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Asian Americans Advancing Justice |
AAJC

President and CEO
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November 18, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

The Honorable Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th St. SW
Washington, D.C. 20528

**Re: Assessment of and Revisions to the Anti-Discrimination Policies of the
Departments of Justice and Homeland Security**

Dear Attorney General Garland and Secretary Mayorkas,

On behalf of The Leadership Conference on Civil and Human Rights and the undersigned organizations, we commend President Biden's pledge and actions to enhance equity in our nation, and in particular his directive to you and your departments to "assess the implementation and effects" of the Justice Department's (DOJ) December 2014 "Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity"ⁱ (2014 Guidance) and to "consider whether this guidance should be updated."ⁱⁱ We appreciate the discussions many of our organizations have had with your departments already, and strongly urge your departments to seize this opportunity to issue comprehensive and meaningful anti-discrimination policies that finally end biased profiling by your agencies, including in their partnerships with state and local law enforcement.

Specifically, we urge you to issue anti-discrimination rules that:

1. Prohibit discrimination based on actual or perceived race, ethnicity, religion, national origin and nationality, sexual orientation, disability, and gender (including gender identity and expression) across each department component, without any loopholes.
2. Close loopholes that treat "routine or spontaneous law enforcement activities" differently from other activities, and treat the border region differently than the rest of the nation.
3. Ensure that nationality and national origin are not used as a proxy to discriminate against people based on their race, ethnicity, or religion.
4. Apply to state and local law enforcement agencies that receive federal funding or participate in joint operations or partnerships with federal law enforcement agencies.
5. Provide data collection, training, and accountability measures to ensure compliance and effective implementation.

More than seven years ago, The Leadership Conference and many partner organizations wrote to President Obama expressing serious concerns about the loopholes in the 2014 Guidance and its application to the Department of Homeland Security (DHS). Put simply, DOJ and DHS have anti-discrimination policies that to this day permit discrimination. Taken together, the loopholes across the two departments allow federal agents to target people and communities for surveillance, investigation, and other measures on the basis of race, ethnicity, religion, and other protected traits; fail to adequately cover large swaths of activity undertaken by each department; and exclude many state and local police partnerships with federal law enforcement from the protections that the 2014 Guidance does include.ⁱⁱⁱ

Because of these deficiencies, the 2014 Guidance in effect sanctions the damaging and unwarranted targeting of communities of color and immigrants, tearing at the fabric of our society. DHS has stated that it follows the 2014 Guidance, but the practical effect of this commitment is very unclear.^{iv} Indeed, DHS has a patchwork of anti-discrimination policies that leave gaping loopholes both in the traits protected and in the activities to which the policies apply.

The 2015 Leadership Conference letter was written after the killings of Michael Brown, Tamir Rice, and Eric Garner. The names of George Floyd, Philando Castile, Breonna Taylor, Daunte Wright, and too many other Black people now join that devastating roster. Still, law enforcement agencies at all levels of government continue to operate in ways that undermine our country's ideals of fairness, justice, and due process for all. DOJ and DHS anti-discrimination policies contribute to this failure and allow both clear bias and "invidious profiling" to continue.^v For example:

- Muslim Americans have for decades been treated as suspicious and targeted for surveillance, investigation, prosecution, and watchlisting by the FBI and other agencies.^{vi} The FBI has spied on Muslim communities, including by infiltrating their places of worship.^{vii} When traveling, Muslim Americans are regularly subjected to questioning about their faith by DHS agents.^{viii} Muslim Americans have also been subjected to DHS-funded countering violent extremism programs that wrongly assume that their religious and political beliefs are precursors to terrorism.^{ix}
- Black communities have long been in law enforcement's crosshairs. In 2017, the FBI concocted the label "black identity extremists," opening the door to bias-based profiling of Black people and Black-led organizations demanding racial justice.^x Since the FBI has been forced to drop this category, the bureau hides the extent to which its operations target racial justice movements by grouping them together with violent white supremacists.^{xi}
- Federal agencies have used false and stigmatizing stereotypes to profile and target Asian Americans, particularly Chinese American scientists and academics.^{xii} Racial bias against people of Asian descent has influenced the investigations and prosecutions of Asian Americans and immigrants across the country.^{xiii} This discrimination intensified under DOJ's "China Initiative," the wide-ranging effort to scrutinize, investigate, and prosecute U.S.-based scientists and researchers believed to have connections to China. Although DOJ has rightly disavowed the China Initiative, Asian American communities remain concerned that discrimination will continue in the name of national security unless explicitly banned — and that rising xenophobia has further fueled anti-Asian sentiments and a new wave of racial profiling.
- Black and Latino migrants and other immigrants also face blatant discrimination at the border

- and in immigration enforcement.^{xiv} One study in Michigan found that while people of Latin American origin make up 16.8 percent of the state's foreign-born population, nearly 84 percent of all noncitizens apprehended by Border Patrol were originally from Latin America.^{xv}
- American citizens and lawful permanent residents, particularly Arabs, Muslims, Middle Easterners, and South Asians, are targeted for questioning and detained at the border based simply on their country of birth.^{xvi} Officers charged with identifying potentially risky travelers by looking for suspicious behaviors have said that a scientifically discredited program they employed amounted to a back door for racial profiling.^{xvii} Exacerbating matters, Customs and Border Protection is deploying secretive teams that target, detain, and interrogate innocent travelers and may do so based on “instinct,” creating the high risk that these secretive teams are targeting travelers based on explicit or implicit biases.^{xviii}
 - Racial justice, indigenous, and border rights activists exercising their First Amendment rights to protest are treated as suspect and even as national security threats.^{xix} DHS's Office of Intelligence and Analysis has targeted racial justice protestors. The department's own reviews paint an alarming picture of the extent to which counterterrorism authorities have been subverted for political purposes to falsely paint protestors as potential terrorists.^{xx} The FBI has also used its authorities to target individuals engaged in migrant justice work, including border groups' activities and family separation protests.^{xxi}

At the root of the problem is the fact that the 2014 Guidance draws a fundamental and unjustified distinction between “routine or spontaneous law enforcement decisions, such as ordinary stops” and all other contexts. For the former, federal law enforcement officers are banned from using race, religion, national origin, and other protected traits “to any degree,” except in a specific suspect description. But the same rule does not apply to activities in the broad and vague contexts of national and homeland security, the border, screening activities, and intelligence gathering. In these contexts, biased profiling continues largely unchecked, often through secretive government programs that evade meaningful accountability. While both departments have a patchwork of other rules, those rules are designed to give federal agents wide discretion in using protected characteristics with weak or non-existent safeguards.^{xxii} For example, DHS's policies fail to cover profiling on the basis of religion and even allow DHS agents to consider the national origin of American citizens.

The 2014 Guidance in effect also excludes state and local law enforcement, failing to use the federal government's immense influence and resources to address biased policing. The killings of Black people made headlines and galvanized historic protests around the country, yet biased policing continues unabated. Many millions of dollars in federal funding flow to state and local police and partnerships between federal, state, and local law enforcement, such as FBI-led Joint Terrorism Task Forces (JTTFs) and DHS-led fusion centers. Given the loopholes outlined above, these partnerships have unsurprisingly come under criticism and scrutiny for bias-infused reporting, analysis, and investigations, and for lacking adequate civil rights, civil liberties, and privacy safeguards.^{xxiii} The partnerships collect and share vast amounts of Americans' personal data and carry out surveillance and investigative activities without adequate public oversight. As a result, both JTTFs and fusion centers have long targeted Muslims and in recent years have added the Black Lives Matter movement and family separation protestors to their list of “suspicious” movements.^{xxiv}

Finally, there is no publicly available information about whether DOJ or DHS have implemented the 2014 Guidance’s requirement to track complaints and study implementation through “targeted, data-driven research projects.”^{xxv} Even the best anti-discrimination policies are of little value without serious attention to implementation and impact, which appear to have been neglected.

We believe these recommendations will go a long way toward meeting our shared goal of eliminating discriminatory policing and profiling, moving our nation forward on the path to achieving the ideal of equal justice for all.

Thank you for considering our views. If you have any questions, please contact Nadia Aziz, senior director of The Leadership Conference’s Fighting Hate & Bias Program, at aziz@civilrights.org; Hina Shamsi, director of the ACLU National Security Project, at hshamsi@aclu.org; and Faiza Patel, senior director of the Brennan Center for Justice’s Liberty and National Security Program, at PatelF@brennan.law.nyu.

Sincerely,

The Leadership Conference on Civil and Human Rights
American Civil Liberties Union
Brennan Center for Justice
American-Arab Anti-Discrimination Committee (ADC)
Andrew Goodman Foundation
Arab American Institute (AAI)
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice – AAJC
Autistic Self Advocacy Network
Bend the Arc: Jewish Action
Center for Disability Rights
Center for the Study of Hate & Extremism
Color of Change
Disability Rights Advocates
Disability Rights Education & Defense Fund
Equal Justice Society
Equality California
FL National Organization for Women
Greater Orlando National Organization for Women
Haitian Bridge Alliance
Hispanic Federation
Houston Immigration Legal Services Collaborative
Impact Fund
Indivisible Miami
Japanese American Citizens League

LatinoJustice PRLDEF
League of Conservation Voters
Matthew Shepard Foundation
Miami Coalition to Advance Racial Equity
Miami NOW
Movement Advancement Project (MAP)
NAACP Legal Defense Fund (LDF)
National Association of Councils on Developmental Disabilities
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Council of Jewish Women, Greater Miami Section
National Employment Law Project
National Hispanic Media Coalition
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIPNLG)
National Organization for Women
NCJW Sarasota Manatee
People for the American Way
Progress Florida
Project on Government Oversight
SAGE
SAVE Inc – Safeguarding American Values for Everyone
Southern Border Communities Coalition
Southern Poverty Law Center Action Fund
Tahirh Justice Center
The Sikh Coalition
TransSOCIAL, Inc.

ⁱ Department of Justice, “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” December 2014, https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf.

ⁱⁱ Exec. Order 14074, § 9(e), 87 Fed. Reg. 32945, 32952–3 (May 25, 2022), <https://www.federalregister.gov/documents/2022/05/31/2022-11810/advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and>.

ⁱⁱⁱ The Leadership Conference on Civil and Human Rights et al. to President Barack Obama, “Re: Concerns with the U.S. Department of Justice Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” February 24, 2015, <https://civilrights.org/resource/re-concerns-with-the-u-s-department-of-justice-guidance-for-federal-law-enforcement-agencies-regarding-the-use-of-race-ethnicity-gender-national-origin-religion-sexual-orientation-or-gender-id/#>.

^{iv} Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*, Brennan Center for Justice, April 20, 2022, 4, <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>.

^v Faiza Patel, “Ending the ‘National Security’ Excuse for Racial and Religious Profiling,” Brennan Center for Justice, July 22, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ending-national-security-excuse-racial-and-religious-profiling>.

^{vi} Hugh Handeyside, “This Woman’s Endless Ordeal Shows How the Watchlisting System Harms Innocent People,” American Civil Liberties Union (hereinafter “ACLU”), August 14, 2018, <https://www.aclu.org/news/national-security/womans-endless-ordeal-shows-how-watchlisting-system>; Ahmad Chebli, “I Refused to Become an FBI Informant, and the Government Put Me on the No Fly List,” ACLU, April 6, 2021, <https://www.aclu.org/news/national-security/i-refused-to-become-an-fbi-informant-and-the-government-put-me-on-the-no-fly-list>; Suzanne Monyak, “Advocates Urge 4th Circ. To Strike Down Terrorist Watchlist,” Law360, <https://www.law360.com/articles/1279519/advocates-urge-4th-circ-to-strike-down-terrorist-watchlist>; and *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021).

^{vii} See, e.g., ACLU of Southern California, “Fazaga v. FBI,” accessed November 10, 2022, <https://www.aclusocal.org/en/cases/fazaga-v-fbi>.

^{viii} *Kariye v. Mayorkas*, No. 2:22-cv-01916 (C.D. Cal. filed Mar. 24, 2022).

^{ix} See Faiza Patel and Meghan Koushik, *Countering Violent Extremism*, Brennan Center for Justice, March 16, 2017, https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf; and Rupa Shenoy, “Critics Say Biden’s Plan to Combat Domestic Extremism Repeats Past Mistakes,” *World*, July 1, 2021, <https://theworld.org/stories/2021-07-01/critics-say-biden-s-plan-combat-domestic-extremism-repeats-past-mistakes>.

^x ACLU, “Leaked FBI Documents Raise Concerns About Targeting Black People Under ‘Black Identity Extremist’ and Newer Labels,” August 9, 2019, <https://www.aclu.org/press-releases/leaked-fbi-documents-raise-concerns-about-targeting-black-people-under-black-identi-1>.

^{xi} *Examining the ‘Metastasizing’ Domestic Terrorism Threat After the Buffalo Attack, Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 12 (2022) (testimony of Michael German, Fellow, Liberty & National Security Program, Brennan Center for Justice), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20German%20-%202022-06-07.pdf>.

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[challenge-warrantless-surveillance](#); and ACLU, “In Historic Settlement, U.S. Government To Pay Wrongly Prosecuted Chinese American Scientist More Than \$1.5 Million In Damages,” November 10, 2021, <https://www.aclu.org/press-releases/historic-settlement-us-government-pay-wrongly-prosecuted-chinese-american-scientist>.

^{xiii} Gisela Perez Kusakawa and Hammad Alam, “From ‘War on Terror’ to the ‘China Initiative:’ The Chilling Parallels of Racial Profiling Between Chinese American and AMEMSA Communities,” *Advancing Justice – AAJC*, May 23, 2022, <https://medium.com/advancing-justice-aajc/from-war-on-terror-to-the-china-initiative-the-chilling-parallels-of-racial-profiling-between-a67f802757b2>.

^{xiv} Robert F. Kennedy Human Rights, “Human Rights Groups Support United Nations In Confronting U.S. Government on Racially Discriminatory Immigration Policies,” August 12, 2022, <https://rfkhumanrights.org/press/human-rights-groups-support-united-nations-in-confronting-u-s-government-on-racially-discriminatory-immigration-policies> (citing the Haitian Bridge Alliance and the Black Alliance for Just Immigration); Mexican American Legal Defense and Educational Fund, National Day Laborer Organizing Network, and National Hispanic Leadership Agenda, *Detention, Deportation, and Devastation: The Disproportionate Effect of Deportations on the Latino Community*, May 2014, https://www.maldef.org/assets/pdf/DDD_050614.pdf; ACLU, “Lawsuit Charges U.S. Uses Secrets, Unfounded ‘National Security Concerns’ to Deny Muslim Immigrants Citizenship,” July 31, 2014, <https://www.aclu.org/press-releases/lawsuit-charges-us-uses-secret-unfounded-national-security-concerns-deny-muslim>; and ACLU of Southern California, “Muhanna v. USCIS,” accessed November 10, 2022, <https://www.aclusocal.org/en/cases/muhanna-v-uscis>.

^{xv} ACLU of Michigan, “The Border’s Long Shadow,” March 25, 2021, <https://www.aclumich.org/en/publications/borders-long-shadow>

^{xvi} Mahita Gajanan, “CBP Commissioner: U.S. Border Officers ‘Overzealous’ in Detaining Iranian Nationals, Iranian-American Citizens,” *TIME*, February 12, 2020, <https://time.com/5782835/iranian-nationals-detained-canada-border>; Customs and Border Protection, “Iranian Supreme Leader Vows Forceful Revenge After US Kills Maj. General Qassim Suleimani in Baghdad — Threat Alert High,” Department of Homeland Security (hereinafter “DHS”), accessed November 10, 2022, <https://www.documentcloud.org/documents/6746395-Seattle-Field-Office-Memo.html>; and Hina Shamsi, “Flying Home From Abroad, a Border Agent Stopped and Questioned Me ... About My Work for the ACLU,” ACLU, February 7, 2017, <https://www.aclu.org/news/immigrants-rights/flying-home-abroad-border-agent-stopped-and-questioned-me-about-my-work-aclu>.

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^{xx} Dell Cameron, “Homeland Security Admits It Tried to Manufacture Fake Terrorists for Trump,” *Gizmodo*, November 5, 2022, <https://www.yahoo.com/video/homeland-security-admits-tried-manufacture-114500599.html>.

^{xxi} Jana Winter and Hunter Walker, “Exclusive: Document Reveals the FBI Is Tracking Border Protest Groups as Extremist Organizations,” Yahoo News, September 4, 2019, <https://news.yahoo.com/exclusive-document-reveals->

[the-fbi-is-tracking-border-protest-groups-as-extremist-organizations-170050594.html](https://www.brennancenter.org/our-work/research-reports/focusing-fbi).

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^{xxiv} Chris Brooks, "After Barr Ordered FBI to 'Identify Criminal Organizers,' Activists Were Intimidated at Home and at Work," *Intercept*, June 12, 2020, <https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee/>; Lee Fang, "Why Was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest?," *Intercept*, March 12, 2015, <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest/>; Alex Kane, "How the NYPD's Counterterrorism Apparatus Is Being Turned on Protestors," *VICE*, January 19, 2015, https://www.vice.com/en_us/article/exm3z4/how-the-nypds-counter-terror-apparatus-is-being-turned-on-police-protesters-119; Dan Neumann, "MIAC 'Shadow Report' Raises Questions About Surveillance, Targeting of Vulnerable Mainers," *Beacon (Maine People's Alliance)*, April 1, 2022, <https://mainebeacon.com/miac-shadow-report-raises-questions-about-surveillance-targeting-of-vulnerable-mainers/>; Privacy SOS, "So-Called 'Counterterror' Fusion Center in Massachusetts Monitored Black Lives Matter Protesters," November 27, 2015, <https://privacysos.org/blog/so-called-counterterror-fusion-center-in-massachusetts-monitored-black-lives-matter-protesters/>; Josh Anderson, "Is ARIC Still Watching?," *Austin Chronicle*, December 11, 2020, <https://www.austinchronicle.com/news/2020-12-11/is-aric-still-watching/>; and Jesse Franzblau, "New Documents Expose Government Monitoring of Protests Against Family Separation," National Immigrant Justice Center, April 29, 2019, <https://immigrantjustice.org/staff/blog/new-documents-expose-government-monitoring-protests-against-family-separation>.

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