FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of	)
	)
HireVue, Inc.	)
	)
	)

Complaint and Request for Investigation, Injunction, and Other Relief

Submitted by

The Electronic Privacy Information Center (EPIC)

I. Summary

1. This complaint concerns a company that purports to evaluate a job applicant's qualifications based upon their appearance by means of an opaque, proprietary algorithm.[1] HireVue, a firm located in Utah, provides theses "assessments" to companies seeking to fill job openings, which in turn make hiring determinations that impact the employment opportunities of specific individuals. The company denies that it is engaged in facial recognition and has failed to show that its technique meets the minimal standards for AI-based decision-making set out in the OECD AI Principles or the recommended standards set out in the Universal Guidelines for AI. The company has engaged in unfair and or deceptive trade practices, in violation of the Section 5 of the FTC Act. For the reasons, set out below the Commission should open an investigation, issue an injunction, and provide such other relief as EPIC has proposed.

II. Parties

2. The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, DC. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights

[1] *How to Prepare for Your HireVue Assessment*, HireVue (Apr. 16, 2019), https://www.hirevue.com/blog/how-to-prepare-for-your-hirevue-assessment; Ex. A, Nathan Mondragon et al., HireVue, *The Next Generation of Assessments* 6 (Feb. 2019).

of consumers.[2] EPIC is also a longstanding advocate of algorithmic transparency and ethical limitations on the use of artificial intelligence.[3]

3. HireVue Inc. ("HireVue") is a recruiting-technology company with headquarters located at 10876 South River Front Pkwy #500, South Jordan, UT 84095.[4] HireVue markets and conducts pre-hire assessments using facial recognition technology, biometric data, and artificial intelligence.

III. Public Policy for the Use of Artificial Intelligence

A. The OECD AI Principles

4. The Organization for Economic Cooperation and Development ("OECD") was established in 1961 to promote economic cooperation and development.[5]

5. There are presently 36 members of the OECD, including the United States.[6]

6. In 2019, the member nations of the OECD, working also with many non-OECD members countries, promulgated the OECD Principles on Artificial Intelligence.[7]

7. The United States has endorsed the OECD AI Principles.[8]

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[2] *See, e.g.*, Comments of EPIC, *In the Matter of Unrollme, Inc.,* FTC File No. 1723139 (Sept. 19, 2019), https://epic.org/apa/comments/EPIC-FTC-Unrollme-Sept2019.pdf; Comments of EPIC, *In the Matter of Aleksandr Kogan and Alexander Nix*, FTC File No. 182 3106 & 1823107 (Sept. 3, 2019), https://epic.org/apa/comments/EPIC-FTC-CambridgeAnalytica-Sept2019.pdf; Comments of EPIC, *Standards for Safeguarding Customer Information*, FTC Document No. 2019-10910 (Aug. 1, 2019), https://epic.org/apa/comments/EPIC-FTC-Safeguards-Aug2019.pdf; *In re Zoom Video Commc'ns, Inc.* (Complaint, Request for Investigation, Injunction, and Other Relief), July 11, 2019), https://epic.org/privacy/ftc/zoomEPIC-FTC-Complaint-In-re-Zoom-7-19.pdf; Comments of EPIC, *In the Matter of Uber Technologies, Inc.*, FTC, Docket No. 152-3054 (May 14, 2018), https://epic.org/apa/comments/EPIC-FTC-Revised-Uber-Settlement.pdf; Comments of EPIC, *In the Matter of Paypal, Inc.* FTC File No. 162-3102, (Mar. 29, 2018), https://epic.org/apa/comments/EPIC-FTC-PayPal-ConsentOrder.pdf; *In the Matter of Google Inc.* (Complaint, Request for Investigation, Injunction, and Other Relief), July 31, 2017, https://www.epic.org/privacy/ftc/google/EPIC-FTC-Google-Purchase-Tracking-Complaint.pdf; *In the Matter of Genesis Toys and Nuance Communications* (Complaint and Request for Investigation, Injunction, and Other Relief), Dec. 6, 2016, https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf.

[3] *Algorithmic Transparency: End Secret Profiling*, EPIC (2019), https://epic.org/algorithmic-transparency/.

[4] *Contact Us*, HireVue (2019), https://www.hirevue.com/contact.

[5] *History*, OECD, oecd.org/about/history.

[6] *Id.*

[7] *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.

[8] *U.S. Joins with OECD in Adopting Global AI Principles*, NTIA (May 22, 2019), https://www.ntia.doc.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles.

8. The G-20 Countries have endorsed the OECD AI Principles.[9]

9. According to the OECD AI Principle on Human-Centered Values and Fairness, "AI actors should respect the rule of law, human rights and democratic values, throughout the AI system lifecycle. These include freedom, dignity, and autonomy, privacy and data protection, non-discrimination and equality, diversity, fairness, social justice, and internationally recognized labour rights."[10]

10. According to the OECD AI Principle on Robustness, Security, and Safety, "AI systems should be robust, secure and safe throughout their entire lifecycle so that, in conditions of normal use, foreseeable use or misuse, or other adverse conditions, they function appropriately and do not pose unreasonable safety risk."[11]

11. According to the OECD AI Principle on Transparency and Explainability, AI Actors should "provide meaningful information, appropriate to the context, and consistent with the state of art (i) to foster a general understanding of AI systems, (ii) to make stakeholders aware of their interactions with AI systems, including in the workplace, (iii) to enable those affected by an AI system to understand the outcome, and (iv) to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision."[12]

12. According to the OECD AI Principle on Accountability, "[o]rganisations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles."[13]

13. The OECD Principles on Artificial Intelligence are "established public policies" within the meaning of the FTC Act.[14]

B. The Universal Guidelines for AI

14. The Universal Guidelines for Artificial Intelligence ("UGAI"), a framework for AI governance based on the protection of human rights, were set out at the 2018 meeting of the International Conference on Data Protection and Privacy Commissioners in Brussels, Belgium.[15]

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[9] *G20 Ministerial Statement on Trade and Digital Economy*, https://www.mofa.go.jp/files/000486596.pdf.
[10] OECD Principle 1.2(a), *supra* note 7.
[11] OECD Principle 1.4(a), *supra* note 7.
[12] OECD Principle 1.3, *supra* note 7.
[13] OECD Principle 1.5, *supra* note 7.
[14] 15 U.S.C. § 45(n).
[15] *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), https://thepublicvoice.org/ai-universal-guidelines/; thepublicvoice.org/events/brussels18.

15. The UGAI have been endorsed by more than 250 experts and 60 organizations in 40 countries.[16]

16. According to the UGAI Right to Transparency, "All individuals have the right to know the basis of an AI decision that concerns them. This includes access to the factors, the logic, and techniques that produced the outcome."[17]

17. According to the UGAI Assessment and Accountability Obligation, "An AI system should be deployed only after an adequate evaluation of its purpose and objectives, its benefits, as well as its risks."[18]

18. According to the UGAI Accuracy, Reliability, and Validity Obligations, "Institutions must ensure the accuracy, reliability, and validity of decisions."[19]

19. According to the UGAI Fairness Obligation, "Institutions must ensure that AI systems do not reflect unfair bias or make impermissible discriminatory decisions."[20]

20. The Universal Guidelines for Artificial Intelligence are "established public policies" within the meaning of the FTC Act.[21]

IV. Factual Background

A. HireVue Algorithms Score Job Applicants

21. HireVue Inc. represents that is conducts video-based and game-based "pre-employment" assessments of job candidates on behalf of employers.[22]

22. According to HireVue, when a job candidate seeks employment at company that uses HireVue's algorithmic assessment services, HireVue administers an online "video interview" and/or an online "game-based challenge[]" to the candidate.[23]

23. HireVue states that it collects "tens of thousands of data points"[24] from each video interview of a job candidate, including but not limited to a candidate's "intonation," "inflection," and "emotions."[25]

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[16] *Universal Guidelines for Artificial Intelligence: Endorsement*, The Public Voice (Oct. 23, 2019), https://thepublicvoice.org/AI-universal-guidelines/endorsement/.
[17] UGAI Guideline 1, *supra* note 15.
[18] UGAI Guideline 5, *supra* note 15.
[19] UGAI Guideline 6, *supra* note 15.
[20] UGAI Guideline 4, *supra* note 15.
[21] 15 U.S.C. § 45(n).
[22] *Pre-Employment Assessments*, HireVue (2019), https://www.hirevue.com/products/assessments.
[23] *Id.*
[24] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1.
[25] Mondragon et al., *supra* note 1, at 4.

24. HireVue states that it collects a "rich and complex" array of data from each "psychometric game[]" administered to a job candidate, "giv[ing] insight into a range of cognitive skills, including numeracy, problem-solving, and attention."[26]

25. HireVue purportedly inputs these thousands of personal data points into "predictive algorithms"[27] that allegedly determine each job candidate's "employability."[28]

26. HireVue states that its algorithmic assessments will reveal the "cognitive ability," "psychological traits," "emotional intelligence," and "social aptitudes" of job candidates.[29]

27. HireVue does not give candidates access to their algorithmic assessment scores.[30]

28. Nathan Mondragon, HireVue's chief industrial-organizational psychologist, stated that "Facial Action Units" can make up 29 percent of a candidate's score.[31]

29. According to Loren Larsen, HireVue's chief technology officer, 10% to 30% of a candidate's score is based on facial expressions and the remainder of the score is based on the language used.[32]

30. HireVue does not give candidates access to the training data, factors, logic, or techniques used to generate each algorithmic assessment. In some cases, even HireVue is unaware of the basis for an algorithmic assessment.[33]

31. HireVue has over 700 corporate customers, including major companies like Hilton, Ikea, Oracle, Dow Jones, Koch Industries, Unilever, Urban Outfitters, Carnival, Under Armour, Vodafone, Dunkin' Brands, Keurig Dr Pepper, Cathay Pacific, AB InBev, HBO, Sequoia, Staples, BASF, CARFAX, CDW, Conoco Phillips, Panda Express, Penguin Random House, and Anheuser-Busch.[34] Nonprofits and public sector employers also use HireVue's assessment services, including Atlanta Public Schools and Thurgood Marshall College Fund.[35]

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[26] Mondragon et al., *supra* note 1, at 5.
[27] Mondragon et al., *supra* note 1, at 7.
[28] Mondragon et al., *supra* note 1, at 3, 7.
[29] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1; Ex. A, Nathan Mondragon et al., *supra* note 1, at 6.
[30] Drew Harwell, *A face-scanning algorithm increasingly decides whether you deserve the job*, Wash. Post (Oct. 25, 2019), https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job/
[31] *Id.*
[32] Terena Bell, *This bot judges how much you smile during your job interview*, Fast Company (Jan. 15, 2019), https://www.fastcompany.com/90284772/this-bot-judges-how-much-you-smile-during-your-job-interview.
[33] Harwell, *supra* note 30 ("HireVue offers only the most limited peek into its interview algorithms, both to protect its trade secrets and because the company doesn't always know how the system decides on who gets labeled a 'future top performer.'").
[34] *Customers*, HireVue (2019), https://www.hirevue.com/customers.
[35] *Id.*

32. HireVue's advice to applicants preparing for video assessments is that "[t]he same tips that help you succeed in a traditional interview will also help you succeed in a video-based assessment."[36]

33. College career counselors advise students to use "industry-specific lingo, since it has been suggested that HireVue scans a candidate's answers for keywords."[37]

34. After soliciting feedback from students who had HireVue interviews, Duke University discovered that by far the majority of questions were "behavioral."[38]

35. University of Maryland Robert H. Smith School of Business advises students preparing for AI interviews, "Robots compare you against existing success stories; they don't look for out-of-the-box candidates."[39]

B. HireVue Uses Facial Recognition Technology to Evaluate Candidates

36. HireVue states that it does not use facial recognition technology. On a webpage advising candidates on how to prepare for a video interview, HireVue states:[40]

> *Q: Is this facial recognition technology?*
>
> A: No. HireVue does not use facial recognition technology or track facial features for identity recognition purposes.

37. As the FTC established in 2012, "facial recognition technology" includes "technologies that merely detect basic human facial geometry; technologies that analyze facial geometry to predict demographic characteristics, expression, or emotions; and technologies that measure unique facial biometrics."[41] The term "facial recognition technology" is not limited to facial imaging conducted for identification or authentication purposes.

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[36] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1.
[37] Lilah Burke, *Your Interview with AI*, Inside Higher Ed (Nov. 4, 2019), https://www.insidehighered.com/news/2019/11/04/ai-assessed-job-interviewing-grows-colleges-try-prepare-students.
[38] *Typical Questions from HireVue Interviews*, Duke University Economics Department, https://econ.duke.edu/sites/econ.duke.edu/files/file-attachments/Typical%20Questions%20from%20HireVue%20Interviews.pdf.
[39] Yajun Wang, *You'll Have to Prepare Differently. Here's How.*, Smith Brain Trust (June 5, 2019), https://www.rhsmith.umd.edu/faculty-research/smithbraintrust/insights/how-ace-your-interview-ai.
[40] *Id.*
[41] Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies, Fed. Trade Comm'n (Oct. 2012), https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialtechrpt.pdf.

38. HireVue collects facial data from job candidates to evaluate expressions of emotion and personality. HireVue states that its video-based algorithmic assessments "provide[] excellent insight into attributes like social intelligence (interpersonal skills), communication skills, personality traits, and overall job aptitude."[42]

C. HireVue's Business Practices Produce Results that Are Biased, Unproveable, and Not Replicable

39. HireVue markets its recruiting tools as a way to eliminate biases in the hiring process.[43] But hiring algorithms are more likely to be biased by default.[44]

40. HireVue represents that it builds algorithmic models for employers based on data from top performers. This method can be flawed because to determine if the algorithm is actually working you have to turn it off and hire someone using other criteria to figure out if they meet or fall short of the same performance standards.[45]

41. AI tools often contain gender biases. For example, Amazon abandoned an AI recruiting tool due because the system learned from historical employee data that male candidates were preferable. The system penalized resumes that included the word "women's" and the names of all-women's colleges.[46] The two factors the system found were most indicative of job performance were if the applicant's name was Jared and if the applicant played high school lacrosse.[47]

42. The eye movement tracking captured in video assessments could discriminate against candidates with neurological differences. Eye movement tracking technology can be used to diagnose autism, Parkinson's, Alzheimer's, and psychiatric conditions like depression.[48] Individuals with Autism Spectrum Disorder tend to look at people's mouths rather than making eye contact.[49]

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[42] Mondragon et al., *supra* note 1, at 4.
[43] *4 Ways HireVue Enables True Equal-Opportunity Hiring*, HireVue Blog (Oct. 25, 2019), https://www.hirevue.com/blog/4-ways-hirevue-enables-true-equal-opportunity-hiring.
[44] *See, e.g.*, Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, Harvard Business Review (May 6, 2019), https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias.
[45] Prasanna Tambe, et al., *Artificial Intelligence in Human Resources Management: Challenges and a Path Forward* (2019) at 28–29.
[46] Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (Oct. 9, 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.
[47] Dave Gershgorn, *Companies are on the hook if their hiring algorithms are biased*, Quartz (Oct. 22, 2018), https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/.
[48] Ian Taylor Logan, *For Sale: Window to the Soul Eye Tracking as the Impetus for Federal Biometric Data Protection*, 123 Penn. St. L. Rev. 779 (2019) at 783–85.
[49] Corinne Green and Kun Guo, *Factors contributing to individual differences in facial expression categorisation* (2018).

43. Facial recognition software is often racially biased. In a study of the gender classification accuracy of facial recognition systems, darker females were 32 times more likely to be misclassified than lighter males.[50]

44. Facial recognition software analyzes emotions differently based on the individual's race. Black faces are read as angrier than white faces, even after controlling for the degree of smiling.[51] Microsoft software "interprets black players as more contemptuous when their facial expression is ambiguous."[52]

45. Facial recognition technology has also been used to identify sexual orientation.[53] For example, the technology could correctly distinguish between gay and heterosexual men in 81% of cases, and in 74% of cases for women based on a single facial image (in contrast to humans who had an accuracy rate of 61% for men and 54% for women).[54]

V. Legal Analysis

46. Section 5 of the FTC Act prohibits unfair and deceptive acts and practices and empowers the Commission to enforce the Act's prohibitions.[55]

47. A company engages in a deceptive trade practice if it makes a representation to consumers yet "lacks a 'reasonable basis' to support the claims made[.]"[56]

48. A trade practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[57]

49. In determining whether a trade practice is unfair, the Commission is expected to consider "established public policies."[58]

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[50] *Joy Buolamwini, Gender Shades: Intersectional Phenotypic and Demographic Evaluation of Face Datasets and Gender Classifiers, MIT (2017), https://www.media.mit.edu/publications/full-gender-shades-thesis-17/.*
[51] Lauren Rhue, *Racial Influence on Automated Perceptions of Emotions* (2018), Wake Forest University (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281765.
[52] *Id.*
[53] Alan Burdick, *The A.I. "Gaydar" Study and the Real Dangers of Big Data*, The New Yorker (Sept. 15, 2017), https://www.newyorker.com/news/daily-comment/the-ai-gaydar-study-and-the-real-dangers-of-big-data.
[54] Yilun Wang & Michal Kosinski, *Deep neural networks are more accurate than humans at detecting sexual orientation from facial images*, J. PERSONALITY & SOC. PSYCH. (OCT. 23, 2018).
[55] 15 U.S.C. § 45.
[56] *Daniel Chapter One v. FTC*, 405 F. App'x 505, 506 (D.C. Cir. 2010) (quoting *Thompson Med. Co., Inc., v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986)).
[57] 15 U.S.C. § 45(n); *see also FTC v. Seismic Entm't Prods., Inc.*, Civ. No.1:04-CV-00377 (Nov. 21, 2006) (finding that unauthorized changes to users' computers that affected the functionality of the computers as a result of Seismic's anti-spyware software constituted a "substantial injury without countervailing benefits.").
[58] 15 U.S.C. § 45(n).

VI. HireVue's Violations of the FTC Act

A. HireVue's Deceptive Use of Facial Recognition Technology

50. As described above, HireVue collects facial data in its video interviews of job candidate.[59]

51. According to the FTC, the term "facial recognition technology" includes "technologies that merely detect basic human facial geometry; technologies that analyze facial geometry to predict demographic characteristics, expression, or emotions; and technologies that measure unique facial biometrics."[60]

52. HireVue therefore uses "facial recognition technology" in its video-based assessments of job candidates, as defined by the FTC.

53. HireVue represents to job candidates that it "does not use facial recognition technology or track facial features for identity recognition purposes."[61]

54. HireVue "lacks a 'reasonable basis'" to support this claim.[62]

55. HireVue is therefore engaged in a deceptive trade practice in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1).

56. The FTC has found deceptive uses of facial recognition to be a violation of the FTC Act.

57. In April 2018, EPIC and a coalition of consumer organizations filed a complaint highlighting Facebook's practice of "routinely scan[ning] photos for biometric facial matches without the consent of the image subject"—an unfair and deceptive trade practice and a violation of the Commission's 2011 Facebook consent order.[63]

58. In July 2019, the Commission determined that Facebook's use of facial recognition technology was "[d]eceptive"[64] and "misrepresent[ed] 'the extent to which a consumer can control the privacy'" of their facial data in violation of the 2011 consent order.[65]

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[59] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1; Mondragon et al., *supra* note 1.
[60] *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies*, Fed. Trade Comm'n, *supra* note 41.
[61] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1.
[62] *Daniel Chapter One*, 405 F. App'x at 506 (quoting *Thompson Med. Co., Inc.*, 791 F.2d at 193.
[63] EPIC Complaint, *In re* Facebook, Inc. and Facial Recognition, (Apr. 6, 2018), https://epic.org/privacy/facebook/FTC-Facebook-FR-Complaint-04062018.pdf.
[64] Compl. at 39, *United States v. Facebook*, No. 19-2906 (D.D.C. filed July 24, 2019).
[65] *Id.* ¶ 183.

B. HireVue's Unfair Use of Facial Recognition, Biometric Data, and AI Systems

59. As described above, HireVue uses facial recognition technology, biometric data, and secret algorithms to purportedly assess the "cognitive ability," "psychological traits," "emotional intelligence," and "social aptitudes" of job candidates.[66]

60. HireVue's use of secret algorithms to analyze job candidates' biometric data violates widely-adopted ethical standards for the use of artificial intelligence ("AI") and is "unfair" within the meaning of the FTC Act.

i. HireVue's Algorithmic Assessments Violate the OECD Principles on AI

61. HireVue's algorithmic assessments of job candidates are not transparent.

62. HireVue's algorithmic assessments of job candidates cannot be evaluated or understood by the candidates.

63. HireVue's algorithmic assessments of job candidates cannot be meaningfully challenged.

64. HireVue cannot be held accountable for the proper functioning of its secret algorithmic assessments.

65. HireVue has therefore violated the OECD Principles on Artificial Intelligence.

ii. HireVue's Algorithmic Assessments Violate the Universal Guidelines for AI

66. HireVue does not provide job candidates with access to the training data, factors, logic, or techniques used to generate each algorithmic assessment.

67. HireVue has not adequately evaluated whether the purpose, objectives, and benefits of its algorithmic assessments outweigh the risks.

68. HireVue has not ensured the accuracy of its algorithmic assessments.

69. HireVue has not ensured the reliability of its algorithmic assessments.

70. HireVue has not ensured the validity of its algorithmic assessments.

71. HireVue has not established that the assessments are free of unfair bias and impermissible discrimination.

72. HireVue has therefore violated the Universal Guidelines for Artificial Intelligence.

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[66] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1; Mondragon et al., *supra* note 1, at 6.

iii. HireVue's Algorithmic Assessments Are 'Unfair' Under the FTC Act

73. HireVue's use of biometric data and secret algorithms is "unfair" because it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[67]

74. HireVue's use of biometric data and secret algorithms causes or is likely to cause substantial injury to a large class of people—namely, job candidates seeking to contract with one of the 700 companies that rely on HireVue's assessments.[68]

75. HireVue claims to collect "tens of thousands" of biometric data points through its assessments,[69] including but not limited to a job candidate's "intonation," "inflection," and "emotions."[70]

76. HireVue inputs these personal data points into secret "predictive algorithms"[71] that allegedly determine each job candidate's "employability."[72] Companies then rely on HireVue's assessments to determine whether to contract for the services of each job candidate.

77. Because these algorithms are secret—even to HireVue itself, in some cases[73]—it is impossible for job candidates to know how their personal data is being used or to consent to such uses.

78. HireVue's intrusive collection and secret analysis of biometric data thus causes substantial privacy harms to job candidates.

79. HireVue's intrusive collection and secret analysis of biometric data also causes substantial financial harms to job candidates. Many job candidates are denied opportunities to contract with companies based on HireVue's algorithmic assessments, and many of those same candidates are forced to expend significant resources to identify alternate contracting opportunities.

80. The injuries caused by HireVue's use of biometric data and secret algorithms cannot be reasonably avoided. HireVue's video-based and game-based assessments are used by 700

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[67] 15 U.S.C. § 45(n).
[68] *Customers*, HireVue, *supra* note 34.
[69] *How to Prepare for Your HireVue Assessment*, *supra* note 1.
[70] Mondragon et al., *supra* note 1, at 4.
[71] Mondragon et al., *supra* note 1, at 7.
[72] Mondragon et al., *supra* note 1, at 3, 7.
[73] Drew Harwell, *A face-scanning algorithm increasingly decides whether you deserve the job*, Wash. Post (Oct. 25, 2019), https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job/ ("HireVue offers only the most limited peek into its interview algorithms, both to protect its trade secrets and because the company doesn't always know how the system decides on who gets labeled a 'future top performer.'").

companies,"[74] and job candidates are not given an opportunity to opt out of or meaningfully challenge HireVue's assessments.

81. The harms caused by HireVue's use of biometric data and secret algorithms are not outweighed by countervailing benefits to consumers or to competition. HireVue has failed to demonstrate any legitimate purpose for the collection of job candidates' biometric data or for the use of secret, unproven algorithms to assess the "cognitive ability," "psychological traits," "emotional intelligence," and "social aptitudes" of job candidates.[75]

82. Other methods that accomplish the goal of evaluating job candidates are readily available and have long been in use.

83. HireVue is therefore engaged in an unfair trade practice in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1).

VII. Prayer for Investigation and Relief

84. EPIC urges the Commission to investigate HireVue and to find that its uses of facial recognition technology, biometric data, and secret, unproven algorithms constitute unfair and deceptive trade practices under Section 5 of the FTC Act.

85. EPIC furthers urges the Commission to:

    a. Initiate an investigation into the business practices of HireVue;

    b. Halt HireVue's scoring of job candidates pending substantial changes in business practices;

    c. Require that HireVue make public the algorithm used to produce assessments of job candidates;

    d. Require that HireVue make known to candidates the precise basis for their evaluation;

    e. Require that HireVue comply with the requirements of the OECD AI Principles;

    f. Require that HireVue comply with the requirements of the Universal Guidelines for AI; and

    g. Provide such other relief as the Commission finds necessary and appropriate.

[74] *Customers*, HireVue, *supra* note 34.
[75] *How to Prepare for Your HireVue Assessment*, HireVue, *supra* note 1; Mondragon et al., *supra* note 1, at 6.

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