

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

**UNEQUAL OPPORTUNITY: A CRITICAL
ASSESSMENT OF THE U.S. COMMITMENT TO THE
ELIMINATION OF RACIAL DISCRIMINATION**

A Response to the 2007 Periodic Report of the United States
in Preparation For Country Review of the United States By the United Nations
Committee on the Elimination of Racial Discrimination



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Lawyers' Committee For Civil Rights Under Law

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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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Morrison & Foerster LLP greatly appreciates the opportunity to have worked with its long-standing client, the Lawyers' Committee, in producing this Shadow Report on the United Nations Convention on the Elimination of All Forms of Racial Discrimination. Morrison & Foerster LLP views the Shadow Report as contributing to the advancement of civil rights through this important international treaty reporting process.

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UNEQUAL OPPORTUNITY: A CRITICAL ASSESSMENT OF THE U.S. COMMITMENT TO THE ELIMINATION OF RACIAL DISCRIMINATION

INTRODUCTION AND EXECUTIVE SUMMARY

We welcome the Periodic Report of the United States of America (April 2007) ("2007 U.S. Report")¹ to the United Nations Committee on the Elimination of Racial Discrimination ("CERD Committee"). The 2007 U.S. Report outlines past and existing legislative, judicial, administrative, and other measures through which the United States ("U.S. Government") has given effect to its undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention") in accordance with Article 9 of the Convention.

While the 2007 U.S. Report highlights various advances achieved to date and identifies obstacles to the U.S. Government's compliance with the Convention, it does not fully address approaches for eliminating racial discrimination that continue to plague our society. Thus, while the U.S. Government has taken significant strides to eliminate *de jure* discrimination and has established certain remedial structures, it has failed to meet its obligation under the Convention to identify and eradicate the *de facto*, systemic discrimination that continues to exist in the United States.

This non-governmental organization ("NGO") Shadow Report ("Shadow Report") has been produced as a result of concerns of the Lawyers' Committee for Civil Rights Under Law that the 2007 U.S. Report does not reflect the reality of racism in American society today. Its purpose is to supplement the 2007 U.S. Report with additional information and provide an enhanced picture of how racism and discrimination continue to affect different communities in the United States. As discussed in greater detail in this Shadow Report, the current conditions in the United States with respect to enforcement of laws, federal policies, and judicial interpretations of laws, suggest that progress toward the goals of the Convention, including to guarantee for all individuals the full and equal enjoyment of human rights and fundamental freedoms, has stalled, and in some cases, has reversed.

This Shadow Report focuses on key areas of concern, specifically voting rights and electoral reform, equal justice, employment discrimination, affirmative action, hate speech and racially-motivated hate crimes, environmental justice and health care, housing and community development issues, minority business issues, and education. It also provides proposed recommendations for the CERD Committee to consider with respect to its review of the 2007 U.S. Report.

The 2007 U.S. Report marks a continuation of a trend toward applying international human rights conventions only to the extent that U.S. domestic laws already exist to implement the Convention's provisions. In 2001, the CERD Committee found that the U.S. Government interpreted the Convention narrowly, to the benefit of its own domestic law and at the expense of implementation of the Convention. The U.S. Government's justification for refusing to adopt international human rights law rests mainly on the claim that U.S. law

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provides adequate human rights protection. The persistence of racial discrimination and inequalities in the United States, as documented in this Shadow Report and elsewhere, refutes this claim.

Voting Rights. The principal fault of the 2007 U.S. Report regarding political and voting rights is the excessive focus on the purpose and reason for the laws and policies at issue coupled with a disregard for the ways in which these laws have been recently interpreted and implemented, sometimes with discriminatory effects. While the laws discussed by the United States, such as the Help America Vote Act, were indeed enacted to increase access to the franchise, they are increasingly interpreted in ways that have the opposite impact on minority voters. In addition, a phenomenon of increased politicization of voting rights enforcement has been observed with a profoundly negative impact on minority voting rights. Federal enforcement of laws designed to expand the franchise, such as increased voter registration, have recently been interpreted in ways which go against the very purpose of the laws' enactment. Voter identification laws, fueled by unsupported claims of voter fraud, have disproportionately impacted minority voters. The United States also continues to disenfranchise more incarcerated persons than any other country in the world, resulting in an egregious impact on racial minorities. These significant problems that remain in the area of voting rights could be solved either by improved interpretation and enforcement of existing laws or enactment of new laws to substantially increase access to the ballot.

Equal Justice and Access to Justice. In the area of equal justice and access to justice, racial minorities continue to suffer a higher incarceration rate than non-minorities. With an adversarial legal system designed by and for lawyers, meaningful access to courts in the United States means access to counsel. To truly provide equal justice, the U.S. Government and its state and local governments should provide counsel in all proceedings involving criminal charges and in civil proceedings involving basic human needs. In addition, statistics continue to show a disturbing link between race and the imposition of the death penalty. The United States has failed to ensure that the death penalty is not imposed as a result of the economic, social, and educationally disadvantaged position of the convicted person, such as by imposing a moratorium on the death penalty, as recommended by the CERD Committee in 2001.

Employment. Pronounced disparities between racial minorities and others continue in unemployment, earnings and poverty rates, leading to the conclusion that discrimination is preventing minorities from receiving equal employment opportunities. The United States has a long history of discrimination in the workplace, and race, color and national origin continue to have a pervasive effect on the experience of its workers. A predominant theme of the past several years has been the lack of enforcement of federal laws designed to remedy discrimination in employment for minorities by the government agencies tasked with this responsibility. The types of cases pursued reflect a marked reduction in the number of disparate impact cases, which seek broad reform of employment selection practices that adversely affect the employment opportunities for a minority group. A significant number of cases filed by the federal agency charged with enforcement of these laws have been "reverse

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discrimination” cases, alleging discrimination against Whites. In addition, recent judicial interpretations of federal labor laws have resulted in the strengthening of immigration enforcement by weakening worker protections, leading to employment discrimination at the intersections of race and national origin. National security and fears of terrorism justifications also have been used to limit protections against discrimination, or even fuel discrimination, based on national origin, religion, race, and color. These realities show that while efforts have been made to address discrimination in the U.S. workplace, there remains much room for improvement.

Affirmative Action. The Convention obligates States Parties to take special and concrete measures to ensure adequate development and protection of racial and ethnic groups and individuals belonging to them. “Affirmative action” measures — or measures to increase opportunities for racial and ethnic groups in employment, education and contracting to counter the effects of long-term discrimination against such groups — taken by the U.S. Government have failed to achieve full access and equality. In practice, the U.S. Government has imposed significant limitations on affirmative action programs. Judicial review of affirmative action measures in the context of education, employment and government contracting, require that such measures be narrowly tailored to further a compelling governmental interest and are strictly construed. In the employment arena, public employers must have convincing evidence of prior discrimination, which is more than mere societal discrimination, before it can implement affirmative action programs. Affirmative action has been distorted to promote “color blindness” rather than to ensure adequate development and protection of minorities.

Hate Speech and Racially-Motivated Hate Crimes. The Convention requires States Parties to penalize certain conduct, including dissemination of ideas based on racial superiority or hatred and acts of violence or incitement to violence against any race or group of persons of another color or ethnic origin. Hate speech and hate crimes persist in the United States. A recent example, the “Jena 6” incident in the state of Louisiana, where, after a string of racially-charged incidents six Black teenagers were prosecuted for the beating of a White classmate, garnered international attention as a symbol of racial injustice. Although freedom of speech is guaranteed by the First Amendment to the U.S. Constitution, as reflected in the 2007 U.S. Report, it does not prevent the U.S. Government from taking other measures to ensure that acts of violence, or speech that incites violence against a racial group is prohibited and prosecuted.

Environmental Justice and Healthcare Disparities. Environmental racism and health care disparities, especially as environmental pollution and myriad health problems associated with poor air and water quality and toxic exposure disproportionately burden low income communities and people of color. Such disparities in the United States primarily impact the poor, uninsured, and other vulnerable and high risk populations. Many Americans continue to face inequalities in health care coverage, provider access and overall health status.

Housing and Community Development. In the area of housing and community development, the United States has not taken all appropriate measures without regard to race to ensure the enjoyment of, in particular, the right to adequate housing, as recommended by the CERD

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Committee. Despite the recommendations of the CERD Committee and the requirements of the Convention, the United States has made little progress in addressing racial disparities relating to access and enjoyment of housing. While the U.S. Government correctly acknowledges the challenges posed by racial discrimination in housing, the 2007 U.S. Report provides an incomplete assessment of the problem. *De facto* segregation persists in many metropolitan and rural areas throughout the country. Discrimination in the private housing market remains prevalent. Public housing remains substandard and insufficient at both the state and federal levels.

Minority Business. The representation of minority-owned businesses in various economic sectors, by numbers and by sales receipts, continues to be well below minorities' representation in the population as a whole as compared to their White-owned counterparts. Disparities exist not only in the formation of minority-owned businesses, but also in the development and growth of these businesses. U.S. Government policies as to lending and contracting, and judicial interpretation of remedial programs to address under-representation of minorities in government contracting have worked to halt advancements towards full and equal opportunities.

Education. The U.S. Government has failed to prevent apartheid conditions in public schools and to promote access to quality educational opportunities for racial and ethnic minority groups historically and presently prone to discrimination—leading to large achievement gaps, high rates of suspension, expulsion, and criminal sanctions for minority students, and low graduation rates for minority and English Language Learner students. These circumstances diminish opportunities for the full and equal enjoyment of economic opportunities, human rights, and fundamental freedoms. The U.S. Government, including federal agencies charged with assuring access to equal educational opportunities for all individuals, have all but abandoned school integration and diversity as a matter of policy. Moreover, the U.S. Government has opposed voluntary and conscious efforts by communities nationwide to reduce extreme racial and ethnic isolation in grades K-12 and open pathways to higher education for minority students. As judicial remedies for racial discrimination weaken and federal legislation proves inadequate, it is imperative that the U.S. Government take far-reaching structural reforms to comply with the Convention and eliminate racial disparities in public education.

Summary of Key Recommendations:

In addition to other recommendations discussed in this Shadow Report, the Lawyers' Committee proposes the following recommendations for the CERD Committee's consideration:

- The U.S. Government should vigorously enforce federal voting rights laws and ensure that the taint of political considerations is removed from its enforcement of these laws.
- The U.S. Government should support efforts to repeal or revise the most burdensome felon disenfranchisement laws.

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- The U.S. Government should use all appropriate means to fulfill the U.S. Constitution's promise of equal justice in both civil and criminal matters, and its obligation under the Convention to guarantee the right of everyone to equality before the law and equal treatment before the tribunals and all other organs administering justice.
- The U.S. Government should recognize a right to counsel in civil proceedings for economically disadvantaged individuals especially when basic human needs are at stake, such as shelter, sustenance, safety, health, or child custody.
- The U.S. Government should impose a moratorium on imposition of the death penalty until it can ensure that that the penalty is not imposed as a result of racial bias or as a result of the economically, socially and educationally disadvantaged position of the convicted person.
- The U.S. Government should show its commitment to protecting employment rights by using all appropriate means to ensure federal agencies protect those rights and promote equal treatment.
- The U.S. Government, in the face of narrow doctrinal interpretations by the courts, should encourage and support the enactment of laws to protect the employment rights of minorities and prevent disparate impact on minorities.
- The U.S. Government should recognize its mandatory obligations under the Convention to use "special measures," and the goals of full access and equality to education, employment, and contracting. The U.S. Government should cease relying on structural and constitutional limitations to avoid promoting positive change and focus on the implementation of special measures, including using all appropriate means to support voluntary efforts to promote diversity.
- The U.S. Government should create appropriate infrastructure to monitor the effectiveness and fairness of current affirmative action programs in education, employment, and contracting, and to generate additional effective affirmative action measures.
- The U.S. Government should work to enact laws to close the gaps that currently exist in federal hate crimes laws by making it easier to prosecute those who commit racially motivated crimes and by increasing the reporting accuracy of hate crime incidents.
- The U.S. Government should use all appropriate means to ensure that federal agencies collect, analyze, and maintain data regarding the exposure of communities to hazardous materials.
- The U.S. Government should take all appropriate action to address environmental protection standards for schools receiving federal funds, including guidelines for indoor air quality and physical placement of schools.

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- The U.S. Government should take all appropriate action to ensure enforcement of environmental laws and the protection of minority and low-income communities disproportionately impacted by environmental hazards.
- The U.S. Government should set specific benchmarks for the speedy investigation and resolution of complaints of racial discrimination by those in the housing market, and take all appropriate measures to ensure appropriate redress of such complaints.
- The U.S. Government should allocate public housing assistance to encourage integration and diversity in both rural and metropolitan areas.
- The U.S. Government should use all appropriate means to improve the prospects for development and success of minority-owned businesses such as adoption of lending goals with meaningful enforcement mechanisms, review of federal contracting processes, and mentoring programs.
- All levels of government in the United States should enact laws that adopt an effects test to measure *de facto* barriers to equal educational opportunities. Concurrently, laws should provide safeguards that protect against practices that have either the purpose or the effect of discrimination on the basis of race.
- All levels of government in the United States should reject the use of the 'colorblind' doctrine in legislation and government education policies, which is fundamentally inconsistent with the obligation under the Convention to use special measures to promote the adequate development of quality educational opportunities to those historically denied such opportunities and those currently facing *de facto* barriers to quality educational opportunities.

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CHAPTER 1: COMPARATIVE LEGAL ANALYSIS OF THE CERD COMMITTEE'S 2001 RECOMMENDATIONS AND THE UNITED STATES REPORT TO THE CERD COMMITTEE OF APRIL 2007

Introduction.

1. The 2007 U.S. Report marks a continuation of a trend toward applying international human rights conventions only to the extent that U.S. domestic laws already exist to implement the Convention's provisions. Critics of the U.S. Government's record on human rights state that "in the cathedral of human rights, the U.S. Government is more like a flying buttress than a pillar - choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of the system."² One manifestation of the U.S. Government's "flying buttress" policy is the set of reservations, understandings and declarations ("RUDs") it attaches to treaty ratifications. RUDs are attacked as a thinly veiled effort to ensure that human rights treaties "effect virtually no change in domestic law."³ In 2001, the CERD Committee found that the U.S. Government interpreted the Convention narrowly, to the benefit of its own domestic law and at the expense of implementation of the Convention. The CERD Committee expressed deep concern over discrimination in the United States and issued a number of recommendations to the U.S. Government in the CERD Committee's 2001 Recommendations.⁴

2. There is a notable discrepancy between the narrow U.S. law on discrimination and the Convention's broader understanding of discrimination. In part, but only in part, this gap is due to the U.S. Government's RUDs. The U.S. Government's justification for refusing to adopt international human rights law rests mainly on the claim that U.S. law provides adequate human rights protection.⁵ However, the persistence of racial discrimination and inequalities in the United States, as documented in this Shadow Report and elsewhere, refute this claim.⁶

3. The U.S. Government responses to the CERD Committee's concerns and recommendations fall short for several reasons. First, the U.S. Government's responses show that, by and large, it has not followed the CERD Committee's recommendations. Second, the U.S. Government continues to interpret the Convention narrowly and fails to demonstrate how its narrow interpretation will nonetheless advance the express goals of the Convention. For these reasons, the U.S. Government has not adequately implemented the CERD Committee's 2001 Recommendations. As a result, an opportunity for leadership in strengthening implementation of the Convention has been lost.

Overview of the CERD Committee's Concerns and Recommendations to the U.S. Government.

Concerns:

4. The CERD Committee noted the persistence of racial discrimination and inequalities in the United States. Examples included the Native American population's

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continued problems in the areas of land rights and poverty; the high proportion of Blacks subject to capital punishment; unequal educational opportunities, especially for Black, Hispanic and Native American pupils; and unequal health care for minority and disadvantaged women. The CERD Committee also expressed concern over discrimination in private conduct exempted from regulation. The CERD Committee further found that federal and state civil rights agencies were insufficiently funded.⁷

5. The CERD Committee also found that the U.S. Government interpreted the Convention narrowly. It expressed concern over the judiciary's restrictive treaty interpretation which favored U.S. federal law.⁸ This practice is contrary to the almost universally applied rule of statutory construction referred to as the *Charming Betsy* doctrine. Under the *Charming Betsy* doctrine, federal statutes ought never to be construed to violate international law if any other possible construction remains.⁹ This rule of construction reflects principles of customary international law that courts must assume Congress ordinarily seeks to follow.¹⁰

6. In addition, the CERD Committee found that the U.S. Government reservation to Article 4 prohibiting racist speech was incompatible with the Convention because of the connection between "hate speech" and "hate crime." While the U.S. Government argued then as now that the Constitution's First Amendment curtails the government's ability to restrict advocacy of racist ideas, and the U.S. Government adopted a reservation on that point when it ratified the Convention, the CERD Committee argued that exercise of the right of free speech carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.¹¹

Recommendations:

- The CERD Committee issued recommendations to the U.S. Government, including to (1) take measures to ensure consistent application of the Convention at all levels of government; (2) reconsider its reservation to Article 4 prohibiting racist speech; (3) review legislation so as to criminally sanction the largest possible sphere of private conduct which is discriminatory on racial or ethnic grounds; (4) pay attention to legislation and practice that is discriminatory in effect; (5) implement immediate and effective measures to ensure appropriate training of the police force to combat racial discrimination and to criminally prosecute racially motivated violence; and (6) guarantee the right to equal treatment before the courts. Noting the disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas, the CERD Committee recommended that the U.S. Government ensure that no death penalty is imposed as a result of racial bias or due to the economically, socially and educationally disadvantaged position of the convicted person.¹²
- The Lawyers' Committee supports all of these recommendations ("2001 Recommendations"), and urges the CERD Committee to reiterate them in its

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concluding observations and recommendations on the 2007 U.S. Report, except for the recommendation relating to racist speech. On this point, the U.S.'s position is supported both by its Reservation and by U.S. Supreme Court interpretations of the guarantee of free speech in the First Amendment to the U.S. Constitution.

The United States' Responsibility to Follow Up on the CERD Committee's 2001 Recommendations.

7. The CERD Committee's guidelines to assist States parties to implement the 2001 Recommendations,¹³ and Rule 67 of the Rules of Procedure of the CERD Committee, explain the legal significance of the CERD Committee's statements and outline the scope of the duty to respond to the CERD Committee. Specifically, Rule 67 provides that if the CERD Committee "determines that some of the obligations of that State party under the Convention have not been discharged, it may make suggestions and general recommendations in accordance with Article 9, paragraph 2, of the Convention."¹⁴ This means that the CERD Committee's suggestions and recommendations are not mere advice, but a formal determination of non-compliance with some obligation of the Convention. Because many of the CERD Committee's suggestions and recommendations to the U.S. Government do constitute formal determinations of non-compliance, the U.S. Government must make every effort to implement and follow up on the CERD Committee's suggestions and recommendations, and submit comprehensive general reports evidencing that progress.

8. To that end, the U.S. Government should follow the CERD Committee's Guidelines to follow up on the 2001 Recommendations. These Guidelines include:

- Disseminate the 2001 Recommendations as widely as possible so as to facilitate the participation of concerned minorities in the implementation of the Convention and the 2001 Recommendations.
- Designate a representative who would act as a focal point and who would be in charge of liaising with the Follow-up Coordinator or the alternate. This person would facilitate the communication between the State party and the CERD Committee, as well as facilitate the active engagement and commitment of various ministries, departments and stakeholders.
- Regular Reporting on Progress—Submit comprehensive reports on the general fulfillment of obligations under the Convention on a regular basis. The periodic reports should contain information on measures taken to implement the recommendations of the CERD Committee, as requested in the reporting guidelines of the CERD Committee.
- Cooperation with national human rights institutions and non-governmental organizations—involve national human rights institutions, non-governmental organizations and other stakeholders in the process of implementation of the Convention and of the 2001 Recommendations. This can be done by convening

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roundtables and workshops on a regular basis with the aim of assessing the progress in the implementation of the 2001 Recommendations.

- Assistance to follow-up activities—the Follow-up Coordinator or in his/her place the alternate is available to meet with representatives of the State party to discuss the implementation of the 2001 Recommendations.

9. Of particular note is Guideline (1) to disseminate the 2001 Recommendations *as widely as possible* to facilitate participation of concerned minorities, and Guideline (4) to cooperate with national human rights institutions and NGOs by convening roundtables and workshops on a regular basis. The 2007 U.S. Report does not indicate that the U.S. Government disseminated the 2001 Recommendations as widely as possible. Further, the U.S. Government does not provide evidence of participation of concerned minorities in the implementation of the Convention and the 2001 Recommendations.

10. Guideline (3) requires the U.S. Government to submit comprehensive reports on the fulfillment of obligations, including measures taken to implement the 2001 Recommendations. The report “should also reflect in all its parts the actual situation as regards the practical implementation of the provisions of the Convention and the progress achieved.”¹⁵ As discussed below, sometimes the U.S. Government follows the CERD Committee’s guidelines, particularly with respect to (a) reporting on concrete measures taken to implement the 2001 Recommendations and (b) the actual situation regarding progress achieved; other times, the U.S. Government does not.

Analysis of the United States’ 2007 Response.

11. The U.S. Government response reflects a continuation of its trend toward a narrow interpretation of the Convention and application of the Convention only to the extent that United States domestic laws already exist to implement its provisions. The following addresses the U.S. responses to the 2001 Recommendations, focusing on (1) the sufficiency of the response vis-à-vis the U.S. Government’s obligations under the Convention; and (2) whether the response strengthens or weakens the U.S. Government’s implementation of the Convention.

Paragraph 390: (Consistent Application of the Convention at all Levels of Government).

12. U.S. GOVERNMENT RESPONSE: The U.S. quotes its “Understanding” with respect to taking measures to ensure application of the Convention at all levels of government and summarily states that the ways in which the Convention are implemented by the federal government, state and local government and territories are described throughout the 2007 U.S. Report.¹⁶

13. ANALYSIS: The U.S. Government response is insufficient. It has not demonstrated that it has taken further action to advance the goal of consistent application of the Convention at all levels of government.

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Paragraph 391: (Reservation regarding Article 4 of the Convention—adopt Regulations in Accordance with Article 4).

14. U.S. GOVERNMENT RESPONSE: The U.S. Government states that its RUDs are compatible with the objects and purposes of the Convention. It further explains that its Constitutional protections for individual freedoms of speech, expression, and association, absent its RUDs, would be construed in tension with Articles 4 and 7.¹⁷

15. ANALYSIS: The CERD Committee contends that free speech and Article 4 are not incompatible because a citizen's exercise of his/her right of freedom of opinion and expression also carries responsibilities, among which is the obligation not to disseminate racist ideas. The U.S. Government response does not directly address that contention. Instead, it explains that the U.S. courts' free speech jurisprudence would be in tension with Articles 4 and 7 absent a reservation, which is certainly the case.¹⁸

16. The Convention favors criminalizing some speech that is protected under the First Amendment. Under U.S. law, a distinction is made between speech that incites violence and speech that merely advocates violence. While hate speech that incites violence is unlawful, hate speech that advocates violence is constitutionally protected.¹⁹ The U.S. Government response justifies First Amendment protection for hate speech under the theory that truth will ultimately prevail in an uninhibited marketplace of ideas. This justification for the pursuit of truth originated in the utilitarian philosophy of John Stuart Mill, who believed that the discovery of truth relies on trial and error and requires uninhibited expression.²⁰ Justice Oliver Wendell Holmes imported Mill's justification for uninhibited expression into American constitutional jurisprudence as the "free marketplace of ideas."²¹ This became the dominant justification for free speech in the United States, as evidenced by the 2007 U.S. Report's reference to it in its response. Critics of this justification and the U.S. approach to free speech point out that the U.S. approach "either underestimates the potential for harm of hate speech that is short of incitement to violence, or overestimates the potential for rational deliberation as a means to neutralize calls to hate."²² Other critics point out that proponents of hate speech regulation "see no value in protecting bias-motivated speech against certain already oppressed groups and question the necessity and logic of using the First Amendment to protect speech that not only has no social value but also is socially and psychologically damaging to minority groups."²³

17. Nonetheless, the U.S. Government's position is supported by its Reservation and by U.S. Supreme Court interpretations of the First Amendment to the U.S. Constitution. Hate speech is protected by the First Amendment, but its most odious and dangerous manifestations may be constitutionally proscribed. The Lawyers' Committee recommends that the U.S. Government promote vigorous educational efforts and private internet screening, both of which are constitutional means of combating the dissemination of hate speech. It further recommends that the U.S. Government enhance penalties for hate crimes and establish a more transparent nexus between hate crimes and the worst forms of hate speech. Congress should provide federal assistance to investigate and prosecute hate crimes, and increase government reporting efforts regarding the same crimes.

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Paragraph 392 (Render Liable to Criminal Sanctions the Largest Possible Sphere of Private Conduct that is Discriminatory).

18. U.S. GOVERNMENT RESPONSE: The U.S. Government provides examples of discriminatory private conduct that is unlawful and sources of authority in U.S. law (e.g. 13th Amendment, 42 U.S.C. §§ 1981, 1982; Commerce Power of Article I of the Constitution, Title II and Title VII of the 1964 Civil Rights Act, Fair Housing Act; Spending Power of Article I of the Constitution and Section 5 of the 14th Amendment, Title VI of the 1964 Civil Rights Act). It explains that the reason for its RUD is that it is unclear whether the term “public life” in the definition of “racial discrimination” in the Convention is synonymous with the permissible sphere of governmental regulation under U.S. law.²⁴

19. ANALYSIS: The U.S. Government provides an explanation of how domestic laws render *some* private discriminatory conduct unlawful. This raises questions as to what private discriminatory conduct is left out, and whether the concept of privacy as a “fundamental freedom,” which the U.S. Government asserts in response to the CERD Committee’s concern, covers racially discriminatory private conduct. Why is some discriminatory private conduct unlawful and other is not? To the extent that U.S. law does not currently criminalize private conduct that is discriminatory, it should adopt new laws to fulfill its obligation under the Convention, particularly regarding the sale and rental of housing, employment, credit and provision of public accommodations (e.g. transportation, hotels, medical care, etc.). The U.S. Government stands on its refusal to implement the Convention’s stronger protections against private discrimination. This position weakens implementation of the Convention.

Paragraph 393 (Protection Against Any Form of Unjustifiably Disparate Impact).

20. U.S. GOVERNMENT RESPONSE: The 2007 U.S. Report defines “unjustifiably disparate impact” under the Convention to mean “race-neutral practices that both create statistically significant racial disparities and are unnecessary, i.e. unjustifiable.”²⁵ The U.S. Government concludes that the Convention’s protection against “unjustifiable disparate impact” in Article 1(1)(c) does not impose obligations contrary to existing U.S. law. It provides examples of equivalent standards used in litigating disparate impact claims and practices subject to disparate impact challenges under Title VII and Title VI, as well as Equal Protection claims under the Fifth and Fourteenth Amendments of the Constitution. It also states that “since 2000, where deemed necessary, legislation and policies have been reviewed to determine if new enforcement priorities are appropriate in areas involving disparate impact.”²⁶ The Equal Employment Opportunity Commission (“EEOC”), the Department of Justice (“DOJ”), and the Department of Labor’s Office of Federal Contract Compliance Programs have undertaken this review and, according to the 2007 U.S. Report, increased enforcement actions. In addition, the DOJ has focused on a particular form of disparate impact discrimination—discrimination against persons with Limited English Proficiency (“LEP”), and the 2007 U.S. Report provides examples of successes in resolving such cases.²⁷

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21. ANALYSIS: The 2007 U.S. Report's conclusion that the Convention's protection against any form of unjustifiably disparate impact does not impose obligations *contrary* to existing U.S. law is misleading. U.S. law requires proof of discriminatory intent to show Constitutional discrimination, and also to show discrimination under some civil rights statutes.²⁸ In contrast, the Convention allows proof of discrimination based on either discriminatory "purpose or effect."²⁹ As discussed more fully in the section on Article 6 below, critics point out that "victims of racial discrimination in the United States are required to meet a burden of proof that exceeds the requirements of the Convention. By obliging victims of discrimination to prove the discriminatory intent, as opposed to discriminatory effect, of a policy, the U.S. Government imposes an impermissible burden on racial minorities and others who seek to assert their non-discrimination rights."³⁰ In order to comply with the Convention, the U.S. Government should allow proof of discrimination based on disparate impact, whether discriminatory in purpose or effect, in all cases, except where there are sufficient, non-racial justifications for the disparity.

Paragraph 394 (Police Violence and Brutality: Minority Groups and Foreigners).

22. U.S. GOVERNMENT RESPONSE: First, the U.S. Government states that its law prohibits these practices, and that the DOJ, along with the U.S. Attorneys Office and Federal Bureau of Investigation ("FBI"), enforces the law.³¹ Second, the U.S. Government reports how it addressed the incidence of police brutality and discriminatory actions noted in the 2000 U.S. Report, in following the CERD Committee's recommendation by stepping up training of law enforcement officers with a view to combat prejudice that may lead to violence, and after September 11, 2001 added a focus area regarding increased bias against Arab and Muslim Americans or such lawful immigrants.³²

23. ANALYSIS: While this response partially responds to the 2001 Recommendations by providing certain information regarding concrete measures taken to remedy the problem of police brutality, the 2007 U.S. Report downplays the serious issue of police brutality and its persistence in the United States.³³ As required under the reporting guidelines of the CERD Committee, the 2007 U.S. Report should reflect the *actual situation* as regards the practical implementation of the Convention and *the progress achieved*. It is essential for the U.S. Government to accurately represent the magnitude of the problem and the progress achieved in addressing police brutality.

Paragraph 395 (Equal Treatment Before the Courts and All Other Organs Administering Justice):

24. *The CERD Committee expressed concern particularly about the majority of inmates being ethnic or national minorities, and about the particularly high incarceration rate of Blacks and Hispanics. The CERD Committee issued two recommendations: (1) Ensure equal treatment before the courts and all other organs administering justice; and (2) Ensure that a high incarceration rate is not as a result of the economically, socially and educationally disadvantaged position of these groups.*³⁴

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25. U.S. GOVERNMENT RESPONSE: The argument advanced by the U.S. is that the 2001 Recommendations rest on the inaccurate “assumption” that the existence of differing incarceration rates is due to the failure of the U.S. Government to grant equal treatment before the courts and all other organs administering justice. The U.S. Government denies that “assumption,” stating that the “U.S. Government takes firm action to guarantee the right of everyone to equal treatment before the courts and other administrative and judicial entities.”³⁵ The U.S. Government further states that race, ethnicity, and immigration status are not criteria for access to courts. The U.S. Government refers the CERD Committee to the section of its report on Article 5 — and specifically to “research that indicates differences in incarceration rates are related primarily to differential involvement in crime by various groups (with some unexplained disparities particularly related to drug use and enforcement), rather than to differential treatment of persons in the criminal justice system.”³⁶ With respect to the CERD Committee’s second recommendation, the U.S. Government merely responds that “to the extent that varying incarceration rates may relate to socio-economic factors, the United States will continue to work to eliminate the impact of such factors.”³⁷

26. ANALYSIS: With respect to the first recommendation, the U.S. Government response is inadequate. The U.S. Government claims that disparities in incarceration rates are primarily the result of differential involvement in crime by Blacks and Hispanics than other ethnic groups. This argument overlooks the reality of how members of minority groups fare before the courts, particularly in light of socio-economic status and differential access to competent defense counsel.³⁸ Research shows that these “disparities are related to government policies and the disparate treatment of minorities at every stage of the criminal justice system, from investigation to sentencing, with respect to both juveniles and adults.”³⁹ The U.S. Government response is an example of its disregard of the CERD Committee’s recommendation and underlying determination that the U.S. Government has not fulfilled its obligations under the Convention with respect to equal treatment before the courts.

27. As to the CERD Committee’s second recommendation, the U.S. Government does not deny, and by implication concedes, that differential incarceration rates relate to socio-economic factors. This response fails to provide information regarding what it is doing to ensure that the high incarceration rate of Blacks and Hispanics will not be due to socio-economic factors – it states that “it will continue to work to eliminate the impact of such factors.” It does not discuss differential access to highly qualified legal counsel. It puts no concrete measures before the CERD Committee. This failure to adequately respond to the second recommendation weakens implementation because it does not provide the CERD Committee with sufficient information to continue the dialogue regarding methods of eliminating the impact of these factors.

Paragraph 396 (Death Penalty and Racial Bias).

28. U.S. GOVERNMENT RESPONSE: The U.S. Government states that capital punishment is an issue of great public debate, although supported by the majority of citizens in a majority of states in the United States. With respect to application of capital punishment,

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the U.S. Government states that it is confident that it is imposed in only the most egregious cases and in the context of heightened procedural safeguards. Finally, the U.S. Government states that its does not administer capital punishment “in a manner inconsistent with U.S. Government human rights obligations, including the Convention.”⁴⁰

29. ANALYSIS: The specific concern raised by the CERD Committee relates to the “disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.”⁴¹ The U.S. Government response does not address this specific concern. It does not provide any information explaining the correlation and why it does or does not substantiate the CERD Committee’s concern regarding racial bias in imposition of the death penalty. Rather, the U.S. Government denies that its administration of capital punishment violates the Convention. As discussed more fully in the section on Article 5, below, procedural protections for criminal defendants often fail, and this leads to catastrophic results with respect to capital punishment.⁴²

30. The CERD Committee recommended that the U.S. Government “ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted person.”⁴³ The U.S. Government provides no response to this recommendation. It says nothing at all about the imposition of capital punishment as a result of the economically, socially and educationally disadvantaged position of the convicted person.⁴⁴ The failure to respond to the 2001 Recommendations regarding the death penalty shows disregard for the significance of the CERD Committee’s determinations of non-compliance of its obligations and weakens implementation of the Convention.

Paragraph 397 (Disenfranchising Laws and Practices Based on the Commission of Criminal Offenses).

31. U.S. GOVERNMENT RESPONSE: Referring the CERD Committee to its discussion under Article 5, Voting, the U.S. Government responds that the issue is a matter of continuing scrutiny and the law in a number of states has changed in recent years. It concludes “that the longstanding practice of states on this matter, however, does not violate U.S. Government obligations under the Convention.”⁴⁵

32. ANALYSIS: The U.S. Government does not respond to the CERD Committee’s recommendation that the U.S. Government recall “that the right of everyone to vote on a non-discriminatory basis is a right contained in Article 5 of the Convention.” The U.S. Government summarily asserts that its practices do not violate the Convention. It does not directly address how such practices can be reconciled with Article 5’s right to vote on a non-discriminatory basis. Its reference to “the longstanding practice of states on this matter” implies that longstanding practices regarding political disenfranchisement are entitled to an exception to Article 5. There is no such exception to Article 5 of the Convention. These disenfranchising laws deprive over 5.3 million people of the right to vote, including two million Blacks, one of every 12 Black

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adults.⁴⁶ The failure to directly address this concern of the CERD Committee weakens implementation of the Convention.

Paragraph 398 (Disparities in Enjoying of/Right to Adequate Housing, Equal Opportunities for Education and Employment and Access to Public and Private Health Care-Article 5).

33. U.S. GOVERNMENT RESPONSE: The U.S. Government states that some of the economic, social and cultural rights enumerated in Article 5 are not explicitly recognized as legally enforceable “rights” under U.S. law. Nonetheless, it states that U.S. laws “fully comply with the requirements of the Convention that the rights and activities covered by Article 5 be enjoyed on a non-discriminatory basis.” It claims that it has in place measures, including special measures, to ensure non-discriminatory treatment as provided in Article 5, as well as for education, business development, contracting, and “a number of areas that contribute to the enjoyment of social and economic rights.” Additionally, the U.S. Government argues that “substantial progress in addressing disparities in housing, education, employment and access to health care has been made over the years” and cites evidence of further progress, including a slight closing of the gap between poverty rates, unemployment rates, and educational attainment.⁴⁷

34. ANALYSIS: The U.S. Government statement disclaiming its obligation to guarantee economic, social and cultural rights weakens implementation of the Convention for two reasons. First, it provides an example of the U.S. Government’s refusal to implement provisions of the Convention that are not already present in existing U.S. law. Consistent with the *Charming Betsy* principle, discussed above, U.S. laws should be interpreted, wherever possible in a manner consistent with Article 5’s protection of equal enjoyment of economic, social and cultural rights. Second, the statement reflects that the U.S. Government disagrees with the CERD Committee’s recommendation that it take all appropriate measures to resolve the persistent disparities in the enjoying of, in particular, the right to adequate housing, equal opportunities for education and employment, and access to public and private health care. The failure to meet its commitment under Article 5 with respect to equal enjoyment of economic, social and cultural rights weakens implementation of the Convention and creates an obstacle to eliminating racial discrimination in the United States.

Paragraph 399 (Affirmative Action: Obligation When the Circumstances So Warrant):

35. *Here, the CERD Committee signals its disagreement with the U.S. Government’s previously asserted position that the Convention permits, but does not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The CERD Committee clarifies that adoption of special measures when circumstances so warrant, such as in the case of persistent disparities, is an obligation under Article 2, paragraph 2 of the Convention.*⁴⁸

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36. U.S. GOVERNMENT RESPONSE: The U.S. Government states that the CERD Committee misinterpreted its position with respect to affirmative action. It acknowledges that Article 2(2) requires States parties to take special measures “when circumstances so warrant,” and claims that it has in place a number of these measures. The U.S. Government also argues that (i) the decision of whether measures are warranted is left to the judgment and discretion of each State party; and (ii) that special measures under Article 2(2) may or may not in themselves be race-based (“e.g. a measure might be directed at the neediest member of society without expressly drawing racial distinctions.”).⁴⁹

37. ANALYSIS: The U.S. Government’s acknowledgment that Article 2(2)’s requirement for a state party to take special measures “when circumstances so warrant” is obligatory, rather than permissive, is a step forward. Its argument that it is within the U.S. Government’s sole discretion to determine “when circumstances so warrant” special measures under Article 2(2), however, is not persuasive, as it is tantamount to the discredited claim that the obligation is merely permissive. The CERD Committee already provided the U.S. Government with an objective standard for when “circumstances so warrant,” such as in the case of persistent disparities cited in Paragraph 398. The 2007 U.S. Report’s attempt to disclaim an obligation to take special measures under an objective standard weakens implementation of the Convention.

Paragraph 400 (Effective Participation by Indigenous Communities in Decisions Affecting them: e.g. Western Shoshone Ancestral Land).

38. *The CERD Committee expressed two concerns: First, that treaties signed by the U.S. and Native American tribes can be abrogated unilaterally by the U.S. Government; and second, that Western Shoshone ancestral land is to be placed up for auction to private sale, and there are plans for expanding mining and nuclear waste storage on that land. The CERD Committee accordingly recommended that the U.S. Government ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights as required under Article 5(c) of the Convention, and that the U.S. Government observe General Recommendation XXIII on indigenous peoples which stresses the importance of securing “informed consent” of indigenous peoples and calls, inter alia, for recognition and compensation for loss.*⁵⁰

39. U.S. GOVERNMENT RESPONSE⁵¹: With respect to unilateral abrogation of treaties with Native American tribes, the U.S. Government explains that while Congress has the authority to alter treaty obligations of the U.S. Government, alterations that affect property rights may give rise to a Fifth Amendment claim for compensation. With respect to Article 5(c) and General Recommendation XXIII, the U.S. Government responds that U.S. law ensures the rights of members of tribes to participate equally in elections and in the conduct of public affairs, and that tribes (as a group) are afforded rights not afforded to other members of U.S. society based upon the political relationship between the tribes and the U.S. Government (e.g. consultation with tribes on federal actions specifically affecting tribes.)⁵²

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40. With respect to compensation for taken lands generally, and the Western Shoshone in particular, the 2007 U.S. Report states that recovery of compensation for taken lands is the exclusive remedy of the Native American Claims Commission (“ICC”). In 1951, the Western Shoshone brought a land claim before the ICC. In 1962, the ICC found that the Western Shoshone’s lands had been taken and declared the value of the lands and sub-surface rights to be over \$26 million at the valuation date (compensation worth approximately \$157 million as of March 2007). In 1974, certain Western Shoshone descendants, raised objections to the litigation strategy pursued in the claims case. They preferred not to claim compensation for a portion of the lands in favor of restoration of those lands. However, their attempts to intervene were rejected as untimely, and all other U.S. courts who have considered their claims have reaffirmed that the Western Shoshone no longer have a property right in the lands they claim. Most recently, the Court of Federal Claims (“CFC”) ruled that the issue of Western Shoshone treaty title had been resolved by the Supreme Court in 1985. The Department of the Interior is now developing a process to distribute the \$157 million award to the Western Shoshone defendants. The U.S. Government concluded that the dissenting Western Shoshone descendants wish to bring before the CERD Committee what is essentially an internal dispute among the Western Shoshone, despite ample recourse before the U.S. courts, including the U.S. Supreme Court.⁵³

41. ANALYSIS: This response does not provide any justification for its unilateral abrogation of treaties with Native American Tribes. Instead, the U.S. Government argues that treaties with Native American Tribes are subject to special canons of construction that tend to favor Native American interests and that compensation is in fact paid by the U.S. Government for Native American land. The U.S. Government position shows that it does not view unilateral abrogation as a problem which it must address—despite the CERD Committee’s concerns. Its explanation of how the ICC compensates Native American Tribes for lands taken generally and in particular, from the Western Shoshone should enable the CERD Committee to evaluate whether the U.S. Government’s actions through the ICC comport with its obligations under Article 5(c) of the Convention and General Recommendation XXIII. As the U.S. Government admits, historically restrictive laws and policies prevented Native American Tribes from seeking compensation for lands taken.⁵⁴ The U.S. Government’s adoption of the ICC in 1946 provided one mechanism of considering unresolved Native American Tribes’ claims against the U.S. Government. However, the U.S. Government must demonstrate that the ICC’s adjudication of such claims comports with its obligations under the Convention.

Paragraph 401 (Data Regarding Discrimination in Federal and State Prisons).

42. U.S. GOVERNMENT RESPONSE: The 2007 U.S. Report states that the U.S. Government has provided the data requested in the section concerning Article 5, Prisons.⁵⁵ It provides general information regarding the Bureau of Prisons’ (“BOP”) oversight of federal correctional facilities and the DOJ’s investigation of institutional conditions at the state and local level, pursuant to the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. 1997. Additionally, it provides data regarding the DOJ Civil Rights Division’s investigations since the 2000 U.S. Report. This includes the number of CRIPA investigations opened, finding letters

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issued, lawsuits filed, and settlements obtained. It identifies U.S. penal institutions subject to monitoring for compliance with CRIPA settlement agreements.⁵⁶

43. ANALYSIS: While the U.S. Government provides some data regarding its steps to address discrimination in federal and state prisons, it does not provide sufficient specific data: such as information and statistics on complaints made by prisoners and subsequent action taken. As one critic has commented, “since 2002, not a single Civil Rights Division investigation of a prison or jail has resulted in a new enforceable court order” and “between 2002-2004, the Civil Rights Division took action to enforce court orders in just one prison or jail case.”⁵⁷ The U.S. Government explains that complaints are received from numerous sources, only some of which are individuals who live in facilities and their families. It also only provides data for 2006, stating that in 2006, the DOJ received 4,841 CRIPA-related citizen letters and hundreds of telephone complaints. It is not clear why the U.S. Government elected to provide incomplete data, but the effect is to weaken implementation of the Convention to the extent that the CERD Committee is unable to assess U.S. Government compliance with the Convention regarding prisons.

Paragraph 402 (Interagency Working Group’s Role in Implementation of the Convention at the Federal, State and Local Levels, and In All Territories under U.S. Jurisdiction).

44. U.S. GOVERNMENT RESPONSE: The U.S. Government responds that the Interagency Working Group oversees the preparation of reports to the United Nations Human Rights Commission and its constituent bodies, and reports regarding compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and the International Covenant on Civil and Political Rights (“ICCPR”). It also serves as “a point of contact” for coordinating policy on U.S. Government bilateral and multilateral human rights initiatives. As to implementation of the Convention at the state, local and territorial levels, the U.S. Government refers the CERD Committee to an Annex, which describes programs in four states with varying racial and ethnic population compositions.⁵⁸

45. ANALYSIS: The U.S. Government does not explain how the Interagency Working Group has raised awareness among federal agencies about the rights and obligations provided by the Convention beyond its statement that the group oversees issues of human rights policy. Raising awareness among federal agencies was the principal task assigned to the Interagency Working Group under Executive Order 13107 of December 10, 1998 and the question posed by the CERD Committee related to this group’s powers and impact under that mandate. That the U.S. Government response provides little or no information in response to the CERD Committee’s direct question casts doubt on whether this group fulfilled the mandate set by Executive Order 13107.

46. As the Annex provided, it is not clear why the U.S. Government limited its reporting to only four states (Illinois, New Mexico, Oregon and South Carolina) or why these particular states were chosen. The CERD Committee requested “comprehensive information on

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its implementation of [the Convention at] the State and local levels and in all territories under U.S. Government Jurisdiction, including Puerto Rico, the Virgin Islands, American Samoa, Guam and the Northern Mariana Islands.”⁵⁹ The failure to provide such comprehensive information weakens implementation of the Convention to the extent that the CERD Committee is unable to assess the extent to which the U.S. Government has ensured implementation at the state, local and territory level.

Paragraph 403 (Socio-economic Data Disaggregated by Race, Ethnic Origin and Gender on, in Particular, the Indigenous and Arab-American population; and the Populations of the States of Alaska and Hawaii).

47. U.S. GOVERNMENT RESPONSE: The U.S. Government states that it has provided the data requested in the section on Land and People. Socio-economic data on the indigenous, Alaska Native, Hawaiian and other Pacific Islander, and Arab-American populations is found on pp. 6-11 of the 2007 U.S. Report.⁶⁰

48. ANALYSIS: While the CERD Committee will need to assess whether it requires additional data with respect to these groups, the U.S. Government’s compliance with the CERD Committee’s request is a positive step in the dialogue with the CERD Committee. The U.S. Government should not only disaggregate population data, but should also disaggregate data by victim of discriminatory practices and by beneficiary of enforcement efforts in its next report to the CERD Committee.

Paragraph 404 (Optional Declaration Provided for in Article 14 of the Convention Regarding CERD Committee Receiving Communications From Individuals).

49. U.S. GOVERNMENT RESPONSE: The U.S. Government remains aware of the possibility of making the optional declaration under Article 14, but has not elected to do so.⁶¹

50. ANALYSIS: The U.S. Government has not changed its position with respect to this optional declaration. This is consistent with its general position that its own domestic laws provide sufficient human rights protections for its citizens and evidences its reluctance to subject its domestic human rights record to the judgment of international tribunals.

Paragraph 405 (Amendments to Article 8, ¶6 of the Convention Regarding Funding of Costs of the CERD Committee from the Regular Budget of the United Nations).

51. U.S. GOVERNMENT RESPONSE: The U.S. Government argues that it does not support the amendment to Article 8, Paragraph 6, because it believes that the costs of the CERD Committee should be funded under the Convention itself by the parties thereto, as required by the Convention in its original form.⁶²

52. ANALYSIS: In its original form, the Convention apportioned the expenses of the CERD Committee to 50 percent equally among all the States parties and 50 percent proportionally on the basis of the scale of assessment applicable to the United Nations regular

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budget.⁶³ On January 15, 1992, the Fourteenth Meeting of States Parties to the Convention adopted an amendment to add a further paragraph, as Article 8, Paragraph 7, which provided for the financing of the CERD Committee from the regular budget of the United Nations, a measure which was endorsed by the General Assembly through its resolution 47/111 of December 16, 1992.⁶⁴ The reason for the amendment was that over the years a number of States parties to the Convention had failed to fulfill their financial obligations, despite numerous appeals made both by the Secretary-General and the General Assembly, resulting in a shortage of funds and the cancellation of a number of sessions of the CERD Committee. The amendment will enter into force when accepted by a two-thirds majority of States parties to the Convention.⁶⁵ As of July 20, 2007, 43 States parties accepted the amendment.⁶⁶ The U.S. Government, however, refused to support the amendment and offers no alternative to address this concern of disruption of the CERD Committee's work. The U.S. Government should either accept the amendment because it will ensure that the CERD Committee's work is not undermined by certain States parties' failure to fulfill their financial obligations or support an alternative means to ensure adequate funding in practice.

Paragraph 406 (Making Available to the Public and Publicizing U.S. Government Reports and 2001 Recommendations).

53. U.S. GOVERNMENT RESPONSE: The U.S. Government states that it agrees with the CERD Committee's intention to allow the public access to its deliberations. It pledges to continue to make available to the public both its reports to the CERD Committee and the CERD Committee's responses, as well as all other publicly available CERD Committee documents.⁶⁷

54. ANALYSIS: The U.S. Government commitment to making the CERD Committee's reports and observations available to the public is a positive step. It is not clear from the 2007 U.S. Report, however, that the U.S. Government will do more than merely make these documents publicly available, such as publicizing the CERD Committee's findings through educational campaigns at the federal, state, or local level. In this respect, the U.S. Government also does not follow the CERD Committee's guideline regarding dissemination of the 2001 Recommendations "as widely as possible," and this position weakens implementation of the Convention.

Paragraph 407 (Recommends that the U.S. Government Submit its Fourth Periodic Report, Jointly with its Fifth periodic report, due on November 20, 2003 and that it Address All Points Raised in the 2001 Recommendations).

55. U.S. GOVERNMENT RESPONSE: The U.S. Government responds that the 2007 U.S. Report constitutes the fourth, fifth, and sixth periodic reports of the U.S. Government.⁶⁸

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56. ANALYSIS: No information regarding the reason for this delay is provided, and is an unacceptable failure to timely file the fourth and fifth periodic reports. The U.S. Government should submit each of its future reports in a timely fashion.

Conclusion.

Proposed Questions for the CERD Committee to Put to the U.S. Government Regarding Responding to the 2001 Recommendations.

- What has the U.S. Government done to follow the CERD Committee's guideline to disseminate the concluding observations as widely as possible so as to facilitate the participation of concerned minorities in the implementation of the Convention and of the concluding observations of the CERD Committee? What more could the U.S. Government do to publicize both the CERD Committee's concluding observations and the U.S. Government response?
- Does the "fundamental freedom" of privacy include the freedom to engage in private racial discrimination? How does this comport with the text and with the object and purpose of the Convention? What, if any, legal barriers prevent the U.S. Government from adopting new laws to address private discrimination, particularly in the sale and rental of housing, employment, credit and provision of public accommodations?
- How has the Interagency Working Group raised awareness among U.S. federal agencies about the rights and obligations provided by the Convention?
- Why are victims of racial discrimination in the U.S. required to prove the discriminatory intent, as opposed to discriminatory effect, of a policy — a burden of proof that exceeds the requirements of the Convention? What initiatives can and will the U.S. Government take to promote an effects test so as to comply with its treaty commitment?

Proposed Concerns and Recommendations to the U.S. Government Regarding Responding to the 2001 Recommendations.

- Reiterate the concerns and recommendations in paragraphs 393-396 issued to the U.S. Government in 2001, with one exception; the U.S. Government should oppose legislation and practice that is discriminatory in effect, not merely "pay attention" to it.
- To the extent that existing U.S. law does not currently criminalize private conduct that is discriminatory, it should reconsider its RUD, and adopt new laws enforcing the broader protections of the Convention against discrimination, particularly in the sale and rental of housing, employment, credit and provision of public accommodations.

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- The U.S. Government should provide more specific data regarding discrimination in federal and state prisons such as statistics on complaints made by prisoners and subsequent action taken.
- The U.S. Government should use all appropriate means to ensure adequate legal services are available to indigent persons accused of crimes in states, localities and territories under its jurisdiction.

Recommendations to the U.S. Government Regarding Responding to the 2001 Recommendations.

- The U.S. Government should interpret domestic laws relating to discrimination according to the *Charming Betsy* Doctrine. Under this universal doctrine, federal statutes ought never to be construed to violate international law, including the Convention, if any other possible construction is possible.
- The U.S. Government should follow the guidelines of the CERD Committee regarding follow-up and implementation of the 2001 Recommendations, particularly with respect to disseminating the CERD Committee's findings as widely as possible.
- The U.S. Government should enforce Executive Order 13107 and provide the Interagency Working Group with the resources to raise awareness among federal agencies of the rights and obligations granted to individuals under the Convention, ICCPR and CAT conventions.

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CHAPTER 2: VOTING RIGHTS

Introduction.

57. Article 2 of the Convention requires that each State Party “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) . . . undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) . . . undertake not to sponsor, defend or support racial discrimination by any persons or organizations; (c) . . . take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; [and] (d) . . . prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”

58. Article 5(c) the Convention requires States Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . political rights, in particular the right to participate in elections — to vote and to stand for — election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service. . . .”

59. Article 6 of the Convention requires that States Parties “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

60. In response to the 2000 U.S. Report, the CERD Committee recommended that the U.S. Government eliminate practices that may not be discriminatory in purpose, but in effect, including those that have an unjustifiably disparate impact.

Voting Rights Act Reauthorization.

61. In the face of significant discrimination in voting, the Voting Rights Act (“VRA”) of 1965 was enacted to enforce the promise of the Fifteenth Amendment to the U.S. Constitution that the right to vote should not be denied on account of race or color. Section 5 of the VRA is widely credited as the force behind increases in minority registration, voter turnout, and office-holding following the VRA’s enactment. Section 5 requires “covered jurisdictions,” or those with a documented history of discriminatory voting practices and low voting turnout, to receive approval from the DOJ or the U.S. District Court for the District of Columbia before making

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changes to voting procedures.⁶⁹ These jurisdictions must first prove that any new voting procedures will not have either *the purpose or the effect* of denying or abridging the right to vote on account of race or membership in a minority language group.

62. Congress recently revisited the VRA in reauthorizing certain provisions of the VRA that were set to expire in 2006. Unlike the initial passage and prior reauthorizations of the VRA in which the DOJ provided context and analysis of its oversight of the expiring provisions, in 2006, DOJ handed Congress thousands of pages to sort through itself to understand the scope and impact of DOJ's oversight.⁷⁰ DOJ's failure to make its best case for VRA reauthorization may influence the outcome of a lawsuit currently challenging the constitutionality of the 2006 reauthorization.

63. The findings of discrimination by Congress in its reauthorization report underline the continued need for VRA's protections: few Blacks have been elected in state legislatures relative to the total Black population in certain areas; the number of language minority officials elected to office has failed to keep pace with population growth; and the ability of minority citizens to elect their candidates of choice is affected by racially-polarized voting.⁷¹ Congress also found indicia of continued efforts to discriminate reflected by, for example, covered jurisdictions' resistance to submitting voting changes for pre-clearance, the continued need for federal observers to monitor polling places in covered jurisdictions to prevent harassment and intimidation inside polling stations.⁷² This record revealed that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the Fifteenth Amendment to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution."⁷³ Congress noted that "without the continuation of the expiring provisions of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."⁷⁴

64. The Voting Section of the DOJ plays a critical role in enforcing the pre-clearance process of the VRA, because it reviews voting changes, recommends whether a change should be prohibited, and handles litigation.⁷⁵ This enforcement process has become increasingly politicized. Historically, the DOJ "has adhered to a strong institutional norm against efforts to inject partisan political considerations into its Section 5 decision-making."⁷⁶ As reflected in a series of pre-clearance determinations, the political appointees to the DOJ have interfered with the independent Section 5 pre-clearance process by injecting partisan politics into the decision-making.⁷⁷

65. In 2003, a highly partisan Texas redistricting plan was adopted by the Texas state legislature that sought to increase the voting strength of the Republican Party in Congress but, in the process, targeted several minority areas thereby limiting the opportunity of minority voters to elect candidates of their choice to Congress and their opportunity to exert a substantial influence in congressional elections.⁷⁸ The career staff of the Voting Section concluded that the plan

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violated the VRA because it resulted in retrogression of minority electoral opportunity, but the DOJ's political appointees nonetheless pre-cleared the plan.⁷⁹

66. In subsequent litigation over the plan, plaintiffs argued that the Texas redistricting plan resulted in an unconstitutional political gerrymander and a violation of Section 2 of the VRA (which prohibits practices or procedures that deny citizens an equal opportunity to participate in the political process on the basis of race, color, or membership in a language minority group).⁸⁰ The Supreme Court held that one district violated Section 2, because the new district lines were drawn in a manner that reduced the Hispanic voting population from 57.5 percent to 46 percent. To compensate for this, the Texas Legislature created a new Hispanic-majority district, spanning about 500 miles, and including Hispanics with differing political preferences. The Supreme Court rejected the premise that a state can always make up for the less-than equal opportunity of some individuals by providing greater opportunity to others; thus the Texas Legislature's plan still violated Section 2 even though it created the new Hispanic-majority district elsewhere in the state.⁸¹ The Supreme Court did not find a violation of the VRA where a new line broke apart a district where Blacks had been the second-largest racial group. In the 2007 U.S. Report, the U.S. Government states that this case adopted a new principle of law under Section 2, and notes that the Supreme Court did not hold that any other district violated the VRA. Contrary to that claim, the case did not adopt a new Section 2 principle but merely found, in accordance with prior interpretations of the VRA, that one district eliminated minority electoral opportunity.

67. In 2005, the DOJ pre-cleared a Georgia law requiring voters to present government-issued photo identification in order to vote.⁸² The Voting Section's career staff recommended an objection, and made reference to an explicitly racial statement by the sponsor of the legislation.⁸³ The DOJ pre-cleared the plan the very next day, notwithstanding the fact that it had received additional information from the state that was not fully analyzed. Subsequent analysis of this additional data showed that hundreds of voters did not have the required voter identification with a disproportionate number of them minorities, thus providing further evidentiary support for the objection recommended by the professional staff. Contrary to the usual DOJ procedure, the staff memorandum recommending the objection was not forwarded to the Assistant Attorney General for Civil Rights before he made the final pre-clearance decision.⁸⁴ Federal courts later invalidated the Georgia law as an unconstitutional poll tax violating the Fourteenth Amendment.⁸⁵

68. The rejection of the staff recommendations by political staff in each of these cases is a historical anomaly.⁸⁶ Compounding this break from well-established process was the Voting Section's institution in December 2005 of a new rule requiring staff members reviewing Section 5 submissions to limit their analysis to the facts and prohibiting recommendations as to whether or not the DOJ should impose an objection to the voting change, a prohibition that increases the ability of political appointees to make politically-motivated pre-clearance decisions without appearing to repudiate career staff directly.⁸⁷

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Litigation by the DOJ.

69. The number of civil rights cases filed by the DOJ has greatly decreased while the number of annual civil rights complaints to the DOJ remains constant. In the 2007 US Report, the U.S. Government describes DOJ litigation in Section 2 challenges, but in fact the current administration has brought fewer Section 2 cases, and at a significantly lower rate than any other administration since 1982.⁸⁸ A total of ten Section 2 cases have been brought by the current administration, five of which contain vote dilution claims.⁸⁹ Most hard hit seem to be Section 2 cases on behalf of Black and Native American voters. Only two cases have been filed on behalf of Blacks and none on behalf of Native Americans, but the DOJ seems to have found the resources to file the first reverse discrimination case on behalf of White voters.⁹⁰ As DOJ's Section 2 enforcement efforts have been insufficient, private individuals and organizations have been forced to carry the burden of bringing complex and extensive litigation to protect minority voting.

70. In stark contrast to the Section 2 enforcement record, a major focus of this administration has been enforcement of requirements to provide language assistance to voters in particular categories that speak or self-identify as speaking English less than well. The administration has brought about 19 such language minority cases, all involving Spanish-language claims and two including additional claims relating to Asian-language groups, and one including claims exclusively related to Asian-language groups.⁹¹

The Help America Vote Act.

71. Congress has the authority to dictate the time, place, and manner of federal elections, and under this authority, it has enacted or introduced legislation to improve voting opportunities.⁹² The implementation and enforcement of these laws has been manipulated to achieve political objectives at the expense of voters' free exercise of their right to vote. Narrow interpretations of rights afforded by these laws also have a disproportionate effect on minority voters.

72. The Help America Vote Act ("HAVA") was enacted in the wake of the controversies surrounding the 2000 general election, and contains judicially enforceable provisions such as use of provisional ballots under certain circumstances, voter notices, voting machine requirements, and a requirement for statewide voter registration databases.⁹³ Some of the DOJ's interpretations of this act have been politically motivated. For example, in contrast to the DOJ's long-standing position favoring private litigation in the area, the Civil Rights Division of DOJ argued in three amicus briefs (filed in the weeks preceding the 2004 presidential election) that private citizens could *not* enforce HAVA's provisional ballot requirements, and that it alone could enforce the Act, a position ultimately rejected by at least one federal appellate court.⁹⁴ The timing of these amicus briefs — very close to a major election on a highly charged partisan issue in states holding the balance of the 2004 election — also is highly suspect.⁹⁵

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73. The provisional ballot provision of HAVA also has been enforced as to disenfranchise voters.⁹⁶ Under HAVA, if an individual appears at the polls on Election Day to cast a ballot but is not listed on voter registration rolls, he is permitted to cast a provisional ballot, and, if the individual is later determined to be eligible to vote, the provisional ballot is counted as a vote. In the 2004 election, however, only 64.5 percent of provisional ballots were actually counted.⁹⁷ Some of the ways in which HAVA's provisional balloting provisions failed, thus disenfranchising many voters, included not counting provisional ballots cast outside the voter's assigned precinct (a rule of administrative convenience which should not overcome a citizen's fundamental right to vote), and not counting provisional ballots cast by first-time voters without identification (provisional ballots should ensure that voters without identification are not deprived of their fundamental right to vote, while preserving the state's ability to verify their eligibility by other means).⁹⁸

74. In the 2007 U.S. Report, the U.S. Government touts the creation under HAVA of the Election Assistance Commission ("EAC"), established as a national clearinghouse for election administration information and to provide guidance on HAVA. In reality, the EAC record also reflects overly politicized positions.⁹⁹ Two studies conducted by EAC, a voter fraud/intimidation study and a study on the impact of voter identification demonstrate EAC's failure to fulfill its statutory mandate.¹⁰⁰ The research submitted by the consultants on the two reports found no evidence for the position that rampant voter impersonation or other voter fraud at the polls was corrupting the electoral process, but found that voter identification had a negative impact on voter turnout, particularly among minority voters. The EAC, however, refused to release these reports during a critical period in the ongoing debate over the efficacy of voter identification requirements, and DOJ officials tried to influence who worked on the reports, and the substance of the two reports.¹⁰¹

Government-Issued Photo Voter I.D. Laws.

75. The 2007 U.S. Report does not address the restrictions on voting in the form of voter identification requirements. Arguments are increasingly made by persons in the U.S. that voters must be required to show identification at polls in order to prevent fraud in voting, despite a lack of evidence to support this contention of fraud. Some states have adopted voter identification laws notwithstanding arguments from minority communities that these laws impose an unconstitutional burden on the fundamental right to vote in violation of the Fourteenth Amendment of the Constitution, and in some cases, in violation of the NVRA of 1993, the VRA, and the Civil Rights Act of 1964.¹⁰² Nearly half of states have voter identification requirements that are more stringent than those mandated by HAVA, and most of these provisions have been adopted in the last four years.

76. Georgia and Indiana have passed the most stringent photo-ID laws.¹⁰³ For example, until July 2005, Indiana voters seeking to vote in person had to sign a polling book for purposes of signature matching; in 2005, the Indiana legislature enacted a law that required voters to present a government-issued photo ID. When the law was challenged as unconstitutionally burdening the right to vote, the district court granted summary judgment for

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the defendants and a divided panel of the U.S. Court of Appeals for the Seventh Circuit affirmed, holding that there was sufficient need for the voter ID law, notwithstanding the complete absence of prosecutions for voter fraud in Indiana, which could be explained by “endemic under-enforcement of minor criminal laws ... and by the extreme difficulty of apprehending a voter impersonator.”¹⁰⁴ Based on some evidence of voter fraud in other states, as well as evidence in Indiana of a discrepancy between the number of registered voters in the states and the substantially smaller number of people actually eligible to vote, the court held that voter impersonation was in fact a problem and justified Indiana’s interest in preventing voter fraud.¹⁰⁵

77. Identification requirements seem to disproportionately impact minorities’ voting rights as they are more likely to lack identification. For example, Black citizens disproportionately lack photo identification.¹⁰⁶ Additionally, not only are minority voters less likely to possess photo ID, but they are also more likely than White voters to be selectively asked for ID at the polls.¹⁰⁷

Felon Disfranchisement.

78. In its comments to the 2000 U.S. Report, the CERD Committee expressed concern about felon disenfranchisement, or the political disenfranchisement of a large segment of the ethnic minority population denied the right to vote by disenfranchising laws and practices based on the commission of more than a certain number of criminal offenses, sometimes extending beyond completion of their sentences.

79. The U.S. disenfranchises more incarcerated persons than any other country for which data is available, by any measure: categories of persons disenfranchised, percentage of total population or total number of persons in prison.¹⁰⁸ The U.S. even disenfranchises persons who are sentenced to non-prison penalties, such as community supervision, while few other countries do so.¹⁰⁹ The number of disenfranchised people who have fully completed their sentences, incarceration plus any period of post-incarceration supervision, is higher in the U.S. than any other country in the world.¹¹⁰ Also, the U.S. states that deprive probationers, incarcerated persons and formerly incarcerated persons of the right to vote, do so automatically, and judges often are not even aware that their sentences carry the automatic consequence of loss of the vote. As a result, sentenced persons are seldom formally notified that they have been permanently or otherwise deprived of the right to vote.¹¹¹ The breadth, duration, coverage of wide ranges of offenses and racial effect of U.S. disenfranchisement laws are unprecedented.

80. The main rationales supporting disenfranchisement — promoting civic responsibility and respect for the law, and imposing appropriate punishment — have come under strong attack. As a recent decision in the European Court of Human Rights demonstrated, denying the right to vote is more likely to send messages undermining the respect for the law and democracy than messages enhancing those values because as that legitimacy of law and obligation to obey it stem directly from the right of every citizen to vote.¹¹² Disenfranchisement also is not tailored to the acts and circumstances of the individual offender, bears little relation to

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the offender's particular crime, and does not serve a valid criminal law purpose to justify it as appropriate punishment.¹¹³

81. As the 2007 U.S. Report notes, the standards and procedures for disenfranchisement vary among states. The type of disenfranchisement is thus determined by the law of the state where the individual resides, ranging, for example, from no disenfranchisement in Maine and Vermont to permanent disenfranchisement in 14 states, unless rights are restored by a governor or board of pardon. Forty-eight states prohibit felon inmates from voting while incarcerated; 36 states prohibit felons from voting while they are on parole, and 31 of these 36 states also prohibit felony probationers from voting.¹¹⁴ Three states deny the right to vote to all ex-offenders who have completed their sentences.¹¹⁵ Nine other states disenfranchise certain categories of ex-offenders or allow for voting rights restoration for certain types of offenses after a specified waiting period.¹¹⁶ Other states, like Kentucky, have added character tests to the voting rights restoration process.¹¹⁷

82. Disenfranchisement laws sit at the intersection of two systems with clear histories of discrimination in the United States, elections and criminal justice, so their racial impact should be of great concern. Originally felon voting bans were adopted alongside literacy tests and poll taxes in the Jim Crow era as a way to bar Blacks from voting. Today, because of racial disparities in the criminal justice system and the fact that Blacks are far more likely to be subject to criminal punishment than other groups, these laws continue to affect minorities disproportionately, diluting the voting strength of their communities.¹¹⁸

83. Although racially neutral on their face, felon disenfranchisement laws are clearly tied to criminal punishment in the United States where Black imprisonment rates have consistently exceeded White rates since at least the Civil War era and remain approximately seven times higher than rates among Whites today.¹¹⁹ With the historical shift away from overtly discriminatory laws and discourse, felon disenfranchisement laws are now defended on race-neutral grounds, e.g., disenfranchisement is based on individual criminal choice not race.¹²⁰ This defense is echoed in the 2007 U.S. Report, in which the U.S. Government reports that political disenfranchisement does not arise from a person's membership in a racial group, or as a result of race, color or origin, but is a result of the individual's criminal acts adjudicated in a court of law.

84. The racial impact of felon disenfranchisement laws is clear: two million Blacks cannot vote due to a felony conviction, which is a disenfranchisement rate nearly five times that for non-Blacks.¹²¹ In five states that deny the right to vote to ex-offenders, one in four Black men is permanently disenfranchised.¹²² In fourteen states, more than one in ten Americans have lost the right to vote by virtue of a felony conviction and five of these states disqualify over 20 percent of the Black voting age population.¹²³ Blacks are not only disproportionately disenfranchised, but are also less likely to have their voting rights restored.¹²⁴ Felon disenfranchisement thus remains a potentially effective means to neutralize the political power of Black voters. Supporting this is the fact that states with greater non-white prison populations

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have been more likely to ban convicted felons from voting than states with proportionally fewer non-whites in the criminal justice system.¹²⁵

85. Drug convictions contribute to a large extent to creating these statistics.¹²⁶ Research suggests there is a greater incidence of drug convictions in the Black community due largely to the fact that “non-whites are more vulnerable than Whites to arrest for drugs” due to “a more dense police presence where blacks reside.”¹²⁷ Drug convictions thus are responsible for part of Black disenfranchisement, and highlight the arbitrariness of these laws and their potentially racially discriminatory application.¹²⁸

86. The legal mechanisms available in the United States for addressing the disparate racial impact of disenfranchisement laws are blatantly inadequate. The evidentiary burdens required to challenge the laws under the Fourteenth Amendment and the VRA are onerous. In a Fourteenth Amendment challenge, courts have not required states to advance a compelling interest to justify the laws.¹²⁹ To show discrimination, a plaintiff must introduce historical evidence that the law was passed deliberately to discriminate against minorities.¹³⁰ This stringent standard is generally very difficult to prove, and most courts have not found disenfranchisement laws to violate the Equal Protection Clause.¹³¹

87. Finally, the process by which persons can seek to regain their voting rights is often little used, extremely cumbersome, confusing, and anti-democratic.¹³² The number of persons whose voting rights are restored in most states is modest, particularly in comparison with the number of persons disenfranchised.¹³³ Different and confusing waiting periods, some as long as ten years, may also apply depending on the type of crime or the different time periods a felony conviction was acquired.¹³⁴ As right restoration is discretionary, the prospects for regaining one's rights can shift dramatically depending on the state administration.¹³⁵

DC Voting Rights.

88. The District of Columbia's right to full congressional representation has long been a subject of debate. In the 2007 U.S. Report, the U.S. Government argues that D.C.'s lack of representation is a function of the U.S. Constitution, and the structure of government, rather than racially-motivated. But the District's lack of full voting representation in Congress has a disparate racial impact due to the city's current demographic makeup. Although recently large numbers of White residents have moved to the District of Columbia, it is still a Black majority city, at 57 percent. The Inter-American Commission on Human Rights, for example, expressed concern as to the possibility that the absence of Congressional representation for the District of Columbia has had a disproportionately prejudicial impact upon the Black community residing in the District.¹³⁶ Despite legislation introduced to provide for District of Columbia voting rights and representation, the U.S. Government continues to oppose the legislation, on constitutionality grounds.

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Recommendations.

- The U.S. Government should vigorously enforce all provisions of federal voting rights laws and ensure that the taint of political considerations is removed from its enforcement of these laws.
- The U.S. Government should support passage of laws granting the citizens of the District of Columbia the right to full congressional representation.
- The U.S. Government should support efforts to repeal or revise the most burdensome felon disenfranchisement laws
- The U.S. Government should support the passage of laws that punish citizens who use, or attempt to use, deceptive practices and intimidation with the intention of preventing another person from exercising the right to vote in an election.

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CHAPTER 3: EQUAL JUSTICE AND EQUAL ACCESS TO JUSTICE

Introduction.

89. Article 5 of the Convention requires that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice,” in addition to other enumerated basic rights.

90. The CERD Committee has further recommended specific steps to ensure enjoyment of these rights, including (1) supplying legal information to persons in vulnerable social groups, who are often unaware of their rights; (2) promoting “institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation,” and providing such services in areas where vulnerable social groups live; (3) expanding cooperation with organizations that specialize in protecting the rights of marginalized communities; (4) guaranteeing the right to assistance of counsel to all arrested persons, as well as guaranteeing that arrests, pretrial detentions, and trials that are not arbitrary or discriminatory; and (5) “set[ting] up a system under which counsel and interpreters will be assigned free of charge, together with legal help or advice and interpretation services.”¹³⁷

91. The CERD Committee, in 2001, noted its concern that the majority of incarcerated individuals in the United States are racial minorities. It also noted “a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty” To ameliorate these serious discriminatory effects, the CERD Committee recommended that the United States take firm action to guarantee the right to equal treatment before the courts and to ensure that the high incarceration rate of racial minorities is not a result of the socio-economic marginalization of racial minorities. The CERD Committee also recommended a moratorium on the death penalty to ensure that the death penalty is not imposed as a result of racial bias or socio-economic disadvantage.¹³⁸

92. Since 2001, the U.S. Government has neither imposed a moratorium on the death penalty nor taken the steps necessary to guarantee equal access to justice. The United States took the position in the 2007 U.S. Report that merely providing the rights enumerated under Article 5 fulfills its obligation to provide equal justice because Article 5 “does not affirmatively require State parties to provide or to ensure observance of each of the listed rights themselves.” Article 5, however, specifically requires states to guarantee the *enjoyment* of these rights.¹³⁹ A right without the means to enjoy it is no right at all. To ensure equal justice, the U.S. Government must take steps to allow racial minorities to have meaningful access to the courts.

93. With an adversarial legal system designed by and for lawyers, meaningful access to courts in the United States means access to counsel. The Constitution confers the right to counsel and a trial for persons charged with a crime, the right to equal protection under the law, and the right to due process.¹⁴⁰ Although these are powerful rights, many Americans, including racial minorities, remain powerless to enforce them.

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94. The United States Supreme Court has long recognized that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”¹⁴¹ The American justice system is based on an adversarial model, with each side presenting facts and issues to a judge or jury. When one side lacks an attorney, or the resources for an attorney, the opportunity for equal treatment is in jeopardy. Yet for many racial minorities, legal representation is completely out of reach. In civil proceedings, the U.S. Government does not generally recognize a right to counsel. The U.S. Government does fund legal aid for the poor, who are disproportionately racial minorities, but fails to provide the resources necessary for legal aid to meet the legal needs of the poor. There is a right to counsel in criminal proceedings, but in practice this right is often illusory. Federal, state, and local governments fail to provide the funding, supervision, or resources to provide access to the quality of counsel necessary to enjoy equal justice. To truly provide equal justice, the U.S. Government and its state and local governments should provide counsel in all proceedings involving criminal charges and in civil proceedings involving basic human needs.

Failure to Provide A Right to Counsel in Civil Proceedings Or Adequate Funding For Legal Aid.

95. The U.S. Supreme Court has recognized a right to counsel in civil cases if lack of representation would render the proceeding fundamentally unfair,¹⁴² but courts have applied this right narrowly such that the right is rarely found. The U.S. Government funds legal assistance for the most impoverished, but current funding is inadequate to protect the rights of even this group.

96. Failure to provide equal access to justice for the poor is tantamount to failure to provide equal access to racial minorities. A disproportionate number of the people who are unable to afford access to the courts are racial minorities. According to U.S. Government Census data, Blacks and Hispanics account for less than a quarter of all households, but more than half of the population below the poverty line.¹⁴³ The U.S. Government’s guidelines for setting the poverty threshold arguably render even these numbers deceptively low. Taking into account the modern needs of families, it is estimated that 52 percent of all Black households and 56 percent of Hispanic households lack the income necessary to meet basic needs, compared to just 20 percent of White households.¹⁴⁴ The gap between White and minority households as to assets — the funds that might allow an individual to pursue a legal solution — is even greater. The median net worth for White households in 2000 was \$79,400. The median net worth for Black households was only \$7,500, and Hispanic households \$9,750.¹⁴⁵ Thus, a primary obstacle to racial minorities enjoying equal justice is poverty. The high cost of litigation, including attorney fees, court fees, and other expenses puts a legal solution financially out of reach, and effectively creates a disparate impact on racial minorities.

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The U.S. Government Has a Model for Resolving the Legal Needs of the Poor, But Has Restricted and Under-Funded the Program at the Expense of the Poor and Racial Minorities.

97. The initial U.S. Government-funded legal aid system, started in the 1960s by the Office of Economic Opportunity and further developed in the 1970s by the Legal Services Corporation (“LSC”), was unique among legal aid models.¹⁴⁶ Unlike legal aid in other countries which funded private attorneys for the poor on a fee-for-service basis, the U.S. system used staff attorneys employed by private, nonprofit entities and funded a system of national and state support centers, training programs, and a national information clearinghouse that provided support on substantive issues and undertook litigation and lobbying efforts on broad national and statewide issues affecting the poor.¹⁴⁷ Perhaps most important, the United States system focused on reforming laws affecting the poor to reach a greater number of people and prevent future problems. Legal aid providers won several landmark decisions that revolutionized the laws protecting the poor.¹⁴⁸ By taking a systemic approach, legal services providers were able to make significant strides in resolving or preventing many legal problems of the poor.

98. LSC also expanded the availability of legal aid geographically from urban areas previously served into nearly every county in the country. LSC developed a plan for “minimum access” to legal assistance, which it defined as funding for two attorneys for every 10,000 poor people in every region of the country. With a budget of \$321.3 million supporting 325 programs in 1,450 neighborhood and rural offices, LSC achieved this “minimum access” in 1981.¹⁴⁹

99. Shifting ideologies and political objectives brought an end to minimum access just one year later, when the U.S. Government reduced funding by 25 percent from 1981 to 1982. The U.S. Government showed hostility toward LSC, even seeking to eliminate LSC altogether. These efforts decimated legal services for the poor. The legal aid programs that did survive were forced to cut back on the training, litigation support, community education, and other efforts.¹⁵⁰

100. In the mid-1990s, the U.S. Government further limited access to justice for the poor by placing restrictions on the use of LSC funds, prohibiting LSC-funded programs from using *any* funds — including funds from private sources — to represent certain clients and to perform certain kinds of work. LSC programs could not represent prisoners, certain groups of undocumented immigrants, or public housing residents being evicted based on drug charges, nor could it participate in class actions, welfare reform advocacy, or lobbying and rulemaking. LSC programs could no longer recover attorney’s fees in any case, which had been a major source of funding. These restrictions have forced LSC to largely abandon its unique focus on law reform and implement a traditional legal aid model providing basic individual representation.¹⁵¹ Legislative and administrative advocacy and class actions are efficiency tools, allowing an entity to address systemic problems and ameliorate poverty for many. Such restrictions on LSC funding impair the LSC’s ability to serve all of the poor and to impact structural inequalities.

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101. Despite the funding reductions, LSC remains the single largest source of legal aid funds in the United States, providing nearly a third of the \$1 billion spent on legal aid each year and employing 60 percent of all legal aid attorneys.¹⁵² Privately funded and pro bono programs provide additional assistance, but the legal needs of the poor remain largely unmet.

102. A 2005 study by LSC found that for every client served by an LSC-funded program, at least one person who sought help was turned away because of insufficient resources. This figure does not account for people who need help but do not seek it, either because they do not understand the legal implications of their problem or are unaware of legal aid resources. In all, only one of five or fewer of the legal needs of low income people is addressed with the assistance of a private or legal aid attorney.¹⁵³ Other studies estimate that four-fifths of the legal needs of low-income people and two-thirds of the needs of middle-income people go unmet.¹⁵⁴

103. The difference in availability of legal counsel for low-income Americans compared to the general population is staggering. In the United States, there is one lawyer providing personal civil legal services for every 525 people. For the poor, there is only one legal aid attorney for every 6861 people at the 125 percent of poverty threshold.¹⁵⁵

Failure to Guarantee a Right to Counsel.

104. The private bar provides pro bono assistance to the poor, but as a whole, the private bar largely fails to make a significant contribution.¹⁵⁶ With private sources failing to meet the needs of the poor, it is imperative that the federal, state, and local governments in the United States provide the resources to fill these needs.

105. To meet the legal needs of those unable to afford counsel, the U.S. Government needs to vastly increase its funding for legal aid at all levels of government and lift restrictions that limit the legal aid system's ability to address systemic problems. LSC estimates that to provide assistance to all low-income persons, the federal government's contribution to funding legal aid would need to increase from its current budget of \$377 million to \$1.6 billion.¹⁵⁷ Restrictions should also be lifted to allow LSC-funded programs to use private funds for any means, and to use LSC funds for advocacy that can address the needs of many, including class actions, and advocacy before legislatures and rulemaking entities.

106. The legal needs of the poor do not differ substantially from the needs of middle-income individuals.¹⁵⁸ Yet the U.S. Government restricts LSC funding to help only the poorest of the poor. With limited exceptions, LSC-funded programs may provide assistance only to persons earning less than 125 percent of the federal poverty guidelines.¹⁵⁹ In 2007, this income ceiling was \$25,813 for a family of four, and just \$12,763 for an individual.¹⁶⁰ Experts estimate that incomes considerably higher than the 125 percent of poverty mark are needed to fund just the basic needs of housing, transportation, child care, food, healthcare, and taxes.¹⁶¹ Other studies estimate that the annual income necessary for a family to meet its basic needs ranges from \$31,080 to \$64,656, depending on the area of the country.¹⁶² These basic needs do not include legal expenses and yet these basic income levels do not qualify for government-funded

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legal aid. It is estimated that 9.2 million people have incomes below the level necessary to meet basic needs, but above the income the U.S. Government deems “poverty” — including 4.3 million minorities.¹⁶³ For such individuals, meeting basic needs leaves few resources for attaining the representation necessary for equal access to justice.

107. In 2006, the American Bar Association House of Delegates unanimously approved a resolution urging federal, state, and territorial governments to guarantee legal counsel, at government expense, for low income persons in adversarial proceedings where basic human needs are at stake, such as shelter, sustenance, safety, health, or child custody.¹⁶⁴ Providing this right would ensure that the legal needs of the poor do not continue to fall through the cracks between the U.S. Government’s inadequate funding and the private sector’s inability or unwillingness to step up to its responsibilities. This right to counsel also would provide legal assistance for a broader range of income levels, including people with incomes too low to afford counsel, but too high for LSC’s low income ceiling.

Counsel for Criminal Defendants.

108. In its landmark 1963 decision, *Gideon v. Wainwright*, the United States Supreme Court guaranteed counsel for criminal defendants at most stages of criminal proceedings.¹⁶⁵ But while criminal defendants enjoy a right to counsel, the government’s failure to provide necessary funding undermines this right. The U.S. Government spends one hundred billion dollars annually on criminal justice, but only 2 to 3 percent of that on indigent defense.¹⁶⁶ The DOJ has recognized indigent defense programs “in terms of funding, caseloads, and quality, [to be] in a chronic state of crisis.”¹⁶⁷

109. A recent study by the American Bar Association similarly found that defense attorneys for the indigent do not have the time, resources, training, or supervision to provide quality representation. This crisis leaves the poor without access to a fair trial and at constant risk of wrongful conviction.¹⁶⁸ With as much as 80 percent of criminal cases involving indigent defendants, inadequate indigent defense pervades much of the criminal justice system.¹⁶⁹ Minorities in particular suffer because of they are disproportionately involved in the criminal justice system. At least three-fifths of all state court criminal defendants are minorities. Blacks in particular comprise 44 percent of state court criminal defendants, while only 13 percent of the general population.¹⁷⁰ Black men are 6.5 times as likely to be incarcerated as White men. Approximately one in nine Black males between the ages of 25 and 29 are incarcerated, and one in three can expect to go to prison in their lifetime.¹⁷¹ Regardless of the cause of these highly disproportionate numbers, the over-representation of racial minorities in the criminal justice system means that the United States’ failure to adequately fund attorneys to defend these individuals amounts to racial inequity.

110. Funding for indigent defense is not only inadequate, but inequitable. On average, prosecutors receive eight times the resources per case as indigent defense lawyers.¹⁷² A recent study of indigent cases in Tennessee found \$139 million in federal, state, and local funding for prosecuting indigent defendants, but only \$56 million allocated for defending them.¹⁷³

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Providing prosecutors with this distinct advantage calls into question the fairness of criminal trials.

111. Experts recommend limiting public defender caseloads to no more than 150 felonies or 400 misdemeanors per attorney per year.¹⁷⁴ The caseloads of defense lawyers throughout the country far exceed these limits.¹⁷⁵ Daunting caseloads, along with low pay, make it difficult to attract qualified attorneys to join indigent defense programs. They also impair the quality of representation. Attorneys providing legal services to indigent defendants are often unable to devote the time necessary to provide an adequate defense. Defense attorneys often fail to maintain regular contact with their clients. Some fail to meet with their clients until months after their arrest or, in some cases, not until the last minute in court.¹⁷⁶ One half to four-fifths of defense counsel enter guilty pleas without first interviewing a single prosecution witness and four-fifths enter pleas without filing any defense motions.¹⁷⁷

112. The public defenders' case overload became so severe in New Orleans in the 1990s that the Louisiana Supreme Court declared a presumption that any indigent defendant represented by a New Orleans public defender was receiving ineffective assistance of counsel and authorized judges to halt criminal trials until the state allocated reasonable resources to indigent defense.¹⁷⁸ Similarly, in New York, the New York Civil Liberties Union filed a class action law suit in November 2007, alleging that the state's indigent defense system is so deficient that the system effectively deprives defendants of their right to counsel.¹⁷⁹ The American Bar Association Ethics Committee recommends that an attorney withdraw from cases when he or she believes a caseload is too great to provide basic representation.¹⁸⁰ One public defender in Tennessee in 2007 notified the court that with an average caseload of 23,000 for just 22 attorneys, his office could accept no new misdemeanor cases.¹⁸¹

113. Indigent defendants have little recourse to challenge ineffective representation. There is no right to counsel in proceedings to challenge the quality of counsel or a prosecutor's failure to produce exculpatory evidence, or in proceedings concerning new evidence. Yet these proceedings require investigation, presentation of evidence, and legal argument, making legal representation essential for success. Courts have also set the bar so high for claiming ineffective assistance of counsel that such egregious conduct as a defense counsel sleeping, drinking alcohol, or using controlled substances during trial and failing to object to evidence have been found not to constitute ineffective representation of counsel.¹⁸² Just recently, an attorney who called his client a liar before the jury, presented evidence of his client's prior drug convictions, and failed to present exculpatory evidence or make a closing argument was found to have provided effective assistance of counsel.¹⁸³ With courts setting the bar so low for effective assistance, there is little guarantee that the counsel guaranteed to indigent defendants will provide them equal access to justice.

114. Adequate representation for indigent defendants can mean the difference between life and death. The CERD Committee noted in 2001 the disturbing correlation between race and imposition of the death penalty in the United States. The disproportionate numbers of racial minorities subject to the death penalty has not improved. Blacks comprise just 13 percent of the

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population, but were 40 percent of the individuals executed in 2006, and 42 percent of the inmates on death row in 2005.¹⁸⁴ Illinois imposed a moratorium on the death penalty, and other states have considered such measures, but the majority of states, as well as the federal government, continue to wield the power to execute the convicted. The CERD Committee suggested a moratorium in 2001.¹⁸⁵ The American Bar Association and other organizations, have urged a moratorium.¹⁸⁶ On November 15, 2007, the UN General Assembly's Third Committee approved a resolution calling for a death penalty moratorium.¹⁸⁷ The U.S. Government and each state should heed these recommendations and cease the use of the death penalty at least until the system can be made fair for defendants of all races.

Recommendations

- The U.S. Government should use all appropriate means to fulfill the U.S. Constitution's promise of equal justice in both civil and criminal matters, and to fulfill its obligations under CERD by providing safeguards to promote equal treatment before the tribunals and all other organs administering justice. This should include a legal aid system to provide effective assistance of counsel to the poor in civil disputes and effective assistance of counsel for criminal defendants.
- The U.S. Government should recognize a right to counsel in civil proceedings for economically disadvantaged individuals when basic human needs are at stake, such as shelter, sustenance, safety, health, or child custody.
- The U.S. should impose a moratorium on imposition of the death penalty until it can ensure that that it is not imposed as a result of racial bias or as a result of the economically, socially and educationally disadvantaged position of the convicted person.

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CHAPTER 4: EMPLOYMENT DISCRIMINATION

Introduction.

115. Under Article 5 of the Convention, States Parties must undertake to prohibit and eliminate racial discrimination. Article 5 further charges States Parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of the following rights: (e) ... (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.”

116. Article 6 mandates that signatory nations “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention”

117. The United States has a long history of discrimination in the workplace, and race, color and national origin continue to have a pervasive effect on the experience of U.S. workers. While efforts have been made to address discrimination in the U.S. workplace, there remains much room for improvement. Pronounced disparities in unemployment, earnings and poverty rates lead to the conclusion that discrimination is preventing minorities from receiving equal employment opportunities.

118. As of January 2007, the unemployment rate for Blacks was eight percent, almost two times greater than the unemployment rate for Whites.¹⁸⁸ Poverty rates for Blacks and Hispanics were significantly higher than the overall poverty rate.¹⁸⁹ Blacks and Hispanics were employed at significantly lower levels in management, professions, and related occupations, where Blacks constituted 25.2 percent and Hispanics 18.1 percent, as compared to non-Hispanic whites at 36.6 percent.¹⁹⁰ The same disparities exist in wage rates between minorities and Whites.¹⁹¹

119. Disparities in employment opportunities emerge even when other characteristics of job candidates are equivalent. For example, in a 2003 study, two young high school graduates with similar qualifications applied for entry-level positions, such as waiters, dishwashers, drivers and warehousemen, advertised in a Milwaukee newspaper.¹⁹² The only major difference in the job histories of the two individuals was that one applicant was White and had a criminal record (an eighteen-month sentence for possession of cocaine). The other applicant was Black and did not have a criminal record. The applicants visited 350 potential employers in the Milwaukee area. They were similarly successful, with the White applicant being called back for another interview 17 percent of the time, and the Black applicant 14 percent of the time. The authors of the study “concluded that a young black male seeking employment carried the same disadvantage because of his race as a white man carrying an eighteen-month conviction for cocaine possession.”¹⁹³

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Enforcement of Employment Protections Negatively Impacts Minorities.

120. Under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 (1972 Amendments), it is unlawful for an employer to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color or national origin.¹⁹⁴ The purpose of Title VII, as shown in the legislative history, was to address the steady rise in unemployment rates amongst Blacks that had become evident in the fifteen years prior to the bill's passage and was "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" ¹⁹⁵

121. Even as the unemployment, wage, and poverty rates of Blacks and Whites continue to differ significantly, a predominant theme of the past several years has been the lack of enforcement of Title VII cases for minorities by the various government agencies tasked with this responsibility, including the DOJ. The types of cases being pursued reflect a marked reduction in the number of "disparate impact" cases¹⁹⁶ and cases that allege that Blacks are the victims of racial discrimination. Even with a significant decrease in overall Title VII cases filed, a significant number of Title VII cases filed by the DOJ have been "reverse discrimination" cases, alleging discrimination against Whites.

122. Under Title VII, the Attorney General has authority to bring suit against a state or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. Generally, these are factually and legally complex cases that seek to alter employment practices, such as recruitment, hiring, assignment and promotion, and that have the purpose or effect of denying employment or promotional opportunities to a class of individuals. Under its "pattern or practice authority," the DOJ can obtain relief in the form of employment compensation and injunctive relief to eliminate discriminatory practices.

123. Title VII provides additional enforcement mechanisms, such as filing suit against a state or local government employer, and prosecution of enforcement actions relating to discrimination in employment by federal contractors.

124. With all of these enforcement arrows in its quiver, the number of lawsuits filed by the DOJ has dropped markedly in recent years even as the number of referrals from the EEOC has remained constant. Since January 20, 2001, the DOJ had filed only 46 Title VII cases, or an average of approximately seven cases per year.¹⁹⁷ This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources).¹⁹⁸ By comparison, prior administrations nearly double the efforts of the DOJ's priorities in terms of Title VII enforcement.¹⁹⁹

125. Along with the decrease in Title VII enforcement cases filed since 2001, the type of cases filed has changed. Of the four race-based Title VII cases brought by the DOJ in 2007,

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fully half of these were reverse discrimination cases alleging discrimination against Whites.²⁰⁰ This is in contrast to prior administrations where 13 pattern or practice cases were filed, eight of which raised race discrimination claims on behalf of racial minorities. As to pattern or practice cases, ten of the 46 Title VII cases brought over the previous seven years are pattern or practice cases, six of which allege racial discrimination. Two of the racial discrimination pattern or practice cases are also reverse discrimination cases alleging discrimination against Whites²⁰¹ As a result, over the course of seven years, only three pattern or practice suits on behalf of racial minorities were filed by DOJ. One case addressed allegations of discrimination against Native Americans.²⁰²

126. The numbers and nature of cases themselves reflect a stark picture of the DOJ's priorities in terms of Title VII enforcement. Recent Congressional oversight hearings reflect this same concern regarding the pointed shift in resources and priorities away from the original intent for which the Civil Rights Division and Title VII were established.²⁰³ The DOJ's own Strategic Plan for its fiscal years 2007-2012²⁰⁴ reflects this shift in priorities farther away from the original intent of Title VII and the establishment of the Civil Rights Division. It lays out no objective, goal, commitment, statement, or even past record regarding the pursuit of Title VII cases, even though it does include extensive descriptions of its goals and commitment for cases involving human trafficking and combating religious discrimination, and other areas. This absence suggests that the DOJ has changed its priorities to the detriment of minorities challenging race discrimination.

127. The EEOC has a better record of enforcing the equal employment rights of minorities pursuant to Title VII. For its 2006 fiscal year, of the 371 suits that the EEOC filed, 294 (or nearly 80 percent of those suits) were suits with Title VII claims.²⁰⁵ In addition, over the seven-year course of the current Administration, the percentage and number of suits that the EEOC filed with Title VII claims has remained fairly constant.²⁰⁶

128. While the EEOC has a better record in enforcing Title VII cases, its authority is limited. The EEOC does not have rulemaking authority to issue binding rules and regulations and as a result, employers have little incentive to comply with EEOC rules and regulations. In addition, the EEOC does not have the authority to issue cease-and-desist orders. Finally, the EEOC's budget has been cut in recent years, limiting its ability for vigorous enforcement of racial discrimination cases.

Interpretations of Employment Statutes Diminish Employee Rights.

129. Recent U.S. Supreme Court decisions reflect a more strict interpretation of federal laws, including Title VII, and resulted in important rulings that provide greater protection for employers than for workers.

130. In 2007, the U.S. Supreme Court dealt a blow to workers' rights by severely limiting the time frame within which an employee can challenge a discriminatory pay decision in the *Ledbetter v. Goodyear Tire and Rubber Co.* case.²⁰⁷ Employees suing under Title VII must

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bring their claims no more than 180 days after the alleged unlawful employment practice occurred. The U.S. Supreme Court held that an employer's unlawful decision to set an employee's pay, rather than a subsequent issuance of a paycheck reflecting the earlier discrimination, counts as the "unlawful employment practice" for purposes of triggering the Title VII limitations period.²⁰⁸

131. Although *Ledbetter's* claim dealt with sex discrimination in pay, the decision will also impact cases alleging pay disparities due to discrimination based on race, color, religion or national origin. In contrast to complainants of racial and ethnic discrimination, plaintiffs claiming sex discrimination have a possible alternative remedy by suing under the Equal Pay Act, which has a longer limitations period. Plaintiffs claiming pay discrimination on other prohibited grounds are limited to bringing federal actions under Title VII.

132. The U.S. Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), further eroded the ability of employees to challenge disparities in treatment based on race. In that case, the U.S. Supreme Court upheld a federal regulation that excludes all workers who provide in-home care for elderly or disabled people from federal wage and overtime protections. The vast majority of these workers are women of color, performing stressful, physically demanding jobs, but are among the lowest paid in the service industry. The U.S. Supreme Court's decision to uphold the rule means that these workers will continue to be treated unfairly despite providing essential services to the elderly and disabled.

Anti-Immigrant Sentiment Has Led to Employment Discrimination at the Intersections of Race and National Origin.

133. Current estimates of the number of foreign-born Legal Permanent Residents, Asylees and Refugees in the United States with documents issued by the U.S. Government total over 17.5 million.²⁰⁹ The Department of Homeland Security ("DHS") estimates that another 11.5 million immigrants are present in the United States without documents.²¹⁰ The overwhelming majority of immigrants in the United States, with or without documents, are from countries with Hispanic, Asian, South Asian, African or Pacific Islander racial majorities. The DHS estimates that nearly 57 percent of undocumented individuals present in the United States are Mexican.²¹¹ Nearly eighty percent of undocumented persons in the United States hail from five countries in the Americas.²¹² The reality that the overwhelming majority of immigrants are racial minorities has blurred distinctions between employment discrimination based on origin and race.

134. One in five low-wage workers is an immigrant.²¹³ Immigrant workers are over represented in the highest risk, lowest paying jobs.²¹⁴ While 21 percent of native-born households are living below 200 percent of the U.S. poverty threshold, over 40 percent of immigrant working families have incomes below 200 percent of the U.S. poverty threshold.²¹⁵

135. Regardless of when or how someone entered the United States, once here, the Constitution protects them from discrimination based on their race and national origin and from

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arbitrary treatment by the government.²¹⁶ In the absence of federal immigration reforms, federal agencies, as well as state and local actors have enacted a number of laws that unlawfully discriminate against immigrants. Across the country, state legislatures have considered 1,404 immigration measures this year, enacting 170 of them.²¹⁷ For the most part, the laws were spurred by rising resentment over “illegal immigration” and included measures to curb illegal immigrants’ access to jobs.²¹⁸

136. In addition to state governments, many municipalities have adopted ordinances to bar illegal immigrants from working. An example that received nationwide attention was the anti-immigrant ordinance adopted by the City of Hazleton, Pennsylvania. The city ordinance sought to punish employers and landlords for doing business with undocumented immigrants.²¹⁹ Hazleton’s mayor’s justification for the measure was that “illegal immigrants” had unleashed a crime wave in Hazleton. However, only four of 428, or less than one percent, of violent crimes in Hazleton in the last 6 years could be attributed to undocumented immigrants.

137. Hazleton’s ordinance ultimately was struck down by a federal district court as unconstitutional.²²⁰ The court emphasized that illegal immigrants have the same civil rights as legal immigrants and citizens, and concluded that “Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community.”²²¹ The court stated, “[i]t requires no argument that right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”²²² The court also noted that the Due Process Clause of the U.S. Constitution applies to “all persons in the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²²³

138. Another development threatening the employment rights of immigrant minorities is a new regulation passed by the DHS under which the Social Security Administration is to notify employers of inconsistencies between their employees’ W-2 forms and their Social Security numbers. Under the “No-Match” regulation, employers can be fined \$10,000 if they fail to fire workers who use fake Social Security numbers. The regulation was slated to go into effect on September 15, 2007. Immigrant rights groups and labor unions, including the A.F.L.-C.I.O. predicted that the rules would unleash discrimination against Hispanic workers.²²⁴ The A.F.L.-C.I.O., along with the American Civil Liberties Union and the National Immigration Law Center, acted quickly to obtain a temporary restraining order to prevent the rule from going into effect.²²⁵ On October 10, 2007, a federal court granted a preliminary injunction, noting that if the DHS rule were allowed to proceed, the mailing of no-match letters, accompanied by DHS’s guidance letter, would result in irreparable harm to innocent workers and employers.²²⁶

139. In 2002, the U.S. Supreme Court ruled in *Hoffman Plastics Compound, Inc. v. NLRB*, that an undocumented worker from Mexico was not entitled to an award of backpay after his employer was found to have violated federal labor laws by laying him off in retaliation for his union activities, because doing so would run counter to U.S. policy underlying federal immigration laws.²²⁷ This decision thus results in discriminatory treatment of workers based on

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their status. In response to *Hoffman*, Mexico requested an advisory opinion from the Inter-American Court of Human Rights, which ruled that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay, as all workers.²²⁸

National Origin and Religious Discrimination Against Arab, Muslim, Sikh and South Asian American Communities Post 9/11.

140. As noted in the U.S. 2007 Report, in the wake of 9/11, there has been an increase in discrimination experienced by Arab, Muslim, Sikh, South Asian Americans, and others.²²⁹ The U.S. Government reports that the “administration has . . . placed a high priority on outreach to these communities and enforcement against discrimination involving such bias.”²³⁰ Six years later, it is obvious that the efforts have either been not effective or not enough.²³¹ Furthermore, the U.S. Government has used national security and fears of terrorism justifications to limit protections against discrimination, or even fuel discrimination, based on national origin, religion, race, and color. For example, two members of Congress in an open letter, attacked the DOJ for sending envoys to the Islamic Society of North America convention, because, according to the lawmakers, the Islamic Society of North America was a group of “radical jihadists.”²³²

141. In addition, Aliakbar and Shahla Afshari, an Iranian-American couple having worked for the National Institute for Occupational Safety for over seven years were fired in 2004 after failing secret background checks. They were not given any explanation for failing the background checks. They believe that their participation in Iranian-American conferences may have been the cause. The Afsharis sued the agency for national origin discrimination, and as commented by the director of the Center for National Security Studies: “This looks suspiciously like the witch hunts of the 50's, this time targeted against Muslim Americans.”²³³

142. The USA Patriot Act, enacted shortly after 9/11, also has come to symbolize a widespread threat to constitutional rights in the post-9/11 era in the name of national security.²³⁴ It has a direct negative effect on workers' rights, such as its provision that employers can cooperate with law enforcement officers seeking access to employee personnel files without violating Title VII of the CRA, which would otherwise bar any inquiry based on race, religion or national origin.²³⁵

Recommendations

- The U.S. Government should show its commitment to protecting employment rights by using all appropriate means to ensure federal agencies protect those rights and promote equal treatment.
- The U.S. Government, in the face of narrow doctrinal interpretations by the courts, should encourage and support the enactment of laws to protect the employment rights of minorities and prevent disparate impact on minorities.

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- The U.S. Government should be consistent in its message that discrimination on the basis of national origin, in particular against Arab, Muslim, Sikh, and South Asian American persons, will not be tolerated.

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CHAPTER 5: AFFIRMATIVE ACTION

Introduction.

143. Article 1, Section 4, Article 2, Section 2 and Article 5, subsection (e)(i) and (v) of the Convention collectively create an affirmative obligation on the U.S. Government as a member State Party to take “special and concrete measures” in social, economic, cultural and other fields to ensure adequate development and protection of certain racial and ethnic groups (and individuals belonging to them) to guarantee the full and equal right to and enjoyment of economic, social and cultural rights.

144. In response to the 2000 U.S. Report, the CERD Committee stated, “[w]ith regard to affirmative action, the Committee notes with concern the position taken by the State party that the provisions of the Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic, or national groups.”²³⁶ It further stated that the adoption of special measures when the circumstances so warrant, “such as in the case of persistent disparities, is an obligation stemming from Article 2, paragraph 2 of the Convention.”²³⁷

145. Although the 2007 U.S. Report now acknowledges that the obligation of Article 1, Section 4, Article 2, Section 2 and Article 5(e) of the Convention is mandatory, the U.S. Government responds that the decision of whether measures are warranted is left to the judgment and discretion of each State Party.²³⁸ Its argument that it is within the U.S. Government’s sole discretion to determine “when circumstances so warrant” special measures under Article 2(2), however, is not persuasive, as it is tantamount to the discredited claim that the obligation is merely permissive. The CERD Committee already provided the U.S. Government with an objective standard for when “circumstances so warrant,” such as in the case of persistent disparities cited in Paragraph 398 of the CERD Committee’s concluding observations on the U.S. Report in 2001.²³⁹

146. Historically in the United States, certain racial and ethnic groups have not had full access to and equality in education, employment and economic opportunities. The legacy of slavery and the treatment of Native Americans and pervading perception of non- (or limited) English speaking immigrants continue to limit access and perpetuate inequality among minorities.

147. Although corrective affirmative action measures have been taken by the U.S. Government, full access and equality has yet to be achieved and significant race/ethnic-based discrepancies are ongoing. In education, the high school drop-out rate for White students in 2004 was 6.8 percent, but was 11.8 percent for Black students and 23.8 percent for Hispanic students.²⁴⁰ Unemployment rates for adult White men as of July 2007 were 4.2 percent, but 8.0 percent for Black men and 5.9 percent for Hispanic men.²⁴¹ Wages in 2004 for Black and Hispanic men were 74.5 percent and 63.2 percent, respectively, of those wages paid to White men.²⁴²

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148. Some statistical data indicating this lack of full access to and inequality in education, employment and economic opportunities for minorities is referenced in the 2007 U.S. Report.²⁴³ This data shows the stagnation of future progress towards the goal of eliminating discrimination mandated by the Convention (and by the United States Constitution).

Laws Enacted to Address Disparities

149. The 2007 U.S. Report references legislative initiatives and programs enacted within the United States to affirmatively promote access to and equality in education, employment and government contracting. These range from the establishment of governmental bureaus and agencies targeting equality in employment opportunities to statutory programs like the United States Small Business Act requiring federal agencies to set goals for contracting with “small and disadvantaged businesses.”²⁴⁴

150. The 2007 U.S. Report sets forth recent changes in governmental agency infrastructure to demonstrate the U.S. Government's concern over access and equality, including the creation of the Office for Civil Rights and Civil Liberties in the DHS²⁴⁵ and the restructuring of the Department of Defense Secretary for Equal Opportunity position.²⁴⁶ The 2007 U.S. Report also refers to the establishment of new agencies, such as the Department of Interior's Office of Hawaiian Relations.²⁴⁷ It also outlines the basic constitutional and legal framework through which U.S. Government's obligations under the Convention are implemented, including the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution²⁴⁸ mandating that all persons are equal before the law and entitled to constitutional protection.²⁴⁹

151. However, despite the stated commitment to access and equality, the 2007 U.S. Report also advances perceived limitations to this commitment. First, it argues that it is within the U.S. Government's sole discretion to determine “when circumstances warrant” under Article 1, Section 1 of the Convention and what types of measures to use.²⁵⁰ Second, it expounds upon constitutional limitations on affirmative action programs, such as the general prohibition against (i) quotas, (ii) preference afforded to unqualified individuals and (iii) undue burdens on persons not beneficiaries.²⁵¹ Third, it notes that “any affirmative action plan that incorporates racial classifications must be narrowly tailored to further a compelling government interest.”²⁵² Finally, it discusses ongoing concerns over reverse discrimination and the ability to avoid race-based programs to focus on socio-economic factors.²⁵³

152. In practice, the U.S. Government has imposed significant limitations on affirmative action programs. Although affirmative action measures have been upheld by the U.S. Supreme Court in the context of education, employment and government contracting, such measures must be narrowly tailored to further a compelling governmental interest and will be strictly construed to pass constitutional muster.²⁵⁴ In the employment arena, public employers must have “convincing evidence” of prior discrimination, which is more than mere societal discrimination, before it can implement affirmative action programs.²⁵⁵

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153. Increasingly, affirmative action is being distorted to promote “color blindness” rather than to ensure adequate development and protection of minorities. The justification for that distortion is concern over reverse discrimination.²⁵⁶ Some U.S. states have specifically prohibited the adoption of any affirmative action measures. The states of Washington, California and Michigan have enacted laws that effectively ban all forms of affirmative action in public education, public employment and public contracting.²⁵⁷

154. While the recent Supreme Court decision in *Grutter v. Bollinger*²⁵⁸ upheld the constitutionality of voluntary affirmative action policies, holding that a law school had a compelling interest in attaining a diverse student body, there remains an essential gap in federal law implementing the Convention. There are no U.S. constitutional or statutory provisions that preempt state laws banning affirmative action programs.

155. The 2007 U.S. Report concludes that the existing affirmative action infrastructure is adequate and that the U.S. Government is satisfied with achievement of objectives to date. In reality, the executive and legislative branches of the federal government have continued to oppose affirmative action measures. For instance, the brief for the U.S. Government as amicus curiae in support of the petitioner’s claim in *Parents Involved in Community Schools v. Seattle School District*²⁵⁹ that the district’s race-based student assignment plan violated the Equal Protection Clause of the Fourteenth Amendment stated that, among other things, the district’s efforts were not based on a compelling governmental interest, amounted to “outright racial balancing,” treated students solely as members of racial groups and denied them individualized, holistic consideration, failed to consider race-neutral means and unfairly burdened innocent third parties.²⁶⁰ Attacking the Seattle School District’s affirmative action measures as “not based on a compelling governmental interest” contravenes the U.S. Government’s obligations under the Convention. As a voluntary signatory and member State Party to the Convention, the U.S. Government is obligated to harmonize its efforts with the requirements of the Convention and those of the Constitution, which in reality are consistent.²⁶¹

Affirmative Action and Education.

156. The 2007 U.S. Report advances examples of special measures taken such as direct support for historically Black colleges.²⁶² The examples cited, however, do not adequately address the persistent problem of discrimination in education. Furthermore, the U.S. Department of Education’s Office of Civil Rights has failed to bring any enforcement actions under Title VI of the CRA. The failure to take special measures to address problems in discrimination has resulted in a perceived increase in the disparity between historically Black colleges and traditionally White institutions. Special measures that would have a meaningful impact are affirmative action programs that address significant disparities among racial groups. While the 2007 U.S. Report correctly notes that affirmative action programs should be designed to last only for the period of time needed to right the wrongs of the past,²⁶³ educational discrimination is prevalent and there remains a significant disparity among Whites and minorities, especially with respect to higher education.

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157. The U.S. Government also fails to acknowledge diversity as a compelling interest. The 2007 U.S. Report notes that to date, the U.S. Supreme Court has not recognized the goal of achieving broad diversity as a “compelling interest” outside of the educational setting.²⁶⁴ Nor has the Court found that the goal of achieving simple racial diversity is a compelling interest that would permit racial classifications in an educational setting. The U.S. Government failure to find racial diversity as compelling interest significantly undermines previous gains.

158. In this regard, the U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District*, and *Meredith v. Jefferson County Board of Education* severely limits *Brown v. Board of Education*.²⁶⁵ As stated by Justice Stevens (the Court’s longest serving member) in his dissent, “no member of the Court that I joined in 1975 would have agreed to today’s decision.”²⁶⁶

159. State initiatives, such as California’s Proposition 209, Washington’s Initiative 200 and Michigan’s Civil Rights Initiative, end long-standing state affirmative action programs, including in education. As a State Party to the Convention, the U.S. Government should initiate measures, such as federal legislation or a constitutional amendment, to prevent the undermining of federally-guaranteed civil rights.

160. In addition, the U.S. Government should support the role of NGOs in the enforcement of affirmative action measures. NGOs have filed numerous amicus briefs in support of affirmative action measures in cases where White plaintiffs sued public institutions over the alleged discriminatory use of race, such as the pivotal affirmative action cases of *Parents Involved in Community Schools v. Seattle School District* and *Grutter v. Bollinger*. While NGOs often step in to defend and frame the issue from a civil rights perspective, it is critically important that the U.S. Government voice support for affirmative action programs and initiatives that are designed to remedy discriminatory practices and disparities.

Affirmative Action and Employment.

161. In 2001, the CERD Committee expressed concern regarding the persistent disparities in the enjoyment of the right to equal opportunities for employment and recommended the U.S. Government take all appropriate measures, including “special measures” according to Article 2, Section 2 of the Convention, to ensure the right of everyone, without discrimination as to race, color or nationality or ethnic origin to the enjoyment of the rights in Article 5 of the Convention, including, without limitation, employment.²⁶⁷ The CERD Committee noted with concern the tension between this mandate and individual U.S. states’ rights.²⁶⁸

162. With respect to affirmative action in employment, the U.S.’s response to the CERD Committee’s recommendations reflects little change since 2001. The decision as to “when circumstances so warrant” is up to the discretion of the U.S. Government, as well as the precise nature and scope of the action.²⁶⁹ The U.S. Government admits that even though

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progress has been made, disparities of results continue to exist.²⁷⁰ Nonetheless, the U.S. Government maintains that its laws and regulations meet the requirements in Article 5.²⁷¹

163. The “foundation” statute in support of full access and equality in employment is Title VII of the CRA, which prohibits employment discrimination based on race, color, religion, sex or national origin.²⁷² Title VII’s prohibition of race discrimination does not require “strict scrutiny” in the analysis of private, voluntary affirmative action programs;²⁷³ such programs are valid if they are intended to “eliminate conspicuous racial imbalance in traditionally segregated job categories”²⁷⁴ and when the programs do “not necessarily trammel the interests of white employees.”²⁷⁵

164. In April 2006, the new EEOC Compliance Manual was introduced with updated guidance on Title VII prohibitions on discrimination in employment based on race and color. However, this effort by the U.S. Government to provide guidance on employment laws focuses on the ability of individuals to file complaints and not on affirmative steps towards access and equality.

165. With respect to federal public employers, the U.S. Supreme Court has rejected affirmative action designed to remedy a generalized history of “societal discrimination.”²⁷⁶ The government agency instead must show specific evidence of past discrimination to justify affirmative action measures.²⁷⁷ If and only if such evidence is shown, the U.S. Supreme Court will uphold a broad range of affirmative actions.²⁷⁸ Paradoxically, public employers now have less leeway than private employers to engage in race-conscious affirmative action measures. The U.S. Government should take all necessary steps to support affirmative action in the public sector.

166. At the state level, state anti-affirmative action initiatives described above have had a detrimental effect on affirmative action in employment. California’s Proposition 209, Washington’s Initiative 200 and Michigan’s Civil Rights Initiative end long-standing state affirmative action programs, including in public employment, except as required by federal law. These state initiatives are contrary to the U.S. Government’s obligations under the Convention and the U.S. Government should take all necessary measures to discourage them, including by enacting preemptive federal law.

Affirmative Action and Contracting.

167. Non-discriminatory obligations are imposed on federal contractors and sub-contractors by Executive Order. While the Department of Labor’s (“DOL”) Office of Federal Contract Compliance Programs indicates that employers must comply with the laws and regulations concerning non-discrimination in employment, the actions taken by the DOL are remedial and do not prevent discrimination from occurring. That is, special measures are not implemented to adequately detect and remedy systemic discrimination. The examples cited in the 2007 U.S. Report illustrated actions that were taken in an attempt to remedy discriminatory acts that had already occurred, rather than to prevent such acts from occurring.²⁷⁹

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168. The 2007 U.S. Report states that several special measures are in place to ensure the enjoyment of social and economic rights. Race-conscious programs in contracts continue to face financial and social barriers, such as limited access to capital and discrimination in the bid process. These circumstances persist even though minority-owned businesses grew exponentially in previous years.²⁸⁰

169. As in education and employment, state initiatives have undermined prior gains. For instance, California's Proposition 209 has resulted in a sharp decline in the opportunities for disadvantaged business enterprises, including minority based businesses.²⁸¹

Recommendations.

- The U.S. Government should recognize its mandatory obligations under the Convention to use "special measures," and the goals of full access and equality to education, employment, and contracting. The U.S. Government should cease relying on structural and constitutional limitations to avoid promoting positive change and focus on the implementation of special measures, including using all appropriate means to support voluntary efforts to promote diversity.
- The U.S. Government should create appropriate infrastructure to (1) monitor the effectiveness and fairness of current affirmative action programs in education, employment, and contracting, and (2) to generate additional effective affirmative action measures.
- The U.S. Government should spearhead affirmative action efforts to eliminate racial discrimination and provide full access and equality in education, employment and contracting, recognizing its responsibility as a model to the private sector and individual states.

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CHAPTER 6: HATE SPEECH AND HATE CRIMES

Introduction.

170. Article 4(a) obliges States Parties to penalize four categories of misconduct: (i) all dissemination of ideas based on racial superiority or hatred; (ii) incitement to racial hatred; (iii) all acts of violence or incitement to violence against any race or group of persons of another color or ethnic origin; and (iv) the provision of any assistance to racist activities, including its financing.

171. Article 4(b) requires States Parties to declare illegal and prohibit organizations that promote and incite racial discrimination, to prohibit their propaganda activities, and to make participation in such organizations and activities as offense punishable by law. Article 4(c) imposes an obligation to forbid public authorities and institutions from promoting or inciting racial discrimination.

172. Under Article 5, States Parties must undertake to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin to equality before the law, notably in the enjoyment of the following rights: (a) the right to equal treatment before the tribunals and all other organs administering justice; and (b) the right to security of persons and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.

173. The CERD Committee also has commented that States Parties should criminalize acts of racism as provided in Article 4, “in particular the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, violence or incitement to racial violence, but also racist propaganda activities and participation in racist organizations. States Parties are also encouraged to incorporate a provision in their criminal legislation to the effect that committing offences for racial reasons generally constitutes an aggravating circumstance”²⁸²

174. In response to the 2000 U.S. Report, the CERD Committee recommended that “firm action be taken to punish racially motivated violence and ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such action.”

Hate Speech and the First Amendment.

175. Hate speech persists in the United States. The United States, however, is limited by the U.S. Constitution in effectively curtailing hate speech. By issuing a reservation to Article 4, the U.S. Government made clear that it would not restrict Americans’ free speech rights through the adoption of legislation or any other measures, to the extent they are protected by the Constitution and the laws of the United States.

176. Although most harmful and virulent hate speech is protected by the First Amendment to the U.S. Constitution, speech or other activities that are designed to intimidate do not receive First Amendment protections. In a decision arising from prosecution of a Klu Klux

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Klan leader at a rally, the U.S. Supreme Court held that states can criminalize speech or other conduct if it is “directed at inciting or producing imminent lawless action” and is “likely to incite or produce such action.”²⁸³ The U.S. Supreme Court also has held that “the First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, . . . a State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”²⁸⁴ Instead of prohibiting all messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence.”

Hate Speech and the Internet.

177. Hate speech has been pervasive on the internet and, like other forms of racist speech, receives First Amendment protection. Hate speech on the internet is not likely to fit within the “fighting words” exception to the First Amendment (*i.e.*, words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”²⁸⁵), although an exception can be carved out for “true threats” on the internet, such as sending threatening email messages to a victim or even a public announcement on the internet of an intention to commit an act that is racially motivated.²⁸⁶ An exception to the First Amendment’s protection may also be made for harassment via email or the internet, “as long as it is sufficiently persistent and malicious as to inflict, or is motivated by desire to cause, substantial emotional or physical harm and is directed at a specific person.”²⁸⁷

178. Although freedom of speech is guaranteed by the First Amendment, it does not prevent the U.S. Government from (i) supporting technologies that allow individuals to avoid hate speech, (ii) developing educational and other programs advocating tolerance and condemning racial hatred and prejudice, or (iii) exposing new technologies that allow individuals or groups to spread hate towards a targeted racial group.

Hate Speech Targeted at Immigrants.

179. Due to the recent debates in the United States regarding immigration reform, there has been an increase in hate speech directed towards Hispanics. There also has been an increase in the activity of anti-immigration groups. According to the Anti-Defamation League (the “ADL”), many extremist events have taken place in southern states where “white supremacists hope to exploit anti-immigration sentiment that has risen as a result of a significant influx of Hispanic immigrants, primarily agricultural workers, into areas of the South that had never before had a substantial Hispanic population.”²⁸⁸

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Hate Crimes.

180. A hate crime occurs when the perpetrator of the crime intentionally seeks out an individual because of that person's group identity targeting not only an individual, but an entire community or category of people. Unlike a random act of violence, one of hate crime's goals is to terrorize the entire community.

181. According to the ADL, failure to address bias crimes "could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes therefore cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups—these incidents can damage the fabric of our society and fragment communities."²⁸⁹

182. In 2005, over 7,000 hate crime incidents were reported. Of that number, 56 percent were motivated by race, with 68 percent against Blacks, 20 percent against Whites, five percent against Asian-Pacific Islanders and two percent against Native Americans. There were incidents motivated by ethnicity or national origin, with 58 percent targeted against Hispanics. Of the hate crimes, 62 percent were against persons and 37 percent were against property. Fifteen percent of the hate crimes were motivated by religion. Of this amount, 69 percent were against Jews, 11 percent were against Muslims, five percent were against Catholics, and four percent were against Protestants.²⁹⁰

183. Statistics also reflect an increase in reported crimes against Hispanics. The FBI reported 522 incidents of crimes against Hispanics in 2005, up from 475 in 2004, raising anti-Hispanic crime from 6.2 percent of hate crime incidents to 7.3 percent. Many observers attribute much of the increase to the recent debate over immigration reform.²⁹¹ As some observers note, "the bias that motivates a hate crime... is rooted in a wider public climate of discrimination, fear, and intolerance against targeted communities, which may also be echoed in or enhanced by public policy."²⁹²

184. As is the case with the increase in hate crime incidents involving Hispanics during the immigration reform debates, certain groups were targeted victims after the terrorist attacks of September 11, 2001. According to the DOJ, under its initiative to combat "backlash" crimes, the Civil Rights Division has investigated more than 750 backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. Since 2001, the Civil Rights Division has charged 165 defendants in 105 cases of bias-motivated crimes.²⁹³

185. Although the DOJ has had some success in prosecuting these bias-motivated crimes, federal hate crimes prosecutions under 18 U.S.C. § 245, the federal hate crimes statute, are relatively few "both because of the narrow scope of the federal hate crimes law and because of federal reluctance to preempt or disrupt local prosecutions."²⁹⁴ Crimes must be motivated by a person's race, color, national origin, or religion and occur while the victim is engaged in a specified "federally protected activity."

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186. According to the ADL, “from 1991-2005, for example, the FBI documented over 113,000 hate crimes. During that period, however, the DOJ brought fewer than 100 cases under 18 U.S.C. § 245. In the past, DOJ officials identified a number of significant racial violence cases in which federal prosecutions had been stymied by unwieldy jurisdictional requirements.”²⁹⁵ The number of FBI investigations into civil rights violations – including hate crimes and police abuse incidents – declined by more than 60 percent between 2001 and 2005.²⁹⁶

187. In addition to the federal hate crimes law, the U.S. Congress passed the Hate Crimes Statistics Act (“HCSA”) in 1990. HCSA requires the DOJ to acquire data from law enforcement agencies across the country on crimes that “manifest prejudice based on race, religion, sexual orientation, or ethnicity” and to publish an annual summary of the findings.

Gaps in Existing Hate Crimes Laws.

188. Existing federal hate crimes laws have various reporting weaknesses that prevent the FBI from capturing the extent to which hate crime incidents occur. In 2005, there were 12,417 law enforcement agencies in the United States that participated in the data collection effort as compared to 12,711 in 2004. The number of participating agencies dropped 2.3 percent from 2004; only 16.4 percent of participating agencies reported a single hate crime.²⁹⁷

189. The statistics were also incomplete in other ways including absence of data for certain cities (New York and Phoenix), states (Mississippi, Alabama and Hawaii), and less than 10 hate crimes were reported in four other states.²⁹⁸

190. There also is little information published about juvenile hate crime offenders. The HCSA report does not provide specific information about either juvenile hate crime offenders or victims. An October 2001 report by the DOJ’s Bureau of Justice Statistics provided information about the frequent involvement of juveniles in hate crime incidents. The report analyzed nearly 3,000 of the 24,000 hate crimes reported to the FBI from 1997 to 1999, and revealed that a disproportionately high percentage of both the victims and the perpetrators of hate violence were young people under 18 years of age.²⁹⁹ Specifically, 33 percent of all known hate crime offenders were under the age of 18, and another 29 percent of all hate crime offenders were between 18 and 24 years of age.

Case Study: Jena 6.

- National attention has been focused on events that occurred in Jena, Louisiana in the case of six Black teenage boys charged with various felony crimes and facing lengthy prison sentences as a result of racially-driven incidents on a high school campus.
- At Jena High School, there was a tree where it was commonly known that only the White students could sit. A freshman asked the school principal if Blacks could sit under the tree, to which the principal responded that they could do whatever they wanted. The next day, three nooses, in school colors, were hung from the tree. The

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principal expelled the students responsible for hanging the nooses. Dismissing the nooses as a “youthful stunt”, however, the school board and superintendent reduced the expulsions to three-day in-school suspensions. Racial tensions rose at the school. A sit-in took place, followed by a series of fights.

- A White youth, apparently taunting a Black student, was thrown to the ground and kicked. In response to the attack on the White student, the prosecutor arrested and charged the six teenagers with attempted second degree murder, later reduced to second degree aggravated battery and conspiracy. The six were also expelled from school. In prosecuting one of the six, a 16-year old was tried as an adult and convicted by an all-White jury of aggravated assault and conspiracy. At the trial, the prosecutor argued that the gym shoes worn by the student were a “deadly weapon.” The appellate court later vacated the youth’s conviction, on the grounds that the 16-year old should not have been tried as an adult.³⁰⁰
- In testimony before Congress regarding the incident and the role of federal intervention in hate crimes and race-related violence in public schools, the U.S. Attorney for the region where Louisiana is located stated that the DOJ rarely brings cases against juveniles, and when it does they are not open to the press or public. He reported that while they found the conduct “deeply disturbing and offensive, the DOJ and U.S. Attorney declined to pursue charges after learning that the nooses had been hung by juveniles who had been promptly sanctioned by the school.”³⁰¹

Case Study: Hate Crimes on College Campuses.

- Every year, more than a half million students endure bias-motivated slurs, vandalism, threats, and physical assaults on college campuses.³⁰² The FBI typically documents almost 10,000 hate crimes every year, and other estimates range as high as 200,000.
- The 1998 Higher Education Act (“HEA”) requires all colleges and universities to collect and report hate crime statistics to the Office of Postsecondary Education of the U.S. Department of Education.³⁰³ Currently, colleges must report any crimes involving bodily injury in which the victim was targeted because of his or her race, gender, religion, sexual orientation, ethnicity, or disability. The American Association of University Women (“AAUW”) points out that there are limitations to the data gathered under HEA which likely result from discrepancies between the FBI definition of hate crimes and the HEA definition. The FBI definition includes several types of offenses omitted by the HEA definition. AAUW supports the amending of the HEA hate crime definition to align it with the definition used by the FBI because improved data would give parents and students a more accurate understanding of campus safety, and provide educational institutions with a better picture of their campus climate.

191. In the United States, the prevention, investigation, and prosecution of crimes against persons or property are primarily the responsibility of local authorities. Under proposed

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federal legislation, the Local Law Enforcement Hate Crimes Prevention Act (“LLEHCPA”), the federal government would provide more assistance to local law enforcement officials by allowing them to apply for federal grants. Federal agents would be given broader authority to assist state and local police, and the DOJ would have the authority to aid state and local jurisdictions either by lending assistance or, where local authorities are unwilling or unable, by taking the lead in investigations and prosecutions of serious crimes motivated by prejudice based on race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim. It also would provide for grants to state and local communities to combat violent crimes committed by juveniles, train law enforcement officers and assist in state and local investigations and prosecutions of bias-motivated crimes.³⁰⁴

192. The LLEHCPA is likely to face much opposition because it seeks to protect individuals on the basis of gender, gender identity, disability, and sexual orientation. Conservative religious groups have said that the bill would make criminals of clergymen who speak out against homosexuality, then inadvertently inspire violence from misguided followers.³⁰⁵

Case Study: Violence Between Blacks and Hispanics in Los Angeles.

- As reported in the Los Angeles Times, Los Angeles County incidents of violence increased 26 percent in 2005, with much of the increase due to aggression between Blacks and Hispanics, often at schools. There was a 50 percent increase in racially-motivated offenses, especially toward immigrants and between Blacks and Hispanics. Conflicts between Blacks and Hispanics occurred in neighborhoods, jails, and schools, which showed a 111 percent increase. As Supervisor Yvonne Braithwaite Burke said, “All it takes is one incident.” The analysis by the county Commission on Human Relations (the “County Commission”) revealed tensions between Blacks and Hispanics with the majority of suspects in anti-Black crimes being Hispanic and vice versa.
- The County Commission stressed that hate crimes are widely underreported and accurate statistics likely show a far greater number of incidents especially in schools, jails, and juvenile detention halls. Others attribute the increase in gang-related hate crimes to a lack of opportunities for youth, struggling schools, and scarce jobs.³⁰⁶

Recommendations.

- The U.S. Government should encourage education efforts directed at school officials, teachers, and parents about the activities that constitute hate crimes and other threats of intimidation, and to discourage intolerance and hostility in schools and the communities.
- The U.S. Government should work to enact laws to close the gaps that currently exist in federal hate crimes laws by making it easier to prosecute those who commit

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racially motivated crimes and by increasing the reporting accuracy of hate crime incidents.

- The U.S. Government, state government, and private organizations should produce and disseminate messages of tolerance, both on-line and through traditional media outlets, to counteract the proliferation of racist, sexist, homophobic, and other constitutionally protected “hate speech.”
- The U.S. Government should develop and further encourage the private development and distribution of filtering software that can selectively limit the content accessible from individual and networked computers. This technology can be voluntarily implemented in homes or anywhere that personal discretion permits the blocking of hate speech.

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CHAPTER 7: ENVIRONMENTAL JUSTICE AND HEALTH CARE DISPARITIES

Introduction.

193. Article 2(1)(c) of the Convention obligates each State Party to take measures to review its law and policy and amend or rescind laws that have the effect of creating or perpetuating racial discrimination wherever it exists.

194. In response to the 2000 U.S. Report, the CERD Committee noted its concern “about persistent disparities in the enjoyment of, in particular . . . access to public and private health care.” It recommended that the U.S. Government “take all appropriate measures, including special measures according to article 2, paragraph 2 of the Convention, to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to the enjoyment of rights contained in article 5 of the Convention.”

195. Environmental justice is “the fair treatment of people of all races, cultures, and income with respect to the development, implementation, and enforcement of environmental laws and policies, and their meaningful involvement in the decision-making processes of the government.”³⁰⁷ “Fair treatment” means that no group of people, including racial, ethnic or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of federal, state, local and tribal programs and policies. “Simply put, environmental justice demands that everyone . . . is entitled to equal protection and equal enforcement of our environmental, health, housing, land use, transportation, energy and civil rights laws and regulations.”³⁰⁸ Disparities in health are “differences between two or more population groups in health outcomes and in the prevalence, incidence, or burden of disease, disability, injury, or death.”³⁰⁹

196. Environmental racism and health care disparities persist in the United States. Low-income communities and people of color are disproportionately burdened by environmental pollution and myriad health problems associated with poor air and water quality and toxic exposure. Such disparities in the United States primarily impact the poor, uninsured, and other vulnerable and high risk populations. The 2000 U.S. Report noted the disproportionate impact of transportation and hazardous waste clean-up projects on minority populations. It also reported on the striking disparities in the prevalence of certain diseases and conditions among these same populations.³¹⁰ It noted that “almost every form of disease and disability is more prevalent among the poor . . . and that they tend to live in environments (both urban and rural) which exacerbate these problems.”³¹¹ The 2007 U.S. Report acknowledges that “[f]ederal agencies continue to address issues concerning the environmental impacts of activities such as the locating of transportation projects and hazardous waste clean-up projects, on . . . minority and low income populations,” and that health disparities among Whites and minorities “were found in treatment for cancer, cardiovascular disease, HIV/AIDS, diabetes, and mental illness, and were also seen across a range of procedures, including routine treatments for common health problems.”³¹²

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Environmental Justice Overview.

197. Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” signed by President Clinton in 1994, incorporated environmental justice principles into the work of federal agencies. It requires federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States,” to collect data on the health and environmental impact of their programs, activities on minority populations and low-income populations, and to develop policies to achieve environmental justice.³¹³ It does not, however, create legally enforceable rights or obligations.³¹⁴

198. Federal agencies have not fully integrated the tenets of environmental justice into environmental decision-making. In September 2005, the Associated Press reported—based on an analysis of an Environmental Protection Agency (“EPA”) research project—that Blacks are nearly 80 percent more likely than Whites to live in neighborhoods where industrial pollution is suspected of posing the greatest health danger.³¹⁵

199. In October 2003, the U.S. Commission on Civil Rights reported on the “failure” of the EPA and the Departments of the Interior, Housing and Urban Development and Transportation “to fully incorporate environmental justice into agency core missions,” citing “the absence of accountability and critical assessments for environmental justice programs and activities, and the lack of top-down leadership on environmental justice issues.”³¹⁶ In March 2004, the EPA’s Office of the Inspector General (“OIG”) concluded that the EPA had not fully implemented environmental justice, and specifically, that the EPA had not “fully implemented Executive Order 12,898 [or] consistently integrated environmental justice into its day-to-day operations.”³¹⁷ It recommended that “[EPA] issue a memorandum reaffirming that Executive Order 12898 is an [EPA] priority and that minority and low-income populations disproportionately impacted will be the beneficiaries of this Executive Order . . . articulate a clear vision on the EPA’s approach to environmental justice. . . [and] ensure appropriate training is provided.”³¹⁸

200. More recently, in July 2005, the Government Accounting Office (“GAO”) found the EPA continued to fail to address environmental justice.³¹⁹ Specifically, the GAO found with respect to development of clean air rules, the EPA did not initially address environmental justice, did not provide guidance and training to identify potential environmental justice concerns, and its economic reviews did not consistently provide decision makers with an environmental justice analysis.³²⁰ The EPA was harshly criticized for a research study, called the Children’s Environmental Exposure Research Study (“CHEERS”), which was reported to have deliberately targeted low-income and minority children to test exposure household pesticides and toxins, without sufficient safeguards to protect the study participants.³²¹ The EPA ultimately cancelled the study in response to these criticisms, including that it selected its study participants based on race and economic status.

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Enforcement of Title VI and Environmental Laws in Minority and Low-Income Communities.

201. Title VI of the CRA provides that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³²² Under section 602 of Title VI, agencies distributing federal funds are required to issue regulations implementing the CRA to proscribe activities that have the effect of discriminating on the basis of race, color, or national origin. In 2001, notwithstanding earlier precedent holding that a private right of action exists to enforce these disparate impact regulations under § 602, the U.S. Supreme Court held that no private right of action exists.³²³ As a result, for many communities, federal agencies are the sole enforcers of the protections from discrimination provided by Title VI.

202. In 2005, the EPA issued its environmental justice Strategic Plan.³²⁴ It fails to establish goals to reduce or eliminate the disproportionate burden placed on minority and low-income communities as to environmental pollutants. Moreover, it states that the EPA will attempt to provide environmental justice without regard to race. This race-neutral approach to addressing adverse environmental effects on populations ignores Executive Order 12898 and undermines the very purpose of environmental justice. Finally, the Strategic Plan either rejects the recommendations of the OIG and GAO in their entirety or accepts them only to the extent they do not require the EPA to address the unjust and disparate burdens its programs and policies have on minorities and low-income communities.

Discriminatory Siting of Environmentally Hazardous Waste Facilities.

203. In 1987, the United Church of Christ Commission for Racial Justice issued a seminal study—Toxic Wastes and Race in the United States—that identified race as the most significant variable in predicting where commercial hazardous waste facilities were located in the United States. In February 2007, twenty years after the release of the initial study, the United Church of Christ Commission for Racial Justice has issued a follow-up report—Toxic Wastes and Race at Twenty—revealing that “racial disparities in the distribution of hazardous wastes are greater than previously reported.”³²⁵

204. According to the report, over 5.1 million people of color currently live in neighborhoods with one or more commercial hazardous waste facilities.³²⁶ Eighty percent of Hispanics and 65 percent of Blacks live in counties that failed to meet at least one of the EPA’s outdoor air quality standards, as compared to 57 percent of Whites.³²⁷ Moreover, “[p]eople of color in 2007 are more concentrated in areas with commercial hazardous sites than in 1987.”³²⁸ Housing segregation, zoning practices and infrastructure development programs all contribute to the disproportionate exposure of minority communities to hazardous materials.³²⁹

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Case Study: Jefferson County, Texas.

- Jefferson County, Texas ranks in the top 10 percent for worst air quality in the United States.³³⁰
- The two major cities in Jefferson County are predominantly populated by minorities. The population of Beaumont is 45.8 percent Black and the population of Port Arthur is 43.7 percent Black.³³¹
- These two cities host 21 chemical plants and refineries. In two predominantly White communities in the same area of Jefferson County—Port Neches and Winnie—there are only three chemical plants and refineries.³³²
- Citizens of Jefferson County face a cancer risk more than 100 times the goal set by the Clean Air Act. Seventy-two percent of the air cancer risk is from vehicles; 24 percent of the air cancer risk is from major industrial facilities.
- In 2007, the U.S. Army and Veolia Environmental Services decided to dispose of chemical waste from the destruction of deadly VX nerve agent stockpile in Port Arthur, an area already smothered by refineries and chemical plants.³³³ The Community In-Power Development Association (“CIDA”) and other residents were forced to file a lawsuit against the U.S. Army and Veolia Environmental Services to stop the shipment of the deadly nerve agent VX to be incinerated in Port Arthur, an area already smothered by refineries and chemical plants, and hit hard by Hurricane Rita.³³⁴

Lead in Schools and Child Care Facilities.

205. Lead poisoning can cause learning disabilities, behavioral problems and at very high levels, seizures, coma and even death.³³⁵ It is a serious and all-too-common problem for minority children. Although concentrations of lead in blood levels of American children have decreased in recent years, “black children and poor children continue to have higher blood lead concentrations.”³³⁶ Indeed, 3 percent of Black children compared to 1.3 percent of White children have elevated blood lead levels.³³⁷ Not surprisingly, 35 percent of families with incomes under \$30,000 live in housing with lead hazards, compared to only 19 percent of families with incomes over \$30,000.³³⁸ Black children suffer from lead poisoning at rates twice that of White children at every income level, but for low-income Black children the rate is 28.4 percent compared to 9.8 percent for low-income White children.³³⁹

206. Various federal initiatives have focused on the issue of lead poisoning in children. The President’s Task Force on Environmental Health Risks and Safety Risks to Children—formed in 1997 by executive order—includes officials from the EPA, the Department of Health and Human Services, the Consumer Products Safety Commission and the Department of Housing and Urban Development.³⁴⁰ The Task Force formulated a plan to eliminate childhood

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lead poisoning that was incorporated into the Department of Health and Human Services' Healthy People 2010 goals for the nation.³⁴¹ The EPA's Office of Ground Water and Drinking Water has focused its efforts on Lead and Copper Rule ("LCR") Revisions, which require that public water systems monitor a fixed number of customer taps for lead, and if certain thresholds are met, the system must undertake a program to control corrosivity of water, increase monitoring, educate the public and possibly replace lead service lines within the distribution system.³⁴² The Office of Prevention, Pesticides and Toxic Substances addresses lead in paint and dust, and has developed a lead campaign for Head Start programs to promote lead poisoning prevention in young children at Head Start Day Care Centers.³⁴³

207. Despite these initiatives, there is no federal law requiring sampling of drinking water in schools or child care facilities that receive water from other public water systems (although schools that have an independent water supply are subject to regulation and sampling as non-community public water systems).³⁴⁴ States and local jurisdictions have established programs for testing drinking water lead levels in schools, but in the absence of additional federal funding, it would be difficult to expand programs beyond existing efforts because state drinking water programs are already challenged by funding shortfalls.³⁴⁵ Similarly, existing federal regulations do not provide guidance to school districts on how to ensure schools are not located on or near toxic sites, or govern indoor air quality and overall environmental health of school buildings.

Case Study: Washington, D.C.

- In 2004, the D.C. Water and Sewer Authority ("WASA") identified approximately 29 schools with elevated levels of lead in their water fixtures. Subsequently, WASA and the D.C. Department of Health offered free blood lead screenings to students and "worked closely with the EPA to establish the most effective protocol for sampling the water outlets in the public schools that served the target population of children under the age of six in Head Start, Pre-K, and Kindergarten programs."³⁴⁶ "The lead levels had begun rising in 2001, but all three government agencies failed to alert the public to the well-established health risk."³⁴⁷ Citizens and experts alike alleged that these agencies "did not follow standard protocols [in the tests]," but "used methods to make the lead look low when it wasn't."
- In January 2007, the D.C. City Council disclosed that tests conducted between August 2006 and January 2007 had revealed that lead levels at five public schools exceeded federal standards for drinking water.³⁴⁸

Health Care Disparities.

208. In 2000, the U. S. Government reported that "[p]ersons belonging to minority groups tend to have less adequate access to health insurance and health care," and that "[h]istorically, ethnic and racial minorities were excluded from obtaining private insurance, and although such discriminatory practices are now prohibited by law, statistics continue to reflect

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that persons belonging to minority groups, particularly the poor, are less likely to have adequate health insurance than White persons.”³⁴⁹ It also noted that “[a]lmost 30 percent of Hispanic children, and 18 percent of African American children are estimated to be without health insurance,” and that “immigrants, those who are unemployed, work part-time, or are retired often have inadequate insurance.”³⁵⁰

209. The 2007 U.S. Report states that “despite progress in overall health in the nation, continuing disparities exist in the burden of illness and death experienced by some minority groups, compared to the United States population as a whole.”³⁵¹ It also notes that “minorities are less likely than Whites to receive needed care, including clinically necessary procedures, in certain types of treatment areas.”³⁵² It cites, for example, a 2002 report by the Institute of Medicine of the National Academy of Sciences (“IOM”) that highlighted racial disparities in treatment for cardiovascular disease.³⁵³

210. Many Americans continue to face inequalities in health coverage, provider access and overall health status. Significantly, the IOM has estimated that 18,000 deaths per year are directly related to the lack of health care insurance.³⁵⁴ In the United States, private health insurance, or employment-related insurance, is the largest source of health spending,³⁵⁵ however, minorities are not only less likely to be covered by private health insurance than are Whites, they are less likely to use government-sponsored health coverage.³⁵⁶ For example, nearly 18 percent of all Asian Americans and 22 percent of Pacific Islanders are uninsured, compared to just over 11 percent of Whites.³⁵⁷ In 2004, one out of five Blacks was uninsured for the year, compared to one out of nine Whites.³⁵⁸ Similarly, Hispanics represent nearly 30 percent of America’s uninsured.³⁵⁹ Uninsured Americans “are less likely to receive preventive care, screening services, and appropriate acute or chronic disease management, and they are more likely than insured individuals to have poorer overall health.”³⁶⁰

211. In 2000, the Department of Health and Human Services launched Healthy People 2010, a comprehensive, nationwide health promotion and disease prevention agenda that contains 467 objectives “designed to serve as a framework for improving the health of all people in the United States during the first decade of the 21st century.”³⁶¹ In December 2006, the United States Department of Health and Human Services issued the Healthy People 2010 Midcourse Review, assessing “the Nation’s progress toward increasing the quality and years of healthy life and eliminating health disparities for all Americans.”³⁶² The report stated that although about 60 percent of the objectives were met or moved toward their targets, 20 percent moved away from their objectives and “health disparities remain virtually unchanged.”³⁶³ Indeed, despite the fact that “[b]etween 1997 and 2003, the disparities gap between poor and middle/high-income persons with health insurance decreased by 10 to 49 percentage points,” poor people remain three times as likely to lack health insurance as middle/high-income people.³⁶⁴

212. The prevalence of HIV/AIDS in the Black community in the U.S. is an epidemic. While “race and ethnicity, by themselves, are not risk factors for HIV infection,” “historical, structural, environmental, and cultural factors—including racism and discrimination, poverty,

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denial, stigma, homophobia, and limited access to health care—African Americans are more vulnerable to HIV infection.”³⁶⁵ Efforts to combat HIV/AIDS in Black communities—by government and community leaders alike—have failed to reduce the high rates of HIV infection. According to the National Institutes of Health, “racial and ethnic minority populations in the United States, primarily African Americans and Hispanics, constitute 58 percent of the more than 928,188 cases of AIDS reported to the Centers for Disease Control and Prevention (“CDC”) since the epidemic began in 1981.”³⁶⁶ Indeed, Blacks make up 50 percent of all AIDS cases reported in the United States.³⁶⁷ As with many diseases, having health insurance improves access to care for individuals infected with HIV/AIDS. In the United States, Blacks with HIV/AIDS are more likely than their White counterparts to have government-sponsored insurance or no insurance.³⁶⁸ Additionally, one fifth of Blacks with HIV/AIDS (22 percent) are uninsured compared to 17 percent of Whites.³⁶⁹

213. Another example of the effects of health care disparities is the prevalence of lung disease among minority populations. As the U.S. Government noted in its 2000 U.S. Report, “black children are three times more likely than White children to be hospitalized for asthma.”³⁷⁰ Asthma is an inflammation and constriction of the airways that makes it difficult to breathe. The disease, which kills over 5,000 Americans each year, is considered an “epidemic” by the United States Department of Health and Human Services.³⁷¹ According to the CDC, asthma risk factors “are known or suspected to be more prevalent in poor, urban communities, where low-quality housing, roach infestation, tobacco smoke exposure, and other conditions contribute to a high asthma burden.”³⁷²

214. While lung disease affects people of all races and cultures, some groups are especially hard hit because they do not have equal access to health education or quality medical services” or because “they suffer from elevated exposure to indoor-air contaminants.”³⁷³ The impact on minority communities is devastating and disproportionate. For example, Blacks and ethnic Hawaiians are 55 percent more likely than Whites to develop lung cancer from light to moderate smoking.³⁷⁴ Similarly, Black men are at least 50 percent more likely to develop lung cancer and 30 percent more likely to die from the disease than White men.³⁷⁵ As noted by the EPA, solutions to addressing the disease “must be developed with a holistic approach that recognizes the equal importance of [genetics, environment and behavior, age or stage of development].”³⁷⁶ That approach defines the “environment” as “the chemical, physical and biological agents to which we are exposed in our regular everyday surroundings, but also lifestyle choices, socioeconomic status, poverty, diet and nutrition, and behavior.”³⁷⁷

Recommendations.

- The U.S. Government should use all appropriate means to ensure that federal agencies collect, analyze, and maintain data regarding the exposure of communities to hazardous materials. Formal guidance should be issued addressing the assessment of cumulative risk to communities (accounting for social, economic, and behavioral factors). The data collected should be disaggregated by race, ethnicity, gender, age, income and geography.

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- The U.S. Government should take all appropriate action to address environmental protection standards for schools receiving federal funds, including guidelines for indoor air quality and physical placement of schools.
- The U.S. Government should take all appropriate action to ensure enforcement of environmental laws and the protection of minority and low-income communities disproportionately impacted by environmental hazards.
- The U.S. Government should increase outreach efforts to educate minorities about public health insurance programs. Increased funding for public health insurance programs is also needed at the state and federal levels.
- The U.S. Government should increase outreach efforts to educate minorities about diseases with disproportionate impact, such as HIV/AIDS.

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CHAPTER 8: HOUSING AND COMMUNITY DEVELOPMENT ISSUES

Introduction.

215. Article 2 of the Convention requires that States Parties “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) . . . undertake[] to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) . . . undertake[] not to sponsor, defend or support racial discrimination by any persons or organizations; (c) . . . take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; [and] (d) . . . shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization. . . .”

216. Article 2(2) requires States Parties to “take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”

217. Article 5(e) of the Convention further obligates States Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” in the enjoyment of “economic, social and cultural rights, in particular: . . . [t]he right to housing.” The CERD Committee also has commented as to Article 5 that the rights set forth shall be protected by a State Party, and “[s]uch protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State Party concerned to ensure the effective implementation of the Convention”³⁷⁸

218. In response to the 2000 U.S. Report, the CERD Committee noted its concern regarding the “persistent disparities in the enjoyment of, in particular, the right to adequate housing.” The Committee recommended that the United States take “all appropriate measures” to ensure this right without regard to race.³⁷⁹

219. Despite the recommendations of the CERD Committee and the requirements of the Convention, the U.S. Government has made little progress in improving racial disparities relating to access and enjoyment of housing. While the U.S. Government correctly acknowledges the challenges posed by racial discrimination in housing, the 2007 U.S. Report provides an incomplete assessment of the problem. *De facto* segregation persists in many metropolitan areas throughout the country. Discrimination in the private housing market remains prevalent. Public housing remains substandard and insufficient at both the state and federal levels.

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Housing Discrimination in the United States: Background and Legal Framework.

220. The United States faces an enduring legacy of historic policies of racial discrimination and segregation in housing.³⁸⁰ Federal government policies accelerated the suburbanization of America's urban centers, resulting in Whites leaving cities for newly constructed suburbs and concentrating minorities in older, substandard housing in the urban centers.³⁸¹ The Department of Housing and Urban Development ("HUD") and its predecessor agencies administered U.S. public housing programs in a manner that confined minority beneficiaries to geographically and economically isolated ghettos.³⁸² And in the recent past, the federal government engaged in two main practices that work to reinforce patterns of residential segregation: (i) assignment of tenants to public housing based on race,³⁸³ and (ii) locating public housing only in minority neighborhoods in cities where minorities depend on it.³⁸⁴

221. The Fair Housing Act is the centerpiece of United States federal legislation to combat racial discrimination in the housing market. In addition to broad prohibitions on discriminatory activity in the sale and rental of housing³⁸⁵ and residential real estate-related transactions,³⁸⁶ the statute imposes an affirmative obligation on HUD and all executive agencies to "administer the programs and activities relating to housing and urban development" to "further the policies" of the FHA.³⁸⁷ As a federal judge explained in interpreting the provision, it requires HUD "to do something more than simply refrain from discriminating themselves or from purposely aiding discrimination by others. To the contrary, action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."³⁸⁸ This exhortation echoes the obligations of the U.S. Government under the Convention as well. The 2007 U.S. Report fails to address the continuing gap between laws on the books and reality in the housing market.

Private Market Housing Discrimination.

222. In 2005, there were 6 million households, comprising 13.4 million individuals, with "worst case" housing needs, meaning that they earned 50 percent or less of the median incomes in their area, and either spent 50 percent or more on rent or lived in severely inadequate housing.³⁸⁹ Blacks account for 22 percent of worst case housing needs and Hispanics account for 20 percent, even though they account for just 12 percent and 9 percent, respectively, of the nation's households.³⁹⁰ And the situation has grown markedly worse over just the last two years, with the number of Blacks with worst case housing needs increasing 28 percent and the number of Hispanics increasing 13 percent.³⁹¹

223. A fundamental problem is a lack of affordable rental housing stock. In 2005, for every 100 households earning 50 percent or less of the median area income, there were just 76.7 housing units that were affordable (costing less than 30 percent of household income) and available (not rented by higher income households).³⁹² This is down from 81.4 housing units from just two years prior in 2003. With just over 16 million households in this country earning 50 percent or less of median area income,³⁹³ this translates into a total shortage of housing stock of about 3.7 million housing units.

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224. And yet, U.S. Government housing policy is not focused on these severe housing shortages, even for what it acknowledges to be the “worst case” needs. Budgets for housing programs have declined in three of the last four years, and the President’s budget for 2008 calls for further cuts.³⁹⁴ Budget constraints at HUD mean that only one quarter of those eligible for federal housing assistance are actually able receive such assistance.³⁹⁵

225. Racial discrimination in the real estate market, in the rental market, and in financing cause these gaps to persist over time. According to the National Law Center on Homelessness and Poverty, “every year in the United States, more than 1.7 million fair housing violations are committed solely against African Americans.”³⁹⁶ HUD’s own annual report indicates that of 10,328 housing-related complaints handled by the agency in 2006, race and disability made up the largest percentiles.³⁹⁷ In fact, most of the complaints focused on the terms and conditions of the sale or rental of housing (58 percent) or the refusal to rent (26 percent). In an earlier HUD study and report, the agency found that among Blacks, Asians, and Pacific Islanders one in every five customers encountered discrimination by rental agents.³⁹⁸ The results among Hispanics were even more alarming, as one of four encountered discrimination by rental agents.³⁹⁹

226. While the U.S. Government’s own statistics demonstrate persistent inequality in the housing market, the studies and statistics produced by NGOs present a picture even worse than that offered by the U.S. Government in the 2007 U.S. Report. To cite one example, the National Fair Housing Alliance (“NFHA”) estimates the incidence of discrimination against Blacks, Hispanics, Asian Americans, and Native Americans in rental and sales markets to be 3.7 million violations each year.⁴⁰⁰

Case Study: Post-Katrina Gulf State Region

227. Displaced individuals seeking relocation housing faced and continue to face rampant housing discrimination and other racial disparities in housing availability in the Gulf State Region after Hurricane Katrina. In addition to internet advertisements requesting “whites only,” testing by the National Fair Housing Authority in 2005, revealed that Blacks in comparison to their White counterparts were:

- Less likely to be told about available apartments;
- Less likely to have phone calls returned;
- Less likely to be given information;
- More likely to receive higher rent or security deposit quotations; and
- Less likely to receive special inducements or discount offers.⁴⁰¹

Follow-up testing in 2006 revealed that many of the same conditions persisted.⁴⁰²

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Public Housing Discrimination.

228. Public housing remains substandard and insufficient at both the state and federal levels. The lack of adequate public housing disproportionately impacts minorities, who make up a disproportionately larger share of the low-income population than do Whites.⁴⁰³ While states and municipalities make decisions regarding the location and administration of public housing, federal action is of primary importance in this arena, due to state and municipal reliance on federal funding.

229. As of 2003, there were only 78.2 affordable units for every 100 extremely low-income households in the U.S. Of those, only 44 were available, and only three quarters were “physically adequate.”⁴⁰⁴ Because minorities are disproportionately represented among low-income households, these shortages also disproportionately impact their rights to adequate housing. The U.S. has seen a declining annual budgetary allocation for public housing funding from \$7.1 billion in 2001 to \$5.6 billion in 2007.⁴⁰⁵ The U.S. Government fails to address in its submission to the CERD Committee why the budgetary allocation has been cut in the face of clear need for more resources simply to maintain the still-inadequate provision of public housing.

Discrimination in Financing.

230. While ensuring an adequate supply of affordable housing is one key to the development of communities in which America’s racial minorities live, another is increasing levels of home ownership. In addition to being a critical component of a family’s financial safety net, homeownership is associated with stable neighborhoods, lower rates of crime, higher levels of educational attainment, greater levels of civic participation, and improved measures of health.⁴⁰⁶ Unfortunately, homeownership rates for minorities lag far behind those of Whites. In 2006, 75.8 percent of non-Hispanic whites owned their own homes, compared with 47.9 percent of Blacks and 49.7 percent of Hispanics.⁴⁰⁷ This is only marginally better than in 2000, when 47.2 percent of Blacks and 46.3 percent of Hispanics owned their own homes.⁴⁰⁸

231. This problem is made worse by the discriminatory lending practices racial minorities face in trying to get financing to buy a home. While “redlining” – the once common practice of refusing to lend to residents of minority neighborhoods – has been outlawed for nearly 30 years, it has been replaced by predatory lending practices and are equally pernicious. Predatory lending — the practice of charging individuals rates of interest and fees out of proportion with their risk of default — saps home equity and results in higher rates of default and foreclosure.

232. Blacks were about 11.8 percent of the nation’s households but received 20.1 percent of high-priced “subprime” purchase loans issued during 2004.⁴⁰⁹ Similarly, Hispanics account for 9.1 percent of the nation’s households, but received 21.3 percent of the nation’s subprime home purchase loans.⁴¹⁰ While some disparity in subprime lending is a result of the more precarious financial position, on average, of minority homebuyers, this does not account for the full disparity. Among middle and upper income households, for example, the subprime

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share of loans to Blacks was 2.7 times higher than the subprime share of loans to Whites.⁴¹¹ Experts estimate that between 35 percent and 50 percent of those who receive subprime mortgages could have qualified for a less expensive prime interest rate mortgage.⁴¹² Black and Hispanic applicants also are more likely to be offered less favorable rates for similar insurance coverage.⁴¹³

233. Fully 31 percent of mortgage loans made in minority neighborhoods (those that are 80 percent to 100 percent minority) were subprime loans, compared with just eight percent of mortgage loans made in White neighborhoods (those that are 80-100 percent White).⁴¹⁴ It is still unclear what response, if any, the federal government will propose in response to this problem. Some state and local governments are considering taking action,⁴¹⁵ but it remains to be seen whether there will be large-scale efforts to prevent many minority families from losing their homes.

Discrimination in Zoning.

234. In addition to discriminatory actions taken within the rental and housing markets, the use of zoning authority continues to contribute to the segregation of neighborhoods on the basis of race and ethnicity. The Fair Housing Act prohibits zoning rules that have the effect of discriminating on the basis of race without a legitimate nondiscriminatory justification. However, many municipalities have recently enacted zoning ordinances designed to exclude immigrants and other groups from moving into their communities. In some cases, as in Hazelton, Pennsylvania, the municipality punishes landlords who rent to undocumented immigrants.⁴¹⁶ In other cases, as in St. Bernard Parish, Louisiana, ordinances have been passed prohibiting the purchase or rental of housing by those who did not have a blood relative who was a current resident.⁴¹⁷

Transportation.

235. Transportation policies also have a discriminatory effect on minority populations. Modes of transportation most used by minorities are generally underfunded as compared to modes of transportation relied on by Whites. Data suggests that just three percent of Whites rely on public transportation to get to work as compared to 12 percent of Blacks and nine percent of Hispanics.⁴¹⁸ While Blacks comprise 12 percent of the total population, and Hispanics 12.5 percent, they comprise 31 percent and 18 percent of public transportation users, respectively.⁴¹⁹ In urban areas, Blacks and Hispanics together comprise 54 percent of public transportation users.⁴²⁰

236. Public transportation, however, is routinely underfunded compared with funding for roads and highways. The federal government earmarks 80 percent of funding for surface transportation to highways and just 20 percent for public transportation.⁴²¹ The emphasis on roads and highways benefits those who own cars and drive. It is estimated that only seven percent of Whites do not own automobiles, as compared to 24 percent for Blacks and 17 percent for Hispanics.⁴²² This disparity underscores the economic burden that transportation poses. Those in the lowest income quintile spent fully 36 percent of their household budget on

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transportation, compared with those in the highest income quintile, who spent just 14 percent.⁴²³ The economic consequences of the transportation policy are felt in another form as well: the emphasis on roads and highways contributes to a de-concentration of jobs from central cities. As more jobs move to the public-transit-poor suburbs away from cities, they exacerbate the “spatial mismatch” identified above for those who lack automobiles.⁴²⁴

237. Moreover, the investments made in public transportation are skewed to the disadvantage of minorities. Among different forms of public transportation, minorities are more dependent on bus transit, with Blacks and Hispanics comprising 62 percent of bus riders (compared with 35 percent of subway riders, and 29 percent of commuter rail riders).⁴²⁵ Bus transit, however, is systematically underfunded as compared to subway and commuter rail transit. The federal government requires that its transportation funds only be used on capital expenditures rather than operating expenses, and because bus transit is less capital-intensive than subway and commuter rail transit, federal funds disproportionately fund the latter forms.⁴²⁶

Actions Taken by the United States Government to Comply with CERD.

Public Assistance.

238. Federal vouchers designed to subsidize individuals' market rents, referred to as Section 8 vouchers, are the major bulwark of federal public housing assistance. Ideally, such vouchers empower individual recipients to choose housing adequate for their needs and to avoid segregating all public-assistance recipients into single areas. But restrictions on recipient use of housing vouchers result in concentrations of those using vouchers into particular buildings or neighborhoods.⁴²⁷ For example, the federal government no longer funds housing mobility programs, which assist voucher recipients seeking to move into lower-poverty areas.⁴²⁸ Furthermore, the program — like other aspects of the federal government's approach to fair housing — is seriously under-funded. This underfunding has encouraged some public housing authorities to further restrict the portability of Section 8 vouchers, exacerbating the concentration of voucher recipients into higher poverty neighborhoods.⁴²⁹ In recent years, such funding has continued to decline.⁴³⁰

239. In the 2007 U.S. Report, the U.S. Government highlights HUD's Minority Housing Initiative in regards to public assistance in responding to public complaints of discriminatory treatment in housing.⁴³¹ The Initiative aims to “promptly resolv[e] housing complaints and reduc[e] the backlog of cases.”⁴³² Thus far, however, the U.S. Government has failed in this effort as complaints continue to languish and cases grow stale.⁴³³

DOJ Enforcement Efforts.

240. In addition to HUD, the Civil Rights Division of the DOJ is responsible for investigating and bringing actions against those individuals and businesses who engage in racial discrimination in housing. In 2006, the Housing Section of the DOJ filed 31 lawsuits for violation of fair housing laws.⁴³⁴ In early 2006, the DOJ also launched a new initiative called “Operation Home Sweet Home,” to increase the number of fair housing cases brought on the basis of fair housing testing. Although the Report represents this program to be “inspired by the

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victims of Hurricane Katrina, who lost their homes and were seeking new places to live,” the Government provides no evidence that the program, supposedly devised with victims of Hurricane Katrina in mind, has resulted in any housing-related civil rights gains for those displaced by the storm.⁴³⁵ While the 2007 U.S. Report states that DOJ has taken action to enforce housing laws,⁴³⁶ it fails to note that there has been a dramatic decrease in pursuing such investigations and cases.⁴³⁷

Recommendations

- The U.S. Government should use all appropriate means to ensure that legal protections against racial discrimination in the purchase and rental of housing are enforced
- U.S. Government agencies should set specific benchmarks for the speedy investigation and resolution of complaints of racial discrimination by those in the housing market.
- The U.S. Government should work with state governments to ensure that public housing units are dispersed throughout metropolitan areas, rather than concentrated in particular minority communities.
- The U.S. Government should allocate public housing assistance in a way that encourages integration and diversity in both rural and metropolitan areas.
- The U.S. Government should take all appropriate action to ensure public transportation policies and funding do not negatively impact minority communities.
- The U.S. Government must enforce the laws and regulations already in place to prevent discriminatory and predatory lending practices. Investigations into the current mortgage and housing crisis should determine the degree to which lenders specifically targeted minority clients and predominately minority neighborhoods for loans on unconscionable or unsustainable terms.

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CHAPTER 9: MINORITY BUSINESS ISSUES

Introduction.

241. Article 1(4) provides that “special measures” taken by State Parties for the “sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,” if such measures do not result in separate rights for different groups and are not continued once the objectives for them have been achieved.

242. Article 2 requires States Parties to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) . . . undertake[] to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) . . . undertake[] not to sponsor, defend or support racial discrimination by any persons or organizations; (c) . . . take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) . . . prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”

243. Article 5 obligates State parties to undertake “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (e) Economic rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions. . . .”

244. In response to the 2000 U.S. Report, the CERD Committee noted that while laws, institutions and measures designed to eradicate racial discrimination affecting the equal enjoyment of economic, social and cultural rights exist, it was concerned about “persistent disparities” in the enjoyment of the right to equal opportunities for employment and recommended that the U.S. Government take all appropriate measures to ensure the right of everyone to the enjoyment of rights set down in Article 5.⁴³⁸

Disparities in the Representation of Minorities in Business.

245. The representation of minority-owned businesses in various economic sectors, by numbers and by sales receipts, continues to be well below their representation in the population as a whole as compared to their White-owned counterparts. In 2002, the non-Hispanic White population comprised 68.20 percent of the total U.S. population, but comprised nearly 83 percent of total U.S. business ownership and over 92 percent of total business receipts (excluding publicly-held companies).⁴³⁹ By comparison, Blacks comprised 11.8 percent of the

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total population, owned 4.99 percent of firms and accounted for 0.99 percent of total business receipts; Hispanics were 13.5 percent of the total population, owned 6.55 percent of firms and accounted for 2.48 percent of total business receipts.⁴⁴⁰ In 2002, on average, for every dollar earned by a White-owned firm, Black-owned businesses earned 43 cents, Pacific Islander-owned firms earned about 59 cents, and Hispanic, Native American, and Asian-owned businesses earned 56 cents.⁴⁴¹

246. Disparities exist not only in the formation of minority-owned businesses, but also in the development and growth of these businesses. In 2000, the U.S. Government recognized this disparity and reported in the 2000 U.S. Report that minorities lack “equal access to business capital and credit markets. Minorities continue to have difficulty raising capital or securing loans to finance a business. Without sufficient access to such financial markets, minority entrepreneurs will continue to start and grow businesses at a much slower rate than their White counterparts. This problem further lessens the prospects of wealth creation in under-served communities, thus perpetuating the cycle of poverty that disproportionately affects minorities.”⁴⁴²

247. A December 2005 report issued by the U.S. House of Representatives Small Business Committee Democratic Staff reported that banks make smaller loans to minority-owned firms than to non-minority owned firms, even when controlling for capitalization, owner education, race, age and experience.”⁴⁴³

248. Minority business enterprises continue to struggle in New Orleans in the aftermath of Hurricanes Katrina and Rita. Over 18,000 businesses were impacted in the Greater New Orleans area alone and many have been forced to leave or are on the brink of doing so because of a lack of meaningful federal and state assistance.⁴⁴⁴ Prior to Hurricanes Katrina and Rita, the five parish Greater New Orleans region was home to more than 28,000 small businesses that represented almost 10 percent of the state’s 200,000 businesses. A 2007 survey of three major New Orleans commercial corridors revealed that a large number of small- and medium-sized businesses serving people at the lower end of the economic spectrum remained closed.⁴⁴⁵

Laws to Address the Under-Representation in Business.

249. Under Section 8(a) of the Small Business Act of 1958, the Small Business Administration (“SBA”) is authorized to enter into contracts with the federal government for services, materials, or to perform construction work by subcontracting the work to “socially and economically disadvantaged small business concerns.”⁴⁴⁶ “Socially disadvantaged” individuals are those that have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of certain groups. Blacks, Native Americans, Hispanics, Asian-Pacific Americans, and Asian-Indian Americans have been officially designated as socially disadvantaged. “Economically disadvantaged” individuals are those who are members of socially disadvantaged groups whose ability to compete has been impaired due to diminished capital and credit opportunities. It also mandates that bidders for larger federal contracts (*i.e.*, those in excess of \$500,000 for goods and services and \$1,000,000 for construction), submit a

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plan that includes percentage goals for the utilization of minority businesses prior to the awarding of the contract.

250. Pursuant to Section 15(g)(1) of the Small Business act of 1958, each federal agency must have an annual goal that represents the maximum practicable opportunities for small business concerns to participate in the performance of contracts let by that agency. SBA's responsibility under this section, among others, is to ensure that the federal government-wide goal for participation of small business concerns is at least 23 percent of the total value of all prime contract awards for each fiscal year and that the Small Disadvantaged Business ("SDB") goal must be at least 5 percent of the total value of all prime contract and sub-contract awards for each fiscal year.⁴⁴⁷

Enforcement of Applicable Laws.

251. SBA loan programs can play an important role in filling the financing gap for minority-owned firms. According to the latest Survey of Business Owners, however, data suggests that a larger percentage of White firms relied on government-guaranteed bank loans and business loans from the government as compared to their Hispanic and Black counterparts, and in some cases as compared to their Asian, Native American or Alaska Native, Native Hawaiian and other Pacific Islander counterparts.⁴⁴⁸

252. During the past five years, the SBA has made smaller loans to entrepreneurs, resulting in minority-owned firms lacking sufficient funds to carry out their business plans. According to data from the SBA, the average SBA loan to a minority-owned small business declined more than 40 percent, from a high of nearly \$290,000 in 2000, to just over \$168,000 in 2005.⁴⁴⁹ In addition, racial disparities exist in the SBA's disbursement of funds. While the average overall loan size for an SBA loan is \$157,000, the average loan is only \$80,000 for a Black-owned business and \$123,000 for a Hispanic-owned business.⁴⁵⁰

253. Studies also show that minority businesses receive less than two percent of all venture capital investment. SBA's Small Business Investment Company ("SBIC") program was developed to address this issue, but less than 6 percent by dollar amount of SBIC financings find their way to minority-owned small businesses: 1.4 percent of the program's investment went to Black-owned firms; 1.7 percent to Hispanic-owned firms; 0.1 percent to Native American-owned firms; 0.9 percent to Asian Pacific-owned firms; and 1.1 percent to South Asian-owned firms.⁴⁵¹

254. The SBA Microloan program plays an important role in enabling minority entrepreneurs, especially low-income entrepreneurs, to start and maintain businesses. In 2004, the SBA Microloan program provided \$26.5 million in very small loans and \$15 million in associated technical assistance, of which more than 50 percent went to minority entrepreneurs, providing them with more than \$13 million in capital. The current administration contends, however, that very small loans are more widely available now than they were a decade ago when the SBA began the Microloan program and, therefore, continued funding of the Microloan program is unnecessary.⁴⁵²

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255. Federal agencies also frequently consolidate contracts that small businesses could perform into larger packages, or “bundled contracts,” that are beyond the scope and capabilities of small businesses. The increased use of bundled contracts has adverse effects on the ability of minority-owned firms to receive federal contracts and is reported to be a major contributing factor in the declining number of contracts being awarded to minority owned businesses.⁴⁵³ Data suggests that for every increase in 100 bundled contracts, there is a decrease of 60 contracts to small businesses.⁴⁵⁴

256. Under the 1996 Telecommunications Act, the Federal Communications Commission (“FCC”) is required to examine and create regulations to remove the barriers to participation experienced by women, minorities, and small businesses. In 2000, 198 minority broadcasters owned 449 full power commercial radio and television stations, or 3.8 percent of the 11,865 such stations licensed in the United States.⁴⁵⁵ The 23 full power commercial television stations owned by minorities in 2000 accounted for less than two percent of the 1,288 U.S. Government licensed stations, representing the lowest level of minority full power television ownership since the National Telecommunications and Information Administration (NTIA), a branch of the Department of Commerce, began reporting this information in 1990.⁴⁵⁶ On April 3, 2006, the National Association of Hispanic Journalists (“NAHJ”) sent a letter to U.S. Department of Commerce Secretary Carlos Gutierrez calling on the agency to conduct a minority ownership study.⁴⁵⁷ The response on behalf of Secretary Gutierrez informed the NAHJ that the agency had no present plans to conduct a minority ownership study, but that the Administration shared the NAHJ’s concern that “American media reflect the diversity of the nation’s people.”⁴⁵⁸

257. Federal government assistance to farming businesses in poor rural communities also impacts minority farmers differently from White farmers. For example, from 2001 to 2005, the federal government spent about \$1.2 billion in agricultural subsidies to boost farmers’ incomes and invigorate local economies in the Mississippi Delta region where most residents are Black, but less than 5 percent of the money went to Black farmers.⁴⁵⁹ Rather, 95 percent of funding went to large, commercial farms, virtually all of which have White owners.⁴⁶⁰

258. The 2000 U.S. Report states that “[i]n 1997, USDA appointed a Civil Rights Action Team to address allegations of discrimination against minority farmers in the United States. As a result of its investigations, the Civil Rights Action Team concluded that minority farmers had lost significant amounts of land and potential farm income as a result of discriminatory practices by the USDA. That same year, a major class action lawsuit was filed against the U.S. Government and the USDA, alleging widespread discrimination against Black farmers in the United States.⁴⁶¹ As a result of the lawsuit, the 2000 U.S. Report continues, a consent decree was entered, establishing a claims mechanism through which individual class members could resolve their complaints in an expeditious and fair manner. To date, 11,120 Black farmers have received over \$323 million in compensation.”

259. The 2007 U.S. Report states that as of November 13, 2006, “over 22,000 class members had received more than \$921 million in damages and debt relief. In addition, the USDA has developed several other initiatives to assist minority and socially disadvantaged

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farmers, including an Office of Minority and Socially Disadvantaged Farmers, a Minority Farm Register to assist in outreach, and new guidelines for improving minority participation in county committee elections.”

260. There have been many reports made to the Southern Land Cooperative by Black farmers regarding flaws in the settlements. First, many existing farmers did not benefit as much as farmers who attempted to farm or who discontinued farming.⁴⁶² There also have been reports that some existing farmers in Mississippi did not apply for relief because of fear of reprisals.⁴⁶³ These reprisals reportedly involve the possibility of “squeezing” farmers who have existing loans. Second, the lack of reliable data on loans applied for during the period of the settlement makes it virtually impossible to accurately ascertain which farmers are most negatively impacted.⁴⁶⁴

261. The U.S. Supreme Court’s decision in *City of Richmond v. J.A. Croson Co.*, established the current constitutional limits of permissible race-based public contracting programs. In a reversal of long-established precedent, the U.S. Supreme Court extended the highest level of judicial scrutiny to legislation to benefit rather than injure the historic victims of discrimination.⁴⁶⁵ However benign the government’s motive, race-conscious measures must pass the highest constitutional test of “strict scrutiny.” Similarly, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in a challenge to the federal government’s practice of giving general contractors a financial incentive to hire subcontractors owned by “socially and economically disadvantaged individuals,” and in particular, the federal government’s consideration of race in identifying such individuals, the U.S. Supreme Court held that courts should apply the same strict scrutiny review. In doing so, a majority of the Justices rejected the proposition that “strict scrutiny” of affirmative action measures means “strict in theory, fatal in fact,” and agreed that “the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country” may justify the use of race-based remedial measures in certain circumstances. Thus after *Croson* and *Adarand*, affirmative action and similar programs have been eliminated entirely or replaced with weaker programs that are “race neutral.”⁴⁶⁶ For example, in June 1995, in reaction to the U.S. Supreme Court’s decision in *Adarand*, the FCC rescinded rules designed to help women and minorities participate effectively in spectrum auctions for PCS licenses.⁴⁶⁷

262. In addition, in response to legal challenges, the DOT, which operates one of the largest federal programs for affirmative action in construction, now allows its grant recipients to set annual goals for participation by minorities, women, and other disadvantaged businesses with a race/gender-conscious component, a race-gender neutral component, or both.⁴⁶⁸ The resulting increased use of race/gender-neutral goals in the DOT program appears to have resulted in greatly reduced participation by minority and women firms.⁴⁶⁹ Thus, the removal of affirmative action programs suggests negative consequences for minority-owned businesses.⁴⁷⁰ As stated by a member of the U.S. Commission on Civil Rights, however, there is “significant data demonstrating that socially and economically disadvantaged firms continue to lag well behind where they should be in proportion to the country’s demographic composition or labor force representation.”⁴⁷¹

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Recommendations

- The U.S. Government should use all appropriate means to improve the prospects for success of minority-owned businesses such as adoption of national minority-lending goals with meaningful enforcement mechanisms, review of federal contracting processes, including the “bundling” of contracts, which have an adverse impact on smaller businesses, and mentoring programs.
- The U.S. Government should collect census data on businesses more frequently and include in census analysis the measurement of growth rates of minority populations and the business growth rates of such minority populations.
- The U.S. Government should support research and scholarship regarding the plight of minority owned businesses to capture and illustrate the ongoing discrimination and to provide concrete solutions to such discrimination.

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CHAPTER 10: EDUCATION

Introduction.

263. Article 5(e)(v) of the Convention requires States Parties to undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably, in the enjoyment of various economic, social, and cultural rights, including the right to education and training.⁴⁷²

264. Two Convention Articles provide a framework of responsibility for affirmative steps by a State Party to eliminate racial discrimination in educational opportunities. Article 1(4) states that “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individuals requiring such protection” may be necessary and shall not be deemed racial discrimination.

265. Similarly, Article 2 provides in relevant part that each State Party shall “amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; and shall undertake to “encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.” States Parties also shall “take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights, and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different groups after the objective for which they were taken have been achieved.”⁴⁷³

266. The CERD Committee, in its 2001 Concluding Observations for the U.S., specifically noted its concern for racial disparities in education by stating, “the Committee is concerned about persistent disparities in the enjoyment of, in particular, the right to . . . equal opportunities to for education.”⁴⁷⁴ The CERD Committee also reminded the U.S. Government that “the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the Convention.”⁴⁷⁵

267. CERD General Recommendation XXX urges parties to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education”⁴⁷⁶

268. In its General Recommendation XIX concerning the wording of Article 3, which obligates States Parties to undertake to prevent, prohibit, and eradicate all practices of racial segregation and apartheid, the CERD Committee recognized “that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons,” such as residential patterns reflecting the racial divisions in society which often overlap with economic divisions.⁴⁷⁷

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269. The U.S. Government has failed to prevent apartheid conditions in public schools and to promote access to quality educational opportunities for racial and ethnic minority groups historically and presently prone to discrimination—leading to large achievement gaps, high rates of suspension, expulsion, and criminal sanctions for minority students, and low graduation rates for minority and English Language Learner (“ELL”) students.⁴⁷⁸ All of these circumstances diminish opportunities for the full and equal enjoyment of economic opportunities, human rights, and fundamental freedoms.

270. Major factors contributing to current levels of racial inequality in educational opportunities in the United States include school attendance zones that promote segregation,⁴⁷⁹ the setting of school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; systems of ability grouping and tracking that consistently retain or place minority students in lower level classes;⁴⁸⁰ a failure to counteract differences in parental income and educational attainment, which correlate with race;⁴⁸¹ lower expectations held by teachers and administrators for minority students;⁴⁸² and underperforming, poorly financed schools that perpetuate minority students’ underachievement due to lower teacher quality, larger class size, and inadequate facilities.⁴⁸³ These factors are related to laws and policies systematically placing the poorest minority children within inadequate educational environments, which further perpetuates and increases overall racial disparity.⁴⁸⁴

271. In the 2007 U.S. Report, the U.S. Government asserts that it has instituted several initiatives “to strengthen federal protections in the area of education.”⁴⁸⁵ In particular, it claims that the No Child Left Behind Act (“NCLB”)⁴⁸⁶ “is designed to promote high educational standards in accountability in public elementary and secondary schools, thus providing an important framework for improving the performance of all students.”⁴⁸⁷ It also asserts that “the Act requires . . . that the results of annual statewide testing be published and disaggregated at the school, school district, and states levels, by poverty, race, ethnicity, gender, migrant status, disability status, and limited English proficiency.”⁴⁸⁸ Each state is required to establish academic content and standards for school districts to ensure that students from all backgrounds make “adequate yearly progress” toward academic proficiency.

272. Although the NCLB was intended to highlight the differences in student performance by race and class, it does little to promote integration or respond to systemic inequities that continue to plague elementary and secondary schools in the United States. Increasingly, minority students are concentrated in high poverty schools and are disproportionately disciplined through zero tolerance school policies.

273. The U.S. Congress and the Executive Branch of the federal government, including the U.S. Department of Education and the U.S. Department of Justice, have all but abandoned school integration and diversity as a matter of policy. Moreover, the U.S. Government has opposed voluntary and conscious efforts by communities nationwide to reduce extreme racial and ethnic isolation in grades K-12 and open pathways to higher education for minority students. As U.S. judicial remedies for racial discrimination weaken and federal legislation proves inadequate, it is imperative that the State Party take affirmative action and far-

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reaching structural reforms to comply with the Convention and to eliminate racial disparities in public education

School Resegregation.

274. Racial isolation and school segregation are increasing in the United States.⁴⁸⁹ The average White child in America attends a school in which 78 percent of the other students are White. The average Black student attends a high school where only 30 percent of the other students are White.⁴⁹⁰ Sixty percent of all Black students in New York State, including those in New York City, attend schools that are at least 90 percent Black.⁴⁹¹

275. Over five million ELL students, 10 percent of the total U.S. public school population, are enrolled in K-12 schools.⁴⁹² Nationwide, more than 53 percent of ELL students are concentrated in schools where more than 30 percent of their peers are also ELLs.⁴⁹³ By contrast, 57 percent of English-speaking students attend schools where less than one percent of students have limited English proficiency.⁴⁹⁴

276. In the 2003-2004 school year, more than three quarters (79 percent) of the estimated ELL students were native Spanish speakers.⁴⁹⁵ Overall, Latinos⁴⁹⁶ make up 20 percent of the K-12 population; and Latinos are the most racially isolated minority group in U.S. schools.⁴⁹⁷ Nationally, almost one in nine Latino students attends a school that is 99-100 percent minority.⁴⁹⁸ Seventy-six percent of Latinos attend predominantly minority schools.⁴⁹⁹ A typical Latino student attends a school that is less than one-third White.⁵⁰⁰

277. Segregated residential pattern and economic development of an area also contribute to apartheid conditions in schools. The concentration of poverty, and the disproportionate numbers of minorities that live in poverty in the U.S. directly impact the degree of race-based segregation in public schools. The median income for Black and Latino households is 61 percent and 71 percent, respectively, of the median income for non-Latino White households.⁵⁰¹ In addition, neighborhoods in the United States remain highly segregated and racial minorities are more likely to live in high-poverty areas than Whites.

278. Residential segregation, coupled with fragmentation of housing markets into small school districts, results in high segregation within schools. In the Northeast and Midwest regions of the United States, where residential segregation is at its greatest, the highest proportion of intensely segregated schools exists—51 percent and 46 percent respectively.⁵⁰² The Midwest, which includes Chicago, Illinois and Detroit, Michigan, has the largest percentage of schools where Black students are “extremely segregated” in “99-100%” minority schools at 26 percent.⁵⁰³ In addition, Latino students are “intensely segregated” in “90-100%” minority schools at 39 percent of schools in the West.⁵⁰⁴ The separate administration of school and housing desegregation and enforcement decisions severely limits the ability of national, state, and local officials to address this conjoined problem.

279. The majority of funding for elementary and secondary education is provided by revenue raised from local property taxes. This type of funding system leads to disparate quality levels of education between property-rich districts that are able to raise more money for

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education and property-poor districts that have limited economic resources. Too often, these property-poor districts also have predominantly minority students.

280. Schools across the Southern region of the United States spend less per pupil than other areas of the country, which means extra educational and social services are not available for students with extra social and economic needs. The state of Connecticut in the Northeast—with just 29 percent low income enrollment—spends up to \$11,600 on each student. The state of Mississippi in the Southeast, where low-income enrollment is 75 percent, spends just \$5,600 per student. Southern states tax for education at the same rates as do other regions of the country, but the South's higher poverty rates translate into less taxable income and less revenue to invest in education. In recent years, the influx of Latino immigrants moving into the South coupled with high birth rates among poor minorities have caused low-income enrollment in Southern schools to increase dramatically. In 2006, 54 percent of students enrolled in public schools in the South were low income, up from 37 percent just 16 years ago.⁵⁰⁵

281. Overall, because minorities are more likely to be concentrated in areas of high poverty, they also are more likely to be subject to “a constellation of inequalities” that shape schooling. Disparate educational resources lead to larger class sizes, substandard facilities, lower per-pupil spending, and fewer counseling services and community resources.⁵⁰⁶ Schools with high concentrations of poverty and minority students typically have less qualified, less experienced teachers, lower levels of peer group competition, limited curricula taught at less challenging levels, more student health problems, more turnover of enrollment and grade retention, high crime rates that inhibit learning, and many other factors that seriously affect academic achievement.⁵⁰⁷ One scholar noted that “[c]ontinuing residential segregation and inequitable support for education based on where one lives exacerbate inequities and deny resources for effective solutions.”⁵⁰⁸ In short, segregated high poverty schools do not afford minority students with equal opportunities to develop academically and socially.

School Integration Efforts.

282. Integrated schools are an important tool for mitigating the pattern of U.S. residents self-segregating by class and race.⁵⁰⁹ Two recent U.S. Supreme Court school integration cases, however, have limited a school district's ability to address integration. In *Parents Involved in Community Schools v. Seattle School District No. 1*, White parents successfully sued a school district that voluntarily used race-conscious measures to promote the educational and social value of diversity and integration in K-12 grades. The U.S. Government filed two amicus briefs, supporting the prohibition of any measures to voluntarily and consciously address racial inequality in schools.⁵¹⁰ Meanwhile, the U.S. Supreme Court received numerous amicus briefs by researchers providing massive evidence demonstrating the negative impact of inequalities of segregated schools, along with educational and social gains found in integrated schools.⁵¹¹ In *Meredith v. Jefferson County*, the school district adopted a voluntary student assignment plan, after a court-mandated desegregation decree was lifted in 2000, which identified students as either Black or “other,” and strived to keep Black enrollment in each school between 15 and 50 percent. The U.S. Supreme Court held that the use of race was unconstitutional. These two decisions limit the circumstances under which school districts

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can consider race when establishing plans to achieve diverse school populations, and will likely have a negative impact on school district's efforts to integrate schools.

283. The decisions also ultimately undermine traditional jurisprudence and mechanisms to desegregate public schools, such as the landmark case *Brown v. the Board of Education*.⁵¹² The present constitutionally permitted use of race conscious measures in school assignment as outlined by the U.S. Supreme Court in these decisions limit the application of "special measures" required under Articles 1 and 2 of the Convention to promote adequate racial inclusion.⁵¹³ Under Article 2, such remedial measures are not only sanctioned but required, so long as "they shall not be continued after the objectives for which they were taken have been achieved." Interestingly, in each of these cases, the local governments were attempting to implement programs in order to promote integration and diverse environments in their school districts. The U.S. Government condemned these efforts rather than support the school districts.⁵¹⁴

Achievement Gap between Minority and White Students.

284. Research suggests that serious achievement disparities exist between minority and White students at the primary and secondary levels. Government agencies and other entities use the term "achievement gap" to describe a nation-wide phenomenon where lower-income, Black, and Latino students as a group perform worse academically and score lower on standardized tests than their peers. The current achievement gap correlates to the long-standing difference in educational opportunity and attainment that exists between Black, Latino, and Native American students and their White and Asian counterparts.⁵¹⁵

285. Under the NCLB, a school district is required to provide students enrolled in a school identified for improvement with the option to transfer to another public school in the district that has not been identified for improvement. This option to transfer is the only federal remedy offered parents with children in schools designated by such inequities. Often, schools with low-achievement levels are located in school districts with high concentrations of poverty and minority students, and almost all schools within the same district have rampant inequities and low-achievement. Thus, parents have no or limited options to ensure quality educational opportunities for their children, and the federal remedy offered fails to promote adequate racial inclusion.

286. While NCLB may help to identify achievement disparities that exist among racial groups, it does little to reduce what has been coined as an "educational debt" to disadvantaged students that has accumulated over centuries of denied access to education and employment, reinforced by deepening racial isolation and poverty, and resource inequalities in schools.⁵¹⁶ According to NCLB critics, to reduce this educational debt, it is necessary to "rectify decades of neglecting the needs of our most school-dependent children through ensuring equal access to high quality teachers, well provisioned schools, and multiple educational resources for every child."⁵¹⁷

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287. Social and educational inequities outside of the school also contribute to these noticeable differences in achievement; for example, lack of access to health care, or varying levels of parent involvement.⁵¹⁸ Low-income students tend not to be as ready for primary education, are more likely to repeat a grade, and are less likely to graduate from high school than their wealthier peers. They perform worse than higher income students on state and national exams measuring educational progress.⁵¹⁹

288. ELL students suffer particularly acute educational inequalities in U.S. schools. In Minnesota, children who are proficient in English score twice as high as those who are still learning the language.⁵²⁰ Contrary to the assumption that children speaking a language other than English are foreign-born, ELL K-12 students are predominately native-born, U.S. citizens. Seventy-six percent of elementary school and 56 percent of secondary school ELL students are citizens; and over 50 percent of the ELL students in public secondary schools are second or third-generation citizens.⁵²¹ Therefore, the stereotype of ELL students as foreign-born immigrants is inaccurate. The majority are, in fact, citizens and legal permanent residents of the United States whose academic and linguistic needs are not met by the public school system.

289. Latino student outcomes are intrinsically tied to ELL student achievement, as Latinos make up the largest majority of ELL students. Moreover, given the growth of Latinos and ELLs in our nation's schools, overall student achievement in U.S. schools will increasingly depend on how these groups fare academically. ELLs represent around 10 percent of public school enrollment and are concentrated in large, urban school districts; a quarter of the 100 largest school districts have an ELL student population of at least 15 percent.⁵²²

290. The Latino student 'dropout rate' is disproportionately high. In 2000, about 530,000 Latinos between the ages of 16 and 19 did not graduate from high school, yielding a dropout rate of 21.1 percent for all Latino persons between those ages.⁵²³ The Latino youth dropout rate was more than three times greater than that of their White, non-Latino counterparts whose dropout rate in 2000 was roughly seven percent.⁵²⁴ The school dropout rate in secondary schools is more pronounced in large inner-cities, among foreign-born Latino, and among ELLs.⁵²⁵

291. It is unclear how ELLs, or millions of Latino students, perform academically and whether or not they are receiving high-quality instructional services. Distortion of student dropout rates has enabled schools and districts to artificially inflate test scores and misrepresent student outcomes. In effect, tracking of ELL student achievement is difficult, and entities have not been able to hold local and state educational agencies fully accountable for improving educational outcomes for ELLs.⁵²⁶ Nonetheless, some data exists on ELL student performance in specific states. In the Commonwealth of Massachusetts, the total percentage of students that dropped out in 2006 was 11.7 percent, while that number more than doubled for ELL students, whose dropout rate was 25.6 percent.

292. Research indicates that on average, Black, Latino, and Native American students demonstrate significantly lower reading, math, and vocabulary skills at school entry than do White and Asian-American children. A number of studies suggest that "[w]e could eliminate at

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least half, and probably more, of the Black-White test score gap at the end of twelfth grade by eliminating the differences that exist before children enter first grade.”⁵²⁷ Despite the great significance of pre-school and Head Start⁵²⁸ initiatives, more than half of Head Start programs surveyed across the United States have been forced to cut early childhood health and education services for America’s most at-risk children and families.⁵²⁹ These cuts come despite studies finding pre-K participation to be associated with significantly higher reading and math skills at school entry, narrowing gaps if not fully closing them.⁵³⁰ These studies also found that these advantages were long-lasting for children from low-income homes, many of whom were Black, Latino, or from immigrant families.⁵³¹

293. Tracking or “ability grouping” of low-income and minority students into lower-level and remedial courses are other institutional practices that have a discriminatory effect on student achievement and access to educational opportunity. These practices are not always explicit in policy, but appear in various forms. Groupings may occur on objective criteria, such as standardized testing, or on subjective decisions by teachers or school administrators. Once tracked or grouped to a particular level, a student may remain in the same level throughout his or her academic career. Students tracked at lower levels often lack access to a higher quality curriculum, thus impacting their achievement relative to higher tracked peers. Research has shown that minority students are over-represented in lower level tracks and under-represented in higher level tracks.⁵³²

294. Many minority parents and students are uninformed of their child’s curriculum options, or that their neighborhood schools do not offer higher level or college preparatory curriculum. Therefore, low income and minority students often find themselves ill-prepared and ineligible for post-secondary education.⁵³³ Minority parents traditionally have fewer resources for challenging a history of discriminatory tracking, and thus even high-achieving minority students often find themselves ineligible for direct enrollment to university.⁵³⁴

295. In 1995, the Chicago Public School system (“CPS”) established a retention program to improve student readiness for grade-level promotion. Under this program, CPS held back students concentrated in elementary schools that served the highest numbers of low-income and minority students. Black students are four times as likely to be held back as White pupils, and Latino students are three times as likely to be held back.⁵³⁵ Furthermore, minority students, particularly in schools with teacher shortages and high turnover, are retained disproportionately to their more affluent, generally White counterparts.⁵³⁶

School Discipline.

296. Systematic disparities foster lower academic achievement in highly segregated minority schools.⁵³⁷ They create stigmas that lower student expectations and discourage academic engagement.⁵³⁸ Minority students are overrepresented in lower economic classes, and students in lower economic classes are at increased risk for school suspension. Racial overrepresentation in school suspension may not always be the result of intentional racial bias as classified by the law; rather, it is a corollary of the overuse of exclusionary school discipline for students from lower socio-economic backgrounds.⁵³⁹ Schools with a high concentration of

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minority students lack resources to discipline constructively, and administrators more often suspend and expel students.⁵⁴⁰ The high frequency and extremity of disciplinary measures increase student alienation from schools and force young students onto a track that has a high probability of leading to incarceration.⁵⁴¹

297. Racial disparities in suspension, expulsion and arrest rates in school contribute to disproportionately high dropout rates and referrals to the justice system for minority youth. While national data is unavailable, local cities show increasing arrest rates in schools for minority students. In 2002-2003, Black students in the CPS system constituted 51 percent of total enrollment, but 76 percent of suspensions, almost 78 percent of expulsions, and 77 percent of arrests in schools during the same period.⁵⁴² Overall, the public school system has become an entry point into the juvenile justice system, in particular for minority youth. This occurrence is often referred to as the “school to prison pipeline.” Historical inequities, such as racially segregated education, underfinanced schools, concentrated student poverty, and racial disparities in law enforcement, all impact this virtual pipeline.⁵⁴³

298. Researchers from the National Economic and Social Rights Initiative conducted qualitative interviews and focus groups in New York City schools to document school disciplinary measures. The report highlights several alarming issues and found that teachers often do not have the training and support needed to foster a positive climate for students, and consequently, resort to degrading and abusive comments.⁵⁴⁴ Students also reported that there is disparate treatment in the application of discipline based on racial and ethnic background. For example, the report documents how teachers and school administrators stereotype students based on how they are dressed and even make disparaging comments based on those stereotypes.⁵⁴⁵

299. In 1994, Congress passed the Gun Free Schools Act,⁵⁴⁶ which mandates a one-year expulsion for any student who brings a firearm to school. Since that time, school districts have passed various “zero tolerance” policies mandating suspension or expulsion from school for a variety of offenses. Concurrently, states have passed legislation mandating expulsion for a broad range of offenses. In general, zero tolerance student discipline policies have often led to the imposition of overly harsh or disproportionate punishments for relatively minor infractions. State statutes on zero tolerance policy in Arizona allows for schools to modify expulsion requirements on a case-by-case basis. School officials can therefore expel some students for offenses, but simultaneously decline to punish other students for the same offense, ultimately leading to disproportionate treatment.⁵⁴⁷

Recommendations.

- All levels of government in the United States should enact laws that adopt an effects test to measure *de facto* barriers to equal educational opportunities. Concurrently, laws should provide safeguards that protect against practices that have either the purpose or the effect of discrimination on the basis of race.
- All levels of government in the United States should reject the use of the ‘colorblind’ doctrine in legislation and government education policies. This doctrinal incorporation threatens the United States’ obligation under the Convention to use

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special measures to promote the adequate development of quality educational opportunities to those historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities.

- All levels of government in the United States should permit school districts to voluntarily promote school integration through the use of carefully tailored race-conscious measures to promote educational, democratic and cultural benefits of racial and ethnic diversity in the classroom.
- The U.S. Government should support a constitutional amendment and support ratification by the states to create a fundamental right to education based on human rights standards, and promote the creation and preservation of U.S. laws that provide remedies for racial and ethnic disparities that cause *de facto* segregation in education. A federal right to a quality education ought to provide federal protections equal to or greater than the constitutional rights that already exist in particular state jurisdictions throughout the United States.
- All levels of government in the United States should increase language access services for students and parents, and require and support local school implementation of best teaching practices for ELL students to reach English proficiency and for English speakers to learn a second language.
- All levels of government in the United States should take affirmative steps to remove barriers to higher education for children who have adapted to life in a new country and excelled. For example, states should allow immigrant children residents to pay in-state tuition for post-secondary education.
- The U.S. Government should ensure that all levels of government direct resources to programs designed to teach positive behavior and conflict resolution as an alternative to zero-tolerance discipline and criminalization in schools.

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¹ Periodic Report of the United States of America Submitted under Article IX of the International Convention on the Elimination of all Forms of Racial Discrimination to the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/6 (May 1, 2007).

² Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002) (citing Professor Louis Henkin).

³ Lawyers' Committee for Human Rights, *In the National Interest 2001: Human Rights Policies For The Bush Administration (Enhancing U.S. Compliance with Human Rights Treaties)*, at 115, <http://www.lchr.org/ITNI/> (submitted to Pres. Bush July 31, 2001).

⁴ *Id.*

⁵ See Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2D 365, 372 (1998).

⁶ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination U.S., U.N. GAOR 56th Sess., Supp. No. 18, ¶¶ 380-407, U.N. Doc. A/56/18 (Aug. 14, 2001).

⁷ U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg., U.N. Doc CERD/C/SR.1475 (2001).

⁸ *Id.*

⁹ *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

¹⁰ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

¹¹ U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 7.

¹² Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6.

¹³ U.N. Comm. on the Elimination of Racial Discrimination, Committee's Guidelines to Follow-Up on Concluding Observations and Recommendation, 68th Sess., U.N. Doc CERD/C/68/Misc.5/Rev.1 (Mar. 2, 2006).

¹⁴ Rules of Procedure of the U.N. Comm. on the Elimination of Racial Discrimination, Rule 67.

¹⁵ U.N. Comm. on the Elimination of Racial Discrimination, General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Article 9, Paragraph 1 of the Convention, 57th Sess., 1429th mtg., U.N. Doc CERD/C/70/Rev.5 (Dec. 5, 2000).

¹⁶ Report, *supra* note 1, at 103-04.

¹⁷ Report, *supra* note 1, at 104-05.

¹⁸ See Friedrich Kübler, *How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 357 (1998).

¹⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1959); *R.A.V. v. City of Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

²⁰ See John Stuart Mill, *On Liberty* (1859), in *ON LIBERTY AND OTHER ESSAYS* 1, 1 (John Gray ed., 1991).

²¹ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²² Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1559 (2002-03).

²³ Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 289 (2004) (citing Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 851-54 (1994)).

²⁴ Report, *supra* note 1, at 105-06.

²⁵ Report, *supra* note 1, at 106.

²⁶ *Id.* at 107.

²⁷ *Id.* at 107-08.

²⁸ *Id.* at 106.

²⁹ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, (citing CERD, Article 1, paragraph 1, and General Recommendations Adopted By the U.N. Comm. on the Elimination of Racial Discrimination, Gen. Rec. No. 14, Definition of Discrimination (Art. 1, para. 1) (42nd Sess. 1993)).

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³⁰ American Civil Liberties Union (ACLU), Brief and Initial Analysis of the United State Report to the Committee on the Elimination of Racial Discrimination, at 11 (May 2007).

³¹ Report, *supra* note 1, at 109.

³² *Id.*

³³ See ACLU, *supra* note 30, at 7.

³⁴ Report, *supra* note 1, at 109.

³⁵ *Id.* at 110.

³⁶ *Id.*

³⁷ *Id.*

³⁸ As discussed more fully in the section of this Shadow Report on Article 5, state public defender programs are grossly-under-funded. ACLU, *supra* note 30, at 2.

³⁹ *Id.* at 4.

⁴⁰ Report, *supra* note 1, at 110.

⁴¹ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6.

⁴² ACLU, *supra* note 30, at 4.

⁴³ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6.

⁴⁴ ACLU, *supra* note 30, at 4.

⁴⁵ Report, *supra* note 1, at 111.

⁴⁶ ACLU, *supra* note 30, at 7-8.

⁴⁷ Report, *supra* note 1, at 111.

⁴⁸ *Id.* at 112.

⁴⁹ *Id.*

⁵⁰ *Id.* at 112-13.

⁵¹ The U.S. provides a detailed response to both the Committee's recommendations to the 2000 report and also to the individual complaints raised by certain Western Shoshone descendants before the Committee. This discussion is limited to the U.S.'s response to the Committee's concerns and recommendations.

⁵² Report, *supra* note 1, at 113.

⁵³ *Id.* at 114.

⁵⁴ *Id.*

⁵⁵ This information is found beginning with paragraph 171 on p. 61 of the Report through paragraph 179 on p. 64, *supra* note 1.

⁵⁶ *Id.* at 61-63.

⁵⁷ ACLU, *supra* note 30, at 5.

⁵⁸ Report, *supra* note 1, at 120.

⁵⁹ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 402.

⁶⁰ Report, *supra* note 1, at 120.

⁶¹ *Id.* at 120-21.

⁶² *Id.* at 121.

⁶³ International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Provision of Sufficient Resources: 11/01/94, CERD Meeting of States Parties, 15th mtg., U.N. Doc. CERD/sp/47 (1994).

⁶⁴ Amendment to article 8 of the CERD: 15/01/92, CERD Meeting of States Parties, 14th mtg., U.N. Doc. CERD/sp/45 (1992).

⁶⁵ By its resolution 47/111 of 16 December 1992, the General Assembly also requested the Secretary-General to take the necessary measures to ensure that the Committee meets as scheduled until the amendment enters into force. *Id.*

⁶⁶ Amendment, *supra* note 64.

⁶⁷ Report, *supra* note 1, at 121.

⁶⁸ *Id.*

⁶⁹ 42 U.S.C. § 1973c. Covered jurisdictions include all or parts of Alabama, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, portions of New York City, North Carolina, South Carolina, South

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Dakota, Texas. Covered jurisdictions were selected based upon their use of literacy tests and other discriminatory devices known to have been used to bar Blacks from registering and voting, in addition to jurisdictions administering their elections only in English in a manner that inhibited participation by language minority citizens.

⁷⁰ Joseph Rich, Mark Posner, and Robert Kengle, *The Voting Section*, in *THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS* 40, 40 (W. Taylor et al. eds., 2007).

⁷¹ See Report 109-478 to accompany Pub. L. No. 109-246, §§ 2(b)(4), (7), 120 Stat. 577, H.R. 9, 109th Congress (July 27, 2006).

⁷² *Id.* at § 2(b)(5).

⁷³ *Id.* at § 2(b)(7).

⁷⁴ *Id.* at § 2(b)(9).

⁷⁵ J. Rich et al., *The Voting Section*, *supra* note 70, at 32.

⁷⁶ *Id.* at 36.

⁷⁷ *Id.*

⁷⁸ *Id.* at 37.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *LULAC v. Perry*, 126 S. Ct. 2854 (2006).

⁸² J. Rich et al., *The Voting Section*, *supra* note 70, at 37.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Common Cause v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). A Georgia state trial court also invalidated the law on state constitutional grounds.

⁸⁶ J. Rich et al., *The Voting Section*, *supra* note 70, at 38

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 41. See, e.g., *United States v. Ike Brown* (S.D. Miss. 2005) (holding local election and party officials' practices, including holding party caucuses in private homes, and inviting only Blacks to meetings, discriminated against Whites in violation of Section 2).

⁹¹ For recent DOJ enforcement of the VRA bilingual provisions on behalf of Hispanic voters, see, e.g., *United States v. Kane County* (N.D. Ill. 2007); *City of Earth* (N.D. Tex. 2007); *United States v. Littlefield ISD* (N.D. Tex. 2007). Few cases have been filed on behalf of speakers of other minority languages. See, e.g., *United States v. City of Boston* (D. Mass. 2005); *United States v. City of Walnut* (C.D. Cal. 2007); *United States v. City of Rosemead* (C.D. Cal. 2005); *United States v. San Diego County* (S.D. Cal. 2004).

⁹² U.S. Const. art. I, § 4.

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⁹³ For HAVA enforcement, *see* *United States v. Galveston County* (S.D. Tex. 2007) (failure to provide provisional ballots to individuals eligible to vote, to post specific voting information at polling places, and to provide adequate instructions for mail-in registrants and first-time voters); *United States v. City of Philadelphia* (E.D. Pa. 2007) (failure to provide alternative-language information); *United States v. Cibola County* (D.N.M. 2007) (failure to ensure that provisional ballots were available and offered to voters, and to require identification from certain first-time voters who registered by mail); *United States v. New Jersey* (D.N.J. 2006) (failure to fully implement computerized statewide voter registration list for use in the upcoming federal election and collect new voter applicant's driver's license or social security numbers); *United States v. Cochise County* (D. Ariz. 2006) (repeated failure to post certain information in polling places during federal elections); *United States v. Maine* (D. Me. 2006) (failure to ensure full access to voting for disabled voters by requiring that each polling place have a voting system accessible to disabled voters); *United States v. Alabama* (M.D. Ala. 2006) (failure to take actions necessary to achieve timely compliance with HAVA, including implementing a uniform, official, interactive computerized statewide voter registration list, coordinating with necessary statewide agency databases and the Social Security Administration regarding the statewide voter registration list, and collecting proscribed identification information from applicants for voting); *United States v. New York* (N.D.N.Y. 2006) (failure to comply with HAVA requirements regarding voting system standards and statewide voter registration database); *United States v. Westchester County* (S.D.N.Y. 2005) (failure to post HAVA-required information in polling places); *United States v. San Benito County* (N.D. Cal. 2004) (failure to post HAVA-required information in polling places and to provide requisite written information regarding the process of casting a provisional ballot).

⁹⁴ *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004).

⁹⁵ J. Rich et al., *The Voting Section*, *supra* note 70, at 43.

⁹⁶ *See A Summary of the 2004 Election Day Survey, How We Voted: People, Ballots & Polling Places: A Report to the American People of the United States Election Assistance Commission*, U.S. ELECTION ASSISTANCE COMMISSION (2005), http://www.eac.gov/clearinghouse/docs/eds2004/2004-election_day_survey/attachment_download/file (the highest reported rate of counting provisional ballots was among predominantly Hispanic jurisdictions, 79.3%, followed by predominantly non-Hispanic White areas, 62.6%; predominantly non-Hispanic Black communities, 58.6%; and predominantly non-Hispanic Native American jurisdictions, 48.7%).

⁹⁷ *Id.* at 6-5.

⁹⁸ *Id.* at 7-8.

⁹⁹ *See* Statement of Jon Greenbaum, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Before the House Administration Committee (Aug. 2, 2007).

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

¹⁰² As shown above, despite such proof, the Department of Justice has also pre-cleared new laws requiring voters to present identification, including picture identification at the polls on Election Day, as in Georgia, Florida and Arizona.

¹⁰³ In Arizona, Proposition 200 required individuals to provide proof of citizenship before registering to vote and when voting must provide identification with name, address and photograph, or two forms of identification with their name and address. In May 2005, the U.S. Attorney General pre-cleared the new law. Georgia's law, passed in 2005, was ultimately upheld by the federal court. *See Common Cause/Georgia v. Billups*, No. 4:05-CV-0201-HLM, 2007 U.S. Dist. LEXIS 68950, at *111 (N.D. Ga. Sept. 6, 2007).

¹⁰⁴ *See Indep. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782-84 (S.D. Ind. 2006); *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

¹⁰⁵ *Crawford*, 472 F.3d at 953-54. The U.S. Supreme Court has recently consented to review this case.

¹⁰⁶ Brennan Center for Justice at NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, at 3 (Nov. 2006), http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf (noting that 25% of Black voting-age citizens have no current government-issued photo ID, compared with 8% of White voting-age citizens).

¹⁰⁷ *Id.*

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¹⁰⁸ The Sentencing Project and the International Human Rights Law Clinic, Washington College of Law, American University, *Barriers to Democracy: A Petition to the Inter-American Commission on Human Rights for a Thematic Hearing on Felony Disenfranchisement Practices in the United States and the Americas*, at 5 (May 2007), http://www.sentencingproject.org/Admin/Documents/publications/fd_PETITION%20TO%20IACHR_final_formatted.pdf.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 41.

¹¹² *Hirst v. United Kingdom (No. 2)*, Application No. 74025/01, at 10 (Eur. Ct. Human Rights, Oct. 6, 2005) (discussing the rationale of the *Sauvé v. Canada (No.1)*, [1992] 2 S.C.R. 438, in which a Canadian petitioner in prison, Rick Sauvé, challenged the constitutionality of Canada's electoral law, which prohibited all persons in prison from voting).

¹¹³ *Id.* at 10.

¹¹⁴ Elizabeth A. Wahler, *Losing the Right to Vote: Perceptions of Permanent Disenfranchisement and the Civil Rights Restoration Application Process in the State of Kentucky*, THE SENTENCING PROJECT, 1, 1 (2006).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 3 (initial application and additional written letter or essay explaining why the applicant thinks his rights should be reinstated along with three letters from character references).

¹¹⁸ Angela Behrens, *Chapter 6, Disenfranchisement and Civic Reintegration: Felons Speak Out*, at 151 in J. MANZA & C. UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

¹¹⁹ Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, *AJS VOL. 109*, No. 3, 559, 560 (Nov. 2003).

¹²⁰ *Id.* at 572.

¹²¹ The Sentencing Project and the International Human Rights Law Clinic, *Barriers to Democracy*, *supra* note 108, at 1.

¹²² *Id.*

¹²³ Angela Behrens, *Chapter 2, The Racial Origins of Felon Disenfranchisement*, at 67 in J. MANZA & C. UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

¹²⁴ *Id.* at 92.

¹²⁵ Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination"*, *supra* note 119, at 596. *See also* Behrens, *The Racial Origins of Felon Disenfranchisement*, *supra* note 123, at 67 (When Blacks make up a larger proportion of a state's prison population, the state is significantly more likely to adopt or extend felon disenfranchisement.).

¹²⁶ *See* Human Rights Watch, *United States Punishment and Prejudice: Racial Disparities in the War on Drugs*, VOL. 12, No. 2(G) (May 2000) (Blacks have long been arrested for drug offenses at higher rates than Whites; the higher arrest rates of Black drug offenders do not reflect higher rates of drug law violations; because drug law enforcement resources have been concentrated in low-income, predominantly minority urban areas, drug offending Whites have been disproportionately free from arrest compared to Blacks; Whites constitute a far greater share of the drug selling population than of the population arrested for drug selling; in poor Black neighborhoods, drug transactions are more likely to be conducted on the street, in public and between strangers and thus leading more easily to arrests than in the White neighborhoods where drugs are more likely to be sold indoors, in bars, clubs and private homes; racial profiling also plays a role.).

¹²⁷ A. Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 753 (1993).

¹²⁸ Ryan S. King & Marc Mauer, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia*, THE SENTENCING PROJECT 8 (Sept. 2004).

¹²⁹ *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (Supreme Court held that the Equal Protection Clause of the U.S. Constitution did not require states to advance a compelling interest before denying the vote to citizens convicted of crimes, as Section 2 of that amendment expressly allowed states to deny the right to vote for

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participation in rebellion, or other crime). *But see* Thies v. State Admin. Bd. of Election Laws, 387 F. Supp. 1038 (D. Md. 1974) (Ramirez left open the possibility that unequal enforcement may violate the Equal Protection Clause of the Fourteenth Amendment); Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982) (selective enforcement can lead to the invalidation of an otherwise constitutional disenfranchisement law).

¹³⁰ See Hunter v. Underwood, 471 U.S. 222 (1985) (Ramirez left open a valid claim that the unequal enforcement of disenfranchisement laws was unconstitutional; to show discrimination under the Equal Protection Clause, a plaintiff had to introduce historical evidence that legislators deliberately passed the law to discriminate against minorities).

¹³¹ See Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (holding that the original discriminatory intent of the statute, to discriminate against Blacks and include only crimes thought to be primarily committed by Blacks, was no longer present and the current statute was not unconstitutional because subsequent amendments broadened the list of crimes); see also Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (holding that Florida's initial decision to adopt the disenfranchisement provision was based on a non-racial rationale because at the time the right to vote was not extended to Blacks, the existence of racial discrimination behind some of the constitutional provisions in Florida did not show that racial animus motivated the criminal disenfranchisement provision given Florida's long-standing tradition of criminal disenfranchisement, and reenactment eliminated any taint from the allegedly discriminatory 1968 provision).

¹³² M. Mauer & T. Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*, THE SENTENCING PROJECT, at 2 (Feb. 2005).

¹³³ *Id.* at 2.

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

¹³⁶ The Inter-American Commission on Human Rights considered a petition regarding the issue, and concluded that the United States violated petitioners' rights under the relevant articles of the American Declaration by denying them an effective opportunity to participate in their federal legislature. Report No. 98/03, Case 11.204, Statehood Solidarity Committee, Unites States (Dec. 29, 2003). Petitioners' rights to participate in the federal legislature of the United States have been limited or restricted both in law and in fact as the District's delegate is prohibited from casting a deciding vote in respect of any legislation that comes before Congress, and they had thus been denied an equal right under law in accordance with Article II of the Declaration to participate in the government of their country by reason of their place of residence, and, accordingly, their right under Articles XX of the Declaration to participate in their federal government has been limited or restricted.

¹³⁷ General Recommendations Adopted By the U.N. Comm. on the Elimination of Racial Discrimination, Gen. Rec. No. 31, on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, at ¶¶ 7, 8, 9, 23, 26, 28, 30 (2005).

¹³⁸ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶¶ 395-96.

¹³⁹ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5.

¹⁴⁰ U.S. Const. amend. VI, XIV.

¹⁴¹ Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

¹⁴² Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981).

¹⁴³ *Income, Poverty, and Health Insurance Coverage in the Unites States: 2006*, U.S. CENSUS BUREAU, at 5, 12 (Aug. 2007).

¹⁴⁴ *Poverty and Family Budgets*, ECONOMIC POLICY INSTITUTE (Aug. 2001), <http://www.epi.org>.

¹⁴⁵ *Net Worth and Asset Ownership of Households: 1998 and 2000*, U.S. CENSUS BUREAU, <http://www.census.gov>.

¹⁴⁶ Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CENTER FOR LAW & SOCIAL POL'Y, at 3-4, 22-24 (Jan. 2007).

¹⁴⁷ *Id.* at 7-9.

¹⁴⁸ Shapiro v. Thompson, 394 U.S. 618 (1969); Goldberg v. Kelley, 397 U.S. 254 (1970); Escalera v. New York City Hous. Auth., 425 F. 2d 853 (2d Cir. 1970); King v. Smith, 392 U.S. 309 (1968).

¹⁴⁹ Houseman et al., *Securing Equal Justice for All*, *supra* note 146, at 22-24.

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¹⁵⁰ *Id.* at 30-32.

¹⁵¹ *Id.* at 36; Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2188-89 (1999).

¹⁵² *Documenting the Justice Gap in America*, A REPORT OF THE LEGAL SERVICES CORPORATION, at 16 (Sept. 2005); Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2007*, CENTER FOR LAW & SOCIAL POL'Y, at 1-2, 11-12, <http://www.clasp.org>.

¹⁵³ *Documenting the Justice Gap in America*, *supra* note 152, at 4, 13-14.

¹⁵⁴ Deborah L. Rhode, ACCESS TO JUSTICE 79 (2004).

¹⁵⁵ *Documenting the Justice Gap in America*, *supra* note 152, at 16.

¹⁵⁶ Deborah L. Rhode, PRO BONO IN PRINCIPLE AND IN PRACTICE 20 (2005) (describing average pro bono contribution for a member of the private bar as less than 30 minutes per week and less than half a dollar a day; of the hundred most financially successful firms, less than 20% comply with the American Bar Association's minimum yearly standard of 50 hours of pro bono work per attorney).

¹⁵⁷ *Documenting the Justice Gap in America*, *supra* note 152, at 19.

¹⁵⁸ *Id.* at 17.

¹⁵⁹ 45 C.F.R. § 1611.3.

¹⁶⁰ 72 Fed. Reg. 3147-48 (Jan. 24, 2007).

¹⁶¹ A recent study of California basic needs finds that a two-parent family needed approximately an annual income of \$72,343 just to make ends meet. *Making Ends Meet: How Much Does It Cost to Raise a Family in California?*, CALIFORNIA BUDGET PROJECT, at 16 (Oct. 2007).

¹⁶² Sylvia Allegretto, *Basic Family Budgets*, ECONOMIC POLICY INSTITUTE, <http://www.epi.org>.

¹⁶³ Jared Bernstein et al., *How Much is Enough? Basic Family Budgets for Working Families*, at Table 2 (Numbers of Families and Persons Below Family Budgets and Poverty Level, (May 2000), <http://www.epinet.org/issueguides/poverty/ima/hia/table2.gif>).

¹⁶⁴ ABA House of Delegates Resolution 112A, approved Aug. 7, 2006.

¹⁶⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶⁶ RHODE, ACCESS TO JUSTICE, *supra* note 154, at 123.

¹⁶⁷ *Improving Criminal Justice Systems Through Expanded Strategies: Innovative Collaborations*, REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE, at 19 (Feb. 1999).

¹⁶⁸ American Bar Association Standing Committee on Legal Aid & Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, at 38-40 (2004).

¹⁶⁹ Spangenberg Group, *Keeping Defender Workloads Manageable*, at 2 (Jan. 2001).

¹⁷⁰ Lawyers' Committee for Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity*, REPORT OF THE JUDICIAL INDEPENDENCE AND ACCESS TO THE COURTS PROJECT, at 7 (June 2005).

¹⁷¹ William J. Sabol et al., *Prison and Jail Inmates at Midyear 2006*, BUREAU OF JUSTICE STATISTICS, at 9 (June 2007); Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, BUREAU OF JUSTICE STATISTICS, at 8 (2003).

¹⁷² RHODE, ACCESS TO JUSTICE, *supra* note 154, at 123.

¹⁷³ Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (June 2007).

¹⁷⁴ American Council of Chief Defenders Statement on Caseloads and Workloads (Aug. 24, 2007), <http://www.nlada.org>; *Gideon's Broken Promise*, *supra* note 168, at 17-18.

¹⁷⁵ Public defender caseloads in Rhode Island surpass these standards by 30-40% for felonies and 150% for misdemeanors. In one Nebraska County, some public defenders handle 1200 cases a year, including felonies, misdemeanors, child support, contempt cases, and juvenile cases. In Pennsylvania, the caseload of one public defender's office nearly doubled from 1980 to 2000, while the number of attorneys handling those cases remained the same. In New York, one county averages 175 felonies and 1000 misdemeanor cases per attorney each year. A public defender program in one Georgia County has averaged 530 felonies a year, and public defenders in Albuquerque, New Mexico average 1000 to 1200 misdemeanor cases a year. *Gideon's Broken*

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Promise, *supra* note 168, at 18; Danny Hakim, *Judge Urges State Control of Legal Aid for the Poor*, N.Y. TIMES, June 28, 2006; DAVID COLE, NO EQUAL JUSTICE 83 (1999).

¹⁷⁶ *Gideon's Broken Promise*, *supra* note 168, at 18.

¹⁷⁷ RHODE, ACCESS TO JUSTICE, *supra* note 154, at 124.

¹⁷⁸ State v. Peart, 621 So. 2d 780, 879 (La. 1993).

¹⁷⁹ Joel Stashenko, *NYCLU Suit Seeks Reform of Defense for Indigent*, NEW YORK LAWYER (Nov. 9, 2007), <http://www.nylawyer.com/display.php/file=/news/07/11/110907e>.

¹⁸⁰ ABA Formal Opinion 06-441, at 1; Norman Lefstein & Georgia Vagenas, *Excessive Defender Caseloads: ABA Ethics Committee Weighs In*, THE CHAMPION, at 10-22 (Dec. 2006.)

¹⁸¹ Jamie Satterfield, *Public Defender: We're Overloaded*, KNOXVILLE NEWS SENTINEL, June 27, 2007.

¹⁸² COLE, NO EQUAL JUSTICE, *supra* note 175, at 78-80.

¹⁸³ Mary Alice Robbins, *Hey, Calling Your Client a Liar and Drug Dealer at Trial Doesn't Make You a Bad Lawyer*, NEW YORK LAWYER (Oct. 3, 2007), <http://www.nylawyer.com/display.php/file=/news/07/10/100307i>.

¹⁸⁴ Bureau of Justice Statistics, *Capital Punishment Statistics*, <http://www.ojp.usdoj.gov/bjs/cp.htm>.

¹⁸⁵ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 396.

¹⁸⁶ See, e.g., American Bar Association Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/>.

¹⁸⁷ *Two Day Deliberations End with Contentious Resolution Calling for Moratorium on Use of Death Penalty Approved by Third Committee After Vote*, United Nations Press Release (Nov. 15, 2007).

¹⁸⁸ Report, *supra* note 1, at ¶ 220.

¹⁸⁹ *Id.* at ¶ 221 (discussing poverty rates in 2005).

¹⁹⁰ *Id.* at ¶ 222.

¹⁹¹ See Foreman et al., *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation's Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 85 (Fall 2004).

¹⁹² Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 97 (Fall 2004).

¹⁹³ *Id.* See also Foreman et al., *The Continuing Relevance of Race Conscious Remedies and Programs in Integrating the Nation's Workforce*, *supra* note 191, at 86-87 (discussing studies pairing Black applicants with similarly situated Whites and confirming continued existence of discrimination).

¹⁹⁴ See 42 U.S.C. § 2000e-2(a)(1).

¹⁹⁵ United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 202-204 (1979).

¹⁹⁶ Disparate impact cases are those that seek broad systemic reform of employment selection practices that adversely affect the employment opportunities for a minority group, such as Blacks or women. See Richard S. Ugelow, *Employment Litigation Section*, in THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS 26, 26 (W. Taylor et al. eds., 2007), <http://www.americanprogress.org>.

¹⁹⁷ Information about the ELS' complaints, court-approved consent decrees and judgments, and out-of-court settlements can be found at <http://www.usdoj.gov/crt/emp/papers.html>.

¹⁹⁸ Sarah Crawford, *House Oversight Hearing of the Civil Rights Division, U.S. Department of Justice: The Record of the Employment Litigation Section under the Bush Administration*, at 2 (Mar. 22, 2007).

¹⁹⁹ *Id.*

²⁰⁰ United States v. Village of Woodmere, No. OH, CIV 07-1541 (N.D. Ohio filed May 25, 2007) and United States v. City of Indianapolis, No. CIV 07-0897 (S.D. Ind. filed July 11, 2007).

²⁰¹ United States v. Bd. of Trs. of S. Ill. Univ., C.A. No. 06-4037-JLF (S.D. Ill. filed Feb. 8, 2006) and United States v. Pontiac, Michigan Fire Dep't, No. CIV 05-72913 (E.D. Mich. filed July 27, 2005).

²⁰² United States v. City of Gallop, NM, No. CIV 04-1108 (D.N.M. filed Sept. 29, 2004).

²⁰³ See Hearing Before the S. Judiciary Comm. on "Civil Rights Division Oversight," 110th Cong. (June 21, 2007) (testimony of Brian Landsberg, former Deputy Assistant Attorney General, stating noting that the Civil

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Right's Division's priorities have become so diffuse with less priority placed on the core responsibilities of the Division to combat racial discrimination against people of color).

²⁰⁴ U.S. Dep't of Justice, Strategic Plan: Fiscal Years 2007-2012 (2007),

http://www.usdoj.gov/jmd/mps/strategic2007-2012/strategic_plan20072012.pdf.

²⁰⁵ EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2006* (last modified on Jan. 31, 2007),

<http://www.eeoc.gov/stats/litigation.html>.

²⁰⁶ *Id.*

²⁰⁷ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

²⁰⁸ *Id.* at 2165.

²⁰⁹ Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006,

Department of Homeland Security Office of Immigration Statistics, at 3 (Aug. 2007).

²¹⁰ *Id.* at 4.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Capps et al., *A Profile of the Low-Wage Immigrant Workforce*, URBAN INSTITUTE, at 6 (Oct. 27, 2003),

<http://www.urban.org/url.conf?ID=310880>.

²¹⁴ *Immigrant Workers at Risk: The Urgent Need for Improved Safety and Health Policies and Programs*, AFL-CIO, at 3 (Aug. 2005).

²¹⁵ Capps et al., *A Profile of Low-Income Working Immigrant Families*, URBAN INSTITUTE, at 2 (June 2005),

<http://www.urban.org/url.conf?ID=311206>.

²¹⁶ The Rights of Immigrants - ACLU Position Paper (9/8/2000),

<http://www.aclu.org/immigrants/gen/11713pub20000908.html>.

²¹⁷ Julia Preston, *Surge in Immigration Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007.

²¹⁸ *Id.*

²¹⁹ *Federal Court Strikes Down Discriminatory Anti-Immigrant Law in Hazelton, Pennsylvania*, ACLU Press Release (7/26/2007).

²²⁰ Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007.

²²¹ *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).

²²² *Id.* at 534 (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

²²³ *Id.* (internal quotations omitted).

²²⁴ See Julia Preston, *U.S. Set for a Crackdown on Illegal Hiring*, N.Y. TIMES, Aug. 8, 2007.

²²⁵ See Am. Fed'n of Labor v. Chertoff, Case No. 07-4472, 2007 WL 2972952, at *4 (N.D. Cal. Oct. 10, 2007).

²²⁶ *Id.*; see also *What the Order Granting a Preliminary Injunction Means for the DHS Rule about Social Security "No Match,"* NATIONAL IMMIGRATION LAW CENTER, at 1 (Oct. 2007),

http://nilc.org/immsemplymnt/ssp_NM_Toolkit/no-match_PI_2007-10-10.pdf.

²²⁷ *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002).

²²⁸ See Inter-American Court of Human Rights, Legal Condition and Rights of Undocumented Migrant Workers, Consultative Opinion OC-18/03 (September 17, 2003)

Report, *supra* note 1, at ¶ 105.

²²⁹ *Id.*

²³⁰ See Neil MacFarquhar, *Abandon Stereotypes, Muslims in America Say*, N.Y. TIMES, Sept. 4, 2007

(discussing that American Muslims experience an increase in discrimination).

²³¹ *Id.*

²³² James Dao, *Mystery Cloaks Couple's Firing as Risks to U.S.*, N.Y. TIMES, (Dec. 12, 2004).

²³³ Garcia, *Labor's Fragile Freedom of Associations Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 302 (Winter 2006).

²³⁴ USA PATRIOT Act of 2001, 50 U.S.C. § 1861. See also Garcia, *Labor's Fragile Freedom of Associations Post-9/11*, *supra* note 232, at 302.

²³⁵ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 399.

²³⁶ *Id.*

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- ²³⁸ Report, *supra* note 1, at ¶¶ 126, 127, 129.
- ²³⁹ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 398.
- ²⁴⁰ U.S. Dep't of Education, National Center for Education Statistics, Digest of Education Statistics (2005).
- ²⁴¹ U.S. Dep't of Labor, Bureau of Labor Statistics (2007).
- ²⁴² U.S. Current Population Survey and the National Committee for Pay Equity (2007).
- ²⁴³ Report, *supra* note 1, at ¶¶ 219-25.
- ²⁴⁴ *Id.* at ¶¶ 128-29.
- ²⁴⁵ *Id.* at ¶ 44.
- ²⁴⁶ *Id.* at ¶ 46.
- ²⁴⁷ *Id.* at ¶ 47.
- ²⁴⁸ U.S. Const. amend. V and XIV §1.
- ²⁴⁹ Report, *supra* note 1, at ¶ 41.
- ²⁵⁰ *Id.* at ¶ 127.
- ²⁵¹ *Id.* at ¶ 130.
- ²⁵² *Id.* at ¶ 131.
- ²⁵³ *Id.* at ¶ 127.
- ²⁵⁴ *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
- ²⁵⁵ *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986).
- ²⁵⁶ Report, *supra* note 1, at ¶ 133.
- ²⁵⁷ *See, e.g.*, Cal. Const., Art. 1 § 31(a); Washington State Civil Rights Initiative; Michigan Civil Rights Initiative.
- ²⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- ²⁵⁹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 127 S. Ct. 2738 (2007).
- ²⁶⁰ Brief for Petitioner, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 05-908, 2006 WL 2415458 (U.S. Aug. 21, 2006).
- ²⁶¹ *See* *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986); *see also* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).
- ²⁶² Report, *supra* note 1, at ¶ 46.
- ²⁶³ *Id.*
- ²⁶⁴ *Id.* at ¶ 48.
- ²⁶⁵ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).
- ²⁶⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 127 S. Ct. 2738, ___ (Stevens, J., dissenting).
- ²⁶⁷ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6 at ¶ 398.
- ²⁶⁸ *Id.*
- ²⁶⁹ Report, *supra* note 1, at ¶ 127.
- ²⁷⁰ *Id.* at ¶ 219.
- ²⁷¹ *Id.*
- ²⁷² 42 U.S.C. § 2000e.
- ²⁷³ *See* *United Steel Workers v. Weber*, 443 U.S. 193 (1979).
- ²⁷⁴ *Id.* at 204.
- ²⁷⁵ *Id.* at 208; *Wygant*, 476 U.S. at 267.
- ²⁷⁶ *Wygant*, 476 U.S. at 276-77.
- ²⁷⁷ *Id.*
- ²⁷⁸ *Id.* at 280; *see also* *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 481 (1986); *United States v. Paradise*, 480 U.S. 149, 177 (1987).
- ²⁷⁹ Report, *supra* note 1, at ¶ 46.

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²⁸⁰ Andrew B. Bernard & Matthew J. Slaughter, *The Life Cycle of a Minority-Owned Business: Implications for the American Economy*, PREPARED FOR NATIONAL MINORITY ENTERPRISE DEVELOPMENT (MED) WEEK 2004 CONFERENCE, SEPTEMBER 7-10, 2004.

²⁸¹ Monique W. Morris et al., *Free to Compete?: Measuring the Impact of Proposition 209 on Minority Business Enterprises*, DISCRIMINATION RESEARCH CENTER, at 21 (Aug. 2006).

²⁸² General Recommendations Adopted By the U.N. Comm. on the Elimination of Racial Discrimination, Gen. Rec. No. 31, on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005).

²⁸³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁸⁴ *Virginia v. Black*, 538 U.S. 306, 363 (2003).

²⁸⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁸⁶ Xiamon Huang et al., *Computer Crimes*, 44 AM. CRIM. L. REV. 285, 320-21 (2007).

²⁸⁷ *Id.*

²⁸⁸ Anti-Defamation League, *White Supremacists Ratchet Up Anti-Hispanic Action As U.S. Immigration Debate Rages*, (May 24, 2006), http://www.adl.org/PresRele/Extremism_72/4822_72.htm.

²⁸⁹ Civilrights.org, *House Crime Subcommittee Hearing Testimony on the LLEHCPA*, <http://www.civilrights.org/issues/hate/llehcpa-testimony.html>.

²⁹⁰ See U.S. Dep't of Justice, Federal Bureau of Investigation, *Hate Crime Statistics 2005, Uniform Crime Reports*, <http://www.fbi.gov/ucr/hc2005/incidentsoffenses.htm>.

²⁹¹ See Anti-Defamation League, *White Supremacists Ratchet Up Anti-Hispanic Action*, *supra* note 288.

²⁹² Human Rights Watch, *U.S. Law and International Human Rights Standards in WE ARE NOT THE ENEMY* (Nov. 2002), http://www.hrw.org/reports/2002/usahate/usa1102-02.htm#P173_21889.

²⁹³ U.S. Dep't of Justice, *Philadelphia Woman Pleads Guilty to Federal Hate Crime*, (June 22, 2007), http://www.usdoj.gov/opa/pr/2007/June/07_crt_446.html.

²⁹⁴ Human Rights Watch, *U.S. Law and International Human Rights Standards*, *supra* note 292.

²⁹⁵ Civilrights.org, *House Crime Subcommittee Hearing Testimony on the LLEHCPA*, *supra* note 289.

²⁹⁶ Paul Shukovsky et al., *FBI Opening Far Fewer Civil Rights Inquiries: Terrorism Supersedes Hate Crimes, Police Abuse*, SEATTLE POST-INTELLIGENCER, Apr. 25, 2007, http://seattlepi.nwsourc.com/national/313178_fbicivilrights26.html.

²⁹⁷ Civilrights.org, *FBI Statistics for 2005 Called Incomplete*, http://civilrights.org/press_room/buzz_clips/fbi-hate-crime-statistics-for-2005-called.

²⁹⁸ *Id.*

²⁹⁹ Civilrights.org, *supra* note 289.

³⁰⁰ MSNBC, *The 'Jena Six'*, <http://www.msnbc.msn.com/id/20793079/site/newsweek/page/0/>; NAACP, *NAACP Leads March on Jena-September 20, 2007*,

<http://www.naacp.org/get-involved/activism/alerts/110-aa-2007-7-20/index.htm>.

³⁰¹ Joint Statement Of Lisa M. Krigsten Counsel To The Assistant Attorney General Civil Rights Division Department Of Justice And Donald Washington United States Attorney For The Western District Of Louisiana Department Of Justice Before Committee On The Judiciary United States House Of Representatives Concerning The Jena 6 And The Role Of Federal Intervention In Hate Crimes And Race-Related Violence In Public Schools Presented October 16, 2007, <http://judiciary.house.gov/media/pdfs/Krigsten071016.pdf>.

³⁰² See Southern Poverty Law Center, *10 Ways to Fight Hate on College Campuses*, <http://www.tolerance.org/campus>.

³⁰³ See American Association of University Women, *Improving Hate Crimes Laws*, http://www.aauw.org/advocacy/issue_advocacy/actionpages/upload/AAUW-hate-crimes-legislation-110.pdf.

³⁰⁴ Human Rights Campaign, *The Local Law Enforcement Hate Crimes Prevention Act / Matthew Shepard Act*, http://www.hrc.org/laws_and_elections/5660.htm.

³⁰⁵ See Jonathan Weisman, *House Backs Expanded Hate-Crime Law: Bush Has Threatened Veto of Measure to Extend Federal Protection to Gays*, WASH. POST, May 4, 2007, at A04.

³⁰⁶ See Susannah Rosenblatt, *L.A. County Incidents Increased 26 percent Last Year, Fueled Largely by Aggression between Blacks and Hispanics, Often at Schools*, L.A. TIMES, Dec. 15, 2006, at Part B, Page 3.

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³⁰⁷ Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency, Memorandum to Assistant Administrators et al., *EPA's Commitment to Environmental Justice* (Aug. 9, 2001), http://www.mde.state.md.us/assets/document/environmental_justice/ejreport01/ej_2001_Annual_Report_partE.pdf; see also Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Memorandum to Assistant Administrators et al., *Reaffirming the U.S. Environmental Protection Agency's Commitment to Environmental Justice* (Nov. 4, 2005), <http://www.epa.gov/compliance/resources/policies/ej/admin-ej-commit-letter-110305.pdf>.

³⁰⁸ Robert D. Bullard, Ph.D. et al., *Toxic Wastes and Race at Twenty: Grassroots Struggles to Dismantle Environmental Racism in the United States*, EXECUTIVE SUMMARY, at 2 (Feb. 2007), [http://www.snre.umich.edu/news/newsdocs/Mohai percent20_2007 percent20UCC percent20Executive percent20Summary.pdf](http://www.snre.umich.edu/news/newsdocs/Mohai%20percent20_2007%20UCC%20Executive%20Summary.pdf).

³⁰⁹ Families USA, *Minority Health: Quick Facts About Disparities*, <http://www.familiesusa.org/issues/minority-health/facts/>.

³¹⁰ See, e.g., Initial Report of the United States of America Submitted under Article IX of the International Convention on the Elimination of all Forms of Racial Discrimination to the Committee on the Elimination of Racial Discrimination, U.N. doc. CERD/C/351/Add.1, at 19, 84 (Sept. 21, 2000) (“Persons belonging to minority groups tend to have less adequate access to health insurance and health care.”; “The United States recognizes that low-income and minority communities frequently bear a disproportionate share of adverse environmental burdens and is working to implement existing laws that better protect all communities.”).

³¹¹ *Id.* at 17-18.

³¹² Report, *supra* note 1, at 87, 88.

³¹³ Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), reprinted as amended in 42 U.S.C. § 4321 (1994 & Supp. VI 1998).

³¹⁴ U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools For Achieving Environmental Justice*, at 2 (Oct. 2003), <http://www.law.umaryland.edu/Marshall/usccr/documents/cr2003X100.pdf>.

³¹⁵ See David Pace, *More Blacks Live With Pollution*, <http://hosted.ap.org/specials/interactives/archive/pollution/part1.html>.

³¹⁶ U.S. Commission on Civil Rights, *Not in My Backyard*, *supra* note 314, at 9.

³¹⁷ Office of the Inspector General, Evaluation Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice, at i (March 1, 2004), <http://www.gov/oig/reports/2004/20040301-2004-P-00007.pdf>.

³¹⁸ *Id.* at ii.

³¹⁹ Government Accounting Office, Attention to Environmental Justice When Developing Clean Air Rules (July 2005), <http://www.gao.gov/new.items/d05289.pdf>.

³²⁰ *Id.* at 3-5.

³²¹ See <http://www.epa.gov/cheers/>.

³²² 42 U.S.C. § 2000d.

³²³ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³²⁴ U.S. Environmental Protection Agency, *Draft Framework for Integrating Environmental Justice at the U.S. Environmental Protection Agency*, <http://www.epa.gov/compliance/resources/publications/data/planning/strategicplan/ej/framework-strategicplan-publiccomment.pdf>.

³²⁵ Robert D. Bullard, Ph.D. et al., *Toxic Wastes and Race at Twenty*, *supra* note 308, at 1.

³²⁶ *Id.*

³²⁷ American Lung Association, *State of Lung Disease in Diverse Communities: 2005*, at 21, <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=308853>.

³²⁸ *Id.* at 5.

³²⁹ U.S. Commission on Civil Rights, *Not in My Backyard*, *supra* note 314, at 15.

³³⁰ *Id.* at 17.

³³¹ *Id.* at 18.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

³³² *Id.* at 17-18.

³³³ Rusty Middleton, *A Lot of Nerve*, Texas Observer (Sept. 7, 2007), <http://www.texasobserver.org/article.php?aid=2573>.

³³⁴ See Sierra Club, *Club and Allies Working to Stop Toxic Waste Incineration in Texas* (Sept. 19, 2007), <http://www.sierraclub.org/grassroots/stories/00022.asp>.

³³⁵ U.S. Centers for Disease Control & Prevention, *General Lead Information: Questions and Answers*, <http://www.cdc.gov/nceh/lead/faq/about.htm>.

³³⁶ American Academy of Pediatrics, *Policy Statement: Lead Exposure in Children: Prevention, Detection, and Management*, PEDIATRICS VOL. 116, NO. 4, 1037 (Oct. 2005),

³³⁷ U.S. Centers for Disease Control & Prevention, *General Lead Information*, *supra* note 332.

³³⁸ David E. Jacobs et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, ENVIRONMENTAL HEALTH PERSPECTIVES VOL. 110, NO. 10, A599-A606 (Oct. 2002).

³³⁹ U.S. Commission on Civil Rights, *Not in My Backyard*, *supra* note 314, at 21.

³⁴⁰ See Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997).

³⁴¹ See <http://www.healthypeople.gov>.

³⁴² 40 C.F.R. § 141; see also U. S. Environmental Protection Agency, *Lead and Copper Rule: A Quick Reference Guide*, http://www.epa.gov/safewater/lcrrm/pdfs/qrg_lcrrm_2004.pdf.

³⁴³ See U.S. Environmental Protection Agency, *Lead in Paint, Dust and Soil: Outreach Campaigns and Materials*, <http://www.epa.gov/lead/pubs/leadpbed.htm>.

³⁴⁴ U.S. Environmental Protection Agency, *Controlling Lead in Drinking Water for Schools and Day Care Facilities: A Summary of State Programs*, at 1 (July 2004),

http://www.epa.gov/safewater/lcrrm/pdfs/report_lcrrm_schoolsummary.pdf.

³⁴⁵ *Id.*

³⁴⁶ D.C. Department of Health Offers Free Blood Lead Screenings at 29 D.C. Public Schools, Press Release, <http://www.dcwatch.com/wasa/040429.htm>.

³⁴⁷ Carol D. Leonnig, *D.C. Officials Say Tap Water is Safe*, WASH. POST, July 20, 2007, at B01.

³⁴⁸ V. Dion Haynes, *Answers Demanded For Elevated Lead Levels*, WASH. POST, Feb. 16, 2007, at B0; see also Theola Labbe, *Tests Find Elevated Lead Levels at Five Schools, D.C. Council Told*, WASH. POST, Feb. 15, 2007, at B04.

³⁴⁹ 2000 Report, *supra* note 310, at 19.

³⁵⁰ *Id.* at 83.

³⁵¹ Report, *supra* note 1, at 39-40.

³⁵² *Id.* at 87.

³⁵³ *Id.*

³⁵⁴ IOM Committee on the Consequences of Uninsurance, *A Shared Destiny: Community Effects of Uninsurance* (2003).

³⁵⁵ The Henry J. Kaiser Family Foundation, *Health Care Costs: A Primer*, at 8 (Aug. 2007), <http://www.kff.org/insurance/7670.cfm>.

³⁵⁶ Families USA, *Improving Health Coverage and Access For African Americans* (Jan. 2006), <http://www.familiesusa.org/assets/pdfs/minority-health-tool-kit/AfrAm-fact-sheet.pdf>.

³⁵⁷ Asian & Pacific Islander American Health Forum, *Health Insurance Coverage: Asian Americans and Pacific Islanders* (Dec. 2006), http://www.apiahf.org/resources/pdf/AAPI_Insurance_coverage_Fact_Sheet.pdf.

³⁵⁸ Families USA, *Improving Health Coverage For African Americans*, *supra* note 356.

³⁵⁹ Families USA, *Improving Health Coverage and Access For Latinos* (Jan. 2006), <http://www.familiesusa.org/assets/pdfs/minority-health-tool-kit/Hispanic-fact-sheet.pdf>.

³⁶⁰ Families USA, *Improving Health Coverage and Access For African Americans*, *supra* note 356.

³⁶¹ *About Healthy People 2010*, <http://www.cdc.gov/nchs/about/otheract/hpdata2010/abouthp.htm>.

³⁶² *HP 2010 Midcourse Review*, <http://www.healthypeople.gov/data/midcourse/>.

³⁶³ *Id.*

³⁶⁴ *Id.*

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

³⁶⁵ U.S. Centers for Disease Control & Prevention, *A Heightened National Response to the HIV/AIDS Crisis Among African Americans*, at 2 (June 2007),

<http://www.cdc.gov/hiv/topics/aa/resources/reports/pdf/heightenedresponse.pdf>.

³⁶⁶ U.S. Dep't of Health & Human Servs., National Institutes of Health, National Institute of Allergy & Infectious Diseases, *HIV Infection in Minority Populations* (Apr. 2005),

<http://www.niaid.nih.gov/factsheets/Minor.htm>.

³⁶⁷ *Id.*

³⁶⁸ The Henry J. Kaiser Family Foundation, *HIV/AIDS Policy Fact Sheet* (July 2007),

<http://www.kff.org/hivaids/upload/6089-04.pdf>.

³⁶⁹ *Id.*

³⁷⁰ 2000 Report, *supra* note 307, at 82.

³⁷¹ U.S. Dep't of Health & Human Servs., *Action Against Asthma: A Strategic Plan For the Department of Health and Human Services* 1 (2000), <http://aspe.hhs.gov/sp/asthma>.

³⁷² U.S. Centers for Disease Control & Prevention, *Asthma Intervention for Children in Central Harlem Shows Great Promise*, <http://www.cdc.gov/prc/tested-interventions/promising-interventions/asthma-intervention-children-central-harlem.htm>.

³⁷³ American Lung Association, *State of Lung Disease in Diverse Communities: 2007*, *supra* note 324, at 5.

³⁷⁴ Rob Stein, *Race May Be Factor In Lung Cancer*, THE WASHINGTON POST, Jan. 26, 2006, at A12.

³⁷⁵ American Lung Association, *African Americans and Lung Disease Fact Sheet* (Oct. 2006),

<http://www.lungusa.org/site/apps/s/link.asp?c=dvLUK9O0E&b=34706&ct=67249>.

³⁷⁶ U.S. Environmental Protection Agency, *Building Healthy Environments to Eliminate Health Disparities Symposium*, at 33, <http://www.epa.gov/compliance/resources/publications/ej/annual-project-reports/health-disparities-symposium-2003.pdf>.

³⁷⁷ *Id.*

³⁷⁸ General Recommendations Adopted By the U.N. Comm. on the Elimination of Racial Discrimination, Gen. Rec. No. 20, Non-Discriminatory Implementation of Rights and Freedom (Art. 5) (48th Sess. 1996).

³⁷⁹ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6.

³⁸⁰ Poverty Race & Research Action Council, Brief Statement on the Issue of Housing Segregation in the United States, Prepared for the 2005 North American Consultation on Women and the Right to Housing, at 7 (2005).

³⁸¹ *Id.*

³⁸² Submission on Racial Segregation and the Right to Housing, Prepared by Allard K. Lowenstein International Human Rights Clinic at Yale Law School on Behalf of Poverty & Race Research Action Council, Before the Inter-American Commission on Human Rights, Situation of the Right to Adequate Housing in the Americas Hearing – 122nd Period of Sessions at 2, 6 (2005) (describing the U.S.'s history of discriminatory housing policies), www.prrac.org/pdf/IACHRLetter2005.pdf.

³⁸³ *Id.* at 7.

³⁸⁴ *Id.*; see also *Thompson v. U. S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (offering a lengthy history of housing discrimination based on race in the Baltimore area).

³⁸⁵ 42 U.S.C. § 3604.

³⁸⁶ 42 U.S.C. § 3605.

³⁸⁷ 42 U.S.C. § 3608(d).

³⁸⁸ *Thompson*, 348 F. Supp. 2d at 398 (offering a lengthy history of housing discrimination based on race in the Baltimore area).

³⁸⁹ U.S. Department of Housing & Urban Development, Office of Policy Development & Research, *Affordable Housing Needs 2005: Report to Congress*, at 11 (May 2007).

³⁹⁰ http://www.ncrc.org/policy/analysis/policy/2006/2006-04-20_NCRC-OA-PRRACReport.pdf, at 2.

³⁹¹ U.S. Department of Housing & Urban Development, Office of Policy Development & Research, *Affordable Housing Needs 2005*, *supra* note 394, at 17.

³⁹² *Id.* at 37.

³⁹³ *Id.* at 56.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

³⁹⁴ Douglass Rice & Barbar Sard, *Congress Should Increase HUD's Budget To Prevent Families From Losing Assistance And Address Growing Needs*, CENTER ON BUDGET AND POLICY PRIORITIES, at 2-3 (June 1, 2007).

³⁹⁵ *Id.* at 10.

³⁹⁶ National Law Center on Homelessness & Poverty, *Housing Rights for All: Promoting and Defending Housing Rights in the United States*, at 58 (2005) (citing National Fair Housing Alliance, *2004 Fair Housing Trends Report*, at 2 (2004)). Note that this figure does not include discrimination in lending, insurance, racial and sexual harassment, planning and zoning.

³⁹⁷ The Office of Fair Housing & Equal Opportunity, *FY 2006: Annual Report on Fair Housing*, at 3-8 (2007), <http://www.hug.gov/offices/fheo/fy2006rpt.pdf>.

³⁹⁸ Margery Austin Turner et al., *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions*, URBAN INSTITUTE (2002).

³⁹⁹ *Id.*

⁴⁰⁰ National Fair Housing Alliance (NFHA), *The Crisis of Housing Segregation: 2007 Fair Housing Trends Report*, at 3 (Apr. 30, 2007), www.nationalfairhousing.org.

⁴⁰¹ National Fair Housing Alliance, *Still No Home For The Holidays*, at 3 (Dec. 22, 2006).

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ The Council of Large Public Housing Authorities, *Frequently Asked Questions*, <http://www.clpha.org/page.cfm?pageID=1070> (citing HUD statistics).

⁴⁰⁵ National Association of Housing & Redevelopment Officials, *President's 2007 Budget Proposal Continues Public Housing Disinvestment: Total Annual Public Housing Funding 2001-2011*, http://www.nahro.org/conferences/07_ph_01_11.pdf.

⁴⁰⁶ National Association of Realtors Research Division, *Social Benefits of Homeownership and Stable Housing*, (Jan. 2006).

⁴⁰⁷ *Housing Vacancy Survey Annual Statistics: 2006*, U.S. CENSUS BUREAU, at Table 20 (Feb. 12, 2007).

⁴⁰⁸ *Id.*

⁴⁰⁹ National Community Reinvestment Coalition, The Opportunity Agenda, and PRRAC, *Homeownership and Wealth Building Impeded* (Apr. 2006).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² Association of Community Organizations for Reform Now, *Separate and Unequal: Predatory Lending in America*, at 6 (Feb. 2004).

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 27.

⁴¹⁵ Vikas Bajaj, *Increasing Rate of Foreclosures Upsets Atlanta*, N.Y. TIMES, July 9, 2007; Gretchen Morgenson, *Beware of Exploding Mortgages*, N.Y. TIMES, June 10, 2007.

⁴¹⁶ Fair Housing Rights Center in Southeastern Pennsylvania, *Other Anti-Immigration Ordinances Around the Nation*, <http://www.smalltowndefenders.com/public/node/6>.

⁴¹⁷ The enforcement of this provision has been stayed pending the resolution of a lawsuit. *Id.* at 16.

⁴¹⁸ Thomas W. Sanchez et al., *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities*, CAMBRIDGE, MA: THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, at vii (2003).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* at 11.

⁴²² *Id.* at 9.

⁴²³ *Id.* at vii.

⁴²⁴ *Id.* at 17.

⁴²⁵ *Id.* at vii.

⁴²⁶ *Id.* at 14.

⁴²⁷ Susan J. Popkin & Mary K. Cunningham, *CHAC Section 8 Program: Barriers to Successful Leasing Up*, URBAN INSTITUTE, at 4-5 (1999) (citing Stephen D. Kennedy & Meryl Finkel, U.S. Dep't of Hous. & Urban

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Dev., *Section 8 Rental Voucher and Rental Certificate Utilization Study: Final Report* (1994)). See also Manny Fernandez, *Bias is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007 (chronicling recent struggles for Section 8 recipients to find willing landlords in New York City).

⁴²⁸ Philip Tegeler, *New Directions for U.S. Housing Policy: The Unmet Potential of Two Large Housing Programs*, in THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS 98, 98 (W. Taylor et al. eds., 2007), http://www.cccr.org/downloads/civil_rights2.pdf.

⁴²⁹ *Id.*

⁴³⁰ National Low Income Housing Coalition, *Housing Choice Vouchers*, http://www.nlihc.org/detail/article.cfm?article_id-2774&id=23.

⁴³¹ Report, *supra* note 1, at ¶ 246.

⁴³² *Id.*

⁴³³ NFHA, *The Crisis of Housing Segregation*, *supra* note 402.

⁴³⁴ The Office of Fair Housing and Equal Opportunity, *FY 2006: Annual Report on Fair Housing*, *supra* note 399, at 3-8. In the same report HUD acknowledged that 1,172 cases had passed the 100 day mark, indicating the significant backlog of “aged” cases at the agency.

⁴³⁵ The Justice Department's Fair Housing website, <http://www.usdoj.gov/crt/housing/fairhousing/index.html>, does not indicate the filing of any lawsuits or the negotiation of any settlements relating to post-Katrina housing discrimination in the Gulf State region.

⁴³⁶ Report, *supra* note 1, at ¶ 243.

⁴³⁷ NFHA, *The Crisis of Housing Segregation*, *supra* note 405.

⁴³⁸ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6.

⁴³⁹ Office of Advocacy, U.S. Small Bus. Admin., *Minorities in Business: A Demographic Review of Minority Business Ownership*, at 1-2 (Apr. 10, 2007).

⁴⁴⁰ *Id.* Among the different minority populations included in the 2002 Survey, Asians were more proportionately represented in their ownership of businesses. In 2002, Asians comprised 4% of the total U.S. population, owned 4.6% of businesses and accounted for 3.65% of total business receipts.

⁴⁴¹ *Id.* at 2.

⁴⁴² 2000 Report, *supra* note 310, at 18.

⁴⁴³ Staff of H. Small Bus. Comm., 109th Cong., *Minority Business Summit Report*, at 2 (Dec. 8, 2005) (prepared by Nydia M. Velasquez, Ranking Member) www.house.gov/smbiz/Reports/MBS2005.pdf (hereinafter “Minority Business Summit Report”).

⁴⁴⁴ Kevin J. Curnin et al., *Missed Opportunities – Louisiana's Failure to Spur Economic Redevelopment after Katrina*, at 1 (2007). (The article will be published in the Winter issue of the ABA Journal for Affordable Housing and Community Development).

⁴⁴⁵ *Id.* at 1-2.

⁴⁴⁶ 13 C.F.R. § 124.103(a)-(c) (2006).

⁴⁴⁷ SBA thus has the responsibility to ensure that the federal agencies' goals, in the aggregate, meet the Government-wide goals established at 15(g)(1) of the Act. SBA receives all the Federal agencies proposed goals to statistically calculate whether the government-wide statutorily mandated goals have been achieved.

⁴⁴⁸ *2002 Survey of Business Owners: Characteristics of Businesses*, U.S. CENSUS BUREAU (Sept. 27, 2006), <http://www.census.gov/csd/sbo/cbcharts.pdf>.

⁴⁴⁹ *Minority Business Summit Report*, *supra* note 443, at 3.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 4.

⁴⁵³ Paul Murphy, *Small Business Research Summary* (2000), <http://www.sba.gov/advo/research/rs203.pdf>

⁴⁵⁴ *Minority Business Summit Report*, *supra* note 448, at 9.

⁴⁵⁵ See Mark Lloyd, *Civil Rights and Communications Policy Section*, in THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS, (W. Taylor et al. eds., 2007), <http://www.americanprogress.org>.

⁴⁵⁶ U.S. Dep't of Commerce, *Changes, Challenges, and Charting New Courses, Minority Commercial Broadcast Ownership in the United States* (2000), <http://search.ntia.doc.gov/pdf/mtdpreportv2.pdf>.

⁴⁵⁷ Letter from Veronica Villafaña, President, National Association of Hispanic Journalists, to Honorable Carlos M. Gutierrez, Secretary, U.S. Dep't of Commerce (Apr. 3, 2006), <http://www.nahj.org/nahjnews/articles/2006/april/gutierrezletter.shtml>.

⁴⁵⁸ Letter from John M. R. Kneuer, Acting Assistant Secretary for Communications and Information, U.S. Dep't of Commerce, to Veronica Villafaña, President, National Association of Hispanic Journalists (Apr. 27, 2006), <http://www.nahj.org/nahjnews/articles/2006/april/NTIAResponseLetter.pdf>.

⁴⁵⁹ Gilbert M. Gaul & Dan Morgan, *A Slow Demise in the Delta: U.S. Farm Subsidies Favor Big Over Small, White Over Black*, WASH. POST, June 20, 2007, at A1.

⁴⁶⁰ *Id.*

⁴⁶¹ *Pigford v. Veneman*, 143 F. Supp. 2d 28 (D.D.C. 2002).

⁴⁶² George Amedee, Ph.D. & Dickey D. Selmon, M.S., *The Black Farmers Settlement: The True Cause of the Struggle*, in 2 ENTREPRENEURSHIP POL'Y J. 101 (Don-Terry Veal ed., 2005).

⁴⁶³ Dickey D. Selmon, The Black Farmers Claim Workshop, *Interviews with Selected Black Farmers and Black USDA Employees* (1999).

⁴⁶⁴ George Amedee, Ph.D. & Dickey D. Selmon, M.S., *The Black Farmers Settlement: The True Cause of the Struggle*, *supra* note 462.

⁴⁶⁵ *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *see also*, David G. Blanchflower & Jon S. Wainwright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*, at 7 (2005).

⁴⁶⁶ Blanchflower & Wainwright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*, *supra* note 465 at 3.

⁴⁶⁷ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, P.P. Docket 93-253, FCC 95-301, released July 18, 1995 (describing how the FCC, through its authority to auction licenses to spectrum, established and then rescinded rules that granted preferences in the auction process to certain designated entities that have historically lacked access to capital including small business, women and minorities). *See also* Congressional Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management* (1997), <http://www.cbo.gov>.

⁴⁶⁸ Blanchflower & Wainwright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*, *supra* note 465, at 3.

⁴⁶⁹ *Id.* (noting that between 2000 and 2002, about 21% of state DOTs adopted goals that were primarily race/gender-neutral, 14% adopted entirely race/gender-neutral goals, and although federal highway construction aid dollars increased from \$14.7 billion in 1998 to \$24.3 billion in 2002, and overall disadvantaged business goals remained constant, the proportion of federal aid dollars awarded to such businesses declined almost 30% in the period).

⁴⁷⁰ *Id.* at 12 (describing drop of minority participation in city contracts of 87% in Richmond, VA after *Croson*, and other substantial drops in minority participation in city contracts across the U.S.).

⁴⁷¹ *Id.* at 86.

⁴⁷² *See* Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 398.

⁴⁷³ *Id.*, art. 2 §§ (1)(c)(e), (2).

⁴⁷⁴ Concluding Observations of the U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 6, at ¶ 398.

⁴⁷⁵ *Id.* at ¶ 399.

⁴⁷⁶ General Recommendations Adopted By the U.N. Comm. on the Elimination of Racial Discrimination, Gen. Rec. No. 30, Discrimination Against Non-Citizens, at ¶ 29 (2004).

⁴⁷⁷ Committee on the Elimination of Racial Discrimination - General Comment 19: Article 3 (Racial Segregation) (1995), <http://www.ohchr.org/english/bodies/cerd/comments.htm>.

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⁴⁷⁸ The term English Language Learner (ELL), as used throughout this chapter, indicates a person who is in the process of acquiring English and has a first language other than English.

⁴⁷⁹ Roslyn Arlin Michelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS C. R. 1062, 1069 (2003).

⁴⁸⁰ *Id.* at 1063.

⁴⁸¹ *Id.* at 1064-65.

⁴⁸² George Farkas, *Racial Disparities and Discrimination in Education: What Do We Know, How Do We Know It, and What Do We Need to Know?*, 105 TCHRS C. R. 1128, 1135 (2003).

⁴⁸³ *Id.* at 1130.

⁴⁸⁴ Michelson, *When Are Racial Disparities in Education the Result of Racial Discrimination?*, *supra* note 483, at 1073.

⁴⁸⁵ See Report, *supra* note 1, at ¶¶ 93-97.

⁴⁸⁶ 20 U.S.C. § 6301. In 2002, the United States Congress passed the No Child Left Behind Act (“NCLB”) as an effort to increase transparency in schools and to encourage schools to focus on the academic development of students from all backgrounds. NCLB student test performance results are disaggregated by race, disability, and socio-economic status, providing widespread documentation of racial inequalities in education.

⁴⁸⁷ Report, *supra* note 1, at ¶ 96.

⁴⁸⁸ *Id.*

⁴⁸⁹ Gary Orfield & Chungmei Lee, *Brown at 50: King’s Dream or Plessy’s Nightmare?* (Jan. 2004),

<http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

⁴⁹⁰ Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY 8, 8 (Jan. 2006),

http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

⁴⁹¹ *Id.*

⁴⁹² See <http://www.ncela.gwu.edu/expert/faq/08leps.html> (publishing state-reported data regarding ELL enrollment).

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ Randy Capps et al., *The New Demography of America’s Schools: Immigration and the No Child Left Behind Act*, URBAN INSTITUTE, at 16-17 (2005),

http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED490924&ERICExtSearch_SearchType_0=eric_accno&accno=ED490924

⁴⁹⁶ We exchange the term ‘Hispanic’ with ‘Latino’ in this chapter. ‘Latino’ refers to persons of the origin of Latin America, while ‘Hispanic’ insinuates origin from Spain. In U.S. Census data, however, ‘Hispanic’ is the term used to indicate origin from Spanish speaking countries. Nonetheless, ‘Latino’ is considered by many as a more appropriate term for describing a person from a Spanish-speaking county other than Spain; and moves the focus from a pan-ethnic, historical identity to contemporary struggles for equality of people of Spanish-speaking ancestry in the United States. See Patricia Gándara & Christina González, *Why We Like to Call Ourselves Latinas*, JOURNAL OF HISPANIC HIGHER EDUCATION VOL. 4, NO. 4, 392-98 (2005),

<http://jhh.sagepub.com/cgi/content/abstract/4/4/392>.

⁴⁹⁷ Source: U.S. Dep’t of Education. See <http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp>.

⁴⁹⁸ Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, at 32 (Jan. 2003),

<http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Income, Poverty, and Health Insurance Coverage in the United States: 2005*, U.S. CENSUS BUREAU (Aug. 2006), <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

⁵⁰² Orfield et al., *Racial Transformation and the Changing Nature of Segregation*, *supra* note 494, at 10.

⁵⁰³ Orfield et al., *Racial Transformation and the Changing Nature of Segregation*, *supra* note 494.

⁵⁰⁴ *Id.*

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⁵⁰⁵ Southern Education Fund, *A New Majority: Low Income Students in the South's Public Schools* (2007), <http://www.sefatl.org/pdf/A%20New%20Majority%20Report-Final.pdf>.

⁵⁰⁶ See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, at App. 33 (2006) (describing gaps in class size, facilities, per-pupil spending, and curricular and interpersonal counseling).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 135 (John A. Powell et al. eds., 2001); see also Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 164, 180 (John Charles Boger & Gary Orfield eds., 2005).

⁵¹⁰ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, Amicus Brief of the United States of America to the Supreme Court in Support of Petitioners, 2005 U.S. Briefs 908; 2006 U.S. S. Ct. Briefs LEXIS 694 (Aug. 21, 2006).

⁵¹¹ For examples of amicus briefs submitted in support of school districts, see http://www.naacpldf.org/volint/add_docs/volint_school_amicU.S.html.

⁵¹² *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁵¹³ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2792 (Kennedy, J.) (acknowledging the potential for diversity to be a compelling interest in the K-12 context, and listing ways in which a race-conscious plan to enhance diversity could be constitutional, such as strategic site selection of new schools, drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by races).

⁵¹⁴ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, Amicus Brief of the United States of America to the Supreme Court in Support of Petitioners, 2005 U.S. Briefs 908; 2006 U.S. S. Ct. Briefs LEXIS 694 (Aug. 21, 2006).

⁵¹⁵ See Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?* EDUCATIONAL RESEARCHER VOL. 31, NO. 1, 3-12 (2002), <http://edr.sagepub.com/cgi/content/abstract/31/1/3>.

⁵¹⁶ In his dissent to the decision in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, Justice Breyer noted the correlation between school segregation and residential segregation, stating that there is an "interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies" where such policies "have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes." 127 S. Ct. at 2920 (Breyer, J., dissenting).

⁵¹⁷ Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION (May 21, 2007).

⁵¹⁸ See *The Opportunity Gap Achievement and Inequality in Education* (Carol DeShano da Silva et al. eds, 2007).

⁵¹⁹ Southern Education Fund, *A New Majority*, *supra* note 505.

⁵²⁰ See MINNESOTA MINORITY EDUCATION PARTNERSHIP.

⁵²¹ Capps et al., *The New Demography of America's Schools*, *supra* note 495.

⁵²² Melissa Lazarin, *Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act*, (Issue Brief, No. 16) at National Council of La Raza (2006), <http://www.titlei.org/reports/nclrib16.pdf>.

⁵²³ Source: U.S. Census Bureau (2003).

⁵²⁴ Richard Fry, *High School Dropout Rates for Latino Youth*, ERIC DIGEST (Nov. 2003), <http://www.ericdigests.org/2004-3/latino.html>.

⁵²⁵ Adriana D. Kohler, *Hispanic Education in the United States*, (Statistical Brief No. 8, Conference Edition) at National Council of La Raza (2006).

⁵²⁶ Capps et al., *The New Demography of America's School*, *supra* note 495.

⁵²⁷ See e.g. Meredith Phillips et al., *Does the Black-White Gap Widen After Children Enter School in*

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THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks et al. eds., 1998) (estimating that about half of the Black-White test score gap at twelfth grade is attributable to gaps that exist at first grade.)

⁵²⁸ A federal program that promotes school readiness by enhancing the social and cognitive development of children through the provision of educational, health, nutritional, social and other services to enrolled children and families. Head Start provides grants to local public and private non-profit and for-profit agencies to provide comprehensive child development services to economically disadvantaged children and families, with a special focus on helping preschoolers develop the early reading and math skills they need to be successful in school. See Office of Head Start, <http://www.acf.hhs.gov/programs/hsb/index.html>.

⁵²⁹ National Head Start Association, *Special Report: Quality of Head Start Programs Imperiled By Steady Erosion of Funding*,

http://www.saveheadstart.org/backpages/NHSA_January_2007_Budget_Survey_Report.pdf.

⁵³⁰ See K.A. Magnuson et al., *Does Prekindergarten Improve School*

Preparation and Performance? NATIONAL BUREAU OF ECONOMIC RESEARCH (NBER) WORKING PAPER #10452 (Apr. 2004), www.nber.org/papers/w10452.

⁵³¹ *Id.*

⁵³² Lawyers' Committee for Civil Rights Under Law, *One Child at a Time: A Parent's Guide to Advocating for Equal Educational Opportunities* (2005),

http://www.lawyerscomm.org/2005website/projects/education/educationpics/Arizona%20Guidebook_final.doc.

⁵³³ Susan Auerbach, *Why Do They Give the Good Classes to Some and Not to Others?: Latino Parent Narratives of Struggle in a College Access Program*, 104 TCHRS C. R. 1369, 1372 (2002), <http://www.hrpujc.org/documents/TCRecordAuerbach.pdf>.

⁵³⁴ *Id.* at 1372, 1383.

⁵³⁵ Maureen Kelleher, *Suspensions Up in CPS*, CATALYST CHICAGO (Dec. 2004).

⁵³⁶ Donald R. Moore, Ed.D. et al., Comment on *Ending Social Promotion in Chicago: The Effects of Retention and Ending Social Promotion: Dropout Rates in Chicago After Implementation of Eighth Grade Promotion Rate* (Chicago: Consortium on Chicago School Research) Designs for Change (Apr. 2004).

⁵³⁷ Brief of Social Scientists as Amici Curiae Supporting Respondents, *Parents Involved v. Seattle Sch. Dist.* No. 1, 127 S. Ct. 2738 (No. 05-908), 2006 U.S. S. Ct. Briefs LEXIS 1024, App. 37-40 (noting reduced test scores and graduation rates for students in minority segregated schools, independent of the race of the student).

⁵³⁸ NAACP Legal Defense & Education Fund, *Dismantling the School to Prison Pipeline*, http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf.

⁵³⁹ Indiana Education Policy Center, *Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, POLICY RESEARCH REPORT #SRS1 (June 2000), <http://www.indiana.edu/~safeschl/cod.pdf>.

⁵⁴⁰ See Brief of Social Scientists, *supra* note 542 (noting that student testing and accountability programs give schools incentives to remove such students from schools, and testing encourages holding students back, which in turn leads to misbehavior).

⁵⁴¹ Indiana Education Policy Center, *Color of Discipline*, *supra* note 539.

⁵⁴² Kelleher, *Suspensions Up in CPS*, *supra* note 535.

⁵⁴³ See NAACP Legal Defense & Education Fund, *Dismantling the School to Prison Pipeline*, *supra* note 538.

⁵⁴⁴ Elizabeth Sullivan, National Economic and Social Rights Initiative, *Deprived of Dignity, Degrading Treatment and Abusive Discipline in New York & Los Angeles Public Schools* (2007), <http://www.nesri.org/Deprived%20of%20Dignity%2007.pdf>.

⁵⁴⁵ *Id.*

⁵⁴⁶ 20 U.S.C. § 8921.

⁵⁴⁷ Lawyers' Committee for Civil Rights Under Law, *One Child at a Time: A Parent's Guide to Advocating for Equal Educational Opportunities*, *supra* note 532.

APPENDIX

**PROPOSED RECOMMENDATIONS AND QUESTIONS
TO THE UNITED STATES**

**UNEQUAL OPPORTUNITY: A CRITICAL ASSESSMENT OF THE U.S.
COMMITMENT TO THE ELIMINATION OF RACIAL DISCRIMINATION**

A Response to the 2007 Periodic Report of the United States
in Preparation For Country Review of the United States By the United Nations Committee on
the Elimination of Racial Discrimination

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To assist the CERD Committee in its analysis of the 2007 U.S. Report, the following is a summary of proposed recommendations and questions to the United States:

1. Regarding the U.S. Response to the CERD Committee's 2001 Recommendations and Concerns:

- The CERD Committee should reiterate the concerns and recommendations in paragraphs 393-396 issued to the U.S. Government in 2001, with one modification; the U.S. Government should oppose legislation and practice that is discriminatory in effect, not merely “pay attention” to it.
- To the extent that existing U.S. law does not currently criminalize private conduct that is discriminatory, it should reconsider its RUD, and adopt new laws enforcing the broader protections of the Convention against discrimination.
- The U.S. Government must provide more specific data regarding discrimination in federal and state prisons such as statistics on complaints made by prisoners and subsequent action taken.
- The U.S. Government should take all appropriate measures to ensure that adequate legal services are provided to indigent persons accused of crimes in states, localities and territories under its jurisdiction.

2. Regarding the 2007 U.S. Report Relating to Voting Rights (Articles 2, 5, & 6):

- The U.S. Government should vigorously enforce the Voting Rights Act particularly in regards to minorities whose voting rights have historically been subject to attack.

What steps has the U.S. Government taken to ensure that the pre-clearance process required by the Voting Rights Act remains free of partisan considerations?

- The U.S. Government should support passage of laws granting the citizens of the District of Columbia the right to full congressional representation.

Although, according to the 2007 U.S. Report, the lack of representation may not necessarily be racially motivated, the effect nonetheless has a disparate racial impact and thus triggers the U.S. Government's obligation under Article 2(c) to take effective measures to amend laws that have the effect of creating racial discrimination.

- The U.S. Government should use all appropriate means to encourage states to repeal or revise the most burdensome felon disenfranchisement laws.

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What steps are being taken at all levels of government in the U.S. to restore the voting rights of U.S. citizens who have been denied their rights under felony disenfranchisement laws?

- The U.S. Government should support the passage of laws that punish citizens who use, or attempt to use, deceptive practices, and intimidation with the intention of preventing another person from exercising the right to vote in an election.

What steps has the U.S. Government taken to evaluate the effect of discrimination regarding voter identification requirements, and to prevent deceptive practices and intimidation with the intent to prevent another person from exercising his or her right to vote?

3. Regarding the 2007 U.S. Report Relating to Equal Justice and Equal Access to Justice (Article 5):

- The U.S. Government should use all appropriate means to fulfill the U.S. Constitution's promise of equal justice in both civil and criminal matters, and to fulfill its obligations under the Convention by providing safeguards to promote equal treatment before the tribunals and all other organs administering justice. This should include a legal aid system to provide effective assistance of counsel to the poor in civil disputes and effective assistance of counsel for criminal defendants.

What procedures are in place to ensure the provision of adequate counsel for indigent criminal defendants? Does a standardized protocol exist that jurisdictions can use as a framework for establishing public defense systems? If so, what are the minimum requirements for establishing effective assistance of counsel and what enforcement mechanisms are in place?

- The U.S. Government should recognize a right to counsel in civil proceedings for economically disadvantaged individuals when basic human needs are at stake, such as shelter, sustenance, safety, health, or child custody.

What is the extent of indigent access to legal representation in civil matters in the United States? Legal Services Corporation restrictions on funding and type of practice impair its ability to adequately advocate for clients regarding civil matters. Furthermore, private legal assistance does not meet the demand for indigent representation in civil matters.

- The U.S. Government should impose a moratorium on imposition of the death penalty until it can ensure that that this penalty is not imposed as a result of racial

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bias or as a result of the economically, socially, and educationally disadvantaged position of the convicted person.

What are the distinguishing factors among states that have imposed the moratorium on the death penalty? How many other states have similar factors?

4. **Regarding the 2007 U.S. Report Relating to Employment Discrimination (Article 5 & 6):**

- The U.S. Government should show its commitment to protecting employment rights by using all appropriate means to ensure that federal agencies protect those rights and promote equal treatment.

Due to budget cuts, to what extent have federal agency-initiated lawsuits, including EEOC-initiated lawsuits, and investigations declined in recent years? Of those lawsuits, what percentage involved cases initiated by minorities?

- The U.S. Government, in the face of narrow doctrinal interpretations by the courts, should encourage and support the enactment of laws to protect the employment rights of minorities and prevent disparate impact on minorities.

What are federal legal options for plaintiffs alleging pay disparities due to discrimination based on race and ethnic origin?

- The U.S. Government should be consistent in its message that discrimination on the basis of national origin, in particular against Arab, Muslim, Sikh, and South Asian American persons, will not be tolerated.

What barriers have there been to effective community outreach and what are some possible options the U.S. Government is considering for overcoming these barriers? How many claims of discrimination based on national origin have been investigated, and prosecuted by the U.S. Government?

5. **Regarding the 2007 U.S. Report Relating to Affirmative Action (Articles 1, 2, & 5):**

- The U.S. Government should recognize its mandatory obligations under the Convention to use “special measures,” and the goals of full access and equality to education, employment, and contracting. The U.S. Government should cease relying on structural and constitutional limitations to avoid promoting positive change and focus on the implementation of special measures, including using all appropriate means to support voluntary efforts to promote diversity.

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What special measures does the U.S. Government plan to take to prevent the stagnation of progress towards the goal of eliminating discrimination, particularly in the areas of education, employment, and economic opportunity, as mandated by the Convention (and by the U. S. Constitution)?

What data exists indicating that current affirmative action measures cause reverse discrimination? How does the U.S. Government justify its opposition to using affirmative action measures when Convention article 1(1) authorizes special measures “when circumstances warrant”?

- The U.S. Government should create appropriate infrastructure to (1) monitor the effectiveness and fairness of current affirmative action programs in education, employment, and contracting, and (2) to generate additional effective affirmative action measures.

How does the U.S. Government follow up or monitor Executive Orders imposing non-discriminatory obligations, such as those imposed on federal contractors and sub-contractors? Furthermore, as obligated under the Convention, what affirmative actions do the U.S. Government and the state governments take to prevent discriminatory acts from occurring, rather than simply providing a remedy?

- The U.S. Government should spearhead affirmative action efforts to eliminate racial discrimination and provide full access and equality in education, employment and contracting, recognizing its responsibility as a model to the private sector and individual states.

How does the U.S. Government provide technical assistance on the creation and implementation of affirmative action programs to the private sector and individual states?

6. Regarding the 2007 U.S. Report Relating to Hate Speech and Hate Crimes (Articles 4 & 5):

- The U.S. Government should encourage education efforts directed at school officials, teachers, and parents about the activities that constitute hate crimes and other threats of intimidation, and to discourage intolerance and hostility in schools or the community.

How does the U.S. Government encourage and support education efforts directed to communities about activities that constitute hate crimes?

- The U.S. Government should work to enact laws to close the gaps that currently exist in federal hate crimes laws by making it easier to prosecute those who commit

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racially motivated crimes and by increasing the reporting accuracy of hate crime incidents.

What steps is the U.S. Government taking to increase the reporting accuracy of hate crime incidents?

- The U.S. Government, state government, and private organizations should produce and disseminate messages of tolerance, both on-line and through traditional media outlets, to counteract the proliferation of racist, sexist, homophobic, and other constitutionally protected “hate speech.”
- The U.S. Government should develop and further encourage the private development and distribution of filtering software that can selectively limit the content accessible from individual and networked computers. This technology can be voluntarily implemented in homes or anywhere that personal discretion permits the blocking of hate speech.

Has the U.S. Government supported technologies that allow individuals or groups to avoid hate speech, as well as exposed those technologies that allow individuals or groups to spread hate speech toward a targeted racial group?

7. Regarding the 2007 U.S. Report Relating to Environmental Justice and Health Care Disparities (Article 2)

- The U.S. Government should use all appropriate means to ensure that federal agencies collect, analyze, and maintain data regarding the exposure of communities to hazardous materials. Formal guidance should be issued addressing the assessment of cumulative risk to communities (accounting for social, economic, and behavioral factors). The data collected should be disaggregated by race, ethnicity, gender, age, income and geography.

What are current U.S. Government best practices for the assessment of cumulative risk of exposure to hazardous materials to communities? How have federal agencies implemented environmental justice principles in environmental decision-making and assessments?

- The U.S. Government should take all appropriate action to address environmental protection standards for schools receiving federal funds, including guidelines for indoor air quality and physical placement of schools.

What are current U.S. Government guidelines for indoor air quality of schools and placement of schools? Which entity is responsible for inspecting schools?

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- The U.S. Government should take all appropriate action to ensure enforcement of environmental laws and the protection of minority and low-income communities disproportionately impacted by environmental hazards.

How many cases in this reporting period have involved the enforcement of environmental laws to redress environmental hazards disproportionately impacting low-income and minority communities?

- The U.S. Government should increase outreach efforts to educate minorities about public health insurance programs. Increased funding for public health insurance programs is also needed at the state and federal levels.

What are current barriers to increasing U.S. Government outreach efforts to education minorities about public health insurance programs?

- The U.S. Government should increase outreach efforts to educate minorities about diseases with disproportionate impact, such as HIV/AIDS.

How does the U.S. Government account for the various historical, structural, environmental, and cultural factors, including discrimination that has led to the disparate number of minorities infected with HIV/AIDS?

8. **Regarding the 2007 U.S. Report Relating to Housing and Community Development (Articles 2 & 5)**

- The U.S. Government should use all appropriate means to ensure that legal protections against racial discrimination in the purchase and rental of housing are enforced.

In 2001 the CERD Committee noted its concern regarding persistent disparities in the right to adequate housing in the United States, and it recommended the U.S. take “all appropriate measures” to ensure this right without regard to race. Since 2000, what measures, and to what extent, has the U.S. ensured legal protections in the purchase and rental of housing?

- U.S. federal agencies should set specific benchmarks for the speedy investigation and resolution of complaints of racial discrimination by those in the housing market.

Do U.S. Government agency benchmarks exist for the timely investigation and resolution of complaints of racial discrimination in the housing market? If so, what are these benchmarks and are they adequately addressing the volume of housing complaints?

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- The U.S. Government should work with state governments to ensure that public housing units are dispersed throughout metropolitan areas, rather than concentrated in particular minority communities.

What policies do U.S. Government agencies adopt or recommend to ensure that public housing units are situated so as to avoid perpetuating the existence of racially-isolated communities, particularly those with high concentrations of poverty and minimal economic opportunity? Please describe policies adopted for the Gulf Coast communities highly impacted by Hurricanes Katrina and Rita.

- The U.S. Government should allocate public housing assistance in a way that encourages integration and diversity in both rural and metropolitan areas.

What policies do U.S. Government agencies adopt or recommend to promote integration and diversity in both rural and metropolitan areas in allocating public housing units?

- The U.S. Government should take all appropriate action to ensure public transportation policies and funding do not negatively impact minority communities.

Please describe current U.S. Government “best practices” or regulations for ensuring that public transportation policies and funding do not negatively impact minority communities.

- The U.S. Government must enforce the laws and regulations already in place to prevent discriminatory and predatory lending practices. Investigations into the current mortgage and housing crisis should determine the degree to which lenders specifically targeted minority clients and predominately minority neighborhoods for loans on unconscionable or unsustainable terms.

Please describe current U.S. Government regulations or recommendations to states to prevent predatory lending practices that disparately impact minorities. Have U.S. Government agencies conducted investigations regarding the degree to which lenders specifically targeted minority clients and predominately minority neighborhoods for loans on unconscionable or unsustainable terms?

9. **Regarding the 2007 U.S. Report Relating to Minority Business Issues (Articles 1, 2 & 5)**

- The U.S. Government should use all appropriate means to improve the prospects for success of minority-owned businesses such as adoption of national minority-lending goals with meaningful enforcement mechanisms, review of federal contracting processes, including the “bundling” of contracts, which have an adverse impact on smaller businesses, and mentoring programs.

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How have U.S. Government policies improved the development and success of minority-owned businesses? How does the government evaluate the effectiveness of its policies?

- The U.S. Government should collect census data on businesses more frequently and include in census analysis the measurement of growth rates of minority populations and the business growth rates of such minority populations.

How does the U.S. Government compare the growth rates of minority populations to the business growth rates of such populations? What special measures does the U.S. Government take to promote business enterprise and economic opportunity for these rapidly growing populations in the United States?

- The U.S. Government should support research and scholarship regarding the plight of minority owned businesses to capture and illustrate the ongoing discrimination and to provide concrete solutions to such discrimination.

10. **Regarding the 2007 U.S. Report Relating to Education (Articles 2, 4 & 5)**

- All levels of government in the United States should enact laws that adopt an effects test to measure *de facto* barriers to equal educational opportunities. Concurrently, laws should provide safeguards that protect against practices that have either the purpose or the effect of discrimination on the basis of race.

How does the U.S. Government discourage forces of racial division leading to the resegregation of public schools and lower academic achievement, on average, by minority students? Does the U.S. Government currently track racial resegregation patterns occurring in public schools and measure its disparate impacts on students? How does the No Child Left Behind Act promote integration and equal educational opportunity as required by Convention Article 2 and Article 5?

- All levels of government in the United States should reject the use of the 'colorblind' doctrine in legislation and government education policies. This doctrinal incorporation threatens the United States' obligation under the Convention to use special measures to promote the adequate development of quality educational opportunities to those historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities.

*Please provide information on measures taken by the U.S. Government to reduce *de facto* segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated.*

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- All levels of government in the United States should permit school districts to voluntarily promote school integration through the use of carefully tailored race-conscious measures to promote educational, democratic, and cultural benefits of racial and ethnic diversity in the classroom.

What measures may elementary and secondary schools use to advance integration and equal educational opportunities for all students? Please comment on the "Seattle/Louisville" decision and how the U.S. Government's position in that case is consistent with its obligation to promote special measures under the Convention. Furthermore, how will the U.S. Government measure the impact of this decision on schools?

- The U.S. Government should support a constitutional amendment and support ratification by the states to create a fundamental right to education based on human rights standards, and promote the creation and preservation of U.S. laws that provide remedies for racial and ethnic disparities that cause de facto segregation in education. A federal right to a quality education ought to provide federal protections equal to or greater than the constitutional rights that already exist in particular state jurisdictions throughout the United States.

Please comment on the barriers to the enactment of a federal constitutional amendment to create a fundamental right to education based on human rights standards. Has the U.S. Government taken measures to promote the right to public education?

- All levels of government in the United States should increase language access services for students and parents, and require and support local school implementation of best teaching practices for English Language Learners to reach English proficiency and for English speakers to learn a second language.

Please comment on the reduction of bilingual programming used to integrate immigrant students into the U.S. public education system and advance cultural communication skills of native born students.

- All levels of government in the United States should take affirmative steps to remove barriers to higher education for children who have adapted to life in a new country and excelled. For example, states should allow immigrant children residents to pay in-state tuition for post-secondary education.

Please comment on the discrepancies in high school graduation rates for minority students. What type of policies has the U.S. Government adopted to promote high school graduation and post secondary educational opportunities for minority students?

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- The U.S. Government should ensure that all levels of government direct resources to programs designed to teach positive behavior and conflict resolution as an alternative to zero-tolerance discipline and criminalization in schools.

How many complaints did the Office of Civil Rights within the Department of Education receive and investigate in this Convention reporting period? What policies or regulations does the U.S. Government advance to prevent the disparate and threatening effect of school discipline on the educational and life opportunities of minority students?