



To: Members of the Equality Working Group
From: American Civil Liberties Union
Date: July 8, 2014

Re: Equality Working Group Initiative on Race and Gender

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The ACLU welcomes the Equality Working Group's initiative focusing on executive branch actions on discrimination at the intersection of race and gender. We have appreciated our past work with the Equality Working Group and are providing this memorandum to suggest priority objectives the agencies should undertake in furtherance of the initiative and Executive Order 13107's mandate to fully implement U.S. human rights treaty obligations. In light of the Working Group's mandate to advance implementation of the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention"), we appreciate your goal of explicitly linking the Equality Working group's work to U.S. human rights obligations. Accordingly, for each recommendation below, we briefly describe the related human rights legal obligations and recommendations of human rights treaty bodies.

1. Access to Emergency Contraception for Native American Women – Health and Human Services

Native American women experience sexual assault at a higher rate than all other U.S. populations, which is one reason why it is essential that they have access to over-the-counter emergency contraception (known as "Plan B").¹ Although the emergency contraceptive Plan B has been available without a prescription to adult women since 2006,² studies show

¹ See Native American Community Board, Indigenous Women's Dialogue, Roundtable Report on the Accessibility of Plan B as an Over the Counter Within Indian Health Service (February 2012), available at <http://www.nativeshop.org/images/stories/media/pdfs/Plan-B-Report.pdf>; Amnesty International, Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA (2007), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

² Plan B was approved for sale without a prescription to adults in 2006. The age restriction was lowered to 17 in 2009. It is currently available over-the-counter to women and girls of all ages. See Rob Stein, *17-Year-Olds to Gain Access to Plan B Pill*, Wash. Post (April 26, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/22/AR2009042202248.html>.

that as much as 90 percent of Indian Health Service facilities do not provide it over the counter to the Native American women they serve. Some facilities require a doctor's visit and prescription, while others do not carry it at all.³

For some Native American women, if emergency contraception is unavailable at their Indian Health Service facility, the next alternative may be hundreds of miles away. The effectiveness of emergency contraception decreases every twelve hours. Yet the distance and potentially insurmountable transportation costs make timely access to emergency contraception difficult if not impossible for many women.⁴

Indian Health Service's failure to ensure access to over the counter emergency contraception violates its own internal policies, legal obligations, and Federal Drug Administration (FDA) guidelines. Pursuant to a court order, the FDA approved Plan B for all-ages for over the counter use. Indian Health Service has since added the drug to its national core formulary, obligating Indian Health Service pharmacies and emergency rooms to stock it. Yet the problem of inconsistent access or no access persists.

International human rights obligations: As a party to the Race Convention, the U.S. government is obligated to review policies that create or perpetuate racial discrimination, and amend, rescind or nullify laws and regulations that have the effect of creating or perpetuating racial discrimination.⁵ The gross disparity in access to emergency contraceptives for Native American women may amount to discrimination in the fields of sexual and reproductive health, in violation of the Race Convention.⁶ The Committee on the Elimination of Racial Discrimination has specifically urged the United States to "address persistent racial disparities in sexual and reproductive health," including by "facilitating access to adequate contraceptive and family planning methods."⁷ Human rights law also obligates the US government to provide adequate health services support to victims of sexual assault, as part of its "due diligence" to address abuses committed by private individuals.⁸

³ See *id.*; Letter from Alexa Kolbi-Molinas and Charon Asetoyer, CEO, Native American Community Board, to Janet Ingersoll, FOIA Coordinator, Department of Health and Human Services, (Feb. 26, 2013), *available at* https://www.aclu.org/files/assets/ihs_ec_foia_letter_signed.pdf.

⁴ See Press Release, ACLU, Despite Legal Obligations, Over Half of Indian Health Services Facilities Reportedly Offer No Emergency Contraception (Feb. 26, 2013), <https://www.aclu.org/reproductive-freedom/despite-legal-obligations-over-half-indian-health-services-facilities>.

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c), December 21, 1965, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 UNTS 195, entered into force January 4, 1969, ratified by the United States on October 21, 1994, *available at* <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> [hereinafter Race Convention].

⁶ See *id.*, art. 1, art. 5(iv) (noting the right to public health and medical care).

⁷ U.N. Committee on the Elimination of Racial Discrimination (CERD), Consideration of reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 32-33, CERD/C/USA/CO/6 (May 8, 2008), *available at* <http://www.refworld.org/docid/4885cfa70.html>.

⁸ International law obligates government to protect and fulfill human rights. This includes the concomitant responsibility governments have to both ensure their own officials comply with human rights standards and to act with "due diligence" to address abuses carried out by private individuals. Due diligence includes a requirement that where human rights violations occur, the government provide compensation and support for victims. See Race Convention, art. 2; U.N. Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general

The U.N. Declaration on the Rights of Indigenous Peoples, adopted by the U.N. General Assembly in September 2007, emphasizes that indigenous peoples have “an equal right to the enjoyment of the highest attainable standard of physical and mental health”⁹ and requires state measures to “ensure that indigenous women...enjoy the full protection and guarantees against all violence and discrimination.”¹⁰ The United States supports the Declaration as part of President Obama’s commitment to addressing the consequences of a history of marginalization against Native Americans.¹¹

Recommendations:

- The U.S. Department of Health and Human Services (HHS) should issue a formal policy requiring Indian Health Service facilities to ensure over the counter access to emergency contraceptives.
- HHS should direct Indian Health Service to develop a campaign to increase awareness among Native American women about the availability of emergency contraception.
- HHS should direct Indian Health Service to develop better protocols related to sexual assault, including providing women with information about STDs, pregnancy, emergency contraception and abortion options.

2. Employment Discrimination Against LGBT People of Color

There is no federal law that explicitly protects lesbian, gay, bisexual, and transgender (LGBT) people from employment discrimination and 32 states currently lack such explicit protections for both sexual orientation and gender identity. The reality of being fired, denied a job, or experiencing some other form of discrimination in the workplace is one with which too many LGBT people, particularly LGBT people of color, have personal experience. For example, surveys of black LGBT people put rates of employment discrimination near 50 percent. For Asian and Pacific Islander LGBT people, those who say they have experienced employment discrimination based on their sexual orientation range from 75-82 percent.¹² The largest national survey of transgender people to date, the National Transgender Discrimination Survey, found that nearly half had been discriminated against in hiring, promotion, or job retention and nearly 80 percent had experienced at least one form of harassment or mistreatment at work because of

legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, *available at* <http://www.refworld.org/docid/478b26ae2.html>; U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38, *available at* <http://www.refworld.org/docid/453882a422.html>; Jessica Gonzales v. United States, Inter-American Commission on Human Rights, Report No. 80/11, Case 12.626 (July 21, 2011), *available at* <https://www.aclu.org/womens-rights/jessica-gonzales-v-usa-iachr-final-report>.

⁹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 24(2), U.N. Doc. A/RES/47/1 (2007).

¹⁰ *Id.*

¹¹ See Memorandum from U.S. Dep’t of State, U.N. Declaration on the Rights of Indigenous Peoples Review, *available at* <http://www.state.gov/s/tribalconsultation/declaration/>.

¹² Movement Advancement Project et al., A Broken Bargain for LGBT Workers of Color 29 (2013), *available at* <http://www.lgbtmap.org/file/a-broken-bargain-for-lgbt-workers-of-color.pdf>.

their gender identity.¹³ Among transgender people of color, about a third of black, Latino, and American Indian respondents each reported having lost a job due to bias.¹⁴

Because of this, LGBT people of color have higher rates of unemployment compared to non-LGBT people of color. For example, unemployment rates for transgender people of color have reached as high as four times the national unemployment rate.¹⁵

Even in the absence of an explicit federal prohibition on sexual orientation and gender identity discrimination in employment, Executive Branch agencies can still take steps to protect LGBT people from this form of discrimination. The White House, in particular, has authority to prohibit employment discrimination among federal contractors, a step the President has promised to take.

International Human Rights Obligations: As a party to the Race Convention, the U.S. government is obligated under Article 2 to “prohibit and bring to an end, by all appropriate means...racial discrimination by any persons, group or organization.”¹⁶

In its 2008 Concluding Observations on the United States, the Committee urged the U.S. government to “take all appropriate measures—including increasing the use of ‘pattern and practice’ investigations—to combat *de facto* discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention.”¹⁷ It also urged the U.S. to ensure the availability of effective remedies and protection to workers belonging to racial, ethnic and national minorities, in case of violation of their human rights by their employer.¹⁸

These obligations apply with equal force to the patterns of discrimination against LGBT workers that we have described. Indeed, the U.S. government recently accepted a recommendation in the Universal Periodic Review process that it “take measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender.”¹⁹ Two months after it accepted this recommendation, the United States cosponsored a resolution in the U.N.’s Human Rights Council to condemn human rights abuses against LGBT people and to commission the first-ever U.N. report on the challenges faced by LGBT people globally.²⁰

Recommendations:

¹³ Jaime M. Grant et al., *Injustice at Every Turn* 56, 53 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

¹⁴ *Id.* at 53.

¹⁵ Movement Advancement Project et al., *supra* note 12, at 5.

¹⁶ The U.S. ratified the treaty subject to a reservation that it does not undertake obligations under Article 2 with respect to private conduct except as mandated by the Constitution and U.S. law. Race Convention, art.2(1)(d).

¹⁷ CERD, *supra* note 7 ¶ 28.

¹⁸ *Id.*

¹⁹ U.S. Dep’t of State, Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights In Conjunction with the Universal Periodic Review: Response to the U.N. Human Rights Council Working Group Report ¶ 112 (March 10, 2011), available at <http://www.state.gov/j/drl/upr/157986.htm>.

²⁰ Press Release, U.S. Dep’t of State, United Nations Human Rights Council Resolution on Sexual Orientation & Gender Identity (June 17, 2011), available at <http://www.state.gov/secretary/20092013clinton/rm/2011/06/166383.htm>.

- As the President recently pledged, the White House should issue an executive order immediately barring all federal contractors from engaging in employment discrimination based on sexual orientation and gender identity. Given that an estimated one in five American workers is employed by a federal contractor, the reach of such an order would be significant.
- The U.S. Equal Employment Opportunity Commission should issue guidance on the scope of protections for LGBT people under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex.
- The U.S. Department of Labor should adopt rules explicitly prohibiting discrimination based on sexual orientation and gender identity in federally-funded job training and workforce development programs.

3. Access to Housing and Implementation of the Violence Against Women Act

With reauthorization of the Violence Against Women Act (VAWA) in 2013, Congress expanded vital protections for victims of domestic violence, stalking and sexual assault.²¹ Implementation of these protections will have a real impact on the many survivors who would otherwise risk losing their housing due to the violence perpetrated against them. This includes women of color, some of whom reportedly experience significantly higher rates of intimate partner violence than the general population.

While HUD issued a notice on VAWA in early fall 2013, it has not yet issued a rule. To fulfill VAWA's promise and address ongoing threats to the housing security of victims of violence, HUD should swiftly issue a rule that provides clear and effective guidance to housing providers. We also urge HUD to bolster implementation of VAWA in its final rule on the affirmatively furthering fair housing (AFFH) obligation.²² A current example where coordination of AFFH and VAWA implementation would be useful is the issue of nuisance ordinances. Across the country, there are municipal ordinances that impose penalties based on a tenant's alleged misconduct or repeated calls to the police. These ordinances, often known as chronic nuisance, "crime-free," or disorderly behavior ordinances, generally provide for a fine or other penalty against a landlord after a rental unit exceeds the threshold number of calls to the police or "nuisance activities" specified by the local ordinance. In order to avoid these penalties, many landlords seek to eliminate the "nuisance" by evicting the unit's tenants.

In practice, chronic nuisance ordinances may violate the rights of protected groups, including women who make up the vast majority of domestic violence victims and who may need to reach out to police repeatedly due to the conduct of their abusers.²³ Nuisance ordinances have also

²¹ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§201-04, 127 Stat. 54, 80-84 (2013).

²² The ACLU submitted comments on the HUD's proposed rule on Affirmatively Furthering Fair Housing in September 2013. See ACLU Comments on the Affirmatively Furthering Fair Housing (AFFH) Proposed Rule, Docket No. FR-5173-P-01 (Sept. 17, 2013), available at https://www.aclu.org/sites/default/files/assets/aclus_comments_on_vawa_2013s_applicability_to_hud_programs_10-7-13_final_0.pdf; 78 Fed. Reg. 43710 (proposed on July 19, 2013) (to be codified at 24 C.F.R. parts 5, 91, 92, 570, 574, 576, and 903).

²³ Memorandum from Sara K. Pratt, Deputy Sec'y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors, Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and

been found to disproportionately impact and be disparately enforced against communities of color,²⁴ and such disparities impact black women in particular.²⁵ In addition to raising serious fair housing problems, these ordinances clearly conflict with VAWA when they are enforced to evict a survivor in a covered program.

HUD can further strengthen VAWA implementation through the Assessment of Fair Housing (AFH) proposed to be part of the AFFH process. The AFH can be a powerful tool for ensuring that jurisdictions and program participants consider goals for mitigating the housing issues faced by survivors. Domestic and sexual violence is a primary cause of homelessness for women and children and, as HUD has recognized, survivors often face housing problems related to experiencing violence.²⁶

International Human Rights Obligations: As a party to the Race Convention, the U.S. government is obligated to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them full and equal enjoyment of human rights and fundamental freedoms.”²⁷

The U.S. government is obligated to take steps proactively to prevent acts of gender-based violence, including addressing the underlying conditions that perpetuate rights violations.²⁸ While the United States has made advances in this area, such as the enactment and expansion of VAWA, the U.N. Human Rights Committee has expressed concern that victims still continue to “face obstacles to obtain[ing] remedies” and urged the U.S. to “ensure remedies for all victims” including “steps to improve the provision of emergency shelter [and] housing . . . for victims of domestic violence.”²⁹ The U.N. Special Rapporteur on violence against women has likewise recognized that, “inadequate implementation . . . has resulted in the continued prevalence of violence against women and the discriminatory treatment of its victims, with particular detrimental effects on poor, minority, and immigrant women,” and specifically recommended “effective implementation, regulation, monitoring, and evaluation of VAWA’s housing protections.”³⁰

the Violence Against Women Act (Feb. 9, 2011) [hereinafter HUD Memorandum] (explaining that, “even when consistently applied, women may be disproportionately affected by [zero-tolerance] policies because, as the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers.”).

²⁴ One recent study of a Milwaukee nuisance ordinance found that properties in black neighborhoods received a disproportionate number of nuisance ordinance citations when compared to properties in non-black neighborhoods. See Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of third-Party Policing for Inner-City Women*, 78 *American Sociological Review* at 1 (2013).

²⁵ See Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 *American Journal of Sociology* at 88 (2012) (“In poor black neighborhoods, eviction is to women what incarceration is to men: a typical but severely consequential occurrence contributing to the reproduction of urban poverty.”), available at <http://scholar.harvard.edu/files/mdesmond/files/desmond.evictionpoverty.ajs2012.pdf>.

²⁶ See HUD Memorandum, *supra* note 23 at 1.

²⁷ Race Convention, art. 2(1)(e).

²⁸ Race Convention, art. 5(b).

²⁹ *Id.*

³⁰ Rashida Manjoo, Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to the United States of America, 112, 113, A(h) (June 2011).

Full implementation of VAWA and the AFFH obligation are also important steps toward realization of intersectional human rights recognized under the International Covenant on Civil and Political Rights, including equal protection of the law, and the right to housing recognized by the Universal Declaration of Human Rights and the Race Convention.³¹ Indeed, in its June 2013 report to the Committee on Elimination of Racial Discrimination, the U.S. government touted the AFFH program and described a review process “designed to combat racial and ethnic discrimination in housing.”³² We join the U.N. Human Rights Committee in urging the U.S. government to ensure full and effective implementation of VAWA and to take steps to improve the provision of housing to women victims of domestic violence.³³

Recommendations:

- Affirmatively Furthering Fair Housing:
 - To ensure that jurisdictions and program participants consider their obligation to affirmatively further fair housing with respect to survivors, the Assessment of Fair Housing should describe programs to help victims, prevent violence, and enhance safety. Such an assessment relates closely to what is required by VAWA,³⁴ and could be used to coordinate the requirements of the low income housing tax credit program, now covered by VAWA, with new fair housing planning efforts.
 - In its final rule, HUD should establish concrete enforcement mechanisms for AFFH obligations and provide for more substantive administrative review of state and local jurisdictions’ efforts.
- VAWA Implementation:
 - HUD should direct covered housing providers to provide a uniform notice, available in multiple languages, of VAWA housing rights for applicants and tenants at three critical junctures—annually; when there is a request for an emergency transfer; and when a family breaks up due to violence;
 - HUD should create mechanisms for administrative enforcement of VAWA rights, including a system of oversight and coordination within HUD headquarters and process for coordinating investigation of VAWA violations with Fair Housing Act violations; and
 - HUD should establish a model emergency transfer plan for use by housing providers participating in HUD covered programs and designate points of contact within HUD who will coordinate and ensure the efficiency of transfers within and among the covered housing

³¹ ICCPR, art. 26, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; U.N. General Assembly, Universal Declaration of Human Rights, art. 25, 10 December 1948, 217 A (III), *available at* <http://www.refworld.org/docid/3ae6b3712c.html>; Race Convention, art. 5(e)(iii).

³² U.S. Periodic Report to the U.N. Committee on the Elimination of Racial Discrimination, ¶ 28 (June 12, 2013).

³³ U.N. Human Rights Committee (HRC), Concluding observations on the fourth periodic report of the United States of America, para 16 (23 April 2014), CCPR/C/USA/CO/4, *available at* <http://www.refworld.org/docid/5374afcd4.html>.

³⁴ 42 U.S.C. §§ 1437c-1(a)(2), (d)(13).

programs. We describe these and other recommendations in greater detail in our comments on HUD's notice, which we submitted in October 2013.³⁵

4. Implementation of the Fair Labor Standards Act to Home Care Workers

The Department of Labor's final rule on application of the Fair Labor Standards Act (FLSA) to domestic service has the potential to ensure that home care workers receive critical overtime and minimum wage protections. We urge the Department of Labor not to delay implementation of the rule past its earlier stated January 2015 implementation date.³⁶ Delaying implementation is unnecessary and detrimental to these workers and their families.

A 2011 HHS study reported that 95 percent of home health aides are women, more than a third are African American, and nearly 15 percent are immigrants.³⁷ The exclusion of this work from wage and hour protections thus disproportionately harms women of color. It perpetuates inequality on gender, racial, ethnic and national origin grounds.

Too many home care workers are barely able to sustain their own families on the wages they earn: half live in households that rely on public benefits such as Medicaid, food stamps and housing subsidies. Implementing this new rule will extend federal oversight and minimum labor protections to home care workers and lay a foundation for improving the quality of these jobs as our country's demand for in-home services and supports grow.

International Human Rights Obligations: As we previously noted, the Race Convention obligates the U.S. government to "prohibit and bring to an end, by all appropriate means...racial discrimination by any persons, group or organization."³⁸ The Convention specifically emphasizes that this duty applies to the "right[] to work," including "equal pay for equal work" and "just and favorable remuneration."³⁹ The Committee on the Elimination of Racial Discrimination urged the U.S. government in 2009 to "take all appropriate measures" to "combat de facto discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities" to rights. During the 2010 Universal Periodic Review process, the U.S. government stated that it is "committed to enforcing employment and

³⁵ ACLU Comments on the Department of Housing and Urban Development Notice on the Violence Against Reauthorization Act of 2013, Docket No. FR-5720-N-01 (October 7, 2013), *available at* https://www.aclu.org/sites/default/files/assets/aclus_comments_on_vawa_2013s_applicability_to_hud_programs_10-7-13_final_0.pdf; 78 Fed. Reg. 47717 (proposed on August 6, 2013).

³⁶ In March 2012, the ACLU wrote comments in support of the proposed rule. *See* ACLU Comment in Support of the Wage and Hour Division's Proposed Changes to the Companionship and Live-in Worker Regulations Under the Fair Labor Standards Act (FLSA), RE: RIN No. 1235-AA05 (March 21, 2012), *available at* https://www.aclu.org/files/assets/aclu_comments_to_dol_whd_re_flsa_companionship_and_live_in_workers.pdf.

³⁷ *See* Galina Khatutsky et al., U.S. Department of Health and Human Services, Understanding Direct Care Workers: A Snapshot of Two of America's Most Important Jobs 4-8 (2011), *available at* <http://aspe.hhs.gov/daltcp/reports/2011/CNAchart.htm>. The U.S. population, by comparison, is 50.8% female, 12.9% African American, and 12.9% immigrant. *See* American Community Survey, Table DP-1: Profile of General Population and Housing Characteristics: 2010 (includes numbers on gender and race); *see also id.* at Table S0201, Selected Population Profile in the United States: 2010 American Community Survey 1-Year Estimates (includes numbers on immigrant population).

³⁸ Race Convention, art. 2(1)(d).

³⁹ Race Convention, art. 2(2); art. 5(e)(i).

labor laws to protect workers' rights" and expressed support in part for a recommendation that it take necessary measures to ensure fair work conditions for workers belonging to minorities.⁴⁰

Recommendations:

- The Department of Labor should move forward with implementation of the final rule and maintain the implementation deadline of January 1, 2015.

5. Revision of the Justice Department Guidance on Use of Race

Although the U.S. government states that the purpose of the U.S. Department of Justice's 2003 Guidance on the Use of Race by Federal Law Enforcement is to ban racial profiling, the current Guidance has the perverse effect of tacitly authorizing the profiling of almost every minority community in the United States, with particular impact on women of color. The Guidance exempts from its ban on racial profiling practices that are related to "protecting the integrity of the Nation's borders" and "investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security). Furthermore, the Guidance does not ban profiling based on religion, national origin or sexual orientation.

These exemptions and omissions allow racial and ethnic profiling to persist at the federal, state and local level. Specifically, the ACLU has reported on the FBI's collection of demographic data to map where people with particular racial or ethnic makeup live, basing this data collection on crude stereotypes about the types of crimes different racial and ethnic groups commit. Within the Transportation Security Administration, the Screening Passengers by Observation program—began in 2007—deploys behavior detection officers to U.S. airports to look for preselected facial expressions, body language, and certain appearances deemed suspicious. Officers participating in this program recently came to the ACLU to report that colleagues at Boston's Logan Airport were racially profiling airline passengers in an effort to boost arrests for drug and immigration violations. This and other racial profiling practices have particular impact on Muslim, Middle Eastern and South Asian women scrutinized based on Muslim head coverings.⁴¹

At the border, the ACLU has documented numerous cases of profiling at points of entries, the use of internal checkpoints, and the involvement of roving patrols in the 100-mile-zone of U.S. borders. These cases can be traced to the government's assertion of authority to conduct warrantless searches on vessels, trains, aircrafts, or other vehicles within 100 miles of any external boundary of the United States—an area that includes roughly two-thirds of the U.S. population.

⁴⁰ Report of the Working Group on the Universal Periodic Review, United States of America, ¶ 89 U.N. Doc. No. A/HRC/16/11 (January 4, 2011); Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, ¶ 23 U.N. Doc. No. A/HRC/16/11/Add.1 (March 8, 2011).

⁴¹ See ACLU & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* 36 (August 2009), available at https://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf.

International Human Rights Obligations: The U.S. government has an obligation under the Race Convention to “to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”⁴² In its 2008 Concluding Observations, the CERD Committee urged the United States to do more to meet this obligation, specifically calling on the state to “strengthen efforts to combat racial profiling at the federal and state levels.”⁴³ It expressed concern about racial profiling based on national security grounds and profiling aimed at Arabs, Muslims and South Asians, noting General Recommendation No. 30’s emphasis that “measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin.”⁴⁴

More recently, the U.N. Human Rights Committee urged the U.S. to review the 2003 Guidance and to expand the “protection against profiling on the basis of religion, religious appearance, and national origin.”⁴⁵ It generally called on the U.S. to “step up measures to effectively combat and eliminate” various forms of racial profiling, noting specifically the targeting of ethnic minorities and surveillance of Muslims—in the absence of any wrongdoing—by the FBI and New York Police Department.⁴⁶

Recommendations:

- Revise the Department of Justice’s Guidance Regarding the Use of Race to: (1) prohibit profiling based on religion, national origin, sexual orientation and gender identity; (2) end exceptions for border integrity and national security; (3) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; (4) explicitly state that the ban on racial profiling applies to data collection, intelligence activities, assessments and predicated investigations; and (5) make the Guidance enforceable.
- Revise the Department of Homeland Security’s April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates DOJ’s Guidance by reference, accordingly.
- Support the passage of the End Racial Profiling Act (ERPA).

Thank you for your attention to this matter. Please do not hesitate to call Legislative Counsel Naureen Shah at 202-675-2327 or contact her at nshah@aclu.org if you have any questions.

⁴² Race Convention, art. 2(1)(c).

⁴³ CERD, Concluding Observations (2008), ¶ 14.

⁴⁴ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

⁴⁵ U.N. Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, 23 April 2014, CCPR/C/USA/CO/4, ¶7 available at <http://www.refworld.org/docid/5374afcd4.html>.

⁴⁶ *Id.*, ¶7, 23.