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Commission on Fair Housing & Equal Opportunity
The State of Fair Housing in America

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My name is Leslie M. Proll. I am the Director of the Washington office of the NAACP Legal Defense & Educational Fund, Inc. (the Legal Defense Fund). Founded by Thurgood Marshall, the Legal Defense Fund is the nation's oldest civil rights law firm. We have served as legal counsel for African Americans in most of the country's major racial discrimination cases, and we consider ourselves as counsel for black America.

I am pleased to testify before the Commission on Fair Housing and Equal Opportunity. The Legal Defense Fund is a proud and enthusiastic sponsor of the Commission. It is our experience that housing issues remain at the core of our structural inequality. We are keenly aware of the need for strengthened enforcement of fair housing laws and creative ideas and solutions for promoting a more integrated society at all levels, with full participation by all relevant industries.

It is appropriate to undertake this important effort on the 40th Anniversary of passage of the Fair Housing Act and on the 20th Anniversary of passage of the amendments to the Fair Housing Act. This year also marks the 60th Anniversary of the Supreme Court's historic opinion in *Shelley v. Kraemer*, 334 U.S. 1 (1948), which struck down racially restrictive covenants. In a companion case, Charles Hamilton Houston explained the impact of housing discrimination in language that still resonates today:

[Racial restrictive covenants] have been a direct and major cause of enormous overcrowding into slums, with consequent substantial disorganization of family and community life. These effects have not been, and cannot be, in our fluid society, confined to the intended victims of the restrictions; they permeate the community and exert a baneful influence upon the economic, social, moral, and physical well-being of all persons, white and black, young and old, rich and poor. They are incompatible with the foundations of our republic and their judicial approbation may well imperil our form of government and our unity and strength as a nation.¹

The Role of the Civil Rights Division

We are pleased to offer remarks today on the potential contribution by the U.S. Department of Justice in combating the segregated living patterns that continue forty years after passage of the Fair Housing Act. For half a century, the Civil Rights Division has stood as the nation's beacon for equal opportunity and racial justice. The Division was created in the wake of the Supreme Court's landmark decision in *Brown v. Board of Education*, and became part of the first civil rights law since Reconstruction. Its courageous and aggressive enforcement of the new civil rights statutes passed in the 1950s and 1960s opened countless doors for African Americans and other racial minorities. While national civil rights organizations such as the Legal Defense Fund certainly bring civil rights cases, it is the Civil Rights Division that is the principle enforcer of our nation's civil rights laws.

¹ Consolidated Brief for Petitioners at 8, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291).

At its inception, the Civil Rights Division was dedicated exclusively to ridding society of the racial segregation and racial discrimination which permeated virtually every social structure. Sadly today, while racial divisions continue to haunt our country, the Division has sharply deviated from its original mission across civil rights subject areas, including housing. The Division has been decimated by a host of recent controversies. Congressional oversight hearings and news reports have recounted the severe problems which have plagued the Division, including the politicization of litigation; improper hiring practices; the firings and transfers of valued career lawyers and section chiefs; a decrease in the racial diversity of Division staff; the shifting of enforcement priorities; and a substantial decline in cases filed on behalf of racial minorities which have comprised the core of the Division's docket for most of its existence.² Currently, the Justice Department's Office of Inspector General and Office of Professional Responsibility are conducting a joint investigation into both substantive legal decisions made by the Civil Rights Division as well as its personnel practices.³ We are hopeful that a new administration will work to restore the stature and integrity of the Division so that it can once again inspire public confidence in its enforcement of the law.

It is important for the Civil Rights Division to maintain its continuity and steadfastness of mission. Priorities can be discharged without abdicating core responsibilities. Civil rights enforcement should not be a zero sum game in our complex and increasingly diverse society. Protecting African Americans is not inconsistent with protecting Latinos; protecting disabled persons is not inconsistent with protecting women; and protecting citizens who are being discriminated against because of their religious beliefs need not be in tension with doing the same for those whose national origin has subjected them to discrimination. Priorities may change from administration to administration but the role of the Division as a protector of marginalized citizens and minorities is its core charge.

Racial discrimination in the nation has proven to be hard to overcome. Maintaining a department of the federal government that is motivated to discharge this mission is critical to enforcement of the civil rights laws. It also has tremendous symbolic and practical significance. The Civil Rights Division is second to none in terms of the time, resources and capacity it has to bring systemic litigation to address discrimination. While

² *Civil Rights Division Oversight, Hearing Before the S. Judiciary Comm.*, 110th Cong., 1st Sess. (June 21, 2007); *Oversight of the Civil Rights Division: Hearing Before the S. Judiciary Comm.*, 109th Cong., 2d Sess. (Nov. 16, 2006); *Oversight Hearing on the Voting Section of the Civil Rights Division, Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties, H. Judiciary Comm.*, 110th Cong., 1st Sess. (Oct. 30, 2007); *Oversight Hearing on the Employment Section of the Civil Rights Division, Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties, H. Judiciary Comm.*, 110th Cong., 1st Sess. (Sept. 25, 2007); *Changing Tides: Exploring the Current State of Civil Rights Within the Department of Justice, Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties, H. Judiciary Comm.*, 110th Cong., 1st Sess. (Mar. 22, 2007); Carol D. Leonnig, *Political Hiring in Justice Division Probed*, WASH. POST, June 21, 2007, at A1; Charlie Savage, *Civil Rights Hiring Shifted in Bush Era*, BOSTON GLOBE, July 23, 2006, at A1.

³ Carol D. Leonnig, *Political Hiring in Justice Division Probed*, WASH. POST, June 21, 2007, at A1; *DOJ Probe Turns to Civil Rights Division*, LEGAL TIMES, June 4, 2007.

civil rights organizations and the private bar can significantly impact the enforcement of civil rights laws, they cannot possibly mount the systemic challenges to discrimination in the manner and number of which the Civil Rights Division is capable. There is simply no substitute for the Civil Rights Division's role. A case brought by the Division reverberates throughout the community, the state, and the region. It can have industry-wide impact in terms of deterrence and reform. The broad-based injunctive relief that the Division can pursue cannot be matched through the efforts of individual or private lawsuits alone.

The Fair Housing Docket

In preparation for the Commission's hearing, the Legal Defense Fund examined the fair housing docket of the Civil Rights Division for the past eight years.⁴ Although the Division has filed numerous cases addressing other forms of discrimination prohibited by the Fair Housing Act such as sex, religion, disability and familial status, we reviewed in detail those cases addressing race and national origin discrimination to determine the extent of the Division's activities in promoting more racially integrated housing, consistent with its historic purpose.

Over the course of eight years, the Civil Rights Division itself – apart from cases brought by individual United States Attorneys – filed approximately fifty-five cases addressing housing discrimination on the basis of race, color and/or national origin. This number includes lawsuits involving the rental, sale and zoning of housing,⁵ as well as two cases addressing retaliation for aiding others in the exercise of their fair housing rights⁶ and one case involving website advertising for rental housing.⁷ This total amounts to 6.9 cases per year during this period. We believe that this small volume of new litigation does not reflect an aggressive enforcement record or a strong commitment to housing equality, given the persistence of race discrimination in housing and the widespread occurrence of residential racial segregation. The small volume of new race discrimination litigation is also striking in light of the Justice Department's resources: the Civil Rights Division has over 300 attorneys, with at least 30 attorneys staffing the Housing and Civil Enforcement Section. In addition, most of the cases that have been filed are not sufficiently complex or resource intensive to justify only a few filings per year. If the Civil Rights Division wants to bring about systemic changes to our nation's segregated housing patterns, it first must drastically alter its own litigation docket.

⁴ This time period spans the length of one administration, reflecting one set of goals and priorities.

Additionally, through oversight hearings and commentary, it is believed that the publicly available docket of the current administration is the most complete, while the docket of previous administrations is incomplete.

⁵ Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep't of Justice, Complaints Filed, *available at* <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm>. This number does not include lending or insurance cases, which are discussed *infra*.

⁶ *United States v. Lake County Bd. of Comm'rs*, No. 2:04-415 (N.D. Ind. filed Oct. 6, 2004); *United States v. Altmayer*, No. 05-1239 (N.D. Ill. filed Mar. 2, 2005).

⁷ *United States v. Spyder Web Enter.*, No. 03-1509 (D.N.J. filed Apr. 3, 2003).

Rental and Sales Cases

The nature of the Civil Rights Division's housing docket is equally troubling. Nearly all of the cases addressed discrimination in the rental market. While certainly there is a significant amount of discrimination against minorities in the rental market, we believe the vast resources of the Justice Department should not be devoted almost exclusively to eradicating only one form of discrimination in housing.

Moreover, very few of the rental cases – only five – addressed racial discrimination in public housing or other low-income housing such as the Section 8 program.⁸ The Commission on Fair Housing and Equal Opportunity has received testimony about the history of de jure segregation in public housing and its impact on present-day patterns of segregation. At the Chicago hearing, Professor Florence Roisman testified that “[g]overnment – federal, state and local – has been and still is the principal engine of racial and economic segregation in the United States.”⁹ The federal government's role in creating and maintaining residential segregation should continue, even today, to provide a strong impetus for its own aggressive enforcement efforts to ensure that that low-income housing is both sited and offered on a nondiscriminatory basis and in a manner that promotes integration.

Unfortunately, only a handful of the Division's cases addressed one of the most pernicious forms of discrimination – discrimination in real estate sales, by real estate agencies or individual homesellers.¹⁰ If we are ever to bring about residential integration, the racial composition of our nation's single-family neighborhoods must also be addressed. Simply put, the real estate industry must be included in our collective fight against segregation.

Steering in real estate sales remains rampant and contributes greatly to the racial segregation we still see across the country. As we commemorate the 40th Anniversary of the Fair Housing Act, the Civil Rights Division should be leading the way in committing resources to bring systemic cases against those various facets of the housing industry whose practices perpetuate racial segregation. As a solo practitioner in Birmingham, Alabama in the 1990s, with no staff and few resources, I filed a major sales discrimination

⁸ *United States v. Hous. Auth. of Winder*, No. 2-08-CV-1096 (N.D. Ga. filed Sept. 26, 2008); *United States v. Henry*, No. 2:07-342 (E.D. Va. filed July 25, 2007); *United States v. San Francisco Hous. Auth.*, No. 4:02-4540 (N.D. Cal. filed Sept. 18, 2002); *United States v. Blakely Hous. Auth.*, No. 1:02-CV-87-3 (M.D. Ga. filed June 10, 2002); *United States v. City of Mt. Pleasant*, No. 1-01-0069 (M.D. Tenn. filed June 29, 2001).

⁹ *Hearing before the Commission on Fair Housing and Equal Opportunity* (Chicago, Ill. July 15, 2008) (testimony of Florence Roisman).

¹⁰ Five other cases addressed zoning or land-use laws and were filed in 2004 or earlier. *United States v. City of Janesville*, (case number unavailable) (N.D. Iowa filed Nov. 5, 2004); *United States v. Borough of Bound Brook*, (case number unavailable) (D.N.J. filed Mar. 12, 2004); *United States v. Little Rock Planning Comm.*, (case number unavailable) (E.D. Ark. filed Sept. 30, 2003); *United States v. City of Agawam*, No. 02-30149 (W.D. Mass. filed Aug. 13, 2002); *United States v. City of Pooler*, No. 4:01-263 (S.D. Ga. filed Nov. 13, 2001).

case against the State's largest real estate company.¹¹ I filed a similar case against a large real estate company in Montgomery, Alabama.¹² Both cases were based on racial steering by real estate agents, and included sales testing evidence as well as testimony by African-American real estate agents working for the companies, confirming the steering practices.

The federal government has traditionally prosecuted cases based on discrimination in the real estate market. Some of the earliest cases filed under the Fair Housing Act involved discrimination in sales. *See, e.g., United States v. Northside Realty Assoc.*, 501 F.2d 181 (5th Cir. 1974) (enjoining Atlanta realty company from discriminating against homebuyers); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973) (ruling that Montgomery realtor refused to sell homes to African Americans). There is no reason whatsoever why the Civil Rights Division should be bringing fewer of these cases now.

Importantly, the Division must be willing to employ all the legal tools available in order to enforce fully the fair housing laws. While individual claims have a place on the Division's docket, it is imperative that the Division continue its longstanding tradition of bringing "pattern or practice cases," as authorized under the Fair Housing Act.¹³ These cases represent the most efficient and effective manner to redress widespread segregation and discrimination in the housing and lending markets. And, these are cases that will likely not be prosecuted by the private bar or civil rights organizations with limited resources. Litigation of systemic discrimination claims is costly, complicated and protracted, but this is precisely the type of case in which the federal government should bring to bear its extraordinary resources.

Moreover, discrimination that adversely impacts a particular protected class has long been actionable under the Fair Housing Act. In an early example, the Fourth Circuit held that a landlord's policy of evicting children from an apartment building had a disproportionate impact on minority tenants in violation of the Fair Housing Act. *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983 (4th Cir. 1984). And, in an early challenge by the Justice Department to a zoning ordinance prohibiting the construction of multiple-family dwellings, the Eighth Circuit noted:

Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

¹¹ *Byrd v. First Real Estate Corp. of Ala.*, No. 95-3087-S (N.D. Ala. 1998). The Civil Rights Division intervened. The case was settled.

¹² *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000).

¹³ 42 U.S.C. § 3614(a) provides: "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court."

United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (alterations in original) (internal quotation marks and citation omitted).

Under the Bush administration, the Civil Rights Division has filed few disparate impact claims under any federal civil rights laws.¹⁴ Remarkably, however, the Division has reportedly prohibited altogether such cases in the Housing and Civil Enforcement Section.¹⁵ Thus, the Division has foreclosed an entire class of cases that are otherwise actionable under the Fair Housing Act. This is a disturbing development that needs to be reversed. In previous administrations, disparate impact cases were permissible. For example, in *United States v. The Hillhaven Corp.*, 960 F. Supp. 259, 262 (D. Utah 1997), the government's "primary theory of liability" was that a landlord's policy caused a disparate impact on persons with disabilities.

The Division's refusal to bring disparate impact systemic cases makes the job of the private bar that much more difficult. Not only does the burden fall upon organizations and private attorneys to fill the void, with fewer resources, but it signals to the housing and lending industry that they face reduced scrutiny of their practices and even gives fuel to the argument by some that certain forms of race discrimination may no longer exist.

The Division must also be willing to challenge new types of discrimination in the housing industry. For example, the Division should be playing a leading role in combating the posting of discriminatory housing ads on the Internet, just as they led the way decades ago in enforcing the Fair Housing Act with respect to print ads. *See, e.g., United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) (upholding constitutionality of Fair Housing Act's prohibition of discriminatory advertising). The Division has brought only one case in this area, in 2003. In *United States v. Spyder Web Enterprises*,¹⁶ the Division alleged that the website "TheSublet.com" published notices that contained discriminatory rental preferences based on race, sex, family status, and national origin. The Division settled the suit, obtaining an injunction against the website and a small victims' fund of \$10,000 and a civil penalty of \$5,000.¹⁷

There are many more cases involving discriminatory Internet housing ads that the Division could, and should, be litigating. For example, the Fair Housing Councils of the San Fernando Valley and San Diego, California recently won a victory in the Ninth Circuit against the owner of the website "roommates.com," based on the website's active role in

¹⁴ *See, e.g.*, Employment Litig. Section, Civil Rights Div., U.S. Dep't of Justice, Complaints Filed, available at <http://www.usdoj.gov/crt/emp/papers.html>.

¹⁵ *Changing Tides: Exploring the Current State of Civil Rights Within the Department of Justice*, Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties, H. Judiciary Comm., 110th Cong., 1st Sess. 145 (Mar. 22, 2007) (testimony of Wade Henderson, Pres. and Chief Executive Officer, Leadership Conference on Civil Rights).

¹⁶ No. 03-1509 (D.N.J. filed Apr. 3, 2003).

¹⁷ *See* Consent Decree, *United States v. Spyder Web Enter.* No. 03-1509 (D.N.J. Jan. 18, 2004), available at <http://www.usdoj.gov/crt/housing/documents/spydersettle.htm>.

soliciting discriminatory housing ads. See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (reversing the dismissal of the housing organizations' Fair Housing Act claims). Also, the Chicago Lawyers' Committee for Civil Rights Under Law sued the website "craigslist" over online housing ads that stated, among other things, "No Minorities," but lost on appeal in the Seventh Circuit. See *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding that craigslist was exempted from liability because it was not a "publisher or speaker" under 47 U.S.C. § 230(c), part of the Communications Decency Act of 1996). The courts are in the midst of deciding important issues regarding the liability of Internet sites for discriminatory housing ads posted on their websites, and the Civil Rights Division should be taking a stand on these issues, rather than sitting on the sidelines.

Testing Cases

We are also concerned about the underutilization of the Civil Rights Division's testing program. Established in 1991, this program relies on the use of testers who investigate housing discrimination by posing as prospective buyers or renters for the purpose of determining whether a member of a protected class is treated differently.¹⁸ Testing evidence is a powerful enforcement tool and is widely used by private fair housing organizations to affirmatively investigate potential fair housing violations. It also provides critical evidence in cases involving bona fide applicants.

Although the Division's program has been in operation for over seventeen years, it appears to be vastly underutilized. In the past eight years, the Division has brought only sixteen cases based on testing for discrimination against all four of the protected classes that are the subject of the testing program – race, national origin, disability or familial status.¹⁹ In describing its testing program on its website, the Division notes that it has filed 85 cases based on evidence generated by the program since its inception.²⁰ One may therefore assume that the remaining 69 cases were filed in the years from 1991 to 2000.

¹⁸ Fair Hous. Testing Program, Civil Rights Div., U.S. Dep't of Justice, available at <http://www.usdoj.gov/crt/housing/fairhousing/testing.htm>.

¹⁹ Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep't of Justice, Cases Developed Through Testing Program, available at <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#testing>. The eight cases consist of the following: *United States v. C.F. Enterprises*, No. 08-61295 (S.D. Fla. filed Aug. 13, 2008); *United States v. Regent Court Apartments*, (case number unavailable) (E.D. Mich. filed Jan. 18, 2008); *United States v. Pine Properties*, No. 07-11819 (D. Mass filed Sept. 26, 2007); *United States v. Dawson Development*, No. 05-0095 (N.D. Ala. filed Jan. 18, 2005); *United States v. B&S Properties of St. Bernard*, No. 04-1063 (E.D. La. filed Apr. 15, 2004); *United States v. Fair Plaza Associates*, No. 02-1181 (D.N.M. filed Sept. 19, 2002); *United States v. Meadows of Jupiter*, No. 02-80811 (S.D. Fla. filed Aug. 27, 2002); *United States v. Habersham Properties*, No. 02-1531 (N.D. Ga. filed June 5, 2002).

²⁰ Fair Hous. Testing Program, Civil Rights Div., U.S. Dep't of Justice, available at <http://www.usdoj.gov/crt/housing/fairhousing/testing.htm>.

Remarkably, the Division has filed only eight testing cases involving race or national origin discrimination in the past eight years.²¹ This low number proves more disappointing given the ostensible effort by the Division to enhance its testing in this area as part of its “Operation Home Sweet Home” initiative in 2006. According to testimony by Deputy Assistant Attorney General for Civil Rights Jessie Liu before the Judiciary Committee of the U.S. House of Representatives, the Division “committed additional resources to [the] fair testing program and enhanced [its] targeting.”²² Although the Division apparently conducted more than 500 paired tests in fiscal year 2007, the testing program has produced only three race or national origin cases.²³ The large number of tests that have not resulted in litigation suggests either that the testing program is highly ineffective, or that the Division has refused to authorize litigation despite sufficient testing evidence.

Unfortunately, the only testing cases that were filed by the Division addressed rental discrimination. The more complicated, resource-intensive sales cases were not brought despite the fact that the charter of the Division’s testing program expressly states that it is designed to challenge discriminatory practices in the sale of housing.²⁴ Indeed, sales testing has long been a part of the testing protocol in fair housing law.1 *See, e.g., Chicago v. Matchmaker Real Estate Sales Ctr.*, 982 F.2d 1086 (7th Cir. 1992) (upholding steering claims by the City of Chicago and others against real estate agents); *Heights Cmty. Cong. v. Hilltop Realty*, 774 F.2d 135 (6th Cir. 1985) (racial steering proven through use of “checkers” contracted by City of Cleveland Heights for audit).

In fact, the only case filed by the Division to include any form of sales testing relied on tests performed by the National Fair Housing Alliance, not the Civil Rights Division. In *United States v. S&S Group, Ltd.*, No. 08-04099 (N.D. Ill. filed July 18, 2008), the National Fair Housing Alliance (NFHA) conducted testing of the sales practices of ReMax East-West. After the testing revealed steering based on race and/or national origin, NFHA filed a complaint with HUD. When HUD determined that reasonable cause existed to believe that discriminatory housing practices had occurred, NFHA chose to rely

²¹ Five more cases were based on disability discrimination. *United States v. Nat’l Prop. Inc.*, No. 2:07-00434 (E.D. Pa. filed Feb. 1, 2007); *United States v. Douglass Mgmt. Inc.*, (case number unavailable) (D.D.C. filed Jan. 30, 2006); *United States v. Compton Place Assoc.*, (case number unavailable) (M.D. Fla. filed Apr. 11, 2003); *United States v. Resurrection Ret. Cmty.*, (case number unavailable) (N.D. Ill. filed Oct. 17, 2002); *United States v. Edward Rose & Sons*, No. 02-73518 (E.D. Mich. filed Sept. 3, 2002). Three more cases were familial status cases. *United States v. Pecan Terrace*, (case number unavailable) (W.D. La. filed Sept. 30, 2008); *United States v. Adams*, No. 07-2108 (W.D. Ark. filed Sept. 28, 2007); *United States v. Fountainbleau Apartments*, No. 1:06-104 (E.D. Tenn. filed Apr. 27, 2006). Two of the race cases also alleged familial status discrimination. *United States v. Fair Plaza Assoc.*, No. 02-1181 (D.N.M. filed Sept. 19, 2002); *United States v. Meadows of Jupiter*, No. 02-80811 (S.D. Fla. filed Aug. 27, 2002).

²² *Hearing Before the Judiciary Comm., U.S. House of Representatives, Enforcement of the Fair Housing Act of 1968*, 110th Cong., 2d Sess. (June 12, 2008) (testimony of Jessie Liu, Dep. Assist. Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice).

²³ *Id.*

²⁴ Fair Hous. Testing Program, Civil Rights Div., U.S. Dep’t of Justice, *available at* <http://www.usdoj.gov/crt/housing/fairhousing/testing.htm>.

on the election procedure under the Fair Housing Act and have the Civil Rights Division file the complaint.

In our view, the lack of testing cases simply represents a missed opportunity for the Division to investigate and then prosecute cases beyond those it files under the election procedure of the Fair Housing Act. Private fair housing organizations have conducted rental, sales, lending and insurance testing for decades, with much success. The Division is now able to contract with fair housing organizations for assistance in conducting the testing, a development we applaud. Yet the docket reveals that the Bush Administration has relied on a fair housing organization to conduct its testing on only one occasion.²⁵

There is ample opportunity for the Division to cooperate with fair housing organizations in order to locate cases that are priorities for the Division. For example, in a case filed in September 2008, *United States v. Morgan*, No. 4:08-00176 (S.D. Ga. filed Sept. 8, 2008), the Savannah-Chatham County Fair Housing Council conducted testing which resulted in claims by the Division alleging race and sex discrimination. We view this as a positive development and an example of cooperation between the Division and private organizations that has not existed in recent times. Throughout the Bush Administration, testing by organizations was either conducted prior to the filing of a HUD charge or generated by the Division itself or through an organization with which it contracted. In this instance, the Civil Rights Division was able to file a case based on evidence forwarded by a fair housing organization.

In this spirit, we suggest that the Division conduct more outreach efforts to fair housing organizations as part of its search for systemic and other impact litigation. There are dozens of private fair housing organizations. As Shanna Smith, President of the National Fair Housing Alliance testified before the Judiciary Committee of the U.S. House of Representatives, these organizations are at the forefront in identifying, testing and litigating fair housing complaints and therefore could be instrumental in providing information and case referrals.²⁶ There is no substitute for the Division's ability to acquire information about issues and matters happening on the ground. Such outreach could assist the Division in identifying and pursuing targeted affirmative investigations to address large scale problems and also to monitor progress. The Division is uniquely situated to conduct these investigations in terms of its profile and resources, and the investigations themselves could lead to greater compliance. As Ms. Smith noted in her testimony, however, cooperation with the private fair housing community will succeed only if accompanied by

²⁵ *United States v. Meadows of Jupiter*, No. 02-80811 (S.D. Fla. filed Aug. 27, 2002). We could locate three such instances during the previous administration, although that docket is known to be incomplete. *United States v. Wellston Corp.*, No. 00-1056 (E.D. Wis. filed July 31, 2000); *United States v. Stevens & Anstine*, (case number unavailable) (E.D. Pa. filed Apr. 28, 2000); *United States v. Garden Homes Mgmt. Corp.*, No. 99-2900 (D.N.J. filed June 21, 1999).

²⁶ *Hearing Before the Judiciary Comm., U.S. House of Representatives, Enforcement of the Fair Housing Act of 1968*, 110th Cong., 2d Sess. (June 12, 2008) (testimony of Shanna Smith, Pres. and Chief Executive Officer, Nat'l Fair Hous. Alliance).

a strong commitment from leadership of the Civil Rights Division to full enforcement of the law.²⁷

In a similar vein, the Division should also consider and explore new ways to develop, enhance and improve its relationship with other community groups and local civil rights organizations. These community contacts are certain to play an increasingly important role in civil rights enforcement going forward. These individuals enhance the quality of federal civil rights enforcement by helping with the development of the kinds of evidence and testimony necessary to enforce and prosecute these cases effectively. In recent years, certain litigation postures and choices taken by the Attorney General have created much distance between the Justice Department and community organizations. It is important that these relationships be repaired and restored going forward. Greater coordination between the Community Relations Service and the Civil Rights Division may be one way to bring about improvement.

Fair Lending

One of our strongest criticisms of the federal government's recent enforcement efforts arises in the area of lending discrimination against homebuyers. In the past eight years, the Civil Rights Division has brought only five home mortgage discrimination cases on behalf of persons in a minority group.²⁸ All of the cases involved redlining claims and they must represent only a percentage of what could have been filed with an aggressive enforcement approach.²⁹ More importantly, the cases did not at all address the pernicious practices – increasingly common over the past decade – involving predatory lending and reverse redlining, which have now gripped our financial system.

The first lending case filed by this administration was *United States v. Mid America Bank*, No 1:02-9458 (N.D. Ill. filed Dec. 30, 2002). The Division filed and settled claims of redlining, which involved the failure to market and provide lending products in predominantly minority areas in Chicago. Two years later, the Division filed and settled another redlining case, *United States v. Old Kent Financial Corp.*, No. 04-71879 (E.D. Mich. filed May 19, 2004), alleging a failure to make business and residential loans in predominantly African-American neighborhoods in Detroit. The case was characterized as the first settlement of claims involving discrimination in commercial lending. That same year, the Division filed and settled another redlining case, *United States v. First American Bank*, No. 04-4585 (N.D. Ill. filed July 13, 2004). The complaint alleged a failure to

²⁷ *Id.*

²⁸ Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep't of Justice, Fair Lending Enforcement, available at <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#lending>. The Division has filed six other cases under the Equal Credit Opportunity Act, alleging discrimination on the basis of gender, marital status, race or national origin in the provision of consumer loans.

²⁹ According to Shanna Smith, private fair housing organizations processed 1,245 lending complaints in 2007. *Hearing Before the Judiciary Comm., U.S. House of Representatives, Enforcement of the Fair Housing Act of 1968*, 110th Cong., 2d. Sess. (June 12, 2008) (testimony of Shanna Smith, Pres. and Chief Executive Officer, Nat'l Fair Hous. Alliance).

market and provide lending products to predominantly minority neighborhoods in Chicago. More than two years later, the Division filed and settled another redlining case. In *United States v. Centier Bank*, No. 06-344 (N.D. Ind. filed Oct. 13, 2006), the Division alleged a failure to market and provide lending products to predominantly African-American and Latino neighborhoods in Gary, Indiana. The fifth case was filed just three weeks ago, *United States v. First Lowndes Bank*, No. 2:08-cv-00798 (M.D. Ala. filed Sept. 29, 2008). That suit alleges that African Americans were charged higher interest rates on manufactured housing loans in Alabama.

In stark contrast, the Civil Rights Division under the previous Administration filed at least more than twice that number of fair lending cases on behalf of minorities, including African Americans, Latinos and Native Americans.³⁰ In fact, the first mortgage lending case ever filed by the United States was filed under George H.W. Bush's Administration, *United States v. Decatur Federal Savings & Loan*, No. 92-2198 (N.D. Ga. filed Sept. 17, 1992). Based in Atlanta, that case brought national attention to the practice of redlining and heralded a decade of strong fair lending enforcement by the Civil Rights Division. In 1996, the Division brought its first predatory case, charging a Long Beach lender with unlawfully charging excessive rates to minority, female and elderly borrowers. *United States v. Long Beach Mortgage Co.*, No. 96-6159 (C.D. Cal. filed Sept. 5, 1996). And, in a combined action in March 2000, the Civil Rights Division, the Department of Housing and Urban Development, the Federal Trade Commission, and the United States Attorney for the Eastern District of New York filed suit against Delta Funding, which was engaged in subprime mortgage lending in more than a third of the states with its business concentrated in predominantly minority areas in Brooklyn and Queens. *United States v. Delta Funding Corp.*, No. CV-00-1872 (E.D.N.Y. filed Mar. 30, 2000). The suit alleged that Delta, which obtained its loans through mortgage brokers, charged higher broker fees to African-American females in securing home mortgage loans. The complaint was resolved with a settlement agreement that applied to the company's operations nationwide and required the Delta, *inter alia*, to refuse to fund loans with discriminatory or unearned broker fees and to ensure that loans are not made to persons who cannot afford the payments.

We are extremely troubled by the fact that this administration has not filed a single mortgage lending case addressing a predatory practice or reverse redlining, in which minorities are targeted for exploitative loan products.³¹ Numerous studies have demonstrated the prevalence of these discriminatory practices. For example, in a study of home-loan data from 2006, the National Community Reinvestment Coalition found that middle- to upper-income African Americans were more than twice as likely as similar whites to receive a high-cost mortgage in 155 metropolitan areas, or over 70% of the

³⁰ Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep't of Justice, Fair Lending Enforcement, available at <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#lending>. The docket reflects at least thirteen such cases.

³¹ On its website, the Division has a detailed description of predatory lending practices but does not identify a single recent case. Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep't of Justice, Fair Lending Enforcement Program, available at http://www.usdoj.gov/crt/housing/bl_01.htm

metropolitan areas they studied.³² Low- to moderate-income African Americans were more than twice as likely as whites to receive a high-cost mortgage in almost half of the metropolitan areas.³³ In a time when economic markets around the world are collapsing as a result of the subprime crisis, it is simply unfathomable that the federal government has not used federal civil rights laws to curb these abuses.

In the meantime, cities, states, private attorneys and public interest organizations have had to step in to try to fill the gap left by the federal government. At the Commission's hearing in Los Angeles, John Relman discussed the lawsuit he filed in January 2008 on behalf of the City of Baltimore. The City sued Wells Fargo, charging the bank with discriminatory lending, which led to disproportionately high foreclosure rates in Baltimore's African American neighborhoods. Complaint, *Mayor & City Council of Baltimore v. Wells Fargo Bank*, No. 08-CV-0062 (D. Md. filed Jan. 8, 2008). The Attorneys General of New York and Massachusetts have brought significant suits challenging predatory lending practices aimed at minorities. In July 2008, the New York Attorney General announced a \$1 million settlement following its investigation of GreenPoint Mortgage (a subsidiary of Capital One Financial Corporation) for discrimination in mortgage fees against African-American and Latino customers.³⁴ The Massachusetts Attorney General sued H&R Block and its subsidiary Option One Mortgage Corporation in June of this year, alleging that they "charged black and Latino borrowers higher points and fees than similarly situated white . . . borrowers." Complaint ¶ 14, *Massachusetts v. H&R Block, Inc.*, No. 08-2474 (Mass. Super. Ct. filed June 3, 2008).

In 2007, the NAACP filed a class action suit against fourteen national mortgage lenders in federal court in Los Angeles, based on evidence that African Americans receiving subprime mortgage loans from those companies were over 30% more likely to receive a higher-rate loan than white borrowers with the same qualifications. Complaint ¶ 1, *NAACP v. Ameriquest Mortgage Co.*, No. 07-0794 (C.D. Cal. filed July 11, 2007). Also in 2007, the National Community Reinvestment Coalition sued Accredited, Inc., a subprime mortgage lender, and its parent company, Accredited Holding, alleging a pattern and practice of discrimination against African-American and Latino homeowners in major metropolitan areas across the United States. In August of this year, the federal district court rejected the defendants' motion to dismiss that case. See *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, No. 07-1357, 2008 WL 3974310, at *8 (D.D.C. Aug. 28, 2008) (holding that plaintiffs properly stated a disparate impact claim under the Fair Housing Act).

These represent just a few of the many challenges to unfair lending practices in minority communities that have been brought over the last eight years. Yet the Civil

³² NAT'L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA'S METROPOLITAN AND RURAL AREAS 13 (2008).

³³ *Id.* at 12.

³⁴ Press Release, Office of the N.Y. Att'y Gen., Attorney General Cuomo Obtains Approximately \$1 Million for Victims of GreenPoint's Discriminatory Lending Practices (July 16, 2008), available at www.oag.state.ny.us/media_center/2008/jul/july16a_08.html.

Rights Division found itself unable to dedicate its resources to even *one* of these types of reverse redlining cases – a shocking omission, particularly now that we are beginning to understand the true cost of the subprime lending industry’s practices, both for communities of color and the nation as a whole.

Multi-Disciplinary Approach

The Legal Defense Fund suggests that the Civil Rights Division could do much more work at the intersection of education and housing. Although the Division maintains a “School and Housing Opportunities Initiative,” there are only two cases listed on it.³⁵ In *United States v. Tunica County School District*, the Division reported that a county board of supervisors adopted a resolution to implement a county-wide affordable housing plan, pursuant to a consent decree adopted in 1999.³⁶ And in a decades-old housing and education case, *United States v. Yonkers Board of Education*, the Division announced a settlement agreement in 2007 that ended court supervision but required continued implementation of a housing desegregation plan.³⁷

Given our institutional knowledge about school integration, we recognize the deep structural role that residential segregation plays in perpetuating inequality in our nation’s schools.³⁸ The Caucus for Structural Equality has found that “[t]he racial makeup of residential neighborhoods is the most important determinant of the racial composition of the schools within them.”³⁹ It is therefore incumbent upon all of us to focus on housing as an important area of opportunity in which to promote integration in education and in the workforce, as well as in residential patterns themselves.

In our view, a focus by the Civil Rights Division on the interface between housing patterns and educational systems could not be more timely. Last year, the Supreme Court limited the tools available to local school districts to promote school integration. In

³⁵ Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep’t of Justice, School and Housing Opportunities Initiative, available at <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#nat>.

³⁶ Consent Decree, *United States v. Tunica County Sch. Dist.*, (case number unavailable) (N.D. Miss. 1999); see also Hous. & Civil Enforcement Section, Civil Rights Div., U.S. Dep’t of Justice, School and Housing Opportunities Initiative, available at <http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#nat>.

³⁷ Settlement Agreement, *United States v. Yonkers Bd. of Educ.*, No. 80-6761 (S.D.N.Y. Apr. 1, 2007).

³⁸ There is a two-way link. Residential segregation often leads to educational segregation: “In communities where we find racially segregated housing patterns, however, assigning students based solely on geographic proximity to schools can result in significant racial isolation.” NAACP LEGAL DEF. & EDUC. FUND, INC., STILL LOOKING TO THE FUTURE: VOLUNTARY KI-12 SCHOOL INTEGRATION 21 (2008). Efforts to promote educational integration can lead to residential integration. “A comprehensive school integration plan can actually counter residential segregation. In fact, after decades to court-ordered school integration, residential segregation actually declined across the South in the 1990s.” *Id.* at 47.

³⁹ Brief of the Caucus for Structural Equity as Amicus Curiae Supporting Respondents at 17, *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007) (Nos. 05-908, 05-915) (emphasis added). The brief also notes that “[s]egregated housing patterns fuel segregated classrooms and disparate educational outcomes. In turn, low quality public schools reinforce segregated housing patterns due to the strong correlation between housing prices and public school quality In short, school segregation is both an important outcome and a crucial source of residential segregation.” *Id.* at 26.

Parents Involved in Community Schools v. Seattle School District No. 1, the Court held that the Seattle and Louisville school districts' race-conscious integration policies violated the Equal Protection Clause of the Constitution.⁴⁰ The Court's resistance to voluntary integration plans adopted by school districts places renewed attention on fair housing strategies in order to promote equal educational opportunities.

This is particularly important for the Civil Rights Division. In the past few years, the Department of Justice has taken legal positions which have not only abandoned its traditional role in school desegregation cases, but which have turned the Department in the opposite direction. Nowhere has this been more apparent than in the recent Supreme Court consideration of the voluntary school integration cases. Since the *Brown v. Board of Education* cases, in which the Department argued in support of those challenging school segregation laws, the federal government has played a central role in school desegregation cases. But in the Seattle and Louisville cases, the Justice Department opposed the use of any voluntary race-conscious action to promote integration in public schools.⁴¹ This position constituted a reversal of historic proportions by the Justice Department, which throughout its fifty-year existence has forcefully advocated for equal educational opportunity. Ultimately, five members of the Supreme Court disagreed with the arguments advanced by the Department, and permitted our educational institutions to continue to rely on certain race-conscious methods to pursue diversity and/or avoid racial isolation in schools.⁴²

Amicus Briefs

The Civil Rights Division can also enhance its enforcement role by filing more amicus briefs in fair housing cases. Amicus filings can be a very efficient use of the Division's time and resources, because they permit the Division to share its important fair housing perspective with the federal courts through targeted briefs or argument. The presence of the federal government as a friend-of-the-court in civil rights litigation can be powerful. In situations in which courts are looking for guidance on the application of fair housing law, an amicus brief by the government can be very helpful to the development of the law. As the government itself has stated in one such amicus brief, "Any decision by this Court concerning [the Fair Housing Act] will set an important precedent that could impact the enforcement efforts of the United States. The United States, therefore, has an interest in setting forth its views as to these issues."⁴³

It appears that the filing of amicus briefs has decreased in recent years. According to the Division's docket, a number of amicus briefs in cases involving discrimination on

⁴⁰ 127 S. Ct. 2738.

⁴¹ Brief for the United States As Amicus Curiae Supporting Petitioner, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915).

⁴² *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2811 (Breyer, J., dissenting.)

⁴³ Amicus Brief of United States at 1-2, *Equal Rights Ctr. v. Avalon Bay Cmities.*, No. 05-26265 (D. Md. June 26, 2008).

the basis of race and national origin were filed in the 1990s.⁴⁴ However, we could locate only one such brief filed during the current Administration.⁴⁵ A number of briefs were filed in familial status cases and disability cases.⁴⁶ We urge the Division to increase its filings on behalf of all classes protected under the Fair Housing Act.

Finally, we urge the Division to take every opportunity to weigh in on the critical issues of the day when it comes to fair housing law. For example, the Ninth Circuit recently considered the important issue of when the statute of limitations is triggered in claims where the alleged discriminatory practice is the “failure to design and construct” a multifamily dwelling in accordance with the Fair Housing Act. *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008). The plaintiff sued within two years of leasing an apartment, arguing under the “continuing violation” theory that the design and construction violation did not terminate until the defects were cured. In an *en banc* decision, the Ninth Circuit rejected that argument, holding that the limitations period began upon the completion of the construction period, when the last certificate of occupancy is issued. *Id.* at 466. The *Garcia* decision significantly curtails use of the continuing violation doctrine, which has been widely used in fair housing cases. The Civil Rights Division was notably absent.

Conclusion

The Legal Defense Fund is well aware that the nation’s work in eradicating racial discrimination remains unfinished business. Sadly, there are many forms of discrimination that still permeating our social structures and keep African-Americans and other minority communities from full participation in our society. The Civil Rights Division of the Justice Department has an important and unique role to play in enforcing our nation’s civil rights laws. Under any Administration, it is imperative that the Division place the law above politics and fulfill its obligations as the nation’s principal law enforcement agency.

Thank you for the opportunity to testify. I would be happy to answer any questions.

⁴⁴ See, e.g., Amicus Brief of United States, *Veles v. Lindow*, 2000 U.S. App. LEXIS 27672 (9th Cir. Nov. 1, 2000) (No. 99-15795); Amicus Brief of United States, *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000) (No. 98-3597); Amicus Brief of United States, *Cason v. Nissan Motor Acceptance Corp.*, No. 3-98-0223 (M.D. Tenn. July 31, 2000); Amicus Brief of United States, *Hargraves v. Capitol City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000) (No. 98-1021); Amicus Brief of United States, *Metro. St. Louis Equal Hous. Opportunity Council v. Gundacker Real Estate Co.*, No. 98-00837 (E.D. Mo. 1998).

⁴⁵ Amicus Brief of United States, *Sherman Ave. Tenants Assoc. v. District of Columbia*, No. 00-00862 (D.D.C. June 12, 2001).

⁴⁶ See, e.g., Amicus Brief of United States, *Hamad v. Woodcrest Condo. Ass’n*, No. 00-72555 (E.D. Mich. Nov. 5, 2003) (familial status); Amicus Brief of United States, *Equal Rights Ctr. v. Avalon Bay Cmities.*, No. 05-26265 (D. Md. July 1, 2008) (disability); Amicus Brief of United States, *Jeffrey O. v. City of Boca Raton*, No. 03-80178 (S.D. Fla. Feb. 16, 2007) (disability).