019). See also U.S. Gov't Accountability Office, GAO-16-267, Face Recognition Technology: FBI Should Better Ensure Privacy and Accuracy (May 2016), available at <https://www.gao.gov/assets/680/677098.pdf>.

¹⁵ Os Keyes, "The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition," *Proceedings of the ACM on Human Computer Interaction* 2, CSCW, Article 88 (Nov. 2018), <https://doi.org/10.1145/3274357>.

APPENDIX

QUESTIONS FOR W. WILLIAM RUSSELL FROM CHAIRMAN BENNIE G. THOMPSON

Question 1. DHS's response to GAO's report noted that the Department was "pleased to note" that GAO's analysis of civil rights complaint data "identified only 3,700 complaints related to passenger screening alleging civil rights and civil liberties violations."

Do you believe the Department treats allegations of civil rights and civil liberties violations with the seriousness they deserve?

Answer. Over the course of our recent review, our observation was that TSA generally treated the civil rights and civil liberties complaints received in a professional manner. We reviewed about 3,700 complaints received by TSA from October 2015 through February 2018 alleging civil rights and civil liberties violations related to passenger screening.¹ For the 2,059 complaints with complete information, we found that TSA's Multicultural Branch—the office responsible for reviewing complaints alleging civil rights and civil liberties violations—reviewed the complaints to determine if the complaint included indications of discrimination. Through this process, the Multicultural Branch found indications of potential discrimination and unprofessional conduct that involved race or other factors in 1,066 complaints. In response, TSA recommended a range of refresher training across airports or for screeners at individual airports identified in these complaints. In addition, TSA's Office of Human Capital Employee Relations reported that it took a range of disciplinary actions—from letters of reprimand to termination—for 100 screeners from October 2015 through February 2018, in part in response to passenger complaints alleging civil rights and civil liberties violations.²

Question 2. Has GAO studied the extent to which DHS and TSA focus on civil rights and civil liberties compliance when developing technologies and procedures?

Answer. GAO has not studied this issue directly. However, in 2014, we found that test results on TSA's advanced imaging technology (AIT) screening systems indicated that certain factors had an effect on false alarm rates.³ According to Transportation Security Laboratory test results of AITs with automated target recognition (ATR) system from 2009 through 2012, certain factors, such as body mass index (BMI) and headgear, such as turbans and wigs, may contribute to greater fluctuations in the false alarm rate, either above or below that threshold.⁴

In the course of work, we also found that in August 2018, as part of a Broad Agency Announcement (BAA), TSA invited vendors to submit proposals for AIT im-

¹ GAO, *Aviation Security: TSA Has Policies that Prohibit Unlawful Profiling But Should Improve Its Oversight of Behavior Detection Activities*, GAO-19-268 (Washington, DC: June 4, 2019).

² TSA officials stated that none of the complaints that resulted in the disciplinary actions were specific to behavior detection. TSA's Human Capital Employee Relations officials determined that more than 60 percent of the 100 screeners used inappropriate comments or were engaged in misconduct, including offensive comments or actions based on another's race, national origin, and/or sex, among other factors.

³ GAO, *Advanced Imaging Technology: TSA Needs Additional Information Before Procuring Next-Generation Systems*, GAO-14-357 (Washington, DC: March 31, 2014).

⁴ AIT systems equipped with ATR (AIT-ATR) automatically interpret the image and display anomalies on a generic outline of a passenger instead of displaying images of actual passenger bodies like the AIT systems that used IOs (AIT-IO). Screening officers (SO) use the generic image of a passenger to identify and resolve anomalies on site in the presence of the passenger. BMI is a number calculated from a person's weight and height and is considered a fairly reliable indicator of body fatness by the Centers for Disease Control and Prevention. BMI categories include underweight (BMI below 18.5), normal (BMI from 18.5 to 24.9), overweight (BMI from 25.0 to 29.9), and obese (BMI over 30.0).

improvements that promote Federal Civil Rights compliance.⁵ Vendors were also encouraged to submit solutions that addressed capability gaps in civil rights compliance, including upgrades to improve screening of transgender passengers.

The BAA stated that submissions “should ensure access and equal opportunity as required by Section 504 of the Rehabilitation Act, 6 C.F.R. Part 15, and DHS Directive No. 065–01 (Sept. 25, 2013) and DHS Instruction No. 065–01–001 (Mar. 13, 2015) for individuals with disabilities, and to improve screening of headwear and hair in compliance with Title VI of the Civil Rights Act.”

Question 3. Has GAO studied whether the DHS and TSA Office for Civil Rights and Civil Liberties are appropriately empowered within their respective organizations?

Answer. GAO has not studied this issue.

QUESTIONS FOR SIM J. SINGH FROM CHAIRMAN BENNIE G. THOMPSON

Question 1a. What interactions has the Sikh Coalition had with TSA’s Multicultural Branch?

Has TSA been willing to meet with you and listen to your concerns?

Answer. The TSA Multicultural Branch has met with the Sikh Coalition in the past and invited us to participate in coalition conference calls. Our most recent TSA Multicultural Coalition conference call occurred on June 7, 2019, where the Sikh Coalition and other civil rights advocacy groups listened to the TSA’s presentation on progress it was making towards addressing concerns raised by passenger complaints.

During the last call with TSA, the Sikh Coalition discussed complaints we received from several Sikh passengers who were subjected to secondary screenings because of their turbans based on “local rules”. We expressed concerns about the inconsistency of TSA’s policies at different airports. Multicultural Branch officials stated that they did not believe any such “local rules” existed but assured us they would look into the issue. Subsequently, the Sikh Coalition filed a complaint (see attached) on this issue regarding a Sikh passenger who was subjected to secondary screening based on an alleged “local rule” after he had already been cleared from the screening area. The individual in question originally filed a FlyRights complaint but was asked by TSA to provide additional information before they would review his complaint. We learned on the Multicultural Coalition conference call that responses to these requests for additional information must be submitted within 10 days. However, the email requesting that additional information does not provide a time line for submitting responses, nor does it provide a contact email to submit this supplemental information. Our client, therefore, submitted a new complaint through TSA’s website. We are still waiting to learn the results of the investigation into his complaint. Additionally, TSA has not yet provided us with any information about the steps it will take to ensure that agents are not relying on local rules to subvert civil rights of travelers with turbans.

Question 1b. Do you believe the Multicultural Branch is appropriately empowered to drive change within TSA?

Answer. The Multicultural Branch at the TSA has frequently attempted to resolve all traveler concerns with all known civil rights stakeholders participating in the same events. Events such as the Annual Disability and Multicultural Coalition Conference or periodic Coalition Conference Calls are well-attended by disparate community interest groups. As a result, specific concerns experienced by community groups are not provided adequate consideration by the Multicultural Branch as attendees are severely constrained in time to address wide-ranging community concerns. The infrequency of these meetings contributes to competition amongst civil rights groups to flag their concerns with the TSA. The Multicultural Branch should seek to institute quarterly meetings for community groups with similar concerns. One such model to follow is the DOJ Interagency regular meetings with civil rights organizations of the Muslim, Arab, Sikh, and South Asian (MASSA) community to narrowly tailor discussions and solutions pertinent to the specific community.

Question 2a. The Sikh Coalition developed the FlyRights App to help passengers file complaints with TSA.

Why was it necessary to create your own app for this purpose?

Answer. In the third quarter of 2011, the TSA claimed to have received a mere 11 complaints, and as such the agency was able to claim it did not profile travelers. The Sikh Coalition received many more incidents of TSA profiling from travelers

⁵ *TSA Innovation Task Force: Innovative Demonstrations for Enterprise Advancement (IDEA) 2018 BAA* (August 2, 2018) https://www.fbo.gov/index.php?s=opportunity&mode=form&id=7f581e20fe1e865a60437d733c14992b&tab=core&_cview=1.

during this time period and it became abundantly clear action was required to help address the under-counting of reports.

While the TSA was accepting email complaints and complaints submitted through the TSA's website, many travelers were unsure of how to file a complaint, felt intimidated, or would forget details and lose motivation as time passed following an incident. FlyRights was launched in April 2012 to give travelers a quick and easy way to file their complaints. The App was also able to add a layer of transparency that the TSA lacked. Travelers are able to track the frequency of complaints at specific airports and gain access to know your rights materials. The application has been used hundreds of times since its launch, and the data further supports our previous claim that Sikhs remain disproportionately targeted in cases of profiling at airports.

Question 2b. Please describe the range of travelers that have used FlyRights App besides Sikh travelers.

Answer. Travelers from all walks of life and identities have used the FlyRights App. Reports submitted through FlyRights do not track an individual's specific identity but track whether the traveler believes that they were discriminated against based on a category of race, ethnicity, religion, nationality, gender, and/or disability. The FlyRights App has been promoted within various community stakeholder groups that are not Sikh and used by non-Sikh travelers, including travelers with disabilities, transgender, and/or African Americans.

Question 2c. What types of complaints have you seen from other communities, and are these shared experiences?

Answer. We have received profiling complaints from Muslim travelers who were subject to secondary screening, including one instance where the traveler had already been cleared from the screening area and boarded his flight, yet was taken off the plane because he was allegedly "chosen for extra screening." Similarly, we have seen complaints from African-American travelers being subject to secondary screening of their hair and subsequently having their bags thoroughly searched. We have also received complaints from transgender travelers who reported they were told by TSA officers that they had to go through a heightened security screening—including a full body pat-down and a thorough search of all their personal belongings. Other complaints from transgender travelers report being denied a pat-down by an officer of the same gender as they present themselves. Lastly, we have seen complaints of gender discrimination, where a female passenger who maintains short hair was designated as male and subsequently subject to a pat-down by a male officer. On numerous occasions, nursing mothers have also filed complaints about attempting to bring breast milk through security.

Although complaints filed by Members of other communities are not always identical to the complaints filed by Sikh travelers, there is a clear pattern of heightened security screening for minority communities.

QUESTION FOR JANAI S. NELSON FROM CHAIRMAN BENNIE G. THOMPSON

Question. TSA says it has strengthened training for TSO's in recent years, including for working with diverse passenger populations.

What aspects of these civil rights and civil liberties complaints can be addressed solely through increased officer training and professional development? Which aspects of these complaints would instead require changes to TSA's technologies or standard operating procedures?

Answer.

1. No aspects of hair discrimination and other civil rights complaints against TSA can be addressed solely through increased officer training and professional development.

With respect to discriminatory hair pat-downs that disproportionately burden Black people, the subject of my testimony on June 4, 2019, increased officer training and professional development are necessary but, unfortunately, not sufficient to address this problem. Training and professional development are essential to constrain some of the potentially discriminatory and/or unconstitutional aspects and effects of Transportation Security Administration (TSA) policies, practices, and technologies. However, while training, including anti-bias training and professional development, must be funded and required, they are insufficient on their own to eliminate most aspects of civil rights concerns. As long as TSA maintains policies and practices such as requiring screeners to conduct unscientific behavior detection activities and

using technologies like facial recognition¹ and full-body scanners that cannot distinguish between contraband and Black hair, the disparate and disproportionate harm will continue. Training and professional development can help mitigate that harm, but it will not eliminate the sources of the harm, which are the technologies, policies, and practices that perpetuate racial discrimination.

In addition to eliminating the sources of the harm, TSA should immediately evaluate its current anti-bias and anti-discrimination training and assess the data it has collected, particularly with respect to hair pat-down complaints filed by Black women. In 2015, a lawsuit filed by the ACLU of Northern California against TSA because of TSA's racially discriminatory hair searches resulted in TSA agreeing to "make certain that current training related to nondiscrimination is clear and consistent for TSA's workforce" and to ensure that its Multicultural Branch "will specifically track hair pat-down complaints filed . . . [by] African-American females throughout the country to assess whether a discriminatory impact may be occurring at a specific TSA secured location."² The agreement also stipulated that two airports, Los Angeles International Airport (LAX) and Minneapolis St. Paul International Airport (MSP), will retrain their TSA workforces "to stress TSA's commitment to race neutrality in its security screening activities with special emphasis on hair pat-downs of African-American female travelers."³

Given that this agreement was executed in 2015, TSA should have already begun implementing a plan to evaluate its training with respect to racial discrimination and hair pat-downs. This plan should have included consistently reviewing and assessing complaints regarding hair pat-downs and whether the increased and more-targeted trainings were having an impact on the quantity or the substance of the complaints, both on a National level and specifically with respect to LAX and MSP. There is no evidence, though, that TSA has in fact implemented such a plan, or that TSA is treating the issue with the appropriate level of attention and importance. As a result, it is difficult to have any confidence in TSA's record keeping or its transparency with the public.

At bottom, the burdens that Black passengers face when traveling by air as a result of TSA's technology, policies, and practices are unacceptable. Responsive training and professional development that are informed by complaint data and comprehensive evaluation can help ensure that, when full-body scanners single out Black women for hair pat-downs, for example, these searches are done in the least invasive and most culturally competent ways that preserve the passenger's dignity and privacy. However, mitigating the harm visited upon Black travelers through improved training and professional development is a short-term and ultimately inadequate goal. Instead, TSA must eliminate fully the discriminatory burdens on Black passengers.

2. Aspects of hair discrimination and other civil rights complaints against TSA that require changes to TSA's technologies or standard operating procedures.

As an initial matter, while it is essential for TSA to pay attention and act responsively to discrimination complaints, the focus must be on rooting out and addressing the underlying discrimination and civil rights violations—not simply on minimizing the number of complaints. First, there are many indicators that discriminatory searches, including hair pat-downs, are under-reported. Some frequent flyers may notice that they are being disproportionately selected for searches; others may not. In addition, there are many instances of discriminatory hair pat-downs that are reported or are not advanced in the complaint process.⁴ Reports also suggest that Black women are subjected to hair pat-downs at far greater rates than other passengers.⁵ Second, even the best training may minimize the number of complaints,

¹ Facial recognition technology or systems are "computer-based security systems that are able to automatically detect and identify human faces" based on a "recognition algorithm." Electronic Privacy Info. Ctr., Face Recognition, <https://www.epic.org/privacy/facerecognition/> (last visited July 5, 2019). The dangers of both facial recognition technology and TSA's behavior detection procedures are discussed further in response to Question 2, *infra*.

² Letter from Bryan W. Hudson, TSA, to Novella Coleman, ACLU (Jan. 12, 2015), https://www.aclunc.org/sites/default/files/2015.01.12%20Singleton%20TSA%20resolution_0.pdf (setting forth terms of agreement).

³ *Id.*

⁴ Brenda Medina, *TSA Agents Say They're Not Discriminating Against Black Women, but Their Body Scanners Might Be*, *ProPublica* (Apr. 17, 2019), <https://www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be> ("Most people we heard from said they had not known they could file a complaint.")

⁵ See *id.*; Tatiana Walk-Morris, *Why is the TSA Still Searching Black Women?*, *Cosmopolitan* (Apr. 24, 2018), <https://www.cosmopolitan.com/lifestyle/a18666534/tsa-black-women-hair-searches/>; Gaby Del Valle, *How Airport Scanners Discriminate Against Passengers of Color*, *Vox* (Apr. 17, 2019), <https://www.vox.com/the-goods/2019/4/17/18412450/tsa-airport-full-body-scanners-racist>.

but it is not a substitute for addressing the root problem. For example, through effective training, it is possible for TSA screeners to interact with Black women flagged for a hair pat-down in a manner that treats them with fairness, dignity, respect, and privacy. Relatedly, the number of complaints submitted to TSA could conceivably decrease even though the full-body scanners continue to misidentify Black hair as potential contraband. The potentially hidden nature of this discrimination underscores the need for a sustained effort to bring transparency and reform to the technologies and policies that have a discriminatory impact on Black women, other people of color, and the LGBTQ community.

My testimony on June 4 focused largely on the effects of full-body scanners and called for, among other things, increased transparency, more robust data collection, a more publicized and navigable complaint process, an explanation from TSA regarding how the many false-positive results from full-body scanners are justified by a security need, and a revisiting of the programming and algorithms used in the full-body scanners to make clearer the distinction between Black hair and actual security threats. I stress again here that it is unacceptable for technological flaws to perpetuate racism. Agencies must be held accountable when the systems they sanction and oversee reflect racial bias and impermissibly discriminatory decision making. If TSA would not tolerate a screener who disproportionately and with no basis singles out Black women for hair pat-downs, there is no excuse for TSA to continue relying on a technology that consistently does the same. TSA must provide the necessary fixes to full-body scanners or use a non-discriminatory alternative.

Other TSA security technologies and procedures are equally concerning. For example, TSA's plan for a sweeping expansion of its use of facial recognition technology,⁶ with little public oversight, has drawn censure from many, including Senators concerned about, among other things, the technology's potentially discriminatory effects and TSA's refusal to submit its plan to formal rulemaking before beginning to roll it out.⁷ TSA's facial recognition technology is part of its expansive biometrics plan, which also includes collecting and storing fingerprint data from TSA Pre-Check passengers to perform criminal background checks.⁸ TSA also plans to share passenger biometrics data with other DHS agencies.⁹ It does not appear that TSA has adequately responded to concerns raised about the ways in which facial recognition technology operates in a racially discriminatory manner. The Department of Homeland Security's Office of the Inspector General published a 2018 report in which it questioned the U.S. Customs and Border Protection's (CBP) use of facial recognition and biometric technology, noting that "CBP could not consistently match individuals of certain age groups or nationalities" and that "biometric confirmation" was "limited . . . to only 85 percent of all passengers processed."¹⁰ Ample research reveals race-based disparities in the accuracy of facial recognition.¹¹ It would be a hollow achievement to have a workforce adequately trained in anti-bias and anti-

⁶Transp. Sec. Admin., TSA Biometrics Roadmap 5, (Sept. 2018), https://www.tsa.gov/sites/default/files/tsa_biometrics_roadmap.pdf [hereinafter TSA Biometrics Roadmap] ("Facial recognition has long been TSA's modality of choice in aviation security operations. . . . The TSA Biometrics Roadmap seeks to leverage facial recognition technology to automate that process to enhance security effectiveness, improve operational efficiency, and streamline the passenger experience.").

⁷Electronic Privacy Info. Ctr., Comments to the Transp. Sec. Admin., Review of the 2018 National Strategy for Transportation Security (Apr. 25, 2019), <https://epic.org/apa/comments/EPIC-Comments-TSA-National-Strategy-for-Transportation-Security-Apr-2019.pdf> (quoting Senator Udall ("it is unclear . . . whether the software treats all travelers and Americans equally in practice . . .") and Senator Markey ("I'm very disappointed that [TSA] will not commit to ensuring these fundamental protections are in place through a formal rulemaking . . .").

⁸TSA Biometrics Plan at 12.

⁹Id. at 13 ("TSA will integrate existing biometric holdings and newly collected biometric data with the DHS enterprise biometric system of record (IDENT/HART) and gain access to additional biometric services in accordance with applicable laws, regulations, and policy.").

¹⁰U.S. Dep't of Homeland Sec., Office of Inspector Gen., OIG-18-80, *Progress Made, but CBP Faces Challenges Implementing a Biometric Capability to Track Air Passenger Departures Nation-wide 2* (Sept. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-80-Sep18.pdf>.

¹¹See, e.g., James Vincent, *Gender and racial bias found in Amazon's facial recognition technology (again)*, *The Verge* (Jan. 25, 2019), <https://www.theverge.com/2019/1/25/18197137/amazon-rekognition-facial-recognition-bias-race-gender>; Joy Buolamwini and Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, *Proceedings of Machine Learning Research* 81:1-15, 1 (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> (noting that "[r]ecent studies demonstrate that machine learning algorithms can discriminate based on classes like race and gender," using an evaluation tool to determine "bias present in automated facial analysis algorithms," and finding "substantial disparities in the accuracy of classifying" people of color).

discrimination principles when race-based discrimination continues unchecked through automation and algorithms.

In addition to problematic technologies like facial recognition, biometrics, and the full-body scanners, TSA has employed pseudo-scientific “behavior detection” procedures for well over a decade.¹² Under these procedures, screeners rely on a checklist of behavioral indicators to assess whether a passenger is acting suspiciously. After years of growing concerns from Congressmembers and others over ineffectiveness and misuse, TSA eliminated its Behavior Detection Officer position consistent with a Congressional mandate and, in November 2017, eliminated its stand-alone behavior detection program.¹³ In August 2017, the behavior detection program was revised and the behavior indicator list was cut down from 96 indicators to 36. TSA now refers to the procedures as “Optimized Behavior Detection”¹⁴—essentially a secret risk assessment tool that TSA claims is scientifically proven to identify people who pose security threats. Despite the persistent racial profiling claims and complaints from passengers over the years, TSA “rapidly expanded” its behavior detection program while “never produc[ing] empirical data in support of the program” and “costing taxpayers a total of \$1.5 billion between 2007 and 2015.”¹⁵ In 2013, the Government Accountability Office found that “TSA was unable to demonstrate that the agency’s behavior detection activities could reliably and effectively identify high-risk passengers. . . .”¹⁶ Worse, TSA’s own scientific record not only shows behavior detection to be unreliable, but also shows “an unacceptable risk of racial and religious profiling” while containing “materials that range from culturally insensitive to racially and religiously biased and sexist.”¹⁷

In multiple contexts, we have seen technology (e.g., social media platforms) develop at a rapid pace while executives and decision makers ignore certain warning signs along the way, creating intractable problems that would have been more manageable to address earlier in the process. We hope that TSA is not intent on taking this path and is listening to critical concerns, including those about racial discrimination, as it makes its security decisions. According to TSA, it is adequately training its screeners on TSA’s policies against racial profiling,¹⁸ and, since the 2015 agreement with the ACLU of Northern California, TSA should have been ensuring that training related to nondiscrimination is clear and consistent for all of its employees. Instead of simply promising more trainings, TSA should evaluate what it is currently offering and assess why it has been insufficient. Most importantly, TSA should be fully transparent with its technologies, such as full-body scanners and facial recognition technology, as well as its procedures, such as behavior detection. It must also undertake the work necessary to understand the risks of discriminatory effects, and then develop the technology and procedures in a way that eliminates those risks.

As a Government agency that interacts with millions of people of color each year as they navigate air travel in the United States, it is TSA’s responsibility to ensure that they are safe, treated fairly, and can travel by air without civil rights violations. These problems have persisted for too long, and TSA or an oversight body must strike at their root before the spread of untested and unchecked technology causes them to grow out of reach.



¹² U.S. Gov’t Accountability Office, *Aviation Sec., TSA has policies that prohibit unlawful profiling but should improve its oversight of behavior detection activities 1* (Apr. 2019) [hereinafter GAO Report].

¹³ See GAO Report at 7–9; Michael Nunez, *TSA knows its racist profiling system doesn’t work, Gizmodo* (Feb. 8, 2017), <https://gizmodo.com/the-tsa-knows-its-racist-profiling-program-doesnt-work-1792129898>.

¹⁴ *Id.* at 9–10.

¹⁵ Nunez, *supra* note 13.

¹⁶ GAO Report at 1.

¹⁷ ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program 1* (2017).

¹⁸ GAO Report at 14–15.