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

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

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

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

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

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

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

I. "THE FUTURE OF FAIR HOUSING"

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

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

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

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

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

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

II. FAIR HOUSING WORK OF THE LAWYERS' COMMITTEE

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

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

A. Fair Housing and the Foreclosure Crisis

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

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

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

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

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

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

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

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

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

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

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

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

B. Discriminatory Housing Advertising on the Internet

1. Post-Hurricane Katrina

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

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

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

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

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

2. Existing Case Law

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

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

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

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

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

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

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

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

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

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

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

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

D. Exclusionary Zoning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Source of Income Discrimination

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

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

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

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

F. Disparate Impact Claims

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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