



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Alvaro M. Bedoya

Statement of Commissioner Alvaro M. Bedoya
On *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation*
Commission File No. 202-3190

December 19, 2023

1. Biased face surveillance hurts people.

The Commission brings this action against Rite Aid over its use of face surveillance technology to “drive and keep persons of interest out of [its] stores.”¹ The technology alerted employees when it identified a supposed match between a customer and the images in Rite Aid’s database.² The Commission charges that the technology produced thousands of incorrect matches.³

We often talk about how surveillance “violates rights” and “invades privacy.” We should; it does. What cannot get lost in those conversations is the blunt fact that *surveillance can hurt people*. In its complaint, the Commission alleges:

- A Rite Aid employee stopped and searched an 11-year-old girl because of a false match.⁴ The girl’s mother reported that she missed work because her daughter was so distraught about the incident.⁵
- Rite Aid employees called the police on a customer because the technology generated an alert against an image that was later described as depicting “a white lady with blonde hair.”⁶ The customer was Black.
- Many other customers – people shopping for food, medicine, and other basics – were wrongly searched, accused, and expelled from stores. Sometimes, they were humiliated in front of their bosses, coworkers, or families.⁷

Sadly, we’ve heard this all before. Two years ago, a mom in Detroit dropped her teenage daughter off at a local skating rink. But she couldn’t get in. A face recognition system used by that skating rink mistakenly blocked her entry. She’d never been there before. But a computer

¹ Complaint for Permanent Injunction and Other Relief at para. 3, Fed. Trade Comm’n v. Rite Aid Corp. (E.D. Pa. Dec. 19, 2023).

² *Id.*

³ *Id.* at para. 31.

⁴ *Id.* at para. 91.

⁵ *Id.*

⁶ *Id.* at para. 48.

⁷ *Id.* at para. 4.

told security that she'd been in a fight there earlier that year – with 97% confidence.⁸ In Detroit alone, at least three people have been falsely accused of a crime because of facial recognition technology.⁹ Some have been arrested in front of their family.¹⁰ All have been Black.¹¹

It has been clear for years that facial recognition systems can perform less effectively for people with darker skin and women.¹² In spite of this, we allege that Rite Aid was more likely to deploy face surveillance in stores located in plurality-non-White areas than in other areas.¹³ Rite Aid then failed to take some of the most basic precautions. The Commission alleges Rite Aid gave a presentation that identified *only a single risk* with expanding its face surveillance program: “[m]edia attention and customer acceptance”;¹⁴ that it used low-quality images that were unsuitable for automated analysis, including those captured using closed-circuit TV cameras and media reports;¹⁵ that it trained store employees to “push for as many enrollments as possible”;¹⁶ and that it typically did not include confidence intervals to help store-level employees better gauge whether a match might be a false positive.¹⁷

⁸ Randy Wimbley & David Komer, *Black teen kicked out of skating rink after facial recognition camera misidentified her*, FOX 2 DETROIT (July 16, 2021), <https://www.fox2detroit.com/news/teen-kicked-out-of-skatingrink-after-facial-recognition-camera-misidentified-her>.

⁹ Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, THE N.Y. TIMES (Aug. 6, 2023), <https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html>.

¹⁰ Miriam Marini, *Farmington Hills man sues Detroit police after facial recognition wrongly identifies him*, DETROIT FREE PRESS (Apr. 13, 2021 4:07 PM), <https://www.freep.com/story/news/local/michigan/2021/04/13/detroit-police-wrongful-arrest-faulty-facial-recognition/7207135002/>.

¹¹ Hill, *supra* note 9.

¹² See, e.g., PATRICK GROTH ET AL., NAT’L INST. OF STANDARDS AND TECHN., FACE RECOGNITION VENDOR TEST PART 3: DEMOGRAPHIC EFFECTS (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> (finding “empirical evidence for the existence of demographic differentials in the majority of contemporary face recognition algorithms that we evaluated.”); CYNTHIA M. COOK ET AL., DEMOGRAPHIC EFFECTS IN FACIAL RECOGNITION AND THEIR DEPENDENCE ON IMAGE ACQUISITION: AN EVALUATION OF ELEVEN COMMERCIAL SYSTEMS, IEEE TRANSACTIONS ON BIOMETRICS, BEHAVIOR, AND IDENTITY SCIENCE (2019), <https://mdtf.org/publications/demographic-effects-image-acquisition.pdf> (finding that demographics affected the confidence scores that algorithms assigned to a given match, with incorrect scores being more common for women, younger people, and subjects with darker skin); Krishnapriya K. S. et al., *Characterizing the Variability in Face Recognition Accuracy Relative to Race* (Conference on Computer Vision and Pattern Recognition Workshops, 2019), https://openaccess.thecvf.com/content/CVPRW_2019/papers/BEFA/S_Characterizing_the_Variability_in_Face_Recognition_Accuracy_Relative_to_Race_CVPRW_2019_paper.pdf (finding algorithms produced higher confidence in true positive matches for men over women). See also Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1, 8 (2018), <https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> (finding that all tested facial analysis tools designed to classify faces by gender perform better on male faces than female faces, better on lighter faces than darker faces, and worst on darker female faces). See also CLARE GARVIE, CENTER ON PRIVACY & TECHNOLOGY AT GEORGETOWN LAW, A FORENSIC WITHOUT THE SCIENCE: FACE RECOGNITION IN U.S. CRIMINAL INVESTIGATIONS 21(2022), https://mcusercontent.com/672aa4fbde73b1a49df5cf61f/files/2c2dd6de-d325-335d-5d4e84066159df71/Forensic_Without_the_Science_Face_Recognition_in_U.S._Criminal_Investigations.pdf (surveying research and concluding that “[r]egardless of what differential is discovered, each of these studies underscores a key weakness in the reliability of a face recognition search—that the accuracy of a given search can change depending on the demographic of the person....”).

¹³ Complaint, *supra* note 1, at para. 41.

¹⁴ *Id.* at para. 11.

¹⁵ *Id.* at para. 22.

¹⁶ *Id.* at para. 23.

¹⁷ *Id.* at para. 27.

The result was a system that malfunctioned frequently and spectacularly.¹⁸ The problems were so obvious that employees expressed frustration about the accuracy of the system.¹⁹ Many people are frightened and frustrated by retail theft. But it is easy to see how biased surveillance systems like this one make stores *less* safe.

People encountering these facts for the first time may reflect on the fact that “shopping while Black” was a problem long before the age of commercial face surveillance. A decade ago, then-President Barack Obama famously remarked that “[t]here are very few African-American men in this country who haven’t had the experience of being followed when they were shopping in a department store” – including him.²⁰

One key difference with face surveillance is that a *computer* is telling a person that the customer is suspicious. And people trust computers. This is in part because of “automation bias” – a human tendency to believe that what a machine tells us must be true.²¹

II. Today’s settlement offers a strong baseline for what an algorithmic fairness program should look like.

The attached Order has many strengths. First and foremost, *it flat-out bans Rite Aid from using face surveillance for five years*,²² and requires deletion of biometric data collected in connection with the operation of the system.²³ Going forward, if Rite Aid decides to take up such a system in the future, the Order:

- forces Rite Aid to tell people when they are enrolled in the system, and tell them how to contest their entry into that system;²⁴
- forces Rite Aid to tell consumers when it takes some action against them based on that enrollment that could hurt them, and tells them how to contest those actions;²⁵
- forces Rite Aid to answer those complaints quickly;²⁶

¹⁸ *Id.* at para. 31.

¹⁹ *Id.*

²⁰ Gene Demby, *Two Tales of Profiling, From The Highest Offices In The Land*, NPR (July 19, 2013), <https://www.npr.org/sections/codeswitch/2013/07/19/203715163/two-tales-of-profiling-from-the-highest-offices-in-the-land>.

²¹ See, e.g., Kate Goddard et al., *Automation bias: a systematic review of frequency, effect mediators, and mitigators*, 19 J. OF THE AM. MED. INFORMATICS ASS’N 121, 121 (2017), <https://www.ncbi.nlm.nih.gov/pmc/article/PMC3240751/pdf/amiajnl-2011-000089.pdf>.

²² Decision and Order at 6-7, Rite Aid Corporation, FTC Docket No. C-4308 (Dec. 19, 2023) (Provision I).

²³ *Id.*

²⁴ *Id.* at 13-15 (Provision IV) (this provision has a limited exception for situations where notice is impossible due to safety concerns or the nature of the security incident involved).

²⁵ *Id.* (this provision also has a limited exception for situations where notice is impossible due to safety concerns or the nature of the security incident involved).

²⁶ *Id.*

- requires robust testing, including testing for statistically significant bias on the basis of race, ethnicity, gender, sex, age, or disability – *acting alone or in combination*;²⁷
- requires detailed assessment of how inaccuracies may arise from training data, hardware issues, software issues, probe photos, and differences between training and deployment environments;²⁸
- requires ongoing annual testing “under conditions that materially replicate” conditions in which the system is deployed;²⁹
- requires that Rite Aid shut down the system if it cannot address the risks identified through this assessment and testing;³⁰ and
- creates an opportunity for the Commission to conduct ongoing compliance monitoring.³¹

Commission Staff worked hard to reach this agreement under unusual and complex circumstances. I applaud them for it.

Having recognized those strengths, I want to be clear about two things. First, I want industry to understand that this Order is a *baseline* for what a comprehensive algorithmic fairness program should look like. Beyond giving people notice, industry should carefully consider how and when people can be enrolled in an automated decision-making system, particularly when that system can substantially injure them. In the future, companies that violate the law when using these systems should be ready to accept the appointment of an independent assessor to ensure compliance.

Second, no one should walk away from this settlement thinking that this Commission affirmatively supports the use of biometric surveillance in commercial settings. While I believe we have obtained the strongest possible settlement with the evidentiary record and legal posture with which we have been presented, there is a powerful policy argument that there are some decisions that should not be automated at all; many technologies should never be deployed in the first place. I urge legislators who want to see greater protections against biometric surveillance to write those protections into legislation and enact them into law.

III. This case is part of a broader trend of algorithmic unfairness.

It is my view that Section 5 of the FTC Act requires companies using technology to automate important decisions about people’s lives – decisions that could cause them substantial injury – to take reasonable measures to identify and prevent foreseeable harms. Importantly, these protections extend beyond face surveillance. Indeed, the harms uncovered in this

²⁷ *Id.* at 7-13 (Provision III).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 25-6, 27-8 (Provisions XIV & XVI).

investigation are part of a much broader trend of algorithmic unfairness – a trend in which new technologies amplify old harms.

We see it in hiring when employers develop résumé screening models, trained on their predominantly male workforce, that spuriously reject women.³² We see it in housing when advertising platforms steer housing ads away from people based on their sex and estimated race or ethnicity.³³ And we see it in credit when a lender’s pricing models charge applicants who attended a Historically Black College or University higher rates for refinancing a student loan than similarly situated applicants who did not.³⁴

Algorithmic unfairness is pernicious. It hurts people invisibly and at scale. And it tends to harm people because of *who they are*, reifying patterns of discrimination deeply embedded in our nation’s history.³⁵ Algorithmic unfairness hurts people who are already hurting. I am proud that this Commission is moving to confront it.

³² Jeffrey Dastin, *Insight - Amazon scraps secret AI recruiting tool that showed bias against women*, REUTERS (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scrapssecret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

³³ Press Release, Dep’t of Just., Justice Department and Meta Platforms Inc. Reach Key Agreement as They Implement Groundbreaking Resolution to Address Discriminatory Delivery of Housing Advertisements (Jan. 9, 2023), <https://justice.gov/opa/pr/justice-department-and-meta-platforms-inc-reach-key-agreement-they-implement-groundbreaking>.

³⁴ STUDENT BORROWER PROT. CTR., EDUCATIONAL REDLINING 10 (2020), <https://protectborrowers.org/wp-content/uploads/2020/02/Education-RedliningReport.pdf>.

³⁵ As this Commission has previously explained, “Practices that meet the factors of Section 5(n) are not insulated from the Commission’s oversight merely because they involve discriminatory conduct. [...] Section 5 does not wilt when Congress legislates.” See Chair Lina M. Khan, Comm’r Rebecca Kelly Slaughter, and Comm’r Alvaro M. Bedoya, Joint Statement In the Matter of Passport Auto Group (Oct. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/joint-statement-of-chair-lina-m.-khan-commissioner-rebecca-kelly-slaughter-and-commissioner-alvaro-m.-bedoya-in-the-matter-of-passport-auto-group.pdf.