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PROTECTING THE AMERICAN DREAM (PART I): A LOOK AT THE FAIR HOUSING ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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http://www.nationalfairhousing.org/portals/33/reports/future_of_fair_housing.pdf

January 2007 report by Michigan's Fair Housing Centers entitled "Sexual Orientation and Housing Discrimination in Michigan."
http://www.fhcmichigan.org/images/Arcus_web1.pdf

May 1, 2009 report by the National Fair Housing Alliance entitled "Fair Housing Enforcement: Time for a Change."
http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=dsT4nlHikhQ%3D&tabid=3917&mid=5321

PROTECTING THE AMERICAN DREAM (PART I): A LOOK AT THE FAIR HOUSING ACT

THURSDAY, MARCH 11, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:58 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Cohen, and Chu.

Staff present: (Minority) David Lachmann, Subcommittee Chief of Staff; Kanya Bennett, Counsel; and (Minority) Paul Taylor, Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order now that a convening quorum is present.

I will recognize myself for an opening statement first.

Today, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties begins a review of housing discrimination, the Fair Housing Act, and the effectiveness of our government's enforcement of the law.

Housing discrimination remains a persistent problem in our country. While we would like to think that housing discrimination is an artifact of the past, we know it is not. Jim Crow laws and restrictive covenants may no longer be with us, but the discriminatory attitudes and practices they represented remain with us.

Outright discrimination, steering, a refusal to build accessible housing as required by law, and discriminatory lending practices continue to plague renters and prospective homeowners. Additionally, there are still people who are subjected to legally sanctioned discrimination in many jurisdictions. Discrimination on the basis of sexual orientation and gender identity are perfectly legal in many areas, and people are regularly denied a place to live simply because of that status.

Today, earlier today, I have introduced along with Chairman Conyers legislation amending the Fair Housing Act to correct that omission. Many communities around the Nation have already done so, and the time is long since passed when the Nation should follow suit.

As the Subcommittee continues its work, we will be looking at other ways to amend our fair housing laws and to devise other strategies to ensure that we can most effectively eliminate housing discrimination once and for all. We are fortunate today to have a distinguished panel of witnesses who will provide an excellent update on where we stand and recommend further actions to fulfill the promise of the Fair Housing Act.

Fair housing has always been a value that has defied partisanship. I look forward to work with my colleagues on both sides of the aisle to further the American values of equality and fairness.

In the interest of proceeding—well, I don't have to do that. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing if necessary.

Yes, I should mention that one reason a number of the Members of the Committee or the Subcommittee are not here today is that the Congressional Black Caucus is having a meeting at the White House right now, and that has deprived us of some of our interested Members for the moment.

We will now turn to our witnesses. As we ask questions of our witnesses, the Chair will recognize—well, I will dispense with that. [Laughter.]

I was going to say we will recognize Members in the order of seniority, et cetera. I will now introduce the witnesses.

Shanna Smith is president and CEO of the National Fair Housing Alliance. Ms. Smith began her career in 1975 as executive director of the Toledo Fair Housing Center, where she pioneered investigations and litigation in fair housing practices. Ms. Smith also serves on the executive committee of the Leadership Conference on Civil Rights, where she co-chairs its fair housing task force, is a member of the board of the Center for Responsible Lending, and was appointed in January 2008 to the Federal Reserve's Community Advisory Council.

Barbara Arnwine has been the executive director of the Lawyers' Committee for Civil Rights Under Law since 1989. While there, she has played an instrumental role in advocating for the passage of civil rights legislation, including the Civil Rights Act of 1991.

She has spent her career advocating on behalf of civil rights in the areas of housing, fair lending, community development, employment, voting, education and environmental justice. Ms. Arnwine is a graduate of Scripps College and earned her law degree from Duke University.

Kenneth Marcus holds the Lillie and Nathan Ackerman chair in equality and justice in America at the Baruch School of Public Affairs City University of New York, where he teaches public administration, education law, and civil rights.

Before joining the faculty at Baruch, Mr. Marcus served as a staff director of the United States Commission on Civil Rights and as the general deputy assistant secretary of housing and urban development for fair housing and equal opportunity. Mr. Marcus is a graduate of Williams College magna cum laude and the University of California, Berkeley, School of Law.

John Relman is the founder and director of the firm Relman and Dane. Mr. Relman has practiced extensively in the areas of fair housing and fair lending law. Before going into private practice, Mr. Relman served as project director of the Fair Housing Project at the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

Prior to joining the committee, he clerked for the Honorable Sam Ervin III of the U.S. Court of Appeals for the Fourth Circuit and the Honorable Joyce Hens Green of the U.S. district court for the District of Columbia. Mr. Relman is a graduate of Harvard University and received his law degree from the University of Michigan.

Rea Carey is the executive director of the National Gay and Lesbian Task Force Action Fund based in Washington, D.C., which advocates on behalf of the gay, lesbian, bisexual and transgender community. She has over 20 years of experience in nonprofit management and in public policy issues affecting the LGBT community. Ms. Carey earned her master's degree in public administration from Harvard University's Kennedy School of Government.

Okianer Christian Dark is associate dean of academic affairs and professor of law at Howard University. Prior to joining Howard's faculty in the fall of 2001, Ms. Dark served as an assistant United States attorney in the civil division of the U.S. attorney's office in Portland, Oregon. There, Ms. Dark was responsible for the civil rights litigation in the district of Oregon, which included the Fair Housing and Americans with Disabilities Act.

She has also offered her personal story as a victim of housing discrimination in a videotape titled "Who Can Ever Get Used to This?", which has been used nationally for training purposes by fair housing organizations, law school property and fair housing courses, and by the United States Department of Justice. Ms. Dark received her B.A. magna cum laude from Upsala College and her law degree from Rutgers University.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record.

I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at the table. When 1 minute remains, the light will switched from green to yellow and then red when the 5 minutes are up.

Before we start, let me apologize for beginning the hearing a little late. Most of that was due, as you know, to the fact that we were voting on the floor.

Before we begin, it is customary for the Committee to swear in its witnesses.

[Witnesses sworn.]

Mr. NADLER. Thank you. Let the record reflect that the witnesses answered in the affirmative. You may be seated.

Our first witness will be Ms. Smith, who is recognized for 5 minutes.

TESTIMONY OF SHANNA L. SMITH, PRESIDENT AND CEO, NATIONAL FAIR HOUSING ALLIANCE

Ms. SMITH. Thank you. Good afternoon, and thank you, Chairman Nadler, for the opportunity to talk about the American dream and fair housing.

As you know, the Fair Housing Act was passed in 1968 and amended in 1988 with very strong bipartisan support. Congress's intent was to create neighborhoods where people would have equal access to the American dream and an opportunity to live where they wanted to by choice and free of discrimination.

For myriad reasons, we as a Nation have truly failed to come close to achieving the goals of the Fair Housing Act.

So the 1968 law clearly articulated two goals of the Fair Housing Act. And in 1972, the U.S. Supreme Court, in *Trafficante v. Metropolitan Life Insurance Company* and Parkmerced Apartments in San Francisco talked about those two goals.

One is obvious. It is the elimination of housing discrimination. But the second goal is to promote residential integration.

Our failure as a Nation to effectively address both individual and systemic housing, lending and insurance discrimination means discrimination is still pervasive and residential segregation remains the norm. It is important to point this out, because when you look at the companion law, Title VII, the Equal Opportunity Employment Act, we see many corporations who have succeeded in having a diverse workforce. But each night, that workforce goes home to segregated communities, segregated neighborhoods.

The Fair Housing Act is one of the strongest civil rights laws that has ever been passed. One of the main reasons we do not have more integrated communities today is because the law has not been effectively enforced. We need to use the strength of the existing law to promote integration and fight housing discrimination.

So how prevalent is discrimination? Last year, HUD, the U.S. Department of Justice, the private fair housing groups, and the State and local agencies only reported about 30,000 complaints of discrimination. We have looked at research to show that we could estimate that more than 4 million instances of housing discrimination happened annually.

Who is being harmed by this? Well, we have the seven protected classes, but in addition, we need to talk about how people with disabilities and families with children right now are reporting the highest rates of discrimination.

We recently settled a lawsuit with the fifth largest builder in the United States, the AG Spanos company. And I have to say that Michael Spanos and the company was very good to work with. He was concerned that the discrimination happened.

But the fact is, from 1991 through 2007 and 2008, they built apartment complexes, 123 apartment complexes, that were not accessible to people with disabilities. And in that settlement, you know, he has got to renovate and retrofit 12,300 apartments at a cost of nearly $8 million to $10 million. And had they been built correctly, people with disabilities would have had access to those units and this latter cost wouldn't have come to play.

Families with children are experiencing rampant rates of discrimination. When you consider that 2 million children are homeless now because of the foreclosure crisis and families with children are looking for housing every day, they look on the Internet and they see ads that say, "No kids," "no teenagers," "three-bedroom apartment, one child," "three-bedroom single-family home for rent, four people only."

And the law says you can—in a three bedroom with a family—you can have a husband and wife and four kids, and yet they are restricting occupancy.

Then we have the whole issue of underreported complaints of housing discrimination. Sexual harassment in housing continues to increase. I personally think with the advent of Viagra that we have seen much more sexual harassment of particularly low-income women in housing.

And a recent case in New York City in the——

Mr. NADLER. Excuse me. Let me just explore that for a second. Sexual harassment in housing. What is the connection with the housing?

Ms. SMITH. The landlords will require or——

Mr. NADLER. Oh, sexual harassment by landlords.

Ms. SMITH. Yes, I am sorry.

Mr. NADLER. Okay.

Ms. SMITH. Sexual harassment by the landlords. The New York City case on the Upper West Side that just happened this month—I am sorry, in February—women were being evicted because they refused to have sex with the landlord and the superintendent. The superintendent was a convicted child sex offender, and the women had no idea that they had any protection under the fair housing law, that landlords cannot sexually harass a tenant.

Other underreported issues deal with national origin. Latinos and Asian-Americans are not filing cases although our investigations when we do testing show high rates of discrimination that they experience.

Oh, it said stop.

Also, the other thing I wanted to talk about very quickly is disparate impact. All 11 circuits have heard fair housing cases, and they have all said that the Fair Housing Act covers both intentional discrimination and discrimination by housing policies and practices that have a disparate impact.

And while the Supreme Court hasn't made a decision, all 11 circuits have. And in my testimony, I have several examples.

And finally, quick recommendations. The National Fair Housing Alliance since 1990 has supported adding additional protected classes: source of income, source of—I would say source of legal income, marital status, sexual orientation, and gender identity or expression.

We worked with former Secretaries Jack Kemp and Henry Cisneros and had a commission on fair housing. And the top recommendation was to create an independent fair housing agency for enforcement of the law.

And finally, on the discriminatory advertising I talked about, the Communications Decency Act protects these Internet providers and servicers and allows them to run ads or have people post ads that say no kids, no Blacks, Christians only. So what we would like to see is an amendment to the Communications Decency Act so that it does—it no longer trumps the Fair Housing Act.

Thank you.

[The prepared statement of Ms. Smith follows:]

PREPARED STATEMENT OF SHANNA L. SMITH

Testimony before the
House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

"Protecting the American Dream: A Look at the Fair Housing Act"

March 11, 2010

Shanna L. Smith
President and CEO
National Fair Housing Alliance
1101 Vermont Avenue, NW
Suite 710
Washington, DC 20010

"Protecting the American Dream: A Look at the Fair Housing Act"

Good afternoon. My name is Shanna Smith and I am the President and CEO of the National Fair Housing Alliance (NFHA). Thank you for inviting me to testify today about the Fair Housing Act and housing discrimination.

I have spent my entire career combating housing discrimination in its many forms as well as promoting residential integration, beginning in 1975 as the Executive Director of the Toledo Fair Housing Center. I have lead NFHA's office in Washington, DC since it was established in 1988. The National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

The Fair Housing Act was passed in 1968 and amended in 1988 with strong bi-partisan support. Congress designed the Fair Housing Act to create a better a America and offer everyone equal access to the American Dream to own a home and live in the neighborhood of his or her choice free from discrimination. For myriad reasons, we have failed to come close to achieving the goals of the Act. The 1968 law clearly articulated the dual purpose of the Act: to eliminate housing discrimination and to promote residential integration. It did not include, at the time, an effective administrative remedy. Congress corrected this problem with the 1988 amendments by significantly strengthening the administrative enforcement process. Still, we fall dramatically short of reaching the actual goals of the Fair Housing Act.

Our failure as a nation to effectively address both individual and systemic housing, lending and insurance discrimination means discrimination is still pervasive and residential segregation remains the norm. This is important in contrast to the diversity achieved by many corporations in America. Yet, while people are working together in greater numbers than ever before—many go home each night to racially segregated neighborhoods.

My testimony explores the nature and extent of housing discrimination as it is manifested today, how enforcement action is moving from the individual case by case format to addressing systemic segregation and discrimination, albeit slowly, and why systemic enforcement actions using disparate impact arguments can make important and needed progress in achieving the Congressional intent of the law. I also discuss how the Fair Housing Act could still be improved to fight discrimination against additional protected classes and to address other issues that have arisen since 1968. Finally, I discuss the recommendations necessary to make enforcement of the law effective.

I. Coverage under the federal Fair Housing Act

A. Coverage: Currently, the Fair Housing Act provides protections based on race, color, religion, national origin, sex, disability and/or familial status. The Fair Housing Act was designed to address both individual complaints of housing discrimination and also to

challenge institutionalized, systemic policies or practices of discrimination. When Congress passed the Fair Housing Act in 1968 and amended it in 1988, it established two goals to be achieved:

1. To eliminate housing discrimination; and
2. To promote residential integration.

B. State and Local Fair Housing Coverage: Many states and localities have expanded the protections under their state or local fair housing laws. For example, fourteen states and the District of Columbia have additional protections based on sexual orientation[1] and four states[2] and the District of Columbia include gender identify or expression. Two hundred forty municipalities prohibit discrimination because or sexual orientation and approximately 60 localities include protection for gender identity or expression. Other states/localities have protections based on marital status, survivors of domestic violence, source of income, Section 8 Voucher holders, military status, matriculation and personal appearance.

C. Who can file a complaint under the Fair Housing Act? An aggrieved person has been broadly defined in the regulations and by the courts. Individuals or families who have experienced discrimination are covered under the law, but the courts have also given standing to bring administrative or legal action to the following groups as well:

Municipalities to challenge discriminatory practices such as racial steering by real estate companies [*City of Evanston v. Baird Warner, Inc.*, No. 89 C 1098 (ND IL 10-23-89; *Gladstone Realtors v. Village of Bellwood*, 429 U.S. 91, 114 (1979)]; denying apartments to people with disabilities (*United States v. Southern Management Corp.*, 955 F.2d 914 4th Cir. 1992-Fairfax-Falls Church Community Social Services Board); and reverse redlining.

Interracial and Minority Neighborhoods to challenge racial steering by real estate companies, redlining by lenders or appraisal companies: [*Old West End Association (OWE) v Buckeye Federal Savings and Loan*; *Steptoe (OWE) v. Savings of Am.*, 800 F. Supp. 1542 (N.D. Ohio 1992); Harrison (OWE) v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893 (N.D. Ohio 1977); *Laufman v. Oakley Building and Loan Co.*, 408 F. Supp. 489, 492-93 (S.D. Ohio 1977)]. The last two cases were filed by white families living in the interracial communities and experiencing discrimination because of the racial composition of their neighborhood.

Whites harassed or evicted because they have visitors of another race/national origin or living in predominately white apartment complexes, neighborhoods or communities IF they can show that managers, owners, real estate agents or lenders are engaging in practices to deny people of color and others access, thereby, perpetuating residential segregation. [*Trafficante et al v Metropolitan Life Insurance Company,* 409 U.S. 205 (1972) *Harp v Ward, Moonlight Mobile Home Park]*

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[1] California Connecticut Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin

[2] California, Minnesota, New Mexico and Rhode Island

Non-profit Organizations such as Oxford House and Independent Living Centers to challenge discrimination against people with disabilities (*Memphis Center for Independent Living and the United States v. Milton and Richard Grant Co. et al.* (W.D. Tenn.) *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Tsombanidis v. City of West Haven*, 180 F. Supp. 2d 262 (D. Conn. 2001);*Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993); *United States v. Town of Garner* (E.D.N.C.) (complaint filed in May of 2009).

Faith-based Organizations to challenge landlords for refusing to rent to people with disabilities or families with children moving from transitional housing. (St. Paul's Community Center in Toledo, Ohio filed a HUD administrative complaint against a landlord refusing to rent to families with children—conciliation agreement provided 2 and 3 bedroom apartments rent free for three years to St Paul's to place families in housing making the transition from homeless shelters.)

Real Estate Agents who challenge other agents or brokers for refusing to schedule showings for homes when their clients are members of the protected groups or restricting African American agents to only working with African American buyers, and Black agents who lose listings because a seller states she doesn't want a Black agent listing her home.[3] *[State of Arizona, Edington, Grimm Buyer Brokers Realty of Sedona v Feliks and Bozena Mlynarczyk 2006; Alice Payne v Coldwell Banker Residential Real Estate, Inc, Byrd, Humes v First Real Estate Corporation;* Hall v. Lowder Realty Co. (M.D. Ala. 1997) *2005CV0094 Ohio Civil Rights Commission v. Limes, Keith RK].*

Rental Managers who refuse to implement policies or practices of the owner to deny units to people of color, families with children or people with disabilities. In most situations, former rental managers testify on behalf of victims explaining the policy or practice the owner instituted to keep them from renting apartments.

Fair Housing Organizations to challenge rental, sales, lending or insurance discrimination as well as design and construction issues *[Havens Realty Corp. v. Coleman, 455 U.S. (1982). United States v. Arlington Park Racecourse, LLC and Churchill Downs, Inc., (N.D. Ill. 2005); Toledo Fair Housing Center and Ohio Civil Rights Commission v. Farmers Insurance Group of Companies] National Fair Housing Alliance, et al. v. AG Spanos Companies, et al.*, F. Supp. 2d 1054 (N.D. Cal. 2008); *United States v. Coldwell Banker Joe T. Lane Realty* (N.D. Ga.) (consent decree filed February 2010); *United States v. S&S Group, Ltd. d/b/a ReMax East-West (DeJohn)*(N.D. Ill.) (consent decree entered February 2009); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46 (D.D.C. 2002); *Briceno, et al. v. United Guaranty* (N.D. Ohio) (settlement December 1989).

Testers to challenge discrimination because of receiving untruthful information about availability. This was decided in the U.S. Supreme Court decision *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

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[3] www.democratandchronicle.com/apps/pbcs.dll/article?AID=/20070713/NEWS0203/70710352/-1/COLUMS#storychat#storychat

II. How Prevalent is Housing Discrimination?

A. Complaints Investigated by Private Non-Profit Fair Housing Organizations

The Numbers: In 2008 the total number of complaints filed with government and private fair housing organizations was 30,758.[4] (2009 numbers are not yet available.) It is estimated that more than 4 million incidents of housing discrimination occur annually, so you can see we are barely addressing housing discrimination in America. In 2008, private, non-profit fair housing organizations reported investigating 20,173 complaints alleging housing, lending, insurance discrimination or racial or sexual harassment in housing. HUD reported processing 2,123 complaints and State/local government agencies reported receiving 8,429 complaints. There is some overlap in the government numbers because fair housing organizations refer complaints or file complaints with a government agency.

Fair housing organizations receive far more calls to their offices than the 20,173 complaints, but these landlord-tenant issues, housing counseling or referrals for apartment are not counted in these numbers. The 20,173 complaints reported in NFHA's Trends Report documents allegations of violations of federal and/or state fair housing laws.

DISCRIMINATION BY PROTECTED CLASS 2008				
Basis	NFHA Members	HUD	FHAP	DOJ
Race	18.5%	31%	36%	39%
Disability	31.3%	49%	43%	36%
Family Status	17.5%	17%	16%	21%
National Origin	9.5%	9%	14%	6%
Sex	3.9%	9%	11%	9%
Religion	1.5%	2%	3%	6%
Color	0.6%	1%	3%	n/a
Other*	17.1%	4%	6%	n/a

* The "other" category for NFHA complaints represents complaints arising from categories protected at the state or local level including sexual orientation, source of income, marital status, medical condition, age, or student status. The "other" category for HUD and FHAP complaints represents complaints of retaliation. HUD, FHAP, and DOJ data are for Fiscal Year 2008. Totals may exceed 100 percent, because a single complaint may have multiple bases. Other than NFHA's data, percentages are rounded to the nearest whole number.

[4] National Fair Housing Alliance, *Fair Housing Enforcement: Time for a Change, 2009 Fair Housing Trends Report*, May 1, 2009.

B. How the Internet Fosters Housing Discrimination

Email Profiling: While some advertising for apartments, homes for sale, mortgage loans and homeowners insurance can still be found in local newspapers, the majority of advertising for housing, loans and insurance takes place over the Internet. The first point of contact is through email. The name used in the email address can have positive or negative consequences. One study found that if your email address name is racially or ethnically identifiable as African American, Latino, Asian American, Arab American, you may not get a response from the manager, real estate agent, lender or insurer.[5] There were differences in responses about apartment availability when the names Patrick McDougall, Tyrell Washington, and Said Al-Rahman were used. Patrick McDougall received a 79% positive reply to housing inquires while Tyrell Washington and Said Al-Rahman received a positive reply to their email inquires only 40% of the time.

Discriminatory Advertisements: From June 2008- July 2009, the National Fair Housing Alliance and 27 of our member fair housing organizations reviewed craigslist rental ads. We identify more than **7,500 discriminatory rental advertisements** stating a preference, limitation or denial of housing to families with children.[6] Ads on craigslist stated, "2 Bedroom-NO kids", "Adults only" or "No teenagers." Illegal advertising was identified in every state. NFHA and our members filed more than 1,000 complaints with the U.S. Department of Housing and Urban Development (HUD). The majority of complaints were ultimately withdrawn because neither the fair housing groups nor HUD had the staff resources necessary to identify and charge everyone who posted these illegal advertisements. The Seventh Circuit Court of Appeals ruled that craigslist is not liable for the discriminatory ads published on the site stating that craigslist is protected under Section 230 of the Communications Decency Act, 47 U.S.C., which provides interactive computer service providers with immunity from claims based on third-party content. However, all print media is held liable under the Fair Housing Act. [7]

What is disheartening and wholly unacceptable is families with children reading these ads must believe that is it legal to discriminate against them. Additionally, NFHA asked a number of people who posted the ads if they knew they were violating the law and many responded that they thought it was fine to deny or limit the number of children because they were "just cutting and pasting from other ads on craigslist." Craigslist is one of the top ten most viewed sites in the world with more than 30 million views each month, including 25 million in the United States.

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[5] Journal of Applied Social Psychology, 2006 pages 934-952, 36, 4 Rental Discrimination and Ethnicity in Names Adrian G. Carpusor and William E. Loges Laboratory studies have demonstrated the ability of names to prime stereotypes. To apply these theories and test the effect of name-based ethnic stereotypes on housing discrimination, 1,115 inquiry e-mail messages were sent to landlords advertising apartment vacancies in Los Angeles County over 10 weeks (6 weeks before the conflict with Iraq began in March 2003 and 4 weeks during the conflict). One of three names that implied either Arab, African American, or White ethnicity was randomly assigned to each of the messages sent. African American and Arab names received significantly fewer positive responses than the White name, and the African American name fared worst of all. This pattern held true in all rent categories, in corporate and privately owned apartment complexes, and before and during the war in Iraq.

[6] National Fair Housing Alliance. *For Rent: NO KIDS! How Internet Housing Advertisements Perpetuate Discrimination*, August 11, 2009.

[7] *Ragin v. The New York Times Co.*, 923 F.2d 995 (2d Cir.), cert. denied, 502 U.S. 821 (1991), *Spann v. Colonial Village Inc,* 899 F.2d 24 (D.C. Cir. 1990), *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972) cert denied, 409 U.S. 934 (1972)

With millions of families turned out of their homes through foreclosure, one must wonder how they secure housing free from discrimination.

Roomates.com, another Internet advertiser, was sued by two of NFHA's members, the Fair Housing Councils of San Fernando Valley and San Diego, for publishing discriminatory advertisements and employing a system that allowed users to deny housing because of children, gender or sexual orientation. The court said because Roomates.com allowed posters to make selections on a drop down menu that would illegally exclude children, and allowed the case to proceed to trial. This case is still pending.

C. Types of Discrimination Today

Linguistic Profiling: Our brains filter information constantly and we make split second judgments and decisions that affect the lives of others. At some point in time during the process of securing housing, an applicant speaks with a landlord, real estate agent, loan officer or insurance agent. People, consciously or unconsciously, evaluate the caller and sometimes make judgments and decisions based on their voice. This is not a problem unless the listener uses his/her assumptions to discriminate.

For example, if someone with an accent calls to inquire about an apartment and the landlord lies about the availability because the person is Latino, he has violated the law. Testing will document if linguistic profiling was used as a basis for the denial. Testing over the telephone has documented thousands of cases of discrimination over the past 42 years. Juries have listened to the plaintiff and the testers and decided that truthful information about available units was only given to people who sounded White. Sometimes the apartment manager, real estate agent, loan originator or insurance agent will screen calls and return only those calls from people who "sound White." When a person is looking for an apartment, home, a loan or insurance, it is unlikely they make more than one or two calls to the business because they believe if some one wants their business they will return the messages. Linguistic profiling and message screening can be a very effective way to reject some one without ever talking to them or seeing them face to face.

Rental Markets: The chart above indicates that people with disabilities, African Americans and families with children have the highest percentage of reported allegations of discrimination. The reports may be so high because discrimination against people with disabilities and families with children tends to be blatant. For example, in 2008 the Fair Housing Partnership of Greater Pittsburgh used disabled and non-disabled testers to document how people who are deaf would be treated when inquiring about renting an apartment. Twenty five testers using a relay system contacted apartment owners and twelve (48%) of the deaf testers experienced discrimination. Sometimes the landlord would abruptly hang up when the relay operator explained this was a call for over the phone. In addition, deaf people were discriminated against at a rate of 10% in person.[8] Hundreds of complaints are also filed annually because newly constructed buildings are not accessible to people who use wheelchairs or have other mobility challenges. Veterans returning with disabilities including traumatic brain injuries are also facing discrimination when

[8] *www.healthbridges.info/wp/wp-content/uploads/.../sept08-newsletter.pdf*

seeking rental housing or trying to have a reasonable modification made to the apartment to accommodate the physical disability.

Builders, Architects and Developers: When the Fair Housing Act was amended in 1988, Congress gave builders, developers and architects until March 13, 1991 to follow the design and construction requirements of the Act. In addition, HUD and Justice created educational programs to teach housing developers how to design and construct accessible housing. In spite of the millions of dollars spent by HUD and Justice to teach the industry how to comply, too many builders continue to construct multi-family housing that is not accessible to people with disabilities. The Justice Department and private fair housing agencies have brought many lawsuits resulting in builders' having to spend hundreds of thousands and even millions of dollars to retrofit apartments. NFHA believed that the messaging and litigation from the government must have had a significant impact. However, NFHA has settled two lawsuits in the past six months with builders who should have known better. Ovation Company, a builder in the Las Vegas area, was sued by NFHA when we found 368 buildings (1512 units) out of compliance. After identifying violations, NFHA learned that the principal in the company had been caught before by the Justice Department for building apartments out of compliance with the Fair Housing Act. NFHA sued and settled with the builder agreeing to retrofit the buildings and paying $750,000 in damages and attorney fees.

NFHA and four of its member organizations tested multi-family buildings developed by the A.G. Spanos Companies, the nation's fifth largest builder, for design and construction flaws that render buildings inaccessible to people with disabilities. During their investigation, and in the course of litigation filed against the builder, NFHA and its members identified 123 apartment complexes built since 1991 that did not meet the law's standards. Fortunately, the Spanos Companies worked closely and cooperatively with NFHA to address the design and construction problems found in the buildings and to address broader accessibility problems found throughout the nation. A stipulated judgment was filed in November 2009, in which the Spanos Companies agreed to retrofit 12,300 units, establish a $4.2 million National Accessibility Fund through NFHA to provide grants to people to compensate for "lost housing opportunities" for about 3,800 out-of-compliance units that could not be retrofitted, provide $150,000 to each plaintiff to establish a local grant fund to make existing housing accessible and $40,000 to NFHA and its Atlanta member to establish a coalition to draft a white paper to look at future housing needs for people with disabilities. The landmark settlement is valued at approximately $15 million and covers apartment complexes built since March 1991.

Sales Markets, Lenders and Foreclosures: With so many homes on the market because of the foreclosure crisis you might think there would be minimal discrimination—after all real estate agents need to sell homes to have an income. Of course, many agents do follow the law. However, NFHA still receives reports of racial steering, preferential treatment toward investors versus single family homebuyers, and denial of the opportunity to rent a foreclosed home because of children, race or national origin.

Even in this difficult market, NFHA has reports of African Americans being steered away from homes or denied the right to purchase homes in predominately White neighborhoods. Good deals

on foreclosed homes appear to be marketed to Whites in white neighborhoods and to investors in minority communities.

Real Estate Owned Properties (REO): There are allegations by fair housing organizations that servicers are not maintaining homes in minority or integrated neighborhoods while they make sure lawns are mowed, side walks cleared of snow, routine maintenance completed and renovations completed to make homes in highly marketable White neighborhoods. It is inevitable that some foreclosures will take place, but how we deal with those properties and help those families will have substantial fair lending implications. For example, recent matched pair testing conducted by NFHA has uncovered blatant racial steering among real estate agents. Such discrimination must not be perpetuated in the disposition of foreclosed properties.

Lending Discrimination -- Scams and Tight Credit Markets: Foreclosure and mortgage delinquency scams are out of control. So many people are being scammed every day because they find themselves in desperate situations with their servicers threatening foreclosure and the inability to have their current loans modified. In addition, there simply are not enough certified housing counselors available to provide immediate help. Scammers promise immediate help for a fee from $800 to $5,000 and, of course, no help is provided and the money disappears into the scammers' accounts. Everyone involved in enforcement feels like we are playing "whack-a-mole" when we attempt to stop these scammers.

I have personally been conducting testing to try to identify the corporate entities behind the larger scam operations. I began my investigation in August and scammers are still contacting me because the original website captured my test identity information and continues to sell it. These scammers use various methods to try to get me to give them money. They promise or guarantee to stop a foreclosure. They promise or guarantee they can lower my monthly payment with a loan modification or refinancing. They state that they have the inside track to servicers and when I suggest that I may call a free housing counselor first, they berate the counselors and laugh saying, "Good luck—when they don't help you –you call me back if you haven't lost your house by then." Others try to sound like a friend when they say for just $800 they can begin the process of saving my house.

NFHA received a HUD Fair Housing Initiatives Program (FHIP) grant to conduct investigations, but we will need to work closely with law enforcement so when a scammer removes money from our tester's checking account, law enforcement will be able to follow the money to identify the scammer and his boss. If federal and state law enforcement can bring down large companies with hundreds of scammers, it might have the impact we are seeking.

Tight Credit and Fair Lending: In the early 1980s when interest rates were 17%, fair housing organizations still found banks and mortgage companies denying loans to qualified African American buyers.[9] In late 2008, NFHA conducted lending testing of banks and found that qualified African American and Latino applicants were provided information about loans with higher rates and fees than the less qualified White testers. In some situations, African Americans were even denied the information about applying for a loan and told they had to return in two weeks because the person working with first time homebuyers was on vacation. However, the

[9] *McMililan v. Huntington National Bank.*

similarly situated White tester speaking to the same bank employee just a day later was provided assistance and information for a loan. When credit is tight qualified women and people of color get squeezed.

Race Discrimination: African Americans continue to report high rates of discrimination in rental, sale and lending arenas. Rental discrimination continues in the same vein as years ago only more subtle. In the past, an apartment manager would simply refuse to return telephone calls or say nothing is available. Now the landlord often says, "There are three applications ahead of your application, but if they fall through I promise to call you. Leave your name and number." This kind of statement sounds believable until the African American renter sees that the unit remains advertised or a white friend from work calls the apartment manager and learns the unit is available right now.

More and more fair housing agencies have to conduct full application rental testing to uncover the internal process used to screen out or deny units to people of color. Too often a management company will say that the applicant's credit score is the reason for the denial, but an investigation indicates no credit inquiry was made. Some apartment management companies say they require the applicant to make 3 times the rent, but they do not apply the "rule" equally. Full application testing is necessary to document discrimination that can occur during the application process.

Sexual, Religious and Racial Harassment: All three of these areas are under-reported because most people have no idea the Fair Housing Act protects them from harassment in housing. People of color will often decide not to report harassment for fear it will escalate. Following the September 11 attacks, Arab Americans, Muslims and South Asians found themselves targets of harassment in their homes or apartments. When they called the police, it was reported as possible criminal violations and few complaints made it to fair housing organizations or the government for enforcement. Again, we found that people were afraid to report vandalism because they hoped it might just stop if they ignored it.

Sexual harassment in housing is seriously under reported because women do not know they have protections under the fair Housing Act. For example, on February 1, 2010 the *New York Post* carried a story about an apartment superintendent of several Upper West Side buildings in New York City where women were being evicted because they refused to engage in sexual activity with the superintendent.[10] One victim, Carol Engle explained: "He said, 'If we were friends, I could help you out, and I could pay. "I said, 'You mean if I had sex with you? That's what you're trying to say?' And he said, 'Yes and . . . not just once. I'd come over a couple of times a week, and I could help you out.' "

The newspaper reported that the super, a convicted sex offender who spent time in prison: "September 1987, -- already in prison for sexually abusing a 5-year-old girl -- was sentenced to 10 to 20 years after pleading guilty to rape, sodomy and sexual-abuse charges related to an attack on three Suffolk County girls between ages 5 and 7... he was denied parole four times before his

[10] http://www.nypost.com/p/news/local/manhattan/resident_evil_fhucKFMAxrRvfmJAtyewiL#ixzz0eOuEoxjl

2001 release – he made other children watch him abuse the girls, a Suffolk County prosecutor said at the time."

D. Disparate Impact

Evidence of disparate impact can be documented when a housing, lending or insurance provider applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity. Disparate impact is covered by the Fair Housing Act; however, challenges to disparate impact continue to be made. NFHA urges HUD to issue a regulation clarifying how disparate impact cases in housing ought to be made and distinguishing the differences between fair housing and employment cases.

In 1974, the Eighth Circuit became the first federal appellate court to find a Fair Housing Act violation based on the discriminatory effect (impact) of the defendant's actions.[11] All eleven appellate courts agree that the Fair Housing Act covers both intentional housing discrimination as well housing actions, policies or practices that have a disparate impact.

It is difficult if not impossible to prove intent in all housing discrimination cases. For example, prior to 1997, the homeowners insurance industry used "moral hazard" as justification to deny replacement cost coverage to homes built before 1970 and valued below an arbitrary number such as $200,000 in Washington, DC, $50,000 in Ohio and Virginia. The industry had no data to support its conclusion that a homeowner would have an incentive to burn down his home if it was insured for its replacement cost rather than its current market value. This policy based on age and value had a disparate impact on homeowners living in integrated and minority neighborhoods across America. The policy was challenged first through the HUD administrative process. State Farm became the first company to eliminate the policy and notify all of its policy holders that they were entitled to purchase replacement cost coverage for their home. Allstate followed shortly thereafter signing a conciliation agreement with HUD and NFHA. However, litigation was required to get Liberty Mutual, Prudential, Travels, Aetna, and American Family insurance companies to change policies that had a disparate impact because of the racial composition of neighborhoods or race or ethnicity of homeowners.

In the rental context, disparate impact is played out by owners who have occupancy policies stating "one heartbeat" per bedroom. This has a disparate impact on families with children, especially since the rule of thumb is two people per bedroom. Landlords who have a policy to evict people who have an incident of domestic violence, even when the occupant has a restraining order against the perpetrator and apartment owners who refuse to accept alimony or child support as income in computing income eligibility for an apartment. These policies have a disparate impact on female headed households.

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[11] *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85, 1188 (8th Cir. 1974) (holding, in exclusionary land-use case brought by the Justice Department, that the defendant-municipality violated the FHA's § 3604(a) and § 3617 and commenting that in order "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . Effect, and not motivation, is the touchstone . . . .").

In the lending context disparate impact manifested in minimum loan amount policies for mortgage loans and mortgage insurance. In the Midwest, lenders refused to write loans under $50,000 or $30,000 and mortgage insurance companies refused to insure loans under $30,000. Countrywide, for example, had an advertisement in St. Louis for special loans programs but the home had to be valued at more than $75,000. However, the majority of the homes in Black neighborhoods were valued at less than $75,000.

III. Recommendations for Amendments to the Fair Housing Act

The Fair Housing Act is one of the strongest civil rights laws we have on the books. One of the main reasons we do not have a more integrated nation today is because the law has not been enforced properly or to any great extent. We need to use the strength of the existing Act to promote integration and fight discrimination.

But times have changed since 1968, and even since 1988, and there are amendments that should be made to the Fair Housing Act to bring it up to date and to make it stronger.

Expand the Groups Protected: The National Fair Housing Alliance supports expanding coverage based on source of income, martial status, sexual orientation and gender identity or expression.

Create an Independent Agency for Fair Housing Education and Enforcement: I have been engaged in fair housing education and enforcement for 35 years. I have tried during this time to help make the administrative enforcement mechanism work by filing hundreds of complaints, working with investigators and HUD FHEO headquarters. Effective enforcement is a hit or miss proposition.

The creation of a new agency was the top recommendation of the bipartisan National Commission on Fair Housing and Equal Opportunity, co-chaired by former HUD Secretaries Henry Cisneros and the late Jack Kemp. This Commission toured the country in 2008 and heard testimony on the state of fair housing, HUD's and DOJ's enforcement record, and other issues. In December 2008, the Commission issued a report entitled, "The Future of Fair Housing" with nine recommendations for improving the state of fair housing in the nation.[12]

Fair housing enforcement has never been a priority at HUD. HUD has too many conflicts of interest to be able to effectively enforce the law. For example, HUD wants to work closely with landlords so they will accept Section 8 Vouchers or real estate companies so they will market FHA REO properties or manage foreclosed multi-family apartments. HUD is invested in CDBG recipients so it is unlikely to penalize a city that engages in housing discrimination. Zanesville, Ohio and St. Bernard Parish are examples of HUD allowing these cities to receive CDBG funds in spite of overt actions of discrimination under the Fair Housing Act. It should be noted by both Republican and Democratic administrations have failed in this respect. Showe Builders was found by federal jury to have violated the Fair Housing Act in the 1980s and the jury decision

[12] The National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing*. December 2008. Available at www.nationalfairhousing.org.

was upheld by the 6th Circuit Court of Appeals, but never sanctioned the builder who was one of the largest recipients of Section 8 subsidies. The list goes on and on.

It is NFHA's position that enforcement of the law must be removed from HUD and placed in an independent agency along with the Fair Housing Initiatives Program (FHIP) and the Fair Housing Assistance Program (FHAP). Congress will have better oversight for enforcement of this important law and be able to measure the actual effectiveness of enforcement efforts. HUD would retain an Office of Fair Housing to address equal opportunity in its own programs.

NFHA also recommends reviving the President's Fair Housing Council according to Executive Order 12892 issued by President Clinton in 1994. The order requires all federal agencies to cooperate with the HUD Secretary to "review the design and delivery of all federal programs to ensure they support a coordinated strategy to affirmatively further fair housing;"

IV. Other Legislative Recommendations

Amend the Communications Decency Act in order to eliminate discriminatory advertising and place the same publishing standards on Internet providers as is placed on newspaper publishers. In order to comply with the Fair Housing Act, newspapers utilize screening systems to keep advertisements containing discriminatory statements from being printed. However, a legal interpretation of the Communications Decency Act holds that interactive Internet providers, like craigslist, are not publishers and, therefore, are not liable for violating the Fair Housing Act if discriminatory housing ads are published on their sites. A simple amendment to the Communications Decency Act could be made to hold entities like craigslist responsible for the discriminatory ads found on the website and uphold the Fair Housing Act, which makes it illegal to make, print, or publish or cause to be made, printed, or published any advertisements that discriminate, limit, or deny equal access to apartments or homes because of race, color, national origin, sex, religion, familial status and disability.

Allow Full Application Testing in Mortgage Lending: As shown by countless studies, discrimination in lending occurs throughout the entire process of applying for a loan. Brokers and lenders may accept loan applications for protected borrowers, but may violate the Fair Housing Act by offering borrowers discriminatory terms or conditions throughout the process. Fair housing organizations would like to investigate lenders through testing to determine the extent of these practices and to enforce the law when it is broken.

However, it is currently is a felony to provide false information on loan application—even for an organization using a tester with no intention of accepting the loan. Fair housing advocates have been asking the DOJ since 1990 to work with us to assure that legitimate testing be conducted. We have suggested that they establish lender tester profiles in the credit bureau system so that we may test and investigate lending practices all the way through the loan process. We also asked for immunity from prosecution to conduct full application lending testing. In the past, the DOJ replied that it would be up to the local US Attorney to decide whether or not to prosecute the tester. Currently, we have asked the Department to revisit this request; however, I believe the best approach would be narrowly construed legislation that provides an exemption from

prosecution for full application lending testing conducted by qualified fair housing agencies approved by the DOJ. Credit reporting companies must also be given the legal authority to work with qualified fair housing organizations approved by DOJ so that they can assist the fair housing agencies in creating credit reports for fair lending testers.

Thank you once again for the invitation to testify before you today. I look forward to working with you to enhance the Fair Housing Act and to promote fair housing and inclusive communities throughout our nation.

Mr. NADLER. Thank you.
Ms. Arnwine is recognized for 5 minutes.

TESTIMONY OF BARBARA ARNWINE, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Ms. ARNWINE. Good afternoon, Chairman Nadler.

My name is Barbara Arnwine, and I am the executive director of the Lawyers' Committee for Civil Rights Under the Law. Thank you for this opportunity to testify at this important hearing on the Fair Housing Act.

Forty-two years after passage of the Fair Housing Act as amended in 1988, we are still so far from fulfilling its promise. Its requirement that communities receiving Federal housing assistance and the Federal Government proactively further fair housing, residential integration, and equal opportunity needs better governmental enforcement and continued due diligence by civil rights organizations like the Lawyers Committee, NFHA, and all the ones that are represented here.

This need was reiterated during hearings held as part of the National Commission on Fair Housing and Equal Opportunity. The commission's recommendations were released in a major report in December 2008 entitled the "Future of Fair Housing," and we urge this Congress to affirmatively act upon them as soon as possible.

I will address some of these today, and I am sure my esteemed panel member Dean Okianer Dark, who was a member of this commission, will also provide more details.

As a multifaceted civil rights organization, the Lawyers' Committee works across many disciplines to address civil rights issues and their impact upon minority communities. Our environmental justice, community development, and education projects are all especially interconnected with the work of the Fair Housing Project in a coordinated effort to combat discriminatory practices and resegregation.

To this end, we are recommending diversity and education and integration requirements, and the reauthorization of the elementary and secondary education act programs to redress the Federal Government's role in perpetuating segregated communities in the education context and the housing context.

Presently, the Lawyers' Committee's top fair housing priority is fighting the foreclosure crisis. As stated in the "Future of Fair Housing" report, "The impact of this crisis is causing one of the greatest losses of wealth in the American minority community in its history." Millions of distressed homeowners have become vulnerable targets to unscrupulous and sometimes criminal third-party scammers posing as loan modification specialists.

The Lawyers' Committee has responded by creating a coordinated national campaign entitled the loan modification scam prevention network to support existing efforts at the national, State and local levels. We are working with Fannie Mae, Freddie Mac, NFHA, and NeighborWorks of America. The Lawyers' Committee is leading an effort to increase reporting and prosecution of alleged scammers to support ongoing enforcement efforts.

Our Web site, www.preventloanscams.org, provides additional information about our campaign.

For a legislative fix, we are supporting the formation of the Consumer Financial Protection Agency, which the House has already passed, and is now awaiting passage in the Senate. We believe this new agency will help quell discriminatory, deceptive and fraudulent loans which have led to this current foreclosure crisis.

As part of our litigation efforts after Hurricane Katrina, the Lawyers' Committee created the Disaster Survivor Legal Assistance Initiative and emerged as one of the leading civil rights organizations in providing legal assistance to victims of the storm. This brought a number of cases to light.

First, alleged violations by Internet providers of the Fair Housing Act arose as a major issue. And as Shanna has already said, before the courts have thus far shielded Internet providers under the Communications Decency Act, we ask that Congress adopt a simple amendment to the CDA which makes clear that nothing in the CDA limits the application of the Fair Housing Act or any similar State law.

Second, for several years, the Lawyers' Committee's fair housing program has given priority to fighting discriminatory zoning decisions in municipalities. This has been a major barrier in our post-Katrina housing recovery efforts in Mississippi and New Orleans. A case we are involved in with John Relman and others in St. Bernard's Parish illustrates how HUD's enforcement of Section 808 of the Fair Housing Act can be extremely effective in fighting discriminatory and exclusionary zoning.

Despite HUD's actions, we still believe it is necessary for HUD, one, to release a guidance as soon as possible so that recipients of Federal housing know their duties, and it is critical for Congress to amend the Fair Housing Act so that a discriminatory housing practice involves a violation of the affirmatively furthering provision under Section 3608.

Third, the Lawyers' Committee has focused much of its amicus litigation on source of income discrimination. And while we are encouraged by the court's decisions thus far, we urge congressional action here, as well.

Discrimination based on source of income is currently not covered under the Fair Housing Act. Hence, to better ensure compliance and clarify the act's original intent, we recommend an amendment to the Fair Housing Act that would add source of income as a protected class.

And lastly, all courts of appeal have recognized that violations of the Fair Housing Act may be proved on a disparate impact standard. However, the standard is now under attack by the financial industry in a series of fair lending cases, and it is very important that the standard be vigorously defended by the Department of Justice and by the adoption by HUD of a regulation consistent with the holdings in all of these courts of appeals.

The Lawyers' Committee applauds this Subcommittee's actions to take a close look at the Fair Housing Act. It is increasingly clear that fair housing is the lynchpin to protecting the American dream. We look forward to the further hearings addressing these issues and determining what actions are most important and will be most successful.

Thank you so much.

[The prepared statement of Ms. Arnwine follows:]

PREPARED STATEMENT OF BARBARA ARNWINE

MARCH 11, 2010

HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES

"PROTECTING THE AMERICAN DREAM: A LOOK AT THE FAIR HOUSING ACT

TESTIMONY OF
BARBARA ARNWINE, EXECUTIVE DIRECTOR,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

My name is Barbara Arnwine and I am Executive Director of the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee for Civil Rights Under Law, *hereinafter referred to as the Lawyers' Committee,* is a nonpartisan, nonprofit organization established in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. The Committee fulfills its mission by using the skills and resources of the bar to address matters of racial justice and economic opportunity through legal actions, transactional legal services, public policy reform, and public education.

For almost 47 years, the Lawyers' Committee has advanced racial and gender equality through a highly effective and comprehensive program involving educational opportunities, fair employment and business opportunities, community development, open housing, environmental health and justice, criminal justice, and meaningful participation in the electoral process.

Chairman Nadler, I want to thank the Sub-Committee for the opportunity to testify at this important hearing on the Fair Housing Act. Almost forty two years ago, Congress passed Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act"), which, as amended in 1988, prohibits discrimination in public and private housing markets that is based on race, color, national origin, religion, sex, disability, or familial status. Importantly, the Act also requires communities receiving federal housing assistance and the federal government to proactively further fair housing, residential integration, and equal opportunity goals. However, equal opportunity in housing and achieving desegregated neighborhoods remain a major challenge in communities throughout our country, with an impact far beyond providing shelter free from discrimination.

As a multifaceted organization, the Lawyers' Committee works across many disciplines to address these issues and their impact upon minority communities. While we are here today to focus upon the Fair Housing Act, the Lawyers' Committee will continue to work with Congress to address the effect of other statutes and governmental obligations upon housing patterns and

vice versa. The role of educational patterns, the enforcement of environmental justice laws, criminal statutes, and even voting rights laws all play a critical role in the development of a community. Where we live shapes our lives -- our interactions with others, our work life and employment opportunities, our health, and our access to public transportation. The Lawyers' Committee will draw upon our longstanding expertise to comprehensively combat discriminatory practices against minority communities so that the phrase "equal opportunity for all," is not just an ideological concept, but a reality.

I. "THE FUTURE OF FAIR HOUSING"

By way of introduction to my discussion of important fair housing and fair lending issues, I first want to make special note of the National Commission on Fair Housing and Equal Opportunity which was formed in 2008, the 40th anniversary of passage of the Fair Housing Act, by the Lawyers' Committee, the Leadership Conference on Civil Rights Education Fund, the National Fair Housing Alliance, and the NAACP Legal Defense and Educational Fund, to investigate the state of fair housing. The seven-member commission was co-chaired by two former U.S. Housing and Urban Development (HUD) secretaries – the Honorable Henry Cisneros, a Democrat, and the late Jack Kemp, a Republican. Over a six month period in-depth hearings were held in five major cities -- Chicago, Houston, Los Angeles, Boston, and Atlanta – to assess our progress in achieving fair housing for all. Upon completion of the hearings the Commission issued a major report in December 2008 entitled *"The Future of Fair Housing."* As briefly summarized in this report:

> "The hearings exposed the fact that despite strong legislation, past and ongoing discriminatory practices in the nation's housing and lending markets continue to produce levels of residential segregation that result in continued disparities between minority and non-minority households in access to good jobs, quality education homeownership attainment and asset accumulation. This fact has led many to question whether the federal government is doing all it can to combat housing discrimination. Worse, some fear that rather than combating segregation, HUD and other federal agencies are promoting it through the administration of their housing, lending, and tax programs.

The report contains several recommendations found in the Executive Summary of the Report.[1] In addition, while the Commission did not reach consensus on recommending action concerning legislative or regulatory changes, many witnesses drew attention to a number of areas where legislative or regulatory changes may be needed to address confusion about the ways in which the Fair Housing Act and other laws apply.[2]

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[1] The recommendations in the report's executive summary include: (1) creating an independent fair housing enforcement agency; (2) reviving the President's Fair Housing Council; (3) ensuring compliance with the "affirmatively furthering fair housing" obligation by the federal government; (4) strengthening compliance of the affirmatively furthering fair housing obligation by federal grantees; (5) strengthening the Fair Housing Initiatives Program (FHIP); (6) adopting a regional approach to fair housing; (7) ensuring that fair housing principles are emphasized in programs addressing the mortgage and financial crisis; (8) creating a strong, consistent fair housing education campaign; and (9) creating a new collaborative approach to fair housing issues.

[2] Appendix A, entitled "Emerging Fair Housing Legislative and Regulatory Issues," discusses these ideas. They include (1) amendments to the Community Decency Act with respect to discriminatory housing advertising on the internet; (2) an amendment to the Fair Housing Act to provide direct enforcement for failure to affirmatively further fair housing which includes a claim for damages; (3) addition of a new protected class to the Fair Housing Act source of income discrimination; (4) clarification of court decisions to establish that a failure to design and construct accessible housing is a continuing violation of

My esteemed panel member, Dean Okainer Dark was a member of this Commission and can provide more details of the work and recommendations of the Commission.

II. FAIR HOUSING WORK OF THE LAWYERS' COMMITTEE

Much of the Lawyers' Committee's work is focused on housing and community development issues. One of my first actions when I became Executive Director of the Lawyers' Committee in 1989 was to create our Fair Housing Project. Since then the Lawyers' Committee has engaged in a wide variety of activities focused on litigation to enforce fair housing and fair lending laws and advocacy for fair housing initiatives and legislation. In 1991, shortly after the establishment of the Fair Housing Project, we created the Environmental Justice Project that works with the private bar to represent and advocate on behalf of communities of color to address environmentally discriminatory conditions and decisions. More recently in 2004 we formed the Community Development Project, the first national transactional pro bono program that provides direct legal services to non-profit organizations involved in community development activities in the most underserved regions of the country. Of course, all of these projects work together with our Education Project to combat discriminatory practices in predominately minority communities, particularly the continuance and, in some cases, the re-emergence of segregated communities.

As set forth below, fair housing litigation brought by the Lawyers' Committee has addressed many important fair housing issues, several of which are noted in *The Future of Fair Housing* report.

A. Fair Housing and the Foreclosure Crisis

Presently, the Lawyers' Committee's top fair housing priority is fighting the foreclosure crisis. At its roots, this crisis is a civil rights issue. As stated in *The Future of Fair Housing* report:

> The roots of this crisis are not simply a result of the rapid growth of collateralized mortgage obligations (the purchase and bundling of mortgages into securities), the exotic loan products that were created for this booming secondary market, and the deregulation of the financial services industry. They also can be traced to historic discrimination and to more recent racial discrimination in housing and mortgage lending. Indeed, in describing the similarity of the causes of the present foreclosure crisis to past discrimination, one Commission witness described it as "déjà vu all over again." Similarly, the disproportionate impact of foreclosures on minority homeowners and renters has been underreported by the media. The impact of this crisis is causing one of the greatest losses of wealth in the American minority community in its history.

The report traces the historical discrimination in housing by both government policies and private redlining of neighborhoods that left individuals living in predominately minority neighborhoods without access to mainstream mortgage lending. More recently, there was an increase in the availability of mortgages to minority communities, but it came primarily through a newly created subprime mortgage market that made mortgages available to higher risk and non-

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the Fair Housing Act; (5) reject the reasoning in recent case law that overturned decades of case law which established that the Fair Housing Act applies to both discrimination in the acquisition of housing and post-acquisition discrimination; (6) adoption by HUD of a regulation outlining the application of the Fair Housing Act to acts of sexual harassment in the housing context; and (7) develop a general principle of fair housing choice for low-income families receiving federal housing assistance.

traditional borrowers, albeit at higher interest rates. The subprime market became inundated with widespread discrimination where predatory lenders targeted toxic products to minority communities. Furthermore, lending policies such as yield spread premiums provided incentives for predatory lenders, thusresulting in many minority current and future homeowners being steered to risky subprime loans even when their income and credit scores would have qualified them for prime loans. Analysis of 2006 HMDA data showed while only 17 percent of white homeowners had subprime loans, 54 percent of African-Americans and 47 percent of Hispanics had subprime loans. [3] Not surprisingly, when the housing bubble burst in recent years, it resulted in unprecedented numbers of foreclosures and the resulting disinvestment and blight which fell disproportionately on minorities, causing probably the greatest loss of wealth in minority communities in history.

The crisis continues. In the midst of the current economic turmoil and foreclosure crisis, what we call the "second wave" of the foreclosure crisis has emerged. Millions of distressed homeowners have become vulnerable targets to unscrupulous and sometimes criminal third-party scammers, con-artists, and thieves. These homeowners, desperate to keep their homes, are at risk from individuals and companies posing as "loan modification specialists," some of whom are the very people who previously peddled subprime loans. The alleged "rescuers" employ various scams with disastrous consequences for already desperate homeowners: phantom foreclosure counseling, lease-back or repurchase scams, fraudulent refinance, fraudulent loan modification, bankruptcy foreclosure, and reverse mortgage fraud. While waiting for the promised relief, homeowners not only lose their money but often fall deeper into default and lose valuable time.

It is this crisis which the Lawyers' Committee is now focused on. We have created a coordinated national campaign entitled the Loan Modification Scam Prevention Network (LMSPN or Network) to support existing efforts at the national, state and local levels to fight this scourge. Along with the Lawyers' Committee, the lead organizations working on this campaign are Fannie Mae, Freddie Mac, and NeighborWorks America. Key partners in the coalition include governmental agencies, such as the Federal Trade Commission, the U.S. Department of Housing and Urban Development (HUD), U.S. Department of Justice, the U.S. Treasury Department, the Federal Bureau of Investigation, and state Attorneys General offices, as well as leading non-profit organizations from across the country.

This new, broad coalition includes a two-part response. First, NeighborWorks is leading a national media and outreach campaign to educate homeowners and the public on potential scams. Second, the Lawyers' Committee is leading an effort to increase reporting and prosecution of alleged scammers to support ongoing enforcement efforts at the federal, state and local levels. Our website --- www.preventloanscams.org -- was just launched and provides the following:

- Creation of National Database - A national database (National Loan Modification Scam Database) has been created to house complaints submitted by homeowners against alleged scammers. These complaints can now be submitted via a simple online form (found at http://complaint.preventloanscams.org, also available in hard copy) by homeowners, housing counselors and advocates working with homeowners, at foreclosure prevention events, and through the Homeowners' HOPE Hotline (1-888-995-HOPE). Increasing the number of complaints in the Database is a top priority of the Network.
- Support of State and Local Efforts - The Network supports ongoing state and local law enforcement efforts by sharing complaint information, providing access to national data

[3] See *The Future of Fair Housing, pp. 31-33.*

to determine whether alleged scammers are operating across jurisdictions and state lines, working with active coalitions, educating the public and homeowners, and supporting commonsense legal and policy reforms.

- Increased Enforcement Actions - It is anticipated that as a result of the National Loan Modification Scam Database, enforcement activities will increase at the state and local level not only by prosecutors, but also state regulatory agencies. In addition, the Network will coordinate closely with governmental law enforcement and local legal organizations representing victims of scams to file high impact litigation where appropriate.
- Direct Homeowner Contact - Trained volunteers will contact homeowners who have reported scams to conduct a more substantive intake to collect detailed information about scammers and how they operate and transmit this information to appropriate law enforcement agencies.
- Public Education - A strategic public education effort is underway, utilizing both online and offline tools, to use the information in the Database and the experience of leaders on the ground to help homeowners identify and avoid scams and paint the clearest picture of the havoc wrought by loan modification scammers.

B. Discriminatory Housing Advertising on the Internet

1. Post-Hurricane Katrina

After Hurricane Katrina, the Lawyers' Committee created the Disaster Survivors Legal Assistance Initiative in large part because of the disproportionate impact the storm had, particularly on affordable housing for minorities. Because of the far-reaching work of that Initiative, the Lawyers' Committee emerged as the national civil rights organization taking the lead in providing legal assistance to victims of the storm.

One of the first fair housing issues that we addressed after Hurricane Katrina was in December 2005 when we assisted the Greater New Orleans Fair Housing Action Center in the filing of complaints with HUD alleging violations of the Fair Housing Act. These alleged violations were by five internet providers who posted housing ads for victims of the hurricane which contained explicitly discriminatory preferences. The ads included statements such as: "[I] would love to house a single mom with one child, not racist but white only;" "2 bedrooms, pvt bath, use of whole home, for white family of up to 5;" "We would prefer a middle class white family;" "We are willing to share our home with a white woman with children or a married white couple with children." Such ads were widespread after Hurricane Katrina as evidenced by five similar HUD complaints filed in December 2005 by the National Fair Housing Alliance.

On February 28, 2006 the House Financial Services Committee's Subcommittee on Housing and Community Development held a hearing on "Fair Housing Issues on the Gulf Coast in the Aftermath of Hurricanes Katrina and Rita." Our Director of our Fair Housing Project, Joe Rich, testified at that hearing and was specifically asked to comment on the internet advertising issue. As noted in his testimony, Mr. Rich stated that that the type of discriminatory ads found on post Katrina websites violate Section 804(c) of the Fair Housing Act, but that Section 230(c)(1) of the Communications Decency Act (CDA) included a provision giving immunity to providers of "interactive computer service" which included the following language: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This broad immunity was being routinely invoked to dismiss Fair Housing Act claims based on discriminatory internet housing advertising. Mr. Rich further testified that: "If courts were to accept this distinction between

housing advertising in the print as opposed to on the internet, the result would be absurd – discrimination that is illegal in print media would be permitted on the internet. To make this proposition more absurd, housing advertising on the internet is growing significantly while declining in the print media."

Accordingly, in order to equitably and effectively combat discriminatory advertising, the Lawyers' Committee recommends that Congress adopt a simple amendment to the CDA which makes clear that nothing in the CDA limits the application of the Fair Housing Act or any similar state law.

2. Existing Case Law

After our first work on internet advertising issues in 2005 and 2006, the Lawyers' Committee then urged courts to find that the CDA did not immunize internet providers from violations of the Fair Housing Act by filing *amicus curiae* briefs in two major cases addressing this issue. In a case filed by our Chicago affiliate, *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc.,* we filed amicus briefs in both the district court and Seventh Circuit Court of Appeals; and in *Fair Housing Council, et al. v. Roommates.com.*, we filed an amicus brief when the case was heard *en banc* by the Ninth Circuit Court of Appeals.

Unfortunately, neither Court accepted our claim, instead holding that the CDA did provide immunity to internet providers from Fair Housing Act discriminatory advertising claims as long as the internet sites did not cause the discriminatory notices to be posted and did nothing else that would take it out of the these protections. [4]Thus, these decisions uphold the illogical result that discriminatory ads that are illegal in print media are protected by immunity provided by the CDA if placed on internet sites as long as the internet provider does nothing to cause or contribute to the ads that are posted.[5] In short, the need for Congress to amend the law to eliminate this anomaly still remains.

C. <u>Post-Acquisition Discrimination</u>

Until 2004, there had been over 35 years of precedent that held that discrimination occurring after a person acquires a home or rents an apartment in cases violated Section 804(b) of the Fair Housing Act. But in a 2004 Seventh Circuit case, *Halprin v. Prairie Single Family Homes of Dearborn Park Association*, 388 F.3d 327 (7th Cir. 2004), the interpretation of this provision was drastically narrowed to cover only discrimination during the sale or rental of a dwelling, but not anything that occurred thereafter.

The practical effect of the decision in *Halprin* significantly undermined the effectiveness of the Act by changing the decisive question from *whether* there was housing discrimination to *when* such housing discrimination occurred. Its impact was immediate and severe both in the Seventh Circuit and in other jurisdictions where *Halprin was* recognized as persuasive authority. It meant that claims of tenants and homeowners who have indisputably experienced racial, sexual, or other forms of harassment or discrimination by landlords, neighbors, or municipal authorities may not have a remedy under the Fair Housing Act merely because the discrimination occurred after they took occupancy of their dwelling.

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[4] See *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist,* 519 F.3d 666 (7th Cir. 2008) and Fair *Housing Council, et al. v. Roommates.com.* 521 F.3d 1157 (9th Cir. 2008)(en banc).

[5] Because Roommates.com created the discriminatory questions and choice of answers and designed its website registration process around them, it lost its CDA immunity and the case was remanded to the district court to determine if the ads at issue violated the Fair Housing Act.

After this decision, several other courts followed the reasoning of this case, including two cases in which the Lawyers' Committee participated. In *Cox* v. *City of Dallas*,[6] a Fifth Circuit case in which the Lawyers' Committee participated as *amicus curiae,* the court held that a city's alleged discriminatory refusal to enforce zoning laws and close an illegal dump near homes did not give rise to a Section 3604(b) claim because it occurred after acquisition of the homes. *Steele, et al. v. City of Port* Wentworth (S.D. GA) was a case brought under the Fair Housing Act by the Lawyers' Committee alleging that the city failed to provide water and sewer services to identifiably African American neighborhoods, while providing those services to identifiably white neighborhoods. In 2008, the district court dismissed the case in a summary judgment opinion which was based in part on a holding that section 804(b) of the Fair Housing Act did not cover the alleged discrimination because it occurred well after the acquisition of homes in the minority community.[7] In other words, African American homeowners who had lived in their neighborhood for decades could not sue a local government under the Fair Housing Act to obtain water and sewer services or facilities that were being withheld on a discriminatory basis; but any individual who wished to move into that same neighborhood – and likely had no knowledge of the level of services or facilities that the local government actually provided – could bring such a claim.

More recently, however, courts are starting to reject this radical reinterpretation of the Fair Housing Act. Most important is the case of *Bloch v. Frischholz*, in which the Seventh Circuit revisited this issue *en banc*. Based on our long experience in litigating Fair Housing Act cases, the Lawyers' Committee put together a coalition of our affiliates in Chicago, Washington, Boston, Philadelphia, San Francisco and Mississippi, along with the National Fair Housing Alliance, and submitted an *amicus curiae* brief urging the *en banc* court to reverse the panel decision holding that post-acquisition discrimination was not covered by the Fair Housing Act. On November 13, the United States Court of Appeals for Seventh Circuit, sitting *en banc* in the case, held in an 8-0 unanimous opinion that plaintiffs have a claim under the Fair Housing Act for discrimination by a condominium association that occurred after the plaintiffs had purchased their condo and lived in the dwelling for several years.[8] This holding in essence reversed the earlier Seventh Circuit holding in *Halprin* and held that homeowners have a claim under the Fair Housing Act for discrimination that occurred after the plaintiffs had moved into the dwelling they had purchased.

At about the same time as this decision, the Ninth Circuit reached the same conclusion in *Committee Concerning Community Improvement v. City of Modesto,* 583 F.3d 690 (9th Cir. 2009), a case in which our San Francisco affiliate participated. There the court held that Section 804(b) of the Fair Housing Act applied to post-acquisition discrimination claims involving timely provision of public services, such as emergency and police services, to majority Latino neighborhoods because limiting the Act to claims brought at the point of acquisition would frustrate congressional purpose.

We are hopeful that these two decisions will return the interpretation Section 804(b) with respect to post-acquisition and post-rental discrimination to what it had uniformly been since the passage of the Act in 1968. However, we must be vigilant in light of how far some courts had strayed prior to these two decisions.

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[6] 430 F.3d 734, 745 (5th Cir. 2005), cert. denied, 547 U.S. 1130 (2006)
[7] 2008 U.S. Dist LEXIS 20637 (S.D. Ga. 2008)
[8] See 587 F3d 771 (7th Cir. 2009)(*en banc*)

D. Exclusionary Zoning

One of the priorities of the fair housing program of the Lawyers' Committee has been fighting discriminatory zoning decisions of municipalities. This discrimination resulted in the exclusion of affordable housing from white areas of the jurisdiction with the consequent result of (1) discriminating against minorities who disproportionately seek affordable housing and (2) perpetuating residential segregation. These actions reflect the stubborn and widespread racial NIMBYism in our country which continues to cause the exclusion of minorities from areas of high educational and employment opportunity by perpetuating residential segregation. As the National Commission on Fair Housing and Equal Opportunity noted in "The Future of Fair Housing" at page 10:

> When the Fair Housing Act became law in 1968, high levels of residential segregation had already become entrenched. However, Act's promise as a tool for deterring discrimination and dismantling segregation remains unfulfilled. During the forty years since the Act was passed, these segregated housing patterns have been maintained by a continuation of discriminatory governmental decisions and private actions that the Fair Housing Act has not stopped.

Exclusionary zoning has been a primary barrier in our housing recovery efforts in Mississippi and New Orleans after Hurricane Katrina. In many instances, the opposition has been racially or ethnically based and, as a result, housing recovery for low- and moderate-income people has been severely hampered, and an affordable housing crisis continues unabated in these states. The most egregious example of exclusionary zoning is a case that came out of our post Hurricane Katrina work -- *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish* (E.D. La). The extraordinary recalcitrance of St. Bernard Parish, even in the face of several federal court orders, demonstrates racial NIMBYism at its worst.

Shortly after Hurricane Katrina, St. Bernard Parish, a 93% white Parish which abuts two virtually all African-American neighborhoods of New Orleans, including the Lower Ninth Ward, passed a series of restrictive land use ordinances, culminating in a September 19, 2006 ordinance that prohibited all but "blood relatives" from renting homes from homeowners. Almost immediately, on October 3, 2006, we brought this case on behalf of the Greater New Orleans Fair Housing Center, the same organization we worked with when discriminatory internet ads appeared in 2005. Shortly thereafter, on November 13, 2006, the Parish agreed to the preliminary relief sought – an injunction against any implementation of the discriminatory ordinance. Ultimately, St. Bernard Parish formally repealed the ordinance on December 2006 and entered into a consent decree in 2008.

But the discriminatory actions of St. Bernard Parish did not end with this consent decree. In September 2008, after a real estate development corporation had initiated the process of developing four affordable multi-family housing developments, the Parish passed another ordinance which placed a twelve month moratorium on the construction of all multi-family housing with more than 5 units. A motion to enforce the consent decree was filed and resulted in a detailed 26 page order on March 25, 2009 finding that the Parish's intent in "enacting and continuing the moratorium is and was racially discriminatory."[9] Despite this, the Parish continued to place barriers in the way of the developer by failing to issue necessary permits, leading to two contempt orders in August and September of 2009.[10] Even then, the Parish's recalcitrance continued. The Parish set a special election for November 14, 2009, putting to the

[9] 641 F. Supp. 2d 563 (E.D. La. 2009)
[10] See 648 F. Supp. 2d 805 (E.D. La. 2009) and 2009 U.S. Dist. 88539 (E.D. La. 2009)

voters a referendum to permanently ban the construction of multi-family housing complexes of more than six units in the parish. At that point, HUD stepped in and threatened to cut off federal funds. Only then did the Parish cancel the election and since then has refrained from further discriminatory zoning.

This last action is very important. HUD's enforcement of Section 808 of the Fair Housing Act can be an especially effective tool to effectively fighting discriminatory exclusionary zoning. Courts have long recognized that this "affirmatively furthering" duty requires HUD to "do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[11] Yet, as noted in *The Future of Fair Housing* (p. 37): "Despite these strong requirements, the testimony [at Commission hearings] unanimously reported that the process was not functioning as intended. HUD has not been successful in bringing the affirmatively furthering obligation life."

However, since this report there appears to be the beginnings of an important change at HUD with respect to enforcement of Section 808. The action in St. Bernard demonstrates this. Especially important is an August 2009 consent decree entered in *United States ex rel. Anti Discrimination Center of Metro New York v. County of Westchester* in August 2009. Noteworthy are provisions in the settlement by which the County commits to spend $51.6 million to develop 750 units of affordable housing over the next seven years in County neighborhoods with small minority populations to promote inclusive residential patterns. Importantly, the County is required to take all appropriate action, including legal action if necessary, to address inaction or actions by County municipalities that hinder this.

HUD's renewed commitment to enforcement of Section 808 of the Fair Housing Act is demonstrated by a press release issued just ten days ago on March 1, 2010, in which Assistant Secretary for Fair Housing and Equal Opportunity stated:

> Our nation's commitment to equality can be found in many places in our society — in our history books, in our polling places and our places of employment. Among the most important places it can be found are our homes and neighborhoods, the latter of which fundamentally shape our futures by determining where our children go to school and what jobs are nearby. Diverse, inclusive communities offer the most educational, economic and employment opportunities to their residents. They cultivate the kind of social networks our communities and our country need to compete in today's increasingly diverse and competitive global economy. Indeed, studies have proved that students of all races and backgrounds are better prepared for the work force and engage in more complex and creative thinking when the learn to live in a diverse environment.
>
> Despite these documented benefits, we know that racially segregated neighborhoods of concentrated poverty resulted not in spite of government but in many cases because of it. And not just at the federal level. That is why in order to receive federal funds local jurisdictions must analyze and take action to address residential segregation and discrimination. It is this obligation that the court found Westchester County failed to fulfill in a recent case brought by a civil rights organization. To ensure the county did not lose access to millions of federal dollars, the U.S. Department of Housing and Urban Development brought the parties together to reach an agreement in which Westchester would provide 750 affordable, accessible homes over the next seven years in neighborhoods with in which

[11] *See NAACP v Secretary of Housing and Urban Development,* 817 F.2d 149, 155 (1st Cir. 1987)(Breyer, J.); see also, *Otero v. New York City Housing Auth.,* 484 F.2d 1122, 1134 (2nd Cir. 1973)("Action must be taken to fulfill, as much as possible, the goal of open, integrated racial housing patterns and to increase the presence of desegregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."); *Shannon v. HUD,* 577 F.2d 854 (3rd Cir. 1978).

Westchester would provide 750 affordable, accessible homes over the next seven years in neighborhoods with little racial diversity possible

HUD is presently considering a much needed regulation spelling out for recipients of federal housing assistance the affirmatively furthering duties that are required by the affirmatively furthering fair housing requirement. We strongly urge that the regulation be published for comment as soon as possible, and that HUD's new emphasis on Section 808 enforcement continue and expand.

In addition, *The Future of Fair Housing* report noted that most courts have found no "direct" cause of action against HUD or HUD grantees under Section 3608, and that based on recent decisions on the use of §1983 to enforce federal statutes, some courts are becoming reluctant to entertain a claim based on §3608 against state or local government entities. Moreover, the Fair Housing Act contains no administrative procedure for HUD to accept a complaint based on Section 3608, leaving some victims of government discrimination without a remedy. Because the Act does not include a violation of Section 3608 as one of the provisions that the Department of Justice has authority to enforce, the federal government has no ability to enforce Section 3608 in court. Thus, one of the ideas presented in the Commission report is "an amendment to the Fair Housing Act – defining a discriminatory housing practice to include a violation of the affirmatively further provision [Section 3608] – that would provide several direct remedies including an administrative complaint, an express private right of action in federal and state court and an authorization for action by the U.S. Department of Justice if the violation amounted to a pattern and practice of discrimination or a matter of general public importance." (p. 61). This would greatly strengthen enforcement of this important provision in the Act.

E. <u>Source of Income Discrimination</u>

Since its inception, the federal Section 8 voucher program has been a crucial tool in promoting opportunity for racial and economic housing desegregation. The Section 8 program provides a rare and much needed opportunity for low income and minority families to move into lower-poverty and less-segregated neighborhoods. The Section 8 program gives the voucher holder an expanded choice of where to live including market rate private housing in suburban communities. Indeed, housing choice is the paradigmatic feature of the Section 8 program.

While providing choice is a core component of the Section 8 program, research supports the conclusion that landlords' refusal to accept rental subsidies in more affluent, predominantly white, suburban communities is a significant barrier to such choice and consequently economic and racial integration. However, source of income discrimination is not a protected class under the Fair Housing Act. As noted earlier, , *The Future of Fair Housing* report included this as one of the issues that should be considered, stating at p. 62: "Discrimination based on source of income can have a profound effect on the housing choices that are available to home seekers including an effect of perpetuating neighborhoods that are racially and economically impacted. For that reason, a systematic examination of the need for an amendment to the Fair Housing Act to prohibit discrimination based on source of income is needed."

Several states and local governments have prohibited source of income discrimination. Because of the importance of this issue, the Lawyers' Committee has participated in three cases (Connecticut, Maryland and Minnesota) involving such laws as an *amicus curiae*. In each case, the primary issue was whether the prohibition on source of income discrimination required landlords to participate in the Section 8 program. In the two cases thus far decided – *Commission on Human Rights & Opportunities v. Sullivan Assoc.*, 285 Conn. 208 (S. Ct. Conn, 2008) and

Montgomery County v. Glenmont Hills Assoc., 402 MD 250 (Ct of Appeals, 2008) – the courts agreed with our argument that there was such a requirement.

F. Disparate Impact Claims

In addition to *St. Bernard Parish,* the Lawyers' Committee has two other exclusionary zoning cases pending in the District Court for the Eastern District of New York – *ACORN (The New York Association of Community Organizations for Reform Now, et al. v. County of Nassau and Village of Garden City* and *Fair Housing in Huntington Committee v. Town of Huntington.* Both cases allege intentional discrimination in zoning decisions which have placed barriers to the development of affordable housing which would promote desegregated housing patterns in these jurisdictions. In addition, both cases have claims that these actions also violate the Fair Housing Act pursuant to a disparate impact analysis. It is these claims that are the focus of these cases.

Ever since the early years of litigation under the Fair Housing Act, courts have been called upon to determine whether its prohibitions are limited to practices prompted by discriminatory intent or do they also cover those that produce a discriminatory impact. Although often challenged, four decades of such litigation has produced a strong consensus that the Act does include an impact standard. Every one of the eleven circuits to have considered the issue has held that the Fair Housing Act prohibits not only intentional housing discrimination, but also housing actions having a disparate impact. However, the Supreme Court has never directly ruled on the issue of whether the Act includes an impact standard. Two decisions have openly avoided the issue.[12]

In recent years, there have been Supreme Court opinions dealing with impact claims under other civil rights statutes indicating that each statute's coverage of such claims must be determined on the basis of that statute's particular text and purposes.[13] Thus, while the overwhelming consensus among lower courts that Fair Housing Act violations may be proved through an impact standard, defendants continue to vigorously contest this issue.

This is especially apparent in fair lending cases brought under the Fair Housing Act and the Equal Credit Opportunity Act. Between 2001 and 2009, the federal government's vigorous fair lending program of the1990s under both the Bush I and Clinton Administrations dissipated and fair lending enforcement was left to private groups. Stuart Rossman, Litigation Director of the National Consumer Law Center, testified in September 2008 before the National Fair Housing Commission that starting in September 2007 twenty three fair lending cases had been brought attacking the discretionary pricing policies of banks, including the practice of providing yield spread premiums to brokers thereby incentivizing the discriminatory marketing and pricing of expensive subprime loans to minorities. Disparate impact claims are central in all of these cases. In all of these cases, financial industry defendants are uniformly seeking dismissal on grounds that Fair Housing Act and Equal Credit Opportunity violations cannot be proved a disparate impact analysis. Thus far in every case that has decided such motions to dismiss, the courts have rejected these arguments. Nevertheless, it remains one of the most important fair housing issues presently on the horizon.

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[12] *See City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 199-200 (2003); *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988).

[13] *See, Smith v. City of Jackson*, 544 U.S. 228, 233-40 (2005) (ADEA); *see also Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-73 (2009) (Title VII).

We have been encouraged by the major turnaround in fair lending enforcement at the Department of Justice. In a speech before the Rainbow PUSH Coalition on January 14, 2010, Assistant Attorney General Thomas Perez stated that "fair lending is a top priority for the Civil Rights Division" and announced he had hired a special counsel for fair lending and established a dedicated fair lending unit in the Division's Housing Section. As of the date of the speech, the unit already had 38 pending fair lending investigations.

Just last week, the Division announced the filing and settlement of a major fair lending against two subsidiaries of the American International Group Inc. In the settlement, defendants agreed to pay a minimum of $6.1 million to African American customers who were charged higher broker fees than similarly-situated, non-Hispanic white customers. The complaint alleges that higher total broker fees were charged to black borrowers as the result of defendants' "policy and practice of allowing unsupervised and subjective discretion by brokers in the setting of direct fees." Importantly, it appears that the Department alleged that defendants'policies and practices violated the Fair Housing Act not only because of "intentional and willful [actions that] were implemented with reckless disregard for the rights of black borrowers," but they also violated the Act under a disparate impact analysis. Specifically, the Department's press release announcing the settlement states that the defendants' discretionary pricing practice "had a disparate impact on African American borrowers, who were charged higher broker fees than white, non-Hispanic borrowers on thousands of such loans from July 2003 until May 2006, a period of time before the federal government obtained an ownership interest in American International Group Inc." The statement goes on to note that these practices are "not justified by business necessity or legitimate business interests," and which "cannot be fully explained by factors unrelated to race."

A vigorous defense of the disparate impact standard by the Department would be of tremendous importance to fair housing advocates. It would reinvigorate the 1994 Interagency Policy Statement on Fair Mortgage Lending Practices that states that violations of fair lending laws could be proven by application of a disparate impact analysis. This policy was ignored by the Department during the Bush administration when in 2001 the Division explicitly stated that it would not litigate fair housing cases involving policies or practices that relied on a disparate impact analysis to prove a violation of the Fair Housing Act. Disparate impact claims in fair lending cases are now under attack by financial industry defendants and thus it is particularly important for the Department to play a strong role in defending this standard.

Lastly, regulatory action by HUD concerning this issue is sorely needed. As noted above, despite the overwhelming consensus among lower courts that the Act includes an impact standard, defendants, especially financial institution defendants, are engaged in a vigorous and concerted effort to contest this issue. Lack of HUD guidance in a regulation has contributed to the continued uncertainty concerning such claims. The Supreme Court has often relied on interpretive regulations of the agency charged with enforcing particular civil rights statutes in deciding whether those statutes include an impact standard.[14] Courts have consistently held that HUD regulations are entitled to substantial deference in determining the meaning of the Act. Thus, a HUD regulation providing support for the unanimous views of all courts of appeals would significantly strengthen defense of the impact standard.

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[14] *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. at 239-40; *id.* at 243-47 (Scalia, J., concurring); *Griggs*, 401 U.S. at 433-34.

III. CONCLUSION

The Lawyers' Committee applauds the Subcommittee's actions to take a close look at the Fair Housing Act. It is increasingly clear that fair housing is the linchpin to "protecting the American dream," not only by providing non-discriminatory housing opportunities and requiring affirmative steps to further fair housing that will break the continued grip of residential segregation, but also by providing equal opportunity to minorities in so many crucial facets of life, especially education, access to employment opportunities and adequate health care. Strong fair housing and fair lending laws with vigorous enforcement of such laws are central to this endeavor. We look forward to the further hearings addressing these issues and determining what actions are most important and will be most successful.

Mr. NADLER. Thank you.

Mr. Marcus is recognized for 5 minutes.

TESTIMONY OF KENNETH MARCUS, LILLIE AND NATHAN ACKERMAN VISITING PROFESSOR, BARUCH COLLEGE SCHOOL OF PUBLIC AFFAIRS, CITY UNIVERSITY OF NEW YORK

Mr. MARCUS. Thank you, Mr. Chairman. It is always an honor to——

Mr. NADLER. Speak directly into the mic, please.

Mr. MARCUS. Better?

I commend the Subcommittee for entertaining the topic today. As Ms. Arnwine pointed out, we have not yet fulfilled the mission behind the Fair Housing Act. We continue to see serious, significant discrimination of many kinds throughout this country in housing and in lending, particularly glad that Ms. Smith pointed out a case of sexual harassment, which we do see in apartments around the country, and I think that that example is particularly useful because it is one example that shows that as bad as discrimination is in other areas—employment, education, labor, so on and so forth—when it happens in your home, when it happens in your home, there is a kind of a violation that goes beyond what one sees elsewhere.

And we do see today forms of discrimination like sexual harassment, like outright racism in housing that really need to be addressed. My successor at the Office of Fair Housing and Equal Opportunity, John Trasvina, tells a story of a gentleman just last year, of a case in which a landlord saw his tenant speaking to an African-American couple and said, "If you all want to have African-Americans to visit, we are going to have to ask you to move. We are not having those people at our property. We own the property. That has never happened. And we are not going to let it start happening with this."

So one sees that sort of blatant outright discrimination. And that is something that we need to address and address firmly and for which we need a very strong civil rights apparatus to address.

However, I think the reason that we have heard already from two witnesses a discussion of disparate impact is that nowadays most people who harbor prejudice of this sort will not admit it quite so openly. They will conceal it. They will deny it. In some cases, they are even unconscious of it.

For that reason, we have disparate impact as a means of discerning discrimination where intent cannot be proven. But disparate impact has been controversial, because while it can be useful as a legitimate law enforcement tool, it can also be misused. And when it is misused, there are real dangers—both legally and in terms of equity—and I want to say a few words—and I want to say a few words about that.

You have heard from two witnesses correctly that the courts of appeals have found that disparate impact is a viable claim under the Fair Housing Act. And I think that that argument would prevail in any court in the country, with the possible exception of the Supreme Court.

We do not know what the Supreme Court would say if disparate impact is challenged, as it has been challenged before when the

issue has been averted. And there are a lot of arguments that can go either way on this issue.

We know, for instance, that when President Reagan signed the amendment to the Fair Housing Act, he said that the bill "does not represent any congressional or executive branch endorsement of the notion expressed in some judicial opinions that Title VIII violations may be established by a showing of disparate impact," et cetera. In fact, he said more explicitly Title VIII speaks only to intentional discrimination.

So I would say that the question remains unsettled in the sense that we still don't know what the Supreme Court would do and that, if Congress has a view on this, it can resolve it—it can resolve it with legislation.

More importantly, perhaps, if it does address that, there is the question as to whether certain forms of disparate impact are inconsistent with equal protection, an issue that was raised both in the Kennedy opinion and in the Scalia opinion in the recent New Haven firefighters case, *Ricci v. DeStefano.*

In that case, the question was raised as to whether disparate impact may violate equal protection to the extent that, for instance, it presses either employers or other entities to use race-conscious remedies for permits other than to combat discrimination.

Now, I see I need to sum up, so what I am going to say is, the reason that I am raising this is that there remains a real question as to whether in a subsequent case the Supreme Court would either narrow in an unpredictable way or entirely strike down the use of disparate impact under Title VIII.

If Congress wants to avoid that, it needs to address disparate impact in this legislation in a way that will preserve it from judicial challenge.

Mr. NADLER. Let me just ask you a question at this point.

Mr. MARCUS. Yes, sir.

Mr. NADLER. Do you believe a challenge in front of the Supreme Court on disparate impact would be statutory or constitutional in nature?

Mr. MARCUS. Well, I think it could go either way. I think that Justice Scalia is predicting that the constitutional challenge is upcoming, and I think it will happen.

As for the statutory challenge, since there is no circuit split, I don't see it imminently, but we know that the Supreme Court got two cases in which it could have been resolved.

So I think both challenges may come up, but the constitutional challenge may be more imminent.

Mr. NADLER. Thank you.

Mr. MARCUS. Thank you.

[The prepared statement of Mr. Marcus follows:]

PREPARED STATEMENT OF KENNETH MARCUS

Professor Kenneth Marcus
Lillie and Nathan Ackerman Chair in
Equality and Justice in America at the
Bernard Baruch School of Public Affairs,
City University of New York

House Constitution Subcommittee Hearing on

"Protecting the American Dream:
A Look at the Fair Housing Act"

March 11, 2010

Testimony before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties
March 11, 2010

Kenneth L. Marcus[1]

Chairman Nadler, Ranking Member Sensenbrenner, Distinguished Committee Members, I am honored to appear before you again today. My name is Kenneth L. Marcus. I am the Lillie & Nathan Ackerman Chair in Equality & Justice in America at Baruch College of the City University of New York. In addition, I am a former General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity. I am also especially pleased to join at this table some highly respected experts whom I well remember from my time heading the U.S. Department of Housing and Urban Development's Office of Fair Housing & Equal Opportunity, including Shanna Smith of the National Fair Housing Alliance and John Relman of Relman Dane, as well as other experts whom I am pleased to meet today. The pursuit of fair housing for all Americans is indeed a matter of pressing concern, and I commend this subcommittee for its continuing oversight to ensure that the duty to affirmatively further fair housing is honored by this administration, by state and local governments, and by the whole housing community.

The problem of housing discrimination – actual, intentional bigotry based on race – remains a serious problem in the United States, although we have made dramatic and significant progress over the years. My distinguished former colleague and successor at the Office of Fair Housing and Equal Opportunity, John Trasviña, tells the story of

[1] Lillie & Nathan Ackerman Chair in Equality & Justice in America, Bernard M. Baruch College of the City University of New York, School of Public Affairs; Director, Initiative on Anti-Semitism & Anti-Israelism, Institute for Jewish & Community Research

HUD's recent successful settlement of an Alabama case against owners Wilbur and Julie Williams. In June 2008, as Assistant Secretary Trasviña has recently related, the Williamses drove by the house that they had rented to one Melissa Jones, and they saw her speaking to African American neighbors in their front yard. Later that day, Ms. Williams called Ms. Jones, and she alleged said, "If y'all want to have African Americans to visit, we're going to ask you to move...We're not having those people at our property. We own the property and…that's never happened and we're not going to start today with it happening." Ms. Williams alleged made other discriminatory comments as well. Such bigotry persists even today in the United States and, when it is found, it must be fought.

We know, however, that in the twenty-first century, those who harbor racial bias are seldom so overt in their expression. As racism has become socially stigmatized and legally regulated, most people who bear racial animus have learned to conceal their bias in ways that are difficult to identify or to prove. The disparate impact doctrine can be used to identify intentional discrimination which is hard to demonstrate under the doctrine of differential treatment. The Obama administration has recently announced, in various venues, that it would invoke disparate impact theories more aggressively than did the Bush Administration. Used judiciously, disparate impact can be a useful enforcement tool for identifying intentional or unconscious discrimination in circumstances where the discriminators' motivations are otherwise difficult to ascertain. Used improperly, however, it creates real problems of law and public policy.

In the fair housing context, the most obvious problem is that the applicable statute does not authorize it. The Fair Housing Act, unlike Title VII, does not expressly provide

a disparate impact cause of action. Nor does it contain language regarding "adverse[] affects" of the sort that has bolstered a disparate impact claim in other statutory contexts. Instead, its statutory language speaks in terms of discrimination "because of," "based on," or "on account of" various enumerated classifications. The Supreme Court has customarily interpreted such terms as providing an intent requirement. In this sense, reliance upon HUD's fair housing regulations unavoidably raises the prospect – absent legislation to incorporate a disparate impact theory – that its prosecutions exceed its statutory mandate. Indeed, President Ronald Reagan's signing statement for the 1988 Amendments insists "that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." In short, President Reagan admonished, "Title 8 speaks only to intentional discrimination." While HUD has long pursued disparate impact claims under Title VIII, the Supreme Court has not yet evaluated the conformity of those regulations with the underlying legislation. Several federal circuit courts have found disparate impact claims to be viable under the Fair Housing Act, but their determinations must be considered provisional until the Supreme Court settles the matter. If Congress believes that Title VIII should cover disparate impact, and wants to protect government officials from accusations that their prosecutions are *ultra vires*, it can of course amend the statute to provide an explicit basis for the use of this doctrine. If it chooses to do so, however, it should beware the broader risks posed by misuse of this doctrine.

The Supreme Court's recent decision in the so-called New Haven firefighters' case, *Ricci v. DeStefano*, raises the deeper problem that current disparate impact doctrine may violate the Equal Protection Clause of the U.S. Constitution. In that case, Justice Scalia observed that the Court's narrow opinion "merely postpones the evil day" the Court will have to decide the central, looming question: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" The same question arises with respect to the Fair Housing Act to the extent that it is interpreted to support disparate impact claims.

In a nutshell, the problem is that disparate impact doctrine, as it has evolved over the years, has come to encompass more than just intentional and unconscious discrimination. This broad doctrine has come to include a wide range of actions which have unintended adverse impacts on certain groups which are merely difficult to explain on non-racial grounds. This can lead housing providers or lenders to avoid legitimate criteria such as credit-worthiness or employment status which have legitimate (if difficult-to-prove) non-discriminatory rationales but adverse impacts on some racial groups. The problem is that these potential defendants would be forced to demonstrate a business "necessity" for the policy, and such demonstrations are hard to mount even when their validity is intuitively obvious. Some have argued that this has had a destabilizing influence on certain markets. Worse, the doctrine is sometimes used to pressure regulated entities – employers, for example, but perhaps also lenders or housing providers – to engage in quota-like behavior to avoid the prospect of disparate impact

liability. In other words, they are forced to use surreptitious means to "get their numbers right" in order to avoid disparate impact liability.

To the extent that any version of the disparate impact doctrine either constitutes or mandates race-conscious governmental actions for reasons other than the elimination of intentional or unconscious discrimination, I would submit that it is vulnerable to challenge under the Equal Protection Clause. As Justice Scalia's *Ricci* opinion acknowledges, "The question is not an easy one." It is not, however, an avoidable one. As Scalia observed, "the war between disparate impact and equal protection will be waged sooner or later... [and] it behooves us to begin thinking about how – and on what terms – to make peace between them." For this reason, I would urge that any disparate impact provision adopted by this Congress be drafted in a manner which would shield it from constitutional challenge. Mr. Chairman, I ask that my article on this topic, "The War between Disparate Impact and Equal Opportunity," 2008-2009 Cato Supreme Court Review 53-83, be included with and incorporated into my testimony. In that article, I have argued that a "good-faith" defense, if adopted by this Congress, could save disparate impact provisions from the constitutional challenges which might otherwise lead to their judicial invalidation.

While I have framed my remarks largely in terms of legal considerations, I should also observe that there are questions of equity and policy which also constrain proper uses of the disparate impact doctrine. As I have noted, the problem of actual, intentional discrimination remains a pressing one even today. It is my belief that the civil rights enforcement agencies of the United States, including the Office of Fair Housing and Equal Opportunity, have a duty to spend their scarce precious resources pursuing

precisely these forms of bigotry. To the extent that they may pursue more marginal cases, based on aggressive interpretations of law, to target disparities that are not based on either intentional or unconscious discrimination, they dilute their strength, divide their focus, and misuse their scarce precious taxpayer funds. People of good will may debate the wisdom or justice of governmental attempts to level disparities which do not arise from intentional or unconscious discrimination. Whatever their value, however, they are a different project from combating discrimination. Given the seriousness of racism, ethnic bias, and other forms of bigotry, it behooves civil rights enforcement agencies to focus their energies on their core mission of eliminating discrimination. This subcommittee can advance that mission by ensuring that legitimate law enforcement tools, including the disparate impact doctrine, are crafted and codified in a manner which focuses them on actual discrimination and shields them from legal challenge.

ATTACHMENT

The War between Disparate Impact and Equal Protection

*Kenneth L. Marcus**

Title VII of the Civil Rights Act of 1964 forbids job discrimination based on race, color, religion, sex, or national origin.[1] Title VII was originally enacted as a regulation of interstate commerce and applied only to private employers. In 1972, however, the Act was extended to the public sector pursuant to Congress's Fourteenth Amendment authority to ensure that "[no] State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Because the Equal Protection Clause was intended to guarantee equal opportunities rather than equal outcomes, the Supreme Court's application of that clause has focused on intentional discrimination. Title VII initially barred only disparate treatment, which encompasses only such intentional discrimination and, under some interpretations, also unconscious bias. But under Title VII, Congress expanded the reach of anti-discrimination litigation: Employers may be held accountable not only for disparate treatment, but also for disparate impact, which refers to discriminatory effects arising out of workplace policies or procedures, even when an intent to discriminate cannot be proven.

On its face, the New Haven firefighters' case, *Ricci v. DeStefano*, is about the tension between these two sides of Title VII.[2] At root, however, the real war is between disparate impact and the Equal Protection Clause.

* Lillie & Nathan Ackerman Chair in Equality & Justice in America, City University of New York, Bernard M. Baruch College School of Public Affairs; Director, Initiative on Anti-Semitism & Anti-Israelism in American Educational Systems, Institute for Jewish & Community Research; J.D., University of California at Berkeley; B.A. in Moral and Political Philosophy, Williams College. The author submitted an amicus brief, together with several other scholars, on behalf of the plaintiffs in Ricci v. DeStefano, 557 U.S. ____, 129 S. Ct. 2658.

[1] 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.

[2] 557 U.S. ____, 129 S. Ct. 2658 (2009).

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I. Introduction

"The way to stop discrimination on the basis of race," Chief Justice John Roberts recently wrote, "is to stop discriminating on the basis of race."[3] In other words, state actors can best achieve equal treatment by eliminating all governmental racial preferences. This notion builds upon Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, which proclaimed that "our Constitution is colorblind, and neither knows nor tolerates classes among its citizens."[4] It contrasts, however, with Justice Harry Blackmun's equally canonical view that "in order to get beyond racism, we must first take account of race."[5] To the extent that anti-discrimination jurisprudence now adopts—or shuttles between—these conflicting views, a difficult question emerges for disparate-impact doctrine: Under what circumstances, if any, can state actors intentionally discriminate in order to avoid the unintended discrimination that might otherwise result from facially neutral policies?

The question is whether such race-conscious actions are consistent with the constitutional guarantee that no person will be denied "the equal protection of the laws." Although posed in *Ricci*, the issue is not resolved there. As Justice Antonin Scalia observed in his concurrence to that decision, the Court's narrow resolution of *Ricci* "merely postpones the evil day" the Court will have to decide the central, looming question: "Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[6] As Scalia acknowledges, "The question is not an easy one."[7] It is, however, both important and timely. Because "the war between disparate impact and equal protection will be waged sooner or later . . . it behooves us to begin thinking about how—and on what terms—to make peace between them."[8]

[3] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[4] Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[5] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

[6] Ricci, 129 S. Ct. at 2682 (Scalia, J., concurring).

[7] *Id.*

[8] *Id.* at 2683.

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Although *Ricci* does not resolve this conflict, it does identify the problem clearly and suggests that a future case will resolve it. *Ricci* holds that employers may not subject employees to disparate treatment without a strong basis in evidence to believe that facially neutral application of their employment policies would entail liability for disparate impact.[9] Writing for a five-justice majority, Justice Anthony Kennedy based the Court's opinion entirely on Title VII. Significantly, Kennedy emphasized that the Court does not address "the constitutionality of the measures taken here in purported compliance with Title VII," nor does it "hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case."[10] In other words, the Court explicitly reserved the option to hold, in a later case, that the prospect of disparate-impact liability is never a sufficient justification, under the Equal Protection Clause, for the use of racially preferential employment measures.

This article will argue that equal protection is consistent with disparate impact only when the latter provision is narrowly construed. Disparate impact plays an important role in identifying and eliminating intentional and unconscious discrimination that cannot be proved through other means. Even under strict scrutiny, state actors may take narrowly tailored race-conscious actions to avoid creating such discriminatory impacts.[11] On the other hand, disparate impact is also sometimes used to level racial disparities that do not arise from intentional or unconscious discrimination. Equal protection does not permit state actors to take race-conscious actions for this purpose. Because Title VII's disparate-impact provision is based in significant part on this less-than-compelling rationale, this article will argue that it must be narrowed or struck down. Finally, disparate impact may also be used to eliminate systemic racial biases that do not arise from an institution's present or prior discriminatory actions. Equal protection may permit state actors to conduct certain

[9] *Id.* at 2675 (Kennedy, J.) (majority opinion).

[10] *Id.* at 2676.

[11] Under the Equal Protection Clause, courts will strictly scrutinize state laws that discriminate on the basis of race. Strict scrutiny requires the state to show that the law is, first, justified by a compelling governmental interest and, second, narrowly tailored to achieve that interest.

narrowly tailored race-conscious actions to avoid disparate impacts of this sort, although Congress cannot constitutionally require them.

II. Background

Ricci is a challenge to the New Haven Civil Service Board's decision not to certify the results of a promotional examination in the city's fire department brought by 18 white and Hispanic firefighters who likely would have been promoted based on their strong performance on the test. CSB had come to its decision after finding that very few African American or Hispanic firefighters scored highly enough on the examination to be promoted. CSB had been advised by counsel that certifying the results could render New Haven liable to minority candidates under Title VII's disparate-impact provision.

Firefighting is a field in which, as Justice Ruth Bader Ginsburg observed in her dissent, "the legacy of racial discrimination casts an especially long shadow."[12] Congress took note of this history in 1972 when it extended Title VII to state and local government employers. Specifically, Congress took note of a U.S. Commission on Civil Rights report that found that racial discrimination in municipal employment was even "more pervasive than in the private sector."[13] In particular, the USCCR had criticized fire and police departments for "[b]arriers to equal employment . . . greater . . . than in any other area of State or local government," finding that African Americans held "almost no positions in the officer ranks."[14] The USCCR had reported that intentional racism was partly responsible, but that the problem was exacerbated by municipalities' failure to apply merit-based hiring and promotion principles. Instead, government agencies often relied on nepotism, political patronage, and other practices that reinforced long-standing racial disparities.

Historically, New Haven's fire department has been characterized by stark racial disparities similar to what the USCCR had observed nationwide. In the early 1970s, for example, African Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the city's 502 firefighters. In recent years, African

[12] Ricci, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

[13] *Id.* at 2690 (quoting H. R. Rep. No. 92-238, p. 17 (1971)).

[14] *Id.* at 2690–91.

Americans and Hispanics have remained significantly under-represented among New Haven's senior firefighting officers. For example, only one of the fire department's 21 captains is black. New Haven did not present any evidence, however, to demonstrate that New Haven's fire department had previously engaged in racial discrimination.[15]

In 2003, 118 firefighters took New Haven's promotional examinations to qualify for advancement to lieutenant or captain.[16] New Haven conducted these examinations infrequently, so the results would dictate which applicants would be considered for promotion during the following two years. The examination had both written and oral components. New Haven's contract with its firefighters' union required that the written exam would account for 60 percent and the oral exam 40 percent of an applicant's total score. The CSB's charter established a "rule of three," under which municipal hiring authorities must fill any vacancy by selecting a candidate from the top three scorers.

New Haven contracted with Industrial/Organizational Solutions, Inc. to develop and administer the tests. IOS specializes in designing examinations for fire and police departments. IOS began its test-design process by conducting analyses to identify the knowledge, skills, and abilities that are essential for the positions. IOS interviewed incumbents and their superiors, conducted ride-alongs and observed on-duty officers. Based on these practices, IOS prepared questionnaires and administered them to most incumbent department officers. At every stage, IOS over-sampled minority officers so that the results would not be biased towards white applicants. In order to prepare the oral examination, IOS used its job analysis data to develop hypothetical situations that would test relevant job requirements. Candidates were given the hypotheticals and asked to address them before a three-person panel of assessors. Sixty-six percent of the panelists were minority group members, and every assessment panel had two minorities.

Seventy-seven firefighters took the lieutenant examination: 43 whites, 19 blacks, and 15 Hispanics. Only 34 candidates passed:

[15] Amicus Br. of Claremont Inst. Center for Const. Jurisprudence, Ricci v. DeStefano, 2009 WL 507011 at *19, citing Pet. App. 938a–945a, 1013a–1037a.

[16] Ricci, 129 S. Ct. at 2664.

25 whites, 6 blacks, and 3 Hispanics. When the examination was conducted, eight lieutenant positions were vacant. Under New Haven's "rule of three," the top ten candidates were eligible for promotion. All 10 of them were white. Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant. Forty-one firefighters took the captaincy examination: 25 whites, 8 blacks, and 8 Hispanics. Twenty-two passed: 16 whites, 3 blacks, and 3 Hispanics. Because seven captain positions were vacant, nine candidates were immediately eligible for elevation: 7 whites and 2 Hispanics. In other words, if the CSB had certified the results, no black firefighters could have been considered for any of the then-vacant promotional opportunities.

When the racial disparities in the test results were revealed, a heated public debate ensued. Some firefighters threatened to sue New Haven for disparate-impact discrimination if the department made promotions based on the examinations. Others threatened to sue if New Haven discarded the test results because of the racial composition of the candidates who would otherwise be promoted. New Haven's attorney, Thomas Ude, counseled the city that under federal antidiscrimination law, "a statistical demonstration of disparate impact," in and of itself, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer initiated, voluntar[y] remedies—even . . . race-conscious remedies."[17] The test-maker, meanwhile, insisted that there was "nothing in those examinations . . . that should cause somebody to think that one group would perform differently than another group."[18] At Ude's urging, New Haven sided with the protesters and discarded the examinations.

The plaintiff firefighters allege that New Haven (and various officials) discriminated against them based on their race by disregarding the test results, in violation of both Title VII's disparate-treatment provision and the Fourteenth Amendment's Equal Protection Clause. New Haven defended its actions, arguing that it had refused to certify the examination results based on a good-faith belief that, had it certified the results, it would have been liable under Title VII's disparate-impact provision for adopting a practice that adversely affected minority firefighters.[19]

[17] *Id.*, 129 S. Ct. at 2666–67 (quoting App. to Pet. for Cert. in No. 07-1428, p. 443a).

[18] *Id.*, 129 S. Ct. at 2668 (quoting App. in No. 06-4996-cv (CA2), at A961).

[19] *Id.* at 2661.

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III. The Supreme Court's Opinion

Justice Anthony Kennedy, writing for the Court, reversed the Second Circuit and held in favor of the plaintiffs. Justice Kennedy began with the observation that New Haven's actions would violate Title VII's disparate-treatment prohibition absent some valid defense.[20] This is important, because the district court had characterized New Haven's actions as involving "the use of race-neutral means to improve racial and gender representation."[21] After all, New Haven had discarded all test results, rather than treating results differently based on the race of the test-taker.

In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy had appeared to argue that such race-neutral measures do not trigger strict scrutiny under the Equal Protection Clause. But here, Kennedy emphasized that New Haven decided not to certify the results because of racial disparities in performance. Quoting the district court, Kennedy characterized New Haven's view as that "too many whites and not enough minorities would be promoted were the lists to be certified."[22] Absent sufficient justification, Kennedy explained, such "race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[23]

Kennedy next considered whether the intent to avoid disparate-impact liability justified disparate-treatment discrimination that would otherwise be prohibited. He rejected the firefighters' argument that it can never be permissible under Title VII for an employer to "take race-based adverse employment actions in order to avoid disparate-impact liability—even if the employer knows its practice violates the disparate-impact provision."[24] As Kennedy explained, this approach would ignore Congress's decision when codifying the disparate-impact provision in 1991 to expressly prohibit both forms of discrimination. Apparently, in a situation where either disparate treatment or disparate impact could be avoided, but not both, Kennedy surmised that Congress wanted the courts to establish relevant standards rather than categorically prohibit one or the other.

[20] *Id.* at 2664.

[21] Ricci, 554 F. Supp. 2d at 157.

[22] Ricci, 129 S. Ct. at 2673 (quoting Ricci, 554 F. Supp. 2d at 152).

[23] *Id.* (citing 42 U.S.C. § 2000e-2(a)(1)).

[24] *Id.* at 2674.

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Similarly, Kennedy rejected the argument that an employer must violate the disparate-impact provision before it can use the fear of a disparate-impact suit as a defense to a disparate-treatment claim. Forbidding employers from undertaking race-based action unless they know, with certainty, that their conduct violates the disparate-impact provision would "bring compliance efforts to a near standstill."[25]

On the other hand, Kennedy also rejected New Haven's argument that race-based employment decisions can be justified by an employer's mere good-faith belief that its actions are necessary for compliance with Title VII's disparate-impact provision.[26] Kennedy explained that allowing employers to violate the disparate-treatment prohibition based on a mere showing of "good-faith" would encourage race-based decisionmaking at "the slightest hint of disparate impact."[27] This would, Kennedy aptly observed, "amount to a *de facto* quota system, in which a 'focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures.'"[28] Moreover, it could encourage employers to manipulate employment practices in order to engineer the employer's "preferred racial balance." "That operational principle," Kennedy wrote, "could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing."[29]

Triangulating between these two absolute positions, Kennedy adopted a new standard based on Equal Protection Clause jurisprudence. In the past, the Court had held that some race-conscious state remedial actions are constitutionally permissible, but only if there is a "'strong basis in evidence'" that such remedial actions were necessary.[30] Applying the strong-basis-in-evidence standard to Title VII, Kennedy argued, would give effect to both disparate treatment

[25] *Id.* at 2674.

[26] *Id.*

[27] *Id.* at 2675.

[28] Ricci, 129 S. Ct. at 2675, (citing Watson v. Fort Worth Bank & Trust, 487 U.S., 977, 992 (1988) (plurality opinion)).

[29] Ricci, 129 S. Ct. at 2675 (citing 42 U.S.C. §2000e-2(j)).

[30] Richmond v. J. A. Croson Co., 488 U. S. 469, 500 (1989) (plurality opinion by O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)).

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and disparate impact, allowing violations of the former in the name of compliance with the latter only in limited circumstances. Employers would not be barred from race-based decisionmaking unless and until there were a provable disparate-impact violation, but they would be required to demonstrate strong evidence of disparate-impact liability.

Applying this standard, Kennedy found that New Haven lacked a strong basis in evidence for its actions. He acknowledged that the racially adverse impact here was significant and that New Haven indisputably faced a prima facie case of disparate-impact liability. On the captain's examination, white candidates had a 64 percent pass rate compared to 37.5 percent for black and Hispanic candidates. On the lieutenant's exam, 58.1 percent of the white candidates passed while only 31.6 percent of black candidates and only 20 percent of Hispanic candidates passed. The pass rates for minorities were approximately half those for white candidates and thus fell significantly below the Equal Employment Opportunity Commission's 80-percent threshold, which triggers the disparate-impact provision of Title VII.[31] As Kennedy put it, based on the degree of adverse impact reflected in the results, "respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact."[32]

Nevertheless, Kennedy insisted that "a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity . . . and nothing more—is far from a strong basis in evidence that the city would have been liable under Title VII had it certified the results."[33] Kennedy reasoned that New Haven could have defended against a disparate-impact claim if the examinations were job-related and consistent with business necessity, and there were no equally valid, less discriminatory alternative that New Haven had rejected even though it served the city's needs.

IV. Discussion

A. The Nature and Extent of the Conflict

Ricci is significant as the first case to identify the conflict between equal protection and disparate impact. Title VII's disparate-impact

[31] See 29 CFR §1607.4(D) (2008).

[32] Ricci, 129 S. Ct. at 2678.

[33] *Id.*

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provision provides that employment practices with adverse ethnic or racial impacts violate Title VII unless (i) the practices are job-related and based upon business necessity and (ii) there are no adequate, less-discriminatory alternatives.[34] Like other governmental actions, this provision conflicts with the Equal Protection Clause to the extent that it (or a state actor implementing it) classifies people by racial groups, has an illicit motive, or allocates benefits on the basis of race.

Justice Ginsburg denies the existence of any conflict in her *Ricci* dissent, arguing that the Court's decision "sets at odds" two "core directives" which, properly interpreted, advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity."[35] Ironically, it was one of Ginsburg's former clerks, Professor Richard A. Primus, who first identified and explored the conflict in a seminal *Harvard Law Review* article, "Equal Protection and Disparate Impact: Round Three."[36] The conflict is best understood when broken down into the three areas in which disparate-impact doctrine and practice would violate equal protection: racial classifications, illicit motives, and racially allocated benefits.

1. Racial Classifications

Under the Equal Protection Clause, the courts subject all state actors' racial classifications to strict scrutiny, regardless of whether minority groups are helped or harmed by the classification.[37] Disparate impact may entail suspect racial classifications in two respects: first, in the legislation itself, which would subject the congressional enactment to strict scrutiny; second, in actions taken by public employers to comply with the legislation. Equal protection concerns are particularly acute where disparate-impact compliance entails preferential treatment or the use of quotas by public employers.[38]

[34] 42 U.S.C. § 2000e-2(a), (k)(1)(A). In addition to race and national origin, this provision also covers disparate impacts on the basis of color, sex and religion.

[35] Ricci, 129 S. Ct. at 2699 (Ginsburg, J., dissenting) (citing McDonnell Douglas Corp. v. Green, 411 U. S. 792, 800 (1973)).

[36] Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493 (2003).

[37] See Croson, 488 U.S. at 494 (1989) (plurality opinion) (citing Wygant, 476 U.S. at 279–80); see also *id.* at 520, 527–28 (Scalia, J., concurring).

[38] See, e.g., Watson, 487 U.S. at 992 (O'Connor, J., plurality).

Title VII's disparate-impact provision does not expressly discuss particular racial groups. If a race-based cause of action is pursued, however, agencies, litigants and courts will have to classify people according to their race.[39] As *Ricci* illustrates, employers may be driven by compliance concerns to classify their employees and candidates by race in order to avoid the prospect of disparate-impact liability. Worse, as Justice Kennedy observes, employers may also use the prospect of disparate-impact liability as a pretext to justify their efforts to achieve a particular ethno-racial balance in their workforce.

As long ago as *Watson v. Fort Worth Bank & Trust* (which predated the 1991 Civil Rights Act), Justice O'Connor recognized "that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures"[40] This is a potentially widespread problem because racial disparities are ubiquitous in every realm of social encounter—if only because, as O'Connor observed, "[I]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."[41] Despite Title VII's nominal aversion to the use of racial preferences,[42] an employer faced with the resulting disparities may find it cheaper to use racial preferences than to determine whether the disparities arise from policies that are job-related and consistent with business necessity. As Justice O'Connor noted, it would be "unrealistic to suppose that employers can eliminate, or discover

[39] Primus, *supra* note 36 at 508.

[40] See Watson, 487 U.S. at 992 (O'Connor, J., plurality).

[41] See *id.*

[42] See 42 U. S. C. § 2000e-2(j):

> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

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and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[43]

Hence the "Hobson's choice" for public employers: "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."[44] Naturally, the "prudent employer" will take care to discuss such programs "in euphemistic terms," but "will be equally careful to ensure that the quotas are met."[45] An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism. The tendency of disparate-impact law is to pressure employers to effectuate quotas in just this manner: Employers increasingly understand that disparities will not survive a disparate-impact challenge except to the extent that existing processes can be tied to business necessities. Justice O'Connor argued that various evidentiary mechanisms can counteract this tendency, including the requirements of the prima facie case, causation requirements, and burdens of proof.[46] Whether they have done so is an empirical question, but *Ricci* provides new reasons for concern.

Ironically, this point is well illustrated in Justice Ginsburg's dissent. As Ginsburg reveals, New Haven's fire department could have designed the racial composition of its senior officers fairly precisely by altering the respective weights assigned to the written and oral components of its promotional examinations. Because minorities had a comparative advantage on the oral component, New Haven could increase the minority pass rate by overweighting that section. Indeed, the city's failure to do so is subject to precisely the attack that Ginsburg levels—that written examinations cannot properly evaluate certain important professional competencies (e.g., complex

[43] See Watson, 487 U.S. at 992 (O'Connor, J., plurality) (citation omitted).

[44] See *id.* at 993 (1988) (O'Connor, J., plurality); see also Roger Clegg, Disparate Impact in the Private Sector: A Theory Going Haywire, Briefly . . . Perspectives on Legislation, Regulation, and Litigation v.9 no.12 (Dec. 2001) at 11 ("And so—surprise—many defendants will simply ensure that the disparate impact doe not occur in the first place, by taking steps to guarantee that their numbers come out right.").

[45] See *id.* at 993 (1988) (O'Connor, J., plurality).

[46] See *id.* at 994–98 (1988).

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behaviors, interpersonal skills, and ability to succeed under pressure). Given the ability to determine the likely racial outcome of alternative testing protocols, New Haven would always be subject to disparate-impact liability except to the extent that the city adopts promotional mechanisms that yield no adverse statistical outcomes on racial minorities—tests that achieve rigid quotas based on demographic racial balancing.

2. Illicit Motives

Since *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court has subjected governmental actions motivated by discriminatory intent to strict scrutiny.[47] The Court has consistently applied this principle, not only to statutes that contain express racial classifications, but also to facially race-neutral statutes that are motivated by a racial purpose. Clearly, intentional discrimination is the core concern both Title VII and the Equal Protection Clause. Disparate impact, say its proponents, is a means of uncovering surreptitious intentional discrimination. For this reason, the Court has considered the "'correction of past discrimination to be a compelling government interest [when] eliminat[ing] the discriminatory effects of the past as well as [barring] like discrimination in the future.'"[48] Indeed, to the extent that the disparate-impact provision serves the "prophylactic" function of preventing intentional discrimination, it can be seen as a means of enforcing equal protection.[49]

a. Congressional motives

The problem is that the purpose of Title VII's disparate-impact provision is not limited to ascertaining hidden discriminatory intent or unconscious bias. If this were its sole purpose, as Justice Scalia noted in his concurrence, then employers would be permitted to assert a defense of "good faith."[50] The unavailability of that defense suggests that something other than discriminatory intent is at issue.

[47] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252 (1977).

[48] Freeman v. Pitts, 503 U.S. 467, 511 (1992) (quoting Green v. County Sch. Bd. 391 U.S. 430, 438 n. 4 (1968)).

[49] See Tennessee v. Lane, 541 U.S. 509, 520 (2004) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.").

[50] 129 S.Ct. at 2682.

Professor Primus adds that other technical features, such as the unavailability of damages in disparate-impact litigation, further demonstrate that Congress viewed disparate-impact as addressing something more and perhaps less than intentional discrimination.[51] This in turn raises a fundamental question: If Congress intended the disparate-impact provision to address something other than intentional discrimination, what exactly was Congress trying to address?

Congressional motives may have included a desire to increase racial diversity in the workforce other than by reducing discrimination. Former White House counsel Boyden Gray has disclosed that a "principal motivation" for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing.[52] Some critics opposed the disparate-impact provision of the 1991 Act on the ground that it was a "government mandate for proportional quotas."[53] Indeed, law professor Nelson Lund has written that nearly all of the congressional debate leading up the Civil Rights Act of 1991 concerned "whether and to what extent" Title VII's disparate-impact provision encouraged employers to implement quotas or to discriminate in favor of minorities in other ways.[54] It has been observed that public resistance to quotas led Congress to strip from the 1991 Act many of the provisions that would have significantly increased the pressure on employers to achieve proportional representation.[55] The resulting compromise did not, however,

[51] Primus, *supra* note 36 at 521–522. To the extent that disparate-impact litigation reveals intentional discrimination, there is no reason why wrongdoers should not have to repay the victims of their discrimination to the same extent as in disparate-treatment cases. Congress's failure to provide for damages in disparate-impact cases suggests a tacit recognition that liable employers may be responsible for something less onerous than intentional discrimination.

[52] See Boyden Gray, The Civil Rights Act of 1991: A Symposium: Disparate Impact: History and Consequences, 54 La. L. Rev. 1487, 1491 (Jul. 1994) (quoting William Coleman, a prominent advocate for the disparate impact provision, as announcing his motivation during a White House meeting: "What I need is a generation of proportional hiring, and then we can relax these provisions").

[53] Michael Carvin, Disparate Impact Claims Under the New Title VII, 68 Notre Dame L. Rev. 1153, 1153 (1993).

[54] Nelson Lund, The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform, 6 Geo. Mason L. Rev. 87, 88 (Fall 1997).

[55] See Kingsley R. Browne, Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?, 43 Case W. Res. L. Rev. 287, 380–381 (1993).

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eliminate the use of statistical evidence to pressure employers to alter the demographic composition of their workforces.

b. Public employer motives

The other potentially problematic governmental motivations are those of public employers who rely upon disparate impact to justify their adoption of race-conscious practices. As the *Ricci* case illustrates, governmental employers rely on the disparate-impact provision when undertaking significant employment decisions. After all, Equal Employment Opportunity Commission regulations emphasized that Congress, in passing Title VII, "strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action."[56] Employees who disfavor nonminority applicants by canceling promotions to avoid creating a disparate impact, as in *Ricci*, are likely engaged in race-based actions. Even before *Ricci*, the Court had rejected as "flawed" the argument that strict scrutiny did not apply because of the need to consider race for purposes of compliance with antidiscrimination law.[57]

3. Allocation of Benefits on the Basis of Race

With characteristic bluntness, Justice Scalia describes the allocation problem as a conflict between two legal principles. On the one hand, the disparate-impact provision "not only permits but affirmatively requires" race-based actions "when a disparate-impact violation would otherwise result."[58] On the other hand, "if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties (e.g., employers, whether private, State, or municipal) discriminate on the basis of race."[59] To Scalia, the facts of *Ricci* and other disparate-impact cases illustrate that the disparate-impact provision "place[s] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions

[56] 29 C.F.R. § 1608.1(b).

[57] Shaw v. Reno, 509 U.S. 630, 653 (1993).

[58] 129 S. Ct. at 2682 (2009).

[59] *Id.* (citations omitted).

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based on (because of) those racial outcomes."[60] Such "racial decision-making," Scalia observes, is "discriminatory" under *Ricci*.

Equal protection recognizes a "personal right[] to be treated with equal dignity and respect" which may be affronted by state actions that treat people less as individuals than as ethnically determined racial members.[61] This right reflects the "ultimate goal" of "eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."[62] "The idea is a simple one: 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'"[63] This command is violated when any individual "is disadvantaged by the government because of his or her race."[64] More broadly, strict scrutiny is applicable "when the government distributes burdens or benefits on the basis of individual racial classifications."[65] It was for this reason that the Court struck down the undergraduate admissions policy at the University of Michigan,[66] which failed to provide an individualized process of review, while upholding the law school admissions policy at that same institution.[67]

The firefighters argued with some plausibility that New Haven's actions more heavily emphasized racial labeling than the University of Michigan had in *Gratz v. Bollinger*. The allocation of benefits at issue here, it must be emphasized, is not merely that minorities disproportionally benefit from antidiscrimination laws because they are disproportionately subjected to discrimination. Instead, the concern here is that public employers, pressured by the prospect of disparate-impact liability, will employ preferences or quotas to

[60] *Id.*

[61] See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

[62] See id. at 495 (plurality opinion) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 320 (1986) (plurality opinion)).

[63] Miller v. Johnson, 515 U.S. 900, 911 (1995), (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks and citations omitted)).

[64] Adarand v. Pena, 515 U.S. 200, 230 (1995).

[65] Parents Involved, 551 U.S. at 719.

[66] Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

[67] Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

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groups disfavored by existing statistical disparities. The problem is not the existence or size of the resulting reallocation—which would be unobjectionable if it resulted from the elimination of intentional or subconscious discrimination—but rather the means employed.

Allocation of public benefits must be made on an individual basis, rather than on the basis of racial group membership. Failure to do so, the Court has instructed, may reflect racial prejudice,[68] perpetuate pernicious stereotypes,[69] foster social balkanization, and frustrate the goal of achieving a "political system in which race no longer matters."[70] As the *Adarand* Court said, "whenever the government treats any person unequally because of [his] race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of Equal Protection."[71]

4. Ginsburg's Claim of Illusoriness

Justice Ginsburg's dissent denies the very existence of this conflict, arguing that "Title VII's disparate-treatment and disparate-impact proscriptions must be read as complementary." Before *Ricci*, Ginsburg argued, there had been not "even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions." It is only the *Ricci* opinion itself that "sets at odds the statute's core directives."

According to Professor Primus, thinking about the possibility "that equal protection might affirmatively prohibit the use of statutory disparate impact standards departs significantly from settled ways of thinking about antidiscrimination law."[72] Indeed, other

[68] See Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

[69] Metro Broadcasting, 497 U.S. at 604 (O'Connor, J., dissenting) (citation omitted).

[70] Shaw, *supra* note 57,at 657.

[71] Adarand, 515 U.S. at 229–230.

[72] Primus, *supra* note 36 at 495. Indeed, *Davis* appeared to bless Congress's use of disparate-impact in federal civil rights statutes. See Davis, 426 U.S. at 248. Primus, however, points out that this language was merely dicta. Primus, *supra* note 36 at 497–98. Moreover, as Primus observed, "equal protection has changed a great deal since *Davis* was decided, and the changes raise questions about a statute that places people in racial categories and measures liability in part by reference to the allocation of employment opportunities among those racial groups." *Id.* at 495. In Primus's provocative formulation, "Pre-*Davis*, many courts and commentators believed that state actions creating disparate impacts violated equal protection; post-*Adarand*, one could well ask whether state actions prohibiting disparate impact violate equal protection." *Id.* at 496 (internal citations omitted).

scholars had also observed that disparate-impact theory was widely accepted before *Ricci*.[73] In this sense, there is some truth to Ginsburg's argument. Moreover, to the extent that the disparate-impact provision is narrowly construed as a means to limit intentional or even unconscious discrimination, the conflict dissolves. The problem is that disparate impact has grown in ways that exceed that core purpose, and that is the source of its conflict with both disparate treatment and equal protection.

It may be true, as Ginsburg argued, that before *Ricci* the Supreme Court had never explicitly questioned the conformity of Title VII's disparate-impact component with equal protection. The Court's prior failure to recognize this conflict does not, however, prove that the conflict did not exist. What Ginsburg apparently means is that, before *Ricci*, conflicts between the two provisions were largely decided in favor of disparate impact—and disparate treatment had been construed narrowly enough to avoid the appearance of discord.

B. Ricci's Contribution to the Resolution of the Conflict

In a dark prophesy or curse, Ginsburg argues that the majority's opinion "will not have staying power."[74] Beyond its identification of the disconnect between disparate impact and equal protection, *Ricci* provides three potentially important contributions towards a resolution: the Court's treatment of race-neutral diversity policies, its discussion of disparate-impact quota-tendencies, and its establishment of a strong-basis-in-evidence standard.

1. Treatment of Race-Neutral Diversity Policies

The key fact in *Ricci* is that disparate-treatment analysis was triggered by an employment decision that arguably had race-conscious intent and effects, even though it treated employees of all races in an identical manner (by discarding their test scores). The intent of the employment decision could be characterized either as race-neutral (anti-discrimination compliance) or as race-conscious (altering the racial composition of promoted candidates). While both factors were undoubtedly in play, the separate opinions of Justices Kennedy, Scalia, and Samuel Alito all reflect the majority's conclusion that

[73] See, e.g., Deborah Malamud, Values, Symbols, and Facts in the Affirmative Action Debate, 95 Mich. L. Rev. 1668, 1693 (1997).

[74] Ricci, 129 S. Ct. at 2690.

race-conscious motivations predominated. The most salient lesson from Justice Kennedy's majority opinion is that facially neutral employment decisions will trigger disparate-treatment analysis when they are motivated by a predominantly race-conscious intent. After *Ricci*, one can draw a parallel lesson from Kennedy's *Parents Involved* concurrence: Facially neutral educational decisions will trigger strict scrutiny when they are motivated by a predominantly race-conscious intent. That link between the two opinions has broad implications.

The lower courts had decided that New Haven's decision to discard its examination results should not even trigger disparate-treatment analysis, because the action was facially neutral. As the district court reasoned, "all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion."[75] Justice Ginsburg was similarly convinced that "New Haven's action, which gave no individual a preference, was simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly."[76]

Some thought that this argument would appeal to Justice Kennedy. In *Parents Involved*, Kennedy had insisted that school boards could pursue diversity objectives through the way in which they select new school sites; draw attendance zones; allocate resources for special programs; recruit students and faculty; and track enrollments, performance, and other statistics.[77] Significantly, Kennedy argued, "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[78] Some commentators interpreted this language as a signal that race-neutral diversity plans would not trigger strict scrutiny even if they are motivated by a racial intent.[79] If this interpretation had been correct, however,

[75] Ricci v. DeStefano, 554 F. Supp. 2d 142, 158 (Conn. 2006), aff'd, 530 F.3d 87 (2d Cir. 2008) (per curiam).

[76] Ricci, 129 S. Ct. at 2696 (Ginsburg, J. dissenting) (quoting 554 F. Supp. 2d at 157).

[77] Parents Involved, 551 U.S. at 788 (Kennedy, J., concurring).

[78] *Id.*

[79] See, e.g., Samuel Estreicher, The Non-Preferment Principle and the "Racial Tie-breaker" Cases, 2006–2007 Cato Sup. Ct. Rev. 239, 249–50 (2007).

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then Kennedy should have ruled with New Haven in *Ricci*. After all, if school districts can redraw school boundary lines in order to achieve diversity goals, then employers should be able to rewrite examinations in order to achieve antidiscrimination goals.

Viewed through the lens of *Ricci*, *Parents Involved* now takes on a different complexion. In light of *Ricci*, it now appears that some commentators' initial interpretation was incorrect. Kennedy's *Parents Involved* concurrence may now be better understood as arguing that facially neutral state actions should be subjected to strict scrutiny whenever racial considerations are the "predominant" governmental motivation. Kennedy prefers this standard, adopted from voting rights cases, to the less stringent "but for" standard, under which defendants might be held liable if they would not have engaged in the challenged conduct "but for" the impermissible motivation.[80] This is consistent with the position, established in *Ricci*, that facially race-neutral governmental practices that are motivated by racial purposes should be treated judicially in the same manner as if their race-consciousness were overt.[81] Taking *Ricci* and *Parents Involved* together, the Court has established that racially neutral governmental actions with a predominant racial motive trigger both strict scrutiny and disparate-treatment analysis.

The scope of decisions covered by this new rule is potentially broad, encompassing racially motivated decisions by school districts to redraw school boundaries or employ socioeconomic factors in student assignment decisions, state universities to institute percent-rank plans, and private universities to give admissions or financial

[80] Kennedy's point is that government bodies sometimes have mixed motives for the questionable decisions that they make. A school board, for example, may redraw school boundary lines because it reduces overcrowding, simplifies bus routes, and increases each school's student body diversity in terms of both family income and race. Under the predominant-motivation approach, the school board's decision would trigger strict scrutiny only if racial diversity is the board's predominant motivation. If the board's other goals figured equally in its decisionmaking, then race is not the predominant motivation, even if they would not have been sufficient to support the decision without the added factor of race.

[81] Some commentators interpreted *Parents Involved* in this manner from the start. See George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 Cath. U. L. Rev. 991, 1012–13 (Sum. 2008); Brian Fitzpatrick, Essay, Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 Mich. J. Race & L. 277, 290 (2007).

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aid preferences on the basis of either student economic status or such factors as whether a student is the first person in his family to attend college. In all of these cases, strict scrutiny and disparate-treatment analysis are both triggered.

This should have significant ramifications for policies like the University of Texas's former "Ten Percent Plan," under which UT guaranteed admissions to students graduating within the top 10 percent of their high school class.[82] There is considerable evidence, including contemporaneous admissions, which suggest that Texas policymakers adopted this plan in order to diversify the racial composition of UT's student body, in the face of a judicial decision which precluded the explicit consideration of race. As in *Ricci*, the government used a facially neutral policy to pursue a racially conscious agenda. Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas's racial motivations predominated in the institution of the plan.[83]

Where strict scrutiny applies, the defendant not only must proffer a compelling governmental interest but also must satisfy the stringent demands of narrow tailoring: Have less racially intrusive alternatives been subjected to the rigors of "serious, good-faith consideration"?[84] Is the program limited by explicit sunset provisions?[85] Does the institution regularly monitor the program to determine its continuing necessity?[86]

[82] See Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan, 53 Baylor L. Rev. 289, 291–93 (2001).

[83] See, e.g., Kenneth L. Marcus, Diversity & Race-Neutrality, 103 Nw. U. L. Rev. Colloquy 163, 166–67 (2008), available at http://ssrn.com/abstract=1284652.

[84] See Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (requiring "serious, good faith consideration of workable race-neutral alternatives").

[85] See *id.* at 342 (articulating the principles that "all governmental use of race must have a logical end point" and that "the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity"); Croson, 488 U.S., at 510 (plurality opinion) (discussing the importance of the principle that any "deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter. . ."); Stephanie Monroe, Guidance Letter, Use of Race in Student Admissions, (Aug. 28, 2008) at 2, available at http://www.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html (reminding postsecondary institutions that "the use of race must have a logical end point").

[86] See id. (reminding postsecondary institutions that "[p]eriodic reviews are necessary" when race is used as a factor in college admissions).

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2. *The Tendency of Disparate Impact Towards Quotas*

Ricci is also important for its recognition, particularly in the Scalia concurrence, that disparate-impact compliance can lead to quotas. The question of quotas is significant because the Court had long established that "[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'"[87] *Ricci* reiterates *Watson*'s concern that disparate impact, when not sufficiently constrained by evidentiary standards, will tend to pressure employers to establish quotas. "Even worse," *Ricci* adds, is the prospect that employers could reengineer employment practices in order to achieve a "preferred racial balance."[88] Thus, the *Ricci* Court held that anything less than the strong-basis-in-evidence standard creates the risk of "a *de facto* quota system, in which . . . an employer could discard test results . . . with the intent of obtaining the employer's preferred racial balance."[89]

Justice Kennedy's majority opinion insists that quota-seeking designed for disparate-impact compliance offends Title VII's express language, which does not call for outright racial balancing.[90] Justice Scalia deftly pierces this conceit: While disparate-impact laws may not require employers to impose racial quotas, neither do such laws provide a "safe harbor."[91] Yet, in effect, disparate impact forces employers to impose quotas when quotas are the most cost-effective way to satisfy the requirements of disparate impact. Under these circumstances, Scalia argues, Congress is as liable for the employer's imposition of a quota as if Congress had established the quota itself. By analogy, he hypothesizes a private employer who refrains from imposing a racial quota but who deliberately designs hiring practices to reach the same result. Such an employer, Scalia points out, would be liable for employment discrimination, "just one step up the

[87] Watson, 487 U.S. at 993 (internal citations omitted).

[88] Ricci, 129 S. Ct. at 2675.

[89] *Id.*

[90] *Id.* at (citing § 2000e–2(j)).

[91] Ricci, 129 S. Ct. at 2681 (Scalia, J., concurring).

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chain."[92] From this analogy, Scalia reasons that governmental pressure to alleviate disparate impact "would therefore seemingly violate equal protection principles."[93] It does not matter that race is considered only "on a wholesale, rather than retail, level" because equal protection requires the government to treat citizens as individuals.[94]

3. The Strong-Basis-in-Evidence Test

As *Ricci*'s Kennedy-Scalia dialogue on the topic of quotas suggests, public employers must be held to a standard that can ferret out disparate-impact concerns that are merely pretextual. Thus, when the Court addresses the conflict between disparate impact and equal protection, it may be tempted to rely upon *Ricci*'s strong-basis-in-evidence test. Unfortunately, the new standard is problematic in several respects: its inappropriate focus on the government's interest in liability-avoidance (as opposed to its interest in nondiscrimination), its apparent unworkability, and the unlikelihood that it is sufficiently well-considered to endure over time.

a. Incorrect focus on liability-avoidance

The first concern is that *Ricci's* discussion of the government's interest in avoiding disparate-impact liability is, at best, a circuitous articulation of the government's proper interest. To the extent that disparate impact is a trustworthy device for identifying actual discrimination, state actors who are sincere about compliance should be less concerned about the prospect of liability than they are about the violation itself. In other words, they should be more concerned about doing the right thing than they are about being sued for doing wrong. The government's proper interest, then, is to provide equal protection, not to avoid liability for discrimination. The fact that New Haven articulates its interest primarily in terms of liability-avoidance merely confirms that the city was driven by the *ex post* disparate impact of the promotional examination, not by an *ex ante* conviction that certification of the examination would actually have been discriminatory. This is a distressing symptom of the pathology of disparate-impact doctrine.

[92] *Id.* at 517.
[93] *Id.*
[94] *Id.*

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The focus on liability-avoidance generates subsidiary problems for the strong-basis-in-evidence standard. For example, should the public employer's basis in evidence depend on factors unrelated to the presence of actual discrimination, such the credibility of witnesses, the availability of evidence, the sympathetic qualities of the likely plaintiffs, or its own unsympathetic qualities? To the extent that the government's requisite interest is defined in terms of the basis in evidence for its calculation of potential liability, the answer to all these questions must be yes. Of course, none of these questions addresses the prospect that the government is engaged in discrimination sufficient to justify actions that would otherwise violate equal protection. Obviously, the government's interest is in avoiding conduct that would actually be discriminatory, regardless of whether it would be found to be such by a court. The strong-basis-in-evidence standard should support the government's determination that the practices in question are intentionally discriminatory or at least that they are motivated by unconscious bias.

b. Ineffectiveness of the standard

Justice Ginsburg argues that the strong-basis-in-evidence standard is inapposite, vague, and yet perhaps more stringent than the majority acknowledges. With some justification, she argues that "[o]ne is left to wonder what cases would meet the standard and why the Court is so sure this case does not." Ginsburg is probably correct to complain that the majority "stacks the deck . . . by denying respondents any chance to satisfy the newly announced strong basis-in-evidence standard." As she argues, the proper course would have been to remand the case for a determination of New Haven's compliance.[95]

Indeed, Justice Kennedy is flatly wrong when he states, in defense of the Court's preemptory ruling, that New Haven's evidence of disparate-impact liability was "nothing more" than "a significant statistical disparity." New Haven had also presented less statistically discriminating alternatives that would have promoted important business objectives, such as underweighting the written component

[95] See, e.g., Johnson v. California, 543 U. S. 499, 515 (2005).

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of the examination or eliminating it altogether—as the nearby town of Bridgeport had with marked success.[56]

Given the findings that the lower courts had already made, it is likely that they would have found that New Haven did in fact have a strong basis in evidence to believe that it faced probable disparate-impact liability. This would in turn have led to another Second Circuit decision in favor of New Haven, which the Court could have reversed only by deciding the constitutionality of Title VII's disparate-impact provision. Justice Alito responds to Ginsburg's dissent by presenting copious evidence to show that New Haven discarded its examination results in order to satisfy a politically powerful constituency, rather than to avoid unintentional discrimination. Alito's evidence is quite convincing: New Haven's supposed fear of disparate-impact liability may well have been a pretext to engage in politically driven racial balancing. This does not, however, address Ginsburg's underlying point.

Regardless of New Haven's motives, a strong case can be made that the city would have been liable under existing disparate-impact law to the extent that it had failed adequately to consider alternative procedures that would have generated less racially disparate results. It is not clear whether Kennedy and Alito's failure to acknowledge this point demonstrates the unworkability of the substantial-basis standard or merely that it was incorrectly applied. Even if the latter were the case, however, it does not speak well of a newly created judicial standard when the issuing court cannot apply it properly.

c. Likely impermanence of the standard

Will the strong-basis-in-evidence test endure even in the context in which *Ricci* presents it—as a standard for determining when state actors may legitimately take race-conscious action to avoid disparate-impact liability? Ginsburg predicts that it will not. She is likely correct but not necessarily for the reasons that she has in mind. Ginsburg clearly yearns for the day when an ideologically

[56] Ginsburg was also concerned by testimony that some exam questions were not relevant to New Haven's firefighting procedures and that firefighters had unequal access to study materials which fell in part along racial lines. That is because many white candidates could get materials and assistance from family members in the fire department, while most minority candidates were "first generation firefighters" who lacked such support networks. *Ricci*, 129 S. Ct. at 2693 (Ginsburg, J., dissenting).

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reconstructed Court will overturn *Ricci* and embrace a vigorous conception of disparate impact. Depending on the timing of future Supreme Court vacancies, that is certainly a possibility. It is also possible, however, that a Court substantially similar in composition to the present one will continue the work that *Ricci* began. That Court would likely narrow the scope of the disparate-impact provision in order to conform it to the requirements of the Equal Protection Clause. Interestingly, *Ricci*'s strong-basis standard would no better survive the ruling of a sympathetic Court than it would an unsympathetic one.

In one respect, this point may belabor the obvious. Suppose the Court interprets the Equal Protection Clause expansively and strikes down or substantially limits the disparate-impact provision. In that case, the *Ricci* strong-basis-in-evidence standard would no longer be applicable to state actors who fear that their employment practices have a disparate impact. Even with a strong basis, the use of race-conscious measures would be a constitutionally forbidden non-starter. The more interesting question is how this equal protection result would affect non-state actors who are subject to Title VII. Would the *Ricci* standard apply to a large private employer that contemplated race-conscious action to address potential disparate-impact liability? Probably not. After all, Congress cannot require employers to engage in conduct that, if federally conducted, would violate the Equal Protection Clause. If the equal protection bars state actors from engaging in race-conscious activity in order to avoid a disparate impact, then it also bars Congress from requiring private employers to do so. For this reason, further deliberations on the issues underlying *Ricci* will likely doom the *Ricci* standard, whether the reviewing Court is sympathetic to *Ricci*'s premises or not.

C. The Proper Resolution

1. Anti-Discrimination Device

The core purpose of the disparate-impact provision is the government's compelling interest to identify and eliminate intentional or unconscious discrimination that cannot be proved through the disparate-treatment provision.[97] Given the difficulty of proving conscious

[97] See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

intent, let alone the near-impossibility of demonstrating implicit bias, disparate impact provides a means of enforcing antidiscrimination laws in an age when bigots seldom announce their prejudices.[98] Employers seldom leave behind direct evidence of discriminatory animus.[99] This is particularly true in the case of large corporate employers, whose intent must be gleaned from their various agents, who may have differing motivations, overlapping authority, and practices that differ from formal policy. For this reason, the disparate-impact provision permits plaintiffs to prove discrimination by presenting evidence of the discriminatory effects of employment practices and by demonstrating that the employer's justification offered for these practices is pretextual.[100] As discussed above, the narrowly tailored use of disparate-impact analysis to effect this purpose is constitutionally unproblematic.

In practice, the constitutionality of applying disparate impact will turn on the question of narrow tailoring. Difficult problems arise, as arguably occurred in the *Ricci* case, when public employers shift the allocation of employment benefits in order to avert racial disparities that cannot be justified by business necessity. The government should not be in the position of requiring actual, present, intentional discrimination as a means of averting the prospect of potential, perhaps unconscious, discrimination. Even when disparate-impact analysis is employed as a prophylactic device to avert intentional discrimination, it should be used in a way that does not generate other forms of discrimination. The use of racially preferential practices, quotas or double standards, for example, will seldom—if ever—be the least intrusive means of achieving the government's antidiscrimination interest. Courts will likely need to address this issue on a case-by-case basis to ensure that the method chosen to avert discrimination is least likely to exacerbate the problem it is intended to redress.

[98] See, e.g., Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened.").

[99] U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony to the employer's mental processes.").

[100] George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1309–10 (1987).

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2. Leveling Device

Beyond its role in combating intentional and unconscious discrimination, disparate impact has also been used more broadly as a means of redistributing employment opportunities. As the Court explained in *Watson v. Fort Worth Bank & Trust*, "the necessary premise of the disparate-impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[101] The idea is that employers who lack discriminatory animus may nevertheless, and for no good reason, adopt practices that have the effect of limiting employment opportunities for women and minorities. As *Griggs* instructed, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[102] The government's motive in redistributing employment opportunities, however, absent intentional or unconscious discrimination, is on weaker ground than its motive in avoiding actual discrimination.

Because this latter strand of disparate-impact law is on much weaker footing constitutionally, one potential approach is to interpret the disparate-impact provision as serving only the purpose of combating intentional or unconscious discrimination.[103] As Justice Scalia and Professor Primus have pointed out, however, this interpretation is difficult to maintain in light of various statutory provisions, such as the absence of a good-faith defense. Given this problem, the Court may be forced to strike down the disparate-impact provision and encourage Congress to reenact it without its problematic features.[104] This will ensure that disparate impact is grounded on a compelling governmental interest.

[101] Watson, 487 U.S. at 987 (1988).

[102] Griggs, 401 U.S. 424, 432 (1971); see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

[103] Primus, *supra* note 36.

[104] Roger Clegg has floated legislative language to produce this result. See Clegg, *supra* note 44, at 34–35:

> In any action brought under 42 U.S.C. 2000e–2(k), no respondent shall be found liable if it can demonstrate that the challenged practice was neither adopted with the intent of discriminating on the basis of race, color, religion, sex, or national origin nor applied unequally on the basis of race, color, religion, sex, or national origin.

Professor Primus argues that limiting disparate impact to its role in addressing intentional discrimination fails to address what he considers to be a larger purpose of antidiscrimination law: eradicating "historically embedded hierarchies."[105] As a practical matter, Primus concedes that disparate-impact litigation no longer plays a significant role in creating opportunities for large numbers of nonwhite workers. However, Primus argues that disparate impact's "symbolic or expressive functions" are nevertheless important because they shape the way in which the public understands antidiscrimination law and policy.[106] For this reason, Primus urges the courts not to perpetuate "a worldview on which racial inequity is primarily the product of present bad actors rather than largely a matter of historically embedded hierarchies."[107]

These arguments, however, provide a less-than-compelling rationale for abiding conduct that violates the fundamental right to equal protection of the laws. Symbolic or expressive functions may be important, but they cannot outweigh the harms of actual discrimination. Moreover, disparate impact's symbolic and expressive functions are not entirely benign. When it degenerates into preferential treatment, dual standards, and racial quotas, disparate impact may affect the institutionalization of race-consciousness and, with it, the entrenchment of pernicious stereotypes, social division, resentment, and stigmatization.[108] Nevertheless, there may be some truth to the notion that governmental agencies must be permitted to address—in a race-conscious but not racially preferential manner—those structural forms of bias that, although not supported by current discriminatory intent, nevertheless affect the demographic compositions of the workforce. This issue is best understood in terms of disparate impact's function as a "diversity management device."

3. Diversity Management Device

A third function of disparate impact is to identify practices that, while not supported by present discriminatory intent, have the function of restricting employment opportunities by gender or race. This

[105] Primus, *supra* note 36 at 499.

[106] *Id.*

[107] *Id.*

[108] See, e.g., Clegg, *supra* note 44 at 11–14.

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might be described as a "diversity management" device in the sense that it is intended to address frictions that arise from human diversity, rather than to address present intentional or subconscious discrimination or to advance particular racial outcomes.[109] For example, an agency may have a dominant culture—a "body of unspoken and unexamined assumptions, values, and mythologies"—which historically developed around a predominantly white male workforce and to which white males can more easily adapt than members of other groups.[110] Certain practices within this culture (e.g., advancing employees who seem to be a good "fit") may have an adverse impact on minorities and women.

The requirement that employers use less-disparity-producing alternatives can break down practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[111] One example is the use of height and weight requirements for prison guards that may exclude most women, rather than directly measuring strength or other job-relevant variables.[112] In *Griggs*, for example, the Court held that Title VII prohibits disparate impact regardless of an employer's intentions, announcing that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[113]

The last two sections explained, however, why Congress cannot statutorily disassemble such cultural obstacles to equal opportunity. Investigating and responding to the racial impacts of institutional culture are, after all, race-conscious activities that require some degree of racial categorization. Strict judicial scrutiny, which applies in this situation, cannot be satisfied by a government interest in disassembling employment obstacles—unless they result from conscious or unconscious discriminatory animus. On the other hand, it is troublesome to suggest that government actions to address such cultural issues—for example, auditing agency practices to identify nondiscriminatory obstacles to equal advancement—cannot be

[109] See Gill Kirton and Anne-Marie Greene, The Dynamics of Managing Diversity: A Critical Approach, 2d ed. (2005) at 123–127.

[110] See R. Roosevelt Thomas Jr., From Affirmative Action to Affirming Diversity, in Harvard Business Review on Managing Diversity (2001) at 16–17.

[111] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[112] See Dothard v. Rawlinson, 433 U.S. 321 (1977).

[113] Griggs, 401 U.S. at 426 n.1.

undertaken proactively by state actors without offending equal protection. While Congress may not be able to mandate such activities, it seems that public employees must be permitted to voluntarily undertake them.

V. Conclusion

There is one point on which Justice Ginsburg agreed with her former clerk's "Equal Protection and Disparate Impact" analysis in the *Harvard Law Review*. "The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection," Primus insisted (and Ginsburg approvingly quoted) "suggests that only a very uncompromising court would issue such a decision."[114] This may be true. At the same time, it is no less true that the very incompatibility of current disparate-impact doctrine with equal protection suggests that only a very irresponsible court could uphold the former in a challenge based on the latter. At any rate, it is not clear that "compromising" is the best attribute that we can expect from a court enforcing equal protection nor that we should prefer our jurisprudence in this area to be "compromised."

This article has explained why Title VII's disparate-impact provision, as currently drafted, cannot survive a challenge based on the Equal Protection Clause. Congress can best save the provision by providing an exception for good-faith employer behavior that is not motivated by any form of discriminatory animus. Even when limited in this manner, however, disparate impact is still susceptible to various forms of abuse when it provides the basis for race-conscious state actions. This can be curtailed by judicious enforcement of the narrow-tailoring requirement. Specifically, the courts should look with great skepticism at state actions that entail any form of racial or ethnic preference or quota. On the other hand, equal protection does not prohibit—and indeed its underlying values may encourage—the voluntary, non-preferential efforts by public or private employers to eliminate policies and practices that tend to limit equal employment opportunities without adequate business or public policy justification.

[114] Primus, *supra* note 36 at 585.

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Mr. NADLER. I now recognize Mr. Relman for 5 minutes.

TESTIMONY OF JOHN P. RELMAN, FOUNDER AND DIRECTOR, RELMAN AND DANE

Mr. RELMAN. Thank you, Chairman Nadler. And thanks——

Mr. NADLER. Microphone, please.

Mr. RELMAN. Yes, good.

Thank you, Chairman Nadler, and thank you very much both for convening these hearings and for the opportunity to testify.

My testimony today will address two topics: discrimination housing practices directed toward the disability community and the role of private firms in recent large fair housing enforcement actions.

The Fair Housing Act has prohibited disability discrimination for 22 years, yet hundreds of thousands of people with disabilities remain stranded in institutional or inaccessible settings because of architectural and attitudinal barriers.

Just as the Fair Housing Act was a powerful force for racial integration in America, it was also intended to promote the integration of people with disabilities. For people with disabilities, integration means being part of the American mainstream and not being treated unfavorably because of a housing provider's biases or stereotypes about disability.

Vigorous enforcement of the Fair Housing Act and timely enforcement of the Fair Housing Act is particularly important when it comes to refusals to accommodate inaccessible design and construction. It can be the difference between a person with a disability being allowed to or being able to live in an integrated setting or being relegated to an institutional setting.

Twenty-two years after the amendment, the governmental enforcement of the Fair Housing Act's disability provisions still does not begin to approach the level of a national commitment. The Obama administration inherited a bureaucratic environment from past Administrations that has left a backlog of complaints languishing on the desks of investigators, some of whom don't fully understand the basic elements of the disability discrimination claim, and that has left people languishing unnecessarily in institutional settings.

Under the leadership of Assistant Attorney General Tom Perez and HUD Secretary Shaun Donovan, the Obama administration is taking what I believe are important steps to improve enforcement of the Fair Housing Act's disability protections. But because discrimination against people with disability remains rampant, more fair housing complaints allege disability discrimination than any other protected class.

And for this reason, the Administration needs private civil rights firms as enforcement partners. I would direct the Committee's attention to both the statistics in Shanna Smith's testimony showing the number of disability complaints filed and also her reference to the Spanos case. That was a case that we litigated on behalf of the National Fair Housing Alliance.

And although we only have 14 lawyers in our national civil rights practice, yet we were able to prosecute successfully this very complicated and cutting-edge case, I think an example of ways that private firms can assist with the need to fill the gap where the Federal Government has not been able to fill in.

Beyond problems with design and construction, people with disabilities also face a rash of other problems that includes differential treatment, facially neutral rules that have a harsher disparate impact on them, refusal to provide reasonable accommodations in

rules and policies, or to permit reasonable modifications of units that give access to common areas and increase accessibility.

And we have also seen problems in retirement homes, where housing providers impose rules and policies that discriminate on the basis of disability.

As well, there appears to be a widespread use of advertisements for active adults and those capable of living independently without assistance. These are discriminatory advertisements. Policies such as these and practices discourage people with disabilities from applying and living in communities with people who do not have disabilities.

In many of these situations, the Fair Housing Act already provides sufficient substantive protections. And the principal question is really one of enforcement. There are, however, a number of areas in which we believe—I believe the Fair Housing Act or the HUD regulations that govern enforcement can be clarified and strengthened.

I would like to mention three. The first concerns the statute of limitations when it comes to design and construction barriers. The court of appeals for the Ninth Circuit has recently adopted a very cramped view of the Fair Housing Act's statute of limitations that bars litigation of design and construction violations that are identified more than 2 years after the date of the final occupancy permits.

What this does is it effectively gives designers and developers a free bite at the apple. It lets them off the hook for blatant violations that are going to be in place for many years to come, and it prevents access as long as they can avoid detection in the first 2 years of operation.

The second issue that we think can be clarified is to provide a private right of conduct that allows individuals and private parties to challenge discriminatory municipal ordinances that prevent people in recovery from drug and alcohol addiction, for example, from being able to live in single-family-zoned areas in neighborhoods and allowing their full integration into these communities. And that is—that is a provision that should be allowed under Section——

Mr. NADLER. I am sorry. Could you—you are saying there should be a private right of action for what exactly?

Mr. RELMAN. For enforcing Section 3608(e)(5) of the Fair Housing Act. This is a provision that allows and requires the duty to affirmatively further fair housing under the Fair Housing Act. And there needs to be a private right of action now to enforce that. That would allow us to address these problems with discriminatory zoning.

And finally, financial conditions is often affected by disability because the latter may limit one's ability to work. As a consequence, many people with disabilities depend on rental subsidies such as the housing choice voucher program to live in decent, safe, affordable and accessible housing.

But the Fair Housing Act does not explicitly prohibit a landlord from simply refusing to accept vouchers. So I believe Congress can end this practice by adopting a prohibition on source of income dis-

crimination similar to the one in the low-income housing tax credit program administered by the Department of Treasury.

And finally, the joint statements that HUD and DOJ have issued have been enormously helpful to advocates and to lawyers like myself. These are joint statements on group homes that have clarified the law, reasonable accommodation and reasonable modification. And they have been used by thousands of advocates.

We are puzzled why HUD and DOJ have not taken a similar approach in other areas, such as with the statute of limitations, continuing violations, et cetera, to clarify what the law should say.

Finally, I would just like to sum up by saying a few words about the role of private firms in fair housing enforcement, because this is very important. Over the last 2 years, our firm has been involved in five major enforcement actions, a $10.8 million jury verdict on behalf of an African-American community in Zanesville, Ohio, a summary judgment ruling in a fair housing case in Westchester County that led to a $52 million settlement requiring Westchester to satisfy its duty to affirmatively further fair housing by building affordable housing in areas of the county that are less than 3 percent African-American, as alluded to by Barbara Arnwine, three findings of contempt against St. Bernard Parish in Louisiana for denying an affordable housing provider the right to build multifamily housing, and two lawsuits brought on behalf of the city of Baltimore and the city of Memphis against Wells Fargo for targeting African-American neighborhoods for unfair and predatory loans, as well as the Spanos case referred to by Shanna Smith.

The questions may fairly be posed, why has so much recent important fair housing litigation been the product of private enforcement efforts like our firm? And how, if at all, is this development related to current or past enforcement efforts by the Federal Government?

I would like to suggest that what I believe has happened is that historically the housing and civil enforcement section has done an excellent job in enforcing the law, both in Republican and Democratic administrations. All of this, though, changed with the last Republican administration. Enforcement efforts eroded significantly not due to the commitment of lawyers, career attorneys who managed to stay, but due to the departure of many other experienced career attorneys who found the environment no longer hospitable to the principles they had committed to.

The result was both a lack of resources needed to identify and litigate new cases and absence of leadership needed to conceive and develop new litigation strategies, both of those things.

So from 2001 to 2008, the responsibility for litigating these cases and for enforcing the law fell increasingly to firms like ours that have the expertise and resources needed to take on these difficult and complex cutting-edge cases.

Now, in one sense, this is nothing different than what Justice Douglas envisioned and Congress envisioned when they first passed the Fair Housing Act. They said that complaints by private persons are the primary method of obtaining compliance with the act. This is what Justice Douglas said in the famous Trafficante case, and it is what Congress intended.

The reality in the years that followed that decision, though, has proved both prescient and understated, prescient because private parties and firms played an important role in enforcing the act, but understated because the role of the Department of Justice proved far more important than either Justice Douglas or Congress might have imagined.

The last thing I want to say about this is I think that the good news is that the Obama administration has renewed the Federal Government's commitment to fair housing enforcement in significant and vital ways. Assistant Attorney General Tom Perez and Secretary Donovan have committed their departments to agendas that incorporate many of the ideas that are at the heart of the cases that I mentioned above.

The Westchester case was settled with the assistance of this Department of Justice. The St. Bernard Parish cases have become a central focus of Secretary Donovan's current efforts. And Assistant Attorney General Perez has opened 45 new lending discrimination investigations, and announced that predatory lending targeted at minority communities is going to be a priority enforcement area.

I think, though, that going forward we need to do three things. The first—and this is my final comment—Congress has got to provide the Department of Justice and HUD with the funding needed to fully staff its enforcement work. Second, Congress has got to adequately fund the fair housing initiatives program to ensure that fair housing organizations have sufficient resources to investigate and test to determine whether housing providers are violating the law.

And third and last, the civil rights division has got to redouble its efforts to coordinate Federal, State, municipal and private efforts to enforce the law, working closely with all of these important stakeholders, to make sure that we fulfill the purpose and the promise that Congress envisioned when it first passed the Fair Housing Act.

Thank you very much.

[The prepared statement of Mr. Relman follows:]

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TESTIMONY OF JOHN P. RELMAN, ESQ.

**BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

MARCH 11, 2010

ENFORCING THE FAIR HOUSING ACT

Testimony of
John P. Relman, Esq.
Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
Thursday, March 11, 2010

Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee: My name is John Relman, and I am the managing partner of Relman & Dane, PLLC, a civil rights law firm based here in Washington, D.C. Our firm litigates discrimination cases across the country. We are known for our representation of victims of housing and lending discrimination, but our practice includes cases involving discrimination in employment, places of public accommodation, racial profiling, police misconduct, and other areas covered by federal and state civil rights laws. Before founding Relman & Dane, I served as Director of the Fair Housing Project at the Washington Lawyer's Committee for Civil Rights and Urban Affairs, and as a staff attorney at the National office of the Lawyers' Committee for Civil Rights.

At a time of turmoil in the housing markets, with unprecedented numbers of foreclosures devastating minority communities in cities across the country, it is particularly important that Congress hears from fair housing advocates and those familiar with the operation of the Fair Housing Act to determine how this important civil rights law can be strengthened to better serve all protected groups and classes. These hearings further that purpose, and I thank you both for convening these proceedings and for the opportunity to testify before the Subcommittee.

My testimony addresses two topics: (1) discriminatory housing practices directed towards the disability community; and (2) the role of private firms in recent, large fair housing enforcement actions.

Disability Issues

A. Making Government Enforcement a True "National Commitment"

The Fair Housing Act ("FHA") has prohibited disability discrimination for 22 years, yet hundreds of thousands of people with disabilities remain stranded in institutional or inaccessible settings because of architectural and attitudinal barriers.

When it passed the Fair Housing Amendments Act of 1988, Congress boldly proclaimed that the new law was:

> [A] clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.Rpt. 100-711, at p. 18, reprinted at 1988 U.S.C.C.A.N 2173, 2179.

Just as the FHA was a powerful force for racial integration in America, it was also intended to promote the integration of people with disabilities. For people with disabilities, "integration" means being part of the "American mainstream," and not being treated unfavorably because of a housing provider's biases or stereotypes about disability. Vigorous and timely enforcement of the FHA is especially important in the context of disability because a single discriminatory act (whether it be disparate treatment, the refusal to accommodate, or inaccessible design and construction) can be the difference between someone being housed in an integrated setting and being relegated to a more institutional setting like a nursing home, assisted living, group home, or other segregated housing set aside for people with disabilities.

Twenty-two years after the Amendments, governmental enforcement of the FHA's disability provisions still does not begin to approach the level of a "national commitment." The

Obama Administration inherited a bureaucratic environment from the last Administration that has left a backlog of complaints languishing on the desks of investigators, some of whom clearly do not understand the basic elements of a disability discrimination claim and have not been told to prioritize these claims for people who find themselves living unnecessarily in institutional settings or in housing that is inaccessible.

Under the leadership of Assistant Attorney General Tom Perez and HUD Secretary Shaun Donovan, the Obama Administration is taking important steps to improve enforcement of the FHA's disability protections. But because discrimination against people with disabilities remains rampant—more fair housing complaints allege disability discrimination than any other protected class—the Administration needs private civil rights firms as enforcement partners.

Relman & Dane, for example, has just fourteen lawyers running a national civil rights practice, yet we have – for ten years now – prosecuted complicated and cutting edge cases involving disability and all other protected classes. Last November we settled one of the largest design and construction accessibility cases under the FHA.[1] The case was filed in 2007, on behalf of the National Fair Housing Alliance and four of its member agencies, against the A.G. Spanos Companies for accessibility violations at 123 apartment complexes in 14 states. After vigorous and successful litigation, we won a stipulated judgment providing for retrofits of 12,300 units and accessibility funds of nearly $5 million to provide greater accessibility for people living in their own homes or units not built by Spanos. Together with similar litigation by the Equal Rights Center and the U.S. Department of Justice, the Spanos litigation alerted the design and building industries that noncompliance with the FHA's accessibility requirements will not be tolerated.

B. Revising the FHA and Regulations to Address Other Areas of Concern for People with Disabilities

Beyond problems with design and construction, people with disabilities also face a rash of other problems, including differential treatment, facially neutral rules that have a harsher (disparate) impact on them, and refusals by owners to grant "reasonable accommodations" in rules and policies, or to permit "reasonable modifications" of units and common areas to increase accessibility. In addition, we have seen a growing number of cases involving retirement housing providers imposing rules and policies that discriminate on the basis of disability in the application and screening, assignment and transfer of residents. There also appears to be widespread use of advertisements for "active adults" and those capable of "living independently without assistance." Policies and practices such as these discourage people with disabilities from applying and living in communities with people who do not have disabilities.

Another area of significant concern is widespread noncompliance with accessibility requirements in housing built with federal funds. Despite high-profile enforcement actions in recent years against public housing authorities in Baltimore, Washington, D.C. and Philadelphia, we continue to receive reports of major cities deploying millions of dollars of Community Development Block Grant and HOME funds without enforcing accessibility requirements. We are currently investigating a matter where the city's failure to enforce these obligations has resulted in wheelchair users living in nursing homes and homeless shelters.

In many of these situations, the FHA already provides sufficient substantive protections, and the principal question is one of enforcement. There are, however, a number of areas in which the Fair Housing Act or the HUD regulations that govern its enforcement could be clarified and strengthened. For instance:

- The U.S. Court of Appeals for the Ninth Circuit has adopted a cramped view of the FHA's statute of limitations provision, barring litigation of design and construction violations that are identified more than two years after the date of the final occupancy permits. *Garcia v. Brockway*, 526 F.3d 456 (11th Cir. 2008). The effect of this interpretation is to let designers and developers off the hook for blatant violations (that will be in place for many decades and prevent access for people with disabilities) so long as they can avoid detection in the first two years of operation. By correcting this interpretation, Congress can significantly expand the number of apartment and condo units in which people with mobility impairments are able to live.

- People in recovery from drug and alcohol addiction still face widespread opposition to the presence of recovery group homes in residential neighborhoods. This often takes the form of discriminatory enforcement of zoning, land use and building ordinances. Discriminatory enforcement by municipalities that receive federal funds may be in violation of the municipalities' certifications that they will "affirmatively further fair housing." 42 U.S.C. §3608. The FHA, however, does not provide a private cause of action to enforce §3608. This in turn limits the ability of private parties to hold violators responsible for their actions. Congress can improve enforcement of this and other FHA obligations by amending the definition of "discriminatory housing practice" provided in 42 U.S.C. §3602 to include "a failure to comply with the obligations of section 3608(e)(5)."

- Financial condition is often affected by disability because the latter may limit one's ability to work. As a consequence, many people with disabilities depend on rental subsidies, such as the Housing Choice Voucher program to live in decent, safe, affordable and accessible housing. But the FHA does not explicitly prohibit a landlord from simply refusing to accept vouchers. Congress can end this practice by adopting a prohibition on "source of income" discrimination similar to the one in the Low Income Housing Tax Credit program administered by the Department of the Treasury.

C. Joint Statements

HUD and DOJ should expand their use of "Joint Statements" on enforcement policy. The Joint Statements on group homes, reasonable accommodation, and reasonable modification have proven enormously helpful. They have been used by thousands of advocates and people with disabilities to secure rights protected under the FHA, without the need to hire a lawyer or file a complaint. It is all the more puzzling, therefore, why HUD has not taken a similar approach in other areas, particularly with issues of limitations and continuing violations theory in new

construction, and the application of the FHA's disability provisions to assisted living and continuing care retirement communities.

The Role of Private Firms in Fair Housing Enforcement

Over the past few years, private law firms have played an important role in securing landmark fair housing judgments and settlements across the country. Relman & Dane has been involved in a number of these important cases. Since 2008, the decisions and settlements include:

- A $10.8 million jury verdict on behalf of an African American community in Zanesville, Ohio that had been denied access to public water for more than 50 years;[2]
- A summary judgment ruling in a fair housing case in Westchester County, New York that led to a $52 million settlement requiring Westchester to satisfy its duty to affirmatively further fair housing by building affordable housing in areas of the County that are less than 3 percent African American;[3]
- Three findings of contempt against St. Bernard Parish in Louisiana for denying an affordable housing provider the right to build multi-family housing that would serve African American renters;[4]
- Lawsuits against Wells Fargo for targeting African American neighborhoods in Baltimore and Memphis for unfair and predatory loans;[5] and
- The landmark Spanos design and construction settlement discussed above.[6]

The questions may fairly be posed, why has so much recent important fair housing litigation been the product of private enforcement efforts, and how, if at all, is this development related to current

or past enforcement efforts by the federal government?

Historically, the Housing and Civil Enforcement Section of the Civil Rights Division at the Department of Justice has taken the lead in bringing fair housing cases in federal courts around the country. Relying on the skill and expertise of career litigators in the Civil Rights Division, DOJ's enforcement efforts remained fairly constant and effective through both Democratic and Republican Administrations alike, until 2001.

All of this changed for the worse during the last Republican Administration. Enforcement efforts eroded significantly, not due to the lack of effort or commitment by career attorneys in the Civil Rights Division who managed to stay, but due to the departure of many other experienced career attorneys who found the environment no longer hospitable to the principles they had committed to. The result was both a lack of resources needed to identify and litigate new cases, and an absence of leadership needed to conceive and develop new litigation strategies. From 2001 to 2008, this responsibility fell increasingly to private civil rights firms, like Relman & Dane, which possessed the expertise and resources needed to take on difficult and complex cutting edge fair housing cases.

In one sense, this development simply reinforced what both Congress and the Supreme Court understood to be the role of private parties in enforcing the Fair Housing Act. As Justice Douglas stated in one of the first fair housing cases decided by the High Court after passage of the Fair Housing Act, "[C]omplaints by private persons are the primary method of obtaining compliance with the Act. . . . [T]he enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, [and] the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorneys

general in vindicating a policy that Congress considered to be of the highest priority.'" *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-11 (1972).

The reality in the years that followed Justice Douglas's opinion in *Trafficante* proved both prescient and understated – prescient, because private parties and firms played an important role in enforcing the Act; understated, because the role of the Department of Justice proved to be far more important than either Justice Douglas or Congress might have imagined.

The good news is that the Obama Administration has renewed the federal government's commitment to fair housing enforcement in significant and vital ways. Assistant Attorney General Tom Perez and Secretary Shaun Donovan have committed their departments to agendas that incorporate many of the issues at the heart of the cases listed above. The affirmatively furthering fair housing claims that underlay the Westchester County and St. Bernard Parish cases have become a central focus of Secretary Donovan's efforts; and the Obama Justice Department played an important role in securing the $52 million Westchester County settlement last fall. Assistant Attorney General Perez has opened 45 new lending discrimination investigations, and announced that predatory lending targeted at minority communities will be a priority enforcement area for his Civil Rights Division. Perhaps most important, the Civil Rights Division has begun hiring new attorneys to fill the void left by the last administration, and has received funding for a substantial number of new positions.

Recent experience demonstrates that, sadly, discrimination in housing remains a persistent and inveterate problem in American life. There is more than enough work to be done by both the federal government and private civil rights firms. The challenge remains in figuring out how best to coordinate private and government enforcement efforts so that each makes the task of the other

easier. Going forward, certain things are clear:

First, Congress must provide the Department of Justice and HUD with the funding needed to fully staff its enforcement work.

Second, Congress must adequately fund the Fair Housing Initiatives Program to ensure that fair housing organizations have sufficient resources to investigate and test to determine whether housing providers are violating the law.

Third, the Civil Rights Division must redouble its efforts to coordinate federal, state, and municipal efforts to enforce fair housing laws, working closely wherever possible with experienced, private civil rights law firms to investigate and prosecute fair housing cases. The promise and purpose that Congress envisioned for the Fair Housing Act will not be fulfilled by either the public or private side working alone – this undertaking requires a true collaboration in all respects.

Thank you for allowing me to share these views with the Subcommittee.

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[1] *See Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., Inc.*, No. 4:07-cv-3255-SBA (N.D. Cal. Nov. 20, 2009) (Stipulated Judgment).
[2] *See Kennedy v. City of Zanesville*, No. 2:03-cv-01047 (S.D. Ohio Aug. 27, 2008) (Amended Clerk's Judgment).
[3] *See United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County*, No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009) (Stipulation and Order of Settlement and Dismissal).
[4] *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 06-7185, 2009 WL 2177241 (E.D. La. July 22, 2009); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 648 F. Supp. 2d 805 (E.D. La. 2009); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 06-7185, 2009 WL 2969502 (E.D. La. Sept. 11, 2009).
[5] *See Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-cv-00062 (D. Md. July 2, 2009) (First Amended Complaint); *City of Memphis v. Wells Fargo Bank, N.A.*, No. 2:09-cv-02857 (W.D. Tenn. Dec. 30, 2009) (Complaint).
[6] *See Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., Inc.*, No. 4:07-cv-3255-SBA (N.D. Cal. Nov. 20, 2009) (Stipulated Judgment).

Mr. NADLER. Thank you.
And I recognize Ms. Carey for 5 minutes.

TESTIMONY OF REA CAREY, EXECUTIVE DIRECTOR, NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND

Ms. CAREY. Good afternoon, Chairman Nadler, Members of the Committee.

Mr. NADLER. Before you continue, let me mention that we have been joined by the gentlewoman from California, Ms. Chu.

Ms. CAREY. On behalf of the National Gay and Lesbian Task Force Action Fund, the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender people, herein after LGBT people, I thank you for the opportunity to testify on housing discrimination as it relates to sexual orientation and gender identity. We are particularly grateful to be included in this hearing.

For us, the pursuit of the American dream, including homeownership, is a risky proposition. When our sexual orientation or gender identity is known, either because we offer it willingly or a landlord, realtor or lender is made aware by other means, there is the potential for outright hostility, property damage, and even physical violence.

Studies show that when callers describe themselves as gay or lesbian, apartments are more likely to be described as unavailable. In a 2007 Michigan study, same-sex couples were shown less desirable properties, were quoted higher rent prices, or encountered outright refusal to sell or rent properties.

In 2009, we, together with the National Center for Transgender Equality, completed a groundbreaking survey of over 6,000 transgender people nationwide. The study showed transgender and gender-non-conforming people were living at twice the rates of extreme poverty and double the rate of unemployment than the general population, despite high levels of education. Disturbingly, 11 percent of transgender people reported having been evicted, and 19 percent reported becoming homeless due to bias.

While the general population has a homeownership of approximately 68 percent at the time of our survey, our survey showed only a 32 percent rate of homeownership among transgender people.

Similarly, LGBT seniors fall within a higher risk category for housing challenges. We recently released Outing Age 2010 describing the multiple economic and policy barriers LGBT people face as we age.

LGBT seniors are more likely to be economically fragile due to the impacts of discrimination over their lifespan. As they need to move into smaller residences and assisted-living facilities, seniors are especially vulnerable. Importantly, amending the FHA will make it more likely they can find safer housing.

Several court cases mirror the research finding housing discrimination. For instance, a 2002 case in New York found housing regulations negatively affected lesbian and gay tenants. And in 2003, Lambda Legal said it had settled a case on the basis of anti-gay housing discrimination in Palm Beach County.

We have received stories from LGBT people who have experienced discrimination. One couple was forced to tell potential landlords that they were roommates because they were harassed and rejected when they had applied as a couple.

In Baltimore, a transgender man upon meeting a potential landlord was asked if he was a boy or a girl, was confronted with a $100-per-month increase in the quoted rent, and was told checks were not accepted. When his friend inquired about the same apartment, she was told checks were accepted and the rent was not raised.

This doesn't have to be the reality for LGBT people, but it is. Thankfully, several jurisdictions have adopted laws to protect LGBT people from housing discrimination. Twenty States and the District of Columbia prohibit discrimination on the basis of sexual orientation, and 13 States and D.C. include gender identity.

For example, in 2007, Iowa amended its Civil Rights Act of 1965 to include both sexual orientation and gender identity. In New York City, one of the most comprehensive civil rights laws in the Nation includes housing protections based on numerous characteristics, including sexual orientation and gender identity.

Despite the protections afforded to some LGBT people by State and local law, Federal protection is necessary. Amending the FHA would provide base line protections for LGBT people living outside currently protected jurisdictions. Further, State and local protections often do not offer robust enforcement and recourse to victims.

LGBT people suffer pervasive discrimination in so many areas of their lives. No one should be evicted, be kept from living in certain areas, or pay more rent simply because of who they are. Nor should anyone have to lie about who they are in order to have safe housing.

For all these reasons, the Fair Housing Act should be amended to ban discrimination on the basis of sexual orientation and gender identity, and we thank you, Chairman Nadler, for your leadership on this issue.

[The prepared statement of Ms. Carey follows:]

PREPARED STATEMENT OF REA CAREY

NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND

Testimony

House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Hearing on Protecting the American Dream: A Look at the Fair Housing Act

Rea Carey, Executive Director, National Gay and Lesbian Task Force Action Fund

March 11, 2010

Testimony of Rea Carey
Executive Director of the National Gay and Lesbian Task Force Action Fund
Before the House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
March 11, 2010

Good afternoon Chairman Nadler and members of the Subcommittee. On behalf of the National Gay and Lesbian Task Force Action Fund – the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender (LGBT) people, I would like to thank you for the opportunity to testify on the Fair Housing Act and housing discrimination as it relates to sexual orientation and gender identity. We are truly grateful to be included in this hearing to discuss housing discrimination. The National Gay and Lesbian Task Force Action Fund supports non-discrimination legislation at the local, state and national level that prohibits discrimination based upon sexual orientation and gender identity. This testimony will discuss reasons why the Fair Housing Act should be expanded to include protections for lesbian, gay, bisexual, and transgender individuals by first describing the type of housing discrimination that LGBT community members encounter and next sharing examples of the LGBT-inclusive housing protections within a few jurisdictions across the country.

The Fair Housing Act was designed to allow people to freely choose where to live and be able to integrate into neighborhoods where they had historically been excluded. While ethnic and racial discrimination in rental or home sales has been well-documented, until recently, few studies have examined the prevalence of such discrimination against LGBT people. A growing body of research reveals widespread discrimination against LGBT people in the housing and rental markets due to fear of difference.

The 2000 Census found LGBT same-sex couples living in 99 percent of all U.S. counties and raising children in 93 percent of all counties. Despite the myth of the well-heeled lesbian or gay couple with no children, living on vast stores of disposable income, Census figures indicate that same-sex couples are raising children on lower incomes than their heterosexual counterparts. This is especially true for Black and Latino same-sex couples, who are raising children at nearly the same rates as their heterosexual peers, on $10,000 less annually.[i] Additionally, our review of the literature on LGBT people as caregivers, find LGBT people taking care of their parents at higher rates than their heterosexual siblings. These families are struggling without the benefit of basic provisions such as employment protections against arbitrary bias, family health plans, family medical leave, social security spousal or survivor benefits, veteran survivor benefits, etc. Discrimination against our families across the board in federal programs creates a financial fragility that most certainly spills over to create heightened housing insecurity. These individual facts tell a story that speaks to the need for a housing safety net for same-sex couples, their families, and individual LGBT people.

For us, the pursuit of the American dream, including home ownership, is a risky proposition. We may experience resistance or outright hostility from a variety of sources including landlords, lenders, and realtors. When we disclose our sexual orientation or gender identity, voluntarily or involuntarily, we may be subjected to violence and/or property damage.[ii] Prospective apartment dwellers also face difficulties. Studies have documented that when test callers described themselves as gay or lesbian, apartments were more likely to be described as unavailable. Testers who presented as homosexual received fewer call-backs and fewer invitations to pursue the property than their heterosexual counterparts.[iii]

Last year we completed a groundbreaking national study on discrimination against transgender people, working with the National Center for Transgender Equality. We found that a shocking 11 percent of transgender people have been evicted because they were transgender and 19 percent have been homeless because they are transgender.

Another study, conducted by the Michigan Fair Housing Centers in 2007, examined rental housing and home ownership to investigate the likelihood of housing discrimination based on sexual orientation; they found 30 percent of same-sex couples were treated differently when attempting to buy or rent a home. This study not only included realtors and landlords but also home finance options with researchers deploying testers in rural areas, small cities, large cities and college towns.[iv] Same-sex couples were shown less desirable properties, were quoted higher rent prices, received less favorable customer service, or encountered outright refusal to sell or rent properties. There were also circumstances during which parties suffered verbal harassment from landlords, realtors, and lenders.

Several court cases and settlements mirror research finding LGBT people as aggrieved parties. For instance, a 2002 case in New York found that housing regulations negatively affected lesbian and gay tenants[v]. And in 2003, our colleague organization, Lambda Legal, settled a case on the basis of anti-gay housing discrimination in Palm Beach County[vi]. The apartment complex agreed to pay $75,000 in damages and legal fees for violating the local law which prohibits discrimination on the basis of sexual orientation and marital status. In August 2008, a Hawaii couple settled a case against the University of Hawaii for failure to provide family housing to same-sex couples.[vii]

When alerting our constituents to this historic hearing, the National Gay and Lesbian Task Force Action Fund received several submissions from LGBT community members whose stories illustrate similar experiences of housing discrimination. As one person stated:

> "…my partner and I, both fresh out of college, could not find housing anywhere. I would call property management agencies in and around our city and mention that my partner and I were looking and all too often the phone would simply go dead on the other end. When I received a promotion in 2006 and had to relocate…things got worse. I was highly criticized for being gay and all too often heard derogatory remarks concerning my sexual orientation. Eventually we would just state that we were roommates, immediately receiving housing."
> -Name withheld

And another person wrote to us about her experience with section 8 housing.

> "even section 8 has been discriminatory at least towards my partner and I…when we got our section 8 and went through their inspection of the apartment on [t]he field site [visit], everything was ok…then as soon as they found out we were Trans lesbians, they then demanded she have a bed in her own room or they would make it very hard on us."
> -Joanne B.

While the Fair Housing Act provides that it is illegal to threaten, coerce, intimidate or interfere with anyone exercising a fair housing right, we received this account of harassment from Joanne B.:

> "…another run in with housing discrimination was above the roller rink…next to the community church that was a storefront church. Since the church, roller rink, and the apartment were owned by the same people who were a part of the storefront church [they] made sure to practice their conversion therapy on my partner and I whenever they could…and my partner and I were evicted."
> -Joanne B.

Incidents of housing discrimination are heightened for transgender individuals who are often more marginalized and experience harassment, unemployment and poverty at double or triple the rates of the general population. As mentioned before, in 2009 we, the National Gay and Lesbian Task Force, together with the National Center for Transgender Equality, completed a groundbreaking survey of 6,456 transgender or gender nonconforming people nationwide;

respondents came from all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands; the racial and ethnic composition of the sample mirrored that of the U.S. population.[viii] Despite having a higher educational attainment level than the general population – 88 percent of our sample had attained some college education – our respondents were living at twice the rates of extreme poverty and double the rate of unemployment than the general population. As a whole, the transgender community reported frequent discrimination in the housing market. As I mentioned before, our research results showed that 11 percent of transgender people had been evicted because they were transgender and 19 percent became homeless because of being transgender. An additional 26 percent of transgender people had to find temporary places to stay with friends or family because they were transgender. Our sample also had a significantly lower home ownership rate than the general population's rate of 68 percent, with only 32 percent of transgender people owning their homes.

The Transgender Law Center (TLC) found similar rates of housing insecurity and discrimination when surveying 646 transgender individuals in California where the state law actually prohibits discrimination against transgender people in housing.[ix] Nineteen percent of respondents indicated that they have experienced housing discrimination because of their gender identity or presentation. Homeownership rates among transgender Californians is disproportionately low at 20 percent compared to 56 percent for the overall population in California.

The following two stories illustrate obstacles transgender individuals face when seeking apartment housing:

> "In October of 2007, I lived in an apartment that I'd occupied since May, having just pulled myself up from homelessness. I was looking for a job daily, and getting help to pay my rent. I paid my rent a tad bit late in October, and then went full time as a woman shortly after that. I let the apartment management know

> what was going on with me, including showing them my letter from my therapist, which was copied and included in my file. I started going to school after that. In November, I went in to pay my rent and it was refused. I was evicted a few days before Thanksgiving, and used my rent money to pay for a hotel room while I asked the school to help with housing. The school rep promised me they would find something. What I got was a craigslist ad to room with a lesbian they had not called, and that was not part of their system. I ended up in a homeless shelter."
> -Toni D.

> "In April of 2008 I was searching for apartments in Baltimore. I found an apartment in a nice area with affordable rent. When I met the women I was to be renting from she raised the price from the advertised price by $100. She also informed me that she would not take checks from me and would only accept cash. This woman was noticeably uncomfortable with me. She asked me if I was a boy or a girl and after I explained everything, her tone noticeably changed. I then had a female friend of the same age inquire about that very apartment and she was given the original price and was told that a check would be an acceptable form of payment."
> -Owen S.

Like transgender individuals, seniors fall within a higher risk category in terms of housing issues for LGBT populations. In November of 2009, the National Gay and Lesbian Task Force released Outing Age 2010[x], a comprehensive review of elder policy in the U.S. We reviewed multiple studies that demonstrate a combination of negative forces bearing down on LGBT elders. Employment discrimination over the lifespan, combined with a lack of recognition of our relationships and families in federal safety net programs such as social security, leave LGBT people especially fragile economically and socially as they age. This certainly translates into higher rates of housing insecurity among LGBT elders – either as they try to retain family homes in the face of long-term care and discrimination in the structure of Medicaid; or when they attempt to secure LGBT friendly elder housing, which is virtually non-existent. Amending the Fair Housing Act to include LGBT people will provide a critical safety net that currently does not exist for the 2-7 million LGBT people who will attain the age of 65 or older over the next decade.

The court cases and research findings attest to the significant need for legislative and policy level protections. In response to this situation, several states have adopted civil rights laws to protect LGBT individuals from housing discrimination. Over twenty states and the District of Columbia prohibit discrimination on the basis of sexual orientation and 13 states and the District of Columbia include gender identity.[xi] Examples include Iowa's Civil Rights Act of 1965 which was amended in 2007 to include both "sexual orientation" and "gender identity," protecting LGBT people in employment, housing, and credit;[xii] California's Fair Employment and Housing Act which protects all LGBT people; and[xiii] New Jersey's Law Against Discrimination which protects LGBT people against discrimination in employment, housing, and public accommodations.[xiv]

In addition, there are over 100 municipalities, both large and small cities, which protect the housing rights of transgender people, including New York City, Chicago, Houston, Dallas, San Diego, Seattle, San Francisco, Atlanta, Philadelphia and Pittsburgh to name just a few. Of particular note is the New York City Human Rights Law which is one of the most comprehensive civil rights laws in the nation. This Law prohibits discrimination in employment, housing and public accommodations based on race, color, creed, age, national origin, alienage or citizenship status, gender, gender identity, sexual orientation, disability, marital status, and partnership status.[xv]It is important to emphasize that despite the protections afforded by state and local level measures, federal protections are still needed particularly given that implementation and uniformity of enforcement varies across jurisdictions. A patchwork quilt of protections is insufficient.

Lesbian, gay, bisexual and transgender (LGBT) individuals suffer pervasive discrimination in employment, housing, education, medical care, and everyday life because of

continuing societal prejudice and fear of the "other." LGBT Americans often find they must leave their homes and move if they wish to live honest, open lives. Indeed, the lack of civil rights legislation helps perpetuate an environment in which hate and harassment can flourish. And the research suggests that despite widespread support for laws protecting people on the basis of sexual orientation and gender identity, the behavior of those involved in the housing industry still warrants strong federal action.[xvi] For these reasons, the Fair Housing Act should be amended to ban discrimination in housing on the basis of sexual orientation and gender identity.

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[i] Dang, A., & Frazer, S. (2004). *Black Same-Sex Households in the United States: A Report from the 2000 Census*. New York: National Gay and Lesbian Task Force Policy Institute and the National Black Justice Coalition and Cianciotto, J. (2005). *Hispanic and Latino Same-Sex Couple Households in the United States: A Report from the 2000 Census*. New York: National Gay and Lesbian Task Force Policy Institute and the National Latino/a Coalition for Justice.

[ii] Leppel, K. (2007). Home-Ownership among Opposite- and Same-Sex Couples in the US. *Feminist Economics* , 1-30.

[iii] Ahmed, A. M. (2009). Detecting Discrimination against Homosexuals: Evidence from a Field Experiment on the Internet. *Economica* , *76*, 588-597.

[iv] Fair Housing Centers of Michigan. (2007). *Sexual Orientation and Housing Discrimination in Michigan.* Ann Arbor: www.fhcmichigan.org.

[v] Brooklyn Housing and Family Services v. Lynch, 740 N.Y.S. 2d 753 (Jan. 24, 2002).

[vi] Available at: http://www.lambdalegal.org/news/pr/florida-housing-discrimination-gay.html last visited 3/9/10.

[vii] O'Leary v. University of Hawai'i, Civil Action 08-1-0504-03, Circuit Court of the First Circuit, State of Hawai'i (Mar. 10, 2008).

[viii] National Center for Transgender Equality and the National Gay and Lesbian Task Force. (2009). *Preliminary Findings: National Transgender Discrimination Survey.*

[ix] Transgender Law Center, *The State of Transgender California: Economic Health of Transgender Californians,* (2009) http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf

[x] Grant, J. (2010). *Outing Age 2010.* New York: National Gay and Lesbian Task Force Policy Institute.

[xi] More expansive protections are available in thirteen states and the District of Columbia which explicitly ban discrimination based on gender expression and identity in housing, employment, and public accommodations. States extending such protection include: California, Colorado, Hawaii (only housing and public accommodation), Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[xii] Iowa Code, § 216

[xiii] Cal. Gov't Code §§ 12900-12996, specifically Cal. Gov't Code § 12921(b); Gov't Code § 12955

[xiv] N.J.S.A. 10:5-1 et. seq., specifically N.J.S.A. § 10:5-12(h); § 10:5-12(o).

[xv] http://www.ci.nyc.ny.us/html/cchr/home.html Gender identity is included in the definition of gender.

[xvi] Lax, J. and Phillips, J. (2009). Gay Rights in the States: Public Opinion and Policy Responsiveness. *American Political Science Review.* 103(3):40.

Mr. NADLER. Thank you.
And I will now recognize Ms. Dark for 5 minutes.

TESTIMONY OF OKIANER CHRISTIAN DARK, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW, HOWARD UNIVERSITY SCHOOL OF LAW

Ms. DARK. Thank you, Chairman.

Good afternoon and thank you, Chairman Nadler, and Members of the Committee. I am honored to participate in this particular hearing about the Fair Housing Act.

As you noted in my introduction, I come to the housing work in an unusual way. I was a victim of housing discrimination in Richmond, Virginia, when as a young law professor at the University of Richmond School of Law I attempted to rent an apartment and was unable to do so based on my race.

I subsequently brought a lawsuit to challenge the discriminatory conduct, which was successfully resolved. However, this particular experience changed me in important ways, and so I began a life to make contributions wherever I could to support the fair housing movement.

Recently, or more recently, I have had the opportunity to serve on the National Commission on Fair Housing and Opportunity, which was established by leading civil rights and fair housing organizations in the country. This commission was formed by the Leadership Conference on Civil Rights Education Fund, the National Fair Housing Alliance, the NAACP Legal Defense and Educational Fund, and the Lawyers' Committee for Civil Rights Under the Law.

The primary purpose of the commission was to investigate the state of fair housing on the 40th anniversary of the Fair Housing Act. It was a seven-member bipartisan commission, superbly led by former U.S. Housing and Urban Development Secretary, the Honorable Henry Cisneros and the Honorable Jack Kemp.

In addition, as my written testimony points out, we had representatives who were distinguished in many ways, and we held as a group five hearings across the country—Chicago, Houston, Los Angeles, Boston and Atlanta—and we heard testimony from many stakeholders, various different interest groups. But here is the bottom line: The hearings exposed the fact that despite strong legislation passed, ongoing discriminatory practices in the Nation's housing and lending markets continued—residential segregation that results in significant disparities beyond minority and non-minority households in access to good jobs, quality education, homeownership attainment, and asset accumulation.

Now, we produced a report based on those hearings that have—that set forth nine recommendations. And I am just going to try to put it in four categories, take the nine and scrunch it down to four.

First and foremost, we recommended the creation of an independent fair housing enforcement agency. In order to address the longstanding and systematic problems with fair housing enforcement, we recommended this independent agency to replace the existing fair housing enforcement structure at HUD.

Support for an independent fair housing enforcement agency was the most consistent theme of the hearing. And as you have heard from the testimony of Ms. Shanna Smith and Mr. John Relman, they have identified some of the problems with the housing enforcement at HUD.

A reformed independent fair housing agency would have three components: a career staff with fair housing experience and competence as the key criteria for employment; an advisory commission appointed by the President with the advice and consent of the Senate that is broadly represented of all the groups, industry advo-

cates and enforcers; and an adequate staff and resources, adequate staff and resources to make fair housing a reality.

And so that was our number-one recommendation. We had about three recommendations that I would say address the silo effect. That is, we have to look at housing in the context of other areas. It has already been pointed out, housing with health, housing with safety, housing with employment, housing with education. All of these areas are impacted.

And so one of our specific recommendations was the revitalization of the President's Fair Housing Council. The President's Fair Housing Council, which was established by Executive Order 12892, would allow for putting all of the relevant agencies together or departments together so that they could develop a plan or whenever they were looking at their plans in particular areas to think about, how would we address fair housing? How would anything that we are doing directly or indirectly affect housing?

A third point that I will address has to do with supporting the Fair Housing Initiatives Program. The Fair Housing Initiatives Program supports fair housing enforcement and education, and it provides funds primarily to nonprofits or to agencies—to nonprofits so that they can address these two points.

Here is—I will tell the FHIPs are really important. These folks are on the front line. I guess that is what I want you to know. They are on the front line, and they need the funds in order to adequately address the problem.

I know this, because when I had suffered discrimination, I didn't know what to do. I didn't even know where to go. Someone told me, "Call HOME," and I said, "Home?" They really meant Housing Opportunities Made Equal. I was like, "I am already home." But they said, "Call HOME."

So I called Housing Opportunities Made Equal. The people there understood immediately what I was experiencing, a rash of different kinds of emotions, anger, humiliation, frustration, and they were extremely helpful in helping me to work through the process.

Honestly, if I had had to depend on HUD to help me through that process, we would still be talking about the lawsuit that should have been brought. But with the help of HOME, I was able to manage my way through the administrative process of identifying an attorney, get this case off the ground.

And, by the way, you say, well, you should have been able to do that anyway, because, after all, you are an attorney, and a pretty experienced one. But it is different when you are the plaintiff. It is different when you are the victim.

You are not thinking like, "Oh, maybe I need to file the following motion." No. That is not what is going on. And so being a lawyer wasn't helpful at that point. It has helped me out of the trauma at that moment.

I will say, finally, because I see my time is just about up, that one of the other points that we found in the hearing—all of these hearings—is that the link between fair housing and foreclosure, the foreclosure crisis, was very clear.

The current mortgage crisis definitely has its roots in decades of discriminatory housing and lending practices. It was well documented throughout our hearing that essentially, as one witness put

it, the subprime market discovered African-Americans and Latino communities and targeted them for unfair and deceptive loan products and lending practices.

That is why the commission strongly recommended that in order to more effectively address this problem, the Federal Government must be improved by fostering better coordination between HUD's administration enforcement of the Fair Housing Act, the Department of Justice, the bank regulatory agencies, and the private fair housing groups, prioritizing fair housing and fair lending litigation to identify and eliminate discriminatory and predatory lending practices and policies, and ensuring the legal standard for violation of the Fair Housing Act and Equal Credit Opportunity Credit Act includes the well-established disparate impact standard.

So in conclusion, I think Ms. Arnwine pointed it out very well in her remarks, so I will just repeat it. Fair housing is the lynchpin for furthering the American dream.

Thank you.

[The prepared statement of Ms. Dark follows:]

PREPARED STATEMENT OF OKIANER CHRISTIAN DARK

Testimony before the

The Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives

"The Recommendations of the National Commission on Fair Housing and Opportunity to accomplish the goals of the Fair Housing Act."

Thursday, March 11, 2010

Okianer Christian Dark, Associate Dean for Academic Affairs and Professor of Law, Howard University School of Law and Commissioner, National Commission on Fair Housing and Opportunity

Testimony of Okianer Christian Dark, Associate Dean for Academic Affairs and Professor of Law, Howard University School of Law and Commissioner, National Commission on Fair Housing and Opportunity

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, Committee on the Judiciary United States House of Representatives

Thursday, March 11, 2010

Good Afternoon, Chairman Jerrold Nadler and members of the House Committee on the Judiciary, I am honored to participate in this hearing on "Protecting the American Dream: A Look at the Fair Housing Act," important legislation enacted in 1968, with the goal of desegregating our communities where we live so that we would ultimately look like an open and inclusive society and become an open and inclusive society.

I come to fair housing work in an unusual way. In 1986, I was a victim of housing discrimination in Richmond, Va when, as a young law professor at the University of Richmond School of Law, I attempted to rent an apartment and was unable to do so based on my race. I subsequently brought a lawsuit to challenge the discriminatory conduct which was successfully resolved. However, the experience changed me in important ways and so I made contributions to the fair housing movement in whatever ways possible. Eventually, I handled Fair Housing cases on behalf of the United States as an Assistant United States Attorney for the District of Oregon and helped to establish the Fair Housing Clinic at the Howard University where we are preparing a new cadre of student leaders to continue the important work in this field. I am sure it is no surprise to you that although the Fair Housing Act is well over 40 years old, housing discrimination persists and sadly, in new and insidious ways like in the housing foreclosure crisis.

More recently, I had the opportunity to serve on the National Commission on Fair Housing and Opportunity which was established by leading civil rights and fair housing organizations in the country. This Commission was formed by the Leadership Conference on Civil Rights Education Fund, the National Fair Housing Alliance, the NAACP Legal Defense and Educational Fund, and the Lawyers' Committee for Civil Rights Under Law. The primary purpose of the Commission was to investigate the state of fair housing in the 40th anniversary of the Fair Housing Act.

The seven-member Commission was bipartisan and lead superbly led by former U.S. Housing and Urban Development (HUD) Secretaries, the Honorable Henry Cisneros and the Honorable and late Jack Kemp. In addition to co-chairs Cisneros and Kemp, the Commission included Pat Vredevoogd Combs, 2007 President of the National Association of Realtors, I. King Jordan, President Emeritus, Gallaudet University, Myron Orfield, Professor of Law, University of Minnesota School of Law and Executive Director, Institute on Race and Poverty at the University of Minnesota and Gordon Quan, Former Mayor Pro Tem and Chair of the Housing Committee in the City of Houston. The Commission was also blessed to have two guest commissioners at two of its hearings, Tina Brooks, the Undersecretary for Housing and Community Development, Commonwealth of Massachusetts (Boston hearing) and Charles McMillan, the 2009 President of the National Association of Realtors (Houston hearing).

The Commission held hearings in five major cities --- Chicago (July 15, 2008), Houston (July 31, 2008), Los Angeles (September 9, 2008), Boston (September 22, 2008) and Atlanta (October 17, 2008). We heard testimony from a range of presenters – scholars and researchers, advocates, realtors, victims of discrimination, and in essence,

"[t]he hearings exposed the fact that despite strong legislation, past and ongoing discriminatory practices in the nation's housing and lending markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households, in access to good jobs, quality education, homeownership attainment and asset accumulation."[1] During the hearings, we heard from "hundreds of witnesses that there are still far too many segregated neighborhoods where skin color determines school quality and economic opportunity; and where municipal services track race and income, rather than need."[2] We learned that "while nationally the incidence of discrimination [was] down; there [were] at least 4 million fair housing violations in our country every year."[3] Perhaps this high incidence of fair housing violations is reflective of the fact that approximately "two-thirds of new households being formed [today] are either racial or ethnic minorities or immigrants."[4] Additionally, individuals with disabilities are increasingly seeking housing options that supports their needs and preserves their dignity as their numbers increase in the schools (at all levels of educational attainment) and the workplace.

1. Create an Independent Fair Housing Enforcement Agency

"In order to address the long-standing and systemic problems with fair housing enforcement, we recommended the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at HUD. Support for an independent fair housing enforcement agency was the most consistent theme of the

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[1] Executive Summary of *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 1 (December 2008), www.civilrights.org/publications/reports/fairhousing.

[2] *Id.* at 2.
[3] *Id.*
[4] *Id*

hearings. A reformed independent fair housing enforcement agency would have three key components: (1) career staff with fair housing experience and competence as the key criteria for employment; (2) an advisory Commission appointed by the president with the advice and consent of the Senate that is broadly representative of industry, advocates, and enforcers; and (3) adequate staff and resources to make fair housing a reality. Such an agency would be empowered at the public policy level to work with the HUD Secretary to advance proactively all of the fair housing issues that are critical to building stronger communities."[5]

2. Revive the President's Fair Housing Council

"In order to build, sustain, and grow strong, stable, diverse communities, we need strong federal leadership that coordinates fair housing policy and practice across agencies. In order to accomplish this, we strongly recommend that the President's Fair Housing Council be revived and given a stronger mandate in the new administration. It must be staffed and reconvened as soon as possible – either within HUD or as part of the proposed White House Office of Urban Policy."[6] "All of the federal agencies with responsibility over housing and urban development activities are obligated not only to promote fair housing, but to '*cooperate with the Secretary* [of HUD] to further such purposes.' (42 U.S.C. § 3608)"[7]

"Executive Order 12892 (1994) took this requirement of cooperation one step further, by establishing the President's Fair Housing Council, which is required to 'review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing.' The Fair Housing Council has

[5] *Id at* 3.
[6] *Id* at 4.
[7] *Id.*

been severely underutilized, and to our knowledge has only met once. Yet the Council has the potential to go beyond the housing-related agencies delineated in the Fair Housing Act to bring in virtually every other cabinet agency whose work may directly or indirectly affect housing."[8] "The Fair Housing Council, working through federal agencies such as the Department of the Treasury, Department of Education, and financial institution regulators would play a critical role in coordinating the work of the various federal government agencies that influence housing and lending policy and practice."[9]

3. Ensure Compliance with the "Affirmatively Furthering Fair Housing" Obligation

"One of the basic principles in the Fair Housing Act and the Housing and Community Development Act of 1974 is that the federal government, and all of its programs and activities, must take proactive steps to advance fair housing, not just to avoid discriminating . . . . In order to take this statutory obligation a reality, we must make changes in federal programs and activities to avoid further segregation and promote wider housing choices for families."[10]

"Since 1968, the Fair Housing Act has contained a requirement that HUD and other federal agencies engaged in housing and urban development and grantees that they fund, act in an affirmative way to further fair housing. (emphasis added) The courts have consistently recognized that this affirmatively furthering duty requires HUD to 'do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply

[8] *Id.*
[9] *Id.*
[10] *Id.*

of genuinely open housing increases.'"[11] "For example, the Section 8 Housing Choice Voucher Program, which creates a portable housing benefit that can be used by an eligible family to rent private apartments in multiple locations, could be reformed to increase access of eligible families to high opportunity communities,[i] by including higher rents where necessary, improving administrative portability of vouchers across jurisdictional lines, re-establishing housing mobility programs to assist voucher-holders seeking to move to higher opportunity areas, creating strong incentives and performance goals for administering agencies, and providing incentives to recruit new landlords into the program. We should mandate that families be provided information and counseling about their range of housing choices, including choices in more integrated areas."[12]

4. Strengthen Compliance with the Affirmatively Furthering Fair Housing Obligation by Federal Grantees

The hearings revealed that the current HUD structure does not facilitate or adequately support its leadership in enforcement of the affirmatively furthering obligation. "Currently, HUD only requires that communities that receive federal funds "certify" to their funding agency that a jurisdiction is affirmatively furthering fair housing. HUD requires no evidence that anything is actually being done as a condition of funding, and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing. Instead, a regulatory structure must provide guidance and direction to ensure that programs receiving federal funds advance fair housing. A reformed structure should be based on existing guidance in

[11] *Id.*
[12] *Id* at 5.

HUD's Fair Housing Planning Guide but expanded to contain specific activities that are required to be undertaken consistent with this report."[13]

In addition, "HUD must also provide training and technical assistance to support the reformed affirmatively furthering initiative, including training and technical assistance to support groups that will work locally and regionally in communities to advance fair housing principles."[14]

5. Strengthen the Fair Housing Initiatives Program (FHIP)

A key area that must be address is the adequate funding for the Fair Housing Initiatives Program (FHIP) which supports fair housing enforcement and education. The bottom-line is that FHIP needs to be increased significantly given the importance of these frontline fair housing organizations all over the country in identifying and supporting claimants who have experienced discrimination in housing. "While the program has been an effective change agent in communities, severe funding constraints and an erratic funding stream have limited its usefulness. Current appropriation levels are grossly inadequate to fund existing private fair housing groups to perform enforcement activities."[15] In addition, the FHIP program could be helped if there were separate funding for a testing program operated by HUD. In this way, the FHIP supported

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[13] *Id* at 5.
[14] *Id* at 5-6.
[15] According to the *Report of the National Commission on Fair Housing and Equal Opportunity*, "[a] full service private fair housing group that successfully competes in FHIP can be awarded no more than $275,000 per year, whether it is located in New York City or Savannah, Georgia. Although about 140 agencies have received enforcement grants over the past ten years, current funding levels permit many fewer groups to be funded every year to conduct enforcement activities. Only 28 groups in the country received consistent funding over the five year period from FY 2003-2007 and 26 private fair housing groups, including some of the oldest and most respected groups, have closed or are at risk."

organizations would not need to use their FHIP funds to conduct the testing. I believe that a bill known as the Fair Housing Act would create a separate testing program funded by HUD that fair housing organizations could access.

6. Adopt a Regional Approach to Fair Housing

"To make real progress toward equal housing opportunity, all of the jurisdictions within a metropolitan area must be coordinated in their efforts."[16] In this way, "[i]mplementation of major investments [within a region] in transportation, employment, education, commercial development, and other infrastructure enhancements [can be] aligned with fair housing goals, to support and develop diverse, sustainable communities with access to opportunity for all residents of the region."[17]

7. Ensure that Fair Housing Principles are Emphasized in Programs Addressing the Mortgage and Financial Crisis

We are all too well acquainted with the mortgage and financial crisis which has gripped our nation. In hearing after hearing, we heard how the foreclosures were devastating communities, particularly minority and immigrant communities. "The current mortgage crisis has its roots in decades of discriminatory housing and lending practices." [18] During the hearings, we heard from many witnesses about the connection between the foreclosure crisis and the lack of fair housing enforcement.

It is well documented that the proliferation of discriminatory lending practices in communities of color over the years, created an opportunity for financial institutions and others to target vulnerable minority communities as a means of maximizing short term

[16] *Id* at 6.
[17] *Id at 6-7.*
[18] *Id* at 7.

profits.[19] As one witness stated, "the subprime market discovered African American and Latino communities and targeted them for unfair and deceptive loan products and lending practices."

This point was illustrated well at our Los Angeles hearing with the testimony of Mr. Jesus Hernandez, a real estate broker in The Sacramento area with experience in residential sales and financing. He stated that generally "subprime lenders target borrowers who have poor credit histories with mortgage products that bring an unusually high yield to lending institutions and their investors. Such excessive profit margins, realized through a pricing structure that includes periodic interest rate increases, prepayment penalties, and balloon payments, place a heavy financial burden on borrowers. Consequently, subprime borrowers are six to nine times more likely to be in foreclosure. Because homeowner equity remains the largest component of wealth for low-income and non-White households in the US, subprime lending, with its higher propensity for foreclosures, undermines and discourages the wealth building capacity of affected homeowners and targeted communities. Thus, the concentration of loans with high foreclosure rates brings a social and financial vulnerability to targeted neighborhoods leaving them highly unstable in times of economic crisis."

Mr. Hernandez had conducted a study of contemporary housing credit practices and foreclosures in the Sacramento area and established a clear connection with segregated housing patterns in that area. His preliminary observations showed that subprime loan activity was highly concentrated in neighborhoods with high ratios of non-Whites resulting from long-standing practices of housing segregation in that city [racially

[19] John P. Relman, *Foreclosures, Integration, and the Future of The Fair Housing Act,* 41 Indiana L. Rev. 629, 631 (2008).

restrictive covenants, informal enforcement of covenants, central city urban renewal programs and mortgage redlining]. Further, his research showed that those neighborhoods which coincidently were largely African American and Latino were experiencing some of the highest mortgage default and foreclosure rates in the US.

In sum, preexisting conditions contributed to the concentration of subprime lending in specific localities and within specific populations." Mr. Hernandez's study was not the only one that empirically demonstrated that an unusually high number of subprime loans with highly questionable provisions were concentrated in low-income communities of color.[20]

This is why the Commission strongly recommends that in order to more effectively address this problem the federal government must be improved by: "(1) fostering better coordination between HUD's administrative enforcement of the Fair Housing Act, the Department of Justice, the bank regulatory agencies, and private fair housing groups; (2) prioritizing fair housing and fair lending litigation to identify and eliminate discriminatory predatory lending practices and policies; and (3) ensuring the legal standard for violation of the Fair Housing Act and the Equal Credit Opportunity Act includes the well-established disparate impact standard. HUD should also implement a

[20] The hearings also revealed that there was active litigation to respond to the predatory practices that led to the foreclosure problem based on the assumption that discriminatory housing practices were linked to the foreclosure problem. At our Chicago hearing, Illinois Attorney General Lisa Madigan announced that the state had instituted a lawsuit against Countrywide and at our Los Angeles hearing, we learned about a lawsuit brought by Attorney John Relman, Relman & Dane, on behalf of the City of Baltimore against Wells Fargo. "Baltimore became the first city to bring suit against a major lender for targeting its minority communities for discriminatory lending practices that it alleges have resulted in unnecessarily high rates of foreclosure. These foreclosures, Baltimore contends, are destroying minority neighborhoods and costing the city millions of dollars in out of pocket costs and damages." While these lawsuits have not concluded in judgments against the Defendants, this is an indication that there is a substantial documented and reasoned belief in the connection between the foreclosure problem and discriminatory behavior.

special fair lending initiative to fund the investigation and redress of discriminatory practices in the lending sector." [21]

8. Create a Strong, Consistent, Fair Housing Education Campaign

"HUD should use its direct budget authority to fund basic education and outreach materials, written in easy- to-understand language, in multiple languages, and in accessible formats. . . targeted to the different types of consumers of fair housing services."[22] In particular, the FHIP program should fund a five-year coordinated national multimedia campaign with two components: one that will educate consumers to recognize and report all types of discrimination for all protected classes and to recognize the value of challenging discrimination; and one that will recognize and advance the idea that diverse communities are stronger communities."[23]

9. Create a New Collaborative Approach to Fair Housing Issues

Collaborate! Collaborate! Collaborate! "No single agency or approach can change the face of our communities."[24] . . . "This new approach will search out best practices and the most effective strategies from the housing industry, corporations, state and local governments, and fair housing practitioners and advocates to strengthen our communities. It will seek to involve constituencies at the local level that can bring new ideas and new energy to revitalize and empower our communities to promote residential integration." [25]

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[21] *Id* at 7.
[22] *Id.*
[23] Also, this multi-media campaign should include a "revitalized approach to fair housing research . . . by developing data and analyzing the effectiveness of strategies to power new approaches to advancing fair housing." *Id* at 7.

[24] *Id* at 8.
[25] *Id.*

As the nation is finding out, the persistence of housing discrimination and segregation affects all communities. When housing is undermined in a community (like it is in so many communities with the foreclosure crisis) then the community is destabilized and everything else in the community is adversely affected as well because of the interconnection between housing and education, access to credit, employment opportunities, environmental justice, transportation, etc..

That is why many of the Commission's recommendations stress agency coordination and cooperation across areas like education, housing and employment, and supports regional planning. We want to evict discrimination from our communities. By adopting and implementing the Commission's 9 recommendations, we will move significantly in the direction of a nation that is committed to integrated neighborhoods, an increase in the availability of affordable housing and a regulated lending environment in which people can borrow without fear. Thank you.

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[i] See testimony of john powell (Los Angeles); Kirwan Institute for the Study of Race and Ethnicity, *The Geography of Opportunity: Review of Opportunity Mapping Initiatives* (July 2008) (Los Angeles Exhibit)

Mr. NADLER. Thank you very much. I will now recognize myself for 5 minutes to ask some questions.

Ms. Smith, you said that—I think you said that fair housing organizations cannot take full advantage of their normal testing methods when it comes to mortgage lending because it is a felony for testers from fair housing organizations to apply for a home loan as part of a discriminatory lending test. Can you elaborate on that? Why is it felony? And what can we do about it?

Ms. SMITH. We can do pre-application testing, but to test throughout the process, you actually have to complete an application. And when you look at the mortgage loan application, it says if you put any untruthful information on there, it is a felony.

And while we have done some full application testing, it has been using people's true information. If we are going to be able to catch these scammers, to continue to test regular banking institutions, we need to test through the process, because I have been doing this for 35 years.

Mr. NADLER. Granted that necessity, what do you think our response to this limitation on your ability should be?

Ms. SMITH. What I would like to see is an amendment to that part of the mortgage loan application granting the opportunity to do full application testing, but I don't think we can just say, oh, anybody can do it. I think we need to run it through the Justice Department and create the identities with the cooperation of the housing section of Justice and the lending experts, and then qualified fair housing organizations could apply to Justice and say, "This is our testing methodology. This is a program. We need 15"——

Mr. NADLER. So Justice, in effect, would have to license or recognize specific organizations to do this?

Ms. SMITH. Yes. And I think that would have good quality control so that not just anybody goes out and tries to do this kind of full application testing. We do testing with Justice now.

Mr. NADLER. I understand that. Okay, thank you.

Let me ask Ms. Carey, the Michigan Fair Housing Center produced a report a couple years ago that examined sexual orientation housing discrimination in Michigan. I understand that HUD just announced to examine in its nationwide decennial study in housing discrimination, discrimination based on sexual orientation and gender identity, but the Michigan study is really the first formal attempt to look at this type of housing discrimination.

How do you think we get the government housing organizations and other interested entities to collect data and develop responses to housing discrimination directed at the LGBT community?

Ms. CAREY [continuing]. Excuse me. Certainly the inclusion of lesbian, gay, bisexual and transgender concerns in this Subcommittee hearing is a notable marker for the government addressing the issue, and we are very thankful for it.

We are very supportive of HUD pursuing the path that they have talked about in terms of finding out more about discrimination against LGBT people through their nationwide study and are pleased that they have started their town halls.

We certainly offer our expertise and those of our colleague organizations to ensure that not only couples are—that HUD is not only gathering information on couples, but on individuals, that we

are not just looking at urban areas, but also rural areas where discrimination——

Mr. NADLER. So this is a question of administrative action by HUD?

Ms. CAREY. Well, I would also add that while HUD is conducting its study, it is our position that we very much need for the Fair Housing Act to be amended to include sexual orientation and gender identity. As we have talked about in our testimony——

Mr. NADLER. Well, we introduced that legislation——

Ms. CAREY [continuing]. People are experiencing the discrimination now.

Mr. NADLER. I introduced that legislation today, along with several others, as you know. Absent that legislation being approved, does HUD have jurisdiction here?

Ms. CAREY. I am sorry?

Mr. NADLER. Without that legislation being approved, does HUD have jurisdiction to engage in this type of testing or looking into it?

Ms. CAREY. Yes. HUD has—as many people know, HUD has conducted other tests before on racial discrimination, and we are pleased that they will be including sexual orientation and gender identity. However, the piecemeal protections across the country that exist in municipal and State law is not enough for many people who are experiencing discrimination, so we very much need the Federal law.

Mr. NADLER. Thank you.

Dean Dark, could you respond to the argument that has been made that the Community Reinvestment Act and other efforts to provide low-and moderate-income individuals and families with access to homeownership are responsible for the prevalence of subprime loans and for the foreclosure crisis?

Ms. DARK. Well——

Mr. NADLER. I gather from your expression you don't agree with that particular——

Ms. DARK. I am sorry. I just——

Mr. NADLER. I gather from your expression you don't agree with that statement.

Ms. DARK. Oh, I definitely disagree with the statement. I guess my response would be that—to take a look at the record, which was extensive, that the commission had—I mean, the commission was able to establish, by looking at exactly what happened.

And so I will just share with you some testimony from Mr. Jose Hernandez, who is a real estate broker in Sacramento area, and he was experienced in residential sales and financing. He stated that generally subprime lenders target borrowers who have poor credit histories with mortgage products that bring an unusually high yield to lending institutions and their investors.

That is what happened, such excessive profit margins realized through a pricing structure that includes periodic interest rate increases, prepayment penalties, balloon payments, that sort of thing, so that the subprime borrowers were six to nine times more likely to be in foreclosure.

Mr. NADLER. Of course.

Ms. DARK. That is the kind—that is what.

Mr. NADLER. Let me ask you a different question on the same area. The Chicago Reporter found that, of the more than 8.5 million mortgages granted nationwide in 2006, African-American borrowers were nearly 2.5 times more likely than their White counterparts to get so-called high-cost home loans and that the racial gap was even wider among the wealthier individuals. So you are not talking about poor people. African-Americans earning $100,000 a year or more were three times more likely than their White counterparts to get high-cost loans.

With these statistics, and having been a victim of housing discrimination, can you speak to how class or education may not protect against discriminatory housing practices in this area, in sales, rent, or lending?

Ms. DARK. I guess what I wanted to say is that no one sees the education or sees the fact that you are—they don't see it. They see that you are Black. And so they may—so you don't get offered the various products. It doesn't mean this is——

Mr. NADLER. And the education—the fact that you are a professor of English literature doesn't necessarily mean that you are——

Ms. DARK. It doesn't mean that you are necessarily up to date or that you are very knowledgeable——

Mr. NADLER. That you are going to be wise to these scams.

Ms. DARK. Right, all of the real estate process. You depend a great deal, of course, on the people that are helping you through the process, and you try to get yourself up to speed, but when you are going through the process, it doesn't necessarily mean just because I am—that I would know, I would know.

But I just want to emphasize that just—you know, they don't—when someone just doesn't see that you are a whole person, they only see your color, that is what happened with this lady. She just couldn't see me in the apartment. She could only see that I was Black. She didn't ask me—she didn't have any questions about my ability——

Mr. NADLER. She saw the obvious.

Ms. DARK. Correct.

Mr. NADLER. Thank you.

I have one more question, and then we will turn to Ms. Chu. Mr. Marcus, I started asking you this before. You mentioned the Supreme Court's decision or lack of decision or coming decisions confronting the question of disparate impact. You said you thought they might not uphold it.

If the Supreme Court were to go the—were to say that disparate impact, unlike all the circuit courts, if the Supreme Court were to overturn the circuits and were to do so on a constitutional basis, what could we do about it?

Mr. MARCUS. What the circuit courts have dealt with is the statutory question, but I think you are asking me now about the constitutional question, and it is a good question. What do we do about it?

Now, if the Supreme Court finds that the disparate impact doctrine as currently understood is inconsistent with equal protection, they could do one of two things. They could narrow it themselves

and fix it, or they could strike it down and ask you to put it back together again.

If they do the latter, there will be a period of time where disparate impact is not available, which has a sort of implication that you can imagine. If you want to anticipate that and to address the doctrine before the Supreme Court deals with it, there are things that you could do to ensure that disparate impact is not used in a way that violates equal protection.

The concern is that disparate impact in some cases is used to address something other intentional or unconscious discrimination and used in a way that can push institutions either to use quotas or other surreptitious means of involving racial preferences or otherwise act in a way that is inconsistent with the Constitution.

A way of addressing that is ensuring something like a good faith defense as a way of addressing a charge of discrimination as a means of ensuring that the disparate impact doctrine is used only to target essentially intentional or unconscious discrimination even when it is hard to find through disparate treatment analysis.

Mr. NADLER. Thank you.

I will now yield to the gentlelady from California, Ms. Chu.

I don't yield. I recognize her.

Ms. CHU. Thank you, Mr. Chair.

Well, I live within a district in Los Angeles, and last November, a major real estate owner, Donald Sterling, the L.A. Clippers owner, settled with the Justice Department for $2.75 million over a discrimination case. He owned around 120 apartment buildings in the L.A. area and was discriminating based on race.

Some apartment buildings were supposed to be Asian-only and some were supposed to be Latino-only and so on and so forth. And it is clear that many tenants don't know if this is illegal or don't know that there are apartment buildings that are off-limits because they aren't advertised or targeted to the community.

Now, Craigslist does do a superb job in informing both prospective tenants and landlords who post ads what their rights and responsibilities are, but what kind of requirements do rental or housing companies in general have to make sure that prospective residents or buyers are aware of the law? And should the Fair Housing Act be changed to make sure that there is greater awareness amongst tenants for prospective tenants? And in fact, should it be changed to accommodate language and cultural issues?

Yes?

Ms. SMITH. I don't think we have to actually change the Fair Housing Act. What would be useful—well, first of all, landlords—the California Apartment Association is one of the best in the country. They have excellent education programs that go out.

But when people walk into an apartment complex, there is no fair housing material or literature available to them. So if the Fair Housing Initiative Program had funding in the national media part of it to create these kinds of materials that could either be downloaded and printed by an apartment complex, real estate agents, or as they are now, available, that we make available to communities, that would be useful.

Craigslist only recently put up more information about the Fair Housing Act. But what we found in our investigation of Craigslist,

where we found 7,500 violations of the Fair Housing Act, we filed 1,000 complaints with HUD. And when we were talking to the people who posted the ads, they said to us they simply would cut and paste existing ads and those existing ads had discriminatory statements in it.

So we think Craigslist has to go a step farther, like newspapers do. They have a filter put in so that the discriminatory language can't be published at all.

And, you know, Craigslist and other Internet providers could create those same kinds of filters that, you know, thousands of newspapers have used since 1988, particularly in this area.

But we need more money in the Fair Housing Initiatives Program. We need to have Congress tell HUD that the education campaign that we do now, we educate potential victims of discrimination, but we also educate the industry.

And if we had more money to do that kind of education, to have prints, posters that could go to all the apartment complexes, so that when I walk in, I may not know anything about the Fair Housing Act, but it is up there, and we could—we have special ads that talk about sexual harassment in housing.

And if those were in the apartment complexes, people could see that and go, "Well, you know what? You can't do that to me, because here is what the law says."

And apartments have large, quick turnover of managers. So it is very hard to make sure your employees, if you are an apartment owner, are always following the law. And this kind of literature right in the apartment manager's office, in the community rooms, in the laundry facilities would be very useful.

Ms. CHU. Are they required to post it?

Ms. SMITH. No. There is absolutely no requirement for anybody to post anything about the Fair Housing Act.

Ms. CHU. Wouldn't it be good to have such a requirement?

Ms. SMITH. I think that would be very useful to have that requirement. At the national commission hearing, people also talked about landlords having a census about people who live there. We often talk to real estate companies to say, when you are showing houses, why don't you create maps to see if your real estate agents are really showing people of all races and national origins homes in that same price range so that they can self-monitor to make sure that nobody is limiting someone's choice?

With lenders, they do have the equal lending opportunity slogan that is required, but any more information about what discrimination looks like in lending is not required. And I just refinanced my house last year. At first, they didn't know I was the president of the National Fair Housing Alliance. They just saw a name, "Shanna Smith," and their profiling of that name was for an African-American.

And then, they were not giving me good rates, and I had 799 credit score, and I wanted a 15-year conventional loan, couldn't get an offer on that. Then, when I put my signature as National Fair Housing Alliance, somebody responded, but I had to go through four closings because they made mistakes with my interest rates, the APR, and the closing cost, and they knew who I was.

So with Congressman Nadler, you are saying, does education matter? If they think they can get away with this, they will just make these changes at the last minute, and most of us don't read those documents. So if it was possible to have more—not a long piece of paper describing things, but even just the print ads that tell people very cleverly what to watch out for and how to recognize discrimination and where to report it. And that just doesn't exist in the housing, lending or insurance industry right now.

Ms. CHU. Well, my time is up, but it just seems to me that if in work places you are required to post something about labor laws, that there should be some way that a similar thing should be posted or information should be handed out.

And I don't know. Could the other persons respond here?

Mr. NADLER. By all means.

Ms. ARNWINE. Yes, I was going to make that precise point, that we are required to as employers to post, you know, employment notices of equal opportunity and other kind of wage and hour notices. There is no reason why there should be any limitation on the same kind of, you know, requirement for posting, you know, fair housing laws or requirements.

I think that, also, you know, Shanna and, you know, NFHA and so many fair housing agencies have done a great job of testing. And I think more testing is necessary, that that is one of the reasons why, you know, FHIP money is so critical, so that you can then find out affirmatively that there are these practices that are blocking people and you can also have the opportunity through more of these fair housing agencies to hear from people when they are in segregated housing, because this reality of multiple-unit apartments with identifiable towers that are African-American, that are White, that are Asian, that are, you know, Latino, we see it all the time. But it is a lack of people, as you said, understanding that that is, in fact, steering and that it is a violation of the law, and that that is also critical.

I also wanted to say, on the question that was brought out, I think, regarding the fair lending, you know, practices and what can be done about them, you know, I just want to—you know, and the whole characterization of this is the fault of, you know, subprime mortgages, really, the fault of African-American and Latino communities, I just wanted to say that that can be one of the most infamous and notorious, you know, themes that I have heard running around in the Congress.

I think that what people need to look at is some of the 23 cases that have been filed by the National Consumer Law Center where they have, you know, really shown in their allegations how discretionary pricing practices of banks actually included the practice of producing yield spread premiums to brokers, thereby incentivizing the discriminatory marketing and pricing of expensive subprime loans. You made more money if you did the subprimes.

And in African-American communities too often, the prime lenders are missing. And that is one of the big issues, that—you know, I live in Prince George's County, which has been really hit hard by this subprime crisis, and a lot of people who were eligible for prime loans were steered into subprime loans.

This is really a tragedy. It is something that has led to—you know, it is an incredible crisis for those borrowers when they should have been into different loan instruments that would have been more favorable to them, more affordable.

But also I just want to say lastly that no African-American community created any CDOs or any of these horrible financial instruments that led to the financial crisis. So I just want everybody to, you know, remember that we bundled nothing. We were victims here, drastically.

Mr. NADLER. Thank you very much. The time of the gentlelady is expired. All time is expired.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. And with that, I would like to thank the witnesses and the Members. And the hearing is adjourned.

[Whereupon, at 3:10 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

The Obama Justice Department has made it clear it intends to follow the Clinton Administration and file more lawsuits under what is called the "disparate impact" theory. Disparate impact lawsuits challenge practices that lead to statistically worse results for a particular group relative to other groups without alleging that the practice is actually discriminatory in its terms, design, or application. That is, disparate impact lawsuits claim there is discrimination when there is often no discrimination at all under any reasonable definition of the term.

Disparate impact theories arose out of Title VII of the Civil Rights Act of 1964, which was designed to protect individuals from intentional discrimination in employment. The Senate floor managers of Title VII, Senators Clifford Case and Joseph Clark, made clear that Title VII prohibited only intentional discrimination, and that it did not require statistical parity in hiring. In their exhaustive memorandum distributed prior to Senate debate on the bill, the Senators wrote "There is no requirement in title VII that an employer maintain a racial balance in his work force." This was reiterated by Senator Hubert Humphrey, who said "If [a] Senator can find in title VII . . . any language which provided that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not there."

But then Alfred Blumrosen, the Equal Employment Opportunity Commission's first chief of compliance, admitted in a law review article years later that he employed "[c]reative administration" to draft regulations under Title VII allowing disparate impact claims He admitted that those regulations did not "flow from any clear congressional grant of authority."

When those regulations were challenged in court, liberal Justice Harry Blackmun wrote that "I fear that a too-rigid application of the EEOC guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection."

With Justice Blackmun's concerns in mind, the Supreme Court, in a 1989 case called *Wards Cove Packing Co. v. Atonio,* made clear that the regulations must be subject to what it called "a reasoned review of the employer's justification for his use of the challenged practice [such that] there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."

But then Congress responded two years later by legislatively overruling that reasonable interpretation of the regulations in *Wards Cove.* That legislation passed over my opposition. As a result, disparate impact lawsuits were encouraged.

The abuse of the disparate impact theory in courts has had real-world consequences. There were many pressures on mortgage lenders to relax the standards under which loans were extended in the 1990's. But one factor was the Clinton Administration Justice Department's aggressive pursuit of disparate impact claims in which it sought to prosecute entities whose mortgage lending policies did not intentionally discriminate, but only had a disparate impact on one group or another.

In 1998, for example, Clinton Administration Housing Secretary Andrew Cuomo announced the results of a federal lawsuit settlement in which a bank was made to extend $2 billion in loans to people who posed a greater credit risk. Secretary Cuomo even admitted during a press conference televised on C-Span that "the 2.1 billion, lending that amount in mortgages, will be a higher risk and I'm sure there'll be a higher default rate on those mortgages than on the rest of the portfolio."

A leading article published in the *Banking Law Journal* at the time made clear that "Lenders relying on written standards and criteria in making decisions as to whether to grant a residential mortgage loan application run the risk of exposure to liability under the civil rights law doctrine known as disparate-impact analysis. . . . Several underwriting guidelines that are fairly common throughout the mortgage lending industry are at risk of disparate-impact analysis [including] creditworthiness standards."

At the same time, in order to alleviate disparate impacts in lending, the Federal Financial Institutions Examination Council issued a report that suggested to lenders that, rather than focusing on credit history as defined in a credit report, such lenders should focus on evidence of a borrower's ability and willingness to repay a loan, including a record of regular payments for utilities and rent.

These lawsuits pressured lenders to bend traditional and time-tested accounting rules and extend more mortgages to many who could not afford them. These relaxed lending standards are now widely regarded as being a prime cause of the current financial crisis. Even *The Washington Post* editorialized that "the problem with the U.S. economy . . . has been government's failure to control systemic risks that government itself helped to create. We are not witnesses a crisis of the free market but a crisis of distorted markets . . . [G]overnment helped make mortgages a purportedly sure thing in the first place."

In our efforts to enforce the nation's housing laws, I hope we do not repeat past mistakes. I look forward to hearing from all our witnesses today.

PREPARED STATEMENT OF JOE SOLMONESE, PRESIDENT,
HUMAN RIGHTS CAMPAIGN

Written Statement of

Joe Solmonese

President

Human Rights Campaign

To the

Subcommittee on the Constitution, Civil Rights and Civil Liberties

Committee on the Judiciary

United States House of Representatives

Hearing on "Protecting the American Dream – A Look at the Fair Housing Act"

March 11, 2010

Chairman Nadler and Members of the Subcommittee:

My name is Joe Solmonese, and I am the President of the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual and transgender (LGBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of our more than 750,000 members and supporters nationwide, I thank you for holding this important hearing and am honored to submit this statement regarding the critical need to expand federal protections against housing discrimination to include sexual orientation and gender identity.

As you'll hear from my friend and fellow advocate Rea Carey, Executive Director of the National Gay and Lesbian Task Force, we know through limited surveys, anecdotal evidence and the actions taken by state and local governments that housing discrimination severely impacts LGBT people. On the one hand, this is intuitive – given the history of pervasive discrimination in this country based on sexual orientation and gender identity, how could LGBT people's access to housing, one of the most basic aspects of everyday life, not be affected? On the other hand, until today, too few in government have even chosen to ask the question, to acknowledge that discrimination

exists and try to understand its scope, its consequences and how to stop it. I thank Chairman Nadler and the Subcommittee for taking this historic step, for asking these important questions and for giving us the opportunity to participate in this conversation.

Housing discrimination against LGBT people is out there, we already know this, and even one instance of it is one too many. Time and again, HRC and our fellow LGBT advocacy groups hear from individuals who have been denied a lease because they are transgender, same-sex couples who are quoted higher rents than straight ones, and numerous other scenarios where who they are or who they love was the difference between finding and securing the home they wanted and being turned away. What fair housing data we have to date bears this out; for example, a 2007 testing study by Michigan's Fair Housing Centers found that 30 percent of same-sex couples were treated differently than different-sex couples when attempting to buy or rent a home.

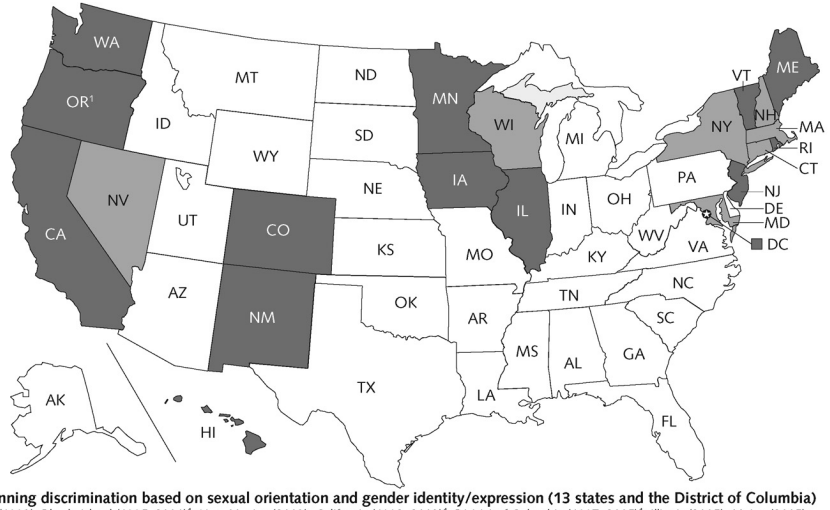
States and localities have already understood that housing discrimination against LGBT people is a problem and have taken action to combat it. Eighteen states and the District of Columbia have barred discrimination in housing based on sexual orientation and twelve states and D.C. also prohibit such discrimination based on gender identity. In addition, many local governments also forbid housing discrimination, including more than 100 cities of all sizes that prohibit discrimination based on both sexual orientation and gender identity.

And, for the first time, the U.S. Department of Housing and Urban Development (HUD) has acknowledged that discrimination against LGBT people is a problem that must be addressed. In October 2009, HUD Secretary Shaun Donovan announced that the Department would promulgate regulations to end discrimination based on sexual orientation and gender identity in HUD-administered housing and home loan programs. In addition, the Department has commissioned the first-ever national study of discrimination against LGBT people in the rental and sale of housing, adding our community to its long history of studying a range of types of discrimination in the housing market.

Secretary Donovan stated that, "[t]he evidence is clear that some are denied the opportunity to make housing choices in our nation based on who they are and that must end." HRC could not agree more and are pleased to have an administration that recognizes this problem and is working to solve it. But they can only do so much on their own; Congress must act to give HUD, the Justice Department and other agencies the tools they need to combat discrimination against LGBT people in housing and others aspects of life. Today's hearing is an important first step. I urge you to amend our nation's fair housing laws to protect against discrimination based on sexual orientation and gender identity and ensure that LGBT people are equally free to make homes for themselves and their families.

State Nondiscrimination Laws in the U.S.

This map has required no update since: **July, 2008**



States banning discrimination based on sexual orientation and gender identity/expression (13 states and the District of Columbia)
Minnesota (1993); Rhode Island (1995, 2001)[1]; New Mexico (2003); California (1992, 2003)[1]; District of Columbia (1997, 2005)[1]; Illinois (2005); Maine (2005); Hawaii (1991, 2005, 2006)[2]; New Jersey (1992, 2006)[1]; Washington (2006); Iowa (2007); Oregon (2007)[1]; Vermont (1992, 2007)[1]; Colorado (2007)

Laws banning discrimination based on sexual orientation (7 states)
Wisconsin (1982); Massachusetts (1989); Connecticut (1991); New Hampshire (1997); Nevada (1999); Maryland (2001); New York (2002)

[1]California, DC, New Jersey, Rhode Island and Vermont first passed sexual orientation nondiscrimination laws, then later passed gender identity/expression laws.

[2]In 1991, Hawaii enacted a law prohibiting sexual orientation discrimination in employment. In 2005, it enacted a law prohibiting sexual orientation and gender identity/expression discrimination in housing. In 2006, public accommodations protections were added for sexual orientation and gender identity/expression.

National Gay and Lesbian
Task Force
www.theTaskForce.org

The New York Times

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PAULA PATTON

May 16, 2009

Minorities Affected Most as New York Foreclosures Rise

By MICHAEL POWELL and JANET ROBERTS

Turn the corner on 145th Street in Jamaica, Queens, and it is as though a cyclone has wheeled through.

One resident, Lakisha Brown, a hospital worker and mother of two, snatched her house back from foreclosure last month, if only temporarily. "We need to sell fast," she says. "I'm just trying to save what's left of my credit." Across the street in this black middle-class neighborhood, Patrick Nicholas, a surgical technician in blue scrubs, shakes his dreadlocks and shrugs. He rents but is moving out. "The owner got foreclosed and told us to leave," he says.

Six doors away, past two foreclosed and boarded-up homes, a burly man in a blue union jacket declines to give his name but his problem is evident. A foreclosure notice is pasted to the door of his house. His tone is mournful. "Tough times, man," he says. "Tough, tough times."

Late to arrive in the Northeast, the foreclosure crisis has swept through the New York region at an explosive pace in the past two years, destroying billions of dollars in housing wealth, according to a New York Times analysis of foreclosures filed since 2005 and federal mortgage data.

It now touches every corner of the region, from estates along the Connecticut Gold Coast to the suburban tracts of Long Island, where 6 percent of all mortgages are at least 90 days delinquent, the point at which foreclosure proceedings usually begin.

But the storm has fallen with a special ferocity on black and Latino homeowners, the analysis shows. Defaults occur three times as often in mostly minority census tracts as in mostly white ones. Eighty-five percent of the worst-hit neighborhoods — where the default rate is at least double the regional average — have a majority of black and Latino homeowners.

And the hardest blows rain down on the backbone of minority neighborhoods: the black middle class. In New York City, for example, black households making more than $68,000 a year are almost five times as likely to hold high-interest subprime mortgages as are whites of similar — or even lower — incomes.

This holds a special poignancy. Just four or five years ago, black homeownership was rising sharply, after decades in which discriminatory lending and zoning practices discouraged many blacks from buying. Now, as damage ripples outward, black families in foreclosure lose savings and credit, neighbors see the value of their homes decline, and renters are evicted.

That pattern plays out across the nation. A study released this week by the Pew Research Center also shows foreclosure taking the heaviest toll on counties that have black and Latino majorities, with the New York region among the badly hit.

On 145th Street in southeast Queens, just south of Linden Boulevard, attached brick homes with tidy, fenced-in gardens stretch into the distance. Children play tag under blooming oaks. But 8 of these roughly 50 homes face foreclosure; 4 are vacant; 2 have plywood boards nailed over punched-out windows.

"My district feels like ground zero," said City Councilman James Sanders Jr., an African-American who represents hundreds of blocks in Queens like this one. "In military terms, we are being pillaged."

Years ago many banks drew red lines on maps around black neighborhoods and refused to lend; more recently, some banks began taking aim at those neighborhoods for the marketing of subprime loans, say consumer advocates.

Black buyers often enter a separate lending universe: A dozen banks and mortgage companies, almost all of which turned big profits making subprime loans, accounted for half the loans given to the region's black middle-income borrowers in 2005 and 2006, according to The Times's analysis. The N.A.A.C.P. has filed a class-action suit against many of the nation's largest banks, charging that such lending practices amount to reverse redlining.

"This was not only a problem of regulation on the mortgage front, but also a targeted scourge on minority communities," said Shaun Donovan, the secretary of Housing and Urban Development, in a speech this year at New York University. Roughly 33 percent of the subprime mortgages given out in New York City in 2007, Mr. Donovan said, went to borrowers with credit scores that should have qualified them for conventional prevailing-rate loans.

For anyone taking out a $350,000 mortgage, a difference of three percentage points — a typical spread between conventional and subprime loans — tacks on $272,000 in additional interest over the life of a 30-year loan.

"There's a huge worry that this will exacerbate historic disparities between the wealth of black and white families," said Ingrid Ellen, co-director of the Furman Center for Real Estate and Urban Policy at New York University. Not that white neighborhoods and towns in the New York region stand immune. During the past decade, buyers of all colors scrimped to buy homes in one of the nation's most expensive housing markets.

Now mortgage delinquencies are rising sharply even in high-income, predominantly white enclaves, from Nirvana Avenue in Great Neck, N.Y., to Otter Rock Drive on a peninsula off Greenwich, Conn.

In the wealthiest ZIP codes, the median delinquency rate — although much lower than the regional rate, 5.3 percent — more than tripled from March 2005 to March 2008, then doubled again in the year since.

As a whole the region has fared better than stretches of Florida and California, where about one in every five borrowers is at least 90 days behind on payments.

Yet the pain in the New York region is considerable. The delinquency rate in Essex County, N.J., stood at 11 percent in March, more than two percentage points higher than in Genesee County, Mich., home to the battered city of Flint, which stands as a national symbol of this recession.

A World of Damage

Sitting on Long Island close by the Atlantic Ocean — salt air flares the nostrils on many days — Roosevelt is 79 percent black and has suffered grievously from segregation over the years. (Long Island, as measured by

school and housing patterns, is among the most racially segregated suburban areas in the nation.) Still, as young black families sought bargains, home ownership rose.

Now subprime loans and a crippled economy have laid many of those families low. Olive M. Thompson, a 45-year-old nursing assistant, lost her $215,000, four-bedroom Cape in January, but not before she drained her 401(k) and declared bankruptcy.

A single mother of four, she recalled arriving in 2003 and seeing a home across the street with a garden so beautiful she fantasized about matching it. That house went into foreclosure.

"Next thing I know, it's boarded up," she said.

Foreclosure represents catastrophe on several levels. As families move to cheaper quarters, they often move their children to different schools. A rising number of foreclosures in a neighborhood is a singularly reliable predictor of an increase in violent crime, according to a recent academic study.

All these ills are magnified for black families, whose median net worth is far smaller than that of white families, and far more tied up in housing.

On Bainbridge Street in the predominantly black Bedford-Stuyvesant section of Brooklyn, 130-year-old brownstone homes loom like grand sailing ships, seemingly impervious to the ravages of time. That solidity is illusory. Looking closer, a visitor can identify homes in jeopardy by the cracked stoops, broken windowsills and tilting chimneys.

Alexia Billiart, 33, who is black, and her husband, who is white, moved a year ago from an expensive neighborhood into a handsome row house in Bedford-Stuyvesant, where they can manage their payments. Across the street, two foreclosed homes have fallen vacant, and a nearby apartment building stands broken and padlocked. At night, young men cluster on the stoops of the vacant homes.

"We figured we'd move here and participate in the rebirth of this block," said Ms. Billiart, who works for a financial planning firm. "It seems to be going backward; it's a little scary."

Several black homeowners along these blocks, including well-paid professionals, confide that they pay strikingly high mortgage rates — 9, 10 or 11 percent annually. How that came to happen is a complicated story.

Over the last decade, many commercial banks, from Wells Fargo to Bank of America to HSBC, acquired subprime lenders that thrived by offering loose lending standards and high interest rates. Court records show that brokers sometimes received bonuses for steering borrowers into high-interest loans laden with extra costs.

Even many blacks and Latinos who say they sought conventional loans ended up with subprime mortgages from these lenders. One reason, many say, was a mistrust of conventional banks.

Colvin Grannum grew up in a black neighborhood in Brooklyn and became president of the Bedford-Stuyvesant Restoration Corporation, a nonprofit organization that builds and renovates housing. His father bought several properties in the 1950s and '60s, often without turning to banks.

"I don't want to say it's in the cultural DNA, but a lot of us who are older than 30 have some memory of

disappointment or humiliation related to banks," Mr. Grannum said. "The white guy in the suit with the same income gets a loan and you don't?"

"So you turn to local brokers, even if they don't offer the best rates."

This may help explain an unusual phenomenon: Upper-income black borrowers in the region are more likely to hold subprime mortgages than even blacks with lower incomes, who often benefit from homeownership classes and lending assistance offered by government and nonprofits.

Help for Lost Causes

The foreclosure storm shows few signs of abating. Scam artists and deed thieves prey on the desperate as complaints flood the offices of local prosecutors. In a church meeting room in the Guyanese neighborhood of Flatlands, Brooklyn, 200 homeowners tell of paying $3,000 or $4,000 to firms to "fix" their mortgage troubles. Often, these firms disappear with the money.

In southeast Queens, politicians have asked homeowner advocacy groups to set up shop in their offices. "My office is St. Jude, the patron saint of lost causes," Councilman Sanders said.

A few step clear of the rubble. Antoinette Coffi, 45, saw an ad on the subway, a photo of a black couple gazing at a gleaming home. She walked into that company's office two years ago, and six weeks later she, her two children, her mother and cousin had a home in Queens. She ended up with not one but two mortgages, including a variable-rate loan that started at 11 percent.

Last year her work hours were cut and she fell behind. "The stress, oh my God," she said, her voice thick with the juicy vowels of her native West Africa.

With the help of Changer, an advocacy group, she has kept the house. But her neighbors may not be as lucky. "Everywhere, everyone talks about being put in the street," she said.

Foreclosure is cutting so deep as to reshape the geography. If enough homes go vacant in Queens and Newark and Roosevelt, a cycle of disinvestment could beckon.

"Some home-owning neighborhoods may turn back to rentals and some might not survive," said Jay Brinkman, chief economist for the Mortgage Bankers Association in Washington. "They might end up bulldozed."

That sounds a touch apocalyptic. The Obama administration has set aside $50 billion to persuade banks to reduce monthly payments to help borrowers avoid foreclosure. Immigrants continue to flock here, and New York City officials have spent tens of billions of dollars since the 1980s to rebuild and shore up hard-pressed neighborhoods.

But few in 1965 would have predicted the South Bronx devastation of 1979. At the very least, tens of thousands of people will lose their homes, their savings and their dreams.

"Rather than helping to narrow the wealth and home ownership gap between black and white," Mr. Grannum said, "we've managed in the last few years to strip a lot of equity out of black neighborhoods."

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MARISA TONEI
CATHERINE KEENER

August 11, 2009

Westchester Adds Housing to Desegregation Pact

By SAM ROBERTS

Westchester County entered into a landmark desegregation agreement on Monday that would compel it to create hundreds of houses and apartments for moderate-income people in overwhelmingly white communities and aggressively market them to nonwhites in Westchester and New York City.

The agreement, if ratified by the county's Board of Legislators, would settle a lawsuit filed by an antidiscrimination group and could become a template for increased scrutiny of local governments' housing policies by the Obama administration.

"This is consistent with the president's desire to see a fully integrated society," said Ron Sims, the deputy secretary of housing and urban development, which helped broker the settlement along with the Justice Department. "Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."

The agreement calls for the county to spend more than $50 million of its own money, in addition to other funds, to build or acquire 750 homes or apartments, 630 of which must be provided in towns and villages where black residents constitute 3 percent or less of the population and Hispanic residents make up less than 7 percent. The 120 other spaces must meet different criteria for cost and ethnic concentration.

The county, one of the nation's wealthiest suburbs, has seven years to complete the construction or acquisition of the affordable housing.

Affordable housing is defined by a complex formula, but generally it is meant to help working families keep from spending more than a third of their gross income on housing. A family of four could make up to $53,000 as a tenant and up to $75,000 as an owner and still qualify.

There is no minimum income level, "but it's not going to be no-income," said Craig Gurian, executive director of the Anti-Discrimination Center, which filed the lawsuit. "This agreement is not focused on facilitating housing for the poorest of the poor." The center is a nonprofit anti-bias advocacy and litigation group based in New York City.

Mr. Gurian said that while black and Hispanic residents have a disproportionate need for affordable housing, "this is an opportunity-creating agreement, not a guarantee" that the homes would go to minority members.

"Residential segregation underlies virtually every racial disparity in America, from education to jobs to the delivery of health care," said Mr. Gurian.

No communities have been chosen to receive the homes, officials said. But according to the

Anti-Discrimination Center, more than two dozen predominantly white towns or villages are eligible, including Bedford, Bronxville, Eastchester, Hastings-on-Hudson, Harrison, Larchmont, Mamaroneck, New Castle, Pelham Manor, Rye and Scarsdale.

A federal monitor, James E. Johnson, has been appointed to ensure that the county abides by the settlement. Given that 120,000 acres in the county meet the criteria, the monitor "should have no difficulty making sure that Westchester ends its policy of allowing affordable housing to be off-limits in the most highly white neighborhoods in the county," Mr. Gurian said.

The lawsuit, filed under the federal False Claims Act, argued that when Westchester applied for federal Community Development Block Grants for affordable housing and other projects, county officials treated part of the application as boilerplate — lying when they claimed to have complied with mandates to encourage fair housing.

A Westchester official originally dismissed the suit as "garbage." But the county was largely repudiated in February when Judge Denise L. Cote ruled in Federal District Court that between 2000 and 2006 it had misrepresented its efforts to desegregate overwhelmingly white communities when it applied for the federal housing funds.

Judge Cote concluded that Westchester had made little or no effort to find out where low-income housing was being placed, or to finance homes and apartments in communities that opposed affordable housing.

As part of Monday's agreement, the county admitted that it has the authority to challenge zoning rules in villages and towns that in many cases implicitly discourage affordable housing by setting minimum lot sizes, discouraging higher-density developments or appropriating vacant property for other purposes. Westchester agreed to "take legal action to compel compliance if municipalities hinder or impede the county" in complying with the agreement.

It was unclear Monday to what extent localities could thwart the agreement, if any chose to do so. Mary Beth Murphy, the town supervisor of Somers, which is among the possible locales for new housing, said that while she was unaware of the agreement, "we certainly are committed to affordable housing and have amended our zoning legislation in recent years to create more opportunities."

The agreement could spark challenges to suburban county governments across the country that have resisted pressure to undo decades of residential segregation.

Andrew J. Spano, the Westchester County executive, attributed the settlement to "a historic shift of philosophy" by federal housing officials. He said he had signed the agreement to avoid further litigation and possible penalties.

The county admitted no wrongdoing, attributed the judge's ruling to a technicality and argued that since it had previously invested in affordable housing, "what is different is the locations where the housing must be built."

"We are settling the lawsuit because we have no choice," Mr. Spano said.

The suit by the Anti-Discrimination Center applied to towns and villages in Westchester. The federal government deals directly with the county's larger cities, among them Yonkers, which nearly went bankrupt

before capitulating in a housing segregation case that began in 1980 and dragged on for years. That city, which had concentrated public housing in its southwest, was forced to build on the east side, where more whites lived.

The agreement is subject to approval within 45 days by the county's Board of Legislators, which is also required to approve a $32.9 million bond sale to help finance the housing. Without legislative approval, the litigation would resume and the county would be faced with having to prove at trial that it did not knowingly file false claims.

Most of the homes would be new construction, although some existing houses and apartments could qualify if the county made them permanently affordable.

The case was litigated by Mr. Gurian and the center's lawyer, John Relman, and supported by testimony from Andrew A. Beveridge, a sociologist at Queens College of the City University of New York.

Dr. Beveridge found that "racial isolation is increasing for blacks, falling slightly for whites" and that "income level has very little impact on the degree of residential racial segregation experienced by African-Americans."

Mr. Gurian said that the 750 homes called for by the agreement "represents only a small percentage of need," but that "it's designed to be practical."

Mathew R. Warren contributed reporting.

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CYRUS JUNE 18

December 31, 2009

Memphis Accuses Wells Fargo of Discriminating Against Blacks

By MICHAEL POWELL

The mayor of Memphis, A C Wharton Jr., has walked with bile rising in his throat through the streets of Hickory Hill and Orange Mound and Whitehaven in recent years, as house after house in those black neighborhoods has fallen into foreclosure.

On Wednesday, Mr. Wharton and other city and county officials filed a lawsuit accusing one of the nation's largest banks, Wells Fargo, of singling out black homeowners for high-interest subprime mortgages.

The lawsuit, filed in federal court in Tennessee, marshaled a raft of statistics to argue that Wells Fargo offered one lending reality for whites and another for blacks. In Shelby County, which includes Memphis, one of every eight Wells Fargo loans in predominantly black neighborhoods resulted in foreclosure, compared with only one in 59 such loans in white neighborhoods, the lawsuit said.

Such charges, if proven, amount to reverse redlining — marketing expensive loan products specifically to black customers.

"You drive through our neighborhoods and it's just palpable — you can see a strong emerging black homeowning community that's gone," Mr. Wharton said in an interview. "The clarity of the patterns just stand out like a sore thumb."

The lawsuit is one of several discrimination suits filed against Wells Fargo in the past two years, as city and state officials argue that the bank must take responsibility for the social and economic effects of a decade of loose — some federal agencies have argued irresponsible — lending practices. In Baltimore, officials say that Wells Fargo's lending practices tipped hundreds of homeowners into foreclosure and cost the city millions of dollars in taxes.

Lawyers for the City of Baltimore produced two former loan officers who described a pattern of discriminatory practices aimed at persuading blacks to take out what the officers called "ghetto loans," high-interest mortgages. Their affidavits are also cited in the Memphis suit.

Last summer, the Illinois attorney general, Lisa Madigan, started a lawsuit accusing Wells Fargo of marketing high-cost mortgage loans to black and Latino customers while selling lower-cost loans to white borrowers with similar incomes.

The cumulative effect, Ms. Madigan argued, was to turn the black and Latino neighborhoods of the nation's cities "into ground zero for subprime lending."

Wells Fargo officials have consistently declined interviews on the subject and noted only that their loans

account for a small fraction of the nation's total mortgage lending.

A spokesman, Kevin Waetke, wrote in an e-mailed statement that while the bank had not had a chance to study the Memphis lawsuit, "the allegations referenced in earlier news reports about Wells Fargo's lending practices are baseless and inaccurate.

"Other courts have found similar suits against lenders to be without merit," Mr. Waetke wrote, "and we are confident of a similar outcome here."

A federal judge in Baltimore has not gone that far, but this month he did suggest he might narrow the scope of that city's lawsuit. The judge said the suit tended to hold Wells Fargo responsible for "the deterioration of the inner city," which, he said, was implausible.

Memphis and Shelby County officials make a similar argument, if perhaps more grounded in statistics. Memphis draws 70 percent of its budget from property taxes, and so, Mayor Wharton said, rows of vacant homes are like a fiscal dagger to its heart. Shelby County has 40 percent of all the foreclosed homes in Tennessee.

"Property tax is the mother's milk of government here," Mr. Wharton said. "Our unemployment is high, our poverty rate is 35 percent; we cannot afford to lose our tax base."

Many black homeowners in Memphis, the lawsuit says, could have qualified for prime-rate mortgages, thereby saving themselves tens of thousands of dollars over the life of a mortgage. That conforms with nationwide patterns, according to a variety of studies.

Last spring, The New York Times analyzed foreclosures and subprime lending in New York City and found that black homeowners making more than $68,000 were nearly five times as likely to hold high-interest subprime mortgages as whites of similar or lower incomes. (The disparity was greater for Wells Fargo borrowers in New York, where 2 percent of whites and 16.1 percent of blacks in that income group hold subprime mortgages.)

What makes the Memphis case particularly nettlesome, said John Relman, a lawyer who represents the city and county, is that statistics suggest that Wells Fargo knew how to write responsible mortgage loans — for whites. "Wells knew how to write and get people into low-cost loans," Mr. Relman said. "You just don't see much of that in the black community."

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Justice Dept. Fights Bias in Lending

By CHARLIE SAVAGE

WASHINGTON — The Justice Department is beginning a major campaign against banks and mortgage brokers suspected of discriminating against minority applicants in lending, opening a new front in the Obama administration's response to the foreclosure crisis.

Tom Perez, the assistant attorney general for the department's Civil Rights Division, is expected to announce Thursday in New York that the administration is creating a new unit that will focus exclusively on unfair lending practices.

"We are looking at any and every practice in the industry," Mr. Perez said in a recent interview.

As part of an expansion of the Civil Rights Division approved by Congress last year, the Justice Department is hiring at least four lawyers and an economist for the new unit, while about half a dozen current staff members will transfer into it.

Mr. Perez plans to formally announce the new unit at the "Wall Street Project" conference organized by the Rev. Jesse Jackson's Rainbow/PUSH Coalition. He characterized the effort as a major turnaround, and criticized the previous administration as failing to scrutinize lending practices amid the subprime mortgage boom.

While past lending discrimination cases primarily focused on "redlining" — a bank's refusal to lend to qualified borrowers in minority areas — the new push will instead center on a more recent phenomenon critics have called "reverse redlining."

In reverse redlining, a mortgage brokerage or bank systematically singles out minority neighborhoods for loans with inferior terms like high up-front fees, high interest rates and lax underwriting practices. Because the original lender would typically resell such a loan after collecting its fees, it did not care about the risk of foreclosure.

It is a rarely used theory, and it carries political risks. Some critics have contended that government rules pushing banks to lend to minority and low-income borrowers contributed to the financial meltdown. The campaign could rekindle that debate.

"They encourage lenders to make risky loans for reasons such as diversity, and then when lenders have a problem because they made too many risky loans, they condemn them for that," said Ernest Istook, a fellow at the conservative Heritage Foundation and a former Republican congressman from Oklahoma.

Still, Mr. Istook emphasized that he was "not defending anybody who engages in wrongful redlining practices."

A representative of the Mortgage Bankers Association, the lobbying arm of the real estate finance industry, did not respond to a request for comment.

Under federal civil rights laws, a lending practice is illegal if it has a disparate impact on minority borrowers, and the Obama administration is signaling that it intends to make the enforcing of fair lending laws a signature policy push in 2010.

The division has already opened 38 investigations into accusations of lending discrimination. Under federal lending laws, it can seek compensation for borrowers who were victimized by any illegal conduct, as well as changes in a lender's practices.

John Relman, a housing lawyer, said there was plenty of evidence that some banks violated fair housing laws during the subprime boom.

Mr. Relman has helped the Cities of Baltimore and Memphis sue Wells Fargo over the costs taxpayers incurred because of foreclosures. As part of those lawsuits, he obtained affidavits from former Wells Fargo loan officers who said the bank had systematically singled out minority borrowers for high-interest, high-fee mortgages, bypassing its own underwriting rules. The State of Illinois has also sued the bank.

Wells Fargo has denied any wrongdoing. Last week, a judge dismissed Baltimore's lawsuit, saying there were too many other causes of the damage to inner-city neighborhoods to blame the bank. Mr. Relman said the city intended to file a new complaint that focused more narrowly on recouping costs associated with specific properties.

But it is much easier for the federal government to sue banks like Wells Fargo. Mr. Relman said he hoped the Justice Department decided to join the cases.

"Not only would we welcome them; we encourage them to get involved," Mr. Relman said. "It's long overdue."

Mr. Perez has hired Eric Halperin as a special counsel for fair lending. Mr. Halperin, a career lawyer in the division from 1998 to 2004, is currently the Washington director and head litigator for the Center for Responsible Lending, a nonprofit group that focuses on financial products it deems predatory.

The division has also gained access to data the Treasury Department is collecting from banks about loan modifications for people seeking to avoid foreclosure. It intends to search for signs of any disparate impact on minorities.

The Justice Department is also working with several state attorneys general who have taken an interest in bringing potential lawsuits over banks' subprime lending practices.

Richard Cordray, the attorney general of Ohio, said federal and state officials were sharing information and helping one other develop potential legal theories about how to go after reverse redlining.

"We are looking at a common problem and a common pattern to determine what can be done about it," Mr. Cordray said.

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The Washington Post

AIG units settle lending discrimination allegations

By Bloomberg News
Friday, March 5, 2010; A14

AIG Federal Savings Bank and Wilmington Finance settled Justice Department claims that they broke the law by allowing wholesale mortgage brokers to charge higher direct broker fees to black borrowers.

In a consent order filed Thursday in federal court in Wilmington, Del., the banks -- both units of New York-based American International Group -- agreed to pay at least $6.1 million to resolve the allegations.

The case is part of a crackdown on discriminatory lending, and marks the first time the Justice Department has held lenders responsible for alleged discriminatory activities of affiliated brokers, said Thomas Perez, assistant attorney general in charge of the department's civil rights division. The department has 45 open investigations involving lending discrimination, he said Thursday at a news conference in Washington.

AIG Federal and Wilmington Finance deny the allegations, according to the settlement, which requires court approval.

"We are pleased to have reached an agreement with the government to resolve the issues in the complaint, as well as to avoid the distractions and burdens of protracted litigation over contentious issues," AIG spokesman Mark Herr said in a statement.

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