

[EXTERNAL] FW: Bader FOIA: Lhamon responsive documents (Part 1 of 3)

From: David Ganz
To: hfb138@yahoo.com
Cc: Tilghman, Michael (USADC)
Recipients: hfb138@yahoo.com; MTilghman@usa.doj.gov

From: David Ganz Sent: Monday, October 25, 2021 10:29 AM To: 'Tilghman, Michael (USADC)' <Michael.Tilghman@usdoj.gov> Cc: Pilar McLaughlin <pmclaughlin@uscrr.gov>; Sheryl Cozart <scocoart@uscrr.gov>; Andrew Gall <agall@uscrr.gov> Subject: Bader FOIA: Lhamon responsive documents (Part 1 of 3)

David Ganz
General Counsel, Office of the General Counsel
U.S. Commission on Civil Rights
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425
(617) 669-6413

This message, including attachments, is confidential and may contain information protected by the attorney-client privilege or work product doctrine. If you are not the addressee, any disclosure, copying, distribution, or use of the contents of this message are prohibited. If you have received this email in error, please destroy it and notify me immediately.

Established as an independent, bipartisan, fact-finding federal agency, our mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws. We pursue this mission by studying alleged deprivations of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, or national origin, or in the administration of justice. We play a vital role in advancing civil rights through objective and comprehensive investigation, research, and analysis on issues of fundamental concern to the federal government and the public.

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Date : 7/1/2020 2:11:44 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "stephen gilchrist" thegilchristassociates@gmail.com Cc : "Rukku Singla" rsingla@uscrr.gov Subject : Re: [EXTERNAL] Fwd: Proposal... Thank you for sending. Ok to share with all as your proposal?

On Jul 1, 2020, at 10:28 AM, stephen gilchrist <thegilchristassociates@gmail.com> wrote:
Madam chair - I took a stab at this to see if this was close to what is needed regarding a submission.
I welcome your thoughts.

----- Forwarded message ----- From: Thomas Simuel <tsimuel32@aol.com> Date: Wed, Jul 1, 2020, 1:18 PM Subject: with footnotes To: >

<Fair housing.doc>
<mailto:tsimuel32@aol.com>

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Date : 7/6/2020 5:13:42 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Rukku Singla" rsingla@uscrr.gov Subject : Fw: checking in FYI
Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Catherine Lhamon Sent: Monday, July 6, 2020 5:06 PM To: Robert Amarty Subject: checking in Hi Robert. I'm checking in to let you know I am thinking of you and hoping you are taking care in this difficult time. I miss seeing you in the halls. And I am, as I always am, grateful that you bring your gifts to our shared work. Take care of you.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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Date : 7/7/2020 12:31:44 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Rukku Singla" rsingla@uscrr.gov, "Mauro Morales" mmorales@uscrr.gov Subject : Fw: gratitude!
Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Catherine Lhamon Sent: Tuesday, July 7, 2020 12:30 PM To: Trisha.Castaneda@mail.house.gov; matthew.alpert@mail.house.gov Subject: gratitude! Matt and Trisha, I can't resist sending you a note to tell you how truly delighted I am to see a very meaningful funding increase for the U.S. Commission on Civil Rights in the CJS appropriations bill, and the maintenance of existing statutory provisions affecting our funding. Thank you, so much, to you and to Chair Serrano for the confidence in the Commission's important work the bill provisions reflect and for your ongoing attention to this civil rights mission I love. I have fingers crossed that the bill's provisions will be enacted. And I am delighting in contemplating what more we could do with what your work projects for us. Thank you, so much.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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https://www.facebook.com/pg/USCCRRgov/posts/?ref=page_internal

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Date : 7/7/2020 12:30:40 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Trisha.Castaneda@mail.house.gov" Trisha.Castaneda@mail.house.gov, "matthew.alpert@mail.house.gov" matthew.alpert@mail.house.gov Subject : gratitude! Matt and Trisha, I can't resist sending you a note to tell you how truly delighted I am to see a very meaningful funding increase for the U.S. Commission on Civil Rights in the CJS appropriations bill, and the maintenance of existing statutory provisions affecting our funding. Thank you, so much, to you and to Chair Serrano for the confidence in the Commission's important work the bill provisions reflect and for your ongoing attention to this civil rights mission I love. I have fingers crossed that the bill's provisions will be enacted. And I am delighting in contemplating what more we could do with what your work projects for us. Thank you, so much.

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Date : 7/7/2020 12:31:31 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Matthew.Kaplan@mail.house.gov" Matthew.Kaplan@mail.house.gov Subject : gratitude Matt, I can't resist sending you a note to tell you how truly delighted I am to see a very meaningful funding increase for the U.S. Commission on Civil Rights in the CJS appropriations bill, and the maintenance of existing statutory provisions affecting our funding. Thank you, so much, to you and to Congresswoman Kaptur for the confidence in the Commission's important work the bill provisions reflect and for your ongoing attention to this civil rights mission I love. I have fingers crossed that the bill's provisions will be enacted. And I am delighting in contemplating what more we could do with what your work projects for us. Thank you, so much.

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Date : 7/12/2020 5:29:11 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Vicki Shabo" shabo@newamerica.org Subject : Re: [EXTERNAL] RE: Women in Prison: Seeking Justice Behind Bars - new report from U.S. Commission on Civil Rights Ack Vicki. I just saw the note below in my drafts folder, meaning I did not send it when I thought I had. Your note really meant a lot to me. I'm sorry I didn't actually tell you so at the time.

Thank you for this nice note!

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Vicki Shabo <shabo@newamerica.org> Sent: Wednesday, February 26, 2020 8:48 AM To: Catherine Lhamon Subject: [EXTERNAL] RE: Women in Prison: Seeking Justice Behind Bars - new report from U.S. Commission on Civil Rights Great job on NPR this morning!! I'm so glad you're doing this important work! From: Catherine Lhamon <clhamon@uscrr.gov> Sent: Wednesday, February 26, 2020 8:32 AM Subject: Women in Prison: Seeking Justice Behind Bars - new report from U.S. Commission on Civil Rights Today, the U.S. Commission on Civil Rights released our report, Women in Prison: Seeking Justice Behind Bars. The evidence and testimony presented to the Commission painted a dire picture of the conditions of confinement for incarcerated women. We urge Congress and the Department of Justice to take immediate action to ensure that correctional officials do not violate the rights of incarcerated women. The report examines the state of federal civil rights protections for incarcerated women to explore women's experiences while incarcerated. It covers a range of issues incarcerated women face, including access to healthcare, prevention of sexual assault, discipline and segregated housing, parental rights, and availability of programming. The report provides examples of prison administrations seeking to address these issues and it evaluates the response of the federal government.

<mailto:clhamon@uscrr.gov>
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<mailto:clhamon@uscrr.gov>
https://url.emailprotection.link/?bOU2y58jxFZjldB0GVu79omdTmna5_Ci8aMURpURQtemO3HWzSC73AI-ntT4pyOIPM2JbXnY7ofaA70PNukb8hb5LsqK2U3N4HTpUE2nHc0xt_YEcDQTQ1j6ermMqPxDQ0

The Commission's research includes examination of high rates of a history of trauma reported by incarcerated women, as well as policies responsive to this trauma.

The Commission majority found that many prison policies and facilities are not designed for women or tailored to their specific needs. Rather, many policies were adopted from men's prison institutions without evaluating their application to women's prison institutions. Despite federal laws aimed at protecting incarcerated people, many incarcerated women continue to experience physical and psychological safety harms while incarcerated and insufficient satisfaction of their constitutional rights.

There is a lack of standardization among prison systems regarding how female-specific healthcare, such as gynecological and prenatal care, is provided. Some prisons provide adequate regular care while others do not.

Sexual abuse and rape remain prevalent against women in prison. Incarcerated women who report sexual assault have experienced retaliation by their institutions and prison personnel in violation of their rights under the Constitution and other federal laws.

When prisons do not take gender-specific characteristics into account, prisons tend to classify incarcerated women at higher security requirement levels than necessary for the safety and security of prisons. This classification results in some women serving time in more restrictive environments than is necessary and appropriate.

Many incarcerated women are placed at facilities far from their families, many times as a result of a lack of regional facilities, despite policies requiring that they be placed as close to home as practicable. Many prison policies do not prioritize family visits, such as by permitting extremely limited family visitation hours that often do not reflect distances visiting family must travel. U.S. Department of Justice litigation against prisons involving sexual abuse among other wrongs, has secured important changes to safeguard incarcerated women's rights.

Based on these findings, the Commission recommends that the Department of Justice should continue to enforce the civil rights of incarcerated women in states that violate the rights of incarcerated women. All prisons should prohibit shackling pregnant women and placing them in solitary confinement, as these practices represent serious physical and psychological health risks. Prisons should ensure they provide adequate healthcare to incarcerated women, including mental and physical healthcare needs.

Congress should provide funding to ensure correctional agencies protect

incarcerated people from sexual abuse.

Prison officials should enforce policies that support parental rights and familial contact except where inconsistent with safety concerns. Institutions should provide free video and low-cost phone services to incarcerated persons, and should not ban in-person visits for non-safety reasons. Women in Prison, based on expert and public input, and extensive research and analysis, offers actionable recommendations to the President, Congress, and federal agencies. We hope you find it useful, and share it with your networks. The Commission held a public briefing on the subject in February 2019, including testimony from academic experts, formerly incarcerated women, prison administrators and policy experts. We invite you to view the morning, afternoon, and public comment sessions, and the briefing transcript. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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https://url.emailprotection.link/?bEITOrvjDxDd0L1-H2eKD20C9fTNYuBwRo21rDuEKEX9mhKq3rbikXUIRoEzZn_-8o5zc7kPv8pEkGbjIXgTCVeLzclXNcG47D7Wnp6YOZEIsQ0gxp5dj8m8R3vvcJm

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Date : 7/14/2020 1:27:22 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Kristen Clarke" kclarke@lawyerscommittee.org Subject : Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) Hi Kristen. We have not yet received this testimony so I am checking in to be sure we don't miss it. Thank you for all you are doing in this time.

On Jun 20, 2020, at 1:17 PM, Kristen Clarke <kclarke@lawyerscommittee.org> wrote:

Thank you kindly for the follow up, Catherine. We will indeed submit written testimony for this important report.

Thank you,

Kristen

Kristen Clarke President and Executive Director Lawyers' Committee for Civil Rights Under Law 1500 K Street, N.W., Suite 900 Washington, DC 20005 kclarke@lawyerscommittee.org Requests: executiveassistant@lawyerscommittee.org

From: Catherine Lhamon <clhamon@uscrr.gov> Sent: Saturday, June 20, 2020 3:38 PM To: Kristen Clarke <kclarke@lawyerscommittee.org> Subject: Fw: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke)

Hi Kristen. I'm forwarding below and attached an invitation to submit written testimony for the voting rights update in the covid19 context that the U.S. Commission on Civil Rights is working on. We would love to incorporate your expertise in the report we will issue.

I hope you are taking care.

<mailto:kclarke@lawyerscommittee.org>
<mailto:kclarke@lawyerscommittee.org>

Catherine E. Lhamon
Chair
U.S. Commission on Civil Rights
1331 Pennsylvania Ave NW, Suite 1150
Washington, DC 20425
clhamon@usccr.gov

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From: Nicholas Bair Sent: Thursday, June 11, 2020 12:41 PM To: 'kclarke@lawyerscommittee.org' <kclarke@lawyerscommittee.org> Cc: Katherine Culliton-Gonzalez <kculliton-gonzalez@usccr.gov> Subject: U.S. Commission on Civil Rights - Invitation to Submit Testimony Dear Ms. Clarke: I am writing to you today on behalf of the U.S. Commission on Civil Rights to inquire if you would be interested in providing a written submission to the Commission regarding the issue of minority voting rights during the COVID-19 pandemic. The Commission plans to issue an update to the Commission's 2018 report, An Assessment of Minority Voting Rights Access in the United States, in the fall of 2020. Due to your extensive expertise in this area, I wanted to know if you would be willing to share your knowledge with the Commission. We hope you will be able to participate. The attached invitation letter contains more specific details about the report update topic, questions the Commission will address, and how to submit written testimony. If you have any questions, please feel free to contact me. We ask that you indicate whether you plan on participating by Thursday June 18, 2020. Thank you for your time and consideration. Sincerely, Nicholas Bair, Esq. Civil Rights Analyst

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U.S. Commission on Civil Rights Office of Civil Rights Evaluation P: 202-376-8132 nbair@usccr.gov www.usccr.gov 1331 Pennsylvania Avenue, NW Suite 1150 Washington D.C. 20425

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Date : 7/14/2020 7:41:17 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) yup, thank you

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Rukku Singla Sent: Tuesday, July 14, 2020 7:12 PM To: Catherine Lhamon Subject: Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) Can you tell her Wednesday July 22? We'll probably be incorporating the testimony when we get the draft on July 24.

From: Catherine Lhamon <clhamon@usccr.gov> Date: Tuesday, July 14, 2020 at 6:33 PM To: Rukku Singla <rsingla@usccr.gov> Subject: Fwd: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke)

Begin forwarded message:

From: Kristen Clarke <kclarke@lawyerscommittee.org> Date: July 14, 2020 at 3:31:28 PM PDT To: Catherine Lhamon <clhamon@usccr.gov> Subject: Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke)

Catherine, Thank you for your note. This has been a challenging time for our team. I regret that we missed the July 1st deadline. Can you please let me know the final deadline for submission of testimony?

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

Kristen Kristen Clarke (she/her) President and Executive Director Lawyers' Committee for Civil Rights Under Law 1500 K Street, N.W., Suite 900 Washington, DC 20005 kclarke@lawyerscommittee.org Requests: executiveassistant@lawyerscommittee.org

From: Catherine Lhamon <clhamon@usccr.gov> Sent: Tuesday, July 14, 2020 1:27 PM To: Kristen Clarke <kclarke@lawyerscommittee.org> Subject: Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) Hi Kristen. We have not yet received this testimony so I am checking in to be sure we don't miss it. Thank you for all you are doing in this time.

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Thank you kindly for the follow up, Catherine. We will indeed submit written testimony for this important report. Thank you, Kristen Kristen Clarke President and Executive Director Lawyers' Committee for Civil Rights Under Law 1500 K Street, N.W., Suite 900 Washington, DC 20005 kclarke@lawyerscommittee.org Requests: executiveassistant@lawyerscommittee.org

From: Catherine Lhamon <clhamon@usccr.gov> Sent: Saturday, June 20, 2020 3:38 PM To: Kristen Clarke <kclarke@lawyerscommittee.org>

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<mailto:kclarke@lawyerscommittee.org>
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Subject: Fw: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) Hi Kristen. I'm forwarding below and attached an invitation to submit written testimony for the voting rights update in the covid19 context that the U.S. Commission on Civil Rights is working on. We would love to incorporate your expertise in the report we will issue. I hope you are taking care. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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https://url.emailprotection.link/?bEITOrvjDxDdL1-H2eK20C9fTNYu8Wro21rsDukEX9mhKq3rbIKXUIRoEzZn_-8o5zc7kPV8pEkQbjjXgrTCVeLzclXNcG47DfWnp6YOZEIsQ0gxp5dj8m8R3wvcJm

address, and how to submit written testimony. If you have any questions, please feel free to contact me. We ask that you indicate whether you plan on participating by Thursday June 18, 2020. Thank you for your time and consideration. Sincerely, Nicholas Bair, Esq. Civil Rights Analyst U.S. Commission on Civil Rights Office of Civil Rights Evaluation P: 202-376-8132 nbair@usccr.gov www.usccr.gov 1331 Pennsylvania Avenue, NW Suite 1150 Washington D.C. 20425

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Date : 7/14/2020 7:42:22 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Kristen Clarke" kclarke@lawyerscommittee.org Subject : Re: [EXTERNAL] Re: U.S. Commission on Civil Rights - Invitation to Submit Testimony (Kristen Clarke) Thank you Kristen and I hope you and your team take care in this difficult time. We will need to receive the testimony no later than Wednesday July 22 to be able to incorporate it into our report. I hope very much that we will be able to include Lawyers Committee information.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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Kristen

Kristen Clarke (she/her) President and Executive Director Lawyers' Committee for Civil Rights Under Law 1500 K Street, N.W., Suite 900 Washington, DC 20005 kclarke@lawyerscommittee.org Requests: executiveassistant@lawyerscommittee.org

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<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal
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Kristen

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<mailto:kclarke@lawyerscommittee.org>

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From: Nicholas Bair Sent: Thursday, June 11, 2020 12:41 PM To: 'kclarke@lawyerscommittee.org' <kclarke@lawyerscommittee.org> Cc: Katherine Culliton-Gonzalez <kculliton-gonzalez@usccr.gov> Subject: U.S. Commission on Civil Rights - Invitation to Submit Testimony Dear Ms. Clarke: I am writing to you today on behalf of the U.S. Commission on Civil Rights to inquire if you would be interested in providing a written submission to the Commission regarding the issue of minority voting rights during the COVID-19 pandemic. The Commission plans to issue an update to the Commission's 2018 report, An Assessment of Minority Voting Rights Access in the United States, in the fall of 2020. Due to your extensive expertise in this area, I wanted to know if you would be willing to share your knowledge with the Commission. We hope you will be able to participate. The attached invitation letter contains more specific details about the report update topic, questions the Commission will address, and how to submit written testimony. If you have any questions, please feel free to contact me. We ask that you indicate whether you plan on participating by Thursday June 18, 2020. Thank you for your time and consideration. Sincerely, Nicholas Bair, Esq. Civil Rights Analyst U.S. Commission on Civil Rights Office of Civil Rights Evaluation P: 202-376-8132 nbair@usccr.gov www.usccr.gov 1331 Pennsylvania Avenue, NW Suite 1150 Washington D.C. 20425

<mailto:clhamon@usccr.gov>
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<mailto:nbair@usccr.gov>
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Date : 7/16/2020 3:48:38 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Dugue, Monalisa" Monalisa.Dugue@mail.house.gov Subject : Re: [EXTERNAL] Women/Girls' Bill Thank you for reaching out. I'm sorry that I don't know a useful answer to this question.

On Jul 16, 2020, at 12:06 PM, Dugue, Monalisa <Monalisa.Dugue@mail.house.gov> wrote:

CAUTION: This email is from outside USCCR.

Hi Ms. Lhamon, I hope this message finds you well! I am reaching out to you by way of Lisalyn Jacobs, as she suggested if anyone would know the answer to my question it'd be you. I would like to know which office/s/dept./s within Dept of Ed would be best situated to deal with the mandated provisions in the attached Education excerpt of the bill I am working on re Black women and girls. Please also let me know if your schedule would permit a conversation either today or tomorrow. Thanks immensely in advance! Kindest Regards, Monalisa Dugué Deputy Chief Counsel U.S. House of Representatives Committee on the Judiciary Crime, Terrorism, & Homeland Security (202) 225-3951 Monalisa.dugue@mail.house.gov <EDUCATION Excerpt from Women-Girls bill.docx>

<mailto:Monalisa.dugue@mail.house.gov>

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Date : 7/16/2020 4:43:19 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Karyn Bass Ehler" kbassehler@gelaw.com Cc : "kbassehler@gmail.com" kbassehler@gmail.com Subject : Re: [EXTERNAL] Transitions Thank you for coming back to public service at this crucial time. There is nowhere more important for you to be. I'm so glad to read your news and I look forward to staying in touch.

On Jul 16, 2020, at 1:37 PM, Karyn Bass Ehler <kbassehler@gelaw.com> wrote:

CAUTION: This email is from outside USCCR.

Dear Catherine, I hope this email finds you, your family, and your team doing okay as we continue to weather these challenging times. I'm writing to share some big news on my front – I have been recruited back to public service and starting next month I will be serving as the General Counsel for the Illinois Department of Public Health (IDPH). During these times I have really felt the call to service and to help in whatever way I can. In this new capacity, I will be helping to address this crushing pandemic and the systemic racism and inequality in health care that in many ways have been laid bare for the world to see during this pandemic. While I will miss my colleagues and clients at Grant & Eisenhofer, I'm looking forward to the opportunity to build on the incredible leadership of IDPH and help lead it through this next chapter. I do hope we can catch up soon and I wanted to pass along my personal contact information to help us do just that! My personal email address is kbassehler@gmail.com and my cell phone number is 647.917.6713. Sending you and your family all the best. All my best, Karyn Karyn L. Bass Ehler | Grant & Eisenhofer P.A. Head of Civil Rights Practice Group 30 N. LaSalle St., Suite 2350 Chicago, IL 60602 (312) 610-5350 (312) 610-5352 direct dial

<mailto:kbassehler@gmail.com>

(312) 214-0001 facsimile Pronouns: She/ Her/ Hers kbassehler@gelaw.com www.gelaw.com

This communication may be protected by the attorney/client privilege and may contain confidential information intended only for the person to whom it is addressed. If it has been sent to you in error, please do not read it. Please inform the sender by e-mail or the phone number above that you have received this message in error. Then delete this message and any attachments without copying, forwarding or reading it. Any dissemination, distribution, copying, forwarding or other reproduction of this message (which may be monitored electronically by Grant & Eisenhofer PA) is strictly prohibited.

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Date : 7/16/2020 4:41:01 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Ron Lieber" ronlieber@gmail.com Subject : Re: [EXTERNAL] Re: TOMORROW: COVID-19 in Indian Country: The Impact of Federal Broken Promises on Native Americans Thank you my friend!

On Jul 16, 2020, at 1:25 PM, Ron Lieber <ronlieber@gmail.com> wrote:

CAUTION: This email is from outside USCCR.

I see you Chair Lhamon. Proud of you. Stay safe out there...

On Thu, Jul 16, 2020 at 4:17 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

I hope you'll join the U.S. Commission on Civil Rights tomorrow, Friday July 17, for our virtual briefing examining the impact of COVID-19 on Native Americans.

I also invite you to join the social media conversation (using #BrokenPromises and #USCCRBriefings), and to follow my newly created official @ChairLhamon Twitter account, where I will share information from the virtual briefing as well as Commission information going forward.

U.S. Commission on Civil Rights Virtual Briefing

COVID-19 in Indian Country: The Impact of Federal Broken Promises on Native Americans

Friday July 17, 2020, 10:00am Eastern Time Hearing will be livestreamed

at: <https://www.youtube.com/user/USCCR/videos> on Friday July 17, at 10:00 a.m. Eastern Time, the U.S. Commission on Civil Rights will hold a virtual briefing to evaluate the impacts of COVID-19 on Native Americans. In 2018, the Commission issued Broken Promises: Continuing Federal Funding Shortfall for Native Americans, which addressed the inadequacy of federal funding for Native American programs despite the United States' trust responsibility to promote tribal self-government, support the general wellbeing of Native American people, tribes and villages, and to protect their land and resources. The Commission will hear testimony from experts on how the pandemic has impacted Native American communities with respect to healthcare, housing, and infrastructure components such as access to water and

<mailto:clhamon@usccr.gov>
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broadband, and whether the federal government is meeting its obligations to Native American people in this current crisis. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, July 17, 2020, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

Briefing Agenda for COVID-19 in Indian Country: The Impact of Federal Broken Promises on Native Americans: 10:00 a.m. - 11:45 a.m. I. Introductory Remarks: Chair Catherine E. Lhamon: 10:00 a.m. - 10:10 a.m. II. Panel: 10:10 am - 11:40 am

• Geoffrey Blackwell, Chief Strategy Officer and General Counsel, AMERIND Risk

• Chief William Smith, Chairman, National Indian Health Board • Chief Lynn Malerba, Secretary, USET Sovereignty Protection Fund • Jonathan Nez, President, Navajo Nation • Fawn Sharp, President, National Congress of American Indians • Francys Crevier, Executive Director, National Council of Urban

Indian Health III. Closing Remarks: Chair Catherine E. Lhamon: 11:40 a.m. - 11:45 a.m.

Call for Public Comments: In addition to the testimony collected on Friday, July 17, 2020 via virtual briefing, the Commission welcomes the submission of material for consideration as we prepare our report. Please submit such information no later than Friday, July 24, 2020, by email to BrokenPromises@usccr.gov or by mail to OCRE/Public Comments, U.S. Commission on Civil Rights, 1331 Pennsylvania Ave. NW, Suite 1150, Washington, DC 20425. Please address the following questions:

1. Broken Promises found that Native Americans experience distinct health disparities as compared to other Americans which are compounded by Native American healthcare programs being chronically underfunded. How has the outbreak of COVID-19 impacted these health disparities?

2. Broken Promises found that there is a severe lack of affordable housing and adequate physical infrastructure in Indian Country. Due to a lack of federal investment in affordable housing and infrastructure such as roads, water, sewer, and electricity, Native Americans often find themselves living in overcrowded housing without basic utilities and infrastructure. What have been the consequences of these disparities in housing conditions and access to infrastructure during the outbreak of COVID-19?

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<mailto:BrokenPromises@usccr.gov>

3. Broken Promises found that telecommunications infrastructure, especially wireless and broadband internet services, is often inaccessible to many Native Americans in Indian Country. These services are necessary to keep the community connected to telehealth services, remote education, economic development, and public safety. Has this lack of telecommunications created additional barriers for Native Americans in coping with and reacting to the pandemic?

4. Have the congressional responses to the pandemic – especially the passage of the CARES Act and other stimulus packages – done enough to help Native people with the challenges posed by COVID- 19?

5. Has the Executive Branch's responses to the pandemic – including its statutory interpretation and administrative implementation of laws passed by Congress – done enough to help Native peoples cope with the challenges passed by Congress?

6. What recommendations should the Commission make to Congress and the federal government to ensure that Native American communities can address the coronavirus pandemic?

Catherine E. Lhamon

Chair

U.S. Commission on Civil Rights

1331 Pennsylvania Ave NW, Suite 1150

Washington, DC 20425

clhamon@usccr.gov

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Date : 7/16/2020 4:43:29 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Fwd: [EXTERNAL] Transitions To update the contact list

Begin forwarded message:

From: Karyn Bass Ehler <kbassehler@gelaw.com> Date: July 16, 2020 at 1:37:21 PM PDT To: Catherine Lhamon <clhamon@usccr.gov> Cc: "kbassehler@gmail.com" <kbassehler@gmail.com> Subject: [EXTERNAL] Transitions

CAUTION: This email is from outside USCCR.

Dear Catherine, I hope this email finds you, your family, and your team doing okay as we continue to weather these challenging times. I'm writing to share some big news on my front – I have been recruited back to public service and starting next month I will be serving as the General Counsel for the Illinois Department of Public Health (IDPH). During these times I have really felt the call to service and to help in whatever way I can. In this new capacity, I will be helping to address this crushing pandemic and the systemic racism and inequality in health care that in many ways have been laid bare for the world to see during this pandemic. While I will miss my colleagues and clients at Grant & Eisenhofer, I'm looking forward to the opportunity to build on the incredible leadership of IDPH and help lead it through this next chapter. I do hope we can catch up soon and I wanted to pass along my personal contact information to help us do just that! My personal email address is kbassehler@gmail.com and my cell phone number is 847.917.6713. Sending you and your family all the best. All my best, Karyn Karyn L. Bass Ehler | Grant & Eisenhofer P.A. Head of Civil Rights Practice Group 30 N. LaSalle St, Suite 2350

<mailto:kbassehler@gmail.com>

Chicago, IL 60602 (312) 610-5350 (312) 610-5352 direct dial (312) 214-0001 facsimile Pronouns: She/ Her/ Hers kbassehler@gelaw.com www.gelaw.com

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Date : 7/16/2020 4:41:30 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Ron Lieber" ronlieber@gmail.com Subject : Re: [EXTERNAL] Re: TOMORROW: COVID-19 in Indian Country: The Impact of Federal Broken Promises on Native Americans Aw! That is so nice. Physically distance and wear masks though.

On Jul 16, 2020, at 1:27 PM, Ron Lieber <ronlieber@gmail.com> wrote:

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PS I was out running on a totally deserted road in a forest in Truro, MA the other Sunday morning at 7am and a car breaks the silence and pulls over and rolls down the window and it's Kate Sussman. We're getting our peoples together tomorrow.

R

On Thu, Jul 16, 2020 at 4:24 PM Ron Lieber <ronlieber@gmail.com> wrote:

I see you Chair Lhamon. Proud of you. Stay safe out there...

On Thu, Jul 16, 2020 at 4:17 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

I hope you'll join the U.S. Commission on Civil Rights tomorrow, Friday July 17, for our virtual briefing examining the impact of COVID-19 on Native Americans.

I also invite you to join the social media conversation (using #BrokenPromises and #USCCRBriefings), and to follow my newly created official @ChairLhamon Twitter account, where I will share information from the virtual briefing as well as Commission information going forward.

U.S. Commission on Civil Rights Virtual Briefing

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<mailto:ronlieber@gmail.com>

<mailto:clhamon@usccr.gov>

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19 on Native Americans. In 2018, the Commission issued Broken Promises: Continuing Federal Funding Shortfall for Native Americans, which addressed the inadequacy of federal funding for Native American programs despite the United States' trust responsibility to promote tribal self-government, support the general wellbeing of Native American people, tribes and villages, and to protect their land and resources. The Commission will hear testimony from experts on how the pandemic has impacted Native American communities with respect to healthcare, housing, and infrastructure components such as access to water and broadband, and whether the federal government is meeting its obligations to Native American people in this current crisis. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, July 17, 2020, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

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• Chief William Smith, Chairman, National Indian Health Board • Chief Lynn Malerba, Secretary, USET Sovereignty Protection Fund • Jonathan Nez, President, Navajo Nation • Fawn Sharp, President, National Congress of American Indians • Francys Crevier, Executive Director, National Council of Urban

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https://url.emailprotection.link/?bS2rsQHd7mSfioVhmrBh3ebncuXrCiv88TgcypHH3my4dOMZLldfxS9T5Uz0zTB4Y_dEBSZGJwF9_FpmoX-1RmCsnbUWBhhcp_G60FyHT-31SbmUt2eR01YwJbuYok
<mailto:BrokenPromises@usccr.gov>

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Catherine E. Lhamon

Chair

U.S. Commission on Civil Rights

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Date : 7/19/2020 5:59:31 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Michelle Sanchez" michelle_sanchez@help.senate.gov Subject : Accepted: [EXTERNAL] Registration approved for Webex meeting: Continuing the Fight: Ensuring the ADA Works for Everyone

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Date : 7/19/2020 6:39:33 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Fwd: [EXTERNAL] Registration approved for Webex meeting: Continuing the Fight: Ensuring the ADA Works for Everyone

Begin forwarded message:

From: Michelle Sanchez <michelle_sanchez@help.senate.gov> Date: July 19, 2020 at 1:01:57 PM PDT To: Catherine Lhamon <clhamon@usccr.gov> Subject: [EXTERNAL] Registration approved for Webex meeting: Continuing the Fight: Ensuring the ADA Works for Everyone

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Date : 7/22/2020 5:03:08 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Kristen Clarke" kclarke@lawyerscommittee.org Subject : Re: [EXTERNAL] Fw: Lawyers' Committee Testimony to USCCR Thank you so much for submitting testimony even in this difficult time

On Jul 22, 2020, at 1:27 PM, Kristen Clarke <kclarke@lawyerscommittee.org> wrote:

CAUTION: This email is from outside USCCR.

Catherine,

Thank you for the opportunity to present testimony on this important topic.

Kristen

From: Marcia Johnson-Blanco <mblanco@lawyerscommittee.org> Sent: Wednesday, July 22, 2020 4:25 PM To: nbair@usccr.gov <nbair@usccr.gov> Cc: Ezra Rosenberg <erosenberg@lawyerscommittee.org>; Kristen Clarke <kclarke@lawyerscommittee.org> Subject: Lawyers' Committee Testimony to USCCR Good afternoon Nicholas, Attached please find a copy of the Lawyers' Committee's testimony. Thank you for this opportunity to share this information. Marcia Marcia Johnson-Blanco Co-Director, Voting Rights Project Lawyers' Committee for Civil Rights Under Law 1500 K Street, N.W., Suite 900 Washington, D.C. 20005 O: 202-662-8346 M: 202-256-2588 <Clarke USCCR Statement-0722.docx>

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Date : 7/23/2020 3:56:24 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Mauro Morales" mmorales@usccr.gov, "Rukku Singla" rsingla@usccr.gov Subject : Fwd: Recommendation Request - Gabrielle Gray Attachment : image001.png;ATT00001.htm;GGray_Resume2020.pdf;ATT00002.htm;

Begin forwarded message:

From: Vanita Gupta <gupta@civilrights.org> Date: July 23, 2020 at 12:42:51 PM PDT To: "catherine.lhamon@gmail.com" <catherine.lhamon@gmail.com> Subject: FW: Recommendation Request - Gabrielle Gray

Hi Catherine –

Wanted to flag this application for your Social Scientist position. Gabby is absolutely terrific. She worked at The Leadership Conference and at The Lawyers Committee on hate crimes and policing issues and she just got her PhD! Happy to chime in more praise but you get the deal. No need to write me back. Hope you and your loved ones are doing okay. Thanks for all you're doing! Vanita

GABRIELLE L. GRAY, PhD

Milwaukee, WI | C: 414-524-9616 | gabrielle.gray.gg@gmail.com EDUCATION Howard University – Washington, D.C.

Doctor of Philosophy in Political Science, May 2020

Marquette University – Milwaukee, WI Master of Arts in Educational Policy and Leadership, December 2013

Marquette University – Milwaukee, WI Bachelor of Arts in Political Science, May 2012

EXPERIENCE

The Leadership Conference Education Fund– Washington, D.C. Policing Campaign Manager, 2018–2019

• Assisted in production of 21st Century policing best practices report and community advocacy toolkit. • Managed local campaigns in Dallas, Texas and Minneapolis, Minnesota. • Facilitated management of and communication with local campaign consultants and sub-grantees. • Helped to develop Policing Campaign's long-term strategic plan.

Lawyers' Committee for Civil Rights Under Law– Washington, D.C. National Coordinator, 2017–2018

§ Built and maintained relationships with community organizations and community leaders § Analyzed key policy issues in areas of legislation and hate crime reporting § Researched and investigated community issues, and compile detailed research reports § Developed metrics and manage sub-grant contracts with community organizations

Educational Opportunity Program, Marquette University– Milwaukee, WI Interim Behavioral Science Specialist, 2015

§ Implemented strategic retention strategies for at-risk students of color § Managed staff of twelve professional and college-level staff § Organized and managed summer bridge program for 90 incoming college students § Developed and delivered a summer Social Justice seminar for incoming college students

Milwaukee Collegiate Academy– Milwaukee, WI Spanish Teacher, 2013–2015

§ Created and implemented Spanish curriculum and lesson plans for Spanish level I and II to an urban high school population

§ Provided support and developed administrative disciplinary processes for teachers and students OTHER INVOLVEMENTS

Coalition for Justice – Milwaukee, WI Community Organizer/ Executive Member, 2015–2016

Howard L. Fuller Torch Fellowship –Milwaukee, WI Fellow, 2013–2015

SKILLS

Advanced in Microsoft Office | Proficient in SPSS | Excellent Communication Skills | Teamwork Emotional Intelligence | Research & Strategy | Ability to Multitask | Self-Motivated | Detail Oriented

Vanita Gupta

President and CEO

The Leadership Conference on Civil and Human Rights

The Leadership Conference Education Fund

civilrights.org

From: Gabrielle Gray <gabrielle.gray.gg@gmail.com> Sent: Friday, July 17, 2020 4:29 PM To: Vanita Gupta <gupta@civilrights.org> Cc: Becky Monroe <monroe@civilrights.org> Subject: Recommendation Request - Gabrielle Gray

Dear Vanita,

I hope this email finds you well!

As you may know, I recently completed my PhD from Howard University and am in search of a research-focused position within the civil rights domain. I am reaching out to request a reference letter from you for a new opportunity I am seeking with the US Commission on Civil Rights as a [Social Scientist](#). Under your leadership I learned a lot about policing and civil rights more broadly. I strongly believe the knowledge and skills I gained as the Policing Campaign Manager will complement this position.

Thank you very much for considering my request. I have attached a copy of my updated resume for your review.

If you have any questions or need further information, please do not hesitate to let me know.

Sincerely,

Gabby

--

Gabrielle Gray, PhD

Tele: [\(414\) 524-9616](tel:4145249616)

gabrielle.gray.gg@gmail.com | gabrielle.gray@bison.howard.edu

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Date : 7/23/2020 3:57:20 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Vanita Gupta" gupta@civilrights.org Subject : Re: Recommendation Request - Gabrielle Gray Thank you for the flag. She sounds great.

On Jul 23, 2020, at 12:42 PM, Vanita Gupta <gupta@civilrights.org> wrote:

Hi Catherine –

Wanted to flag this application for your Social Scientist position. Gabby is absolutely terrific. She worked at The Leadership Conference and at The Lawyers Committee on hate crimes and policing issues and she just got her PhD! Happy to chime in more praise but you get the deal. No need to write me back. Hope you and your loved ones are doing okay. Thanks for all you're doing! Vanita <image001.png>

Vanita Gupta President and CEO The Leadership Conference on Civil and Human Rights The Leadership Conference Education Fund

civilrights.org

From: Gabrielle Gray <gabrielle.gray.gg@gmail.com> Sent: Friday, July 17, 2020 4:29 PM To: Vanita Gupta <gupta@civilrights.org> Cc: Becky Monroe <monroe@civilrights.org> Subject: Recommendation Request - Gabrielle Gray

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<http://www.civilrights.org/>
<https://www.usajobs.gov/GetJob/ViewDetails/572789500>

rights more broadly. I strongly believe the knowledge and skills I gained as the Policing Campaign Manager will complement this position.

Thank you very much for considering my request. I have attached a copy of my updated resume for your review.

If you have any questions or need further information, please do not hesitate to let me know.

Sincerely,

Gabby

-- Gabrielle Gray, PhD Tele: (414) 524-9616 gabrielle.gray.gg@gmail.com | gabrielle.gray@bison.howard.edu PRIVILEGE AND CONFIDENTIALITY NOTICE: This email and any attachments may contain privileged or confidential information and is/are for the sole use of the intended recipient(s). Any unauthorized use or disclosure of this communication is prohibited. If you believe that you have received this email in error, please notify the sender immediately and delete it from your system. <GGray_Resume2020.pdf>

<tel:%28414%29%20524-9616>
<mailto:gabrielle.gray.gg@gmail.com>
<mailto:gabrielle.gray@bison.howard.edu>

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Date : 7/24/2020 4:35:38 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Mueller, Sarah (HELP Committee)" Sarah_Mueller@help.senate.gov Cc : "Knackstedt, Kimberly (HELP Committee)" Kimberly_Knackstedt@help.senate.gov, "Eagen, Thomas (Aging)" Thomas_Eagen@aging.senate.gov, "Gamel-McCormick, Michael (Aging)" Michael_Gamel-McCormick@aging.senate.gov, "Rukku Singla" rsingla@usccr.gov Subject : Re: TODAY! Continuing the Fight NEW EVENT LINK Sarah, Kim, Thomas, and Michael: thank you for planning and producing today's ADA at 30 panel and for including me in it. I am so grateful for the frame you conceived and for the opportunity to lift up the important civil rights issues you gave a platform for discussion today. Please also thank Senator Murray and Senator Casey from me.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Mueller, Sarah (HELP Committee) <Sarah_Mueller@help.senate.gov> Sent: Friday, July 24, 2020 9:45 AM Cc: Knackstedt, Kimberly (HELP Committee); Eagen, Thomas (Aging); Gamel-McCormick, Michael (Aging) Subject: [EXTERNAL] TODAY! Continuing the Fight NEW EVENT LINK

CAUTION: This email is from outside USCCR.

Thank you for registering for "Continuing the Fight: Ensuring the ADA Works for Everyone" co-hosted by Senators Murray and Casey. Due to the large registration volume, we are switching this event to a new WebEx event room. This will better accommodate the large capacity of over 300 attendees registered! Please use this link (with full url and password information below) to join us at 1:00pm EST today. Note that your previous link will no longer work to enter into the event. You do not need to re-register, just click here at the time of the event. Feel free to share this new link with your networks! The panel will center on the next 30 years and beyond of the ADA and shine a spotlight on how intersectional identities—including race, gender, and sexuality—affect access to the rights affirmed by the ADA. Members of Congress have been invited to give remarks.

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https://url.emailprotection.link/?bbxQeU4tDaH0mGPJB6pRXJR8FzWwKNPdq23GilnvIDJYQIZv1mq7uPu4DjInLvZy8NQgDkwSpGLyJwibJSYApp9Ibl2KK3yAirVVMmzJTUNEJ5xX17aRhm8tSUCV-Adjco04ft8xRWZmvsVUqpQ_tGUTUQW-Pz4V2IPRTdqbaE~
https://url.emailprotection.link/?bbxQeU4tDaH0mGPJB6pRXJR8FzWwKNPdq23GilnvIDJYQIZv1mq7uPu4DjInLvZy8NQgDkwSpGLyJwibJSYApp9Ibl2KK3yAirVVMmzJTUNEJ5xX17aRhm8tSUCV-Adjco04ft8xRWZmvsVUqpQ_tGUTUQW-Pz4V2IPRTdqbaE~

Panelists include: - Jeiri Flores, Advocacy Discipline Coordinator, University of Rochester LEND - Conchita Hernandez Legorreta, Maryland Statewide Blind and Low Vision

Specialist - Catherine Lhamon, Moderator, Chair, U.S. Commission on Civil Rights

CART and American Sign Language will be provided. For further accommodations contact sarah_mueller@help.senate.gov. Questions about these events and more contact thomas_eagen@aging.senate.gov and sarah_mueller@help.senate.gov. Full link with password: <https://senate.webex.com/senate/onstage/g.php?MTID=e6fa730d6ff72aabd92e62c9e712393ac> Event number (access code): 199 343 5431 Event password: zKThndww245 Call in number: +1-415-527-5035 Thanks, Sarah Mueller Disability Policy Fellow Senate Health, Education, Labor, and Pensions Committee Ranking Member Patty Murray Sarah_Mueller@help.senate.gov o: (202) 224 - 0767| c: (202) 604 - 9790

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https://url.emailprotection.link/?bbxQeU4tDaH0mGPJB6pRXJR8FzWwKNPdq23GilnvIDJYQIZv1mq7uPu4DjInLvZy8NQgDkwSpGLyJwibJSYApp9Ibl2KK3yAirVVMmzJTUNEJ5xX17aRhm8tSUCV-Adjco04ft8xRWZmvsVUqpQ_tGUTUQW-Pz4V2IPRTdqbaE~
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mailto:Sarah_Mueller@help.senate.gov

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Date : 7/26/2020 12:45:17 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Phillip Atiba Goff" goff@policingequity.org Subject : Re: [EXTERNAL] Some Personal News I'm excited for Yale and glad that you will continue your good work unchanged. Thanks for letting me know.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Phillip Atiba Goff <goff@policingequity.org> Sent: Sunday, July 26, 2020 7:47 AM To: Phillip Atiba Goff Subject: [EXTERNAL] Some Personal News

CAUTION: This email is from outside USCCR.

Hey Friends,

Feels strange to have personal news in the midst of all this mess, but wanted to let you know that I have recently accepted a position as a Professor of African American Studies and Psychology and Yale. I'll likely announce more publicly later this week, so wanted you to hear from me first. Nothing about CPE or our mission is changing—we'll just have access to better pizza. I'll miss my colleagues and the students at CUNY, but am energized by the ways in which Yale is working to support our work. I'm long overdue for a catch up with most of you, and hope you'll forgive me this summer of absurdity while we look for a new place (maybe in New Haven, maybe NYC. Who knows?!) and deal with the aftermath of all the fascism and murder. May you and all of your people stay healthy and safe until we can manage to be together again, virtually or in person. Hoping for the former and hoping for soon.

Best, Phil

Phillip Atiba Goff, Ph.D. Professor of African American Studies and Psychology

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
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Yale University

Co-Founder & CEO Center for Policing Equity <http://www.policingequity.org>

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https://url.emailprotection.link/?b58EzslZTYIY2IIAFNtUjwVc8leF_e71DR08HsFNfuRUNidSus4rU0q4mRY4PQeJLi9vtovcBrIkKKAU2dOYve9W3Is6x3K34DmdeogKLasUOaQztn9jfl6N03_DJ3D

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Date : 7/28/2020 5:36:42 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "twolff@law.upenn.edu" twolff@law.upenn.edu Subject : serving on the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights? Hi Tobias. Would you be interested in serving on the Pennsylvania advisory committee to the U.S. Commission on Civil Rights? Or do you know candidates you think would be effective members on the committee? I've pasted below the blurb about applying.

I hope you are taking care in this bleak time.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/r/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov.

The Commission has 51 Advisory Committees for every state and DC, who serve as the Commission's eyes and ears on the ground across the country, investigating and researching civil rights issues specific to their jurisdiction. Advisory Committees have recently examined civil rights impacts of civil asset forfeiture, racially disparate incarceration rates, education funding, payday lending, solitary confinement policies in prisons, fair housing, human trafficking, immigration policies, policing practices, seclusion and restraint of students with disabilities, and voting rights, among other topics. In addition to advising the Commission directly, Advisory Committee reports may lead to policy changes at the national, state, or local levels. Recent examples where reports were

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cited as a source for such changes include reports on solitary confinement policies in Connecticut, the conditions of women's prisons in New Hampshire, and seclusion and restraint policies of students with disabilities in Kansas.

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Date : 7/28/2020 5:33:10 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "cpastore@law.usc.edu" cpastore@law.usc.edu Subject : service on California Advisory Committee to the U.S. Commission on Civil Rights? Hi Clare. I'm hoping you are still interested in the idea of serving on the California advisory committee to the U.S. Commission on Civil Rights. That committee is up for reappointment and I've pasted below the blurb about how to apply.

I also hope you are taking care in this bleak time.

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Date : 7/28/2020 6:42:44 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "ljones628@gmail.com" ljones628@gmail.com Subject : serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? Hi Lisa. Might you have interest in serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? In the hope that you might, I've pasted below the application information.

I hope you and your family are taking care in this difficult time.

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Date : 7/28/2020 6:28:51 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "seth.galanter@gmail.com" seth.galanter@gmail.com, "sgalanter@youthlaw.org" sgalanter@youthlaw.org Subject : interest in serving on DC Advisory Committee to U.S. Commission on Civil Rights? Hi friend. Would you have interest in serving on the DC Advisory Committee to the U.S. Commission on Civil Rights? If so, I've pasted below information about how to apply, in addition to information about the other jurisdictions for which we will soon appoint members -- if you know others who would be excellent candidates in those jurisdictions I hope you will share the information widely.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/r/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov. The Commission has 51 Advisory Committees for every state and DC, who serve as the Commission's eyes and ears on the ground across the country, investigating and researching civil rights issues specific to their jurisdiction. Advisory Committees have recently examined civil rights impacts of civil asset forfeiture, racially disparate incarceration rates, education funding, payday lending, solitary confinement policies in prisons, fair housing, human trafficking, immigration policies, policing practices, seclusion and restraint of students with disabilities, and voting rights, among other topics. In addition to advising the Commission directly, Advisory Committee reports may lead to policy changes at the national, state, or local levels. Recent examples where reports were cited as a source for such changes include reports on solitary confinement policies in Connecticut, the conditions of women's prisons in New Hampshire, and seclusion and restraint policies of students with disabilities in Kansas.

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Date : 7/28/2020 6:30:26 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "max.lesko@gmail.com" max.lesko@gmail.com, "mlesko@childrensdefense.org" mlesko@childrensdefense.org Subject : DC Advisory Committee to U.S. Commission on Civil Rights? Hi friend. Would you have interest in serving on the DC Advisory Committee to the U.S. Commission on Civil Rights? I've pasted below application information in case you might be interested.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/r/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov.

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restraint policies of students with disabilities in Kansas.

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Date : 7/28/2020 6:44:15 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "lisamaatz@gmail.com" lisamaatz@gmail.com Subject : serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? Hi Lisa. Might you have interest in serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? In the hope that you might, I've pasted below application information. I hope you're taking care.

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restraint policies of students with disabilities in Kansas.

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Date : 7/28/2020 6:50:13 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "alicewyao@gmail.com" alicewyao@gmail.com Subject : DC Advisory Committee to U.S. Commission on Civil Rights? Hi Alice. Might you have interest in serving on the DC Advisory Committee to the U.S. Commission on Civil Rights? In case you might, I've pasted below information about how to apply.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/r/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov. The Commission has 51 Advisory Committees for every state and DC, who serve as the Commission's eyes and ears on the ground across the country, investigating and researching civil rights issues specific to their jurisdiction. Advisory Committees have recently examined civil rights impacts of civil asset forfeiture, racially disparate incarceration rates, education funding, payday lending, solitary confinement policies in prisons, fair housing, human trafficking, immigration policies, policing practices, seclusion and restraint of students with disabilities, and voting rights, among other topics. In addition to advising the Commission directly, Advisory Committee reports may lead to policy changes at the national, state, or local levels. Recent examples where reports were cited as a source for such changes include reports on solitary confinement policies in Connecticut, the conditions of women's prisons in New Hampshire, and seclusion and restraint policies of students with disabilities in Kansas.

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Date : 7/28/2020 6:32:12 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "kbracey@jenner.com" kbracey@jenner.com, "kalibracey@aol.com" kalibracey@aol.com Subject : interest in serving on the DC Advisory Committee to U.S. Commission on Civil Rights? Hi friend. Might you be interested to serve on the DC Advisory Committee to the U.S. Commission on Civil Rights? In the hope that you might, I've pasted below information about the committees and the application.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/tr/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov. The Commission has 51 Advisory Committees for every state and DC, who serve as the Commission's eyes and ears on the ground across the country, investigating and researching civil rights issues specific to their jurisdiction. Advisory Committees have recently examined civil rights impacts of civil asset forfeiture, racially disparate incarceration rates, education funding, payday lending, solitary confinement policies in prisons, fair housing, human trafficking, immigration policies, policing practices, seclusion and restraint of students with disabilities, and voting rights, among other topics. In addition to advising the Commission directly, Advisory Committee reports may lead to policy changes at the national, state, or local levels. Recent examples where reports were cited as a source for such changes include reports on solitary confinement policies in Connecticut, the conditions of women's prisons in New Hampshire, and seclusion and restraint policies of students with disabilities in Kansas.

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Date : 7/26/2020 6:51:37 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "aabrokwa@youthlaw.org" aabrokwa@youthlaw.org Subject : DC Advisory Committee to the U.S. Commission on Civil Rights? Hi Alice. Might you have interest in serving on the DC Advisory Committee to the U.S. Commission on Civil Rights? In case you might, I've pasted below information about how to apply.

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Date : 7/28/2020 6:48:31 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Clare Pastore" cpastore@law.usc.edu Subject : Re: service on California Advisory Committee to the U.S. Commission on Civil Rights? Hurrah that you will apply and hurrah that you and your family have stayed healthy.

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From: Clare Pastore <cpastore@law.usc.edu> Sent: Tuesday, July 28, 2020 6:28 PM To: Catherine Lhamon Subject: [EXTERNAL] RE: service on California Advisory Committee to the U.S. Commission on Civil Rights?

CAUTION: This email is from outside USCCR.

Hi Catherine—thanks for the heads up about this. I'm very interested and will apply. I hope you and your family are well. I'm relieved to report we are ok and all 4 kids are healthy and still employed. Clare Clare Pastore Professor of the Practice of Law USC Gould School of Law 699 Exposition Blvd Los Angeles, CA 90089 cpastore@law.usc.edu From: Catherine Lhamon [<mailto:clhamon@usccr.gov>] Sent: Tuesday, July 28, 2020 2:33 PM To: Clare Pastore <cpastore@law.usc.edu> Subject: service on California Advisory Committee to the U.S. Commission on Civil Rights?

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
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Hi Clare. I'm hoping you are still interested in the idea of serving on the California advisory committee to the U.S. Commission on Civil Rights. That committee is up for reappointment and I've pasted below the blurb about how to apply. I also hope you are taking care in this bleak time. The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/tr/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov.

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Date : 7/29/2020 3:24:33 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Alice Abrokwa" aabrokwa@youthlaw.org Subject : Re: [EXTERNAL] Re: DC Advisory Committee to the U.S. Commission on Civil Rights? Terrific. Thank

you.
On Jul 29, 2020, at 10:34 AM, Alice Abrokwa <aabrokwa@youthlaw.org> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine,

Thanks so much for suggesting this! I'm going to take a look at the FAQs and give this real thought, and I may poke you if I have questions.

Thanks again,

Alice Alice Abrokwa (Pronouns: she / her / hers) Senior Attorney National Center for Youth Law 1313 L St NW, Suite 130, Washington, DC 20005 202-868-4786 (direct line) 202-868-4781 (main phone) 202-868-4788 (fax)

On Tue, Jul 28, 2020 at 6:51 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

Hi Alice. Might you have interest in serving on the DC Advisory Committee to the U.S. Commission on Civil Rights? In case you might, I've pasted below information about how to apply.

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<mailto:clhamon@usccr.gov>

encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, <https://www.usccr.gov/pubs/sac.php>. Further information about serving is here: <https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf>. Candidates may submit their applications via the online application portal at <https://www.surveymonkey.com/r/S7WCLL6>. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@usccr.gov.

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Catherine E. Lhamon

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Date : 7/30/2020 3:31:43 PM From : "Catherine Lhamon" <clhamon@usccr.gov> To : "Lisa Maatz" <lisamaatz@gmail.com> Subject : Re: [EXTERNAL] Re: serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? Hurrah. It's great to hear from you, too.

On Jul 29, 2020, at 10:28 PM, Lisa Maatz <lisamaatz@gmail.com> wrote:

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YES!!!! Sounds perfect, and I really appreciate your thinking of me. I am doing pretty well in the slower pace of Ohio...new job...taking care of mom...cottage on the lake...cute pup. But I've been a bit restless...and this could be the way to put my federal civil rights knowledge to work in the state. I'm jazzed... Will work on the app this weekend. Looks like Ohio has openings starting in November. :)

As for the job, I'm knee deep in the \$60mill federal bribery and corruption case that just saw our state Speaker of the House and others arrested. Working on progressive reforms of course. Good stuff.

Best, Lisa

Lisa M. Maatz <lisamaatz@gmail.com> 202/306-4421 (texting or email is always the best way to reach me) Twitter: @LisaMaatz LinkedIn.com/in/LisaMaatz

sent by AOL dialup

On Tue, Jul 28, 2020, 6:44 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

Hi Lisa. Might you have interest in serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? In the hope that you might, I've pasted below application information. I hope you're taking care.

<mailto:lismaaatz@gmail.com>
<mailto:clhamon@usccr.gov>

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Date : 8/3/2020 1:06:12 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Graves, Fatima Goss" fgraves@nwl.org Cc : "Martin, Emily" emartin@nwl.org, "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Invitation - Small Discussion re: Systems of Sexual Misconduct Accountability for Candidates/Nominees/Officeholders Thank you for doing this. I can join at that time on the 19th. We can circulate some excerpts from two recent Commission reports in case useful as pre reads.

It will be nice to hear your voices and to be in this conversation.

On Aug 3, 2020, at 7:30 AM, Graves, Fatima Goss <fgraves@nwl.org> wrote:

CAUTION: This email is from outside USCCR.

Catherine, The past months and years have shown us that when allegations of sexual harassment or violence are brought against political candidates, judicial nominees, or high officeholders, we lack the systems necessary for appropriate response: trusted, nonpolitical, unbiased systems for factfinding and accountability that do not unnecessarily expose survivors to harm. I am reaching out to invite you to join me in a small conversation I am co-hosting with Professor Anita Hill about what such a system might look like and the principles that should inform its design.

Would you be available to join us via Zoom on Wednesday, August 19th, 3:00-4:30 Eastern/12:00-1:30 Pacific?

We hope this conversation will bring together a few trusted experts— academics and practitioners—to discuss accountability models from other contexts and whether they suggest principles or structures for a better approach here. Our ultimate goal would be to come to consensus on principles that could shape a call for reform. In preparation for that conversation, I invite your thoughts on any models that might usefully serve as background for this conversation, as we are working to identify a few helpful pre-reads: for example, are there useful elements from the complaint process for sitting federal judges; from legal ethics commissions; from candidate financial disclosure requirements; or from whistleblower protections in other contexts? I welcome your suggestions on any background materials that might helpfully inform a conversation about how to create independent and trustworthy factfinding systems in high stakes and contested contexts.

Finally, if you would like to participate in this discussion but the date and time doesn't work, please let us know, as we will find a new time if we can't get critical mass with this one. Fatima

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Date : 8/5/2020 12:21:07 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "J. Morgan Kousser" kousser@hss.caltech.edu Subject : A Long March Toward Progress | www.caltech.edu What a pleasure to read this today: <https://www.caltech.edu/about/news/long-march-toward-progress>

Thank you for the justice you have secured

<https://www.caltech.edu/about/news/long-march-toward-progress>

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Date : 8/5/2020 1:52:54 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rush, Carly (HELP Committee)" Carly_Rush@help.senate.gov Subject : Re: [EXTERNAL] 15 min call Great. Please call my cell: 213-400-1344

On Aug 5, 2020, at 10:28 AM, Rush, Carly (HELP Committee) <Carly_Rush@help.senate.gov> wrote:

CAUTION: This email is from outside USCCR.

Can we do 3:30 today? What's the best number to reach you at?

Sent from my iPhone

On Aug 5, 2020, at 1:13 PM, Catherine Lhamon <clhamon@usccr.gov> wrote:

Yes. I could talk today before 5 pm est or Monday or Tuesday 5-7 pm est. does that give you any workable window?

On Aug 5, 2020, at 6:12 AM, Rush, Carly (HELP Committee) <Carly_Rush@help.senate.gov> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine- Do you have 15 mins this week or next to talk about OCR and staffing? Appreciate it! I hope you are doing well! Carly Carly Rush

General Counsel & Chief Oversight Counsel, Minority Staff Senate Health, Education, Labor and Pensions Committee 202-224-0166

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Date : 8/5/2020 1:13:02 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rush, Carly (HELP Committee)" Carly_Rush@help.senate.gov Subject : Re: [EXTERNAL] 15 min call Yes. I could talk today before 5 pm est or Monday or Tuesday 5-7 pm est. does that give you any workable window?

On Aug 5, 2020, at 6:12 AM, Rush, Carly (HELP Committee) <Carly_Rush@help.senate.gov> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine- Do you have 15 mins this week or next to talk about OCR and staffing? Appreciate it! I hope you are doing well! Carly Carly Rush General Counsel & Chief Oversight Counsel, Minority Staff Senate Health, Education, Labor and Pensions Committee 202-224-0166

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Date : 8/7/2020 5:55:42 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Michael Lieberman" michael.lieberman@splcenter.org Cc : "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] well done! Attachment : image002.jpg; Thank you! I'm so glad to know where you are now. I hope we can schedule a call with Margaret soon. I liked her so much on today's zoom. And thank you for the room rating prompt. I don't know how that is done but I am glad you like the books.

On Aug 7, 2020, at 12:03 PM, Michael Lieberman <michael.lieberman@splcenter.org> wrote:

CAUTION: This email is from outside USCCR.

Catherine I hope you are well and your family safe in these challenging times. Good to see you on the webinar with Margaret – and well done. Nice, also, to get a glimpse inside your Zoom Room. Have you been rated? I feel confident that organizing your library by color is extra points! I want to find time for you to get to know Margaret. You will like her. Best for the weekend. Michael <image002.jpg> Michael Lieberman he/him/his

Senior Policy Advisor | Policy Southern Poverty Law Center & SPLC Action Fund T 202.909.3434 michael.lieberman@splcenter.org | www.splcenter.org Facebook | Twitter | Instagram | YouTube | Donate

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<mailto:michael.lieberman@splcenter.org>
https://url.emailprotection.link/?bJoMkgTymqcTLusKni6i8IM0QHT1P5QyRFD-zwGR0_Tgi-9WHSXPk1DCXXfegvXtrJkvWwY5wvKRI5zGYaspdRQ~~
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https://url.emailprotection.link/?bU1XictA3tqbW79rXxOHaRA_h38DKVZ_FD07be2-WH_rC6dXk38aoBprtBX7zwG7X0jsadWvuduNurylv-MDgfA~~

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Date : 8/14/2020 3:03:07 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "gaurag@gmail.com" gaurag@gmail.com, "munoz@newamerica.org" munoz@newamerica.org Cc : "Rukku Singla" rsingla@usccr.gov Subject : finding time to talk about federal civil rights enforcement planning? Attachment : 11-21-Are-Rights-a-Reality.pdf; Hi Gautam and Cecilia. I hope these email addresses are ok to use for this outreach. I'd love to find time to talk with you, or with the person you think would be right, about recent U.S. Commission on Civil Rights evaluation of federal civil rights enforcement across 13 federal civil rights agencies. The Commission report, which I've attached here, aims to set a blueprint for

what effective federal enforcement should look like. As I know you know that topic is close to my heart so I would love to talk with you or your team about planning for ways to fulfill federal civil rights promises most effectively. Please let me know if we could find some time.

I hope you are both taking care in this intense time.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
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U.S. COMMISSION ON CIVIL RIGHTS

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Evaluating Federal Civil Rights Enforcement

Are Rights a Reality?

November 2019 Statutory Report

U.S. Commission on Civil Rights 1331 Pennsylvania Avenue, NW Washington, DC 20425

www.usccr.gov

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.¹

142 U.S.C. §1975a.

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Civil Rights Enforcement

2019 Statutory Enforcement Report

Letter of Transmittal November 21, 2019 President Donald J. Trump Vice President Mike Pence Speaker of the House Nancy Pelosi On behalf of the United States Commission on Civil Rights ("the Commission"), I am pleased to transmit our briefing report, Are Rights a Reality? Evaluating Federal Civil Rights Enforcement. The report is also available in full on the Commission's website at www.usccr.gov. Congress charges the federal government with enforcing federal civil rights laws providing protection from discrimination on the bases of race, color, religion, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, voting, education, and public accommodations. Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. In this report, the Commission evaluates the most essential elements for effective federal civil rights enforcement, examining thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency's external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

- U.S. Department of Justice, Civil Rights Division • U.S. Department of Education, Office for Civil Rights • U.S. Department of Labor, Office of Federal Contract Compliance Programs and Civil Rights Center and Civil Rights Center • U.S. Department of Health and Human Services, Office for Civil Rights • U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity • U.S. Equal Employment Opportunity Commission • U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties • U.S. Environmental Protection Agency, External Civil Rights Compliance Office • U.S. Department of Transportation, External Civil Rights Programs Division of the

Departmental Office of Civil Rights

UNITED STATES COMMISSION ON CIVIL RIGHTS 1331 Pennsylvania Ave., NW ☐ Suite 1150 ☐ Washington, DC 20425 www.usccr.gov

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ii Evaluating Federal Civil Rights Enforcement

- U.S. Department of Veterans Affairs, Office of Resolution Management • U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights • U.S. Department of the Treasury, Office of Civil Rights and Diversity • U.S. Department of the Interior, Office of Civil Rights

The Commission majority approved key findings including the following: the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unaddressed. Key Commission majority recommendations include the following: Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should give civil rights offices that now lack such authority the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms. Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. No agency should prioritize enforcement of one civil rights protection over another. We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled. For the Commission,

Catherine E. Lhamon Chair

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x ACKNOWLEDGEMENTS

ACKNOWLEDGEMENTS The Commission's Office of Civil Rights Evaluation (OCRE) produced this report under the direction and with the contribution of Katherine Culliton-González, Esq., OCRE Director. Social Scientist Sarale Sewell performed much of the principal research and writing. OCRE Civil Rights Analyst Nicholas Bair, Esq., also provided valuable research and writing. Dr. LaShonda Brenson, Civil Rights Analyst, and Contractor Elizabeth Paukstis, Esq., assisted with research. Commission Interns Maia Brockbank (B.A. Candidate 2021, Stanford University), Valentina Cannavo (B.A. 2019, University of California, Berkeley), Annika Hvide (M.A. Educational Transformation Candidate July 2019, Graduate School of Science and Arts), Amy Jeanneret (B.A. Candidate 2020, University of Denver), Lauren Kelly (B.A. Candidate 2020, Carnegie Mellon University), and Law Clerks Sara Asrat (J.D. Candidate 2021, Stanford University), Taylor Dowd (J.D. Candidate 2020, George Washington University), Erin Drolet (J.D. Candidate 2021, George Washington University), Kyle Pham (J.D. Candidate 2021, University of Michigan), Kori Pruett (J.D. Candidate 2021, Georgetown University), Matt Robinson (J.D. Candidate 2020, University of Southern California), Ariana Rosenthal (J.D. Candidate 2020, University of North Carolina), Mark Saunders (J.D. Candidate 2021, Duke University), Juliette Singarella (J.D. Candidate 2021, Georgetown University), and Elizabeth Vincento (J.D. Candidate 2020, George Washington University) provided valuable research assistance. Commissioners' Special Assistants Sheryl Cozart, Alec Deull, Jason Lagria, Carissa Mulder, Amy Royce, Rukku Singla, Peach Soltis, Alison Somin, and Irena Vidulovic assisted their Commissioners in reviewing the report. With the assistance of Attorney-Advisor Pilar Velasquez McLaughlin, Lillian Ofili (J.D. Candidate 2021, Georgetown University), Brooke Schwartz (J.D. Candidate 2021, Georgetown University), Ben Falstein (J.D. Candidate 2021, Georgetown University), Christine Kumar (J.D. Candidate 2021, George Washington University), the Commission's General Counsel Maureen Rudolph, reviewed and approved the report for legal sufficiency. The Illinois Advisory Committee to the U.S. Commission on Civil Rights collected and provided testimony, findings, and recommendations on related civil rights issues within its jurisdiction.

1 Evaluating Federal Civil Rights Enforcement

Executive Summary Many times over our 62-year existence, the Commission has examined effectiveness of civil rights enforcement among federal agencies.¹ Congress charges the federal government with enforcing civil rights under the U.S. Constitution,² as well as federal civil rights statutes such as the Civil Rights Acts of 1957 and 1964,³ and subsequent civil rights statutes such as the Voting Rights Act,⁴ the Fair Housing Act,⁵ Section 794 of the Rehabilitation Act,⁶ the Americans with Disabilities Act,⁷ Title IX of the Education Amendments Act of 1972,⁸ the Age Discrimination Act,⁹ and many others. These laws provide federal protections from discrimination on the bases of race, color, religion or conscience, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, voting, education, and public accommodations.¹⁰ Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. The specific jurisdiction of federal agencies' civil rights offices varies; but generally their charges include receiving and adjudicating civil rights complaints, monitoring compliance by federally funded and other covered entities and

1 See, e.g., U.S. Comm'n on Civil Rights, Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume One: A Blueprint for Civil Rights Enforcement, 2002, <http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf> [hereinafter USCCR, Ten-Year Check-Up Vol. 1: A Blueprint]; U.S. Comm'n on Civil Rights, A Bridge to One America: The Civil Rights Performance of the Clinton Administration, 2001, <http://www2.law.umaryland.edu/marshall/usccr/documents/clintoncivirt.pdf>; U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement, 1995, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12f96.pdf> [hereinafter USCCR, Funding for Civil Rights Enforcement 1995]; U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: Two Years Later, 1973, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>; U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: Seven Months Later, 1971, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>. See also U.S. Comm'n on Civil Rights, Enforcing Title IX, 1980, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf> (focused on Title IX enforcement by the Department of Health, Education, and Welfare); U.S. Comm'n on Civil Rights, Federal Enforcement of Equal Employment Requirements, 1987, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11093z.pdf> (focused on equal employment enforcement by the Equal Employment Opportunity Comm'n, the Department of Justice Civil Rights Division's Employment Section, and the Department of Labor's Office of Federal Contract Compliance Programs). 2 See U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XV, § 1; see also infra notes 16-20 (discussing the fundamental protections of these Reconstruction Amendments). 3 Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4. 4 Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101). 5 Fair Housing Act, 42 U.S.C. § 3601. 6 Rehabilitation Act, 29 U.S.C. § 794. 7 Americans with Disabilities Act, 42 U.S.C. § 12101. 8 Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88. 9 Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07. 10 See infra notes 21-30 (discussing statutes enforced by federal civil rights offices). Because since 1983 the Commission's statute specifically prohibits "the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about the laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion," the Commission may not use any of its resources to study this issue.

<http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/clintoncivirt.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12f96.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>
<http://www2.law.umaryland.edu/marshall/usccr/documents/cr11093z.pdf>

2 Evaluating Federal Civil Rights Enforcement

and other activities ranging from issuing notices to public reporting to investigating and administratively resolving or litigating in federal court to remedy civil rights violations. Congress has charged the Commission with monitoring these federal civil rights enforcement efforts.¹¹ The last time the Commission reported on federal civil rights enforcement generally, across multiple agencies, was in 2002.¹² In this current report, the Commission draws from methods and conclusions in prior Commission reports for metrics to evaluate the most essential elements for effective civil rights enforcement. For this report, the Commission examines thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency's external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

• U.S. Department of Justice, Civil Rights Division • U.S. Department of Education, Office for Civil Rights • U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center • U.S. Department of Health and Human Services, Office for Civil Rights • U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal

Opportunity • U.S. Equal Employment Opportunity Commission • U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties • U.S. Environmental Protection Agency, External Civil Rights Compliance Office • U.S. Department of Transportation, Departmental Office of Civil Rights • U.S. Department of Veterans Affairs, Office of Resolution Management • U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights • U.S. Department of the Treasury, Office of Civil Rights and Diversity • U.S. Department of the Interior, Office of Civil Rights¹³

The Commission bases conclusions in this report on information received through interrogatories and document requests sent to these agencies,¹⁴ independent research, and testimony and public comments received during and following a public briefing the Commission held in November 2018, at which current and former federal agency officials, advocates, legal scholars, and community members testified. Chapter 1 of this report discusses the history of federal civil rights law and the Commission's statutory role in evaluating the effectiveness of federal civil rights enforcement since 1957. Chapter 1 also explains scope and methodology of this report. In reviewing the efficacy of 13 federal agencies' external civil rights enforcement programs, the

11 Civil Rights Comm'n Act, 42 U.S.C. § 1975a(c)(1). 12 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 1 (evaluating 10 federal agencies). 13 In 2002, the Commission evaluated 11 agencies. Ten of the agencies on the current list were included in 2002; the difference being that the 2002 report did not evaluate the DHS, the VA, or Treasury, and it did evaluate the Small Business Administration. *Ibid.*, 2. 14 Interrogatories and Document Requests are specific questions and requests for documents that the Commission sent to each of the 13 agencies under the Commission's statutory authority to do so. 42 U.S.C. § 1975a(e).

3 EXECUTIVE SUMMARY

Commission identified and analyzed three core factors against which to measure federal civil rights offices: (1) the office's legal authority and responsibility, (2) the enforcement tools the office has at its disposal, and (3)its budget and staffing. Furthermore, the Commission reviewed seven essential elements of effective civil rights enforcement programs:

1. Prioritization for Civil Rights Agency-Wide, 2. Strategic Planning and Self-Evaluation, 3. Complaint Processing, Agency-Initiated Charges, and Litigation, 4. Proactive Compliance Evaluation, 5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education,

Outreach, and Publicity, 6. Interaction and Coordination with External Agencies and Organizations, 7. Research, Data Collection, and Reporting.

Chapter 1 reports general results of the Commission's research. Chapters 2 through 14 examine data from FY 2016 to FY 2018 from each federal agency in depth. The research shows that most of the civil rights office in each of the agencies have sufficient legal authority, fairly clear responsibility, and a range of civil rights enforcement tools. In addition, the Commission received bipartisan testimony supporting the view that civil rights laws should be enforced consistently. The report reflects many highlights of effective civil rights enforcement efforts during each of the fiscal years. However, a variety of factors hinder consistent performance and efficacy of federal civil rights offices. The Commission's research shows trends including insufficient resources, reduced staffing levels, failure to process complaints in a timely manner, vague complaint processing mechanisms, a tapering off of agency-initiated charges and systemic litigation in some key areas, backtracking in affirmative civil rights policy guidance, a lack of coordination in the face of emerging civil rights crises, and a need for more data collection, research, and public reporting. Key Commission findings and recommendations based on this evidence and analysis include:

4 Evaluating Federal Civil Rights Enforcement

Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics. As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unaddressed. Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including ED OCR and HUD FHEO, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics. Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans.

5 EXECUTIVE SUMMARY

Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics. Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms.

6 Evaluating Federal Civil Rights Enforcement

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7 Chapter 1: Introduction

Chapter 1: Introductory History, Research Scope and Methodology, and Analysis of Key Factors and Essential Elements for Effective Federal Civil Rights Enforcement

This chapter will first briefly summarize the origins of federal civil rights law and the Commission's past work evaluating the efficacy of federal civil rights enforcement. It will then summarize the methodology of the current report as well as major factors and elements evaluated, adding information about some of the major research findings. Origins of Federal Civil Rights Law and Enforcement Congress established the U.S. Department of Justice in 1870, shortly after the Civil War,¹⁵ with the founding purpose to enforce the Reconstruction Amendments.¹⁶ These Constitutional amendments generally established that every person born or naturalized in the United States is a citizen of the U.S., that every person in the U.S. is entitled to due process of law and equal protection under the law, and that all citizens have the right to vote.¹⁷ Resultant progress was later significantly curtailed during the Jim Crow era beginning in 1877 and lasting through the Civil Rights Movement in the 1950s.¹⁸ During the Jim Crow era, pervasive state laws sought to discourage or prevent black citizens from exercising their right to vote through poll taxes and literacy tests, and they segregated every aspect of public life leaving black people specifically and people of color generally in separate and less equal circumstances.¹⁹ Concern over this regression, as expressed in the burgeoning civil rights movement, supported the need for the federal government to have more authority to protect the civil rights guaranteed by the Reconstruction Amendments.²⁰ The Civil Rights Act of 1957 established the Civil Rights Division of the U.S. Department of Justice, which at the time focused on protecting the right to vote through direct enforcement of

15 Act to Establish the Department of Justice, ch. 150 § 5, 16 Stat. 162 (1870). 16 *Id.* 17 U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XV, § 1. See U.S. Comm'n on Civ. Rights, An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report, 2018 [hereinafter USCCR, Minority Voting] ("[i]t was not until 1924, when Congress passed the Indian Citizenship Act, that Native Americans were entitled to U.S. citizenship and voting rights (and that this entitlement did not impair the individual's right to remain a tribal member)."). See also U.S. CONST. amend. XIX (1919) (extending the right to vote to women). 18 USCCR, Minority Voting, supra note 17, at 17-18. 19 *Ibid.*, 17 n. 39. 20 *Ibid.*, 20-23. See also Patricia M. Wald, "To Feel the Great Forces": The Times of Burke Marshall, 105 Yale L.J. 611, 613-14 (1995); Drew S. Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. C.R.-C.L. L. Rev. 309, passim (1984). But cf. *infra* note 549 (former Atty General Sessions' memo discussing federalism and states' rights arguments); Joshua Thompson, Senior Attorney, Pacific Legal Foundation, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 3-4 (discussing federalism concerns in relation to voting rights and legacy desegregation cases) [hereinafter Thompson Statement].

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federal civil rights laws.²¹ The 1957 Act also provided for the creation of the bipartisan U.S. Commission on Civil Rights (the Commission), charging the Commission to investigate facts as well as federal laws and policies regarding civil rights in the U.S. and to send reports to the President and Congress.²² The 1957 Act also provided the Commission with the authority to hold hearings and receive testimony.²³ The passage of the Civil Rights Act of 1964 (the 1964 Civil Rights Act) then expanded modern federal civil rights enforcement. Title VI of this Act barred discrimination on the bases of race, color, and national origin in all federal funding, and specifically provided for an increased federal role in civil rights enforcement.²⁴ The Act charges all federal agencies that distribute federal funding with ensuring compliance.²⁵ Title VII of this Act prohibits employment discrimination on the bases of race, color, religion, sex, and national origin.²⁶ In 1966, Congress granted the United States Attorney General the authority "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."²⁷ Successive U.S. Attorneys General have widely used this statute not just to file original lawsuits on behalf of the U.S., but also to file amicus briefs and statements of interest in actions brought by private parties that concern the civil rights interests of the federal government.²⁸ In 1968, Congress passed the Civil Rights Act of 1968, and along with adding civil rights protections for Native Americans,²⁹ Title VIII added comprehensive protections and enforcement mechanisms to protect individuals from housing discrimination on the bases of race, color, religion, and national origin, with subsequent amendments that added sex, familial status, and disability status as protected classes.³⁰ During the 1960s and 1970s, the federal government made significant gains in expanding civil rights enforcement, as Congress also expanded federal protections and enforcement powers.³¹ More agencies became not only required to enforce, but more involved in enforcing civil rights law.³² In 1970, the Commission attempted to "evaluate for one moment in time the status of the entire Federal civil rights enforcement effort—to determine how effectively the Federal government as

21 See *infra* notes 372-442 (discussing the Civil Rights Division and its legal authorities). 22 The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. I, §§ 101 and 104. 23 *Id.* § 102. 24 42 U.S.C. § 2000d (1964). 24 *Id.* 25 *Id.* 26 42 U.S.C. § 2000e (1964). 27 Victor Zapana, Note, The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.-C.L. L. Rev. 227, 231 n.17 (2017) (quoting U.S.C. § 517 (2014)). 28 *Id.* at 231-234. 29 25 U.S.C. §§ 1301-1304. 30 42 U.S.C. §§ 3601-3631. 31 See U.S. Comm'n on Civil Rights, Ten-year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?, p. ix, 2002, <https://www.usccr.gov/pubs/archives/10yr02/vol2/vol2.pdf> [hereinafter USCCR, Ten-Year Check-Up Vol. II: An Evaluation]. 32 *Ibid.*

<https://www.usccr.gov/pubs/archives/10yr02/vol2/vol2.pdf>

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a whole has geared itself to carrying out civil rights responsibilities pursuant to the various constitutional, congressional, and presidential mandates which govern their activities."³³ The Commission's research "disclosed a number of inadequacies common to nearly all Federal departments and agencies—inadequacies in agency recognition of the nature and scope of their civil rights responsibilities, in the methods used to determine civil rights compliance, and in the use of enforcement techniques to eliminate noncompliance."³⁴ During the 1980s and 1990s, there were more debates about the scope and meaning of federal civil rights protections; however, enforcement continued to expand due to federal government actions as well as those of private litigants. As the Commission summarized in a previous comprehensive report on federal civil rights enforcement (issued in 2002):

Presidential executive orders and congressional actions in the 1970s and 1980s resulted in an array of government programs designed to enforce civil rights laws. For examples, the Voting Rights Act Amendments of 1975 and the Civil Rights Restoration Act of 1987 were enacted. In the 1990s, despite calls proclaiming that equality had been achieved on all fronts, the nation continued to struggle to ensure equal participation for all its citizens. However, legislative action was necessary to protect the civil rights of people with disabilities. Thus, the Americans with Disabilities Act of 1990 was passed into law.³⁵

Today, there are many civil rights laws that the various federal agencies enforce that the Commission has examined in this report, beyond what was mentioned in the brief historical background summarized above. In addition to statutory changes Congress made, federal enforcement of civil rights laws is also subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the executive branch.³⁶ At the Commission's November 2018 briefing regarding federal civil rights enforcement, the Commission heard testimony indicating that federal civil rights enforcement has changed from the Obama to the Trump Administration, as well as testimony describing what effective federal civil

33 Letter of Transmittal from Rev. Theodore M. Hesburgh, C.S.C. Chair, with fellow Commissioners and Staff Director, U.S. Comm'n on Civil Rights, to U.S. President and U.S. Congress in Federal Civil Rights Enforcement Effort: A Report, 1970, p. ii, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf> [hereinafter USCCR, Federal Civil Rights Enforcement Effort]. 34 *Ibid.* 35 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 23. 36 Olatunde C.A. Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. L. Rev. 1339, 1360-61 (2012) [hereinafter Johnson, Beyond the Private Attorney General]. See also Stephen S. Worthington, Beacon or Bludgeon? Use of Regulatory Guidance by the Office for Civil Rights, 2017 BYU Educ. & L.J. 161 (2017); see also Kate Andrias, The President's Enforcement Power, N.Y.U. L. Rev. 88, 1031-25 (2013).

<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf>

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rights enforcement should look like, untethered to a specific Presidential Administration.³⁷ The Commission's research below will study and evaluate data about how enforcement may have varied during FY 2016, FY 2017, and FY 2018.³⁸ This evaluation also provides a critical look at federal civil rights enforcement in both the Trump and Obama Administrations, with a lens toward providing recommendations regarding effective satisfaction of the relevant Constitutional protections as well as the laws Congress has enacted. The importance of the Federal Role Although civil rights law can at times be enforced by private parties or by state attorneys general, Congress has provided the broadest and most specific authority to enforce civil rights laws to federal agencies.³⁹ In their joint letter submitted for the November 2018 briefing, seventeen State Attorneys General who have been active in civil rights enforcement stated that:

These [civil rights] causes of action, with powerful remedies to redress and prevent violations that affect many people, are reserved to the federal government. If the federal government declines to enforce these laws, the states are not positioned to pick up the slack. These matters were largely committed to federal enforcement authorities by Congress.⁴⁰

The Commission's work to evaluate federal civil rights enforcement has long recognized the value of a strong federal role to ensure adequate protections for Americans across the country.⁴¹

³⁷ See, e.g., Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 1 [hereinafter Schlanger Statement] (recommending structural changes); see also Robert Driscoll, Member, McGlinchey Stafford and former Deputy Assistant Atty General, Civil Rights Division, U.S. Department of Justice, testimony, Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Washington, DC, Nov. 2, 2018, transcript, pp. 115-117 and 119-20 [hereinafter Federal Civil Rights Enforcement Briefing] (describing the continuous obligation to enforce civil rights laws). ³⁸ The federal government's Fiscal Year begins on October 1 of the preceding calendar year. Therefore, the time period studied in this report is from October 1, 2015 through September 30, 2018. ³⁹ See, e.g., 42 U.S.C. § 1983-88 (providing for private rights of action but with enhanced authority of the Attorney General); U.S. Dep't of Justice, Title VI Legal Manual (updated Mar. 18, 2019) § III, Department of Justice Role Under Title VI, <https://www.justice.gov/crt/fcs/TBmanual> (describing DOJ and other agencies' role in issuing guidance and regulations, review applications for federal funding, monitor compliance, and enforce civil rights laws against recipients) [hereinafter DOJ, Title VI Legal Manual]. See also *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966) (although the Tenth Amendment permits states to determine voting qualifications, they cannot do so in violation of the Fourteenth Amendment or any other constitutional provision). ⁴⁰ Ellen F. Rosebaum, Oregon Attorney General, joined by State Attorneys General from California, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington State, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 6 [hereinafter State Attys General Statement]. ⁴¹ See USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 16, 19-20.

11 Chapter 1: Introduction

Past Commission Reports on Federal Civil Rights Enforcement The Commission's authorizing statute requires the Commission to submit at least annual reports that monitor federal civil rights enforcement efforts in the United States.⁴² The Commission has issued various reports analyzing the efficacy of federal civil rights enforcement and offering findings and recommendations for federal agencies to improve their enforcement efforts. These reports include:

• Federal Civil Rights Enforcement Effort: A Report (1970)⁴³ • HEW and Title VI: A Report on the Development of the Organization, Policies, and

Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964 (1970)⁴⁴

• Federal Civil Rights Enforcement Effort: Seven Months Later a Report (1971)⁴⁵ • Federal Civil Rights Enforcement Effort: One Year Later (1971)⁴⁶ • Federal Civil Rights Enforcement Effort: A Report (1971)⁴⁷ • Federal Civil Rights Enforcement Effort: A Reassessment (1973)⁴⁸ • Enforcing Title IX: A Report of the U.S. Commission on Civil Rights (1980)⁴⁹ • Funding Federal Civil Rights Enforcement (1995)⁵⁰ • Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs

(1996)⁵¹ • Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights

Recommendations? Volume I: A Blueprint for Civil Rights Enforcement (2002)⁵² • Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights

Recommendations? Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation⁵³

⁴² 42 U.S.C. § 1975a(c)(1). ⁴³ USCCR, Federal Civil Rights Enforcement Effort, supra note 33. ⁴⁴ U.S. Comm'n on Civil Rights, HEW and Title VI: A Report on the Development of the Organization, Policies, and Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964, 1970, <https://babel.hathitrust.org/cgi/pt?id=uc1.b3166272;view=1up;seq=11>. ⁴⁵ U.S. Comm'n on Civil Rights, Federal Civil Rights Enforcement Effort: Seven Months Later a Report, 1971, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>. ⁴⁶ U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later, 1971, 47 *Ibid.* ⁴⁷ U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment, 1973, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>. ⁴⁸ U.S. Commission on Civil Rights, 1980, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>. ⁴⁹ USCCR, Funding Federal Civil Rights Enforcement, 1995, supra note 1. ⁵⁰ U.S. Comm'n on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs: A Report of the U.S. Commission on Civil Rights, 1996, <https://babel.hathitrust.org/cgi/pt?id=uc1.31210012722623;view=1up;seq=3> [hereinafter USCCR, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs]. ⁵¹ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1. ⁵² USCCR, Ten-Year Check-up Vol. II: An Evaluation, supra note 31.

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<https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>
<https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>
<https://babel.hathitrust.org/cgi/pt?id=uc1.31210012722623;view=1up;seq=3>

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• Funding Federal Civil Rights Enforcement: 2000-2003 (2002)⁵⁴ • Funding Federal Civil Rights Enforcement: 2004 (2003)⁵⁵ • Funding Federal Civil Rights Enforcement: The President's 2006 Request (2005)⁵⁶

These reports illustrate ongoing deficiencies in effective civil rights enforcement. What the Commission made clear in the first comprehensive report in 1970 on federal civil rights enforcement bears re-emphasizing:

[T]he inadequacies described herein have deep roots in the past. They did not originate with the current Administration, nor was there any substantial period in the past when civil rights enforcement was uniformly at a high level of effectiveness. Rather, the inadequacies are systemic to the federal bureaucracy and it is only through systemic changes that the great promises of civil rights laws will be realized.⁵⁷

While it is certain that progress has been made since the Commission's 1970 report, the present data the Commission collected from 13 agencies spanning three fiscal years and two administrations show that much work still remains to be done. Scope and Methodology This report reviews the efficacy of external (not internal) federal civil rights enforcement by the civil rights offices of 13 federal agencies.⁵⁸ External enforcement encompasses working towards compliance with federal civil rights law in programs and activities administered within the regulated community, as distinct from within the particular federal agency itself. Many civil rights statutes broadly prohibit any recipient or beneficiary of federal financial assistance from discriminating against individuals on the bases of race, color, national origin,⁵⁹ sex,⁶⁰ disability,⁶¹ or age.⁶² In the administration of these programs and activities. Relevant federal laws also prohibit

54 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement: 2000-2003, 2002, <https://www.usccr.gov/pubs/archives/crfund02/report.pdf>. 55 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement 2004, 2003, <https://babel.hathitrust.org/cgi/pt?id=osu.32437122009356;view=1up;seq=5>. 56 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement: The President's 2006 Request, 2005, <https://www.usccr.gov/pubs/archives/crfund06/crfund06.pdf>. 57 USCCR, Federal Civil Rights Enforcement Effort, supra note 33. 58 In this context, internal civil rights enforcement refers to personnel matters involving federal government staff. 59 42 U.S.C. §§ 2000d-2000d-4. 60 20 U.S.C. §§ 1681-86. 61 29 U.S.C. § 794. 62 42 U.S.C. §§ 6101-07.

<https://www.usccr.gov/pubs/archives/crfund02/report.pdf>
<https://babel.hathitrust.org/cgi/pt?id=osu.32437122009356;view=1up;seq=5>
<https://www.usccr.gov/pubs/archives/crfund06/crfund06.pdf>

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employment discrimination by private employers and state and local government entities.⁶³ In addition, many other civil rights statutes, executive orders, and regulations exist to protect individuals from discrimination in these federally funded programs and activities on various other protected bases.⁶⁴ Furthermore, other civil rights law protections apply to state and local jurisdictions or individuals and entities, including private employers, regardless of whether they receive federal funding.⁶⁵ These protections include most criminal civil rights statutes, but also some other civil rights statutes such as the Americans with Disabilities Act and the Voting Rights Act.⁶⁶ To have meaning, these statutes must be enforced (whether through voluntary or other measures), and as discussed herein, the main enforcement responsibilities pertain to the agencies of the federal government and are primarily enforced through agencies' civil rights offices.⁶⁷ The Commission therefore evaluated the external civil rights enforcement offices of the following 13 agencies:

• U.S. Department of Justice (DOJ), Civil Rights Division (CRT) • U.S. Department of Education (ED), Office for Civil Rights (ED OCR) • U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs

(OFCCP) and the Civil Rights Center (CRC) • U.S. Department of Health and Human Services (HHS), Office for Civil Rights (HHS

OCR) • U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and

Equal Opportunity (FHEO) • U.S. Equal Employment Opportunity Commission (EEOC) • U.S. Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties

(CRCL) • U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office

(EPCO) • U.S. Department of Transportation (DOT), Departmental Office of Civil Rights (DOCR)

⁶³ See, e.g., Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), 42 U.S.C. § 2000e(a) and (b) (defining "persons" as including state and local governments, and defining employers prohibited from violating civil rights protections as "any person engaged in industry affecting commerce who has fifteen or more employees"); and see U.S. Comm'n on Civil Rights, In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes, November 2019, at 9-14, <https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf> (discussing federal criminal civil rights laws applicable to individuals and state and local governments). ⁶⁴ See *infra* Legal Authority and Responsibility sections of each of the following agency chapters. ⁶⁵ See, e.g., 18 U.S.C. § 241 (Conspiracy against rights), 242 (Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs). ⁶⁶ *Id.* See, e.g., 8 U.S.C. § 1324b (Immigration and Nationality Act's anti-discrimination provision); 42 U.S.C. § 3604 (Fair Housing Act's prohibition against discrimination in sale or rental of housing); 42 U.S.C. §§ 10301 to 10702 (Voting Rights Act of 1965); 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019) (U.S. Dep't of Education's enforcement authority under the Americans with Disabilities Act, even for entities that are not recipients of federal financial assistance). ⁶⁷ See *infra* the Legal Authority and Responsibility sections of each of the following agency chapters.

<https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf>

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• U.S. Department of Veterans Affairs (VA), Office of Resolution Management (ORM) • U.S. Department of Agriculture (USDA), Office of the Assistant Secretary for Civil Rights

(OASCR) • U.S. Department of the Treasury (Treasury), Office of Civil Rights and Diversity (OCD) • U.S. Department of the Interior (Interior), Office of Civil Rights (DOI OCR)⁶⁸

The Commission sent interrogatories and document requests to each of the 13 federal civil rights offices, for which each agency provided responses and supplementary information about its scope of jurisdiction, organizational structure, budget, staffing, caseload, process of enforcement, policy directives, policy changes, and other relevant information to help measure their efficacy. The Commission reviewed and analyzed information the agencies submitted, conducted independent research, and identified some overarching themes that characterized status of federal civil rights enforcement during the fiscal years in question. For six of the agencies with the largest civil rights offices (DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC), the Commission conducted a more in-depth review to substantively evaluate the efficacy of those agencies' civil rights enforcement work. The Commission also took into account information received during a public briefing held on November 2, 2018, when the Commission received testimony from 22 expert witnesses including current and former federal civil rights enforcement officials, academic and legal experts, and advocates. The briefing was followed by a public comment session that included a state Attorney General and a representative from the office of another state Attorney General, representatives of several nonprofit advocacy groups, and members of the public who offered their perspectives on civil rights enforcement effectiveness. The Commission also received 39 written public comments from individuals, community and advocacy groups, as well as state Attorneys General. The Commission used a consistent set of factors to evaluate each of the 13 civil rights offices. These consist of three core measurement factors: First, each chapter evaluates the legal authority and responsibilities for civil rights enforcement that the civil rights office has. Second, this report evaluates the enforcement tools that each civil rights office has the authority to use. Third, each chapter examines the relevant budget and staffing levels for the civil rights enforcement offices, while also assessing the workload of each office from FY 2016 to FY 2018. The Commission then analyzes civil rights enforcement efficacy through the lens of seven components of effective civil rights enforcement, which are described below.

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Analysis of Components of Effective Civil Rights Enforcement Programs and Barriers to Effective Enforcement The agency chapters that follow present data and information for each of the 13 agencies' civil rights offices that the Commission investigated, covering the period from FY 2016 to FY 2018. Legal Authority and Responsibility, Budget and Staffing, and Enforcement Tools The first three sections of each agency chapter present the following information about each agency civil rights office:

- The legal authority and responsibility of each agency civil rights office
- The enforcement tools that each agency civil rights office has the legal authority to use
- Budget and staffing levels of each agency civil rights office

Some of the 13 federal civil rights offices have clear responsibilities with statutes and regulations stating that they "must" or "shall" enforce the law, whereas others have authority to enforce without clear responsibilities; moreover, this level of responsibility can vary depending on the particular statute. For example, a DHS regulation states that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days. Title VI regulations require that all covered agencies "shall" perform periodic compliance reviews.⁷⁰ Title VI regulations are not as clear about the timing for complaint resolutions, and instead only require that agencies try to resolve complaints in 180 days.⁷¹ The Commission's research shows that agencies generally do not meet this aspirational goal.⁷² Some agencies decreased in their satisfaction of the goal during the time period the Commission reviewed. For example, between FY 2016 and 2018, the number of complaints that the U.S. Department of Transportation was able to close within a 180-day timeframe decreased by approximately 20 percent.⁷³ Most agencies operate under federal civil rights statutes that apply only to recipients of federal funding,⁷⁴ but for example, the U.S. Department of Justice's Civil Rights Division and the U.S. Equal Employment Opportunity Commission have statutory authority to enforce civil rights laws against state and local jurisdictions, private employers, or individuals, regardless of whether they

69 For purposes of this report, all included agencies are "covered" agencies with the exception of EEOC, which is not a covered agency under Title VI. See generally 29 C.F.R. § 1691. 70 See infra note 445. See also 28 C.F.R. § 42.407. 71 See infra note 446. See also 28 C.F.R. § 42.408. 72 See infra notes 1368-76 (HHS); 1614-17 (HUD); 2207-9 (EEOC workload); 2472-81 and 2510-16 (DHS); 2715- 30 (EPA); 2906-8 (DOT); and 3234-53 (USDA). 73 See infra notes 2906-8. 74 See infra notes 372-442, 1017-1028, 1241-1272, 1447-1475, 1788-1842, 2065-2094, 2299-2326, 2620-2630, 2779-2808, 2943-3004, 3097-3118, 3288-3318, and 3421-3454 (Legal Authority and Responsibility sections of each of the following chapters).

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have received federal funding.⁷⁵ Some agencies' civil rights offices, such as DHS CRCL, DOL CRC, and DOT DOCR also have jurisdiction or responsibility to evaluate internal agency policy and actions for compliance with civil rights laws, on behalf of the public.⁷⁶ (For further information, see Legal Authority and Responsibility in each of the following chapters.) Regarding budget and staffing, for each of the agencies herein, the report examines the degree to which current budgets and staffing allow the offices to perform their statutory and regulatory functions. For some agencies, the report also evaluates the management practices in place in the offices to determine whether these practices are sufficient to meet the volume of civil rights issues within the civil rights offices' jurisdiction. (For further information, see Tables 1.2, 1.3 and 1.4 and subsequent analysis in this chapter, as well as the more specific Budget and Staffing sections in each of the following chapters.) Regarding enforcement tools, Congress has charged federal agencies' civil rights offices with receiving and processing civil rights complaints, engaging in compliance monitoring, providing policy guidance and issuing regulations, and other enforcement activities such as coordination with other agencies and litigation in federal court.⁷⁷ University of Michigan Law Professor Margo Schlanger, who is also the former head of DHS CRCL, has written that the power and authority of civil rights offices often differ, as some have enforcement power and some may only provide recommendations.⁷⁸ Civil rights offices have a number of tools available to them that are preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting).⁷⁹

75 See, e.g., U.S. Dep't of Justice, Civil Rights Division, Jurisdiction, infra notes 372-442. For example, the Voting Rights Act provides for federal enforcement authority with regard to state and local entities, whether or not they receive federal funding, and Section 11(b) provides for jurisdiction over persons who intentionally interfere with the right to vote. 52 U.S.C. § 10301 (jurisdiction over state and local jurisdictions); 52 U.S.C. § 10308 (civil and criminal sanctions against "whoever" deprives or attempts to deprive any person of the right to vote). Another example is that the Department of Education's Office for Civil Rights jointly enforces the Americans with Disabilities Act, regardless of whether the entity in question received federal funds. 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019); see also, e.g., Equal Employment Opportunity Comm'n, Legal Authority and Responsibility Section at infra notes 2067-2094. 76 See U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Legal Authority and Responsibility Section at infra notes 2299-2326. 77 See, e.g. Education Authorization Act (authorizing OCR at ED— Section 203(c)(2) of the Dept of Educ. Organization Act, 20 U.S.C. § 3413, Pub. L. 96-88, 93 Stat. 668 states: "There shall be in the Department an Office for Civil Rights" and "the Secretary shall delegate to the Assistant Secretary for Civil Rights all functions, other than administrative and support functions, transferred to the Secretary under section 301(a)(3).". See also Arne Duncan, Former Sec'y of Educ., Dep't of Educ., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 n.5 [hereinafter Duncan Statement]; The Homeland Security Act of 2002, 6 U.S.C. § 345(a)(4), Pub. L. 107-296, § 705(a)(1), 116 Stat. 2135, 2220 (2002). 78 Margo Schlanger, Commentary, Offices of Goodness: Influence Without Authority in Federal Agencies, 36 Cardozo L. Rev. 2, 85 (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322797 [hereinafter Schlanger, Offices of Goodness]. 79 Id. at 92-101.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322797

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The Commission developed a universal list of existing potentially available federal civil rights enforcement tools, in order to establish a basis for evaluation of each agency. This universal list appears in each agency chapter, with the Commission's research evaluating whether the agency has specific legal authority (based on federal law or regulation or Executive Order) to use each of the tools on this list. This authority may be delegated from the agency head. The universal list evaluates whether the agency civil rights office has specific legal authority for:

- Complaint Resolution – to receive, investigate, and resolve civil rights complaints that allege violations of the civil rights laws that the agency civil rights office enforces.
- Agency-Initiated Charges – to initiate enforcement actions that are not in response to the filing of a complaint.
- Litigation – to pursue litigation as a means of resolving a complaint of discrimination. While some agencies have legal authority to refer complaints to DOJ for litigation, the Commission interpreted this particular enforcement tool to authorize the agency civil rights office the power to litigate in court independently of DOJ or any other agency, outside of the framework of its administrative process of complaint resolution.
- Proactive Compliance Reviews or Evaluations – to initiate compliance reviews for recipients or contractors in order to monitor compliance with the civil rights laws that the agency civil rights office enforces.
- Testing – to conduct undercover testing by sending individuals to apply for services or benefits and gather objective information about an entity's business practices or compliance with the civil rights laws that the agency enforces.
- Observation – to assign staff to observe as a means to assess whether a process has run in compliance with the civil rights laws that the agency civil rights office enforces.
- Issuance of Policy Guidance – to issue and disseminate policy guidance • Issuance of Regulations – to issue regulations through the formal rulemaking process. • Technical Assistance – to advise recipients or contractors about how to achieve compliance

with the civil rights laws that the agency civil rights office enforces in specific fact circumstances.

- Publicity – to publicize information, including complaint resolutions, litigation, or policy directives.
- Community outreach to stakeholders – to conduct outreach, particularly to educate recipients, contractors, or the general public about their rights and responsibilities under the civil rights laws that the agency civil rights office enforces.
- Research, data collection, and reporting – to conduct civil rights research, collect data, and issue reports to publicize any research and data conducted, relevant to the laws and protections offered under the civil rights laws that it enforces.
- Collaboration with states/local agencies – to collaborate or partner with states or local agencies with regard to enforcing the civil rights laws within its jurisdiction.
- Collaboration with other federal agencies – to collaborate or partner with federal agencies with regard to enforcing the civil rights laws within its jurisdiction.

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- Strategic Plan – to issue a strategic plan that outlines specific civil rights enforcement goals and priorities for enforcing the civil rights laws under its jurisdiction.
- Annual reports – to issue an annual report that charts the agency civil rights office's progress in enforcing the civil rights laws under its jurisdiction.

The Commission notes that the information presented in this section only documents the agency civil rights office's specific legal authority or obligation to use each of the enforcement tools listed and does not detail whether the agency actively utilizes these particular tools. Moreover, whether or not an agency has specific legal authority, it may still actively utilize some of the tools on this universal list. For example, a civil rights office may not have specific legal authority to send federal observers, but as part of its activities, it may send staff or consultants to observe whether a regulated entity is in compliance. Such further analysis is presented within each of the following chapters. The agencies' civil rights offices examined have the following set of specific legal authorities:

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Table 1.1: Specific Legal Authorities for Civil Rights Enforcement Tools Enforcement Tools DOJ ED HHS HUD

	DOJ	ED	HHS	HUD
DOL OFCCP				
DOL CRC EEOC DHS EPA DOT VA USDA Treasury Interior				
Complaint Resolution	X	X	X	X
Agency- initiated Charges	X	X	X	X
Litigation	X	X		
Proactive Compliance Evaluations	X	X	X	X
Testing	X	X	X	X
Observation	X			
Guidance or Other Policy Docs	X	X	X	X
Regulations	X	X	X	X
Technical Assistance	X	X	X	X
Publicity	X	X	X	X
Outreach	X	X	X	X
Research, Data Collection, and Reporting	X	X	X	X
Collaboration w/State and Local Agencies	X	X	X	X

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Collaboration w/Other Federal Agencies X X X X X

X X X X X X X X X

Strategic Planning X X X X X

X X X X X X X X X

Annual Reports X X X X X

X X X X X X X X X

SOURCE: Commission Staff Research (see citations in each chapter)

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Seven Essential Elements of Effective Federal Civil Rights Enforcement Each agency chapter also includes an analysis of the data presented and research regarding what the Commission has determined to be essential elements of effective federal civil rights enforcement. These are:

1. Prioritization for Civil Rights Agency-Wide 2. Strategic Planning and Self-Evaluation 3. Complaint Processing, Agency-Initiated Charges, and Litigation 4. Proactive Compliance Evaluation 5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education,

Outreach, and Publicity 6. Interaction and Coordination with External Agencies and Organizations 7. Research, Data Collection, and Reporting

The Commission identified these components based on the Commission's body of work in this field over six decades, investigating and reporting on federal civil rights enforcement effectiveness. As charged by Congress, the Commission has routinely evaluated federal civil rights enforcement and determined that there are many components to an effective civil rights enforcement program.⁸⁰ As early as 1970, the Commission determined that key components included prioritization of civil rights, effective methods to determine compliance, and effective enforcement techniques.⁸¹ For the current report, the Commission relies mainly on factors identified in a 2002 Commission report, which is the Commission's most recent, before now, comprehensive cross-federal agency evaluation of civil rights enforcement. In that report, the Commission brought together the recommendations from 16 prior Commission reports evaluating 11 different agencies over the course of the previous decade. The Commission thus had a great deal of data based on past reports about the 11 agencies studied, and the Commission used that comprehensive dataset to analyze comparative and overarching factors or elements of effective civil rights performance.⁸² Specifically, the Commission reviewed the over 1,100 recommendations the Commission had made regarding those 11 agencies over time and evaluated whether the agencies had implemented them.⁸³ Drawing on these conclusions from those 11 agency reports, the Commission found that: Without establishing priority of civil rights and gaining sufficient funding and staffing, federal agencies will struggle to even implement a civil rights enforcement system. However, once the priority of civil rights is recognized and resources are provided, the agency must implement civil

rights planning, policy guidance and regulations, technical assistance, education and outreach, a complaint processing system, a compliance review system for federal funding recipients, and staff training.⁸⁴ The Commission recognized that these elements would only provide the "basic components" of a civil rights enforcement office. "Superior" enforcement offices, then, would optimize their efficacy by "integrating [civil rights enforcement] throughout the agency, delegating responsibility, establishing oversight for others performing civil rights responsibilities, coordinating civil rights enforcement activities with other federal agencies, streamlining them, and involving the affected community in their development."⁸⁵ Against this backdrop, the Commission evaluated federal civil rights enforcement during FY 2016 through FY 2018. Commission research indicates that some civil rights enforcement offices determined that their enforcement tools should be selectively used in order to best solve the precise civil rights problems at hand.⁸⁶ At the Commission's briefing, Leon Rodriguez, Partner at Seyfarth Shaw and former Director of HHS OCR, affirmed that "[a]fter many years in various prosecutorial and government leadership positions, I came to my role at [HHS] OCR with a hard-earned understanding that compliance is best promoted by use of all the tools at our disposal: enforcement, education, engagement and audit."⁸⁷ But Curt Decker, who leads National Disability Rights Network, underscored the importance of enforcement: "Enforcement is what ensures that the rights of all people are respected and implemented, especially for those who are disadvantaged and in the minority. Without vigorous oversight and enforcement efforts led by the federal government, alongside private entities, these rights have no value or meaning."⁸⁸ In 2002, the Commission also developed a Checklist for Evaluating Federal Agencies' Civil Rights Enforcement.⁸⁹ Many of the items on the checklist continue to be relevant and are included in various parts of the current report below.⁹⁰ The data the Commission collected for the current study—based upon testimony, interrogatories, document requests, and independent research of 13 agencies—is more limited than the data evaluated in 2002, when the Commission had greater

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80 42 U.S.C. § 1975a; see also supra notes 43-56 (bullet point list of major prior commission reports). 81 USCCR, Federal Civil Rights Enforcement Effort, supra note 33. 82 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at iv. 83 Ibid. (The agencies were: the Equal Opportunity Employment Commission, the Departments of Justice, Education, Health and Human Serv's, Hous. and Urban Dev., Labor, Transportation, Agriculture, and the Interior, the Environmental Protection Agency, and the Small Business Administration.)

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84 Ibid., 46. 85 Ibid. 86 See infra notes 1534-5 (HUD); 1931-1933 (DOL); and 2479-2487 (DHS). 87 Leon Rodriguez, Former Director, U.S. Dep't of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Rodriguez Statement]. 88 Curtis L. Decker, Executive Director, National Disability Rights Network, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 1. 89 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 73-78 (Appendix C). 90 Some of the items on the checklist are not as relevant to the current study. In this category are factors such as whether Congress has expanded agencies' civil rights responsibilities (it has typically not since 2002), along with factors that represent the level of detail that was possible considering the 2002 data based on 11 separate agency reports, as well as Commission resources. However, comparing the 2002 checklist, the main categories are included in the Commission's current analysis below.

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resources. Nonetheless, the research herein demonstrates that the seven key factors of effective civil rights enforcement that the Commission identified in 2002 remain applicable today. In establishing and evaluating these factors, the Commission contributes to a critical evaluation of what effective federal civil rights enforcement entails. Shared consensus around this issue is difficult to maintain, as priorities ebb and flow with the changing political environment. Margo Schlanger, Law Professor at the University of Michigan and former Officer of DHS CRCL testified that the office she formerly led requires structural changes in order to effectively fulfill its congressional mandate.⁹¹ Robert Driscoll, former Deputy Assistant Attorney General, argued that federal civil rights enforcement functions effectively as per its various legal mandates.⁹² Fatima Goss-Graves, President and CEO of the National Women's Law Center, recommended recalling a shared moral consensus in the absence of a shared enforcement consensus:

[O]ne of the things that I think would be really useful right now is to have, either together or separately, the heads of each of the civil rights enforcement agencies communicate very strongly the values around why they're in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative.⁹³

The Degree to Which the Relevant Agency Prioritizes Civil Rights Agency-Wide Factors that can indicate an agency's prioritization of civil rights include the placement of the civil rights enforcement office in the agency, the structure of the enforcement office itself, whether the agency conducts strategic planning with civil rights objectives, whether an agency conducts self- evaluations on the expenditures and staffing needed for civil rights responsibilities, how much enforcement authority the office has, and critically, the resources (in funding and staffing) dedicated to civil rights enforcement.⁹⁴

91 Schlanger Statement, at 1-5. 92 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, pp. 115-17. 93 Fatima Goss Graves, President and CEO, National Women's Law Center, Federal Civil Rights Enforcement Briefing, Testimony, pp. 193-94. 94 Ibid., 66-70; see also Duncan Statement, Aderson Francois, Professor of Law and Director of Institute for Public Representation, Civil Rights Clinic, at Georgetown University Law Center, testimony, Federal Civil Rights Enforcement Briefing, pp. 226-27; Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep't of Hous. and Urban Dev., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Greene Statement].

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Whether the civil rights enforcement office head has a direct line of communication with the head of the agency can speak to the level of influence that the civil rights enforcement office has over the actions of the agency overall. The Commission, in its 2002 evaluation of federal civil rights enforcement across multiple agencies, found that civil rights offices in several agencies "were often void of clear authority, responsibility, and accountability."⁹⁵ The evaluation explained:

Whether authority for civil rights activities was centralized in one office or distributed throughout several, civil rights personnel often had no direct line of authority to the Department Secretary or agency head. The organizational placement of the office and staff in charge of civil rights often impaired the staff's ability to gain the funding and resources needed to carry out the office mission and failed to provide the office the authority to ensure that civil rights concerns were fully integrated into all departmental or agency programs.⁹⁶

The Commission recommended in 2002 that federal agencies "should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency."⁹⁷ Further, regarding effective organizational structure, the Commission stated that: "The first element to foster civil rights enforcement is a primary civil rights office organizationally placed to ensure primacy within the agency. One way to achieve this primacy is for the civil rights unit to have a direct line of authority to the departmental Secretary or agency head."⁹⁸ Many agencies place the civil rights enforcement office to report directly to the Secretary of the agency. For instance, HHS OCR reports to the Office of the Secretary of HHS;⁹⁹ similarly, ED OCR reports to the Office of the Secretary¹⁰⁰ and at the U.S. Department of Transportation, the Director of the Departmental Office of Civil Rights acts as the "designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation."¹⁰¹ This is also true of the Officer of Civil Rights and Civil Liberties of the U.S. Department of Homeland Security.¹⁰² However, other agencies place the enforcement office as one of several subcomponents of a larger office dedicated to equal opportunity, diversity, and inclusion, without a direct line or reporting to the Secretary or agency head. For instance, at Treasury, the External Civil Rights program, led by a Civil Rights Program Manager, is housed within Treasury's Office of Civil Rights and Diversity.¹⁰³ The Civil Rights Program Manager reports to the Office of Civil Rights and Diversity Director and Deputy Director, who reports to the Assistant Secretary for Management, who reports

95 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. 96 Ibid. 97 Ibid. 98 Ibid., 13. 99 42 U.S.C. § 3501; 45 C.F.R. § 80.1. 100 Dep't of Educ. Organization Act, Section 203(c)(2); see also Duncan Statement, at 2. 101 U.S. Dep't of Transportation, "About DOCR," <https://www.transportation.gov/civil-rights/about-docr> [hereinafter DOT, "About DOCR"]. 102 See infra notes 2350-2353. 103 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

<https://www.transportation.gov/civil-rights/about-docr>

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to the Treasury Secretary.¹⁰⁴ And at EPA, ECRCO is located within the office of and reports to the General Counsel of the agency.¹⁰⁵ At DOJ, each of the sections of the Civil Rights Division reports through the Assistant Attorney General for Civil Rights, and the Assistant Attorney General for Civil Rights reports to an Associate Attorney General and not to the Attorney General herself or himself.¹⁰⁶ Former Secretary of Education Arne Duncan testified to the Commission that he included the Assistant Secretary for Civil Rights (the lead civil rights enforcer at ED OCR) as part of his "executive team."¹⁰⁷ To Duncan, prioritizing civil rights among the agency executive team resulted in the prioritization of civil rights, and civil rights enforcement, as a core mission of the agency, signaling internally and externally how valued the work is.¹⁰⁸ Robert Driscoll testified similarly, stating that it "always pays to have experienced civil rights enforcers in the room when you're making decisions, even policy decisions, so that they can add that perspective."¹⁰⁹ However, the DOJ Civil Rights Division does not report directly to the agency head.¹¹⁰ Leon Rodriguez discussed the incorporation of civil rights enforcement with the agency mission: "As [HHS] Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another."¹¹¹ Rodriguez went on to use the example of language access in health care services as demonstrative of this alignment in mission: "When doctors and patients, when healthcare providers and patients do not communicate effectively, people die, people get inferior healthcare. And so it's the same thing as the mission of the Department of Health and Human Services' mission. It is to improve the health status access to social services to all Americans."¹¹² Critically, particularly given the resource-starved nature of most enforcement offices, Rodriguez testified that he believes that making civil rights a priority is "zero dollars. That's free. That's just making a commitment."¹¹³ Some agency enforcement offices are working towards a higher-level integration of civil rights enforcement. Winona Lake Scott, Acting Deputy Assistant Secretary of USDA OASCR, testified to the Commission that one of the agency priorities at USDA was to "elevat[e] the reporting

104 Ibid., 10; U.S. Dep't of the Treasury, "About," <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>. 105 See U.S. Environmental Protection Agency chapter, infra notes 2620-2779; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. 106 U.S. Dep't of Justice, "Organizational Chart," <https://www.justice.gov/agencies/chart> (accessed May 17, 2016) [hereinafter DOJ, "Organizational Chart"]. 107 Arne Duncan, Former Sec'y of Educ. at the Dep't of Educ., current Managing Partner of Emerson Collective, testimony, Federal Civil Rights Enforcement Briefing, p. 76; see also Duncan Statement, at 1. 108 Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 75. 109 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 147. 110 See infra note 464. 111 Leon Rodriguez, Former Director, U.S. Dep't of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, testimony, Federal Civil Rights Enforcement, p. 44. 112 Ibid., 45. 113 Ibid., 91.

<https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>

<https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>

<https://www.justice.gov/agencies/chart>

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structure of civil rights functions to the mission area level” and “strengthen[] the role of [her] office in providing supervision to the mission area civil rights functions.”¹¹⁴ And as one former HUD official noted, “[T]he enforcement of civil rights law through civil rights divisions of various agencies . . . is only one aspect of protecting or advancing civil rights. It is also critical to look deeply at how agencies enforce and advance civil rights in the implementation of their programs, the programmatic side, not the civil right[s] side.”¹¹⁵ Relatedly, the structure of the civil rights offices studied varies widely across different agencies. Some of the larger offices have a headquarters office focused on policy development and management with some enforcement staff, with regional offices placed around the country to handle enforcement cases in those geographic areas. ED OCR, 116 HHS OCR, 117 EEOC, 118 HUD FHEO, 119 and DOL OFCCP¹²⁰ all follow this model, for example. In addition to the enforcement offices supervised by leadership from headquarters, some agencies also fund outside organizations (state and local agencies, or state and local non-governmental organizations) to handle some cases. HUD FHEO¹²¹ and EEOC¹²² both utilize this model. This model offers the benefit of increasing the number of complaints that can be addressed in the subject area jurisdiction of these agencies (housing and employment, respectively), but as both agencies testified to the Commission, outsourcing this work also requires greater coordination for consistent enforcement.¹²³ Establishing coordination amongst these outside entities was one of the top five priority areas HUD FHEO highlighted in its testimony to the Commission.¹²⁴ EPA ECRCO appears to be setting up a similar program in its office, with the Cooperative Federalism initiative, which is a pilot project that will initiate partnerships with EPA Regional Offices to “engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other

¹¹⁴ Winona Lake Scott, Associate Assistant Secretary for Civil Rights, U.S. Dep’t of Agriculture, testimony, Federal Civil Rights Enforcement Briefing, p. 106. As discussed in the chapter specific to USDA, this effort to change and strengthen the civil rights office role at USDA appears to be ongoing and still to deviate in practice from the aspiration of the goal. ¹¹⁵ Barbara Sard, Former Senior Advisor on Rental Assistance, U.S. Dep’t of Hous. and Urban Dev., testimony, The Role of the Federal Government in Protecting Your Civil Rights Panel Hearing at American Univ. Washington College of Law, Oct. 26, 2018, transcript (submitted as public comment to the Commission), p. 69. ¹¹⁶ U.S. Dep’t of Educ., “About OCR,” <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (accessed May 24, 2019) [hereinafter ED, “About OCR”]. ¹¹⁷ U.S. Dep’t of Health and Human Services, “Regional Offices,” <https://www.hhs.gov/about/agencies/iea/regional-offices/index.html> (last accessed May 24, 2019). ¹¹⁸ Equal Employment Opportunity Comm’n, “EEOC Office List and Jurisdictional Map,” (accessed May 24, 2019). <https://www.eeoc.gov/field/> ¹¹⁹ U.S. Dep’t of Hous. and Urban Dev., “Contact FHEO,” https://www.hud.gov/program_offices/fair_housing_equal_opp/contact_fheo (accessed May 24, 2019). ¹²⁰ U.S. Dep’t of Labor, “OFCCP Key Personnel – Regional Offices,” <https://www.dol.gov/ofccp/contacts/regkey.htm> (accessed May 24, 2019). ¹²¹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 3-5. ¹²² Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, pp. 1-3. ¹²³ Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep’t of Hous. and Urban Dev., testimony, Federal Civil Rights Enforcement Briefing, p. 74; Carol Miaskoff, Acting Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Comm’n, testimony, Federal Civil Rights Enforcement Briefing, p. 74. ¹²⁴ Greene Statement, at 3.

<https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>
<https://www.hhs.gov/about/agencies/iea/regional-offices/index.html>
<https://www.hhs.gov/about/agencies/iea/regional-offices/index.html>
<https://www.eeoc.gov/field/>
https://www.hud.gov/program_offices/fair_housing_equal_opp/contact_fheo
<https://www.dol.gov/ofccp/contacts/regkey.htm>

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states could model.”¹²⁵ ECRCO reports that once these programs are in place and effectively implemented at the state level, “many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs.”¹²⁶ In 2002, the Commission recommended that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions. Accordingly, these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”¹²⁷ Not all civil rights offices maintain this recommended separation. For example, the current organizational chart of Treasury’s Office of Civil Rights and Diversity shows that external and internal civil rights enforcement have been essentially combined.¹²⁸ Similarly, DOL CRC combines internal and external civil rights enforcement functions into one office.¹²⁹ Another critical factor for assessing an agency’s prioritization of civil rights is the authority the enforcement office exercises over the rest of the agency, any office subcomponents, funding recipients and other persons or entities, or other federal agencies. Some agencies’ civil rights enforcement offices are imbued with independent authority to enforce the civil rights laws under their jurisdiction, while other offices are limited to advisory authority only to influence compliance with civil rights laws. For instance, the Fair Housing Act gives HUD the direct authority to administer and enforce the provisions of that law,¹³⁰ though this authority does not extend to actions by other executive branch agencies.¹³¹ On the other end of the spectrum, DHS CRCL “lacks authority either to prosecute or to discipline” other agency components and therefore their complaint handling is meant to provide a “foundation” for “systematic recommendations.”¹³² This is despite Congress’ providing DHS CRCL with authority to review agency policy before it is implemented.¹³³ Professor Schlanger believes that there are other factors needed to maximize efficacy. In her testimony before the Commission, she stated that civil rights offices need to have both influence within the agency and commitment, both of which depend heavily on external reinforcement, and noted that these offices “exist to bring into their agencies not just a value that is not primary, but one that constrains or even conflicts with the agency’s *raison d’être*” . . . and these offices face

¹²⁵ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. ¹²⁶ *Ibid.* ¹²⁷ USCCR, Ten-Year Check-Up: Volume 1, *supra* note 1, at 47. ¹²⁸ U.S. Dep’t of the Treasury, Response to USCCR Document Request No. 2, p. 21 (referencing their attachment of this chart). ¹²⁹ See *infra* note 1615. ¹³⁰ 42 U.S.C. § 3606 and supporting regulations, discussed *infra* at Chapter 4. ¹³¹ See Authority of Department of Hous. and Urban Dev. to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, 18 Op. O.L.C. 101 (1994). ¹³² Schlanger, Offices of Goodness, *supra* note 78, at 98-99 (also noting that CRCL does have enforcement authority for disability complaints brought under Section 504 of the Rehabilitation Act). ¹³³ See *infra* notes 2360-2366 (discussing purposes of this authority under the Homeland Security Act).

<https://www.justice.gov/file/20346/download>
<https://www.justice.gov/file/20346/download>

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“continual pressure to slide into disempowered irrelevance or to be tamed by capture or assimilation.”¹³⁴ Therefore, these civil rights offices’ tools “must be carefully prepared, and its influence and commitment purposefully produced and maintained.”¹³⁵ She added that, in order to be effective, civil rights offices also need:

- Information • Right of consultation • A voice external to the agency • Adequate resources • The ability to safeguard their own investigations.¹³⁶

Robert Driscoll asserted in his testimony before the Commission that federal civil rights enforcement should be a law enforcement function, not a partisan endeavor, explaining:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It’s not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice. . . . [I]t is important to recognize that some of the most important work, civil rights work that is done in the country has nothing to do with our political differences but, rather, rule of law that tries to make our intellectual agreements, statutory promises, and constitutional convictions a reality for all of us.¹³⁷

Also during the Commission’s briefing, Joshua Thompson, a senior attorney at the Pacific Legal Foundation, asserted what he believes to be “unintended consequences” stemming from the “over- enforcement” of civil rights laws.¹³⁸ He contended that disparate impact regulations under Title VI lead to discrimination against traditionally targeted communities when over-enforced.¹³⁹ In

¹³⁴ Schlanger, Offices of Goodness, *supra* note 78, at 103-104. ¹³⁵ *Id.* at 117. ¹³⁶ Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School, testimony, Federal Civil Rights Enforcement Briefing, p. 247. ¹³⁷ Driscoll Testimony, Federal Civil Rights Enforcement Briefing, pp. 115-17. Driscoll has elsewhere published recommendation that “an affirmative civil-rights agenda, one that is consistent with conservative principles, can and should be pursued . . . for the good of the nation.” Robert N. Driscoll, This is What a Trump Civil-Rights Agenda Should Look Like, National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>. See also John Yang, President and Executive Director, Asian Americans Advancing Justice | AAJC, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 3 (“We expect civil rights enforcement offices to investigate complaints of civil rights violations and act to enforce civil rights laws, not selectively but across the board.”). ¹³⁸ Joshua Thompson, Senior Atty, Pacific Legal Foundation, Testimony, Federal Civil Rights Enforcement Briefing, p. 174. ¹³⁹ *Ibid.*, 174-75.

<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>
<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>

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addition, Thompson stated that “continued enforcement of ‘zombie’ desegregation orders comes with significant costs.”¹⁴⁰ He went on to argue that: “As the Commission evaluates the best ways to maximize the benefits of civil rights enforcement, it should be mindful of focusing resources on non-mandated disparate impact regulations under Title VI as well as the decades-old desegregation orders that often work to the detriment of the nation’s most needy children.”¹⁴¹ The Commission notes that Thompson later acknowledged that the federal government is obliged to enforce disparate impact regulations, undermining Thompson’s own description of the law quoted here.¹⁴² However, the Commission’s research also shows that unless agencies have sufficient resources to enforce all civil rights laws over which they have jurisdiction evenly,¹⁴³ then agencies will have incentive to use resources selectively to maximize efficiencies. The Commission received further testimony from Arne Duncan and Leon Rodriguez on these points. Duncan said in his written testimony that he thinks it is an “impossible task” to prioritize some civil rights issues over others because “picking one or a handful of issues to focus on” communicates inappropriately that the other issues in an agency’s jurisdiction are less important.¹⁴⁴ But Rodriguez testified in writing and orally about leading his staff to prioritize; and written testimony from Bryan Greene, who at the time of his testimony was the General Deputy Assistant Secretary of HUD FHEO, included specific agency priorities. Consistent with that preference for prioritization within HUD, Kim Kendrick, former Assistant Secretary of HUD FHEO, testified that, in retrospect, she wishes she had prioritized systemic remedies over focusing on the number of complaints filed each year.¹⁴⁵ The Commission’s decades of research show that civil rights enforcement offices have been inadequately funded, with negative impacts on their ability to enforce civil rights law. In 2002, the Commission reported that nearly 10 percent of its 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources.¹⁴⁶ The Commission also consistently found a need to increase staffing for civil rights enforcement.¹⁴⁷ In 2002, the Commission found that:

Commission reviews of civil rights implementation, compliance, and enforcement at several agencies over the past decade revealed a system that was often unequal

¹⁴⁰ *Ibid.*, 179. ¹⁴¹ *Ibid.*, 179. ¹⁴² In fact, Thompson later stated that the federal government is obliged to enforce disparate impact regulations. See *infra* note 1043 (“In his written statement, Thompson acknowledged that the current DOJ enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool.”). ¹⁴³ See *infra* notes 1530-4, 1546-58, 1928-33 and 2475-84 (regarding budget limitations forcing agencies to selectively enforce civil rights protections). ¹⁴⁴ Duncan Statement, at 2. ¹⁴⁵ Kim Kendrick, Former Assistant Sec’y for Fair Hous. and Equal Opportunity, U.S. Dep’t of Hous. and Urban Dev., Current Partner, Leftwich LLC, Testimony, Federal Civil Rights Enforcement Briefing, p. 238. ¹⁴⁶ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 11. ¹⁴⁷ *Ibid.*, 11-12.

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to the task. The greatest hindrances to fulfilling the civil rights obligations were insufficient funding and inefficient, thus ineffective, use of available funds.¹⁴⁸

The Commission therefore recommended in 2002 that Congress allocate more funding and resources for civil rights enforcement activities.¹⁴⁹ The Commission’s current research shows that budgets and staffing of civil rights enforcement offices vary widely among different agencies, and based on the data the Commission reviewed, some are insufficiently resourced. See Tables 1.2, 1.3, and 1.4.

¹⁴⁸ *Ibid.*, 46, Finding 1.1. ¹⁴⁹ *Ibid.*, 46, Recommendation 1.1.

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Table 1.2. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2016

Agency Budget Requested

Budget Appropriated

Employees+ Number of complaints received*

DOJ Civil Rights Division

\$175.00 \$148.20 606 N/A

ED OCR \$130.69 \$107.00 563 16,720 HHS OCR++ \$42.70 \$38.79 243 4,380 HUD FHEO \$152.10 \$135.52 484 8,460

DOL OFCCP \$113.68 \$105.47 581 588 1,696*

DOL CRC \$7.99 \$6.88 13 613 EEOC \$373.11 \$364.50 2,202 91,503** DHS CRCL \$20.95 \$21.80 85 3,067

EPA ECRCO¹⁵⁰ Not available

\$2.02 11.5 31

DOT DOCR \$9.67 \$9.67 30 342

VA ORM \$43.70 \$43.70 296 28 USDA OASCR† \$24.44 \$24.07 36 413

Treasury OCRD Not available

\$0.27 2 31

DOI OCR† \$3.41 \$3.45 3 47 TOTAL \$1,097.44 \$1,011.34 5,155.5

SOURCE: documented in subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP's primary enforcement mechanism is compliance evaluations, so the numbers reflected in the "number of complaints received" column reflect the number of complaints received (top number) and the number of compliance reviews completed (bottom number) by OFCCP. **Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs. DOJ did not provide the Commission with information about number of complaints received and only stated that it receives "thousands of complaints each year." Moreover, DOJ CRT primarily uses agency-initiated charges to enforce the civil rights laws under its jurisdiction.

150 EPA ECRCO was created in 2016, after a restructuring of the former Office of Civil Rights. See infra Chapter 9 on EPA; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

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Table 1.3. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2017

Agency Budget Requested

Budget Appropriated

Employees+ Number of complaints received*

DOJ Civil Rights Division

\$155.60 \$148.00 606

ED OCR \$137.70 \$108.50 579 12,837 HHS OCR++ \$42.70 \$38.70 243 6,469 HUD FHEO \$144.23 \$136.52 496 8,262

DOL OFCCP \$114.16 \$104.47 563 686 1,142*

DOL CRC \$8.04 \$6.88 13 733 EEOC \$376.64 \$364.50 2,082 84,254** DHS CRCL \$21.40 \$22.57 86 3,523

EPA ECRCO Not available \$2.28 12.5 25

DOT DOCR† \$9.75 \$9.75 30 288

VA ORM† \$47.68 \$47.68 296 63 USDA OASCR† \$24.75 \$24.20 36 403 Treasury OCRD Not available \$0.44 3 30 DOI OCR† \$3.48 Not available 3 24 TOTAL 1,086.13 1,014.49 5,048.5

SOURCE: documented in subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP's primary enforcement mechanism is compliance evaluations, so the number reflected in the "number of complaints received" column reflects the number of compliance reviews received by OFCCP. **Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs.

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Table 1.4. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2018

Agency Budget Requested

Budget Appropriated

Employees+ Number of complaints received*

DOJ Civil Rights Division

\$148.10 \$147.20 593

ED OCR \$106.79 \$117.00 529 12,435 HHS OCR++ \$32.53 \$38.79 243 7,692 HUD FHEO \$135.10 \$134.64 484 7,781

DOL OFCCP \$88.00 \$103.47 508 1,418 *812

DOL CRC \$6.86 \$6.88 14 670 EEOC \$363.80 \$379.50 1,968 76,418**

DHS CRCL \$21.96 \$23.57 93 (projected) 1,477 (as of April 11, 2018)

EPA ECRCO \$2.19 12 15 DOT DOCR† \$9.50 \$9.50 30 332 VA ORM† \$0.00 \$47.68 296 28

USDA OASCR† \$23.30 \$24.04 36 405

Treasury OCRD Not available \$0.51 3 18 (as of March 9, 2018)

DOI OCR† Not available Not available 2 20 TOTAL \$935.94 \$1,034.87 4,816

SOURCE: subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP's primary enforcement mechanism is compliance evaluations, so the number reflected in the "number of complaints received" column reflects the number of compliance reviews received by OFCCP. **Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs.

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For federal agencies' civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data, 151 nine agencies' budget requests for their civil rights offices experienced an overall decrease from FY 2016 to FY 2018. 152 These were: DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP and CRC, EEOC, DOT DOCR, VA ORM, and USDA OASCR. DHS' Office for Civil Rights and Civil Liberties was the only civil rights office that saw an overall increase in the requested budget amount from FY 2016 to FY 2018. The Commission did not obtain data on the budget requests for EPA ECRCO, Treasury, and DOI OCR for the fiscal years in question. For federal agencies' civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data, four federal agencies experienced overall decreases in their allocated budgets for their civil rights offices from FY 2016 to FY 2018. These agencies were DOJ CRT, HUD FHEO, DOL OFCCP, and DOT DOCR. Seven agencies' (ED OCR, EEOC, DHS CRCL, EPA ECRCO, VA ORM, USDA OASCR, and Treasury) allocated budgets increased during fiscal years 2016 to 2018. DOL CRCL's and HHS OCR's allocated budgets overall remained relatively constant during that period of time. 153 The Commission did not obtain data on the budget allocations for DOI OCR. For federal agencies' civil rights offices for which the Commission was able to obtain complete staffing data, five agencies' civil rights offices experienced overall decreases in staffing levels from FY 2016 to FY 2018. 154 These agencies included DOJ CRT, ED OCR, DOL OFCCP, EEOC, DOI OCR. Four agencies' civil rights offices (DOL CRC, DHS CRCL (projected), EPA ECRCO, and Treasury OCRD) experienced overall increases in staffing levels from FY 2016 to FY 2018.

151 The Commission sent interrogatories to each agency and requested budget data, including the requested and allocated budget amounts for FY 2016, FY 2017, and FY 2018. Some agencies were not able to offer information about their budget requests for the fiscal years in question. The individual agency chapters describe the individual agencies' budgets in greater detail, and in some cases, can provide insight into why this information is unavailable. 152 Please note that some agencies may have experienced an increase in the requested budget from FY 2016 to FY 2017, or from FY 2017 to FY 2018, but all of these agencies saw an overall decrease when comparing their FY 2016 budget request to their FY 2018 request. See infra notes 465-72 (DOJ); Figure 3.1 and notes 1041-51 (ED); 1290- 1304 and Figure 4.1 (HHS); notes 1508-23 and Figure 5.3 (HUD); Figure 6.2 and notes 1869-74 (DOL OFCCP); notes 1890-1900 (DOL CRC); 2115-24 (EEOC); 2344-9 (DHS); 2648-51 (EPA); 2822-34 (DOT); 3019-21 and Figure 11.1 (VA); 3137-44 (USDA); 3331-9 (Treasury); and 3472-4 (Interior) (analysis of available budget data for all agencies). Notes regarding methodology: out of 13 agencies evaluated, the Commission was only able to obtain requested budget numbers for 9 agencies. Also, budget data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses. 153 Unless a budget increase keeps pace with increased expenses, it functions as a budgetary cut. Note that given the proportion of these budgets allocated to salaries, the cost of which almost always increases annually, that means that for civil rights offices whose budgets remained stagnant, the real value of the budget allocation has likely decreased. 154 See infra notes 462-64, 474-75 (DOJ); 1053-67 and Figure 3.2 (ED); notes 1301-10 (HHS); 1524-8 (HUD); 1877-8 (DOL OFCCP); 1886-9 (DOL CRC); 2125-34 and Figure 7.2 (EEOC); 2347-77 (DHS); 2644-7 (EPA); 2842-8 (DOT); 3022-29 (VA); 3133-6 (USDA); 3340-7 (Treasury); and 3467-81 (Interior) (analysis of available staffing data for all agencies). Notes regarding methodology: staffing data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses.

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Five agencies' civil rights offices staffing levels remained constant during that period of time (HHS OCR, HUD FHEO, DOT DOCR, VA ORM, and USDA OASCR). When comparing requested budget amounts to allocated budget amounts for the fiscal years in question, on average, agency civil rights offices were allocated approximately 93 percent of their total requested budget amounts in FY 2016. 155 In FY 2017, on average, agency civil rights offices were allocated approximately 94 percent of their total requested budget amounts, a slight increase from FY 2016. 156 In FY 2018, on average, agency civil rights offices were allocated approximately 106 percent of their total requested budget amounts, increasing sharply from the previous fiscal years. 157 However, this may be attributed to the fact that the majority of agencies that provided budget request information saw an overall decrease of the total requested budget amounts from FY 2016 to FY 2018. At the same time, the majority of agencies' civil rights offices experienced an increase in their total allocated budgets from FY 2016 to FY 2018. Federal civil rights agencies have struggled to manage their caseloads. For example, in June 2018, a federal court required EPA's civil rights office to timely process any pending and future race based discrimination complaints submitted by the Plaintiffs and accepted by EPA for investigation, for a period of five years from the date of the Judgment. 158 When fully staffed, ECRCO only had between 11.5 and 12.5 full time equivalent employees during FY 2016-2018 to address all civil rights violations nationwide. 159 In light of the federal court requirement for ECRCO to submit to its oversight and ensure timely complaint processing in the future, ECRCO has further noted that it "received funding to support its budget request," and "has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question." 160 Similarly, another federal court recently held that DHS CRCL was not timely processing complaints. 161 The pertinent DHS regulation states that all types of discrimination

disabilities on the basis of disability with an answer to the individual within 180 days.162 But a federal district court found that CRCL's 2.75-year delay in processing a civil rights complaint by an individual with disabilities regarding his treatment at the airport by DHS' Transportation Security Agency (TSA) was "unreasonable" where DHS and TSA offered "no justification or

155 This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation. 156 This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation. 157 This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation. 158 Judgment, *Californians for Renewable Energy v. U.S. Dep't of Environmental Protection*, No. 15-3292, 2 (N.D. Cal. Jun. 13, 2016). 159 See infra notes 2644-2647 (discussing ECRCD's staffing levels from FY 2016-2018). 160 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6. 161 SAI v. Dep't of Homeland Sec., 149 F. Supp. 3d 99 (D.D.C. 2015). 162 6 C.F.R. § 15.70(g).

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explanation."163 Furthermore, during the Commission's briefing, CRCL reported that they had insufficient resources to process over 3,000 complaints regarding separation of migrant children from their parents or other adult family members at the border, and that they rely on a system of choosing a small number (23 out of over 3,000) of what they consider to be representative complaints to investigate.164 CRCL's Deputy Officer also told the Commission that they need more resources to improve complaint processing times.165 During the course of the Commission's review, other agency leaders in federal civil rights offices stated that declining or insufficient resources present challenges to maintaining an effective civil rights enforcement program.166 For example, Bryan Greene noted in his testimony before the Commission that when there are budget constraints, responding to civil rights complaints effectively and pursuing systematic compliance monitoring can be challenging: "FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate [in a given time period] and how fast we can investigate them depends on staff resources[.]"167 During a briefing of the Illinois Advisory Committee to the Commission in May 2019, focused on fair housing, Sara Pratt, the former Deputy Assistant Secretary for Fair Housing Enforcement and Programs and Senior Advisor to the Assistant Secretary at HUD put it even more starkly: "Today's staffing levels are so low that it's easy to believe that understaffing of the civil rights function is a deliberate action designed to undermine effectiveness of work."168 Former ED Secretary Arne Duncan asserted in his testimony before the Commission that budgets for civil rights enforcement can speak to the values and priorities of the agency, and "when you cut staff, you're walking back those commitments" to civil rights.169 Dexter Brooks, Associate Director of Federal Sector Programs at the Office of Federal Operations, EEOC, testified before the Commission that more funding at the EEOC could enable it to manage data and track trends in real time that could help identify problem areas.170 Margo Schlanger testified that there is no accepted understanding of how many staff members the civil rights enforcement offices should have to be able to enforce consistent with the jurisdictions afforded to them — and that a sufficient time has passed since Congress enacted Title VI at least to

163 149 F. Supp. 3d at 120. 164 Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep't of Homeland Security, testimony, Federal Civil Rights Enforcement Briefing, p. 126. 165 See infra notes 244-285 (testimony of Deputy Officer Venture); and see note 2442 (post-briefing statement of CRCL's new Deputy Officer for Programs and Compliance Peter Mina, discussing need for more funding). 166 Greene Statement, at 2; Venture, Testimony, Federal Civil Rights Enforcement Briefing, p. 125; Schlanger Testimony, Federal Civil Rights Enforcement Briefing, p. 247. 167 Greene Statement, at 1-3. 168 Sara Pratt, Counsel at Relman, Dane & Colfax PLLC, testimony, Fair Housing Briefing before the Illinois Advisory Committee of the U.S. Comm'n on Civil Rights, May 3, 2019, transcript, p. 37 [hereinafter Illinois SAC Fair Housing Briefing]. 169 Duncan Statement, at 77. 170 Dexter Brooks, Associate Director of Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission, testimony, Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing Before the U.S. Comm'n on Civil Rights, May 9, 2019, transcript, pp. 66-68 [hereinafter Sexual Harassment in Government Workplaces Briefing].

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be able to set that measure now.171 The Commission's resources do not currently enable the Commission to help determine that number; however, the research shows that many of the civil rights offices are under-performing due to insufficient resources. Aderson Francois, Professor of Law at Georgetown Law School, explained in his testimony to the Commission that since the 1980s, he has observed that federal civil rights offices have had the tendency to turn into "ghost agencies" that "cease to function according to their statutes and regulations"172 under certain conditions. He noted several warning signs, identified below, including a shrinking budget. Professor Francois noted that a few of the civil rights offices that the Commission is examining, namely ED OCR, HHS OCR, and DOL OFCCP, are exhibiting many of these warning signs, experiencing budget and staff reductions.173 As discussed herein, the Commission's research shows that between FY 2016 and FY 2018, ED OCR has asked for less funding but in FY 2018, Congress provided \$10 million more than ED OCR requested (an increase from the prior fiscal year).174 ED OCR did experience a 6% staff reduction during this time period, notwithstanding the significant Congressional increase in appropriations to the agency. A similar pattern is seen with HHS OCR: in FY 2018 HHS asked for less funding but Congress provided a slight increase to HHS OCR, bringing the funding allocations back to the level of FY 2016.175 DOL OFCCP did experience a decrease in both requested and allocated budgets, with the requested amount decreasing by \$25.7 million between FY 2016 and FY 2018, and the amount Congress allocated decreasing by \$2 million.176

171 Schlanger Testimony, Federal Civil Rights Enforcement Briefing, pp. 279-81. Harvey Johnson, Director, U.S. Dep't of Veterans Affairs, Office of Resolution Management, claimed he secured budget increases for VA OCR "based on a sound business case that we built using data science to show here is what I need in order to properly execute a civil rights program, whether it be internal or external."172 Harvey Johnson, Director, U.S. Dep't of Veterans Affairs, Office of Resolution Management, testimony, Federal Civil Rights Enforcement Briefing, pp. 126-27. Johnson did not explain the basis of the data science the office used. 172 Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 226. 173 Ibid., 229. 174 See infra Figure 3.1 (Requested and Allocated Budget for ED OCR FY 2016 to FY 2018). 175 See infra Figure 4.1 (Requested and Allocated Budget for HHS OCR FY 2016 to FY 2018). 176 See infra Figure 6.2 (Requested and Allocated Budget for OFCCP FY 2016 to FY 2018).

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Professor Francois also noted several consequences to agencies becoming "ghost agencies" which include:

- The communities that these agencies are designed to serve are ultimately not getting the justice they deserve.
- There is a loss of institutional memory, and agencies will "forget" how to properly engage in effective civil rights enforcement work.177
- There is a "loss of deterrence effect," which disincentivizes certain entities to uphold their responsibilities under the law.
- There is a loss of "doctrinal development," which is an incredibly important role of civil rights offices to play in their specific area of focus, as courts tend to give them more leeway in the course of litigation than is given to private litigants.178

In early 2017, the Trump Administration announced a proposal to merge DOL's OFCCP with EEOC and create a single agency working on employment discrimination, which the Administration cited as a way to promote government efficiency.179 The proposal also sought to reduce OFCCP's budget by \$17 million and reduce its staff by approximately 25 percent.180 The Senate Appropriations Committee rejected the proposal, but the committee did encourage OFCCP to look for ways to become more efficient as its funding would be reduced.181 As discussed in more detail in Chapter 6, OFCCP is aiming to reach a much higher percentage of contractors

177 The institutional memory loss Professor Francois describes here operates in practice not as actual memory loss but as patterns of engagement that calcify as agency practice, requiring affirmative change to alter. See, e.g. Society for History in the Federal Government, "Historical Programs in the Federal Government," 1992, <http://www.shfg.org/Historical-Programs-Guide> (noting that "Government decision makers unacquainted with the history of their organizations are comparable to amnesia victims who do not remember people, places, and events in their past," and "[o]ften, these officials' lack of institutional memory affects their perceptions of the character and mission of their organizations and the past pattern of agency decisions"); see also, e.g. Larry Schwartz, "DOJ's War on Competence," Huffpost, May 25, 2011, https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS88&guce_referrer_sig=AQAAANFOPV4tmP2iaQm1ydW822yqRGD5xJRRfQ3vuNFg1kwx5rBb1el38KTDWulXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZslWDOqgIES3TKdBp-pzF5ZlY2kFallsz7FEcXlh_MqXfSbczdZEsI3U5zXa6sckp_6AVg4xWqKrq437tp (discussing how DOJ was "populated [with] key components of DOJ partisan operatives, many of whom lack substantive qualification for their jobs," who remain "embedded in the government—and shielded by civil service protections against new bosses who want to oust them," has "resulted in an alarming exodus of career attorneys—the longtime backbone of the [Civil Rights] Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws"); see also, e.g. Katherine Barrett & Richard Greene, "Higher the Rank, Higher the Turnover," *Governing the States and Localities*, Jun. 23, 2016 (discussing how higher-ranking positions often experience the highest rate of turnover in state government, noting that "[s]uch a high turnover is hazardous to a state's smooth functioning" and "you lose institutional knowledge" which is one key to success). 178 Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 230. 179 See infra notes 1904-1914 and 2122-4 (discussing proposed merger between DOL and EEOC). 180 Lawrence Z. Lorber, Annette Tyman, and Michael L. Childers, "President Trump's Budget Includes Proposed Merger of EEOC and OFCCP," Seyfarth Shaw LLP, May 23, 2017, https://www.seyfarth.com/publications/OMM052317-LE#_ftn1. 181 See Suzanne Keys, "EEOC and OFCCP Merger Stalled...For Now," *BALANCEview*, Sep. 26, 2017, <https://www.berkshireassociates.com/balanceview/eoc/ofccp-merger-stalled-for-now>.

<http://www.shfg.org/Historical-Programs-Guide>
https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS88&guce_referrer_sig=AQAAANFOPV4tmP2iaQm1ydW822yqRGD5xJRRfQ3vuNFg1kwx5rBb1el38KTDWulXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZslWDOqgIES3TKdBp-pzF5ZlY2kFallsz7FEcXlh_MqXfSbczdZEsI3U5zXa6sckp_6AVg4xWqKrq437tp
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https://www.seyfarth.com/publications/OMM052317-LE#_ftn1
<https://www.berkshireassociates.com/balanceview/eoc/ofccp-merger-stalled-for-now>
<https://www.berkshireassociates.com/balanceview/eoc/ofccp-merger-stalled-for-now>

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through compliance assistance, and compliance verification and incentives.182 OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, which requires more resources.183 Additionally, USDA solicited formal comments on a proposed reorganization of OASCR, in line with Executive Order 13781 which called for reorganization within the executive branch agencies.184 The agency stated that the reorganization was designed to consolidate civil rights management functions across USDA to improve customer service and maximize efficiency.185 The plan has raised concern from various civil rights advocates as to the elimination of certain positions that would come with this restructuring. The USDA Office of Inspector General (OIG) itself cautioned USDA to consider "OIG's unique mission and independence," when considering realignment, and indicated it would continue to examine "the effectiveness of this realignment as part of our future audit planning process."186 The USDA has a documented history of discrimination in past decades in the delivery of programs and the treatment of employees, and during the period from 2001-2008, OASCR only found merit to one complaint of program discrimination out of more than 14,000 complaints filed during that time.187 Whether and How Effectively the Civil Rights Office Engages in Strategic Planning and Self-Evaluation In the 2002 review of federal civil rights enforcement, the Commission stressed the importance of clearly communicating prerogatives in order to increase effectiveness, recommending "all federal agencies should include civil rights objectives and goals in their strategic plans."188 Leaders of civil rights organizations made clear in their testimony before the Commission that a lack of transparency remains an issue hampering civil rights enforcement on the federal level. At the Commission's briefing, Fatima Goss Graves noted that in the absence of effective agency communication, "there are sort of basic and longstanding concerns and a real worry that the wrong communication is going out there."189 Vanita Gupta, President of Leadership Conference on Civil and Human Rights and former head of the DOJ Civil Rights Division, followed up on this point, stating "it's really important that the public have access to critical data on civil rights enforcement."190 She suggested this transparency would aid agencies in the essential work of articulating "their law enforcement objectives and goals and mandates."191

182 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 183 Ibid. 184 See infra notes 3151-69 and Figures 12.2 and 12.3. 185 See Strengthening Civil Rights Management, 83 Fed. Reg. 10,825 (Mar. 13, 2018). 186 Phyllis K. Fong, USDA Inspector General, Comments on "Strengthening Civil Rights Management" Request for Information, 83 Fed. Reg. 10,825 (Mar. 23, 2018), <https://www.regulations.gov/document?D=USDA-2018-0002-0006> (comment from Amy Lowenthal attaching letter from Inspector General Fong). 187 See infra note 3173. 188 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. 189 Goss Graves Testimony, Federal Civil Rights Enforcement Briefing, p. 194. 190 Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights, Testimony, Federal Civil Rights Enforcement Briefing, p. 195. 191 Ibid. See also Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp.197-98.

<https://www.regulations.gov/document?D=USDA-2018-0002-0006>
<https://www.regulations.gov/document?D=USDA-2018-0002-0006>

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Strategic plans for civil rights enforcement may be issued at the agency and/or civil rights office level. The agency civil rights offices evaluated herein differ in whether they conduct strategic planning with civil rights objectives. Some of the larger civil rights offices, such as DOJ CRT, EEOC, and ED OCR, issue strategic plans or conduct strategic planning as a part of their budget planning process. These plans have explicit civil rights objectives, though they vary in their specificity. For example, DOJ's CRT has identified combatting hate crimes and sexual harassment, among other goals, in its CRT-specific FY 2018 strategic plan.192 Some federal agencies include civil rights objectives in their agency-wide strategic planning. For instance, HUD's Strategic Plan for 2014-2018 included several strategic objectives related to fair housing that addressed the efforts of FHEO as well as integrating principles of fair housing into HUD's other programs.193 HUD's Strategic Plan 2018-2022, however, does not mention fair housing or civil rights enforcement among its priorities for the next four years.194 HUD remains focused on its strategic goals of advancing economic

opportunity, protecting taxpayer funds, and streamlining operations, but chose not to include any fair housing-related strategic goals or objectives.195 The omission of fair housing in this most recent strategic plan reflects a change in civil rights prioritization at HUD. Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Similarly, the lack of inclusion of civil rights-focused priorities also communicates a particular message to the public. But Bryan Greene identified FHEO's priorities in his testimony before the Commission. The five identified priorities were: timely, effective investigations; issuance of clear, helpful assistance- animal guidance; combatting of sexual harassment in housing; meaningful, less burdensome implementation of the Fair Housing Act's "affirmatively furthering" equal access to housing

192 See infra note 501. 193 U.S. Dep't of Hous. and Urban Dev., Fiscal Year 2016 Annual Performance Report, p. 65, https://www.hud.gov/sites/documents/FY_2016_APR.PDF [hereinafter HUD, 2016 Annual Performance Report]. 194 U.S. Dep't of Hous. and Urban Dev., Strategic Plan 2018-2022, February 2018, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf> [hereinafter HUD, FY 2018-2022 Strategic Plan]; see also U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). HUD commented:

HUD has clarified that there is no change in prioritization. The 2018-2022 plan simply takes it as axiomatic that HUD's bedrock mission is fighting discrimination and then uses the strategic goals section to delineate methods of improving operational efficiency. The core language from the 2014-2018 strategic plan on discrimination was not eliminated, rather it was moved to the introductory section articulating HUD's purpose where it is front and center. The first line of the 2018-2022 report reads: "HUD is working to . . . build inclusive and sustainable communities free from discrimination."

Ibid. 195 HUD, FY 2018-2022 Strategic Plan, supra note 194, at 2.

https://www.hud.gov/sites/documents/FY_2016_APR.PDF
<https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf>

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mandate; and greater oversight of Fair Housing Assistance Program (FHAP) and Fair Housing Initiatives Program (FHIP) to promote higher quality work.¹⁹⁶ Given the agency-level nature of its civil rights enforcement mission, EEOC has issued a strategic plan for FY 2018-2022 that focuses on goals of combating and preventing employment discrimination through the strategic application of EEOC's law enforcement authorities; preventing employment discrimination and promoting inclusive workplaces through education and outreach; and achieving organizational excellence.¹⁹⁷ In addition, EEOC noted that it "solicited and received comments from a wide range of stakeholders and the public."¹⁹⁸ EEOC also issued a strategic enforcement plan for FY 2017-2021, which focuses on its enforcement priorities, which include (but are not limited to) protecting vulnerable workers and underserved communities, equal pay, and systemic workplace harassment.¹⁹⁹ The Commission has previously recommended that strategic plans should include "(1) specific short-term goals and long-term objectives, (2) timeframes for meeting goals and objectives and (3) consideration of both available and projected resources and budget constraints."²⁰⁰ However, in researching this report and in the responses to the Commission's interrogatories, staff found an overall dearth of data about agency performance and effectiveness (with a few notable exceptions).²⁰¹ For example, information about DOJ CRT's hundreds of cases was fairly accessible, but Criminal Section cases were not published on the website and there were other major gaps in the data about CRT's activities.²⁰² The Office of Inspector General also critiqued the CRT for lack of transparency about how it handles complaints about police misconduct.²⁰³ Congress explicitly requires some agencies, such as ED OCR, HUD FHEO, USDA OASCR, and DHS CRCL, to report to Congress the work of their civil rights enforcement office and whether these offices have met their statutory responsibilities.²⁰⁴ As of this writing, the last report from ED OCR under this requirement was from 2016, and the last report from HUD FHEO and from DHS

¹⁹⁶ Greene Statement, at 3. ¹⁹⁷ See infra notes 2148-2153 (discussing EEOC's FY 2018-2022 strategic plan goals). ¹⁹⁸ U.S. Equal Employment Opportunity Comm'n, Strategic Plan for Fiscal Years 2018-2022, p. 1, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf [hereinafter EEOC, FY 2018-2022 Strategic Plan]. ¹⁹⁹ See infra notes 2165-2171 (discussing EEOC's FY 2017-2021 strategic enforcement plan goals). ²⁰⁰ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 21. ²⁰¹ See, e.g., supra notes 1227-1239 (discussing ED OCR's research and data collection efforts). ²⁰² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). DOJ noted that "Federal Rule of Criminal Procedure 6 prohibits disclosure of grand jury sensitive information. Moreover, unlike civil cases, criminal cases do not result in public settlements. In any event, the Criminal Section issues press releases about significant developments in criminal cases, such as indictments and convictions, that are available on the DOJ CRT website." Ibid. ²⁰³ U.S. Dep't of Justice, Office of the Inspector General, Audit of the Department of Justice's Efforts to Address Patterns or Practices of Police Misconduct and Provide Technical Assistance on Accountability Reform to Police Departments, February 2018, p. 5, <https://oig.justice.gov/reports/2018/a1814.pdf> [hereinafter DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct]. See also infra note 613-614 (regarding some subsequent improvements). ²⁰⁴ See Duncan Statement, at 3 (citing section 203(b)(1) of the Department of Educ. Organization Act, 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1).

https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf
<https://oig.justice.gov/reports/2018/a1814.pdf>

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CRCL were from 2017, notwithstanding the statutory requirement that these reports be annual.²⁰⁵ When done, such public reporting not only demonstrates that agency civil rights offices are engaging in self-reflection and self-evaluation, but also displays a transparency that informs the public of the civil rights values and practices of the agency. Fatima Goss-Graves stated in her testimony before the Commission that it's important for the heads of civil rights offices to "communicate very strongly the values around why they're in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative."²⁰⁶ Such reporting or strategic planning can also provide critical information to leadership on how to better train their staff to address any weaknesses in the efficacy of their offices. Enforcement offices differ in whether they evaluate their own efficacy, either as a part of their strategic planning process or otherwise. Some offices also use particular standards or metrics to evaluate the efficacy of their staff on an individual basis. Some agencies use case closure rates as one measure of office success, including ED OCR and HUD FHEO.²⁰⁷ The Commission received testimony identifying additional measures to self-evaluate agency efficacy. Bryan Greene stated that there's been a "sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive."²⁰⁸ Greene said he thinks the key is "having staff resources to go in and do quality assurance."²⁰⁹ Craig Leen, Director of DOL OFCCP, said he has changed OFCCP's measure of success; whereas previous Administrations used a closed case indicator as the metric, now OFCCP is looking at adopting an index that "also rewards more the bigger cases."²¹⁰ Additionally, DOL requires that all staff performance management plans link to the respective agency's operating plan. Carol Miaskoff, Associate Legal Counsel at EEOC, testified that individual employee evaluations are linked to the strategic and strategic enforcement plans of the agency.²¹¹ These reportedly focus on identifying and resolving systemic discrimination (in addition to individual complaints).²¹² Following EEOC's 2005 adoption of a Systemic Task Force, a 2016 internal report reviewing its systemic enforcement programs discussed the achievements of its systemic program declaring that

²⁰⁵ U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities," <https://www2.ed.gov/about/offices/list/ocr/congress.html> (accessed Oct. 15, 2019) [hereinafter U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities"]; U.S. Dep't of Homeland Security, "CRCL Annual Reports to Congress," <https://www.dhs.gov/publication/crcl-annual-reports>. ²⁰⁶ Fatima Goss-Graves, President and CEO of the National Women's Law Center, Testimony, Federal Civil Rights Enforcement Briefing, p. 196. ²⁰⁷ See infra notes 1086-1106 (discussing in part the ED OIG inspection report's concern that case closure as metric could incentivize staff to close cases without effective evaluation); see Greene Statement, at 1 (discussing HUD). ²⁰⁸ Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 73. ²⁰⁹ Ibid. ²¹⁰ Craig Leen, Director of the Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, testimony, Federal Civil Rights Enforcement Briefing, p. 72. ²¹¹ Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, pp. 70-71. ²¹² See infra notes 2169-2171 (discussing EEOC's focus on systemic discrimination).

<https://www2.ed.gov/about/offices/list/ocr/congress.html>
<https://www.dhs.gov/publication/crcl-annual-reports>

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EEOC had "made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program."²¹³ The report also noted that:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.
- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.
- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.
- Over 60 percent of systemic resolutions raised identified national priority issues in FY 2015.
- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.
- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.
- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006).²¹⁴

EEOC has also noted that one of its strategic goals is to educate members and covered employers in the public and government sectors of the public about employment discrimination laws, and to achieve more inclusive work environments.²¹⁵ In contrast to this detailed self-evaluation, the Commission's research shows that DOJ's Civil Rights Division's metric centers on the success rate of its cases – it sets a goal of 85 percent of cases being successful, and reports that it has well exceeded that goal in the last three fiscal years.²¹⁶ By focusing on percent, this metric does not take into account the number of enforcement actions or cases resolved, or whether those cases address systemic discrimination, or whether the Division is equally active and effective across all of its component sections. However, the Commission's research indicates that CRT is currently very effective in some of the areas it has set forth in its strategic plan, particularly in bringing enforcement actions against alleged perpetrators of hate crimes and sexual harassment.²¹⁷ Simultaneously, from FY 2016 to FY 2018, CRT decreased in the number of enforcement actions against law enforcement agencies allegedly

²¹³ U.S. Equal Employment Opportunity Comm'n, Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, Jul. 7, 2016, p. iv, <https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf> [hereinafter EEOC, A Review of the Systemic Program]. ²¹⁴ Ibid., iv-v. ²¹⁵ See infra note 2148. ²¹⁶ See infra note 492. ²¹⁷ See infra notes 508-509 and 529-531.

<https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf>

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engaged in patterns or practices of constitutional violations,²¹⁸ and this parallels the fact that those actions which were part of the FY 2017 strategic plan were omitted in subsequent plans.²¹⁹ Effective Use of Enforcement Tools: Complaint Processing, Agency-Initiated Charges, and Litigation Many civil rights offices have the authority to adjudicate complaints administratively and to bring agency-initiated charges (defined as the authority to investigate self-initiated charges, absent the filing of a specific complaint).²²⁰ Some may take further steps towards litigation, but with the exception of EEOC, agency civil rights offices generally must defer to DOJ's authority to prosecute civil rights violations in federal court.²²¹ EEOC has the authority to bring affirmative litigation for the issues under its jurisdiction.²²² Each of the three steps of this essential enforcement tool are addressed in chronological order below. In 2002, the Commission found that after reviewing the civil rights complaint processing procedures of several agencies during the prior 10 years, there were ongoing challenges and insufficiencies.²²³ The Commission went on to state that due to these challenges:

The Commission has thus made many recommendations for charge processing and complaint resolution. Generally, the recommendations have focused on ensuring that agencies have a comprehensive process to resolve complaints efficiently and expeditiously to achieve maximum results. Another key theme has been improving customer service by creating systems that are easy to navigate for potential charging parties and publicizing policies and procedures.²²⁴

Current Commission research shows that some civil rights offices process every complaint that passes an initial screening for jurisdiction (e.g., ED OCR, HHS OCR,²²⁵ HUD FHEO),²²⁶ whereas others only process a small portion or have a system to select representative complaints (e.g., DHS CRCL).²²⁷ At EEOC, the agency investigates all charges that are filed.²²⁸

²¹⁸ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases. ²¹⁹ See infra notes 501-502 and 530-531. ²²⁰ See infra notes 446-448, 1029-31, 1273-75, 1476-80, 1843-45, 1850-52, 2095-7, 2327-9, 2631-3, 2809-11, 3006- 8, 3119-21, 3319-21, 3455-7 (referencing the enforcement tools sections in each chapter, specifically to the bullets discussing complaint processing, agency initiated charges, and litigation). ²²¹ See infra note 376 (discussing 28 C.F.R. § 0.50(g)) (1969) and notes 954-6 (DOJ and EEOC). ²²² See infra note 2097. ²²³ USCCR, Ten-Year Check-Up: Volume 1, supra note 1, at 34. ²²⁴ Ibid. ²²⁵ U.S. Dep't of Health and Human Services, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file) (noting that "HHS OCR processes and investigates every complaint that passes an initial screening for jurisdiction"). ²²⁶ 34 C.F.R. §§ 100.7(e), 104.61, 106.71, 108.9, 110.34. ²²⁷ See U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. As discussed in the chapters that follow, these agencies lack jurisdictional authority so to prioritize their cases. Nonetheless, in practice the agencies do select and long have selected which cases to investigate. ²²⁸ See infra notes 2172-88 (discussion of EEOC procedures and practices under 29 C.F.R. § 1614).

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But in evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction that come to them, leaving allegations of civil rights violations unaddressed. For example, with rare exceptions, DOJ CRT has no known procedures to process complaints, and has no duty to respond to the "thousands" of complaints it told the Commission it receives each year.²²⁹ Moreover, whereas the Commission has recommended "streamlining the intake process and formalizing intake procedures to ensure consistency across offices," CRT has no known uniform procedures across its nine sections to inform complainants of the status of any enforcement actions that might be taken in response to their complaints.²³⁰ A recent DOJ OIG report recommended that the Special Litigation Section improve its procedures, and some improvements have been made; however the Commission was not provided with nor could the Commission find any indication that these improvements have been made in all of the other CRT sections.²³¹ Some agency leaders have acknowledged that they have to prioritize, or find alternate ways of working with the limited resources that they have.²³² The Prioritization section earlier in this chapter discussed various panels' testimonies that explained how agencies have to use their resources selectively to maximize their efficiency, and while some opt to advance agency policy priorities, some believe that prioritization is an "impossible task" due to the importance of all civil rights issues.²³³ The Deputy Director of DHS CRCL testified to the Commission that they use the total number of complaints to gauge how significant a civil rights issue might be, but then only select a representative number to address directly.²³⁴ CRCL told the Commission that it

decide on a set number of issue-based priorities, and focus on resolving complaints that fall within those designated priorities.236 The data provided to the Commission shows that Treasury's civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending.237

229 See infra notes 536-7 (regarding thousands of complaints), 538 (Justice Manual generalized processes on how complaints may be investigated) and 602-19 (Special Litigation Section processes, contrasted with other sections). 230 USCCR, Ten-Year Check-Up: Volume 1, supra note 1, at 34; see infra notes 538 and 602-19. 231 See infra notes 602-19. 232 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125; Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 32. 233 See supra note 144. 234 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 235 See infra notes 2472-6. 236 See supra notes 144-145 and 164-165. 237 See infra notes 3377 (discussing that all 31 complaints reportedly received during FY 2016 – 2018 were based on disability).

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Whether an agency can initiate charges based on their findings is also critically important. By agency-initiated charges, the Commission means the authority to self-initiate enforcement, absent the filing of a specific complaint.238 The Commission also found in 2002 that agency-initiated charges are "useful for identifying systemic discrimination."239 The Commission's investigation reflects that this truism still persists today. For example, Treasury's external civil rights enforcement office only received 30 complaints in FY 2017, and they were all filed under one basis, disability.240 But with billions of federal funding from Treasury going to state, local, and private financial institutions (see Table 1.4), there are likely to be other civil rights issues such as racially discriminatory credit practices, which the 30 complaints filed with Treasury do not give the civil rights office the opportunity to address.241 Agency-initiated charges and compliance reviews could address such issues not coming in to the agency through complaints. Whether enforcement actions are developed by individual complaints or agency-initiated charges, agencies' Title VI, Title IX and Section 504 regulations require an attempt to resolve complaints by informal means whenever possible, prior to taking other enforcement actions.242 DOJ and many other agencies highly rely on settlements, mediation, or other informal means of complaint resolution.243 For instance, one of DOJ CRT's FY 2017 resolutions was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.244 CRT told the Commission that it used this resolution type because Title VI "is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together

238 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 35. Note that this definition is similar to how ED OCR structures its proactive compliance evaluations, which may not become enforcement actions if ED OCR's compliance evaluation results in finding no violations. 239 Ibid. 240 See infra notes 3382 (although one complaint of the 30 mentioned was filed on the basis of disability and age). 241 See infra Table 1.5 (\$5-6 billions of dollars issued in FY 2016-18) and notes 3411-21 (Treasury civil rights compliance approaches) and note 978 (DOJ prosecution of discriminatory lending practices). 242 See, e.g., 28 C.F.R. § 42.107 ("If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible"); see also, e.g., 24 C.F.R. § 103.300 ("During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint"); 40 C.F.R. § 7.120(d)(2) ("OCR shall attempt to resolve complaints informally whenever possible"); 29 C.F.R. § 1601.24(a) ("Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion"); 49 C.F.R. § 21.11(d)(1) ("If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible"). 243 See infra notes 633-41 (DOJ); 1116-25 (ED); 1376 (HHS); 1581 (HUD); and 2188-90 (EEOC). 244 See U.S. Dep't. of Justice, "Press Release: Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals," Jul. 18, 2017, <https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court> [hereinafter DOJ, "Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals"].

<https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court>
<https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court>

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jointly."245 CRT added that "by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime."246 As another example, a GAO report indicates that when OFCCP finds violations, it will generally resolve them through conciliation agreements, and "between fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations."247 Lilian Dorka, Director of the Environmental Protection Agency's External Civil Rights Compliance Office (ECRCO) emphasized reliance on informal complaint resolution methods. She testified: "We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations."248 Although settlements are an effective tool, and they allow an agency to increase productivity and decrease backlogs by resolving more cases, deciding to settle rather than pursue litigation or formal administrative finding can in particular instances indicate or reflect civil rights offices' choice not to use authorities and/or enforcement tools they have.249 The EPA, for example, notably did not ever make a single formal finding of discrimination or Title VI violation until 2016.250 This absence of violation finding was not due to a lack of viable complaints, and environmental justice groups successfully sued the EPA over its lackluster civil rights enforcement in 2015.251 If voluntary compliance is not successful, the vast majority of federal agencies examined (except for EEOC) may refer complaints to DOJ to initiate litigation in federal court to enforce Title VI or

245 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT's website which was referenced in response to the Commission's Interrogatories. 246 Ibid. 247 U.S. Government Accountability Office, Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance, September 2016, p. 24, <https://www.gao.gov/assets/680/679960.pdf> [hereinafter GAO, Strengthening Oversight]. 248 Lilian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 3 [hereinafter Dorka Statement]. 249 See USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38 (explaining how mediation and settlement may fail to resolve underlying or systemic causes of discrimination); infra notes 549-61 and 565-64; Ian MacDougall, "Why Jeff Sessions' Final Act Could Have More Impact Than Expected," ProPublica, Nov. 12, 2018, <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>. 250 U.S. Comm'n on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898, September 2016, p. 40, https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf [hereinafter, USCCR, Environmental Justice]. 251 Californians for Renewable Energy v. U.S. Dep't of Environmental Protection, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Nicholas Iovino, "Judge Rules EPA Improperly Delayed Racial Bias Probes," Courthouse News Service, Apr. 2, 2018, <https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/> [hereafter Iovino, "Judge Rules EPA Improperly Delayed Racial Bias Probes"].

<https://www.gao.gov/assets/680/679960.pdf>
<https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>
https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf
<https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/>
<https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/>

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other federal civil rights laws.252 The discretion of whether to prosecute them generally rests with DOJ.253 Perhaps critically, DOJ focuses more on systemic civil rights litigation under the civil rights statutes it enforces.254 In 2002, the Commission stated that rooting out discrimination is an essential goal of civil rights enforcement, and that litigation is sometimes necessary to meet that goal.255 The Commission commented in 2002 that:

Many agencies consider litigation a last resort for resolving complaints of discrimination. While the Commission recognizes the resource demands in litigating cases, it also recognizes the importance of doing so to develop case law, to obtain appropriate relief, and to send a message to potential violators about the strength of the agency's enforcement program. Thus, many of the Commission's recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped.256

Moreover, the Commission stated that "because few complaints result in litigation, enforcement agencies must have strong litigation strategies. The Commission recommended that litigation be central to an enforcement strategy but advised agencies to seek and litigate cases that set legal precedent and to mediate other cases. The Commission also advised agencies to seek input from stakeholders in developing litigation strategy."257 Regarding FY 2016 – 2018, community input was rarely documented in the data agencies provided to the Commission.258 Regarding EEOC's litigation efforts, because of resource limitations, it "can only file lawsuits in a very small number of the charges where [EEOC] find[s] reasonable cause to believe that there was discrimination."259 EEOC explained that: Recognizing its resource limitations, the [EEOC] has long emphasized that the litigation program should focus on cases that have the potential to impact multiple workplaces or large groups of applicants or employees, emerging issues where the agency's expertise may be especially critical to achieving a successful outcome, and individual cases where broader law enforcement goals can be advanced with the successful resolution of the case. In addition, the litigation program focuses on population groups and geographic locations where private enforcement of anti-discrimination laws is rare, and individuals have minimal access to the legal system to protect their rights.260

252 See, e.g., infra notes 1157 (ED), 1386 (HHS), 1584 and 1599 (HUD), 2701 (EPA), 2879 (DOT) and 3047 (VA). 253 See infra notes 371-84, 532-743 (referencing DOJ CRT Legal Authority and Responsibility and Complaint Processing sections). 254 See infra notes 541-64. 255 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 256 Ibid., 38. 257 Ibid. 258 For documented instances, see infra notes 969, 979 and 981 (DOJ); 1223 and 1239-40 (ED); 1738-43 (HUD); 2605-6 (DHS); 2770-4 (EPA); and 3074-7 (VA). 259 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 32. 260 U.S. Equal Employment Opportunity Comm'n, Fiscal Year 2020 Congressional Budget Justification, March 2019, p. 40, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf> [hereinafter EEOC, FY 2020 Budget Justification].

<https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>

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In addition, EEOC has the authority to initiate investigations through Commissioners' charges that can lead to litigation in federal court.261 The Commission also heard testimony that, "[o]ne of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people."262 During FY 2016 – FY 2018 DOJ CRT mainly engaged in agency-initiated charges and systemic litigation.263 It enforces several civil rights statutes that authorize federal enforcement action if state or local jurisdictions engage in a pattern or practice of systemic discrimination.264 Under these statutes, either a policy or a systemic practice that results in discriminatory treatment may be considered as evidence of illegal pattern or practice discrimination.265 In addition, many other DOJ CRT cases seek systemic remedies such as modifying voting practices and procedures to remedy Voting Rights Act violations.266 HUD also noted that "[m]any Fair Housing Act cases initiated by the Civil Rights Division are actually initiated when HUD files an administrative charge of discrimination and one of the parties elects to proceed in federal court. In these circumstances, the Fair Housing Act specifies that DOJ "shall" initiate a lawsuit in federal court."267 Commission research shows that CRT's enforcement actions have generally decreased (by 23.7 percent) between FY 2016 through FY 2018.268 The following chart (Figure 1.1) shows the number of civil rights enforcement actions CRT has resolved per fiscal year:

261 See infra notes 2096, 2176, 2181-3 (discussing EEOC's authority to issue Commissioners' charges); 262 Green Statement, at 2; Kendrick Testimony, Federal Civil Rights Enforcement Briefing, pp. 273-74; Francois Testimony, Federal Civil Rights Enforcement Briefing, pp. 271-72. 263 See Appendix A and see infra notes 541-48 and 564-67 for further analysis. 264 See infra notes 541-45 (describing DOJ's pattern or practice enforcement authorities). 265 Ibid. 266 See infra notes 546-61 and 565-7. 267 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 268 See infra notes 626-9 and Figure 2.3 (analyzing DOJ CRT cases from Fiscal Years 2016-18). Chapter 2 details the methodology of researching the 388.5 cases resolved by CRT through settlement, consent decree or judicial decisions during FY 2016 – 2018, with data disaggregated by type of case and type of resolution.

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Figure 1.1: CRT Cases Resolved Per Fiscal Year

SOURCE: CRT Website; Commission Staff Research

In 2002, the Commission also emphasized that the remedies secured in resolving cases is critically important, stating that "the Commission recognizes that for effective enforcement, remedies must address the root of discrimination."269 The report warned that "[m]ediation or other settlement agreements, if not performed carefully, may ignore the larger picture in the interest of resolving the complaint at hand."270 The report went on to explain that in order "[t]o avoid this, the Commission recommended that mediation only be used when it is appropriate to the nature of the complaint, and mediation staff should ensure that settlements include provisions for changes in employer practices or policies that might have a discriminatory effect."271 The Commission's research for this report shows that DOJ's current strategy disfavoring resolution of cases by court-ordered consent decrees is likely to have a negative impact on effective enforcement of civil rights.272 Comparing settlements, former Attorney General Sessions stated that out-of-court settlements are different because they require a new lawsuit to enforce them.273 In contrast, the consent decrees that CRT is able to secure in federal court are more readily enforceable and may include ongoing monitoring with more systemic reform measures that would address the root of discrimination.274 But since former Attorney General Sessions issued a directive memo in November 2018 disfavoring the use of consent decrees to resolve cases, the rate at which

269 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 270 Ibid., 38. 271 Ibid. 272 See infra notes 572-82. 273 See infra note 549 (citing Sessions Memo at n. 2 (defining settlement as "an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract"). Compare DOJ's statement to the Commission that "A settlement agreement is enforceable through court action and is just as 'enforceable' as a consent decree." See also infra note 572 (CRT stated: "The Sessions memo represents Department policy binding on CRT."). 274 See infra notes 551-58 and 565-71.

FY 2016 FY 2017 FY 2018

CRT Cases Resolved Per Fiscal Year

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CRT has resolved cases through consent decrees (rather than out-of-court settlements) has plummeted.²⁷⁵ Effective Use of Enforcement Tools: Proactive Compliance Evaluation In 2002, the Commission noted the importance of monitoring compliance, recommending that federal agencies monitor compliance through pre- and post-award reviews, through data supplied by recipients and other data sources, as well as on-site visits, desk audits, and other methods.²⁷⁶ The impact of civil rights compliance monitoring may be large or small, depending on the efficacy of federal agency monitoring. Trillions of dollars in federal funding supports programs and activities in many sectors of society, which are impacted by how agencies decide to monitor compliance. The following table demonstrates how much federal funding and financial assistance has been awarded to recipients over the fiscal years in question (FY 2016-2018). As noted below, this funding may be awarded to a company, an organization, a government entity (i.e., state, local, tribal, federal, or foreign), or an individual, and this funding may be obligated in the form of a contract, grant, loan, insurance, direct payment, or by other means.²⁷⁷ See Table 1.5. Table 1.5: Amount of federal funding and financial assistance by federal agency, FY 2016- 2018 Agency Fiscal Year 2016 Fiscal Year 2017 Fiscal Year 2018 DOJ \$11,877 \$11,891 \$14,245 ED \$76,758 \$74,663 \$79,573 HUD \$31,950 \$53,862 \$57,779 HHS \$1,155,715 \$1,214,140 \$1,231,663 Labor \$9,690 \$10,446 \$10,020 EEOC \$48 \$50 \$56 EPA \$5,283 \$5,181 \$5,688 Transportation \$69,962 \$68,116 \$74,719 Treasury \$6,323 \$5,990 \$5,102 DHS \$26,738 \$26,815 \$44,255 VA \$198,028 \$203,124 \$192,987 Agriculture \$134,602 \$122,980 \$121,410 Interior

\$9,890 \$9,683 \$10,455

Source: USASPENDING.gov Note: Amounts in millions of dollars Note: All data from usaspending.gov, using complete category of "Award," which usaspending.gov defines as "Money the federal government has promised to pay a recipient. Funding may be awarded to a company, organization, government entity (i.e., state, local, tribal, federal, or foreign), or individual. It may be obligated (promised) in the form of a contract, grant, loan, insurance, direct payment, etc."

²⁷⁵ See infra notes 574-79, 583, 636-37 and Figure 2.6. ²⁷⁶ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 39-41. ²⁷⁷ USASPENDING.gov, <https://www.usaspending.gov>.

<https://www.usaspending.gov/>

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The vast majority of civil rights enforcement offices examined have legal authority as well as responsibility to engage in proactive compliance evaluations. For example, Commission staff research found that the agency's regulations require DOJ, ED, HHS, HUD, DHS, EPA, DOT, the VA, USDA, Treasury, and DOI to conduct periodic compliance investigations; and in contrast, EEOC's regulations do not include this requirement.²⁷⁸ The same 11 of the 13 agencies that are required to conduct periodic compliance evaluations have authority under their regulations to enforce based on the findings.²⁷⁹ Regulations require that investigations go through a voluntary compliance process for resolution, but if that is not effective, they can lead to withholding of funds without the need for a complaint from an impacted individual.²⁸⁰ In sum, in most agencies, federal law and regulations provide some basic responsibilities and discretion for agency-initiated monitoring and enforcement. DOJ federal regulatory guidelines summarize the responsibility that comes with this agency discretion as follows:

Primary responsibility for prompt and vigorous enforcement of title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in each agency the authority and the duty to select, from among the available sanctions, the methods best designed to secure compliance in individual cases. The decision to terminate or refuse assistance is to be made by the agency head or his designated representative.²⁸¹

Based on available information, the way the agencies use this discretion varies. For example, DOL OFCCP noted that its "primary enforcement mechanism is neutrally scheduled compliance evaluations (i.e., not prompted by complaints), and OFCCP prioritizes identifying systemic discrimination."²⁸² Furthermore, "OFCCP's model is largely proactive, consisting of broad compliance reviews... without the need for a complaint."²⁸³ DOL OFCCP stated that it is only able to audit about 1 to 2 percent of contractors a year,²⁸⁴ and OFCCP has specifically been focusing on conducting compliance reviews that might result in "big findings."²⁸⁵ This Trump Administration approach is consistent with the approach taken during the Obama Administration;

²⁷⁸ 6 C.F.R. § 21.11(a) and (c) (DHS); 7 C.F.R. § 15.5(a) (USDA); 24 C.F.R. § 1.7(a) and (c) (HUD); 28 C.F.R. §42.107(a) and (c) (DOJ); 31 C.F.R. §22.7 (a) and (c) (Treasury); 34 C.F.R. § 100.7(a) and (c) (Ed); 38 C.F.R. § 18.7(a) and (c) (VA); 40 C.F.R. §§ 7.105, 7.115(a) and (b) (EPA); 43 C.F.R. 17.6(a) and (c) (Interior); 45 C.F.R. § 80.7(a) and (c) (HHS); 49 C.F.R. § 21.11(a) and (c) (DOT). DOL has the authority to conduct compliance evaluations, but is not required to do so by regulation, see 41 C.F.R. §§ 60-1.20(a), 60-1.26. ²⁷⁹ See infra notes 449 (DOJ), 1031 (ED), 1275 (HHS), 1480 (HUD), 2329 (DHS), 2633 (EPA), 2811 (DOT), 3008 (VA), 3121 (USDA), 3321 (Treasury) and 3457 (DOI). DOL also has this authority. See infra notes 1845 and 1952. ²⁸⁰ See, e.g. 28 C.F.R. § 42.108(a) ("If there appears to be a failure or threatened failure to comply with this [DOJ Title VI regulation] and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this [DOJ Title VI regulation].") ²⁸¹ 28 C.F.R. § 50.3(b). ²⁸² U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). ²⁸³ Ibid. ²⁸⁴ Leen Testimony, Federal Civil Rights Enforcement Briefing, p. 24. ²⁸⁵ Ibid., p. 51.

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In FY 2016, OFCCP reduced the total number of compliance reviews and focused on big results.²⁸⁶ With several new initiatives, OFCCP has a goal of reaching a much higher percentage of contractors through compliance assistance efforts, compliance verification, and compliance incentives.²⁸⁷ OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, while making compliance reviews and assistance more focused, faster, and less burdensome. OFCCP plans to triple the number of evaluations it schedules in the coming year.²⁸⁸ Although some of the reviews will be abbreviated (focused reviews and compliance checks), the agency will be reminding many more contractors of their EEO obligations.²⁸⁹ Furthermore, OFCCP has recently focused on the establishment of global resolutions and monitoring programs in an effort to expand worker protections to more workplaces. The agency now encourages Early Resolution Procedures to promote early and efficient supply and service compliance.²⁹⁰ The agency is also developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.²⁹¹ The VERP will officially recognize the outstanding efforts of its top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations.²⁹² Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity In order to identify what policy guidance materials are, the Commission relies in part on 2015 Government Accountability Office (GAO) testimony to the U.S. Senate regarding Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes. In her testimony before the relevant Senate subcommittee, GAO's Director of Strategic Issues Michelle Sager explained that:

One of the main purposes of guidance is to explain and help regulated parties comply with agencies' regulations. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because

286 U.S. Dep't of Labor, Agency Financial Report Fiscal Year 2016, pp. 14-15, https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2016annualreport.pdf. ²⁸⁷ U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). ²⁸⁸ U.S. Dep't of Labor, "OFCCP has released the FY2019 Supply & Service Scheduling List," <https://www.dol.gov/ofccp/scheduling/index.html> [hereinafter DOL, "OFCCP has released the FY2019 Supply & Service Scheduling List"]. ²⁸⁹ See 41 CFR §§ 60-1.20, 60-300.60, and 60-741.60. ²⁹⁰ U.S. Dep't of Labor, OFCCP, Directive 2019-02, Early Resolution Procedures, Nov. 30, 2018, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html [hereinafter DOL, Early Resolution Procedures]. ²⁹¹ U.S. Dep't of Labor, OFCCP, Directive 2019-04, Voluntary Enterprise-wide Review Program (VERP), Feb. 13, 2019, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_04.html [hereinafter DOL, Voluntary Enterprise-wide Review Program]. ²⁹² U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2016annualreport.pdf

<https://www.dol.gov/ofccp/scheduling/index.html>

https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html

https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_04.html

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the guidance can prompt changes in the behavior of regulated parties and the general public.²⁹³

The GAO Strategic Director also explained how guidance fits in the hierarchy of the federal legal system. At the top level are statutes, in which Congress provides authority to agencies; statutes are legally binding. Next, there are federal regulations, which implement statutes and are legally enforceable. Third, guidance may be issued by agencies, through which agencies "may explain how regulations are implemented," but guidance is not legally binding.²⁹⁴ At the more granular level, civil rights enforcement offices may also use a range of other policy-related tools to assure civil rights protections. In 2002, the Commission considered the following types of policy guidance essential to effective civil rights enforcement: "clear and pertinent policy guidance, including internal procedures, external policy, and current regulations," as well as technical assistance to help recipients of federal funding "establish policies and procedures that comply with antidiscrimination laws," and "education and outreach, such as helping victims of discrimination and the public understand their civil rights and how to obtain assistance if discrimination occurs."²⁹⁵ The Commission also found that effective civil rights enforcement requires promoting a national understanding of discrimination, and that policy was a key component of ensuring this promotion of national understanding.²⁹⁶ In 2002, the Commission took note that over one-third of the 1,100 recommendations the Commission had made in the past ten years concerned policy. Common themes included the need to update regulations, and the Commission also made a specific recommendation on the need for a specialized policy unit in each agency, unencumbered with civil rights enforcement responsibilities. The Commission found that "[t]he lack of updated and clear policy guidance, and the inadequate resources devoted to it, are among the primary reasons for poor civil rights enforcement."²⁹⁷ The Commission's 2002 report found that technical assistance may consist of "educational forums, advice, or written policy documents."²⁹⁸ The Commission encouraged federal agencies responsible for enforcing civil rights laws to implement robust technical assistance programs to assist recipients of federal financial assistance in voluntary compliance with civil rights protections.²⁹⁹

²⁹³ U.S. Gov't Accountability Office, Statement of Michelle A. Sager, Director, Strategic Issues, Testimony Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes, GAO-15-834-T, What GAO Found (introductory page), Sept. 23, 2015, <https://www.gao.gov/assets/680/672687.pdf>. ²⁹⁴ Ibid., 6, Figure 1: Hierarchy of Statutory and Regulatory Authority. ²⁹⁵ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 3. ²⁹⁶ Ibid., 1, xi. ²⁹⁷ Ibid., 25. ²⁹⁸ Ibid., 32. ²⁹⁹ Ibid., 32-33.

<https://www.gao.gov/assets/680/672687.pdf>

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During the Commission's briefing Robert Driscoll made a distinction between civil rights enforcement and civil rights policy:

I know we currently have a Republican President and a Conservative Attorney General, a situation [with] which I am very familiar, having served under President George W. Bush and Attorney General John Ashcroft and thus, there is controversy and disagreement at a policy level among the civil rights community. As I have alluded to previously, conservatives, including conservative civil rights lawyers, such as myself, tend to feel bound by statutory and constitutional text. As such, advocacy groups and others that want, in the absence of statutory authority, to advance certain issues . . . are sometimes disappointed. I'm sure there's a member of this panel or members of the group today who are disappointed with some of the current federal civil rights enforcers. So these disagreements, in my mind, highlight the distinction between civil rights enforcement, the topic of today's panel, and civil rights policy. Federal civil rights enforcers do not write with a free hand.³⁰⁰

In the current evaluation, the Commission observed some trends in policy shifts that have occurred. While the following section does not document every observed trend, it does highlight several noteworthy trends in policy changes that have occurred across these agencies from FY 2016 to FY 2018, to establish a basis for understanding this policy evolution on a macro level. The Commission's analysis is limited to whether policy is being issued, and to changes in policy that would either expand or restrict the effectiveness of civil rights enforcement. The Commission found that many of the agencies studied in this report are specifically required to issue guidance and technical assistance to recipients of federal financial assistance, which clarifies recipients' obligations under federal civil rights laws.³⁰¹ Moreover, many civil rights offices (e.g., DOJ CRT, ED OCR, DOL OFCCP, HHS OCR, EPA ECRCO) issue guidance documents that may assist recipients of federal funding (such as schools, housing providers, hospitals, etc.) to comply with federal civil rights law.³⁰² Furthermore, in at least one of the relevant statutes, Congress

³⁰⁰ Driscoll, Federal Civil Rights Enforcement Briefing, pp. 119-20. ³⁰¹ See, e.g., 28 C.F.R. § 41, Exec. Order 12,250 (1980); 7 C.F.R. § 15.5(a) (requiring USDA to issue guidance and technical assistance); 24 C.F.R. § 1.6(a) (requiring HUD to issue guidance and technical assistance); 29 C.F.R. § 31.5(a) (requiring DOL CRC to issue guidance and technical assistance); 31 C.F.R. § 22.6(a) (requiring Treasury to issue guidance and technical assistance); 34 C.F.R. § 100.6(a) (requiring ED to issue guidance and technical assistance); 40 C.F.R. § 7.20(b) (requiring EPA to issue guidance and technical assistance); 43 C.F.R. § 17.5(a) (requiring DOI to issue guidance and technical assistance); 45 C.F.R. § 80.6(a) (requiring HHS to issue guidance and technical assistance). ³⁰² See, e.g., infra notes 803-27, 831, 835-40, 843, 845-859 (relevant DOJ guidance); 1996-1218 (ED); 1393-1422 (HHS); 2006-43 (DOL); and 2754-7 (EPA).

intended to increase effective civil rights enforcement by providing the civil rights office (DHS CRCL) with authority to review agency policy before it is implemented.³⁰³

In its 2003 annual report, ED OCR highlighted the importance of issuing policy guidance, stating: “OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information.”³⁰⁴ However, during FY 2017 and 2018, ED OCR rescinded more policy guidance than it issued.³⁰⁵ Executive Order 12,250, issued in 1980 and later codified in federal regulations, requires DOJ to “coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions” in Title VI, Title IX, Section 504 and any provision of federal law prohibiting discrimination on the basis of race, national origin, disability, religion or sex.³⁰⁶ According to DOJ’s Title VI Legal Manual, if two federal agencies issue conflicting policy guidance or regulations, DOJ is authorized to determine the final government-wide position on the matter.³⁰⁷ DOJ is also required to issue model Title VI and other civil rights regulations and provide policy guidance to other agencies.³⁰⁸ In addition to its coordination role, DOJ has also issued a number of policy guidance materials and directives regarding civil rights, which are discussed in Chapter 2 of this report.³⁰⁹ The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration.³¹⁰ Some champion these efforts, citing that deregulation can lead to economic growth and “improvements to quality of life from access to innovative products

³⁰³ See infra notes 2360-4 (discussing purposes of this authority under the Homeland Security Act). ³⁰⁴ U.S. Dep’t of Educ., Office for Civil Rights Annual Report to Congress FY 2003, p. 19, <https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>. ³⁰⁵ See infra notes 1200-06. ³⁰⁶ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), § 1-201 Coordination of Nondiscrimination Provisions, <https://www.justice.gov/crt/executive-order-12250>; 29 C.F.R. § 0.51(b). ³⁰⁷ DOJ, Title VI Legal Manual, supra note 39, at 4. ³⁰⁸ See infra notes 787-9. ³⁰⁹ See infra notes 806-14 (DOJ Title VI guidance) and 821-57 (other DOJ civil rights guidance documents issued FY 2016-2018). ³¹⁰ Diane Katz, “Here’s How Much Red Tape Trump Has Cut,” The Heritage Foundation, Oct. 17, 2018, <https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut>. This article notes that as per guidance from the White House, only “significant” regulatory actions count towards this cap; see also Memorandum Re: Guidance Implementing Executive Order 13,771, Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> (that provides specific guidelines for what constitutes a “significant guidance document” for the purposes of EO 13771).

<https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>

<https://www.justice.gov/crt/executive-order-12250>

<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

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and services.”³¹¹ However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.³¹²

In January 2017, President Trump signed Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs.³¹³ This order highlighted the new Administration’s focus on “financial responsibility” in the management of public funds, public spending, and the budgeting process, noting that “it is essential to manage the costs associated with the governmental imposition on private expenditures required to comply with Federal regulations.”³¹⁴ Specifically, for every one new regulation issued, it called for the identification of at least two prior regulations for elimination to offset any incremental costs associated with the implementation of the new regulations.³¹⁵ At the end of FY 2017, the Administration reported that for every “significant” regulation passed, twelve they deemed “outdated, unnecessary, or duplicative” regulations were eliminated,³¹⁶ exceeding the two-for-one order. In testimony submitted to the Commission, YWCA strongly denounced these policy changes, stating that:

These and other recent actions exacerbate systemic barriers, reinforce gender and racial stereotypes, and send a clear message that the federal government will no longer fulfill its critical role of protecting and vindicating civil rights. And the true irony is that these rollbacks are occurring at a time when women have heightened

³¹¹ Neomi Rao, “The Trump administration’s deregulation efforts are saving billions of dollars,” The Washington Post, Oct. 17, 2018, https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceaad2ab1_story.html?noredirect=on&utm_term=.a24d532ab006; Thomas A. Firey, “Dire Fears of Trump Deregulation,” Cato at Liberty, Mar. 13, 2017, <https://www.cato.org/blog/dire-fears-trump-deregulation>; Thomas A. Hemphill, “Manufacturing Benefits from Trump’s Deregulation Agenda,” The Heartland Institute, Feb. 13, 2019, <https://www.heartland.org/news-opinion/news/manufacturing-benefits-from-trumps-deregulation-agenda>; “Trump’s Deregulation Binge is Lightening The Economy’s Load,” Investor’s Business Daily, Dec. 15, 2017, <https://www.investors.com/politics/editorials/trumps-deregulation-binge/>; Julie Appleby, “High Stakes, Entrenched Interests And The Trump Rollback Of Environmental Regs,” Kaiser Health News, Nov. 12, 2018, <https://khn.org/news/high-stakes-entrenched-interests-and-the-trump-rollback-of-environmental-regs/>; Scott Sumner, “Opinion: Why free-market economists aren’t impressed with Trump’s deregulation efforts,” Market Watch, Dec. 19, 2018, <https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>; Laura Meckler and Devlin Barrett, “Trump administration considers rollback of anti-discrimination rules,” The Washington Post, Jan. 3, 2019, https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74 [hereinafter Meckler et al., “Trump administration considers rollback of anti-discrimination rules”]; ³¹³ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). ³¹⁴ Id. ³¹⁵ Id. ³¹⁶ The White House, “Regulatory Relief Efforts Deliver \$23 Billion In Regulatory Cost Savings,” Oct. 17, 2018, <https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>.

https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceaad2ab1_story.html?noredirect=on&utm_term=.a24d532ab006

https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceaad2ab1_story.html?noredirect=on&utm_term=.a24d532ab006

https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceaad2ab1_story.html?noredirect=on&utm_term=.a24d532ab006

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<https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>

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https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74

https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74

<https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>

<https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>

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concerns about discrimination, safety and economic security [as documented in recent survey data YWCA submitted to the Commission].³¹⁷

The Commission received significant testimony about the negative impacts on effective civil rights enforcement of recent policies restricting civil rights. It also received some testimony favoring a tightening of civil rights policies. According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration’s restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations.³¹⁸ This is despite ongoing prosecution of hate crimes by CRT in the Trump Administration.³¹⁹ Some also contend that Trump Administration regulatory and guidance changes in civil rights areas have made impacted persons fearful of approaching the federal government to protect them against violations.³²⁰ Anthony Varona, Professor of Law at American University, Washington College of Law, distilled this view: “[k]ey federal agencies now are aggressively undermining the recognition and protection of the civil rights of millions of Americans that depend on them.”³²¹ Seventeen State Attorneys General submitted comments critiquing the Trump Administration’s policy changes regarding federal civil rights, and summarized their view as follows:

³¹⁷ YWCA, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 2. ³¹⁸ John Yang, President and Executive Director, Asian Americans Advancing Justice | AAJC, testimony, Federal Civil Rights Enforcement Briefing, pp. 182-88. ³¹⁹ See supra note 217 (discussing research findings), citing infra notes 508-09. ³²⁰ Asian and Pacific Islander American Health Forum, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 1-2 (discussing how various rollbacks in civil rights protections for limited-English proficient and communities of color chill participation and deter access to federal health care programs); Center for American Progress, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 5 (discussing need to build community trust with law enforcement); End Rape on Campus, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 2 (discussing “the Department of Education’s recent and impending decision-making to rescind previous guidance on Title IX enforcement and replacing it with a dangerous regulation that will chill reporting and prevent students everywhere from accessing their civil rights under Title IX”); South Asian Americans Leading Together, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 1-2 (regarding fear of reporting hate crimes); NAACP Legal Defense and Educational Fund, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 8, notes 27-28 (regarding fear of Census participation); National Urban League, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 5 (rollbacks in civil rights to protect against police violence “places our communities and their civil rights at further risk”); Partnership for Inclusive Disaster Strategies, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 4 (discussing issues chilling access, stating that “We are much less concerned with which federal entity is responsible for enforcement, and far more concerned with who we can look to for enforcement of civil rights obligations currently harming children and adults with disabilities and those who will be harmed as soon as the next disaster.”); ³²¹ Anthony Varona, Professor of Law, American University Washington College of Law, testimony, Federal Civil Rights Enforcement Briefing, pp. 254-55.

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As the chief law officers of our states, we urge this commission to report with impartiality the tangible threat to civil rights enforcement in America today. We stand ready to take action when and wherever we are needed to protect the rights of the people in our states from assaults on their freedoms and civil rights. But without the genuine partnership of the federal government, the tools we have to conduct that enforcement are limited. To put an even finer point on it: The federal government should partner with us in protecting civil rights, rather than posing a constant and dangerous threat to them.³²²

Burth Lopez, Senior Attorney at the Mexican American Legal Defense and Educational Fund (MALDEF), also contended that “under the [Trump] administration it has become clear that executive priorities have shifted away from the enforcement of civil rights in areas that are critical to Latinos, workers, students and voters.”³²³ Kristen Clarke, president and executive director of the Lawyers’ Committee for Civil Rights Under Law, testified before the House Committee on the Judiciary that:

By abandoning full enforcement of our federal civil rights laws, this Justice Department has also sent a dangerous message that the rights of vulnerable communities simply do not matter.³²⁴

The National LGBTQ Task Force also expressed concern about policy changes impacting the communities they represent, in the areas of immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns.³²⁵ The Task Force concluded that:

There has been an unprecedented rollback and lack of enforcement of civil rights protections in the past two years, with many of them directly impacting LBGQT people and families. LBGQT people need to know that the law protects them, and does so regardless of our race, national origin, or immigration status.

³²² State Attys General Statement, at 8. ³²³ Burth Lopez, Senior Atty at the Mexican American Legal Defense and Educational Fund, testimony, Federal Civil Rights Enforcement Briefing, p. 187. ³²⁴ Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Comm. on the Judiciary, 11th Cong. (2019) (statement of Kristen Clarke, President and Executive Director, Lawyers’ Committee for Civil Rights Under Law at 2-3), <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>. ³²⁵ National LGBTQ Task Force, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018 [hereinafter National LGBTQ Task Force Statement] (passim).

<https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>

<https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>

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In addition to these well-documented civil rights enforcement issues, there has been a lack of transparency, consistency, process, and collaboration across agencies and with the public. The most vulnerable people in our communities have been the most impacted by these actions. With more input through Notice and Comment Rulemaking or regular listening sessions, the most impacted people can be heard.³²⁶

The Commission also studied how agencies use publicity to promote their policy priorities and educate the public about protections granted by civil rights laws. The U.S. Department of Transportation, for example, established a Civil Rights Learning Center, a collaboration between all of DOT’s civil rights offices to “foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders.”³²⁷ Additionally, DOT DOCR’s website makes a number of learning resources available to the public explaining external civil rights, including podcasts, videos, learning hubs, online training modules, and guidance for funding recipients from DOT and its OAs.³²⁸ Further details about how other agency’s civil rights offices use these tools are discussed in the relevant section of each of the following chapters. Effectiveness of Interaction and Coordination with External Agencies and Organizations Agency civil rights enforcement offices also differ in the extent to which they coordinate with other federal agencies, and other stakeholders of the enforcement work, including the individuals who are subject to the offices’

Useful, regulated entities, and the general public. Some agencies with subject-matter expertise and legal authority under federal statutes or regulations are required to coordinate with each other. For example, according to the EEOC:

Approximately 30 Federal departments and agencies provide Federal financial assistance. These agencies are responsible for ensuring that recipients of Federal financial assistance comply with: Section 504 of the Rehabilitation Act on the basis of disability, Title VI of the Civil Rights Act of 1964 on the bases of race, color, and national origin, and Title IX of the Education Amendments of 1972 on the basis of sex. EEOC regulations at 29 C.F.R. Part 1640 (issued jointly with the Department of Justice, 28 C.F.R. Part 37) address how EEOC will handle charges/complaints of disability discrimination that also may be covered under Section 504; 29 C.F.R. Part 1691 (also issued jointly with Justice, 28 C.F.R. Part 42) addresses Titles VI and IX. In addition, EEOC Management Directive 1002 addresses coordination of

326 National LGBTQ Task Force Statement, at 15. 327 U.S. Dep't of Transportation, "Civil Rights Learning Center (CRLC)," <https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc> [hereinafter DOT, "Civil Rights Learning Center"]; 328 U.S. Dep't of Transportation, "Learning Resources," <https://www.transportation.gov/civil-rights/civil-rights-learning-center/learning-resources> [hereinafter DOT, "Learning Resources"].

http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1640_00.html
http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1691_00.html
http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1691_00.html
<https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc>
<https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc>
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complaints/charges against recipients of Federal financial assistance. DOJ's Coordination and Review Section, Civil Rights Division, works with EEOC to coordinate enforcement of these laws.

Employers that are Federal government contractors or subcontractors also may be covered by Executive Order 11246, which prohibits discrimination on the basis of race, color, national origin, religion, and sex, and section 503 of the Rehabilitation Act, which prohibits disability discrimination. The Department of Labor, Office of Federal Contract Compliance Programs, administers and enforces these workplace prohibitions.³²⁹

There are other examples of coordination that are not mandatory. Based on a presidential directive, DOJ, DHS, HHS, HUD and DOT issued joint agency guidance to recipients of federal financial assistance on the nondiscrimination protections of Title VI in emergency and disaster preparedness, response, and recovery. The guidance provides an overview of the application of Title VI in emergency and disaster management and examples of promising practices that recipients of federal financial assistance can take in advance of emergencies and disasters, to ensure Title VI compliance.³³⁰

Then in September 2016, the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties, in collaboration with the Federal Emergency Management Agency's Office of Equal Rights and the Office of Disability Integration and Coordination, issued a notice about this guidance and protections under Section 504 of the Rehabilitation Act to U.S. Department of Homeland Security recipients on their obligations to ensure nondiscrimination in the provision of federally assisted services to disaster survivors.³³¹ Likewise, in the Obama Administration ED and DOJ entered a formal memorandum of understanding regarding how the agencies would coordinate Title IX enforcement activities to better ensure effective enforcement.³³² Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. This is also a role that the Commission has encouraged in the past,

329 U.S. Equal Opportunity Employment Comm'n, "How Other Federal Agencies Address Civil Rights Issues," <https://www.eeoc.gov/federal/whatothersdo.cfm> (accessed May 20, 2019). 330 See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination and Compliance Section, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, Aug. 16, 2016, <https://www.justice.gov/crt/fcs/EmergenciesGuidance>; see also infra notes 803-04 (discussing joint agency collaboration and release date). 331 *Ibid.* 332 White House Task Force to Protect Students From Sexual Assault, Not Alone, April 2014, p. 20, <https://www.justice.gov/archives/ovw/page/file/905942/download> [hereinafter White House Task Force to Protect Students From Sexual Assault, Not Alone]; U.S. Dep't of Education, Office for Civil Rights, Memorandum of Understanding Between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division, Apr. 29, 2014, http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleIX-04-29-2014.pdf.

<http://www.usdoj.gov/crt/cor/index.htm>
<http://www.usdoj.gov/crt/cor/index.htm>
<http://www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm>
<http://www.dol.gov/esa/regs/compliance/ofccp/sec503.htm>
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<https://www.justice.gov/crt/file/665401/download>
<https://www.dhs.gov/publication/notice-recipients-nondiscrimination-during-disasters>
<https://www.eeoc.gov/federal/whatothersdo.cfm>
<https://www.justice.gov/crt/fcs/EmergenciesGuidance>
<https://www.justice.gov/archives/ovw/page/file/905942/download>
http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleIX-04-29-2014.pdf

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to improve coordination and enforcement of antidiscrimination laws governing recipients of federal funding.³³³ Executive Order 12,250, "Leadership and Coordination of Nondiscrimination Laws," which defines DOJ's role, is codified within DOJ's Title VI regulations. These regulations provide that the Assistant Attorney General for Civil Rights "shall" coordinate the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination on the bases of race, color, national origin, handicap, religion, or sex under any program or activity receiving federal financial assistance.³³⁴ Coordination regulations also require that agencies must notify DOJ if they are unable to resolve findings of noncompliance.³³⁵ DOJ asserts that: "DOJ is the federal government's litigator," and that "[a]gencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution)."³³⁶ Several witnesses at the Commission's briefing spoke to the need for coordination among federal agencies, to ensure consistent results across the federal government. Some agencies have more formal systems set up for this engagement. Carol Miaskoff testified to the Commission that EEOC's Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they "clash" with civil rights laws.³³⁷ Leon Rodriguez spoke to the Commission about the Civil Rights Investigator Academy, which was an effort to provide skills and training to civil rights staff across different agencies, and ensure consistent approaches and results across the federal government.³³⁸ As Brian Greene stated, "[M]ost of our coordination is directly with the Department of Justice, in part, because the Department of Justice shares civil rights enforcement authority under the Fair Housing Act. We handle individual complaints. They have pattern [or] practice authority."³³⁹

333 See infra notes 940-4 (discussing USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 6-8 and U.S. Comm'n on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, 1996, at 132-34). 334 Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995; 29 C.F.R. § 0.51 (b). The only exception is that: "Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment." *Id.* § 1 – 503; 29 C.F.R. § 0.51 (a). Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-84. 335 28 C.F.R. § 42.411(a). 336 DOJ, Title VI Legal Manual, supra note 39, at § III.B. 337 *Id.* at 82. 338 *Id.* at 83-84. 339 Greene Statement, at 80-61.

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Use of Research, Data Collection, and Reporting Some civil rights enforcement offices have statutory responsibility to collect data. In 2002, the Commission found that having sufficient data to identify civil rights violations and determine whether there is compliance with federal civil rights laws is important.³⁴⁰ Since then, the Commission has repeatedly found that data collection and reporting are essential to effective civil rights enforcement, and that a lack of effective civil rights data collection is problematic. For example, the Commission reported in 2018 that there is currently no system in place to collect or report victimization and crime data in Indian Country and that many tribes lack computerized systems for collecting such data.³⁴¹ The Commission also found that tribal nations need accurate data in order to plan and evaluate their law enforcement and judicial programs. Although federal law enforcement agencies are required to report crime data to the Uniform Crime Reporting Program, participation of tribal law enforcement is merely voluntary. As a result, Native American crime statistics likely are underreported, which creates challenges in fully understanding crime and law enforcement issues in Indian Country.³⁴² The Commission's report also discussed a lack of data about Native Americans in general, with regard to health, education, and other federal civil rights issues. The Commission majority also found that the collection of data was essential for the federal government's fulfillment of its treaty obligations: "The federal government has also failed to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, making monitoring of federal spending to meet its trust responsibility difficult."³⁴³ The Commission recommended that:

Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.³⁴⁴

Also in 2018, the Commission found that accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database capturing rates of police use of force exists, creating a void in effective civil rights enforcement.³⁴⁵

340 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 41. 341 U.S. Comm'n on Civil Rights, Broken Promises: Continuing Federal Funding Shortfall for Native Americans (2018) at 56, <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [hereinafter USCCR, Broken Promises]. 342 *Ibid.*, 57. 343 *Ibid.*, 2. 344 *Ibid.* 345 U.S. Comm'n on Civil Rights, Police Use of Force: An Examination of Modern Policing, 2018, p. 137, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf> [hereinafter USCCR, Police Use of Force].

<https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>
<https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>

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Therefore, the Commission recommended that:

Congress should condition cities' receipt of federal law enforcement funds on the cities' collection and reporting of data regarding police use of force practices to the Department of Justice in a format that is aggregable and comparable nationally. [and that] Congress should require the Department of Justice to release to the public twice each year the names of departments and jurisdictions that fail to report use of force information in the manner in requires.³⁴⁶

These are just two examples of recent reports in which the Commission has considered the need for data collection to be paramount.³⁴⁷ The Commission also notes that some civil rights statutes require data collection because Congress considered this collection important to advance the agency civil rights enforcement offices' overall mission of effective civil rights enforcement.³⁴⁸ For example, the 2013 Death in Custody Reporting Act includes enforcement mechanisms, similar to those of the 2003 Prison Rape Elimination Act. DOJ does collect PREA data.³⁴⁹ Regarding the Death in Custody Act, states' DOJ Safe Streets funding would be reduced by 10 percent if states fail to report deaths in custody.³⁵⁰ The DOJ Office of Inspector General reports that DOJ has not yet begun collecting data but plans to do so in 2020.³⁵¹ More broadly, the Commission heard testimony of continuing disparities and discrimination within the purview of OCRs from a variety of stakeholders, emphasizing the need for accurate data collection and reporting. Bryan Greene at HUD noted: "Ongoing segregation in America, regular reports of sexual harassment in housing, and newly constructed properties inaccessible to people with disabilities, are just some examples that underscore that we have not yet conquered housing discrimination."³⁵² A former Deputy Assistant Attorney General testified that complaints of sexual

346 *Ibid.*, 139. 347 USCCR, Broken Promises, supra note 341, at 6 (data on Native American and Native Hawaiians and Other Pacific Islander racial groups are often incomplete, inaccurate, old, or not tracked by the federal government... there is a critical need for more accurate and current data collection for these communities), p. 11 (the Commission has emphasized the importance of data collection and has recommended increased data collection efforts). 348 See e.g. infra notes 983-8 (discussing DOJ's reporting requirements under the Equal Credit Opportunity Act, the Civil Rights of Institutionalized Persons Act, Title VI, and former reporting requirements of state and local jurisdictions under Section 5 of the Voting Rights Act). 349 See, e.g. Ramona R. Rantala, Sexual Victimization Reported by Adult Correctional Authorities, 2012-15, Bureau of Justice Statistics, July 2018, <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>. 350 34 U.S.C. 60105. 351 U.S. Dep't of Justice, Office of the Inspector General, Review of the Department of Justice's Implementation of the Death in Custody Act of 2013, Dec. 2018, p. i, <https://oig.justice.gov/reports/2018/e1901.pdf> ("We found that, despite the DCRA requirement to collect and report state arrest-related death data by fiscal year (FY) 2016, the Department does not expect to begin its collection of this data until the beginning of FY 2020. This is largely due to the Department having considered, and abandoned, three different data collection proposals since 2016."). 352 Greene Testimony, Federal Civil Rights Enforcement Briefing, pp. 21-22.

<https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>
<https://oig.justice.gov/reports/2018/e1901.pdf>

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harassment against landlords increased significantly in response to HUD outreach on the issue, citing the increase in complaints as a positive step in civil rights enforcement because the increase reflects greater public awareness of the issue.³⁵³ Arne Duncan specifically mentioned the importance of collecting "A massive amount of data. A treasure trove of data telling us all kinds of things."³⁵⁴ He noted this data's importance came not only in confirming educational discrimination the department already suspected, but in identifying inequalities previously unperceived.³⁵⁵ The Commission's research showed that few agencies engage in the type of public data collection, research and reporting needed

to perform effective civil rights enforcement work. Congress created ED OCR's data collection and analysis;356 ED OCR's Civil Rights Data Collection exists to fulfill this purpose. DHS RCL also has the statutory authority to perform data collection and public reporting.357 Additionally, Dexter Brooks testified to the Commission about research from EEOC social scientists on topics such as harassment in the workplace and achieving cultural change, stating that EEOC considers these types of reports an important enforcement tool.358 U.S. Department of Transportation's DOCR, for instance, requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT-funded program/project may have a disparate impact upon certain racial/ethnic populations.359 Furthermore, some agencies have broad powers to collect data (within the limits of privacy law) and publish research results and have published civil rights studies.360 For example, the VA published a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, examining the impacts of delayed or missed care.361 The study found a high level of harassment, and that "[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need."362

353 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 118. 354 Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 36. 355 Ibid., 35-40. 356 20 U.S.C. 3413(c). 357 See 6 U.S.C. § 345(a)(2) and 6 U.S.C. § 345(b). 358 Brooks Testimony, Sexual Harassment in Government Workplaces Briefing, pp. 66-68. 359 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 13. 360 See supra Table 1.1, Publicity. 361 Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care, Women's Health Issues 29-2 (2019), pp. 107-15, [https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf). 362 Ibid., 113.

[https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf)
[https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf)

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Over the past few years, the Trump Administration also made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers,363 older adults,364 foster youth and parents,365 crime victimization,366 and disease prevention.367 ***** The following chapters will explore the above three key factors and seven essential elements of effective civil rights enforcement in greater detail with regard to each of the 13 agencies studied, and will delve into a thorough examination of the efficacy of current federal civil rights enforcement efforts of each of these thirteen agencies, based on agency provided data and testimony the Commission received as well as Commission staff's independent research of hundreds of cases, enforcement data and trends, policy changes, and other relevant factors (in FY 2016, 2017, and 2018). Additionally, the final chapter of this report will provide a series of Commission findings and recommendations for the examined agencies.

363 Hansi Lo Wang, "Census Bureau Caught in Political Mess over LGBT Data," National Public Radio, Jul. 18, 2017, <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>. 364 Sejal Singh, Laura E. Durso, and Aaron Tax, "The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults," Center for American Progress, Mar. 20, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>. 365 Julie Moreau, "Health Department Proposes Nixing Data Collection on LGBTQ Foster Youth," NBC News, Apr. 18, 2019, <https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>. 366 In this case, the administration stopped directing the survey to youth under 18 (rather than eliminating an LGBTQ-related question), but activists argue that this disproportionately affects minor victims of crime who identify as LGBTQ. "Trump Administration Continues Erasing LGBTQ People in Data Collection," Anti-Violence Project Action Brief, Apr. 13, 2018, <https://avp.org/words-matter-2/>. 367 Chris Johnson, "Trump's CDC to Roll Back LGBT Data Collection: Report," Washington Blade, May 18, 2018, <https://www.washingtonblade.com/2018/05/18/trumps-cdc-to-rollback-lgbt-health-data-collection-report/>.

<https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>
<https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>
<https://www.americanprogress.org/about/staff/durso-laura/bio/>
<https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>
<https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>
<https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>
<https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>
<https://avp.org/words-matter-2/>
<https://www.washingtonblade.com/2018/05/18/trumps-cdc-to-rollback-lgbt-health-data-collection-report/>

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Chapter 2: U.S. Department of Justice, Civil Rights Division This chapter analyzes the U.S. Department of Justice (DOJ) Civil Rights Division's (CRT) activities in enforcing civil rights in the period of FY 2016 to FY 2018. As the chapters that follow do for other agencies, the chapter summarizes CRT's jurisdiction, enforcement tools, and resources. It then analyzes data collected about CRT based upon the seven key elements of effective civil rights enforcement identified in Chapter 1. The former head of CRT Vanita Gupta, who served in the Obama Administration, testified extensively about CRT before the Commission, emphasizing that the Civil Rights Division is "charged with upholding the civil and constitutional rights of all people in America."368 Former Deputy Assistant Attorney General and CRT Chief of Staff Robert Driscoll, who served in the George W. Bush Administration, similarly stated that: "[F]ederal civil rights enforcement is not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences;"369 instead they must "well and faithfully discharge the duties of the office."370 Publicly available data shows that CRT (in the Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections) resolved 388.5 civil rights cases during FY 2016-2018, primarily through court-ordered consent decrees and out-of-court settlement agreements, although some cases went to trial.371 A chart of these cases is in Appendix A, and the litigation section of this chapter below includes other charts and graphs showing data patterns over time. A description of the relevant methodology is also found in the litigation section of this chapter. Legal Authority and Responsibility In summarizing CRT's legal authority and responsibility, the Commission emphasized in 2002 that:

It is mainly through its Civil Rights Division (Division) that DOJ protects the civil rights of all citizens in areas such as housing, education, employment, immigration, disabilities, law enforcement, and voting. The Division also carries out the Department's coordination and oversight responsibilities with respect to other federal agencies' civil rights enforcement responsibilities, including the implementation of Title VI.372

368 Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 170. 369 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 116. 370 5 U.S.C. § 3331 (Oath of office); see also U.S. Dep't of Justice, Justice Manual (March 2018), § 1 – 4.010, <https://www.justice.gov/jm/jm-8-1000-civil-rights-division> [hereinafter DOJ Justice Manual] ("Government ethics rules implement this common value: public service is a public trust, meaning that the decisions and actions that federal employees take must be made in the best interests of the American people."). 371 See Appendix A, Chart of CRT Cases Resolved, FY 2016-2018; and see infra notes 621-744 (discussing the specific data). 372 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 5.

<https://www.justice.gov/jm/jm-8-1000-civil-rights-division>

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The Commission's current research shows that this structure of CRT's legal authority and responsibilities is largely unchanged. Much of this authority comes directly from federal civil rights statutes and regulations. The Civil Rights Act of 1957 established CRT to enforce the civil and constitutional rights that prohibit discrimination.373 DOJ CRT is the nation's oldest federal civil rights enforcement agency. DOJ CRT has considerable power and influence; not only does it enforce many civil rights statutes, but under Executive Order 12,250 (1980), the Attorney General also coordinates across the federal government the enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and all other statutes that prohibit discrimination against protected classes by federal agencies and federal fund recipients.374 DOJ codified the provisions of this Executive Order in federal regulations.375 Its power is also established by its statutory ability to litigate to enforce civil rights statutes (including those also enforced by other agencies) in federal court.376 Pursuant to the Civil Rights Act of 1957, an order of then-Attorney General William Rogers in December 1957 established the CRT within DOJ. That order provided that CRT shall be headed by an Assistant Attorney General, and under the Assistant Attorney General's "general supervision and direction," be charged with:

- Enforcement of all Federal statutes affecting civil rights, and authorization of such enforcement, including criminal prosecutions, and civil actions and proceedings on behalf of the Government; and appellate proceedings in all such cases.
- Requesting, directing and reviewing of investigations arising from reports or complaints of public officials or private citizens with respect to matters involving civil rights.
- Conferring with individuals and groups who call upon the Department in connection with civil rights matters, advising such individuals and groups thereon, and initiating appropriate action.
- Coordination within the Department of Justice on all matters affecting civil rights. (e) Research on civil rights matters, and the making of recommendations to the Attorney

General as to proposed policies and legislation therefor. (f) Upon their request, assisting the Commission on Civil Rights and other similar Federal

bodies in carrying out research and formulating recommendations.377

373 U.S. Dep't of Justice, Civil Rights Division, "About Division Overview," <https://www.justice.gov/crt/about-division-overview> (accessed Jun. 21, 2018). The full list of civil and criminal civil rights statutes enforced by CRT is available in Title 8 of the DOJ Justice Manual, supra note 370. 374 Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995. The only exception is that: "Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment." Id. §1 – 503; see also Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-84; and further discussion of Executive Order 11250 at infra notes 940-43. 375 28 C.F.R. § 0.51. 376 Id. § 0.50(a). 377 U.S. Dep't of Justice, Office of the Atty General, Establishment of the Civil Rights Division in the Department of Justice, Order No. 155-57 (Dec. 9, 1957), <https://www.justice.gov/crt/creation-and-role-civil-rights-division> (accessed Mar. 11, 2019).

<https://www.justice.gov/crt/about-division-overview>
<https://www.justice.gov/crt/about-division-overview>
<https://www.justice.gov/crt/creation-and-role-civil-rights-division>

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DOJ also codified these duties as federal regulations that clearly list these same activities as functions that "shall be conducted, handled, or supervised by" the Assistant Attorney General for CRT.378 DOJ regulations have since expanded the list of civil rights statutes under the enforcement authority of CRT in item (a) above, and added the following additional duties:

- Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights.
- Representation of Federal officials in private litigation arising under 42 U.S.C. 2000d or under other statutes pertaining to civil rights.
- Administration of sections 3(c) and 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973a(c), 1973c).
- Administration of section 105 of the Civil Liberties Act of 1988 (50 U.S.C. App. 1989b).
- Certifications under 18 U.S.C. 245.
- Enforcement and administration of the Americans with Disabilities Act of 1990, Public Law 101-336.
- Community education, enforcement, and investigatory activities under section 102 of the

Immigration Reform and Control Act of 1986, as amended.- Certifications under 18 U.S.C. 249, relating to hate crimes.379

DOJ CRT presently enforces the following civil rights statutes:

A. CIVIL STATUTES. 8 U.S.C. § 1324b (Immigration and Nationality Act's anti-discrimination provision); 15 U.S.C. §§ 1691 to 1691f (Equal Credit Opportunity Act); 18 U.S.C. § 248 [redacted]; 20 U.S.C. §§ 1681 to 1688 (Title IX of the Educational Amendments of 1972), 1706 to 1710 (Equal Educational Opportunities Act of 1974); 29 U.S.C. §§ 794 to 794g (Section 504 of the Rehabilitation Act of 1973); 34 U.S.C. § 12601 (Pattern or Practice of Unlawful Conduct by Law Enforcement or in the Administration of Juvenile Justice), 10228 (Safe Streets Act); 38 U.S.C. §§ 708(c) and 4301 to 4335 (USERRA); 42 U.S.C. §§ 1997 to 1997f (Civil Rights of Institutionalized Persons Act), 2000a to 2000a-6 (Title II of the Civil Rights Act of 1964), 2000b to 2000b-3 (Title III of the Civil Rights Act of 1964), 2000c to 2000c-9 (Title IV of the Civil Rights Act of 1964), 2000d to 2000d-7 (Title VI of the Civil Rights Act of 1964), 2000e to 2000e-7 (Title VII of the Civil Rights Act of 1964), 2000h-2 (Title IX of the Civil Rights Act of 1964), 2000cc to 2000cc-5 (Religious Land Use and Institutionalized Persons Act), 2000ff to 2000ff-11 (Genetic Information Nondiscrimination Act), 3601 to 3619 (Fair Housing Act), 12101 to 12213 (Americans with Disabilities Act); 50 U.S.C. §§ 3901 to 4043 (Servicemembers Civil Relief Act), 52 U.S.C. §§ 10101 (Civil Rights Act of 1957), 10301 to 10702 (Voting Rights Act of 1965); 20101 to 20107 (Voting Accessibility for the Elderly and Handicapped Act of 1984), 20301 to 20311 (Uniformed and Overseas Citizens Absentee

378 28 C.F.R. §0.50 (emphasis added). 379 Id. §0.50(e), (g), (h) and (j) – (l).

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Voting Act of 1986), 20501 to 20511 (National Voter Registration Act of 1993), 20701 to 20706 (Civil Rights Act of 1960), 21081 to 21085, 21111 (Help America Vote Act of 2002).

(Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs), 248 [redacted], 249 (Hate crime acts), 594 (Intimidation of voters), 875 (Interstate communications), 876 (Mailing threatening communications), 1351 (Fraud in foreign labor contracting), 1504 (Influencing juror by writing), 1508 (Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting), 1510 (Obstruction of criminal investigations), 1519 (Destruction, alteration, or falsification of records in federal investigations and bankruptcy), 1531 [redacted], 1581 (Peonage), 1582 (Vessels for slave trade), 1583 (Enticement into slavery), 1584 (Involuntary servitude), 1585 (Seizure, detention, transportation or sale of slaves), 1586 (Service on vessels in slave trade), 1587 (Possession of slaves aboard vessel), 1588 (Transportation of slaves from United States), 1589 (Forced labor), 1590 (Trafficking with respect to servitude), 1592 (Document servitude), 1593 (Restitution), 1593A (Benefitting financially from trafficking), 1594 (General provisions, including attempts and conspiracies), 1597 (Unlawful conduct with respect to immigration documents), 1621-1623 (Perjury), 2421 (Transportation for purposes of prostitution); 42 U.S.C. §§ 300a-8 [redacted], 2000e-8 and e-10 (Certain wrongdoing by EEOC), 3631 (Criminal provisions of Fair Housing Act), 52 U.S.C.A. § 10307 (Refusal of person, acting under color of law, to permit vote of qualified voter), 10308, 10501-10503, 10505 (Relating to voting), 10701 (Enforcement of 26th Amendment), 20701 and 20702 (Related to record keeping in elections).380

It also enforces the following Executive Orders and federal regulations:

C. EXECUTIVE ORDERS. 12,250 (Leadership and Coordination of Nondiscrimination Laws), 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs), and 13,166 (Improving Access to Services for Persons with Limited English Proficiency).

D. CODE OF FEDERAL REGULATIONS. 28 C.F.R. §§ 35.101 to 35.190 (Title II of the

Americans with Disabilities Act); 28 C.F.R. §§ 36.101 to 36.608 (Title III of the Americans with Disabilities Act); 28 C.F.R. §§ 42.101 to 42.112 (Department of Justice Title VI implementing regulations); 28 C.F.R. §§ 42.201 to 42.215 (Safe Streets Act implementing regulations); 28 C.F.R. §§ 44.100 to 44.305 (regulations implementing Immigration and Nationality Act's anti-discrimination provision); 28 C.F.R. §§ 54.100 to 54.605

380 DOJ Justice Manual, *supra* note 370, at § 8 – 1.100.

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(Department of Justice Title IX implementing regulations); 28 C.F.R. §§ 51.1 to 51.67 (Procedures for the Administration of Section 5 of the Voting Rights Act); 28 C.F.R. §§ 55.1 to 55.24 (Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups); 38 C.F.R. §§ 4301 to 4323 (USERRA Enforcement).381

This authority may be co-extensive with other agencies that may enforce the same statutes, such as Title VI or the Fair Housing Act or the Americans with Disabilities Act.382 (Interaction with other federal agencies is discussed in the section on Interaction and Coordination with External Agencies and Organizations below.383) In the modern era, sections of CRT have carried out these duties.384 DOJ created the Appellate Section (APP) as a separate component of CRT in 1974. APP works cooperatively with other CRT sections in representing the U.S. in matters before federal courts of appeals.385 According to the Justice Manual as reissued in March 2018, CRT “has a strong interest in ensuring that the Department of Justice presents consistent arguments nationwide on civil rights issues.”386 The Criminal Section (CRM) prosecutes criminal matters, while the other sections focus on civil matters. It works closely with the Federal Bureau of Investigation (FBI), which conducts most of its investigations.387 The Criminal Section enforces the United States Constitution and over 25

381 *Ibid.*, corrected by U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 382 See *infra* notes 395-9 and 419-26. 383 See *infra* notes 929-77. 384 See, e.g., DOJ Justice Manual, *supra* note 370, at §§ 8 – 2.000 – 2.601, Enforcement of Civil Rights Statutes (describing the duties and authorities of each of these CRT sections). 385 U.S. Dep’t of Justice, Civil Rights Division, “Appellate Section,” <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019) [hereinafter DOJ CRT, “Appellate Section”]. 386 DOJ Justice Manual, *supra* note 370, at § 8 – 2.150. A local U.S. Attorney’s Office may also handle an appeal that occurs in the jurisdiction, but DOJ practice is that the decision of whether it will be handled locally or by the Appellate Section of CRT must be made by the Assistant Attorney General for CRT “or his or her designee, usually the Section Chief of the Appellate Section.” DOJ Justice Manual, *supra* note 370, at § 8-2.150. Even then, if a U.S. Attorney’s Office takes on a federal civil rights case, DOJ practice is that the Appellate Section must approve all substantive appellate pleadings. *Ibid.* The Appellate Section also “works with the Solicitor General in developing the government’s position in Supreme Court cases involving civil rights issues,” and “provides legal counsel to other components of the Division regarding civil rights issues.” DOJ CRT, “Appellate Section,” *supra* note 385. 387 See DOJ Justice Manual, *supra* note 370, at § 8 – 3.150 (“The United States Attorneys’ Offices may decline cases by orally advising the FBI or other lead federal investigative agency of the declination. The declination should then be reflected in the investigative report submitted by the FBI or other lead federal investigative agency.”); and § 8 – 3.190 (procedures for closing an investigation after the final FBI report).

<https://www.justice.gov/crt/appellate-section>

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federal statutes related to protecting civil rights.388 These include civil rights protections against hate crimes,389 criminal damage to religious property,390 human trafficking,391 criminal interference with housing or other civil rights,392 civil rights conspiracy,393 and deprivation of rights under color of law.394 The Disability Rights Section (DRS) administers and enforces the Americans with Disabilities Act (ADA),395 coordinates the implementation and enforcement of Section 504 of the Rehabilitation Act of 1973,396 and enforces the Genetic Information Nondiscrimination Act.397 The Special Litigation and Educational Opportunities Sections of the Civil Rights Division also enforce Title II of the Americans with Disabilities Act under certain circumstances.398 DRS promulgates regulations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (which prohibits disability discrimination in federally conducted programs or activities, as well as programs or activities receiving federal financial assistance). DRS also coordinates implementation of these laws by federal agencies. The Section’s coordination authority under Section 504, established by Executive Order 12,250, includes review and approval of federal agencies’ regulations and policy guidance regarding Section 504. DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.399 According to its website, the Employment Litigation Section (ELS) enforces two main laws and an Executive Order:400 Title VII of the Civil Rights Act of 1964 (barring workplace discrimination on the basis of sex, race, color, national origin, or religion),401 the Uniformed Services Employment and Reemployment Rights Act (USERRA) (barring workplace discrimination on the

388 These are: 8 U.S.C. § 1324 (Bringing and harboring certain aliens); 8 U.S.C. § 1328 (Importation of aliens for immoral purpose); 18 U.S.C. §§ 241-242 (Infringement of rights); 18 U.S.C. § 245(b)(2) (Federally protected activities); 18 U.S.C. § 247 (Damage to religious real property); 18 U.S.C. § 248 (Freedom of access to clinics); 18 U.S.C. § 249 (Hate crimes prevention); 18 U.S.C. § 1351 (Fraud in foreign labor contracting); 18 U.S.C. § 1546 (Visa fraud); 18 U.S.C. § 1581 (Peonage); 18 U.S.C. § 1584 (Involuntary servitude); 18 U.S.C. §§ 1589-1594 (Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 18 U.S.C. §§ 1596, 3271 (Extra-territorial jurisdiction); 18 U.S.C. §§ 2421-2422 (Interstate transportation of persons related to prostitution); 42 U.S.C. § 3631 (Criminal interference with right to fair housing). 389 18 U.S.C. § 245(b)(2); 18 U.S.C. § 249. 390 18 U.S.C. § 247. 391 8 U.S.C. §§ 1324, 1328; 18 U.S.C. §§ 1351, 1546, 1581, 1584, 1589-1594, 1596, 2421-2422, 3271. 392 42 U.S.C. § 3631 (Criminal provisions of Fair Housing Act); 18 U.S.C. §§ 245(b)(2), (b)(4), & (b)(5) (interference with other federally-protected activities such as in federally-funded programs and activities, and voting). 393 18 U.S.C. § 241. 394 *Id.* § 242. 395 42 U.S.C. §§ 12101 et seq. 396 29 U.S.C. § 794(a). 397 42 U.S.C. §§ 2000ff et seq. 398 See DOJ Justice Manual, *supra* note 370, at § 8-2.400 (Disability Rights Section). 399 *Ibid.* 400 U.S. Dep’t of Justice, Civil Rights Division, “Laws Enforced by the Employment Litigation Section,” <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017). 401 42 U.S.C. § 2000e et seq.

<https://www.justice.gov/crt/laws-enforced-employment-litigation-section>

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basis of military service or status as a veteran),402 and Executive Order 11,246 (barring federal contractors from engaging in workplace discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin).403 ELS also works with the U.S. Department of Labor’s Civil Rights Center and Office for Federal Contract Compliance Programs, which may refer complaints to CRT for possible enforcement.404 The Educational Opportunities Section (EOS) enforces federal statutes and court decisions that prohibit discrimination against students on the bases of race, color, sex, national origin, language, religion, and disabilities in elementary and secondary schools and higher education institutions. The statutes it enforces include Title IV of the Civil Rights Act of 1964 (covering discrimination on the bases of race, color, national origin, sex, and religion in public schools),405 Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, and national origin by recipients of federal financial assistance); Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in education programs and activities receiving federal financial assistance); the Equal Education Opportunities Act of 1974 (requiring, among other things, that state and local educational agencies take appropriate action to overcome the language barriers of English Language Learner students),406 the Individuals with Disabilities in Education Act,407 Section 504 of the Rehabilitation Act of 1973,408 and Titles II and III of the Americans with Disabilities Act of 1990.409 EOS also has the ability to intervene in private suits involving alleged violations of certain anti-discrimination statutes and the 14th Amendment.410 DOJ established the Federal Coordination and Compliance Section (FCS) in 1970. Formerly called the Federal Programs Section, DOJ renamed the section with its current title in 2010, “in part to more accurately capture the Section’s administrative enforcement role with respect to both DOJ-funded entities and other agencies’ dockets.”411 As of March 2018, DOJ reissued the Justice Manual stating that FCS has principal responsibilities for: (1) “coordinating and ensuring consistent and effective enforcement by all executive agencies of laws that prohibit discrimination on the basis of race, color, national origin, sex, or religion by recipients of federal financial assistance,” as well as by the federal government; and (2) investigating “allegations of discrimination based on race, color, national origin (including limited English proficiency), sex,

402 38 U.S.C. § 4301 et seq. 403 Exec. Order No. 11,246, Nondiscrimination in Government Employment, 30 Fed. Reg. 12,319 (Sep. 28, 1965). DOJ notes that these provisions have been incorporated into federal legislation. DOJ Justice Manual, *supra* note 370, at § 8 – 2.212 (“The text of Executive Order 11246, as amended, is set forth immediately following Section 2000e of Title 42 of the United States Code.”). 404 See *infra* notes 1954-5 and 2053-6 (discussing DOL’s jurisdiction and ability to refer). 405 20 U.S.C. § 1681 et seq. 406 *Id.* § 6301 et seq. 407 *Id.* § 1400 et seq. 408 29 U.S.C. § 701 et seq. 409 42 U.S.C. § 12131 et seq. 410 U.S. Dep’t of Justice, Civil Rights Division, “Educational Opportunities Section Overview,” <https://www.justice.gov/crt/educational-opportunities-section-overview> (accessed Jul. 28, 2017). 411 *Ibid.*

<https://www.justice.gov/crt/educational-opportunities-section-overview>

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or religion against recipients receiving financial assistance from the Department of Justice.”412 These duties also stem from Executive Order 12,250 of 1980, and are codified in federal regulations.413 FCS performs these duties by investigating agency referrals to CRT and complaints.414 FCS also “plays a central role in coordinating compliance with Executive Order 13,166, which relates to access by limited English proficiency (LEP) individuals to federal government services, and Executive Order 13,160, which prohibits discrimination on a number of bases in federally conducted education and training programs.”415 The Justice Manual clarifies that neither of these Executive Orders confers a private right of action against the federal government.416 “Executive Order 13,160 does, however, provide for administrative enforcement by individual agencies receiving complaints alleging discrimination in agency-conducted education and training programs.”417 When those complaints involve DOJ-funded activities, FCS undertakes Title VI compliance review. In his written statement to the Commission, Leon Rodriguez, Former Director of HHS OCR, stated that during his tenure, FCS also facilitated “creating a unified professional community among the Offices for Civil Rights.”418 The Housing and Civil Enforcement Section (HCE) prosecutes discrimination in housing under the Fair Housing Act,419 and in public accommodations under Title II of the Civil Rights Act.420 The Section also enforces the Equal Credit Opportunity Act,421 and the Servicemembers Civil Relief Act, which provides for temporary suspension of judicial and administrative proceedings in housing, credit and taxes for military personnel while they are on active duty.422 Finally, the Section enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits local governments from adopting land use provisions that burden religious practice.423 CRT can file a complaint under the Fair Housing Act (FHA) when there is evidence that a person or entity has displayed a “pattern or practice” of civil rights violations or has discriminated against a group that raises an issue of “general public importance.”424 The Attorney General has the discretion to decide what “general public importance” entails and courts generally defer to the Attorney General’s decision.425 As then HUD FHEO General Deputy Assistant Secretary Bryan Greene testified to the Commission, HUD FHEO splits authority for enforcement of the Fair

412 DOJ Justice Manual, *supra* note 370, at § 8 – 2.240. 413 28 C.F.R. § 0.51 (codifying the provisions of Executive Order 12,250). 414 DOJ Justice Manual, *supra* note 370, at § 8 – 2.241. 415 *Ibid.* at § 8 – 2.242. 416 *Ibid.* 417 *Ibid.* 418 Rodriguez Statement, at 2. 419 42 U.S.C. § 3601 et seq. 420 *Id.* § 2000a et seq. 421 15 U.S.C. § 1691 et seq. 422 50 U.S.C. § 3901 et seq. 423 42 U.S.C. § 2000cc, et seq. 424 U.S. Dep’t of Justice, Civil Rights Division, “A Pattern or Practice of Discrimination,” <https://www.justice.gov/crt/pattern-or-practice-discrimination> (accessed Aug. 6, 2015). 425 *Ibid.*

<https://www.justice.gov/crt/pattern-or-practice-discrimination>

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Housing Act, with HUD FHEO generally handling individual complaints and DOJ handling systemic cases, although the FHA provides that HUD may initiate and refer systemic cases.426 The Immigrant and Employee Rights (IER) Section enforces the anti-discrimination provisions of the Immigration and Nationality Act (INA), which prohibit discrimination in hiring, firing, or recruiting on the basis of citizenship status and national origin, unfair documentary practices, and retaliation or intimidation.427 The INA’s antidiscrimination provisions specifically prohibit discrimination based on citizenship or national origin in hiring, firing or referral for a fee, unfair documentary practices during the employment eligibility process, and retaliation or intimidation for engaging in protected activity, such as contesting a perceived violation, filing a charge of discrimination with the IER, or cooperating with an investigation.428 The Special Litigation (SPL) Section enforces several major statutes protecting the rights of institutionalized persons, including the Civil Rights of Institutionalized Persons Act (CRIPA) which protects the civil rights of people in institutional facilities.429 SPL also enforces the Omnibus Crime and Safe Streets Act, which prohibits discrimination by any law enforcement agency receiving federal funds,430 and the Violent Crime and Law Enforcement Act of 1994 (VCLEA), which prohibits “pattern or practice” violations in which law enforcement, or officials of government agencies involved with juvenile justice, deprive individuals of their constitutional rights.431 The Supreme Court has held that a pattern or practice exists where violations are repeated and not isolated.432 SPL also enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires state and local governments or persons acting under color of law to not place impermissible restrictions on religious practice.433 This jurisdiction is shared with HCE.434 The SPL Section may also enforce other federal statutes, such as Title VI of the Civil Rights Act, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Developmentally Disabled Assistance and Bill of Rights Act and Protection and Advocacy for Individuals with Mental Illness,435 and enforce these statutes in collaboration with the Disability Rights Section.

426 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 80-81; see also *infra* notes 1598-1608 (discussion of statutory and regulations governing this split jurisdiction) (in HUD Chapter). 427 8 U.S.C. § 1324b. 428 U.S. Dep’t of Justice, Civil Rights Division, “Immigrant and Employee Rights Section,” <https://www.justice.gov/crt/immigrant-and-employee-rights-section> [hereinafter DOJ CRT, “Immigrant and Employee Rights Section”]. 429 42 U.S.C. § 1997 et seq. 430 34 U.S.C. § 10701. 431 *Id.* § 12601. 432 A pattern or practice exists where violations are repeated rather than isolated. Int’l Bd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977) (noting that the phrase “pattern or practice” “was not intended as a term of art,” but should be interpreted according to its usual meaning “consistent with the understanding of the identical words” used in other federal civil rights statutes). 433 42 U.S.C. § 2000cc, et seq. 434 See Appendix

<https://www.justice.gov/crt/immigrant-and-employee-rights-section>
https://www.justice.gov/sites/default/files/crt/legacy/2015/07/30/idaho_soi_7-20-15.pdf

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The Voting Section (VOT) enforces the Voting Rights Act of 1965 (VRA),⁴³⁶ the National Voter Registration Act of 1993 (NVRA),⁴³⁷ and the Help America Vote Act of 2002 (HAVA).⁴³⁸ It also enforces the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁴³⁹ Voting Accessibility for the Elderly and Handicapped Act of 1985,⁴⁴⁰ as well as pertinent sections of the Civil Rights Acts of 1957 and 1964.⁴⁴¹ CRT also includes a Policy & Strategy Section, whose work this chapter describes in the Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity section.⁴⁴² Enforcement Tools Under the broad mandate set forth in Executive Order 12,250, as codified in federal regulations, CRT “shall” issue policy guidance, provide technical assistance, conduct research, provide educational materials to the public as well as impacted entities, consult with other agencies (federal, state and local), and investigate compliance with federal civil rights laws.⁴⁴³ Federal statutes also provide DOJ CRT with significant litigation authority, and federal regulations state that it “shall” enforce civil rights laws.⁴⁴⁴ Each of these CRT enforcement tools—which are duties that “shall” be done⁴⁴⁵—is listed below, then analyzed as relevant in the subsections of this chapter below assessing the efficacy of CRT’s work.

436 52 U.S.C. § 10301 et seq. 437 Id. § 20501 et seq. 438 Id. § 20901 et seq. 439 Id. § 20301 et seq. 440 Id. § 20101 et seq. 441 Id. §§ 10101, 20701. 442 See infra notes 784–928. 443 28 C.F.R. § 0.50. 444 See supra notes 377–379; and see 28 C.F.R. §§ 0.50(a) and (g). 445 28 C.F.R. § 0.50; see also supra notes 377–79 (discussing that the regulatory language of “shall” and the language of Exec. Order No. 12,250 illustrate that these are obligations).

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The Commission has identified which agency enforcement tools DOJ CRT has specific legal authority to use. Among all agencies reviewed, it is the only civil rights office that has specified legal authority to use all of the enforcement tools that the Commission reviewed. These are:

• Complaint Resolution⁴⁴⁶ • Agency-Initiated Charges⁴⁴⁷ • Litigation⁴⁴⁸ • Proactive Compliance Reviews or Evaluations⁴⁴⁹ • Testing⁴⁵⁰ • Observation⁴⁵¹ • Issuance of Policy Guidance⁴⁵² • Issuance of Regulations⁴⁵³ • Technical Assistance⁴⁵⁴ • Publicity⁴⁵⁵ • Community Outreach to Stakeholders⁴⁵⁶ • Research, Data Collection, and Reporting⁴⁵⁷ • Collaboration with States/Local Agencies⁴⁵⁸ • Collaboration with other Federal Agencies⁴⁵⁹

446 28 C.F.R. § 0.50(b) (“The following functions are assigned to and shall be conducted, handled or supervised by the Assistant Attorney General, Civil Rights Division... (b) requesting and reviewing investigations arising from reports or complaints of public officials or private citizens with respect to matters affecting civil rights”); see also 28 C.F.R. § 35.171 (obligating CRT to review all ADA complaints it receives); DOJ Justice Manual, supra note 370, at §§ 8-1.20-8-2.130 (outlining CRT’s complaint and investigation procedures). 447 28 C.F.R. § 0.50(a) (Assistant Atty General “shall” “conduct” “Enforcement of all Federal statutes affecting civil rights” except for certain criminal statutes); and see, e.g., 34 U.S.C. § 12601; 42 U.S.C. § 12101 et seq. (examples of authority to enforce federal civil rights statutes under its jurisdiction). 448 28 C.F.R. § 0.50(a). 449 Id. § 50.3; see also 28 C.F.R. §§ 0.50(b) and 36.502. 450 U.S. Dep’t of Justice, Civil Rights Division, “Fair Housing Testing Program,” <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 13, 2019). 451 52 U.S.C. § 10305. 452 28 C.F.R. § 0.50(a). 453 42 U.S.C. § 2000d-1; Exec. Order No. 12,250 §§ 1-1 and 1-202 -207, 28 C.F.R. app. A §1-303 (DOJ CRT’s authority to coordinate, ensure consistency and review Title VI, Title IX and Section 504 regulations of other agencies); but see 5 U.S.C. § 301 (only heads of agencies may prescribe regulations); but see 28 C.F.R. § 0.50(f) (Assistant Atty General of CRT “shall” “conduct” “Research on civil rights matters, and the making of recommendations to the Attorney General as to proposed policies and legislation relating thereto.”). 454 See, e.g., DOJ Justice Manual, supra note 370, at § 8-2.240. 455 28 C.F.R. § 42.405. 456 Id. §§ 0.50(c) and 0.53(b)(5). 457 Id. § 0.50(f) (research on civil rights matters). 458 Id. § 0.50(e) (Assistant Atty General “shall” “handle” “Consultation with and assistance to ... State and local agencies on matters affecting civil rights”). 459 Exec. Order No. 12,250, 28 C.F.R. app. A §1-207; 28 C.F.R. § 0.50(e) (Assistant Atty General “shall” “handle” “Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights”) and (j) (“Upon request, assisting, as appropriate, the Commission on Civil Rights or other similar Federal bodies in carrying out research and formulating recommendations.”).

<https://www.justice.gov/crt/fair-housing-testing-program-1>
<https://www.justice.gov/crt/fair-housing-testing-program-1>

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• Strategic Plan⁴⁶⁰ • Annual Reports⁴⁶¹

Staffing and Budget As per its FY 2019 budget request, CRT currently employs 566 full time equivalent persons, 422 of whom are attorneys.⁴⁶² CRT staffing has declined each year since 2016, although its funding has been relatively at the same level.⁴⁶³ CRT noted that it was subject to a department-wide hiring freeze from February 2017 through early 2019.⁴⁶⁴ See Figure 2.1. Figure 2.1

SOURCE: Reproduced from U.S. Dep’t of Justice, Civil Rights Division, FY 2019 Budget Request at a Glance, at 1.

CRT told the Commission that in its FY 2017 Budget Request, it requested \$3.1 million as “adjustments to base,” meaning an increase to keep current with ongoing expenses. In addition, the Division requested \$4.2 million in budget enhancements to expand specific enforcement areas.⁴⁶⁵ The Budget Request stated the increase would have included \$2.7 million designated for program changes to policing and criminal justice work “to investigate and prosecute discriminatory and unconstitutional conduct, increase community confidence in the police, and improve public safety.”⁴⁶⁶ Congress not only denied CRT this increase, but also decreased its budget.⁴⁶⁷ The President’s budget request for CRT also asked for an increase of \$893,000 for FY 2018,⁴⁶⁸ which Congress denied. The President’s budget request did not request any increase in CRT funding for FY 2019.⁴⁶⁹

460 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. §1115(b). 461 28 U.S.C. § 529. 462 U.S. Dep’t of Justice, Civil Rights Division, FY 2019 Budget Request at a Glance, p. 1, <https://www.justice.gov/jmd/page/file/1033091/download> [hereinafter DOJ CRT, FY 2019 Budget Request at a Glance]. 463 Ibid. 464 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 465 Ibid. 466 Ibid. 467 U.S. Dep’t of Justice, Civil Rights Division, FY 2018 Budget Request at a Glance, <https://www.justice.gov/jmd/page/file/968381/download>. 468 Ibid. 469 DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462.

<https://www.justice.gov/jmd/page/file/1033091/download>
<https://www.justice.gov/jmd/page/file/968381/download>

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Congress decreased CRT’s budget by \$200,000 in FY 2017, and by \$800,000 in FY 2018.⁴⁷⁰ In addition, there were no proposed “Program Changes” in CRT’s FY 2018 and 2019 Budget Requests, which has only happened one other time since FY 2009.⁴⁷¹ CRT told the Commission that it does not budget section-by-section, so the amount of funding per section is not available.⁴⁷² Moreover, DOJ argued that “CRT’s work is not comparable to the other civil rights offices analyzed in this report because it is not an agency OCR; the Office of Civil Rights within the Office of Justice Programs [OJP] is DOJ’s OCR. CRT has responsibility for government-wide coordination of federal funding nondiscrimination statutes under EO [Executive Order] 12,250, and shares a relatively smaller portion of the responsibility of the administration enforcement for those statutes as to DOJ recipients, with OJP OCR.”⁴⁷³ CRT’s public records indicated that in 2016, there were 80 positions (57 attorneys) responsible for “policing and Criminal Justice,” but it is unclear which of those were assigned to the Criminal Section or to SPL.⁴⁷⁴ According to a DOJ Office of Inspector General report, as of April 2016, there were 33 full-time employees in the Special Litigation Section assigned to its Police Practice Group, which expended \$6.7 million (46% of the Section’s budget for 2016).⁴⁷⁵ A January 4, 2017 report CRT issued, The Civil Rights Division’s Pattern and Practice Police Reform Work, indicated that CRT did not then have enough resources to open investigations for all law enforcement entities that meet the basic criteria for a pattern or practice investigation, so it reportedly has had to prioritize.⁴⁷⁶ A February 2018 DOJ OIG report found that 17 law enforcement misconduct investigations were undertaken between 2011–2016, and that attorneys worked an average of 6,354 hours per case.⁴⁷⁷ From 2011 to 2016, the CRT’s systems logged 6,605 referrals or complaints received by the SPL that related to state or local law enforcement agencies.⁴⁷⁸

470 Ibid. 471 Ibid. 472 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Oct. 1, 2019) (on file). 473 U.S. Dep’t of Justice, Civil Rights Division, FY 2017 Budget and Performance Summary, <https://www.justice.gov/jmd/file/822036/download>. 474 DOJ, Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 5. 475 U.S. Dep’t of Justice, Civil Rights Division, The Civil Rights Division’s Pattern and Practice Police Reform Work, January 2017, pp. 6-7, <https://www.justice.gov/crt/file/922421/download> [hereinafter DOJ CRT, CRT’s Pattern and Practice Police Reform Work]. The two factors for whether a pattern or practice investigation are appropriate are: 1) “Would the allegations, if proven, establish a violation of the Constitution or federal laws?” and 2) “Would the allegations, if proven, constitute a pattern or practice, as opposed to sporadic or isolated violations of the Constitution or federal laws?” id. at 5. See U.S. Dep’t of Justice, “Press Release: Justice Department Releases Report on Civil Rights Division’s Pattern and Practice Police Reform Work,” Jan. 4, 2017, <https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>. 477 DOJ, Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 8. 478 Ibid., 9-10.

<https://www.justice.gov/jmd/file/822036/download>
<https://www.justice.gov/crt/file/922421/download>
<https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>
<https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>

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Assessment Prioritization for Civil Rights Agency-wide Considering that CRT’s statutory authority and responsibilities to enforce federal civil rights laws have not significantly changed during the fiscal years studied, the above-described budget challenges are critical.⁴⁷⁹ as they may be linked to decreases in the number of cases brought and precedents set.⁴⁸⁰ CRT’s primary mission is external enforcement against state and local governments or private actors who are required to comply with federal civil rights law, and it may also exercise its authority to defend other federal agencies and actors who have been accused of civil rights violations. One way that it can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators.⁴⁸¹ If CRT’s position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy.⁴⁸² possibly creating a chilling effect.⁴⁸³ CRT does not have a direct line of authority to the head of the agency, the Attorney General. The Assistant Attorney General for Civil Rights (AAG for CRT) does not report directly to the Attorney General (who is the head of the agency), but instead reports to an Associate Attorney General.⁴⁸⁴ CRT noted that, “CRT has the same organizational position and reporting structure as every other civil litigating component in DOJ, such as Civil, Antitrust, Tax, or ENRD.”⁴⁸⁵ In addition to civil rights enforcement authority, including the authority to litigate in federal court, the AAG for CRT may make recommendations to the Attorney General regarding proposed policies and legislation.⁴⁸⁶ coordinates in the DOJ “all matters affecting civil rights,”⁴⁸⁷ and is delegated “Leadership and Coordination of Nondiscrimination laws” within the federal

479 In 2002, the Commission found that increasing statutory authority without increasing the budget and staffing of agency civil rights offices was problematic. USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 46-47. Similarly, keeping the same authority but decreasing budget and staffing could be problematic. 480 See infra notes 622-9 (decrease in number of cases brought) and 630-7 (decrease in consent decrees and increase in out-of-court settlements). 481 See infra notes 562-64 (discussing the Commission’s 2002 assessment of efficacies in litigation and comparing them to various current CRT litigation practices). 482 If setting a broad precedent through systemic litigation increases efficacy, then logically setting a limiting or very narrow precedent would decrease efficacy. See also Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 231 (discussing a “loss of doctrinal development” because “each of these agencies have a tremendously important role to play in the way that doctrine in their particular area develops, because courts tend to give them far more leeway in the course of litigation. And the moment that they step out from enforcing, that role cannot be fully fulfilled by private litigants, so we lose, if you will, the way the doctrine itself develops.”). 483 See Yang Testimony, Federal Civil Rights Enforcement Briefing, pp. 162-66. 484 See, e.g., DOJ, “Organizational Chart,” supra note 106; see also 28 C.F.R. § 0.1. 485 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 486 28 C.F.R. § 0.50(f). 487 Id. § 0.50(d).

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government.⁴⁸⁸ However, this delegation of authority for leadership and coordination of nondiscrimination laws is limited to issuing regulations, and specifically does not include “approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972.”⁴⁸⁹ Only the Attorney General may approve such regulations; however this regulation still provides significant authority to CRT to issue federal regulations under the Civil Rights Act of 1964, 490 and section 902 of the Education Amendments of 1972.⁴⁹¹ Strategic Planning and Self-Evaluation The agency has developed a strategic plan to accomplish civil rights activities with measures of performance, performance goals, and assessments of the accomplishments; however, its metrics are broad. According to this broad metrics set, the agency has met its strategic goals. According to the DOJ-wide Annual Performance Report and Performance Plan for FY 2016–2017, the only stated civil rights performance measure was to “favorably resolve” 85 percent of both civil and criminal civil rights cases, and CRT achieved this goal in 2016 and 2017.⁴⁹² DOJ’s Annual Performance Report for FY 2018 reported an additional CRT performance measure under the objective to “[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens, and serves the national interest.” The performance measure for this objective sets a target of successfully resolving 75 percent of INA Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.⁴⁹³ DOJ’s FY 2018 performance report also adds a new strategic objective to “Defend First Amendment rights to exercise religion and free speech,” tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁴⁹⁴

488 Id. § 0.51(a). 489 Id. (citing Executive Order 12,250’s specific delegation of those authorities to the Atty General). 490 Id. (citing Executive Order 12,250 and 28 C.F.R. § 0.180, requiring such regulations to be issued by the Attorney General). 491 CRT commented to the Commission that: “Under Title VI and Title IX, each federal agency department and agency is “authorized and directed” to issue implementing rule, regulations, and orders of general applicability to effectuate the provisions of these statutes. The Coordination Regulations state that each federal agency that issues or amends its regulation implementing Title VI or Title IX is required to submit the proposed regulation or amendment and receive approval by the AAG. 28 C.F.R. 42.403. The Atty General has the delegated authority of the President, pursuant to EO 12,250, to approve them.” U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 492 U.S. Dep’t of Justice, Office of the Atty General, FY 2016 Annual Performance Report and FY 2018 Annual Performance Plan, May 2017, <https://www.justice.gov/doj/page/file/968516/download>; [hereinafter DOJ CRT, FY 2016 Annual Performance Report]; U.S. Dep’t of Justice, Office of the Atty General, FY 2017 Annual Performance Report and FY 2019 Annual

<https://www.justice.gov/doj/page/file/968516/download>
<https://www.justice.gov/doj/page/file/1033761/download>
<https://www.justice.gov/doj/page/file/1148176/download>

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CRT also set an internal goal of reaching a certain amount of trainings on human trafficking for law enforcement partners, but its performance reports include incomplete and inconsistent information.⁴⁹⁵ DOJ defined the term “favorably resolve” to “include those cases that resulted in court judgments favorable to the government, as well as settlements.”⁴⁹⁶ DOJ’s reported results for civil rights cases are below (see Table 2.1): Table 2.1

SOURCE: DOJ Annual Performance Reports

CRT itself releases an annual “Performance Budget” report that outlines the division’s mission, its performance in the last year in reaching set measures in line with strategic goals, a strategic plan for achieving the next year’s performance benchmarks, and justifications for any requested budget increases. The budget requests for CRT also include specific focus areas. According to the FY 2019 Budget Request, CRT’s strategy from FY 2017 to 2019 shared several focus areas over the three years.⁴⁹⁷ The language and overall summary of these areas were largely consistent. However, in FY 2017, the budget requests included “ensuring constitutional policing and advancing criminal justice reform,” and in FY 2018 and 2019, the budget requests omitted these focus areas.⁴⁹⁸ Other changed language included removing priorities to protect the rights of people with disabilities, and to protect LGBT individuals from discrimination, harassment, and violence.⁴⁹⁹

⁴⁹⁵ See DOJ CRT, FY 2019 Performance Budget Congressional Justification, p. 32, <https://www.justice.gov/file/1034196/download> [hereinafter DOJ CRT, FY 2019 Performance Budget Justification]; U.S. Dep’t of Justice, Civil Rights Division, FY 2018 Performance Budget Congressional Justification, pp. 3-4, <https://www.justice.gov/file/968731/download> [hereinafter DOJ CRT, FY 2018 Performance Budget Justification]; U.S. Dep’t of Justice, Civil Rights Division, FY 2017 Performance Budget Congressional Justification, pp. 35-36, <https://www.justice.gov/jmd/file/820981/download> [hereinafter DOJ CRT, FY 2017 Performance Budget Justification]. ⁴⁹⁶ DOJ CRT, FY 2017 Annual Performance Report, supra note 492, at 30. ⁴⁹⁷ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25-26; DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35-36. ⁴⁹⁸ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495; DOJ CRT, FY 2017 Performance Budget Justification, supra note 495. ⁴⁹⁹ *Ibid.*

Strategic Measure FY 2016 FY 2017 FY 2018 “Percent of civil rights cases favorably resolved: criminal cases”

85% 98% N/A

“Percent of civil rights cases favorably resolved: civil cases”

100% 98% N/A

<https://www.justice.gov/file/1034196/download>
<https://www.justice.gov/file/968731/download>
<https://www.justice.gov/jmd/file/820981/download>

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FY 2018’s report added a strategic area to “promote equal education opportunities,” which was not included in the prior or subsequent years. Also, in its FY 2019 and 2018 Performance Budget Reports, CRT stated that one of its strategic focus areas is IER’s prioritization of the anti-discrimination provision of the INA, “to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders.”⁵⁰⁰ To illustrate the process further, below are what CRT listed as key enforcement areas listed under CRT’s FY 2020 Strategy:

- Prosecute Hate Crimes. CRT will prioritize hate crimes enforcement to ensure that individuals and communities are protected from crimes that are motivated by racial, religious, or other bias.
- Prosecute Human Trafficking. CRT will continue its highly successful human trafficking program. Prosecuting human trafficking presents unique challenges.
- Protect the Rights of U.S. Workers. CRT will continue to combat workplace discrimination. In FY 2020, CRT will prioritize enforcement of the Immigration and Nationality Act to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders.
- Protect Religious Freedom. The Division will continue to combat religious discrimination under the Religious Land Use & Institutionalized Persons Act (RLUIPA). In the last year, the Division filed a record number of eight RLUIPA lawsuits and initiated a record number of 31 RLUIPA investigations, resulting in a 30 percent increase in the number of cases, and a 50 percent increase in the number of investigations initiated over FY 2017.
- Ensure the Rights of Military Servicemembers. Servicemembers make tremendous sacrifices for our nation. When their duties call them far away from home, the Division stands ready to protect their rights, specifically with regard to employment, voting, and fair lending. CRT will build on its successes as it continues these efforts on behalf of the nation’s military service men and women, and veterans. Safeguard Voting Rights for All Americans. CRT will continue to protect voting rights through efforts to detect and investigate voting practices that violate federal laws and through affirmative litigation to enjoin such practices.
- Combat Sexual Harassment in Housing. CRT will continue pursuing sexual harassment in housing through its Sexual Harassment Initiative introduced in FY 2018. The Division has recently filed and settled a number of path-breaking cases providing significant compensation and relief to thousands of victims of discrimination.
- Combat Discrimination Motivated by Race and National Origin. In FY 2020, the Division will dedicate additional resources to civil investigations and suits involving allegations that individuals suffered discrimination because of their race or national origin.

⁵⁰⁰ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25.

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The Division enforces several statutes that it can use to address such discrimination in employment, housing, education, and other areas.⁵⁰¹

Each of the above “key enforcement areas,” except the last, was included in the FY 2019 Strategy,⁵⁰² in which no program changes were requested. In the interim, as DOJ has decided to reorganize the Community Relations Services by transferring its most important outreach duties, CRT’s FY 2020 budget request includes “absorbing the functions of the Community Relations Service (CRS) with 15 positions, including 2 attorneys.”⁵⁰³ Under its strategic plan for FY 2018-2022, CRT’s only reported performance measure is “successful disposition of 90 percent of Immigration and Nationality Act (INA) Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.”⁵⁰⁴ This measure is a part of the DOJ’s broader goal to “[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens and serves the national interest.”⁵⁰⁵ As described above, in 2019, DOJ added CRT-specific performance measures for future years, tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁵⁰⁶ Beyond filing “a record 161 cases” in 2017, CRT summarized its criminal enforcement efforts over FY 2016 and FY 2017 in its FY 2019 Performance Budget report as follows:

In FY 2016 and FY 2017, the Division exceeded its performance goals. During those two years, the Division, in conjunction with United States Attorneys’ Offices: charged 681 defendants with criminal civil rights violations; filed 322 criminal civil rights cases, the highest number compared with any other two-year period since counting began in 1993; filed 200 human trafficking cases, the highest number in any two-year period since counting began in 1993.⁵⁰⁷

These statistics reflect a broad range of enforcement of criminal civil rights protections. CRT’s stated goal in connection with hate crimes in its FY 19 Performance Budget report was to ensure that “individuals and communities are protected from crimes that are motivated by racial, religious or other bias.”⁵⁰⁸ As of February 2018, CRT had charged 16 defendants and obtained 15 hate crimes convictions since 2016.⁵⁰⁹

⁵⁰¹ U.S. Dep’t of Justice, Civil Rights Division, FY 2020 Budget Request at a Glance, <https://www.justice.gov/jmd/page/file/1142376/download>. [hereinafter DOJ CRT, FY 2020 Budget Request at a Glance]. ⁵⁰² DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462. ⁵⁰³ DOJ CRT, FY 2020 Budget Request at a Glance, supra note 501. (The budget also requests a 3.2% funding increase and 15 new positions.) ⁵⁰⁴ U.S. Dep’t of Justice, Department of Justice Strategic Plan for 2018 – 2022, pp. 28-29, <https://www.justice.gov/jmd/page/file/1071066/download>. ⁵⁰⁵ *Ibid.*, 14. ⁵⁰⁶ *Ibid.*, 51. ⁵⁰⁷ DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462, at 18. ⁵⁰⁸ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32. ⁵⁰⁹ *Ibid.*, at 5 (This statistic was reported in 2019 Performance Budget report released in March 2018).

<https://www.justice.gov/jmd/page/file/1142376/download>
<https://www.justice.gov/jmd/page/file/1071066/download>

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According to DOJ’s FY 2016 Annual Report to Congress, in 2016, CRT announced a pilot Servicemembers and Veterans Initiative to support its enforcement efforts and related military member protections.⁵¹⁰ It provided funding through the end of 2018 to increase the number of attorneys and support staff tasked with enforcing the SCRA and to appoint Initiative Liaisons to work with local military members.⁵¹¹ In each of its last three performance reports, CRT has acknowledged the difficulty and intensive nature of investigating and prosecuting human trafficking, which it planned to counter by dedicating “time, resources, and specialized skill in jurisdictions across the country.”⁵¹² In 2012, DOJ was one of three co-chair agencies releasing a Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017, which set forth “a 5-year path for further strengthening coordination, collaboration, and capacity across governmental and nongovernmental entities dedicated to providing support to the victims of human trafficking.”⁵¹³ CRT’s FY 2019 Performance Budget states that its focus on combatting human trafficking has led to an increase in charges and convictions. In conjunction with U.S. Attorneys’ Offices, CRT filed 200 human trafficking cases in 2016-2017, the highest two-year total since counting began in 1993 and close to the 5-year total of 235 from 2008-2012.⁵¹⁴ According to CRT’s 2019 Performance Budget, CRT also surpassed its projection of human trafficking complaints reviewed, by over 60 percent.⁵¹⁵ In its FY 2018 Performance Budget report, one of CRT’s new stated “Strategic Focus Areas” was a general goal to “promote equal educational opportunities.”⁵¹⁶ CRT was more specific in its FY 2019 Performance Budget report, and stated three key areas of focus for EOS moving forward: (1) enforcing *Brown v. Board of Education* through school desegregation cases; (2) combatting religious discrimination; (3) confronting harassment and hate incidents in school settings.⁵¹⁷ In FY 2014 and 2015, EOS resolved 19 cases, opened 26 investigations of alleged discrimination, negotiated eight settlements for English Learner (EL) student protections and continued to enforce about 180 desegregation cases.⁵¹⁸ In FY 2015 and 2016 EOS resolved 25 cases, opened 28 investigations of alleged discrimination, negotiated 9 agreements related to ELL students, and

⁵¹⁰ U.S. Dep’t of Justice, Civil Rights Division, Attorney General’s 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, <https://www.justice.gov/crt/page/file/996791/download>, at 7. ⁵¹¹ *Ibid.* ⁵¹² DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25; DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32. ⁵¹³ Coordination, Collaboration, Capacity: Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017, <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>. ⁵¹⁴ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 4-5, 18. ⁵¹⁵ *Ibid.*, 14. ⁵¹⁶ DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25-26. ⁵¹⁷ *Ibid.* ⁵¹⁸ DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 29.

<https://www.justice.gov/crt/page/file/996791/download>
<https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>

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continuously monitored 163 school desegregation cases.⁵¹⁹ Similar information was not available in CRT’s 2019 Performance Budget, although it noted EOS continued to monitor and enforce the approximately 170 longstanding desegregation cases.⁵²⁰ In CRT’s recent Performance Budget reports, it emphasized an effort to focus on the enforcement of the USERRA to bring about the re-employment of veterans and promotional opportunities.⁵²¹ Notably, there is no other mention of the Employment Litigation Section in its focus areas or larger Division strategic goals.⁵²² In its FY 2019 Performance Budget Request, CRT stated its intention to increase resources for Crisis Intervention Team (CIT) officers that are trained to respond to calls of people with substance abuse or mental health issues who are in crisis.⁵²³ CRT reported that because they are often not sufficiently trained, police officers responding to calls involving individuals in crisis can often lead to injuries to police or police using excessive force.⁵²⁴ In FY 2017, CRT enforced agreements in seven jurisdictions to increase CIT training.⁵²⁵ One of CRT’s stated focus areas for 2017 in its Performance Budget Report was to “Promote Fair Lending and Fair Housing,” in part because housing access influences an individual’s and family’s access to education, transportation and job opportunities and its close correlation with credit accessibility.⁵²⁶ Promoting fair housing was also listed as a goal in the FY 2018 Performance Budget Report’s focus areas, though not fair lending.⁵²⁷ Its FY 2019 performance budget clarified that to “Combat Sexual Harassment in Housing” was a goal that CRT is aggressively pursuing.⁵²⁸ The data below shows that CRT’s Housing Section has been productive and effective in this area.⁵²⁹ CRT’s focus on protecting the rights of children and adults in institutions, as stated in its FY 2019 Performance Budget Report involves two main goals: (1) redressing sexual abuse of those in institutions by using the Prison Rape Elimination Act as a framework for CRIPA investigations and settlements; and (2) protecting the rights of children with disabilities by ensuring they receive adequate services in the most integrated setting that is appropriate.⁵³⁰ This is a shift away from its 2017 report where it emphasized the Special Litigation Section’s increased efforts “to ensure effective, constitutional, and accountable policing.”⁵³¹

519 DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 20. 520 See DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 24. 521 Ibid., 22. 522 Ibid., 30. 523 Ibid., 524 Ibid., 525 Ibid., 526 DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35. 527 DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25. 528 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495; see also Cases Involving Sexual Harassment in Housing Resolved by CRT's Housing and Civil Enforcement Section (FY 2016-2018), infra notes 679-91. 529 See infra notes 679-91. 530 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 20. 531 DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 28.

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Complaint Processing, Agency-Initiated Charges, and Litigation First, this section describes the results of the Commission's research about CRT's overall complaint, investigation, and litigation processes. Second, this section analyzes data about CRT's litigation. CRT's main enforcement tool is litigation;⁵³² therefore with regard to CRT, the Commission mainly evaluates the 388,553 cases acted upon and resolved by certain sections of CRT during Fiscal Years 2016-2018,⁵³⁴ as well as the cases litigated by the Appellate and Criminal Sections. It then analyzes data and trends showing the scope and impacts of this main tool among DOJ's civil rights enforcement efforts. With the exception of ADA complaints, CRT is not under any obligation to investigate each complaint it receives.⁵³⁵ There is little available information on CRT's specific complaint and investigation process, and in response to the Commission's interrogatories, Acting Attorney Gore referred the Commission to its website.⁵³⁶ The website states that:

There are many ways that the Division learns about potential civil rights violations. Each year, it receives thousands of letters, emails and phone calls from individuals, public officials and organizations about potential civil rights violations. In addition, other government agencies such as the Federal Bureau of Investigation (FBI), Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), Department of Housing and Urban Development (HUD) and the Navajo Nation Human Rights Commission send the Division information about potential civil rights violations. The Division also uses publicly available information from newspapers, television and other media to learn about potential civil rights violations.⁵³⁷

532 28 C.F.R. § 0.50(a). 533 One of the cases is counted as half of a case resolution, because a January 13, 2017 agreement in principle to enter into a consent decree with Chicago regarding police practices, was later opposed on October 12, 2018 in DOJ's Statement of Interest Opposing Proposed Consent Decree. See Agreement in Principle Between the United States Department of Justice and the City of Chicago, Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/opa/file/925901/download>; and see United States Statement of Interest Opposing Proposed Consent Decree, State of Illinois v. City of Chicago, No. 17-cv-8260 (N.D. Ill. Oct. 12, 2018). 534 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18 (analyzing enforcement actions from CRT's Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections). 535 See 28 C.F.R. 35.171 (discussion of DOJ obligations regarding ADA complaints received). 536 Letter from Acting Attorney General John M. Gore (Mar. 26, 2018) (responding to the Commission's February 9 Interrogatories and Document Requests)[hereinafter CRT Response to USCCR Interrogatories]. 537 U.S. Dep't. of Justice, Civil Rights Division, "How Does the Division Find Out About Possible Civil Rights Violations," <https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations> (accessed Mar. 8, 2019).

<https://www.justice.gov/opa/file/925901/download>

<https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations>

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The Justice Manual states that:

Information that may indicate an investigation under a federal civil rights statute is appropriate may come to the Civil Rights Division or a United States Attorney's Office through a variety of channels, including referrals or complaints from other federal agencies, victims or community organizations, private attorneys, media coverage, and other sources. Upon receiving such information, the Civil Rights Division or the United States Attorney's Office may engage in a pre-investigation review to determine whether an investigation is appropriate. Pre-investigation review includes taking actions such as speaking to and reviewing materials received from a complainant and reviewing publicly available information.⁵³⁸

The U.S. Department of Justice's 93 U.S. Attorneys⁵³⁹ may also enforce civil rights protections, but the Justice Manual (applicable to all DOJ attorneys including those in U.S. Attorney's Offices) clarifies that major decisions, such as whether to bring a complaint or settle a civil rights case, must be authorized by the Assistant Attorney General.⁵⁴⁰ In this report, the Commission reviews the work of the CRT and not that of U.S. Attorneys. Sometimes the agency's litigation is systemic. Similar to the Fair Housing Act, under the Equal Credit Opportunity Act (ECOA), CRT can file a lawsuit against a lender that has displayed a "pattern or practice" of discrimination.⁵⁴¹ CRT may also bring pattern or practice cases under the Violent Crime and Law Enforcement Act of 1994, to address systemic problems that have led to patterns or practices of civil rights violations by law enforcement agencies or in the incarceration of juveniles or administration of juvenile justice or the Civil Rights of Institutionalized Persons Act, to address allegations that state or local governments subject people confined in residential institutions to unlawful conditions pursuant to a "pattern or practice."⁵⁴² In January 2017, CRT reported that it prioritizes pattern or practice cases involving police based upon whether the issue involves core issues common to many similar law enforcement agencies (unlawful use of force,

538 DOJ Justice Manual, supra note 370, at § 8-2.110 (CRT AAG reserves right to determine when a civil rights investigation should be opened), § 8-2.120 ("In most instances, the Assistant Attorney General for the Civil Rights Division shall authorize the filing of a complaint in civil rights cases, and in most cases the complaint must be signed by the Assistant Attorney General for the Civil Rights Division. Some civil rights statutes also require the complaint to be signed by the Attorney General."), § 8 - 2.130 ("As described in greater detail in other sections of this Title of the United States Attorney's Manual, the Civil Rights Division will work cooperatively with United States Attorney's Offices to determine the most appropriate assignment of responsibilities for the preparation of pleadings and other legal documents in connection with the litigation and trial of civil rights cases. Unless specifically delegated, ultimate responsibility for the conduct and resolution of civil rights cases remains with the Assistant Attorney General for the Civil Rights Division."). 539 U.S. Attorneys are appointed by the president to "ensure that the laws are faithfully executed" in each federal district. See U.S. Dep't. of Justice, "U.S. Attorneys," <https://www.justice.gov/usao/about-offices-united-states-attorneys> (accessed Mar. 13, 2019). "The United States Attorney is the chief federal law enforcement officers in their districts, and is also involved in civil litigation where the United States is a party." Ibid. 540 DOJ Justice Manual, supra note 370, at § 8-2.100. 541 U.S. Dep't of Justice, Civil Rights Division, "The Equal Credit Opportunity Act," <https://www.justice.gov/crt/equal-credit-opportunity-act-3> (accessed Nov. 8, 2017). 542 42 U.S.C. § 14141.

<https://www.justice.gov/usao/about-offices-united-states-attorneys>

<https://www.justice.gov/usao/about-offices-united-states-attorneys>

<https://www.justice.gov/crt/equal-credit-opportunity-act-3>

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racial profiling, etc.), whether "allegations represent an emerging or developing issue," and whether or not other federal intervention is available.⁵⁴³ "A high-profile incident—such as a shooting death, a use of excessive force, or a false arrest—standing alone never warrants opening a pattern-or-practice investigation. . . . the focus of a pattern or practice case is on systemic reform of widespread police practices and institutional change."⁵⁴⁴ CRT also told the Commission that these cases involve "institutional reform" and therefore take much longer to develop, prosecute, and monitor for subsequent compliance than some other cases.⁵⁴⁵ Even among cases that are not "pattern or practice" cases, due to the nature of the statutes it enforces against state or local governments or private entities that allegedly discriminate against protected classes, CRT's cases are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual. These include all hate crimes cases, which are always prosecuted against an individual.⁵⁴⁶ But typically, CRT's litigation involved systemic remedies requiring state or local jurisdictions to make changes in their policies and procedures.⁵⁴⁷ Even cases of discrimination brought against private businesses have required systemic remedies.⁵⁴⁸ The relief CRT procures through its cases may be ordered by a judge through a court opinion or entry of a consent decree, or it may be agreed upon by the parties in an out-of-court settlement, or in some cases, through a letter agreement—and the efficacy of each of these tools varies in levels of enforceability and impact in setting precedent and sending a message to potential violators. Judicial opinions are more effective in developing civil rights law as they set binding precedent on subsequent decisions in the same jurisdiction (and offer persuasive authority to similar cases in other jurisdictions). Out-of-court settlements are at the other end of the spectrum because they are not always enforceable in court.⁵⁴⁹ Consent decrees are in the middle as they provide enforceability because they are federal court orders.⁵⁵⁰ The criteria for and value of consent decrees as a form of civil rights enforcement may also depend on the particular federal civil rights statute's requirements and the circumstances of the case at

543 DOJ CRT, CRT's Pattern and Practice Police Reform Work, supra note 476, at 6-7. 544 Ibid., 8. 545 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 546 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Hate Crimes Cases. 547 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section and Voting Section Cases. 548 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights Cases. 549 U.S. Dep't of Justice, Office of the Atty General, Memorandum from Attorney General Sessions to Heads of Civil Litigating Components and U.S. Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), n. 2, <https://www.justice.gov/opa/press-release/file/1109621/download> [hereinafter Sessions Memo] (defining settlement as "an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract"). 550 See, e.g., USCCR, Minority Voting, supra note 17, at 239, 258-59, and 268.

<https://www.justice.gov/opa/press-release/file/1109621/download>

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hand. For example, under current interpretation from the Attorney General,⁵⁵¹ federal election observers may only be ordered by a court and "as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment," and not if the violations are few in number, have been eliminated, or are not likely to be repeated.⁵⁵² Therefore, this tool is only available if CRT is able to demonstrate serious VRA violations and procure a consent decree or judicial decision, rather than an out-of-court settlement.⁵⁵³ If there are conflicts with state or local law (such as zoning laws or practices that may violate the Fair Housing Act⁵⁵⁴ or the RLUIPA, which "protects religious institutions from unduly burdensome or discriminatory land use regulations"⁵⁵⁵), a court order might be needed for the state or local jurisdiction to be fully empowered to follow federal civil rights law, without violating state law.⁵⁵⁶ During a recent briefing on Women in Prison: Seeking Justice Behind Bars, the Commission received testimony from a state correction official that even without a conflict of law, consent decrees may be needed to give local officials the court-ordered authority to procure the resources and support of the state to reform their institutions to come into compliance with federal civil rights law.⁵⁵⁷ There are other

551 The language of the Voting Rights Act authorizes federal observers to "(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated." 52 U.S.C. § 10305(d). For further analysis of the statute and DOJ's interpretation of their authority under it, see USCCR, Minority Voting, supra note 17, at 269. 552 52 U.S.C. § 12302(a) ("Federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendment: "(1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."). For further discussion of DOJ's ability to send federal observers, see 553 Id. (observers may only be ordered by federal judges and based on the above criteria); and see supra note 549 citing Sessions' Memo at 2 (defining settlement as requiring a lawsuit to enforce it). 554 See, e.g., U.S. Dept. of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, Nov. 16, 2016, <https://www.justice.gov/opa/file/912366/download> [hereinafter DOJ, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act] (including various examples of local land use and zoning laws that may conflict with the Fair Housing Act). 555 U.S. Dep't of Justice, Civil Rights Division, Federal Religious Land Use Protections, <https://www.justice.gov/crt/page/file/1070736/download> [hereinafter DOJ, Federal Land Use Protections]. 556 See, e.g., Memorandum Order Denying Motion to Dismiss, United States v. Bensalem Township, PA, No. 16- 3938 (E.D.P.A. Nov. 14, 2016), <https://www.justice.gov/crt/case-document/file/912191/download> (preceding a settlement requiring that The Township "amend its Zoning Ordinance in a way that, to the satisfaction of the United States, will assure that the Zoning Ordinance is in compliance" with the RLUIPA, and if the Township wishes, "taking into consideration the decision of the United States District Court for the Eastern District of Pennsylvania in First Korean Church of New York, Inc. v. Cheltenham Township, No. 05-6389, 2012 WL 645986 (Feb. 29, 2012), aff'd 2013 WL 362819 (3d Cir. Jan. 24, 2013)." Settlement Agreement, ¶ 8.a.557 At the Commission's February 2019 briefing on the status of women in prison, Wendy Williams, Alabama Department of Correction's Deputy Commissioner of Women's Services, testified that without the consent decree, Tutwiler would not have been able to secure funds from the state in order to make the systemic changes needed to come into compliance with the Prison Rape Elimination Act. Wendy Williams, Alabama Department of Correction's Deputy Commissioner of Women's Services, testimony, Women in Prison: Seeking Justice Behind Bars Briefing Before the U.S. Comm'n on Civil Rights, Washington, D.C., Feb. 22, 2019, transcript, pp. 240-41.

<https://www.law.cornell.edu/uscode/text/52/10302>

<https://www.law.cornell.edu/uscode/text/52/10302>

https://www.law.cornell.edu/uscode/text/52/10303#f_2

<https://www.justice.gov/opa/file/912366/download>

<https://www.justice.gov/crt/page/file/1070736/download>

<https://www.justice.gov/crt/case-document/file/912191/download>

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factors, such as the need to ensure both immediate and long-term enforceability in federal court, that argue for consent decrees.⁵⁵⁸ These factors all depend on the circumstances of the case, and in other cases, settlements may be more effective in terms of procuring a quicker and less resource-intensive remedy, if the jurisdiction is willing to come into compliance.⁵⁵⁹ In 2002, the Commission recognized the value of settlements, but also warned against their over-use as "some concerns about the implementation of these methods have prompted a series of recommendations."⁵⁶⁰ Concerns included addressing the root causes of discrimination found in policies and practices with disparate impact, and recommendations included that settlements "should only be seen and used as one of the strategies" to eliminate unfair practices.⁵⁶¹ With regard to litigation, in 2002, while the Commission recognized the resource demands involved, the Commission also recognized litigation's importance in developing case law, among other factors: "[t]hus, many of the Commission's recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped."⁵⁶² The importance of litigation to developing case law is in part due to the nature of the U.S. legal system in which the law is developed through precedents set by judges; impact in efficacy can be magnified if CRT resolves a case through a judicial decision or opinion. Moreover, these precedents have further impact if, through the work of the Appellate Section, they are upheld by the judiciary at the federal Courts of Appeals and Supreme Court levels.⁵⁶³ The data below shows that CRT resolves its cases

558 See, e.g., American Univ. Washington College of Law, The Role of the Federal Government in Protecting Your Civil Rights, Transcript of Panel Hearing Conducted on Oct. 26, 2018 (submitted as public comment to the Commission),

Testimony of Chiraag Bains (Legal Director, Demos, and former senior DOJ CRT attorney) criticizing the recent decrease in enforcement actions against police departments and the attempts to pull out of consent decrees in Baltimore and Chicago, and noting that during the Obama Administration: "There were 19 agreements reached and 15 of those were consent decrees, court-ordered agreements with a monitor and the power of sanctions to be brought if the defendant didn't complete the requirements of the consent decree." at 57, 60; see also infra note 642 (testimony of Vanita Gupta). 559 See, e.g., USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 560 Ibid., 38. 561 Ibid., 38, n. 268; see also infra notes 655-63 (discussing mediation under the ADA). 562 Ibid., 38. 563 See USCCR, Minority Voting, supra note 17, at 255 n. 1425.

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through judicial decisions much less often than through other methods, but some cases do go to trial and CRT has had a highly effective record of winning nearly all of its cases both at the trial court level and after any appeals.⁵⁶⁴ One important feature of CRT consent decrees and federal judicial decisions is that they typically require ongoing monitoring by the federal government or a court-ordered monitor to ensure that the state or local jurisdiction come into compliance.⁵⁶⁵ This is also a feature of some out-of-court settlement agreements, but as former Attorney General Sessions has made clear, settlements require filing a lawsuit in order to be enforced.⁵⁶⁶ CRT told the Commission that it also expends resources monitoring compliance after cases are resolved by settlement, consent decree or judicial decision, emphasizing that:

The compliance side of CRT's work is substantial in institutional reform cases involving law enforcement agencies, correctional facilities, and governmental agencies that serve people with disabilities. Cases involving a pattern or practice of law enforcement misconduct, for example, come to an end only after the law enforcement agency has fully complied with the consent decree or settlement, which typically requires the agency to revamp its policies, training, supervision, and accountability systems, and demonstrate real improvement in outcomes like uses of force and stops, searches, and arrests. These reforms take years. By excluding this work and treating institutional reform settlements the same as settlements with individual actors, this metric [of cases resolution] understates the

Hon. John M. Walker, Jr., Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, "The Role of Precedent in the United States," Stanford Law School China Guiding Cases Project, Commentary, Nov. 15, 2016. ("A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases. The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into "circuits" with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. A court may consider decisions by other, non-superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts.").

⁵⁶⁴ See, e.g., supra notes 492-93 (reporting that CRT has had over 85% rate of "successful" cases). ⁵⁶⁵ See, e.g., USCCR, Police Use of Force, supra note 345, at 4 (recommending use of consent decrees) and 86-96 (researching efficacy of consent decrees in CRT law enforcement cases). ⁵⁶⁶ Sessions Memo, supra note 549, at n. 2 (defining settlement as "an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract").

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investment that CRT has made in enforcing civil rights laws and the work of the Special Litigation Section in particular.⁵⁶⁷

One major shift during the period of this report was a November 2018 DOJ-wide memorandum that creates a new presumption against using consent decrees and creates new rules for review of proposed consent decrees and out-of-court settlements.⁵⁶⁸ This new memo originated with then Attorney General Sessions' concerns about CRT consent decrees in cases involving patterns or practices of civil rights violations by state or local law enforcement.⁵⁶⁹ Former Attorney General Sessions had previously called for a department-wide review of all consent decrees already in place to ensure that they follow the administration's principles regarding federalism, and to ensure that their terms are reasonable.⁵⁷⁰ At that time, the Commission issued a statement urging DOJ to continue to use all mechanisms, including consent decrees, to ensure constitutional policing.⁵⁷¹ Attorney General Sessions' subsequent November 2018 memo (which sets forth department policy binding on CRT)⁵⁷² did not rule out all consent decrees, but it did create a new requirement that all CRT lawyers as well as all federal attorneys in U.S. Attorney's Offices must memorialize the reasons that a consent decree is needed and procure approval of the Assistant Attorney General based on a showing of factors regarding federalism concerns.⁵⁷³ This requirement strongly signaled that DOJ now disfavors use of consent decrees. The Commission's research shows that of the 368.5 cases CRT resolved during FY 2016-2018, 26.6 percent (104) of the cases CRT brought were resolved by consent decrees,⁵⁷⁴ indicating that the impact of the memo is substantial. Moreover, since the November 8, 2018 Sessions memo, CRT has entered into only a few consent

⁵⁶⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁵⁶⁸ Jessica Huseman & Annie Waldman, "Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government," ProPublica, Jun. 15, 2017, <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>. ⁵⁶⁹ Sessions Memo, supra note 549. ⁵⁷⁰ Ibid.; see U.S. Dep't of Justice, Memorandum for Heads of Department Components and United States Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>. ⁵⁷¹ U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments To Ensure Constitutional Policing (Apr. 24, 2017), https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf. ⁵⁷² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file) ("The Sessions memo represents Department policy binding on CRT[.]"). ⁵⁷³ Sessions Memo, supra note 549, at 1-2. ⁵⁷⁴ See infra notes 631-4.

<https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>

<https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>

<https://www.justice.gov/opa/press-release/file/1109681/download>

https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf

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decrees (as of June 17, 2019).⁵⁷⁵ CRT told the Commission that it has entered into one new consent decree, conducted a "final filing" of one consent decree, and proposed to the federal court another consent decree, since the issuance of the memo.⁵⁷⁶ Counting each of these consent decrees, even one that is only a final entry of a prior consent decree approved by a federal court, and one that is currently only proposed to a federal court,⁵⁷⁷ at the current rate, CRT is on track to have resolved 5-6 cases by consent decree in 12 months since the Sessions memo. In comparison, data from the last three fiscal years shows that CRT resolved an average of 34.6 cases/year by consent decree.⁵⁷⁸ Moreover, between FY 2016 and FY 2018, there have been significantly fewer consent decrees procured per year, and particularly through the work of CRT in certain sections.⁵⁷⁹ Sessions' memo states that it:

requires that the Department provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; requires special caution before using a consent decree to resolve disputes with state or local governmental entities; provides guidance on the limited circumstances in which such a consent decree may be appropriate; limits the terms for consent decrees and settlement agreements with state and local governmental entities, including terms requiring the use of monitors; and amends the process for the approval of these mechanisms in cases in which they are permissible.⁵⁸⁰

The Sessions memo also issued rules about when CRT can enter into out-of-court settlements. According to that memo, in contrast to a consent decree, "[t]he term 'settlement agreement' means an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract."⁵⁸¹ The memo clarified that CRT leadership must approve every settlement of every federal civil rights case that would:

(1) place the Department or another federal agency in a long-term position of monitoring compliance by a state or local governmental entity; (2) create long-term

⁵⁷⁵ In June 2019, CRT stated that it entered into Consent Order, United States v. 3rd Generation, Inc. & California Auto Finance, No. 8:18-cv-00523 (C.D. Cal. Mar. 12, 2019), <https://www.justice.gov/crt/case-document/file/1142566/download>, which the Commission verified. CRT also told the Commission that the Voting Section has proposed a consent decree to the court in one of its cases, but that consent decree is not yet accepted by the court. See Complaint, United States v. Eastpointe, No. 2:17-cv-10079 (E.D. Mich. Jan. 10, 2017), <https://www.justice.gov/crt/case-document/file/1149711/download>; and that its prior consent decree with the City of Jacksonville has been recently filed in final form with the court. U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁵⁷⁶ Ibid. ⁵⁷⁷ Ibid. ⁵⁷⁸ 104/3 = 34.6. ⁵⁷⁹ See infra notes 635-7 and Figure 2.8 (declining use of consent decrees in Housing Section), and notes 637-8 and Figure 2.9 (declining use in the Special Litigation Section). ⁵⁸⁰ Sessions Memo, supra note 549, at 1 and n. 1 (noting that "As used in this memorandum, the term 'state and local governmental entities' also includes territorial and tribal entities, as federal consent decrees and settlements with such entities raise many of the same concerns regarding democratic autonomy and accountability."). ⁵⁸¹ Ibid., n. 2.

<https://www.justice.gov/crt/case-document/file/1142566/download>

<https://www.justice.gov/crt/case-document/file/1142566/download>

<https://www.justice.gov/crt/case-document/file/1149711/download>

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structural or programmatic obligations, or long-term, indeterminate financial obligations, for a state or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. The Office of the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified and consulted before any such agreement is finalized.⁵⁸²

The impact of this new policy is substantial, as 266.5 (68.6%) of the 388.5 CRT cases resolved during FY 2016-2018 were resolved by out-of-court settlements.⁵⁸³ Added to its impact on consent decrees, this data shows that the memo's impact is relevant to over 95 percent of all CRT cases.⁵⁸⁴ Federal law also authorizes DOJ to file Statements of Interest or amicus briefs in federal court cases in which the U.S. has an interest.⁵⁸⁵ Statements of Interest may be filed by the Appellate Section, by U.S. Attorneys, or by the substantive law sections of CRT, with the approval of the Appellate Section.⁵⁸⁶ CRT told the Commission that Statements of Interest are usually filed at the federal district court level by the trial litigation sections, and that amicus briefs are usually filed in courts of appeals or the Supreme Court by the Appellate Section, although the Appellate Section may sometimes also file or assist with Statements of Interest in district courts.⁵⁸⁷ Through these briefs, CRT may choose to act in cases brought by other parties that "involve developing or problematic areas of civil rights law or that may significantly affect the Division's enforcement responsibilities."⁵⁸⁸ These cases have also been identified through the Appellate Section's monitoring of civil rights litigation throughout the nation.⁵⁸⁹ CRT has made wide use of Statements of Interest or amicus briefs as a method to explain the government's position on civil rights issues and to help courts and the American people understand rights and obligations under civil rights laws.⁵⁹⁰ The Appellate Section may also act through an intervention that, if approved by the court, leads to the DOJ becoming a third party participating in another federal civil rights case not brought by DOJ, but of interest to CRT.⁵⁹¹ Several civil rights statutes specifically allow the CRT to intervene in a private case.⁵⁹² Federal Rules of Civil Procedure also provide for intervention by government officers or agencies that administer or enforce the statutes and regulations at issue in

⁵⁸² Ibid., 6. ⁵⁸³ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Grand Totals. ⁵⁸⁴ 68.6% (settlements) + 26.8% (consent decrees) = 95.4%. ⁵⁸⁵ 28 U.S.C. § 517; see also Fed. R. App. Proc. § 29 (a)(2) ("The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing[.]").

⁵⁸⁶ DOJ Justice Manual, supra note 370, at § 8 – 2.170. ⁵⁸⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁵⁸⁸ DOJ CRT, "Appellate Section," supra note 385. ⁵⁸⁹ Ibid. ⁵⁹⁰ See Victor Zapana, Note, The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.- C.L. L. Rev. 227, 228, 237 (2017). ⁵⁹¹ See, e.g., U.S. Dep't. of Justice, Civil Rights Division, Appellate Section, "Third Party Intervention in Civil Rights Cases," <https://www.justice.gov/crt/appellate-briefs-and-opinions-5> (accessed Mar. 19, 2019). ⁵⁹² 28 U.S.C. §§ 517, 2403(a).

<https://www.justice.gov/crt/appellate-briefs-and-opinions-5>

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a private case.⁵⁹³ In an intervention, DOJ may become part of the ongoing litigation.⁵⁹⁴ However, Statements of Interest or amicus briefs are more common.⁵⁹⁵ CRT told the Commission that "the Appellate Section usually only intervenes on appeal in the first instance (and then files an "intervenor brief" when the constitutionality of a statute is being challenged, consistent with the Department's authority under 28 U.S.C. § 2403(a)."⁵⁹⁶ CRT may also defend federal agencies in constitutional challenges to federal civil rights statutes and agency programs. For example, CRT reported that during the fiscal years studied, "the Appellate and Employment Litigation Sections have done work to defend federal agency affirmative action programs."⁵⁹⁷ Commission staff research confirmed that when the U.S. was sued by a contractor challenging the U.S. Department of Transportation's affirmative action procedures, the Appellate Section defended the policies during both the Obama and Trump Administrations.⁵⁹⁸

⁵⁹³ F.C.R.P. § 24(b)(2)(a) and (b). ⁵⁹⁴ See F.C.R.P. Title IV (Parties), § 24(a)(Intervention of Right if statute so provides) and § 24(b)(2)(B)(Permissive Intervention by a Government Officer or Agency). ⁵⁹⁵ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Section. ⁵⁹⁶ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report, citing authority of the United States to intervene in cases involving constitutional questions, under 28 U.S.C. § 2403(a)) (on file). ⁵⁹⁷ Ibid.; see also DOJ Justice Manual, supra note 370, at § 8 – 2.214 ("The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration's 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs."). ⁵⁹⁸ See Brief for the United States as Appellee, Midwest Fence Corp. v. United States Department of Transportation, No. 15-1827, 5, 14-16 (8th Cir. Oct. 26, 2015) (CRT Obama Administration brief arguing that DOT's regulatory requirements with an aspirational goal at least 10% of federal highway funds be awarded to small businesses "owned and controlled by socially and economically disadvantaged individuals" and related regulations are narrowly tailored to meet a compelling government interest and therefore constitutional); and see Brief for the Federal Respondents (Brief in Opposition to Petition for Certiorari), Midwest Fence Corp. v. United States Department of Transportation, No. 16-975, 12 (S.Ct. May 23, 2017) (CRT Trump Administration brief arguing that, "The decision below rejecting petitioner's facial and as-applied equal-protection challenges to the federal DBE regulations does not warrant further review. In this Court, petitioner does not challenge the court of appeals' holding that the regulations on their face are narrowly tailored to a compelling governmental interest. That holding accords with decisions of every other court of appeals to address the issue."). The Supreme Court declined to review the case on September 26, 2017 (reported at 137 S. Ct. 2292).

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CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections. All available information indicates that CRT sections have no known specific intake, investigator or decision-making procedures about whether and how to prosecute.⁵⁹⁹ Moreover, as Leon Rodriguez has discussed, a federal court once had to compel CRT to enforce *Brown v. Board of Education's* nationwide mandate to desegregate schools, resulting in an order requiring CRT to adjudicate every related complaint in a timely fashion.⁶⁰⁰ He also commented that President Nixon forced out former CRT Director Leon Panetta after Panetta took a stance in favor of enforcing the law requiring schools to desegregate, but that it is important to enforce civil rights law, and added that:

So even in times when you think you are behind the eight ball, you are in fact very likely creating conditions that down the line will actually strengthen the ability of a law enforcement agency to do its job.⁶⁰¹

A February 2018 report by DOJ's Office of Inspector General (OIG) concluded that CRT's Special Litigation Section could "enhance its case selection procedures to better memorialize decisions to move or not with investigations" and "refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns."⁶⁰² The OIG tied SPL's case selection process with overall efficacy issues, and stated that "[c]onsidering CRT's mission, we believe it is important that it refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns" in its decisions about investigations.⁶⁰³ "Although CRT has increased the transparency of how it selects jurisdictions to investigate for police misconduct practices, the OIG found that SPL's case selection systems and procedures could be enhanced."⁶⁰⁴ The OIG found that CRT leadership did not always document decisions to open pattern or practice investigations and did not maintain draft memoranda prepared by CRT attorneys in a central depository.⁶⁰⁵ At the time of the audit, CRT's Police Practice Group (PPG) had not established written policies to guide its attorneys, who did not use CRT tracking systems, on how to initially assess complaints and referrals in the process of beginning investigations of potential patterns or practices of police misconduct.⁶⁰⁶ CRT utilized factors requiring objective information to select cases, but its attorneys subjectively weighed the importance of each factor in deciding the merits

⁵⁹⁹ U.S. Dep't of Justice, Response to USCCR Interrogatories, at 3-4 (referring the Commission to the CRT website). ⁶⁰⁰ Leon Rodriguez, Hearing before American University, Washington College of Law, pp. 67-68. ⁶⁰¹ *Ibid.*, 68. ⁶⁰² DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at ii. ("Moreover, the CRT did not maintain these draft memoranda in a central depository. An archive of deferred or declined draft justification memoranda, along with the general reasons why the CRT leadership deferred or declined to open an investigation, would improve the CRT's institutional memory and help its attorneys identify potentially at-risk agencies for future consideration.") ⁶⁰³ *Ibid.* ⁶⁰⁴ *Ibid.*, 5. ⁶⁰⁵ *Ibid.*, 5. ⁶⁰⁶ *Ibid.*, 10.

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of a case.⁶⁰⁷ Although CRT-approved justification memoranda (J-memos) on the matter consistently applied the facts of allegations to statutory requirements, they did not clearly delineate or analyze other decision factors consistently.⁶⁰⁸ Moreover, CRT SPL did not track or maintain J- memos that were not approved by CRT leadership.⁶⁰⁹ OIG recommended that CRT SPL establish a depository of J-memos regarding police for use on subsequent matters and adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made.⁶¹⁰ OIG also found that although some improvements had been made in by the Special Litigation Section, CRT should improve its case selection procedures to better memorialize decisions to move forward or not with investigations.⁶¹¹ CRT noted to the Commission that the audit only reviewed how SPL initiated investigations of law enforcement agencies under 34 U.S.C. § 12601, and not how SPL or CRT initiated any other kind of investigation;⁶¹² however, based on the dearth of information about the processes of other sections, the Commission cannot determine whether their processes are effective. During the audit, the Special Litigation Section reported in early January, 2017 that it would standardize and document (or log) referrals and complaints about alleged police misconduct, and process them through a uniform system that could result in a J-memo recommending investigation and potential enforcement action.⁶¹³ In June 2019, CRT reported to the Commission that since the OIG report, "SPL has now implemented all of OIG's recommendations, including:

- Establishing priorities for enforcing the law enforcement misconduct provisions of 34 U.S.C. § 12601, and reviewing those priorities on an annual basis;
- Establishing guidelines for evaluating whether to initiate a preliminary inquiry; • Establishing requirements for law enforcement misconduct investigation justification

memoranda ("J memos");

⁶⁰⁷ *Ibid.*, 13. ⁶⁰⁸ *Ibid.* ⁶⁰⁹ *Ibid.*, 14. ⁶¹⁰ *Ibid.*, 15. ⁶¹¹ *Ibid.*, ii. ⁶¹² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file). ⁶¹³ DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 9-10:

CRT developed separate processes and procedures to receive, catalog, and assess complaints and referrals of police misconduct that are largely dependent on the source and fall into one of two categories, controlled or non-controlled. CRT specially designates complaints or investigation requests from elected federal, state, and local officials, as well as any communication addressed to the Attorney General, as controlled correspondence. CRT tracks such controlled correspondence in the Intranet Quorum system, maintained by the Justice Management Division's Departmental Executive Secretariat. Correspondence from the public addressed directly to the CRT or its personnel, as well as referrals from local advocacy groups, federal law enforcement agencies, Assistant U.S. Attorneys, research groups, litigators, and whistleblowers within state and local police departments, are designated as non-controlled. CRT staff scan and log non-controlled correspondence into the Correspondence Tracking System (CTS) database. Additionally, the CRT uses investigative journalism reports and media coverage of significant police misconduct as a source of potential allegations. However, CRT does not specifically track such news stories.

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- Establishing a repository of previous J-memos; • Establishing a policy for making referrals of law enforcement misconduct; • Establishing a process for retaining documentation of decisions to deny or defer

recommendations to open law enforcement investigations under 34 U.S.C. § 12601."⁶¹⁴ It is not clear if SPL has implemented OIG's additional recommendations to "adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made,"⁶¹⁵ or if CRT implemented any of these recommendations in other sections of CRT outside of SPL, even though the OIG's review was limited to SPL. CRT clarified to the OIG that complaints about police would go through the below process (see Figure 2.2):⁶¹⁶ Figure 2.2

Source: U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁶¹⁴ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁶¹⁵ DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 15. ⁶¹⁶ *Ibid.*, 9.

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In addition to complaints or agency-initiated investigations to enforce the civil rights statutes under its jurisdiction, under Title VI, "DOJ also serves as the federal government's litigator. Title VI authorizes DOJ to enforce Title VI through the filing of civil actions. DOJ, on behalf of Executive agencies, may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations or recipients' noncompliance to DOJ for judicial enforcement."⁶¹⁷ DOJ has interpreted this charge expansively, asserting in its Title VI manual that:

In this regard, the Coordination Regulations direct agencies to advise DOJ if they are unable to achieve voluntary compliance and to request that DOJ assist in seeking resolution of the matter. Id. § 42.411(a). Agencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution). FCS provides assistance to agencies in making determinations of noncompliance, including providing pre-enforcement legal counsel when it appears it may be difficult to obtain a voluntary resolution.⁶¹⁸

There are not any known comparable written procedures for any other sections of CRT, but there are specific procedures for requesting a CRT amicus brief. Through the CRT Appellate Section's Amicus Curiae Program, amicus briefs may be requested by a private party and are more likely to be undertaken by the section if the case presents "one or more important legal questions involving the interpretation or application of a statute that the Civil Rights Division enforces."⁶¹⁹ The guidelines for accepting an amicus state that "Amicus participation by the Civil Rights Division generally should be limited to cases:

- in which a court requests participation by the Civil Rights Division; • which challenge the constitutionality of a federal civil rights statute (cf. 28 U.S.C.

§ 2403(a)); • which involve the interpretation of a civil rights statute, Executive Order, or regulation that

the Department of Justice promulgated or that the Department of Justice (or another federal agency) is empowered to enforce;

- which raise issues whose resolution will likely affect the scope of the Civil Rights Division's enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);
- which raise constitutional challenges of public importance under the First or Fourteenth Amendment of the U.S. Constitution;
- which raise issues that could significantly affect private enforcement of the statutes the Civil Rights Division enforces; or

⁶¹⁷ DOJ, Title VI Legal Manual, supra note 39, at III.B, Department of Justice Role Under Title VI. ⁶¹⁸ Id. ⁶¹⁹ U.S. Dep't. of Justice, Civil Rights Division, Appellate Section, "Amicus Curiae Program," <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019).

<https://www.justice.gov/crt/appellate-section>

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- in which a special federal interest is clear and is not likely to be well-served by private litigants.⁶²⁰

Data Regarding CRT Cases The following sections evaluate the efficacy of CRT enforcement through analyzing publicly available data about its litigation efforts as well as further information CRT provided to the Commission.⁶²¹ This chapter analyzes comprehensive data about the hundreds of cases CRT resolved during Fiscal Years 2016-2018. The chapter also analyzes data from the various sections of CRT to demonstrate trends in the level and focus of enforcement activities. Cases Resolved To evaluate the efficacy of CRT's litigation, the Commission looked to cases resolved from FY 2016 – 2018, as resolved cases represent actual remedies agreed to or ordered to redress civil rights violations. Commission staff identified 388.5 cases resolved among seven CRT sections that bring civil actions to enforce the nation's civil rights laws during FY 2016-2018.⁶²² This number did not include Appellate or Criminal Section cases, as these cases are resolved differently.⁶²³ nor did it count the compliance agreements generated by the work of the Federal Coordination & Compliance Section, as that section's work is discussed in the Proactive Compliance Evaluation part of this chapter, below. Moreover, the Commission did not have sufficient information to evaluate the Criminal Section cases; however, limited information about those cases are discussed in further detail below.⁶²⁴ On the other hand, the enforcement actions resolved by the seven other sections can be identified by cases resolved through out-of-court settlements, consent decrees, or judicial opinions at the district court level. Moreover, due to resource limitations, CRT's post- agreement or post-judgment monitoring was not counted in this category. The great majority of these cases had some positive results in which defendants agreed or were compelled to take measures to come into compliance with civil rights law.⁶²⁵ Based on reviewing the civil cases CRT resolved at the non-appellate level during FY 2016-2018, the Commission was able to measure some trends in the quantity and impact of civil rights enforcement, as discussed below.

⁶²⁰ DOJ Justice Manual, supra note 370, at § 8-2.170. ⁶²¹ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report, including information about cases not provided in response to the Commission's Interrogatories and not available on the CRT website) (on file). ⁶²² See Appendix A, Chart of CRT Cases Resolved FY 2016-2018. ⁶²³ See supra note 202 (DOJ comments that Criminal Section cases are not comparably resolved) and infra notes 565-96 (explanation of how Appellate cases are different as many involve filing Statements of Interest in private cases rather than direct DOJ enforcement actions). ⁶²⁴ See infra notes 722-32 (Appellate Section cases) and 732-44 (Criminal Section cases). ⁶²⁵ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

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The Commission's review of these cases shows that the total number of cases resolved dropped during FY 2018, although some sections have resolved more cases. Each of the cases is listed and categorized in Appendix A of this report. Table 2.2 shows the number of cases resolved per section per fiscal year. The Commission notes that the work of some sections, such as the Special Litigation Section, is often more complex than others as pattern or practice or other more systemic cases can entail more complex investigation and enforcement actions.⁶²⁶ Table 2.2: CRT Cases Resolved Per Section, FY 2016-18 CRT SECTION DRS EOS ELS IER HCE SPL VOT TOTAL by FY 2016 16 8 6 61 41 8 3 143 2017 8 14 3 57 46 4 5 4 136.5 2018 14 5 5 49 28 3 5 109 TOTAL 38 27 14 167 115 15 5 12 388.5

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; further information received from U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis. Chart of CRT Cases Resolved FY 2016-2018. On the chart above, CRT SEC = CRT Section; APP = Appellate Section; CRIM = Criminal Section; DRS = Disability Rights Section; ED = Educational Opportunities Section; EMP = Employment Rights Section; IER = Immigrant & Employee Rights Section; HCE = Housing & Civil Section; SPL = Special Litigation Section; VOT = Voting Section.

Figure 2.3: CRT Cases Resolved Per Fiscal Year

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018. This represents a decrease of 23.6 percent from Fiscal Year 2016 to Fiscal Year 2018.⁶²⁷

⁶²⁶ See supra notes 567; see also infra notes 637-46 and 709-18 (Special Litigation Section cases). ⁶²⁷ 143 – 109 = 34 and 34/143 = 23.8%.

109
0
20
40
60
80
100
120
140
160
FY 2016 FY 2017 FY 2018

CRT Cases Resolved Per Fiscal Year
<http://www.justice.gov/crt/search-cases-and-matters>
<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.4: CRT Cases Resolved by Section, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

As the data illustrated above shows, the Special Litigation Section had a decrease in the number of cases resolved from FY 2016 to FY 2018.⁶²⁸ Other sections, such as the Educational Opportunities, Housing, and Immigrant and Employee Rights Sections, had an increase from FY 2016 to FY 2017, with a decrease in FY 2018.⁶²⁹ Although the Voting Section had fewer cases resolved than other sections, it also showed a slight increase in FY 2018. Some cases and trends are discussed in further detail below. Data Regarding Type of Resolution of CRT Cases The following pie chart and table show the percentage of cases resolved by consent decree, settlement, or judicial decision, by CRT section.

⁶²⁸ See, e.g., *infra* notes 637-46 and 709-18 (for more information on Special Litigation cases); and notes 719-22 (for more information on Voting Section cases). ⁶²⁹ See, e.g., *infra* notes 663-68 (for more information on Educational Opportunities and Housing Section cases); and 635-7 and 678-700 (for more information on Housing and Civil Enforcement Section cases).

0
10
20
30
40
50
60
70
DRS EOS ELS IER HCE SPL VOT

CRT Cases Resolved by Section FY 2016-18
2016 2017 2018
<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.5: Consent Decrees, Settlements and Judicial Decisions by CRT Sections (Excluding Appellate and Criminal), FY 2016-18⁶³⁰

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Further, the data also shows that the amount of consent decrees per year has decreased over time. The number of consent decrees has incrementally decreased over the fiscal years in question.⁶³¹ In FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018.⁶³²

⁶³⁰ One settlement is only counted as half (0.5), because the Obama Administration's agreement in principle to enter into a consent decree regarding Chicago police practices was later changed by the Trump Administration. See *infra* notes 710-13. ⁶³¹ See *infra* notes 633-6 (documenting that FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018, and documenting number of consent decrees per section per fiscal year). ⁶³² U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters [hereinafter DOJ CRT, "Search Cases and Matters"]; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

266.5
104
18
Type of Resolution of CRT Cases FY 2016-18
Settlements Consent Decrees Judicial Decisions

<http://www.justice.gov/crt/search-cases-and-matters>
<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.6: CRT Total Consent Decrees, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Of the 104 consent decrees entered into in federal court by CRT from FY 2016-2018, 57 (54.8%) were in FY 2016, 39 (37.5%) were in FY 2017, and 8 (7.7%) were in FY 2018.⁶³³ These data also illustrate that some sections have used consent decrees more than others, and some sections used settlements more than others. For example, IER resolved all but one of their 166 cases by out-of-court settlements (including Letters of Resolution), and the one that was resolved in court was through a judicial decision (not a consent decree). They had zero consent decrees. The Disability Rights Section resolved more than twice as many cases by settlement (12 cases by consent decree, and 25 by settlement).⁶³⁴

⁶³³ Appendix A, Chart of CRT Cases Resolved FY 2016-2018. ⁶³⁴ *Ibid.*

0
10
20
30
40
50
60
FY 2016 FY 2017 FY 2018
Total CRT Consent Decrees/Year

<http://www.justice.gov/crt/search-cases-and-matters>

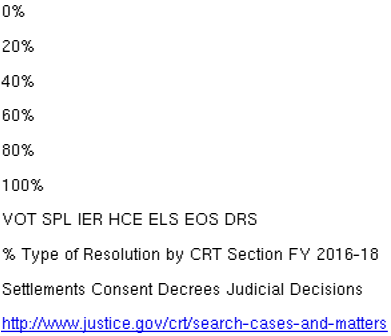
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Figure 2.7: Percent Consent Decrees, Settlements and Judicial Decisions by CRT Section, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff

Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

The Housing, Education and Employment Sections resolved relatively more cases by consent decree, with the Housing Section resolving the most (64 cases, 55.6%) by consent decree, but with zero consent decrees in FY 2018.⁶³⁵ Seven of the 115 HCE cases were resolved by judicial decisions, while 64 were resolved by consent decrees and 44 by settlements. The last consent decree entered into by HCE was in an FHA sex discrimination case resolved by a federal court ordering the decree in July 2017.⁶³⁶ The following data illustrates how this section's use of consent decrees has diminished, going from 40 in FY 2016 to zero in FY 2018, while settlements went from zero to 27 in the same time period.

635 Ibid. 636 See Consent Decree, United States v. Walden, No. 1:16-cv-00042 (N.D.W.V. July 10, 2017); Cf. Appendix A, Chart of CRT Cases Resolved, Housing Section Cases (FY 2016 – 18).

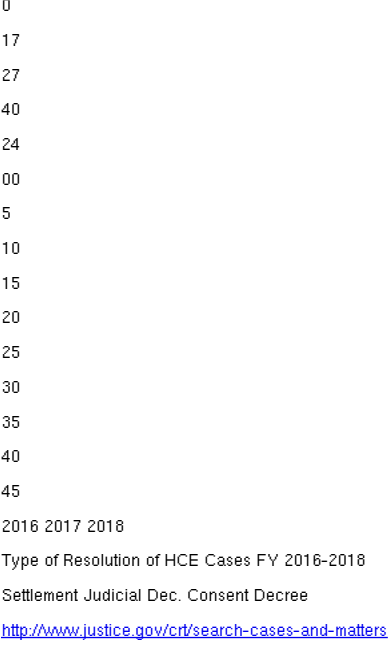


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Figure 2.8: Type of Resolution CRT Housing Cases FY 2016-2108

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

The Special Litigation Section entered into a total of five consent decrees during FY 2016-2018; four were in FY 2016, one was in FY 2017, and there were none in FY 2018.⁶³⁷ Data for the current report, from FY 2016-2018, shows that SPL has decreased its use of consent decrees, consistent with DOJ leadership direction. The following graph shows the types of resolution of cases, including all types of SPL cases resolved. The Commission considers that 8.5 cases resolved during this time period were resolved through settlement, two were resolved through judicial decisions, and four were resolved by consent decrees.

637 Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

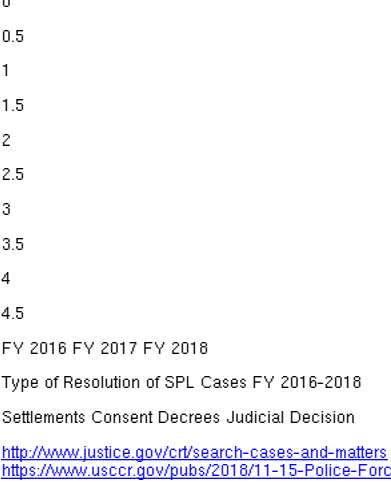


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Figure 2.9: Type of Resolution of SPL Cases FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,"www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission's November 2018 report on Police Use of Force: An Examination of Modern Policing Practices discussed that SPL has brought law enforcement misconduct "pattern or practice" cases since they gained jurisdiction through the VCCLEA in 1994, and documented that the Bush II administration tended to resolve these cases through settlements, while the Obama administration not only investigated more cases,⁶³⁸ but also preferred to resolve them through court-ordered consent decrees.⁶³⁹ The Commission's research also showed several positive impacts of consent decrees, although it also showed that DOJ didn't have the capacity to effectively monitor and measure the results of consent decrees.⁶⁴⁰ The Commission recommended that DOJ "should return to vigorous enforcement of constitutional policing, including pursuant to 42 U.S.C. § 14141 and use of consent decrees as necessary where constitutional policing standards are not being upheld."⁶⁴¹ Former CRT head Vanita Gupta testified at the Commission's briefing that consent decrees are key to civil rights enforcement because they provide for court oversight "regardless of political winds."⁶⁴² Professor Sam Bagenstos, who served as a CRT career attorney from 1994-1997 and then later as a Deputy Assistant Attorney General in the Obama Administration has written that,

638 U.S. Comm'n on Civil Rights, Police Use of Force: An Examination of Modern Policing Practices, (2018), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>, at n. 529 ("According to a January 13, 2017 statement on the DOJ website: "Since 2009, the Special Litigation Section of the Justice Department has opened 25 investigations into law enforcement agencies. The section is enforcing 20 agreements with law enforcement agencies, including 15 consent decrees and one post-judgment order."). 639 Ibid., 87. 640 Ibid., 86-95. 641 Ibid., 4. 642 Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 170.



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overall, CRT's authority to bring pattern or practice cases "lay largely dormant" during the Bush administration.⁶⁴³ That changed, with more transformative consent decrees, as follows:

The Obama Administration, by contrast, aggressively used the pattern-and-practice statute to reform police departments[] The [Civil Rights] Division initiated investigations that were unprecedented in their number and scope; it entered into

consent decrees to enforce law enforcement in major cities such as New Orleans, Seattle, Cleveland, and Ferguson, Missouri, and it filed contested litigation in Maricopa County, Arizona. Those decrees addressed issues such as use of excessive force, racial profiling, and the failure to protect victims of gender-based and LGBT- based violence.⁶⁴⁴

Also at the Commission's briefing, former CRT Chief of Staff during the Bush Administration Robert Driscoll testified that there have been mixed results with consent decrees, stating that "they've been expensive and you've ended up with increased crime and they even increased civil rights violations," but "in some places it's worked well where . . . there has been a more collaborative approach."⁶⁴⁵ Driscoll recommends that a study be done to determine which approaches are most effective.⁶⁴⁶ Other Sample Data Trends from CRT Cases CRT's legal authority and responsibility to litigate disparate impact claims is documented in a later section of this chapter.⁶⁴⁷ At the Commission's briefing, Georgetown Law Professor Aderson François stated that "[U]nless government agencies play an active role in civil rights enforcement, the law is never going to develop the way it was originally intended."⁶⁴⁸ In addition to its built-in credibility as the nation's civil rights prosecutor, DOJ CRT has specific jurisdiction to enforce disparate impact that private parties and State Attorney Generals lack,⁶⁴⁹ further bolstering its importance as a backstop against harm Americans otherwise suffer from a form of discrimination DOJ's longstanding regulatory authority has recognized and continues to recognize as pernicious and in need of federal enforcement. Data the Commission reviewed yielded examples of civil rights enforcement trends specific to the individual CRT sections, discussed section by section below.

⁶⁴³ See, e.g. Samuel R. Bagenstos, "Civil Rights Déjà Vu, Only Worse," American Prospect, Dec. 12, 2016, <https://prospect.org/article/civil-rights-déjà-vu-only-worse>. ⁶⁴⁴ Ibid. (adding that "In the past couple of years [as of Dec. 2016], the division has expanded its work to target practices that entrench economic inequality in the criminal justice system."). ⁶⁴⁵ Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 131. ⁶⁴⁶ Ibid. ⁶⁴⁷ See infra notes 870-900 (analyzing CRT Title VI Manual and disparate impact law, including Supreme Court and other federal legal precedents). ⁶⁴⁸ François Testimony, Federal Civil Rights Enforcement Briefing, p. 279. ⁶⁴⁹ See infra note 885 (discussing the Sandoval case); and see State Atty's General Statement, at 1, 8.

<https://prospect.org/article/civil-rights-d%C3%A9j%C3%A0-vu-only-worse>

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During FY2016 - 2018, CRT's Disability Rights Section (DRS) was active in protecting the rights of individuals with disabilities. DRS resolved 25 cases through settlement, another 12 through consent decrees, and 1 by judicial decision.⁶⁵⁰ In litigation in Florida, DRS collaborated with the Special Litigation Section (SPL) to defend on appeal the agency's authority to enforce the ADA against state and local entities.⁶⁵¹ This was similar to litigation conducted by the SPL in a multi-week trial in Texas to defend the rights of individuals with disabilities to receive services in integrated, home- and community-based settings rather than institutions.⁶⁵² Additionally, DRS prevailed on a motion to enforce a 2012 settlement agreement in North Carolina addressing the unnecessary institutionalization of adults with serious mental illness,⁶⁵³ and negotiated a supplemental agreement in New York to resolve ambiguities in a 2013 agreement about the unnecessary segregation of adults with serious mental illness.⁶⁵⁴ DRS also entered into a new, five-year settlement agreement in Louisiana, to resolve allegations of unnecessary segregation of adults and children with serious mental health conditions.⁶⁵⁵ In enacting the ADA, Congress specifically encouraged the use of alternative means of dispute resolution, including mediation, to resolve ADA disputes. For example, DOJ's ADA Mediation Program seeks to resolve Title II and Title III ADA complaints through funding mediation, which is intended to decrease the time and cost of reaching a resolution. ⁶⁵⁶ If CRT believes a complaint is appropriate for mediation and the complainant agrees, it will refer the issue to trained mediators across the country.⁶⁵⁷ In 2002, the Commission's federal civil rights enforcement report noted that mediation may be useful to increase efficiencies, but also warned that "mediation may ignore the larger picture in interest of resolving the complaint at hand."⁶⁵⁸ In order to be effective at the essential goal of rooting out discrimination, the Commission recommended that "mediation only be used when it is appropriate as to the nature of the complaint, and mediation staff should ensure that settlement agreements include provisions for changes in... practices and policies that might

⁶⁵⁰ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Disability Rights Cases. In the case resolved by judicial decision, CRT lost at the trial level in November 2016, and on behalf of the United States, filed a notice of appeal to the Fourth Circuit January 18, 2017, Memorandum Opinion, United States v. Sheriff Woody & City of Richmond, No. 3:16-cv-127 (E.D. Va., Nov. 11, 2016); Notice of Appeal, United States v. Sheriff Woody & City of Richmond, No. 3:16-cv-127 (E.D. Va., Jan. 18, 2017) (signed by DRS Chief, Deputy Chief, and CRT leadership). But after the change in administration, the federal government filed a motion to voluntarily dismiss the complaint, and the court dismissed the appeal, leaving the negative decision to stand. Order, United States v. Sheriff Woody & City of Richmond, No. 3:16-cv-127 (4th Cir., Jul. 28, 2017). ⁶⁵¹ A.R. v. Secretary, Florida Agency for Health Care Admin., No. 17-13595-BB (11th Cir. Oct. 18, 2017). ⁶⁵² Guillermo Contreras, "Trial wraps up in lawsuit against the state by developmentally disabled Texans" My San Antonio, Nov. 15, 2018, <https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>. ⁶⁵³ Order, United States v. North Carolina, No. 5:12-cv-557-D (E.D.N.C. Sep. 21, 2017). ⁶⁵⁴ United States v. New York, No. 1:13-cv-04165 (E.D.N.Y. Mar. 12, 2018). ⁶⁵⁵ Settlement Agreement, United States v. State of Louisiana, No. 3:16-cv-00608 (M.D. La. June 6, 2018), <https://www.justice.gov/crt/case-document/file/1072816/download>. ⁶⁵⁶ U.S. Dep't of Justice, Civil Rights Division, Resolving ADA Complaints Through Mediation: An Overview, September 2016, https://www.ada.gov/mediation_docs/mediation-brochure.pdf. ⁶⁵⁷ Ibid. ⁶⁵⁸ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 38.

<https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>

<https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>

<https://www.justice.gov/crt/case-document/file/1072816/download>

https://www.ada.gov/mediation_docs/mediation-brochure.pdf

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have a discriminatory effect."⁶⁵⁹ As discussed above, these recommendations also apply to settlements of cases.⁶⁶⁰ According to the 2019 CRT Performance Budget, in 2016, the ADA Mediation Program referred 353 matters, completed 291 matters and successfully resolved 79 percent of the completed matters.⁶⁶¹ In 2017, the Program referred 195 matters, completed 143 matters and successfully resolved 83 percent of completed cases.⁶⁶² CRT told the Commission, "The ADA mediation program has successfully resolved thousands of ADA disputes resulting in increased access for people with disabilities."⁶⁶³ In contrast, the Educational Opportunities Section (EOS) resolved relatively more cases with consent decrees; however, they were all entered into in legacy desegregation cases. During this time period, 10 EOS cases were resolved by consent decrees, of which all were legacy desegregation cases, 14 were resolved by out-of-court settlements, and relatively few cases (4) went to trial and were resolved by judicial decisions.⁶⁶⁴ The data additionally show that the types of cases brought to resolution also varied a bit. For example, race and national origin claims were resolved in all three fiscal years, but no claims based on sex or status of individuals with disabilities were resolved in FY 2018. The Commission notes that in FY 2017, there were two cases resolving dual claims of race or national origin discrimination, with claims involving allegations of discrimination against persons with disabilities.⁶⁶⁵

⁶⁵⁹ Ibid. ⁶⁶⁰ See supra note 249 (regarding settlements and consent decrees and citing the Commission's 2002 report at page 38). ⁶⁶¹ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 23-24. ⁶⁶² Ibid., 30. ⁶⁶³ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁶⁶⁴ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases. Of the four judicial decisions, after the issuance of a judicial opinion in FY 2016, one of the cases was thereafter resolved by consent decree in FY 2017, and since each case may only be counted once, it is coded as being resolved by consent decree. See Opinion and Order, Cowan and United States (as Intervenor-Plaintiff) v. Bolivar County, MS, No. 2:65-cv-31 (N.D. Miss. May 13, 2016), <https://www.justice.gov/crt/case-document/file/1002091/download>, and see Modification Order for Consent Decree, Cowan and United States v. Bolivar County, MS, No. 2:65-cv-31 (N.D. Miss. Mar. 13, 2017), <https://www.justice.gov/crt/case-document/file/1002106/download>. See also Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (United States v. School Dist. of Philadelphia; United States v. Kansas State Univ.). ⁶⁶⁵ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (T.R., et al. v. School Dist. of Philadelphia, No. 2:15-cv-04782 (E.D. Pa. Nov. 30, 2016) (regarding race/national origin and disability); Settlement Agreement between United States and Wicomico County, Maryland Public Schools (Jan. 23, 2017), <https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement> (Settlement Agreement regarding race/national origin and disability).

<https://www.justice.gov/crt/case-document/file/1002091/download>

<https://www.justice.gov/crt/case-document/file/1002106/download>

<https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement>

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Figure 2.10: Types of Cases Brought by EOS, By Fiscal Year (FY 2016-2018)

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases.

Most (11 out of 13) of EOS' racial discrimination cases were legacy school desegregation cases. Of these, 10 were resolved by ongoing consent decrees, which may explain the high number of consent decrees for this CRT section.⁶⁶⁶ DOJ initiated these cases after the Supreme Court's decision in Brown v. Board of Education in 1954.⁶⁶⁷ The legacy cases generally began in the late 1960s and throughout the 1970s and are cases in which the United States is a party. EOS is responsible for their ongoing litigation with regard to the rights to equal access to educational opportunities and programs until vestiges of segregation no longer remain.⁶⁶⁸ The Employment Litigation Section (ELS) also resolved the majority of its cases with consent decrees. The section resolved 6 cases in FY 2016, 3 in FY 2017, and 5 in FY 2018.⁶⁶⁹ Of these 14

⁶⁶⁶ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (United States v. Monroe City (LA); United States v. St. Martin Parish (LA); United States v. Cotton Plant S.D. #1 (AR); United States v. Bd. of Educ. of Hendry Cty. (FL); United States v. St. James Parish (LA); United States v. School Bd. of the City of Suffolk (VA); United States v. Bolivar Cty. Bd. of Educ. (MS); United States v. State of Georgia, McDuffie S.D. (GA); United States v. Jackson Cty. S.B. (FL); United States v. South Bend Community School Corp. (IN)). ⁶⁶⁷ Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 349 U.S. 294, 300-01 (1955) ("Brown II"); see also Green v. County School Bd. of New Kent County, Va., 391 U.S. 430, 436-37 (1968) (discussing need to effectively remove obstacles to a unity, nonracial public education system); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 17-18 (1971); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 197-209 (1973). ⁶⁶⁸ But see Nikole Hannah Jones, "Lack of Order: The Erosion of a Once-Great Force for Integration," ProPublica, May 1, 2014, <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> (detailing the inaccuracy of the Justice Department's list of active desegregation orders and failure to respond to questions about "how it monitors, enforces, and litigates desegregation cases"). ⁶⁶⁹ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Employment Litigation Section.

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FY 2016 FY 2017 FY 2018

Types of Claims in EOS Cases Resolved FY 2016-2018

Race Claims Nat'l Origin (ELL) Sex Disability

<http://www.justice.gov/crt/search-cases-and-matters>

<https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration>

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total cases, it resolved 3 (21.4%) with settlements, 9 (62.3%) with consent decrees, and 2 (14.3%) were resolved by judicial decisions.⁶⁷⁰ Eleven of these 14 cases (78.6%) were brought to enforce Title VII of the 1964 Civil Rights Act and other federal law protections that prohibit employment practices that discriminate on the grounds of race, sex (including pregnancy), religion, and national origin.⁶⁷¹ Eight were brought to enforce protections against sex discrimination; of these one prosecuted pregnancy discrimination and another prosecuted sexual harassment, and another was a case prosecuting both sex and ethnicity/race discrimination.⁶⁷² They resulted in nine cities, counties, and state governments, as well as the Commonwealth of Puerto Rico and the University of Baltimore, agreeing to enter into settlements or court-supervised consent decrees that require changing their practices to come into compliance with Title VII.⁶⁷³ The Federal Coordination and Compliance (FCS) focused on Statements of Interests and settlements or other resolutions of Title VI and Title IX cases. In FY 2016, FCS was involved in submitting a Statement of Interest in four Title VI cases,⁶⁷⁴ and one in a Title IX case.⁶⁷⁵ There is no indication that FCS has been involved in submitting Statements of Interest or amicus briefs in similar cases in FY 2017 or FY 2018.⁶⁷⁶ FCS was also active in several language access in courts matters to enforce Title VI's protections against national origin discrimination with regard to DOJ funding recipients, which are discussed in the Proactive Compliance Evaluation section of this chapter.⁶⁷⁷ In terms of the number of cases resolved, the Housing and Civil Enforcement section (HCE) was one of the most productive sections of CRT in FY 2016 and FY 2017, though some of its productivity dropped off in FY 2018.

⁶⁷⁰ Ibid. ⁶⁷¹ Ibid. ⁶⁷² Ibid. ⁶⁷³ Ibid. ⁶⁷⁴ U.S. Dep't of Justice, Civil Rights Division, "Department of Justice Title VI Briefs," <https://www.justice.gov/crt/fcs/Title-VI-Briefs>. ⁶⁷⁵ U.S. Dep't of Justice, Civil Rights Division, "Title IX of the Education Amendments of 1972," <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination>. ⁶⁷⁶ Ibid. ⁶⁷⁷ See infra notes 753-65. FCS is also significantly involved in policy dissemination and coordination with other federal agencies, and so its work is also discussed in those sections of this chapter. See infra notes 800-12 (regarding policy dissemination) and 929-45 (regarding coordination).

<https://www.justice.gov/crt/fcs/Title-VI-Briefs>

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Figure 2.11: Total CRT Housing Cases Resolved FY 2016-2018

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

As discussed above, in FY 2018, CRT spearheaded a Sexual Harassment Initiative with the goal of enforcing rights to freedom from harassment in housing, and reported that it has already procured relief for impacted persons.678 The following cases involving allegations of sexual harassment in housing were resolved by HCE during FY 2016-2018: Cases Involving Sexual Harassment in Housing Resolved by CRT's Housing and Civil Enforcement Section, FY 2016-2018 (With Amount of Civil Penalties and Compensatory Damages) Fiscal Year 2016:

- Consent Decree between the United States and Pendygraft (\$5,000 in damages)679 • Consent Decree between the United States and Encore Management Company, Inc. (\$110,000 in damages and \$10,000 in civil penalty)680

Fiscal Year 2017: • Consent Decree between the United States and Wygul (\$15,000 in damages)681 • Judicial Decision (Default Judgement) United States v. Encore Management Company, Inc. (\$55,000 in civil penalty against Defendant Anthony James, \$30,000 in civil penalty

678 See supra notes 501 and 526. 679 Consent Decree, United States v. Pendygraft, No. 5:15-cv-00293-JMH (E.D. Ky. 2016). 680 Consent Decree, United States v. Encore Management Co., No. 2:14-cv-28101 (S.D. W. Va. 2016). 681 Consent Decree, United States v. Wygul, No. 1:14-cv-2880-JDB-egb (W.D. Tenn. 2016).

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FY 2016 FY 2017 FY 2018

Total HCE Cases Resolved Per FY

<http://www.justice.gov/crt/search-cases-and-matters>

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against Defendant Christopher Terrill James, and \$5,000 in civil penalty against Defendant Kisha James682

- Consent Decree between the United States and Walden (\$500,000 in damages and \$100,000 in civil penalty)683
- Settlement Agreement between the United States and Housing Authority of the City of Anderson, Indiana (\$70,000 in damages)684
- Settlement Agreement between the United States and Kansas City, Kansas City Housing Authority(\$360,000 in damages and \$5,000 in civil penalty)685

Fiscal Year 2018:

- Settlement Agreement between the United States and Tjoelker (\$140,000 in damages and \$10,000 in civil penalty)686
- Settlement Agreement between the United States and Webb (\$600,000 in damages and \$25,000 in civil penalty)687
- Consent Decree between the United States and Webb (\$27,500.00)688 These cases illustrate the impact of utilizing strategic planning to meet the Commission's recommendations to use litigation to "develop case law, to obtain appropriate relief and to send a message to potential violators about the strength of an agency's enforcement program."689 Although the above cases have not resulted in judicial decisions that would develop case law, HCE's ongoing investigations and resulting litigation may do so.690 Furthermore, the settlements and consent decrees include monetary compensation for victims, and otherwise meet the goal of sending a message to potential violators about the strength of the agency's enforcement program. HCE's other cases also resulted in compensatory damages and civil penalties.691 HCE also utilizes unique testing programs as part of its litigation strategies. HCE developed the Fair Housing Testing Program in 1992, to uncover hidden discriminatory practices as a part of its enforcement efforts of the FHA.692 This program tests whether housing providers are complying with fair housing laws by sending individuals to properties to pose as prospective renters or buyers

682 United States v. Encore Management Co., No. 2:14-cv-28101 (S.D. W. Va. 2017). 683 Consent Decree, United States v. Walden, No. 1:16-cv-42 (N.D. W. Va. 2017). 684 Settlement Agreement, United States v. Housing Authority of the City of Anderson, Indiana (S.D. Ind. 2017). 685 Settlement Agreement, United States v. Kansas City, Kansas City Housing Authority (D. Kan. 2017). 686 Settlement Agreement, United States v. Tjoelker, (W.D. Mich. 2017). 687 Settlement Agreement, United States v. Webb (E.D. Mo. 2018). 688 Settlement Agreement, United States v. Webb, No. 4:16-cv-01400-SNLJ (E.D. Mo. 2018). 689 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 690 See supra notes 501 and 528. 691 See, e.g., Complaint, United States v. Trump Village, No. 15-CV-7306 (E.D.N.Y. Dec. 23, 2015); Settlement Agreement, United States v. Trump Village, No. 15-CV-7306 (E.D.N.Y. July 18, 2017) (including \$10,000 in civil penalties and \$40,000 in compensatory damages for complaints, in case resolving allegations of discrimination against persons with disabilities through policies prohibiting support animals). 692 U.S. Dep't of Justice, Civil Rights Division, "Fair Housing Testing Program," <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 19, 2016).

<https://www.justice.gov/crt/fair-housing-testing-program-1>

<https://www.justice.gov/crt/fair-housing-testing-program-1>

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and gather information.693 The most recent case brought after housing testing was United States v. Goss, resolved in late 2016 though a court-ordered consent decree with a Florida landlord to prohibit discrimination against black applicants.694 CRT's FY 2019 Performance Budget stated that HCE will extend the testing tools and methods of the Fair Housing Testing Program into the lending context.695 In 2016, HCE filed a Statement of Interest challenging Sandcastle Towers, a New York landlord that did not provide housing for persons with criminal convictions. CRT's amicus brief in this private case against a federally-funded affordable housing provider, stated that, "The United States thus has a strong interest in ensuring the correct interpretation and application of the FHA in this case [about disparate impact law], thereby promoting the dismantling of unlawful barriers to housing for formerly incarcerated individuals."696 In 2016, CRT argued that "FHA bars criminal records bans that have a disparate impact on applicants based on race or national origin unless they are supported by a legally sufficient justification."697 However, since then, CRT has not been involved in that case, and no further substantive filings have been made.698 This may be because of the reported desire of the current administration to shift positions on disparate impact.699 The Housing Section's recent Statements of Interest have focused more on Religious Land Use Rights. CRT attorneys filed a brief supporting the Catholic Church's application to expand their buildings in Kansas, and another in support of the religious land use rights of the Jagannath Organization for Global Awareness to build a temple in Howard County, Maryland on land that was already zoned for religious uses.700 The Immigrant and Employee Rights (IER) section was highly productive, but resolved the great majority of its cases using out-of-court settlements and letter agreements, although it did win one important judicial order. In addition to 116 Letters of Resolution,701 from FY 2016-2018, IER

693 Ibid. 694 See Consent Order, United States v. Goss, 8:16-cv-02802 (M.D. Fla. Dec. 12, 2016). 695 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 29. 696 Ibid., 8. 697 Ibid., 12. 698 See U.S. Dist. Ct. E.D.N.Y. (Brooklyn), Civil Docket for Case No. 1:14-cv-06410, The Fortune Society v. Sandcastle Towers Housing Development Fund Corp. et. al., https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1 (accessed Mar. 16, 2019) (on file). The United States continues to be listed as Interested Party represented by an Assistant U.S. Attorney from the Eastern District of New York. Id. 699 See infra notes 870-900 (Disparate Impact Policy). 700 Statement of Interest of the United States, Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church's suit under RLUIPA arguing their religious exercise was substantially burdened by City of Mission Woods after being denied a land use permit to convert a residential house adjacent to the Church's property into meeting house to allow for additional programming and meeting space.) Statement of Interest of the United States, Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff's suit under RLUIPA alleging Howard County's complete denial of JOGA's land use application and petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA's ability to practice their religion. At the time the suit was filed, there was no Jagannath temple anywhere in the State of Maryland.). 701 These Letters of Resolution are considered in the Commission's calculations as a form of settlement.

https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1

https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1

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resolved 50 cases, with 49 (98%) of those resolved through out-of-court settlements. Another feature of this section's enforcement work is that its settlements (but not its Letters of Resolution) typically included civil fines to be paid to the federal government, and for those brought on behalf of individuals, back pay for the persons who lost wages due to the alleged discrimination.702 During FY 2016-2018, of the 50 out-of-court settlements, 49 IER enforcement actions resulted in agreements to pay \$3,302,622.65 in civil penalties.703 According to the Commission's review of the settlement agreements on the CRT IER Section's website, there was only one case in which no civil penalties were awarded. Furthermore, in FY 2018, in litigation before the Executive Office of Immigration Review (which adjudicates cases under the INA), CRT won a judicial order finding pattern or practice violations and ordering further proceedings to determine sanctions.704 Based upon the FY 2018 order establishing the violations and calling for sanctions, in December 2018, CRT won "high civil penalties" in the amount of \$757,868 to be paid by the defendant companies for "knowing, pervasive and, continuing" discriminatory document practices, including asking hundreds of U.S. citizens and Lawful Permanent Residents, as well as asylees and refugees, for unnecessary documentation, discriminating based on citizenship status, as well as "flagrant bad-faith and callous disregard of responsibility."705 The final order also included injunctive relief that the companies cease and desist their discriminatory practices and take remedial measures including training their staff and being subjected to federal monitoring and reporting requirements.706 Table 2.3: IER Cases Resolved FY 2016-2018 Fiscal Year Number of Cases Resolved Settlements Other FY 2016 20 20 FY 2017 13 13 FY 2018 18 17 1 judicial order TOTAL 51 50 1

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

702 See, e.g., Settlement Agreement, United States and J.E.T. Holding Co., Inc. (Jan. 17, 2017) (settlement of \$12,000 to U.S. Government and establishment of \$40,000 back pay fund for citizenship status discrimination); Settlement Agreement, United States and 1st Class Staffing, L.L.C. (Dec. 13, 2016) (civil penalty of \$17,600 and \$720 payment to charging party, for document discrimination; employer required more or different documents from noncitizens compared to citizens). 703 See Appendix A, Chart of CRT Cases Resolved, FY 2016 - 18, Immigrant and Employee Rights. 704 United States v. Technical Marine Maintenance Texas, LLC, & GulfCoast Workforce, LLC, 13 OCAHO No. 1312, at 11 (2018). 705 United States v. Technical Marine Maintenance and Gulf Coast Workforce, OCAHO No. 17B00089, 4-5, 7-9 (EOIR, Dec. 10, 2018). 706 Id.

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documentation a worker can show, or reject valid documentation, based on a worker's citizenship status or national origin. This was the basis for CRT prosecution in 35 out of the 50 (70.0%) cases resolved. There were also 12 (24.0%) cases about citizenship status discrimination, in which employers unjustifiably limited persons they would hire to citizens, or conversely, to non-citizens.⁷⁰⁷ Additionally, IER issues letters of resolution to employers who voluntarily reach an agreement with the aggrieved party resolving discrimination charges or to conclude independent investigations where the employer has voluntarily corrected its practices and no victims were identified.⁷⁰⁸ Like settlement agreements, these letters often require the employer's high-level officials' participation in an IER webinar, its commitment to comply with the laws and regulations of the INA moving forward and, in some cases, include back pay to the aggrieved party.⁷⁰⁹ However, unlike settlement agreements, the letters are not published on the website and do not include any indication of findings of violations or claims that were resolved. See Table 2.4. Table 2.4: IER Letters of Resolution Fiscal Year IER Letters of Resolution FY 2016 41 FY 2017 44 FY 2018 31

SOURCE: CRT Website; DOJ Agency Review; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

The Special Litigation (SPL) section enforces one of the often complex types of civil rights law, and the section resolved eight cases in FY 2016, 4.5 in FY 2017, and three in FY 2018. The majority of cases have been "pattern or practice" cases regarding systemic law enforcement misconduct.

707 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights. 708 U.S. Dep't of Justice, Civil Rights Division, "IER Letters of Resolution FY 2018," <https://www.justice.gov/crt/ier-letters-resolution-fy-2018> (accessed Jul. 13, 2019). 709 *Ibid.*

<https://www.justice.gov/crt/ier-letters-resolution-fy-2018>

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Figure 2.12: Types of SPL Cases FY 2016-18

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission notes that one FY 2017 settlement agreement, regarding Chicago police, was only an Agreement in Principle to enter into a consent decree.⁷¹⁰ That agreement in principle was later opposed by former Attorney General Sessions and dropped by DOJ,⁷¹¹ although private litigation resulted in a consent decree.⁷¹² The DOJ agreement to enter into a consent decree that was dropped is coded as 0.5 or half of a settlement agreement in the Commission's research. The other SPL consent decrees during this time frame were with the Cities of Ferguson and Newark regarding policing (both in April 2016), Baltimore police (in April 2017), and Georgia state hospitals (in May 2016).⁷¹³ SPL was also active in filing Statements of Interest in cases related to law enforcement practices. For example, in October 2015, it filed a Statement of Interest in a case brought by the parents of students with disabilities against School Resource Officers, stating that "children – particularly children with disabilities – risk experiencing lasting and severe consequences if SROs unnecessarily criminalize school-related misbehavior by taking a disproportionate law

710 Agreement in Principle Between The United States Department of Justice and the City of Chicago Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/925921/download> (signed by former Principal Deputy Atty General Vanita Gupta and SPL career attorneys). 711 See United States Statement of Interest Opposing Proposed Consent Decree, *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Oct. 12, 2018).

712 Consent Decree, *State of Illinois v. City of Chicago*, 1:17-cv-06260 (N.D. Ill. Jan. 31, 2019), <https://www.justice.gov/opa/press-release/file/1100631/download>. 713 Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180 (E.D. Mo. April 19, 2015); Consent Decree, *United States v. City of Newark*, No. 2:16-cv-01731 (D.N.J. May 5, 2016).

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FY 2016 FY 2017 FY 2018

Types of SLC Cases FY 2016-18

Corrections Disability Juvenile Justice Law Enforcement

<https://www.justice.gov/crt/case-document/file/925921/download>

<https://www.justice.gov/opa/press-release/file/1100631/download>

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enforcement response to minor disciplinary infractions."⁷¹⁴ SPL argued that such unnecessary responses including handcuffing the children above the elbows posed the risk of "last and severe consequences" for children, "particularly children with disabilities,"⁷¹⁵ and told the court that the ADA applies to interactions between school resource officers and children with disabilities, and that law enforcement agencies must make reasonable modifications when necessary to avoid disability-based discrimination.⁷¹⁶ SPL and Disability Rights Section attorneys signed the brief telling the court that the case implicated DOJ's civil rights enforcement efforts and that: "The Defendant Sheriff's Office also had a duty to create policies and administer those policies in a way that does not have the effect of discriminating against children with disabilities; the Court should reject Defendants' attempt to avoid that duty."⁷¹⁷ The Division also filed, together with DOJ's Access to Justice office, a Statement of Interest in *Stinnie v. Holcomb*, a case challenging Virginia's practice of suspending a person's license for failure to pay court fines and fees.⁷¹⁸ During the fiscal years studied, the Voting Section resolved 12 cases, fewer cases than other civil CRT sections. The following graph shows the number of cases resolved per fiscal year. Figure 2.13: Voting Cases Resolved FY 2016-18

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

The data also shows that the Voting Section's cases were mostly resolved through settlements (6), and though an additional four were resolved through consent decrees and two by judicial

714 Statement of Interest of the United States, S.R. & L.G. v. Kenton County, No. 252:15-cv-143, 1 (E.D. Ky. Oct. 2, 2015), <https://www.justice.gov/crt/file/780706/download>. 715 *Id.* 716 *Id.* at 2. 717 *Id.* 718 Statement of Interest of the United States, *Stinnie v. Holcomb*, No. 13-cv-00044 (W.D. Va. Nov. 7, 2016), <https://www.justice.gov/crt/case-document/file/917681/download>.

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Voting Cases Resolved FY 2016-2018

<https://www.justice.gov/crt/file/780706/download>

<https://www.justice.gov/crt/case-document/file/917681/download>

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decisions.⁷¹⁹ The Voting Section also filed eight (8) Statements of Interest during this time period, and some cases included a change in position.⁷²⁰ The type of Voting Section cases also varied, with one VRA case and two NVRA cases brought in each of the three fiscal years, one HAVA case brought in FY 2017, and three UOCAVA cases brought in FY 2018.⁷²¹ The Voting Section also filed eight Statements of Interest during FY 2016- 2018.⁷²² Appellate Section activities were not included in the total measure of CRT cases resolved (by judicial decision, consent decree or out-of-court settlement), because their nature is different. First, the date of a final judicial decision is not the best measure of this section's enforcement efforts in any particular year, as these cases often take many years, and second, the section files Statements of Interests in private cases in which the impact is difficult to measure as it may be that the court cites the DOJ's brief, or it may be that the court takes it into account and takes a position somewhat, but not entirely, consistent with the DOJ's brief. At the same time, CRT's appellate litigation work is impactful as these cases set a higher level of precedent than those resolved at the lower (federal district) court level.⁷²³ At the federal level, they can set precedents in the nation's 13 courts of appeals that generally govern the 94 district courts in various states, or they may assist in setting a Supreme Court precedent.⁷²⁴ The Commission based its assessment of this section's work during FY 2016-2018 on the date of briefs filed, which the Appellate Section filed in the Supreme Court, courts of appeals, district

719 DOJ CRT, "Search Cases and Matters," supra note 632; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. 720 See also USCCR, *Minority Voting*, supra note 17, at 239-275 (Ch. 5) (discussing Voting Section's declining number of cases brought to enforce the provisions of the Voting Rights Act in recent years, despite documented increase in discrimination in voting and VRA cases brought by private parties having quadrupled during the five years since the Supreme Court's 2013 decision in *Shelby County v. Holder*). 721 DOJ CRT, "Search Cases and Matters," supra note 632; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; see Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. 722 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. 723 See USCCR, *Minority Voting*, supra note 17, at 64 n. 340:

For a description of federal courts of appeals, see United States Courts, "Court Role and Structure," <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (accessed Jul. 26, 2018) ("There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court's task is to determine whether or not the law was applied correctly in the trial court."); see also U.S. Courts, *How Appellate Courts are Different from Trial Courts*, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> (accessed Jul. 26, 2018). ("At a trial in a U.S. District Court, witnesses give testimony and a judge or jury decides who is guilty or not guilty—or who is liable or not liable. The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decision in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.")

724 *Ibid.*

<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>

<http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>

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courts and state courts.⁷²⁵ CRT referred the Commission to its website for that information.⁷²⁶ Among the cases published on the CRT website, based on the date of filing of the briefs, the Appellate Section filed 33 cases in FY 2016, 39 in FY 2017, and 38 in FY 2018, with a total of 110 of these briefs filed during the fiscal years studied. Of those 110 briefs, 44 (40%) were in cases involving federal civil rights law in representation of the U.S. upon appeal.⁷²⁷ But also during FY 2016-18, 66 (60%) of the Appellate Section's enforcement actions were based on Statements of Interest in cases brought by other parties—either amicus briefs or briefs in intervention.⁷²⁸ Supreme Court decisions were issued in ten of these cases.⁷²⁹ Of these, four involved voting rights, two involved the rights of individuals with disabilities, two involved employment rights, one involved education and one involved housing.⁷³⁰ DOJ later reported to the Commission that "according to the Appellate Section's internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147."⁷³¹ Based on information from the Appellate Section's website, the Commission verified there were 110 briefs filed during FY 2016 – 2018, however, information about the 37 additional cases from the Appellate Section's internal data was not

provided.732 Criminal Section cases were extensive, but difficult to evaluate, in large part because DOJ does not publish the legal documents from these cases or its website.733 Unlike other CRT sections, the Criminal Section does not provide public links to the major legal filings and decisions in their cases and these cases can only be located through paid legal databases (e.g., Westlaw and

725 This methodology is also consistent with that suggested by the DOJ CRT in its agency review of the draft report. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file). 726 U.S. Dep't of Justice, Response to USCCR Interrogatories, at 2. 727 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Briefs by Date of Filing. 728 *Ibid.* 729 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision. 730 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision: Green v. Brennan, Postmaster General, 136 S. Ct. 1769 (2016); Fisher v. University of Texas, 136 S. Ct. 2198 (2016); Harris v. Arizona Independent Redistricting Commission, 136 S. Ct. 1301 (2016); Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016); Wittman v. Personhuballah, 136 S. Ct. 1732 (2016); Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2016); Bethune-Hill v. Virginia State Board of Elections, 137 S. Ct. 788 (2016); Bank of America v. Miami, Wells Fargo v. Miami, 137 S. Ct. 1296 (2017); Cooper (McCroby) v. Harris, 137 S. Ct. 1455 (2017); Andrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017). 731 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 732 CRT commented that "according to the Appellate Section's internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147. They include filings in the Supreme Court, courts of appeals, district courts, and state courts." Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file). Some cases were provided to the Commission, but among those, various were not filed during Fiscal Years 2016-2018. On July 18, Commission staff requested information about cases that were not on the Appellate Section's website that may have also fallen within these fiscal years. (On file.) These cases were not received from CRT and therefore the Commission has no information about them to analyze. 733 See U.S. Dep't of Justice, Civil Rights Division, "Criminal Section," <https://www.justice.gov/crt/criminal-section> (accessed Jul. 18, 2019) [hereinafter DOJ CRT, "Criminal Section"].

<https://www.justice.gov/crt/criminal-section>

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PACER).734 It does issue press releases but they typically do not include links to the legal documents, and during a 2018 briefing on hate crimes, the Commission and a coalition of civil rights groups urged CRT to provide more information regarding its hate crimes litigation.735 Lack of transparency regarding federal efforts to combat hate crimes can hinder public awareness about these crimes. At the hate crimes briefing, Former Deputy Assistant Attorney General Roy Austin testified that "you can't understate the importance of public awareness over hate crimes. The condemnation, the shame that goes with that. And how that impacts whether or not someone is going to commit one in the future."736 Criminal prosecution of hate crimes may also send a message to the targeted communities that law enforcement care.737 The Commission was able to procure information about hate crimes cases from CRT (including case numbers so that Commission staff could review legal documents), through which they provided information about 57 hate crimes cases (20 in FY 2016, 16 in FY 2017, and 21 in FY 2018).738 In FY 2016, there were 6 charges, 3 plea agreements, and 16 convictions.739 In FY 2017, there were 9 charges, 3 plea agreements, and 15 convictions.740 In FY 2018, there were 15 charges, 1 plea agreement, 10 convictions, 1 court decision of not guilty, and 1 charged resolved by the court ordering residential treatment.741 This is an area of civil rights performance where there was a high level of impact in the number of convictions in FY 2016 and FY 2017, with a drop (by 1/3) in FY 2018. However, as DOJ provided the Commission with information about charges, it is notable that the number of charges in hate crimes cases has increased each fiscal year.

734 U.S. Dep't of Justice, Civil Rights Division, "Press Releases," <https://www.justice.gov/crt/press-releases>; see also <https://www.justice.gov/crt/search-cases-and-matters> (displaying links to cases from other sections, but not the Criminal section) (accessed Jul. 10, 2019). 735 See Lena Masri, National Litigation Director, Council on American-Islamic Relations, testimony, In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes Briefing before the U.S. Commission on Civil Rights, Washington, D.C., May 11, 2018, transcript, p. 220 [hereinafter Hate Crimes Briefing]; Hate Crimes Coalition, "Post-Charlottesville Hate Crimes Summit Coalition Recommendations to the Department of Justice," The Leadership Conference on Civil & Human Rights, Sep. 15, 2017, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>; and see Muslim Public Affairs Council, Public Statement to U.S. Commission on Civil Rights, Jun. 25, 2018, at 2, <https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>. 736 Roy Austin, partner at Harris, Wiltshire & Grannis, LLP and former Deputy Assistant Atty General of the Civil Rights Division, U.S. Dep't of Justice, testimony, Hate Crimes Briefing, p. 281. 737 *Ibid.*, 280. 738 This information was not received in response to the Commission's Interrogatories, which only referred the Commission to the CRT website. The website only provides incomplete information about its cases in the DOJ's press releases. The Criminal Section website also does not include the federal case number, nor links to plea agreements or judicial decisions, which could only be found on PACER (a paid service to procure non-privileged information about federal court filings) with a case number. After receiving the draft report, CRT provided information about some, but not all, of its Criminal Section cases. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file); see also Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases). 739 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases). 740 *Ibid.* 741 *Ibid.*

<https://www.justice.gov/crt/press-releases>
<http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>
<http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>
<https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>

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The Commission also received from DOJ information about 70 "color of law" cases brought against officials (mainly state and local law enforcement)742 accused of intentionally violating civil rights while acting under the color of law, during FY 2016-2018.743 This information was only provided through press releases. The Criminal Section's press releases show that there were 25 convictions in color of law cases in FY 2016, 19 in FY 2017, and 23 in FY 2018. However, the lack of publication of the underlying legal documents hindered the Commission's ability to research these cases further. Also according to their press releases, the Criminal Section has also been active in actions brought to enforce protections against human trafficking and forced labor. The Criminal Section's press releases show that there were 7 convictions in human trafficking and forced labor cases in FY 2016, 13 in FY 2017, and 13 in FY 2018. As with the color of law cases, CRT's lack of publication of the underlying legal documents hindered the Commission's ability to research these cases further. The concerns raised about lack of transparency in hate crimes cases are equally applicable to color of law and trafficking cases. Proactive Compliance Evaluation The Civil Rights Division has some duties with regard to external enforcement of Title VI, Title IX and Section 504. The Office of Justice Programs distributes DOJ funding, and its Civil Rights Office provides technical assistance and conducts compliance monitoring for most grantees.744 For this report, the Commission concentrated the current evaluation on CRT.745 CRT's duties with regard to compliance evaluation include: coordinating compliance under Executive Order 12,250 (which is also discussed in the Interaction and Coordination section of this chapter); investigating allegations of discrimination based on race, color, national origin (including limited English proficiency), sex, or religion against recipients receiving financial assistance from the U.S. Department of Justice;746 monitoring compliance with the requirements of Executive Order 13,166 requiring meaningful access for persons with limited-English proficiency (LEP) in state and local court systems; maintaining the LEP.gov website to assist other agencies in monitoring compliance; and providing advice and assistance to other agencies in how to comply with Title VI, Title IX and Section 504. These duties are primarily performed by the Federal Coordination & Compliance Section (FCS). In addition, CRT receives referrals for litigation to ensure compliance with the relevant statutes from other agencies; defends the constitutionality of relevant statutes when agencies are sued, and litigates enforcement actions on behalf of other agencies and the DOJ itself. CRT's election monitoring may be another form of monitoring for compliance, similar to CRT's

742 In its agency review, CRT noted that "CRT CRM prosecutes federal officials alleged to have committed criminal civil rights violations." Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file). 743 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (color of law cases) 744 See U.S. Dep't of Justice, Office of Justice Programs, Civil Rights Requirements Associated with OJP Awards, <https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm> (accessed Jul. 23, 2019). 745 See Letter from U.S. Comm'n on Civil Rights to Acting Assistant Atty General John Gore (Feb. 9, 2018), attaching Interrogatories and Document Requests regarding the Civil Rights Division (on file). No similar letter was sent to the Office of Justice Programs. 746 DOJ Justice Manual, supra note 370, at § 8.2.240 (Federal Coordination & Compliance Section).

<https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm>

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monitoring of compliance with the terms of cases resolved through settlements, consent decrees, and judicial decisions. This latter set of duties is mostly performed by the specific litigating section. FCS Proactive Compliance Evaluation Activities CRT told the Commission that monitoring compliance with civil rights statutes was the responsibility of the Office of Justice Programs, but OJP was not the subject of evaluation in this report.747 With regard to investigations, the Federal Coordination and Compliance Sections has five Title VI Letters of Findings on its website, and none are within FY 2016-2018.748 Executive Order 12,250 charges DOJ with coordinating compliance with Title VI and other federal statutes requiring nondiscrimination by recipients of federal funding. DOJ has issued policy guidelines, codified in federal regulations, indicating that agencies should take the lead on compliance for federal funding recipients.749 But DOJ's regulations also state that:

While primary responsibility for enforcement of title VI rests directly with the head of each agency, in order to assure coordination of title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.750

The Commission was unable to evaluate this activity.751 However, the Commission notes that assisting other agencies in compliance monitoring is an important function of DOJ, as noted in the Commission's 2002 report,752 and that some information about how this function is performed should be made public. For example, it would be helpful to know how often FCS is consulted by which agencies, and if and generally how it responds, whether it performs outreach, and whether its advice is based on any best practices. Regarding LEP compliance monitoring, the FCS's website indicates that it reached three settlement agreements with state courts to remove language barriers or otherwise provide for equal access for LEP individuals in FY 2016.753 It also issued a Letter of Resolution a month after its settlement with Kentucky state courts, telling the jurisdictions that the investigation was closed as

747 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 748 U.S. Dep't of Justice, Civil Rights Division, Federal Coordination and Compliance Section, "Department of Justice Title VI Letters of Finding: Investigations," <https://www.justice.gov/crt/fcs/TitleVI-LOF>. 749 28 C.F.R. § 50.3. 750 28 C.F.R. § 50.3(c)(v). 751 This was due to lack of publicly available information. See U.S. Dep't of Justice, Civil Rights Division, "Federal Coordination and Compliance Section," <https://www.justice.gov/crt/fcs> (accessed Oct. 21, 2019). 752 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 6-7. 753 U.S. Dep't of Justice, Civil Rights Division, "Federal Coordination and Compliance Section News," <https://www.justice.gov/crt/federal-coordination-and-compliance-section-news>.

<https://www.justice.gov/crt/fcs/TitleVI-LOF>
<https://www.justice.gov/crt/fcs>
<https://www.justice.gov/crt/federal-coordination-and-compliance-section-news>

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it had taken affirmative steps to address the complaint allegations and come into compliance.754 The FCS asked that the jurisdiction provide quarterly updates for a period of two years.755 FCS reached two further agreements in FY 2017, and one other in FY 2018.756 One of the FY 2017 agreements was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.757 After that, FCS and Washington State Courts developed a model LEP plan through their partnership, which includes ongoing technical assistance.758 CRT told the Commission that it used this resolution type because Title VI "is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together jointly."759 CRT added that "by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime."760

754 See Letter to Director of Kentucky Administrative Office of the Court, Acting Chief of FCS Christine Stoneman (Jun. 22, 2016), <https://www.justice.gov/crt/file/871056/download>. Also, a prior Memorandum of Understanding with the state courts of Colorado was closed by letter in FY 2016, as FCS determined that the jurisdiction had come into compliance. Letter to Colorado State Court Administrator, Acting Chief of FCS Christine Stoneman (Jun. 21, 2016), <https://www.justice.gov/opa/file/868851/download>. 755 *Ibid.* 756 *Ibid.* 757 See DOJ, "Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals," supra note 244. 758 *Ibid.* 759 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT's website which was referenced in response to the Commission's Interrogatories. 760 *Ibid.*

<https://www.justice.gov/crt/file/871056/download>
<https://www.justice.gov/opa/file/868851/download>

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Table 2.5: FCS Resolved Cases FY 2016-2018 Party Type of Resolution Date of Resolution Basis FY 2016 Washington State DOL (by DOJ & DOL) Settlement 10/1/2015 LEP (workers) Los Angeles Superior Court Settlement 9/20/2016 LEP (public users) Kentucky Courts Settlement 6/22/2016 LEP (public users) FY 2017 Washington State Courts Partnership 7/18/2017 LEP (public users) Pennsylvania State Courts Settlement (MOU) 4/20/2017 LEP (public users) FY 2018 Eau Claire County, WI, Circuit Court Settlement 6/13/2018 LEP (public users) SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Federal Compliance & Coordination.

CRT told the Commission FCS uses a variety of resolution methods and has undertaken other compliance reviews and discussions to help entities come into voluntary compliance with these obligations.761 One example is a Voluntary Resolution Agreement entered into April 2014 (prior to the Fiscal Years studied in this report),762 which was closed in April 2016.763 The Commission notes that during the two years of this agreement, FCS worked closely with the Rhode Island state courts to help them come into compliance with their obligations to provide meaningful access to LEP persons,764 as required under Title VI.765 The FCS website states that FCS reviews and approves each federal agency's internal and external LEP guidelines, which are implementation plans designed to ensure LEP persons have access to that agency's programs—as well as the programs of an agency's recipient of federal funds.766

761 *Ibid.* 762 Voluntary Resolution Agreement Between the United States and the Rhode Island Judiciary, Dep't of Justice No. 171-66-2 (Mar. 26, 2014), https://www.lep.gov/resources/MOA_RI_040914_signed.pdf. 763 Letter from Acting Chief of Federal Coordination & Compliance Section to the Chief Justice of the Supreme Courts of Rhode Island (Apr. 21, 2016), https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf. 764 *Ibid.* 765 See, e.g., Lau v. Nichols, 414 U.S. 563, 568 (1974). 766 See, e.g., U.S. Dep't of Justice, Office of the Atty General, Memorandum of the Attorney General to Heads of Federal Agencies, General Counsels and Civil Rights Heads, "Federal Government's Commitment to Language Access Under Executive Order 13166 (Feb. 17, 2011), p. 2, https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf [hereinafter DOJ, Memorandum: Federal Government's Commitment to

<http://www.justice.gov/crt/search-cases-and-matters>
https://www.lep.gov/resources/MOA_RI_040914_signed.pdf
https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf
https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf

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Proactive Compliance Monitoring by Other CRT Sections Another compliance-based enforcement tool is on-the-ground monitoring for potential civil rights violations. In the case of federal election monitoring to observe compliance with federal voting rights laws, such monitoring can have a calming effect on discriminatory activity, or it can lead to further CRT investigation that may result in new or additional enforcement action.⁷⁶⁷ The Voting Rights Act provides for federal observers, certified by the Attorney General through CRT and recruited through the Office of Personnel Management (OPM) government-wide, to enter polling places and monitor elections according to specific standards.⁷⁶⁸ But as the Commission reported last year: “Although the Shelby County [2013 Supreme Court] decision did not directly address the issue of federal observers, DOJ has interpreted Shelby County to mean that DOJ could no longer deploy federal observers to the jurisdictions formerly covered under Section 5 [of the VRA], except under the limited circumstances of a court order.”⁷⁶⁹ CRT may still send federal observers if they are ordered by a federal judge, in cases where there is a significant need to protect against constitutional violations.⁷⁷⁰ Additionally, CRT still sends its own staff to monitor elections on a regular basis, although they do not have a statutory right to observe elections from inside the polling places.⁷⁷¹ Prior to Shelby County, the Attorney General certified and sent federal observers to 153 jurisdictions in 11 states.⁷⁷² In a 2016 report, *An Assessment of Access to Minority Voting Rights*, the Commission found that the Shelby County decision had a negative impact on CRT’s ability to observe elections and collect information about possible unlawful voting practices or procedures.⁷⁷³ Current data shows similar patterns:

- In FY 2016, DOJ sent 211 federal observers and 93 staff election monitors to observe elections. In comparison, in FY 2012, DOJ sent 460 OPM federal observers and 123 staff election monitors. ⁷⁷⁴ This amounts to fewer than half the number of observers and 75.6 percent of staff election monitors present in FY 2016, compared with FY 2012.

- In FY 2017 (which included the 2016 November general election) it sent 143 OPM federal observers and 452 staff election monitors to over 76 jurisdictions in 29 states. In comparison in FY 2013 (which included the 2012 November general election) DOJ sent

⁷⁶⁷ See, e.g., USCCR, *Minority Voting*, supra note 17, at 30, 58, 138 n. 809, 176-77, and 191 (and testimony and data therein). ⁷⁶⁸ 52 U.S.C. § 10305(a)(2) and (b) – (e). ⁷⁶⁹ USCCR, *Minority Voting*, supra note 17, at 256. ⁷⁷⁰ *Ibid.* (also includes analysis of the scope of the Attorney General’s authority to order federal observers and the observers’ own authorities and duties, under Section 8 of the Voting Rights Act); see also supra notes 551-53 (discussing 52 U.S.C. § 12302(a), under which federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendment). ⁷⁷¹ USCCR, *Minority Voting*, supra note 17, at 254-60. ⁷⁷² U.S. Dep’t of Justice, *Civil Rights Division, Voting Section, “Federal Observers,”* <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (accessed Mar. 15, 2017). ⁷⁷³ USCCR, *Minority Voting*, supra note 17, at 254. ⁷⁷⁴ *Ibid.*, 256; updated by U.S. Dep’t of Justice, *Civil Rights Division, Response to USCCR Affected Agency Review*, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

<https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>

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780 federal observers and 259 staff election monitors to 78 jurisdictions in 23 states.⁷⁷⁵ Even though the number of jurisdictions covered was comparable (76 and 78, respectively), the number of persons monitoring compliance on the ground decreased significantly between the 2012 and 2016 general elections, amounting to DOJ sending only 18.3 percent (143/780 × 100) of the number of observers and 57.3 percent (259/452 × 100) the number of staff monitors during the 2016 elections, compared with 2012.

This updated data shows that there was an ongoing overall decrease in CRT’s election monitoring activities, even in the use of CRT staff monitoring, which is a less-resource intensive form of election monitoring.⁷⁷⁶ Civil rights compliance also is performed by CRT in most other civil cases, after they are resolved through settlement, consent decree or judicial decision, in the hundreds of cases CRT resolves each year. Post-resolution monitoring by CRT, or a court-appointed monitor, helps ensure that entities come fully into compliance with the terms of the case resolution, before the monitoring is ended and the case can be closed.⁷⁷⁷ This is especially important in what CRT terms “institutional reform” cases.⁷⁷⁸ In addition to its compliance monitoring through DOJ’s Office of Civil Rights of the Office of Justice Programs, which distributes DOJ funding,⁷⁷⁹ CRT effectuates compliance with Title VI, Title IX and Section 504 by acting on matters referred to DOJ for litigation on behalf of other agencies,⁷⁸⁰ or to enforce these civil rights laws against recipients of DOJ funding.⁷⁸¹ These cases are part of CRT’s active litigation docket discussed in the Complaints Processing, Agency-Initiated Charges, and Litigation section of this chapter.

⁷⁷⁵ USCCR, *Minority Voting*, supra note 17, at 258; updated by U.S. Dep’t of Justice, *Civil Rights Division, Response to USCCR Affected Agency Review*, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁷⁷⁶ USCCR, *Minority Voting*, supra note 17, at 259. ⁷⁷⁷ U.S. Dep’t of Justice, *Civil Rights Division, Response to USCCR Affected Agency Review*, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁷⁷⁸ See supra note 567 (discussing Special Litigation Section “pattern or practice” cases). ⁷⁷⁹ U.S. Dep’t of Justice, *Response to USCCR Interrogatories*. ⁷⁸⁰ See, e.g., *Complaint, United States v. Housing Authority of the City of Bridgeport*, No. 3:17-cv-1922 (D. Conn., Nov. 15, 2017)(ADA/504 referral from HUD, civil action filed by CRT); <https://www.justice.gov/crt/case-document/file/1011841/download>. ⁷⁸¹ See, e.g., *Complaint, United States v. Maricopa County, AZ, Maricopa County Sheriff’s Office, and Sheriff Joseph M. Arpaio*, No. 2:10-cv-01878, ¶2 (D. Ariz. Sept. 2, 2010) (“Accountability for taxpayer funds is a fundamental element of Title VI, its implementing regulations, and the contractual assurance agreements that all recipients sign as a condition of receiving federal financial assistance. As recipients of federal financial assistance, Defendants are required by law, regulation, and contract to provide the United States with access to documents, other sources of information, and facilities in connection with Title VI investigations or compliance reviews.”). This Title VI compliance enforcement action also included pattern or practice statutory and constitutional claims regarding racial profiling of Latino drivers, and it reached the Ninth Circuit Court of Appeals, which held that Sheriff Arpaio was liable under Title VI. *United States v. Maricopa County*, 889 F. 3d 648, 653 (9th Cir. 2018); cert. denied sub nom. *Maricopa Cty., Ariz. v. United States*, 139 S. Ct. 1373 (2019).

<https://www.justice.gov/crt/case-document/file/1011841/download>

<https://www.justice.gov/crt/case-document/file/1011841/download>

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In addition, if other federal agencies are challenged in their authority to ensure compliance with federal civil rights laws, CRT will defend them,⁷⁸² and may also defend federal civil rights laws (including compliance rules and enforcement actions) if they are challenged.⁷⁸³ Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity Regulations CRT has an important coordinating role under federal law, particularly under Title VI and other civil rights laws applicable to recipients of federal funding.⁷⁸⁴ This tool is designed to standardize enforcement and share information about how to comply with the regulated community.⁷⁸⁵ According to the Title VI Manual issued by CRT, it has an important role and authority in compliance for federal funding recipients, to “ensure consistent and effective enforcement across the federal government.”⁷⁸⁶ First, it must approve and has clearance authority over other agencies’ Title VI regulations.⁷⁸⁷ CRT has broadly interpreted this Title VI regulatory requirement to mean CRT must approve “comprehensive regulations that govern, in part, a federal agency’s Title VI implementation or enforcement,” and:

In addition, federal implementing directives (whether in the nature of regulations or implementing guidance) that agencies issue under any of the laws covered by Executive Order 12,250 are “subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect.” Id. § 1-402. These documents include regulations issued to effectuate statutes that “provide in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” Id. § 1- 201(d). The authority to review such guidance documents has been delegated to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 0.51(a) (“The Assistant Attorney General in charge of the Civil Rights Division shall, except as reserved herein, exercise the authority vested in and perform the functions assigned to the Attorney General by Executive Order 12,250 (“Leadership and Coordination of Nondiscrimination Laws”).”)⁷⁸⁸

⁷⁸² See, e.g., *Motion to Dismiss, Su v. United States Dep’t of Educ., Office for Civil Rights, Region XV*, No. 13-3093 (6th Cir. Apr. 12, 2012) (CRT brief). ⁷⁸³ See, e.g., *King v. Marion County Circuit Court*, No. 16-3726 (11th Cir. Feb. 17, 2017) (CRT Brief as Intervenor defending Title II of the ADA). ⁷⁸⁴ See *infra* notes 940-45. ⁷⁸⁵ See supra notes 306-08. ⁷⁸⁶ DOJ, *Title VI Legal Manual*, supra note 39, at III.A, Department of Justice Role Under Title VI. ⁷⁸⁷ *Ibid.* ⁷⁸⁸ U.S. Dep’t of Justice, *Civil Rights Division, Response to USCCR Affected Agency Review*, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file), citing Exec. Order No. 12,250 at §1-402.

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CRT has also clarified that while it must review and approve certain federal agency regulations, it only “may require that policy guidance issued under any of the laws covered by EO 12,250 [Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations] be “submitted for approval before taking effect.”⁷⁸⁹ Policy Guidance In 2002, the Commission clearly found that guidance is needed for effective civil rights enforcement,⁷⁹⁰ and the DOJ Title VI Legal Manual affirms this conclusion by finding that DOJ CRT is at the very least required to issue Title VI guidance.⁷⁹¹ Former Deputy Assistant Attorney General Eve Hill supports the use of affirmative guidance as a tool for effective civil rights enforcement. Ms. Hill stated that “technical assistance [through DOJ guidance] around the ADA is vital for everyone involved,” and that “when people don’t understand that law, access to services can be threatened, and the courts become the only recourse.”⁷⁹² And after DOJ withdrew a relevant guidance, Disability Rights Counsel Susan Mizner of the ACLU commented that:

Withdrawing this guidance does not change the legal responsibilities of state and local governments. States must still comply with the ADA, and must still promote integrated employment for people with disabilities. If the Justice Department won’t do its job, the disability rights community will. The ACLU will continue to remind employers of the law, states of their obligations, and people with disabilities that we are all worthy of being part of our country and our workforce.⁷⁹³

⁷⁸⁹ *Ibid.* ⁷⁹⁰ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, supra note 1, at 25. ⁷⁹¹ DOJ, *Title VI Legal Manual*, supra note 39, at III.A, Department of Justice Role Under Title VI. ⁷⁹² David M. Perry, “Companies that Exploit Disabled People Have a Friend in Jeff Sessions,” *Pacific Standard*, Jan. 4, 2018, <https://psmag.com/economics/jeff-sessions-roll-back-disability-rights> [hereinafter Perry, “Companies that Exploit Disabled People Have a Friend in Jeff Sessions”]. (Also commenting that: “The Americans With Disabilities Act was never meant to be run by lawsuits. Instead, since 1992, the Department of Justice (DOJ) has been releasing technical assistance documents in order to explain disability-related civil rights obligations in plain language. The goal is to preemptively answer questions, but also to provide a model for consistency across the country.”) ⁷⁹³ “ACLU Statement on DOJ Withdrawal of Disabilities Guidance,” ACLU, Dec. 22, 2017, <https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance> [hereinafter “ACLU Statement on DOJ Withdrawal of Disabilities Guidance”].

<https://psmag.com/economics/jeff-sessions-roll-back-disability-rights>

<https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance>

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As discussed in Chapter 1, federal policy guidance can be an impactful tool for civil rights enforcement.⁷⁹⁴ The Commission considers it as among the “essential elements for effective civil rights enforcement.”⁷⁹⁵ In 1996 and 2002 reports,⁷⁹⁶ the Commission focused on Title VI and the need for CRT to issue updated policy guidance and regulations regarding recipients of federal funding by other agencies:

Since the Commission’s 1996 report, CORS [now called FCS] has issued a policy guidance titled “The Enforcement of Title VI of the Civil Rights Act and Related Statutes in Block-Grant Type Programs.” CORS attributes its development to recommendations made by the Commission and other advisory groups.⁷⁹⁷

In 2002, the Commission found that CRT did not provide updated policy guidance, and it did not have a formal Title VI technical assistance program,⁷⁹⁸ and recommended that it improve these functions.⁷⁹⁹ Under federal law, DOJ is charged with developing “formal and informal guidance regarding implementation of Title VI, including legal interpretations of the statute and regulations,” and this work is done mainly through FCS.⁸⁰⁰ Federal courts give special deference to DOJ’s Title VI guidance documents.⁸⁰¹ DOJ also acts as a federal agency coordinator and clearinghouse of information, and provides oversight and coordination of Title VI implementation, mainly through FCS.⁸⁰² FCS released several guidance documents in FY 2016 that covered guidance on language access in state courts, and emergency preparedness, response and recovery.⁸⁰³ In the past, CRT’s guidance on language access policies had been expansive and FCS offered technical assistance, which it may still be providing.⁸⁰⁴ In FY 2017, FCS released guidance on Title VI requirements with regard to child welfare systems.⁸⁰⁵ Prior to the fiscal years studied in this report, in August 2016, FCS led

⁷⁹⁴ See supra notes 178 and 321 (discussing testimony of Professors Anthony Varona and Aderson Francios). ⁷⁹⁵ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, supra note 31, at 2. ⁷⁹⁶ USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, supra note 51, at 141-144; USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, supra note 31, at 15. ⁷⁹⁷ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, supra note 31, at 15. ⁷⁹⁸ *Ibid.*, 7. ⁷⁹⁹ *Ibid.*, 8. ⁸⁰⁰ See DOJ, *Title VI Legal Manual*, supra note 39, at III.A.2. ⁸⁰¹ *Ibid.*, III.A.2, citing “See, e.g., *United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1080 (D. Ariz. 2012) (citing *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979)).” ⁸⁰² DOJ, *Title VI Legal Manual*, supra note 39, at III.A.3 and 4. ⁸⁰³ U.S. Dep’t of Justice, “Press Release: Federal Agencies Issue Joint Guidance to Help Emergency Preparedness, Response and Recovery Providers Comply with Title VI of the Civil Rights Act,” Aug. 16, 2016, <https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>. ⁸⁰⁴ CRT told the Commission that this information was privileged. U.S. Dep’t of Justice, *Civil Rights Division, Response to USCCR Affected Agency Review*, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁸⁰⁵ U.S. Dep’t of Justice, “Press Release: Departments of Justice and Health and Human Services Issue Joint Guidance for Child Welfare Systems,” Oct. 19, 2016, <https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>.

<https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>

<https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>

<https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>

<https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>

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agencies in releasing a joint guidance regarding the need to provide language access during emergencies. DOJ together with Homeland Security (DHS), Housing and Urban Development (HUD), Health and Human Services (HHS), and Transportation (DOT), issued the guidance to “ensure” that persons “affected by disasters do not face unlawful discrimination on the basis of race, color, or national origin (including limited English proficiency) in violation of Title VI of the Civil Rights Act of 1964 (Title VI).”⁸⁰⁶ It concluded by emphasizing that:

Hurricane Katrina and subsequent emergencies and disasters highlight a recurring lesson: we need to take proactive measures to ensure that all members of our communities are appropriately incorporated into emergency management activities. We invite you to contact the civil rights office of your federal funding agency or DOJ’s Federal Coordination and Compliance Section in the Civil Rights Division for additional technical assistance on compliance with Title VI and other federal civil rights laws.⁸⁰⁷

Another important function of FCS is maintaining the LEP.gov website, which provides extensive guidance on the implementation of Executive Order 13,166, which requires federal agencies to ensure LEP persons have meaningful access to their services, and that the agencies work to ensure that recipients of federal funding provide meaningful access to persons who are limited-English proficient.⁸⁰⁸ In 2019, the federal government’s LEP.gov website says that FCS has “taken the lead in coordinating and implementing this Executive Order,” but that agencies and recipients of federal funding do not necessarily have to submit an LEP plan to FCS.⁸⁰⁹ Specifically, the current language states that:

Q. Do recipients of federal funds have to submit written language access plans to the Department of Justice or to their federal funding agency each year? A. No. While planning is an important part of ensuring that reasonable steps are taken to provide meaningful access to LEP individuals seeking services, benefits, information, or assertion of rights, there is no blanket requirement that the plans themselves be submitted to federal agencies providing federal financial assistance. In certain circumstances, such as in complaint investigations or compliance

⁸⁰⁶ DOJ, DHS, HUD, HHS and DOT, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, 1 (Aug. 16, 2015), <https://www.justice.gov/crt/file/885401/download>. ⁸⁰⁷ *Ibid.*, 16. ⁸⁰⁸ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file); see also Exec. Order No. 13,166, Improving Access to Service for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>; and see, e.g., Lau v. Nichols, 414 U.S. 563, 568 (1974) (regarding meaningful access). ⁸⁰⁹ “Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals,” Limited English Proficient (LEP), LEP.gov, A Federal Interagency Website, <https://www.lep.gov/faqs/faqs.html#OneQ7> (accessed Jul. 21, 2019) [hereinafter “Commonly Asked Questions,” LEP.gov].

<https://www.justice.gov/crt/file/885401/download>
<https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>
<https://www.lep.gov/faqs/faqs.html#OneQ7>

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reviews, recipients may be required to provide to federal agencies a copy of any plan created by the recipient.⁸¹⁰

In 2011, as compliance with Title VI’s protections against national origin discrimination was spotty, Attorney General Holder specifically requested that each federal agency submit an LEP compliance plan to the FCS, and that agencies that issued federal assistance require their grantees to submit LEP compliance plans, among other steps.⁸¹¹ But currently, the website does not display a required submission of a plan, although it does provide information about why it is important to have such a plan and why it should be continuously updated, and it states that “agencies that conduct activities overseas must still submit a plan for making their domestic activities accessible to people who are limited English proficient.”⁸¹² In addition to those issued by FCS, policy guidance may sometimes be issued by other CRT sections. The Educational Opportunities Section has only published one new guidance document during FY 2016-2018.⁸¹³ Comparatively, between 2014 and 2016, EOS and ED OCR released at least eight such documents, related to Asian American and Pacific Islander student rights, ELL students’ equal access to education, and non-discriminatory school discipline.⁸¹⁴ Other types of guidance and technical assistance and its dissemination through publicity are discussed in this chapter’s section on Interaction and Coordination with External Agencies and Stakeholders, as they have resulted from interaction with other agencies as well as stakeholders. For example, after several roundtables on religious discrimination in schools, with a Dear Colleague letter from former CRT head Vanita Gupta, DOJ released its final report on Combating Religious Discrimination Today, which included recommendations and increased resources and guidance, for agencies, schools, and community leaders.⁸¹⁵ DOJ has also issued policy guidance impacting civil rights. As discussed below, the major policy changes in the Obama Administration took expansive views of civil rights protections, and the Trump Administration’s focus has been restrictive and may be less effective for impacted communities.⁸¹⁶

⁸¹⁰ *Ibid.*, Question 8. ⁸¹¹ DOJ, Memorandum: Federal Government’s Commitment to Language Access, supra note 766, at 2. ⁸¹² “Commonly Asked Questions,” LEP.gov, supra note 810, at Question 12 (agencies with overseas activities), D (why it’s important to have an LEP plan, citing DOJ, Memorandum: Federal Government’s Commitment to Language Access, supra note 766) and E (why it’s important to update LEP plans). ⁸¹³ See U.S. Dep’t of Justice, Civil Rights Division, “Guidance and Resources,” <https://www.justice.gov/crt/guidance-and-resources> (accessed Jul. 5, 2018). ⁸¹⁴ *Ibid.* ⁸¹⁵ See U.S. Dep’t of Justice, Combating Religious Discrimination Today: Final Report, July 2016, https://www.justice.gov/Combating_Religious_Discrimination [hereinafter DOJ, Combating Religious Discrimination Today]. ⁸¹⁶ See supra notes 317-26 (comments of civil rights groups).

<https://www.justice.gov/crt/guidance-and-resources>
https://www.justice.gov/Combating_Religious_Discrimination

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During FY 2016, on December 15, 2015, DOJ issued new guidance on preventing gender bias in law enforcement responses to sexual assault and domestic violence.⁸¹⁷ On March 14, 2016, DOJ released guidance (including a dear colleague letter that DOJ later rescinded) encouraging state and local governments to engage in fine and fee reform efforts.⁸¹⁸ On May 13, 2016, DOJ and ED released a joint guidance, which summarized a school’s Title IX obligations regarding transgender students and explained how DOJ and ED evaluate a school’s compliance with those obligations.⁸¹⁹ On July 1, 2016, as a part of the DOJ’s ADA Voting Initiative, CRT released new guidance documents about ADA requirements with respect to polling places.⁸²⁰ FY 2017 spanned two presidential administrations, the end of the Obama Administration, and the beginning of the Trump Administration. On October 31, 2016, DOJ released a statement discussing the application of the integration mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to state and local governments’ employment service systems for individuals with disabilities.⁸²¹ On November 10, 2016, with HUD, DOJ issued an updated Joint Statement on the application of the Fair Housing Act to State and Local Land Use Practices.⁸²² Citing a recently issued Supreme Court decision, the Joint Statement clarified that:

Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* The Court stated that “[t]hese unlawful practices include zoning laws and other housing

⁸¹⁷ U.S. Dep’t of Justice, Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence, Dec. 15, 2015, <https://www.justice.gov/opa/file/799366/download>. ⁸¹⁸ U.S. Dep’t of Justice, “Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices,” Mar. 14, 2016, <https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>. In 2017, the Commission released a report, Targeted Fines and Fees Against Communities of Color, which found that the imposition of fine and fees have disproportionately impacted communities and people of color. See U.S. Comm’n on Civil Rights, Targeted Fines and Fees Against Communities of Color, September 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf. ⁸¹⁹ U.S. Dep’t of Justice & Dep’t of Education, Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. ⁸²⁰ U.S. Dep’t of Justice, “Press Release: Justice Department Issues Updated Guidance on the Americans with Disabilities Act Checklist for Polling Places,” Jul. 1, 2016, <https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>. ⁸²¹ U.S. Dep’t of Justice, Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments’ Employment Services Systems for Individuals with Disabilities (Oct. 31, 2016), http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf [hereinafter DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*]. ⁸²² DOJ, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, supra note 554, at 4.

<https://www.justice.gov/opa/file/799366/download>
<https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>
https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>
<https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>
<https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>
http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf
http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf

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restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”⁸²³

Just prior to that, in October 2016, the CRT Housing Section had filed an amicus brief in a case in New York, strongly defending the disparate impact standard in a case alleging that a landlord’s exclusion of applicants with criminal records discriminated against black and Latino applicants.⁸²⁴ This example illustrates how policy guidance and litigation may be utilized together to develop the law and send messages to potential violators. In December 2016, CRT released updated guidance for election officials on how to comply with Section 203 of the VRA.⁸²⁵ The most recent Census Bureau determinations of which jurisdictions were subject to Section 203 of the VRA, which requires that election materials and assistance be provided in languages spoken by minority voters if their community reaches a certain threshold number or percentage of eligible voters, were made on December 5, 2016 when 263 jurisdictions were determined to be covered by Section 203.⁸²⁶ On December 15, 2016, DOJ issued a guidance letter to State, County, and Municipal Officials explaining obligations under the Religious Land Use and Institutionalized Persons Act.⁸²⁷ In FY 2016, the Housing Section filed two Statements of Interest with federal courts regarding this statute,⁸²⁸ again illustrating how policy and litigation may coordinate to develop the law. On January 20, 2017, the presidential administration changed as Donald J. Trump was sworn in as President of the U.S. On February 22, 2017, ED and DOJ rescinded joint Title IX guidance clarifying protections under the law with regard to transgender students.⁸²⁹ This issue is further discussed in the U.S. Department of Education chapter of this report.⁸³⁰

⁸²³ *Ibid.* ⁸²⁴ United States of America’s Statement of Interest, *The Fortune Society v. Sandcastle Towers Housing, No. 1:14-cv-06410*, (E.D.N.Y. Oct. 8, 2016). ⁸²⁵ 28 C.F.R. Pt. 55 (2016). ⁸²⁶ 81 Fed. Reg. 87,532-38 (Dec. 5, 2016). ⁸²⁷ U.S. Dept. of Justice, Letter Re: The Religious Land Use and Institutionalized Persons Act (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download>. ⁸²⁸ Statement of Interest of the United States, Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church’s suit under RLUIPA arguing their religious exercise was substantially burdened by the City after being denied a land use permit to convert a residential house adjacent to the Church’s property into meeting house to allow for additional programming and meeting space); Statement of Interest of the United States, Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff’s suit under RLUIPA alleging Howard County’s complete denial of JOGA’s petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA’s ability to practice their religion, particularly as there was no Jagannath temple anywhere in the State of Maryland.). ⁸²⁹ U.S. Dep’t of Justice and U.S. Dep’t of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Title IX Guidance on Transgender Students (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [hereinafter DOJ and ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence]. ⁸³⁰ See infra notes 1200-03 (discussing the impact of the rescission).

<https://www.justice.gov/crt/page/file/918596/download>
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

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Moving on to fiscal year 2018, on October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties.⁸³¹ This new guidance permits recipients of federal funding to make exceptions to their services based on “sincerely held religious beliefs.”⁸³² The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.⁸³³ Craig Leen, Director of OFCCP, noted that OFCCP’s decision to implement new guidance with respect to the religious exemption of Executive Order 11,246 was in part prompted by the Attorney General’s memorandum on religious liberty.⁸³⁴ Two days later, the Justice Department also reversed a policy that previously clarified that transgender workers are protected under Title VII of the Civil Rights Act of 1964.⁸³⁵ During the fiscal years studied, implementation of these changes has occurred in DOL and is underway in HHS (see DOL and HHS chapters of this report).⁸³⁶ On November 16, 2017, then-Attorney General Sessions issued a memorandum to all components of the U.S. Department of Justice prohibiting the issuance of letters or guidance documents that serve to take the place of the regulatory process or modify the law stating, “[d]epartment components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch.”⁸³⁷ However, this guidance made no substantive change to existing DOJ or agency practice.⁸³⁸ Sessions’ memorandum also withdrew several dozen guidance documents pursuant to recommendations made by the U.S. Department of Justice Regulatory Reform Task Force during fiscal year 2018 that had been previously issued by DOJ. On December 21, 2017, DOJ withdrew 25 guidance documents, including inter alia guidance on fines and fees, guidance on ADA construction compliance, and guidance pertaining to protecting the rights of legal permanent

⁸³¹ U.S. Dept. of Justice, Office of the Atty General, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>. ⁸³² *Ibid.* ⁸³³ Varona Testimony, Federal Civil Rights Enforcement Briefing, pp. 255-58; National LGBTQ Task Force Statement, at 8-9. ⁸³⁴ Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 87-88. ⁸³⁵ U.S. Dept. of Justice, Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964, Oct. 4, 2017, <https://www.justice.gov/ag/page/file/1006961/download>. ⁸³⁶ See infra notes 1395-1419 and 2020-36 (regarding HHS and DOL, especially with regard to reversal of a policy clarifying that transgendered workers are protected under Title VII of the Civil Rights Act of 1964 on Oct. 4, 2017). ⁸³⁷ U.S. Dept. of Justice, Memorandum: Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>. ⁸³⁸ See Administrative Conference of the United States, Guidance in the Rulemaking Process, Rec. No. 2014-3 (Jun. 24, 2014), <https://www.acus.gov/recommendation/guidance-rulemaking-process>.

<https://www.justice.gov/opa/press-release/file/1001886/download>

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residents.⁸³⁹ The Commission strongly criticized the withdrawal of these guidance documents.⁸⁴⁰ DOJ did not replace these guidance documents with new guidance about how to satisfy the law the rescinded documents described. On July 3, 2018, the Justice Department withdrew a further 24 guidance documents including inter alia guidance on federal protections against national origin discrimination, joint DOJ and ED guidance on the use of race by educational institutions.⁸⁴¹ This set of withdrawals included outdated policy guidance documents that were replaced, such as an outdated version of public outreach material discussing refugees' and asylees' rights to work that was replaced by CRT's Immigrant & Employee Rights Section in December with an updated version.⁸⁴² On April 6, 2018, Attorney General Sessions notified all U.S. Attorneys of the administration's zero-tolerance policy towards immigrants crossing the southern border of the U.S., leading to thousands of Central American children being separated from their parents at the border.⁸⁴³ During the Commission's briefing, the Executive Director of Asian Americans Advancing Justice testified that the positions of the Trump Administration had a chilling effect on immigrant communities' reporting potential civil rights violations to the federal government.⁸⁴⁴ On June 13, 2018 DOJ announced its Place to Worship Initiative, "which will focus on protecting the ability of houses of worship and other religious institutions to build, expand, buy, or rent facilities" as protected by RLUIPA.⁸⁴⁵ The initiative intends to include hosting community outreach events, educating and training organizations about RLUIPA requirements, and providing additional resources to federal prosecutors.⁸⁴⁶ DOJ hosted a community outreach event on June 25, 2018,⁸⁴⁷ released a RLUIPA Q&A document that outlined the law's requirements, scope, and interpretation.⁸⁴⁸ This document emphasized that, in the passage of RLUIPA:

839 U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 25 Guidance Documents," Dec. 21, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>. 840 U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions' Withdrawal of Critical Civil Rights Guidance, (Jan. 19, 2018). 841 See also United States' Statement of Interest, Students for Fair Admissions v. Harvard, No. 1:14-cv-14176 (D. Mass., Aug. 30, 2018), <https://www.justice.gov/opa/press-release/file/1090856/download>. 842 U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 24 Guidance Documents," Jul. 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>; see also U.S. Dept. of Justice, Civil Rights Division, Immigrant & Employee Rights Section, Information About Refugees and Asylees About Form I-9, December 2018, <https://www.justice.gov/crt/page/file/1119566/download>. 843 U.S. Dept. of Justice, Office of the Atty General, Memorandum for Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [hereinafter DOJ, Zero-Tolerance Memorandum]. 844 Yang Testimony, Federal Civil Rights Enforcement Briefing, pp. 182-88. 845 U.S. Dept. of Justice, "Press Release: Department of Justice Announces Place to Worship Initiative," Jun. 13, 2018, <https://www.justice.gov/opa/pr/departement-justice-announces-place-worship-initiative-0>. 846 Ibid. 847 Ibid. 848 U.S. Dept. of Justice, Civil Rights Division, Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (Jun. 13, 2018), <https://www.justice.gov/crt/page/file/1071246/download>.

<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>
<https://www.justice.gov/opa/press-release/file/1090856/download>
<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>
<https://www.justice.gov/crt/page/file/1119566/download>
<https://www.justice.gov/opa/press-release/file/1049751/download>
<https://www.justice.gov/opa/press-release/file/1049751/download>
<https://www.justice.gov/opa/pr/departement-justice-announces-place-worship-initiative-0>
<https://www.justice.gov/crt/page/file/1071246/download>

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Congress... heard testimony that, as a whole, religious institutions were treated worse than comparable secular institutions by zoning codes and zoning authorities. As RLUIPA's Senate sponsors, Senator Hatch and the late Senator Kennedy, said in their joint statement issued upon the bill's passage: "Zoning codes frequently exclude churches in places where they permit theaters, meetings halls, and other places where large groups of people assemble for secular purposes. . . . Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes."⁸⁴⁹

CRT also released a shorter informational document about RLUIPA and DOJ's role in its enforcement.⁸⁵⁰ CRT had announced a similar, broader initiative in 2016, the Combatting Religious Discrimination Today Initiative, which brought together community and religious leaders for roundtable discussions across the country.⁸⁵¹ That initiative led to the production of a report about what the DOJ would focus on moving forward to help combat religious discrimination.⁸⁵² One of the themes was the lack of education and awareness about RLUIPA, which yielded a recommendation to increase outreach and education for local officials and religious communities on RLUIPA.⁸⁵³ Campaign for Youth Justice has commented that they were concerned that in June 2018, DOJ's Office of Juvenile Justice and Delinquency Prevention issued new, reduced compliance requirements for states to demonstrate that they are addressing disproportionate minority contact in the juvenile justice system; the new requirements have states assessing themselves rather than reporting sufficient data for DOJ to assess whether states are meeting their responsibilities.⁸⁵⁴ Also in 2018, citing President Trump's Executive Order 13,777 calling for reduction in government regulation, then-Attorney General Sessions rescinded ten ADA guidance documents.⁸⁵⁵ Some experts believe that rescission of many of these documents will not have much effect on disability rights enforcement or compliance.⁸⁵⁶ Whether or not that view is accurate, without question the rescission of a 2016 Olmstead guidance has been widely described as

849 Ibid., 1. 850 DOJ, Federal Religious Land Use Protections, supra note 555. 851 Letter from Vanita Gupta, Principal Deputy Assistant Atty General, to State, County and Municipal Officials (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download> (re: the Religious Land Use and Institutionalized Persons Act). 852 DOJ, Combatting Religious Discrimination Today, supra note 815. 853 Ibid., 23. 854 Campaign for Youth Justice, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Dec. 17, 2018, at 2. 855 "DOJ Rescinds 10 ADA Guidance Documents," Ballard Spahr, Jan. 3, 2018, <https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>. 856 Ibid; see also Michelle Diamant, "Justice Department Scraps ADA Guidance," Disability Scoop, Jan. 4, 2018, <https://www.disabilityscoop.com/2018/01/04/justice-scraps-ada-guidance/24546/>.

<https://www.justice.gov/crt/page/file/918596/download>
<https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>
<https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>
<https://www.disabilityscoop.com/2018/01/04/justice-scraps-ada-guidance/24546/>

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concerning.⁸⁵⁷ This guidance document outlined the integration mandate of Title II of the ADA. The integration mandate requires allowing people with disabilities to live integrated lives and avoid unnecessary, and unlawful segregation from society.⁸⁵⁸ and, more specifically, requires public entities to administer their services, including their employment programs, in the manner "that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."⁸⁵⁹ The Supreme Court in Olmstead held that public entities are required to provide community-based services to persons with disabilities when appropriate, when agreed to by these individuals, and when reasonable accommodations can be made.⁸⁶⁰ The Code of Federal Regulations requires that: "To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination."⁸⁶¹ ADA's integration mandate is a statutory requirement that cannot be overturned by a guidance.⁸⁶² Nor can a guidance overturn a Supreme Court opinion or federal regulations.⁸⁶³ So the related rules were not overturned by the Sessions guidance. CRT told the Commission that, "Enforcement actions are far more important than any guidance document, which cannot change the law[.]" and "that the Division continued its work with Olmstead settlements, trials, and actions under the Trump Administration.⁸⁶⁴ The value of this guidance was shown by it being complemented by enforcement actions as well as interaction and coordination with other agencies. After the Olmstead decision, CRT brought

857 U.S. Dept. of Justice, Withdrawal of the Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. to State and Local Governments' Employment Service Systems for Individuals with Disabilities (Dec. 21, 2017), https://www.ada.gov/withdrawn_olmstead.html [hereinafter DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead]; "ACLU Statement on DOJ Withdrawal of Disabilities Guidance," supra note 793; Perry, "Companies that Exploit Disabled People Have a Friend in Jeff Sessions," supra note 792. 858 The guidance summarized the statutory and regulatory provisions as follows:

[T]he ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead v. L.C., supra note 821, at 2.

859 Ibid. ("Therefore, the ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."⁶ The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 860 Ibid., note 8, citing Olmstead, 527 U.S. at 607. 861 Ibid., note 9, citing 28 C.F.R. § 35.130(b)(7). 862 See, e.g., Order, Texas v. E.E.O.C., No. 513-CV-255-C, at *4 (N.D. Tex. Feb. 1, 2018), <http://www.naacpldf.org/files/about-us/Doc.%20117.pdf> (explaining that a guidance is only as enforceable as the underlying law). 863 Id. 864 U.S. Dept. of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

https://www.ada.gov/withdrawn_olmstead.html
<http://www.naacpldf.org/files/about-us/Doc.%20117.pdf>

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two cases against states for ADA violations over non-integrative and discriminatory employment practices, procuring a consent decree in Rhode Island in 2014,⁸⁶⁵ and after CRT intervention in a private case, a court-approved settlement agreement in Oregon in 2015.⁸⁶⁶ In January 2015, CRT led an Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities, based on the DOJ's Olmstead enforcement and the Obama Administration's prioritization of this issue.⁸⁶⁷ Based on these cases as well as the underlying law discussed above, in 2016, CRT took the position that the ADA integration mandate required that public entity workshops had to make sufficient opportunity for qualified individuals with disabilities to work in integrated settings, where they would receive wages the same as non-disabled workers.⁸⁶⁸ As discussed in Chapter 1, the Commission has previously found that affirmative policy guidance helps send a message that the federal government will protect civil rights, whereas restrictive guidance may send the opposite message and therefore be ineffective.⁸⁶⁹ Disparate Impact Policy In January 2019, the Washington Post reported that internal memoranda directed Justice Department officials to consider the impact of modifying or removing disparate impact regulations. 870 The Post also reported the Education Department and HUD were considering changes in their policies on enforcing "disparate impact" protections against discrimination,⁸⁷¹ and HUD had already announced its intentions and by April 2019, the proposed rulemaking public meeting process had begun.⁸⁷² Although the Commission cannot independently verify the Washington Post report about internal DOJ memoranda, as discussed in Chapter 5, HUD has now issued a notice of proposed rulemaking weakening disparate impact enforcement. CRT has over time, actively enforced the disparate impact body of civil rights law.

865 Order Approving Consent Decree & Consent Decree, United States v. Rhode Island, No. 1:14-cv-00175 (D.R.I. April 9, 2014), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana. 866 United States of America's Motion to Intervene, Lane v. Kitzhaber, No. 3:12-cv-00138-ST (D. Ore. Mar. 27, 2013); Settlement Agreement, Lane v. Brown (formerly Lane v. Kitzhaber), No. 3:12-cv-00138-ST (D. Ore. Sept. 8, 2015), approved by U.S. Magistrate Judge Janice Stewart (Dec. 29, 2018); and see Independent Reviewer, 2016 Report to the Court, Lane v. Brown (Jan. 1 – Dec. 31, 2016), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana. 867 U.S. Dept. of Justice, Civil Rights Division, Presentation: Department of Justice Olmstead Enforcement Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, passim. (Jan. 23, 2015), <https://www.dol.gov/odep/topics/date/SheilaForan.pdf>. 868 Perry, Companies that Exploit Disabled People, supra note 793; DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead, supra note 857; DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead v. L.C., supra note 821. 869 See supra notes 295-96. 870 See Meckler et al., "Trump Administration Considers Rollback of Anti-discrimination Rules," supra note 312. 871 Ibid. 872 See Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standards, 83 Fed. Reg. 28,560 (proposed Jun. 20, 2018); and See Office of Management and Budget, EO 12866 Meeting 2529-AA98, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (FR-6111-P-01), Proposed Rule Stage (Apr. 25, 2019), <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>.

https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana
https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana
<https://www.dol.gov/odep/topics/date/SheilaForan.pdf>
<https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>
<https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>

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Disparate impact discrimination can be unintentional discrimination that stems from policies that are neutral as written, but have an unlawful adverse and discriminatory effect on a particular protected class of individuals.⁸⁷³ Since the Commission called for use of the disparate impact standard when developing the first regulations implementing the 1964 Civil Rights Act, which agencies incorporated, and Congress and agencies incorporated it into later civil rights laws and regulations,⁸⁷⁴ the disparate impact standard has been an enforcement tool available to federal civil rights offices. The standard helps to "ensure that there isn't discrimination that whether intentionally or inadvertently is having an impact on particular protected classes of people in this country."⁸⁷⁵ Many federal civil rights statutes recognize the use of disparate impact to root out unintentional discrimination.⁸⁷⁶ Some of these statutes govern governmental agencies and some private actors.⁸⁷⁷ Additionally, recipients of federal funding are subject to disparate impact regulations, so regulatory changes or changes in federal enforcement of disparate impact protections could have a sweeping impact. Twenty-six federal funding agencies have Title VI regulations prohibiting not only intentional discrimination, but also prohibiting certain types of discrimination based on disparate impact caused by legally questionable policies or practices.⁸⁷⁸ The 26 agencies with Title VI disparate impact regulations include 12 of the 13 agencies studied in this report.⁸⁷⁹ The remaining agency, EEOC, enforces federal disparate impact statutory protections and regulations under

873 “Disparate Impact,” Legal Information Institute, https://www.law.cornell.edu/wex/disperate_impact. 874 See Olatunde C.A. Johnson, The Agency Roots of Disparate Impact, 49 Harv. C.R.-C.L. L. Rev. 125, 139 (2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship (describing how, after Title VI passed in 1964, the Commission worked on a task force with the White House, the Department of Justice, and the Bureau of Budget to draft the final regulations first “for the Department of Education, and Welfare, which then became the model for all other federal agencies.”). 875 Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 198. 876 See 52 U.S.C. § 10101(a)(1) [previously 42 § 1971] (Civil Rights Act); 52 U.S.C. § 10301(a) (Voting Rights Act); 42 U.S.C. § 12112(a), 42 U.S.C. § 12112(b)(3), 42 U.S.C. § 12112(b)(2), 42 U.S.C. § 12112(b)(6), 42 U.S.C. § 12182, 42 U.S.C. § 12182(b)(3)(A) (Americans With Disabilities Act); 42 U.S.C. § 2000c-6(a) (Civil Rights Act, Title IV); 42 U.S.C. § 12132 (Americans With Disabilities Act Title II); 15 U.S.C. § 1691(a) (Equal Credit Opportunity Act); 42 U.S.C. § 2000a(a) (Civil Rights Act of 1964, Title II); 42 § 3604(a), 42 U.S.C. § 3606, 42 U.S.C. § 3607 (Fair Housing Act); 42 U.S.C. § 2000e-2(b), 42 U.S.C. § 2000e-2(c)(3), 42 U.S.C. § 2000e-2(k) (Civil Rights Act of 1964, Title VII); 34 U.S.C. § 10228 [previously 42 U.S.C. § 3789D] (Omnibus Crime Control and Safe Streets Act). See also The Editorial Board, “The Latest Front Against Civil Rights,” *The New York Times*, Jan. 4, 2019, <https://www.nytimes.com/2019/01/04/opinion/disperate-impact-discrimination-trump.html>. 877 See, e.g., 42 U.S.C. § 10301 (Section 2 of the Voting Rights Act, providing that “no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State... in a manner which results in denial or abridgement of the right of any United States citizen to vote on account of race or color[.]”) 878 DOJ, Title VI Legal Manual, supra note 39, at Section VII.A. 879 See 7 C.F.R. § 15.3(b)(2)–(3) (USDA); 34 C.F.R. § 100.3(b)(2)–(3) (EPA); 40 C.F.R. § 7.35(b)–(c) (EPA); 45 C.F.R. § 80.3(b)(2)–(3) (HHS); 6 C.F.R. § 21.5(b)(2)–(3) (DHS); 24 C.F.R. § 1.4(b)(2)(i)–(3) (HUD); 43 C.F.R. § 17.3(b)(2)–(3) (DOI); 28 C.F.R. § 42.104(b)(2)–(3) (DOJ); 29 C.F.R. § 31.3(b)(2)–(3) (DOL); 49 C.F.R. § 21.5(b)(2)–(3) (DOT); 31 C.F.R. § 22.4(b)(2) (Treasury); 38 C.F.R. § 18.3(b)(2)–(3) (VA); 880 See Equal Employment Opportunity Comm’n, *Employment Tests and Selection Procedures*, https://www.eeoc.gov/policy/docs/factemployment_procedures.html (discussing *Griggs v. Duke Power*, 401 U.S. 424 (1971)).

https://www.law.cornell.edu/wex/disperate_impact
https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship
<https://www.nytimes.com/2019/01/04/opinion/disperate-impact-discrimination-trump.html>
https://www.eeoc.gov/policy/docs/factemployment_procedures.html

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While other federal agencies have engaged in efforts to limit the use of disparate impact in their enforcement efforts,⁸⁸¹ they contrast sharply with the revision of the DOJ’s Title VI legal manual that leaves intact the strong admonition that agencies must use the disparate impact legal standard in their Title VI (race discrimination) civil rights enforcement work, in part because the tool is exclusively available to federal administrative agencies for enforcement.⁸⁸² This legal manual continues to strongly endorse the disparate impact legal tool and discusses the lawfulness and practical utility of the tool.⁸⁸³ The legal manual also states that since the Supreme Court ruled in 2001 that private parties may not enforce disparate impact regulations, the role of the federal government is vital.⁸⁸⁴ In addition, several statutes the Justice Department enforces proscribe discrimination that is shown through disparate impact.⁸⁸⁵ The Americans with Disabilities Act, Title VII of the Civil Rights Act, the Fair Housing Act, and the Voting Rights Act contain language that either explicitly authorizes, or has been interpreted to authorize, disparate impact claims.⁸⁸⁶ Courts have also interpreted the Equal Credit Opportunity Act as encompassing disparate impact claims, while they have had differing views with regard to Title II of the Civil Rights Act.⁸⁸⁷

881 Meckler et al., “Trump administration considers rollback of anti-discrimination rules,” supra note 312. 882 DOJ, Title VI Legal Manual, supra note 39, at § VII.B. The website states “updated March 18, 2019.” Id. CRT told the Commission that the Title VI Legal Manual has not been updated since Jan. 12, 2017. U.S. Dept of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 883 *Ibid.* 884 In the 2001 case of *Alexander v. Sandoval*, the Supreme Court held that private parties may not enforce Title VI disparate impact regulations, and that only the federal government can enforce them. 532 U.S. 275 (2001). CRT pointed out in its Title VI Manual (according to DOJ website, “Updated March 18, 2019”) that federal “agencies’ critical role [in enforcing Title VI disparate impact regulations] only increased after the Supreme Court’s 2001 decision in *Alexander v. Sandoval*!” DOJ, Title VI Legal Manual, supra note 39, at § VII.B (citing 532 U.S. 275 (2001)). The Manual explains that:

Following *Sandoval*, the Civil Rights Division issued a memorandum on October 26, 2001, for “Heads of Departments and Agencies, General Counsels and Civil Rights Directors” that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although *Sandoval* foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them. Nor does *Sandoval* affect the disparate impact provisions of other laws, such as Title VII or the Fair Housing Act. The agencies’ Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism. *Ibid.*

885 See Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012); Omnibus Crime Control and Safe Streets Act, 34 U.S.C. § 10228 (2012); The Civil Rights Act, 42 U.S.C. §§ 2000a, 2000c-6, 2000e-2 (2012); The Fair Housing Act, 42 U.S.C. §§ 3604, 3606, 3607 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12132 (2012); The Voting Rights Act, 52 U.S.C. § 10301 (2012); The Voting Rights Act, 52 U.S.C. § 10301 (2012). 886 See Civil Rights Act, 42 U.S.C. § 2000e-2(b), (c), (k) (2012); Voting Rights Act, 52 U.S.C. § 10301(a) (2012); Americans with Disabilities Act, 42 U.S.C. § 12112(b) (2012). Fair Housing Act, 42 U.S.C. §§ 3604-3605. 887 See *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1340-41 (2d Cir. 1974) (applying disparate impact analysis to a claim under Title II of the Civil Rights Act); *Natl’ Ass’n for Advancement of Colored People v. Ameriquest Mortg. Co.*, 635 F.Supp.2d 1096, 1104 (C.D. Cal. 2009) (finding disparate impact claims cognizable under the Equal Credit Opportunity Act and Fair Housing Act). See also *Akiyama v. U.S. Judo Inc.*, 181 F.Supp.2d 1179, 1185-86 (W.D. Wash. 2002) (declining to apply disparate impact analysis to a religious discrimination claim under Title II).

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The Supreme Court has repeatedly upheld disparate impact regulations.⁸⁸⁸ Moreover, the term “disparate impact” elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest.⁸⁸⁹ Courts have long been clear that proving disparate impact discrimination requires more than just proving the existence of a statistical disparity in impact.⁸⁹⁰ For example, in the *Inclusive Communities* housing case, the Supreme Court recently held that a showing that the defendant’s policies unfairly and directly caused the disparate impact is required.⁸⁹¹ In addition, discrimination claims based on Title VI disparate impact regulations (which 12 of the agencies reviewed in this report enforce) can be defeated when the policies are necessary for a “legitimate, nondiscriminatory goal.”⁸⁹² Moreover, the DOJ Title VI legal manual states that the disparate impact standard used under the Fair Housing Act “is substantially similar to the Title VI... standard.”⁸⁹³ This holds true for Title VII employment discrimination claims as well.⁸⁹⁴ That means that across these agencies, if a policy with disparate impact is not needed to further a legitimate goal, it may be unlawful. The former head of CRT Vanita Gupta has opined that, “Disparate-impact liability can uncover disguised discriminatory intent and/or unconscious prejudices. And unconscious bias can have the same effect as overt bias: It can undermine equal opportunity.”⁸⁹⁵ On the other hand, at the Commission’s briefing, Pacific Legal Foundation’s Joshua Thompson posited that using a disparate impact theory of enforcement is not the best use of agency resources.⁸⁹⁶ At the Commission’s briefing, Thompson remarked that, “Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination. ‘The question of intent, rather than incidental effect, ought to be at the heart’ of disparate impact enforcement.. [R]egarding it as an end in itself perverts a law against racial discrimination into a law that can require racial

888 See *infra* notes 892 and 894 (discussing Supreme Court cases). 889 See *Texas Dept. of Housing & Community Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2512 (2015) (“A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.”). 890 *Ibid.*; see also *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1412 (11th Cir. 1993). 891 *Inclusive Communities*, 135 S. Ct. at 2519, 2522-24. 892 U.S. Dept of Educ., Office for Civil Rights, “Dear Colleague Letter: Preventing Racial Discrimination in Special Education.” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-raceditis-special-education.pdf>. See also *Elston*, 997 F.2d at 1412 (explaining that, in disparate impact cases under Title VI, “defendants attempting to meet the ‘substantial legitimate justification’ burden have commonly been required to demonstrate the ‘educational necessity’ of their practices, that is, to show that their challenged practices ‘bear a manifest demonstrable relationship to classroom education’”) (quoting Georgia State Conf. of Branches of NAACP v. State of Ga., 775 F.2d 1403, 1416 (11th Cir. 1985)). 893 DOJ, Title VI Legal Manual, supra note 39, at § VII.B. 894 See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (upholding disparate impact employment discrimination claims when there was past purposeful discrimination and a new eligibility test that was not related to job performance). 895 Adam Serwer, “Trump Is Making It Easier to Get Away With Discrimination,” *The Atlantic*, Jan. 4, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/disperate-impact/579466/> [hereinafter Serwer, “Trump Is Making It Easier to Get Away With Discrimination”]. 896 See Thompson Statement, at 3; Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp. 176-77.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-raceditis-special-education.pdf>
<https://www.theatlantic.com/ideas/archive/2019/01/disperate-impact/579466/>

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discrimination.”⁸⁹⁷ Thompson also argued that “plausible disparate impact claims can be raised from any host of benign policies or practices”⁸⁹⁸ and that “racial disparities can often simply be caused by the laws of chance.”⁸⁹⁹ In his written statement, Thompson acknowledged that the current CRT enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool.⁹⁰⁰ Nonetheless, Thompson advocated against federal enforcement of this mandatory enforcement tool. Technical Assistance CRT told the Commission that:

One of the central missions of the Federal Coordination and Compliance Section is providing technical assistance, to federal agency partners and to recipients of federal financial assistance. For example, FCS runs the federal clearinghouse for language access-related TA to both federal agencies and recipient entities. LEP.gov, which is managed and curated by FCS, receives approximately 60,000 hits a year and is a major resource for language access technical assistance. This is only one example of the myriad technical assistance projects that FCS has spearheaded over the years – from training videos to in person technical assistance to technical assistance publications. Beyond LEP, FCS has also provided child welfare, environmental justice, emergencies, and other public-facing technical assistance between October 2015-September 30, 2018.⁹⁰¹

Further, since FCS also works in coordination and interaction with other federal agencies, more of its work, particularly in the area of interacting with those agencies regarding LEP issues in relation to federal emergency response, is described in that section of this chapter. Some other CRT sections provide technical assistance to help entities know how to comply and come into compliance with civil rights law. For example, IER provides the public information about the INA’s anti-discrimination provision through its hotlines, public education materials, and other outreach to the public.⁹⁰² DRS operates the ADA Technical Assistance Program, which provides free information and technical assistance to businesses, governments and people with disabilities to promote voluntary compliance with the ADA.⁹⁰³

897 *Ibid.*; see also Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp. 176-77. 898 Thompson Testimony, Federal Civil Rights Enforcement Briefing, p. 177. 899 *Ibid.* 900 See Thompson Statement, at 2 and n. 6. 901 U.S. Dept of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 902 DOJ CRT, “Immigrant and Employee Rights Section,” supra note 428. 903 U.S. Dept of Justice, Civil Rights Division, “Disability Rights Section,” <https://www.justice.gov/crt/disability-rights-section> (accessed Oct. 22, 2019).

<https://www.justice.gov/crt/disability-rights-section>
<https://www.justice.gov/crt/disability-rights-section>

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Another example is when CRT provides technical assistance through a letter. For example, in 2012, CRT’s former Special Litigation Section Chief wrote to the Escambia County Sheriff’s Office that he appreciated their cooperation with CRT’s investigation and that:

While we are closing our investigation without a finding, we did conclude that there are systemic deficiencies relating to the way in which ECSO officers use force that, if left unaddressed, may result in civil rights violations. The following recommendations, if implemented, will reduce the risk of future violations.⁹⁰⁴

More recent examples of such letters may be found in the FCS partnership and other CRT communications through agreements that include CRT’s provision of technical assistance, discussed above.⁹⁰⁵ CRT may also provide technical assistance through strategic initiatives and interaction with stakeholders. For example, through the Multi-family Accessibility Initiative, “HCE is developing plans to collaborate with developers, architects, code officials, accessibility advocates and other stakeholders” to increase accessible housing for persons with disabilities and ensure compliance with Fair Housing Act accessibility standards.⁹⁰⁶ DOJ reported to Congress that as part of the DOJ-wide Religious Discrimination Initiative and in line with its focus on religious discrimination in schools, EOS trains U.S. Attorneys to partner and support community school leaders to be more responsive to possible religious discrimination.⁹⁰⁷ Publicity This section discusses only a few examples of how CRT disseminates information about civil rights through outreach and publicity. In July 2016, DOJ released its final report on *Combating Religious Discrimination Today*, compiled after conducting several roundtables with various other federal agencies and with community groups across the country.⁹⁰⁸ In addition to several common trends in education settings that arose from roundtable discussions, the report had various recommendations to improve on the “noticeable uptick” of religious discrimination in schools.⁹⁰⁹ These focused on providing increased resources for education, guidance regarding students’ understanding of religions and stakeholders’ awareness of their religious rights, and training for

904 U.S. Dept of Justice, Civil Rights Division, Technical Letter from Special Litigation Section Chief to Sheriff (Sep. 4, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/05/escambia_taleter_9-4-12.pdf. 905 See supra note 902. 906 DOJ CRT, FY 2019 Performance Budget/Justification, supra note 495, at 28-29. 907 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 24. 908 DOJ, *Combating Religious Discrimination Today*, supra note 815, at 9 (“Agencies that participated in the roundtables include the Departments of Education, Homeland Security (DHS), and Labor (DOL); the Equal Employment Opportunity Commission (EEOC); the White House Initiative on Asian Americans and Pacific Islanders; the White House Office of Faithbased and Neighborhood Partnerships; and within the Justice Department, the Civil Rights Division, Federal Bureau of Investigation (FBI), Office of Justice Programs, Executive Office for U.S. Attorneys, and Community Relations Service.”). 909 *Ibid.*, 12.

https://www.justice.gov/sites/default/files/crt/legacy/2012/09/05/escambia_taleter_9-4-12.pdf

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supervisors and teachers.⁹¹⁰ Reportedly, this initiative led EOS and U.S. Attorney’s Offices to open six investigations into religious discrimination in schools.⁹¹¹ However, EOS has not resolved any cases about religious discrimination in school since then.⁹¹² IER’s work includes public outreach and education to inform the public, employers and organizations about rights and responsibilities under the INA.⁹¹³ IER has an extensive list of educational materials on its website for both workers and employers. It has 16 worker-related educational or guidance documents (but only one of which was written in 2017 and another in 2018),⁹¹⁴ and 15 employer related documents (two of which were written or revised in 2017 and one that was written in 2018).⁹¹⁵ Additionally, IER hosts regular webinars for workers and employers.⁹¹⁶ For example, it had five webinars scheduled and available for free registration on its website between July 9 and August 27, 2018.⁹¹⁷ It also hosts joint webinars regarding workers’ rights and how to complete the I-9 employment verification process,⁹¹⁸ provides information about the INA and its obligations, and attempts to informally resolve disputes using its

Improvements could be made to the data CRT reports about its own work. As discussed above, information about cases resolved can generally be found on the CRT website for most of the CRT sections.920 The public information is most complete for cases that have been resolved by settlement, consent decree, or judicial opinions. However, the Criminal Section does not publish this information on the CRT website, and instead only publishes press releases about its cases without links to the litigation documents,921 making it exceedingly difficult to find information about the details of CRT's criminal civil rights enforcement work.922 In criminal cases, grand jury information is privileged; however, plea agreements, court orders and decisions, and most CRT briefs are not as they are published on websites that require the case numbers, which the Criminal

910 *Ibid.*, 14-16. 911 *Ibid.* 912 See *supra* notes 666-68 (listing EOS cases by type). 913 *Ibid.* 914 U.S. Dep't of Justice, Civil Rights Division, "Worker Information," <https://www.justice.gov/crt/worker-information> (accessed Jul. 16, 2018). 915 U.S. Dep't of Justice, Civil Rights Division, "Employer Information," <https://www.justice.gov/crt/page/file/1080256/download> (accessed Jul. 16, 2018). 916 U.S. Dep't of Justice, Civil Rights Division, "Webinars," <https://www.justice.gov/crt/webinars> (accessed Jun. 29, 2018). 917 *Ibid.* 918 *Ibid.* 919 U.S. Dep't of Justice, Civil Rights Division, "Frequently Asked Questions," <https://www.justice.gov/crt/frequently-asked-questions-faqs> (accessed Jan. 31, 2017). 920 See *supra* notes 536 and 622-25. 921 DOJ CRT, "Criminal Section," *supra* note 733. 922 Cases were located mainly on PACER and Westlaw, which are paid legal research services. The CRT website only provides press releases on cases, which do not include links to legal documents. Only a few of the court documents needed to research these cases were free and publicly available on the DOJ website. See U.S. Dep't of Justice, Civil Rights Division, Criminal Section, "Press Releases," <https://www.justice.gov/crt/press-releases>; see also DOJ CRT, "Search Cases and Matters," *supra* note 632 (showing cases from other DOJ CRT sections, but no cases from the Criminal Section) (accessed Oct. 30, 2019).

<https://www.justice.gov/crt/worker-information>
<https://www.justice.gov/crt/worker-information>
<https://www.justice.gov/crt/page/file/1080256/download>
<https://www.justice.gov/crt/webinars>
<https://www.justice.gov/crt/frequently-asked-questions-faqs>
<https://www.justice.gov/crt/press-releases>

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Section does not provide on its website's press releases, and these websites require paid access that members of the public should not have to rely on to review these important cases. In addition to access to basic and non-privileged legal documents such as complaints, briefs, and consent decrees or settlements along with judicial decisions in the case, some sections provide information about investigations, when the statute requires that investigative findings be issued,923 and others provide information about complaints filed,924 whereas others do not.925 This variation in transparency hampers external evaluation of the important work of CRT,926 and dilutes the ability of CRT to "send a message to potential violators about the strength of the agency's enforcement program," which the Commission considers an important goal of systemic civil rights litigation.927 Furthermore, it is not clear how CRT chooses the issues to investigate or the cases it will litigate, making it difficult to evaluate if CRT makes appropriate choices and uses its resources to effectively enforce civil rights.928 Interaction and Coordination with External Agencies and Organizations FCS issues Title VI reports, which are summarized in the following section of this chapter,929 provides information about Title VI and Title IX regulations in all relevant federal agencies,930 and includes links to agencies' Title VI delegation agreements (in which they may delegate enforcement authority),931 as well as these four Title VI collaboration agreements:

923 See, e.g., U.S. Dep't of Justice, Civil Rights Division, "Special Litigation Section," <https://www.justice.gov/crt/special-litigation-section> (accessed May 21, 2019). 924 See, e.g., U.S. Dep't of Justice, Civil Rights Division, Voting Section, "Voting Section Litigation," <https://www.justice.gov/crt/voting-section-litigation> (including complaints filed) (accessed May 21, 2019); U.S. Dep't of Justice, Civil Rights Division, Employment Litigation Section, "Complaints Filed," <https://www.justice.gov/crt/employment-litigation-section-cases#compl> (accessed May 21, 2019). 925 See, e.g., U.S. Dep't of Justice, Civil Rights Division, Educational Opportunities Section, "Educational Opportunities Cases," <https://www.justice.gov/crt/educational-opportunities-cases> (accessed May 21, 2019). 926 See, e.g., Rob Arthur, "Exclusive: Trump's Justice Department is Investigating 60 Percent Fewer Cases Than Obama's," VICE, Mar. 6, 2019, https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas ("VICE News analyzed the public information posted online by five of the division's eight civil rights sections — Voting, Education, Disability Rights, Housing, and Special Litigation — and confirmed with multiple DOJ sources that the data posted by those sections was complete. Three sections — Criminal, Employment, and Immigrant and Employee Rights — had incomplete data and were left out of the analysis."). 927 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 38. 928 See *supra* notes 599-616. 929 See *infra* notes 995-6. 930 U.S. Dep't of Justice, Civil Rights Division, "Federal Agency Specific Regulations," https://www.justice.gov/crt/fcs/Agency_Regulations (accessed Aug. 1, 2019). 931 *Ibid.*

<https://www.justice.gov/crt/special-litigation-section>
<https://www.justice.gov/crt/voting-section-litigation>
<https://www.justice.gov/crt/employment-litigation-section-cases#compl>
<https://www.justice.gov/crt/educational-opportunities-cases>
https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas
https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas
<https://www.justice.gov/crt/search-cases-and-matters>
https://www.justice.gov/crt/fcs/Agency_Regulations

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Table 2.6: Memoranda Of Understanding

Department of Agriculture and Department of Housing and Urban Development

Department of Education, Office of Civil Rights and Department of Justice, Civil Rights Division

Department of Health & Human Services, Office for Civil Rights & Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section

Department of Defense and Department of Health, Education, and Welfare

SOURCE: U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Federal Agency Specific Regulations," https://www.justice.gov/crt/fcs/Agency_Regulations (accessed May 20, 2019).

On January 9, 2017, before the change in federal administrations, FCS and the U.S. Department of Health and Human Services entered into a Memorandum of Understanding that established agreed upon procedures for coordination, information sharing, and delegation of authority relating to the agencies' civil rights efforts.932 FCS also utilizes materials from its technical assistance work in ensuring meaningful access to federal and federally assisted program, discussed in the previous subsection, to promote consistency and collaboration amongst agencies who are engaged in the same effort.933 Furthermore, FCS regularly shares interagency information through newsletters about Title VI developments including investigations, resolutions, regulatory updates, new agency guidance, directives, initiatives, reports, outreach, and training. It issued these newsletters seasonally (Winter, Spring, Summer, Fall) up until Winter 2017.934 During the Fiscal Years studied, CRT published information about seven Title VI agency policy regulations or guidance documents proposed or issued in FY 2016 and two in FY 2017.935 At the Commission's briefing, former Deputy Assistant Attorney General Leon Rodriguez testified that during the Obama Administration, FCS used its authority in a broad and powerful manner, including providing training on civil rights laws to federal employees in other agencies, to ensure their consistent application.936

932 U.S. Dep't of Justice, Civil Rights Division & U.S. Department of Health and Human Services, Office for Civil Rights, Memorandum of Understanding Between the U.S. Departments Of Health And Human Services And Justice (Jan. 9, 2017), <https://www.justice.gov/crt/page/file/924161/download>. (The memo sought "to maximize effort, promote efficiency, and eliminate duplication and inconsistency in the enforcement of civil rights laws in child welfare and in other areas of mutual interest or overlapping jurisdiction."). 933 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 934 See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Title VI Newsletters," <https://www.justice.gov/crt/fcs/newsletters> (the most recently posted newsletter was issued in Winter 2017). 935 *Ibid.* 936 Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-94 (Leon Rodriguez regarding the importance of coordination, civil rights offices being "infinitely more powerful if coordinated," as well as the Civil Rights Training Institute he helped establish for unified training at the National Advocacy Center).

https://www.justice.gov/crt/fcs/Agency_Regulations
<https://www.justice.gov/crt/page/file/924161/download>
<https://www.justice.gov/crt/fcs/newsletters>

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In April 2018, Acting Assistant Attorney General Gore issued a memo to all federal agency civil rights directors and general counsels, drafted by FCS, reiterating that Executive Order 12,250 requires federal agencies to gain the Attorney General's approval for enacting, amending or repealing any regulation that effectuates Title VI, Title IX, and Section 504 of the Rehabilitation Act to ensure that agencies are fulfilling their civil rights obligations and that there is consistent implementation across the federal government.937 The memo asserts that CRT may require clearance of any other regulation that implements other nondiscrimination provisions or laws.938 Also in April 2018, Gore issued another memo clarifying the Department's exclusive authority to issue technical assistance and regulations implementing Title II, Subtitle A of the ADA and the need for consistency in interpretation between Title II and Section 504.939 DOJ CRT's former Coordination and Review Section primarily conducted the duties of coordinating compliance under Executive Order 12,250. In 2002, the Commission emphasized that CORS had "responsibility to make certain that designated federal agencies meet their responsibility for nondiscrimination under Title VI."940 In 1996, the Commission issued a report assessing DOJ's Title VI enforcement activities, and found that DOJ "lacked commitment" to Title VI enforcement, as changes in its budget and resources dedicated to Title VI showed that DOJ's civil rights priorities had shifted.941 Specifically, the Commission reported that:

DOJ transferred CORS staff to other sections and reduced drastically the resources available for Title VI enforcement activities. The Commission noted that CORS lacked adequate resources and funding to support Title VI enforcement and because of the Department's poor planning could not carry out the enforcement of Title VI effectively. As a result, the Commission found CORS' Title VI work inadequate and recommended changes in the organizational structure of the section.942

Those changes included clearly defining CORS' responsibility to coordinate and monitor agency delegation agreements, and improving its litigation referral and support duties as it had only referred a couple of case for litigation and did not participate in substantive advice or review of briefs based on Title VI expertise.943 In 2002, the Commission recommended that CORS "provide

937 U.S. Dep't of Justice, Civil Rights Division Acting Ass't Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations and Policy Guidance Documents (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>. 938 *Ibid.*, 1-2. 939 U.S. Dep't of Justice, Civil Rights Division Acting Ass't Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 940 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, *supra* note 31, at 6 (emphasis added). 941 *Ibid.*, 7. 942 *Ibid.*, 7. 943 USCCR, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, *supra* note 51, at 132-34.

<https://www.justice.gov/crt/page/file/1060276/download>
<https://www.justice.gov/crt/page/file/1060276/download>

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information to the public on Title VI and consult with stakeholders regularly."944 CRT told the Commission that it is active, especially in training agencies on compliance, but as discussed above, it considers much of its work with other agencies privileged.945 Some other CRT sections also have specific coordination roles with other agencies. The Criminal Section works in coordination with the U.S. Department of Labor and DHS to combat human trafficking.946 CRT has operated a Human Trafficking Prosecution Unit (HTPU) since 2008.947 In addition to prosecution, HTPU also provides "victim assistance resources, legal guidance and coordination between prosecuting districts overlapping criminal networks."948 HTPU leads the Anti-Trafficking Coordination Team Initiative, an effort that convenes agents and prosecutors from the FBI, U.S. Attorneys' Office, DHS, and U.S. Department of Labor together with CRT in "combatively selected districts to develop high-impact human trafficking investigations and prosecutions."949 Phase I ran from 2011-2013 and reportedly resulted in an 86 percent increase in convictions of human trafficking violations in six selected districts compared to an increase of just 14 percent in other districts.950 There was also an increase of 119 percent in cases filed and of 114 percent in defendants charged in selected districts, compared to increases of just 18 percent and 12 percent in the same categories in non-selected districts. Phase II began in December 2015, but similar information is not yet available.951 Under Executive Order 12,250, CRT, through DRS has authority that includes review and approval of federal agencies' regulations and policy regarding Section 504; DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.952 CRT also told the Commission that:

In 2017, DRS convened an Interagency Working Group on Service Animals to identify issues of concern regarding the use of service animals and to better ensure that Federal agencies are taking a consistent approach under Section 504. The working group has been meeting on a quarterly basis and recently expanded its scope to matters arising under Section 504 more generally. Representatives from over 20 Federal agencies have participated in this working group.

944 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, *supra* note 31, at 8. 945 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 946 U.S. Dep't of Justice, Civil Rights Division, "Human Trafficking Prosecution Unit (HTPU)," <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> (accessed Jul. 28, 2017). 947 *Ibid.* 948 *Ibid.* 949 DOJ CRT, FY 2019 Performance Budget Justification, *supra* note 495, at 5. 950 U.S. Dep't of Justice, "Press Release: Departments of Justice, Labor and Homeland Security Announce Phase II of Anti-Trafficking Coordination Team Initiative," Jun. 25, 2015, <https://www.justice.gov/opa/pr/departments-justice-labor-and-homeland-security-announce-phase-ii-anti-trafficking>. 951 *Ibid.* 952 See DOJ Justice Manual, *supra* note 370, at § 6-2.400 (Disability Rights Section).

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DRS also partners with the EEOC to enforce Title I of the ADA against state and local government employers 953

ELS partners with the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL) to enforce the civil rights protections under its jurisdiction.954 Under Title VII, EEOC receives the initial claims about alleged violations by state or local governments, and “may” refer them to DOJ CRT for “appropriate legal proceedings” if they are “unable to obtain compliance.”955 ELS may also initiate pattern or practice suits against state or local employers (even if EEOC has not referred the case). Title VII allegations against private employers fall under EEOC’s authority, and allegations against federal government entities are primarily resolved by EEOC.956 However, in conjunction with U.S. Attorney’s Offices, CRT’s ELS is responsible for defending federal contractors or grantees charged with discrimination in federal court.957 Similarly, DOL has primary responsibility for resolving complaints of discrimination by service members under USERRA, but it is not up to DOL to refer them if litigation is needed. Instead:

If the Department of Labor does not resolve a complaint, regardless of whether it determines the complaint to have merit, it will refer the complaint to the Employment Litigation Section upon the request of the servicemember who filed the complaint. When the Employment Litigation Section receives an unresolved USERRA complaint from the Department of Labor, the Section reviews the Department of Labor’s investigative file accompanying the complaint to determine whether to extend representation to the complainant.958

953 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 954 U.S. Dep’t of Justice, Civil Rights Division, “Laws Enforced by the Employment Litigation Section,” <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017). 955 DOJ Justice Manual, supra note 370, at § 8 – 2.212 (Affirmative Suits Under Executive Order 11,246, As Amended). 956 Id. at § 8 – 2.211 (“The Department of Justice shares enforcement authority under Title VII with the Equal Employment Opportunity Commission (EEOC). The Department of Justice has authority to seek to remedy employment discrimination by state and local governments and their agencies and political subdivisions. The EEOC has authority to seek to remedy employment discrimination by private employers. The EEOC also has primary enforcement responsibility with respect to allegations of discrimination by the federal government.”). See also *infra* notes 2179-90 (discussing EEOC cases of this type). 957 See DOJ Justice Manual, supra note 370, at § 8 – 2.214 (“The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration’s 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs.”) 958 DOJ Justice Manual, supra note 370, at § 8 – 2.213 (Affirmative Suits Under the USERRA).

<https://www.justice.gov/crt/laws-enforced-employment-litigation-section>

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Moreover, CRT retains discretion to provide direct legal representation in federal court to USERRA claimants in both state and federal cases.959 HCE partners with several federal agencies (HUD, the Federal Trade Commission, Consumer Finance Protection Board), state and local officials, and bank regulatory agencies to promote fair housing and lending.960 The Housing Section was also part of a Federal Interagency Reentry Council that DOJ convened in 2011, “to discuss and implement strategies to remove barriers to successful reentry of formerly incarcerated individuals so that they can compete for jobs, attain stable housing, support their children and families, and contribute to their communities.”961 CRT announced the Sexual Harassment in Housing Initiative on October 17, 2017 and reportedly seeks to increase CRT’s efforts in protecting women against harassment by property owners, managers, or other individuals who have control over property.962 On April 12, 2018,963 DOJ led an inter-agency initiative through a HUD-DOJ Task Force to Combat Sexual Harassment in Housing intended to leverage the combined information, resources, and expertise of the two departments to further the initiative’s goal of combatting sexual harassment.964 The other major components involve outreach to stakeholders. DOJ released an outreach toolkit designed to facilitate individuals reaching out to others in their community to raise awareness of the issue and answer common questions and concerns regarding the subject.965 DOJ also started a public awareness campaign to help victims of harassment be aware of the resources available to them and report the harassment.966 HCE’s website indicates that it filed two cases in 2016 that included

959 *Ibid.* (“USERRA provides that the Attorney General, through the Employment Litigation Section, may represent a claimant in federal district court if he or she determines that the claimant is entitled to the rights or benefits being sought. In USERRA suits involving local government and private employers, the Attorney General is authorized by statute to provide direct legal representation to individuals by filing a lawsuit on the individual’s behalf. In USERRA suits involving state government employers, the Attorney General may file suit in the name of the United States to recover relief that benefits the complainant.”) 960 DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 15. 961 The White House and U.S. Dep’t of Justice, The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future, August 2016, pp. 50-52, <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf> (discussing the Federal Interagency Reentry Council’s accomplishments and actions in the context of housing). 962 U.S. Dep’t of Justice, Civil Rights Division, “Sexual Harassment in Housing Initiative,” <https://www.justice.gov/crt/sexual-harassment-housing-initiative> (accessed Apr. 13, 2018); U.S. Dep’t of Justice, “Press Release: Justice Department Announces Initiative to Combat Sexual Harassment in Housing,” Oct. 3, 2017, <https://www.justice.gov/opa/pr/justice-department-announces-initiative-combat-sexual-harassment-housing>. 963 U.S. Dep’t of Justice, “Press Release: Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing,” Apr. 12, 2018, <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing> [hereinafter DOJ, “Justice Dep’t Announces Nationwide Initiative to Combat Sexual Harassment in Housing”]. 964 *Ibid.* 965 *Ibid.* See also U.S. Dep’t of Justice, Civil Rights Division, Sexual Harassment in Housing Partnership Toolkit, <https://www.justice.gov/crt/page/file/1055011/download>. 966 DOJ, “Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing,” supra note 963.

<https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>
<https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>
<https://www.justice.gov/crt/sexual-harassment-housing-initiative>
<https://www.justice.gov/opa/pr/justice-department-announces-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/crt/page/file/1055011/download>

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allegations of sexual harassment, four similar cases in 2017 and three in 2018.967 At the Commission’s briefing, former Assistant Attorney General Driscoll submitted written testimony about the success of this initiative, stating that “recent effective publicity and enforcement by the Civil Rights Division has driven huge increases in enforcement, with complaints increasing by almost 500 percent. This kind of success gains little notoriety because the proposition that residents should not be sexually harassed by their landlords has widespread agreement.”968 In addition, although the increase in complaints highlights the widespread scope of the problem, Driscoll argued that the fact that CRT’s initiative led to decreased complaints should also be considered a “success.”969 As noted above, the Commission’s research confirms that the Housing Section has secured civil fees and compensatory damages in a number of sexual harassment cases during FY 2016 – 2018.970 ECOA grants regulatory and oversight authority over lenders to different federal agencies,971 and requires that those agencies refer matters they believe constitute a discriminatory “pattern or practice” to the DOJ for possible prosecution.972 In 1996, DOJ sent a guidance document to the participating agencies that outlined the factors that the agencies should consider when deciding whether a complaint or other observed practices would constitute a possible discriminatory “pattern or practice” that would allow the DOJ to file charges.973 2016 CRT reports related to fair lending enforcement referred to these guidelines.974 IER has also entered agreements with foreign ministries and consulates to form partnerships aimed at educating foreign nationals from the other signing country working in the U.S. about their rights as U.S. workers and the anti-discrimination provisions of the INA.975 IER has entered into five such agreements with five different countries (Ecuador, El Salvador, Mexico, Honduras, Peru), all of which occurred during the Obama administration (1 in Dec. 2015, 3 in 2016 and 1 in Jan. 2017).976 CRT sent the Commission information about the Department-wide Hate Crimes Enforcement and Prevention Initiative led by CRT’s Policy Section (POL) which coordinates all of the Department’s anti-hate crime efforts. According to CRT:

967 U.S. Dep’t of Justice, Civil Rights Division, “Housing and Civil Enforcement Cases,” <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex> (accessed Jul. 11, 2018) (date of first filed complaint in the action as provided on the HCE website was used to determine when HCE filed the case). 968 Robert Driscoll, Member, McGlinchey Stafford, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2. 969 *Ibid.* 970 See supra notes 678-91 (listing cases). 971 15 U.S.C. § 1691c (a). 972 Id. §§ 1691e (g)-(h). 973 U.S. Dep’t of Justice, Identifying Lender Practices That May Form the Basis of a Pattern or Practice Referral to the Department of Justice, 1996, <https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/regguide.pdf>. 974 See DOJ CRT, Attorney General’s 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, supra note 510. 975 DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 17. 976 U.S. Dep’t of Justice, Civil Rights Division, “Partnerships,” <https://www.justice.gov/crt/partnerships> (accessed May 11, 2018).

<https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex>
<https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/regguide.pdf>
<https://www.justice.gov/crt/partnerships>

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Managed by POL, the Initiative is charged with coordinating the Department’s efforts to eradicate hate crimes, and facilitating training, outreach, and education to law enforcement agencies and the public at the federal, state, local and tribal levels. The Initiative reflects the combined and sustained efforts of multiple DOJ components in addition to CRT, including the Office of Community Oriented Policing Services (COPS Office), the Community Relations Service (CRS), the Federal Bureau of Investigations (FBI), the Office of Justice Programs (OJP), and U.S. Attorney’s Offices (USAOs). Recent Initiative accomplishments include the following:

- In October 2018, POL and the COPS office co-developed the first-ever law

enforcement roundtable on improving the identification and reporting of hate crimes, a 1.5 day event that brought together law enforcement and other leaders from around the country to explore successful practices and challenges in identifying, reporting, and tracking hate crimes. Attendees and presenters included police chiefs of major cities and leaders of major policing organizations.

- POL spearheaded with CRS the launch of a new hate crimes website, a one-stop portal for the general public, law enforcement officials, educators, public officials, media, and other stakeholders to access Department resources about hate crimes. See <https://www.justice.gov/hatecrimes/>. The website aggregates Department resources about effective hate crime laws, prevention programs, best police policies and procedures, community awareness building practices, victim service resources, and law enforcement training initiatives, as well as information about reporting hate crimes and a summary of recent hate crimes prosecutions. See <https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>.

- POL also worked with components to develop other deliverables advancing the fight against hate crimes, including extension of the COPS Office’s Collaborative Reform Technical Assistance Center program, a partnership with the International Association of Chiefs of Police (IACP), and eight leading law enforcement leadership and labor organizations, to cover hate crimes, allowing law enforcement to access significant resources to build and improve their hate crimes investigation and reporting practices. See 10/29/18 press releases for details: See <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.977

977 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

<https://www.justice.gov/hatecrimes/>
<https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>
<https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>
<https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>
<https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>

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Research, Data Collection, and Reporting With some gaps, many CRT sections make their cases generally easily accessible on the CRT website.978 Some CRT sections include pamphlets or other information such as FAQs about civil rights protections.979 And DRS provides technical assistance materials for ADA compliance on ADA.gov.980 In addition to the publications listed above, CRT has maintained a periodic email update, “Religious Freedom in Focus,” about its religious liberty and religious discrimination cases from February 2004 through April 2019 (its latest update, Volume 79).981 As discussed previously in this chapter, in January 2017, CRT released a comprehensive report regarding its Pattern and Practice Police Reform Work: 1994-Present.982 Some CRT reports are required by statute or regulation. For example, the Equal Credit Opportunity Act (ECOA) Amendments of 1976 require that HCE report its overall enforcement efforts and include some information about related efforts related to the FHA Servicemembers Civil Relief Act lending provisions, in an Annual Report to Congress.983 These reports must discuss the administration of HCE’s functions under the ECOA and include a summary of enforcement actions taken.984 HCE must also include an assessment of the extent to which compliance with the requirements of ECOA is being achieved.985 In 2016, the annual ECOA report showed that CRT received 22 ECOA and FHA referrals from agencies (all but one of which played a role in a lawsuit), 8 of which led to a CRT investigation and 12 of which were returned to the agency pursuant to the 1996 guidelines for administrative enforcement.986 In total CRT opened 18 fair lending investigations, filed 7 fair lending lawsuits (settling six of them), and obtained nearly \$37 million in relief.987 At the end of 2016, it had 33 open investigations.988 The report also emphasized CRT’s focus on education and training, citing its participation in 17 outreach events related to fair lending practices and SCRA enforcement in 2016.989 In 2017, the annual ECOA report showed that CRT opened 7 fair lending investigations, filed 3 fair lending lawsuits, and settled two, obtaining nearly \$63 million in relief.990 At the end of the year, CRT had 22 open fair lending

978 See, e.g., DOJ CRT, “Search Cases and Matters,” supra note 632. 979 U.S. Dep’t of Justice, Civil Rights Division, “Publications,” <https://www.justice.gov/crt/publications> (accessed May 20, 2019) [hereinafter DOJ CRT, “Publications”]. 980 See “ADA.gov, Information and Technical Assistance to the Americans With Disabilities Act,” <https://www.ada.gov/>. 981 U.S. Dep’t of Justice, Civil Rights Division, “Publications,” supra note 979. 982 See supra note 476. 983 15 U.S.C. § 1691f. 984 See DOJ CRT, Attorney General’s 2016 Annual Report to Congress, supra note 510. 985 *Ibid.*, 11-13. 987 *Ibid.*, 3, 11. 988 *Ibid.*, 5. 989 *Ibid.*, 11. 990 U.S. Dep’t of Justice, Civil Rights Division, The Attorney General’s 2017 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, September 2018, p. 3, <https://www.justice.gov/crt/page/file/1097406/download>.

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investigations.⁹⁹¹ Information on CRT's 2018 fair lending enforcement efforts are not yet available, as the annual report has not been released. The Civil Rights of Institutionalized Persons Act (CRIPA) requires that DOJ must report its annual CRIPA enforcement efforts to Congress.⁹⁹² Each report must include information on all actions instituted pursuant to CRIPA, as follows:

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of Title 28

(1) a statement of the number, variety, and outcome of all actions instituted

pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.⁹⁹³

The Commission's research shows that CRT has been in compliance with these reporting requirements from FY 2016-2018.⁹⁹⁴ Similarly, Title VI regulations include specific reporting requirements that pertain to DOJ as an agency that distributes federal funding.⁹⁹⁵ For example, all Title VI agencies must collect compliance data from applicants for and recipients of federal assistance "sufficient to permit effective enforcement of title VI."⁹⁹⁶ Publicly available information is insufficient to determine whether CRT is in compliance with this data collection requirement.

⁹⁹¹ *Ibid.*, 4. ⁹⁹² 42 U.S.C. § 1997f. ⁹⁹³ *Ibid.* ⁹⁹⁴ See DOJ CRT, "Publications," *supra* note 979; Commission Staff summary. ⁹⁹⁵ 28 C.F.R. § 42.403. ⁹⁹⁶ *Ibid.* § 42.406.

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Regarding collection of data about race and ethnicity, there are no known statutory requirements for CRT to collect or demand such data, except in the development of a particular enforcement action where it would be useful as evidence. Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder*, under federal regulations, the Voting Section was required to collect, and covered jurisdictions were required to provide, data about whether proposed changes in voting procedures (such as redistricting, or moving a polling place, or changing the rules of voter registration and access) would have a racially discriminatory impact.⁹⁹⁷ However, since that decision eviscerating the preclearance requirements of the Voting Rights Act, that data is no longer required to be collected.⁹⁹⁸

⁹⁹⁷ See USCCR, *Minority Voting*, *supra* note 17, at 29 (citing 28 C.F.R. § 51.27n (required contents of submission of voting changes for preclearance included racial impact data) and 59 (impact of post-Shelby County loss of preclearance)). ⁹⁹⁸ *Ibid.*

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Chapter 3: U.S. Department of Education, Office for Civil Rights⁹⁹⁹ Congress established the U.S. Department of Education (ED) in 1979,¹⁰⁰⁰ although its origins date back to 1867, when Andrew Jackson signed legislation creating the Department in order to collect information about local schools.¹⁰⁰¹ Congress abolished the Department of Education one year later in 1868, and assigned its remaining duties into the Office of Education under the authority of the Department of the Interior.¹⁰⁰² That Office was later transferred to the Department of Health, Education, and Welfare (now the Department of Health and Human Services).¹⁰⁰³ After the expansion of civil rights through decisions such as *Brown v. Board of Education* in 1954,¹⁰⁰⁴ and federal funding for education in the 1950s, 1960s, and 1970s that created programs to assist low-income students, students of color, women, people with disabilities, and Limited English Proficiency (LEP) students gain equal access to educational opportunity,¹⁰⁰⁵ Congress reestablished the Department in October 1979 with the enactment of the Department of Education Organization Act.¹⁰⁰⁶ Among the Congressional findings were that "education is fundamental to the development of individual citizens and the progress of the Nation," and that "there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex[.]"¹⁰⁰⁷ In creating the Department of Education, Congress declared the purposes of the department:

⁹⁹⁹ Pursuant to Commission procedures, the Commission gave all agencies studied in this report an opportunity to review a draft of this report and provide feedback before the final internal draft, however ED OCR did not provide any comments or feedback in response to the Commission's draft. ¹⁰⁰⁰ 20 U.S.C. § 3411, Department of Educ. Act, Pub. L. No. 96-88 § 210, 93 Stat. 668 (1979). ¹⁰⁰¹ Dept of Educ. Establishment Act 14 Stat. 434 (1867); U.S. Dept of Education, "An Overview of the U.S. Department of Educ.," September 2010, <https://www2.ed.gov/about/overview/focus/what.html> [hereinafter ED, "An Overview"]. ¹⁰⁰² Department of Educ. Abolition Act of 1868; ED, "An Overview," *supra* note 1001. ¹⁰⁰³ *Ibid.* ¹⁰⁰⁴ Under the U.S. Constitution, there is no specific right to public education, but there are rights to equal access to public education. As the Supreme Court clarified in *Brown v. Board of Education*, because education is so critical to every person's ability to become literate and succeed in life and participate in civic society, providing lesser education to persons based on their race violates the Equal Protection clause of the Fourteenth Amendment, which prohibits discrimination based on race. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (racial segregation of students violated the right of African-American students to "equal educational opportunities," emphasizing that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); see also *Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982) (Constitution does not provide a fundamental right to education) but if the state provides it, status-based discrimination violates Equal Protection, *id.* at 221; and see U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Introduction: Relevant Civil Rights Laws, July 23, 2019, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [hereinafter USCCR, *Beyond Suspensions*]. The legislation that today sets forth the civil rights laws that ED enforces flow from the seminal *Brown* case and are based on the Fourteenth Amendment including the Congressional authority to enact appropriate legislation to ensure its enforcement. *Ibid.*; cf. *infra* notes 1016-28 (laws that OCR enforces). ¹⁰⁰⁵ ED, "An Overview," *supra* note 1001. ¹⁰⁰⁶ 20 U.S.C. § 3400 et. seq., Dept of Educ. Organization Act, Pub. L. 96-88, 93 Stat. 668 (1979). ¹⁰⁰⁷ 20 U.S.C. § 3401 (1) and (2).

https://en.wikipedia.org/wiki/Act_of_Congress
<http://legislink.org/us/pl-96-88>
<https://www.congress.gov/bills/96th/congress/senate-bill/210>
https://en.wikipedia.org/wiki/United_States_Statutes_at_Large
<http://legislink.org/us/stat-93-666>
<https://www2.ed.gov/about/overview/focus/what.html>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>

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1. to strengthen the Federal commitment to ensuring access to equal educational opportunity for very individual;

2. to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;

3. to encourage the increased involvement of the public, parents, and students in Federal education programs;

4. to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;

5. to improve the coordination of Federal education programs; 6. to improve the management and efficiency of Federal education activities, especially with

respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and

7. to increase the accountability of Federal education programs to the President, the Congress, and the public.¹⁰⁰⁸

Along these lines, ED states that its mission is "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."¹⁰⁰⁹ As will be discussed herein, ED OCR enforces civil rights laws and regulations under its jurisdiction through processing and acting upon individual complaints, through its own compliance investigations of educational institutions receiving federal funds, through providing technical assistance, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations.¹⁰¹⁰ The Commission received testimony from a 25-year career executive within ED OCR who worked in civil rights enforcement through multiple presidential administrations, underscoring the importance that "OCR must continue to use all of the regulatory, policy, enforcement, and technical assistance tools available to it as a federal civil rights law enforcement agency to promote and ensure compliance with the federal laws prohibiting harassment in education."¹⁰¹¹ During the period of the Commission's review, as will be discussed below, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of

¹⁰⁰⁸ 20 U.S.C. § 3402 ¹⁰⁰⁹ U.S. Dept of Educ., "Mission," <https://www2.ed.gov/about/overview/mission/mission.html> (accessed May 29, 2019). ¹⁰¹⁰ See *infra* notes 1029-40. ¹⁰¹¹ Debbie Osgood, Partner at Hogan Marren Babbo & Rose, and former National Enforcement Director at the Office for Civil Rights, U.S. Department of Education, Written Statement for the In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes Briefing before the U.S. Comm'n on Civil Rights, May 11, 2018, pp. 1, 6 [hereinafter Osgood Statement] (noting her 25 years in Office for Civil Rights).

<https://www2.ed.gov/about/overview/mission/mission.html>

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guidance,¹⁰¹² reducing the scope and number of investigations conducted,¹⁰¹³ and seeking to curtail its budget capacity significantly.¹⁰¹⁴ A journalist who reviewed the history of ED OCR at the beginning of the Trump Administration predicted, accurately, that "the strategies that [Secretary] DeVos might well follow" for ED OCR would follow those of prior history when President "Reagan did restrain the power of the Office for Civil Rights [at ED] by cutting back its funding, reducing investigations and reviews, and rescinding guidance."¹⁰¹⁵ Legal Authority and Responsibility The Department of Education Organization Act of 1979 created the agency's Office for Civil Rights (ED OCR).¹⁰¹⁶ Congress tasked ED OCR with external civil rights enforcement.¹⁰¹⁷ The Department of Education Organization Act also created the position of Assistant Secretary for Civil Rights to lead ED OCR.¹⁰¹⁸ ED OCR defines its mission as "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."¹⁰¹⁹ ED OCR is responsible for enforcing the following civil rights laws in the context of education:¹⁰²⁰

• Title VI of the Civil Rights Act of 1964¹⁰²¹ • Title IX of the Education Amendments Act of 1972¹⁰²² • Section 504 of the Rehabilitation Act of 1973¹⁰²³ • Age Discrimination Act of 1975¹⁰²⁴ • Title II of the Americans with Disabilities Act of 1990¹⁰²⁵ • Boy Scouts of America Equal Access Act of 2001¹⁰²⁶

¹⁰¹² See *infra* notes 1196-1214. ¹⁰¹³ See *infra* notes 1086-1183. ¹⁰¹⁴ See *supra* Figure 3.1. ¹⁰¹⁵ James S. Murphy, "The Office for Civil Rights's Volatile Power," *The Atlantic*, Mar. 13, 2017, <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/> (cited in: Duncan Statement at 6-7). ¹⁰¹⁶ 20 U.S.C. § 3413, Department of Educ. Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 673 (1979). ¹⁰¹⁷ Dept of Educ. Organization Act, 20 U.S.C. § 3413(c); 34 C.F.R. § 100.1. ¹⁰¹⁸ 20 U.S.C. § 3413. ¹⁰¹⁹ ED, "About OCR," *supra* note 116. ¹⁰²⁰ U.S. Dept of Educ., Response to USCCR Interrogatory No. 1, at 6. ¹⁰²¹ 42 U.S.C. §§ 2000d-2000d-4. ¹⁰²² 20 U.S.C. §§ 1681-88. ¹⁰²³ 29 U.S.C. § 794. ¹⁰²⁴ 42 U.S.C. §§ 6101-07. ¹⁰²⁵ 28 C.F.R. § 35. ¹⁰²⁶ 20 U.S.C. § 7905 (prohibiting discrimination under any education program or activity receiving Federal financial assistance on the basis of sex, with some limited exceptions for conferences, fraternities and sororities, and other activities).

<https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>

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These laws protect students in American schools and education programs from discrimination based on race, color, national origin, sex, disability, and age.¹⁰²⁷ ED OCR has described its jurisdiction as follows:

Under Title VI, Title IX, Section 504, and the Age Discrimination Act, OCR has jurisdiction over institutions that receive Federal financial assistance from ED, including state education agencies, public elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums. Under Title II, OCR has jurisdiction over public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools) and public libraries. Under the Boy Scouts Act, OCR has jurisdiction over public elementary schools, public secondary schools, local educational agencies, and State agencies that receive funds made available through ED.¹⁰²⁸

• Complaint resolution1029 • Agency-initiated charges1030 • Proactive compliance evaluations1031 • Guidance or other policy documents1032 • Regulations1033 • Technical assistance1034 • Publicity1035

1027 ED, “About OCR,” supra note 116. 1028 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 1, at 6. 1029 34 C.F.R. §§ 100.7(c), 104.61, 105.41(b), 106.71. 1030 Id. § 100.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process). 1031 Id. § 100.7(a) (conduct of investigations). 1032 Id. § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1033 20 U.S.C. § 3474 (Secretary authorized to prescribe regulations); see also 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations); 28 C.F.R. § 41.4 (Agency duty to issue Rehabilitation Act Section 504 regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1034 34 C.F.R. § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1035 28 C.F.R. § 41.5(b)(1) (requirements for notification of rights under Section 504 of the Rehabilitation Act); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information); 28 C.F.R. § 54.140 (requirements for public dissemination of Title IX information).

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• Research, data collection, and reporting1036 • Collaboration/partnership with state/local agencies1037 • Collaboration/partnership with other federal agencies1038 • Strategic Plans1039 • Annual Reports1040

While ED OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits ED OCR from engaging in, for example, outreach to regulated communities and in fact ED OCR regularly does exactly that, as described in further detail below. Budget and Staffing See Figure 3.1. In FY 2016, OCR requested a total of \$130.6 million, and Congress appropriated \$107.0 million, which represented a 10% increase from the previous appropriation. In FY 2017, OCR’s budget request increased to \$137.7 million, yet the Congressional appropriation only rose to \$108.5 million. In FY 2018, the first budget request of the Trump Administration, OCR’s budget request decreased significantly to \$106.7 million, down \$31 million from the FY 2017 request level and down \$1.8 million from the previous year’s Congressional appropriation, yet the FY 2018 actual Congressional appropriation increased significantly to \$117.0 million. Figure 3.1: OCR Requested and Allocated Budget

Source: U.S. Dep’t of Educ., Office for Civil Rights, Fiscal Year 2019 Budget Request, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, Fiscal Year 2018

1036 20 U.S.C. § 3413(c)(1) (Assistant Secretary authorized “to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights”); 28 C.F.R. § 42.406 (regarding data collection and information sharing). 1037 34 C.F.R. § 100.6(a) (“The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); see also 34 C.F.R. § 104.5, 34 C.F.R. § 106.4. 1038 28 C.F.R. § 42.413. 1039 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1040 20 U.S.C. § 3413(b)(1).

FY 2016 FY 2017 FY 2018 Requested \$130,691,000 \$137,708,000 \$106,797,000 Allocated \$107,000,000 \$108,500,000 \$117,000,000

\$0

\$50,000,000

\$100,000,000

\$150,000,000

Figure 3.1: OCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>

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Budget Request, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>; U.S. Dep’t of Educ., Fiscal Year 2018 Budget Summary and Information, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>; U.S. Dep’t of Educ., Fiscal Year 2018 Congressional Action, Mar. 27, 2018, p. 14, U.S. Dep’t of Educ., <https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>; Fiscal Year 2017 Budget Summary and Information, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep’t of Educ., Fiscal Year 2016 Budget Summary and Information, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>; U.S. Dep’t of Education, Response to Interrogatory No. 9, at 13-14.

ED OCR noted that its budget “does not include a separate listing of funds designated for enforcement activities versus other activities,” nor does it “include a separate listing of funds designated for use on investigating civil rights concerns that OCR raises proactively or that do not arise from complaints.”¹⁰⁴¹ A key distinction between the Trump Administration’s budget request in FY 2018 and the FY 2016 request is that the FY 2016 budget request included a separate listing of an additional 192 investigators and 8 additional non-investigative staff ED planned to hire if Congress appropriated additional funds. Between 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent, while ED OCR staffing decreased by 11 percent during the same ten year period.¹⁰⁴² The FY 2016 budget request stated that a total increase in 200 full time equivalent (FTE) staff was necessary to reduce the “anticipated case level per staff from 28 to 19.”¹⁰⁴³ For FY 2016, the agency asked for an additional 30 million dollars to cover the requested increase in OCR personnel.¹⁰⁴⁴ In contrast, the FY 2018 budget request stated that “OCR staff must handle its increased complaint workload while maintaining existing operations,” yet the report acknowledges that OCR may find it difficult to meet the performance target levels to resolve complaints within 180 days.¹⁰⁴⁵ ED OCR’s FY 2018 budget request noted that in FY 2016, the case load per staff was 41 cases, and that this ratio “will likely continue to increase through FY 2018 due to fewer staff.”¹⁰⁴⁶ To compensate for the decreasing staff levels and the steady increase in the number of complaints received by ED OCR, the agency’s FY 2018 budget request stated that, “OCR must make difficult choices, including cutting back on initiating proactive investigations.”¹⁰⁴⁷ Further, the Trump Administration’s FY 2019 budget request highlighted that in FY 2018, ED OCR reduced the number of FTEs from 569 to 529, and made changes to ED OCR’s case processing manual in order to allow for a smaller number of FTEs to handle a larger caseload.¹⁰⁴⁸ The FY

1041 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 9, at 13. 1042 See infra notes 1066-1165. 1043 U.S. Dep’t of Educ., Fiscal Year 2016 Budget Request, p. 14, <https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>. 1044 *Ibid.*, 11 (“The total FY 2016 request is \$130.691 million, supporting a full-time equivalent (FTE) level of 754. This request is a \$30.691 million, or 31 percent, increase above the 2015 level. The majority of the increase is for an additional 200 FTE, which the Department believes is essential for OCR to deliver on its mission of fulfilling the promise of the Civil Rights law by ensuring equal access to educational opportunities.”) 1045 U.S. Dep’t of Educ., Fiscal Year 2018 Budget Request, p. Z-12, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf> [hereinafter ED, FY 2018 Budget Request]. 1046 *Ibid.*, 1047 *Ibid.*, Z-15. 1048 U.S. Dep’t of Educ., Fiscal Year 2019 Budget Request, p. Z-10, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf> [hereinafter ED, FY 2019 Budget Request].

<https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>
<https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>

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2019 budget request also stated that the reduction in staff during FY 2018 resulted from attrition, including offering early retirement or voluntary separation incentives.¹⁰⁴⁹ But unlike ED during the Obama Administration, in its FY 2019 budget request, ED predicted that a reduced number of OCR FTEs would adequately be able to process all of ED OCR’s cases due to anticipated reductions in the number of cases filed per year.¹⁰⁵⁰ Though Congress ultimately appropriated approximately 10 million dollars in funds above what the administration requested, ED’s FY 2018 budget request for ED OCR of approximately 107 million dollars marks a significant reduction in ED’s requested budget for ED OCR compared to previous budget requests of approximately 130.7 million dollars in FY 2016 and 137.7 million dollars in FY 2017.¹⁰⁵¹ ED OCR provided staffing data for fiscal years 2016 and 2017, during which time the number of full-time staff devoted to civil rights investigations and enforcement declined from 403 FTE in FY 2016 to 370 FTE in FY 2017.¹⁰⁵² At the Commission’s briefing, Executive Director of the National Disability Rights Network Curt Decker testified that during the Trump Administration so far, ED OCR has lost 11 percent of its workforce, and “[t]hese reductions were so drastic that Congress stepped in, directing more money to maintaining the staffing levels.”¹⁰⁵³ Former Secretary of Education Arne Duncan testified that cutting staff is tantamount to “walking back commitments to civil rights.”¹⁰⁵⁴ In his written testimony to the Commission, Duncan further noted that “budgets express policy judgments” and that “the Trump Administration takes steps to starve civil rights enforcement that could, if unchecked, last well after the end of the current presidency.”¹⁰⁵⁵

1049 *Ibid.* 1050 *Ibid.* 1051 See supra Figure 3.1. 1052 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 8, at 12. Note that ED OCR staff totals were appreciably higher in both years as discussed below; the text totals here refer only to staff devoted to investigations and enforcement, excluding policy and administrative staff, for examples. 1053 Curtis L. Decker, Executive Director, National Disability Rights Network, testimony, Federal Civil Rights Enforcement Briefing, p. 226; Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 (2018); Andrew Kreighbaum, “Under DeVos, a Smaller Department of Education,” *Inside Higher Ed*, Jun. 13, 2018, <https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>. ED reportedly “purchased more than \$28,000 worth of training related to how to plan and conduct a ‘reduction in force’ action – which is bureaucratic parlance for laying off employees.” Michael Stratford, “North Carolina opens investigation into for-profit law school,” *Politico*, Apr. 24, 2017, <https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>. 1054 Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 77 (“To see the current administration actually get rid of civil rights attorneys, I think speaks -- it tells you everything you need to know about their values. And I would say budgets tell you values, not words, and when you cut staff, you’re walking back those commitments by definition.”) 1055 Duncan Statement, at 6.

<https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>
<https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>
<https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>
<https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>

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In FY 2017, ED requested 753 FTEs for ED OCR, which was comparable to FY 2016, when ED requested 754 FTEs for ED OCR.¹⁰⁵⁶ In alignment with the decreased budget request for FY 2018, President Trump’s first proposed budget only requested funds for 523 FTEs for ED OCR.¹⁰⁵⁷ These proposals contrast with ED OCR’s actual staffing levels, with 563 FTEs in FY 2016, 579 FTEs in FY 2017, and 529 FTEs in FY 2018 through the annualized continuing resolution.¹⁰⁵⁸ Regarding their roles, in response to the Commission’s Interrogatories, ED OCR reported that for FY 2016 and FY 2017, 403 FTEs and 370 FTEs (including General Attorneys, Investigators, Equal Opportunity Specialists, and Equal Opportunity Assistants) were assigned to work exclusively on enforcement-related activities.¹⁰⁵⁹ In addition to the full-time enforcement staff, a total of 14 and 11 investigative staff members worked part-time on enforcement-related activities in FY 2016 and FY 2017 respectively, including General Attorneys and Equal Opportunity Specialists.¹⁰⁶⁰ ED OCR did not have any outside contractors working on enforcement activities during FY 2016 or FY 2017.¹⁰⁶¹ ED OCR also told the Commission that it finalizes its staffing levels after it receives notification of its appropriated funds for a given fiscal year, and staffing levels are “set in a manner to allow [ED] OCR to best meet its mission while operating within its appropriated budget.”¹⁰⁶² Moreover, several other factors may affect staffing levels, such as appropriations or hiring freeze directives, or attrition,¹⁰⁶³ and according to ED OCR, “[ED] OCR continually assesses its staffing needs in light of its complaint receipts, and for FY2018 has initiated the process of hiring for 65 positions.”¹⁰⁶⁴ In its FY 2016 annual report, ED OCR stated that its general staffing level has historically decreased over time, despite the fact that its complaint volume has “exponentially increased.”¹⁰⁶⁵ Between FY 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent.¹⁰⁶⁶ During that same time period, ED OCR staffing levels decreased by 11 percent.¹⁰⁶⁷

1056 U.S. Dep’t of Educ., Fiscal Year 2017 Budget Summary and Background Information, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep’t of Educ., Fiscal Year 2016 Budget Summary and Background Information, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>. 1057 U.S. Dep’t of Educ., Fiscal Year 2018 Budget Summary and Background Information, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>. 1058 *Ibid.*; U.S. Dep’t of Educ., Fiscal Year 2019 Budget Summary and Background Information, p. 58, <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>. 1059 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 8, at 12 (noting that “[Office of Civil Rights] staffing fluctuates and responses to Interrogatory 8 reflect end-of-fiscal year data.”) 1060 *Ibid.* 1061 *Ibid.*, 12-13. 1062 U.S. Dep’t of Educ., Response to Interrogatory 9, p. 14. 1063 *Ibid.* 1064 *Ibid.* 1065 U.S. Dep’t of Educ., Office of Civil Rights, Fiscal Year 2016, Securing Equal Educational Opportunity: Report to the President and Secretary of Education, p. 8, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, FY 16 Securing Equal Educational Opportunity]. 1066 *Ibid.*, 7. 1067 *Ibid.*, 8.

<https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>
<https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>

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Figure 3.2: ED OCR Staffing Levels vs. Complaints Received FY 1981-2016

Source: U.S. Dep't of Education

Assessment Prioritization for Civil Rights Agency-wide In 2002, the Commission recommended that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”¹⁰⁶⁸ Organizational Structure As the Commission has noted in the past, with the passage of the Department of Education Organization Act in 1979, Congress ensured that the Assistant Secretary of Education for Civil Rights would have a direct line to the Secretary of Education, and tasked the Assistant Secretary with providing civil rights leadership throughout ED.¹⁰⁶⁹

¹⁰⁶⁸ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. ¹⁰⁶⁹ 20 U.S.C. § 3413.

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ED OCR is currently led by Kenneth L. Marcus, Assistant Secretary of Education for Civil Rights, whom the U.S. Senate confirmed on June 7, 2018.¹⁰⁷⁰ The Assistant Secretary reports directly to the Secretary of Education, and is the principal advisor on civil rights matters, providing “overall direction, coordination, and leadership,” which indicates an effort to integrate civil rights into every component of the organization.¹⁰⁷¹ ED OCR enforces external civil rights matters at its headquarters in Washington, DC, as well as through its 12 regional offices around the country in:

• Atlanta • Boston • Chicago • Cleveland • Dallas • Denver • Kansas City • New York • Philadelphia • San Francisco • Seattle • DC Metro¹⁰⁷²

When all positions are filled, each regional office has a Regional Director and a Program Manager, a Chief Attorney, Team Leaders, Attorneys, Equal Opportunity Specialists, and administrative support positions.¹⁰⁷³

¹⁰⁷⁰ U.S. Dep't of Educ., “Kenneth L. Marcus, Assistant Secretary for Civil Rights — Biography,” <https://www2.ed.gov/news/staff/bios/marcus.html> (accessed May 20, 2019) (Assistant Secretary Marcus served as the Staff Director of the Commission from 2004 to 2008; Marcus was appointed to the Commission Staff Director position in the second term of the George W. Bush Administration.). ¹⁰⁷¹ 20 U.S.C. § 3413 (a), (c); U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 10-11. ¹⁰⁷² ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 6. ¹⁰⁷³ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 10.

<https://www2.ed.gov/news/staff/bios/marcus.html>

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Figure 3.3: Organizational Structure of OCR

Source: U.S. Department of Education, Office for Civil Rights

Figure 3.3 displays ED OCR's organizational structure in August of 2018.¹⁰⁷⁴ In its response to the Commission's interrogatories, ED OCR clarified that the Resource Management Team, the Program Legal Group, and all Enforcement Divisions report to the Assistant Secretary for Civil Rights, and there is a Deputy Assistant Secretary for Policy and Development, a Deputy Assistant Secretary for Management and Planning, a Deputy Assistant Secretary for Enforcement, a Deputy Assistant Secretary for Management, and senior counsel.¹⁰⁷⁵ ED OCR also noted that it had a Chief of Staff as a part of its senior staff in FY 2016 and FY 2017, and when vacancies in senior positions occur, staff may be designated to fill these vacancies on an “acting” basis.¹⁰⁷⁶

¹⁰⁷⁴ U.S. Dep't of Educ., Response to Document Request No. 2, OCR Org Chart Dated Aug. 2018. ¹⁰⁷⁵ The Resource Management Team and the Budget and Planning Support Team are responsible for “planning, developing, and implementing budget, operational, and administrative policy for OCR.” The Program Legal Group “provides a range of legal services that can include: developing technical assistance materials, regulation development, developing policy guidance, consulting on novel cases from the enforcement offices, and helping to ensure that civil rights issues are appropriately addressed within the Department's programs and initiatives and among federal agencies,” and administers the Civil Rights Data Collection. The Enforcement Division manages the operations of the regional offices and oversees ED OCR's enforcement program. U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 11; see also ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 6. ¹⁰⁷⁶ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 11-12.

RESOURCE MANAGEMENT

TEAM

PROGRAM LEGAL GROUP

TEAM I

TEAM II

TEAM III

SAN FRANCISCO REGION

DENVER REGION

CHICAGO REGION

CLEVELAND REGION

ATLANTA REGION

BOSTON REGION

OFFICE FOR

CIVIL RIGHTS

ENFORCEMENT DIVISION

A

ENFORCEMENT DIVISION

B

ENFORCEMENT DIVISION

C

ENFORCEMENT DIVISION

D

PHILADELPHIA REGION

METRO (DC) REGION

DALLAS REGION KANSAS CITY REGION SEATTLE REGION

NEW YORK REGION

CUSTOMER SERVICE AND TECHNOLOGY

TEAM

BUDGET AND PLANNING SUPPORT

TEAM

HUMAN RESOURCES

TEAM

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Strategic Planning and Self-Evaluation ED as a whole published a Strategic Plan for fiscal years 2018-2022.¹⁰⁷⁷ This follows ED's previous strategic plan spanning fiscal years 2014-2018.¹⁰⁷⁸ The 2014-2018 plan includes equity as one of the six strategic goals for the four year period the plan covers.¹⁰⁷⁹ The 2018-2022 plan includes equal access to high-quality educational opportunities as a strategic objective under the larger strategic goal of supporting state and local efforts to improve learning outcomes for all preschool through grade 12 students in every community.¹⁰⁸⁰ The Assistant Secretary for Civil Rights is statutorily required to report annually to the Secretary of Education and the President summarizing the compliance and enforcement activities of the office.¹⁰⁸¹ The report must also identify significant civil rights or compliance problems for which the Assistant Secretary has recommended corrective action, but has not seen adequate progress made in the judgement of the Assistant Secretary.¹⁰⁸² ED OCR has released every report since 1995 to the public, including the most recent report available which covers FY 2016.¹⁰⁸³ However, Commission research indicated that ED OCR has not published an FY 2017 or FY 2018 annual report, in violation of its statutory obligation.¹⁰⁸⁴ The Commission received written testimony from Fatima Goss Graves, President and CEO of the National Women's Law Center, expressing her concerns about the absence of recent annual reports from ED OCR, and stating that annual reports are an important civil rights enforcement tool, as they allow the public to see how ED OCR enforces statutes and regulations, facilitate Congressional oversight over agency enforcement efficacy, describe what the agency considers important about the state of civil rights, and facilitate agency self-evaluation which is critical to effective enforcement.¹⁰⁸⁵

¹⁰⁷⁷ U.S. Dep't of Educ., Strategic Plan for Fiscal Years 2018-2022, <https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf> [hereinafter ED, Strategic Plan FY 2018- 2022]. ¹⁰⁷⁸ U.S. Dep't of Educ., Strategic Plan for Fiscal Years 2014 – 2018, <https://www2.ed.gov/about/reports/strat/plan2014-18/strategic-plan.pdf>. ¹⁰⁷⁹ Ibid. ¹⁰⁸⁰ ED, Strategic Plan FY 2018-2022, supra note 1077. ¹⁰⁸¹ 20 U.S.C. § 3413(b). ¹⁰⁸² Id. § 3413(b)(1). ¹⁰⁸³ U.S. Dep't of Educ., “Serial Reports Regarding OCR Activities,” supra note 205. ¹⁰⁸⁴ 20 U.S.C. § 3413(b)(1). ¹⁰⁸⁵ Id.; see also Fatima Goss Graves, President and CEO, National Women's Law Center, Written Statement for the Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2019, at 4 [hereinafter Goss Graves Statement] (“[ED] OCR's reports are an important tool to inform the Department, Congress, the President, and the public of [ED] OCR's priorities and enforcement efforts.”). See also Shahab Ahmed Mirza and Frank J. Bewkes, “Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students,” Center for American Progress, Jul. 29, 2019, <https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/> [hereinafter CAP, Civil Rights of LGBTQ Students] (noting that ED OCR has not published any annual reports during the Trump Administration, rendering it “not possible” to specifically analyze complaints in particular categories).

<https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf>

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Complaint Processing, Agency-Initiated Charges, & Litigation In FY 2016, ED's independent Office of the Inspector General (ED OIG) published an audit of the effectiveness of ED OCR's case resolution work stating that:

We found that OCR generally resolves discrimination complaints in a timely and efficient manner and in accordance with applicable policies and procedures. Specifically, we determined that OCR resolves discrimination complaints in a timely fashion at a high overall rate and does not have a large backlog of unresolved cases. The primary factors that contribute to OCR's timely and efficient resolution of complaints include efficient case resolution methods, consistency in case investigation practices, and effective case tracking and information management systems.¹⁰⁸⁶

The Inspector General also concluded that:

OCR has generally developed clearly defined procedures that allow regional staff to follow established policy when resolving the different types of discrimination complaints and allow management to provide clear direction to regional staff when complications or questions arise. We also noted OCR management has created a control environment that ensures the investigative teams understand the importance of compliance with policies and procedures. As a result, OCR is able to ensure that complaints are processed and resolved consistently, efficiently, and effectively across the regions, in line with OCR's statutory and regulatory responsibilities.¹⁰⁸⁷

ED OIG's semiannual report to Congress covering the first half of FY 2016 summarized the findings quoted above from the audit of ED OCR, and noted that an increasing workload combined with decreasing resources "could have a negative effect on complaint resolution," because staff may not be able to maintain their levels of productivity. ¹⁰⁸⁸ The ED OIG evaluation finding high levels of efficacy is notable given the high volume of investigations ED OCR processed during the time period it examined. In FY 2016, ED OCR received 16,720 complaints and initiated 13 proactive investigations.¹⁰⁸⁹ ED OCR stated that this complaint volume was a record high and was partly attributed to a single individual who filed

¹⁰⁸⁶ U.S. Dep't of Educ., Office of the Inspector General, *The Resolution of Discrimination Complaints by the Department's Office for Civil Rights*, p. 2, Dec. 10, 2015, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf> [hereinafter ED OIG, *Resolution of Discrimination Complaints by OCR*]. ¹⁰⁸⁷ *Ibid.*, 3. ¹⁰⁸⁸ *Ibid.* ¹⁰⁸⁹ U.S. Dep't of Educ., Office for Civil Rights, *Fiscal Year 2016 Report to the President and Secretary of Education*, p. 5, <https://www2.ed.gov/about/offices/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, *FY 16 Report to the President and Secretary*] (ED OCR uses the term "proactive investigation" to indicate a compliance review of a recipient of federal financial assistance).

<https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf>
<https://www2.ed.gov/about/offices/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>
<https://www2.ed.gov/about/offices/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>

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6,201 Title IX complaints against elementary and secondary schools and school districts.¹⁰⁹⁰ In comparison, in FY 2015, ED OCR received 10,392 total complaints.¹⁰⁹¹ In FY 2017, the total number of complaints ED OCR received decreased to 12,837.¹⁰⁹² In FY 2018 ED OCR received 12,435 complaints.¹⁰⁹³ The number of cases ED OCR investigated for FY 2016 and FY 2017 were 7,396 and 8,577 respectively.¹⁰⁹⁴ In FY 2018, ED OCR resolved 14,074 complaints, a number that includes cases that resulted in dismissal, administrative closure, a finding of no violation, an early complaint resolution, or a resolution agreement, including cases received prior to FY 2018.¹⁰⁹⁵ These numbers differ slightly from case numbers that ED OCR provided USCCR in its Interrogatory/document request responses. ED OCR reported to USCCR that it opened 16,733 cases in FY 2016 and 12,839 cases in FY 2017.¹⁰⁹⁶ ED OCR reported that it resolved 8,631 cases in FY 2016, and in sharp contrast, resolved 17,821 cases—more than double—in FY 2017.¹⁰⁹⁷ As of the close of FY 2016 and FY 2017 (September 30), 12,055 cases and 7,107 cases were pending respectively.¹⁰⁹⁸ See figure 3.4.

¹⁰⁹⁰ *Ibid.*, 24. ¹⁰⁹¹ *Ibid.*, 24. ¹⁰⁹² *Ibid.*, 24. ¹⁰⁹³ U.S. Dep't of Educ., "Press Release: New Data Show Secretary DeVos' Reforms to the Office for Civil Rights are Driving Better Results for Students," Jul. 10, 2019, <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students> [hereinafter ED, "Reforms to OCR are Driving Better Results for Students"]. ¹⁰⁹⁴ ED OIG, *Resolution of Discrimination Complaints by OCR*, supra note 1086. (noting that "[t]he selection of investigated cases is based on cases either still pending or cases that progressed beyond dismissal and were resolved with administrative closure, no violation, Early Complaint Resolution, or change with or without a resolution agreement"). ¹⁰⁹⁵ ED, "Reforms to OCR are Driving Better Results for Students," supra note 1093. ¹⁰⁹⁶ U.S. Dep't of Educ., *Response to USCCR Interrogatory No. 10*, at 15, and Appendix 1, at 1. ¹⁰⁹⁷ *Ibid.* ¹⁰⁹⁸ *Ibid.* As discussed above, the number of pending cases reported means cases that were not resolved by the end of the fiscal year.

<https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>
<https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>

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Figure 3.4: OCR Status of Complaints for FY 2016 and FY 2017

According to the figures ED OCR reported to the Commission, in FY 2016, the largest number of complaints received (7,072) were Title IX complaints (regarding sex discrimination), which coincides with the information presented in the FY 2019 Budget Request that reported a single

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individual who filed 6,201 Title IX complaints against elementary and secondary schools and school districts.¹⁰⁹⁹ In FY 2017, the largest number and percent of complaints received (5,569/43.4 percent) were complaints alleging discrimination against individuals with disabilities.¹¹⁰⁰ In contrast with the FY 2016 ED OIG report concluding that at that time ED OCR generally effectively and timely resolved complaints in accord with the law, a more recent evaluation from the Center for American Progress focused specifically on ED OCR resolution of sexual orientation and gender identity [SOGI] specific complaints concluded that "SOGI-related complaints were more than nine times less likely to result in corrective action under the Trump Administration than under the Obama Administration."¹¹⁰¹ The report noted that in the Obama Administration ED OCR found no violation or insufficient evidence of a violation in 12.2 percent of sexual orientation and gender identity discrimination complaints, compared to 6.1 percent of such findings in the Trump Administration.¹¹⁰² These data reflect that the Obama Administration found no violation twice as often as the Trump Administration does for this category of cases. As the report explained:

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren't ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence—twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.¹¹⁰³

The report also took issue with ED OCR's public claim that it is delivering more change through its current practices:

While [ED] OCR claimed in a July 2019 press release that "instead of seeing every case as an opportunity to advance a political agenda, [OCR is] focused on the needs of each individual student and on faithfully executing the laws [...]," Assistant Secretary for Civil Rights Kenneth Marcus's claim is countered by the very data published in the release. Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.¹¹⁰⁴

¹⁰⁹⁹ See supra Figure 3.4. ¹¹⁰⁰ U.S. Dep't of Educ., *Response to USCCR Interrogatory No. 10*, at 15, and Appendix 1, at 1. ¹¹⁰¹ CAP, *Civil Rights of LGBTQ Students*, supra note 1085. ¹¹⁰² *Ibid.* ¹¹⁰³ *Ibid.* ¹¹⁰⁴ *Ibid.* Indeed, the report noted that SOGI complaints were "nine times less likely to result in corrective action [in the Trump Administration] than under the Obama Administration." *Ibid.*

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ED OCR noted in its response to the Commission's Interrogatories that it had dismissed or administratively closed 6,492 complaints in FY 2016, and that number more than doubled in FY 2017, with 14,785 complaints dismissed or administratively closed.¹¹⁰⁵ See Figure 3.4. These case closure rates have raised concern among analysts who have evaluated ED OCR case resolution data during the time period investigated. For example, the Center for American Progress reported that ED OCR during the Trump Administration closed 91.5 percent of complaints related to sexual orientation and gender identity through dismissal or administrative closure, whereas in the Obama Administration ED OCR closed 65.4 percent of such cases through these means.¹¹⁰⁶ A ProPublica analysis of more than 40,000 ED OCR cases resolved during the time period the Commission studied for this report characterized ED OCR in the Trump Administration as having "scuttled" cases on the ground that "efficiency is the Trump Administration's priority."¹¹⁰⁷ ED OCR also noted that "[p]rior to the March 5, 2018 revision of OCR's [Case Processing Manual], there was a category for administrative closures, as well as dismissals, but effective March 5, 2018, circumstances that previously would have resulted in an administrative closure are included among the reasons for dismissal."¹¹⁰⁸ Prior to March 5, 2018, ED OCR would administratively close a complaint if any of the following criteria were met:

(a) The same complaint allegations have been filed by the complainant against the same recipient with another federal, state, or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings, and 1. for pending complaint allegations, OCR anticipates that there will be a comparable resolution process under comparable legal standards; i.e., all allegations will be investigated, appropriate legal standards will be applied, and any remedies secured will meet OCR's standards. OCR will advise the complainant that she or he may re-file within 60 days of the completion of the other entity's action. Generally, OCR will not conduct its own investigation; instead, OCR reviews the results of the other entity's determination and determines whether the other entity provided a comparable process and met appropriate legal standards. 2. for resolved complaint allegations, the resolution meets OCR regulatory standards; i.e., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR's standards.

¹¹⁰⁵ *Ibid.* ¹¹⁰⁶ *Ibid.* ¹¹⁰⁷ Annie Waldman, "DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama," ProPublica, Jun. 21, 2018, <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama> (accessed Oct. 16, 2019) [hereinafter Waldman, "DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama"]. ¹¹⁰⁸ U.S. Dep't of Educ., *Response to USCCR Interrogatory 11*, at 17, n.12.

<https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>
<https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>

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(b) The same allegations have been filed by the complainant against the same recipient with state or federal court. An OCR complaint may be re-filed within 60 days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint allegations. (Dismissal with prejudice is considered a decision on the merits.) (c) The complaint allegations are foreclosed by previous decisions of the federal courts, the U.S. Secretary of Education, or the U.S. Department of Education's Civil Rights Reviewing Authority. (d) The complaint allegations are foreclosed by OCR policy determinations. (e.g., OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened pursuant to Section 504, or to refrain from assessing the appropriateness of pedagogical decisions.) (e) OCR obtains credible information indicating that the allegations raised by the complaint have been resolved, and there are no class-wide allegations. In such a case, OCR will attempt to ascertain the apparent resolution. If OCR determines that there are no current allegations appropriate for further complaint resolution, the complaint will be closed. (f) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by the complainant's or injured party's refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint. (g) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by its inability to contact the complainant in order to obtain information that is necessary for investigation of the complaint. The Office will include documentation in the case file of its efforts to contact the complainant by phone, in writing, or via electronic mail to request the necessary information. OCR will not close the complaint until more than 20 calendar days have passed since the date of OCR's attempt to contact the complainant.¹¹⁰⁹

ED OCR noted in its response to interrogatories that any basis that would have previously resulted in an administrative closure would now be grounds for ED OCR to dismiss the complaint under the updated CPM procedures.¹¹¹⁰

¹¹⁰⁹ U.S. Dep't of Educ., "OCR Case Processing Manual (CPM) Archived Information," Art. I § 110 (Jan. 2010) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#fnref4> [hereinafter ED OCR, "Case Processing Manual (Archived)"]. ¹¹¹⁰ U.S. Dep't of Educ., *Response to USCCR Interrogatory No. 11*, at 16-17; see also U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, Nov. 19, 2018, pp. 9-12, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereafter ED OCR, *Case Processing Manual*].

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#fnref4>
<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

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During the time period studied in this report, ED OCR resolved thousands of cases of allegations of discrimination on the basis of race, national origin, sex, disability, and/or retaliation. For example, after an ED OCR investigation identified civil rights concerns, including that black students were consistently overrepresented in the district's disciplinary actions, in April 2016, Oklahoma City Public Schools agreed to reform their school discipline policies.¹¹¹¹ ED OCR's review of the district's discipline practices revealed concerns about incomplete or inconsistent recordkeeping, data collection, provision of due process rights, administration of discipline, and information provided to parents of suspended students, as well as a lack of clarity in misconduct resulting in disciplinary sanctions such as "defiance of authority" or "disrespect."¹¹¹² In its agreement with ED OCR, the district committed to implement several changes including staff training, a reevaluation of disciplinary policies, and measures to change the culture within the district.¹¹¹³ In November of 2016, ED OCR resolved a case with East Hartford Public Schools in Connecticut, after finding that the district discriminated

against limited English proficient (LEP) parents and guardians, including the district which highlighted in red on its website that LEP families seeking to register their children in their district should bring their own translators, facially violating Supreme Court precedent in Plyler v. Doe requiring that school districts not deny students education based on national origin.1114 An ED OCR agreement with the district committed the district to develop a uniform policy for assisting LEP parents and notifying them of the availability of free translation services.1115 In March of 2017, ED OCR signed an agreement with Wittenberg University mandating several changes to the University's Title IX investigation and hearing process including revisions to Title IX policies and procedures and offering to reimburse two students adversely affected by the University's policies for counseling. In November 2016, ED OCR entered into an agreement with Yonkers Public Schools after an ED OCR investigation finding that the district discriminated against students with disabilities by failing to place them in a regular educational environment even when students would have been able to participate in that environment with the help of supplementary aids or services.1116 The ED OCR resolution agreement required that the district remind all teachers and administrators about district policies regarding students with disabilities and implement new training.1117

1111 U.S. Dep't of Educ., "Oklahoma City Public Schools, U.S. Education Department Reach Settlement to Address Disproportionate Discipline of Black Students," Apr. 20, 2016, <https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>. 1112 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 22-23. 1113 *Ibid.* 1114 U.S. Dep't of Educ., Resolution Letter: Case No. 01-15-5001 East Hartford Public Schools, Nov. 30, 2016, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01155001-a.pdf> [hereinafter ED, Resolution Letter: Case No. 01-15-5001]; see also Plyler v. Doe, 457 U.S. 202 (1982). 1115 ED, Resolution Letter: Case No. 01-15-5001, supra note 1114. 1116 *Ibid.* 1117 *Ibid.*

<https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>
<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01155001-a.pdf>

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In November 2017, ED OCR entered into a resolution agreement with the Loleta Union Elementary School District, in California, over alleged verbal and physical harassment and discriminatory discipline of Native American students, including students with disabilities.1118 Students and their families reported that harassment by school administrators and staff was part of a pattern of racial discrimination that included discriminatory discipline practices and a failure to provide special education services to Native American students with disabilities. ED OCR found repeated cases of "unwelcome physical behaviors and derogatory statements made by the former principal, and/or staff members to Native American students."1119 The investigation found many incidents of disparate treatment. For example, a Native American student was suspended six times in a single school year without a disability evaluation even though his student file included a note from a teacher saying his "behavior is keeping him from learning" and a staff member had recommended evaluation and testing.1120 The letter also described a fourth-grade Native American student who had 43 behavioral incidents in a single school year, 38 of which the school described as "major" but whom the school did not evaluate for a disability even though her teacher noted the student had problems focusing and repeated behavioral issues ranging from tantrums to breaking down in tears in class.1121 ED OCR investigators also found that there was a statistically significant difference in the number of discipline referrals to school officials, the number of in-school and out-of-school suspensions, and Native students were overrepresented in the number of referrals to law enforcement—these students made up 30 percent of the student body in 2011-12 and 8 percent in 2012-13, but 100 percent of the referrals from 2011-2013.1122 The Resolution Agreement included consultants, experts and a stakeholder equity committee along with reporting requirements and data-based corrective action plans to help the district come into compliance with its civil rights obligations to provide equal access to education for all, and to ensure against discrimination and harassment based on race or national origin.1123 In August 2018, ED OCR entered into a voluntary resolution agreement with Florence City School District in Alabama to ensure that announcements sent by the school district were published in an accessible format.1124 The agreement required, in part, that the school district develop accessibility features for its website, and required the district to periodically send updates to ED OCR demonstrating that the district remained in compliance with the agreement.1125

1118 See U.S. Dep't of Educ., Office for Civil Rights, Letter to Superintendent John Sutter for the Loleta Union Elementary School District (Nov. 22, 2017), p. 8, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf> [hereinafter ED OCR, Loleta Union Letter to Superintendent]; U.S. Dep't of Educ., Office for Civil Rights, Resolution Agreement, Loleta Union Elementary School District, Case No. 09-14-1111, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf> [hereinafter ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111]. 1119 ED OCR, Loleta Union Letter to Superintendent, supra note 1118, at 6. 1120 *Ibid.*, 26-27. 1121 *Ibid.*, 27. 1122 *Ibid.*, 12 (enrollment), 13 (disciplinary referrals), 13-15 (suspensions), 17 (law enforcement referrals). 1123 ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111, supra note 1118. 1124 U.S. Dep't of Educ., Office for Civil Rights, Resolution Agreement, Florence County School District Complaint Number 04-18-1249, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04181249-b.pdf>. 1125 *Ibid.*

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf>
<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf>

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Process of Investigation and Case Resolution

Consistent with its regulatory requirements,1126 ED OCR has a formalized complaint resolution process that begins with complainants submitting written information for ED OCR to examine, "pursuant to applicable statutes and regulations."1127 ED OCR's Case Processing Manual states that it will provide reasonable assistance to complainants with disabilities and LEP individuals.1128 When ED OCR receives written information, it must undergo an evaluation process to determine whether the information constitutes a "complaint" and requires a further investigation.1129

1126 28 C.F.R. § 42.408. 1127 ED OCR, Case Processing Manual, supra note 1110, at 4. 1128 *Ibid.* 1129 *Ibid.*

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Figure 3.5: ED OCR Complaint Process

Source: U.S. Dep't of Education

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Under its current practices, ED OCR will not pursue a further investigation if:

- Correspondence received is anonymous
- Only courtesy copies of information/complaints filed with another entity or person were

received

- Written information is seeking advice or information from ED OCR
- Information is communicated orally, and not in writing
- Subject matter of the allegations falls outside of ED OCR's jurisdiction
- Written information relies exclusively on statistical data to present an allegation of

discrimination.1130 The Case Processing Manual goes on to state that if ED OCR determines that the subject matter of the allegations falls outside its jurisdiction, it will determine if the complaint should be investigated by another federal government agency and if so, will forward it to the appropriate agency and notify the complainant.1131 The following types of complaints may be referred to other agencies:

- Complaints against proprietary schools, or "privately owned, profit-making enterprises that teach a trade or skill" may be delegated to the U.S. Department of Veterans Affairs;1132

- Complaints against proprietary schools operated by a hospital must be delegated to the U.S. Department of Health and Human Services;1133

- Complaints claiming a service violation of the Age Discrimination Act of 1975 may be delegated to the Federal Mediation and Conciliation Service;1134

- Complaints claiming a violation of the Americans with Disabilities Act that OCR does not have jurisdiction over are referred to the DOJ, and OCR will notify DOJ if they receive a complaint claiming discrimination "by a recipient against which DOJ represents the United States as a party in pending litigation."1135

1130 ED OCR, Case Processing Manual, supra note 1110, at 4-6; Andrew Kreighbaum, "Education Department Updates Manual for Civil Rights Investigations," Inside Higher Ed, Nov. 21, 2018, <https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations> (The Department of Education's Office for Civil Rights case processing manual was updated significantly during the Trump Administration, including adding a controversial provision, later removed, that allowed Department of Education's Office for Civil Rights to dismiss complaints from people who filed multiple complaints under the same or similar bases); see also Laura Meckler, "Education Department's civil rights office retreats, will consider claims filed en masse," The Washington Post, Nov. 20, 2018, https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920. 1131 34 C.F.R. § 100.2 (2000); 34 C.F.R. § 108.2 (2000); ED OCR, Case Processing Manual, supra note 1110, at 6. 1132 38 C.F.R. § 18a.1(a) (1989); ED OCR, Case Processing Manual, supra note 1110, at 26. 1133 38 C.F.R. § 18a.1(a); ED OCR, Case Processing Manual, supra note 1110, at 26. 1134 34 C.F.R. § 110.32(a) (2000); ED OCR, Case Processing Manual, supra note 1110, at 25. 1135 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 4, at 9; see also Ch. 1, Department of Justice Civil Rights Division, Federal Coordination and Compliance Section.

<https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations>
<https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations>
https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920
https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920

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ED OCR's complaint processing manual states that it notifies complainants when it evaluates written information and determines the information to constitute a complaint under its jurisdiction.1136 ED OCR will then determine whether the allegations in the complaint are timely, which based on federal regulations, means that the complaint was filed within "180 calendar days of the date of the alleged discrimination."1137 If the complaint was not timely, the complainant has the opportunity to request a waiver, which can be granted if "the time for filing is extended by the responsible Department official or his designee."1138 Investigations may be opened through the complaint process, or through agency-initiated compliance reviews.1139 Available data indicates that most arrive through complaints as in FY 2016, ED OCR reported that it initiated 13 proactive compliance evaluations while resolving 8,625 cases overall.1140 Federal regulations require:

The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part [Title VI]. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.1141

Importantly, this regulatory language mandates that ED OCR must investigate "whenever" information indicates a possible failure to comply with the civil rights laws ED OCR enforces.1142 The marked increase in case dismissal and closure rates in Fiscal Years 2017 and 2018 raise questions about whether ED OCR is meeting this regulatory mandate. The current complaint processing manual provides that during the evaluation stage, an allegation or a complaint can be dismissed if it does not fall under one of the laws or regulations that ED OCR enforces, lacks factual detail, or is "so speculative, conclusory or incoherent that ED OCR

1136 34 C.F.R. § 100.7 (2000); ED OCR, Case Processing Manual, supra note 1110, at 7. 1137 *Ibid.*, 8; 34 C.F.R. § 100.7(b) (2000) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrpmp.pdf>; see also 34 C.F.R. § 100.7(b) (2019). 1138 34 C.F.R. § 100.7(b); ED OCR, Case Processing Manual, supra note 1110, at 8-9. 1139 34 C.F.R. § 100.7(a) and (b). 1140 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 5. As noted above, ED OCR did not publish an FY 2017 or FY 2018 Annual Report. See supra notes 1084, 1141 34 C.F.R. § 100.7(c). These requirements similarly apply to ED OCR's investigation of discrimination on the basis of disability and sex. See 34 C.F.R. § 104.61 (stating that "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 100.6-100.10 and part 101 of this title) and 34 C.F.R. § 106.71 (stating that "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101). 1142 *Ibid.*

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrpmp.pdf>

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cannot infer that discrimination or retaliation may have occurred or may be occurring."1143 Complaints or allegations may also be dismissed if they are not timely and a waiver is not granted, if ED OCR lacks jurisdiction, or for other administrative reasons.1144 If an allegation is dismissed, ED OCR will notify the complainant in writing.1145 When ED OCR dismisses a complaint or allegation, it is considered resolved and the complaint will be closed.1146 If the allegation is not dismissed, ED OCR's current complaint processing manual provides that ED OCR can open the complaint allegations for investigation or utilize the Rapid Resolution Process (RRP), where a case resolution is expedited during the evaluation stage or after issuing a letter of notification.1147 This is a departure from the earlier ED OCR process in the previous version of the Case Processing Manual issued in February 2015, in which RRP was only available in substantive areas deemed by ED OCR to be appropriate for RRP resolution.1148 ED OCR's current practice as described in its updated complaint processing manual results in the Rapid Resolution Process being available for any case not dismissed during the evaluation stage of the complaint, which is a significant change from previous ED OCR practice that only allowed RRP in limited circumstances.1149 Another path to resolution is through mediation. If ED OCR determines that a complaint is appropriate for mediation, ED OCR starts by facilitating a dialogue between the parties involved through the process entitled Facilitated Resolution Between the Parties.1150 During this process, ED OCR serves as "an impartial, confidential facilitator" between the parties that encourages both parties to "work expeditiously and in good faith toward a mutually acceptable resolution."1151 In FY 2016, the most recent fiscal year for which data was publicly available, ED OCR resolved 309 complaints through its mediation process.1152 If the informal resolution process fails:

[C]ompliance with this part [Title VI] may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.1153

1143 34 C.F.R. § 100.7(c); ED OCR, Case Processing Manual, supra note 1110, at 10. 1144 ED OCR, Case Processing Manual, supra note 1110, at 10. 1145 *Id.*, 9. 1146 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 11, p. 16. 1147 ED OCR, Case Processing Manual, supra note 1110, at 12. 1148 ED OCR, "Case Processing Manual (Archived)," supra note 1110, at 16-17. 1149 34 C.F.R. § 100.7. 1150 ED OCR, Case Processing Manual, supra note 1110, at 13. 1151 *Id.*; 34 C.F.R. § 100.7(d). 1152 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 21. 1153 34 C.F.R. § 100.8; see also, 34 C.F.R. § 104.61 (providing that complaints and compliance investigations initiated under Section 504 of the Rehabilitation Act will follow procedures applicable to Title VI of the Civil Rights Act of

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Whether through a compliance investigation or a complaint-initiated process, if ED OCR discovers that an entity is noncompliant with a resolution agreement or the laws and regulations it enforces, ED OCR says that it will issue a notice of deficiencies and request that appropriate action is taken to remediate such deficiencies.1154 Where ED OCR has secured a resolution agreement with a recipient, ED OCR will continue monitoring the recipient until ED OCR has determined that the recipient has "fully and effectively implemented the terms of the resolution agreement."1155 If ED OCR determines that the entity has failed to comply with the terms and obligations of the agreement, then ED OCR may take action to enforce the agreement.1156 If ED OCR and the entity cannot reach an agreement, or if the entity violates an agreement, then ED OCR has authority to initiate enforcement actions, and may suspend, terminate, or refuse to grant or continue financial assistance, or refer the case to DOJ for litigation.1157 But before any enforcement action, ED OCR must first seek voluntary compliance.1158 This is true in the case of investigations prompted by complaints or proactive compliance evaluation.1159 Once ED OCR shares a proposed resolution agreement with the recipient, then the recipient has 90 days to reach a formal resolution agreement with ED OCR.1160 In this circumstance, the complaint is resolved when the recipient "enters into and fulfills the terms of the resolution agreement."1161 If an education recipient of federal funds does not comply voluntarily, ED OCR may initiate an enforcement action after first providing the federal funds recipient with notice and an opportunity for formal administrative hearing before a hearing examiner.1162 The hearing examiner would either issue an initial decision, from which a federal funds recipient could appeal to the Secretary or another authority designated by the Secretary,1163 or the federal funds recipient could certify the record for decision by the reviewing authority.1164 Any adverse decision from a hearing examiner or reviewing authority would identify findings and the requirement or requirements with which the federal funds recipient is found not to comply.1165 If the Secretary were not the reviewing authority, either the federal funds recipient or ED OCR could request Secretary review of the

1964 at 34 C.F.R. §§ 100.6-100.10, 101); 34 C.F.R. § 106.71 (providing that complaints and compliance investigations initiated under Title IX of the Education Amendments of 1972 will follow procedures applicable to Title VI of the Civil Rights Act of 1964 at 34 C.F.R. §§ 100.6-100.10, 101). 1154 ED OCR, Case Processing Manual, supra note 1110, at 22-23. 1155 *Id.*, 22. 1156 34 C.F.R. §100.8.; ED OCR, Case Processing Manual, supra note 1110, at 23. 1157 34 C.F.R. §100.8(a); ED OCR, Case Processing Manual, supra note 1110, at 22. 1158 20 U.S.C. § 1682 (for Title IX; there are analogous statutory provisions for Title VI and the other statutes OCR enforces); 34 C.F.R. § 100.8(a), (c). 1159 34 C.F.R. §§ 100.7 – 100.8. 1160 ED OCR, Case Processing Manual, supra note 1110, at 18. Of note, ED OCR instituted this 90-day limit on negotiations in 2014 as a means to ensure effective civil rights enforcement. See White House Task Force to Protect Students From Sexual Assault, Not Alone, supra note 332, at 19. 1161 ED OCR, Case Processing Manual, supra note 1110, at 19. 1162 34 C.F.R. §§ 100.8(c), 100.9. 1163 *Id.* § 100.13(d). 1164 *Id.* § 100.10(a)-(c). 1165 *Id.* § 100.10(d).

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decision, or the Secretary could choose on his or her own to review the decision.1166 Following this administrative review process, a federal funds recipient that did not succeed through this process could seek judicial review,1167 including "at any time" requesting full restoration of fund eligibility.1168 To secure fund eligibility, the federal funds recipient would need to show either that the recipient had satisfied the terms and conditions of the Department's final decision or that the recipient had come into statutory compliance and would continue in future so to comply.1169 Performance Criteria ED OCR strives to resolve complaints within 180 days of receipt, noting that the Government Performance and Results Act of 1993 (GPRA) performance measures it has chosen for itself are based upon the percentage of complaints resolved within that time frame, and the percentage of complaints that are pending past that 180 day mark.1170 In its response to the Commission's Interrogatories, ED OCR reported that it resolved 78 percent of its complaints due within 180 days in FY 2016, and resolved 80 percent of its complaints within 180 days in FY 2017.1171 Furthermore, it reported that 11,936 complaints were pending1172 at the end of FY 2016, and this number fell to 7,020 pending complaints at the end of FY 2017.1173 Further ED OCR told the Commission that it measures its efficacy through indicators regarding its case processing, such as internal management matters and the performance of staff,1174 which includes tracking the number of cases assigned and investigated per staff member.1175 To help make ED OCR more efficient, "[ED] OCR increased staff training opportunities and reduced associated costs by shifting from live training and meetings to more cost-efficient online training and videoconferencing."1176 They also established an online presence by updating their website, publishing an "OCR Frequently Asked Questions Hub,"1177 and publishing policy guidance as well as case documents to "maximize [ED] OCR enforcement staff time on compliance activities" and transparency.1178 A ProPublica investigation of case closure rates during the time period the Commission studied reflects dramatic reduction in time to close cases and notably less systematic investigation

1166 *Id.* § 100.10(e). 1167 20 U.S.C. § 1683 (for Title IX); 34 C.F.R. § 100.11. 1168 34 C.F.R. § 100.10(g)(2). 1169 *Id.* § 100.10(g)(1). 1170 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 16, at 22. 1171 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1. 1172 See supra Figure 3.4. 1173 *Id.* 1174 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 17, at 23. 1175 ED, FY 2019 Budget Request, supra note 1049, at Z-14. 1176 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 8. 1177 U.S. Dep't of Educ., "Frequently Asked Questions," <http://www2.ed.gov/about/offices/list/ocr/faqs.html> (accessed Jun. 3, 2019).

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associated with less comprehensive resolution.1179 "Under Obama, 51 percent of cases that took more than 180 days culminated in findings of civil rights violations, or corrective changes. Under the Trump administration, that rate has dropped to 35 percent."1180 The ProPublica investigation noted that these patterns are consistent across substantive issue areas: Outcomes on specific topics reflect this pattern. For instance, 70 percent of complaints of discrimination against students with limited proficiency in the English language were upheld under Obama, compared to 52 percent under the current administration. The proportion of complaints substantiated regarding the individualized educational needs of students with disabilities has dropped from 45 percent to 34 percent; regarding sexual harassment and violence, from 41 percent to 31 percent; and regarding racial harassment, from 31 percent to 21 percent.1181 As the ProPublica investigation explained:

These differences reflect the contrasting approaches of the Obama and Trump administrations to civil rights enforcement, according to people familiar with both. Under Obama, the Office for Civil Rights looked into instances of discrimination against individuals, but also made it a priority to carry out more time-consuming and systemic investigations into disparate treatment of students based on race, disability, or other factors. On the other hand, efficiency is the Trump administration's priority. It has restricted the time and scope of investigations, concentrating on individual complaints that can be handled quickly, and seeking to clear a backlog of more expansive cases. As a result, it has resolved about 3,250 cases that lasted more than six months, compared to about 1,150 during the last 15 months of the Obama administration. Because of this high volume, the raw number of cases concluded with findings of wrongdoing has increased under DeVos, although the percentage is considerably lower.1182

ED OCR has, over time, considered whether other indicators of performance effectiveness would be appropriate, conceding that timeliness, while important, is only one way to measure performance. ED OCR's FY 2001 and 2002 report to Congress noted that:

OCR's current performance indicators measure timeliness of case processing and program outputs, such as percentages of OCR-directed technical assistance and resource materials for recipients and parents. These indicators address only a

1179 Waldman, "DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited From Obama," supra note 1107. The ProPublica investigation studied the first 15 months of the Trump Administration compared with the final 15 months of the Obama Administration. 1180 *Id.* 1181 *Id.* 1182 *Id.*

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portion of OCR's enforcement activities, and we are collecting data and working to develop additional indicators to reflect more fully the work that we do.1183

Proactive Compliance Evaluation Recipients of federal funding through ED programs are required to comply with applicable nondiscriminatory civil rights provisions.1184 In practice this requirement means that every K-12 public school and nearly all public and private colleges and universities must comply with federal nondiscrimination provisions because all these entities receive federal funding.1185 Federal regulations require that funding recipients keep sufficient records so that ED OCR can ascertain whether the entity is in compliance.1186 In FY 2016, the most recent year for which data was publicly available, ED OCR initiated 13 proactive compliance reviews, including seven Title VI compliance reviews and four Title IX compliance reviews.1187 During FY 2016, ED OCR resolved one Title VI compliance review, four Title IX compliance reviews, and one compliance review initiated on the basis of disability.1188 ED OCR has not reported since that time on its conduct of compliance reviews but its budget request documents have noted that ED OCR expected to reduce the number of proactive compliance reviews it would initiate because ED OCR sought fewer investigative staff and would, because of that choice, have fewer staff available to conduct compliance reviews.1189 The compliance reviews ED OCR resolved in FY 2016 included an ED OCR review of Toledo, Ohio public schools following an investigation to "assess whether the district was providing black students with equal access to educational resources."1190 ED OCR and the district entered into a resolution agreement that required the district to ensure all students have equal access to resources, including equal access to teachers with advanced degrees, ensuring equitable distribution of

1183 U.S. Department of Educ., Office for Civil Rights, Annual Report to Congress: Fiscal Years 2001 and 2002, July 2003, <https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html> [hereinafter ED OCR, FY 2001 and 2002 Annual Report]. 1184 34 C.F.R. § 100.6. 1185 See, e.g., U.S. Department of Educ., Office for Civil Rights, "Sex Discrimination: Frequently Asked Questions," <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (accessed Aug. 22, 2019) ("Are all school districts, colleges, and universities covered by Title IX? Generally yes. All public school districts are covered by Title IX because they receive some federal financial assistance and operate education programs. All public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs. There are some private schools that do not receive any federal assistance, and Title IX does not apply to them. Additionally, there are some schools that are specifically exempt from certain parts of Title IX, such as an educational institution that is controlled by a religious organization but only to the extent the application of Title IX would not be consistent with the religious tenets of such organization."). 1186 34 C.F.R. § 100.6(b). 1187 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 5, 18, and 24. 1188 *Id.*, 42. 1189 ED, FY 2018 Budget Request, supra note 1045, at Z-15. 1190 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 20.

<https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html>

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html>

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experienced teachers throughout the district, and providing more live instruction for students.1191 ED OCR also resolved a compliance review of Montana State University Billings after launching an investigation to determine whether the university was discriminating against female students by denying them equal opportunity to participate in athletics, "and whether the university discriminates against male or female students by not awarding athletic financial assistance in proportion to the number of students of each sex participating in the university's athletic programs."1192 Under the resolution agreement, the university must develop a plan to meet the interests and abilities of the underrepresented sex, and submit the plan to ED OCR for review and approval.1193 ED OCR also conducted a compliance review of the San Bernardino County Office of Education in California and entered into a resolution agreement after finding that the county did not have adequate procedures in place to identify students with disabilities.1194 The resolution agreement stipulated that the county ensure that all students with disabilities are appropriately identified and that students with disabilities are provided with appropriate access to public education.1195 Comparative compliance review data for FY 2017 and 2018 was not publicly available at the time of publication of this report. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity Guidance ED OCR issued 38 guidance documents during the Obama Administration.1196 Of these 38, ED OCR issued five during FY 2016 and six in FY 2017 before the change in administration.1197 In comparison, ED OCR during the Trump Administration has issued two guidance documents as of the publication of this report.1198 Secretary DeVos has undertaken a deregulatory push at ED, seeking to roll back many previously issued guidance documents.1199 In both instances of issuing new guidance, as well as in two other instances where it did not affirmatively issue new guidance, the Trump Administration rescinded previously issued guidance. The Trump Administration ED OCR rescinded Title IX guidance on transgender students, guidance on sexual violence and campus sexual misconduct, and several Title VI guidance documents on school discipline and diversity in higher education, among other topics, some of which were previously issued jointly

1191 *Id.* 1192 *Id.*, 30. 1193 *Id.* 1194 *Id.*, 35. 1195 *Id.* 1196 U.S. Dep't of Educ., Office for Civil Rights, "Policy Guidance," <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>. (accessed Jul. 19, 2019) [hereinafter ED OCR, "Policy Guidance"]. 1197 *Id.* 1198 *Id.* 1199 USCCR, Beyond Suspensions, supra note 1004, at 147-50; Andrew Kreighbaum, "DeVos to Announce New Push for Deregulation, Innovation," Inside Higher Ed, Jul. 30, 2018, <https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>

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by ED OCR and DOJ.1200 In only two of these instances has the Trump Administration affirmatively issued replacement guidance: in September 2017, ED OCR issued interim guidance while withdrawing prior guidance related to campus sexual violence,1201 and in December 2018 ED OCR issued a questions and answers document related to race discrimination in school discipline while withdrawing prior guidance on the same issue.1202 Fatima Goss Graves, President and CEO of the National Women's Law Center, characterized the rescission of guidance as ED OCR not meeting its duty to protect students from discrimination, writing that "since February 2017, OCR has retreated from its proactive commitment to enforcing civil rights."1203 The Commission received testimony from Shep Melnick criticizing ED OCR's use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that "their legal status remains ambiguous."1204 But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.1205 Also, as Judge Posner has noted, "Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement."1206 While guidance documents are not themselves legally binding1207—binding parties depends on the underlying law they rely on1208—the Commission has found that they are an important tool for effective civil rights enforcement.1209 In April 2017, President Trump signed an Executive Order aimed at decreasing the federal government's role in education, directing the Secretary of Education to study federal overreach in

1200 U.S. Dep't of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Guidance on Sexual Violence and Issues Q&A on Campus Sexual Misconduct (Sep. 22, 2017); DOJ and ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence, supra note 829; U.S. Dep't of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>; U.S. Dep't of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Jul. 3, 2018),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>. 1201 ED, Dear Colleague Letter: OCR Guidance on Sexual Violence, supra note 829. 1202 ED OCR, "Policy Guidance," supra note 1196. 1203 Goss Graves Statement, at 2. 1204 Shep Melneke, Thomas P. O'Neill, Jr. Professor of American Politics, Boston College, testimony, Federal Civil Rights Enforcement Briefing, p. 242. 1205 See Perez v. Mortgage Bankers Ass'n., 135 S.Ct. at 1203-04. 1206 Hocht v. U.S. Dep't of Agriculture, 82 F.3d 165, 167 (7th Cir. 1996). 1207 U.S. Gov't Accountability Office, Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices, p. 2 (Mar. 14, 2018) <https://www.gao.gov/assets/700/690650.pdf>. 1208 See, e.g., USCCR, Beyond Suspensions, supra note 1004, at n. 23 ("While these [Dear Colleague or guidance] letters do not set legal precedents, they help to inform the public and education officials of the Education Department's (and, where appropriate, the Justice Department's) stance on major issues, the legal standards and requirements of schools, and solutions that the Department believes educational institutions should implement. See U.S. Dep't of Educ., "U.S. Dep't of Education Releases Guidance on Civil Rights of Students with Disabilities" (Dec. 26, 2016), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities> (explaining that "[t]hese guidance documents clarify the rights of students with disabilities and the responsibilities of educational institutions in ensuring that all students have the opportunity to learn"). 1209 *Ibid.*; see USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 48-49.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>
<https://www.gao.gov/assets/700/690650.pdf>
<https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities>
<https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities>

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education.1210 As a result, ED appointed a Regulatory Reform Task Force to analyze and identify Department regulations and policy guidance for "potential repeal, modification, or replacement.1211 In October 2018, ED announced that it was in the process of withdrawing approximately 600 "out-of-date" pieces of subregulatory guidance, including OCR guidance, which ED announced have either been replaced or have been determined to be no longer in effect.1212 The Policy Dissemination section below provides further details. In written testimony to the Commission, Debbie Osgood, partner at the law firm of Hogan Marren Babbo & Rose, Ltd and former National Enforcement Director at ED OCR, indicated how helpful it is to school communities to know what the law is and how OCR will enforce it in order to assist in voluntary compliance with the law.1213 Similarly, former supervisory attorney at ED OCR and current Of Counsel at Ballard Spahr LLP, Olabisi Okubadejo noted that guidance documents published by ED OCR are beneficial to schools in that guidance provides notice of educational institutions' obligations under the law.1214 Technical Assistance ED OCR is required by regulation to provide "assistance and guidance to recipients to help them comply voluntarily" with the requirements of Title VI of the Civil Rights Act of 1964.1215 Pursuant to that requirement, ED OCR makes available civil rights tutorials and technical assistance on its website.1216 ED OCR provides technical assistance in the form of frequently asked questions regarding race and national origin discrimination, sex discrimination, disability discrimination, and age discrimination.1217 As ED OCR noted in its 2003 annual report, "[ED] OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information."1218

1210 Mary Emily O'Hara, "Trump Signs Executive Order Reviewing Federal Role in Education," NBC News, Apr. 26, 2017, <https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>. 1211 U.S. Dep't of Educ., "Department of Education Withdraws Outdated Subregulatory Guidance," Oct. 27, 2017, <https://content.govdelivery.com/accounts/USED/bulletins/1c07774>. 1212 *Ibid.* 1213 Osgood Statement, at 5-6. 1214 *Ibid.*, 3-4. 1215 34 C.F.R. § 100.6. 1216 U.S. Dep't of Educ., "Civil Rights Tutorials and Technical Assistance" <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/cr-ta.html> (accessed Jul. 19, 2019). 1217 *Ibid.* 1218 U.S. Dep't of Educ., Office for Civil Rights Annual Report to Congress FY 2003, December 2004, p. 15, <https://www2.ed.gov/about/offices/list/ocr/anrpt2003/index.html>.

<https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>
<https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>
<https://content.govdelivery.com/accounts/USED/bulletins/1c07774>
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/cr-ta.html>
<https://www2.ed.gov/about/offices/list/ocr/anrpt2003/index.html>

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Outreach ED OCR engages in outreach to its regulated community and potentially affected populations through various program. According to ED OCR's FY 2016 annual report, for example, the office convened university presidents to discuss racial harassment on college and university campuses.1219 Additionally, in FY 2016, "OCR provided more than 295 technical assistance sessions to a wide range of stakeholders – including schools and districts, state education agencies, colleges and universities, parent groups, nonprofit and advocacy organizations, and other federal agencies – and conducted other outreach to galvanize action on important civil rights topics."1220 Information about ED OCR outreach was not similarly available for FY 2017 or FY 2018.1221 Interaction and Coordination with External Agencies and Organizations in ED OCR's most recent available annual report covering FY 2016, the office noted that at that time it had several agreements with other federal agencies, including hosting a conference with the U.S. Department of Housing and Urban Development and U.S. Department of Transportation "to engage in a dialogue about the value of diversity and opportunity in schools and neighborhoods, and to identify effective paths to increase and sustain healthy, non-discriminatory, racially and socioeconomically diverse school environments."1222 ED OCR also participated in the Obama Administration's United State of Women Summit, the White House Task Force to Protect Students from Sexual Assault, and the Asian American and Pacific Islander Bullying Prevention Task Force.1223 ED OCR has not released an annual report since the FY 2016 report, making it difficult to determine whether ED OCR continues to engage in interaction and coordination with other federal government agencies, or if any of the above initiatives remain operative. ED OCR has agreements with several other agencies related to enforcement of civil rights laws. For example, ED OCR and DOJ CRT signed a memorandum of understanding in 2014 agreeing to a "collaborative interagency effort to vigorously enforce Title IX."1224 Also, ED OCR delegates the authority to processes certain complaints against proprietary schools to either the U.S. Department of Veterans Affairs or the U.S. Department of Health and Human Services depending on the type of school.1225 ED OCR cited in its Interrogatory response an agreement to share data and information with HHS regarding ongoing investigations at Michigan State University.1226 Furthermore, for any complaints received by ED OCR alleging certain violations of the ADA over

1219 ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 11. 1220 *Ibid.*, 5. 1221 See infra Chapter 3, Interaction and Coordination with External Agencies and Organizations. 1222 ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 11. 1223 *Ibid.*, 11. 1224 U.S. Dep't of Educ. and U.S. Dep't of Justice, Memorandum of Understanding between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (Apr. 29, 2014) https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf. 1225 U.S. Dep't of Educ., Response to USCCR Interrogatories, at 8. 1226 *Ibid.*

https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf
https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf

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which ED OCR does not have jurisdiction, or when ED OCR is unable to negotiate a resolution agreement with a funding recipient, ED OCR will refer the matter to DOJ.1227 Research, Data Collections, and Reporting Since 1968, ED has conducted the Civil Rights Data Collection (CRDC) to collect information on civil rights issues in public schools, including enrollment information, educational programs, limited English proficiency, and disability.1228 Authority for the CRDC comes directly from its statute, however ED OCR is not explicitly required to conduct the biannual data collection.1229 During the Obama Administration, ED OCR stated that it improved the CRDC including making the collection more inclusive of key indicators of equity and opportunity.1230 In July of 2017, ED OCR published notice in the Federal Register of proposed modifications to ED OCR's data collection procedures through CRDC in preparation for the biannual CRDC.1231 ED stated the changes aim to reduce the burden data collection places on school districts. The purpose of data collection through CRDC is to obtain data regarding implementation of civil rights laws that provide equal educational opportunity to all.1232 The 2017-2018 CRDC added data collection on computer science classes and school internet access, while eliminating the need for schools to provide data on high school equivalency course exam results, Advanced Placement course exam results, and student chronic absenteeism.1233 Data collected through CRDC is publicly available through the CRDC Reporting Tool.1234 During the Obama Administration, ED OCR expanded the CRDC to be more accessible to the public for the purpose of transparency.1235 This boost in transparency provides a resource for institutions and the public to see the data collected by ED OCR.

1227 *Id.* 1228 U.S. Dep't of Educ., "Civil Rights Data Collection," Sep. 25, 2018, <https://www2.ed.gov/about/offices/list/ocr/data.html?src=r>. 1229 20 U.S.C. 3413(c)(1); see also 34 C.F.R. §§ 100.6(b), 106.71, 104.61 (requiring recipients of ED OCR's federal financial assistance to submit to ED OCR "complete and accurate compliance reports at such times, and in such form and containing such information" as ED OCR "may determine to be necessary to enable [ED OCR] to ascertain whether the recipient has complied or is complying" with these laws and implementing regulations). 1230 U.S. Dep't of Educ., Office for Civil Rights, Achieving Simple Justice: Highlights of Activities, Office of Civil Rights 2009-2016, pp. 2-3 <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf> [hereinafter ED OCR, Achieving Simple Justice]; ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 12. 1231 Mandatory Civil Rights Data Collection, 82 Fed. Reg. 33,880 (Jul. 21, 2017). ED OCR publishes notice in the Federal Register ahead of each CRDC to note changes made from the previous CRDC. 1232 *Id.* 1233 U.S. Dep't of Educ., "Civil Rights Data Collection," <https://ocrdata.ed.gov/>. 1234 *Ibid.* 1235 ED OCR, Achieving Simple Justice, supra note 1230, at 2.

<https://www2.ed.gov/about/offices/list/ocr/data.html?src=r>
<https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>
<https://ocrdata.ed.gov/>

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ED OCR also collects data during the complaint process through ED OCR's case management system, which ED OCR fully implemented in 2003.1236 The case management system collects demographic information, as well as the bases upon which complaints were filed and other factual information gathered during the investigation of a complaint.1237 The raw data gathered by ED OCR's case management system is not publicly available, although information gathered from the case management system may be used in publicly available ED OCR reports.1238 The Collection of Racial and Ethnic Data and Data Disaggregation During FY 2016 to FY 2018, ED OCR revised its racial and ethnic data collection in case investigations. This revision was based in part on Executive Order 13,515 of 2009, which called for increased participation of Asian Americans and Pacific Islanders (AAPI) in federal programs, and aimed to, among other things, advance research, data collection, and data analysis for AAPI populations and subpopulations.1239 With respect to collecting and analyzing data pertinent to case/complaint processing in relation to Executive Order 13,515, ED OCR indicated the following:

In investigating and resolving cases, ED OCR's data requests and analysis of data, including racial and ethnic data, depends on the allegations and the matters pertinent to the case. ED OCR does not, however, read Executive Order 13,515 as requiring ED OCR, in its collection and analysis of data in case investigations, to collect and disaggregate its data on certain racial and ethnic populations, including Asian Americans and Pacific Islanders, where such information and analysis is not relevant to the allegations of a particular case.1240

1236 U.S. Dep't of Educ., Privacy Impact Assessment for the Case and Activity Management System, Jun. 26, 2017, p. 2, <https://www2.ed.gov/notices/pia/cams.pdf> [hereinafter ED, Privacy Impact Assessment]; ED OCR, FY 2001 and 2002 Annual Report, supra note 1183. 1237 ED, Privacy Impact Assessment, supra note 1236, at 2. 1238 See, e.g., ED OCR, Achieving Simple Justice, supra note 1230. 1239 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 14, 2009). 1240 U.S. Dep't of Educ., Response to USCCR Interrogatory No. 14, at 20.

<https://www2.ed.gov/notices/pia/cams.pdf>

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Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Health and Human Services (HHS) in April 1953 through the Reorganization Plan No. 1 of 1953.1241 The Secretary of Health and Human Services, Alex M. Azar II, who was sworn in on January 29, 2018, currently leads HHS.1242 HHS' Strategic Plan defines its mission as to "enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services."1243 HHS has a number of operating divisions such as the Administration for Children and Families (ACF), Centers for Disease Control (CDC), Centers for Medicaid and Medicare Services (CMS), Indian Health Services (IHS), and the National Institutes of Health (NIH), among others.1244 Through the Administration for Children and Families, HHS also administers the Office of Refugee Resettlement (ORR);1245 some of the civil rights issues arising under ORR's housing of migrants and refugees are discussed in Chapter 8 (U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties).1246 The Office for Civil Rights (HHS OCR) told the Commission that it is the only HHS office with authority to enforce civil rights laws against external entities as well as enforce civil rights authorities that apply to HHS.1247 HHS OCR enforces laws that prohibit discrimination based on race, color, national origin, disability, age, sex, religion, and the exercise of conscience for individuals who receive services from HHS-funded or HHS-administered programs, including healthcare providers.1248 In May 2019, HHS OCR updated its mission statement:

As an HHS law enforcement agency, OCR investigates complaints, conducts compliance reviews, vindicates rights, develops policy, promulgates regulations, provides technical assistance, and educates the public concerning our nation's civil rights, conscience and religious freedom, and health information privacy and security laws. OCR accomplishes this by:

1241 42 U.S.C. §3501, Pub. L. No. 88-426, 67 Stat. 631 (1953) (HHS was originally called the Department of Health, Education, and Welfare). 1242 U.S. Dep't of Health and Human Services, "HHS Secretary," <https://www.hhs.gov/about/leadership/secretary/index.html> (accessed Jun. 5, 2019). 1243 U.S. Dep't of Health and Human Services, "Introduction: About HHS," <https://www.hhs.gov/about/strategic-plan/introduction/index.html> (accessed Jul. 30, 2019). 1244 See U.S. Dep't of Health and Human Services, "HHS Agencies & Offices," <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (accessed Jul. 30, 2019). 1245 See U.S. Dep't of Health and Human Services, Administration for Children & Families, Office of Refugee Resettlement, "Office of Refugee Resettlement," <https://www.acf.hhs.gov/orr> (accessed Jul. 30, 2019). 1246 See infra notes 2368-2425 (discussing Zero Tolerance and Family Separation; Detention of Migrant Children). 1247 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1248 See generally, 45 C.F.R. §§ 80; 83; 84; 85; 86; 88; 91 and 92.

<https://www.hhs.gov/about/leadership/secretary/index.html>
<https://www.hhs.gov/about/strategic-plan/introduction/index.html>

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Ensuring that recipients of HHS federal financial assistance comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex and religion. Ensuring that HHS, state and local governments, health care providers, health plans, and others comply with federal laws that guarantee the protection of conscience and free exercise of religion and prohibit coercion and religious discrimination in HHS-conducted or funded programs. Ensuring the practices of health care providers, health plans, healthcare clearinghouses, and their business associates adhere to federal privacy, security, and breach notification regulations under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, through the investigation of complaints, self-reported breaches, compliance reviews, and audits.1249

HHS OCR has independent duties and jurisdiction to enforce a wide variety of civil rights laws.1250 HHS OCR currently describes its role as ensuring that “individuals receiving services from HHS- funded programs are not subject to unlawful discrimination, providers and others can exercise their conscience rights, and individuals can exercise their rights to access their health information and can trust the privacy and security of their health information.”1251 HHS OCR states that it advances its mission by “rooting out invidious discrimination and removing unlawful barriers to HHS- funded services.”1252 Furthermore, following creation of a new unit it terms the “conscience protection unit” in 2018, HHS OCR indicates that “by ensuring individuals and institutions can exercise their conscience rights, HHS OCR furthers justice and tolerance in a pluralistic society.”1253

1249 U.S. Dep’t of Health and Human Services, “OCR Leadership,” <https://www.hhs.gov/ocr/about-us/leadership/index.html> (accessed Jul. 22, 2019); see infra note 1322. 1250 See 45 C.F.R. §§ 80.1-80.13 (1964). 1251 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1. 1252 Ibid. 1253 Ibid.

<https://www.hhs.gov/ocr/about-us/leadership/index.html>
<https://www.hhs.gov/ocr/about-us/leadership/index.html>

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Through HHS OCR, HHS enforces the following major civil rights statutes:

- Title VI of Civil Rights Act of 19641254 • Section 504 of the Rehabilitation Act1255 • Title IX of the Education Amendments Act of 19721256 • The Age Discrimination Act of 19751257 • Titles VI and XVI of the Public Health Service Act1258 • Section 1557 of the Patient Protection and Affordable Care Act1259 • The Americans with Disabilities Act1260

HHS OCR also enforces several additional civil rights laws:1261

- Section 508 of the Rehabilitation Act of 1973, which requires federal departments to ensure that persons with disabilities have equal access to publicly available electronic information and technology.1262
- Section 1808(c) of the Small Business Job Protection Act of 1996, which prohibits federally funded child welfare entities from discrimination on the basis of race, color, and national origin when making child placement decisions in adoption and foster care.1263
- Sections 794 and 855 of the PHSA, which prohibit sex-based discrimination in federally assisted health training programs.1264

1254 42 U.S.C. § 2000d. 1255 29 U.S.C. § 794. 1256 20 U.S.C. § 1681. 1257 42 U.S.C. § 6101. 1258 Id. §§ 291, 291a. 1259 Id. § 18116 (codifying section 1557 of the ACA):

Except as otherwise provided for in this title [the ACA] (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

1260 42 U.S.C. § 12132. 1261 See U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 10-16. 1262 29 U.S.C. § 794. 1263 42 U.S.C. § 1996b. 1264 Id. §§ 295m, 296g.

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- Section 508 of the Social Security Act, which bans discrimination based on race, color, national origin, sex, disability, and religion in the Maternal and Child Health Services Block Grant.1265
- Section 533 of the PHSA, which prohibits discrimination based on race, color, national origin, sex, disability, and religion in the Projects for Assistance in Transition from Homelessness program.1266
- Section 1908 of the PHSA, which prohibits discrimination based on race, color, national origin, sex, disability, and religion programs and services funded by Preventative Health and Health Services Block Grants.1267
- Section 1947 of the PHSA, which prohibits discrimination on the basis of age, race, color, national origin, disability, sex, (and, in the case of a woman, pregnancy), and religion in programs and activities funded by Community Mental Health Services Block Grants and Substance Abuse Prevention and Treatment Block Grants.1268
- Family Violence Prevention and Services Act, which bans discrimination based on age, race, color, national origin, disability, sex, and religion in services funded by the statute, such as programs to prevent incidents of family, domestic, and dating violence, to provide support services for victims of such violence, and to provide specialized services for children exposed to such violence.1269
- Low-Income Home Energy Assistance Act of 1981, which bans discrimination based on race, color, national origin, and sex in programs and activities funded by the statute (including grants to states to assist low-income households and those that pay a high proportion of their income for home energy).1270
- Community Services Block Grant, which bans the discrimination on the basis of age, race, color, national origin, and sex in programs and activities funded by the block grant.1271
- Communications Act of 1934, which prohibits discrimination on the basis of age, race, color, national origin, and sex by federally funded public telecommunications entities who conduct demonstration projects for developing techniques of using non-broadcast telecommunications facilities.1272

Enforcement Tools The agency enforcement tools HHS OCR has specific legal authority to use are:

- Complaint resolution1273

1265 Id. § 708. 1266 Id. § 290cc-33. 1267 Id. § 300w-7. 1268 Id. § 300x-57. 1269 Id. § 10406. 1270 Id. § 8625. 1271 Id. § 9918. 1272 Id. § 398. 1273 45 C.F.R. §§ 80.7(b); 83.20; 84.61; 85.61(d); 86.71; 88.2; 91.42; 92.301.

199 Chapter 4: U.S. Department of Health and Human Services

- Agency-initiated charges1274 • Proactive compliance evaluations1275 • Testing1276 • Guidance or other policy documents1277 • Regulations1278 • Technical assistance1279 • Publicity1280 • Research, data collection, and reporting1281 • Collaboration/partnership with state/local agencies1282 • Collaboration/partnership with other federal agencies1283 • Strategic Plans1284 • Annual Reports1285

While HHS OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits HHS OCR from engaging in, for example, outreach to regulated communities, as described in further detail below. Budget and Staffing HHS’s budget is earmarked for HHS OCR’s role within the department for the purposes of: defending the public’s right to nondiscriminatory access to HHS funded health and human services, conscience and religious freedom, and access to, and the privacy and security of, individually identifiable health information.1286

1274 Id. § 80.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process). 1275 Id. §§ 80.7(a); 85.62(b); 91.46; 92.303(c) (conduct of investigations). 1276 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23 (“Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws.”). 1277 45 C.F.R. § 80.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1278 Id. § 90.31; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1279 45 C.F.R. § 80.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1280 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information). 1281 Id. § 42.406 (regarding data collection and information sharing). 1282 45 C.F.R. § 80.6(a) (“The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.”). 1283 28 C.F.R. § 42.413. 1284 GPRM Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010). 1285 Id. § 1115(b). 1286 U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2019 Congressional Justification, 2019, p. 7, <https://www.hhs.gov/sites/default/files/ty2019-ocr-congressional-justification-accessible.pdf> [hereinafter HHS, OCR FY 19 Congressional Justification].

<https://www.hhs.gov/sites/default/files/ty2019-ocr-congressional-justification-accessible.pdf>

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According to HHS, money allocated to HHS OCR’s Civil Rights Division (CRD) is used primarily for civil rights policy development, but HHS stated that CRD also functions as an integral part of HHS OCR’s overall civil rights enforcement program by addressing novel issues of law and enforcement policy, training HHS OCR’s civil rights investigators, coordinating enforcement with other Federal civil rights enforcement agencies, and ensuring that HHS’ civil rights authorities are enforced uniformly across all regional offices – which consumes about 25% of CRD’s time and resources.1287 Approximately 25% of money allocated to the Operations and Resources Division (ORD) (HHS OCR’s direct enforcement offices) is used for civil rights enforcement, the remaining 75% of money allocated to ORD is used for enforcement of HIPAA (health care privacy act) claims.1288 In contrast, 100% of money allocated to HHS OCR’s newly created Conscience and Religious Freedom Division (CRFD) is used for civil rights enforcement.1289 See Figure 4.1 and Table 4.1. In FY 2016, HHS requested a total of \$42.70 million for HHS OCR.1290 Congress allocated to HHS OCR a total of \$38.79 million,1291 which included allocations of \$3.65 million to CRD and \$31.49 million to ORD.1292 In FY 2017, HHS requested a total of \$42.70 million for OCR, the same as FY 2016.1293 In FY 2017, Congress allocated to HHS OCR a total of \$38.70 million,1294 which included allocations of \$4.525 million to CRD and \$30.027 million to ORD.1295 Between FY 2016 and FY 2017, funds for CRD (policy development) increased by \$873,000 and funds decreased for ORD (direct investigations) by \$1.468 million.1296 In FY 2018, HHS requested a total of \$32.53 million for HHS OCR.1297 In FY 2018, Congress appropriated to HHS OCR a total of \$38.79 million,1298 which included allocations of \$4.565 million to CRD, \$28.566 million to ORD, and \$602,000 to support the creation of CRFD.1299 For FY 2018, HHS OCR requested \$602,000 in federal funding for CRFD’s budget.1300

1287 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1288 Ibid. 1289 Ibid., 48. 1290 U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2016 Congressional Justification, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>. 1291 U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2018 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf [hereinafter HHS, OCR FY 2018 Congressional Justification]. 1292 Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. (2015); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1293 U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2017 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/ty2017-budget-justification-ocr_1.pdf. 1294 HHS, OCR FY 19 Congressional Justification, supra note 1286, at 13. 1295 Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1296 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1297 HHS, OCR FY 2018 Congressional Justification, supra note 1291, at 12. 1298 U.S. Dep’t of Health & Human Servs., Fiscal Year 2020 Justification of Estimates for Appropriations Committees, p. 9, <https://www.hhs.gov/sites/default/files/ty-2020-cj-compilation.pdf>. 1299 HHS, OCR FY 2018 Congressional Justification, supra note 1291, at 7; U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48. 1300 U.S. Dep’t of Health and Human Servs., Response to Interrogatory No. 9, at 48.

<https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>
https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf
https://www.hhs.gov/sites/default/files/ty2017-budget-justification-ocr_1.pdf
<https://www.hhs.gov/sites/default/files/ty-2020-cj-compilation.pdf>

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Figure 4.1: Requested and Allocated Budget for HHS OCR

Source: U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2016 Congressional Justification, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>; U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2017 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/ty2017-budget-justification-ocr_1.pdf; U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2018 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf; U.S. Dep’t of Health & Human Servs., OCR Fiscal Year 2019 Congressional Justification, p. 13, <https://www.hhs.gov/sites/default/files/ty2019-ocr-congressional-justification-accessible.pdf>; U.S. Dep’t of Health & Human Servs., Fiscal Year 2020 Justification of Estimates for Appropriations Committees, p. 9, <https://www.hhs.gov/sites/default/files/ty-2020-cj-compilation.pdf>.

From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created CRFD, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices, however, Congress' allocation to HHS OCR remained constant at \$38.8 million. From FY 2016 to FY 2018, HHS OCR staffing has remained relatively constant for its policy development office, but decreased by more than 10 percent in its enforcement offices. Within HHS OCR's enforcement offices, approximately 25 percent of the work is dedicated to civil rights enforcement, and 75 percent to HIPAA compliance and enforcement.1301 HHS OCR reported that 142 staff members and 69 contractors located throughout HHS OCR work part time on civil rights issues, along with eight full time contractors at Headquarters.1302

1301 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49; U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1302 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

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\$32,530,000
\$38,798,000 \$38,708,000 \$38,798,000
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\$20,000,000
\$25,000,000
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\$35,000,000
\$40,000,000
\$45,000,000
FY 2016 FY 2017 FY 2018

Figure 4.1: Requested and Allocated Budget for HHS OCR FY 2016 to FY 2018

Requested Allocated

<https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>
https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf
https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf
https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf
<https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>
<https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>

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Table 4.1: Staffing Levels in CRD, ORD, and CRFD between FY 2016 and FY 2018 FTE Staffing End of FY16 End of FY17 End of FY18 CRD 17 15

(-2) 16 (+1)
ORD 126 114 (-12)
110 (-4)
CRFD1303 0 0 1 (+1)

Source: U.S. Department of Health and Human Services

In FY 2016, CRD had a total of 17 employees and ORD had a total of 126 employees.1304 In FY 2017, CRD had two fewer employees at a total of 15 and ORD had 12 fewer employees at 114.1305 In FY 2018, CRD had one more employee at a total of 16, ORD had four fewer employees at a total of 110, and CRFD had one employee.1306 However, HHS OCR asserts the decreases in personnel have not affected the effectiveness of the divisions impacted between FY 2016 and FY 2017.1307 In June of 2019, HHS OCR employed 24 staff members who work full time on civil rights enforcement who are based at HHS OCR Headquarters and are assigned to the Conscience and Religious Freedom Division and the Headquarters Civil Rights Division.1308 Their positions are described in the table below.

Table 4.2: Staffing Levels at HHS OCR Headquarters 2018-2019 Title & Grade 2018 2019 Deputy Director, SES 2 2 Associate Deputy Director, GS-15 1 Senior Advisor 1 2 Supervisory Civil Rights Analyst, GS-15 4 7 Civil Rights Analyst, GS-14 5 7 Civil Rights Analyst, GS-13 1 1 Civil Rights Analyst, GS-12 1 2 Civil Rights Analyst, GS-11 1 1 Civil Rights Analyst, GS-9 1 Program Support Assistant, GS-11 1 1 Total 17 24

Source: U.S. Dep't of Health and Human Services. "GS" stands for "General Schedule" and refers to the classification and pay system that applies to the majority of federal employees. Office of Personnel Management, Pay & Leave, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> (accessed Aug. 15, 2019).

1303 See HHS, OCR FY 19 Congressional Justification, supra note 1286. 1304 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48. 1305 Ibid. 1306 Ibid. 1307 Ibid. 1308 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

<https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/>

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As of February 2018, HHS OCR stated that it had hired one staff member for CRFD and that it intended to add more career staff "in the near future" for CRFD.1309 In contrast, staffing in the HHS OCR's Operations and Resources Division (ORD) was reduced by two employees.1310 Assessment Prioritization for Civil Rights Agency-wide HHS OCR is a department within the HHS Office of the Secretary, and is led by a Director, rather than an Assistant Secretary. The Director of HHS OCR reports to the Secretary of Health and Human Services. The Director of HHS OCR is appointed by the President and does not require Senate confirmation.1311 HHS OCR is led by its current Director, Roger Severino, whom President Trump appointed to the position in early 2017.1312 The current organizational structure of OCR is as follows (see Figure 4.2):

1309 Ibid. 1310 Ibid. 1311 45 C.F.R. § 85.3 (the Director of the Office for Civil Rights serves concurrently as the Special Assistant to the Secretary for Civil Rights). 1312 U.S. Dep't of Health & Human Servs., "Roger Severino," <https://www.hhs.gov/about/leadership/roger-severino/index.html> (accessed Jun. 10, 2019); Heather Landi, "Trump Administration Appoints Roger Severino to Head Office for Civil Rights," Healthcare Innovation, Mar. 27, 2017, <https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>. (This position does not require Senate confirmation)

<https://www.hhs.gov/about/leadership/roger-severino/index.html>
<https://www.hhs.gov/about/leadership/roger-severino/index.html>
<https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>
<https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>

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Figure 4.2: Organizational Chart for OCR

Source: U.S. Dep't of Health and Human Services, "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>.

The Director is supported by the Principal Deputy Director, General Counsel Civil Rights Division, and five other Senior Executives who lead four OCR divisions and eight regional offices.1313 The following offices and personnel report to the Office of the Director:

• Principal Deputy Director • Office of the Chief of Staff • Office of the Deputy Director of Civil Rights • Office of the Deputy Director for Conscience and Religious Freedom • Office of the Deputy Director for Health Information Privacy • Office of the Deputy Director for Operations and Resources1314

1313 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 9. 1314 U.S. Dep't of Health & Human Servs., "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html> (accessed Jun. 10, 2019).

<https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>
<https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>

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The majority of HHS OCR's enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR's eight regional offices, which are all a part of HHS OCR's Operations and Resources Division (ORD):

• New England: Connecticut; Maine, Massachusetts; New Hampshire; Rhode Island; Vermont

• Eastern and Caribbean: New Jersey; New York; Puerto Rico; Virgin Islands • Mid-Atlantic: Delaware; District of Columbia; Pennsylvania; Virginia; West Virginia • Southeast: Alabama; Atlanta; Florida; Georgia; Kentucky; Mississippi; North Carolina;

South Carolina; Tennessee • Midwest: Illinois; Indiana; Iowa; Kansas; Michigan; Minnesota; Missouri; Nebraska;

Ohio; Wisconsin • Southwest: Arkansas; Louisiana; New Mexico; Oklahoma; Texas • Rocky Mountain: Colorado; Montana; North Dakota; South Dakota; Utah; Wyoming • Pacific: Alaska; American Samoa; Arizona; California; Commonwealth of the Northern

Mariana Islands; Federated States of Micronesia; Guam; Hawaii; Idaho; Marshall Islands; Nevada; Oregon; Republic of Palau; Washington

In January 2018, HHS OCR announced that it had changed its organizational structure to reflect its focus on conscience and religious freedom protections, by adding the CRFD.1315 HHS OCR stated that CRFD was a new division "dedicated exclusively to enforcing laws that protect conscience and religious exercise, and that prohibit coercion and religious discrimination in health care and human services."1316 In May of 2019, HHS OCR changed its mission

to emphasize the agency's commitment to religious freedom and to health information privacy.1317 According to news reports, officials said an increase in the number of complaints filed regarding religious freedom, stating that HHS OCR had received 36 such complaints since January 2017 compared with 10 such complaints filed between 2008 and 2017.1318 In HHS OCR's FY 2020 budget justification, the agency reported receiving 1,333 complaints that contained an

1315 Ibid; U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44; U.S. Dep't of Health and Human Servs., "HHS Announces New Conscience and Religious Freedom Division," Jan. 18, 2018, <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>. 1316 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 41. 1317 U.S. Dep't of Health & Human Servs., "OCR Mission and Vision," Oct. 16, 2019, <https://www.hhs.gov/ocr/about-us/mission-vision/index.html> [hereinafter HHS, "OCR Mission and Vision"]; Rachel Bergman, "HHS Office for Civil Rights Overhauled its Mission and Vision Statements on its Website," Sunlight Foundation, May 1, 2019, <https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>. 1318 Emmarie Huettner, "At New Health Office, 'Civil Rights' Means Doctors' Right To Say No To Patients," Kaiser Health News, Mar. 5, 2018, <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>.

<https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>
<https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>
<https://www.hhs.gov/ocr/about-us/mission-vision/index.html>
<https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>
<https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>
<https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>
<https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>

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allegation of a conscience or religious freedom violation during FY 2018.1319 Of those 1,333, HHS OCR retained 784 complaints, 343 of which alleged conscience violations and 441 of which alleged religious freedom violations.1320 In FY 2017, the most recent data available in HHS' FY 19 budget request, HHS OCR received 30,166 complaints overall.1321 HHS OCR previously described its mission as "to improve the health and well-being of people across the nation; to ensure that people have equal access to and the opportunity to participate in and receive services from HHS programs without facing unlawful discrimination; and to protect the privacy and security of health information in accordance with applicable law."1322 Strategic Planning and Self-Evaluation Every four years, HHS is required to produce a strategic plan that lays out the goals and priorities for the department over the next four fiscal years.1323 HHS OCR does not have its own strategic plan, but the agency-wide strategic plan includes objectives and priorities that are handled by HHS OCR. In 2018, HHS published its strategic plan for fiscal years 2018-2022. The plan includes five strategic objectives:

- Strategic Goal 1: Reform, Strengthen, and Modernize the Nation's Healthcare System
- Strategic Goal 2: Protect the Health of Americans Where They Live, Learn, Work, and Play
- Strategic Goal 3: Strengthen the Economic and Social Well-Being of Americans Across

the Lifespan

- Strategic Goal 4: Foster Sound, Sustained Advances in the Sciences
- Strategic Goal 5: Promote Effective and Efficient Management and Stewardship.1324

In line with HHS OCR's move to protect health care providers' right to religious freedom, HHS Strategic Plan, FY 2018 – 2022 has identified several goals and strategies that will help advance this overarching policy priority:

- Improve health care access and expand choices of care and services options. HHS has identified a strategy to "design healthcare options that are responsive to consumer demands, while removing barriers for faith-based and other community-based

1319 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file); HHS OCR's FY 2020 budget justification was not publicly available on its website at the time of publication of this report. 1320 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1321 U.S. Dep't of Health & Human Servs., FY 2019 Budget in Brief, Feb. 19, 2018, p. 124, 1322 HHS, "OCR Mission and Vision," supra note 1317. 1323 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010). 1324 U.S. Dep't of Health & Human Servs., "Strategic Plan FY 2018 - 2022," <https://www.hhs.gov/about/strategic-plan/index.html> (accessed Jul. 23, 2019).

<https://www.hhs.gov/about/strategic-plan/index.html>
<https://www.hhs.gov/about/strategic-plan/index.html>

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providers."1325 Specifically, the plan calls for HHS to implement and "vigorously enforce" Executive Order 13,798, Promoting Free Speech and Religious Liberty, to "reduce burdens on the exercise of religious and moral convictions, promote equal and nondiscriminatory participation by faith-based organizations in HHS-funded or conducted activities, and remove barriers to the full and active engagement of faith-based organizations in the work of HHS through targeted outreach, education, and capacity building."1326

- Strengthen and expand the healthcare workforce to meet diverse needs. HHS has identified a strategy to "support professional development of the healthcare workforce," specifically by "remov[ing] any barriers to, and promot[ing], full participation in the health care workforce by persons and/or organizations with religious beliefs or moral convictions."1327

- Empower people to make more informed healthcare choices. Similarly, HHS has indicated that in order to achieve this goal, barriers to "HHS conducted, regulated, and funded programs and organizations with religious beliefs or moral convictions" must be removed.1328

HHS OCR referred to "Executive Orders 13,771, Reducing Regulation and Controlling Regulatory Costs, and 13,777, Enforcing the Regulatory Reform Agenda," and asserted that HHS "took required steps to reduce regulatory burden" when developing its 2018 strategic plan and civil rights policy priorities.1329 During the time period examined in this report, HHS also operated under the FY 2014-2018 strategic plan.1330 The strategic plan identified seven goals:

1. To help more Americans achieve the security of quality, affordable health care for themselves and for their families;
2. To keep food and medical products safe;
3. To protect against chronic and infectious diseases;
4. To help Americans find jobs;
5. To help parents access affordable child care;
6. To explore the frontiers of cutting-edge biomedical research; and
7. To fulfill our obligations to tribal communities for health care and human services.1331

1325 U.S. Dep't of Health & Human Servs., HHS Strategic Plan, FY 2018 – 2022 Draft, September 2017, p. 14, <https://www.vor.net/images/stories/2017-2018/hhs-draft-strategic-plan-fy2018-2022.pdf>. 1326 Ibid., 15. 1327 Ibid., 17-18. 1328 Ibid., 20. 1329 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17-18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added). 1330 U.S. Dep't of Health and Human Servs., HHS Strategic Plan FY 2014-2018, Mar. 10, 2014, <https://aspe.hhs.gov/system/files/pdf/258821/StrategicPlanFY2014-2018.pdf> [hereinafter HHS, Strategic Plan FY 2014-2018]. 1331 Ibid., 1.

<https://www.vor.net/images/stories/2017-2018/hhs-draft-strategic-plan-fy2018-2022.pdf>
<https://aspe.hhs.gov/system/files/pdf/258821/StrategicPlanFY2014-2018.pdf>

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The 2014 strategic plan identified the need for HHS to continue to collaborate with DOJ to protect the civil rights of people with disabilities and older adults consistent with the Americans with Disabilities Act and the Supreme Court's 1999 decision in Olmstead, which held that the ADA requires that states place persons with disabilities in integrated, community settings when reasonable and appropriate.1332 HHS releases an annual report each year and makes the report publicly available on its website.1333 HHS' FY 2018 annual report identified five goals for the coming year, consistent with the Department's FY 2018-2022 strategic plan:

1. Reform, Strengthen, and Modernize the Nation's Health Care System
2. Protect the Health and Well-Being of Americans Where They Live, Learn, Work, and

Play 3. Strengthen the Economic and Social Well-Being of Americans across the Lifespan 4. Foster Sound, Sustained Advances in the Sciences 5. Promote Effective and Efficient Management and Stewardship1334

Complaint Processing, Agency-Initiated Charges, and Litigation The majority of HHS OCR's enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR's eight regional offices.1335 In resolving an investigation based on a complaint, HHS OCR can engage in early complaint resolution (when allegations are specific to a single injured party/group); provide technical assistance; enter into a voluntary resolution agreement or formal settlement agreement; issue a letter with violation findings, insufficient evidence for findings, or no violation findings; or rely on administrative closure under some circumstances (e.g., complainant withdraws complaint or refuses to cooperate with the investigation).1336 After closing an investigation, HHS OCR can monitor an entity to ensure that it complies with an agreement (voluntary or otherwise). HHS OCR can engage in further enforcement action, including a suspension or termination of HHS funding if entities refuse or fail to comply after HHS OCR has issued violation findings.1337 The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. In February 2019, Axios obtained HHS records detailing the large number of complaints alleging that children were being sexually abused while in the federal government's custody, after being placed in HHS custody by DHS, which was charged with implementing family separation policies by the White House and

1332 42 U.S.C. 12101 Pub. L. 101-336, 104 Stat. 327; Olmstead v. L.C., 527 U.S. 581 (1999); HHS, Strategic Plan FY 2014-2018, supra note 1330, at 53. 1333 U.S. Dep't of Health and Human Services, 2018 Annual Report, 2018, <https://www.hhs.gov/sites/default/files/2018-annual-report.pdf>. 1334 Ibid., 5-6. 1335 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44. 1336 45 C.F.R. §§ 80.7(d), 80.8. 1337 Id. § 80.8(a); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 14.

<https://www.hhs.gov/sites/default/files/2018-annual-report.pdf>

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DOJ.1338 During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities.1339 "From October 2014 to July 2018, the HHS' Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints."1340 Numbers increased after President Trump's "zero tolerance policy" was put in place in April 2018 (this policy is further discussed in Chapter 8 of this report).1341 The New York Times reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, "the largest number of reports during any five-month span in the previous four years."1342 And relevant to external civil rights enforcement, there have been widespread allegations of sexual abuse among HHS contractors. The largest contractor, Southwest Key, provided housing in Arizona, California, and Texas for over 5,000 children, who were not free to leave.1343 It received more than \$1.3 billion in government contracts for housing immigrant children, from 2013-2018. Of the many allegations, the following is elucidating:

A ProPublica story in August [2018] detailed the charges against Levian Pacheco, a former Southwest Key employee who is accused of molesting eight boys at a Mesa shelter over an 11-month period. Pacheco, who is HIV-positive, [was hired] without a background check [and allowed to work] for nearly four months. He was convicted earlier this month of 10 sex offenses connected to the molestation. In response to media attention and complaints, Arizona health officials reviewed records on background checks at every Southwest Key facility across the state. Of the 13 shelters, the state found two additional facilities also had problems with background checks... Arizona health officials also found that Southwest Key hadn't vetted all employees by interviewing their previous employers and hadn't ensured all employee files contained proof of tuberculosis testing. At some facilities, officials discovered

1338 Caitlin Ownes, Stef W. Kight & Harry Stevens, "Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody," AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>. 1339 Ibid. 1340 Ibid. 1341 Ibid.; see also infra notes 2368-2425 (in this report's chapter assessing the Office for Civil Rights and Civil Liberties of the DHS, discussing zero tolerance, migrant family separation, and how DHS detained and then sent thousands of Central American migrant children to be detained in HHS/ORR shelters). 1342 Matthew Haag, "Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says," New York Times, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>. 1343 Topher Sanders and Michael Grabbel, "Humanitarian Crisis" Looms As Arizona Threatens to Revoke Immigrant Children Shelter Licenses," ProPublica, Sep. 21, 2018, <https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>.

<https://www.propublica.org/article/worker-charged-with-sexually-molesting-eight-children-at-immigrant-shelter>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>
<https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>

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bedroom and bathroom doors missing and problems with the size of residents' rooms.1344

state officials stepped in. After the state of Arizona revoked its permits, Southwest Key was forced to close two shelters.1345 In other Southwest Key shelters run under federal government contracts, videos show physical abuse, including staff at the shelters dragging and slapping migrant children.1346 Complaint Enforcement Process HHS OCR describes itself as responsible for “enforcing all HHS’ civil rights authorities,” ensuring that “everyone has access to health care and human services without discrimination or violation of conscience.”1347 (This enforcement responsibility includes responsibility for enforcing HHS’ civil rights authorities in ORR-funded services.1348) HHS OCR states that it achieves these responsibilities by 1) ensuring that all federal funding recipients comply with civil rights laws, 2) enforcing provisions of the ACA that prohibit discrimination in health care programs and activities, and 3) ensuring that all relevant entities comply with federal laws that guarantee “the exercise of religious beliefs and moral convictions in HHS conducted or funded programs.”1349 HHS OCR regulations require that HHS OCR investigate all complaints within its jurisdiction.1350 According to the HHS OCR website, the Department “reviews all complaints that it receives” and investigates all complaints for which it can assert jurisdiction.1351 It further states that “in some cases, OCR may determine that it cannot investigate an individual’s complaint,”1352 and in some cases OCR will investigate even untimely filed complaints if jurisdiction can be established.1353 HHS OCR states that after it receives a complaint, staff conduct an initial review to determine whether HHS OCR has jurisdiction to review and investigate the complaint.1354 If the complaint

1344 Ibid. 1345 Agnel Phillips, “Southwest Key to Close 2 Phoenix-area Migrant Shelters, Pay Fine to State,” Arizona Republic, Oct. 24, 2018, <https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>. 1346 Janice Williams, “Video Shows Migrant Children Physically Abused by Staffers at Arizona Shelter,” Newsweek, Dec. 30, 2018, <https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796>. 1347 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16. 1348 See 45 C.F.R. § 80.2. 1349 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16. 1350 For example, HHS’ Title VI implementing regulation states that “the responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.” 45 C.F.R. § 80.7(c). 1351 U.S. Dep’t of Health & Human Servs., “What [Office of Civil Rights] considers during intake and review of complaint,” <https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html> (accessed Jun. 6, 2019). 1352 Ibid. 1353 Ibid. 1354 45 C.F.R. § 80.7(b); U.S. Dep’t of Health and Human Servs., “How does OCR investigate a civil rights complaint?” <https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>.

<https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>
<https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>
<https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796>
<https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html>
<https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html>
<https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>
<https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>

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is determined to be within HHS OCR’s jurisdiction, then HHS OCR states that its investigators will pursue several different avenues through which to obtain more information, such as interviews, obtaining documentation, independent research or site visits.1355 HHS OCR reports that Regional Managers typically have discretion to select the most appropriate method of case resolution, based on the facts and circumstances of an individual case.1356 HHS OCR’s practice is that prior to a regional office issuing a Voluntary Resolution Agreement, a Violation Letter of Findings, or a Settlement Agreement, a review must take place and HHS OCR Headquarters must approve the necessary course of action.1357 HHS OCR says it uses the same criteria to assess all of its complaints, evaluating to determine whether “it has the legal authority to review and investigate the complaint”:

- Complaint is timely filed
- Complaint is against an entity covered by an authority enforced by OCR
- Complaint alleges issues that allow OCR to determine subject matter jurisdiction
- Complaint is complete

1355 In its response to interrogatories, HHS OCR noted that the number of civil rights complaints submitted via its online portal in 2017 was nearly double the number submitted the same way in FY 2013.1359 In terms of the civil rights cases investigated and/or resolved during the relevant fiscal years, HHS OCR provided charts showing changes in numbers of cases opened, investigated, and not investigated.1360 In FY 2016, HHS OCR opened 4,380 cases, investigated and closed 211 cases, and closed without investigation (i.e., designated as an administrative closure) 4,652 cases.1361 In FY 2017, HHS OCR opened 6,469 cases, investigated and closed 459 cases, and closed without investigation 4,797 cases.1362 In FY 2018, HHS OCR opened 7,692 cases, investigated and closed 858 cases, and closed without investigation 4,861 cases.1363 These data indicate that HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2016 or FY 2017.1364

1355 45 C.F.R. § 80.7(c). 1356 45 C.F.R. § 80.7(d); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25. 1357 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25. 1358 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 12, at 55 (Office of Civil Rights has noted that a complaint is “complete” when it includes a name, signature, and contact information of the complainant; identification of the entity that allegedly violated the complainants civil rights; and a clear allegation of a violation of any laws that are enforced by Office of Civil Rights.). 1359 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56. 1360 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49. 1361 Ibid., 49. 1362 Ibid. 1363 Ibid. (note that Office of Civil Rights included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers likely changed to some extent by the time of publication). 1364 Ibid.; see infra Table 4.5, for more information about processing times for various types of claims.

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Table 4.3: Number of Complaints/Cases Opened and Carried-in 1365 between FY 2016 and FY 2018

Year Carry-Ins Cases Opened Total FY 2016 1910 4360 6290 FY 2017 1418 6469 7887 FY 2018 2630 7692 10322

Source: U.S. Department of Health and Human Services

Table 4.4: Number of Complaints/Cases Investigated and Not Investigated between FY 2016 and FY 2018

Year Number of Complaints/Cases Investigated

Number of Complaints/Cases Not Investigated*

FY 2016 211 4652 FY 2017 459 4797 FY 2018 858 4861

* This number includes cases that were closed. Source: U.S. Department of Health and Human Services

But notably, HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016.1366 In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days.1367 In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively.1368 In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days.1369 In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively.1370 See Table 4.5. Table 4.5: Length of Time to Investigate and Close/Settle Complaints/Cases between FY 2016 and FY 2018

Source: U.S. Department of Health and Human Services

The patterns become especially striking when reviewing the numbers and types of civil rights complaints closed after investigation in FY 2016, FY 2017, and FY 2018. In FY 2016, HHS OCR

1365 HHS OCR defines carried-in cases as cases that were already open when the year began. 1366 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49. 1367 Ibid. 1368 Ibid (note that OCR included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers may have increased at the time of this writing). 1369 Ibid. 1370 Ibid.

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investigated and closed 80 civil rights complaints based on race, color, or national origin.1371 But in FY 2017, HHS OCR investigated and closed 266 civil rights complaints based on race, color, or national origin.1372 In FY 2018, HHS investigated and closed 691 complaints based on race, color, or national origin.1373 Other notable differences included investigation and closure of civil rights complaints based on age in FY 2016 (40), in FY 2017 (113), and in FY 2018 (309); investigation and closure of civil rights complaints based on general disability in FY 2016 (178), in FY 2017 (498), and in FY 2018 (1,107); and investigation and closure of civil rights complaints based on mental health-related disability in FY 2016 (46), in FY 2017 (112), and in FY 2018 (248).1374 These data show a dramatic increase in productivity in processing each of these types of complaints. The data patterns could indicate use of new and effective management strategies to resolve cases more efficiently than they had been resolved in the past. The Commission heard testimony from Leon Rodriguez, who formerly led HHS OCR, about management efficiencies instituted in his tenure and tough decisions between systemic, time-consuming cases versus routine, individual cases.1375 HHS OCR’s case resolution data between FY 2016 through FY 2018 show notable increases in the number of cases closed with finding no violations (rising from 63 cases in FY 2016 to 150 cases in FY 2018), but also dramatic increases in the cases closed after the regulated entity took corrective action (increasing from 42 cases in FY 2016 to 94 cases in FY 2018), or HHS OCR provided technical assistance (increasing from 75 cases in FY 2016 to 157 cases in FY 2018).1376 Proactive Compliance Evaluation HHS OCR pointed out that some regulations “require attempts at achieving voluntary compliance of covered entities before a case is taken to enforcement.”1377 Cases may be initiated through complaints or through proactive compliance monitoring.1378 HHS OCR receives most discrimination complaints from members of the public, but can also exercise its discretion to engage in testing and compliance reviews to investigate violations in the absence of complaints.1379 Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose

1371 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 10(c) in Excel spreadsheet “10 Interrogatory Response US Comm CR.” 1372 Ibid. 1373 Ibid. 1374 Ibid. 1375 Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 69-70. 1376 U.S. Dep’t of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1377 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23. 1378 See 45 C.F.R. § 80.7(a) (periodic compliance reviews of recipients of federal financial assistance); 45 C.F.R. § 80.7(b) (requiring that HHS OCR process complaints of discrimination filed with HHS OCR). 1379 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23; see also 45 C.F.R. § 80.7(a) (regarding compliance reviews).

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as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws.1380 HHS OCR stated that the primary purpose of compliance reviews is to “address comprehensive systemic issues.”1381 HHS OCR periodically initiates compliance reviews to review the policies, procedures, and practices of recipients of federal financial assistance through HHS to ensure that the recipients are in compliance with federal civil rights laws enforced by HHS OCR.1382 In response to Commission Interrogatories, HHS OCR indicated that it views compliance reviews as a way to address discrimination against under-served communities that might not be addressed by individually filed complaints.1383 Moreover, the civil rights office reported that compliance reviews initiated by HHS OCR must be accompanied by a justification memorandum that explains “the purpose of the review and any indicators that a review is needed, including any preliminary evidence.”1384 In some circumstances, HHS OCR will treat a filed complaint as a compliance review when the manager of an HHS OCR regional office determines that:

- The complaint, because of its scope, involves systemic issues;
- OCR identifies compliance concerns during the course of an investigation involving

unrelated issues that were not raised in the original complaint;- A compliance review would be the most effective means of addressing multiple individual

complaints against the same covered entity; or- The complainant decides to withdraw a complaint that includes class allegations.

1385 HHS OCR also reported to the Commission that it resolves compliance reviews through the following processes (many of which are also applicable to complaint resolution):

- Providing Technical Assistance. In order to assist an entity to comply with its obligations under the relevant nondiscrimination laws, HHS OCR may opt to provide technical assistance. Technical assistance can be provided at any stage of an investigation.

- Letter Confirming Voluntary Action Taken/to Be Taken by a Covered Entity. This is an alternative to a more formal method of case resolution, when an entity will voluntarily provide information outlining a plan of action that this entity will take in order to resolve a complaint.

- Voluntary Resolution Agreement. A Voluntary Resolution Agreement may be utilized when complexities of a certain complaint may make it difficult for HHS OCR to monitor

1380 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23-38. 1381 Ibid., 35. 1382 Ibid. 1383 Ibid. 1384 Ibid. 1385 Ibid., 36.

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voluntary action. The Voluntary Resolution Agreements are developed to allow for effective monitoring, accountability, and consistency with HHS OCR guidelines.

- Violation Letter of Findings. The Violation Letter of Findings is used when an investigation uncovers evidence that establishes a violation. HHS OCR describes this tool as particularly useful when an egregious violation is discovered, or when achieving compliance would promote HHS OCR’s enforcement priorities.

- Settlement Agreement. A formalized agreement that outlines certain remedies to ensure that an entity will take certain actions to achieve compliance. A Settlement Agreement is typically negotiated after the Violation Letter of Findings has been issued, and will be considered resolved once the entity has performed all outlined actions to remedy the violation.

• Insufficient Evidence of a Violation Letter. A letter that is issued when HHS OCR has conducted its investigation and found insufficient evidence of a violation, which may cease any further investigation into the matter.

• No Violation Findings Letter. When an investigation has been concluded and an entity has been found to be in compliance, a No Violation Findings Letter will be issued.

• Closing an Investigated Case without Resolution (Administrative Closure). An Administrative Closure will close a complaint without providing a resolution of the allegations under certain circumstances (complainant withdraws the complaint or refuses to cooperate, etc.). An Administrative Closure can occur at any point during the complaint investigation.

• Requests for Reconsideration. Under certain circumstances, when a complainant requests that a complaint be reconsidered, HHS OCR Headquarters has the discretion to reconsider its initial resolution, limited to the issues raised in the complaint or during the investigation, and identifying errors in OCR's consideration of the facts.

• Monitoring. Monitoring is utilized to ensure that all necessary steps are taken to ensure compliance, consistent with the terms of a Voluntary Resolution Agreement, a Settlement Agreement, a voluntary plan of action, or another agreed-upon action.

• Reviews of State Transition Plans for Home and Community Based Services. The goal of these reviews is to ensure that state transition plans (for compliance with Medicaid regulations) do not put patients at risk of unnecessary institutionalization.

• Enforcement Action. Enforcement action is taken when entities have refused to voluntarily comply or failed to achieve voluntary compliance after Violation Findings have been made. Enforcement action may include a suspension or termination of HHS funding or referral to DOJ for judicial processing.¹³⁸⁶

¹³⁸⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23-38.

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Policy Priorities HHS OCR indicated that it "investigate[s] all complaints of discrimination for which it has jurisdiction" and "does not assign priority to enforcement under one civil rights authority over another."¹³⁸⁷ However, HHS OCR acknowledged that it has intensified its focus on policy and enforcement related to "discrimination on the basis of religion and conscience."¹³⁸⁸ Describing conscience and religious freedom as a "neglected area of policy and enforcement," HHS OCR explained its creation of CRFD, "a new Conscience and Religious Freedom Division to more vigorously and effectively enforce existing laws protecting the rights of conscience and religious freedom."¹³⁸⁹ HHS OCR also discussed its commitment to addressing the opioid crisis and its support for child welfare agencies' abilities to comply with civil rights laws.¹³⁹⁰ With regard to how HHS OCR's policy priorities have changed over FY 2016 to FY 2018, HHS OCR stated that "HHS's civil rights-related policy priorities have not changed over the fiscal years in question."¹³⁹¹ However, HHS OCR asserted that it had identified "a significant need to amend" current federal regulations governing its authority to address complaints about discrimination based on religion and conscience.¹³⁹² Policy changes in HHS OCR have included appointing a "Regulatory Reform Officer" to lead a "Regulatory Reform Task Force."¹³⁹³ There were also policy changes such as limiting the interpretation of sex discrimination—as discussed herein, the Trump administration takes the legal position that sex discrimination should not include discrimination on the basis of gender identity and that providers should not have to refrain from discrimination on the basis of gender identity when providing health care.¹³⁹⁴ Section 1557 (Defining the Scope of the Meaning of Sex Discrimination) In 2016, HHS finalized its regulations governing its enforcement of Section 1557 of the Affordable Care Act, Title IX, and other civil rights laws applicable to HHS-funded programs and activities,

¹³⁸⁷ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17. It's regulations require that "the responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part." 45 C.F.R. § 80.7(c). ¹³⁸⁸ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17. ¹³⁸⁹ Ibid. ¹³⁹⁰ Ibid. ¹³⁹¹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 19. ¹³⁹² Ibid., 20. ¹³⁹³ Ibid., 18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added). ¹³⁹⁴ See infra notes 1395-1419 (Section 1557).

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to address sex discrimination.¹³⁹⁵ The HHS rules define sex discrimination as discrimination based on, inter alia, pregnancy, false pregnancy, childbirth or related medical conditions, sex stereotyping, and gender identity.¹³⁹⁶ HHS then defined gender identity as a person's "internal sense of gender, which may be male, female, neither, or a combination of male and female," which "may be different from an individual's sex assigned at birth," and "may or may not conform to social stereotypes associated with a particular gender."¹³⁹⁷ HHS further specified that a transgender individual is a person "whose gender identity is different from the sex assigned" at birth.¹³⁹⁸ However, in its response to Commission interrogatories, HHS OCR stated that as of December 31, 2016, based on a federal court injunction, it no longer enforces Section 1557's provision prohibiting discrimination based on gender identity.¹³⁹⁹ On June 14, 2019, HHS OCR issued a proposed rule that extensively revised Section 1557 of the Patient Protection and Affordable Care Act.¹⁴⁰⁰ One of the most critical revisions proposed was the redefinition of "sex" to refer only to the biological and anatomical differences between males and females as determined at their birth.¹⁴⁰¹ Unlike under the Obama Administration, "gender identity" would no longer be a protected class under the scope of Section 1557's civil rights statutes and Title IX's prohibition of discrimination on the basis of sex.¹⁴⁰² The comment period for this proposed rule ended August 13, 2019.¹⁴⁰³ More than 130,000 comments were submitted and many comments made by stakeholders were critical of the proposed changes.¹⁴⁰⁴ Commenters who oppose the proposed rule cited as their bases the consequences vulnerable patient populations may face as a result of this walk-back on anti-discrimination protections, such as increased barriers for patients seeking gender transition services and care, categorical exclusion by insurers of coverage for certain health care services, and differential treatment by insurers of certain vulnerable patient populations, including LGBT individuals, with respect to certain benefits.¹⁴⁰⁵

¹³⁹⁵ 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016) (Section 1557 covers discrimination on the basis of race, color, national origin, disability, age, and sex); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7. ¹³⁹⁶ 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016). ¹³⁹⁷ Id. ¹³⁹⁸ Id. ¹³⁹⁹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7; see Franciscan Alliance, Inc., et al. v. Burwell, et al., 227 F. Supp. 3d 660 (N.D. Tex. 2016). ¹⁴⁰⁰ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed Jul. 14, 2019). ¹⁴⁰¹ Id. ¹⁴⁰² "HHS Issues Proposed Rulemaking Drastically Revising ACA Section 1557 Nondiscrimination Regulations," Groom Law Group, Jul. 16, 2019, <https://www.groom.com/resources/hhs-issues-proposed-rulemaking-dramatically-revising-aca-section-1557-nondiscrimination-regulations/>. ¹⁴⁰³ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,846. ¹⁴⁰⁴ "HHS Receives Thousands of Comments on Proposed Reversal of Certain Discrimination Protections," Hall Render, Aug. 20, 2019, <https://www.hallrender.com/2019/08/20/hhs-receives-thousands-of-comments-on-proposed-reversal-of-certain-discrimination-protections/> (commenters include the American Medical Association, the American Hospital Association, a coalition of 22 state Attorneys General, America's Essential Hospitals and the Association for Community Affiliated Plans, all of whom oppose the proposed changes). ¹⁴⁰⁵ Ibid.

<https://www.groom.com/resources/hhs-issues-proposed-rulemaking-dramatically-revising-aca-section-1557-nondiscrimination-regulations/>
<https://www.groom.com/resources/hhs-issues-proposed-rulemaking-dramatically-revising-aca-section-1557-nondiscrimination-regulations/>
<https://www.hallrender.com/2019/08/20/hhs-receives-thousands-of-comments-on-proposed-reversal-of-certain-discrimination-protections/>
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In December of 2018, the Commission sent a letter to HHS Secretary Alex Azar urging HHS not to narrowly define gender to a biological, immutable condition determined at birth.¹⁴⁰⁶ Advocacy groups critical of HHS OCR's proposed regulation have said that the policy is tantamount to pretending that transgender people simply do not exist.¹⁴⁰⁷ The policy, if implemented as reported, would likely face legal challenges.¹⁴⁰⁸ LGBT legal advocacy organization Lambda Legal says that the administration-wide rollback of LGBT protections raises serious legal questions, including implications under the Constitution's Equal Protection Clause.¹⁴⁰⁹ The National LGBTQ Task Force, in a written comment to the Commission, expressed concern that the proposed rule would result in an increase in discrimination against the LGBTQ community.¹⁴¹⁰ At the Commission's briefing, then-American University Washington College of Law Professor Anthony Varona testified regarding rollbacks of protections for transgender persons and LGBT persons that "we are not talking about regulatory minutiae or esoteric points of legal theory when we discuss whether the federal government is satisfying its duty to advance civil rights," and further stated that:

The retrenchment and even the antagonism of federal civil rights enforcement efforts is exemplified vividly through the lens focused on the LGBT community, which is significant both in its size and in our vulnerability. For many years, through both Democratic and Republican administrations, agencies throughout the federal government have responded to the bias and harassment faced by LGBT people with meaningful measures aimed at enforcing and protecting our basic civil rights. But then came the Trump administration and what appears to be a deliberate weaponization of regulatory homophobia and transphobia.^[1411]

The Commission also received public comments and data from the National LGBTQ Task Force and the National Center for Transgender Equality, echoing Professor Varona's analysis and detailing the harm to the LGBT and transgender communities stemming from these federal policy

¹⁴⁰⁶ Correspondence from U.S. Comm'n on Civil Rights to U.S. Dep't of Health and Human Services (Dec. 7, 2018), <https://www.usccr.gov/press/2018/12-07-Transgender-Letter-to-Health-Human-Services.pdf>. ¹⁴⁰⁷ Sarah Mervosh & Christine Hauser, "At Rallyes and Online, Transgender People Say They #WontBeErased," The New York Times, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>. ¹⁴⁰⁸ Patricia A. Smith, Olabisi Ladeji Okubadejo, & Maraya N. Pratt, "What Remedy for Transgender Students if HHS Succeeds in Narrowly Redefining Gender Under Title IX?," National Law Review, Oct. 25, 2018, <https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>. ¹⁴⁰⁹ Lambda Legal, Trump Administration Plan to Expand Religious Refusal Rights of Health Professionals: Legal Issues and Concerns, Jan. 18, 2018, <https://www.lambdalegal.org/health-care-analysis>. ¹⁴¹⁰ National LGBTQ Task Force Statement, at 13-14. ¹⁴¹¹ Varona Testimony, Federal Civil Rights Enforcement Briefing, p. 252.

<https://www.usccr.gov/press/2018/12-07-Transgender-Letter-to-Health-Human-Services.pdf>
<https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>
<https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>
<https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>
<https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>
<https://www.lambdalegal.org/health-care-analysis>

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changes.¹⁴¹² A report by the Fenway Institute also documents concerns with the rollback of LGBT nondiscrimination regulations, in health as well as education and housing.¹⁴¹³ In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language.¹⁴¹⁴ Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care.¹⁴¹⁵ The result of this discriminatory treatment, says Shabab Mirza, an LGBT research assistant at the Center for American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers.¹⁴¹⁶ LGBT advocates fear that HHS' creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community.¹⁴¹⁷ Rea Carey, executive director of the National LGBTQ Task Force, says that, "Health professionals have a duty to care for all their patients regardless of one's gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are."¹⁴¹⁸ In a statement to the Commission, the National LGBTQ Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.¹⁴¹⁹ Language Access in Federally Assisted and Conducted Programs HHS OCR reports that it has compiled fully with Executive Order 13,166 (requiring federal agencies to issue guidance under Title VI regarding language access) and also compiled fully with a 2013 memo from the Attorney General, which requested federal agencies to "join DOJ in

¹⁴¹² National LGBTQ Task Force Statement; National Center for Transgender Equality, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Dec. 17, 2018. ¹⁴¹³ Sean Cahill, Tim Want, and Bishar Jenkins, Trump Administration Continued to Advance Discriminatory Policies and Practices Against LGBT People and People Living with HIV in 2018, The Fenway Institute, 2019, pp. 4-6, https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf. ¹⁴¹⁴ Ibid. ¹⁴¹⁵ Ibid. ¹⁴¹⁶ Chris Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," Washington Blade, Jan. 18, 2018, <https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/> [hereinafter Johnson, "New HHS division slammed as tool for anti-LGBT discrimination"]. ¹⁴¹⁷ Julie Moreau, "Trump administration 'exacerbating' LGBT health care discrimination, report says," NBC News, Jul. 24, 2018, <https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>. ¹⁴¹⁸ Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," supra note 1416. ¹⁴¹⁹ National LGBTQ Task Force Statement, at 13-14.

https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf
https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf
<https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/>
<https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/>
<https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>
<https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>

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recommitting to the implementation" of the order.¹⁴²⁰ The 2013 memo outlined action items for each agency in "an effort to secure the federal government's full compliance with Executive Order 13,166, including establishment of agency-wide Language Access Working Groups to, among other things, develop or update agency language access plans."¹⁴²¹ HHS OCR explained its enforcement of national origin protections regarding entities that receive Federal funds through HHS is achieved by enforcing the Title VI statute and HHS's Title VI implementing regulations. HHS explained that its Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons "helps recipients of HHS financial assistance voluntarily comply with Title VI and thereby reduce discriminatory barriers" to services and programs.¹⁴²² In the context of public education, the Supreme Court has held, based on civil rights regulatory language that HHS still operates under,¹⁴²³ that recipients of federal funding must affirmatively provide language access so that students would have meaningful

access.1424 With regard to recipients of federal funds, compliance with the underlying rules of Title VI against national origin discrimination is subject to a “meaningful access” standard.1425 The meaningful access standard is codified in federal regulations, HHS OCR is obligated to enforce these regulations, as recipients of HHS funding must provide meaningful access to LEP persons.1426

1420 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1 (citing U.S. Dep’t of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166 (Feb. 17, 2011), https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf). Exec. Order No. 13,166 seeks to improve access to services for persons with limited English proficiency. 1421 U.S. Dep’t of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166, (Feb. 17, 2011), p. 2, https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf. 1422 Ibid. 1423 At the time of the Supreme Court’s decision, it evaluated the Title VI regulations of the Department of Health, Education, and Welfare (HEW). That Department has since been split into the Departments of Education and Health and Human Services; the underlying regulation, though, continues to apply to HHS. See 45 C.F.R. 80.3(b)(2) (2005). 1424 Lau v. Nichols, 414 U.S. at 568. 1425 See, e.g., Sandoval v. Hagan, 197 F.3d 484, 510-11 (11th Cir. 1999) (holding that English-only policy for driver’s license applications constituted national origin discrimination under Title VI), rev’d on other grounds, 532 U.S. 275 (2001); Almendares v. Palmer, 264 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI). 1426 45 C.F.R. § 92.201 (Meaningful access for individuals with limited English proficiency); see also 28 C.F.R. § 42.405(d) (1) (2019) (“Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.”).

https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf
https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf

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At the Commission’s briefing, former HHS OCR Director Leon Rodriguez discussed the office’s commitment to providing language access enforcement, to avoid unlawful national origin discrimination; HHS OCR stated that this commitment is unchanged.1427 He also described cases of persons in dire health circumstances being unable to understand doctors and other health care providers and stated that data showed that providing language access saved money and saved lives.1428 He added that: “As Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another.”1429 Technical Assistance HHS OCR indicated that it offers technical assistance to recipients of federal financial assistance at any stage of an investigation if it determines there appears to be a compliance concern.1430 As part of all compliance reviews, HHS OCR stated that it supplies technical assistance.1431 Technical assistance provided to HHS OCR covered entities includes “sample documents and policies; electronic links to regulations, OCR’s fact sheets and website; suggested sources of helpful information from other HHS components; and explanations of regulatory requirements where needed.”1432 Furthermore, HHS OCR makes some technical assistance available on its website.1433 Interaction and Coordination with External Agencies and Organizations In August 2016, HHS OCR, DOJ and HUD issued a joint statement “to remind recipients of federal financial assistance that they should not withhold certain services based on immigration status when the services are necessary to protect life or safety.”1434 Prior to the scope of review of this report, in December of 2014, HHS OCR and DOJ issued joint guidance explaining states’ obligations under Title II of the ADA to avoid placing individuals at serious risk of institutionalization when considering implementation options of the new Fair Labor Standards Act.1435

1427 U.S. Dep’t of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1428 Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 44-45. 1429 Ibid., 44. 1430 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 24. 1431 Ibid., 36. 1432 Ibid. 1433 See, e.g., U.S. Dep’t of Health and Human Servs., “Civil Rights for Providers of Health Care and Human Services,” <https://www.hhs.gov/civil-rights-for-providers/index.html> (accessed Jul. 23, 2019). 1434 U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Hous. and Urban Dev., U.S. Dep’t of Justice, Tri-Agency Joint Letter by DOJ HUD HHS on Life and Safety Services (Aug. 5, 2016), <https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf>. 1435 U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Justice, Dear Colleague Letter from DOJ and HHS re: the Home Care Rule (Dec. 15, 2014) https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf.

<https://www.hhs.gov/civil-rights-for-providers/index.html>
<https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf>
https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf

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A major civil rights issue that emerged involved thousands of migrant children who have been held in cages in former warehouses, in buildings with little light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.1436 The shelters are run by HHS’ Office of Refugee Resettlement.1437 At the shelters, many children are not able to speak to their parents, hug their siblings who are also in custody, go to school, know when they will be released, and there are a troubling number of allegations of abuse.1438 During a February 2019 Congressional hearing, Representative Pramila Jayapal questioned Scott Lloyd, the former head of the agency caring for migrant children, about an HHS child welfare expert’s warning about of the extremely negative psychological effects caused by separating them from their parents. 1439 Lloyd, along with officials from DOJ and the Border Patrol who were also aware of the warning, testified that they did not voice concern over its impact in any other meetings.1440 Furthermore, GAO found that the lack of coordination between DHS and HHS resulted in extreme difficulties in reuniting with their parents, even when ordered to do so by a federal court due to civil rights concerns.1441 HHS OCR indicated that it participates in 21 external groups or partnerships across the federal government, a list of which is included herein at Table 4.6.

1436 Manny Fernandez, “Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children,” The New York Times, Jun. 14, 2018, <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>. 1437 U.S. Government Accountability Office, Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border, Oct. 2018, pp. 17-26, <https://www.gao.gov/assets/700/694963.pdf> [hereinafter GAO, Unaccompanied Children]. 1438 See supra notes 1337-46. 1439 “What we learned from congressional hearing on family separations,” PBS, Feb. 26, 2019, <https://www.pbs.org/newshour/show/what-we-learned-from-congressional-hearing-on-family-separations> [hereinafter PBS, “What we learned from congressional hearing on family separations”]. 1440 Ibid. 1441 GAO, Unaccompanied Children, supra note 1437, at 17-26 Oct. 2018.

<https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>
<https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>
<https://www.gao.gov/assets/700/694963.pdf>
<https://www.pbs.org/newshour/show/what-we-learned-from-congressional-hearing-on-family-separations>

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Table 4.6 External Coordination Groups or Partnerships that Include HHS OCR as a Member Name of Group Description of Group Association of Federal External Civil Rights Specialists/Officers

Inter-agency Association- best practices in Fed civil rights programs.

Child Abuse & Neglect Federal Interagency Workgroup

Share information and receive and review ACF reports on child abuse and neglect.

Child Welfare Coordinating Group Coordination between OCR, ACF and DOJ on child welfare cases.

Dept. of Education LGBT Intra-Agency Roundtable

Identifies LGBT issues of concern and agencies’ enforcement positions regarding LGBT issues.

DHS Federal Civil Rights Coordination in Disasters

Civil rights offices within DHS, FEMA, HHS, and DOJ report and coordinate on disaster- related activities.

DOJ LEP Enforcement Interagency Working Group

Coordinate & Inform LEP enforcement.

DOJ LEP Interagency Working Group Promote cross agency efforts promoting LEP access.

DOJ Service Animal Interagency Working Group

Identifies issues of concern regarding the use of service animals to better ensure Federal agencies take a consistent policy and enforcement approach to service animals under section 504 and Americans with Disabilities Act.

DOJ Title IX Compliance Discussion Group Share information. DOL-HHS Coordinating Group for FLSA To coordinate re: FLSA rules (roll out

completed). Environmental Justice Title VI Interagency Working Group

Established in 1994 under EO 12892, to guide, support and enhance Federal environmental justice and community-based activities.

Home and Community Based Settings (HCBS) Workgroup

Monthly meeting between HHS (OCR, ACL, CMS) and DOJ to provide updates on the HCBS Rule and to discuss State’ progress in modifying state transition plans to ensure that Medicaid-funded services are provided in settings that exhibit home and community- based characteristics.

Human Rights Treaties - Interagency Policy Committee

Report enforcement efforts related to UN Treaties.

Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC)

Reports to Congress and federal agencies on issues related to serious mental illness and serious emotional disturbance – specifically reports on advances in research, prevention, diagnosis, etc.

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Federal Interagency Health Equity Team: National Partnership for Action to End Health Disparities (NPA)

The FIHET participates in the development and implementation of the NPA.

National Project Advisory Committee on Culturally and Linguistically Appropriate Services

Provide advice and expertise to HHS Office of Minority Health on improving culturally and linguistically appropriate services in health care.

Transforming Mental Health Care in America: Federal Partners Senior Workgroup

Interagency collaboration on mental health.

Universal Periodic Review (UPR) – Interagency Delegation

Drafts materials for U.S. delegates who attend UPR meetings re U.S. human rights activities.

Title IX STEM Interagency Working Group – Led by DOJ

Data/Information Sharing to Improve Oversight of Federal Grant-making and Title IX Compliance. <http://www.gao.gov/products/GAO-16-14>

Share best practices and challenges; coordinate during disaster response and recovery.

White House Council on Women and Girls STEM Working Group

Information sharing.

Source: U.S. Dept of Health and Human Services

Research, Data Collection, and Reporting in its FY 2018 budget justification to Congress, HHS OCR identified the collection of health information as essential to improving health care outcomes.1442 HHS OCR implemented its Complaint Portal in 2013 that tracks data related to the intake and processing of complaints.1443 HHS OCR identified one change to its data collection procedures during FY 2016-2018 regarding collection of data from complaints filed under Section 1557 of the Affordable Care Act.1444 The change was prompted by a court injunction prohibiting enforcement of some provisions of Section 1557 addressing sex discrimination.1445

1442 HHS, OCR FY 2018 Congressional Justification, *supra* note 1291, at 25. 1443 U.S. Dept of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56. 1444 *Ibid.*, 60. 1445 *Ibid.*, 60; see also Franciscan Alliance v. Azar, Case No. 7:16-cv-00108 (N.D. Tex. Filed Dec. 31, 2016).

225 Chapter 5: U.S. Department of Housing and Urban Development

Chapter 5: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity Legal Authority and Responsibility Congress established the U.S. Department of Housing and Urban Development (HUD) in 1965.1446 HUD is currently led by Secretary Benjamin S. Carson, who was sworn into office in March 2017.1447 HUD's mission, as presently indicated on its website, is to:

Create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination, and transform the way HUD does business.1448

HUD reports on its website that it strives to uphold its mission by administering federal programs and creating housing policy that can help create affordable housing opportunities in the rental and sales markets for individuals and families; combat homelessness; promote fair housing and inclusive community development; and foster sustainability.1449 HUD reported that the Office of Fair Housing and Equal Opportunity (FHEO) is the primary office at HUD that handles external civil rights enforcement, in conjunction with the Office of the General Counsel (OGC). The mission of FHEO is to "eliminate housing discrimination, promote economic opportunity, and achieve diverse, inclusive communities by leading the nation in the enforcement, administration, development, and public understanding of federal fair housing policies and laws."1450 In his written statement to the Commission, then General Deputy Assistant Secretary Bryan Greene distilled the need for FHEO's work: "Ongoing segregation in America, regular reports of sexual harassment in housing, and newly-constructed properties inaccessible to people with disabilities are just some examples that underscore that we have not yet conquered housing discrimination."1451 Through FHEO and OGC, HUD enforces the following statutes, executive orders, and regulations:1452

1446 42 U.S.C. § 3532 (1965). 1447 U.S. Dept of Hous. and Urban Dev., "Secretary Ben Carson," https://www.hud.gov/about/leadership/ben_carson. 1448 U.S. Dept of Hous. and Urban Dev., "About HUD's Mission," <https://www.hud.gov/about/mission> (last accessed Oct. 9, 2018); U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. 1449 See generally HUD, FY 2018-2022 Strategic Plan, *supra* note 194. 1450 42 U.S.C. §§ 36101-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dept of Hous. and Urban Dev., "About FHEO," https://www.hud.gov/program_offices/fair_housing_equal_opp (accessed Oct. 9, 2018); U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. See also 24 C.F.R. pt. 115. 1451 Greene Statement, at 3. 1452 U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 2-3.

https://www.hud.gov/about/leadership/ben_carson
<https://www.hud.gov/about/mission>
https://www.hud.gov/program_offices/fair_housing_equal_opp

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• The Fair Housing Act;1453 • The obligation to affirmatively further fair housing under the Fair Housing Act, the

obligation for grantees to certify compliance with the Affirmatively Furthering Fair Housing (AFFH) obligation under the Housing and Community Development Act of 1974,1454 the Cranston-Gonzalez National Affordable Housing Act,1455 and the Quality Housing and Work Responsibility Act of 1998;1456

• Title VI of the Civil Rights Acts of 1964;1457 • The Age Discrimination Act of 1975;1458 • Section 504 of the Rehabilitation Act of 1973;1459 • Section 508 of the Rehabilitation Act of 1973;1460 • Title II of the American Disabilities Act;1461 • Architectural Barriers Act of 1968;1462 • Section 3 of the Housing and Urban Development Act of 1968;1463 • Section 109 of Title I of the Housing and Community Development Act of 1974;1464 • Equal Access to Housing;1465 • Title IX of the Education Amendments Act of 1972;1466 • Executive Order 11,063, as amended;1467 • Executive Order 11,246, as amended (Equal Employment Opportunity Programs);1468 • Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in

Federal Programs; Affirmatively Furthering Fair Housing);1469 • Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations);1470 • Executive Order 13,166, Improving Access to Services for Persons with Limited

English Proficiency; and1471

1453 42 U.S.C. §§3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180. 1454 42 U.S.C. § 5309. 1455 *Id.* § 12703. 1456 42 U.S.C. §§3608, 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16) and the implementing regulations at 24 C.F.R. §§ 5, 91, 92, 200, 570, 574, 576, and 903. 1457 42 U.S.C. 42 U.S.C. §§2000d-2000d-4 and implementing regulations at 24 C.F.R. part 1. 1458 42 U.S.C. §§ 6101-07 and implementing regulations at 24 C.F.R. part 146. 1459 29 U.S.C. § 794 and implementing regulations at 24 C.F.R. parts 8 and 9. 1460 29 U.S.C. § 794(d) and 36 C.F.R. part 1194. 1461 42 U.S.C. §12131-34 and 28 C.F.R. part 35. 1462 42 U.S.C. § 4151 et seq. and implementing regulations at 24 C.F.R. part 41. 1463 12 U.S.C. § 1701u and implementing regulations at 24 C.F.R. part 135. 1464 42 U.S.C. § 5309 and implementing regulations at 24 C.F.R. part 6. 1465 24 C.F.R. parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982 (1996). 1466 20 U.S.C. §§ 1681-88 and implementing regulations at 24 C.F.R. part 3. 1467 Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962). 1468 Exec. Order No. 11,246, 30 Fed. Reg. 12,319. 1469 Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 17, 1994). 1470 Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). 1471 Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

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• Executive Order 13,217, as amended (Community-Based Alternatives for Individuals with Disabilities).1472

HUD enforces the Fair Housing Act and other laws that protect people from discrimination in housing on the basis of race, color, religion, national origin, sex, disability, and familial status (among other categories).1473 HUD reports that it also ensures that housing providers and grantees comply with other civil rights statutes, executive orders, and regulations.1474 HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.1475 Enforcement Tools The agency enforcement tools FHEO has specific legal authority to use are:

• Complaint Resolution1476 • Agency-Initiated Charges1477

o FHEO may also bring administrative proceedings to judgement before an administrative law judge1478

1472 Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (Jun. 21, 2001). 1473 42 U.S.C. 3535(d); 42 U.S.C. §§ 3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dept of Hous. and Urban Dev., "Fair Housing Rights and Obligations," https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_rights_and_obligations; U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. 1474 U.S. Dept of Housing and Urban Development, Response to Interrogatory No. 1, at 1. 1475 42 U.S.C. §§ 3535(d), 3610(f), 3616; 24 C.F.R. parts 115 and 125; U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; U.S. Dept of Hous. and Urban Dev., "Fair Housing Assistance Program (FHAP)," https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP [hereinafter HUD, "FHAP"]; U.S. Dept of Hous. and Urban Dev., "Fair Housing Initiatives Program," https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP [hereinafter HUD, "FHIP"]; see *infra* notes 1536-1551. 1476 24 C.F.R. §§ 1.7, 3.605, 6.11, 8.56, 9.170 (indicating that "[t]he agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 [sic.] under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791)," however 29 C.F.R. part 1613 is nonexistent, and the HUD regulation intended to refer to these compliance procedures is 29 C.F.R. part 1615.170 (Compliance procedures)); 24 C.F.R. § 41.5(d); 24 C.F.R. Part 103; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. §§ 146.33-146.37. 1477 42 U.S.C. § 3610(a)(iii). 1478 24 C.F.R. §§ 103.400-103.410 indicates that while the HUD Assistant Secretary can "direct the issuance of a charge under § 103.405 on behalf of the aggrieved person" and can elect to initiate a civil action in lieu of an administrative proceeding, "the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court," thus clarifying that authority to initiate a civil action in federal court lies within DOJ; see also DOJ Justice Manual, *supra* note 370, at § 8-2.231 and see *infra* notes 1584-1608.

https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_rights_and_obligations
https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP
https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP

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o FHEO may elect, in lieu of an administrative proceeding, to have the claims asserted in the charge decided in a civil action in a court of law, which would be handled by the Attorney General.1479

• Proactive Compliance Evaluations1480 • Testing1481 • Issuance of Policy Guidance1482 • Issuance of Regulations1483 • Technical Assistance1484 • Publicity1485 • Community outreach to stakeholders1486 • Research, data collection, and reporting1487 • Collaboration with states/local agencies1488

1479 24 C.F.R. § 103.410(a) discusses how "[i]f a charge is issued under §103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR part 180, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act," thus defining adjudication through the administrative process differently than an election of civil action. 24 C.F.R. § 103.500 outlines procedures for HUD to take prompt judicial action at any time following the filing of a complaint, however states that "the General Counsel may authorize the Attorney General to commence a civil action," and to "ensure that prompt initiation of the civil action, the General Counsel will consult with the Assistant Attorney General for the Civil Rights Division before making the determination that prompt judicial action is necessary," thus clarifying that the authority to initiate a civil action in federal court lies within DOJ; see also DOJ Justice Manual, *supra* note 370, at § 8-2.231 and see *infra* notes 1584-1608. 1480 24 C.F.R. § 1.7(a) (conduct of investigations); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. 108.40(b); 24 C.F.R. § 146.31. 1481 24 C.F.R. §§ 115.100(c), 115.311, 125.107. 1482 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 10.2, 10.6; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1484 42 U.S.C. § 3608(e)(3); 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 8.55 ("The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 1485 24 C.F.R. § 115.308(c); 24 C.F.R. § 180.680(a); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 1486 24 C.F.R. §§ 115.300(e), 115.304(d); 24 C.F.R. § 125.301; 28 C.F.R. § 42.405. 1487 42 U.S.C. §§ 3608(e)(1)-3608(e)(2), 3608(e)(6); 24 C.F.R. § 115.307(a)(3); 28 C.F.R. § 42.406 (regarding data collection and reporting). 1488 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 8.55 ("The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 103.220.

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• Collaboration with other federal agencies1489 • Strategic Plan1490 • Annual Reports1491

According to FHEO, testing "is a critical tool in the fight against housing discrimination."1492 Testing refers to "the use of an individual or individuals ('testers') who, without bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws."1493 Paired testing is conducted when two people assume the roles of applicants with equivalent social and economic characteristics who differ only in terms of the characteristic being tested for discrimination, such as race, disability status, or marital status.1494 Testers and the organizations conducting the tests are not allowed to have any economic or personal interests in the outcome of the tests.1495 Budget and Staffing The Assistant Secretary, Fair Housing and Equal Opportunity leads FHEO. Anna Maria Farias currently serves as the Assistant Secretary for FHEO, having been confirmed by the Senate in August 2017.1496 While the leadership at HUD has changed with the Trump Administration, HUD reports that its organizational structure and general roles and responsibilities of FHEO have not changed from FY 2016 through FY 2018.1497 See Figure 5.1.

1489 24 C.F.R. § 103.220; 26 C.F.R. § 42.413. 1490 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b); 5 U.S.C. § 306(a); see HUD, FY 2016- 2022 Strategic Plan, supra note 194. 1491 42 U.S.C. §§ 3608(e)(6), 3608(e)(2) (A), and 3608(e)(2)(B)(i-iii). 1492 U.S. Dep't of Hous. and Urban Dev., Memorandum Re: Treatment of Testing Evidence in Fair Housing Complaint Investigations, <https://apps.hud.gov/offices/theo/library/testing.pdf>. 1493 24 C.F.R. § 115.100. 1494 "Paired Testing and the Housing Discrimination Studies," Office of Policy Development and Research, HUD User, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>. 1495 24 C.F.R. § 125.107. 1496 PN680 – Anna María Fariás – Department of Hous. and Urban Dev., 115th Congress (2017-2018), <https://www.congress.gov/nomination/115th-congress/680>. 1497 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 11.

<https://apps.hud.gov/offices/theo/library/testing.pdf>
<https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>
<https://www.congress.gov/nomination/115th-congress/680>

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Figure 5.1: FHEO Organizational Chart

Source: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity

Under the Fair Housing Act, the HUD Secretary must delegate the responsibility of civil rights enforcement to the Assistant Secretary for Fair Housing and Equal Opportunity, 1498 who re- delegates this responsibility to the General Deputy Assistant Secretary for the Office of Fair Housing and Equal Opportunity, the Deputy Assistant Secretary for the Office of Enforcement and Programs, and the Deputy Assistant Secretary for the Office of Policy, Legislative Initiatives, and Outreach. 1499 Several of the offices listed under the aforementioned Deputy Assistant Secretaries in Figure 5.1 have a role in civil rights enforcement:

- The Office of Enforcement – conducts complaint investigations, reviews fair housing cases, reconsiders cases if a “no reasonable cause” determination is issued, drafts fair housing policies and guidance, and administers the Fair Housing Assistance Program. 1500
- The Office of Programs – provides guidance and conducts compliance reviews and complaint investigations on Section 3 of the Housing and Urban Development Act; and administers the Fair Housing Initiatives Program. 1501

1498 42 U.S.C. § 3608(a)-3608(c). 1499 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 12. 1500 *Ibid.*, 13; see *infra* notes 1536-1551. 1501 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13; see *infra* notes 1536-1551.

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- The Office of Systematic Investigations – investigates systematic allegations of discrimination and handles Secretary-initiated complaints. 1502
- The Office of Program Standards and Compliance – provides applicable housing-related federal civil rights guidance to other program areas. 1503
- The Policy and Legislative Initiatives Division – oversees FHEO policy development by tracking legislative developments and studies. 1504
- The Education and Outreach Division – initiates fair housing education and outreach. 1505 • HUD Regional Offices – HUD has 10 regional offices in total around the U.S., each with

a Regional Director who oversees FHEO staff to handle the intake, processing, investigation, and determinations as to reasonable cause of complaints. Regional Offices also monitor FHAP agencies within their jurisdiction. The Regional Directors report to the Deputy Assistant Secretary for Enforcement and Programs. 1506

HUD reports that FHEO’s budget is earmarked for “civil rights intake, investigation[s], enforcement, compliance, and outreach.” 1507 In FY 2016, FHEO requested a total of \$152.1 million, 1508 which decreased to \$144.2 million in FY 2017 1509 and \$135.1 million in FY 2018. 1510 Congress appropriated to FHEO \$135.5 million in FY 2016, 1511 which increased slightly to \$136.5

1502 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13. 1503 *Ibid.* 1504 *Ibid.* 1505 *Ibid.* 1506 *Ibid.*, 13. 1507 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14. 1508 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2016 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2016]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1509 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2017 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2017]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1510 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2018 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2018]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1511 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 32-2; HUD FHEO, Program Office Salaries and Expenses FY 2018, supra note 1510, at 50-1. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/documents/54-FHEO.PDF>

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million in FY 2017, 1512 and then decreased slightly to \$134.6 million in FY 2018. 1513 See Figure 5.2. Figure 5.2: Requested and Allocated Budgets for FHEO

Source: U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019, p. 49-1, <https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020, p. 48-1, https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf. Note: Total requested and allocated figures for each fiscal year include sum of the totals for fair housing programs and salaries & expenses.

1512 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf> [hereinafter HUD FHEO, Fair Housing Programs 2019 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019, p. 49-1, <https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2019]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses. 1513 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf> [hereinafter HUD FHEO, Fair Housing Programs 2020 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020, p. 48-1, https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2020]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

FY 2016 FY 2017 FY 2018 Requested Total \$152,100,000 \$144,235,000 \$135,108,000 Allocated Total \$135,521,000 \$136,527,000 \$134,643,000

\$125,000,000 \$130,000,000 \$135,000,000 \$140,000,000 \$145,000,000 \$150,000,000 \$155,000,000

Figure 5.2: Requested and Allocated Budgets for FHEO FY 2016 to FY 2018

Requested Total Allocated Total

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/documents/54-FHEO.PDF>
<https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>
https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf
https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf

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FHEO’s total allocated budget for FY 2016 included \$65.3 million for programs and \$70.2 million for salary and expenses. 1514 FHEO’s total allocated budget for FY 2017 included approximately \$65.3 million for programs and \$71.2 million for salary and expenses. 1515 FHEO’s total allocated budget included for FY 2018 included \$65.3 million for programs and \$69.3 million for salaries and expenses. 1516 In FY 2016, FHEO requested a total of \$71.0 million for fair housing

programs, which included \$45.6 million for FHIP and \$23.3 million for FHAP.1519 In FY 2016, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.1518 In FY 2017, FHEO requested a total of \$70.0 million for fair housing programs, including \$46.0 million for FHIP and \$21.9 million for FHAP.1519 In FY 2017, Congress appropriated to FHEO \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.1520 In FY 2018, FHEO requested a total of \$65.3 million for fair housing programs, which included \$39.2 million for FHIP and \$24.3 million for FHAP.1521 In FY 2018, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.6 million for FHIP and \$23.9 million for FHAP.1522 While FHEO's requested budget changed significantly from FY 2016 to FY 2018, FHEO's allocated budget remained relatively the same during that time.1523 See Figure 5.3.

1514 HUD FHEO, Program Office Salaries and Expenses FY 2018, supra note 1510, at 50-1. 1515 HUD FHEO, Program Office Salaries and Expenses FY 2019, supra note 1512, at 49-1. 1516 HUD FHEO, Program Office Salaries and Expenses FY 2020, supra note 1513, at 48-1. 1517 HUD FHEO, Fair Housing Programs 2016 Summary, supra note 1508, at 32-2. 1518 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 32-2. 1519 HUD, Fair Housing Programs 2017 Summary, supra note 1509, at 33-2. 1520 HUD FHEO, Fair Housing Programs 2019 Summary, supra note 1512, at 31-2. 1521 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 31-2. 1522 HUD FHEO, Fair Housing Programs 2020 Summary, supra note 1513, at 31-2. 1523 *Ibid.*

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Figure 5.3: Requested and Allocated Budgets for FHIP

Source: U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>.

HUD reported that FHEO employed 484 full-time staff in FY 2016, 496 full-time staff in FY 2017, and 484 full-time staff in FY 2018.1524 In his statement to the Commission, Bryan Greene, then General Deputy Assistant Secretary for FHEO, noted that at that time in October 2018, 253 people were dedicated to Fair Housing Act investigations.1525 HUD also reported that in addition to FHEO staff, HUD's OGC has 18 attorneys and a paralegal at headquarters in Washington, DC who do civil rights enforcement work, and additional attorneys at HUD's regional offices who work on fair housing and civil rights matters.1526 According to HUD's responses to the Commission's Interrogatories, FHEO's "staffing levels are unrelated to the budget."1527 But Greene indicated during his testimony before the Commission that "FHEO relies entirely on salaries and expenses funding for its Fair Housing Act investigations."1528

1524 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14. 1525 Greene Statement, at 1. 1526 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 8, at 13. 1527 *Ibid.* 1528 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 19.

Requested FHIP	Allocated FHIP	Requested FHAP	Allocated FHAP	FY 2016	FY 2017	FY 2018
\$45,600,000	\$39,200,000	\$23,300,000	\$24,300,000	\$46,000,000	\$39,200,000	\$21,900,000
\$24,300,000	\$23,900,000			\$24,300,000	\$39,200,000	\$39,600,000

\$0 \$5,000,000

\$10,000,000 \$15,000,000 \$20,000,000 \$25,000,000 \$30,000,000 \$35,000,000 \$40,000,000 \$45,000,000 \$50,000,000

Figure 5.3: Requested and Allocated Budgets for FHIP and FHAP, FY 2016 to FY 2018

FY 2016 FY 2017 FY 2018

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>

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Whereas the FHEO budget has fluctuated minimally during the time period the Commission investigated, as described below the Commission heard compelling testimony regarding consequences of the longstanding failure to increase budget and staffing for fair housing enforcement and comparing the especially lean budget and staffing in recent years to earlier, reportedly still insufficient, budget and staffing. Assessment Prioritization of Civil Rights Agency-Wide FHEO does not have a direct line of authority to the Secretary of HUD, as the Assistant Secretary for Fair Housing and Equal Opportunity reports to the Deputy Secretary of HUD, who in turn reports to the Secretary of HUD.1529 With respect to the resources that FHEO has available to effectively execute its enforcement work, then General Deputy Assistant Secretary Bryan Greene indicated in his written testimony before the Commission that:

• "HUD's effectiveness in carrying out its fair-housing enforcement mission depends on a robust S&E budget."1530

• "When budgets are tight, it is challenging for HUD to respond effectively to complaints filed by individuals and pursue many Secretary-initiated cases. Still, HUD recognizes these cases as an opportunity to obtain broad relief for systemic discrimination, when resources are available."1531

Academic literature supports Greene's assessment, recognizing for example that "staffing and other administrative problems have historically hampered HUD's ability to investigate discrimination claims."1532 HUD's Chicago office regional director testified to the Commission's Illinois Advisory Committee in May 2019 that "[T]his Administration has made budget proposals that are significantly less in terms of staff than previous administrations have done. . . . These funding proposals ultimately result in staffing levels being established."1533 After acknowledging that without budget increases to allow for increases in staff, HUD cannot focus on all areas in its Secretary-initiated investigations or complaints, Greene's written testimony identified current subject area priorities for HUD FHEO.1534 Those priorities are: "[i]ssuance of

1529 U.S. Dep't of Hous. and Urban Dev., Agency Financial Report 2017, p. 3, <https://www.hud.gov/sites/dfiles/CFO/documents/af2017.pdf>. 1530 Greene Statement, at 2. 1531 *Ibid.*, 3. 1532 Johnson, Beyond the Private Attorney General, supra note 36, at 1360 (citing 2004 GAO report). 1533 Maurice McGough, Region V Director Office of Fair Hous. and Equal Opportunity, U.S. Dep't of Hous. and Urban Dev., testimony, Illinois SAC Fair Housing Briefing, pp. 63-64 (responding to question from Committee member Haleem). 1534 Greene statement, at 3.

<https://www.hud.gov/sites/dfiles/CFO/documents/af2017.pdf>

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clear, helpful assistance-animal guidance", "[c]ombating of sexual harassment in housing", and "[m]eaningful, less burdensome implementation of the Fair Housing Act's 'affirmatively furthering' mandate."1535 HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.1536 FHAP is a noncompetitive grant program that funds agencies on the state and local level that administer fair housing laws that HUD has determined to be substantially equivalent to the federal Fair Housing Act.1537 HUD is generally required to refer complaints to FHAP agencies when those complaints allege violations of state or local fair housing laws.1538 and FHAP agencies engage in enforcement activities that include complaint investigation, conciliation, administrative and/or judicial enforcement, training, implementation of data and information systems, and education and outreach.1539 FHIP provides competitive grant funding to fair housing organizations and other non-profits to process complaints of housing discrimination.1540 FHIP agencies assist victims of alleged housing discrimination to identify government agencies (i.e. HUD or a FHAP agency) that can process fair housing complaints, and can conduct a preliminary investigation of claims, which may utilize fair housing testing (a method of assessing discrimination in the housing market), and engage in education and outreach to promote fair housing laws and equal housing opportunity awareness.1541 FHIP has four specific initiatives that provide competitive grant funding for fair housing organizations and other non-profits: the Fair Housing Organizations Initiative (FHOI), the Private Enforcement Initiative (PEI), the Education and Outreach Initiative (EOI), and the Administrative Enforcement Initiative (AEI)—that promote fair housing laws and equal housing opportunity awareness.1542 According to some advocates, including the International Association of Official Human Rights Agencies (IAOHRA) and the Columbia Human Rights Institute, recent cuts in HUD funding have negatively impacted the ability of state and local agencies to enforce fair housing protections.1543 Responses to a survey of local and state human rights agencies included concern from several agencies about ongoing challenges, and "deep concern about further loss of general funding."1544 Many local and state agencies depend on federal funding to continue their enforcement of fair

1535 *Ibid.* 1536 U.S.C. §§ 3535(d), 3601(f), 3616; 24 C.F.R. part 103 Subpart C; 24 C.F.R. parts 115 and 125; U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; HUD, "FHAP," supra note 1475; HUD, "FHIP," supra note 1475. 1537 HUD, "FHAP," supra note 1475; U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. 1538 HUD, "FHAP," supra note 1475. 1539 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 6. 1540 HUD, "FHIP," supra note 1475. 1541 *Ibid.* 1542 *Ibid.* 1543 Columbia Law School Human Rights Institute and the International Association of Official Human Rights Agencies (IAOHRA), Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 8-9. 1544 *Ibid.*, 9.

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housing laws, through FHAP or FHIP partnerships. Without the requisite level of federal funding, these local agencies may shut down or minimize their fair housing work for lack of funds to support it. Bryan Greene noted in his testimony that oversight for the FHIP and FHAP programs accounts for approximately 10 percent of FHEO's work.1545 Greene also testified that since HUD funds and supervises local enforcement (through the FHIP and FHAP programs), funding cuts to HUD undermine the capacity for that local enforcement: "[HUD's] ongoing review of those agencies and the oversight [HUD] provide[s] to them is critical for those agencies to remain viable. When they lose certification, those cases come to HUD and tax our limited resources."1546 Greene noted that it is important to do "mission oversight" and indicated that FHEO is "trying to establish consistency in operations across them and devote staff resources to that currently."1547 Greene mentioned that there are "24 people [on staff] doing that for all of those agencies and several thousand cases."1548 HUD noted that:

[Seventy-seven] percent of fair housing cases are handled by state and local agencies. Those activities are funded through FHEO's FHIP and FHAP programs. HUD's budget request for those two programs that are responsible for the lion's share of the enforcement work has not changed since 2016. HUD's total request for those two programs in both 2016 and 2018 was identical at \$63.5 million. Overall, funding for FHEO in 2019 was actually the highest since 2010, albeit only by a little because funding levels have been generally flat.1549

Additionally, Greene stated in his testimony before the Commission:

FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate and how fast we can investigate them depends on staff resources, both in FHEO and HUD's Office of General Counsel, who provide legal support for our cases. We have a staff today of 460 persons, of which [sic] approximately 253 are dedicated to Fair Housing Act investigations. Notwithstanding declining staff, on average, each year for the last several years, HUD has reduced the time it takes to resolve cases.1550

1545 Greene Statement, at 2. 1546 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 20. 1547 *Ibid.*, 74. 1548 Greene Testimony, Testimony, Federal Civil Rights Enforcement Briefing, p. 74. 1549 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1550 Greene Statement, at 1.

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He went on to say:

HUD's effectiveness in carrying out its fair-housing enforcement mission depends on a robust Salaries and Expenses budget that supports:

• Sufficient numbers of skilled investigators and specialists; • Travel funds to support onsite visits in most of its case investigations; • Information-technology support for field investigations, case-management,

and grants management; • Sufficient compliance staff so we don't have to redirect staff from other

investigations; • Adequate staff for grants management and policy oversight of FHIP and

FHAP; • Sufficient numbers of experienced fair housing attorneys in HUD's Office

of General Counsel to provide FHEO with the legal advice and support necessary for efficient, effective fair housing enforcement.

All the foregoing activities are resource-intensive. The demand-driven Fair Housing Act complaint work [acts] to draw resources from other areas (where we have more discretion), especially if we see an uptick in complaint volume, or if we must devote more resources to closing out a case backlog.1551

HUD FHEO regional staff who testified to a briefing of the Commission's Illinois Advisory Committee held in May 2019 regarding fair housing underscored these critical points, noting that "[R]ight now there are approximately 50 of us who are responsible for doing all of that enforcement work, all of the investigation work, all of the monitoring of the grants, all of that" in the Chicago regional office.1552 Another FHEO Chicago regional office staff member answered a question whether he believes staffing levels are sufficient for a minimum level of enforcement by testifying that "When I first became regional director in 2011, we had a staff of 62" people but "currently have 50 staff persons in the Chicago region . . . covering] 6 states in the industrial Midwest," which he characterized as " areas where there's a great deal of housing segregation and concurrent discrimination."1553 Also during the May 2019 Illinois Advisory Committee briefing, a former career HUD executive testified that after having worked in both Republican and Democratic administrations at HUD, her perspective now is that "[a]lthough no administration has fully staffed civil rights enforcement at HUD . . . , this [Trump] Administration has allowed staffing levels nationally to drop to historic

1551 *Ibid.*, 2. 1552 Kimberly Nevels, Director, Chicago Fair Hous. and Equal Opportunity Center for HUD, testimony, Illinois SAC Fair Housing Briefing, p. 17. 1553 McGough Testimony, Illinois SAC Fair Housing Briefing (McGough responding to a question from the Committee chair), pp. 66-67.

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lows."1554 She shared that, as reported on the basis of open records requests and reports to Congress, the current staff level of HUD FHEO is "the lowest level since 1961" and the Trump "administration has submitted reduced staffing requests for FHEO asking for fewer people in the next year in their budget requests."1555 She went on to state that "numerous studies and reports . . . supported a minimum staffing level of at least 750 persons . . . at the national level to effectively do the basic enforcement compliance program monitoring functions that FHEO has" even without the "add-on responsibilities, such as the obligation to enforce affirmatively furthering fair housing."1556 Despite this record, "today, staffing levels of fair housing enforcement are so low that it's easy to believe that understaffing of the civil rights function is a deliberate action designed to reduce the effectiveness of enforcement and the other work that FHEO does."1557 HUD noted:

FHEO has experienced a decline in staff over many years, including, notably, a decrease from 585 to 491 staff from FY 2013 to FY 2015. It is a priority of Secretary Carson to reinvigorate FHEO's hiring to ensure it has sufficient staff to carry out its core enforcement functions. So far this year, 68 FHEO positions have been advertised, with 18 more positions expected to be posted by August. The Secretary directed that at least 70% of FHEO's new hiring support fair housing enforcement activities. This year FHEO will dedicate 89.7% of positions advertised for new investigators. The Department believes that FHEO's staffing is adequate to carry out its mission.1558

Strategic Planning and Self-Evaluation HUD has a statutory obligation to issue annual reports that include data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of households that are applicants, participants, or beneficiaries of programs administered by HUD.1559 The Secretary is also obligated to report on the progress made nationally in eliminating discriminatory housing practices, what obstacles remain in the way of eliminating these practices, and recommendations for further actions.1560 HUD has issued annual performance reports for each of the fiscal years in question (FY 2016-2018). In FY 2016, HUD indicated that it achieved the following major milestones when evaluating its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

1554 Sara Pratt, Counsel at Relman Dane and Colfax, testimony, Illinois SAC Fair Housing Briefing, pp. 35-36. 1555 *Ibid.*, 36 (citing Danielle McLean, "Trump's HUD wants to expand flawed program that is 'privatizing public housing,'" ThinkProgress, Feb. 28, 2019, <https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>). 1556 *Ibid.*, 36. 1557 *Ibid.*, 37. 1558 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1559 42 U.S.C. § 3608(e)(6). 1560 42 U.S.C. § 3608(e)(2)(A).

<https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>
<https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>

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• Develop a measure for assessing the effect of targeted education and outreach efforts. This

involves using reporting capabilities of social media platforms to "monitor the total users reached, web clicks, and engagements (liked or shared)" to measure the effectiveness of gaining viewer attention; and monitoring the number of contacts, inquiries, and complaints filed "as measures of the effectiveness of a campaign to encourage subsequent action."1561

• Incorporate fair housing topics into existing technical assistance delivery by HUD program offices. This includes incorporating technical assistance on Affirmatively Furthering Fair Housing (AFFH).

• Develop and implement internal training to increase HUD employee understanding of the role of fair housing in HUD's mission. HUD has organized multiple staff trainings on the AFFH rule and has conducted an ongoing speaker series on general fair housing topics.1562

Additionally, during that fiscal year, HUD reported:

• 7,4251563 people received remedies through FHEO's enforcement work; • 35 cases have resulted in monetary relief in excess of \$25,000; and • 579 cases were open more than 300 days, which is a reduction of 19.5 percent since the beginning of FY 2016.1564 In FY 2017, HUD reported the following items about its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

• 1,9141565 people received remedies through FHEO's enforcement work; • 27 cases have resulted in monetary relief in excess of \$25,000 • 436 cases were open more than 300 days, which reduced the number of cases that had been under investigation for over 300 days by almost 25 percent1566

1561 HUD, 2016 Annual Performance Report, *supra* note 193, at 65. 1562 *Ibid.* 1563 As noted in HUD's FY 2016 Annual Performance Report, "[t]he relatively high number of persons receiving relief in FY 2016 [was] due to two cases resolved through conciliation that together provided relief to an estimated 4,500 persons." *Ibid.* 1564 *Ibid.* 1565 HUD noted in its FY 2017 performance report that "FHEO staff have been working during FY 2017 on creating greater consistency in how relief numbers are reported. In a few instances this has led to more conservative estimates of relief in cases involving larger housing providers, which had a significant effect on the reported results." 1566 U.S. Dep't of Hous. and Urban Dev., Fiscal Year 2017 Annual Performance Report, p. 20, https://www.hud.gov/sites/dfiles/SPM/documents/FY17_APR.pdf

https://www.hud.gov/sites/dfiles/SPM/documents/FY17_APR.pdf

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In FY 2018, HUD's annual performance report noted that HUD issued a new strategic plan for FY 2018-2022.1567 In stark contrast to the previous strategic plan,1568 it no longer includes "fair housing" as a strategic objective.1569 While there is a strategic objective to "reduce barriers to affordable housing,"1570 there is no discussion of FHEO's enforcement responsibilities.1571 The objective description does reference the new AFFH rulemaking, but does not reference a role for FHEO, and the "objective lead" is an official in HUD's Office of Congressional and Intergovernmental Relations.1572 In line with HUD's requirement for annual reporting,1573 FHEO publishes an annual report of fair housing. Over the fiscal years in question (FY 2016-2018), FHEO has published annual fair housing reports for FY 2016 and FY 2017, which provide an overview of FHEO's activities and programs, as well as information about FHEO's enforcement work, which includes complaint data about investigations, monetary relief, compliance with notice requirements, adjudication of Fair Housing Act complaints, and Secretary-initiated enforcement.1574 To date, FHEO has not yet published an annual report for FY 2018. Complaint Processing, Agency-Initiated Charges, and Litigation Federal regulations require HUD to conduct a Fair Housing Act investigation once a complaint is filed against a recipient of HUD funding and other housing providers.1575 HUD may also initiate its own investigation of housing practices at "the written direction of the Assistant Secretary."1576 HUD regulations contemplate systemic investigations, if FHEO "determines that the alleged discriminatory practices contained in a complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or will affect a large number of persons[.]"1577

1567 U.S. Dep't of Hous. and Urban Dev., Fiscal Year 2018 Annual Performance Report, Mar. 22, 2019, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDFY2020APP-FY2018APR-3.22.2019.pdf> [hereinafter HUD, FY 2018 Annual Performance Report]. 1568 U.S. Dep't of Hous. and Urban Dev., Strategic Plan 2014-2018, April 2014, <https://www.huduser.gov/portal/publications/pdf/HUD-564.pdf>. 1569 HUD, Strategic Plan 2018-2022, *supra* note 194. 1570 *Ibid.*, 25; HUD, FY 2018 Annual Performance Report, *supra* note 1567, at 44. 1571 *Ibid.* 1572 HUD, FY 2018 Annual Performance Report, *supra* note 1567, at 44. 1573 See *supra* note 1559. 1574 U.S. Dep't of Hous. and Urban Dev., Office of Fair Hous. and Equal Opportunity, Annual Report to Congress FY 2016, <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF> [hereinafter HUD FHEO, Annual Report to Congress FY 2016]; U.S. Dep't of Housing and Urban Development, Office of Fair Hous. and Equal Opportunity, Annual Report to Congress FY 2017, https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf [hereinafter HUD FHEO, Annual Report to Congress FY 2017]. 1575 24 C.F.R. § 103.200 ("Upon the filing of a complaint . . . the Assistant Secretary will initiate an investigation") (emphasis added). 1576 24 C.F.R. § 103.200(b). 1577 *Id.* § 103.205.

<https://www.hud.gov/sites/dfiles/SPM/documents/HUDFY2020APP-FY2018APR-3.22.2019.pdf>

<https://www.huduser.gov/portal/publications/pdf/HUD-564.pdf>

<https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF>

https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf

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FHEO enforces the Fair Housing Act primarily through complaint review and investigation, however indirect mechanisms of enforcement such as public education and outreach are also funded by HUD.1578 HUD also issues guidance documents about civil rights enforcement issues.1579 In addition, HUD reports that it also utilizes the following mechanisms for enforcing the Fair Housing Act,1580 which are provided for under federal regulations:

• Conciliating complaints1581 • Seeking "prompt judicial action" for appropriate temporary or preliminary relief pending

final disposition of the complaint while an investigation is ongoing1582 • Issuing subpoenas1583 • Pursuing litigation before an administrative law judge or in federal court through referral

to DOJ1584 HUD can seek actual damages for "emotional distress and out-of-pocket losses, civil penalties, and injunctive relief."1585 In 2018, the maximum civil penalties ranged from \$20,521 to \$102,6061586 depending on the nature and/or severity of the violation, and these maximum penalties are adjusted annually.1587 In its response to the Commission's Interrogatories, FHEO reported that typically, when HUD receives a complaint, "FHEO investigates the complaint, engages in conciliation, and, if conciliation is unsuccessful in resolving the complaint, determines whether or not there is reasonable cause to believe discrimination has occurred."1588 If the Secretary believes it necessary to carry out the purposes of FHA enforcement, complaints are referred to the DOJ for temporary or preliminary relief, without "findings as to reasonable cause."1589 The Fair Housing Act requires that if FHEO finds reasonable cause to believe that housing discrimination has occurred, HUD OGC files a charge of discrimination with HUD's Office of

1578 24 C.F.R. § 103.1; U.S. Dep't of Hous. and Urban Dev., "Learn About the FHEO Complaint and Investigation Process," https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process [hereinafter HUD, "Learn About the FHEO Complaint and Investigation Process"]. 1579 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. 1580 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1-2. 1581 42 U.S.C. § 3610(b). 1582 *Id.* § 3610(e). 1583 *Id.* §§ 3612, 3614. 1584 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 5, at 10. 1585 HUD provided a correction to the civil penalty amounts in their agency review (as outlined above, noting that these numbers change annually). See Adjustment of Civil Monetary Penalty Amounts for 2018, 83 Fed. Reg. 32,790 (Effective: Aug. 15, 2018). 1586 24 C.F.R. § 180.671(a). 1588 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4. 1589 42 U.S.C. §§ 3610(e)(2), 42 U.S.C. § 3610 (g)(2)(C), and 42 U.S.C. § 3614 (a); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4.

https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process

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Hearing and Appeals.1590 Once the charge is filed, any party may elect for civil action and have the case heard in District Court in lieu of utilizing HUD's administrative enforcement process.1591 If no such election is made, HUD reports that its OGC will litigate the charge of discrimination before an administrative law judge (ALJ) as part of its administrative enforcement proceedings.1592 HUD reports that the ALJ will conduct a hearing within 120 days of the charge.1593 and "make findings of fact and conclusions of law within 60 days after the end of the hearing."1594 If the ALJ finds a respondent responsible for engaging or attempting to engage in a discriminatory housing practice, the ALJ issues an order that may include damages to the aggrieved person.1595 Parties adversely affected by the final decision may appeal to the U.S. Court of Appeals,1596 and HUD or any person entitled to relief may also petition the appropriate U.S. Court of Appeals for enforcement of the final decision.1597 Additionally, HUD may opt to refer the case to DOJ for temporary or preliminary relief pending final decision on the complaint, if necessary to enforce the civil rights laws under its jurisdiction, and it may also immediately refer systemic "pattern or practice" cases or subpoenas, or for criminal proceedings.1598 DOJ explains the process of shared jurisdiction as follows:

In the event that the conciliation process fails, HUD may, upon finding reasonable cause to believe discrimination occurred, issue administrative charges alleging a Fair Housing Act violation. After HUD issues a charge, the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge; or (2) one of the parties to the administrative charge "elects" to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant. These suits by the Civil Rights Division on behalf of complainants are often referred to as "election" cases. Additionally, under the Fair Housing Act, HUD is required to refer to the Attorney General (1) any complaint that involves the legality of a state or local zoning or other land use law or ordinance, 42 U.S.C. § 3614(b)(1); (2) any breach of a HUD conciliation agreement, 42 U.S.C. § 3614(b)(2); (3) requests by the Secretary of HUD to enforce HUD subpoenas in federal district court, 42 U.S.C. § 3614(c); and (4) an authorization by the Secretary of HUD to file a civil action for temporary or preliminary relief relating to Fair Housing Act complaint pending with HUD, 42 U.S.C. § 3610(e)(1).

1590 42 U.S.C. § 3612(b); U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4. 1591 42 U.S.C. § 3612(a). 1592 Id. § 3612(b); U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4. 1593 42 U.S.C. § 3612(g)(1). 1594 Id. § 3612(g)(2); U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4-5. 1595 U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. 1596 42 U.S.C. § 3612(f) and implementing regulations at 24 C.F.R. § 180.710(a). 1597 42 U.S.C. §§ 3216(m); 24 C.F.R. § 180.715. 1598 24 C.F.R. §§ 103.500, 103.510.

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Finally, in conjunction with the Civil Rights Division Appellate Section, the Housing and Civil Enforcement Section has responsibility for the enforcement of orders entered by HUD administrative law judges in Fair Housing Act cases, 42 U.S.C. § 3612(j). United States Attorney's Offices, in coordination with the Housing and Civil Enforcement Section, also have responsibility for seeking collection of monetary judgments, when necessary. The United States Attorney's Offices also have responsibility for enforcing administrative subpoenas issued by HUD under Section 811 of the Fair Housing Act, 42 U.S.C. § 3611. HUD will either refer these matters directly to the relevant United States Attorney's Office or to the Housing and Civil Enforcement Section.1599

The Fair Housing Act also includes a criminal provision, Section 901.1600 Section 901 of the Fair Housing Act makes it unlawful for any individual(s), by the use of force or threatened use of force, to intentionally injure, intimidate, or interfere with, any person's housing rights on the bases of race, national origin, religion, sex, disability or familial status.1601 HUD reports that it refers Section 901 complaints to the DOJ, which handles investigations through the FBI and prosecutions through the Criminal Section of the Civil Rights Division at DOJ.1602 DOJ confirms this in its Justice Manual,1603 and through recently enforcing this section of the FHA in hate crimes cases.1604

• Aggrieved persons or HUD may also file housing complaints under Section 504 of the Rehabilitation Act of 1973 or Title VI of the Civil Rights Acts of 1964, which protect against discrimination on the basis of disability, race, color, and national origin. After a complaint is filed, HUD reports that it conducts an investigation, which may lead to findings of discrimination.1605 The agency then tries to reach a voluntary resolution between parties, but if that is not possible, HUD may pursue enforcement before an ALJ

1599 DOJ Justice Manual, supra note 370, at § 8-2.231(A). 1600 42 U.S.C. § 3631. 1601 Id. 1602 Federal Bureau of Investigation, "What We Investigate," <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>. 1603 DOJ Justice Manual, supra note 370, at § 8-3.010 (enforcement of 42 U.S.C. § 3631 (Interference with Fair Housing Activities)). 1604 See e.g., In the Name of Hate, supra note 63, at notes 854 (discussing the DOJ CRT case of United States v. Dennis, 8:16-CR-365 (M.D. Fla. 2015), conviction of defendants who attempted to intimidate their neighbors, an interracial couple, by burning a six-foot cross in their front yard); 857 (discussing United States v. Saucedo, et al., 2:16-CR-0442 (C.D. Ca. 2016), conviction of defendants who attacked the homes of black families with Molotov cocktails); 879 (discussing United States v. Halfin, 4:18-CR-142 (N.D. Tex. 2018), conviction of defendant who threatened force against black family in his apartment complex); 955 (discussing United States v. Howard, 8:18-CR- 51 (M.D. Fla. 2018), conviction of defendants who harassed, threatened and intimidated a Muslim family in attempt to deter them from buying a home in their neighborhood). 1605 *Ibid.*; but see, Suzy Khimm, Laura Strickler, Hannah Rappleye and Stephanie Gosk, "Under Ben Carson, more families live in HUD housing that fails health and safety inspections," NBCNews, Nov. 14, 2018, <https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421> (noting that "... more failing properties also mean that HUD has a bigger caseload of troubled homes to oversee. And rather than beefing up the department's staff to oversee them, HUD has lost hundreds of staff members in the wake of a hiring freeze mandated by President Donald Trump. HUD's enforcement office, tasked with going after the worst landlords, now has the lowest staff levels since 1999, according to a federal watchdog.")

<https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>
<https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>
<https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421>
<https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421>

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or make a referral to the DOJ who may take additional action.1606 In addition, HUD can initiate suspension or debarment proceedings,1607 or refuse to grant or continue federal financial assistance.1608

Figure 5.4 summarizes FHEO's complaint and investigation process:

1606 U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. 1607 See, e.g., 24 C.F.R. § 8.57(a)(2). 1608 See, e.g., Id. § 1.8(c).

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Figure 5.4: FHEO Complaint and Investigation Process

Source: U.S. Dept of Housing and Urban Development, "Learn About the FHEO Complaint and Investigation Process," https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Overview_of_FHEO's.

In contrast to some other civil rights statutes such as Title VI,1609 the Fair Housing Act provides a private right of enforcement for protections against discrimination, including claims regarding

1609 Alexander v. Sandoval, 532 U.S. 275 (2001) (only DOJ could enforce disparate impact regulations it promulgated under Title VI).

https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Overview_of_FHEO's

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nonintentional types of prohibited discrimination.1610 This tool has led to a broader range of private claims and private civil rights litigation initiated during times when the federal government has not aggressively enforced such rights, including during recent years.1611 As the Commission has discussed, while private litigation is an important tool, the effective civil rights enforcement work of the federal government is also needed.1612 Table 5.1: Total FHEO Complaints Received, FY 2016 to FY 2018 Number of Complaints Received FY 2016 FY 2017 FY 2018 HUD 1,397 1,342 1,790 FHAP 7,063 6,920 5,991 TOTAL 8,460 8,262 7,781

Source: U.S. Dept of Housing and Urban Development, Affected Agency Review Response, Jul. 3, 2019.

HUD reported that FHEO closed approximately 48 percent of the total number of complaints for FY 2016-2018 for "no cause," and closed approximately 30 percent of complaints for those fiscal years due to conciliation or settlements.1613 HUD reported that in FY 2016, it took FHEO 191 days to process and close Title VIII complaints, which rose slightly in FY 2017 and FY 2018 to 202 days and 207 days respectively.1614 In contrast, for complaints filed under other authorities in FY 2016, it took FHEO an average of 464 days to process and close these cases, which decreased to 441 days in FY 2017 and 240 days in FY 2018, as of information reported on June 30, 2018.1615 Bryan Greene noted in his testimony that "[n]otwithstanding declining staff, on average, each year for the last several years, HUD has reduced the amount of time it takes to resolve cases.1616 Additionally, HUD noted that "[l]ikewise, among those cases that had [sic] could have aged beyond 100 days during the fiscal year, each year for the last three years, we are closing a higher percentage of those cases timely."1617 As noted earlier, FHIP and FHAP agencies process approximately 77 percent of FHEO's Fair Housing Act complaints.1618 According to HUD's FY 2016 report submitted to Congress, that year

1610 Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507 (2015); see also *infra* notes 1706-1734 (discussing disparate impact under the FHA). 1611 See, e.g., Alex Gano, Disparate Impact and Mortgage Lending: A Beginner's Guide, 88 Univ. Colo. L. Rev. 1109, 1112 (2017), http://lawreview.colorado.edu/wp-content/uploads/2017/05/13-88-4-Gano_Final.pdf; Relman Dane & Colfax, "Cases & Matters," <https://www.relmanlaw.com/cases>. 1612 USCCR, Minority Voting, supra note 17, at 14. 1613 U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatories, "Civil Rights Commission Data updated 6-1-2018." 1614 *Ibid.* Although, Bryan Greene's testimony noted different numbers for the average amount of days it takes FHEO to process fair housing complaints, specifying 247 days in FY 2016, 209 days in FY 2017, and 122 days in 2018, and noting that "[w]hile some of the cases filed in FY 2018 remain open, as the fiscal year just ended September 30, 2018, we expect the final average to still be lower than FY 2017, consistent with a five-year trend." See Greene Statement, at 1. 1615 *Ibid.* 1616 *Ibid.* 1617 *Ibid.* 1618 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 74.

http://lawreview.colorado.edu/wp-content/uploads/2017/05/13-88-4-Gano_Final.pdf
<https://www.relmanlaw.com/cases>

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there were 1,366 complaints filed with HUD and 7,019 complaints filed with FHAP agencies and 8,385 complaints overall.1619 In FY 2017, the number of complaints filed with both HUD and FHAP decreased slightly to 8,186—there were 6,878 complaints filed with FHAP agencies and 1,308 complaints filed with HUD.1620 While HUD only has the authority to issue a formal charge in federal court through DOJ,1621 HUD does have the authority to initiate complaints on behalf of aggrieved persons or identify a complaint for systemic processing.1622 These complaints can be administratively litigated to judgment before an ALJ, or they can be litigated in federal court by DOJ.1623 Secretary-initiated complaints are an important enforcement tool for HUD. According to Bryan Greene, speaking of HUD FHEO, "one of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people."1624 In 2002, the Commission recommended that agencies initiate litigation on systemic civil rights issues, reasoning that "[b]ecause few complaints result in litigation, enforcement agencies must have strong litigation strategies."1625 The Commission's prior recommendations that were incorporated in 2002 included "stepping up litigation in areas of law that are relatively undeveloped," and advising agencies "to seek and litigate cases that set legal precedent and mediate other cases."1626 In March 2018, the New York Times reported that Anna Maria Farias, Assistant Secretary of Fair Housing and Equal Opportunity at HUD, had ordered a hold on approximately half a dozen Secretary-initiated complaints "until further notice."1627 Some of these halted Secretary-initiated complaints focused on issues of accessibility of residential dwellings; an investigation of a local ordinance in California that could hinder access to group homes for formerly incarcerated individuals; and a high-profile complaint involving advertisers on Facebook having the ability to exclude certain "ethnic affinities," or specific racial or ethnic groups from viewing ads when social media activities have identified them as black, Hispanic, or Asian persons.1628

1619 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574, at 18. 1620 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 45. 1621 See supra notes 1477-1479. 1622 24 C.F.R. § 103.204-103.205. 1623 See Justice Manual at § 8.22.231.A ("After HUD issues a charge [of FHA violation], the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge; or (2) one of the parties to the administrative charge "elects" to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant."). 1624 Greene Statement, at 2. 1625 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 1626 *Ibid.* 1627 Glenn Thrush, "Under Ben Carson, HUD Scales Back Fair Housing Enforcement," The New York Times, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtrref=www.google.com>. 1628 *Ibid.*

<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtrref=www.google.com>
<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtrref=www.google.com>

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Concerning the Facebook complaint, private fair housing organizations subsequently filed a lawsuit against Facebook in March 2018,1629 for which DOJ and HUD issued a Statement of Interest filed by the U.S. Attorney for the Southern District of New York in August 2018, advising the federal court that Facebook could be held liable under the FHA if housing providers use its ad targeting functions to illegally discriminate against prospective renters that fall under protected classes.1630 Whereas Facebook argued that it was protected by the Communications Decency Act as it is "merely an interactive computer service," HUD and DOJ told the federal court that Facebook is an internet service provider, which the Complaint alleges creates and harvests data about the demographic characteristics of "then solicits demographic and other audience preferences from advertisers and implements those preferences using Facebook's proprietary algorithms to enable advertisers to include some customers and exclude others," including through housing advertisements.1631 HUD also reopened its Secretary-initiated complaint against Facebook in August 2018.1632 HUD investigated the complaint and charged Facebook with violating the Fair Housing Act "by encouraging, enabling, and causing housing discrimination through the company's advertising platform."1633 HUD has noted that "Facebook elected to have the case heard in Federal district court rather than before a HUD Administrative Law Judge," thus "HUD referred the case to the Department of Justice as required by the Fair Housing Act."1634 HUD also noted that it "pursued the case even though private organizations settled their complaint with Facebook," and that its actions "were based on the evidence in its investigation and all applicable law."1635 It is unclear whether the reopening of this Secretary-initiated complaint was motivated by the high-profile lawsuit brought by the private fair housing organizations. In March 2019, the private fair housing organizations entered into a settlement agreement with Facebook, where Facebook agreed to pay \$1.9 million in damages and expenses to the plaintiffs, and another \$500,000 for advertising on Facebook to promote fair housing and fair lending

1629 Complaint, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>. 1630 Statement of Interest, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>; see also Katie Benner, "Justice Dept. Backs Suit Accusing Facebook of Violating Fair Housing Act," The New York Times, Aug. 17, 2018, <https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>. 1631 Statement of Interest, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689, 2 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>. 1632 U.S. Dept of Hous. and Urban Dev., "HUD Files Housing Discrimination Complaint Against Facebook," Aug. 17, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085 [hereinafter HUD, "HUD Files Housing Discrimination Complaint Against Facebook"]. 1633 U.S. Dept of Hous. and Urban Dev. v. Facebook, FHEO No. 01-18-0323-8, Charge of Discrimination, https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf, U.S. Dept of Hous. and Urban , "HUD Charges Facebook with Housing Discrimination over Company's Targeted Advertising Practices," Mar. 28, 2019, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035. 1634 U.S. Dept of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1635 *Ibid.*

<https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>
<https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>

<https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>
<https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085
https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035

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educational programs and services.1636 Facebook will also “undertake far-reaching steps that will prevent discrimination in housing, employment, and credit advertising on Facebook, Instagram, and Messenger demonstrating significant progress and a commitment to advancing civil rights.”1637 The New York Times also published information with regard to another one of the complaints (against Epcon Communities, Inc., and Epcon Communities Franchising, Inc.) that was reportedly halted by FHEO Secretary Farias.1638 Since then HUD has charged Epcon Communities with housing discrimination for “failing to design and construct thirty-two multifamily housing communities throughout Ohio that meet the accessibility requirements of the Fair Housing Act.”1639 With regard to Secretary-initiated complaints, HUD has noted:

HUD takes seriously its authority to issue Secretary-initiated complaints under the Fair Housing Act. These matters often involve significant novel matters of national significance requiring substantial resources to investigate. The significance of these matters cannot be measured by the number of filings alone. During testimony, then General Deputy Assistant Secretary Greene stated that there has been a “sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive.”1640 Greene said he thinks the key is “having staff resources to go in and do quality assurance.”1641

Former FHEO Assistant Secretary Kim Kendrick stated that in retrospect, she wished that when she led FHEO from 2005 through 2009 she had prioritized systemic issues rather than “focusing on the number of complaints that FHEO filed each year.”1642 Kendrick explained that during her tenure, the Mortgage Lending Division was established to examine lending discrimination, which had “small successes that impacted a large number of holders, mortgage holders and applicants.”

1636 Settlement Agreement and Release, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689, 2 (S.D.N.Y. 2019), <https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>. 1637 National Fair Housing Alliance, “Civil Rights Advocates Settle Lawsuit with Facebook: Transforms Facebook’s Platform Impacting Millions of Users,” <https://nationalfairhousing.org/facebook-settlement/>. 1638 Glenn Thrush, “Under Ben Carson, HUD Scales Back Fair Housing Enforcement,” The New York Times, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>. 1639 U.S. Dep’t of Hous. and Urban Dev. v. Epcon Communities, Inc., FHEO Nos. 05-12-0088-8 05-13-0010-8, Charge of Discrimination, <https://www.hud.gov/sites/dfiles/FHEO/documents/18ACCESSIBLE%20Epcon%20Charge%20final.pdf>, U.S. Dep’t of Hous. and Urban Dev., “HUD Charges Two Ohio Companies with Discrimination Against Residents with Disabilities, May 17, 2016, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_042. 1640 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 73. 1641 Ibid. 1642 Kendrick Testimony, Federal Civil Rights Enforcement Briefing, p. 236.

<https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>
<https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>
<https://nationalfairhousing.org/facebook-settlement/>
<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>
<https://www.hud.gov/sites/dfiles/FHEO/documents/18ACCESSIBLE%20Epcon%20Charge%20final.pdf>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_042

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and noted that “the impact could be felt because discriminatory practices declined.”1643 She explained that FHEO could have had “a greater impact if we directed more resources to divisions such as that, and to impact -- the fair lending investigations could certainly have a greater impact than a few fair housing complaints that have been serviced by -- that could be serviced by other fair housing agencies or even by the private sector.”1644 Testimony during the Commission’s Illinois Advisory Committee briefing on fair housing, in May 2019, highlighted the value of systemic case results when FHEO is able to achieve them. HUD’s Midwest regional director testified regarding what HUD terms a “cross-programmatic team” investigation, involving FHEO among other HUD programs including the Office of Public Housing and the Office of General Counsel.1645 In 2016 following FHEO findings of racial segregation in housing and race discrimination in employment at the Alexander County public housing authority, among other HUD violations identified, HUD took control of the public housing authority.1646 The regional director testified: “I have been doing fair housing and housing related work for the better part of 40 years, and I can say personally from my own experiences within Alexander County I have never seen housing in the continental United States that compares [as badly] to the housing that people were living in in Alexander County.”1647 An Inspector General report also notes about this investigation that “HUD was ‘stunned . . . at what we saw, not just in terms of the deplorable living conditions that we encountered but at the poor, even absent record keeping, the staggering backlog of critical repairs, all of this going to the very health and safety of the residents living there’ and that these deplorable conditions occurred in ‘segregated housing’ with ‘broken and outdated appliances and pest infestations in housing developments occupied by African-Americans.’”1648 The regional director also testified that HUD had taken distressingly long to act: “HUD had been aware of the negative conditions at the housing authority since at least 2010, including the misuse of funds, conflicts of interest, and failures to comply with HUD policies and federal civil rights laws.”1649 Only following what the regional director described as “significant findings” regarding race and disability based discrimination, including the maintenance of racially segregated public housing, combined with enforcement authorities from other components within HUD, did HUD ultimately take control of the housing authority in 2016 and tear down two of the public housing developments. HUD explained that it tore down the developments because they “were beyond the point of viability”: the “cost of trying to bring those developments back into some sort of condition of habitability would be cost prohibitive.”1650 The HUD Inspector General report elaborates that

1643 Ibid., 238. 1644 Ibid., 238. 1645 McGough Testimony, Illinois SAC Fair Housing Briefing, p. 27. 1646 Ibid., 27-29. 1647 Ibid., 26. 1648 U.S. Dep’t of Housing and Urban Development, Office of Inspector General, Memorandum Re: Final Evaluation Report – HUD’s Oversight of the Alexander County Housing Authority (Jul. 24, 2018), pp. 5, 7, <https://www.hudoig.gov/sites/default/files/documents/2017-OE-0014.pdf> [hereinafter HUD, Memo Re: Oversight of the Alexander County Housing Authority]. 1649 McGough Testimony, Illinois SAC Fair Housing Briefing, p. 26. 1650 Ibid., 29-30.

<https://www.hudoig.gov/sites/default/files/documents/2017-OE-0014.pdf>

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FHEO had issued findings regarding race discrimination in 2014. “FHEO’s authorities enable it to act more quickly than other HUD program offices” with the Public Housing Authority “required to review the finding within a 30-day window and enter into a voluntary compliance agreement to remedy the identified negative conditions.” Other HUD program offices took more time to resolve the remainder of the cross-programmatic review, taking until 2016 for effective action.1651 Ultimately the Inspector General report notes that “[w]ithout FHEO’s involvement, negative conditions at ACHA [the housing authority] may have persisted longer before HUD took it into receivership.”1652 Proactive Compliance Evaluation For recipients of federal financial assistance, HUD FHEO engages in periodic compliance reviews,1653 to which it currently devotes about 20 percent of its staffing resources.1654 FHEO can initiate a compliance review for funding recipients as well as some entities that are not recipients of HUD funding, if allegations of relevant statutory violations have been made,1655 based on the information submitted in a complaint or based on FHEO’s own choice.1656 Compliance reviews could evaluate nondiscrimination compliance work among 5,000+ public assisted entities (Public Housing Authorities, Community Development Block Grant/HOME recipients, Rental Assistance Demonstration, AFFH, AFH marketing plans, reviews of Demolition/Disposition plans, and site and neighborhood reviews).1657 According to the FY 2107 Annual Report, “in FY 2017, the FHIP program awarded \$38 million in grants to 155 organizations to meet the objectives under one or more of the core program initiatives: enforcing the Fair Housing Act under the Private Enforcement Initiative, educating the public and industry stakeholders on fair housing under the Education and Outreach Initiative, and building organizational capacity under the Fair Housing Organizations Initiative.”1658 In contrast, the FY 2017 Annual Report only described one compliance outcome, in which it negotiated a voluntary compliance agreement including a monetary award and rent a Nevada housing authority accountable for violations of Section 504 of the Rehabilitation Act and the FHA, “among the outcomes reached by HUD in FY 2017 under these [compliance] authorities.”1659

1651 HUD, Memo Re: Oversight of the Alexander County Housing Authority, supra note 1648, at 11. 1652 Ibid., 12. 1653 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31. 1654 Greene Statement, at 1-2. 1655 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31. 1656 HUD, “Learn About the FHEO Complaint and Investigation Process,” supra note 1578. 1657 Greene Statement, at 1-2. 1658 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 12. 1659 Ibid.

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity FHEO has the authority to issue guidance under the statutes it enforces as a tool for enforcement.1660 Sara Pratt, a longtime former career HUD executive testified to the importance of policy guidance as a civil rights enforcement tool during an Illinois Advisory Committee briefing on fair housing in May 2019: “There is a need for strong, consistent guidance, instruction, educational materials that are available consistently nationally” from HUD. She explained HUD “should have fair housing materials up online so anybody doing the work around the country could download them.” But, she noted: “I am unaware of any useful civil rights guidance issued in this Administration. This is not political. It’s timeframes I’m observing.”1661 Bryan Greene also testified to the Commission regarding guidance as one of five current civil rights enforcement priorities for HUD FHEO, underscoring the value of the tool.1662 The Commission’s review of HUD’s website shows HUD has issued no civil rights guidance since 2016. In FY 2016, however, HUD issued two guidance documents on the following topics:

- Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions1663

- Fair Housing Act Protections for Persons with Limited English Proficiency1664 Also in FY 2016, HUD finalized the following rule:

Guid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act1665

FHEO publicized this guidance and rulemaking in its FY 2016 annual report.1666 Since then, HUD has engaged in other rulemaking and policy initiatives regarding civil rights during FY 2016-2018 which have demonstrated a notable policy shift. For example, in September 2016, HUD published a final rule regarding the rights of transgender persons against discrimination in federally funded emergency shelters.1667 The rule provides that persons must be provided shelter in accordance with their self-described gender identity and provided practical guidance for how to accommodate all

1660 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. 1661 Pratt Testimony, Illinois SAC Fair Housing Briefing, p. 40. 1662 Greene Statement, at 3. 1663 U.S. Dep’t of Hous. and Urban Dev., Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF. 1664 U.S. Dep’t of Hous. and Urban Dev., Fair Housing Act Protections for Persons with Limited English Proficiency (Sep. 15, 2016), <https://www.hud.gov/sites/documents/LEPMEMO091516.PDF>. 1665 Guid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sep. 14, 2016). 1666 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574. 1667 Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sep. 21, 2016).

https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF
<https://www.hud.gov/sites/documents/LEPMEMO091516.PDF>

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persons in shelter safely.1668 Previously, HUD had clarified that rights to freedom from discrimination in housing applied to LGBT communities.1669 In May 2019, one day following Secretary Ben Carson’s Congressional testimony stating that he had no plans to modify that rule, HUD published a notice of proposed rulemaking in the federal register, proposing to repeal its prior equal access shelter rule and instead to permit shelters to require facility access based on biological sex.1670 In addition, HUD has acted to clarify civil rights to mortgage lenders who were acting on the administration’s other policies. In 2018, federal mortgage lenders reportedly began denying housing applications to recipients of Deferred Action for Childhood Arrivals (DACA),1671 a temporary immigration status extended by the Obama administration, which the Trump administration has opposed.1672 Soon after the reports surfaced, HUD told Congress that its rules requiring lawful immigration status to receive federal mortgage assistance had not changed, stating that “HUD has a longstanding policy regarding eligibility for non-U.S. citizens without lawful status.”1673 HUD’s letter to Congress clarified that legal permanent residents and nonpermanent residents with lawful status are eligible for federally backed mortgages, and that there had been no change in policy.1674 In contrast, HUD proposed a new rule in May 2019 that aims to limit access to federal public housing to households composed exclusively of U.S. citizens.1675 According to the reports, HUD’s own data suggests that as many as 55,000 U.S. citizen children could be rendered homeless by this change in policy because these children and their families now reside in public housing but will be rendered ineligible based on an adult family member’s immigration status.1676 Secretary Carson

1668 Ibid. 1669 Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,661 (Feb. 3, 2012). 1670 U.S. Dep’t of Hous. and Urban Dev., Revised Requirements Under Community Planning and Development Housing Programs, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>; Tracy Jan, “Proposed HUD rule would strip transgender protections at homeless shelters,” The Washington Post, May 22, 2019, https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.8c9f9170263d. 1671 See Ben Lane, “HUD to Lenders: We Are Not Denying Mortgages to DACA Dreamers,” Housing Wire, Mar. 7, 2019, <https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers> (discussing reports of lenders denying mortgage assistance to Dreamers, after which HUD clarified that was not its policy). 1672 See infra note 2436 (discussion of DACA litigation in DHS CRCL chapter). 1673 Letter from Len Wolfson, HUD Assistant Secretary for Congressional and Intergovernmental Relations, letter to Senator Robert Menendez (Dec. 21, 2018), <https://www.housingwire.com/ext/resources/files/Editorial/Documents/Menendez-DACA-Final.pdf>. 1674 Ibid. 1675 Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (May 10, 2019); Sylvan Lane, “Carson on HUD eviction plan: ‘You take care of your own first,’” The Hill, Mar. 21, 2019, <https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>. 1676 Tracy Jan, “Trump Proposal Would Evict Undocumented Immigrants from Public Housing,” The Washington Post, Apr. 18, 2019, https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd063406b80.

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>

https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/utm_term=.8c9f9170263d
https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/utm_term=.8c9f9170263d
<https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers>
<https://www.housingwire.com/ext/resources/files/Editorial/Documents/Mendez-DACA-Final.pdf>
<https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>
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https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd083406b80
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testified that the change is based in “logic” rather than lack of “heart”: U.S. resources, he said, should be reserved for citizens.¹⁶⁷⁷ However, it has been reported that local public housing authorities that are charged with enforcing the rule are opposed to it, citing additional financial and administrative strain.¹⁶⁷⁸ Tim Kaiser, the Executive Director of the Public Housing Authorities Directors Association (PHADA) said that “it feels unnecessary, and like they are changing the rules in the middle of the game,” and it is “a reinterpretation of a long-standing policy, making families that we are already serving ineligible.”¹⁶⁷⁹ John Clarke, President of PHADA, explained that: “Removing a family is not free. It takes staff time. It takes legal resources. Staff will have to sit in court instead of screening families or going over eligibility applications. It doesn’t seem like a quality way to maximize the slim resources we do have.”¹⁶⁸⁰ Affirmatively Furthering Fair Housing Section 808(d) of the Fair Housing Act mandates that HUD program participants affirmatively further fair housing, and stipulates:

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes. All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.¹⁶⁸¹

A major goal of the Fair Housing Act, as affirmed by the Supreme Court, is to establish integrated communities.¹⁶⁸² The Fair Housing Act requires recipients of HUD funding to affirmatively further fair housing by taking active steps to assess, remediate, and document the patterns and practices of segregation in their communities,¹⁶⁸³ and failure to do so could lead to a loss of federal funding or legal exposure.¹⁶⁸⁴ Formally, this rule required jurisdictions to conduct an analysis of impediments to fair housing and document the analysis and steps taken to eliminate these

¹⁶⁷⁷ Ibid. ¹⁶⁷⁸ Mattie Quinn, “Public Housing Agencies Oppose HUD’s Plan to Evict Immigrant Families,” *Governing*, May 21, 2019, <https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>. ¹⁶⁷⁹ Ibid. ¹⁶⁸⁰ Ibid. ¹⁶⁸¹ 42 U.S.C. 3601 § 808(d). ¹⁶⁸² *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 209 (1972). ¹⁶⁸³ Timothy M. Smyth, Michael Allen, and Marisa Schnaith, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *Journal of Affordable Housing*, vol. 23, no. 2 (2015), pp. 231-258 [hereinafter Smyth et al., “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients”]. ¹⁶⁸⁴ Ibid.

<https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>
<https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>

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impediments.¹⁶⁸⁵ The affirmatively furthering fair housing provision has existed since the passing of the Fair Housing Act in 1968.¹⁶⁸⁶ On July 16, 2015, HUD issued the Affirmatively Furthering Fair Housing (AFFH) rule,¹⁶⁸⁷ which clarifies the Fair Housing Act’s requirement that HUD programs be implemented in a way that affirmatively furthers the purposes of the Act,¹⁶⁸⁸ and enables HUD program participants to meet “long-standing fair housing obligations in their use of HUD funds.”¹⁶⁸⁹ According to HUD, the “new rule will provide communities and local decision-makers with the information, tools, and clear guidance they need to comply with their statutory duty to affirmatively further fair housing.”¹⁶⁹⁰ Implementation of the AFFH rule began in 2016, and required jurisdictions to submit an Assessment of Fair Housing (AFH) to HUD, for which HUD created an AFH assessment tool and made data publicly available to help program participants identify and analyze fair housing issues pertaining to patterns of segregation, concentrated poverty among racial and ethnic minorities, disparities in access to opportunity, and disproportionate housing needs.¹⁶⁹¹ The AFH process also included a review process, where HUD would have 60 days to determine whether the program participant had met all requirements for providing its analysis, assessment, and goal setting.¹⁶⁹² HUD would provide a notification to the program participant within 60 days if the AFH was not accepted, and would provide guidance on how to revise the AFH if it is found that any portion of the AFH is “inconsistent with fair housing or civil rights requirements or is substantially incomplete.”¹⁶⁹³ In January 2018, HUD issued a notice postponing the deadline for submission of an AFH by program participants, which noted that “program participants will not be required to submit an AFH using the current Office of Management and Budget (OMB)-approved version of the Assessment of Fair Housing Tool for Local Governments [], but must continue to comply with existing obligations to affirmatively further fair housing.”¹⁶⁹⁴ HUD noted that it “is seeking revisions to the 2015 AFFH rule because there were substantial implementation difficulties with the 2015 AFFH rule,” highlighting that “one estimate found that HUD would need 538 full-time employees to conduct reviews of the 2019 AFFH plans, while HUD would have been able to use

¹⁶⁸⁵ Smyth et al., “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *supra* note 1683, at 231-258; 24 C.F.R. §§ 91.225(a) (1), 91.325(a) (1); 24 C.F.R. §§ 570.487(b), 570.601(a) (2). ¹⁶⁸⁶ James A. Kushner, An Unfinished Agenda: The Federal Fair Housing Enforcement Effort, 6 *Yale L. & POL’Y REV.*, 348, 348-60 (1988); U.S. Government Accountability Office, GAO-10-905, *Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, 2010, <http://www.gao.gov/new.items/d10905.pdf> [hereinafter GAO, *Housing And Community Grants*]. ¹⁶⁸⁷ 80 Fed. Reg. 42,271 (Jul. 16, 2015). ¹⁶⁸⁸ Id. ¹⁶⁸⁹ Id. ¹⁶⁹⁰ HUD, 2016 Annual Performance Report, *supra* note 193. ¹⁶⁹¹ U.S. Dep’t of Hous. and Urban Dev., “AFFH Fact Sheet: The Duty to Affirmatively Further Fair Housing,” <https://www.hudexchange.info/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>. ¹⁶⁹² U.S. Dep’t of Hous. and Urban Dev., “The Assessment of Fair Housing,” <https://www.hudexchange.info/programs/affh/overview/>. ¹⁶⁹³ Ibid. ¹⁶⁹⁴ 83 Fed. Reg. 683 (Jan. 5, 2018).

<http://www.gao.gov/new.items/d10905.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>
<https://www.hudexchange.info/programs/affh/overview/>

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as little as just 28 employees for the task.”¹⁶⁹⁵ Subsequently, in September 2018, HUD issued a notice that proposed to rollback the AFFH assessment tool, which indicated:

HUD’s experience over the three years since the newly specified approach was promulgated demonstrates that it is not fulfilling its purpose to be an efficient means for guiding meaningful action by program participants. Accordingly, HUD has determined that a new approach towards AFFH is required. As HUD begins the process of developing a proposed rule to amend the existing AFFH regulations, it is soliciting public comment on changes that will: Minimize regulatory burden while more effectively aiding program participants to plan for fulfilling their obligation to affirmatively further the purposes and policies of the Fair Housing Act, create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics; provide for greater local control and innovation; seek to encourage actions that increase housing choice, including through greater housing supply; and more efficiently utilize HUD resources.¹⁶⁹⁶

Prior to his appointment as HUD Secretary, Carson wrote in 2015 that this rule amounted to a “failed socialist experiment,” and noted that “government-engineered attempts to legislate racial equality create consequences that often make matters worse.”¹⁶⁹⁷ The National Fair Housing Alliance (NFHA) indicated in their 2018 Fair Housing Trends Report that the delay by HUD is “an effective suspension of the rule,” viewing the AFH as the “lynchpin” of the 2015 rule, and noting that by returning to the system of conducting an analysis of impediments, HUD has “returned to a process whose faults and deficiencies are well-documented.”¹⁶⁹⁸ In May 2018, the National Fair Housing Alliance, Texas Appleseed, and the Texas Low Income Housing Information Service filed a lawsuit against HUD that requested a federal court to order HUD to reinstate the rule.¹⁶⁹⁹ However in late August 2018, a federal judge dismissed the suit, concluding that the plaintiffs did not prove that they were harmed by HUD’s actions, and noted in the opinion that “HUD’s withdrawal of the tool does not ‘perceptibly impair’ the plaintiffs’ abilities to carry out their missions.”¹⁷⁰⁰

¹⁶⁹⁵ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). ¹⁶⁹⁶ 83 Fed. Reg. 40,713 (Sep. 16, 2018). ¹⁶⁹⁷ Ben S. Carson, “Experimenting with failed socialism again,” *The Washington Times*, Jul. 23, 2015, <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/>. ¹⁶⁹⁸ National Fair Housing Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report*, 2018, pp. 35-36, <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>. ¹⁶⁹⁹ Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” *Housing Wire*, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>. ¹⁷⁰⁰ Memorandum Opinion, *National Fair Housing Alliance et al. v. Carson et al.*, No. 18-1076, 40 (D.D.C. 2018), <https://www.courtlistener.com/recap/gov.uscourts.dcd.196383/gov.uscourts.dcd.196383.47.0.pdf>; Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” *Housing Wire*, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>.

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<https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>

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Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation.¹⁷⁰¹ NFHA states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods.¹⁷⁰² Furthermore, NFHA is concerned that delaying the AFH process will ensure that these systemic issues will continue to go unresolved.¹⁷⁰³ At the Commission’s briefing, former Assistant Secretary for Fair Housing and Equal Opportunity during the George W. Bush Administration Kim Kendrick emphasized the importance of public education on this topic, given the absence of enforcement. To Kendrick, the affirmatively furthering fair housing requirement under the Fair Housing Act needs a rule to explain to communities what it means to affirmatively further fair housing, but in the absence of such a rule, “let’s let the communities be better by giving them the tools that they need through education, guidance, policy statements, if we’re not going to have a rule.”¹⁷⁰⁴ The NAACP Legal Defense and Educational Fund stated that HUD’s delay of the Affirmatively Furthering Fair Housing regulation left “local jurisdictions confused, [gave] local residents less voice in important decisions about their communities, and reinstat[ed] an approach to fair housing that the GAO found to be ineffective and poorly administered.”¹⁷⁰⁵ The National Fair Housing Alliance emphasized the signaling effect of the suspension of this rule: “it has sent the message to local governments that HUD will not take seriously the obligation to affirmatively further fair housing as required by the Fair Housing Act.”¹⁷⁰⁶ *Disparate Impact: Role of the Federal Government and Private Litigation in Housing Discrimination Cases* In June 2018, HUD issued advance notice of proposed rulemaking, inviting public comment on potential amendments to its 2013 final rule that implemented the disparate impact standard.¹⁷⁰⁷ and in August 2019 published a proposed rule amending its 2013 final rule.¹⁷⁰⁸ In its 2018 advance notice, HUD noted that it “seeks to ensure that HUD’s disparate impact rule is consistent with [the

¹⁷⁰¹ Kriston Capps, “The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation,” *CityLab*, Jan. 4, 2019, <https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>. ¹⁷⁰² National Fair Housing Alliance, *Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights*, Dec. 17, 2018, at attachment 2 [hereinafter *National Fair Housing Alliance Statement*]. ¹⁷⁰³ Ibid. ¹⁷⁰⁴ Kendrick Testimony, *Federal Civil Rights Enforcement Briefing*, p. 266. ¹⁷⁰⁵ NAACP Legal Defense Fund, *Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights*, Dec. 17, 2018, at 5 [hereinafter *NAACP Legal Defense Fund Statement*]; see also GAO, *Housing and Community Grants*, *supra* note 1686. ¹⁷⁰⁶ National Fair Housing Alliance Statement, at 2. ¹⁷⁰⁷ Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560. ¹⁷⁰⁸ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug. 19, 2019).

<https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>
<https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>

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Supreme Court’s 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities*.¹⁷⁰⁹ In the August 2019 Proposed Rule, HUD again reiterated that it seeks to align its regulations with the decision in *Inclusive Communities*, but whether such a change is in fact necessary based on that Supreme Court ruling is contested. The Supreme Court did not rely upon HUD’s disparate impact rule in *Inclusive Communities* (which held that disparate impact is a viable legal claim, but it must be proven by robust causation) relying instead on the statutory language of the Fair Housing Act.¹⁷¹⁰ The 2013 Final Rule contained a 3-part burden-shifting mechanism for claims alleging discrimination based on disparate impact. In contrast to claims made based on intent, in a disparate impact claim, proof of discrimination is based on the effects of a policy on particular groups. The 2013 Rule requires the plaintiff (or charging party) to prove “that a challenged practice caused or predictably will cause a discriminatory effect.”¹⁷¹¹ If this showing is made, the defendant (or respondent) then has the burden to prove “that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”¹⁷¹² In response, the plaintiff “may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”¹⁷¹³ In its 2019 proposed rule, HUD proposes changing this burden-shifting framework to adopt a new standard a plaintiff must allege to avoid dismissal of a disparate impact claim.¹⁷¹⁴ If adopted, under this rule the plaintiff must allege:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

That the alleged disparity caused by the policy or practice is an adverse effect on members of a protected class.

(4) That the alleged disparity caused by the policy or practice is significant; and

1709 135 S. Ct. 2507 (2015). 1710 Id. at 2523 (“a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that “[f]acial imbalance ... does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 653 (1989).” 1711 24 C.F.R. § 100.500(c)(1) 1712 Id. § 100.500(c)(2) 1713 Id. § 100.500(c)(3) 1714 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(b)).

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(5) That there is a direct link between the disparate impact and the complaining party’s alleged injury.1715

These five elements are required as an initial showing, in contrast to the 2013 Rule, which did not contain specific requirements for how a plaintiff would show at the outset that a policy had a discriminatory effect.1716 In addition, the 2019 Rule provides for new, specified defenses against disparate impact claims. A defendant may defeat a claim by showing that “its discretion is materially limited by a third party” such as a legal or other binding requirement.1717 It may also defend the use of an algorithm or other model by showing it has conformed to specific requirements such as third-party validation and that the inputs to the model are not substitutes for protected characteristics.1718 In contrast to the 2013 Rule, the 2019 proposal eliminates the burden on the defendant to prove a challenged practice is necessary to its business. It provides a defendant may rebut a charge that a practice is arbitrary, artificial, and unnecessary “by producing evidence showing that the challenged policy or practice advances a valid interest (or interests).”1719 but does not require proof. In such a case, the plaintiff has the burden to prove “that a less discriminatory policy or practice exists that would serve the defendant’s identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”1720 Further, the updated proposed rule issued on August 19, 2019, states that “neither the discriminatory effect standard, nor any other item in HUD’s part 100 regulations, requires or encourages the collection of data with respect to protected classes and that the absence of such collection will not result in any adverse inference against a party.”1721 In its preamble to the 2019 proposal, HUD notes plaintiffs will have access to discovery when litigating only when they satisfy each of the 5 new elements, and that failure to satisfy any one will result in dismissal of the case (even if the failure to satisfy is due to a lack of data).1722 This requirement includes the showing that the defendant has no valid interest in the policy or practice under challenge, which previously was not the plaintiff’s initial responsibility to show. At the time of this writing, a number of public comments in response to the rule have already been submitted.1723 In public documents surrounding the advance notice of proposed rulemaking, HUD assured the public “it is not contemplating a disparate impact proposed rulemaking to eliminate disparate impact liability,” adding that “[i]n response to HUD’s 2018 Advance Notice of Proposed Rulemaking on disparate impact, many commenters argued that HUD should revisit its rule in

1715 Id. 1716 See 24 C.F.R. § 100.500(c). 1717 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(c)(1)). 1718 Id. (Proposed amendment to 24 C.F.R. § 100.500(c)(2)). 1719 Id. (Proposed amendment to 24 C.F.R. § 100.500(d)(1)(ii)). 1720 Id. 1721 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, § 100.5, Scope (Aug. 19, 2019). 1722 84 Fed. Reg. 42,860. 1723 Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg., 42,854 (Aug. 19, 2019), § 100.5, Scope, .

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light of the analysis provided in Inclusive Communities.”1724 “HUD is reviewing the Disparate Impact Rule to determine what changes, if any, may be necessary” in light of the decision.1725 In response to the 2018 advance notice of proposed rulemaking, more than 1,900 public comments were submitted. Comments included responses from by insurance companies and corporations arguing for less burdensome regulation of disparate impact liability, and that the robust causation rule should be included in the HUD rule. They further argued the burden of proof should be on plaintiffs, rescinding the burden-shifting framework in the 2013 Rule.1726 In addition, the U.S. Department of the Treasury issued a report in October 2017 recommending that HUD reconsider its use of the disparate impact rule that “could also impose unnecessary burdens on insurers and force them to alter practices in a manner that may not be actuarially sound.”1727 Many fair housing advocates also submitted comments to the notice, speaking in favor of retaining the 2013 rule without amendments. Comments arguing against changes to the 2013 rule take the position that nothing in Inclusive Communities requires HUD to change its regulations, as the 2013 Rule was in force at the time of that decision.1728 They also noted the Rule’s burden-shifting framework effectively implemented the Fair Housing Act’s prohibition on discriminatory housing policies, even without a showing of discriminatory intent, as the law requires.1729 The National Low Income Housing Coalition noted, in comments submitted to HUD, that the rule is a “critical tool that people in protected classes use to attempt to secure changes to policies and procedures that subtly discriminate them,” and urged HUD not to amend the rule and “instead engage in robust

1724 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1725 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560. 1726 See, e.g., Hanover Insurance Company, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; NJM Insurance Group, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; International Bancshares Corporation, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), at 3 (arguing that based on *Wards Cove* and *Inclusive Communities*, the burden of proof should be more focused on the plaintiff), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>. 1727 U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities: Asset Management and Insurance, October 2017, p. 110, https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf. 1728 National Community Reinvestment Coalition, “Disparate Impact Reconsideration Comments,” Aug. 20, 2018, <https://www.jdsupra.com/legalnews/17-state-ags-advise-hud-not-to-change-91963/>. 1729 “17 State AGs Advise HUD Not to Change Disparate Impact Rule,” JDSUPRA, Sep. 10, 2018, <https://ncrc.org/disperate-impact-reconsideration-comments/>.

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>
<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>
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https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf
https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf
<https://www.jdsupra.com/legalnews/17-state-ags-advise-hud-not-to-change-91963/>
<https://ncrc.org/disperate-impact-reconsideration-comments/>

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enforcement.”1730 NAACP LDF also submitted written comments, noting that this rule is crucial for effective civil rights enforcement: “The standards and provisions contained in the Disparate Impact rule protect the rights of individuals in numerous situations and makes significant differences to individuals and communities in life opportunities, public health, intergenerational poverty alleviation, and educational attainment.”1731 Additional scholarship on disparate impact liability in housing includes critics who contend that HUD current regulations do not address “actual racial discrimination in housing” and that HUD’s time would be better spent combating explicitly discriminatory policies and practices.1732 Supporters of HUD’s 2013 disparate impact rule state that discrimination and inequality persist largely due to unconscious bias, and that the disparate impact rule combats discrimination by forcing housing providers to implement the least discriminatory policies possible.1733 Furthermore, supporters of the 2013 disparate impact rule say that discrimination whether explicit or established through evidence of disparate impact end with the same result, reducing equal opportunity for historically marginalized communities.1734 Education and Outreach through FHIP As a formalized component of its FHIP program and as authorized by law,1735 HUD funds education and outreach initiatives.1736 HUD funds local fair housing and other nonprofit organizations through the Education and Outreach Initiative (EOI), which “offers a comprehensive range of support for fair housing activities, providing funding to State and local government agencies and non-profit organizations for initiatives that educate the public and housing providers about equal opportunity in housing and compliance with the fair housing laws.”1737 In FY 2016 and FY 2017, HUD awarded \$7.45 million each year to organizations for education and outreach work.1738 No data was provided on HUD’s FHIP web page about FY 2018 grant totals.1739

1730 National Low Income Housing Coalition, “Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” Aug. 20, 2018, https://nlihc.org/sites/default/files/images/NLIHC_Comment_Disparate_Impact_ANPR.pdf. 1731 NAACP Legal Defense Fund Statement, at 5. 1732 Roger Clegg, “Disparate Impact’ Again — This Time in Housing,” National Review, Jan. 2, 2019, <https://www.nationalreview.com/corner/disperate-impact-again-this-time-in-housing/>. 1733 Derek W. Black, “Ensuring racial equality – from classrooms to workplaces – depends on federal regulations Trump could roll back,” The Conversation, Mar. 6, 2019, <http://theconversation.com/ensuring-racial-equality-from-classrooms-to-workplaces-depends-on-federal-regulations-trump-could-roll-back-110868>. 1734 See, Serwer, “Trump Is Making It Easier to Get Away With Discrimination,” supra note 895. 1735 24 C.F.R. § 125.301. 1736 HUD, “FHIP,” supra note 1475. 1737 *Ibid.* 1738 U.S. Dep’t of Hous. and Urban Dev., “HUD Awards \$38 Million to Fight Housing Discrimination,” Mar. 6, 2016, <https://archives.hud.gov/news/2016/pr16-150.cfm>; U.S. Dep’t of Hous. and Urban Dev., “HUD Awards \$37 Million to Fight Housing Discrimination,” Mar. 6, 2016, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004. 1739 See HUD, “FHIP,” supra note 1475.

https://nlihc.org/sites/default/files/images/NLIHC_Comment_Disparate_Impact_ANPR.pdf
<https://www.nationalreview.com/corner/disperate-impact-again-this-time-in-housing/>
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<https://archives.hud.gov/news/2016/pr16-150.cfm>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004

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Technical Assistance FHEO provides technical assistance to its grantees as required by HUD regulations.1740 and noted in its budget documents that “[i]f the grantee has failed to comply with proper procedures and grant requirements, the Department initially provides technical assistance to correct the error, but if a problem persists, FHEO will withdraw the grant and the organization’s funding.”1741 As part of its enforcement of the affirmatively furthering fair housing stipulation in the Fair Housing Act and in its efforts to implement the AFFH rule, HUD “plans to provide extensive guidance and training to all program participants and direct Technical Assistance (TA) where needed,” and noted that “[d]evelopment of guidance and training materials will begin in fiscal year 2015, but will need to be completed and delivered in fiscal year 2016 and beyond.”1742 In FY 2016, FHEO planned to provide AFFH technical assistance to approximately 1,245 Community Planning and Development jurisdictions and over 3,000 Public Housing Agencies with Assessments of Fair Housing (AFH), with the provision of significant technical assistance to approximately 83 Community Planning and Development jurisdictions and 200 Public Housing Agencies to ensure that these entities “are in the best position to submit a successful AFH.”1743 In FY 2017 providing technical assistance to ensure effective implementation of its AFFH rule was also a FHEO priority.1744 In FY 2018, AFFH appears to have been deprioritized, as it was not discussed in the FHEO FY 2018 salaries and expenses budget document, however FHEO did indicate that it would continue to provide technical assistance to public housing authorities in advancing its Rental Assistance Demonstration program.1745 And previously, in FY 2017, FHEO provided technical assistance regarding the Fair Housing Accessibility FIRST program regarding FHA’s accessible design and construction requirements,1746 and extensive technical assistance, including translation in various languages, to help grantees meet the needs of limited-English proficient customers.1747

1740 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. 1741 HUD FHEO, Fair Housing Programs 2016 Summary, supra note 1508, at 32-10. 1742 HUD FHEO, Program Office Salaries and Expenses FY 2016, supra note 1508, at 50-2. 1743 *Ibid.*, 50-3. 1744 HUD FHEO, Program Office Salaries and Expenses FY 2017, supra note 1509, at 51-2. 1745 HUD FHEO, Program Office Salaries and Expenses FY 2018, supra note 1510, at 50-4. 1746 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 23. 1747 *Ibid.*, 6-8.

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Publicity FHEO does publish the outcomes of its enforcement work in its annual reports.1748 posts its enforcement activity on its website.1749 and regularly issues press releases to publicize high-profile cases,1750 particularly for Secretary-initiated complaints.1751 Effectiveness of Interaction and Coordination with External Agencies and Organizations HUD has the legal authority to “seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial institutions” under the Fair Housing Act.1752 In addition to its coordination with state and local agencies and organizations through the FHIP and FHP programs,1753 HUD has entered into several Memoranda of Understanding (MOU) with both federal agencies and non-government associations.1754 These MOUs include:

- Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations of Complaints that May Violate Both Criminal and Civil Provision of the Fair Housing Act1755
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Consumer Financial Protection Bureau, concerning “the notification and sharing of complaints” and providing “a set of procedures for coordination of FHA and [Equal Credit Opportunity Act] enforcement investigations”1756
- Memorandum of Understanding Between the Department of Agriculture and the Department of Housing and Urban Development, defining “procedures to coordinate the investigation and resolution of complaints alleging violations of the Fair Housing Act”1757

1748 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574, at 10; HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 14. 1749 U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Enforcement Activity,” https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement. 1750 U.S. Dep’t of Hous. and Urban Dev., “Press Releases – 2019,” https://www.hud.gov/press/press_releases_media_advisories. 1751 See, e.g., HUD, “HUD Files Housing Discrimination Complaint Against Facebook,” supra note 1632. 1752 24 C.F.R. § 103.220. 1753 See supra notes 1537-1559. 1754 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 8-9. 1755 Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations and Complaints that

https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement
https://www.hud.gov/press/press_releases_media_advisories

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- Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988 1758
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies, establishing “a set of procedures for coordination and cooperation in the investigation of complaints that allege a violation of the Fair Housing Act” 1759
- Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing 1760
- Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice, promoting “enhanced compliance with the Fair Housing Act ... for the benefit of residents of low-income housing tax credit properties and the general public” 1761
- Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission 1762
- Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development, establishing “institutional mechanisms for communication, cooperation and joint work on affirmative enforcement of laws prohibiting housing discrimination” 1763
- Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors, pledging “continuing cooperation” and identifying “organizational actions that will further fair housing goals and increase minority homeownership” 1764

1758 Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988 (Dec. 7, 1990) (on file). 1759 Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies (on file). 1760 Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing (Jan. 21, 2010) (on file). 1761 Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (August 11, 2000) (on file). 1762 Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission (on file). 1763 Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development (Jun. 11, 1999) (on file). 1764 Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors (on file).

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HUD also participates in several joint task forces and interagency working groups with representatives from DOJ, Consumer Financial Protection Bureau, the Office of the Comptroller of Currency, the Federal Reserve Board, the National Credit Union Association, the Fair Housing Finance Agency, the Federal Trade Commission, the Federal Deposit Insurance Corporation, and others. 1765 These joint task forces and interagency working groups work on the topics of discriminatory and predatory lending practices, sexual harassment in housing, and disability policy. 1766 As discussed above, HUD engages in a complex process with DOJ in referring complaints as well as subpoenas and requests for civil actions to enforce its decisions, as well as those of administrative law judges. 1767 Use of Research, Data Collection, and Reporting HUD has the legal authority to conduct “studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States” and “publish and disseminate reports, recommendations, and information derived from such studies.” 1768 to “make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department.” 1769 HUD must also annually report to Congress, “specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this subchapter, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action.” 1770 HUD indicated in its Interrogatory responses that it does not have a formal data collection process for collecting data on complainants, but does request the following information from complainants: contact information and a relevant basis for a claim. 1771 This request includes the protected characteristic on which the complaint is based, for which data may be collected about race, ethnicity, disability, or other protected bases. 1772 HUD also acknowledged that it does not disaggregate its data on certain racial or ethnic populations. 1773 HUD indicated that for FY 2016 to FY 2018, “policy guidance and procedures for data collection and case management have not changed over the fiscal years in question.” 1774 Since January 1, 2003, HUD collects, maintains,

1765 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 9-10. 1766 *Ibid.* 1767 See *supra* notes 1598-99. 1768 42 U.S.C. §§ 3608(e)(1)-3608(e)(2). 1769 *Id.* § 3608(e)(6). 1770 *Id.* §§ 3608(e)(2), 3608(e)(6). 1771 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 14, at 19. 1772 *Ibid.* 1773 *Ibid.*, 19-20. 1774 *Ibid.*, 20.

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and reports this data in several joint task forces and interagency working groups with representatives from DOJ, Consumer Financial Protection Bureau, the Office of the Comptroller of Currency, the Federal Reserve Board, the National Credit Union Association, the Fair Housing Finance Agency, the Federal Trade Commission, the Federal Deposit Insurance Corporation, and others. 1775 HUD reports that it actively engages in fair housing research, initiated by its Office of Policy Development and Research, 1776 and makes publicly available printed and electronic copies of published HUD research. 1777 HUD has funded paired testing housing discrimination studies (both national studies and pilot studies in a selection of cities) each decade since the 1970s to examine the extent to which housing discrimination in the rental and sales housing markets affects people of color, 1778 people with disabilities, 1779 families with children, 1780 Housing Choice Voucher

1775 HUD FHEO, Annual Report to Congress FY 2016, *supra* note 1574, at 101; HUD FHEO, Annual Report to Congress FY 2017, *supra* note 1574, at 47. 1776 U.S. Dep’t of Hous. and Urban Dev., “About PD&R,” <https://www.huduser.gov/portal/about/research.html>. 1777 U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Publications,” <https://www.huduser.gov/portal/taxonomy/term/39?page=5>. 1778 Wienk, Ronald E., Clifford E. Reid, John C. Simonson, and Frederick J. Eggers, *Measuring Discrimination in American Housing Markets: The Housing Market Practices Survey*, Washington, DC: U.S. Dep’t of Housing and Urban Development, 1979; Turner, Margery, Raymond Struyk, and John Yinger, *Housing Discrimination Study Synthesis*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev. (1991); Turner, Margery, Stephen Ross, George Galster, and John Yinger, *Discrimination in Metropolitan Housing Markets: Phase 1*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2002, <https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets-PDF>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/64421/1000502-Discrimination-in-Metropolitan-Housing-Markets-PDF>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 3 – Native Americans*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets-PDF>; Margery Austin Turner, Robert Santos, Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Rob Pitingolo, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, June 2013, https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf. 1779 Diane K. Levy, Margery A. Turner, Rob Santos, Doug Wissoker, Claudia L. Aranda, Rob Pitingolo, and Helen Ho, *Discrimination in the Rental Housing Market Against People Who Are Deaf and People Who Use Wheelchairs: National Study Findings*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2015, http://www.tilrc.org/assets/news/publications/HDS_Disabilities0615.pdf. Joy Hammel, Janet Smith, Susan Scovill, Ron Campbell, and Rui Duan, *Study of Housing Discrimination on the Basis of Mental Disabilities: Final Report*, U.S. Dep’t of Hous. and Urban Dev., August 2017, <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>. Margery Austin Turner, Carla Herbig, Deborah R. Kaye, Julie Fenderson, Diane K. Levy, *Discrimination Against Persons with Disabilities*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2005, <https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>. 1780 Laudan Aron, Claudia Aranda, Douglas Wissoker, Brent Howell, Robert Santos, with Molly Scott and Margery Austin Turner, *Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>.

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<https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets-PDF>
<https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets-PDF>
https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf
http://www.tilrc.org/assets/news/publications/HDS_Disabilities0615.pdf
<https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>
<https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>
<https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>
<https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>

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recipients based on source of income, 1781 and same sex couples and transgender people. 1782 HUD has also funded paired testing research examining lending discrimination, 1783 and discrimination in home insurance, 1784 and other non-paired testing research. 1785 Over the fiscal years in question (FY 2016-2018), HUD has funded over seven fair housing research studies 1786 and there have been four national Housing Discrimination Studies released since 1977 (the latest published in 2012). 1787

1781 Mary K. Cunningham, Martha M. Galvez, Claudia Aranda, Robert Santos, Douglas A. Wissoker, Alyse D. Oneto, Rob Pitingolo, James Crawford, A Pilot Study of Landlord Acceptance of Housing Choice Vouchers, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., August 2018, <https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>. 1782 Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Brent Howell, Rob Pitingolo, Sarale H. Sewell, Robert Santos, A Paired-Testing Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2017, https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf; Samantha Friedman, Angela Reynolds, Susan Scovill, Florence R. Brassier, Ron Campbell, McKenzie Ballou, An Estimate of Housing Discrimination Against Same-Sex Couples, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2013, https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf. 1783 Turner, Margery Austin, Freiberg, Fred, Godfrey, Erin, Herbig, Carla, Levy, Diane K., Smith, Robin Ross, All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., April 2002, <https://www.huduser.gov/portal/publications/hsgfin/aotbe.html>. 1784 Galster, George, Smith, Robin, Wissoker, Douglas, Zimmermann, Wendy, Hartnett, Kara, Testing for Discrimination in Home Insurance, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., May 1998, <https://www.huduser.gov/portal/publications/fairhsg/discrim.html>. 1785 Krysan, Maria, Crowder, Kyle, Scott, Molly M., Hedman, Carl, Adeayo, Sade, Diby, Somalia, Latham, Sierra, Racial and Ethnic Differences in Housing Search: Final Report, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., May 2018, <https://www.huduser.gov/portal/taxonomy/term/39?page=1>; Santos, Robert, Turner, Margery Austin, Aron, Laudan, Howell, Brent, Future Directions For Research On Discrimination Against Families With Children In Rental Housing Markets, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFutureEssay.pdf>. Miller, Joshua J. Park, Kevin A., Same-Sex Marriage Laws and Demand for Mortgage Credit, February 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/Same-Sex-Marriage-Laws.pdf>. Mitchell, Maxine V., CRE, Miller, Robert E., Brett, Deborah, Kinser, Ralph, Moroney, Ann, Talian, Peter A., Galvez, Martha, Meixell, Braydon, Daniels, Rebecca, Interface of Mobility and Sustainability: Thompson v. HUD Final Report, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., October 2018, <https://www.huduser.gov/portal/sites/default/files/pdf/Thompson-Report.pdf>. 1786 See *supra* notes 1778-85 (cross referencing to the research presented in the footnotes just above this one); U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Publications,” <https://www.huduser.gov/portal/taxonomy/term/39?page=5>. 1787 “Paired Testing and the Housing Discrimination Studies,” Office of Policy Development and Research, HUD User, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html> (the four studies have been in 1977, 1989, 2000, and 2012. They have increased in scope for each study such that the latest study included testing discrimination against, blacks, Hispanics, Asians, and Native Americans).

<https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>
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https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf
<https://www.huduser.gov/portal/publications/hsgfin/aotbe.html>
<https://www.huduser.gov/portal/publications/fairhsg/discrim.html>
<https://www.huduser.gov/portal/taxonomy/term/39?page=1>
<https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFutureEssay.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/Same-Sex-Marriage-Laws.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/Thompson-Report.pdf>
<https://www.huduser.gov/portal/taxonomy/term/39?page=5>
<https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>

Chapter 6: U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center Legal Authority and Responsibility In 1913, President Taft signed the Organic Act of the Department of Labor that established the U.S. Department of Labor (DOL).¹⁷⁸⁸ The Organic Act provided that the purpose of DOL is “to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”¹⁷⁸⁹ DOL is currently led by Acting Secretary Patrick Pizzella, who took office in July 2019.¹⁷⁹⁰ According to its website, DOL describes its mission as to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”¹⁷⁹¹ DOL enforces workers’ rights through various components.¹⁷⁹² DOL’s external federal civil rights enforcement has been conducted primarily through the Office of Federal Contract Compliance Programs (OFCCP), which oversees federal contractors,¹⁷⁹³ and the Civil Rights Center (CRC), which administers and enforces laws that apply to recipients of federal financial assistance and, for disability-related matters, public entities operating programs and activities related to labor and the workforce.¹⁷⁹⁴ Office of Federal Contract Compliance Programs The Office of Federal Contract Compliance Programs (OFCCP) enforces equal employment opportunity laws that apply to federal contractors and subcontractors, and works to “protect

1788 Organic Act of the Department of Labor, 29 U.S.C. § 551 (1913). 1789 Id. 1790 U.S. Dep’t of Labor, “Acting Secretary of Labor Patrick Pizzella,” <https://www.dol.gov/osec>. 1791 U.S. Dep’t of Labor, “About Us,” <https://www.dol.gov/general/aboutdol>. 1792 See, e.g., U.S. Dep’t of Labor, Agencies and Offices, <https://www.dol.gov/general/dol-agencies> (accessed Mar. 31, 2019). At the Commission’s briefing, Atty Burth Lopez of the Mexican American Legal Defense and Educational Fund (MALDEF) testified that:

In the area of employment the Federal Government plays a vital role in protecting health and safety of workers in the workplace. The need for federal enforcement... of OSHA standards is paramount considering that in 2016 there were over 5,000 workplace related deaths and 2.9 million injuries and illnesses on the job. Of these, 900,000 individuals required some time away from the job and 120,000 of those individuals identified as Hispanic or Latino. Yet under the Trump Administration OSHA enforcement has seen an accelerated decline, both in the number of overall enforcement units,... and in the total number of OSHA inspectors[] Lopez Testimony, Federal Civil Rights Enforcement Briefing, pp. 187-188.

1793 See 41 C.F.R. ch. 60. See also infra notes 1796-1813 (cross reference to “authority/jurisdiction” section discussing the laws that OFCCP enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1794 See infra notes 1813-1842 (cross reference to “authority/jurisdiction” section discussing the laws that CRC enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

<https://www.dol.gov/osec>
<https://www.dol.gov/general/aboutdol>
<https://www.dol.gov/general/dol-agencies>

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workers, promote diversity and enforce the law.”¹⁷⁹⁵ OFCCP oversees contractors and subcontractors responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity,¹⁷⁹⁶ national origin,¹⁷⁹⁷ disability,¹⁷⁹⁸ or status as a protected veteran.¹⁷⁹⁹ OFCCP enforces these rights under the following:¹⁸⁰⁰

- Executive Order 11,246 of 1965 (Equal Employment Opportunity)¹⁸⁰¹ • The Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA)¹⁸⁰² • Section 503 of the Rehabilitation Act of 1973¹⁸⁰³

President Johnson signed Executive Order 11,246 in September 1965. As amended, regarding external civil rights enforcement, Executive Order 11,246 requires that an equal opportunity clause be included in each covered government contract and subcontract, including the following:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.¹⁸⁰⁴

1795 See U.S. Dep’t of Labor, “About OFCCP,” <https://www.dol.gov/ofccp/aboutof.html>. See also Further Amendments to Executive Order 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, Exec. Order No. 13,672, Fed. Reg. 42,971 (Jul. 23, 2014) (substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin” in several places in the executive order to “provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity”). 1796 Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1; 41 C.F.R. § 60-20.1. 1797 Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1. 1798 29 U.S.C. 793(a); Pub. L. 101-336 (July 26, 1990), as amended by Pub. L. 110-325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1. 1799 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a). 1800 U.S. Dep’t of Labor, Response to USCCR Document Request No. 1, p. 1. 1801 Exec. Order No. 11,246, 30 Fed. Reg. 12,319 and implementing regulations at 41 C.F.R. §§ 60-1 – 60-50. See also Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,933 (Sep. 11, 2015); 41 C.F.R. § 60-1; Discrimination on the Basis of Sex, final rule, 41 C.F.R. § 60-20. 1802 38 U.S.C. § 4212 and implementing regulations at 41 C.F.R. § 60-300. 1803 29 U.S.C. § 793 and implementing regulations at 41 C.F.R. § 60-741. 1804 Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(1).

<https://www.dol.gov/ofccp/aboutof.html>

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As per DOL regulations, the head of OFCCP has been delegated authority and has the responsibility to carry out “the responsibilities assigned to the Secretary under [Executive Order 11,246].”¹⁸⁰⁵ OFCCP’s regulations implementing Executive Order 11,246’s prohibition on sex discrimination define “sex” to include pregnancy, childbirth, and related medical conditions; gender identity; transgender status; and sex stereotyping.¹⁸⁰⁶ The regulations expressly prohibit, and provide examples illustrating, both disparate treatment discrimination¹⁸⁰⁷ and disparate impact discrimination.¹⁸⁰⁸ They also prohibit harassment on the basis of sex, which the relevant regulation defines to include “sexual harassment (including sexual harassment based on gender identity or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.”¹⁸⁰⁹ By prohibiting harassing conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment,” on the basis of sex, the agency’s hostile work environment regulations also prohibit both intentional discrimination as well as conduct that results in certain discriminatory impacts.¹⁸¹⁰ As noted above, OFCCP also enforces Section 503, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding individuals with disabilities,¹⁸¹¹ and VEVRAA, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding covered veterans (disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces Service Medal veterans).¹⁸¹² Civil Rights Center The CRC has both internal and external enforcement functions. This combining of functions is contrary to the Commission’s 2002 recommendation that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions.”¹⁸¹³ During fiscal years 2016 through 2018, up until August 2018, CRC had three programmatic offices in total, two of which handled external civil rights enforcement: the Office of External Enforcement (OEE),

1805 41 C.F.R. § 60-1.2. Note that the text of OFCCP’s regulations refers to the Deputy Assistant Secretary of Labor as the head of OFCCP, but this reference is obsolete. In 2009, the Department of Labor abolished the Employment Standards Administration (ESA), of which OFCCP was a subcomponent; following this change, OFCCP and the other subcomponents became stand-alone programs. See Delegation of Authority and Assignment of Responsibilities to the Director, Office of Federal Contract Compliance Programs, 74 Fed. Reg. 58,834 (Nov. 13, 2009). 1806 41 C.F.R. § 60-20.2(a). 1807 Id. § 60-20.2(b). 1808 Id. § 60-20.2(c). 1809 Id. § 60-20.8. 1810 Id. § 60 – 20.8(a)(3)(emphasis added). 1811 29 U.S.C. 793(a); Pub. L. 101-336 (July 26, 1990), as amended by Pub. L. 110-325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1. 1812 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a). 1813 USCCR, Ten-Year Check-up: Vol. 1, supra note 1, at 47.

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and the Office of Compliance and Policy (OCAP).¹⁸¹⁴ DOL reported that OEE underwent a reorganization in August 2018, and the responsibilities of OCAP and OEE were combined under the current “Office of External Enforcement” (OEE).¹⁸¹⁵ OEE is still part of CRC (and CRC still has some internal enforcement responsibilities through its Office of Internal Enforcement).¹⁸¹⁶ See Figure 6.3, CRC Organizational Chart. The laws that CRC’s external program enforces generally protect against discrimination on the bases of race, color, national origin (including “limited English proficiency”),¹⁸¹⁷ religion (including “failure to accommodate”),¹⁸¹⁸ sex (including “pregnancy and gender identity”),¹⁸¹⁹ age,¹⁸²⁰ disability (including “failure to provide accessible facilities, accommodations or modifications, or equally effective communications”),¹⁸²¹ and political affiliation or belief.¹⁸²² Some programs or activities also prohibit discrimination based on citizenship status or participation in a program/activity that receives Workforce Innovation and Opportunity Act (WIOA) Title I or Workforce Investment Act (WIA) Title I financial assistance.¹⁸²³ DOL’s website describes the mission of the Civil Rights Center (CRC) as “to promote justice and equal opportunity by acting with impartiality and integrity in administering and enforcing various civil rights laws.”¹⁸²⁴ The website states that these laws specifically protect “[i]ndividuals who apply to, participate in, work for, or come into contact with programs and activities that are conducted by or receive financial assistance from DOL, or, under certain circumstances, from other Federal agencies.”¹⁸²⁵ For disability-related matters, CRC also has jurisdiction over public entities’ operating programs and activities related to labor and the workforce.¹⁸²⁶ CRC reportedly carries out its mission by “investigating and adjudicating discrimination complaints, conducting

1814 See U.S. Dep’t of Labor, “Civil Rights Center (CRC),” <https://www.dol.gov/oasam/programs/crc/about-crc.htm>. See also U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file) (noting that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title). 1815 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1816 U.S. Dep’t of Labor, “Internal Enforcement,” <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>. 1817 29 C.F.R. §§ 31.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (Jun. 23, 2000); Exec. Order No. 13,166, 65 Fed. Reg. 50,121; U.S. Dep’t of Labor, “Civil Rights Center: Mission Statement,” <https://www.dol.gov/oasam/programs/crc/mission.htm> [hereinafter DOL, “CRC Mission Statement”]. 1818 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1819 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1820 29 C.F.R. §§ 35.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1821 29 C.F.R. §§ 32.1, 33.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1822 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1823 DOL, “CRC Mission Statement,” supra note 1817. 1824 DOL, “CRC Mission Statement,” supra note 1817. 1825 DOL, “CRC Mission Statement,” supra note 1817. 1826 Ibid. 1825 Ibid. 1826 Ibid.

<https://www.dol.gov/oasam/programs/crc/about-crc.htm>
<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>
<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>
<https://www.dol.gov/oasam/programs/crc/mission.htm>
<https://www.dol.gov/oasam/programs/crc/mission.htm>

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compliance reviews, providing technical assistance and training, and developing and publishing civil rights regulations, policies, and guidance.”¹⁸²⁷ The Office of External Enforcement (OEE) reportedly:

[S]upports CRC’s responsibility to administer and enforce the laws that apply to recipients of financial assistance under Title I of the Workforce Innovation and Opportunity Act and its predecessor, the Workforce Investment Act (WIA); American Job Center partners listed in WIOA/WIA Section 121(b) that offer programs or activities through the workforce development system; State and local governments and other public entities operating programs and activities related to labor and the workforce; and any recipients of financial assistance from, or programs conducted by, DOL that are not included in the categories above.¹⁸²⁸

OEE processes, investigates and adjudicates complaints that allege discrimination on any of the bases prohibited by the laws that it enforces,¹⁸²⁹ or that allege retaliation against anyone who engages in activity protected by those laws.¹⁸³⁰ As discussed above, DOL informed the Commission that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title.¹⁸³¹ However, during most of the period covered by this report, CRC’s OCAP conducted compliance reviews,¹⁸³² developed regulations,¹⁸³³ reviewed proposed legislation and provided training and technical assistance.¹⁸³⁴ OEE (now including the former OCAP), currently enforces the following laws and executive orders:

- Section 188 of the Workforce Innovation and Opportunity Act and its predecessor, Section 188 of the Workforce Investment Act of 1998, as amended¹⁸³⁵

- Title VI of the Civil Rights Act of 1964, as amended¹⁸³⁶ • Sections 504 and 508 of the Rehabilitation Act of 1973, as amended¹⁸³⁷ • Age Discrimination Act of 1975, as amended¹⁸³⁸ • Title IX of the Education Amendments of 1972, as amended¹⁸³⁹

1827 Ibid. 1828 Ibid. 1829 29 C.F.R. §§ 31.7-31.12, 32 Subpart D, 33.12-33.13, 35 Subpart D, 36.605, 37 Subpart D, 38 Subpart D. 1830 29 C.F.R. §§ 31.7(e), 32.45(g), 33.13, 35.35, 36.605, 37.11, 38.19; U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 9. 1831 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1832 29 C.F.R. §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations). 1833 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations). 1834 29 C.F.R. § 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1835 29 U.S.C. 3248 § 188 and implementing regulations at 29 CFR pts. 37 and 38. 1836 42 U.S.C. 42 U.S.C. §§2000d-2000d-4 and implementing regulations at 29 C.F.R. pt. 31. 1837 29 U.S.C. § 794; 29 U.S.C. § 794(d) and implementing regulations at 29 CFR pts. 32 and 33. 1838 42 U.S.C. §§ 6101-6107 and implementing regulations at 29 C.F.R. pt. 35. 1839 20 U.S.C. §§ 1681-1688 and implementing regulations at 29 C.F.R. pt. 36.

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- Title II, Subpart A of the Americans with Disabilities Act of 1990, as amended¹⁸⁴⁰ • Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs¹⁸⁴¹

Enforcement Tools OFCCP The agency enforcement tools OFCCP has specific legal authority to use are:

- Complaint Resolution1843 • Agency-Initiated Charges1844 • Proactive Compliance Evaluations1845 • Issuance of Regulations1846 • Collaboration/partnership with other federal agencies1847 • Strategic Plan1848 • Annual Reports1849

While DOL OFCCP does not have specific legal authority for other tools identified by the Commission, nothing prohibits DOL OFCCP from engaging in, for example, issuing guidance, providing technical assistance, and conducting outreach to regulated communities, as described in further detail below. CRC The agency enforcement tools CRC has specific legal authority to use are:

- Complaint Resolution1850

1840 42 U.S.C. §§ 12131-12134 and implementing regulations at 28 C.F.R. pt. 35. 1841 Exec. Order No. 13,166, 65 Fed. Reg. 39,775. 1842 Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 1843 41 C.F.R. §§ 60-1.21 – 60-1.24, 60-30.5, 60-50.4, 60-300.61, 60-741.61, 60-742.4 – 60-742.6. 1844 Id. § 60-1.26(a) (“Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings”). 1845 Id. §§ 60-1.20 – 60-1.35, 60-50.4, 60-300.60, 60-741.60; Dep’t of Labor, “About OFCCP: Enforcement Procedures,” <https://www.dol.gov/ofccp/aboutof.html>. 1846 41 C.F.R. §§ 60-1, 60-20, 60-30, 60-50, 60-300, 60-741, 60-742 passim. 1847 Id. §§ 60-1.24(a), 60-50.4, 60-742.2, 60-742.5, 60-742.6. 1848 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1849 29 U.S.C. § 560. 1850 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85.

<https://www.dol.gov/ofccp/aboutof.html>

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- Agency-Initiated Charges1851 • Proactive Compliance Evaluations1852 • Issuance of Guidance1853 • Issuance of Regulations1854 • Technical assistance1855 • Data collection, research and reporting1856 • Publicity1857 • Outreach to stakeholders1858 • Collaboration/partnership with state/local agencies1859 • Collaboration/partnership with other federal agencies1860 • Strategic Plan1861 • Annual Reports1862

Budget and Staffing OFCCP OFCCP is currently led by Director Craig E. Leen.1863 Ondray T. Harris, who was the former Director of OFCCP, vacated the position in July 2018.1864 Figure 6.1 displays OFCCP’s organizational structure:

1851 Id. § 31.7(a) and (c). 1852 Id. §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations). 1853 Id. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1854 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations). 1855 29 C.F.R. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1856 28 C.F.R. § 42.406. 1857 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 1858 29 C.F.R. § 33.11. 1859 Id. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1860 28 C.F.R. § 42.413. 1861 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1862 29 U.S.C. §560. 1863 U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofcpcprt.htm> [hereinafter DOL OFCCP, “Organization Chart”]. 1864 Paige Smith and Ben Penn, “Head of Federal Contractor Watchdog Office Stepping Down,” Bloomberg News, Jul. 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>.

<https://www.dol.gov/ofccp/about/ofcpcprt.htm>

<https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>

<https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>

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Figure 6.1: OFCCP Organizational Chart

Source: U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofcpcprt.htm>.

OFCCP is led by the Office of the Director, which oversees the following Divisions:

- Division of Program Operations • Division of Policy and Program Development • Division of Management and Administration Programs

In addition, OFCCP oversees the operations of its six regions nationwide, which include Mid- Atlantic, Midwest, Northeast, Pacific, Southeast, and Southwest and Rocky Mountain (SWARM).1865

1865 DOL OFCCP, “Organization Chart,” supra note 1863.

<https://www.dol.gov/ofccp/about/ofcpcprt.htm>

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In FY 2016, OFCCP had 581 FTEs.1866 This number slightly decreased to 563 FTEs in FY 2017,1867 and decreased further to 508 FTEs in FY 2018.1868 Figure 6.2 displays OFCCP’s requested and allocated budgets for FY 2016 to FY 2018. Figure 6.2: Requested and Allocated Budgets for OFCCP

Source: U.S. Dep’t of Labor, FY 2016 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>; U.S. Dep’t of Labor, FY 2017 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>; U.S. Dep’t of Labor, FY 2018 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2018/CBJ-2018-V2-10.pdf>; U.S. Dep’t of Labor, FY 2019 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf>; U.S. Dep’t of Labor, FY 2020 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>.

OFCCP requested a total budget of \$113.68 million in FY 2016.1869 This requested amount increased slightly in FY 2017 to \$114.17 million,1870 but sharply decreased in FY 2018 to only

1866 U.S. Dep’t of Labor, FY 2018 Department of Labor Budget in Brief, p. 26, https://www.dol.gov/sites/dolgov/files/legacy-files/FY2018BIB_0.pdf [hereinafter DOL, FY 2018 Budget in Brief]. 1867 U.S. Dep’t of Labor, FY 2019 Department of Labor Budget in Brief, p. 27, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf> [hereinafter DOL, FY 2019 Budget in Brief]. 1868 U.S. Dep’t of Labor, FY 2020 Department of Labor Budget in Brief, p. 28, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/FY2020BIB.pdf>. 1869 U.S. Dep’t of Labor, FY 2016 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>. 1870 U.S. Dep’t of Labor, FY 2017 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2017/CBJ-2017-V2-10.pdf>.

\$113,687,000 \$114,169,000

\$88,000,000

\$105,476,000 \$104,476,000 \$103,476,000

\$0

\$20,000,000

\$40,000,000

\$60,000,000

\$80,000,000

\$100,000,000

\$120,000,000

FY 2016 FY 2017 FY 2018

Figure 6.2: Requested and Allocated Budgets for OFCCP FY 2016 to FY 2018

Requested Allocated

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>

https://www.dol.gov/sites/dolgov/files/legacy-files/FY2018BIB_0.pdf

<https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

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\$88.0 million.1871 However, OFCCP’s allocated amounts have much less significantly declined between FY 2016 and FY 2018. In FY 2016, Congress appropriated to OFCCP \$105.48 million,1872 which declined to \$104.47 million in FY 2017, 1873 and \$103.48 million in FY 2018.1874 In FY 2016, the U.S. Department of Labor indicated that the FY 2017 budget request for OFCCP would be an increase from its prior request, to create two Skilled Resource Centers and facilitate the continued modernization of its core Case Management System.1875 The budget explained that this increase would allow OFCCP to “better align its investigative skills trainings for existing and new compliance officers with geographically concentrated business sector industries,” and “take proactive cost saving steps to reduce its existing footprint of leased office space, support more quality and timely enforcement efforts, and ultimately benefit the countless victims of discrimination.”1876 In FY 2018, the U.S. Department of Labor proposed a sharp decrease in OFCCP staff, requesting only 440 FTEs1877 down from 563 FTEs employed in FY 2017. OFCCP also indicated that it would decrease the number of field office locations as well, which is in direct alignment with the funding reduction.1878 Director of OFCCP Craig Leen stated in his testimony before the Commission that he expects that OFCCP would still be able to fulfill its enforcement responsibilities, even with a substantially reduced staff due to specific management plans Leen has implemented.1879 These plans include the Affirmative Action Program Verification Initiative where government contractors will be required to certify annually that they have an affirmative action program, discussed in further detail below.1880 Leen testified that OFCCP will audit companies that do not certify that they have such a program.1881 Additionally, OFCCP will implement focused reviews,1882 where OFCCP’s review will be restricted to one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices. For example, Section 503 focused reviews will include a comprehensive review of the contractor

1871 U.S. Dep’t of Labor, FY 2018 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>. 1872 Ibid. 1873 U.S. Dep’t of Labor, FY 2019 Congressional Budget Justification Office of Federal Contract Compliance, p. 8, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>. 1874 U.S. Dep’t of Labor, FY 2020 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>. 1875 U.S. Dep’t of Labor, FY 2017 Department of Labor Budget in Brief, p. 37, https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2017/FY2017BIB_0.pdf [hereinafter DOL, FY 2017 Budget in Brief]. 1876 Ibid. 1877 DOL, FY 2018 Budget in Brief, supra note 1866, at 26. 1878 Ibid. 1879 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-24. 1880 Ibid., 24-25. 1881 Ibid., 25. 1882 See 41 C.F.R. §§ 60-1.20(a)(4), 60-300.60(a)(4), and 60-741.60(a)(4); see also U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-04 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_04.html [hereinafter DOL OFCCP, Directive 2018- 04]; see also infra notes 1977, 1981-1985 (discussing focused reviews).

<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>
https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_04.html

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policies and procedures as they relate solely to Section 503, which requires that contractors meet specific affirmative action and nondiscrimination obligations for people with disabilities.1863 CRC CRC is a center within the Office of the Assistant Secretary for Administration and Management (OASAM). OASAM “provides leadership and foundation for effective business operations and procurement; performance budgeting; information technology solutions; human resources and civil rights; security and emergency management; environmental sustainability; and long-term planning with a focus on results so that DOL accomplishes its mission on behalf of America’s workers.”1864 CRC is led by its Director, Naomi Barry-Perez. Lee Perselay is the Chief of the Office of External Enforcement.1865 See Figure 6.3.

1863 U.S. Dep’t of Labor, OFCCP, “Focused Review Frequently Asked Questions,” <https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm>. 1864 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3. 1865 U.S. Dep’t of Labor, Civil Rights Center, “Organization Chart,” <https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart> [DOL CRC, “Organization Chart”].

<https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm>
<https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart>
<https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart>

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Figure 6.3: CRC Organizational Chart

Source: U.S. Dep’t of Labor, “Civil Rights Center Organization Chart,” <https://www.dol.gov/oasam/programs/crc/orgchart.htm> (accessed Jul. 31, 2019)

In FY 2018, CRC had a total of 14 FTE staff members who worked on civil rights enforcement, up from a total of 13 FTEs in FY 2017 and FY 2016.1866 CRC has not utilized any contractors to support its external enforcement work during the fiscal years in question.1867 Over the fiscal years in question, CRC reports that approximately 50 percent of the Director’s time was spent on external civil rights enforcement.1868 CRC also indicated that due to current budget levels, it has “back-filled more senior level positions with entry level positions when they were vacated and has cross-trained/rotated staff from other divisions to assist in enforcement activities.”1869

1866 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 8, at 7-8. 1867 Ibid. 1868 Ibid. 1869 Ibid.

<https://www.dol.gov/oasam/programs/crc/orgchart.htm>

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In FY 2016, the requested budget for CRC’s operations was \$7.99 million.1890 This request slightly increased to \$8.04 million in FY 20171891 and sharply decreased in FY 2018 to \$6.67 million.1892 Over FY 2016 to FY 2018, the allocated budget for CRC remained flat at \$6.8 million, but it was higher than the low amount requested for FY 2018.1893 See Figure 6.4. Figure 6.4: Requested and Allocated Budgets for CRC

Source: U.S. Dep’t of Labor, FY 2016 Budget in Brief, p. 63, <https://www.dol.gov/sites/default/files/documents/general/budget/2016/FY2016BIB.pdf>; U.S. Dep’t of Labor, FY 2017 Budget in Brief, p. 51, https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf; U.S. Dep’t of Labor, FY 2018 Budget in Brief, p. 32, <https://www.dol.gov/sites/default/files/FY2018BIB.pdf>; U.S. Dep’t of Labor, FY 2019 Budget in Brief, p. 33, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>; FY 2020 Budget in Brief, p. 36, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>.

Approximately 65 percent of CRC’s allocated funding covers personnel and benefits, and of that 65 percent, 35-40 percent has been allocated to staffing both OCAP and OEE (for its External Enforcement Program).1894 In FY 2016, approximately \$1.19 million was allocated for staffing, processing, and responding to civil rights complaints, which decreased to \$1.08 million in FY 2017 and \$1.06 million in FY 2018.1895 This equates to approximately 72 percent, 66 percent, and 53 percent of the total budget for staffing the External Enforcement Program, respectively.1896 Additionally in FY 2016, \$465,259 was allocated to staffing for compliance reviews, which steadily increased to \$558,963 in FY 2017 and \$940,506 in FY 2018.1897 This equates to 28

1890 U.S. Dep’t of Labor, FY 2016 Department of Labor Budget in Brief, p. 63, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/FY2016BIB.pdf>. 1891 DOL, FY 2017 Budget in Brief, supra note 1875, at 51. 1892 DOL, FY 2018 Budget in Brief, supra note 1866, at 33. 1893 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 9, at 9. 1894 Ibid. 1895 Ibid. 1896 Ibid., 9-10. 1897 Ibid.



Figure 6.4: Requested and Allocated Budgets for CRC FY 2016 to FY 2018

Requested Allocated
<https://www.dol.gov/sites/default/files/documents/general/budget/2016/FY2016BIB.pdf>
<https://www.dol.gov/sites/default/files/FY2018BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/FY2016BIB.pdf>

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percent, 34 percent, and 46 percent of the total budget for staffing the External Enforcement Program, respectively.1898 See Figure 6.5. Figure 6.5: Staffing Budgets for Complaint and Compliance Review Processing

Source: U.S. Dep’t of Labor, Civil Rights Center, Response to Interrogatory No. 9, p. 9.

CRC has noted that while its allocated budget has remained constant, its overall workload has increased due to:

[W]ork needed to effectively and efficiently implement the nondiscrimination and equal opportunity provisions of Section 188 of WIOA; mitigate the effects of attrition by back-filling more senior level positions with lower-graded/entry level positions and cross training staff from other divisions to assist in enforcement efforts; and absorb career ladder promotions and rental, salary/cost of living, quality step, and within-grade increases.1899

CRC indicated that it has prioritized case processing efficiency, and implementation of Section 188 of WIOA.1900

1898 Ibid. 1899 Ibid., 10. 1900 Ibid., 10.



Figure 6.5: Staffing Budgets for Complaint and Compliance Review Processing

FY 2016 to FY 2018

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Assessment Prioritization of Civil Rights Agency-Wide The Director of OFCCP reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary.1901 CRC is housed within the Office of the Assistant Secretary for Administration and Management, for which the Assistant Secretary reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary. 1902 Neither of these offices has a direct line of authority to the agency head, which the Commission has recommended to ensure prioritization of civil rights enforcement.1903 Proposed Merger with EEOC In May 2017, the Trump Administration proposed merging OFCCP into EEOC as a way to promote government efficiency.1904 This proposed move drew criticism that it would blunt OFCCP's work independently evaluating compliance with civil rights laws through proactive evaluation and reduce its focus on evaluating affirmative action plans.1905 Congress rejected the proposal during the FY 2018 budget process, when it once again appropriated for OFCCP separate from EEOC.1906 The FY 2019 budget request abandoned this plan,1907 although DOL asked for a program decrease of \$12.66 million for OFCCP and eliminated other programs with civil rights implications by zeroing out requests for training and employment services for Indians and Native Americans and for Migrant and Seasonal Workers;1908 however the 2019 budget continues separate funding for OFCCP.1909

1901 U.S. Dep't of Labor, "Organizational Chart," <https://www.dol.gov/general/aboutdol/orgchart>. 1902 DOL CRC, "Organization Chart," supra note 1885. 1903 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. 1904 DOL, FY 2018 Budget in Brief, supra note 1866, at 3 and 26. 1905 Jay-Anne B. Casuga and Kevin McGowan, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," Bloomberg, May 22, 2017, <https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eoec-contracting-watchdog-not-well-received> (accessed Aug. 15, 2019) [hereinafter Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received"]. 1906 Jay-Anne B. Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog," Bloomberg, Sep. 7, 2017, <https://www.bna.com/senate-funding-bill-n73014464290/> (accessed Dec. 19, 2018) [hereinafter Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog"]. 1907 Mike Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding; Includes Call for Paid Leave and Mandatory E-Verify," NT Lakis, Feb. 16, 2018, <http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeoec-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/> (accessed Aug. 15, 2019) [hereinafter Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding"]. 1908 DOL, FY 2019 Budget in Brief, supra note 1867, at 7 (reductions in training for specific programs for communities of color) and 29 (OFCCP). 1909 Dep't of Defense and Labor, Health and Human Servs., and Educ. Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245 (2018).

<https://www.dol.gov/general/aboutdol/orgchart>
<https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eoec-contracting-watchdog-not-well-received>
<https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eoec-contracting-watchdog-not-well-received>
<https://www.bna.com/senate-funding-bill-n73014464290/>
<http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeoec-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/>
<http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeoec-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/>

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While OFCCP and EEOC cover similar issues, differences in the two offices mean a merger would not be simple.1910 For example, OFCCP enforces a requirement that contractors have Affirmative Action Plans, while there is no analogous requirement for EEOC to enforce.1911 Additionally, OFCCP enforces veterans' employment rights whereas EEOC does not.1912 EEOC enforces Title VII's prohibitions on discrimination for the same protected categories as those covered by Executive Order 11,246, with the exception that Title VII contains no explicit protection for gender identity and sexual orientation, although EEOC has taken the position discrimination on those bases constitutes discrimination on the basis of sex.1913 The differences stem from OFCCP's focus on affirmative action and broad-based compliance by federal contractors versus EEOC's focus on workplace discrimination and individual complaints.1914 DOL described the differences between OFCCP and EEOC with respect to external civil rights enforcement as follows:

First, EEOC operates primarily on a reactive, complaint-based model: it generally takes no action against an employer unless and until someone files a complaint of discrimination. By contrast, OFCCP's model is largely proactive, consisting of broad compliance reviews of federal contractor establishments identified through a neutral scheduling system, without the need for a complaint. This process allows OFCCP to review the entirety of a contractor's personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or "glass-ceiling" promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination, whereas EEOC's focus is primarily on individual discrimination. Second, while EEOC's jurisdiction is related to nondiscrimination alone, OFCCP's worker protection enforcement also includes the obligation that contractors take additional affirmative action to ensure equal employment opportunity. This includes requirements that contractors analyze their personnel activity and compensation systems proactively to determine whether they results in disparities, and to develop action-oriented programs to correct any problem areas the contractor has identified.

1910 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1905. 1911 41 C.F.R. pt. 60-2; see also U.S. Dep't of Labor, "Affirmative Action," <https://www.dol.gov/general/topic/hiring/affirmativeact>. 1912 41 C.F.R. pt. 60-300; see also U.S. Department of Labor, OFCCP, "Regulations Implementing the Vietnam Era Veterans' Readjustment Assistance Act," <https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>. 1913 Coalition Letter to Speaker of the House Paul Ryan, House Minority Leader Nancy Pelosi, Chairwoman of the House Committee on Education and the Workforce Virginia Foxx, and Ranking Member on the House Committee on Education and the Workforce Robert C. Scott, Opposing the Elimination of OFCCP (May 26, 2017), p. 2, https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf [hereinafter Coalition Letter Opposing the Elimination of OFCCP]. 1914 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1905.

<https://www.dol.gov/general/topic/hiring/affirmativeact>
<https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>
https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf

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Third, OFCCP's laws provide additional nondiscrimination protections that are not explicitly included in the laws enforced by EEOC. For instance, Executive Order 11,246 contains explicit prohibitions on discrimination on the bases of sexual orientation, gender identity, and against those discussing, disclosing, or inquiring about compensation. Additionally, OFCCP enforces VEVRAA, which prohibits discrimination against protected veterans; EEOC has no equivalent protection. Finally, there are differences in the remedies that the agencies can seek to remedy discrimination. In addition to "make-whole relief," such as back pay for victims of discrimination, OFCCP has the ability to pursue sanctions against a federal contractor that has violated the laws it enforces, including debarment from receiving future federal contracts.1915

The differences articulated here about the way that EEOC and OFCCP respectively approach compliance with federal nondiscrimination laws demonstrate the loss to effective civil rights enforcement if OFCCP were merged into EEOC without the necessary resources (in budget and staffing) to continue the same critical work that OFCCP engages in currently. Strategic Planning and Self-Evaluation OFCCP With respect to DOL's policy priorities for civil rights enforcement, DOL continues to "provide that workers have the opportunity to labor in fair and diverse workplaces."1916 In DOL's Strategic Plan Fiscal Years 2014-2018, one of the strategic objectives is to "Break down barriers to fair and diverse workplaces and narrow wage and income inequality."1917 DOL noted that "[d]iscrimination on the basis of race, color, religion, sex, national origin, disability, or status as a protected veteran not only adversely impacts America's workers and families, but also inhibits economic growth," and it is vital to ensure "that Americans work in workplaces that value diversity and are free from discrimination."1918 With this strategic objective in mind, one of OFCCP's performance goals during this period was to "[e]nforce affirmative action and nondiscrimination in Federal contractor workplaces.1919 OFCCP stated that it would carry out this goal by:

- Strengthening Enforcement of the Contractual Promise of Equal Employment Opportunity • Reinforcing Equal Employment Opportunity Requirements through Regulatory Reform • Expanding Stakeholder Engagement through Effective Relationships1920

1915 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1916 U.S. Dep't of Labor, Strategic Plan Fiscal Years 2014-2018, p. 38 (on file). 1917 *Ibid.*, 39. 1918 *Ibid.*, 39. 1919 *Ibid.*, 41-42. 1920 *Ibid.*, 41-42.

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Additionally, OFCCP's strategic plan set a goal of completing 4,290 compliance evaluations and complaint investigations for each of the fiscal years from FY 2014 through FY 2018 and set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years.1921 DOL's Strategic Plan noted that "[m]any of OFCCP's strategies, initiatives, and activities for Fiscal Years 2018 through 2022 are in response to recommendations in the September 2016 Government Accountability Office (GAO) Report Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance."1922 DOL's Strategic Plan Fiscal Years 2018-2022 also has the strategic objective to "[p]romote fair and diverse workplaces for America's federal contractor employees."1923 Therefore, DOL as a whole has indicated its areas of focus are:

- Strong Enforcement and Emphasizing High-Impact Projects • Expanding Compliance Assistance and Stakeholder Engagement1924

And similar to the previous strategic plan, OFCCP has set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years, as well as completing anywhere from 50 to 80 percent of construction evaluations from high-impact projects over the fiscal years in question.1925 During FY 16, OFCCP achieved 109 percent of its target on a new measure for the fiscal year, "Percent of Discrimination Conciliation Agreements with Systemic Pay Discrimination Findings," and completed 90 percent of evaluations from high-impact construction projects.1926 During the time of the Commission's review, OFCCP indicated it is undergoing a process of determining if it will continue to pursue the strategy of taking on fewer cases, but undertaking a comprehensive examination of each one, or return to handling more cases with less resource-intensive analysis. For context, during the George W. Bush Administration, OFCCP handled 4,000-5,000 cases per year.1927 During the Obama Administration, caseload averages dropped to approximately 1,700 per year.1928 In 2017, OFCCP maintained Obama-era policies and caseload.

1921 *Ibid.*, 43. 1922 U.S. Dep't of Labor, Strategic Plan Fiscal Years 2018-2022, pp. 26-27, <https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf> [hereinafter DOL, FY 2018-2022 Strategic Plan]. 1923 *Ibid.*, 26. 1924 *Ibid.*, 26-27. 1925 *Ibid.*, 26-27. 1926 U.S. Dep't of Labor, Agency Financial Report Fiscal Year 2016, p. 19, <https://www.dol.gov/sites/dolgov/files/OPA/reports/2016annualreport.pdf>. 1927 Bill Osterdorf, "The Year in Review at OFCCP 2017: What DIDN'T Happen at OFCCP," LocalJobNetwork, Nov. 17, 2017, <https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717> (accessed Dec. 19, 2018). 1928 *Ibid.*

<https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf>
<https://www.dol.gov/sites/dolgov/files/OPA/reports/2016annualreport.pdf>
<https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717>
<https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717>

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levels, which reports indicate was due to a delay in installing a new Director, who was not chosen until December 2017.1929 Reports also indicate a reduction in personnel and a desire to cut costs may have reduced the number of evaluations the agency took on in 2017.1930 In FY2017, OFCCP stated that it had "refocused its efforts almost exclusively from systemic hiring discrimination on the basis of sex or race in low-wage jobs to systemic compensation discrimination to ensure workers also receive equal pay without discrimination. This included placement into lower paying jobs due to gender stereotyping."1931 OFCCP stated that it had "reduced its case production to focus on fewer, but more complex high quality cases" across different industries and occupations.1932 Craig Leen, Director of OFCCP, testified with regard to scheduling compliance evaluations:

[T]here was a [] decision to reduce the total amount of audits and focus more on those that are audited. It's something called the deep dive, [] which has received both positive and negative responses. ... Our goal is to take the best aspects of what's called active case management, which is really the Bush Administration approach, which had more audits. And active case enforcement, which was sort of the Obama Administration approach, [] led to less audits.1933

1929 Bill Parker, "The Trump-Era Office of Federal Contract Compliance Programs Begins to Come Into Focus," The Federal Lawyer, May 2018, p. 1, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=pdf. 1930 U.S. Dep't of Labor, Agency Financial Report Fiscal Year 2017, pp. 16-17, https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2017annualreport.pdf. 1931 *Ibid.* 1932 Leen Testimony, Federal Civil Rights Enforcement Briefing, p. 52.

http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=pdf
https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2017annualreport.pdf

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CRC DOL's FY 2018-2022 Strategic Plan does not outline any strategic goals for CRC,1934 and DOL's Annual Performance Reports do not specifically mention the Civil Rights Center.1935 CRC reported that it provides direct support to DOL's overarching strategic goals, but does not have dedicated performance measures for the goals outlined in DOL's strategic plans.1936 However, CRC does have its own performance measures, and has prioritized case processing efficiency, and implementation of Section 188 of WIOA over the fiscal years 2016 to 2018.1937 Complaint Processing, Agency-Initiated Charges, and Litigation Both OFCCP and CRC engage in complaint processing through an administrative process.1938 However, the majority of OFCCP's enforcement work involves conducting compliance evaluations.1939 For example, in FY 2016, complaint investigations constituted only 16 percent of the agency's work.1940 OFCCP's regulations allow OFCCP to refer individual complaints raising potential Title VII violations to the EEOC, and the agency generally does so as a matter of course for all individual complaints in this category.1941 The practice is memorialized under a memorandum of understanding (MOU).1942 The MOU provides that OFCCP retains complaint investigations if the issue presented is a class-wide or systemic one.1943 OFCCP likewise retains individual complaints alleging violations of Section 503 or VEVRAA for investigation.1944

1934 DOL, FY 2018-2022 Strategic Plan, supra note 1922. 1935 U.S. Dept of Labor, FY 2018 Annual Performance Report, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V1-01.pdf>; U.S. Dept of Labor, FY 2018 Annual Performance Report, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf>. 1936 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3. 1937 *Ibid.* 1938 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85; 41 C.F.R. §§ 60-1.21 – 60-1.35, 60-30.5, 60-50.4, 60-300.61 – 60-300.70, 60-741.61 – 60-741-70. 1939 See *infra* notes 1956-1991. 1940 *Ibid.* 1941 41 C.F.R. § 60-1.24 (a); U.S. Dept of Labor, Office of Federal Contract Compliance Programs, “Who can file a complaint?,” <https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployees/ForEmployeesQ6.htm> [hereinafter “DOL OFCCP,” “Who can file a complaint?”]. 1942 “Pursuant to this MOU, OFCCP shall act as EEOC’s agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints/charges simultaneously dual-filed under Title VII. . . . OFCCP will refer to EEOC allegations of discrimination of an individual nature on a Title VII basis in dual filed complaints/charges.” Equal Employment Opportunity Comm’n and U.S. Dept of Labor, Coordination of Functions: Memorandum of Understanding (Nov. 9, 2011), § (7), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm. 1943 *Ibid.*, § (7)(b) (“OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges.”); see also DOL OFCCP, “Who can file a complaint?,” supra note 1941. 1944 DOL OFCCP, “Who can file a complaint?,” supra note 1941.

<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf>
<https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployees/ForEmployeesQ6.htm>
https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm

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OFCCP See Table 6.1. In FY 2016, OFCCP received 588 complaints, and closed 691 complaints including by referring 328 complaints to EEOC.1945 That left OFCCP closing 363 complaints following investigation in FY 2016. In FY 2017, OFCCP received 686 complaints and closed 720 complaints including by referring 401 complaints to EEOC.1946 That left OFCCP closing 319 complaints following investigation in FY 2017. In FY 2018, OFCCP received 1,418 complaints of discrimination, and resolved 1,320 complaints including by referring 786 complaints to EEOC.1947 That left OFCCP closing 534 complaints following investigation in FY 2018. Table 6.1: OFCCP Complaints by Basis, FY 2016 to FY 2018

Fiscal Year	Received	Closed	Race	Sex
FY 2016	588	691	147	161
FY 2017	686	720	161	274
FY 2018	1,418	1,320	272	255

39.4% 35.4% 40.5% Sex 147 161 274

21.3% 22.4% 20.8% National Origin-Hispanic 41 58 84

5.9% 8.1% 6.4% National Origin-Other 33 46 97

4.8% 6.4% 7.3% Religion 28 34 93

4.1% 4.7% 7.0% Color 39 41 118

5.6% 5.7% 8.9% Sexual Orientation 5 14 65

0.7% 1.9% 4.9% Gender Identity 11 9 20

1.6% 1.3% 1.5% Disability 170 177 294

24.6% 24.6% 22.3% Covered Veteran 124 124 132

17.9% 17.2% 10.0% Source: U.S. Department of Labor, OFCCP By the Numbers, <https://www.dol.gov/ofccp/BTN/index.html>. Note: The numbers by Basis do not equal the total number Closed because the Bases are not mutually exclusive.

1945 The number of complaints closed in FY 2016 includes 328 complaints referred to EEOC. 1946 The number of complaints closed in FY 2017 includes 401 complaints referred to EEOC. 1947 The number of complaints closed in FY 2018 includes 786 complaints referred to EEOC.

<https://www.dol.gov/ofccp/BTN/index.html>

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For each fiscal year analyzed in this report, OFCCP received more discrimination complaints on the basis of race than any other basis, with 39.4 percent, 35.4 percent, and 40.5 percent of complaints filed on the basis of race in FY 2016, FY 2017, and FY 2018 respectively. Disability and sex also topped the list of bases upon which individuals filed complaints of discrimination. CRC In FY 2016, CRC received 813 complaints, accepted 24 complaints for investigation, and transferred, referred, or dismissed 563 complaints, largely as non-judicial.1948 CRC also completed 11 complaint investigations during that fiscal year.1949 The number of complaints received decreased moderately in FY 2017 to 733 complaints; however, CRC accepted 32 complaints for investigation, and transferred, referred, or dismissed 1,259 complaints, largely as non-judicial.1950 CRC also completed 35 complaint investigations during that fiscal year.1951 In FY 2018, CRC received a total of 670 complaints, accepted 30 complaints for investigation, and transferred, referred, or dismissed 825 complaints, again primarily as non-judicial.1952 It also completed 32 complaint investigations during that fiscal year.1953 See Table 6.2. Table 6.2: CRC Complaints by Outcome, FY 2016 to FY 2018

Fiscal Year	Total Complaints Received	Total Complaints Accepted for Investigation	Total Complaints Transferred, Referred, or Dismissed
FY 2016	813	24	563
FY 2017	733	30	825
FY 2018	670	32	638

Source: U.S. Dept of Labor, Civil Rights Center, Response to Interrogatory No. 10, p. 10. Note: Complaints that are accepted for investigation may have been received in prior fiscal years.

CRC has noted that a large majority of complaints it receives fall outside its jurisdiction, and are transferred to the appropriate federal, state or local authority to process where possible.1954 Additionally, CRC has joint jurisdiction with other federal agencies with respect to certain complaints, and refers certain complaints “under circumstances specified by regulation.”1955

1948 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10 (CRC has also noted that complaints that are accepted for investigation “may have been received in prior years.”). 1949 *Ibid.* 1950 *Ibid.* 1951 *Ibid.* 1952 U.S. Dept of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1953 *Ibid.* 1954 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10. 1955 *Ibid.*; see, e.g. 29 C.F.R. § 38.61.

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Proactive Compliance Evaluation OFCCP Every covered contract and subcontract must also include an agreement to oversight, including providing access to OFCCP for compliance reviews,1956 as well as a provision stating that in the event of noncompliance “this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11,246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11,246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.”1957 OFCCP’s regulations implementing Executive Order 11,246 also contain this equal opportunity clause.1958 As discussed above, OFCCP told the Commission, “OFCCP’s model is largely proactive, consisting of broad compliance reviews. . . without the need for a complaint.”1959 This process allows OFCCP to review the entirety of a contractor’s personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or “glass-ceiling” promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination. To ensure compliance with federal equal employment opportunity and affirmative action requirements of federal contractors, OFCCP utilizes two key approaches: enforcement and compliance assistance.1960 In September 2016, the Government Accountability Office (GAO) issued a report on OFCCP’s work, finding that since 2010, the majority of compliance evaluations (78 percent) conducted by OFCCP identified no violations, when at the same time, only about 2 percent of compliance evaluations resulted in discrimination findings.1961 However, GAO expressed concern that the methods used in selecting contractors may not focus evaluations on the contractors that pose the greatest likelihood of noncompliance.1962 In conducting compliance evaluations, GAO reported that OFCCP determines which contractors to review based on neutral but non-random factors, such as alphabetical order, size of contract or contract expiration date.1963 GAO found that OFCCP “does not use a generalizable sample that would allow for conclusions about the federal contractor population,” and therefore “does not have reasonable assurance that it is focusing its compliance efforts on those contractors with the greatest risk of noncompliance.”1964

1956 Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(5). 1957 *Id.* at § 202 (6). 1958 41 C.F.R. § 60-1.4. 1959 See *supra* notes 283, 1915. 1960 GAO, Strengthening Oversight, supra note 247, at 10. 1961 *Ibid.*, GAO Highlights. 1962 *Ibid.*, GAO Highlights. 1963 *Ibid.*, 12. 1964 *Ibid.*, 12.

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Craig Leen, Director of OFCCP, explained in his testimony before the Commission how OFCCP altered its method of how to choose contractors to review, based on recommendations set forth in the GAO report. As the GAO report highlighted, and Director Leen confirmed in testimony to the Commission, in a single year OFCCP can only audit about 1-2 percent of contractors over which it has jurisdiction.1965 Director Leen therefore began the Affirmative Action Program Verification Initiative, which he describes as a certification program “where government contractors have to certify whether they have an affirmative action program or not.” 1966 Director Leen explained that some audits would then be based on a lack of verification, and other audits would seek to confirm and further examine the claims made in the verification process.1967 Additionally, GAO reported that the number of contractors OFCCP reviews each year is based on regional and district staffing levels.1968 Contractors are assigned to regional offices for compliance evaluation based on the contractor’s physical address to account for the possibility of an on-site review, conducted in 25 percent of evaluations in 2015.1969 At 2015 staffing levels OFCCP conducted compliance evaluations of approximately 2 percent of federal contractors.1970 Compliance evaluations followed a process called the Active Case Enforcement (ACE) protocol until the directive implementing ACE was rescinded on November 30, 2018.1971 This protocol was adopted in 2010 to require a more in-depth review of contractors under evaluation, where previously a case would be closed after an “abbreviated desk audit” if there were no indicators of discrimination.1972 Under the ACE protocol, a full desk audit was required in each case under compliance evaluation. Now, with the ACE protocol rescinded, OFCCP aims to increase the number of compliance evaluations they complete annually, while shortening the length of time desk audits take and seeking to conciliate issues more efficiently.1973 A compliance evaluation

1965 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-25. 1966 *Ibid.*, 23-25. See also U.S. Dept of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). See U.S. Dept of Labor, OFCCP, Directive 2018-07, Affirmative Action Program Verification Initiative (Aug. 24, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html. On this topic, DOL noted in its comments to the Commission:

GSA denied OFCCP’s request. OFCCP still looks at whether individual contractors check the box, but GSA will not provide a report or access to the database that would provide information on all contractors at once.

Ibid. 1967 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-25. 1968 GAO, Strengthening Oversight, supra note 247, at 12. 1969 *Ibid.*, 19. 1970 *Ibid.*, 15. 1971 U.S. Dept of Labor, Office of Federal Contract Compliance Programs, Directive 2019-01 (Nov. 30, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery [hereinafter DOL OFCCP, Directive 2019-01]. 1972 GAO, Strengthening Oversight, supra note 247, at 14. 1973 DOL OFCCP, Directive 2019-01, supra note 1971; U.S. Dept of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual (October 2014), https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf [hereinafter DOL OFCCP, Federal Contract Compliance Manual].

https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery
https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf

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may include one or any combination of compliance review, compliance check, focused review, and onsite review of records.1974

- A desk audit is a review of the contractor’s written affirmative action program and supporting documentation. On-site review seeks to determine implementation of the affirmative action program and other regulatory requirements. Off-site analysis is review of the records collected during on-site review.
- Off-site review of records can also occur outside the compliance review process, consisting of review of documentation accompanying the affirmative action program as well as other documents related to the contractor’s personnel policies and employment actions.1975
- Compliance check is a determination of the contractor’s record keeping in compliance with record retention regulations.1976
- Focused review is a review that is limited in scope to component(s) of the organization or employment practice(s) or one or more aspects of the contractor’s employment practices.1977

The GAO report also indicates that when OFCCP finds violations, it has generally resolved them through conciliation agreements; “[b]etween fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation

agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations.”1978 Matters not resolved through conciliation are referred to the Solicitor of Labor for administrative enforcement proceedings.1980 In August 2018, OFCCP issued Directive 2018-04 which requires a portion of compliance reviews in 2019 to be comprehensive onsite, focused reviews to ensure compliance with the affirmative action obligations and nondiscrimination laws under its jurisdiction.1981 While focused reviews had always been available to OFCCP as an enforcement tool, evidence reflects that this type of review was rarely used in the past.1982 This Directive also orders OFCCP to develop a standard protocol for conducting these focused reviews; to provide staff training, contractor education, and technical assistance; and to publish these protocols in its Frequently Asked Questions (FAQs) to

1974 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a). 1975 Id. §§ 60-1.20(a)(2), 60-300.60(a)(2), 60-741.60(a)(2). 1976 Id. §§ 60-1.20(a)(3), 60-300.60(a)(3), 60-741.60(a)(3). 1977 Id. §§ 60-1.20(a)(4), 60-300.60(a)(4), 60-741.60(a)(4). 1978 GAO, Strengthening Oversight, supra note 247, at 24. 1979 41 C.F.R. § 60-1.26(a). 1980 § 60-1.26(b). 1981 DOL OFCCP, Directive 2018-04, supra note 1882. 1982 Farrah N.W. Rifej and Maryelena Zaccardelli, “OFCCP Notice of Significant Change in Compliance Review Procedures,” Lexology, Aug. 14, 2018, <https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474> [hereinafter Rifej et al., “OFCCP Notice of Significant Change in Compliance Review Procedures”]. See also Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 26-27.

<https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474>
<https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474>

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make the information publicly available.1983 The Directive did not specify how many focused reviews OFCCP would conduct starting in 2019.1984 However, the scheduling list that OFCCP issued on March 25, 2019, indicates that the agency planned to conduct 500 focused reviews.1985 In FY 2016, OFCCP scheduled 1,048 supply and service compliance reviews and 137 construction compliance reviews for a total of 1,185 scheduled compliance reviews.1986 In that same fiscal year, OFCCP completed 1,522 supply and service compliance reviews and 174 construction compliance reviews for a total of 1,696 completed compliance reviews.1987 In FY 2017, OFCCP scheduled 735 supply and service compliance reviews and 110 construction compliance reviews for a total of 845 scheduled compliance reviews.1988 In that same fiscal year, OFCCP completed 1,036 supply and service compliance reviews and 106 construction compliance reviews for a total of 1,142 completed compliance reviews.1989 In FY 2018, OFCCP scheduled 785 supply and service compliance reviews and 43 construction compliance reviews for a total of 828 scheduled compliance reviews.1990 In that same fiscal year, OFCCP completed 713 supply and service compliance reviews and 99 construction compliance reviews for a total of 812 completed compliance reviews.1991 See Table 6.3.

1983 DOL OFCCP, Directive 2018-04, supra note 1882. 1984 Rifej et al., “OFCCP Notice of Significant Change in Compliance Review Procedures,” supra note 1882. 1985 DOL, “OFCCP has released the FY2019 Supply & Service Scheduling List,” supra note 288. 1986 U.S. Department of Labor, “OFCCP By the Numbers,” <https://www.dol.gov/ofccp/BTN/index.html>. 1987 Ibid. 1988 Ibid. 1989 Ibid. 1990 Ibid. 1991 Ibid.

<https://www.dol.gov/ofccp/BTN/index.html>

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Table 6.3: OFCCP Supply and Service and Construction Compliance Evaluations, FY 2016 to FY 2018 Supply and Service Compliance

Evaluations Construction Compliance Evaluations

FY 2016 FY 2017 FY 2018 FY 2016 FY 2017 FY 2018

Scheduled* 1,048 735 785 137 110 43 Completed* 1,522 1,036 713 174 106 99

Associated with a Mega Construction Project

- - - 86 84 89 - - - 49.4% 79.2% 89.9%

Conciliation Agreement or Consent Decree

275 202 115 83 60 53 18.1% 19.5% 16.1% 47.7% 56.6% 53.5%

EO 11246 Violation 258 195 127 82 59 53 17.0% 18.8% 17.8% 47.1% 55.7% 53.5%

Section 503 Violation 99 71 36 20 12 6.5% 6.9% 5.0% 11.5% 18.9% 12.1%

Section 4212 Violation

140 96 45 24 26 14 9.2% 9.3% 6.3% 13.8% 24.5% 14.1%

Discrimination Violation

38 40 47 1 1 1 2.5% 3.9% 6.6% 0.6% 0.9% 1.0%

Number of Workers in Facilities Reviewed

1,038,54 2

732,235 850,443 16,332 11,855 13,913

Source: U.S. Department of Labor, “OFCCP By the Numbers,” <https://www.dol.gov/ofccp/BTN/index.html>. Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive. *Does not include administrative closures.

Transparency Initiative In September 2018, OFCCP issued Directive 2018-08,1992 extending its so-called transparency initiative to every stage of the compliance evaluation process.1993 The Directive lays out specific procedures on how compliance evaluations will proceed and includes instruction that OFCCP staff

1992 U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive 2018-08, Transparency in OFCCP Compliance Activities (Sep. 19, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_08.html [hereinafter DOL OFCCP, Directive 2018- 08]. 1993 Pamela Wolf, “What Federal Contractors Need To Know About The OFCCP’s Latest Directives,” Wolters Kluwer, Sep. 20, 2018, <http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/> [hereinafter Wolf, “What Federal Contractors Need To Know About The OFCCP’s Latest Directives”].

<https://www.dol.gov/ofccp/BTN/index.html>
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_08.html
<http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/>
<http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/>

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should work to close reviews quickly, within 45 days, if there are no indications of discrimination from initial submissions.1994 The Directive specifically notes “[s]upplemental information requests must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond,” indicating the agency’s priority with this Directive is contractor certainty.1995 Voluntary Enterprise-wide Review Program OFCCP is developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.1996 OFCCP reports to the Commission that the VERP will “officially recognize the outstanding efforts of top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations.”1997 Early Resolution Procedures OFCCP now encourages Early Resolution Procedures (ERP) to promote early and efficient compliance by supply-and-service contractors.1998 OFCCP maintains that these procedures will help contractors and OFCCP achieve their mutual goal of equal employment opportunity in federal contracting and reduce the length of compliance evaluations by resolving problems expeditiously. According to OFCCP, ERP also allows OFCCP and contractors with multiple establishments to more efficiently promote corporate-wide compliance with OFCCP’s requirements. CRC In order to determine the ability of grant applicants to comply with nondiscrimination and equal opportunity provisions of the laws, orders, and regulations, OCAP (formerly part of CRC) conducted pre-approval compliance reviews.1999 OCAP also conducted post-approval compliance reviews.2000 These reviews “may focus on specific programs or activities, or one or more issues within a program or activity.”2001 OCAP also reviewed Nondiscrimination Plans required of states under WIOA/WIA, which must be established and implemented by the Governor and “designed to give a reasonable guarantee that all State Program recipients will comply . . . with the nondiscrimination and equal opportunity provisions of WIOA.”2002 Furthermore, OCAP

1994 Ibid. 1995 DOL OFCCP, Directive 2018-08, supra note 1992, at (7)(d)(ii); Wolf, “What Federal Contractors Need To Know About The OFCCP’s Latest Directives,” supra note 1993. 1996 DOL, Voluntary Enterprise-wide Review Program, supra note 291. 1997 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1998 DOL, Early Resolution Procedures, supra note 290. 1999 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 2. 2000 Ibid. 2001 Ibid. 2002 Ibid., 2-3.

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previously provided training and technical assistance for stakeholders and other interested parties.2003 CRC indicated that under all statutes, it will monitor the activities of the respondent after a Conciliation Agreement or settlement agreement has been negotiated and executed. Ongoing monitoring of entities receiving federal financial assistance under the laws enforced by CRC (outside of the context of a complaint investigation or compliance review conducted by CRC) is primarily the responsibility of State Governors through their Equal Opportunity Officers (to whom training and technical assistance is provided).2004 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OFCCP DOL’s strategic plan for 2018-2022 indicates that one way to meet its strategic goal of “promot[ing] fair and diverse workplaces for America’s federal contractor employees” is to “expand compliance assistance and stakeholder engagement.”2005 Written guidance is contained in large part in the Federal Contract Compliance Manual.2006 OFCCP also provides information to contractors about its enforcement methods, priorities, and legal understandings through the use of Directives.2007 DOL’s strategic plan elaborates:

OFCCP will support voluntary contractor compliance through compliance assistance tools, resources, and incentives; assisting contractors in locating victims of discrimination that are due financial or other remedies resulting from contractors entering into a conciliation agreement (CA) with OFCCP; and creating a comprehensive digital outreach strategy for improving engagement with three types of contractors and other stakeholders, including new and small contractors, construction contractors, and supply and service contractors. OFCCP strategically engages external stakeholders to educate and empower workers to make informed decisions about exercising their employment rights. OFCCP’s outreach strategy emphasizes increased community engagement and establishing meaningful relationships with stakeholders to reach workers most at risk of experiencing workplace discrimination. These stakeholders include community-based organizations, advocacy groups, employee resource groups, job

2003 Ibid., 3. 2004 Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 5, at 6. 2005 DOL, FY 2018-2022 Strategic Plan, supra note 1922, at 27. 2006 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973. 2007 U.S. Dep’t of Labor, “Directives,” <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> [hereinafter DOL, “Directives”].

<https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm>

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placement providers, unions, and state and local government and intergovernmental agencies.2008

In addition, OFCCP published a press release in August 2018 to announce its new guidance, discussed above, as “part of the Department’s efforts to maximize the effectiveness of compliance assistance outreach.”2009 OFCCP actively provides technical assistance to its contractors. OFCCP maintains a website that aims to provide contractors with “clear and easy-to-access information on how to comply with federal employment laws” and provides links to various resources, as well as law-specific compliance assistance for the laws that OFCCP enforces.2010 OFCCP’s compliance assistance includes technical assistance guides, which it is in the process of updating to reflect changes to OFCCP regulations.2011 OFCCP reported to the Commission that by the end of FY 2019, OFCCP plans to issue three technical assistance guides relevant to specific types of contractors: Construction, Supply & Service, and Academic Institutions.2012 In addition, OFCCP’s Federal Contract Compliance Manual indicates that its compliance officers who conduct OFCCP’s enforcement work are responsible for providing technical assistance during compliance reviews to “clarify the contractor’s obligations and the compliance evaluation process” if any questions arise at any point during the process.2013 GAO, however, found that since 2012, OFCCP’s compliance assistance activities have decreased for federal contractors and other stakeholders, and contractors and stakeholders both felt that OFCCP guidance could be clearer to help them understand their responsibilities under the law.2014 OFCCP maintains a website that “provide[s] the public with a list of any documents that are determined to be ‘significant guidance documents.’”2015 That page indicates that OFCCP has not published any significant guidance documents since 2007.2016 OFCCP does actively issue directives, considered to be “interpretative guidance,” and maintain a website that publicizes these directives.2017 During FY 2016-2018, OFCCP issued seven directives covering a variety of policy topics, including focused reviews of

2008 Ibid. 2009 U.S. Dep't of Labor, "U.S. Department of Labor's Office of Federal Contract Compliance Programs Announces New Policies" (Aug. 24, 2018), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180824>. 2010 U.S. Dep't of Labor, "Compliance Assistance," <https://www.dol.gov/ofccp/regs/compliance/ofccpcomp.htm>. 2011 U.S. Dep't of Labor, OFCCP, Response to Document Request No. 5, at 6. 2012 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 2013 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973, at 14. 2014 GAO, Strengthening Oversight, supra note 247, at GAO Highlights. 2015 U.S. Dep't of Labor, "OFCCP Guidance Documents," https://www.dol.gov/ofccp/TAGuides/OFCCP_SGD_Information.htm. 2016 Ibid. This page indicates that "significant guidance documents" are subject to Executive Order 12,866 as amended by Executive Order 13,422 (Jan. 18, 2007) and the Bulletin for Agency Good Guidance Practices, adopted by the Office of Management and Budget. Since then, Executive Order 13,497 was issued which revoked Executive Order 13,422. See Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Feb. 4, 2009). 2017 DOL, "Directives," supra note 2007.

<https://www.dol.gov/newsroom/releases/ofccp/ofccp20180824>
<https://www.dol.gov/ofccp/regs/compliance/ofccpcomp.htm>
https://www.dol.gov/ofccp/TAGuides/OFCCP_SGD_Information.htm

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for EO 11,246 § 204(c), and affirmative action program verification.2018 In addition, OFCCP has issued and made public its Federal Contract Compliance Manual, which "provides new and experienced compliance officers the procedural framework for executing compliance evaluations and complaint investigations," and "provides procedural and technical guidance on compliance issues based on current agency procedures and processes, and improves consistency across the agency's regional and field offices," but notes that "it does not establish substantive agency policy" and "if there is an inconsistency between material in the [manual] and other OFCCP policies and its implementing regulations, the latter are controlling."2019 Religious Freedom Directive On August 10, 2018, OFCCP issued a press release to announce the implementation of new policies to ensure equal employment opportunity and protect religious freedom.2020 OFCCP issued two new policy directives, which include an equal employment opportunity directive to ensure federal contractor compliance with federal anti-discrimination laws, and a religious freedom directive to protect the rights of religious-affiliated organizations and groups.2021 OFCCP states in Directive 2018-03 that "OFCCP staff are instructed to take these [recent Supreme Court] legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246."2022 The Directive further states that OFCCP intends to include the changes incorporated in Directive 2018-03 in its next round of regulatory rulemaking.2023 OFCCP's Directive 2018-03 serves as further assurance to government contractors and subcontractors that the government will not discriminate against them because of their religious character.2024 Legal analysts have pointed out that Directive 2018-03 merely instructs OFCCP staff to consider recent Supreme Court decisions and Executive Orders when reviewing government contractor

2018 Ibid. 2019 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973. 2020 U.S. Dep't of Labor, "U.S. Department of Labor Announces New Policies to Ensure Equal Employment Opportunity and Protect Religious Freedom," Aug. 10, 2018, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180810>. 2021 Ibid. 2022 U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2018-03 (Aug. 10, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf> [hereinafter DOL OFCCP, Directive 2018-03]. See also Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 1250-A-09 (Fall 2018), <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=Religious-Organization+Exemption+>. 2023 Ibid. 2024 Susan Schaecher, "OFCCP Issues 2 Directives Affecting Federal Contract Compliance Reviews," Fisher & Phillips, LLP, Aug. 21, 2018, <https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>.

<https://www.dol.gov/newsroom/releases/ofccp/ofccp20180810>
<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf>
<https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=Religious-Organization+Exemption+>
<https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>
<https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>

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compliance.2025 The Directive on its face does not provide any process or means by which government contractors may claim a religious exemption.2026 However, Directive 2018-03 does indicate that it supersedes any previous guidance that does not reflect those legal developments, including the section in Frequently Asked Questions: Sexual Orientation and Gender Identity that previously addressed "Religious Employers and Religious Exemption."2027 OFCCP prioritized the issuance of this religious freedom directive and proposed this rule despite the fact that it does not typically contract with a large number of religious organizations. Craig Leen, Acting Director of OFCCP, in his testimony before the Commission, indicated that OFCCP "doesn't have a lot of religious organizations that are Government contractors, but we have some," and indicated that "we would like to have more, because we want all companies to feel like they can participate in procurement and they will not be discriminated against."2028 Critics of the religious freedom Directive believe that in practice, it is likely to expand the number of contractors exempt from nondiscrimination requirements for religious reasons.2029 and may give license to discriminate to religious organizations seeking federal contracts.2030 A large group of civil rights organizations stated their opposition to the Directive on the basis that the Directive undermines the executive order OFCCP has the obligation to enforce, which explicitly states religious organizations are not exempt from nondiscrimination requirements on bases other than religion.2031 On August 15, 2019, OFCCP proposed a rule that would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics.2032 The proposed rule would apply to all

2025 Annette Tyman, Lawrence Z. Lorber, and Michael L. Childers, "OFCCP Winds Down Summer By Issuing New Guidance on Religious Discrimination and Announcing New Focused Review Process," Seyfarth Shaw, LLP, Aug. 16, 2018, <https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>. 2026 DOL OFCCP, Directive 2018-03, supra note 2022. 2027 Ibid.; see generally, U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, "Frequently Asked Questions: Sexual Orientation and Gender Identity," https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#content. 2029 Scott T. Allen, "OFCCP Signals Emphasis on 'Religious Liberty' in Federal Contractor Compliance," Foley & Lardner LLP, Aug. 20, 2018, <https://www.laborememploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>. 2029 Scott T. Allen, "OFCCP Signals Emphasis on 'Religious Liberty' in Federal Contractor Compliance," Foley & Lardner LLP, Aug. 20, 2018, <https://www.laborememploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>. 2030 Dominic Holden, "Trump Is Giving Federal Contractors A 'Religious Exemption' For Discrimination," Buzzfeed, Aug. 17, 2018, <https://www.buzzfeednews.com/amphml/dominicholden/trump-loop-hole-lgbt-discrimination>. 2031 Coalition Letter Opposing the Elimination of OFCCP, supra note 1913. 2032 Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019) (comments period to close Sept. 16, 2019); Dominic Holden, "Trump's Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More," BuzzfeedNews, Aug. 14, 2019, <https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate> [hereinafter Holden, Trump's Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More].

<https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>
<https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>
https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#content
<https://www.laborememploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.laborememploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.laborememploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.buzzfeednews.com/amphml/dominicholden/trump-loop-hole-lgbt-discrimination>
<https://www.buzzfeednews.com/amphml/dominicholden/trump-loop-hole-lgbt-discrimination>
<https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate>
<https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate>

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religious organizations, including for-profit corporations, with federal contracts provided that they claim a "religious purpose".2033 This proposed rule conflicts with a 2014 executive order that prohibited discrimination based on sexual orientation and gender identity by federal contractors.2034 This new rule would allow federal contractors to fire or refuse to hire an individual because of the person's sexual orientation, gender identity, status as a pregnant woman or parent, or race, so long as the contractor obtained a religious exemption.2035 In response, employees would be able to take their employers to court over such actions, but currently there is no federal law explicitly protecting LGBT workers from discrimination.2036 Pay Equity Directive In August 2018, OFCCP rescinded Directive 2013-03 (previously referred to as Directive 307) on pay discrimination, replacing it with Directive 2018-05, allowing contractors a greater role in how OFCCP analyzes their compensation systems.2037 The rescinded directive had required OFCCP to conduct its own analysis of which employees should be considered comparable for the purpose of determining discrimination in pay practices. Under the new directive, OFCCP will attempt, where possible, to use the employer's own compensation system groupings to compare employees. It also now more specifically identifies the statistical methodology it will use to evaluate contractors (a point of contention under the prior directive), where Directive 2013-03 used a more open-ended, case-by-case approach to determining pay discrimination.2038 Criticism of the rollback of Directive 2013-03 claims OFCCP needed the tools in that directive to choose which workers to compare so that it could determine, for example, if white and male employees are more likely to get promoted

2033 Holden, "Trump's Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More," supra note 2032. (The Trump administration has stated that the corporation needn't focus entirely on religion to qualify, but that "The contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose.") 2034 Implementation of Executive Order 13,872 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (41 CFR 60). 2035 National Center for Transgender Equality, "Department of Labor Proposes New Plan to Let Employers Discriminate Against Transgender People Using Taxpayer Dollars," (Aug. 14, 2019), <https://transequality.org/press/releases/department-of-labor-proposes-new-plan-to-let-employers-discriminate-against>. 2036 Holden, "Trump's Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More," supra note 2032. 2037 U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (Aug. 24, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>. 2038 Ben Penn and Porter Wells, "Labor Dept. to Relax Obama Pay Bias Policy, Hand Reins to Businesses," Bloomberg News, Apr. 19, 2018, <https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>; David Goldstein and Meredith Shoop, "OFCCP Reins in Compensation Analysis by Rescinding Directive 307 and Issuing New Guidance," JDSupra, Aug. 28, 2018, <https://www.jdsupra.com/legalnews/ofccp-reins-in-compensation-analysis-by-44726/> (accessed Dec. 19, 2019).

<https://transequality.org/press/releases/department-of-labor-proposes-new-plan-to-let-employers-discriminate-against>
<https://transequality.org/press/releases/department-of-labor-proposes-new-plan-to-let-employers-discriminate-against>
<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>
<https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>
<https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>
<https://www.jdsupra.com/legalnews/ofccp-reins-in-compensation-analysis-by-44726/>

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or receive advantageous job assignments.2039 Prior to rescinding the directive, OFCCP settled two large pay discrimination cases against State Street Corp. (\$5 million settlement) and Humana (\$2.5 million settlement) for gender and race disparities in pay.2040 CRC CRC has specific legal authority to issue guidance and provide technical assistance to entities that receive federal financial assistance.2041 CRC maintains a webpage that provides training and compliance assistance information about how to comply with the federal equal opportunity and nondiscrimination laws that it enforces.2042 This webpage lists a variety of compliance information, including CRC directives that provide guidance about compliance.2043 Effectiveness of Interaction and Coordination with External Agencies and Organizations OFCCP OFCCP has a Memorandum of Understanding (MOU) with EEOC regarding the processing of complaints of employment discrimination between the two agencies.2044 This MOU seeks to streamline enforcement by facilitating the exchange of information between the two agencies and reducing duplication of compliance activities, and specifies:

- Prior to the investigation of a charge filed against a contractor, EEOC will contact OFCCP to "(a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC's investigation which have been secured by the contracting agency in previous compliance reviews." 2045
- Prior to conducting a compliance review or a complaint investigation against a contractor, OFCCP will contact EEOC to "(a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor's compliance with

2039 Alexia Fernández Campbell, "The Trump Administration Wants To Make It Easier For Federal Contractors To Hide Pay Discrimination," Vox, Apr. 24, 2018, <https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap> (accessed Dec. 19, 2019). 2040 Ibid. 2041 See supra notes 1853, 1855. 2042 U.S. Dep't of Labor, "Training & Compliance Assistance Tools," <https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>. 2043 Ibid. 2044 Memorandum of Understanding, U.S. Dep't of Labor, Office of Federal Contract Compliance and Equal Employment Opportunity Commission Concerning the Process of Complaints of Employment Discrimination as Between the Two Agencies, <https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofcc.html> [hereinafter DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination]. 2045 Ibid.

<https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap>
<https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap>
<https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>
<https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>
<https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofcc.html>

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The MOU indicates that frequent communication between the two agencies should be utilized in order to effectively coordinate these enforcement efforts.2047 The MOU establishes certain procedures that both agencies will need to adhere to in order to facilitate this cooperation, such as establishing notification procedures, referral procedures, and “provides that the OFCCP will act as the EEOC’s agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII.”2048 Additionally, this MOU emphasizes that both agencies will “increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims.”2049 EEOC and OFCCP also work together as OFCCP only has coordinating authority under the Americans with Disabilities Act; EEOC handles any specific complaints of contractor discrimination on the basis of disability under the ADA.2050 CRC CRC’s regulations implementing Section 186 of WIOA require regulated state, local or nongovernmental agencies to designate Equal Opportunity (EO) officers, who are generally charged with “coordinating recipient and state-level compliance with the regulations, with state-level EO Officers being appointed by and reporting directly to the Governor.”2051 Among the EO Officer responsibilities is “[s]erving as a recipient’s liaison with CRC.”2052 CRC also works directly with DOJ’s Civil Rights Division, engaging with its Federal Coordination and Compliance Section (FCCS) and the Disability Rights Section, and the U.S. Department of Education.2053 For one specific systemic discrimination case over which both agencies had jurisdiction, CRC entered into a Memorandum of Agreement with FCCS to “investigate and resolve” the case.2054 CRC is required to refer certain cases to other federal agencies under certain circumstances and must refer

2046 *Ibid.* 2047 *Ibid.* 2048 Carmen Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC,” Local Job Network, Apr. 16, 2012, <https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479> [hereinafter Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC”]. 2049 *Ibid.* 2050 41 C.F.R. § 60.742; see also U.S. Dep’t of Labor, “The Americans with Disabilities Act of 1990, as amended (ADA),” https://www.dol.gov/ofccp/regs/compliance/ca_ada.htm. 2051 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2052 See 29 C.F.R. 38.31(a). 2053 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2054 *Ibid.*

<https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479>
<https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479>
https://www.dol.gov/ofccp/regs/compliance/ca_ada.htm

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certain cases to EEOC or to a federal grantmaking agency.2055 In addition, CRC participates in interagency working groups established by DOJ’s FCCS.2056 Research, Data Collection and Reporting DOL awards labor research and evaluation grants, for which the purpose is “to build evidence around issues of importance to the Department of Labor and American public, including critical issues related to worker protection, safety and human capital development.”2057 While the Commission is unaware of whether OFCCP or CRC specifically conduct their own independent research, DOL awards research grants for a variety of different labor-related research, including research surrounding civil rights violations under various laws that OFCCP and CRC enforce.2058 Some recent examples of awarded grants during the period from January 2017 to January 2019 include research about the “Initial Impact of Section 503 Rules: Understanding Good Employer Practices and the Trends in Disability Violations Among Federal Contractors” and “Analyzing Sexual Orientation and Gender Identity Discrimination in Federal Contracts.”2059 OFCCP OFCCP uses an internal case management system called the Office of Contract Compliance Programs Case Management System (OFCMS), which includes two subsystems:

- The Case Management System, which is the data collection portion of the case management system
- The Executive Information System, which is the reporting part of the system.2060 In 2014, OFCCP proposed a rule requiring government contractors to report summary data on employee compensation “by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked, and the number of employees.”2061 The rule indicated that the summary compensation data “is a critical tool for eradicating compensation discrimination” and would enable OFCCP to “direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations,” ultimately seeking to enhance greater voluntary compliance and greater deterrence of noncompliant behaviors by contractors and subcontractors.2062 The Commission does not have any evidence that OFCCP has implemented this rule.

2055 *Ibid.* See, e.g., 29 CFR § 35.32(a); 29 CFR § 38.81(b) and (c). 2056 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2057 U.S. Dep’t of Labor, “Labor Research and Evaluation Grants,” <https://www.dol.gov/agencies/oaspe/evaluation/currentstudies/Labor-Research-and-Evaluation-Grants>. 2058 *Ibid.* 2059 *Ibid.* 2060 U.S. Dep’t of Labor, OFCCP, Response to USCCR Interrogatory No. 4, at 4. 2061 Government Contractors, Requirement To Report Summary Data on Employee Compensation, 79 Fed. Reg. 46,561 (Aug. 8, 2014). 2062 *Id.*

<https://www.dol.gov/agencies/oaspe/evaluation/currentstudies/Labor-Research-and-Evaluation-Grants>

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CRC CRC has a formal intake process and gathers information pertinent to processing a complaint.2063 CRC has noted that it does not disaggregate data for racial/ethnic data with regard to the complaints it receives.2064

2063 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 14, at 17-18. 2064 *Ibid.*, 18.

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307 Chapter 7: U.S. Equal Employment Opportunity Commission

Chapter 7: U.S. Equal Employment Opportunity Commission Legal Authority and Responsibility Congress established the U.S. Equal Employment Opportunity Commission (EEOC) as part of Title VII of the Civil Rights Act of 1964 (Title VII), and EEOC began operating on July 2, 1965.2065 EEOC is a bipartisan, independent, presidentially appointed Commission, currently led by Chair Janet Dhillon, with five total members including the Chair, Vice Chair and three other Commissioners (see Figure 7.2).2066 EEOC reports that its mission is to “[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.”2067 EEOC is responsible for enforcing federal laws that prohibit discrimination against a job applicant or an employee.2068 on the basis of race, color, religion,2069 sex.2070 (including pregnancy,2071 gender identity,2072 and sexual orientation.2073), national origin,2074 age (40 or older),2075 disability,2076 or genetic information.2077 In addition, EEOC protects against discrimination based on retaliation against individuals who complained about discrimination, filed a charge of discrimination, or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.2078 Since its creation in 1964, the EEOC’s jurisdiction has grown and now includes the following areas:

2065 42 U.S.C. § 2000e-4; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 1. 2066 U.S. Equal Employment Opportunity Comm’n, “The Commission and the General Counsel.” <https://www.eeoc.gov/eeoc/commission.cfm> [hereinafter EEOC, “The Commission and the General Counsel”]. 2067 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 8. 2068 42 U.S.C. §§ 12112, 12114, 2000e, 2000ff; 29 U.S.C. § 791; Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10; Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640; 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627. 2069 42 U.S.C. § 2000e-16(a)(1). 2070 *Id.* § 2000e-16(a)(1); Pub. L. 88-38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621. 2071 Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10. 2072 42 U.S.C. § 2000e-16(a)(1); see also U.S. Equal Employment Opportunity Comm’n, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [hereinafter EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers”] (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”). 2073 42 U.S.C. § 2000e-16(a)(1); see also EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” supra note 2072 (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”). 2074 42 U.S.C. § 2000e-16(a)(1). 2075 29 U.S.C. § 633(a); 42 U.S.C. § 2000e-16(a)(2). 2076 29 U.S.C. § 791; 42 U.S.C. §§ 12112, 12114, 2000e-16(a)(3); Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640. 2077 42 U.S.C. § 2000ff. 2078 *Id.* § 2000e-3(a).

<https://www.eeoc.gov/eeoc/commission.cfm>
https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

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- Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits employment discrimination based on race, color, religion, sex, and national origin.2079
- The Age Discrimination in Employment Act of 1967 (ADEA), as amended, prohibits employment discrimination against workers age 40 and older.2080
- The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to clarify that discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination and requires employers to treat women affected by pregnancy and pregnancy-related medical conditions the same as any other employees with temporary disabilities with respect to terms and conditions of employment, including health benefits.2081
- The Equal Pay Act of 1963 (included in the Fair Labor Standards Act), as amended, prohibits sex discrimination in the payment of wages to men and women performing substantially equal work in the same establishment.2082
- Titles I and V of the Americans with Disabilities Act of 1990 (ADA), as amended, prohibit employment discrimination based on disability by private and state and local government employers. Section 501 and 505 of the Rehabilitation Act of 1973 provide the same protections for federal employees and applicants for federal employment.2083
- Sections 102 and 103 of the Civil Rights Act of 1991, which amends Title VII and the ADA to permit jury trials, as well as compensatory and punitive damage awards in intentional discrimination cases (unless the respondent is a government, government agency or political subdivision).2084
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability in the workplace. The law also requires that employers provide reasonable accommodations for employees with disabilities when there is no undue hardship on the employer.2085
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), prohibits employment discrimination based on an applicant’s or employee’s genetic information (including family medical history).2086
- Executive Order 11,478, providing for equal employment opportunity in the federal government.2087

2079 *Id.* § 2000e and relevant guidelines at 29 C.F.R. Parts 1602, 1604, 1605, 1606, 1608, and 1614. 2080 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627. 2081 Pregnancy Discrimination Act, Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10. 2082 Equal Pay Act, Pub. L. 88-38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621. 2083 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. Parts 1630 and 1640. 2084 Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). 2085 Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640. 2086 Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 (2008) and implementing regulations at 20 C.F.R. Part 1635. 2087 Exec Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969).

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- Executive Order 12,067, providing for coordination of federal equal employment opportunity programs.2088
- Executive Order 13,164, which requires federal agencies to establish procedures to facilitate the provision of reasonable accommodations.2089

These laws protect individuals from discrimination in employment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability, and genetic information.2090 They also protect against harassment, and prohibit retaliation against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.2091 Furthermore, provisions in the ADA, the Rehabilitation Act, and GINA provide limitations on covered entities obtaining health-related information from applicants and employees and require any health-related information obtained to be kept confidential.2092 Generally, most of these laws cover the following entities (with some exceptions):

- Private, state and local government employers with 15 or more employees.2093
- Labor organizations
- Employment agencies
- Federal government.2094

Enforcement Tools Unlike most of the agencies reviewed in this report, many of which have distinct specific missions, EEOC’s primary function is the enforcement of civil rights laws. EEOC’s authority covers private sector employers, as well as the federal sector (federal agencies), and also covers the administration of its own internal EEO program for employees. This chapter focuses on its private sector enforcement efforts and tools; there may be certain enforcement tools that are used only in the

2088 Exec Order No. 12,067, 43 Fed. Reg. 28,967 (Jun. 30, 1978) and implementing regulations at 29 C.F.R. §§ 1690.101-1690.107. 2089 Exec. Order No. 13,164, 82 Fed. Reg. 654 (Jan. 3, 2017). 2090 See supra notes 2079-89; see also U.S. Equal Employment Opportunity Comm’n, “Prohibited Employment Policies/Practices,” <https://www.eeoc.gov/laws/practices/index.cfm> [hereinafter EEOC, “Prohibited Employment Policies/Practices”]. 2091 See supra notes 2079-89; EEOC, “Prohibited Employment Policies/Practices,” supra note 2090. 2092 29 U.S.C. § 705(2); 42 U.S.C. § 12112(d); 42 U.S.C. § 2000ff-1(b); 42 U.S.C. § 2000ff-5. 2093 29 U.S.C. § 206(d); 42 U.S.C. §§ 2000e(b), 2000e(e); 42 U.S.C. § 12111(5)(A); 42 U.S.C. § 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); 29 U.S.C. § 630(b); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file) (noting that “The ADEA applies to private employers with 20 or more employees, and to state and local government employers of all sizes,” and “There is no minimum employee requirement under the Equal Pay Act”). 2094 29 U.S.C. § 203(d); 29 U.S.C. § 206(d); 29 U.S.C. §§ 630(b), 630(c), 630(d), 630(e); 42 U.S.C. §§ 2000e; 42 U.S.C. § 12111(2); 42 U.S.C. § 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; Title VII

<https://www.eeoc.gov/laws/practices/index.cfm>

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federal sector, and therefore not explored fully in the text below. Though focused on the private sector, some of the data below may include activities that overlap with the federal sector (such as outreach activities) and are not necessarily disaggregated. The agency enforcement tools EEOC has specific legal authority to use are:

- Complaint Resolution2095 • Agency-Initiated Charges2096 • Litigation2097 • Issuance of Regulations2098 • Technical Assistance2099 • Publicity2100 • Community outreach to stakeholders2101 • Data collection, research, and reporting2102 • Collaboration with states/local agencies2103 • Collaboration with other federal agencies2104 • Strategic Plan2105

2095 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691. 2096 Id. §§ 1601.11, 1601.27. 2097 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge); 29 C.F.R. §§ 1601.27, 1620.30(a)(6), 1620.30(b), 1626.15(d), and 1626.19; see also U.S. Equal Employment Opportunity Comm'n, Office of General Counsel, Fiscal Year 2018 Annual Report, <https://www.eeoc.gov/eeoc/litigation/reports/upload/18annrpt.pdf>. In addition to initiating its own litigation, EEOC also has the ability to file amicus briefs in any lower court, including U.S. Courts of Appeal, federal district courts, state courts, and administrative courts. See U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2098 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601, 28 C.F.R. § 42.403. 2099 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; see also U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2019, pp. 51-59, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf> [hereinafter EEOC, FY 2019 Budget Justification]. 2100 28 C.F.R. § 42.405. 2101 42 U.S.C. 2000e-4(h)(2); see also EEOC, FY 2019 Budget Justification, supra note 2099, at 51-59. 2102 42 U.S.C. § 2000e-4(e) (stating that "The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed ... It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable") and (g)(5) (stating that "The Commission shall have power ... to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public"); 29 C.F.R. § 1602; 28 C.F.R. § 42.406; EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 18. 2103 42 U.S.C. § 2000e-4(g)(1) (stating that "The Commission shall have power ... to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals"); 29 C.F.R. § 1601.13 and Subpart G; 29 C.F.R. § 1626.10; EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 6. 2104 29 C.F.R. Part 1690; 28 C.F.R. § 42.413. 2105 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

<https://www.eeoc.gov/eeoc/litigation/reports/upload/18annrpt.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>

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- Annual Reports2106

While EEOC does not have specific legal authority for other tools identified by the Commission, nothing prohibits EEOC from, for example, issuing policy guidance, as described in further detail below. With respect to EEOC's enforcement authority, EEOC utilizes an administrative process to investigate and resolve charges of discrimination, which is just one of the enforcement tools that it utilizes.2107 Olatunde Johnson, Professor of Law at Columbia Law School noted that "EEOC lacks adjudicative capacity, but does have the ability to investigate claims and seek conciliation agreements between parties."2108 However, EEOC has the authority to sue private employers in court under Title VII if the employer is "not a government, governmental agency or political subdivision."2109 It has the power to litigate against private and governmental employers under ADEA and EPA,2110 and it has the capacity to file amicus briefs under any statute under its jurisdiction, and it primarily files them in the U.S. Court of Appeals; however it will not file them in cases against a federal defendant.2111 Under Title VII, EEOC also has the statutory authority to "issue, amend, or rescind suitable procedural regulations."2112 However, Johnson explained that "The EEOC . . . lacks substantive rulemaking power. Title VII . . . grants the EEOC power to issue procedural regulations but not the power to issue substantive regulations defining the ambit of Title VII."2113 Under other statutes that it enforces though, EEOC does appear to have substantive rulemaking power.2114 Budget and Staffing For FY 2016, the President's Budget requested \$373.1 million for EEOC,2115 and Congress appropriated \$364.5 million.2116 The President's Budget requested \$376.6 million for EEOC in FY

2106 42 U.S.C. § 2000e-4(e); see, e.g., EEOC, FY 2019 Budget Justification, supra note 2099, at 51-59. 2107 29 C.F.R. Part 1601 Subpart B. 2108 Johnson, Beyond the Private Attorney General, supra note 36. 2109 42 U.S.C. 2000e-5(f) (1); 29 C.F.R. § 1601.27. 2110 See supra note 2097. 2111 U.S. Equal Employment Opportunity Comm'n, "Amicus Curiae Program," <https://www.eeoc.gov/eeoc/litigation/amicus.cfm>. 2112 42 U.S.C. § 2000e-12. 2113 Olatunde C.A. Johnson, Overreach and Innovation in Equality Regulation, 66 Duke Law Journal (2017), p. 1784, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3531&context=faculty_scholarship. 2114 42 U.S.C. § 2000f-10; 26 U.S.C. § 628. 2115 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2016, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>. 2116 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2018, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf> [hereinafter EEOC, FY 2018 Budget Justification].

<https://www.eeoc.gov/eeoc/litigation/amicus.cfm>
https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3531&context=faculty_scholarship
<https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>

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2017,2117 and Congress appropriated \$364.5 million,2118 which was equal to the amount of EEOC's FY 2016 appropriated budget. In FY 2018, the President's Budget requested \$363.8 million for EEOC,2119 a decrease of approximately \$12.8 million from what was requested for FY 2017,2120 and Congress appropriated \$379.5 million for FY 2018.2121 Between FY 2016 and FY 2018, EEOC's appropriated budget increased by \$15 million. See Figure 7.1. Figure 7.1: Requested and Appropriated Budgets for EEOC

Source: U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2016, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2017, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2018, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2019, February 2018, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2020, March 2019, p. 14, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>.

Proposed Merger with DOL As mentioned in Chapter 4, in May 2017, the Trump Administration proposed merging DOL's OFCCP into EEOC.2122 While EEOC and OFCCP cover similar areas, they have separate jurisdictions and play different roles, raising concerns for critics of the proposed merger.2123

2117 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2017, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf> [hereinafter EEOC, FY 2017 Budget Justification]. 2118 EEOC, FY 2019 Budget Justification, supra note 2099, at 12. 2119 EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2120 EEOC, FY 2017 Budget Justification, supra note 2117, at 14; EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2121 EEOC, FY 2020 Budget Justification, supra note 260, at 14. 2122 See supra note 1904-14 (discussing DOL OFCCP merger with EEOC). 2123 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1906; Coalition Letter Opposing the Elimination of OFCCP, supra note 1913.

\$373,112,000	\$376,646,000
\$363,807,000	\$364,500,000
\$379,500,000	
\$300,000,000	\$310,000,000
\$320,000,000	\$330,000,000
\$340,000,000	\$350,000,000
\$360,000,000	\$370,000,000
\$380,000,000	\$390,000,000

FY 2016 FY 2017 FY 2018

Figure 7.1: Requested and Appropriated Budgets for EEOC FY 2016 to FY 2018

Requested Appropriated

<https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>

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Ultimately, this proposal fell flat during the budget process, and Congress allocated EEOC and OFCCP funds separately, preempting any merger.2124 Staffing In FY 2016, EEOC had 2,202 FTE employees.2125 The number of FTE employees in FY 2017 dropped slightly to 2,082,2126 and further dropped to 1,968 FTE employees in FY 2018.2127 EEOC reported that it had 33 contractors "providing services through our Office of Information Technology," as of April 2018.2128 EEOC noted in its interogatories to the Commission that "all EEOC employees and contractors have some role in 'work[ing] on ... enforcement of the relevant civil rights statutes.'"2129 EEOC leadership is comprised of five Commissioners, as well as the agency's General Counsel.2130 Commissioners serve staggered five-year terms, and no more than three Commissioners can be affiliated with the same party.2131 The Chair is responsible for policy administration and implementation, financial management, and organizational development of the Commission.2132 The Vice Chair and the Commissioners also participate in developing and approving Commission policies, as well as issuing charges of discrimination, and authorizing the filing of lawsuits.2133 The General Counsel supports the Commission to provide direction, coordination, and supervision to EEOC's litigation program.2134 See Figure 7.2.

2124 Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog," supra note 1906; Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding," supra note 1907; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018). 2125 EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2126 EEOC, FY 2019 Budget Justification, supra note 2099, at 12. 2127 EEOC, FY 2020 Budget Justification, supra note 260, at 14. 2128 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 9, at 10. 2129 Ibid. 2130 42 U.S.C. §§ 2000e-4(a) and 2000e-4(b)(1); EEOC, "The Commission and the General Counsel," supra note 2066. 2131 42 U.S.C. § 2000e-4(a); U.S. Equal Employment Opportunity Comm'n, Performance and Accountability Report, Fiscal Year 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf> [hereinafter EEOC, FY 2017 Performance and Accountability Report]. 2132 EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 10. 2133 Ibid. 2134 42 U.S.C. § 2000e-4(b)(1); U.S. EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 10.

<https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>

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Figure 7.2: EEOC Organizational Chart

Source: U.S. Equal Employment Opportunity Commission, Performance and Accountability Report, Fiscal Year 2018, p. 11, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

Assessment Prioritization of Civil Rights Agency-Wide The EEOC is an independent Commission, without an agency reporting structure parallel to agency civil rights enforcement offices. The Commissioners are the head of the agency. Currently, there are two vacant Commissioner positions at EEOC, and the General Counsel position is currently vacant as well.2135 Prior to that, in January 2019, there were three Commissioner positions vacant at EEOC, which meant that there were not enough Commissioners for a quorum.2136 The lack of quorum was due to a hold on all pending EEOC nominees because Senator Mike Lee (R-Utah) objected to the reappointment of now-former Commissioner Chai Feldblum, the first openly LGBT person to sit on the Commission; his opposition was based on what he

2135 EEOC, "The Commission and the General Counsel," supra note 2066. 2136 Paige Smith, "Lacking Quorum, Civil Rights Agency Awaits Renominations," Bloomberg News, Jan. 3, 2019, <https://news.bloomberglaw.com/daily-labor-report/lacking-quorum-civil-rights-agency-awaits-renominations>.

<https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>
<https://news.bloomberglaw.com/daily-labor-report/lacking-quorum-civil-rights-agency-awaits-renominations>

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under her “radical views on marriage” 2137 Some argued that this lack of quorum hindered EEOC’s ability to effectively enforce the employment antidiscrimination laws, 2138 as general decisions on big ticket lawsuits, significant spending, and other policy decisions cannot be made without a quorum. 2139 However, then Acting Chair Victoria Lipnic stated, “[t]here are a lot of responsibilities delegated that are related to the normal functioning operations of the EEOC: taking in charges, investigating them, and issuing charge determinations,” and has added that “[a]ll of that will continue.” 2140 On May 15, 2019, Janet Dhillon was sworn in as the Chair of the EEOC, after President Trump nominated her on June 29, 2017 and the Senate confirmed her on May 8, 2019. 2141 The confirmation of Dhillon as Chair restored a quorum at EEOC. 2142 Although in the context of federal EEO programs, which are not the subject of this report, Dexter Brooks testified to the Commission that most of EEOC’s work is to address “bad actions” that have already happened, but that it would be “ideal for us to be able to have access to data and trends” to identify problem areas. 2143 According to its website, EEOC has placed a high priority on the enforcement of systemic discrimination, as “a strong nationwide program is critical to fulfilling its mission of eradicating discrimination in the workplace.” 2144 Strategic Planning and Self-Evaluation EEOC’s strategic planning process requires its leadership to “reflect upon the statutory mission of the agency, reassess prior goals and objectives, and identify any new goals and objectives that will

2137 Tim Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner,” NBC News, Dec. 19, 2018, <https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eooc-s-only-lgbtq-commissioner-n949611> [hereinafter Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner”]; see also Mike Lee, U.S. Sen., “Press Release: A Threat to Marriage from the EEOC,” Feb. 9, 2018, <https://www.lee.senate.gov/public/index.cfm/2018/2/a-threat-to-marriage-from-the-eooc> (discussing Senator Lee’s view that “Feldblum is no typical Democrat. . . [h]er radical views on marriage and the appropriate use of government power place her far outside even the liberal mainstream,” and his recommendation that “President Trump and Senate Democrats should reject Chai Feldblum’s divisive agenda by finding a more mainstream candidate for the EEOC, one who respects the institution of marriage and religious freedom for all Americans.”); 2138 Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner,” supra note 2137 (quoting a statement from Sunu Chandry, Legal Director at the National Women’s Law Center, “[n]ot having a full commission to lead this work will hamper important civil rights efforts that are currently underway, especially in this #metoo era.”); 2139 Joshua Roberts, “EEOC Delegated Duties to Work Around Lack of Quorum,” Bloomberg Law, Jan. 16, 2019, <https://news.bloomberglaw.com/daily-labor-report/eooc-delegated-duties-to-work-around-lack-of-quorum-1>. 2140 Chris Opfer, “LGBT Debate Shackles Trump Harassment Police,” Dec. 3, 2018, <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>. 2141 U.S. Equal Employment Opportunity Comm’n, “Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission” (May 15, 2019). 2142 Patricia Barnes, “The EEOC Is Back In Business, At The Urging Of Business,” Forbes, May 31, 2019, <https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eooc-is-back-in-business-at-the-urging-of-business/#76101060438d>. 2143 Brooks Testimony, Sexual Harassment in Government Workplaces Briefing, p. 8. 2144 U.S. Equal Employment Opportunity Comm’n, “Systemic Discrimination,” <https://www.eeoc.gov/eeoc/systemic/>.

<https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eooc-s-only-lgbtq-commissioner-n949611>
<https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eooc-s-only-lgbtq-commissioner-n949611>
<https://www.lee.senate.gov/public/index.cfm/2018/2/a-threat-to-marriage-from-the-eooc>
<https://news.bloomberglaw.com/daily-labor-report/eooc-delegated-duties-to-work-around-lack-of-quorum-1>
<https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>
<https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eooc-is-back-in-business-at-the-urging-of-business/#76101060438d>
<https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eooc-is-back-in-business-at-the-urging-of-business/#76101060438d>
<https://www.eeoc.gov/eeoc/systemic/>

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enable the agency to meet its statutory mission,” which is useful to Congress and stakeholders to identify key external factors that “may affect the agency’s ability to carry out its mandate.” 2145 In producing the plan, the EEOC “solicited and received comments from a wide range of stakeholders and the public.” 2146 EEOC’s current strategic plan aligns its policy priorities with its Strategic Enforcement Plan, which “do not materially differ” from EEOC’s current agency policy priorities. 2147 EEOC’s Strategic Plan for Fiscal years 2018-2022 outlines two strategic objectives and one management objective relevant to civil rights enforcement, which are:

- Combat and prevent employment discrimination through the strategic application of EEOC’s law enforcement authorities;
- Prevent employment discrimination and promote inclusive workplaces through education and outreach; and
- Achieve organizational excellence. 2148 These strategic objectives have not substantively changed from those outlined in EEOC’s Strategic Plan for Fiscal years 2012-2016. 2149 With respect to its first Strategic Objective of judiciously utilizing its law enforcement authority, EEOC’s outcome goals strive to remedy and prevent discriminatory employment practices through the strategic application of EEOC’s law enforcement authorities. 2150 According to its strategic plan, in order to measure the success of this first Strategic Objective, EEOC assesses its performance by setting benchmarks for a “significant proportion” of EEOC and FEPA’s resolutions containing “targeted, equitable relief, by resolving at least 9 percent of enforcement lawsuits each year; by reporting its efforts to identify and resolve systemic discrimination; by setting benchmarks for a “significant proportion” of federal agencies to improve their fair employment practices based on EEOC’s oversight and recommendations; and to maintain a high quality standard for investigations, conciliations, hearings, and appeals based on established criteria. 2151 With respect to its education and outreach Strategic Objective, EEOC strives for members of the public to understand employment discrimination laws and know their rights under the laws, and strives for employers, unions, and other covered entities to prevent discrimination, address EEO issues, and achieve more inclusive work environments. 2152 In order to measure its success under this objective, EEOC will expand its use of technology for education and outreach; leverage collaborations with partner organizations to “assist in breaking employment barriers;” and update guidance and other educational materials to be more user-friendly resources for information. 2153 With respect to its Management Objective of achieving organizational

2145 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 3. 2146 *Ibid.*, 1. 2147 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 3, at 8. 2148 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 9. 2149 U.S. Equal Employment Opportunity Comm’n, Strategic Plan for Fiscal years 2012-2016, p. 11, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf. 2150 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 9; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2151 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 10. 2152 *Ibid.*, 9. 2153 *Ibid.*

https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf

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excellence, EEOC strives to cultivate a “skilled and committed” workforce, improve the organization through advancing performance management, advance diversity and inclusion in the workplace, foster constructive employee and labor management relations, strive to implement quality practices in all programs, and model the practices it promotes. 2154 In order to measure its success under this objective, EEOC assesses its performance by measuring performance improvement with respect to employee engagement and inclusiveness, utilizing survey data to provide baseline measures of the effectiveness of EEOC services, making yearly progress on the modernization of its case management systems for program offices, and budgeting to prioritize funding to achieve EEOC’s strategic goals. 2155 Under its statute, EEOC is required to submit a report to Congress and the President after each fiscal year detailing any actions it has taken and any money it has disbursed. 2156 It also must make “further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.” 2157 In all fiscal years in question (FY 2016-FY 2018), EEOC reported that it met or exceeded the majority of its performance measures as set forth in the strategic plan. 2158 In its FY 2018 Performance and Accountability Report, the EEOC Inspector General’s statement indicated that EEOC has had some management challenges, having met less of its Management Objective performance measures as compared to its other strategic objectives’ performance measures. 2159 The Inspector General noted, “EEOC faces barriers to significantly advance its mission to ‘prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.’” identifying strategic performance management, data analytics, and human capital as the specific challenges. 2160 It indicated that in FY 2018, EEOC had improved its management of data analytics, and was working on “improving its human capital processes to correct serious and long-standing performance management inadequacies.” 2161 The Inspector General went on to say that the agency “continues to face serious challenges in managing strategic performance, particularly in strategic planning and performance measurement.” 2162 The Inspector General went on to state that EEOC’s current performance measures were geared to measure activity rather than outcomes, and recommended that EEOC institute measures to “quantify the effectiveness of EEOC’s efforts.” 2163

2154 *Ibid.*, 9. 2155 *Ibid.* 2156 42 U.S.C. § 2000e-4(e). 2157 *Ibid.* 2158 U.S. Equal Employment Opportunity Comm’n, Fiscal Year 2016 Performance and Accountability Report, p. 18, <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>; EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 19. 2159 U.S. Equal Employment Opportunity Comm’n, Fiscal Year 2018 Performance and Accountability Report, pp. 26-30, <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>. 2160 *Ibid.*, 52. 2161 *Ibid.*, 52. 2162 *Ibid.*, 52. 2163 *Ibid.*, 52.

<https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>

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In addition to its strategic plan, EEOC issues a specific strategic plan for enforcement, “to set forth its continued commitment to focus efforts on those activities likely to have strategic impact [defined as “a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry”] advancing equal opportunity and freedom from discrimination in the workplace.” 2164 EEOC outlined certain national priority areas in its Strategic Enforcement Plan FY 2017 – FY 2021, which are:

- Eliminating Barriers in Recruitment and Hiring • Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and

Underserved Communities from Discrimination • Addressing Selected Emerging and Developing Issues • Ensuring Equal Pay Protections for All Workers • Preserving Access to the Legal System • Preventing Systemic Harassment 2165

These priority areas have not changed significantly 2166 from EEOC’s previous strategic enforcement plan. 2167 In 2005, the EEOC formed a task force to examine EEOC’s efforts to address systemic discrimination; the task force ultimately recommended action items for initiating operational reforms, enhancing expertise, creating incentives, improving technology, staffing, and additional investments to address systemic trends. 2168 According to EEOC’s 2016 self-evaluation, A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, since 2005, 2169 EEOC has “made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program.” 2170 The report found:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.

- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.

2164 U.S. Equal Employment Opportunity Comm’n, Strategic Enforcement Plan FY 2017 – FY 2021, p. 1, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf> [hereinafter EEOC, FY 2017-2021 Strategic Enforcement Plan]. 2165 *Ibid.*, 6-9. 2166 For changes to the EEOC’s substantive priority areas see *Ibid.*, p. 2. 2167 See U.S. Equal Employment Opportunity Comm’n, Strategic Enforcement Plan FY 2013 – FY 2016, pp. 9-10, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>. 2168 U.S. Equal Employment Opportunity Comm’n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, March 2006, pp. iv-v, https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf. 2169 EEOC, A Review of the Systemic Program, supra note 2131, at iv. 2170 *Ibid.*

<https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>
https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf

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- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.

- Over 80 percent of systemic resolutions raised identified national priority issues in FY 2015.

- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.

- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.

- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006). 2171

Complaint Processing, Agency-Initiated Charges, and Litigation EEOC is responsible for enforcing federal laws that prohibit employment discrimination on protected bases. 2172 In order to carry out its mission, EEOC has two major enforcement mechanisms available: administrative enforcement and litigation. 2173 EEOC uses the administrative enforcement process when an individual or a Commissioner files a charge of discrimination, and EEOC may initiate an investigation and potentially a conciliation process in order to resolve the charge (including through resolution of systemic discrimination). 2174 EEOC can also initiate directed investigations under the EPA and ADEA. 2175 EEOC may initiate litigation when it believes that an entity (including an individual, class, and/or group) has violated one or more federal antidiscrimination law or laws that EEOC enforces, if other enforcement efforts failed to resolve the violation. 2176 This applies if the respondent is a private employer; otherwise the U.S. Attorney General (DOJ) is authorized to litigate if the respondent is a state or local government employers under Title VII, the ADA, or GINA. 2177 The EEOC Office of General Counsel (OGC) conducts litigation on behalf of EEOC. 2178

2171 *Ibid.*, iv-v. 2172 See supra notes 2079-89. 2173 See supra notes 2095, 2097; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2. 2174 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2. 2175 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file); EEOC, A Review of the Systemic Program, supra note 213, at 4 (noting in footnote no. 22 that “Directed investigations are initiated by EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1967), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. § 211.”). 2176 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a

conciliation agreement acceptable to the Commission may bring a civil action against not a government, governmental agency, or political subdivision named in the charge; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2. 2177 See supra, notes 2097. 2178 U.S. Equal Employment Opportunity Comm'n, "Litigation," <https://www.eeoc.gov/eeoc/litigation/index.cfm>.

<https://www.eeoc.gov/eeoc/litigation/index.cfm>

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An individual may file a private workplace discrimination lawsuit against a covered entity, but before going to court, that individual must first file a charge of discrimination with the EEOC, 2179 in order to allow EEOC the opportunity to determine if there is a reasonable cause to believe that discrimination occurred and provide for a voluntary resolution when possible and appropriate. 2180 Commissioners can also file a charge of discrimination on behalf of an aggrieved individual working in a covered entity, at their discretion. 2181 EEOC reported to the Commission that EEOC Commissioners filing a charge typically is done only in cases in which the alleged discrimination is systemic "or of a different nature than an individual charge alleges." 2182 EEOC notes that in the past five years, approximately 75 percent of Commissioner charges have focused on discrimination in hiring, as "victims typically lack information about a discriminatory hiring policy or practice." 2183

During an investigation or after EEOC determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, EEOC is required to offer alternative dispute resolution to help private sector parties resolve charges of discrimination, 2184 with mediation being a common form of alternate dispute resolution that EEOC offers. 2185 EEOC reported to the Commission that:

EEOC offers an alternative dispute resolution process to resolve certain charges prior to the [continuation] of any investigation. The respondent and charging party are invited to voluntarily mediate these charges. During mediation, the focus of attention is not on whether the law has been violated, but rather, whether the issue can be resolved to the parties' mutual satisfaction. Charges not resolved in mediation are investigated to determine if there is reasonable cause to believe that discrimination has occurred. 2186

2179 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted that this is true for all laws it enforces, with the exception of the Equal Pay Act (EPA). EEOC indicated that under the EPA, an individual doesn't need to file a charge with the EEOC first before filing an EPA lawsuit in District Court. See also U.S. Equal Employment Opportunity Comm'n, "Filing A Charge of Discrimination," <https://www.eeoc.gov/employees/charge.cfm>. 2180 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, A Review of the Systemic Program, supra note 213, at 16-17. 2183 Ibid. 2184 29 C.F.R. § 1601.20 (settlement prior to issuance of a determination), 1601.24 (mediation after issuance of a reasonable cause determination), 1691.9(a). 2185 This option is also available, upon request, at later points in the process. See, U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm'n, "Alternative Dispute Resolution (ADR)," https://www.eeoc.gov/federal/fed_employees/adr.cfm; U.S. Equal Employment Opportunity Comm'n, "Questions and Answers About Mediation," <https://www.eeoc.gov/eeoc/mediation/qanda.cfm> [hereinafter EEOC, "Questions and Answers About Mediation"]. 2186 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

<https://www.eeoc.gov/employees/charge.cfm>

https://www.eeoc.gov/federal/fed_employees/adr.cfm

<https://www.eeoc.gov/eeoc/mediation/qanda.cfm>

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Whether EEOC offers mediation under Title VII in complaints brought against private employers will depend on a range of factors, including the nature of the case, the relationship between the parties, the case's size and complexity, and the relief sought by the charging party. 2187 Both parties must voluntarily opt to mediate the charges in hopes of coming to a negotiated agreement. 2188 In private sector cases, if mediation is not an effective method of obtaining a resolution then EEOC will initiate an investigation to determine if there is reasonable cause to believe discrimination occurred, and if so, will utilize conciliation as a means of remedying the alleged discriminatory practice. 2189 If conciliation is not effective, then EEOC is authorized to bring a civil action against the respondent in federal court. 2190 EEOC also has formalized agreements with state and local Fair Employment Practices Agencies (FEPAs), who administer state or local fair employment laws, to handle administrative enforcement (investigations, conciliation, etc.) on the state and local level. 2191 EEOC currently has agreements with 92 state and local FEPAs, which have resolved over 36,000 employment discrimination charges since FY 2016. 2192 EEOC also contracts with approximately 64 Tribal Employment Rights Organizations (TEROs) responsible for advocating for Native American employment issues with employers on reservations or other Native American lands. 2193 EEOC has several remedies for employment discrimination. When discrimination is discovered, "the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred." 2194 The remedy will depend on the nature and severity of the discriminatory act and effect on the victim, however the employer will need to cease its discriminatory practices and ensure that discriminatory acts are prevented in the future. 2195 Depending on the case, victims may be awarded remedies that include:

- Targeted Equitable Relief. This is non-monetary and non-generic relief that explicitly addresses the employment discrimination at issue in the case. Targeted equitable relief can

2187 EEOC, "Questions and Answers About Mediation," supra note 2185. 2188 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, "Questions and Answers About Mediation," supra note 2185. 2189 29 C.F.R. § 1601.24(a); 29 C.F.R. § 1691(a); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2-3. 2190 29 C.F.R. § 1601.27; 29 C.F.R. § 1691(b)(3); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted: "As noted in our interrogatories, there are exceptions to this statement. If the respondent is a state or local employer and the case is under Title VII, the ADA, or GINA, the U.S. Attorney General is authorized to sue." Ibid. 2191 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 3. 2192 Ibid. 2193 Ibid. 2194 U.S. Equal Employment Opportunity Comm'n, "Remedies For Employment Discrimination," <https://www.eeoc.gov/employees/remedies.cfm> [hereinafter EEOC, "Remedies For Employment Discrimination"]. 2195 Ibid.; see also 29 C.F.R. § 1614.501 (remedies for complaints filed against federal sector employers).

<https://www.eeoc.gov/employees/remedies.cfm>

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include training of employees and supervisors, development of policies and practices to prevent future incidents, and external monitoring of employer actions. 2196

- Recovery of attorney's fees, expert witness fees, and court costs. 2197 • Compensatory and Punitive Damages. These damages may be awarded in private sector

cases when intentional unlawful discrimination has been discovered in cases involving race, color, national origin, sex, religion, disability, or genetic information. This includes Title VII cases involving intentional wage-based sex discrimination. 2198 They can compensate for out-of-pocket expenses incurred or emotional harm suffered from the discrimination and can punish an employer for particularly malicious acts of discrimination. 2199

- Liquidated Damages. Cases involving intentional age discrimination or intentional sex-based wage discrimination under the EPA cannot collect compensatory or punitive damages, but may be entitled to collect liquidated damages, which can be used to punish particularly malicious acts of discrimination. 2200

There are limits on the amount of compensatory and punitive damages that can be awarded, based on the size of the employer. 2201 The amount of liquidated damages awarded can be equal to the amount of back pay awarded to the victim. 2202 With regard to EEOC's private sector enforcement (not including charges filed with state or local FEPAs), in FY 2016, EEOC processed 91,503 new charges, and resolved a total of 97,443 charges (which includes charges from the pending inventory from previous fiscal years). 2203 The number of new charges processed in FY 2017 decreased to 84,254, however while the total number of charges EEOC resolved in FY 2017 increased to 99,109. 2204 In FY 2018, EEOC processed 76,418 new charges and resolved 90,558 charges (again including pending inventory from previous years). 2205 The pending inventory decreased from 73,508 in FY 2016 to 61,621 in FY 2017, and now stands at 49,607 for FY 2018. 2206 See Figure 7.3.

2196 By 2022, the EEOC intends that a "significant proportion of EEOC and FEPA's resolutions contain targeted equitable relief." EEOC, FY 2018-2022 Strategic Plan, supra note 196, at 10 and 14. 2197 EEOC, "Remedies For Employment Discrimination," supra note 2194. 2198 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2199 EEOC, "Remedies For Employment Discrimination," supra note 2194. 2200 Ibid. 2201 Ibid. A limit of \$50,000 is imposed for employers with 15-100 employees; a limit of \$100,000 is imposed for employers with 101-200 employees; a limit of \$200,000 is imposed for employers with 201-00 employees; and a limit of \$300,000 is imposed for employers with more than 500 employees. 2202 EEOC, "Remedies For Employment Discrimination," supra note 2194. 2203 EEOC, FY 2020 Budget Justification, supra note 260, at 34. 2204 Ibid. 2205 Ibid. 2206 Ibid.

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Figure 7.3: EEOC Total New Charges, Total Resolutions, and Pending Inventory for Private Sector Enforcement

Source: U.S. Equal Employment Opportunity Commission, Congressional Budget Justification, Fiscal Year 2020, p. 34, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>. *Pending beginning inventory adjusted to reflect charge activity spanning fiscal years.

Regarding its workload, EEOC noted:

With focused attention on reducing our pending inventory, the results for FY 2017 reflect a dramatic decline of 16.2 percent, to 61,612 [pending] charges. In FY 2018, we maintained the trend of resolving more charges than our receipt levels, resulting in a 19.5 percent drop in our pending inventory, to 49,607. As a result, we project a continued decline in inventory to 43,851 charges in FY 2019. Through the leadership of [then] Acting Chair Victoria Lipnic, the EEOC has prioritized reductions in its inventory in order to build a more effective enforcement program. The focused priority of the Acting Chair led to the reductions realized in FY 2017 and FY 2018. 2207

EEOC stated that it would contemplate other strategies to reduce the current workload, including renewed attention on intake interviews to "help sharpen issues" to assist the agency in evaluating the charge. 2208 EEOC; however, went on to project significant concern about management of its future workload, stating that:

2207 Ibid., 31. 2208 Ibid., 31-32.

91,503 84,254

76,418

97,443 99,109 90,558

73,508

61,621

49,607

0

20,000

40,000

60,000

80,000

100,000

120,000

FY 2016 FY 2017 FY 2018

Figure 7.3: EEOC Total New Charges, Total Resolutions, and Pending Inventory for Private Sector Enforcement

FY 2016 to FY 2018

Total New Charges Total Resolutions Pending Inventory

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without any hiring of investigators and mediators or the ability to backfill vacancies starting in FY 2019, the agency will return to a cycle of an increasing pending inventory, growing to 44,426 in FY 2020, 45,740 in FY 2021 and 47,055 in FY 2022. This will reverse the current trend, and by FY 2020, the EEOC will be receiving more charges than it resolves. The budget levels requested in FY 2020 will yield a loss of 50 investigators and mediator staffing will remain stagnant after three successive years of losses of a combined 19 positions.²²⁰⁹

The majority of charges in FY 2016, FY 2017, and FY 2018 resulted in a No Reasonable Cause determination (67.6 percent, 70.2 percent and 70.6 percent of all resolutions respectively). Only a small percentage of charges in FY 2016, FY 2017 and FY 2018 resulted in Reasonable Cause determinations (3.2 percent, 2.9 percent and 3.5 percent respectively). Many charges over the same period resulted in Administrative Closures (16.1 percent, 15.0 percent and 14.2 percent respectively). A slightly lower percentage of cases during the years in question led to Merit Resolutions, which are outcomes favorable for the charging party or charges with meritorious allegations (16.2 percent, 14.8 percent and 15.2 percent respectively). Settlements, withdrawals with benefits, and successful or unsuccessful conciliations fall under the rubric of Merit Resolutions, which are an important part of the EEOCs enforcement activities.²²¹⁰ Successful conciliations constituted 1.4 percent, 1.2 percent and 1.4 percent of all outcomes for FY 2016, 2017, and 2018 respectively. Settlements constituted 7.4 percent, 6.4 percent and 6.1 percent of all outcomes during the same period. See Table 7.1. Table 7.1 – EEOC Charge Resolutions by Type (all statutes) FY 2016 to FY 2017 FY 2016

Number FY 2016 Percentage

FY 2017 Number

FY 2017 Percentage

FY 2018 Number

FY 2018 Percentage

Total Resolutions 97,443 99,109 90,558 Settlements 7,193 7.4% 6,357 6.4% 5,554 6.1% Withdrawals w/Benefits 5,526 5.7% 5,376 5.4% 5,090 5.6% Administrative Closures 15,729 16.1% 14,884 15.0% 12,860 14.2% No Reasonable Cause 65,882 67.6% 69,583 70.2% 63,921 70.6% Reasonable Cause 3,113 3.2% 2,909 2.9% 3,133 3.5% Successful Conciliations 1,359 1.4% 1,152 1.2% 1,289 1.4% Unsuccessful Conciliations

1,754 1.8% 1,757 1.8% 1,844 2.0%

Merit Resolutions 15,832 16.2% 14,642 14.8% 13,777 15.2% Monetary Benefits (Millions)

\$348.0 \$355.6 \$353.9

Source: U.S. Equal Employment Opportunity Commission, "All Statutes (Charges filed with EEOC) FY 1997 – FY 2018," <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

²²⁰⁹ Ibid., 31. ²²¹⁰ See U.S. Equal Employment Opportunity Comm'n, "Definitions of Terms," <https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>.

<https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>
<https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>

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The EEOC achieved 7,989 successful mediations out of a total 10,461 conducted (76 percent) in FY 2016, 7,218 successful mediations out of a total 9,476 conducted in FY 2017 (76 percent), and 6,754 successful mediation out of a total of 9,437 in FY 2018 (71.5 percent).²²¹¹ The time to completion and monetary benefit resulting varied only slightly over the period. For FY 2016, EEOC completed mediations in an average of 97 days resulting in over \$163 million in benefits, in FY 2017 EEOC averaged 105 days to completion resulting in roughly the same amount (\$163 million) in benefits, and in FY 2018 EEOC averaged 99 days to completion with nearly \$166 million in benefits.²²¹²

²²¹¹ EEOC, FY 2019 Budget Justification, supra note 2099, at 36; EEOC, FY 2020 Budget Justification, supra note 260, at 36. ²²¹² EEOC, FY 2019 Budget Justification, supra note 2099, at 36; EEOC, FY 2020 Budget Justification, supra note 260, at 36.

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Figure 7.4: Number of EEOC Charges by Type/Protected Basis

Source: U.S. Equal Employment Opportunity Commission, "Charge Statistics (Charges filed with EEOC FY 1997 Through FY 2017)," <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. *2018 data has been updated on the "Charge Statistics" website, even though the title still reflects data through only FY 2017

The largest category of EEOC private sector charges filed are based on retaliation, with 41,097 retaliation charges filed in FY 2016, 42,018 in FY 2017 and 39,469 in FY 2018.²²¹³ For those fiscal years, race, disability, and sex topped the list of protected bases for which charges were filed under the private sector enforcement program. See Figure 7.4.

²²¹³ U.S. Equal Employment Opportunity Comm'n, "Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017)," <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.



Retaliation (All Statutes)

Race

Disability

Sex

Age

<https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>
<https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

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In FY 2018 EEOC filed 41 workplace sexual harassment lawsuits.²²¹⁴ This is a 50 percent increase over the number of suits concerning sexual harassment filed by EEOC in FY 2017.²²¹⁵ During the same time frame, the number of charges filed with EEOC alleging sexual harassment rose by 13.6 percent, and EEOC has recovered nearly \$70 million for the victims of sexual harassment through its enforcement work, an increase of \$47.5 million in that time period.²²¹⁶ In appeals of cases involving sexual harassment of federal employees, monetary recovery increased even more dramatically during this period, by 180 percent for a total of \$443,066.²²¹⁷ EEOC has also increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to the 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent.²²¹⁸ In addition to the above mentioned EEOC charges, state and local FEPAs processed 39,129 new charges in FY 2016, 37,234 new charges in FY 2017, and 31,867 in FY 2018.²²¹⁹ State and local FEPAs resolved a total of 38,794 charges in FY 2016, 37,849 in FY 2017 and 37,138 in FY 2018, while continuing to reduce the pending inventory over those fiscal years.²²²⁰ Carol Miaskoff, Associate Legal Counsel at EEOC, testified before the Commission that oversight is important with regard to enforcement strategies and efforts in order to achieve consistency and results across the various EEOC regional offices. She noted that quarterly meetings take place between EEOC Commissioners and office directors “about the kinds of cases that they’re bringing, what they’re finding, what the results are, progress on these priorities, and what needs to be addressed and what isn’t being addressed adequately.”²²²¹ She also noted that a certain percentage of litigation from each district that is aligned with agency priorities goes to the EEOC for review.²²²² Under EEOC delegation agreements, the General Counsel has delegated authority (from EEOC Commissioners) to decide to commence or intervene in litigation, excepting a subset that go to the full EEOC for review, which are:

- Cases that may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses. This category is expected to include many systemic, pattern or practice or EEOC Commissioner charge cases;

2214 U.S. Equal Employment Opportunity Comm’n, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [hereinafter EEOC, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment”]. 2215 *Ibid.* 2216 *Ibid.* 2217 *Ibid.* 2218 *Ibid.* 2219 EEOC, FY 2020 Budget Justification, *supra* note 260, at 39. 2220 *Ibid.* 2221 Carol Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 71. 2222 *Ibid.*

<https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm>

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- Cases that present issues in a developing area of law where the EEOC has not adopted a position through regulation, policy guidance, EEOC decision, or compliance manuals, or where the EEOC has only recently adopted a position;
- Cases that the General Counsel reasonably believes to be appropriate for submission for EEOC consideration, for example, because of their likelihood for public controversy or otherwise;

- All recommendations in favor of EEOC participation as amicus curiae.²²²³ Proactive Compliance Evaluations The EEOC does not have specific authority that authorizes it to conduct compliance reviews with respect to private sector employment. However, EEOC and OFCCP entered into a Memorandum of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies that aims to “reduce duplication of compliance activities” and “facilitate information exchange.”²²²⁴ EEOC and OFCCP will exchange information about compliance reviews or charges filed against a contractor in hopes of streamlining enforcement.²²²⁵ While the MOU does not specifically address whether EEOC has any authority to conduct compliance reviews, it does infer that OFCCP is taking the lead with the proactive compliance reviews conducted for federal contractors. Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity EEOC has the legal authority to disseminate policy through regulations,²²²⁶ technical assistance,²²²⁷ education/outreach,²²²⁸ and publicity.²²²⁹ EEOC disseminates policy to employers and employees through a variety of means. EEOC is obligated to conduct education and outreach activities under Title VII – including the provision of training and technical assistance – to those with rights and responsibilities under antidiscrimination laws.²²³⁰ Title VII of the Civil Rights Act of 1964 also authorizes the EEOC to provide training and technical assistance for those federal agencies with rights and responsibilities under employment antidiscrimination laws.²²³¹ EEOC adopted an outreach strategy through a multi-year nationwide communications and outreach plan, which consisted of collaboration with state and local Fair Employment Practice Agencies, support

2223 EEOC, FY 2017-2021 Strategic Enforcement Plan, *supra* note 2164, at 19-20. 2224 DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, *supra* note 2044. 2225 *Ibid.* 2226 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601; 28 C.F.R. § 42.403. 2227 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15. 2228 42 U.S.C. 200e-4(h)(2). 2229 28 C.F.R. § 42.405. 2230 42 U.S.C. 200e-4(h)(2); EEOC, FY 2019 Budget Justification, *supra* note 2099, at 51. 2231 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; EEOC, FY 2018 Budget Justification, *supra* note 2116, at 16; EEOC, FY 2019 Budget Justification, *supra* note 2099, at 47-49.

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of private enforcement of the federal anti-discrimination laws, collaboration with other agencies, and an integration of research and data.²²³² EEOC offers free and fee-based education and training.²²³³ The EEOC Training Institute holds seminars around the country for employers, employees, human resource professionals, attorneys, state and local officials and union officials.²²³⁴ EEOC focuses private sector education and outreach efforts on traditionally underserved communities and new or small businesses (which are unlikely to have human resources staff).²²³⁵ The commission directs approximately 32 percent of its private sector outreach towards vulnerable communities, with a particular focus on immigrants and farm workers.²²³⁶ On-site training is available to interested parties.²²³⁷ Overall, in FY 2017 EEOC provided free training to over 317,000 individuals through over 4,000 events around the country and served over 17,000 fee-paying individuals through over 430 events conducted by the Training Institute.²²³⁸ In FY 2018, the EEOC launched a new training program entitled, “Respectful Workplaces,” to address pervasive workplace harassment.²²³⁹ The EEOC reports that it is committed to improving the efficacy of its outreach and education efforts through digital technology and social media.²²⁴⁰ The use of technology in outreach efforts receives significant attention in EEOC’s most recent Strategic Plan, which sets the design and implementation of a technology plan for outreach and education as a goal for FY 2018.²²⁴¹ EEOC posts regular updates about new and ongoing cases on its website.²²⁴² In addition, EEOC issues press releases about its enforcement work, including reporting updates on charges/complaints and litigation, data collection, and policy updates.²²⁴³ EEOC indicates that it issues subregulatory guidance documents that provide policy updates and “are used to explain how the laws and regulations apply to specific workplace situations.”²²⁴⁴ These documents, which are approved by the majority of the EEOC’s Commissioners, are listed

2232 EEOC, FY 2017-2021 Strategic Enforcement Plan, *supra* note 2164, at 16-17. 2233 U.S. Equal Employment Opportunity Comm’n, “Federal Training and Outreach,” <https://www.eeoc.gov/federal/training/index.cfm>; U.S. Equal Employment Opportunity Comm’n, “Outreach, Education and Technical Assistance,” <https://www.eeoc.gov/eeoc/outreach/index.cfm>. 2234 U.S. Equal Employment Opportunity Comm’n Training Institute, “EEO Seminars,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=info>. 2235 EEOC, FY 2019 Budget Justification, *supra* note 2099, at 56. 2236 *Ibid.* 2237 U.S. Equal Employment Opportunity Comm’n Training Institute, “On-site Training,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=activity>. 2238 EEOC, FY 2019 Budget Justification, *supra* note 2099, at 54-55. 2239 *Ibid.*, 51-52. 2240 *Ibid.*, 52. 2241 EEOC, FY 2018-2022 Strategic Plan, *supra* note 198, at 19-20; EEOC, FY 2017-2021 Strategic Enforcement Plan, *supra* note 2164. 2242 U.S. Equal Employment Opportunity Comm’n, “Newsroom,” <https://www.eeoc.gov/eeoc/newsroom/>. 2243 U.S. Equal Employment Opportunity Comm’n, “EEOC Press Releases,” <https://www.eeoc.gov/eeoc/newsroom/release/>. 2244 U.S. Equal Opportunity Employment Comm’n, “EEOC Subregulatory Guidance,” <https://www.eeoc.gov/laws/guidance/index.cfm>.

<https://www.eeoc.gov/federal/training/index.cfm>
<https://www.eeoc.gov/eeoc/outreach/index.cfm>
<https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=info>
<https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=activity>
<https://www.eeoc.gov/eeoc/newsroom/>
<https://www.eeoc.gov/eeoc/newsroom/release/>
<https://www.eeoc.gov/laws/guidance/index.cfm>

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on EEOC’s website, and fall under two formats relevant to the private sector:²²⁴⁵ the Compliance Manual, which “advises staff on substantive matters of law for use during investigations and in making reasonable cause determinations;”²²⁴⁶ and enforcement guidance, which “communicate [EEOC’s] position on important legal issues.”²²⁴⁷ EEOC also lists its proposed subregulatory policy documents on its website, indicating that these documents “are approved by a majority of the Commissioners for the purpose of seeking public input, but they do not establish Commission policy until the Commission approves the final version by a majority vote.”²²⁴⁸ Workplace Harassment Over the past few years and in the era of the #MeToo movement,²²⁴⁹ EEOC has ramped up its enforcement of workplace harassment, which includes a priority on preventing sexual harassment, though its enforcement efforts long predate this public focus.²²⁵⁰ In 1986, in *Meritor Savings Bank v. Vinson*, the Supreme Court affirmed that sexual harassment that is “sufficiently severe or pervasive” that creates “a hostile or abusive work environment” violates Title VII of the Civil Rights Act of 1964.²²⁵¹ even if the unwelcome acts are not linked to employee benefits.²²⁵² This decision effectively affirmed prior EEOC policy guidelines on the matter.²²⁵³ In testimony to the Commission, EEOC Associate Legal Counsel Carol Miaskoff stated that then- Acting Chair Lipnic was “frankly horrified” at the EEOC’s docket, “to see the pervasiveness of harassment of all kinds, including sexual harassment in the workplace.”²²⁵⁴ On January 10, 2017, after the issuance of a 2016 report from the EEOC’s Select Task Force’s on workplace harassment,²²⁵⁵ EEOC issued another proposed guidance and sought public comment on said guidance on the issue of harassment in the workplace.²²⁵⁶ This guidance included a definition of protections against discrimination on the basis of sex, which included gender identity, defined as follows:

2245 *Ibid.* 2246 U.S. Equal Opportunity Employment Comm’n, “Compliance Manual,” <https://www.eeoc.gov/laws/guidance/compliance.cfm>. 2247 U.S. Equal Opportunity Employment Comm’n, “Enforcement Guidances and Related Documents,” https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm. 2248 U.S. Equal Opportunity Employment Comm’n, “Proposed Subregulatory Guidance Documents,” <https://www.eeoc.gov/laws/guidance/proposed.cfm>. 2249 See Cassandria Santiago and Doug Criss, “An activist, a little girl and the heartbreaking origin of ‘Me too,’” CNN.com, Oct. 17, 2017, <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>. 2250 EEOC, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” *supra* note 2214. 2251 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). 2252 477 U.S. at 68, 73 (“hostile environment” theory of sexual harassment is actionable). 2253 477 U.S. at 65. 2254 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 33. 2255 See *infra* notes 2294-2296. 2256 U.S. Equal Employment Opportunity Comm’n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; U.S. Equal Employment Opportunity Comm’n, “EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment,” Jan. 10, 2017, <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>.

<https://www.eeoc.gov/laws/guidance/compliance.cfm>
https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm
<https://www.eeoc.gov/laws/guidance/proposed.cfm>
<https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>
<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>

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Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual’s transgender status or the individual’s intent to transition. It also includes using a name or pronoun inconsistent with the individual’s gender identity in a persistent or offensive manner.²²⁵⁷

The definition also included sexual orientation, defined as:

Sex-based harassment includes harassment because an individual is lesbian, gay, bisexual, or heterosexual.²²⁵⁸

Since the change in presidential administrations, the new guidance has not been issued, and there are news reports that the Trump Administration objects to its implementation.²²⁵⁹ National Women’s Law Center’s Fatima Goss Graves noted in written and oral testimony before the Commission that the Office of Management and Budget (OMB) has blocked publication of updated EEOC sexual harassment guidance, without public explanation. She testified that as of July 2019, over two years after its proposal, the guidance remains stalled at the review stage, with no information available about its status.²²⁶⁰ However, EEOC Associate Legal Counsel Carol Miaskoff testified in November 2018 that the guidance is still under review with OMB.²²⁶¹ As Goss Graves explained:

2257 U.S. Equal Employment Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 7-8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; See, e.g., James v. U.S. Postal Serv., EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee's new name or pronoun may constitute sex-based harassment). 2258 U.S. Equal Employment Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (Oct. 27, 2015) (indicating that sexual orientation discrimination claim "necessarily state[s] a claim of discrimination on the basis of sex [because] it involve[s] treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex"). See also Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *4 (W.D. Wash. Sept. 22, 2014); Bouillier v. Hartford Pub. Sch., No. 3:13-cv-01303-WWE, 2016 WL 6818348, at *7-11 (D. Conn. Nov. 17, 2016); EEOC v. Scott Med. Health Ctr., No. 16-225, 2016 WL 6569233, at *5-7 (W.D. Pa. Nov. 4, 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159-61 (C.D. Cal. 2015); Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). But see Hively v. Ivy Tech Cmty. Coll., No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) (stating that Title VII does not prohibit sexual orientation discrimination), aff'd, 830 F.3d 698 (7th Cir. 2016), as amended (Aug. 3, 2016), reh'g en banc granted and opinion vacated, No. 15-1720, 2016 WL 6768828 (7th Cir. Oct. 11, 2016); see also Bostock v. Clayton County Board of Commissioners, 2018 WL 2149179 (11th Cir. May 10, 2018) cert. granted; Altitude Express, Inc. v. Zarda, 139 S.Ct. 1599 (2019); R.G. & G.R. Harris Funeral Homes v. EEOC, No. 18-107 S. Ct. (2019). 2259 Chris Opfer, "White House Leaves Harassment Guidance in Limbo," Bloomberg Law, Jun. 13, 2018, <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>. 2260 See Chris Opfer, "Gag Orders in Job Misconduct Probes Ok, Labor Prosecutor Says," Bloomberg Law, Mar. 20, 2019, <https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>; David Dayen, "Neomi Rao, Nominee To Replace Brett Kavanaugh, Heads Agency That's Been Stalling Sexual Harassment Guidance," The Intercept, Feb. 4, 2019, <https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>. 2261 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, pp. 64-66.

<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>
<https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>
<https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>
<https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>
<https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>

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In the area of sex discrimination . . . this administration has put itself at a disadvantage in enforcing the existing complaints that it is getting. And so by doing things like changing the compliance manual that make it easier to wholesale dismiss whole categories of complaints that you're receiving – so these are individuals who are trying to find their way oftentimes by themselves and who have been told for many years we're open for business, come to us if you have a civil rights concern, and then they get what looks like to them a form letter saying that your concern is unimportant. . . . you got to undo the things that are basically barriers for people who are trying to come forward."2262

But on the subject of EEOC's enforcement, Goss Graves stated: "The one area where I think you're seeing efforts to have meaningful enforcement in the area of harassment right now that is responsive to the need is at the EEOC where they have the highest number of charges."2263 As noted above, the EEOC has increased its enforcement efforts significantly.2264 Goss Graves pointed to one cause for this uptick in charges "tied to the cultural movement," but testified that she "also believe[s] it's tied to them sending messages that they're taking this issue seriously."2265 Interaction and Coordination with External Agencies and Organizations EEOC has entered into agreements with 92 state and local FEPA's and 64 TERO's, as described earlier in this chapter.2266 EEOC has also entered into Memoranda of Understanding with several federal agencies that detail procedures on how agencies should cooperate when there is overlap in enforcement responsibilities.2267 EEOC also has entered into Memoranda of Understanding with several foreign embassies and consulates, which enhance cooperation in instances of employment discrimination involving foreign nationals working in the U.S.2268 At the Commission's briefing Associate Legal Counsel Carol Miaskoff said that EEOC's Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they "clash" with civil rights laws.2269 EEOC and OFCCP have entered into a Memoranda of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies.2270 This MOU

2262 *Ibid.*, 202. 2263 *Ibid.*, 202-03. 2264 See supra notes 2203-2220. 2265 Goss Graves Testimony, Federal Civil Rights Enforcement Briefing, pp. 203-204. 2266 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 4, at 8. 2267 *Ibid.* 2268 *Ibid.* 2269 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 82; see also Ch. 2, DOJ CRT, Federal Coordination and Compliance Section. 2270 DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, supra note 2044.

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seeks to "reduce duplication of compliance activities" and "facilitate information exchange" between EEOC and OFCCP, and specifies that:

Prior to investigation of charges filed against Government contractors subject to Executive Order 11,246, as amended, EEOC will contact OFCC to (a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC's investigation which have been secured by the contracting agency in previous compliance reviews. Prior to conducting compliance reviews or investigations of complaints against Government contractors, OFCC will contact EEOC to (a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor's compliance with Executive Order 11,246, as amended, and (c) obtain and review any pertinent documents. It is anticipated that these contacts will be made routinely between EEOC regional offices and regional offices of OFCC.2271

The MOU establishes Compliance Coordination Committees, designates a Coordination Advocate, and establishes standard notice and consultation procedures.2272 The MOU "clarifies the complaint and charge referral procedures for complaints filed with each agency" and "provides that the OFCCP will act as the EEOC's agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII."2273 Additionally, "the processes and procedures outlined in the MOU emphasize that both agencies will increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims."2274 Research, Data Collection, and Reporting Regarding data collection, EEOC reported to the Commission that during the complaint intake process, EEOC staff gathers relevant information about the allegations, including what happened, when the incident occurred, names of witnesses, information about the respondents, etc.2275 EEOC collects the contact information from the complainant (name, address, phone number, email

2271 *Ibid.* 2272 Couden, "Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC," supra note 2046. 2273 *Ibid.* 2274 *Ibid.* 2275 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 14, at 14.

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address) and requests demographic information pertaining to the age, disability status, race/ethnicity, national origin/ancestry, and gender of the complainant.2276 EEOC reported that in FY 2011, it expanded the national origin categories for individuals who self-identify as Asian, in accordance with E.O. 13515, and disaggregates its data for the following Asian national origins: Cambodian, Chinese, Filipino, Hmong, Indian, Japanese, Korean, Laotian, Pakistani, Thai, Taiwanese and Vietnamese.2277 This data is not publicly reported. EEOC has electronic systems in place to assist individuals who wish to file complaints or wish to inquire about the status a complaint that has already been filed.2278 In March 2016, EEOC launched its Online Charge Status System, which enables individuals who have filed a charge to check the status online, and in November 2017, EEOC launched its Public Portal to enable individuals to make inquiries and appointments to file discrimination charges.2279 In addition, EEOC launched its Respondent Portal in January 2016, which enables respondents to "receive an electronic notice of the charge to view online, submit documents, select options to mediate, and designate representatives."2280 EEOC continues to develop its capabilities in this area and is currently working to extend the access of its public portal to federal employees and agencies who utilize the federal sector EEO complaint process.2281 The EEOC's Strategic Enforcement Plan for 2012-2016 requires EEOC to "develop and approve" a multi-year Research and Data Plan, which was established for the years 2016-2019.2282 This plan establishes guidelines for keeping an inventory of existing EEOC data, modifications/additions to EEOC's survey collection system, and for tracking and reporting data, in addition to establishing a plan for using data for EEOC responsibilities, and outlining certain long-term research projects.2283 EEOC has begun collecting data on pay and hours worked from employers, including federal contractors.2284 Specifically, EEOC collects this data from all employers with 100 or more employees and federal contractors with 50 or more employees "reflecting how much the employers paid workers of different sexes, races and ethnicities."2285 This data collection was originally adopted during the Obama Administration, intending to "root out gender- and race-based pay

2276 *Ibid.* 2277 *Ibid.* 2278 *Ibid.* 2279 *Ibid.* 2280 *Ibid.* 2281 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2282 U.S. Equal Employment Opportunity Comm'n, "Research and Data Plan for 2016-2019," https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm. 2283 *Ibid.* 2284 U.S. Equal Employment Opportunity Comm'n, "EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection," <https://www.eeoc.gov/employers/eeo1survey/index.cfm>. 2285 Melanie M. Hamilton and Jonathan Stoler, "Employers Must Provide Pay Data to EEOC by September 30," The National Review, Apr. 27, 2019, <https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>.

https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm
<https://www.eeoc.gov/employers/eeo1survey/index.cfm>
<https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>
<https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>

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gaps," but was rolled back during the Trump administration.2286 and was the subject of litigation.2287 However, EEOC has now begun the collection of 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands and demographic data on race, gender and ethnicity.2288 EEOC collects its data via various survey forms, which employers can access via EEOC's website.2289 EEOC has a specific legal authority to conduct research and produce reports on its technical studies.2290 Since combating workplace harassment is a policy priority for EEOC over the past several years,2291 in 2015, EEOC created a Select Task Force on the Study of Harassment in the Workplace with members from academia, legal scholars and practitioners, employers and employee advocacy groups, and organized labor.2292 Hearing testimony from over 30 witnesses and receiving numerous public comments, this Select Task Force focused on prevention of workplace harassment, and sought to examine not just actionable forms of workplace harassment, but other non-actionable conduct and behaviors that may "set the stage for unlawful harassment."2293

2286 *Ibid.* 2287 Melanie M. Hamilton and Jonathan Stoler, "EEOC Announces Decision to Collect 2017 Employee Pay Data, in Addition to 2018 Pay Data, by September 30, 2019," The National Review, May 6, 2019, <https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>. The article notes that:

On April 25, 2019, the district court ordered the EEOC to collect a second year of pay data from select employers, giving the EEOC until May 3, 2019 to advise whether it would collect 2017 or 2019 data. Employers have until September 30, 2019 to report 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands. The EEOC has announced that it expects to begin accepting data submissions in mid-July, to facilitate compliance with the court-mandated deadline. In the meantime, employers must still submit Component 1 demographic data on race, gender and ethnicity by May 31, 2019.)

Ibid. 2288 *Ibid.* 2289 U.S. Equal Employment Opportunity Comm'n, "EEO Reports / Surveys," <https://www.eeoc.gov/employers/reporting.cfm>. 2290 42 U.S.C. § 2000e-4(g)(5) (stating that "The Commission shall have power . . . to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public"). 2291 See supra notes 2249-65. 2292 U.S. Equal Employment Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, Executive Summary and Recommendations, Jun. 2016, p. 1, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf [hereinafter EEOC, Study of Harassment in the Workplace]. 2293 *Ibid.*

<https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>
<https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>
<https://www.eeoc.gov/employers/reporting.cfm>
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf

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As a result of the Select Task Force on the Study of Harassment in the Workplace,2294 EEOC issued a report in June 2016 with the findings of the Select Task Force, which reported:

- Workplace harassment often goes unreported, as roughly three out of four individuals who experience harassment will not report the incident to a supervisor or union representative
- Stopping and preventing workplace harassment is good business, as legal costs can be steep for businesses accused of misconduct, emotional costs are high for victims, and all employees will be affected by "decreased productivity, increased turnover, and reputational harm"
- Leadership and accountability are critical to preventing workplace harassment • Training must change to be more effective, should be tailored to the specific workplace,

and new approaches to training should be explored • It's on us to prevent workplace harassment, and everyone plays a role in combating

workplace harassment.2295 The report also issued a number of recommendations around the prevalence of harassment in the workplace, workplace leadership and accountability, policies and procedures to prevent workplace harassment, anti-harassment compliance training, workplace civility and bystander intervention training, outreach and targeted outreach to youth, and the launch of an "It's On Us" campaign in which "co-workers, supervisors, clients, and customers all have roles to play in stopping [] harassment."2296

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Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties In addition to the authority to review nondiscrimination compliance of DHS funding recipients, Congress provided the Office for Civil Rights and Civil Liberties (CRCL) of the U.S. Department of Homeland Security (DHS) broad jurisdiction to advise the DHS Secretary regarding all agency policies, to review complaints about civil rights matters, and to provide public information about them.2297 Notwithstanding this broad jurisdiction with respect to agency programs, Congress did not assign this civil rights office authority to enforce its views of the law or to review policies before they are implemented. At the Commission's briefing, several panelists as well as various public commenters expressed concerns with alleged civil rights violations that fall under the jurisdiction of CRCL.2298

Legal Authority and Responsibility

Congress established the DHS as a federal executive agency with broad duties and authorities, as part of the Homeland Security Act of 2002.2299 The Act combined several other federal agencies, such as the Immigration and Nationality Service (INS), which was formerly an agency of the U.S. Department of Justice, and put them under the umbrella of DHS authority.2300 Created in the wake of 9/11, the DHS's mission is to prevent terrorism, as well as to "carry out all the functions of entities transferred to the Department [such as FEMA and the INS]; ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected..."2301 and to "ensure that the civil rights and civil

2297 See *infra* notes 2305-2306. 2298 See Lopez Testimony, Federal Civil Rights Enforcement Briefing, pp. 186-191; Yang Testimony, Federal Civil Rights Enforcement Briefing, pp. 182-188. The Commission also received written public comments expressing concern about current DHS policies from South Asian Americans Leading Together, the National LGBTQ Task Force, YMCA, and others. See *supra* notes 320-26. The Commission received similar concerns during the Commission's recent briefing on hate crimes. See Chief Terrence Cunningham, Deputy Executive Director, International Association of Chiefs of Police, testimony, Hate Crimes Briefing, p. 69 (regarding his concerns about the Administration's anti-immigrant rhetoric and policies); Suman Raghunathan, Executive Director of South Asian Americans Leading Together, testimony, Hate Crimes Briefing, p. 96-101, 130 (stating that "South Asian, Muslim, Sikh, Hindu, and Middle Eastern communities are existing in a moment where we are the targets of hate that are actively spurred by the anti-immigrant, anti-Muslim, anti-people of color policies advanced by the current administration[.]" *Ibid.* at 97) (emphasis added); Melissa Garlick, Civil Rights National Counsel at the Anti-Defamation League, Hate Crimes Briefing, p. 103 (that: "The federal administration policies and positions defending such actions, such as a tax on so-called sanctuary cities, the Muslim ban, the transgender military ban, they all raise legitimate fears in schools and communities across the country, encourage hate, and have created an environment in which victims are afraid to report crimes or come forward as witnesses, including crimes[.]" (emphasis added). 2299 6 U.S.C. § 111(a); Pub. L. 107-296, Title I, § 101 (Nov. 25, 2002). 2300 Exec. Order No. 13,286, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security, (Feb. 28, 2003), 68 FR 10619, 2003 WL 24028002 (Pres.). 2301 6 U.S.C. § 111(b)(1)(A) – (E).

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liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland[.]2302 DHS is one of the largest federal agencies, and currently has "more than 240,000 employees in jobs that range from aviation and border security to emergency response[.]2303 According to DHS, CRCL's main duties are to "investigate complaints, provide policy advice to Department leadership and components on civil rights and civil liberties issues, and communicate with the public about CRCL and its activities. The statute also requires coordination with the Privacy Officer and Inspector General, and directs CRCL to submit an annual report to Congress.2304 These three duties – to investigate complaints, provide policy advice, and provide public information – are found in the statutory language below.

Congress provided that the Officer of Civil Rights and Civil Liberties (CRCL) "shall:

(1) review and assess information concerning abuses of civil rights, civil liberties, and

profiling on the bases of race, ethnicity, or religion, by employees or officials of the Department;

(2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;

(3) assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;

(4) oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;

(5) coordinate with the Privacy Officer to ensure that— (A) programs, policies, and procedures involving civil rights, civil liberties, and

privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receive appropriate reports regarding such programs, policies, and procedures; and

(6) investigate complaints and information indicating possible abuses of civil rights and civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General."2305

2302 *Id.* § 111(b)(1)(G). 2303 U.S. Dep't of Homeland Security, "About DHS," <https://www.dhs.gov/about-dhs> (accessed Nov. 27, 2018). 2304 6 U.S.C. § 345. 2305 *Id.* (emphasis added); see also Daniel Sutherland, Homeland Security Office for Civil Rights and Civil Liberties: A One-Year Review, The Heritage Foundation, Aug. 10, 2004, <https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review> (explaining that DHS CRCL "primarily has an internal function—assisting the senior leadership to develop policies in ways that protect and enhance our civil liberties").

<https://www.dhs.gov/about-dhs>

<https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review>

<https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review>

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According to CRCL's answers to the Commission's interrogatories,2306 applicable civil rights statutes include the Religious Freedom and Restoration Act,2307 the Architectural Barriers Act of 1968,2308 Rehabilitation Act of 1973,2309 the Genetic Information Nondiscrimination Act of 2008,2310 and the Prison Rape Elimination Act.2311 Statutes and regulations that apply to recipients of DHS financial assistance include these same statutes, as well as Title VI of the Civil Rights Act of 1964,2312 Title IX of the Education Amendments of 1972,2313 the Age Discrimination Act of 1975,2314 and the Implementing Regulations of the 9/11 Commission Act of 2007, which require that CRCL provide training to state and local agencies.2315 A series of 13 executive orders, covering issues ranging from language access rights,2316 the rights of persons with disabilities,2317 and working with faith-based organizations,2318 are also under the purview of CRCL's compliance activities with regard to federal grantees.2319 Under the statutory provision directing CRCL to "review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion"2320 and to "oversee compliance with constitutional, statutory, regulatory, policy or other requirements relating to... civil rights and civil liberties,"2321 CRCL's subject matter jurisdiction is much broader than the above list of statutes, as it encompasses all of "civil rights and civil liberties."2322 For example, CRCL is active in international human rights matters.2323 Its statutory authority is also unique in that it includes high level policy review. At the Commission's briefing, Deputy CRCL Officer Veronica Venture provided written testimony stating that:

2306 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3. 2307 42 U.S.C. § 2000bb et seq. 2308 *Id.* § 4151 et seq. 2309 29 U.S.C. § 701 et seq. 2310 42 U.S.C. 2000ff et seq. 2311 34 U.S.C. § 30301 et seq. 2312 This includes implementing regulations at 6 C.F.R. Part 21 and, for FEMA grantees, at 44 C.F.R. Part 7, Subpart A. U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3. 2313 This includes implementing regulations at 6 C.F.R. Part 17 and, for FEMA grantees, at 44 C.F.R. Part 19. *Ibid.* 2314 With implementing regulations for FEMA grantees at 44 C.F.R. Part 7, Subpart E. *Ibid.* 2315 See Title VIII, Privacy and Civil Liberties, Implementing Regulations of the 9/11 Commission Act of 2007, P.L. 110-53 (Aug. 3, 2007). 2316 Exec. Order No. 13,166, 50 Fed. Reg. 159, 50,121. 2317 Exec. Order No. 13,347, 69 Fed. Reg. 142, 44,573 (Jul. 26, 2004). 2318 Exec. Order No. 13,279, 67 Fed. Reg. 241, 77,141 (Dec. 16, 2016). 2319 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 3. 2320 6 U.S.C. § 345(a)(1). 2321 *Id.* § 345(a)(3). 2322 *Id.* § 345(a)(3). 2323 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2(b), at 5 ("DHS works closely with the Department of State and other agencies to respond to questions, prepare reports, and testify before international bodies that oversee compliance with human rights treaties, many of which have a substantial overlap with domestic civil rights law, including the International Covenant on Civil and Political Rights and the Convention Against Torture, as well as the United Nations' Universal Periodic Review. CRCL serves as the Department's point of contact office for human rights treaty compliance.")

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CRCL is a unique civil rights office... CRCL carries out the Department's unique mission "to ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland." (6 USC 111(b)(1)(G).) No other agency has a statutory mission like that.2324

She went on to emphasize that:

Where our office is unique is in all the work we do regarding DHS's own enormous workforce and contractors to ensure compliance with the Constitution, civil rights and civil liberties laws, and our extensive policies making those broad concepts clear for our operators in the field. Consider... all the places DHS makes contact with the public: passenger screening when boarding a flight, or entering the country by land, sea, or air; immigration benefits interviews; ICE or Border Patrol apprehensions; FEMA benefits in a disaster; and even Secret Service protective activities.2325

University of Michigan Law Professor and former CRCL Officer Margo Schlanger, presented similar testimony, asserting that:

It's a very unusual office, because, unlike most Offices of Civil Rights (OCRs), its chief assignment is to address potential and actual civil rights violations by DHS itself... DHS's CRCL is different: it seeks to move DHS and its components to themselves respect the civil rights of the millions of people DHS's own activities touch—their beneficiaries, [law enforcement] targets, and everyone in between.2326

Enforcement Tools The agency enforcement tools CRCL has specific legal authority to use are:

• Complaint Resolution2327

• Agency-Initiated Charges2328 • Proactive Compliance Evaluations2329

2324 Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep't of Homeland Security, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Venture Statement]. 2325 Venture Statement, at 2. 2326 Schlanger Statement, at 1; but *C.f.* [other agency CROs that also have this goal/any authority]. 2327 6 U.S.C. § 345(a)(6); 6 C.F.R. § 21.11(b). Note that DHS CRCL's ability to resolve complaints is limited to the complaints they receive under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act. 2328 6 C.F.R. § 21.11(a) and (c). 2329 6 C.F.R. § 15.70 (for Section 504 only); Title VI and Title IX enforcement fall under the Secretary. 6 C.F.R. § 21.9 – 17 (Title VI) and 6 C.F.R. § 17.605.

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• Guidance or Other Policy Documents2330 • Regulations2331 • Technical Assistance2332 • Publicity2333 • Outreach to Regulated Community/Potential Victims2334 • Research, Data Collection and Reporting2335 • Collaboration/Partnership with State/Local Agencies2336 • Collaboration/Partnership with Other Federal Agencies2337 • Strategic Plan2338 • Annual Reports2339

While DHS CRCL does not have specific legal authority for other tools identified by the Commission, nothing prohibits DHS CRCL from, for example, engaging in observation, as described in further detail below.

2330 6 U.S.C. § 345(a)(3) – (5) (evaluation of CRCL's use of this enforcement tool is discussed in the Prioritization of Civil Rights Section, *infra* notes 2360-2342 (discussing family separation and Muslim ban policies); 6 C.F.R. § 21.9(a). 2331 6 U.S.C. § 112(e)(Secretary authorized to prescribe regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations); 2332 CRCL's authority and focus on internal agency policy is clear in the legislative history and statutory language of the PATRIOT Act, enabling it to issue written technical assistance. See 6 U.S.C. § 345(a)(3) – (4). 2333 The PATRIOT Act requires that the CRCL Officer "shall - make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer." 6 U.S.C. § 345(a)(2); see also 28 C.F.R. § 42.405 (Public dissemination of title VI information). 2334 6 U.S.C. § 345(a)(2). 2335 CRCL must "coordinate with the Privacy Officer to ensure that—

(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receives appropriate reports regarding such programs, policies, and procedures." 6 U.S.C. § 345(a)(5).

CRCL also reports through the Secretary of Homeland Security, who is required to:

submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report on the implementation of this section [Establishment of Officer

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But although CRCL has fairly unique mission-level authority under the above statute as well as its foundational statutory language under the Homeland Security Act to make policy recommendations “to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities,” it lacks authority to enforce them, as there is no statutory or regulatory requirement that new policies be reviewed by CRCL prior to implementation.2366 The office can be effective if it is consulted and its advice is respected. A former CRCL Senior Advisor describes CRCL’s oversight process as follows:

Policy development is generally owned by one part of an agency, but other elements with appropriate technical knowledge will be brought in to consult and advise ... Congress’ innovation with CRCL was to set up a dedicated office that, in an ordinary policy development process at the DHS, would be included wherever a policy could touch on civil rights and civil liberties issues such as racial profiling, humane detention standards, or free expression. While this process is often carried out behind the scenes, it regularly comes into view in a final policy document. In 2017, for example, the DHS implemented a new legislative requirement to allow DHS entities to capitalize on DOD training missions. Recognizing the potential for civil liberties concerns, CRCL coordinated with other DHS offices to ensure that each such training mission would be subject to a civil rights and civil liberties review, with CRCL available to provide ongoing expert assistance.2367

This section summarizes some of CRCL’s major proactive policy work from FY 2016-2018, and analyzes how that work has or has not been effectively prioritized by the agency. Zero Tolerance and Family Separation2368 At the Commission’s briefing, CRCL Deputy Venture testified that her office was not consulted prior to DHS’ implementation of the Administration’s zero tolerance policy that resulted in separation of thousands of migrant children from their parents, because it “came down very quickly from the White House... across DHS, there was not a lot of time for anyone to really dig into it

2366 See 6 U.S.C. § 345(a), *passim*, and see Schlanger Statement, at 4. 2367 Shuchart, Building Meaningful Civil Rights and Liberties Oversight at the Department of Homeland Security, *supra* note 2358, at 5. 2368 In parallel with the Commission’s work on this report, the Commission formed a bipartisan subcommittee to re-open the Commission’s 2015 report on immigration detention; the subcommittee was to examine the circumstances and impact of zero tolerance and family separation, as well as conditions of immigration detention. The Commission’s follow-up report, Trauma at the Border: The Human Cost of Inhumane Immigration Policies, which was adopted by majority vote of the Commission on August 29, 2019, addresses similar issues to those discussed in this chapter, and some of the text that appears here also appears in Trauma at the Border. See U.S. Comm’n on Civil Rights, Trauma at the Border, Oct. 24, 2019, <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf> [hereinafter Trauma at the Border] (discussing family separation, conditions of detention, CRCL policy and complaints processing, and other civil rights related issues).

<https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf>

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before it was put into place, no.”2369 In October 2018, the GAO reported that previously, only a small number of migrant children were separated from their parents, and this only occurred in cases in which the relationship could not be confirmed, or if the parents were a threat to the safety of the child.2370 On April 6, 2018, then-Attorney General Sessions issued a new “zero tolerance policy” requiring that all federal prosecutors, in conjunction with DHS, seek criminal prosecution of all adult persons crossing the border without authorization, even if they were seeking asylum.2371 Under the revised policy, federal prosecutors were directed to work in conjunction with DHS to criminally prosecute all border crossers apprehended between U.S. ports of entry as criminal misdemeanors rather than civil violations, and charge them for “improper entry” under 8 U.S.C. §1325(a).2372 By requiring that all federal prosecutors pursue criminal charges resulting in the

2369 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 132 (When asked if CRCL was consulted in advance of the Administration formulating its policies on separations of families at the border, Venture responded: “So no, partly because it came down very quickly from the White House. So you know across DHS, there was not a lot of time for anyone to really dig into it before it was put into place, no.”) 2370 GAO, Unaccompanied Children, *supra* note 1437 (“Prior to the Attorney General’s April 2018 memo, according to DHS officials, accompanied children at the border were generally held with their parents in CBP custody for a limited time before being transferred to ICE and released pending removal proceedings in immigration court. However, according to DHS and HHS officials, DHS has historically separated a small number of children from accompanying adults at the border and transferred them to ORR custody for reasons such as if the parental relationship could not be confirmed, there was reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child, or if the child crossed the border with other family members such as grandparents without proof of legal guardianship. ORR has traditionally treated these children the same as other UAC [Unaccompanied Minors].”) 2371 *Ibid.* 1-3; and see Preliminary Injunction, Ms. L. v. ICE, No. 18-0428, 1-2 (S.D. Cal. June 26, 2018) (hereinafter “Preliminary Injunction”), citing see U.S. Atty. Gen., “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration” (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>; Order, Ms. L. v. ICE, No. 18-56151 (9th Cir. Oct. 11, 2011) (staying appeal until Nov. 26, 2019 while district court proceedings continue). In the Preliminary Injunction, the federal court noted that persons crossing the border without legal authorization who are seeking asylum are not crossing illegally. *Id.* at 3-4. See also Order Granting Plaintiff’s Motion to Modify Class Definition, Ms. L. v. ICE, 333 F.R.D. 284, 392 (S.D. Cal. Mar. 6, 2019) (granting expansion of class definition based on new information from DHS Office of Inspector General report that family separation was occurring in 2017, prior to official announcement of the policy, and that potentially thousands more migrant children had been separated from their parents). 2372 DOJ, Zero-Tolerance Memorandum, *supra* note 843. The Attorney General’s memorandum “direct[ed] each United States Attorney’s Office along the Southwest Border to the extent practicable, and in consultation with DHS – adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 8 U.S.C. § 1325(a). This zero-tolerance policy shall supersede any existing policies.” DOJ, Zero-Tolerance Memorandum, *supra* note 843. Congress made improper entry, i.e., not at a port of entry, a misdemeanor offense in 8 U.S.C. § 1325. Moreover, shortly thereafter, at the news conference in San Diego, California near the Southern border with Tijuana, Mexico, then-Attorney General Sessions acknowledged that the “zero tolerance” policy does not have exceptions for those seeking asylum or accompanying minors.

I have put in place a “zero tolerance” policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple. ... I have no doubt that many of those crossing our border illegally are leaving difficult situations. But we cannot take everyone on Earth who is in a difficult situation.” U.S. Dep’t of Justice, Justice News, “Attorney General Sessions Delivers Remarks Discussing the Immigration Actions of the Trump Administration,” San Diego, CA, May 7, 2018, (hereinafter DOJ, “Attorney General Session Remarks.”), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

<https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>

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detection of parents, the memo would force DHS to separate them from their children.2373 On April 23, Border Patrol, USCIS and ICE asked for guidance from the Secretary “regarding various approaches for implementing DOJ’s April 2018 memo.” 2374. The Secretary of Homeland Security approved DOJ’s recommended policy on May 4, and subsequently issued it in a memo on May 11, 2018, implementing the family separation policy.2375 This impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters.2376 The Administration’s new policy of “metering,” or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.2377 Under the new zero tolerance policy, any unauthorized crossings resulted in taking children from their parents and detaining them separately, often in other states or across the country.2378 Some parents were not provided with clear notice that their children were being taken from them, and some were deported without them, making reunification extremely difficult.2379 DHS officials told GAO that they did not find out about the policy until it was announced publicly by the Attorney General on May 7, 2018.2380 However, GAO found that during 2017, Office of Refugee Rights (ORR) officials noticed an increase of children sent to their shelters who had been separated from their parents, and had approached DHS officials about this trend.2381 Similarly, some DHS officials that GAO interviewed had noticed a similar trend in 2017.2382 But according to testimony, CRCL was not consulted.2383 GAO found that DHS officials were making relevant policy recommendations and issuing directives to implement the new policy in May 2018.2384 Clearly, CRCL should have been consulted, as DHS’ separation of migrant children from their parents at the Southern border

2373 GAO, Unaccompanied Children, *supra* note 1437, at 7. 2374 *Ibid.* 2375 *Ibid.* 2376 Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1). 2377 U.S. Dep’t of Homeland Security, Office of the Inspector General, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, September 2018, pp. 5-7, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [hereinafter DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy]. 2378 See “Where Are the Migrant Children Facilities? Scattered Across America,” The Washington Post, Jun. 25, 2018, https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.1ab942dfb597. 2379 DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, *supra* note 2377, at 12-15. 2380 *Ibid.*; see also GAO, Unaccompanied Children, *supra* note 1437, at 7 (“According to DHS and HHS officials we [GAO] interviewed, the departments did not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to ORR. DHS and HHS officials told us that the agencies did not take specific planning steps because they did not have advance notice of the Attorney General’s April 2018 memo. Specifically, CBP, ICE, and ORR officials we interviewed stated that they became aware of the April 2018 memo when it was announced publicly.”) 2381 GAO, Unaccompanied Children, *supra* note 1437, at 13. 2382 *Ibid.* 2383 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 132. 2384 GAO, Unaccompanied Children, *supra* note 1437, at 16.

<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>

https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.1ab942dfb597

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(hereinafter “border”)2385 raised serious civil rights concerns. The overwhelming majority of persons crossing that border are persons of color, primarily from Latin America.2386 For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border.2387 Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India.2388 Those detained have been disparaged by the President’s xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants,2389 and implicating equal protection based on national origin.2390 Their rights to family integrity are also at stake.2391 Moreover, a humanitarian crisis emerged due to thousands

2385 Although the United States also has a border with Canada, hereinafter, “border” will be used to signify the Southern border of the United States, with Mexico. 2386 From 2010-2014, 71% of unauthorized immigrants in the U.S. were from Mexico and Central America, and 4% were from South America, such that 75% were from Latin American countries. Jie Zong, Jeanne Batalova, and Jeffrey Hallock, Frequently Requested Statistics on Immigrants and Immigration in the United States, Unauthorized Immigrants, Migration Policy Institute, Feb. 8, 2018, <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>. See also Dara Sharif, “Haitians and Africans Are Increasingly Among Those Stranded Among US – Mexico Border by Trump Immigration Policies,” The Root, Jul. 9, 2019, <https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stranded-among-us-mexico-border-by-trump-immigration-policies/>. See also Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 88-89 (1973). U.S. Department of Justice, in guidance for federal law enforcement, defines national origin as “an individual’s, or his or her ancestor’s, country of birth or origin, or an individual’s possession of the physical, cultural or linguistic characteristics commonly associated with a particular country,” and discrimination based on national origin happens when people are singled out and denied equal opportunity because “they or their family are from another country[.]” U.S. Dept. of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat’l Origin, Religion, Sexual Orientation, or Gender Identity, (December 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [hereinafter DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat’l Origin, Religion, Sexual Orientation, or Gender Identity]. The Department of Justice’s Civil Rights Division defines national origin as someone’s “birthplace, ancestry, culture, or language.” U.S. Dept. of Justice, Civil Rights Division, Federal Protections Against National Origin Discrimination, (August, 2010), <http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf>. 2391 See *infra* notes 2403-07, discussing federal reports and the class action litigation of Ms. L. v. U.S. Immigration and Customs Enft, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). These claims fall under the Commission’s statutory duty to submit “at least one report annually that monitors Federal civil rights enforcement efforts in the U.S.” 42 USC 1975a(c)(1).

<https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>

<https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>

<https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stranded-among-us-mexico-border-by-trump-immigration-policies/>

<https://trac.syr.edu/phptools/immigration/cbparrest/>

<http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>

<http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf>

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of migrant children, including infants and toddlers, being separated from their parents and held in shelters for 6-8 months, or more, and some are still being held in government shelters.2392 The separation of these families raises issues under the broad jurisdiction of CRCL to assist the Secretary and “oversee compliance with constitutional, statutory, regulatory, policy, and other requirements related to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.”2393 Recently, news reports emerged about thousands of Border Patrol officials being members of a Facebook page that included posts with anti-immigrant rhetoric (including reportedly “racist, sexist and violent images”) that disparaged the Latinx families being separated and the migrants who have died in the agency’s custody.2394 CBP officials reportedly knew about this Facebook page and its contents for “as many as three years,” and their investigation took into account members’ First Amendment and privacy rights.2395 However, if the officers’ statements were to be connected with an overall policy or official actions against Latin American migrants, the statements on the Facebook page implicate civil rights issues.2396 (This may also fall under CRCL’s jurisdiction to review trends in complaints received by DHS Components.2397) A 60 Minutes investigation reported that former CRCL attorney “Scott Shuchart was surprised by the new policy even though he worked at Homeland Security headquarters at the Office for Civil Rights and Civil Liberties. He told us the order was so abrupt it bypassed the usual review.”2398 After site visits, the DHS OIG issued a report finding that lack of preparation and lack of reliable information systems had led to parents being unable to contact or locate their children.2399 A Congressional hearing as well as reports from an internist and a psychiatrist who investigate detention facilities for DHS also showed that the agency knew in advance that that traumatic damage that would be caused by taking children from their parents.2400 These two DHS medical

2392 See *infra* notes 2408 (discussing Feb. 2019 reports) and see Trauma at the Border, *supra* note 2368, at 25-6 (discussing reports and testimony from the Commission Subcommittee’s May 13, 2019 Public Comment Session); Miriam

Jordan, "No More Family Separations, Except These 900," New York Times, July 30, 2019, <https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>. 2393 6 U.S.C. § 345(a)(3) and (4). 2394 See, e.g., Reis Thebault and Nick Miroff, "CBP Officials Knew About Derogatory Facebook Group Years Ago and Have Investigated Posts From It Before," The Washington Post, Jul. 5, 2019, https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d. 2395 Ibid. 2396 See DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat'l Origin, Religion, Sexual Orientation, or Gender Identity, supra note 2390. 2397 See infra note 2408. 2398 Scott Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," 60 Minutes, Nov. 26, 2019, <https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/> [hereinafter Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border"]. 2399 DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, supra note 2378, at 9-12. 2400 PBS, "What we learned from congressional hearing on family separations," supra note 1439; see also Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," supra note 2398 (interviews with Psychiatrist Dr. Pam McPherson and Internist Dr. Scott Allen).

<https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>
https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d
https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d
<https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/>
<https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/>

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consultants had reported their findings of "watching in horror" as children experienced the trauma of being separated, with a "high risk of harm" to the children and their parents, and inadequate water, food and medical care resulting in issues such as extreme weight loss and children becoming depressed due to being detained without their parents in prison-like conditions.2401 They stated that: "In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers."2402 A federal court later documented evidence that in many cases, this also compounded trauma from the dangerous conditions that migrant families had fled from in Central America.2403 If CRCL was able to access the Secretary and mission-level influence envisioned in the Homeland Security Act, and subsequent amendments,2404 it should have been able to stop the family separation policy before it harmed the children. Instead, litigation by private parties was needed, and on June 26, 2018, a federal court issued a preliminary injunction ordering that migrant children who were separated be reunited with their parents within 14 or 30 days.2405 The court also required that the policy of family separation be halted, finding the policy to be "egregious," "outrageous," "brutal" and "offensive."2406 The court's decision also demonstrates the negative impact of ineffective federal civil rights enforcement for thousands of families of color, especially Central American children, finding that:

Children are at risk of suffering great emotional harm when they are removed from their loved ones. And children who have traveled from afar and made their way to this country to seek asylum are especially at risk of suffering irreversible psychological harm when wrested from the custody of the parent or caregiver with whom they traveled to the United States.2407

Numerous religious, civil rights, immigrant rights and community service groups, as well as Members of Congress and the media, responded to the ensuing crisis through contributions, legal

2401 Miriam Jordan, "Whistle-blowers Say Detaining Migrant Families Poses 'High Risk of Harm,'" The New York Times, Jul. 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>. 2402 Ibid. 2403 See Ms. L. v. U.S. Immigration & Customs Enft, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. Jun. 6, 2018) (discussing expert testimony); and see infra notes 2405-2407 for further discussion of the litigation; and see Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," supra note 2398. 2404 See supra notes 2361-64; cf. supra notes 2365-2367. 2405 Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enft, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (Ordering that children under 5 years of age be reunited with their parents within 14 days, and children over 5, within 30 days). 2406 310 F. Supp. 3d at 1145-46, citing several Supreme Court cases (internal citations omitted). 2407 310 F. Supp. 3d at 1147 (quoting expert testimony of Martin Guggenheim, the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law and Founding Member of the Center for Family Representation).

<https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>

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assistance, and investigations of the conditions and impact of family separation, which were publicly available.2408 On June 15, 2018, the Commission majority sent a letter to the Departments of Justice and Homeland Security, urging the ending of separating families at the border and the zero tolerance policy.2409 The zero tolerance policy, the Commission noted, coerced parents into withdrawing valid asylum applications and impaired their legal immigration proceedings for fear of what would happen to their children if they did not comply.2410 The Commission emphasized its concern that these policies, directed at Mexican and Central American immigrants coming to the U.S. through the border, raised questions of unwarranted discrimination of the basis of national origin.2411 In addition, the Commission noted that the policy disregarded that many of those individuals coming to the U.S. are fleeing dangerous situations in their home countries and are seeking asylum within the parameters of our nation's immigration laws.2412 On June 26, 2018, the Commission voted to reopen its 2015 Report With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities, 2413 and formed a bipartisan subcommittee to facilitate discovery associated with reopening the report.2414 DHS initially implemented this policy of separating children from their parents with "no reunification plan in place,"2415 and without review by DHS' CRCL.2416 As discussed, the Homeland Security Act, as amended requires that CRCL's mission be part of the mission of the DHS, that the CRCL Officer have access to the agency head, and that CRCL "review and assess information concerning civil rights" and "periodically review Department policies and procedures to ensure . . . the protection of civil rights."2417 At the Commission's briefing, Deputy Venture was asked whether CRCL was consulted on zero tolerance and family separation, and she said no.2418

2408 Alan Gomez, "Democrats grill Trump administration officials over family separation policy on the border," USA Today, Feb. 7, 2019 <https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>; Refugee and Immigrant Center for Education and Legal Services, "CREW and RAICES Sue DHS Over Continued Family Separation Failures," Dec. 14, 2018, <https://www.raicestexas.org/2018/12/14/crew-and-raices-sue-dhs-over-continued-family-separation-failures/>; Presbyterian Disaster Assistance, "Separated Families and U.S./Mexico Border Update," Aug. 14, 2018, <https://www.presbyterianmission.org/pda-blog/2018/08/14/separated-families-and-u-s-mexico-border-update/>. 2409 Letter from the USCCR to former Atty General Sessions and former DHS Sec'y Nielsen (Jun. 15, 2018), <https://www.usccr.gov/press/2018/06-15-18-letter.pdf>. 2410 Ibid., 1. 2411 Ibid., 1-2. 2412 Ibid., 2. 2413 U.S. Comm'n on Civil Rights, With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities, September 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf. 2414 U.S. Comm'n on Civil Rights, Jun. 26, 2018 Business Meeting Transcript, at 17 In. 18-21. 2415 310 F. Supp. 3d at 1142 ("[i]t is undisputed ICE has no plans or procedures in place to reunify the parent with the child other than arranging for them to be deported together after the parent's immigration case is concluded."). 2416 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 80 (emphasis added). 2417 See supra notes 2304-2305 (discussing 6 U.S.C. §§ 345(1)(a)-(c)). 2418 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 132.

<https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>
<https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>
<https://www.raicestexas.org/2018/12/14/crew-and-raices-sue-dhs-over-continued-family-separation-failures/>
<https://www.presbyterianmission.org/pda-blog/2018/08/14/separated-families-and-u-s-mexico-border-update/>
<https://www.usccr.gov/press/2018/06-15-18-letter.pdf>
https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf

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She stated that the matter was an ongoing investigation, so she was not at liberty to comment about whether, if had CRCL been notified, the policy would have raised civil rights concerns.2419 On June 19, 2019, the Commission received correspondence from CRCL stating that the Commission's draft report "did not accurately capture CRCL's efforts to shape DHS policy," adding that:

CRCL's Programs Branch provides policy advice to the Department on civil rights and civil liberties issues in the policy development process, as well as in implementation after announcement of a new policy. That means that much of our policy work is most effective either on issues that have not yet entered public view, where incremental improvement is possible in an area that is not high profile enough to have triggered litigation, or where we are helping the department to address issues after litigation has clarified difficult legal issues. In whichever case, much of this proactive policy work is part of the deliberative process and, therefore, shielded from public view. . . . Specifically with respect to the zero tolerance policy (family separation), CRCL was not involved in the early development of the policy; however, CRCL's Compliance Branch investigated family separations and made recommendations to U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). As far back as 2016, CRCL processed complaints and voiced concerns regarding the impact of family separation on children. The [CRCL] Programs Branch, in coordination with the [CRCL] Compliance Branch, also raised concerns with the civil rights and civil liberties issues with the zero tolerance policy and the resulting family separations, as the Department of Justice and DHS were implementing the policy. Finally, CRCL is currently completing complaint investigations related to family separation by CBP. We want to emphasize that CRCL raises concerns with DHS policies and activities that impact civil rights and civil liberties issues, even if CRCL was not included in the initial policy development. Unfortunately—due to the above-referenced structural limitations—CRCL often cannot share the details of its work with the public.2420

The Commission's research shows jurisdictional issues have impeded CRCL's ability to assist in evaluating and influencing the policy of family separation. They were apparently not fully included in the advance development of the policy and while CRCL has since been participating in making policy regarding DHS' treatment of minor children and families, and it is involved in drafting regulations that the Administration recently issued to replace the Flores Settlement Agreement

2419 Ibid., 133. 2420 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

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that protects the civil rights of migrant children and families in federal detention, it is unclear the extent to which their recommendations are being implemented. In another comment, on the Commission's draft report, CRCL stated:

Unaccompanied children are in custody of HHS/ORR, so outside of CRCL's jurisdiction. Additionally, CRCL has been involved in the Department's efforts to draft regulations on detention of children, which would replace the Flores Settlement Agreement.2421 Further, CRCL has been involved for many years in reviewing the ICE Family Residential Centers that house family units.2422

However, the reported conditions of migrant children and their families in DHS custody show that CRCL has not been effective in preventing systemic civil rights violations.2423 At minimum they were not consulted in the early critical stages of planning that resulted in the disastrous decision to separate even preverbal toddlers from their parents with no plans on how they would be tracked and reunited. This contrasts with the statutory requirement that CRCL must "periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities."2424 The statutory framework does not include sufficient requirement that CRCL must review every policy change, nor that review occur prior to a new policy being implemented, nor is there any specific authority to ensure that the agency takes CRCL's advice into account.2425 Muslim Ban Deputy Venture testified that CRCL had not been consulted before introduction of the Muslim ban, clarifying that: "These are policies that were pushed out from the White House and [about which they] said to do it."2426 The Commission majority has expressed deep concern about the civil rights implications of the Administration's policy of banning the entrance or visas for

2421 For more information on the Flores Settlement Agreement, which prohibits detention of migrant children for more than 72 hours and otherwise protects their rights to appropriate care, see infra note 2521 and Trauma at the Border, supra note 2368, at notes 277-90. 2422 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73. 2423 See supra notes 2404-2407 (discussing Ms. L litigation). 2424 6 U.S.C. § 345(a)(3). 2425 Id. § 345, passim. 2426 Venture, Federal Civil Rights Enforcement Briefing, p. 132.

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immigrants from majority Muslim countries.2427 In particular, the Commission voted to decry not only the discriminatory impact of these policies, but also the rhetoric behind them, targeting persons based upon their religion.2428 The policy was first introduced through an executive order on January 27, 2017, which banned the entry of foreign nationals from seven predominantly Muslim countries, suspended the entry of Syrian refugees indefinitely, and prohibited the entrance of any refugees from any country for 120 days.2429 Widespread protests by U.S. citizens at airports across the country met the first two iterations of the policy, and more importantly, federal courts swiftly struck down both iterations of the ban in three separate lawsuits on the grounds that the bans were discriminatory and unconstitutional.2430 The Commission received public comments from State Attorneys General who had litigated against the Muslim ban. Virginia Attorney General Mark Herring submitted the following public comment: "One of President Trump's first executive orders attempted to enact a Muslim ban that violated the constitutional rights of many living in our nation and raised fear among American Muslims and other minority communities that they could find themselves the next target of government sanctioned and mandated discrimination."2431 After the litigation, the President issued a third, amended and limited version of the policy that the Supreme Court deemed constitutional, in June 2018.2432 The White House issued these policies through the executive orders discussed above, as well as through an Agency Memo to DHS, the U.S. Department of State and the Director of National Intelligence (DNI).2433 As DHS implemented them, refugees were not allowed to enter the country,

2427 See U.S. Comm'n on Civil Rights, U.S. Comm'n on Civil Rights Expresses Concern Over Executive Orders Promoting Religious and National Origin Discrimination (Feb. 24, 2017), <https://www.usccr.gov/press/2017/statement-02-24-17-EO.pdf> ("Executive Order 13,769 sets out different treatment for persons coming to the United States from specified, Muslim-majority countries without any lawful justification or basis for that different treatment. By singling out seven overwhelmingly Muslim majority countries for exclusion, the Executive Order itself raises the specter of government endorsement of religious and possibly national origin discrimination. This infirmity is compounded by the Executive Order's prioritization of refugees who claim religious persecution, so long as they belong to "a minority religion" in their home country. Moreover, as courts have already recognized, extrinsic evidence also suggests that the EO was motivated by prohibited bias, inconsistent with the Nation's antidiscrimination principles.") 2428 See Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017); see also U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Declines Supreme Court Decision in Muslim Ban Case (July 13, 2018), <https://www.usccr.gov/press/2018/07-13-18-Statement.pdf> (majority of Commission agrees with Justice Sotomayor that the "repackaging [of the policy] does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created."); 2429 Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017) (banning entrance for persons from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.). 2430 See, e.g., Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 259-60 (4th Cir. 2018); State v. Trump, 871 F.3d 646, 654 (9th Cir. 2017); Washington v. Trump, 847 F.3d 1151, 1168 (9th Cir. 2017) (dismissing government's motion for emergency stay pending appeal). 2431 Mark Herring, Atty General of Virginia, testimony, Federal Civil Rights Enforcement Briefing, pp. 339-340. 2432 Trump v. Hawaii, No. 17-965, 2018 WL 3116337, at *24, 188 S.Ct. 2320-21 (U.S. Jun. 26, 2018) (under rational basis standard of review, "[i]t cannot be said that it is impossible to 'discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security interests, quite apart from any religious hostility, we must accept that independent justification.'"). 2433 Findings of Fact, Conclusions of Law, and Order Issuing Preliminary Injunction, Doe v. Trump, 264 F. Supp. 3d 1182, 1184-85 (W.D. Wash. 2018).

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and Muslim Americans with family members from the countries at issue have been forced to endure separation from their loved ones.²⁴³⁴ Although this litigation is ongoing, it illustrates that CRCL should have been involved as the new policies raised substantive civil rights concerns. While these policies originated from the White House, DHS' CRCL should have been consulted prior to implementation, per CRCL's statutory authority.²⁴³⁵ Other Civil Rights Policy Issues Apparently Not Addressed by CRCL Other major policy changes that have resulted in civil rights concerns during FY 2016-2018 include the Administration's retraction of Deferred Action for Childhood Arrivals ("DACA"), and claims pending in federal courts now regarding racially discriminatory animus and due process issues.²⁴³⁶ Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status ("TPS") from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns, including allegations that the retraction of TPS has been motivated by racial animus.²⁴³⁷ Some of these claims of racial animus are based upon statements by President Trump calling Mexicans "rapists" and immigrants "animals," and characterizing countries from which his Administration retracted TPS status as "shithole countries."²⁴³⁸

²⁴³⁴ Id. ²⁴³⁵ 6 U.S.C. § 345(a)(3). ²⁴³⁶ Compare Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 514-15 (9th Cir. 2018) (holding that because USCIS retained ultimate discretionary authority over protections granted by DACA, illegal immigrants did not possess a liberty or property interest protected by due process; but upholding plaintiff's equal protection claim given that the recession of DACA was motivated by discriminatory animus) and *Batala Vidal v. Nielsen*, 291 F. Supp. 3d 260, 274 (E.D.N.Y. 2018) (denying a motion to dismiss plaintiff's equal protection claims where DACA can reasonably be shown to be motivated by racially discriminatory animus against Latinos and in particular, Mexicans and a due process claim for extension applicants) with *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 773-74 (D. Md. 2018) (finding that the rescission of DACA did not create entitlement to any benefits protected by procedural due process, did not "shock the conscious" to violate substantive due process rights, and did not violate the Fifth Amendment's Equal Protection Clause); see also *NAACP v. Trump*, 298 F. Supp. 3d 209, 222 (D.D.C. 2018) (granting motion to dismiss plaintiff's information sharing claim and deferring ruling on plaintiff's constitutional claims, finding that the recession of DACA violated the APA). ²⁴³⁷ See, e.g., *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018) (finding plaintiffs demonstrate serious questions on the merits of an equal protection claim and granting a preliminary injunction); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018) (finding that TPS recipients adequately alleged that the change in TPS policy raised a serious question of equal protection and due process); *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018) (denying defendant's motion to dismiss as the Haitian nationals sufficiently alleged that DHS's termination of Haitian TPS violated their equal protection rights); *Casa de Maryland, Inc. v. Trump*, No. GJH-18-845, slip op. at *1 (D. Md. Apr. 25, 2018) (finding Salvadoran nationals plausibly alleged that the decision to end El Salvador TPS designation violated substantive due process); and see *Complaint, African Communities Together, et. al. v. Trump*, No. 4:19-cv-10432-TSH (D. Mass., Mar. 8, 2019); and *First Motion for Preliminary Injunction* (Mar. 12, 2019) (requesting expedited hearing). The hearing is set for March 28. Id., *Electronic Notice Setting Motion Hearing* (Mar. 13, 2019). ²⁴³⁸ Id.; and see, e.g., *Jayashri Srikantiah & Shirin Sinnar, White Nationalism As Immigration Policy*, 71 *Stanford L. Rev.* (Mar. 2019), <https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy>.

<https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy>

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Regarding the Trump Administration's controversial policy of separation of children from their parents at the border, Cecilia Muñoz, former Director of Domestic Policy for President Obama, commented that, "They issued an order without consulting with the agencies who were responsible for carrying out that order... [The harm to migrant children was] because these decisions were clearly made at the top and pushed down to the agencies without thinking through the ramifications and without thinking through the potential harm."²⁴³⁹ This concern underscores the weakness in the statutory design of DHS CRCL, challenging its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Deputy Venture vividly testified to this statutory weakness:

There are [structural challenges] in the sense that we don't have the ability to enforce. We make recommendations to say CBP or ICE. So I was talking to staffers on the Hill about their looking into possibly giving CRCL the ability to enforce more strongly, if these are not recommendations; these are here what it's going to be. And so of course that means a legislative fix.²⁴⁴⁰

CRCL's new Deputy Officer for Programs and Compliance Peter Mina has noted that "CRCL welcomes the opportunity to work with DHS leadership and Congress to expand statutory authorities and increase the office's funding level."²⁴⁴¹ Professor Schlanger made some recommendations to improve DHS CRCL's ability to review new DHS policies in advance of implementation, but she added that:

[I]n the current climate, it is not clear to me that any of this will work. I just want to be clear about that. This [CRCL] is an internal office. If there is a department that is insisting on orphaning children at the border, if there is a department that is insisting on engaging in Islamophobia... That is insisting on Islamophobic

With respect to immigration, Trump has repeatedly disparaged various groups of nonwhite immigrants. He began his presidential campaign by denouncing Mexican migrants as "rapists." He allegedly commented that Haitian immigrants "all have AIDS" and that Nigerian immigrants would never "go back to their huts" after seeing the U.S. He repeatedly conflated Middle Eastern and Muslim immigrants with terrorists and falsely claimed that most people convicted of terrorism in the U.S. came from abroad. In addition, Trump has trafficked in age-old racist tropes, portraying immigrants as criminals, invaders, threats to women, and even subhuman. On one occasion, Trump described unauthorized immigrants as "animals;" on another, he conjured images of vermin in describing immigrants as threatening to "pour into and infest our Country." Perhaps most infamously, he reportedly railed against immigration from "shithole countries"—an apparent reference to Haiti, El Salvador, and African nations—and asked why the U.S. couldn't get more people from countries like Norway. Id. at § I.A (citing sources).

²⁴³⁹ Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," supra note 2398; see also infra notes 2369-2426 (discussing zero tolerance and the resulting family separation policy, and related civil rights issues). ²⁴⁴⁰ Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 135. ²⁴⁴¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 90.

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screening protocols, if there is a department where violations of civil rights are at the core of what it sees as its role, then an internal civil rights office... might be able to slow that down, might be able to make it more embarrassing, but it is not going to be able to reverse it."²⁴⁴²

Strategic Planning and Self-Evaluation

Regarding performance, CRCL's statute requires that the agency Secretary provide an annual report about implementation of the duties of CRCL, including details of allegations concerning abuse of civil rights by employees and officials of the Department.²⁴⁴³ As required by the Implementing Regulations of the 9/11 Commission Act of 2007, CRCL also provides semi-annual reports to Congress.²⁴⁴⁴ That statute requires that the semi-annual reports include: "(A) information on the number and type of reviews undertaken; (B) the type of advice provided and the response given to such advice; (C) the number and nature of complaints received by the department, agency, or element concerned for alleged violations; and (D) a summary of the disposition of such complaints, the reviews and inquiries conducted, and the impact of the activities[.]"²⁴⁴⁵ The 9/11 Commission Act also requires that these reports to Congress be made "available to the public; and otherwise inform the public of the activities of such [Civil Liberties] officer," as long as consistent with protection of classified information and applicable law.²⁴⁴⁶ CRCL semiannual reports can be found on their website and include fairly comprehensive information about investigations opened, the allegations, and the DHS Component involved.²⁴⁴⁷ Some information, such as the resolution of investigations, including CRCL review of agency policies and funding recipients, is not provided but would be useful to help evaluate the efficacy of the work of the CRCL.²⁴⁴⁸ This information would also be useful to impacted community members as well as federal, state and local officials who are concerned about protecting civil rights, to understand how CRCL is working to protect and advance civil rights and so the regulated community – such as recipients of DHS financial assistance – act in a manner consistent with federal civil rights protections.²⁴⁴⁹ Though the semiannual report does provide CRCL with one direct reporting channel to Congress, the scope and content of these semiannual reports is limited. Other components of DHS, such as the DHS Privacy Office and the Citizenship and Immigration Service Ombudsman, have direct reporting lines to Congress that provide an important level of independence, requiring that they

²⁴⁴² Schlanger Testimony, Federal Civil Rights Enforcement Briefing, p. 252. ²⁴⁴³ 6 U.S.C. § 345(b). ²⁴⁴⁴ 42 U.S.C. § 2000ee-1(f); see also DHS, "CRCL Semiannual Reports," supra note 2339. ²⁴⁴⁵ 42 U.S.C. § 2000ee-1(f)(2). ²⁴⁴⁶ Id. § 2000ee-1(g). ²⁴⁴⁷ See DHS, "CRCL Semiannual Reports," supra note 2339. ²⁴⁴⁸ *Ibid.*, passim. See also, e.g., U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Semiannual Report to Congress, Third and Fourth Quarters, FY 2018, May 31, 2018, <https://www.dhs.gov/sites/default/files/publications/fy-2018-q3-q4-semiannual-report.pdf>. ²⁴⁴⁹ See, e.g., Schlanger Statement, at 3.

<https://www.dhs.gov/sites/default/files/publications/fy-2018-q3-q4-semiannual-report.pdf>

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"submit reports directly to Congress... without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or the Office of Management and Budget."²⁴⁵⁰ The agency's strategic plan only includes mention of "rigorously protecting privacy and civil rights and civil liberties," in relation to "integrating critical data sources, such as those for biometric data, by consolidating or federating screening and vetting processes."²⁴⁵¹ and in relation to cybersecurity or intelligence data.²⁴⁵² In terms of CRCL's strategic planning, the civil rights office told the Commission that:

DHS has not engaged in formal prioritization of planning with respect to civil rights and civil rights enforcement during the years in question. Rather, prioritization is constantly evolving based on identified needs and emerging areas. During the years in question, principal priority enforcement areas have been:

- Use of social media and biometric data in intelligence, vetting, and law enforcement;
- Ensuring language access in Department activities and programs; • Access to programs and activities for individuals with disabilities encountered and served by DHS Components, and particularly during FEMA emergencies; • Accommodation of disabilities in immigration enforcement, including credible fear screenings and immigration detention; • Community engagement on fast-moving changes in immigration and security policies; • Creation of the National Vetting Center; • Building civil rights and civil liberties protections into big data and information

sharing projects.²⁴⁵³ CRCL also identifies areas for proactive policy development through assessing the Department's interest. CRCL stated that former Deputy Secretary Mayorkas took an interest in immigration detention, and that the office "made support of his efforts a priority," and that "there has not been the same leadership interest in that subject [since his departure in November 2016], though it remains a substantial part of CRCL's work."²⁴⁵⁴ Similarly, "following a mass shooting in San Bernardino, California, in December 2015, the Department took a substantial interest in the way social media is used in law enforcement and security, and CRCL made support of these efforts and appropriate civil rights and civil liberties policy a priority."²⁴⁵⁵

²⁴⁵⁰ 6 U.S.C. § 142(e) and § 272(e)(2). ²⁴⁵¹ U.S. Dep't of Homeland Security, Fiscal Year 2014 – 2018 Strategic Plan, 16, https://www.dhs.gov/sites/default/files/publications/FY14-18%20Strategic%20Plan_0_0.PDF. ²⁴⁵² *Ibid.*, 29, 33 and 41. ²⁴⁵³ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 3, at 7. ²⁴⁵⁴ *Ibid.* ²⁴⁵⁵ *Ibid.*

https://www.dhs.gov/sites/default/files/publications/FY14-18%20Strategic%20Plan_0_0.PDF

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To more precisely review what civil rights matters CRCL has prioritized during FY 2016-18, the Commission asked about the office's policy priorities. In response, CRCL provided a list of 10 examples of "enforcement through proactive policy development."²⁴⁵⁶ In addition, responding to how it enforces civil rights law, CRCL's written testimony included information about 15 "current priorities and pressing areas in recent years."²⁴⁵⁷ To compare the current "pressing areas" with what has resulted in proactive policy development, the table below summarizes this information side-by-side. The data shows some level of compatibility between "current priorities and pressing areas;" however, the data also shows that some current priorities are not precisely matched with proactive policy development, and some policies have been developed based on other priorities. This may be because DHS policy changes quickly, such that CRCL is in a responsive rather than proactive position.²⁴⁵⁸

²⁴⁵⁶ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 4-5. ²⁴⁵⁷ Venture Statement, at 4-5. ²⁴⁵⁸ CRCL commented that: "CRCL notes that in a fast-moving policy environment this kind of attempt to match current priorities with proactive policy development may be overly simplistic. For example, CRCL's work may result in policy not being issued or ameliorated in a way that, due to the deliberative policy-making process, cannot be shared with the public. As the process of developing priorities lacks the benefit of hindsight and cannot account for many factors beyond CRCL's control, we would caution against this type of comparison." Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 58.

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Table 8.1: Comparison of CRCL Current Policies and Pressing Areas vs. Stated Areas of Proactive Policy Development

CRCL "Current Priorities and Pressing Areas"

CRCL "Areas of Proactive Policy Development"

Review and auditing classified DHS intelligence products to ensure civil rights and civil liberties (CRCL) protections.

Promulgation of a privacy and civil liberties policy for the Information Sharing Environment (ISE.)

Use of social media and biometrics data in intelligence, vetting, and law enforcement.

Recognition of civil rights issues through CRCL participation in policy on subjects including social media, computer data matching, the use of military training, watchlisting, vetting, and immigration enforcement during disasters and evacuations.

Support for state and local law enforcement CRCL policy development regarding: license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.

Working with the DOJ Global Justice Information Sharing Initiative's Criminal Intelligence Coordinating Council (CICC) to develop policy guidance and templates for state and local law enforcement and justice entities on license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.

"Community engagement on fast-moving changes in immigration and security policies."

Strategic community engagement initiatives by which DHS Senior Policy Advisors facilitate Quarterly Roundtables in 17 cities, and issue-specific community meetings, "to share timely, credible information; receive imperative feedback by individuals potentially impacted by Department activities; and to build trusted public/private partnerships between DHS and all levels of government, law enforcement, and the community."

Development of CRCL training for state and local law enforcement on the issue of preventing terrorism via community partnerships.

CRCL worked with the Federal Law Enforcement Training Centers (FLETC) to develop a national training program, the Law Enforcement Awareness Briefing (LAB) on Terrorism Prevention Partnerships, which was launched in 2019 and is awaiting resources for rollout.

Investigations into family separation and family reunification; family detention by ICE and detention of other vulnerable populations; treatment of unaccompanied children in CBP custody; and processing of asylum seekers by CBP.

CRCL has investigated family separation issues that are not the subject to ongoing litigation, and recommendations have been issued to both CBP and ICE.

Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.

Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.

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Ensuring language access in DHS programs and activities; development of a DHS language access program, working group, and component-specific language access plans.

Development of a DHS language access program, working group, component-specific language access plans, training, and compliance review.

Access to programs and activities for persons with disabilities, particularly during FEMA emergencies.

CRCL, working with FEMA, conducted listening sessions to hear from the public after disasters in 2018, including Hurricane Maria. CRCL compiled feedback and developed recommendations for FEMA's consideration.

Accommodation of disabilities in immigration enforcement.

Collaboration with Immigration and Customs Enforcement on development of new comprehensive policies related to accommodating individuals with disabilities in detention. CRCL Compliance has also reviewed numerous individual claims of disability discrimination many of which resulted in a finding or resolution that included a reasonable accommodation, such as the provision of a sign language interpreter.

Updating the Privacy and Civil Liberties Policy for State and Major Urban Areas Fusion Centers; technical assistance on integration of privacy and CRCL protections in state and local intelligence products.

This was completed in March 2019 under the auspices of the Criminal Intelligence Coordinating Council (CICC), a group under the U.S. Department of Justice's (DOJ) Global Justice Information Sharing Initiative (Global) which is an advisory body to the U.S. Attorney General. CRCL was a part of the working group that updated the Privacy and Civil Liberties Policy for State and Major Urban Area Fusion Centers - a requirement for fusion center recipients of DHS funding. CRCL also plans to respond to requests for technical assistance from the national fusion center network on appropriate integration of the new policy template into existing privacy, civil rights, and civil liberties policies when resources become available.

Incorporating CRCL protections in the National Vetting Center (NVC).2459

The NVC is administered by DHS through U.S. Customs and Border Protection and governed by an interagency National Vetting Governance Board (NVGB). The NVGB is supported by a Legal Working Group and a separate Privacy, Civil Rights, and Civil Liberties (P-CRCL) Working Group which will review all activities of the NVC to ensure they comply with law and

2459 The National Vetting Center was established by a National Security Presidential Memorandum in February 2018, to coordinate Federal Government vetting efforts of persons entering or seeking to remain in the country, to "improve the Government's ability to identify terrorists, criminals, and other nefarious actors, including those who seek a visa, visa waiver, or an immigration benefit, or a protected status; attempt to enter the United States; or are subject to an immigration removal proceedings." U.S. Dep't of Homeland Security, "The National Vetting Center," Feb. 6, 2018, <https://www.dhs.gov/news/2018/02/06/national-vetting-center>.

<https://www.dhs.gov/news/2018/02/06/national-vetting-center>

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policy and protect individuals' privacy, civil rights, and civil liberties, in accordance with U.S. law. CRCL co-chairs the P-CRCL Working Group. Further, DHS published a Privacy Impact Assessment (PIA) assessing the risks to privacy, civil rights, and civil liberties presented by the NVC and the vetting programs that will operate using the NVC. The PIA can be found at <https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>.

Improving training and processes for all DHS employees regarding the Department's zero tolerance policy for harassment.

"Ensuring religious liberty protections, following issuance of the Attorney General's memorandum on 'Federal Law Protections for Religious Liberty.'"

Issuance of a Department policy for accommodating religious beliefs when collecting photographs or fingerprints

"[D]uring the summer and fall of 2017, when several hurricanes and wildfires impacted large regions of the United States and its territories, CRCL and FEMA worked to address potential civil rights issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations. CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters. And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution."

Began development of recommendations to state, local, territorial, and tribal emergency managers to improve the delivery of disaster assistance to disaster survivors with disabilities. CRCL issued these recommendations in March 2019 in advance of the 2019 hurricane season.

Re-stating Department policy on the use of race, ethnicity, and other characteristics in law enforcement and screening

SOURCE: CRCL Testimony and Answers to Interrogatories

These data show current and pressing priorities ranging from intelligence gathering, immigration policy, family separation and reunification, detention policies, language access, access for persons with disabilities, training of state and local entities involved with DHS, internal policies against harassment, ensuring religious liberty, and access to Federal Emergency Management Association benefits. Examples of proactive policy work provided by CRCL address some, but not all, of these pressing issues. For example, CRCL did not provide information about proactive policy work

<https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>

<https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>

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regarding family separation, and also did not answer questions about the policy, citing an ongoing investigation.2460 In addition, other proactive policy has been developed without necessarily being listed as a "current" or "pressing" area. Examples include updated policies regarding racial profiling issued by CRCL.2461

Complaint Processing, Agency-Initiated Charges and Litigation According to the DHS authorizing statute, the Officer for CRCL must "investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General."2462 CRCL told the Commission that:

This does not take into account a number of additional individual remedial compliant avenues for the public that are at the DHS Component level, such as DHS TRIP, which receives and seeks resolution regarding difficulties experienced during travel screening at transportation hubs (airports) or crossing U.S. borders. CRCL, in addition to responding to allegations filed with our office, also reviews complaints made to Component[s] for trends.2463

But as former Officer Margo Schlanger has explained, "CRCL lacks authority either to prosecute or to discipline."2464 Congress charged DHS CRCL with "oversee[ing] compliance" for the agency with civil rights principles but did not give the office authority to require other offices within the agency to change practices consistent with that oversight,2465 except with respect to recipients of DHS funding, under Title VI and Section 504.2466 Apart from that, CRCL only has advisory authority to negotiate compliance where it cannot require it.

CRCL generally has not been effective in assuring civil rights compliance throughout DHS during the Fiscal Years studied. For example, multiple federal courts have ruled that DHS committed constitutional and civil rights violations when detaining and separating immigrant children from their parents.2467 Deputy Venture testified that CRCL received thousands of complaints about

2460 Venture, Federal Civil Rights Enforcement Briefing, p. 133. 2461 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 4. 2462 6 U.S.C. § 345(a)(6). 2463 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73. 2464 Schlanger, Offices of Goodness, supra note 78, at 54, 98. 2465 Ibid. 2466 See infra notes 2567-75. 2467 See Ms. L v. United States Immigration and Customs and Immigration Ent'l, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. 2018) (finding plaintiff set forth sufficient facts and legal basis to state a claim that separation from their children while contesting removal violates due process); M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 118, 121 (D.D.C. 2018) (finding a mother separated from her child was likely to succeed on a due process claim and would suffer irreparable harm in the absence of an injunction); Petition for Habeas Corpus and Complaint for Declaratory, Injunctive, and Monetary Relief, Mejia-Mejia v. United States Customs and Immigration Ent'l, No. 1:18-cv-01445- PLF (D.D.C. 2018) (alleging Fifth Amendment due Due process violations).

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immigrant family separation and detention, but due to resource constraints, CRCL is investigating only a small portion (23 out of over 3,000).2468 This number investigated amounts to only 0.77 percent of the total complaints filed.2469 Moreover, as discussed above, at the Commission's briefing, Deputy Venture testified that the CRCL Officer was not consulted prior to the Trump Administration's introduction and implementation of family separation.2470 After reviewing the draft report, another CRCL official told the Commission that:

Providing the percentage does not capture that these complaints covered the full range of issues raised. Based on these complaints and the ensuing investigation, CRCL has issued recommendations to both ICE and CBP relating to family separation that encompass and address the full range of issues raised in numerous allegations, far more than the 23 officially opened. Also, CRCL has numerous other complaints open related to family separation that support other investigations and cover specific issues, such as the care of children, the use of criteria to separate families, and coercion in separation or reunification.2471

But CRCL receives over 4,000 complaints per year from the public, Congress, DOJ, detainees, nonprofit groups and the press.2472 These complaints detail very high stakes matters, often "concerning civil rights and civil liberties abuses by DHS employees—including...alleged "profiling on the basis of race, ethnicity, or religion,"2473 and in addition to being possibly systemic, they are likely to be about issues that are currently negatively impacting the "persons" and

"Individuals" who are to be protected by CRCL's statute.2474 CRCL's responses to the Commission's Interrogatory and Deputy Venture's testimony both indicate a significant lack of resources impacting CRCL's ability to address most complaints. CRCL is clearly not able to investigate all the complaints it receives.2475 It reported to the Commission that:

CRCL does not currently have sufficient staffing to support opening more investigations of complaints from the general public, or having more intensive and encompassing investigations of such allegations. The allegations CRCL has received are increasingly complex, and in many cases, are the result of reports

2468 Venture Testimony, Federal Civil Rights Enforcement Briefing, pp. 125-26. 2469 23/3,000 = 0.00767. 2470 Venture Testimony, Federal Civil Rights Enforcement Briefing, pp. 132-33; see also supra notes 2368-2435 (discussing the Muslim ban and family separation). 2471 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 13, 2019) (on file). 2472 Venture Statement, at 3; U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19; Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 2473 Schlanger, Offices of Goodness, supra note 78, at 54, 62. 2474 See, e.g. infra notes 2531-36 (complaint about babies at Dilley; complaint about migrants being held outside under a bridge); Cf. 6 U.S.C. § 345(a). 2475 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19.

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requesting very large issues be thoroughly reviewed through a civil rights lens. CRCL presently only has the resources to do a few of these each year.2476

Deputy Venture testified that her office receives "over 4,000 complaints in from or allegations from the general public [annually]... We do not have the resources to actually investigate 4,000 allegations."2477 CRCL later clarified that it "investigates approximately 25 percent of what we receive as allegations."2478 At the Commission's briefing, Deputy Venture testified that her office prioritizes how they address the complaints, and they do so through an "information layer."2479 She stated that family separation was a "perfect example"2480 of that practice, and that:

We got over 3,000 complaints of family separation. We weren't going to open 3,000 complaints. So we are looking through the database... We took a representative sample, for instance, if a person is saying I'm coming with my child, or it's an unaccompanied child, or whatever category it was. So of the 3,000, we took 23 complaints and opened that as an investigation. That is representative of the whole. So that's one way that we are actually using our resources properly.2481

She stated that these types of investigations lead to "recommendations to CBP or to ICE about their policies and practices."2482 based on whether CRCL is seeing violations of law, or whether the subject-matter experts they use to review conditions of detention see lack of medical care or issues with treatment of juveniles.2483 Venture testified that, "[W]e are using the resources as wisely as we can but, in the sense we can't do everything, we just have to be a bit more representational about the complaints that we're looking into."2484 CRCL told the Commission that its intake process is as follows: "CRCL meets weekly to discuss recently received allegations and decide whether they should be opened as complaints or entered into the database 'information layer.'"2485 CRCL continued: "Generally, CRCL opens allegations that raise systemic, egregious, or novel civil rights or civil liberties issues, or allegations that do not appear to have been adequately addressed in another complaint redress forum (such as a Component or Office of Inspector General inquiry)."2486 CRCL does not directly open as complaints the matters placed in the information layer; rather, CRCL uses the information layer to "identify potential patterns of civil rights or civil liberties allegations that may result in later CRCL

2476 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 6, at 14. 2477 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 2478 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68. 2479 Ibid. 2480 Ibid. 2481 Ibid., 126. 2482 Ibid. 2483 Ibid. 2484 Ibid. 2485 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. 2486 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68.

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review or investigation."2487 After being reviewed, CRCL did not open 2,427 allegations (21 percent) as complaints for further investigation in FY 2016, 2,963 (16 percent) in FY 2017, and 1,256 (15 percent) in FY 2018 (up until April 11).2488 Furthermore, in FY 2016, CRCL opened 639 complaint investigations.2489 In this fiscal year, the office "opened more complaints...than in any year before or since."2490 In FY 2017, CRCL opened 560.2491 In FY 2018, CRCL opened 743 and closed 749 out of 4,201 pieces of correspondence.2492 The DHS Office of Inspector General (OIG) has the right of first refusal,2493 and retained 19 of the 743 complaint investigations opened by CRCL in FY 2018.2494 During the first half of FY 2018, up until April 11, CRCL received 221 complaints.2495 As of this date, "CRCL is on pace to open a similar number of complaints in FY 2018 as it did in FY 2017."2496 The bases of all the complaints received during the Fiscal Years studied are documented numerically in Table 8.2 below, and illustrated in the following bar graph in Figure 8.1, produced by Commission staff.

2487 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. 2488 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 7, at 15 2489 Ibid., 15-17. 2490 Ibid., 15-17. 2491 Ibid., 15-17. 2492 Venture Statement, at 3. 2493 6 U.S.C. § 345(a)(6). 2494 Venture Statement, at 3; U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22-26. 2495 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 7, at 15-17. 2496 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22.

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Table 8.2: Number Complaints Received by DHS CRCL by Bases for FY 2016-18 Primary Issue of Complaint FY 2016 FY 2017 FY 2018 (up to April 11) Abuse of authority/misuse of official position 161 159 64 Conditions of Detention 447 839 278 Disability Accommodation (Section 504) 140 38 23 Discrimination/Profiling 271 271 98 Due Process 686 1154 599 Excessive or Inappropriate Use of Force 180 176 56 Fourth Amendment (search and seizure) 41 41 15 Free Speech/Association (First Amendment) 2 1 2 Hate Speech 4 5 2 Human Rights 36 14 4 Inappropriate questioning/inspection conditions (Non-TSA) 56 49 20 Inappropriate touching/search of person (Non- TSA) 15 17 14 Intimidation/threat/improper coercion 76 69 8 Language Access (Limited English Proficiency) 20 21 5 Legal Access 30 44 19 Medical/Mental Health Care 738 446 139 Privacy 9 6 4 Religious Accommodation 38 18 12 Retaliation 13 24 4 Sexual assault/abuse 80 31 93 TSA Advanced Imaging Technology (AIT) and TSA pat-downs 24 29 18 Total 3067 3523 1477

SOURCE: CRCL Responses to USCCR Interrogatory 10.c.

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Figure 8.1: Bases of CRCL Complaints Received FY 2016-18

SOURCE: CRCL Response to USCCR Interrogatory 10.c. The data shows a fairly consistent pattern, with higher levels of complaints received about conditions of detention, discrimination/profiling, due process, and medical/mental health care issues. Moreover, although CRCL received more complaints in 2017, it opened more complaints in 2016.2497 The Commission received a public comment from South Asian Americans Leading Together (SAALT), arguing that CRCL "must have more power and resources," pointing to a complaint it filed in 2015 "regarding the treatment of more than 50 South Asian asylum seekers detained in the El Paso County Detention Facilities who were on hunger strike for a week after waiting for years for hearings even after passing credible fear tests."2498 According to SAALT, CRCL conducted an investigation and provided its findings and recommendations to ICE, where the investigation has remained since at least 2016.2499 CRCL later commented, "CRCL closed this investigation in June 2017, after issuing recommendations to ICE. CRCL is seeking to increase transparency in complaint investigation results going forward."2500 SAALT recommends "an independent

2497 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22. 2498 South Asian Americans Leading Together, Written Statement, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter SAALT Statement]. 2499 SAALT Statement, at 2. 2500 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 66.

0

200

400

600

800

1000

1200

1400

FY 2016 FY 2017 FY 2018 (up to April 11) Column1

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ombudsperson position be created to liaison between communities and CRCL to move such complaints through a transparent process and ensure the civil rights of all detainees are enforced."2501 CRCL told the Commission that "the majority of complaints are investigated and closed without the issuance of recommendations.2502 This usually occurs because either (1) the allegations detailed within the complaint are unsubstantiated, (2) the existing policy, training, and practices already in place are deemed satisfactory, or (3) the issues identified by CRCL's investigation have already been acknowledged by the Component."2503 In FY 2016, CRCL closed 147 investigations with recommendations.2504 That number was 43 in FY 2017, and was only 10 in FY 2018 (up until April 11).2505 After receiving and reviewing allegations, the following steps occur:

If CRCL keeps the complaint for investigation, CRCL requests information from the [DHS] Component and conducts its own factual investigation... Recommendations made as a result of an investigation are generally made confidentially to the effected Component, however CRCL notifies complainants of the general results whenever possible and provides summaries of its recommendations in its annual and semiannual public report.2506

The Components must have an opportunity to review CRCL recommendations, and "each recommendation requires a written response, concurring or non-concurring, within a defined timeframe, and evidence of implementation of any concurred-with recommendations."2507 If a Component non-concurs, it must also provide an explanation, which CRCL reviews."2508 CRCL then determines whether to continue discussions with the Component "or consider raising to leadership."2509 DHS regulations involving federally conducted programs and activities state that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days.2510 The agency regulations incorporate Title VI and Title IX processing

2501 SAALT Statement, at 2. 2502 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 20-21. 2503 Ibid. 2504 Ibid. 2505 Ibid. 2506 Ibid. 2507 Ibid. 2508 Ibid. 2509 Ibid. 2510 6 C.F.R. § 15.70(g). [there is an exception for 504 EEOC procedures – this exception does not apply to CRCL's external enforcement]

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times for claims of discrimination based on sex, race or national origin; CRCL asserts there are no processing deadlines for these types of claims.2511 The average length of time between the date complaints are received and the date closed is as follows (see Table 8.3): Table 8.3: Average Processing Time for CRCL Complaints, FY 2016-2018 FY 2016 FY 2017 FY 2018 (until April 11) 460 days 379 days 343 days

SOURCE: DHS Response to USCCR Interrogatory 7.e. In reviewing this information, CRCL pointed out Section 504 of the Rehabilitation Act is the only type of complaint that CRCL receives that is subject to a strict timeline, that Section 504 complaints represent only one percent of complaints they receive, and that 60 percent of complaints are opened and closed within one year.2512 They added that: "Complaints where recommendations are issued often take longer as CRCL must wait for the Component to respond and begin implementation. Additionally, a small percentage are held in abeyance due to pending litigation or because the OIG has retained the matter."2513 But after an individual filed a complaint about discrimination under Section 504, the D.C. District Court found that CRCL's 2.75 year delay in processing a civil rights complaint was "unreasonable" where DHS and TSA offered "no justification or explanation."2514 The court also noted that, "As a basic matter, and as the Agency Defendants concede, they have failed for almost three years to process an administrative complaint that, by regulation, they were required to have processed in 180 days."2515 DHS' Section 504 regulations clearly state that "all types of allegations on the basis of disability" must be processed by the unit that receives them (whether the Office of Inspector General or CRCL or another unit) within 180 days:

(1) Not later than 180 days from the receipt of a complete complaint over which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing:

(i) Findings of fact and conclusions of law; (ii) A description of a remedy for each violation found; and (iii) A notice of the right to appeal.2516

The volume of complaints and complexity of civil rights issues may also impact CRCL's efficacy.

2511 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 67. 2512 Ibid. 2513 Ibid. 2514 SAI v. Dep't of Homeland Sec., 149 F. Supp. 3d 99, 120 (D.D.C. 2015). 2515 Id. at 120. 2516 6 C.F.R. § 15.70(g).

CRCL may be called upon to assist DHS Components in developing their policies, but it has no mechanism to force its review or to force compliance with its expressed views.2589 For example, in 2017, ICE issued updated Performance Based National Detention Standards that were developed in conjunction with agency stakeholders and CRCL, with major revisions including: "full implementation of the DHS standards, disability accommodation, language access and communication assistance, disciplinary system and special management units, suicide prevention, detainees with serious mental illness, tracking and reporting assaults, identification and monitoring of pregnant detainees, religious meals, and use of force at detention facilities."2590 However, other DHS policies have been issued without CRCL participation.2591 On August 16, 2016, the Departments of Homeland Security, Justice, Housing and Urban Development, Health and Human Services, and Transportation issued guidance for disaster- management agencies that are the recipients of federal funding.2592 The guidance provided instruction on how these agencies could ensure that their emergency-relief programs do not discriminate against any individual or community on the basis of race or ethnicity in violation of Title VI of the Civil Rights Act, which states: "[n]o 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."2593 The guidance encouraged these agencies to adopt five practices that would prepare them to react to an emergency under the requirements set out in Title VI while also effectively responding to community needs: "(A) Reaffirm Commitment to Nondiscrimination Protections... (B) Engage with and include Diverse Racial, Ethnic, and Limited English Proficient Populations... (C) Provide Meaningful Access to LEP Individuals... (D) Include Immigrant Communities in Preparedness, Response, Mitigation, and Recovery Efforts... (E) Collect and Analyze Data." 2594 For each of these practices, the guidance recommended tangible strategies that could be implemented in order to achieve them.2595 Regarding technical assistance, CRCL reports that it provides technical assistance to the national fusion center network on appropriate integration of privacy, civil rights, and civil liberties

2588 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 5. 2589 See supra notes 2360-67 and 2440-41. 2590 U.S. Department of Homeland Security, Immigration and Customs Enforcement, Progress in Implementing PRNDS Standards and DHS PREA Requirements at Detention Facilities, Fiscal Year 2017 Report to Congress, p. 3, https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBND%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf. 2591 See supra notes 2368-2438. 2592 See infra notes 2612-13 (list of Title VI guidance issued during FY 2016-2018). 2593 Ibid. 2594 Ibid. 2595 Ibid.

https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBND%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf
https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBND%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf
https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBND%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf

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protections in state and local intelligence products and other fusion center activities.2596 CRCL also reports that it works to improve cultural competency and awareness of Department personnel through training resources on Sikh, Arab, and Muslim cultures.2597 One of CRCL's main statutory duties is public outreach "through the Internet, radio, television, or newspaper advertisements on the responsibilities and functions of, and how to contact, the [CRCL] Officer."2598 CRCL also performs outreach for DHS through routine stakeholder roundtable meetings in cities across the U.S., distinct town halls on current issues, and subject-specific events focusing on DHS priorities. CRCL also reports that it convenes national Incident Community Coordination Team (ICCT) calls with stakeholder and relevant government leadership in the immediate aftermath of homeland security incidents.2599 CRCL explains that it consults with communities through public town hall meetings and listening sessions to hear the communities' concerns and suggestions. CRCL reports that these consultations have offered valuable input to DHS policy and have helped to develop a guide on appropriate terminology to use when describing a terrorist threat.2600 The CRCL Immigration Section engages with the public about civil and human rights implications of Department immigration programs, policies, procedures, and operations.2601 CRCL also reported that "in 2014, the Department began a Southern Border Initiative (SBI). In light of heightened civil rights concerns, CRCL expanded its community engagement roundtables and other related activity into additional communities along the border most impacted by the SBI."2602 And "during the summer and fall of 2017, several unprecedented hurricanes and wildfires impacted large regions of the United States and its territories," after which "CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters."2603 Effectiveness of Interaction and Coordination with Other Agencies and Stakeholders CRCL reports that its Immigration Section attempts to facilitate dialogue among government agencies and immigration and civil rights organizations.2604 CRCL also facilitates a training

2596 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 4. 2597 U.S. Dep't of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (Jun. 20, 2019). 2598 6 U.S.C. § 345(a)(2). 2599 U.S. Dep't of Homeland Security, "Office for Civil Rights and Civil Liberties Handout," p. 2, https://www.dhs.gov/sites/default/files/publications/CRCL%20Handout_Updated%208-18-17.pdf. 2600 U.S. Dep't of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (accessed Jun. 20, 2019) [hereinafter DHS, "Community Engagement"]. 2601 U.S. Dep't of Homeland Security, "CRCL Immigration Section," <https://www.dhs.gov/crcl-immigration-section> (accessed Jun. 20, 2019). 2602 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 3, at 7. 2603 Ibid., 6. 2604 U.S. Dep't of Homeland Security, "CRCL Immigration Section," <https://www.dhs.gov/crcl-immigration-section> (accessed Jun. 20, 2019).

<https://www.dhs.gov/community-engagement>
https://www.dhs.gov/sites/default/files/publications/CRCL%20Handout_Updated%208-18-17.pdf
<https://www.dhs.gov/community-engagement>
<https://www.dhs.gov/crcl-immigration-section>
<https://www.dhs.gov/crcl-immigration-section>

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program for federal, state, and local law enforcement, which encourages collaboration between officers and the communities they serve.2605 CRCL "partners with the DHS Privacy Office and the DOJ's Bureau of Justice Assistance to provide training at state and major urban areas fusion centers," and "maintains a website with resources and training materials that address civil rights, civil liberties, and privacy."2606 CRCL also works with the federal Privacy and Civil Liberties Oversight Board that is statutorily required to:

(1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.2607

Federal agencies involved in PCLOB include the DHS, U.S. Department of State, Central Intelligence Agency, DOJ, Treasury and HHS.2608 The lack of DHS interaction and coordination with other governmental agencies has, however, compounded civil rights issues arising from DHS' separation of migrant children from their parents. While DHS implemented the separation of thousands of children from their parents, children were placed with the Office of Refugee Resettlement of HHS. Reviewing the process, GAO issued a scathing report showing that the lack of coordination between DHS and HHS regarding the identities of the children and the identities and locations of their parents resulted in a substantial information deficit that made it difficult to reunite children with their parents.2609 In January 2019, the Office of the Inspector General of the U.S. Department of Health and Human Services released a report showing that "thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children."2610 In the time since the separation of these thousands of children came to light, no official numbers have been released by DHS due to the "lack of a coordinated formal tracking system between the Office of Refugee Resettlement . . . and the Department of Homeland Security."2611

2605 DHS, "Community Engagement," supra note 2600. 2606 U.S. Dep't of Homeland Security, "Civil Rights and Civil Liberties, Civil Rights and Civil Liberties Training at Fusion Centers," <https://www.dhs.gov/civil-rights-and-civil-liberties-institute> (accessed Jul. 11, 2019). 2607 42 U.S.C. § 2000ee(c). 2608 Id. 2609 GAO, Unaccompanied Children, supra note 1437, at 17-26. 2610 U.S. Department of Health & Human Services, Office of Inspector General, Separated Children Place in Office of Refugee Resettlement Care, OEI-BL-00511, January 2019, p. 1, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>. 2611 Miriam Jordan, "Family Separation May Have Hit Thousands More Migrant Children Than Reported," New York Times, Jan. 17, 2019, <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

<https://www.dhs.gov/civil-rights-and-civil-liberties-institute>
<https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>
<https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>
<https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>
<https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>

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Following DHS' joint issuance of guidance with DOJ, HUD, HHS, and DOT regarding guarding against discrimination in emergency relief programs that receive federal financial assistance,2612 CRCL reported to the Commission that during the summer and fall of 2017:

CRCL and FEMA worked within the coordinated federal response to address potential civil rights related issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies including the Department of Justice and the Department of Health and Human Services to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations. . . . And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution.2613

Use of Research, Data Collecting, and Reporting Aside from the reporting requirements the Homeland Security Act imposes on CRCL and the Implementing Regulations of the 9/11 Commission Act, which require some data collection and reporting about CRCL's activities in annual and semiannual reports,2614 DHS CRCL has also issued policy documents and public information about civil rights issues,2615 and training documents for fusion centers.2616 The Commission notes that information about the thousands of complaints received by CRCL may be limited, because "CRCL does not require or collect data from complainants related to any specific information in order to file a complaint."2617 The data is reported by type of complaint and DHS Component, rather than race, national origin, gender, or other similar information about status.2618

2612 See supra notes 2592-95. 2613 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 3, at 8. 2614 See supra notes 2443-46. 2615 See supra notes 2456-58 and 2597-2603. 2616 See supra notes 2456-58 and 2606. 2617 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 11, at 27. 2618 See U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Fiscal Year 2017 Annual Report to Congress, supra note 2565, at Table 2.

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Chapter 9: U.S. Environmental Protection Agency, External Civil Rights Compliance Office Congress established the U.S. Environmental Protection Agency (EPA) in 1970 as a result of President Richard Nixon's 37-point directive regarding the environment, which responded to growing public concerns about deteriorating city air, natural areas littered with debris, and urban water supplies contaminated with dangerous impurities.2619 EPA states that its mission is "to protect human health and the environment"2620 by ensuring that:

- Americans have clean air, land and water; • National efforts to reduce environmental risks are based on the best available scientific information; • Federal laws protecting human health and the environment are administered and enforced fairly, effectively and as Congress intended; • Environmental stewardship is integral to U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy;
- All parts of society--communities, individuals, businesses, and state, local and tribal governments--have access to accurate information sufficient to effectively participate in managing human health and environmental risks;
- Contaminated lands and toxic sites are cleaned up by potentially responsible parties and revitalized; and
- Chemicals in the marketplace are reviewed for safety.2621 Legal Authority and Responsibility This mission is impacted by Executive Order 12,898 of 1994, which established federal regulations requiring that Environmental Impact Statements include that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, 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."2622

2619 See U.S. Environmental Protection Agency, "The Origins of EPA," <https://www.epa.gov/history/origins-epa>; Reorganization Plan No. 3, 35 Fed. Reg. 15,623, 84 Stat. 2086 (1970) (presidential directive establishing the EPA and submitted to and approved by Congress), codified at 42 U.S.C.A. § 4231; see also Immigration and Naturalization Service v. Chandha, 462 U.S. 919 (1983) (confirming EPA's legality). 2620 U.S. Environmental Protection Agency, "Our Mission and What We Do," <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>. 2621 Ibid. 2622 Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, 59 Fed. Reg. 7,629, 1994 WL 16189208, Executive Order 12898, § 1-101.

<https://www.epa.gov/history/origins-epa>
<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>
<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>

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The External Civil Rights Compliance Office (ECRCO), located within the Office of the General Counsel at EPA, reports that it strives to advance EPA's mission by enforcing federal civil rights laws that prohibit discrimination by applicants

for recipients of federal financial assistance “through complaint investigations, compliance reviews, technical assistance, and policy formulation.”²⁶²³ The federal civil rights laws that EPA enforces and implements through EPA’s external nondiscrimination regulations at 40 C.F.R. Parts 5 and 7, which prohibit nondiscrimination by recipients of EPA funding,²⁶²⁴ include:

• Title VI of the Civil Rights Act of 1964²⁶²⁵ • Title IX of the Education Amendments of 1972²⁶²⁶ • Section 504 of the Rehabilitation Act of 1973²⁶²⁷ • Age Discrimination Act of 1975²⁶²⁸ • Section 13 of the Federal Water Pollution Control Act Amendments of 1972²⁶²⁹

Enforcement Tools The agency enforcement tools ECRCO has specific legal authority to use are:²⁶³⁰

• Complaint Resolution²⁶³¹ • Agency-Initiated Charges²⁶³² • Proactive Compliance Evaluations²⁶³³ • Issuance of Policy Guidance²⁶³⁴ • Issuance of Regulations²⁶³⁵

²⁶²³ U.S. Environmental Protection Agency, Response to USCCR Interrogatories No. 1 and No. 2, at 1. ²⁶²⁴ 40 C.F.R. Parts 5 and 7. ²⁶²⁵ 42 U.S.C. §§2000d et seq.; 40 C.F.R. Part 7. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations. ²⁶²⁶ 20 U.S.C. §§ 1681 et seq.; 40 C.F.R. Part 5. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations. ²⁶²⁷ 29 U.S.C. § 794; 40 C.F.R. Part 7. See also 28 C.F.R. Part 37 and 29 C.F.R. Part 1640 for procedures consistent with employment coordinating regulations. ²⁶²⁸ 42 U.S.C. §§ 6101 et seq.; 40 C.F.R. Part 7, Subpart F. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1626 for procedures consistent with age coordinating regulations. ²⁶²⁹ 33 U.S.C. §1251; 40 C.F.R. Part 7. ²⁶³⁰ 40 C.F.R. Part 5; 40 C.F.R. Part 7; 28 C.F.R. Part 42 Subpart F; 29 C.F.R. Part 1626; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 2, at 1. ²⁶³¹ 40 C.F.R. Part 7, Subpart E; 40 C.F.R. § 5.605; see generally U.S. Environmental Protection Agency, Case Resolution Manual (January 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf [hereinafter EPA, Case Resolution Manual]. ²⁶³² 40 C.F.R. §§ 7.110(c) and 7.115. ²⁶³³ Id. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”). ²⁶³⁴ 28 C.F.R. § 42.405; 40 C.F.R. § 7.20. ²⁶³⁵ 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations).

https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf

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• Technical Assistance²⁶³⁶ • Publicity²⁶³⁷ • Data collection, research and reporting²⁶³⁸ • Collaboration with states/local agencies²⁶³⁹ • Collaboration with other federal agencies²⁶⁴⁰ • Strategic Plan²⁶⁴¹ • Annual Reports²⁶⁴²

While EPA ECRCO does not have specific legal authority for other tools identified by the Commission, nothing prohibits EPA ECRCO from, for example, engaging in outreach to stakeholders, as described in further detail below. Budget and Staffing ECRCO currently is housed within the Office of the General Counsel (OGC), and it operates under the direction of Lillian Dorka, Director.²⁶⁴³ In FY 2016, ECRCO maintained 11.5 FTEs, which included two detailees from other EPA offices (each working half time).²⁶⁴⁴ This staffing level did not greatly fluctuate, increasing only slightly in FY 2017 to 12.5 FTEs, and decreasing only slightly in FY 2018 to 12 FTEs.²⁶⁴⁵ ECRCO reported that it receives programmatic assistance from an average of 4 attorneys from OGC’s Civil Rights and Finance Law Office on a part-time basis over the fiscal years 2016 to 2018.²⁶⁴⁶ In addition, although it does not track this assistance, ECRCO has noted that it frequently

²⁶³⁶ 40 C.F.R. § 7.105; 40 C.F.R. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 5.605; 28 C.F.R. § 42.405. ²⁶³⁷ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). ²⁶³⁸ 28 C.F.R. § 42.406 (regarding data and information collection); 28 C.F.R. § 42.406 passim (regarding research and reporting); 40 C.F.R. Part 5 passim (regarding research and reporting); 40 C.F.R. Part 7 passim (regarding research and reporting). ²⁶³⁹ 40 C.F.R. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 7.125; 40 C.F.R. § 5.605. ²⁶⁴⁰ 40 C.F.R. § 7.125; 40 C.F.R. § 5.605; 28 C.F.R. § 42.413. ²⁶⁴¹ 40 C.F.R. Part 5 passim; 40 C.F.R. Part 7 passim; GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). ²⁶⁴² 40 C.F.R. Part 5 passim; 40 C.F.R. Part 7 passim; GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). ²⁶⁴³ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. ²⁶⁴⁴ U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. (A detailee is a federal employee who is on temporary detail from another office). ²⁶⁴⁵ Id. ²⁶⁴⁶ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4.

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engages with staff at program and regional offices in its enforcement activities, and receives support from Deputy Civil Rights Officers (DCROs) to help carry out its civil rights mission.²⁶⁴⁷ ECRCO’s total allocated budget for FY 2016 was \$2.02 million, which rose to \$2.28 million in FY 2017, and was projected to decrease slightly to \$2.09 million in FY 2018.²⁶⁴⁸ See Figure 9.1. Figure 9.1: ECRCO Budget Resources for External Civil Rights Enforcement

Source: U.S. Environmental Protection Agency, Response to Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018). *FY 2018 amounts are projected as of June 18, 2019.

ECRCO indicated that its budget “is not itemized in such a way as to identify funds allocated for processing and responding to complaints,” but rather is itemized according to personnel, travel, general expenses, contracts, Working Capital Fund, and grants.²⁶⁴⁹ The budget numbers reflected above are the total of the aforementioned budget line items.²⁶⁵⁰ Despite the reduction in funding from FY 2017 to FY 2018, ECRCO indicated that it has “received funding to support its budget request,” and “has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question.”²⁶⁵¹ External sources, including a federal court opinion, call that assessment into question, as discussed further below.

²⁶⁴⁷ Ibid. ²⁶⁴⁸ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 5-6, 21. ²⁶⁴⁹ Ibid., 5. ²⁶⁵⁰ See U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. ²⁶⁵¹ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6.

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FY 2016 FY 2017 FY 2018*

Figure 9.1: ECRCO Budget Resources for External Civil Rights Enforcement, Fiscal Years 2016 to 2018

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Assessment Prioritization for Civil Rights Agency-Wide In 2016, EPA restructured the functions of the former Office of Civil Rights in an effort to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.²⁶⁵² ECRCO noted that during FY 2016 through FY 2018, “ECRCO has and continues to carry out the same federally mandated responsibilities to enforce several civil rights laws which, together, prohibit discrimination on the basis of race, color, or national origin (including on the basis of limited English proficiency); sex, disability and age by applicants for and recipients of financial assistance from EPA.”²⁶⁵³ This restructuring followed the Commission’s 2016 statutory report that was critical of EPA, finding that “EPA’s inability to proactively ensure that recipients of financial assistance comply with Title VI is exacerbated by its lack of resources and small staff levels.”²⁶⁵⁴ The Commission, in a 2002 evaluation of federal civil rights enforcement across multiple agencies, found that federal civil rights programs “were often void of clear authority, responsibility, and accountability.”²⁶⁵⁵ The Commission has recommended that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”²⁶⁵⁶ ECRCO reported that “in December 2016, EPA took steps to strengthen the agency’s ability to carry out its external civil rights enforcement responsibilities by reorganizing the functions of the Office of Civil Rights (OCR) with respect to its former External Compliance and Complaints Program. The external civil rights enforcement function now resides organizationally within ECRCO, which is in EPA’s OGC [Office of General Counsel].”²⁶⁵⁷ In contrast, the internal functions of the EPA’s OCR, which reviews staff complaints and internal functions, is still located in the Office of the EPA Administrator (the agency head).²⁶⁵⁸ This restructuring of the external functions of the Office of Civil Rights, particularly in the wake of the Commission’s critical 2016 report, runs counter to the previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack of a direct line of authority to the agency head.²⁶⁵⁹ In 2012, EPA recommended the creation of Deputy Civil Rights Officials (DCROs), comprised of senior-level officials who are responsible for ensuring accountability for civil rights compliance

²⁶⁵² U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. ²⁶⁵³ U.S. Environmental Protection Agency, “External Civil Rights Compliance Office (Title VI),” <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. ²⁶⁵⁴ USCCR, Environmental Justice, supra note 250, at 90. ²⁶⁵⁵ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. ²⁶⁵⁶ Ibid. ²⁶⁵⁷ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. ²⁶⁵⁸ See U.S. Environmental Protection Agency, Office of Civil Rights, <https://www.epa.gov/aboutepa/about-office-civil-rights-ocr> (accessed Jun. 9, 2019). ²⁶⁵⁹ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47.

<https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>
<https://www.epa.gov/aboutepa/about-office-civil-rights-ocr>
<https://www.epa.gov/aboutepa/about-office-civil-rights-ocr>

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across the agency.²⁶⁶⁰ DCROs exist in regional offices and national programs—including environmental justice initiatives—and are charged to provide “prompt programmatic, regulatory, analytical, scientific, and technical expertise” which would ultimately assist programs in meeting EPA’s civil rights responsibilities.²⁶⁶¹ DCROs were formally established under EPA Orders 4700 and 4701 in 2013, to support its civil rights enforcement efforts.²⁶⁶² Lillian Dorka, Director of ECRCO, spoke to this issue during her testimony to the Commission:

[T]hese two orders basically require the different regional offices within EPA, as well as the program offices, to identify high level, sort of at the SES level, high level persons that will coordinate with the civil rights program to ensure that civil rights is integrated throughout the agency and also to ensure that we have additional resources. ... there is what we call the Deputy Civil Rights Official, the DCROs within each regional office or program office and I can call on them when I need cooperation, or collaboration, or to know what is going on[,] on the ground. ... So those Orders, which are in fact reflected in our Case Resolution Manual and how we will work with the regional offices and different programs, pretty much put at our disposal a cadre of very, very highly skilled and trained environmental professionals that we can call on for assistance on individual cases.²⁶⁶³

According to ECRCO’s Case Resolution Manual, DCROs are described as, “a critical resource in support of EPA’s civil rights program ... who serve as civil rights champions throughout the EPA, and who provide prompt programmatic, regulatory, analytical, scientific, and technical expertise and support in addition to their vast network of critical stakeholder contacts at a regional level and in specific program areas.”²⁶⁶⁴ The Manual goes on to clarify that these positions utilize “EPA’s preexisting, in-house expertise” which enables EPA to “rely[] less on developing redundant competencies in ECRCO or use[] costly contracts to fill gaps in ECRCO’s technical and scientific expertise to effectively investigate and resolve environmental civil rights cases consistent with the agency’s commitment to sound science and civil rights law.”²⁶⁶⁵ Professor Marianne Engelman Lado notes: “From the get-go, however, DCROs were a designation with responsibility, not a new hire or additional position within each region.”²⁶⁶⁶ Lado points out: “In almost all cases, DCROs were deputy regional administrators or assistant regional administrators, with the additional responsibilities attendant to these titles.” These positions,

²⁶⁶⁰ EPA, Case Resolution Manual, supra note 2631, at 3. ²⁶⁶¹ Ibid. ²⁶⁶² U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; see also EPA, Case Resolution Manual, supra note 2631, at 3. ²⁶⁶³ Lillian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Testimony, Federal Civil Rights Enforcement Briefing, pp. 146-149. ²⁶⁶⁴ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; see also EPA, Case Resolution Manual, supra note 2631, at 3. ²⁶⁶⁵ Ibid.; see also EPA, Case Resolution Manual, supra note 2631, at 3. ²⁶⁶⁶ Marianne Engelman Lado, No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice, 22 Pa. J.L. & Soc. Change 281, 302 (2019) [hereinafter Lado, No More Excuses].

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therefore, do not add additional people with full time availability for civil rights enforcement; as Director Dorka testified to the Commission, these DCROs were not among her employees.²⁶⁶⁷ As explained earlier in this chapter, ECRCO noted in its response to the Commission that it had “received funding to support its budget request” for FY 2016 to FY 2018, and “commensurate with ECRCO’s budget allocations, ECRCO has had sufficient staffing to effectively manage its caseload for the fiscal years in question.”²⁶⁶⁸ ECRCO experienced a slight overall increase in its budget allocations from FY 2016 to FY 2018, and its staffing levels appear to have increased commensurate to those budget allocations, rising from 11.5 to 12 FTEs for the fiscal years in question.²⁶⁶⁹ Therefore, when examining its overall resources, ECRCO’s capacity to manage its civil rights enforcement caseload has slightly increased over FY 2016 to FY 2018. Strategic Planning and Self-Evaluation Prior to EPA’s restructuring the external civil rights enforcement functions of the former Office of Civil Rights within ECRCO, EPA issued a strategic plan solely dedicated to its external civil rights enforcement work goals for the fiscal years 2015-2020 (which was subsequently updated in January 2017, after this restructuring).²⁶⁷⁰ In the External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020, ECRCO outlines three key strategic goals:

• Goal 1: Enhance Strategic Docket Management • Goal 2: Develop a Proactive Compliance Program • Goal 3: Strengthen ECRCO’s Workforce to Promote a High-Performing Organization²⁶⁷¹

According to ECRCO, these measurable goals will help improve complaint management, enhance ECRCO’s external compliance program, and strengthen ECRCO’s workforce.²⁶⁷² Lillian Dorka, Director of ECRCO, noted that all of these priorities are critical in advancing ECRCO’s mission, and ECRCO has made efforts to strengthen its own staff capacity to accomplish its mission, including the development of an ECRCO Competency Framework and Individualized Development Plans.²⁶⁷³ Director Dorka testified that issuing a Complaint Resolution Manual and a Strategic Plan has increased ECRCO’s ability to focus its resources on reducing its complaint docket of unresolved and over-aged complaints.²⁶⁷⁴ ECRCO has indicated that these priorities have not significantly changed “in content or focus” from FY 2016 through FY 2018, however some

2667 Dorka Testimony, Federal Civil Rights Enforcement Briefing, pp. 148-149. 2668 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6. 2669 U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. 2670 U.S. Environmental Protection Agency, External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020, January 2017 (final draft), https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf [hereinafter EPA, ECRCO Strategic Plan]. 2671 *Ibid.*, 5; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2672 EPA, ECRCO Strategic Plan, *supra* note 2670, at 6. 2673 Dorka Testimony, Federal Civil Rights Enforcement Briefing, p. 122-123. 2674 *Ibid.*, 94-96.

https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf

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initiatives have been implemented to enhance the effectiveness of these policy priorities.2675 ECRCO has indicated that when EPA funding recipients experience a “lack of foundational nondiscrimination programs including procedural safeguards required by EPA’s regulations, as well as policies and procedures to ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency,”2676 that absence can impact funding recipients’ ability to comply with their federal civil rights obligations. Additionally, ECRCO has described its proactive efforts to make improvements in this area of “strategic significance” by “the routine integration of procedural safeguard and access requirements into the resolution of all pending complaints,” and has indicated that these measures help to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance,” similar to compliance reviews.2677 In line with its legal responsibility, EPA issues an annual performance report.2678 EPA’s FY 2016 and FY 2017 Annual Performance Reports indicated a goal of “protecting human health and the environment by enforcing laws and assuring compliance,” noting that its environmental justice program contributed to that goal.2679 and noted that “EPA continued to promote environmental justice (EJ) by targeting noncomplying facilities for their disproportionate impacts on low-income and minority communities.”2680 EPA’s FY 2018 Annual Performance Report did not indicate a similar goal, nor did it mention civil rights enforcement at all.2681 The Commission is not aware of any annual performance reports that are issued and made public by ECRCO specifically. Complaint Processing, Agency-Initiated Charges, and Litigation The foundation for EPA’s civil rights complaint resolution process is EPA’s nondiscrimination regulation.2682 Based upon that regulation, ECRCO developed a Case Resolution Manual in 2015 (updated in January 2017), which “provides procedural guidance to ECRCO case managers to ensure EPA’s prompt, effective, and efficient resolution of civil rights cases consistent with federal

2675 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2676 *Ibid.* 2677 *Ibid.* 2678 GPRM Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 2679 U.S. Environmental Protection Agency, FY 2019 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2017 Annual Performance Report, p. 719, <https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>. 2680 U.S. Environmental Protection Agency, FY 2018 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2016 Annual Performance Report, p. 548, <https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>. 2681 U.S. Environmental Protection Agency, FY 2020 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2018 Annual Performance Report, <https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>. 2682 40 C.F.R. Parts 5 and 7. The Commission notes that the agency uses the term “nondiscrimination regulation” rather than the plural, for these regulations. U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 1, at 1.

<https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>

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civil rights law.”2683 In a public comment submitted to the Commission in 2018, Marianne Engelman-Lado, Lecturer at Yale Schools of Public Health and Forestry & Environmental Studies, commended EPA for the issuance of this Case Resolution Manual, which she believes “helped to fill the need for greater uniformity, clarity, and transparency related to the EPA’s handling of complaints filed under civil rights laws.”2684 As per ECRCO’s Case Resolution Manual, when ECRCO receives correspondence, ECRCO “will” formally acknowledge receipt, develop a strategic case management plan to “achieve prompt, effective, and efficient processing of cases,” and conduct a review of correspondence it receives to determine whether it constitutes a complaint.2685 ECRCO should also notify DCROs of incoming correspondence and the review process within the first 10 days after receipt of said correspondence.2686 However, the manual also states that “[a]ll target timeframes in this document are aspirational. They represent goals ECRCO will aim to achieve in the majority of cases.”2687 ECRCO’s case manual also reports review of correspondence will take into consideration a number of factors (e.g., subject matter and personal jurisdiction, timely allegations, and if the correspondence is in writing2688), and will help ECRCO determine whether to accept or reject the complaint.2689 This review (which includes the jurisdictional review) should take place within the first 20 days after acknowledgement of receipt of the complaint.2690 EPA regulations require that ECRCO notify the complainant and recipient of its preliminary findings within 180 days of receiving the complaint.2691 The regulations have been interpreted by a federal court to require EPA to issue preliminary findings even if it has determined that a violation has not occurred, rather than only issuing preliminary findings if it has determined that a violation has occurred.2692 If a complaint is accepted for investigation, ECRCO’s case manual states that it will issue a letter of acceptance and the assigned Case Manager will begin to draft an Investigative Plan, which will include an identification of an applicable legal theory (disparate/different treatment, disparate impact/effects, or retaliation).2693 The early stages of the investigation will take certain criteria into account, and if the complaint does not meet said criteria, then the complaint could be subject to

2683 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 9, at 12. 2684 Lado, No More Excuses, *supra* note 2666, at 303. 2685 EPA, Case Resolution Manual, *supra* note 2631, at 6. 2686 *Ibid.*, 39. 2687 *Ibid.*, 39, n. 1. 2688 *Ibid.*, 7. The Case Resolution Manual notes that a complaint does not have to be written in English, as ECRCO “will take all the necessary steps to ensure that persons who have limited English proficiency can participate meaningfully in its complaint process.” *Ibid.* 2689 *Ibid.* 2690 See 40 C.F.R. § 7.120(d)(1)(i). 2691 40 C.F.R. § 7.115; 40 C.F.R. § 7.120. 2692 *Californians for Renewable Energy v. United States Environmental Protection Agency*, 2018 WL 1586211 (N.D. Cal. 2018). 2693 EPA, Case Resolution Manual, *supra* note 2631, at 15.

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administrative closure.2694 Early Complaint Resolution could be used to resolve a complaint in the early stages of investigation, and provides an opportunity for the complainant and the recipient to reach a mutually acceptable agreement, which will be monitored for compliance.2695 Alternative Dispute Resolution is another method used to resolve complaints, involving a more formal mediation process between complainant(s) and recipient(s) involved to reach a mutually agreeable resolution.2696 Additionally, an Informal Resolution Agreement between the recipient and ECRCO could be reached.2697 If no resolution can be achieved during this stage of the investigative process, then ECRCO’s investigation will continue.2698 After the investigation is complete, ECRCO says it will make an investigative determination and will issue a letter of findings, in which ECRCO will either determine there is insufficient evidence or there are preliminary findings of non-compliance.2699 If ECRCO finds non-compliance, at this stage a respondent can enter into a Voluntary Compliance Agreement with ECRCO, which outlines action steps that a respondent can take to voluntarily remedy discrimination and achieve compliance.2700 If a respondent will not enter into a Voluntary Compliance Agreement, ECRCO may initiate administrative proceedings to “suspend, terminate, or refuse to grant or continue and defer financial assistance from the recipient,” refer the case to DOJ for judicial proceedings, or use “other means authorized by law” (e.g., litigation, etc.).2701 As set forth in EPA’s nondiscrimination regulation, ECRCO must utilize informal or voluntary methods of resolution to resolve complaints of discrimination prior to initiating an enforcement action.2702 In testimony to the Commission for this investigation, Director of ECRCO Lilian Dorka described ECRCO’s use of informal complaint resolution methods, expressing: “We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations.”2703 ECRCO has reported to the Commission that it received 31 complaints in FY 2016, 25 complaints in FY 2017, and 15 complaints in FY 2018.2704 Of those complaints received, ECRCO accepted 8 complaints for investigation in FY 2016, 10 complaints in FY 2017, and 2 complaints in FY

2694 *Ibid.*, 17. 2695 *Ibid.*, 18. 2696 *Ibid.*, 21. 2697 *Ibid.*, 22. 2698 *Ibid.*, 24. 2699 See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, *supra* note 2631, at 29. 2700 See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, *supra* note 2631, at 30. 2701 See 40 C.F.R. §§ 7.115(c) - (f); 7.130; U.S. EPA, Case Resolution Manual, *supra* note 2631, at 37. 2702 40 C.F.R. § 7.120(d)(2); 28 C.F.R. § 42.411(a); 28 C.F.R. § 50.3 i.c. 2703 Dorka Statement, at 3. 2704 U.S. Environmental Protection Agency, Updated Response to Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019); see also U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 7. ECRCO has specified that EPA interprets “open” cases to be the number of cases received during the fiscal years in question. *Ibid.*

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2018.2705 Furthermore, ECRCO rejected 3 complaints for investigation at the jurisdictional review stage in FY 2016, while it rejected 23 complaints in FY 2017, and rejected 31 complaints in FY 2018.2706 See Figure 9.2. Figure 9.2: Complaints Received, Accepted, and Rejected by ECRCO

Source: U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

ECRCO also noted that the number of complaints identified above that are accepted or rejected for investigation in a given fiscal year “were not necessarily received in the same fiscal year.”2707 During FY 2016 to FY 2018, ECRCO received 46 complaints on the basis of race/national origin discrimination; 17 complaints on the basis of disability discrimination; 17 complaints where there was no identified basis of discrimination; and 1 complaint on the basis of sex discrimination.2708 ECRCO further noted that some complaints allege multiple bases of discrimination.2709 In 2016, the Commission examined the EPA’s compliance with and enforcement of Title VI and Executive Order 12,896 in order to advance environmental justice.2710 The Commission reported at that time that since its creation, EPA’s Office of Civil Rights2711 “has never made a formal

2705 *Ibid.* 2706 *Ibid.* 2707 *Ibid.* 2708 *Ibid.* 2709 *Ibid.* 2710 USCCR, Environmental Justice, *supra* note 250, at 40. 2711 Cross reference to current note 578 (note # may change) that reads, “In 2016, the functions of the former Office of Civil Rights were restructured to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.”

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FY 2016 FY 2017 FY 2018

Figure 9.2: Complaints Received, Accepted, and Rejected by ECRCO

Fiscal Years 2016 to 2018

No. complaints received No. complaints accepted No. complaints rejected

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finding of discrimination.”2712 As discussed further below, since that report, EPA ECRCO has found at least two violations of Title VI, and in one case secured corrective action to remedy the violation. The Commission’s report explained

the EPA received over 350 Title VI complaints between 1993 and 2016, which is “broad in scope and raise a variety of environmental issues that disproportionately impact communities of color and low-income communities.”2713 The report highlighted criticisms of EPA’s civil rights office not meeting regulatory timelines for processing these complaints, and cited multiple lawsuits filed against EPA concerning this issue.2714 In 2015, five environmental groups sued EPA based on a claim that EPA had ignored a decade’s worth of Title VI complaints between 1995 and 2005 concerning the discriminatory nature of approvals for environmentally hazardous facilities to operate in predominantly minority communities in Michigan, California, Texas, New Mexico, and Alabama.2715 According to federal regulations, EPA had 180 days to issue initial findings and recommendations for reaching compliance (if appropriate) after a complaint was received.2716 However, the plaintiffs claimed that EPA did not issue any preliminary findings during this time frame, and sought an order to “compel agency action unlawfully withheld or unreasonably delayed.”2717 Citing several prior cases, the district court judge noted that:

It is well documented that the EPA has been sued repeatedly for failing to investigate Title VI complaints in a timely manner. The EPA often takes years to act on a complaint—and even then, acts only after a lawsuit has been filed. The Ninth Circuit has strongly criticized the EPA for such delays. Despite the prior litigation involving its failures to resolve Title VI complaints in a timely manner and this Circuit’s criticism of those delays, the EPA has allowed Plaintiffs’ complaints to languish for decades. It was only during the pendency of this action that the EPA resolved each of Plaintiffs’ administrative complaints.2718

The court then found that “EPA’s failure to issue preliminary findings or recommendations and any recommendations for voluntary compliance constitutes agency action unlawfully

2712 USCCR, Environmental Justice, supra note 250, at 40. Note: since the issuance of the Commission’s report, EPA ECRCO has issued at least two Title VI findings of violation. 2713 USCCR, Environmental Justice, supra note 250, at 25 (discussing how at the time the Commission’s report was published, it was reported that EPA received 290 Title VI complaints between 1993 and 2014, 33 new complaints in 2015, and 35 new complaints in 2016). 2714 Ibid., 25-26. 2715 Californians for Renewable Energy v. U.S. Department of Environmental Protection, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Iovino, “Judge Rules EPA Improperly Delayed Racial Bias Probes,” supra note 251. 2716 40 C.F.R. § 7.115. 2717 Californians for Renewable Energy v. U.S. Department of Environmental Protection, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018). 2718 Id. at “15 (internal citations omitted).

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withheld.”2719 The final judgement the court entered in June 2018 requires EPA to timely process any pending and future Title VI complaints submitted by those specific Plaintiffs in the CARE litigation and accepted by EPA for investigation for a period of five years from the date of the Judgment.2720 ECRCO reported to the Commission that it “is dedicated to consistently and appropriately managing its administrative complaint docket to ensure prompt, effective, and efficient complaint resolution.”2721 ECRCO cited its strategic plan, noting that Goal 1 is to enhance strategic docket management.2722 ECRCO indicated that during FY 2016 to FY 2018, “ECRCO has focused its office resources on reducing its complaint docket and case processing times,” which has “yielded positive results.”2723 As of the beginning of FY 2017, ECRCO had 25 complaints that were accepted and under investigation, and 39 complaints at the jurisdictional review stage, for a total of 64 complaints that were being processed during that fiscal year.2724 Of the 25 accepted complaints under investigation, a total of 15 were resolved (3 resolved with informal resolution agreements, 2 resolved with settlement agreements through the alternative dispute resolution process, and 10 due to administrative closure or insufficient evidence letters of findings) and 10 are still open and under investigation.2725 Of the 39 complaints under jurisdictional review, 22 were rejected for investigation, 9 were accepted for investigation, and 8 remained under jurisdictional review.2726 Additionally, ECRCO received 24 new complaints during FY 2017, 21 of which ECRCO rejected for investigation, 3 of which ECRCO accepted for investigation, and 4 of which are currently at the jurisdictional review stage.2727 As of the end of FY 2018, ECRCO reported that it had 26 complaints in its inventory (17 complaints under investigation and 9 under jurisdictional review), indicating a “significant reduction” from 64 total complaints at the beginning of FY 2017.2728 ECRCO further noted its goal of processing complaints within the 20- day allotted time frame pursuant to EPA’s nondiscrimination regulation (40 C.F.R. Part 7), and that 9 of the 15 complaints it received in FY 2018 “were processed within the 20 days allotted by regulation to accept, reject, or refer complaints.”2729 As of June 2019, all complaints filed in 2018 have been resolved.2730

2719 Id. 2720 Judgment, Californians for Renewable Energy v. U.S. Department of Environmental Protection, No. 15-3292, 2 (N.D. Cal. June 13, 2018). In its review of the Commission’s draft report, EPA noted that “the Court ruled in favor of EPA on Plaintiffs’ ‘pattern and practice’ claim.” Californians for Renewable Energy v. U.S. Department of Environmental Protection, No. 15-3292, 2018 WL 1586211, *19 (N.D. Cal. Mar. 30, 2018). However, plaintiffs won their motion for summary judgement on their other five claims. Id. at *20. 2721 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 6. 2722 Ibid. 2723 Ibid. 2724 Ibid. 2725 Ibid. 2726 Ibid. 2727 Ibid., 9. 2728 Ibid. 2729 Ibid., 9; see also 40 C.F.R. § 7.120(d)(i). 2730 U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

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Environmental justice groups recently criticized EPA ECRCO for dismissing a civil rights complaint in 2018 that was filed against the Alabama Department of Environmental Management (ADEM), alleging that ADEM lacked adequate policies for processing civil rights complaints, which would be a violation of Title VI.2731 The complaint was filed after ADEM rescinded its policies for accepting civil rights complaints, following a lawsuit that was filed against ADEM alleging racial discrimination due to the reissuing of a landfill permit in a community predominantly inhabited by African American residents in Tallahassee, Alabama.2732 In July 2018, EPA ECRCO issued a letter in response to the complaint filed, indicating that it would investigate “[w]hether ADEM has adopted grievance procedures that assure the prompt and fair resolution of complaints which allege violation of the regulation [40 C.F.R. Part 7.90(a)].”2733 EPA ECRCO proceeded to dismiss the complaint in December 2018.2734 In the letter of resolution and closure, issued on December 3, 2018, EPA ECRCO indicated that it had found “insufficient evidence of current noncompliance with Title VI and EPA’s implementing regulations at 40 C.F.R. Parts 5 and 7,” noting that EPA ECRCO had “provided technical assistance to ADEM and in response ADEM updated and posted on its website, in English and other appropriate languages, grievance procedures that meet the regulatory nondiscrimination requirements.”2735 With regard to the complaint against ADEM alleging racial discrimination against the predominantly African American residents of Tallahassee, Alabama, EPA ECRCO found “insufficient evidence of discrimination under Title VI and EPA’s nondiscrimination regulation” with respect to differential treatment and disparate impact against the African American residents on the basis of race.2736 Environmental advocates have argued that “EPA’s failure to take action reflects a persistent pattern” when it comes to enforcing civil rights, and that “EPA has yet again used any possible excuse to avoid finding a violation of civil rights law.”2737 Similarly, in March 2018, EPA closed a complaint regarding the distribution of coal ash in Uniontown, Alabama, without a finding of racial discrimination.2738 The Commission criticized the EPA for this complaint closure, indicating that EPA’s decision to allow the movement and storage of coal ash

2731 Dennis Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” Al.com, Dec. 5, 2018, <https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html> [hereinafter Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency”]. 2732 Ibid. 2733 U.S. Environmental Protection Agency, Letter to David Ludder re: Notification of Acceptance of Administrative Complaint (Jul. 2, 2018), p. 1, http://www.enviro-lawyer.com/2018/07/02_EPA_Acceptance_Complaint.pdf. 2734 Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” supra note 2731. 2735 U.S. Environmental Protection Agency, Letter to Lance R. LeFleur, Director of Alabama Department of Environmental Management re: Resolution and Closure of EPA Administrative Complaint No. 03R-18-R4 (Dec. 3, 2018), pp. 3-4, <https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>. 2736 Ibid., 21. 2737 Jeronimo Nisa, “EPA Slams Door to Justice on Historic Black Community,” Earthjustice, Dec. 12, 2018, <https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community>. 2738 Adam Dodson, “EPA closes Uniontown investigations,” Selma Times-Journal, Mar. 10, 2018, <https://www.selmatimesjournal.com/2018/03/10/epa-closes-uniontown-investigations/>.

<https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html>
<https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html>
http://www.enviro-lawyer.com/2018/07/02_EPA_Acceptance_Complaint.pdf
<https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>
<https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>
<https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community>
<https://www.selmatimesjournal.com/2018/03/10/epa-closes-uniontown-investigations/>

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in Uniontown “has adversely impacted the surrounding community” and it perpetuates “the environmental injustice the Uniontown community must endure.”2739 On January 19, 2017, on the last day of the Obama administration, ECRCO issued a letter that made a first-ever final finding of discrimination, after failed attempts to achieve informal resolution,2740 in a case that alleged the Michigan Department of Environmental Quality (MDEQ) treated African American residents of Flint in a discriminatory manner when permitting a power plant over 20 years ago.2741 The letter, signed by the current Director of ECRCO Lilian Dorka and sent to the complainant Father Phil Schmitter of the St. Francis Prayer Center in Flint, indicated evidence that “African Americans were treated less favorably than non-African Americans,” and noted that a “preponderance of the evidence in EPA’s record would lead a reasonable person to conclude that race discrimination was more likely than not the reason.”2742 EPA issued a finding of discriminatory treatment by MDEQ in the public participation process for the permit at issue. EPA also raised additional and current serious concerns about public participation and MDEQ’s nondiscrimination program, among other things, that are being examined in the context of another EPA civil rights investigation involving MDEQ.2743 On the same day, ECRCO also announced that it entered into an Informal Resolution Agreement with the New Mexico Environment Department (NMED) after a complaint that alleged discrimination based on race and national origin relating to NMED’s issuance of a storage and disposal permit without ensuring that limited-English proficient (LEP) Spanish-speaking residents were provided “a meaningful opportunity for effective public participation” or considering the possible disparate impacts on these individuals.2744 As part of the resolution, NMED agreed to take specific remedial and future actions to address the concerns of the complaint and ensure compliance with all regulations and civil rights statutes to ensure that all people have “meaningful access to all of NMED’s programs and activities.”2745 The Center for Public Integrity noted these two developments, stating that “EPA’s findings in the Michigan and New Mexico cases represent an uptick in activity by a civil-rights office – recently

2739 U.S. Comm’n on Civil Rights, Statement Regarding EPA Decision on Uniontown, Alabama (Mar. 16, 2018), p. 1, <https://www.usccr.gov/press/2018/03-16-statement-EPA.pdf>. 2740 U.S. Environmental Protection Agency, Letter to Father Phil Schmitter (Jan. 19, 2017), p. 29, <https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html> [hereinafter EPA, “Letter to Father Phil Schmitter”]. 2741 Ibid., 3; Talia Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” Center for Public Integrity, Jan. 25, 2017, <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/> [hereinafter Buford, “Rare Discrimination Finding by EPA Civil Rights Office”]. 2742 EPA, Letter to Father Phil Schmitter, supra note 2740. 2743 U.S. Environmental Protection Agency, Response to USCCR Affected Agency Review (Jun. 18, 2019); see U.S. Environmental Protection Agency, Letter to Heidi Grether, Director of the Michigan Dept of Environmental Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>. 2744 U.S. Environmental Protection Agency, Letter to Butch Tongate, Secretary-Designate of the New Mexico Environment Department (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>. 2745 Ibid., 12.

<https://www.usccr.gov/press/2018/03-16-statement-EPA.pdf>
<https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html>
<https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>

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moved into the agency’s Office of General Counsel – long criticized for failing to act on complaints alleging Title VI violations.”2746 Proactive Compliance Evaluation ECRCO is responsible for carrying out its compliance work through a variety of means, including agency-initiated compliance reviews.2747 ECRCO’s Case Processing Manual indicates that “to address issues of strategic significance in civil rights areas, ECRCO will identify, plan, and implement a docket of compliance reviews in consultation with the appropriate DCROs,” and considers “a number of factors, including statistical data, prior complaints, complaints that do not meet certain jurisdictional requirements, reports by other EPA offices, information shared by other federal agencies, and other specific and reliable information from communities and/or sources, which further our strategic goals. ECRCO’s objective will be to engage early and often with recipients of federal assistance to collaboratively identify resolution approaches.”2748 Director Dorka indicated that ECRCO has a “proactive compliance” program “to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance.”2749 She also noted that many recipients lack focus on what she terms “foundational nondiscrimination programs,” which include “procedural safeguards required by EPA regulations,” such as “the continuing notice of nondiscrimination; grievance procedures that assure the prompt and fair resolution of complaints which allege a violation of EPA’s nondiscrimination regulation; and the designation of at least one person to coordinate its efforts to comply with its nondiscrimination obligations.”2750 Dorka added that:

Having in place a foundational nondiscrimination program would assist recipients’ ability to comply with Title VI, Section 504 and other civil rights laws by having policies and procedures to ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.2751

ECRCO has noted that although these proactive initiatives “are not labeled as ‘compliance reviews,’ ECRCO considers that they accomplish the same proactive goal as do compliance reviews: to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information

2746 Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” supra note 2741; see supra notes 2656–2659. 2747 EPA, Case Resolution Manual, supra note 2631, at i; see 28 C.F.R. § 42.407(c); see also 40 C.F.R. §§ 7.110, 7.115; see also 40 C.F.R. § 5.605. 2748 EPA, Case Resolution Manual, supra note 2631, at 33. 2749 Dorka Statement, at 6. 2750 Ibid., 5. 2751 Ibid., 6.

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and assistance.”2752 In 2002, the Commission noted the importance of monitoring compliance, recommending that “Federal agencies should acquire a large portion of their reviews of funding recipients by imposing annual (or even quarterly) reporting requirements that allow an evaluation of the equality among the recipients’ program participants and beneficiaries.”2753 If ECRCO is missing basic data about whether recipients are providing appropriate notice, grievance procedures and having a designated coordinator as required under federal civil rights law, then collecting this basic data would be aligned with the Commission’s recommendations. These data would also be helpful to ensure that recipients of EPA funding need to take steps to come into compliance. Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity ECRCO utilizes various methods to disseminate policy to funding recipients and the general public. As stated in both its Strategic Plan and its Case Resolution Manual, ECRCO provides technical assistance to its funding recipients as part of its proactive compliance program.2754 Director Dorka testified to the Commission that providing information and compliance assistance to states and other recipients is a key part of this proactive compliance program, to “ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.” 2755 ECRCO is also issuing guidance. In January 2017, ECRCO issued guidance through a “Dear Colleague” letter to introduce Chapter 1 of the U.S. EPA’s External Civil Rights Compliance Office Toolkit, which is “a clarification of existing law and policy intended to provide guidance to promote and support EPA

recipients' compliance with federal civil rights laws."2756 The letter indicated that ECRCO is planning to issue additional chapters of the Toolkit that address other civil rights compliance areas.2757 ECRCO's Case Resolution Manual indicates that ECRCO is "responsible for carrying out compliance with these federal nondiscrimination statutes through a variety of means," which includes outreach activities.2758 In its efforts to develop its proactive compliance program, ECRCO had indicated in its Strategic Plan that it plans to conduct various outreach activities, and specifically will "coordinate with DCROs to bring technical assistance, training, and community

2752 Ibid., 6. 2753 USCCR, Ten-Year Check Up Vol. 1: A Blueprint, supra note 1, at 41. 2754 EPA, Case Resolution Manual, supra note 2631, at 1, 26, 36; EPA, ECRCO Strategic Plan, supra note 2670, at 2, 10-12, 14. 2755 Dorka Statement, at 6. 2756 U.S. Environmental Protection Agency, Dear Colleague Letter Re: EPA's External Civil Rights Compliance Office Toolkit (Jan. 18, 2017), p. 1, https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf. 2757 Ibid., 3. 2758 EPA, Case Resolution Manual, supra note 2631, at 1.

https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

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outreach and engagement to stakeholders."2759 In addition, ECRCO's Strategic Plan indicated that ECRCO will "develop an outreach and communication plan that will strategically outline engagement with critical external partnerships and stakeholders," develop technical assistance and training materials to "allow DCROs and other regional staff [] assist ECRCO in outreach to maximize the number of recipients and communities reached," and "improve its training and outreach with all stakeholder communities by making more strategic use of [ECRCO's] website, training videos, webinars, and social media."2760 ECRCO's Case Resolution Manual also notes that in the early stages of case planning, Case Managers are responsible for determining whether a "Communications and Outreach Plan" is necessary "in order to assist in handling public or media inquiries."2761 ECRCO maintains a webpage that is devoted to highlighting and publicizing ECRCO's civil rights compliance work.2762 This webpage largely reports on ECRCO's casework, particularly when it has achieved a resolution to a complaint.2763 However, it also reports updates on policy guidance,2764 rulemaking,2765 and other pertinent updates from ECRCO.2766 Effectiveness of Interaction and Coordination with External Agencies and Organizations ECRCO's Cooperative Federalism initiative is a pilot project to initiate partnerships with EPA Regional Offices to "engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other states could model."2767 ECRCO believes that once these programs are in place and effectively implemented at the state level, "many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs."2768 EPA's description of the Cooperative Federalism initiative notes that "EPA is more effective in its protection of human health and the environment when it works together with states and tribes and engages local communities from a foundation of trust, transparency, and collaboration."2769

2759 EPA, ECRCO Strategic Plan, supra note 2670, at 11. 2760 Ibid., 12. 2761 EPA, Case Resolution Manual, supra note 2631, at 15. 2762 U.S. Environmental Protection Agency, "External Civil Rights Compliance Office – New Developments!" <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments> [hereinafter EPA, "ECRCO – New Developments!"]. 2763 Ibid. 2764 Ibid. (reporting that on January 19, 2017, ECRCO issued Chapter 1 of its Compliance Toolkit). 2765 Ibid. (reporting that on January 1, 2017, ECRCO sent notice to the Federal Register of the withdrawal of a proposed rule to amend EPA's nondiscrimination regulation). See also Nondiscrimination in Programs or Activities Receiving Federal Assistance From the Environmental Protection Agency, 82 Fed. Reg. 2,294 (Jan. 9, 2017). 2766 See, e.g., EPA, "ECRCO – New Developments!" supra note 2762 (reporting an update on February 26, 2016 to a planned public meeting on March 1, 2016). 2767 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2768 Ibid. 2769 U.S. Environmental Protection Agency, "Cooperative Federalism at EPA," <https://www.epa.gov/home/cooperative-federalism-epa>.

<https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments>
<https://www.epa.gov/home/cooperative-federalism-epa>

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ECRCO participates in the Federal Interagency Working Group on Environmental Justice,2770 which strives to "advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns."2771 The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,2772 and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898,2773 which formally recommitted the participating federal agencies to "addressing environmental justice through a more collaborative, comprehensive and efficient process."2774 ECRCO's Case Resolution Manual indicates that it "does not investigate alleged noncompliance with Executive Order 12,898."2775 ECRCO indicated in its strategic plan that it "will continue its regular participation in the federal Interagency Working Group on Environmental Justice [] and the federal Interagency Working Group on Title VI of the Civil Rights Act.2776 Research, Data Collection, and Reporting ECRCO indicated that it "does not have policy guidance and/or procedures for data collection," however, it "collects information from complainants as necessary to determine ECRCO's jurisdiction over the subject matter of a complaint or when requesting information from complainants for purposes of investigating a complaint."2777 ECRCO has also indicated that it "does not collect information from individuals as a matter of routine or for general data collection purposes."2778

2770 EPA, ECRCO Strategic Plan, supra note 2670, at 11; U.S. Dep't of Transportation, "Environmental Justice Strategy," <https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy> [hereinafter DOT, "Environmental Justice Strategy"]; see also Federal Interagency Working Group on Environmental Justice, "Fact Sheet," https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf [hereinafter Federal Interagency Working Group on Environmental Justice, "Fact Sheet"]. Note that this report focuses on the civil rights enforcement of ECRCO and does not fully explore the efforts of the Office of Environmental Justice, which also provides a civil rights function, and has been the target of dramatic funding reductions in recent budget proposals. See U.S. Environmental Protection Agency, FY 2020 Budget in Brief, p. 62, <https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-epa-bib.pdf>. 2771 Federal Interagency Working Group on Environmental Justice, "Fact Sheet," supra note 2770, at 1. 2772 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2773 U.S. Dep't of Justice, U.S. Dep't of the Interior, U.S. Dep't of Agriculture, U.S. Dep't of Labor, U.S. Dep't of Health and Human Servs., U.S. Dep't of Hous. and Urban Dev., U.S. Dep't of Transportation, U.S. Dep't of Energy, U.S. Dep't of Environmental Protection Agency, U.S. Dep't of Commerce, and the U.S. Dep't of Defense, Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (2011), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf> [hereinafter Memorandum of Understanding on Environmental Justice and Executive Order 12,898]. 2774 U.S. Environmental Protection Agency, "Overview of the EJ IWG," <https://www.epa.gov/environmentaljustice/overview-ej-iwg> [hereinafter EPA, "Overview of the EJ IWG"]. 2775 EPA, Case Resolution Manual, supra note 2631, at 11. 2776 EPA, ECRCO Strategic Plan, supra note 2670. 2777 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 11, at 14-15. 2778 Ibid.

<https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy>
<https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy>
https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf
https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf
<https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-epa-bib.pdf>
<https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf>
<https://www.epa.gov/environmentaljustice/overview-ej-iwg>

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Chapter 10: U.S. Department of Transportation, Departmental Office of Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Transportation (DOT) on October 15, 1966.2779 and DOT began operation on April 1, 1967.2780 Currently, DOT is led by Secretary Elaine L. Chao, who was sworn into office as the 18th Secretary of Transportation on January 31, 2017.2781 DOT states that its mission is to "serve the United States by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future."2782 To uphold their mission, DOT is responsible for enforcing and implementing federal regulations that ensure the safety of all persons travelling on land, through air, or by sea.2783 Housed within DOT's Office of the Secretary, which oversees and establishes policy for transportation programs administered by its Operating Administrations (OAs),2784 federal regulations provide that the Departmental Office of Civil Rights (DOCR) "serves as principal advisor" and also "periodically reviews and evaluates the civil rights programs of the Operating Administrations to ensure that recipients of financial assistance meet applicable civil rights requirements."2785 This jurisdiction covers laws and regulations that prohibit discrimination on the basis of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.2786 DOCR has two main jobs: (1) resolving internal civil rights complaints affecting DOT employees and applicants for employment and (2) resolving external civil right complaints relating to the recipients and potential recipients of transportation programs that receive funding through

2779 Department of Transportation Act of 1966, Pub. L. 89-670, 80 Stat. 931. 2780 U.S. Dep't of Transportation, "About DOT," <https://www.transportation.gov/about> (accessed Jun. 17, 2016) [hereinafter DOT, "About DOT"]. 2781 U.S. Dep't of Transportation, "Meet Key Officials," <https://www.transportation.gov/key-officials> (accessed Jan. 18, 2019). 2782 U.S. Dep't of Transportation, "About DOT," supra note 2780. 2783 AllGov, "Department of Transportation (DOT)," <http://www.allgov.com/departments/department-of-transportation?detailsDepartmentID=578#>. 2784 The Operating Administrations at DOT include: the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the National Highway Traffic Safety Administration, the Federal Transit Administration, the Saint Lawrence Seaway Development Corporation, the Maritime Administration, the Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration. See U.S. Dep't of Transportation, External Civil Rights Complaint Processing Manual (September 2007), p. 7, https://www.transportation.gov/sites/dot.gov/files/docs/externalcomplaintmanual-final_1.pdf [hereinafter DOT, Complaint Processing Manual]. 2785 49 C.F.R. § 1.40. 2786 Id.; U.S. Dep't of Transportation, "Office of Civil Rights," <https://www.transportation.gov/civil-rights> [hereinafter DOT, "Office of Civil Rights"].

<https://www.transportation.gov/about>
<https://www.transportation.gov/key-officials>
<http://www.allgov.com/departments/department-of-transportation?detailsDepartmentID=578>
<http://www.allgov.com/departments/department-of-transportation?detailsDepartmentID=578>
https://www.transportation.gov/sites/dot.gov/files/docs/externalcomplaintmanual-final_1.pdf
<https://www.transportation.gov/civil-rights>

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DOT.2787 Through DOCR, DOT enforces the following federal civil rights laws, as per its nondiscrimination regulation at 49 C.F.R. Part 21.2788

• Title VI and Title VII of the Civil Rights Act of 1964, as amended;2789 • Americans with Disabilities Act of 1990;2790 • Civil Rights Act of 1991;2791 • Section 504 of the Rehabilitation Act of 1973, as amended;2792 • Section 508 of the Rehabilitation Act of 1973, as amended;2793 • The Age Discrimination Act of 1975;2794 • Disadvantaged Business Enterprise Program;2795 • Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);2796 • Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations);2797 • Executive Order 13,166 (Improving Access to Services for Persons with Limited English

Proficiency);2798 • Executive Order 13,217 (Community-Based Alternatives for Individuals with

Disabilities);2799 • DOT Order 1000.12, Implementation of the Department of Transportation Title VI

Program;2800 • DOT Order 1000.12A, the U.S. Department of Transportation Title VI Program;2801 • DOT Order 1000.18, External Civil Rights Complaint Processing Manual;2802 • DOT Order 1050.2A, DOT Standard Title VI Assurances and Non-Discrimination

Provisions;2803

2787 DOT, "Office of Civil Rights," supra note 2786. 2788 49 C.F.R. Part 21; DOT, "About DOCR," supra note 101; U.S. Dep't of Transportation, "DOT Discrimination Policy – Complaint Process," <https://www.transportation.gov/civil-rights/complaint-resolution/complaint-process> (accessed Oct. 4, 2016). 2789 42 U.S.C. § 2000d; 49 C.F.R. Part 21 (DOT implementing regulations); 26 C.F.R. Part 42 (DOJ implementing and coordinating regulations). 2790 42 U.S.C. § 12101; 28 C.F.R. Part 35; and 49 C.F.R. Parts 27, 37, 38. 2791 42 U.S.C. § 1981. 2792 29 U.S.C. § 794. 2793 Id. § 794d. 2794 42 U.S.C. § 6101. 2795 49 C.F.R. Parts 23 and 26. 2796 Leadership and Coordination of Nondiscrimination Laws, Executive Order 12,250, 45 Fed. Reg. 72,995. 2797 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2798 Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 2799 Community-Based Alternatives for Individuals with Disabilities, Executive Order 13,217, 66 Fed. Reg. 33,155 (Jun. 18, 2001). 2800 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2801 Ibid. 2802 Ibid. 2803 Ibid.

<https://www.transportation.gov/civil-rights/complaint-resolution/complaint-process>

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• DOT Order 1 101 .62B, Department of Transportation Organization Manual-Departmental Office of Civil Rights;2804

• DOT Order 2100.5, Policies and Procedures for Simplification, Analysis, and Review of Regulations;2805

• Additional Civil Rights Initiatives, as cited in DOT Order 1000.18, Chap. 1-2; 2806 In addition, each OA has its own Office of Civil Rights or certain designated official(s) that are responsible for ensuring civil rights compliance for their respective organization and program. 2807 OAs' approaches to external civil rights enforcement within the offices varies, because OAs operate and fund different types of programs, however the Complaint Processing Manual states that all offices strive "to ensure that all civil rights laws, regulations, and executive orders for which the Department is responsible are implemented and enforced consistently, correctly, and expeditiously." 2808 Enforcement Tools The agency enforcement tools DOCR and DOT's OAs have specific legal authority to use are:

• Complaint Resolution 2809 • Agency-initiated charges 2810 • Proactive Compliance Evaluations 2811 • Issuance of Policy Guidance 2812 • Issuance of Regulations 2813 • Technical Assistance 2814 • Publicity 2815 • Data collection, research and reporting 2816 • Collaboration with state/local agencies 2817

2804 Ibid. 2805 Ibid. 2806 Ibid. 2807 DOT, Complaint Processing Manual, supra note 2784, at 1. 2808 Ibid. 2809 49 C.F.R. §§ 21.11, 28.170, 25.605, and 27.123. 2810 Id. § 21.11(a) and (c). 2811 Id. §§ 21.9, 21.11 (a), 28.170, 25.605, 27.121, and 27.123. 2812 Id. § 21.9(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"), 25.605, and 27.121(a). 2813 Id. § 5.1(b). 2814 Id. § 21.9 (a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 49 CFR §§ 25.605 and 27.121(a). 2815 28 C.F.R. § 42.405. 2816 Id. § 42.406. 2817 49 C.F.R. § 21.9 (a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

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• Collaboration with other federal agencies 2818 • Strategic Plan 2819 • Annual Reports 2820

Budget and Staffing DOT reports that it uses its budget to "carry out an affirmative civil rights program that investigates, reviews, researches, and consults on matters in which it proactively advances equal opportunities." 2821 For FY 2016, DOT requested \$9.67 million for DOCR 2822 and Congress allocated \$9.67 million to DOCR. 2823 For FY 2017, DOT requested \$9.75 million for DOCR, 2824 and Congress allocated \$9.75 million to DOCR. 2825 For FY 2018, DOT requested \$9.50 million for DOCR, 2826 and Congress allocated \$9.50 million to DOCR. 2827 See Figure 10.1.

2818 28 C.F.R. § 42.413. 2819 GPRRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010). 2820 Id. § 1115(b). 2821 U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2017, p. 188, <https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf> [hereinafter DOT, 2017 Budget Estimates]. 2822 U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2016, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>. 2823 U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2018, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf> [hereinafter DOT, 2018 Budget Estimates]. 2824 DOT, 2017 Budget Estimates, supra note 2821, at Sec. 2-1. 2825 U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2019, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>. 2826 DOT, 2018 Budget Estimates, supra note 2823, at OCR-1. 2827 U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2020, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

<https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>

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Figure 10.1: DOCR Requested and Allocated Budget

Source: U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2016, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2017, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2018, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2019, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2020, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

DOCR's overall budget rose slightly from FY 2016 to FY 2017 and decreased to its lowest level in FY 2018 in comparison to the other fiscal years. From FY 2016 to FY 2018, DOCR was allocated 100 percent of the funds it requested each year. Because DOT's OAs are principally responsible for complaint investigation and processing, DOCR "investigates and processes complaints only to assist the OAs when the circumstances warrant." 2828 Consequently, DOCR does not typically process complaints and "DOCR's budget does not allocate a specific amount for processing and responding to civil rights complaints." 2829 However, DOT provided estimates of funds expended for assisting OAs respond to and process complaints, and funds expended by DOCR for helping the OAs with proactively investigating civil rights concerns. 2830 See Figure 10.2.

2828 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2829 Ibid. 2830 Ibid.

FY 2016 FY 2017 FY 2018 Requested \$9,678,000 \$9,751,000 \$9,500,000 Allocated \$9,678,000 \$9,751,000 \$9,500,000

\$9,350,000 \$9,400,000 \$9,450,000 \$9,500,000 \$9,550,000 \$9,600,000 \$9,650,000 \$9,700,000 \$9,750,000 \$9,800,000

Figure 10.1: DOCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>

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Figure 10.2: DOCR Estimated Budget for Assisting Operating Administrations to Process Civil Rights Complaints and Proactively Investigate Civil Rights Concerns

Source: U.S. Department of Transportation, Response to Interrogatory No. 6a and 6b, at 6.

DOT estimates that for assisting OAs with processing civil rights complaints, DOCR expended \$48,775 in FY 2016, \$178,989 in FY 2017, and \$111,632 in FY 2018. 2831 For assisting Operating Administrations with proactively investigating civil rights concerns, DOT estimates that DOCR expended \$202,217 in FY 2016, \$101,733, and only \$1,450 in FY 2018. 2832 Since DOCR assists OAs only when the circumstances warrant, DOT clarified that DOCR funds are only expended when DOCR assistance is necessary. 2833 Therefore, if DOCR assistance is not necessary, there will be no DOCR expenditures. 2834 Organizational Structure DOCR resides within DOT's Office of the Secretary (OST). 2835 The Director of the Departmental Office of Civil Rights is the head of DOCR and acts as the "designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation." 2836 The current Director of DOCR is Charles E. James, Sr. 2837

2831 Ibid. 2832 Ibid. 2833 U.S. Dep't of Transportation, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 2834 Ibid. 2835 DOT, "About DOCR," supra note 101. 2836 Ibid. 2837 U.S. Dep't of Transportation, "Director," <https://www.transportation.gov/civil-rights/about-docr/director>.

FY 2016 FY 2017 FY 2018 Proactive Investigations \$202,217 \$101,733 \$1,450 Complaint Processing \$48,775 \$178,989 \$111,632

\$-

\$50,000

\$100,000

\$150,000

\$200,000

\$250,000

\$300,000

Figure 10.2: DOCR Estimated Budget for Assisting Operating Administrations to Process Civil Rights Complaints and Proactively

Investigate Civil Rights Concerns FY 2016 to FY 2018

Complaint Processing Proactive Investigations

<https://www.transportation.gov/civil-rights/about-docr/director>

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See Figure 10.3. The Disadvantaged Business Enterprise Program Division, formerly known as the External Civil Rights Programs Division, is the office within DOCR that supports OAs' civil rights offices in handling DOT's external civil rights enforcement work. 2838 DOCR indicated that its roles and responsibilities have not changed between FY 2016 and FY 2018. 2839 Figure 10.3: Organizational Structure of DOCR

Source: U.S. Department of Transportation, Department of Transportation Organizational Manual, Departmental Office of Civil Rights, DOT 1101.62B, DOT000153.

The agency's Organizational Manual states that the mission of the Disadvantaged Business Enterprise Program Division is to "ensure compliance with acceptable civil rights policies, regulations, statutes, guidelines, and procedures by external entities receiving Federal financial assistance from DOT." 2840 This Division helps to develop external civil rights regulations and/or policies and communicates them to other Operating Administrations (e.g., Federal Aviation Administration) within DOT or external customers; provides technical assistance; coordinates with other government agencies to ensure uniform implementation of civil rights laws; makes "legally binding appeals decisions concerning denial of certification or improper certification under the Disadvantaged Business Enterprise Program;" and coordinates/interacts with other divisions, administrations, federal/state/local agencies, legislators, advocacy organizations, and others pertaining to civil rights programs and compliance with the relevant civil rights laws that DOT enforces. 2841 DOT reported that in 2018 154 employees worked full-time within DOT on enforcement of relevant civil rights statutes, executive orders, and regulations. 2842 Of those 154 employees, 30

2838 U.S. Department of Transportation, Departmental Office of Civil Rights, DOT 1101.62B, DOT000152, Department of Transportation Organizational Manual, p. DOT000152 [hereinafter DOT, Organizational Manual]. 2839 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 4, at 4. 2840 DOT, Organizational Manual, supra note 2838, at DOT000156. 2841 Ibid., DOT000156. 2842 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 5, at 4.

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worked full-time for DOCR. 2843 A total of eight employees within DOT worked part-time on enforcement of the relevant civil rights statutes, executive orders, and regulations. 2844 There were four full-time contractors who worked on civil rights enforcement for DOCR and two contractors who worked part-time on civil rights enforcement for the Federal Aviation Administration. 2845 DOT also reported that staffing within DOCR remained the same between FY 2016 and FY 2018. 2846 However, they noted that during this time, "16 employees departed DOCR and 11 employees were hired." 2847 Also, in FY 2018 gained one civil rights enforcement employee and the Federal Aviation Administration lost four civil rights enforcement employees. 2848 DOCR did not specify how many of the aforementioned employees were allocated to the Disadvantaged Business Enterprise Program Division. Assessment Prioritization of Civil Rights Agency-Wide

As noted earlier, DOJCR is the principle civil rights advisor to the Secretary, as well as senior-level DOT officials.2850 DOJCR explained to the Commission that “provides oversight, leadership, guidance, technical assistance, and training to the OAs to ensure proper and effective administration of the programs.”2851 Additionally, DOJCR “refers and monitors complaints of discrimination by members of the public to the OA civil rights offices and serves as the primary liaison with external and internal stakeholders concerning civil rights matters.”2852 The authority and responsibility for civil rights enforcement activities at DOT is decentralized and is shared among DOJCR and the civil rights offices in the various OAs across DOT.2853 This is counter to the Commission’s 2002 recommendations regarding civil rights enforcement offices. In 2002, the Commission stated that “the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions” and “these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”2854

2843 Ibid. 2844 Ibid., 5. 2845 Ibid., 5. 2846 Ibid., 5. 2847 Ibid., 5. 2848 Ibid., 5. 2849 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2850 Ibid. 2851 Ibid. 2852 See supra notes 2784–2787, 2807–2808, and 2828–2830. 2853 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47.

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DOCR has both internal (EEO) and external functions, and has noted that its budget “does not allocate a specific amount for civil rights enforcement.”2854 Furthermore, it appears that in some cases, the civil rights offices of DOT’s OAs are set up similarly to handle both internal (EEO) and external functions.2855 and in some cases their budgets do not break out internal and external enforcement line items.2856 But given that the data about external civil rights enforcement is not available, it is difficult to assess the level of prioritization of external civil rights enforcement in this agency that in FY 2018 reportedly distributed more than \$63 billion in transportation investments and \$1.6 billion in discretionary funds, amounting to approximately 80% of DOT’s annual budget.2857 Strategic Planning and Self-Evaluation DOT indicated that its civil rights policy priority is to “enforce the civil rights laws, regulations, and executive orders for which it is responsible so as to eliminate discrimination on a prohibited basis and ensure that all communities are provided with equal access to the programs and activities that receive financial assistance from DOT.”2858 During FY 2016–2018, DOT issued three strategic plans: for FY 2012–2016,2859 FY 2014–2018,2860 and FY 2018–2022.2861 DOT’s strategic plan for FY 2012–2016 specifically included information about civil rights enforcement, which identified a strategic goal to “promote transportation policies and investments that bring lasting and equitable economic benefits to the nation and its citizens,” and indicates that DOT will “investigate and resolve civil rights-related complaints made by air travelers in a timely manner,” as a strategy for meeting this goal for its aviation program.2862 In its strategic plan for FY 2014–2018, DOT identified strategies to increase access for persons with disabilities to meet its goal of fostering improved quality of life in communities, and indicated that it would “enforce the ADA through rigorous compliance reviews, ADA Transition Plans, and regular engagement with federally- funded transportation recipients to address transportation policies and programs that adversely

2854 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2855 See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, “Office of Civil Rights (ACR),” https://www.faa.gov/about/office_org/headquarters_offices/acr/. 2856 See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, Budget Estimates Fiscal Year 2018, pp. 11–12, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281191/aa-fy-2018-cj-final.pdf>. 2857 U.S. Dep’t of Transportation, “U.S. DOT Provides More Than \$63 Billion to Major Transportation Infrastructure Investments Across America in 2018,” <https://www.transportation.gov/briefing-room/dot6718>; “Department of Transportation Appropriations: FY 2019,” EveryCRSReport.com, at Notes (Sep. 25, 2018), <https://www.everycrsreport.com/reports/R45321.html>. 2858 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 3, at 3. 2859 U.S. Dep’t of Transportation, Transportation for a New Generation: Strategic Plan Fiscal Years 2012–2016, https://www.transportation.gov/sites/dot.gov/files/docs/990_355_DOT_StrategicPlan_508lowres.pdf [hereinafter DOT, Strategic Plan 2012–2016]. 2860 U.S. Dep’t of Transportation, Transportation for a New Generation: Strategic Plan Fiscal Years 2014–2018, https://www.transportation.gov/sites/dot.gov/files/docs/2014-2018-strategic-plan_0.pdf [hereinafter DOT, Strategic Plan 2014–2018]. 2861 U.S. Dep’t of Transportation, Strategic Plan for FY 2018–2022, February 2018, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/304866/dot-strategic-planfy2018-2022508.pdf> [hereinafter DOT, Strategic Plan 2018–2022]. 2862 DOT, Strategic Plan 2012–2016, supra note 2859, at 37.

https://www.faa.gov/about/office_org/headquarters_offices/acr/
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281191/aa-fy-2018-cj-final.pdf>
<https://www.transportation.gov/briefing-room/dot6718>
<https://www.everycrsreport.com/reports/R45321.html>
https://www.transportation.gov/sites/dot.gov/files/docs/990_355_DOT_StrategicPlan_508lowres.pdf
https://www.transportation.gov/sites/dot.gov/files/docs/2014-2018-strategic-plan_0.pdf
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/304866/dot-strategic-planfy2018-2022508.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/304866/dot-strategic-planfy2018-2022508.pdf>

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impact the accessibility of transportation systems for individuals with disabilities.”2863 In its strategic plan for FY 2018–2022, DOT did not discuss external civil rights enforcement directly. DOT indicated that its first strategic goal for infrastructure is “Project Delivery, Planning, Environment, Funding, and Finance” and outlined a strategy to achieve that goal is to streamline the environmental review process, noting that DOT “remains committed to ensuring that all communities, including minority populations, low-income populations, and the disability community, have meaningful input into the transportation planning and decision-making processes, and that transportation projects avoid or minimize impacts to communities and the environment to the greatest extent possible.”2864 For all of these strategic plans, it appears that any mentions of civil rights priorities, objectives, or strategies fall under other more broad strategic goals and/or strategies that concern the agency’s programs generally, not just the agency’s civil rights enforcement program. Per the Government Performance and Results Act of 1993 (GPRA),2865 DOT is required to publish agency-wide annual Performance and Accountability Reports (PARs), however none are currently publicly available on their website for the fiscal years in question (FY 2016–2018).2866 DOT also issues agency-wide annual performance plans.2867 While external civil rights enforcement has not been a specific area of focus for the fiscal years in question, the FY 2016 and FY 2017 performance plans have indicated expanding access and choice to improve the quality of life in communities as a strategic goal, specifically to ensure that “all programs, activities, and services are examined to identify barriers to access for persons with disabilities.”2868 The Commission is not aware of any specific PARs or performance plans that have been issued specifically by DOJCR, however some OAs do issue their own PARs.2869 For example, FAA publishes annual PARs,2870 and also has published a business plan for its civil rights office, with outlines a series of targets and goals for external enforcement, compliance, and technical assistance.2871

2863 DOT, Strategic Plan 2014–2018, supra note 2860. 2864 DOT, Strategic Plan 2018–2022, supra note 2861, at 20. 2865 Government Performance and Results Act of 1993 (GPRA), Pub. L. 103-62 (1993); U.S. Dep’t of Transportation, “DOT Budget and Performance Documents,” <https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents> [hereinafter DOT, “Budget and Performance Documents”]. 2866 See DOT, “Budget and Performance Documents,” supra note 2865. 2867 Ibid. 2868 U.S. Dep’t of Transportation, FY-2015 Annual Performance Report / FY-2017 Annual Performance Plan, [pages not numbered], <https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>; U.S. Dep’t of Transportation, FY-2014 Annual Performance Report/FY-2016 Annual Performance Plan, p. 100, https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf. 2869 See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, “Plans and Reports,” https://www.faa.gov/about/plans_reports/. 2870 Ibid. 2871 U.S. Dep’t of Transportation, Federal Aviation Administration, FY2018 ACR Business Plan, https://www.faa.gov/about/plans_reports/media/2018/acr_business_plan.pdf.

<https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents>
<https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>
https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf
https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf
https://www.faa.gov/about/plans_reports/
https://www.faa.gov/about/plans_reports/media/2018/acr_business_plan.pdf

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Complaint Processing, Agency-Initiated Charges, and Litigation DOJCR and DOT’s OAs have the ability to resolve complaints through a variety of means, including alternative dispute resolution (formal mediation),2872 investigation,2873 or administrative proceedings.2874 Any of these processes may result in informal resolutions (prior to issuance of a finding),2875 compliance monitoring,2876 voluntary compliance agreements (settlements),2877 withholding or termination of funds,2878 or referral to DOJ for litigation.2879 DOT’s nondiscrimination regulations authorize DOT to enforce civil rights laws with regard to funding recipients.2880 DOT has stated that it enforces civil rights laws “primarily through the administration of transportation-related programs designed to eliminate prohibited discrimination by recipients of federal financial assistance from DOT.”2881 The OAs charged with administering the pertinent programs are principally responsible for investigating and responding to complaints.2882 DOJCR “investigates and processes complaints only to assist the OAs when the circumstances warrant.”2883 The process DOT (specifically DOJCR or the OAs) utilizes to investigate and process complaints as per its Complaint Processing Manual is as follows:2884 Public complainants who believe they have been discriminated against by DOT or a DOT funding recipient can report the allegation to either the civil rights office within an OA or DOJCR.2885 Complaints are defined as “a written or electronic statement concerning an allegation of discrimination that contains a request for the receiving office to take action”2886 and must be written and filed within 180 days of the alleged act of discrimination in order to be investigated by DOT.2887

2872 49 C.F.R. § 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 5, 36–37. 2873 49 C.F.R. § 21.11 (c), 25.605, and 27.123(c); DOT, Complaint Processing Manual, supra note 2784, at 21–35. 2874 49 C.F.R. § 21.13, and 25.605; DOT, Complaint Processing Manual, supra note 2784, at 44–47. 2875 49 C.F.R. § 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 36. 2876 49 C.F.R. § 21.11 (a), 25.605, and 27.123(a); DOT, Complaint Processing Manual, supra note 2784, at 42–43. 2877 49 C.F.R. § 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 42–43, 42. 2878 49 C.F.R. § 21.13 (c), 25.605, and 27.125(b); DOT, Complaint Processing Manual, supra note 2784, at 45. 2879 49 C.F.R. § 21.13 (a), 25.605, and 27.125(a)(1); DOT, Complaint Processing Manual, supra note 2784, at 44–45. 2880 49 C.F.R. § 21.11, 28.170, 25.605, and 27.123. 2881 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2882 Ibid. 2883 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2884 The Commission is reviewing DOJCR specifically, however, when references are made to “DOT” in this section, it applies primarily to the OAs, but also to DOJCR. DOJCR has noted that the OAs’ civil rights offices are the primary entities that process complaints and conduct other enforcement work, and DOJCR only investigates and processes complaints to assist the OAs in certain circumstances. 2885 U.S. Dep’t of Transportation, “Public Complaint Process,” <https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process> (accessed Jan., 14 2016) [hereinafter DOT, “Public Complaint Process”]. 2886 DOT, Complaint Processing Manual, supra note 2784, at 9. 2887 DOT, “Public Complaint Process,” supra note 2885.

<https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process>
<https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process>

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If DOT determines that the complaint falls under DOT’s jurisdiction, then DOT reports that it sends the complainant a letter within 10 days of DOT receiving the complaint stating “that the complaint will be evaluated to determine whether DOT will investigate the allegations and that further communications about the complaint will occur in the future.”2888 If DOT determines the complaint is within the jurisdiction of another agency, then DOT reports that it sends the complainant a “dismissal” letter stating that the complaint was referred to another agency.2889 Complaints DOT accepts are then checked for completion.2890 A complaint DOT deems complete includes the following information:

- “Sufficient information to understand the facts that led the complainant to believe discrimination occurred and when the discrimination took place
- A way to contact the complainant (a mailing address, and if applicable, a telephone number and e-mail address)
- Identification of the person or group injured by the alleged discrimination • Identification of the person or organization alleged to have discriminated • The basis for the alleged discrimination, e.g., race, national origin, or disability.” 2891

If DOT determines the complaint is incomplete, DOT reports that it contacts the complainant for more information.2892 If the information is not provided to DOT within 30 days of it being requested, DOT reports that it then closes the case.2893 If DOT determines the complaint is to be investigated, then it notifies the complainant and draws up an Investigative Plan that depends on the complexity and elements of the case.2894 DOT reports that it then collects data to answer the following questions:

1. What happened? 2. Why did it happen? 2895

DOT collects this data through interviews, on-site visits, and requested information.2896 Once the investigation is complete, staff prepare an Investigative Report, also known as an Investigative Summary, and use the data to recommend “corrective or remedial action.”2897 The findings of the investigation are sent as a letter to the complainant and the recipient.2898 Then, the complainant

2888 DOT, Complaint Processing Manual, supra note 2784, at 11. 2889 Ibid., 11–12. 2890 Ibid., 12. 2891 DOT, “Public Complaint Process” supra note 2885. 2892 DOT, Complaint Processing Manual, supra note 2784, at 12–13. 2893 Ibid. 2894 Ibid., 22–23. 2895 Ibid., 25. 2896 Ibid., 27. 2897 Ibid., 34. 2898 Ibid., 37–40.

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and recipient may negotiate a Settlement Agreement, which must be approved and signed by a DOT representative, and DOT determines monitoring practices of the recipient (if applicable).2899 DOT staff aim to resolve complaints within 180 days, unless extenuating circumstances arise during the investigation.2900 If the recipient does not comply with the terms of the agreement or cannot agree on a settlement, then DOT reports that it will “initiate administrative enforcement proceedings, or pursue other means authorized by law, including referral to the Department of Justice with a recommendation that appropriate enforcement proceedings be brought.”2901 Also, in response to the Commission’s interrogatories, DOJCR noted that because it does not typically investigate and process complaints, it was only able to provide information contained within its agency-wide complaint tracking platform for complaints investigated and processed during FY 2016 to FY 2018.2902 DOJCR reported to the Commission that in FY 2016, DOT opened 342 external civil rights complaints, closed 255 complaints, and kept open 54 cases at the end of the fiscal year.2903 In FY 2017, DOT opened 288 complaints, closed 272 complaints, and kept open 47 cases by the end of the fiscal year.2904 And in FY 2018, DOT opened 332 complaints, closed 253 complaints, and kept open 170 cases at the end of the fiscal year.2905 See Table 10.1. Table 10.1: Number of External Civil Rights Complaints Opened and Closed between FY 2016 and FY 2018

Fiscal Year	Number of Complaints Opened	Number of Complaints Closed	Number of Complaints Kept Open
FY 2016	342	255	54
FY 2017	288	272	47
FY 2018	332	253	170

54 47 170

Source: U.S. Department of Transportation, Response to Interrogatories 7a, 7f, and 7h, at 7-9.

In FY 2016, DOT closed 189 of the complaints that were opened within 180 days, with 74.12% of complaint closures meeting the 180 day requirement.2906 In FY 2017, DOT closed 163 of the complaints opened within 180 days, with 59.93% of complaint closures meeting the 180 day requirement.2907 And in FY 2018, DOT closed 138 of the complaints that were opened during FY 2018 within 180 days, with 54.55% of complaint closures meeting the 180 day requirement.2908 The rate in which DOT is able to close complaints within a 180 day timeframe decreased by approximately 20 percent from FY 2016 to FY 2018.

2899 Ibid., 42-43. 2900 Ibid., 35. 2901 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2902 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 7, at 7. 2903 Ibid., 8-9. 2904 Ibid. 2905 Ibid. 2906 Ibid. 2907 Ibid. 2908 Ibid.

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Table 10.2: Types of External Civil Rights Complaints Opened between FY 2016 and FY 2018
 FY 2016 FY 2017 FY 2018 ADA/504 301 260 301 Title VI 26 18 9 Disadvantaged Business Enterprise (DBE) 10 8 14 External EEO 2 1 8
 Unknown/Other 3 1 - Age Discrimination Act - - -

Source: U.S. Department of Transportation, Response to Interrogatory 7c, at 7.

See Table 10.2 above. The majority of complaints DOT receives are ADA or Section 504 disability-related complaints, with 86 percent, 90 percent, and 90 percent of complaints opened being ADA/Section 504 complaints for FY 2016, FY 2017, and FY 2018 respectively. Behind ADA/Section 504 complaints, DOT frequently receives Title VI complaints and Disadvantaged Business Enterprise (DBE) complaints. DBE complaints fall under the set of federal transportation regulations governing recipients of federal funding, which are designed to provide opportunity to groups that have been historically disadvantaged in the sector, including women and other socially and economically disadvantaged individuals.2909

2909 See 49 C.F.R. Part 23 and 49 C.F.R. Part 26.

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Table 10.3: Outcomes for External Civil Rights Complaints Closed between FY 2016 and FY 2018
 FY 2016 FY 2017 FY 2018 Administrative Closure 81 110 80 Administrative Closure – Compliance Review 17 14 38 Administrative Closure – Complainant Not Responsive

21 34 27

Administrative Closure – Untimely 3 4 2 Administrative Closure – Litigation 3 1 1 Violation Letter of Finding 11 10 7 Violation Letter of Finding – Corrective Action Monitoring

2 5 2

Violation Letter – Corrective Action Monitoring Ongoing

14 10 10

No Violation Letter of Finding 46 36 43 No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding

14 15 6

Resolved Before Issuing Letter of Finding 20 21 27 Source: U.S. Department of Transportation, Response to Interrogatory 7d, at 8.

See Table 10.3 above. DOT administratively closed the majority of complaints during FY 2016, FY 2017, and FY 2018 (53.8 percent, 62.6 percent, and 60.9 percent respectively), due to several reasons including the unresponsiveness of the complainant, the initiation of a compliance review, lack of complaint timeliness, initiation of related litigation, or for other unspecified reasons.2910 DOT closed a significant number of complaints with a No Violation Letter of Finding (46 complaints in FY 2016, 36 complaints in FY 2017, and 43 complaints in FY 2018), or resolved them before issuing a Letter of Finding (20 complaints in FY 2016, 21 complaints in FY 2017, and 27 complaints in FY 2018).2911 DOT closed a smaller number of complaints with a No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding (14 complaints in FY 2016, 15 complaints in FY 2017, and 6 complaints in FY 2018), with a Violation Letter of Finding – Corrective Action Monitoring Ongoing (14 complaints in FY 2016, and 10 complaints each in FY 2017 and FY 2018), with a Violation Letter of Finding (11 complaints in FY 2016, 10 complaints in FY 2017, and 7 complaints in FY 2018), or with a Violation Letter of Finding – Corrective Action (2 complaints in FY 2016, 5 complaints in FY 2017, and 2 complaints in FY 2018).2912 Proactive Compliance Evaluation DOCR and DOTs OAs have federal regulatory authority to periodically conduct reviews of a funding recipient's programs or activities to determine and/or ensure that that recipient is in

2910 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 7, at 8. 2911 Ibid. 2912 Ibid.

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compliance with the applicable nondiscrimination laws that it enforces.2913 In its responses to the Commission's interrogatories, DOCR stated that OAs charged with administering the pertinent programs are responsible for conducting post-award compliance audits.2914 DOCR indicated in its External Civil Rights Complaint Processing Manual that the guidelines that apply for the complete investigation of a discrimination complaint also should be followed when conducting a compliance review.2915 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity DOCR told the Commission that as the "principal civil rights advisor to the Secretary, Secretarial Officers, OAs, and senior level DOT officials, [DOCR] provides oversight, leadership, guidance, technical assistance, and training to the OAs to ensure the proper and effective administration of the programs."2916 DOCR's website also indicates that it "[p]rovide[s] guidance, expertise, and technical assistance on civil rights issues identified through Departmental policy, programming, or procedure," and "conducts extensive outreach to civil rights stakeholders throughout the country to ensure that communities protected by civil rights laws and impacted by transportation infrastructure decisions have meaningful engagement in the decision-making process."2917 DOCR issued an External Civil Rights Complaint Processing Manual, which is "designed to provide guidance on processing discrimination complaints against U.S. Department of Transportation (DOT) Federal financial assistance recipients."2918 While the manual indicates that it is "for internal agency use," DOCR has made it public via a link to its website.2919 DOT established its Civil Rights Learning Center, a collective initiative of the civil rights offices at DOT, to "foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders."2920 The Civil Rights Learning Center "assists stakeholders with exploring, integrating, and applying civil rights learning to their work and their community," with the goal of "provid[ing] resources that will aid learners in effectively responding to evolving needs and issues regarding civil rights administration and application."2921 DOCR's website also lists a number of "learning resources" on its website for external civil rights, including audiocasts, podcasts, videos, learning hubs, online training modules, and guidance for

2913 49 C.F.R. § 21.11(a); DOT, Complaint Processing Manual, supra note 2784, at 21. 2914 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2915 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 12; DOT, Complaint Processing Manual, supra note 2784, at 22. 2916 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2917 DOT, "Understanding the Departmental Office of Civil Rights (DOCR)," <https://www.transportation.gov/transition/%E2%80%8Bcivil-rights/office-civil-rights> [hereinafter DOT, "Understanding DOCR"]. 2918 DOT, Complaint Processing Manual, supra note 2784, at i. 2919 U.S. Dep't of Transportation, "External Civil Rights Processing Manual," <https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual> (accessed Nov. 5, 2019). 2920 DOT, "Civil Rights Learning Center," supra note 327. 2921 Ibid.

<https://www.transportation.gov/transition/%E2%80%8Bcivil-rights/office-civil-rights>
<https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual>
<https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual>

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funding recipients from DOT and its OAs.2922 In addition, DOCR has a Civil Rights Library resource, which is a legal tool to assist "grant recipients and people who utilize transportation services funded through [DOT] grants."2923 The Civil Rights Library lists legal resources including civil rights laws (U.S. Codes, federal regulations, and public laws), executive orders, and policies that are enforced by DOCR and the civil rights offices in DOT's OAs.2924 The Commission is not aware of whether DOCR or DOT's OAs publicize the resolution of their enforcement efforts (complaints, compliance reviews, litigation, etc.) as a method of disseminating policy. Interaction and Coordination with External Agencies and Organizations DOCR's website indicates that it "coordinate[s] with federal agencies to collaborate on joint policy and to address intersecting enforcement and compliance efforts."2925 DOCR lists its civil rights partners on its website,2926 including DOT's Center for Alternative Dispute Resolution (housed in the Office of the General Counsel),2927 DOT's Disability Resource Center,2928 the U.S. Department of Veterans Affairs' Office of Small and Disadvantaged Business Utilization,2929 and the General Services Administration Advantage program.2930 DOT also participates in the Federal Interagency Working Group on Environmental Justice,2931 which strives to "advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns."2932 The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,2933 and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (that DOCR enforces),2934 which formally recommitted the

2922 DOT, "Learning Resources," supra note 328. 2923 U.S. Dep't of Transportation, "Civil Rights Library," <https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>. 2924 Ibid.; U.S. Dep't of Transportation, "Policies," <https://www.transportation.gov/civil-rights/civil-rights-library/policies>. 2925 DOT, "Understanding DOCR," supra note 2917. 2926 U.S. Dep't of Transportation, "Civil Rights Offices and Partners," <https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>. 2927 U.S. Dep't of Transportation, "Office of the General Counsel, Center for Alternative Dispute Resolution," <https://www.transportation.gov/CADR>. 2928 U.S. Dep't of Transportation, "Disability Resource Center," <https://www.transportation.gov/drc/disability-resource-center>. 2929 U.S. Department of Veterans Affairs, "Office of Small and Disadvantaged Business Utilization," <https://www.va.gov/osdbu/>. 2930 General Services Administration, "Advantage!," https://www.gsaadvantage.gov/advantage/main/start_page.do. 2931 DOT, "Environmental Justice Strategy," supra note 2770; see also Federal Interagency Working Group on Environmental Justice, "Fact Sheet," supra note 2770. 2932 Federal Interagency Working Group on Environmental Justice, "Fact Sheet," supra note 2770, at 1. 2933 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2934 Memorandum of Understanding on Environmental Justice and Executive Order 12,898, supra note 2773.

<https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>
<https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>
<https://www.transportation.gov/civil-rights/civil-rights-library/policies>
<https://www.transportation.gov/civil-rights/civil-rights-library/policies>
<https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>
<https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>
<https://www.transportation.gov/CADR>
<https://www.transportation.gov/drc/disability-resource-center>
<https://www.transportation.gov/drc/disability-resource-center>
<https://www.va.gov/osdbu/>
https://www.gsaadvantage.gov/advantage/main/start_page.do

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participating federal agencies to "addressing environmental justice through a more collaborative, comprehensive and efficient process."2935 Many of DOT's grantees are State Transportation Agencies, and DOCR or the civil rights offices of the OAs interact with them to enforce federal civil rights law. For example:

The Disadvantaged Business Enterprise Program (DBE) is a legislatively mandated [DOT] program that applies to Federal-aid highway dollars expended on federally-assisted contracts issued by [DOT] recipients such as State Transportation Agencies (STAs). The U.S. Congress established the DBE program in 1982 to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- Help remove barriers to the participation of DBEs in DOT-assisted contracts, and
- Assist the development of firms that can compete successfully in the marketplace outside

of the DBE program.

The DBE program ensures that federally assisted contracts for highway, transit and aviation projects are made available for small business concerns owned and controlled by socially and economically disadvantaged individuals... Every three years, STAs are required to set an overall DBE goal that they must either meet, or show that they used good faith efforts to meet, annually. This goal is in the form of a percentage of federal funds apportioned annually to each STA and is calculated based upon the relative availability of DBE firms as compared to all firms in the relevant geographic market area. STAs that do not meet their goal in any given year, must submit a document to their operating

Research, Data Collection, and Reporting DOCR indicated that when DOCR directly receives a complaint, it collects “all relevant information necessary to resolve any compliance issues raised by the complainant, ascertained from the information provided by the complainant, or discovered during the investigation.”2937 This information includes demographic data, among other items such as the basis for the complaint, the complainant’s contact information, and pertinent facts about the discrimination that occurred.2938 DOCR indicated that it disaggregates demographic data concerning racial and ethnic populations, including Asian American and Pacific Islander populations, in accordance with E.O. 13,515 (which requires that federal programs strive to “work to advance relevant evidence-based research, data collection, and analysis” for Asian American and Pacific Islander populations and

2935 EPA, “Overview of the EJ IWG,” supra note 2774. 2936 U.S. Department of Transportation, Federal Highway Administration, Civil Rights, “Disadvantaged Business Enterprise Program (DBE) Program,” <https://www.fhwa.dot.gov/civilrights/programs/dbe/> (accessed Jul. 11, 2019). 2937 U.S. Dept’t of Transportation, Response to USCCR Interrogatory No. 11, at 12. 2938 *Ibid.*

<https://www.civilrights.dot.gov/disadvantaged-business-enterprise>
<https://www.fhwa.dot.gov/civilrights/programs/dbe/>

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subpopulations)2939 when collecting and analyzing this data.2940 DOCR also requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT- funded program/project may have a disparate impact upon certain racial/ethnic populations.2941 DOCR indicated there were no changes in policy guidance surrounding data collection during FY 2016-2018.2942

2939 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009). 2940 U.S. Dept’t of Transportation, Response to USCCR Interrogatory No. 11, at 12. 2941 *Ibid.*, 13. 2942 *Ibid.*

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425 Chapter 11: U.S. Department of Veterans Affairs

Chapter 11: U.S. Department of Veterans Affairs, Office of Resolution Management Legal Authority and Responsibility President Hoover established the U.S. Department of Veterans Affairs (VA) on July 21, 1930 as an independent agency under Executive Order 5,398 and, on March 15, 1989, Congress redesignated the agency as an executive department in the Cabinet.2943 VA describes its mission as “to fulfill President Lincoln’s promise ‘to care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s veterans.”2944 To uphold its mission, VA provides America’s Veterans and their families with benefits and services such as compensation, veteran’s pension, survivor’s benefits, rehabilitation and employment assistance, education assistance, home loan guaranties, life insurance coverage, vocational rehabilitation and employment services, healthcare, and final resting places to commemorate those who have fallen while serving their country.2945 With over 350,000 employees, VA is the second largest federal agency.2946 VA’s Office of Resolution Management (ORM) is responsible for enforcing civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age for veterans and their families.2947 The three major administrations at VA that deliver programs for veterans include the Veterans Health Administration (VHA), the Veterans Benefits Administration (VBA) and the National Cemetery Administration (NCA).2948 ORM works with the external civil rights offices at these three VA administrations, as well as other VA administration offices, to facilitate the enforcement of civil rights.2949

2943 U.S. Dept’t of Veterans Affairs Act of 1988, Pub. L. 100-527, 102 Stat. 2635 (codified as amended at 38 U.S.C. §301). 2944 U.S. Dept’t of Veterans Affairs, “About VA,” https://www.va.gov/ABOUT_VA/index.asp (accessed Mar. 22, 2018). 2945 U.S. Dept’t of Veterans Affairs, “Veterans Benefits Administration,” <https://benefits.va.gov/benefits/> (accessed Feb. 4, 2019). 2946 U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3; Note: According to VA’s Response VA’s response to USCCR Interrogatory No. 5b-5e, at 10-11 Staffing levels for the offices and administrations listed have not changed and VA does not employ contractors or part-time workers on enforcement of civil rights statutes, executive orders, and regulations. 2947 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R. § 18; 20 U.S.C. § 1661-88 and implementing regulations at 38 C.F.R. § 23 subpart A; 29 U.S.C. § 794 and implementing regulations at 38 C.F.R. § 15; 42 U.S.C. §§ 6101 et seq.; U.S. Dept’t of Veterans Affairs, “Office of Resolution Management (ORM),” <https://www.va.gov/ORM/>. 2948 U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3-4; U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. ORM noted that “[u]nder 38 C.F.R. § 18.1 the authority for “obtaining evidence of voluntary compliance,” is also delegated to VBA and VHA. *Ibid.* 2949 38 U.S.C. § 308(b)(7); U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9.

https://www.va.gov/ABOUT_VA/index.asp
<https://benefits.va.gov/benefits/>
<https://www.va.gov/ORM/>

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ORM’s Resolution Support Center (RSC) is a primary resource for Veterans and their families regarding any complaints of discrimination and unfair treatment in VA benefits and services,2950 but investigations are handled by other offices within the VA administrations. ORM’s RSC oversees the initial processing of external complaints that it receives, and is responsible for forwarding these complaints to the appropriate administration for processing, depending on the basis of the complaint.2951 According to ORM’s External Complaints Standard Operating Procedures, it is the responsibility of these administrations (VHA, VBA, and NCA) to investigate civil rights complaints that are referred to them.2952 In addition, VA’s Office of the General Counsel (OGC) is responsible for providing legal guidance to ORM and VA’s administrations as needed on matters concerning external civil rights enforcement.2953 With respect to schools, hospitals, and health care and other facilities’ programs or activities under the purview of VA’s nondiscrimination regulations,2954 ORM is responsible for ensuring that recipients of federal funding2955 comply with the following civil rights statutes, executive orders, and regulations:2956

• Title VI of the Civil Rights Act of 1964;2957 • Age Discrimination Act of 1975;2958 • Section 504 of the Rehabilitation Act of 1973;2959 • Title IX of the Education Amendments of 1972;2960 • Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);2961 • Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs);2962

• Executive Order 11,246 (Equal Employment Opportunity);2963 • Executive Order 11,063 (Equal Opportunity in Housing);2964

2950 U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5. 2951 U.S. Dept’t of Veterans Affairs, External Complaints Processing Standard Operating Procedure, Jun. 2014, p. 3- 5 (on file) [hereinafter VA, External Complaints Processing SOP]. 2952 U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (updated Jun. 19, 2019). 2953 *Ibid.* 2954 38 C.F.R. § 18.1 Subparts A-E; U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 2955 U.S. Dept’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 2956 *Ibid.*, 10 (indicating that this authority is delegated by the Secretary of Veterans Affairs). 2957 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R. § 18. 2958 42 U.S.C. §§ 6101 et seq. 2959 29 U.S.C. § 794 and implementing regulations at 38 C.F.R. § 15. 2960 20 U.S.C. §§ 1681 and implementing regulations at 38 C.F.R. § 23 subpart A. 2961 Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995. 2962 Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 2963 Equal Employment Opportunity, Exec. Order No. 11,246, 30 Fed. Reg. 12,319. 2964 Equal Opportunity in Hous., Exec. Order No. 11,063, 27 Fed. Reg. 11,527.

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• Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing);2965

• Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);2966

• Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency);2967

• Executive Order 13,217 (Community-Based Alternatives for Individuals with Disabilities);2968

• Executive Orders 11,478 (Equal Employment Opportunity in the Federal Government);2969 • Executive Order 13,087 (Equal Employment Opportunity in the Federal Government);2970 • Executive Order 13,152 (Equal Employment Opportunity in the Federal Government);2971 • Executive Order 13,163 (Increasing the Opportunity for Individuals With Disabilities To

Be Employed in the Federal Government);2972 • Executive Order 13,164 (Establishing Procedures to Facilitate the Provision of Reasonable

Accommodation);2973 • Executive Order 13,145 (To Prohibit Discrimination in Federal Employment Based on

Genetic Information);2974 • Executive Order 10,925 (Establishing the President’s Committee on Equal Employment

Opportunity);2975 • Executive Order 11,625 (Prescribing Additional Arrangements for Developing and

Coordinating a National Program for Minority Business Enterprise;2976 • Executive Order 11,701 (Employment of Veterans by Federal Agencies and Government

Contractors and Subcontractors);2977 • Executive Order 12,067 (Providing for Coordination of Federal Equal Employment

Opportunity Programs);2978

2965 Exec. Order No. 12,892, 59 Fed. Reg. 2,939. 2966 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2967 Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 2968 Community-Based Alternatives for Individuals with Disabilities, Exec. Order No. 13,217, 66 Fed. Reg. 33,155 2969 Equal Employment Opportunity in the Federal Government, Exec. Order No. 11,478, 34 Fed. Reg. 12,937 amended by Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998) and further amended by Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000). 2970 Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998). 2971 Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000). 2972 Increasing the Opportunity for Individuals With Disabilities To Be Employed in the Federal Government, Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (Jul. 28, 2000). 2973 Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Exec. Order No. 13,164, 65 Fed. Reg. 46,565 (Jul. 28, 2000). 2974 Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 10, 2000). 2975 Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961). 2976 Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 14, 1971). 2977 Exec. Order No. 11,701, 38 Fed. Reg. 2,675 (Jan. 29, 1973). 2978 Exec. Order No. 12,067, 43 Fed. Reg. 28,967.

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• Executive Order 12,106 (Transfer of certain equal employment enforcement functions);2979 • Executive Order 13,078 (Increasing Employment of Adults with Disabilities);2980 • Executive Order 13,125 (Increasing Participants of Asian Americans and Pacific Islanders

in Federal Programs);2981 • Executive Order 13,162 (Federal Career Intern Program);2982 • Executive Order 13,171 (Hispanic Employment in the Federal Government);2983 • Executive Order 13,175 (Consultation and Coordination with Indian Tribal

Governments);2984 • Executive Order 13,187 (The President’s Disability Employment Partnership Board);2985 • Executive Order 13,199 (Establishment of White House Office of Faith-Based and

Community Initiatives);2986 • Executive Order 13,216, addendum to Executive Order 13,125 (Increasing Opportunity

and Improving Quality of life of Asian Americans and Pacific Islanders);2987 • Executive Order 13,230 (President’s Advisory Commission on Educational Excellence for

Hispanic Americans);2988 • Executive Order 13,256 (Presidents Board of Advisors on Historically Black Colleges and

Universities);2989 • Executive Order 13,592 (Improving American Indian and Alaska Native Educational

Opportunities and Strengthening Tribal Colleges and Universities);2990 • Executive Order 13,339 (Increasing Economic Opportunity and Business Participation of

Asian Americans and Pacific Islanders);2991

2979 Exec. Order No. 12,106, 4 Fed. Reg. 1,053 (Jan. 3, 1979). 2980 Increasing Employment of Adults with Disabilities, Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (Mar. 18, 1998). 2981 Increasing Participants of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,125, 64 Fed. Reg. 31,105 (Jun. 10, 1999). 2982 Federal Career Intern Program, Exec. Order No. 13,162, 65 Fed. Reg. 43,211 (Jul. 12, 2000). 2983 Hispanic Employment in the Federal Government, Exec. Order No. 13,171, 65 Fed. Reg. 61,251 (Oct. 16, 2000). 2984 Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). 2985 The President's Disability Employment Partnership Board, Exec. Order No. 13,187, 66 Fed. Reg. 3,857 (Jan. 17, 2001). 2986 Establishment of White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 31, 2001). 2987 Increasing Opportunity and Improving Quality of Life of Asian Americans and Pacific Islanders, Exec. Order No. 13,216, 66 Fed. Reg. 31,373 (Jun. 11, 2001). 2988 President's Advisory Commission on Educational Excellence for Hispanic Americans, Exec. Order No. 13,230, 66 Fed. Reg. 52,641 (Oct. 17, 2001). 2989 Presidents Board of Advisors on Historically Black Colleges and Universities, Exec. Order No. 13,256, 67 Fed. Reg. 6,823 (Feb. 14, 2002). (This Exec. Order was revoked by: White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010).) 2990 Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011). 2991 Increasing Economic Opportunity and Business Participation of Asian Americans and Pacific Islanders, Exec. Order, Exec. Order No. 13,339, 69 Fed. Reg. 28,037 (May 17, 2004).

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- Executive Order 13,342 (Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives);2992
- Executive Order 13,403 (Amendments to Executive Orders 11,030, 13,279, 13,339, 13,381, and 13,389, and Revocation of Executive Order 13,011);2993
- Executive Order 13,569 (Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13,498, and Revocation of Executive Order 13,507);2994
- Executive Order 13,511 (Continuance of Certain Federal Advisory Committees);2995 • Executive Order 13,515 (Increasing Participation of Asian Americans and Pacific Islanders

in Federal Programs);2996 • Executive Order 13,518 (Employment of Veterans in the Federal Government);2997 • Executive Order 13,522 (Creating Labor-Management Forums to Improve Delivery of Government Services);2998 • Executive Order 13,548 (Increasing Federal Employment of Individuals with

Disabilities);2999 • Executive Order 13,532 (White House Initiative on Historically Black Colleges and

Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities);3000

- Executive Order 13,555 (White House Initiative on Educational Excellence for Hispanics);3001

- Executive Order 13,562 (Recruiting and Hiring Students and Recent Graduates);3002

2992 Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (Jun. 3, 2004). 2993 Exec. Order No. 13,403, 71 Fed. Reg. 28,543 (May 16, 2006). 2994 Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13,498, and Revocation of Executive Order 13,507, Exec. Order No. 13,569, 76 Fed. Reg. 19,891 (Apr. 8, 2011). 2995 Continuance of Certain Federal Advisory Committees, Exec. Order No. 13,511, 74 Fed. Reg. 50,909 (Oct. 1, 2009). 2996 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009). 2997 Employment of Veterans in the Federal Government, Exec. Order No. 13,518, 74 Fed. Reg. 58,533 (Nov. 13, 2009). 2998 Creating Labor-Management Forums to Improve Delivery of Government Services, Exec. Order No. 13,522, 74 Fed. Reg. 66,203 (Dec. 14, 2009). 2999 Increasing Federal Employment of Individuals with Disabilities, Exec. Order No. 13,548, 75 Fed. Reg. 45,039 (Jul. 30, 2010). 3000 White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010). 3001 White House Initiative on Educational Excellence for Hispanics, Exec. Order No. 13,555, 75 Fed. Reg. 65,417 (Oct. 22, 2010). 3002 Recruiting and Hiring Students and Recent Graduates, Exec. Order No. 13,562, 75 Fed. Reg. 82,585 (Dec. 30, 2010).

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- Executive Order 13,583 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);3003

- Executive Order 13,592 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities).3004

Enforcement Tools The agency enforcement tools ORM, in conjunction with the various civil rights offices housed within VA's administrations, has specific legal authority to use are:3005

- Complaint Resolution3006 • Agency-Initiated Charges3007 • Proactive Compliance Evaluations3008 • Issuance of Policy Guidance3009 • Issuance of Regulations3010 • Technical Assistance3011 • Publicity3012 • Data collection, research and reported3013 • Collaboration with states/local agencies3014 • Collaboration with other federal agencies3015

3003 Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 23, 2011). 3004 Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011). 3005 38 C.F.R. Part 18, 38 C.F.R. § 23.605; 28 C.F.R. Part 42 Subpart F. 3006 38 C.F.R. §§ 18.7(b), 18.542, and 23.605. 3007 Id. §§ 18.7(a) and (c). 3008 38 C.F.R. §§ 18.7(a), 18.405(e)(2), 18.541, and 23.605. 3009 Id. § 18.6 (This is required as follows: "Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."), and 23.605 ("The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 38 CFR 18.6 through 18.11."). 3010 28 C.F.R. § 42.403 ("Any federal agency subject to title VI which has not issued a regulation implementing title VI shall do so as promptly as possible and, no later than the effective date of this subpart, shall submit a proposed regulation to the Assistant Attorney General pursuant to paragraph (c) of this section."); 38 C.F.R. § 23.605. 3011 38 C.F.R. §§ 18.6 ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.") and 23.605. 3012 Id. § 18.7(a); 28 C.F.R. § 42.405 (requirement for public dissemination of Title VI information). 3013 28 C.F.R. § 42.406. 3014 38 C.F.R. § 18.6(a) ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."). 3015 28 C.F.R. § 42.413.

<https://www.law.cornell.edu/cfr/text/38/18.6>

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https://www.law.cornell.edu/topn/civil_rights_act_of_1964

<https://www.law.cornell.edu/uscode/text/42/2000d>

<https://www.law.cornell.edu/cfr/text/38/23.605>

<https://www.law.cornell.edu/cfr/text/38/18.6>

<https://www.law.cornell.edu/cfr/text/28/42.403>

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- Strategic Plan3016 • Annual Reports3017

Budget and Staffing ORM's budget for external civil rights enforcement as well as federal EEO functions are combined,3018 and therefore does not break down specific allocations for external civil rights enforcement. In FY 2016, ORM had an allocated budget of \$43.70 million, which rose to \$47.67 million in FY 2017 and \$47.66 million in FY 2018.3019 In FY 2016 and FY 2017, ORM's allocated budget was in line with its requested budget, having requested \$43.70 million in FY 2016 and \$47.66 million in FY 2017.3020 ORM's budget request in FY 2018 was \$0, as VA requested that the office's activities be moved to the Office of Accountability and Whistleblower Protection, however it received an allocation equal to its FY 2017 allocation and the restructuring did not occur.3021 See Figure 11.1.

3016 GPRM Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 3017 38 U.S.C. §§ 527, 529. 3018 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019). 3019 U.S. Dep't of Veterans Affairs, FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2016, p. GenAd-329 [hereinafter VA, FY2017 Budget Submission]; U.S. Dep't of Veterans Affairs, FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, May 2017, p. GenAd-355 [hereinafter VA, FY2018 Budget Submission]; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2018, p. GenAd-317 [hereinafter VA, FY2019 Budget Submission]; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 12 (updated Jun. 19, 2019). 3020 U.S. Dep't of Veterans Affairs, FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, p. GenAd-323; VA, FY2017 Budget Submission, supra note 3019, at GenAd-329. 3021 VA, FY2018 Budget Submission, supra note 3019, at GenAd-355; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission, supra note 3019, at GenAd-317.

<https://www.va.gov/budget/products.asp>

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Figure 11.1: ORM Allocated Budget

Source: U.S. Dep't of Veterans Affairs, FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, p. GenAd-323; U.S. Dep't of Veterans Affairs, FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2016, p. GenAd-329; U.S. Dep't of Veterans Affairs, FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, May 2017, p. GenAd-355; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2018, p. GenAd-317; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Interrogatory No. 6, p. 12 (updated Jun. 19, 2019).

During FY 2016 to FY 2018, ORM employed a total of 296 FTEs who specifically work on civil rights enforcement.3022 ORM indicated that the staffing levels have not changed during the fiscal years in question, despite slight fluctuations in its funding levels.3023 ORM also identified staffing levels at VBA, VHA, and NCA—the three major administrations at VA—for FTEs who specifically work on civil rights enforcement, which is broken down as follows:

- 66 FTEs at VBA • 220 FTEs at VHA • 3 FTEs at NCA3024

ORM is headed by Deputy Assistant Secretary and Acting Executive Director for the Office of Diversity and Inclusion at the U.S. Department of Veterans Affairs, Harvey Johnson.3025 ORM's organizational structure did not change between FY 2016 and FY 2018.3026 See Figure 11.2.

3022 U.S. Dep't of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 3023 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 5, at 11 (updated Jun. 19, 2019). 3024 Ibid., Exhibit 1, at 93-95. 3025 U.S. Dep't of Veterans Affairs, "About ORM," <https://www.va.gov/ORM/index.asp>; U.S. Dep't of Veterans Affairs, "Department of Veterans Affairs senior executive Biography," https://www.va.gov/ORM/docs/BIO_DAS_ORM_Harvey_Johnson_12_18_2.pdf. 3026 U.S. Dep't of Veterans Affairs, response to USCCR Interrogatories, Executive Summary, at 3.

\$43,700,000 \$47,668,000

\$0

\$43,700,000 \$47,668,000 \$47,668,000

\$10,000,000
\$20,000,000
\$30,000,000
\$40,000,000
\$50,000,000
\$60,000,000

FY 2016 FY 2017 FY 2018

Figure 11.1: ORM Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www.va.gov/budget/products.asp>
<https://www.va.gov/ORM/index.asp>
https://www.va.gov/ORM/docs/BIO_DAS ORM Harvey Johnson 12 18 2.pdf

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Figure 11.2: ORM Organizational Chart

Source: U.S. Dep't of Veterans Affairs, Response to Interrogatories, Exhibit 5.

ORM reported to the Commission that it provides "general oversight, coordination, and liaison activities for the external civil rights program," and VA has staff responsible for investigating external civil rights complaints in its administrations and staff offices, including VBA, VHA, and the National Cemetery Administration (NCA).³⁰²⁷ VA noted that it "does not maintain a separate external civil rights office" similar to some other federal agencies, and "external civil rights functions and Federal EEO functions are managed jointly by ORM and within the applicable NCA, VBA, or VHA components."³⁰²⁸ ORM also noted that VA's Office of the General Counsel "will provide as needed legal guidance to ORM as well as other VA administrations or entities on external civil rights related issues."³⁰²⁹

³⁰²⁷ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 4, at 10. ³⁰²⁸ *Ibid.* ³⁰²⁹ *Ibid.*

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Assessment Prioritization of Civil Rights Agency-Wide As noted earlier, ORM is VA's liaison with DOJ, to which it refers complaints for litigation if needed, and "is responsible for receiving external complaints, forwarding these complaints to the proper [VA] administration for investigation."³⁰³⁰ Similar to DOT, the authority and responsibility for civil rights enforcement activities at VA is decentralized, and is shared among ORM and the major administrations (VHA, VBA, and NCA) and various administrations offices across VA. Counter to Commission recommendations, noting that "the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions" and "these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another,"³⁰³¹ ORM has both internal (EEO) and external functions, and has noted that "VA's Civil Rights and Federal EEO functions and programs are jointly combined and funded."³⁰³² Strategic Planning and Self-Evaluation VA has issued two agency-wide strategic plans during the fiscal years in question, one for FY 2014-2020, and one for FY 2018-2024.³⁰³³ In these strategic plans, there are no civil rights-specific strategic goals outlined, however the strategic plan for FY 2014-2020 indicated that VA would "increase support to our Veterans with disabilities," as a strategy for meeting its strategic objective of improving veteran wellness and economic security.³⁰³⁴ The Commission is not aware of any existing VA agency-wide strategic plans or strategic plans published by ORM that specifically have civil rights-related strategic goals or objectives, as per the recommendations of the Commission.³⁰³⁵ VHA, VBA, and NCA each have issued individual strategic plans.³⁰³⁶ In its strategic plan for FY 2013-2018, the VHA indicated that it would "provide veterans personalized, proactive, patient-driven health care" as one of its goals and objectives, specifically with "quality and equity" to

³⁰³⁰ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. ³⁰³¹ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. ³⁰³² U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019). ³⁰³³ U.S. Dep't of Veterans Affairs, FY 2014-2020 Strategic Plan, https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/va_sp_fy14-20.pdf [hereinafter VA, FY 2014-2020 Strategic Plan]; U.S. Dep't of Veterans Affairs, FY 2018-2024 Strategic Plan, May 31, 2019, <https://www.va.gov/oei/docs/VA2018-2024strategicPlan.pdf>. ³⁰³⁴ VA, FY 2014-2020 Strategic Plan, supra note 3033. ³⁰³⁵ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. Although the VA was not one of the 11 agencies reviewed by the Commission in its research leading up to its 2002 report, the Commission believes that the recommendations are applicable to all federal agencies. *Ibid.*, 2 (Methodology). ³⁰³⁶ U.S. Dep't of Veterans Affairs, Veterans Health Administration, VHA Strategic Plan FY 2013-2018, https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf,

https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/va_sp_fy14-20.pdf
<https://www.va.gov/oei/docs/VA2018-2024strategicPlan.pdf>
https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf
https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf

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allow veterans to "receive timely, high quality, personalized, safe effective and equitable health care, irrespective of geography, gender, race, age, culture or sexual orientation."³⁰³⁷ Neither VBA's strategic plan for FY 2014-2020 nor NCA's strategic plan for FY 2018-2022 mention any specific civil rights enforcement-related goals or objectives. VA is required to submit an annual report to Congress that provides a financial accounting of funds received and expended during the fiscal year and reports on programmatic activities, which is to be made public.³⁰³⁸ VA issues an annual performance plan and report to chart the agency's progress, however the reports for the fiscal years in question do not specifically discuss activities related to external civil rights enforcement.³⁰³⁹ Complaint Processing, Agency-Initiated Charges, and Litigation VA regulations authorize ORM and other VA administrations that handle civil rights complaints to receive and investigate complaints, as well as perform periodic compliance reviews.³⁰⁴⁰ According to the VA's External Complaints Processing Standard Operating Procedures, ORM's RSC is responsible for overseeing the processing of external complaints, and receives all written or phone complaints, and is responsible for referring complaints to the various VA administrations, depending on the basis of the complaint.³⁰⁴¹ VHA, VBA, and NCA all have dedicated staff "who are responsible for investigating external civil rights complaints" that are referred to them.³⁰⁴² VA's OGC is to provide "legal guidance as well as other VA administrations or entities on external civil rights related issues."³⁰⁴³ VA regulations require that if an investigation "indicates a failure to comply ... the matter will be resolved by informal means whenever possible."³⁰⁴⁴ VA ORM stated that it prioritizes "commitment to a comprehensive and collaborative approach to civil rights."³⁰⁴⁵ Additionally, when informal resolution is unattainable, ORM indicated in its interrogatory responses that VA effectuates compliance as per the procedure outlined under 38 C.F.R. § 18.6.³⁰⁴⁶ This procedure for effectuating compliance may involve the "suspension or termination of or refusal to grant or

³⁰³⁷ *Ibid.*, 2. ³⁰³⁸ 38 U.S.C. §§ 527, 529. ³⁰³⁹ U.S. Dep't of Veterans Affairs, FY 2018/FY2016 Annual Performance Plan and Report, May 2017, <https://www.va.gov/budget/docs/VAApprFY2018.pdf>; U.S. Dep't of Veterans Affairs, FY 2019/FY2017 Annual Performance Plan and Report, February 2018, https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf; U.S. Dep't of Veterans Affairs, FY 2020/FY2018 Annual Performance Plan and Report, March 2019, <https://www.va.gov/oei/docs/VA2020appr.PDF>. ³⁰⁴⁰ 38 C.F.R. § 18.7; 38 C.F.R. § 18.542; 38 C.F.R. § 23.605. ³⁰⁴¹ VA, External Complaints Processing SOP, supra note 2951, at 3-5. ³⁰⁴² U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 10 (Updated Jun. 19, 2019). ³⁰⁴³ *Ibid.* ³⁰⁴⁴ 38 C.F.R. § 18.7(d). ³⁰⁴⁵ Harvey Johnson, Deputy Ass't Sec'y, Office of Resolution Management & Diversity and Inclusion, Dep't of Veteran Affairs, Written Statement for the U.S. Comm'n on Civil Rights, at p. 3. ³⁰⁴⁶ 38 C.F.R. § 18.6; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (Updated Jun. 19, 2019).

<https://www.va.gov/budget/docs/VAApprFY2018.pdf>
https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf
https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf
<https://www.va.gov/oei/docs/VA2020appr.PDF>

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continue Federal financial assistance or by any other means authorized by law," which may include referral to DOJ for litigation, or "any applicable proceeding under State or local law."³⁰⁴⁷ During FY 2016-2018, VBA, VHA, and NCA processed 127 external civil rights complaints.³⁰⁴⁸ See Table 11.1. In FY 2016, VA administrations processed 36 total external complaints, 23 of which were referred to VHA, 13 were referred to VBA, and 0 were referred to NCA for processing.³⁰⁴⁹ In FY 2017, VA administrations processed a total of 63 complaints, 38 of which were referred to VHA, 24 referred to VBA, and 1 referred to NCA for processing.³⁰⁵⁰ In FY 2018, VA administrations processed a total of 28 complaints, 5 of which were referred to VHA, 60 referred to VBA, and 0 referred to NCA for processing.³⁰⁵¹ ORM did not directly process any complaints during FY 2016-2018.³⁰⁵² Table 11.1: External Civil Rights Complaint Referrals to VA Administrations, FY 2016 to FY 2018 Fiscal Year

ORM VHA VBA NCA Total Referrals for FY

2016 0 23 13 0 36 2017 0 38 24 1 63 2018 0 5 23 0 28 Total 0 66 60 1 127

Source: U.S. Dep't of Veterans Affairs, Corrections submitted during agency review, Jun. 19, 2019.

Of the total number of complaints processed by VHA, VBA, and NCA, the highest number of complaints were filed on the basis of disability.³⁰⁵³ Although VA's complaint data is not fully disaggregated, it shows a consistent level of complaints filed on the basis of sex during FY 2016- 2018.³⁰⁵⁴ At the briefing before the Commission, Harvey Johnson, Deputy Assistant Secretary, ORM at VA testified to the measures the VA ORM has taken to uphold civil rights. Deputy Assistant Secretary Johnson also said during his testimony that ORM received 87 external complaints in the past year, none of which resulted in a finding that discrimination had occurred.³⁰⁵⁵ He further stated that his office's budget grew in the past year and is slated to be increased again after the next round of

³⁰⁴⁷ 38 C.F.R. § 18.6(a). ³⁰⁴⁸ U.S. Dep't of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). ³⁰⁴⁹ *Ibid.* ³⁰⁵⁰ *Ibid.* ³⁰⁵¹ *Ibid.* ³⁰⁵² *Ibid.* ³⁰⁵³ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96-103 (updated Jun. 19, 2019). ³⁰⁵⁴ *Ibid.* ³⁰⁵⁵ *Ibid.* at 102-03; U.S. Dep't of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019), at 2 (noting that the total number of complaints referenced by Director Johnson should be 91 instead of 87, accounting for the addition of FY 2018 complaints, as Mr. Johnson was just referring to FY 2016-2017 complaints in his testimony).

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appropriations.³⁰⁵⁶ He attributed the growth in his budget to the "business case" he has made for civil rights enforcement.³⁰⁵⁷ From FY 2016 – FY 2018, the Veterans Health Administration opened a total of 66 cases based on complaints, of which 22 included sex as one of the bases of the complaint.³⁰⁵⁸ Sixty-two of the cases had been closed as of time of the VA's response. The complaint was resolved in 5 out of the 62 cases. In the remaining cases, there was no evidence to support the claim of discrimination, the complainant failed to respond, or the complainant withdrew.³⁰⁵⁹ In 2018, the VA's Inspector General issued a report describing how veterans are routinely denied benefits related to claims for posttraumatic stress disorder related to military sexual trauma.³⁰⁶⁰ The report found that the VA incorrectly processed approximately 49% of denied claims related to military sexual trauma between April 2017 and September 2017.³⁰⁶¹ According to the annual report required under the Prison Rape Elimination Act (PREA), of the sexual assaults in the military reported in FY 2018, "the Department estimates 20,500 Service members, representing about 13,000 women and 7,500 men, experienced some kind of contact or penetrative sexual assault in 2018, up from approximately 14,900 in 2016."³⁰⁶² The Inspector General's report recommended that the VA implement protections and additional levels of review to ensure that claims are properly evaluated.³⁰⁶³ Effective Use of Enforcement Tools: Proactive Compliance Evaluation ORM indicated that pursuant to 38 U.S.C. § 306(b)(7), ORM works with the VA administrations (VHA, VBA, and NCA) as well as other administration offices "to facilitate the enforcement of Civil Rights statutes, executive orders, and regulations," and indicated that the use of compliance reviews is a tool for enforcement.³⁰⁶⁴ ORM also stated that it forwards external civil rights complaints to VA administrations to investigate.³⁰⁶⁵

³⁰⁵⁶ Johnson Testimony, Federal Civil Rights Enforcement Briefing, p. 127. ³⁰⁵⁷ *Ibid.* Note that Johnson, at the Commission's briefing, stated that he expected his budget to increase in the coming year because of this business case. This appears to be in contradiction with the budget request that was made by the Trump Administration for the office, which was for a budget of \$0. ³⁰⁵⁸ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96 (updated Jun. 19, 2019). ³⁰⁵⁹ *Ibid.* at 100. ³⁰⁶⁰ U.S. Dep't of Veterans Affairs, Office of Inspector General, Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma, Report #17-05248-241, pp. i-ii (Aug. 21, 2018), <https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>. ³⁰⁶¹ *Ibid.* ³⁰⁶² U.S. Dep't of Defense, Annual Report on Sexual Assault in the Military, Fiscal Year 2018, p. 3, https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. ³⁰⁶³ *Ibid.*, 14. ³⁰⁶⁴ See 38 U.S.C. § 306(b)(7); U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9 (updated Jun. 19, 2019); see also supra note 3008. ³⁰⁶⁵ See supra note 3030.

<https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity ORM has statutory authority to so issue guidance and regulations.3066 In his testimony before the Commission, Director Johnson stated that ORM has recently adopted the “It’s on Us” campaign3067 as part of its effort to combat sexual harassment within the VA’s programs, and introduced both conscious and unconscious bias training.3068 The VA has struggled with addressing “an entrenched, sexist culture at many veterans [sic] hospitals” and other medical treatment centers as the agency is adapting to the needs of an increasing number of female veterans.3069 Some female veterans have stated that rather than face harassment at VA medical centers, they have sought treatment at private medical facilities, often at their own expense.3070 During the decade between 2005 and 2015, the percentage of female veterans seeking treatment at VA facilities has increased from 31.2% of female veterans to 41.1%.3071 Additionally, LGBT women seeking treatment at VA facilities have reported harassment at higher rates than non-LGBT women veterans.3072 ORM informed the Commission that VA’s Secretary received a letter from the House of Representatives Committee on Veterans Affairs in May 2019, inquiring as to VA’s progress on implementation of the “End Harassment” campaign “to ensure a safe and welcoming environment for both veterans and employees.”3073 The Center for Minority Veterans conducts outreach activities with minority Veteran stakeholders and coordinates outreach activities.3074 This outreach includes engaging with communities with a high-minority Veteran population, consulting with key representatives from major Veteran Service Organization, local agencies, and other Federal Agencies to increase outreach activities to designated minority Veteran groups.3075 Likewise, the Center for Women Veterans monitors outreach efforts targeting women veterans, other stakeholders, and Federal/state/community partners.3076 This includes ensuring that outreach material portray and target women veterans with inclusive images, messages, and branding in the media.3077

3066 38 C.F.R. § 18.6; 38 C.F.R. § 23.605. 3067 It’s On Us, <https://www.itsonus.org/>. 3068 Johnson Testimony, Federal Civil Rights Enforcement Briefing, pp. 101-02. 3069 Jennifer Steinhauer, “Treated Like a ‘Piece of Meat’: Female Veterans Endure Harassment at the V.A.,” *The New York Times*, Mar. 12, 2019, <https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>. 3070 Richard Sisk, “VA Struggles to Curb Harassment of Female Veterans at Medical Centers,” *Military.com*, Mar. 10, 2019, <https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>. 3071 *Ibid.* 3072 *Ibid.* 3073 Letter to Robert Wilkie, Secretary of Veterans Affairs, Re: Implementation of “End Harassment” campaign (May 10, 2019), p. 1 [hereinafter Letter to Wilkie Re: “End Harassment”]. 3074 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Section VIII, Veterans Civil Rights Related Centers, Offices and Programs, at 62. 3075 *Ibid.* 3076 *Ibid.*, 63. 3077 *Ibid.*, 63.

<https://www.itsonus.org/>
<https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>
<https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>
<https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>
<https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>

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ORM indicated that VA provides cultural competency, unconscious bias/implicit association, diversity and inclusion training to the VA workforce, including training focused on Veteran, disability, LGBT issues, generational issues, and emerging diversity and inclusion issues.3078 The VA also has launched education campaigns about civil rights issues. For example, the VA recently launched a new education campaign to raise awareness about sexual harassment, which involved VA facilities putting up posters reminding staff and other veterans using the facility that certain words or phrases constitute harassment.3079 Effectiveness of Interaction and Coordination with External Agencies and Organizations ORM is VA’s liaison with DOJ for external civil rights complaints received under the various civil rights laws it enforces.3080 As the liaison, ORM “is responsible for receiving external complaints, forwarding these complaints to the proper administration for investigation based on the nature of the complaint, and ensuring complaints in some cases are resolved by informal means.”3081 ORM indicated that VA’s Office of Diversity and Inclusion runs Special Emphasis Programs intended “to ensure that agencies take affirmative steps to provide equal opportunity to minorities, women, and people with disabilities in all areas of employment” through internal and external initiatives.3082 In addition, VA’s Centers for Minority Veterans and Women Veterans have federal, state, and community partners that help conduct education and outreach to minority and women veterans.3083 Research, Data Collection, and Reporting ORM receives data on discrimination that does not necessarily result in a formal complaint from surveys that are distributed to every person who received services at a VA facility.3084 At the Commission’s briefing, Director Johnson emphasized that even if someone does not file a formal complaint, the person may write about an issue on that survey. The agency collects that data, and Johnson’s office has access to that data. The office will use that data to anticipate where they may be issues bubbling up before “a gross violation.”3085 VA reported that complaint information is tracked via an Excel spreadsheet/SharePoint case tracking system.3086 Information and data is collected, including name, contact information, basis

3078 *Ibid.*, Section IXI, VA Diversity and Inclusion (D&I) Strategic Plan FY 2017-2020, at 74. 3079 See supra note 3073. 3080 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5. 3081 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 3082 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 6 (updated Jun. 19, 2019). 3083 See supra notes 3074-3077. 3084 Johnson Testimony, Federal Civil Rights Enforcement Briefing, pp. 153-156. 3085 *Ibid.* 3086 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 11, at 17.

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for complaint, issues, witnesses who can support the allegation(s), and remedy sought to resolve issue(s) or allegation(s).3087 VA reported that racial and ethnic data collected from complainants is not disaggregated.3088 VA also reported that its data collection procedures and case management protocol did not change over the fiscal years in question (FY 2016-2018).3089 The VA has an Office of Research and Development, which conducts research that aims to improve Veterans’ health and wellbeing, to help develop effective care solutions for Veterans, among other things.3090 In February 2019, VA issued the results of a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, also examining the impacts of delayed or missed care.3091 The study found that a high level of harassment, and that “[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need,”3092 but it only covered 12 locations in its randomized sample.3093 The House of Representatives Committee on Veterans Affairs applauded recent published research that VA funded,3094 examining the prevalence of harassment on women veterans and the impacts on their medical care, and recognized VA for its swift response with the initial implementation of its “End Harassment” campaign.3095 However, the House Committee letter pointed out that “training regarding harassment of or by veterans is not mandatory, and that it is possible there are employees across VA that have been untouched by direct intervention programs,” and “[f]urthermore, because all reporting is done locally, there is no accountability regarding facilities that continue to fail to respond to sexual harassment.”3096

3087 *Ibid.*, 18. 3088 *Ibid.*, 18. 3089 *Ibid.*, 18. 3090 VA, “About the Office of Research & Development,” <https://www.research.va.gov/about/default.cfm>. 3091 Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care, *Women’s Health Issues* 29-2 (2019), pp. 107-115, [https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf). 3092 *Ibid.* 113. 3093 *Ibid.*, passim. 3094 See supra note 3073. 3095 Letter to Wilkie Re: “End Harassment,” supra note 3073, at 1. 3096 *Ibid.*, 1-2.

<https://www.research.va.gov/about/default.cfm>
[https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf)
[https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf)

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Chapter 12: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Agriculture (USDA) in 18623097 with the mission to:

[A]cquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants.3098

In 1994, Congress created the position of Assistant Secretary of Agriculture for Civil Rights within USDA, and delegated to the Assistant Secretary responsibility for:

(1) ensuring compliance with all civil rights and related laws by all agencies and under all programs of the Department; (2) coordinating administration of civil rights laws (including regulations) within the Department for employees of, and participants in, programs of the Department; and (3) ensuring that necessary and appropriate civil rights components are properly incorporated into all strategic planning initiatives of the Department and agencies of the Department.3099

USDA is currently led by Secretary Sonny Perdue, who was sworn into office on April 25, 2017.3100 The Office of the Assistant Secretary for Civil Rights (OASCR) provides guidance for USDA’s civil rights programs and enforces laws and regulations that prohibit discrimination on the bases of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.3101

3097 7 U.S.C. §2201, Pub. L. 92-419, 12 Stat. 387, U.S. Dep’t of Agriculture, “USDA Celebrates 150 Years,” <https://www.usda.gov/our-agency/about-usda/history>. 3098 7 U.S.C. §2201. 3099 *Id.* § 6918(c), Pub. L. 103-354, 108 Stat. 3212 (1994). 3100 7 U.S.C. § 2202, 25 Stat. 659 (1889) (establishing the Dep’t of Agriculture and the position of Secretary of Agriculture); U.S. Dep’t of Agriculture, “Sonny Sworn in as 31st U.S. Secretary of Agriculture,” <https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn-31st-us-secretary-agriculture>. 3101 7 U.S.C. § 6918, PUB. L. 107-171, 116 STAT. 518 (2002).

<https://www.usda.gov/our-agency/about-usda/history>
<https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn-31st-us-secretary-agriculture>

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Through OASCR, USDA enforces the following regulations, executive orders, and statutes:3102

• Title VI of the Civil Rights Act of 1964, as amended3103 • Title VII of the Civil Rights Act of 19643104 • Section 504 of the Rehabilitation Act of 19733105 • Americans With Disabilities Act of 19903106 • The Age Discrimination Act of 19753107 • Title IX of the Education Amendments Act of 19723108 • Civil Rights Restoration Act of 1987, as amended3109 • Title VIII of the Civil Rights Act of 1968, as amended3110 • Food Stamp Act of 1977, as amended3111 • Equal Credit Opportunity Act of 19743112 • Title VII of the Consumer Protection Act of 19743113 • 7 C.F.R. § 2, Subpart C, Section 2.25 – Delegations of Authority by the Secretary of

Agriculture to the Assistant Secretary for Civil Rights • 7 C.F.R. § 2, Subpart P, Delegation of Authority by the Assistant Secretary of Agriculture • 7 C.F.R. § 15, Nondiscrimination • 7 C.F.R. § 15a, Education Programs or Activities Receiving Federal or Benefiting From

Federal Financial Assistance • 7 C.F.R. § 15b, Nondiscrimination on the Basis of Handicap in the Programs and Activities

Receiving Federal Financial Assistance • 7 C.F.R. § 15c, Nondiscrimination on the Basis of Age in Programs and Activities

Receiving Federal Financial Assistance • 7 C.F.R. § 15d, Nondiscrimination in Programs or Activities Conducted by the United

States Department of Agriculture

3102 U.S. Dep’t of Agriculture, Office of Civil Rights, Departmental Regulation No. 4330-002, Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance From USDA, (Mar. 3, 1999), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4330-002.htm>; U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4330-003, Nondiscrimination in USDA- Conducted Programs and Activities, (Oct. 5, 2015), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf> [hereinafter USDA OASCR, Departmental Regulation No. 4330-003]. 3103 42 U.S.C. §§ 2000d – 2000d-7 and implementing regulations at 7 C.F.R. Part 15. 3104 42 U.S.C. § 2000e et. seq. and implementing regulations at 29 C.F.R. Part 1601. 3105 29 U.S.C. § 794 and implementing regulations at 7 C.F.R. Part 15b. 3106 42 U.S.C. § 12101 et. seq. 3107 *Id.* § 6101 et. seq. and implementing regulations at C.F.R. Part 15c. 3108 20 U.S.C. §§ 1681-88 and implementing regulations at 7 C.F.R. Part 15a. 3109 Pub. L. 100-259, as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166. 3110 42 U.S.C. § 3601 et. seq. 3111 7 U.S.C. § 2011 et. seq. 3112 15 U.S.C. § 1691 et. seq. and implementing regulations at 12 C.F.R. Part 1002 3113 15 U.S.C. §§ 1691-1691f.

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4330-002.htm>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf>

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• 7 C.F.R. § 15e, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the United States Department of Agriculture

• 12 C.F.R. § 1002, Equal Credit Opportunity Regulation B • 45 C.F.R. § 90 – Nondiscrimination on the Basis of Age in Programs and Activities

Receiving Federal Financial Assistance • 28 C.F.R. § 42, Subpart F – Coordination of Enforcement of Nondiscrimination in

Federally Assisted Programs • 28 C.F.R. § 50.3 – Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964 • 28 C.F.R. § 35 – Nondiscrimination on the Basis of Disability in State and Local

Government Services • 29 C.F.R. § 1691; 28 C.F.R. § 42, Subpart H – Procedures for Complaints of Employment

of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973

• 28 C.F.R. § 41 – Implementation of Executive Order 12,550, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs

• 28 C.F.R. § 35, Subpart F – Compliance Procedures • Executive Order 12,250, Leadership and Coordination of Nondiscrimination Laws 3114

Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations 3115

• Executive Order 13,216, Amendment to Executive Order 13,125, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs 3116

• Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs 3117

• Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency 3118

Enforcement Tools The agency enforcement tools OASCR has specific legal authority to use are:

• Complaint resolution 3119 • Agency-initiated charges 3120

3114 Exec. Order No. 12,250, 45 Fed. Reg. 72,995 and implementing regulations at 28 C.F.R. Part 41. 3115 Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 3116 Exec. Order No. 13,216, 66 Fed. Reg. 31,373. 3117 Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 3118 Exec. Order No. 13,166, Fed. Reg. 50,121. 3119 7 C.F.R. §§ 15.6, 15.8(a) 15a.605, 15b.42, 15c.7(e), 15d.5, 15e.17(d). 3120 Id. § 15.8(a).

<https://www.federalregister.gov/executive-order/13125>

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• Proactive compliance evaluations 3121 • Guidance or other policy documents 3122 • Regulations 3123 • Technical assistance 3124 • Publicity 3125 • Research, data collection, and reporting 3126 • Collaboration/partnership with state/local agencies 3127 • Collaboration/partnership with other federal agencies 3128 • Strategic Planning 3129 • Annual Reports 3130

While USDA OASCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits USDA OASCR from, for example, engaging in outreach to stakeholders, as described in further detail below. Budget and Staffing Budget USDA's federal budget documents include funding requests for the "Office of Civil Rights (OCR)" at USDA, which indicate that "OCR seeks innovative methods to make progress towards meeting the regulatory standards for processing the Department's Equal Employment Opportunity (EEO) and program complaints." 3131 USDA's budget documents did not break down the amount of funds dedicated specifically to the processing of external complaints. However, testimony indicates that in 2018, 36 out of approximately 126 OASCR employees were dedicated to external civil rights enforcement (or "program complaints"), 3132 indicating that perhaps up to 30 percent of the budget below may be spent on external enforcement.

3121 Id. §§ 15.5, 15b.42, 15c.5, 15d.4, 15a.605. 3122 Id. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3123 7 U.S.C. § 6918(c); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 3124 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3125 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 3126 7 C.F.R. § 15d.4(b); 28 C.F.R. § 42.406 (regarding data collection and information sharing) 3127 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3128 28 C.F.R. § 42.413 3129 GPPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 3130 7 U.S.C. § 2207. 3131 U.S. Dep't of Agriculture, 2018 President's Budget, Office of Civil Rights, p. 11-1, <https://www.obpa.usda.gov/11ocr2018notes.pdf> [hereinafter USDA, 2018 President's Budget]. 3132 See infra note 3136 (discussing testimony of Associate Asst. Secretary for Civil Rights Winona Lake Scott regarding 36 employees dedicated to "program" complaints processing and related issues); Cf. infra notes 3133- 3136.

<https://www.obpa.usda.gov/11ocr2018notes.pdf>

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As of September 30, 2016, OASCR had 131 FTEs, all located in Washington, DC. 3133 As of September 30, 2017, this number was 133 FTEs. 3134 The number of FTEs for FY 2018 was projected to decrease slightly to 126. 3135 In her testimony before the Commission, Associate Assistant Secretary for Civil Rights Winona Lake Scott indicated in November 2018 that OASCR had 36 employees devoted to external or program enforcement activities, "ensuring compliance with civil rights statutes, executive orders, and regulations through our core enforcement functions, such as complaint processing, civil rights impact analyses, compliance reviews, and training." 3136 As illustrated in Figure 12.1, in FY 2016, OASCR requested \$24.44 million, 3137 which increased slightly in FY 2017 to \$24.75 million, 3138 and fell to \$23.30 million in FY 2018. 3139 In FY 2016, Congress allocated OASCR \$24.07 million, 3140 which rose slightly to \$24.20 million in FY 2017, 3141 and Congress allocated an estimated \$24.04 million in FY 2018 through the annualized continuing resolution. 3142 Figure 12.1: OASCR Requested and Allocated Budget

Source: Dep't of Agriculture, FY 2016 Explanatory Notes, Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocr2016notes.pdf>; Dep't of Agriculture, FY 2017 President's Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2017notes.pdf>; Dep't of Agriculture, FY 2018 President's Budget Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocr2018notes.pdf>; Dep't of Agriculture, FY 2019 President's Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2019notes.pdf>.

3133 USDA, 2018 President's Budget, supra note 3131, at 11-1. 3134 U.S. Dep't of Agriculture, 2019 President's Budget, Office of Civil Rights, p. 11-1, <https://www.obpa.usda.gov/11ocr2019notes.pdf> [hereinafter USDA, 2019 President's Budget]. 3135 *Ibid.* 3136 Scott Testimony, Federal Civil Rights Enforcement Briefing, p. 107. 3137 USDA, 2018 President's Budget, supra note 3131, at 11-3. 3138 *Ibid.*, 11-4. 3139 *Ibid.*, 11-3. 3140 USDA, 2019 President's Budget, supra note 3134, at 11-4. 3141 *Ibid.* 3142 *Ibid.*

FY 2016 FY 2017 FY 2018 Requested \$24,443,000 \$24,750,000 \$23,304,000 Allocated \$24,070,000 \$24,206,000 \$24,042,000



Figure 12.1: OASCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www.obpa.usda.gov/11ocr2016notes.pdf>
<https://www.obpa.usda.gov/11ocr2017notes.pdf>
<https://www.obpa.usda.gov/11ocr2018notes.pdf>
<https://www.obpa.usda.gov/11ocr2019notes.pdf>

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During fiscal years 2016 and 2017, OASCR requested more than it was allocated (\$24,443,000 vs. \$24,070,000 in FY 2016 and \$24,750,000 vs. \$24,206,000 in FY 2017). 3143 In response to Commission interrogatories, OASCR indicated that it believes it has sufficient budget and staffing levels to manage its caseload, and that its allocated budget has not deviated significantly from the requested budget for the agency. 3144 Assessment Prioritization of Civil Rights Agency-wide USDA Departmental Regulation No. 4330-003 indicates that "OASCR shall provide the overall leadership, coordination, and direction in USDA's civil rights programs," which includes cooperation with the various divisions of the agency to investigate complaints and resolving any other issues of noncompliance. 3145 Congress created the position of Assistant Secretary of Agriculture for Civil Rights by passing the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. 3146 On January 28, 2019, Secretary Perdue appointed Naomi Earp as Deputy Assistant Secretary for Civil Rights, a position that does not require Senate confirmation, 3147 and she was sworn in as Deputy Assistant Secretary for Civil Rights on February 6, 2019. 3148 Ms. Earp now leads OASCR in her capacity as Deputy Assistant Secretary, as no Assistant Secretary has been confirmed by the Senate. 3149 Because an Assistant Secretary has not been confirmed, OASCR communicates through the Deputy Assistant Secretary directly to the Secretary of USDA. 3150 As will be discussed herein, after proposing shutting down the office altogether, the Trump Administration instead reorganized OASCR effective October 1, 2018. 3151 The memorandum announcing the reorganization included an updated OASCR organizational chart, which does not include the appointed position of Deputy Assistant Secretary for Civil Rights, the position that Ms. Earp, the most senior official at OASCR, currently holds. 3152

3143 See supra notes 3137-3142. 3144 U.S. Dep't of Agriculture, Response to USCCR Interrogatories, at 5. 3145 USDA OASCR, Departmental Regulation No. 4330-003, supra note 3102, at 4-5. 3146 7 U.S.C. § 6918, Pub. L. 103-354, 108 Stat. 3212 (1994). 3147 U.S. Dep't of Agriculture, "Perdue Selects Three Senior Leaders at USDA," <https://www.usda.gov/media/press-releases/2019/01/28/perdue-selects-three-senior-leaders-usda>. 3148 U.S. Dep't of Agriculture, <https://www.ascr.usda.gov/>; see also Dan Flynn, "Brashears, Earp, Hutchins start work today at USDA," Food Safety News, Jan. 29, 2019, <https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>. 3149 U.S. Dep't of Agriculture, "OASCR Leadership and Organization," <https://www.ascr.usda.gov/oascr-leadership-and-organization> (accessed Jun. 17, 2019). 3150 U.S. Dep't of Agriculture, "USDA Organization Chart," <https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf>. 3151 U.S. Dep't of Agriculture, Memorandum Re: Office of the Assistant Secretary for Civil Rights Reorganization (Nov. 8, 2018), <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf> [hereinafter USDA, OASCR Reorganization Memorandum]; see also infra notes 3153-3169. 3152 USDA, OASCR Reorganization Memorandum, supra note 3151.

<https://www.usda.gov/media/press-releases/2019/01/28/perdue-selects-three-senior-leaders-usda>
<https://www.usda.gov/media/press-releases/2019/01/28/perdue-selects-three-senior-leaders-usda>
<https://www.ascr.usda.gov/>
<https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>
<https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>
<https://www.ascr.usda.gov/oascr-leadership-and-organization>
<https://www.ascr.usda.gov/oascr-leadership-and-organization>
<https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf>
<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

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In March 2018, USDA solicited formal comments on a proposed realignment of the OASCR, with the professed objective to "improve customer service, better align functions within the organization, and ensure improved consistency, resource management, and strategic decision-making." 3153 USDA indicated that this proposal was in line with Executive Order 13,781, the Comprehensive Plan for Reorganizing the Executive Branch, 3154 and uses the authority of the Secretary to reorganize. 3155 The reorganization plan, which ultimately was not adopted in full, proposed redistributing OASCR's civil rights duties to various departments throughout the agency, including the Office of the Inspector General (OIG). 3156 This proposed action would have eliminated the Deputy Assistant Secretary for Civil Rights, the Policy Division, the Training and Cultural Transformation Division, and the Early Resolution and Complaint Division. It would have reclassified the Senior Executive Service (SES) Director for the Office of Adjudication as the SES Executive Director for Civil Rights Enforcement who would have been responsible for additional tasks beyond civil rights complaint management, such as budget, contracting and procurement, human resources management, facilities management, strategic planning, and Continuity of Operations. 3157 Some critics of this reorganization raised concerns that USDA was proposing to eliminate a number of positions, but had not done a thorough assessment of need, making the elimination of positions premature. 3158 Some critics are concerned that USDA did not adequately justify why certain positions or departments are being eliminated or consolidated. The USDA Inspector General submitted comments regarding this restructuring, encouraging USDA to keep in mind "OIG's unique mission and independence" when considering this

realignment, and indicated that OIG will continue to examine “the effectiveness of this realignment as part of our future audit planning process.”3159 OASCR was reorganized effective October 1, 2018.3160 Figure 12.2 displays OASCR’s previous organizational structure, prior to October 1, 2018, and figure 12.3 displays what has changed with the reorganization. Notably, the reorganization did not include the proposed dilution of OASCR’s enforcement authority. 3161 The reorganization also elevated the civil rights enforcement functions of OASCR, indicating a prioritization of complaint investigation and enforcement. According to a memorandum from Winona Lake Scott, Acting Deputy Assistant Secretary for Civil Rights, to the Subcabinet Officials, the reorganization was meant to “meet Secretary Perdue’s vision for a more

3153 Strengthening Civil Rights Management, 83 Fed. Reg. 10,825. 3154 Executive Order 13,781, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13,959 (Mar. 16, 2017). 3155 Reorganization Plan No. 2 of 1953 § 4(a), as amended, Pub. L. 103-354, title II, §218(e)(1), 108 Stat. 3213 (Oct. 13, 1994). 3156 Strengthening Civil Rights Management, 83 Fed. Reg. 10,825. 3157 Id. 3158 David Lipsetz, Housing Assistance Council, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 24, 2018). 3159 Phyllis K. Fong, USDA Inspector General, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 23, 2018). 3160 USDA, OASCR Reorganization Memorandum, supra note 3151. 3161 7 U.S.C. § 6918.

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efficient and effective business operation” and “streamline the delivery of equal employment opportunity and program complaint services at the Mission Area level and ensure USDA projects a unified voice on civil rights issue which touch program recipients, customers, applicants and employees.”3162 The memorandum further explains that the 2018 restructuring was meant to target the following eight priorities:

1) Elevating the USDA Agency reporting structure of civil rights functions to the mission area-level; 2) Strengthening OASCR’s role in providing leadership to the mission area civil rights functions; 3) Implementing a timely, fair, transparent and consistent approach to addressing all complaints; 4) Directing effective, robust and area-level mandatory civil rights training; 5) Monitoring and evaluating the implementation of reasonable accommodation throughout the Department; 6) Collaborating with Human Resources on appropriate issues affecting civil rights; 7) Determining optimum staffing levels to implement civil rights functions department-wide; and 8) Empowering mission areas and staff offices to implement civil rights mandates.3163

After the October 2018 reorganization, OASCR consists of five divisions: 3164

• Conflict Complaints Division (CCD)3165 • Center for Civil Rights Enforcement (CCRE);3166 • Center for Civil Rights Operations (CCRO);3167 • Data and Records Management (DRMD);3168 • Program Planning and Accountability (PPAD).3169

3162 U.S. Dep’t of Agriculture, “Office of the Assistant Secretary for Civil Rights,” <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>. 3163 Ibid. 3164 U.S. Dep’t of Agriculture Response to USCCR Affected Agency Review (Jul. 8, 2019) (on file). 3165 CCD monitors agreement compliance; manages and administers the EEO complaint process only for conflict of interest complaints filed against the Office of the Secretary and other senior leaders; drafts Final Agency Decisions (FAD) and Civil Rights Impact Analyses (CRIA); supports EEOC Management Directive; provide guidance to the office. See U.S. Dep’t of Agriculture, “Conflict Complaints Division,” <https://www.ascr.usda.gov/conflict-complaints-division>. 3166 CCRE manages the Employment Complaints Division (ECD), the Employment Investigation Division (EID), the Program Complaints Division (PCD), and the Program Adjudication Division (PAD). 3167 “CCRO provides policy, compliance, training and data and record management services and manages the Compliance Division, Policy Division, and Training Division. 3168 DRMD oversees the Civil Rights Enterprise System (CRES) which tracks all employment and program complaints of discrimination, fields all email and telephonic requests for status updates on complaints, and serves as the repository for all electronic and paper files in OASCR. 3169 PPAD is responsible for coordinating all OIG and GAO audits and performs human resources functions.

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

<https://www.ascr.usda.gov/conflict-complaints-division>

<https://www.ascr.usda.gov/conflict-complaints-division>

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Figure 12.2: OASCR Organizational Structure Prior to October 1, 2018

Source: U.S. Department of Agriculture, “OASCR Organizational Chart,” https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf.

Figure 12.3: OASCR Organizational Structure Effective October 1, 2018

Source: U.S. Dep’t of Agriculture, “Office of the Assistant Secretary for Civil Rights,” 2, <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>.

https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf

https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

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As discussed below, OASCR has had mixed success in prioritizing civil rights enforcement throughout USDA over the years, as evidenced by civil rights class action lawsuits brought against USDA, resulting during the Obama Administration in over one billion dollars paid out to farmers and ranchers whom USDA discriminated against in various programs.3170 Commission reports published in 1965, 1982, and 1990 found discrimination in both program delivery and employment at USDA, and “that civil rights abuses at the USDA were actively contributing to the decline in minority farm ownership.”3171 USDA itself published a pamphlet noting that:

For decades, the United States Department of Agriculture had an unfortunate and checkered history with regards to civil rights. Reports going as far back as the 1960s have found discrimination at USDA in both program delivery and the treatment of employees, and we are the subject of a number of lawsuits brought by minority farmers and ranchers alleging discrimination.3172

USDA added that “between 2001 and 2008, the [George W.] Bush Administration OASCR found merit to only one complaint of program discrimination” out of more than 14,000 civil rights program complaints filed at USDA during that same time period.3173 The George W. Bush Administration ended field investigations of discrimination complaints in favor of conducting investigations solely over the phone.3174 This change, in part, contributed to most pending administrative complaints being dropped by USDA due to the statute of limitations expiring.3175 In April of 2009, GAO testified before Congress regarding recommendations to the new administration to address long-standing civil rights issues at USDA.3176 The testimony, and a report on the same topic issued by GAO in October of 2008, recommended that OASCR better manage strategic planning, with an emphasis on more stakeholder input and linking funding to

3170 See infra notes 3171-3172. 3171 “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” p. 11, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf [hereinafter “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration”]. For discussion of contemporary effects of this longstanding race discrimination perpetrated by USDA without mitigation from its civil rights office, see also Vann R. Newkirk II, “The Great Land Robbery,” *The Atlantic*, September 2019, <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> [hereinafter Newkirk, “The Great Land Robbery”]. 3172 “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” supra note 3171, at 1. 3173 Ibid., 2. 3174 Ibid., 11. 3175 Ibid., 11. 3176 U.S. Government Accountability Office, Testimony as prepared Before the Subcommittee on Department Operations, Oversight, Nutrition and Forestry, Committee on Agriculture, House of Representatives: U.S. Department of Agriculture Recommendations and Options Available to the New Administration and Congress to Address Long-Standing Civil Rights Issues, Apr. 29, 2009, <https://www.gao.gov/assets/130/122370.pdf>.

https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf

<https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>

<https://www.gao.gov/assets/130/122370.pdf>

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anticipated civil rights results.3177 The report also recommended that Congress take action by implementing a statutory performance agreement that would require OASCR to meet certain performance goals by law.3178 GAO suggested that Congress provide for an oversight board to oversee performance of USDA civil rights activities.3179 Finally, the GAO report recommended that the Secretary of USDA explore appointing an ombudsman to address external and internal civil rights concerns.3180 During the Obama Administration, in response to long-standing civil rights deficiencies at USDA, then-Secretary Vilsack commissioned a separate, independent civil rights assessment of USDA which was published in 2011.3181 After receiving the results of the independent assessment, USDA took several steps to improve its civil rights programs, including upgrading OASCR’s complaint tracking and processing system, and reducing the number of open civil rights complaints at OASCR.3182 During the Obama Administration, USDA settled several long-standing class action lawsuits brought by women, black, Latino, and Native American farmers in an effort to remedy some of the longstanding discriminatory practices at USDA.3183 The 2010 Keeseagle consent decree made \$680 million available to over 3,600 Native American farmers, who alleged that they had been unfairly denied loans by the USDA.3184 The agreement addressed discrimination claims made between 1981 and 1999, and contained a number of substantive requirements USDA must fulfill, including creating a debt forgiveness policy, establishing moratoria on foreclosures of claimants’ farms, and implementing a range of programmatic relief measures.3185 Also in 2010, USDA entered into the Pigford II (In re Black Farmers Discrimination Litigation) court-ordered settlement agreement, which totaled \$1.25 billion, including payments of \$870

3177 U.S. Government Accountability Office, Report to Congressional Requesters: U.S. Department of Agriculture, Recommendations and Options to Address Management Deficiencies in the Office of the Assistant Secretary for Civil Rights, October 2008, pp. 5-6, <https://www.gao.gov/assets/290/282835.pdf>. 3178 Ibid., 6-7. 3179 Ibid., 7. 3180 Ibid., 7. 3181 U.S. Department of Agriculture, Independent Assessment of the Delivery of Technical and Financial Assistance Civil Rights Assessment, Mar. 31, 2011, http://www.federationsoutherncoop.com/pigford/research/Civil_Rights_Assessment_Executive_Summary.pdf. 3182 Tom Vilsack, “The People’s Department: A New Era for Civil Rights at USDA,” *Medium*, Aug. 2, 2016, <https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49> [hereinafter Vilsack, “The People’s Department”]; “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” supra note 3171, at 3. 3183 Vilsack, “The People’s Department,” supra note 3182. 3184 Order on Plaintiffs’ Motion for Final Approval of Settlement, *Keeseagle v. Vilsack*, No. 99-3119 (D.D.C. filed April 28, 2011); Bill Chappell, “U.S. Reaches \$680M Deal With Native American Farmers,” *NPR*, Oct. 19, 2010, <https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers>. 3185 U.S. Dep’t of Justice, Office of Public Affairs, “Attorney General Holder and Agriculture Secretary Vilsack Announce Settlement Agreement with Native American Farmers Claiming Discrimination by USDA,” (Oct. 19, 2010) <https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>.

<https://www.gao.gov/assets/290/282835.pdf>

http://www.federationsoutherncoop.com/pigford/research/Civil_Rights_Assessment_Executive_Summary.pdf

<https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49>

<https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers>

<https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>

<https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>

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million to 18,310 black farmers and ranchers.3186 When eligible farmers did not meet the claims deadline of the settlement agreement of Pigford I (Pigford v. Glickman3187), which compensated black farmers for USDA’s discrimination against them in the 1980s and 1990s, Congress extended relief for claimants who had submitted a late-filing request and had not yet received a merits determination.3188 These individuals were grouped into a new, single class and became the Plaintiffs of Pigford II.3189 In addition to the \$1.25 billion compensation scheme, the agreement required a moratorium on foreclosures of claimants’ farms.3190 In 2011, USDA entered into a third settlement, addressing discrimination claims of Latino and women farmers and ranchers, and paying out over \$195 million to 3,144 claimants.3191 The settlement required establishment of a loan forgiveness program for successful claimants, among other terms.3192 Pursuant to the settlement agreement in re: Black Farmers Discrimination Litigation, USDA established an Office of the Ombudsperson dedicated to helping identify systemic issues related to farmers and ranchers for USDA programs.3193 However the office sunset3194 on April 26, 2019, after final disbursements in the case were approved in 2013, and does not appear to be active at the time of this report’s writing.3195 USDA’s civil rights policy statement has changed dramatically in recent years. During the Obama Administration, then-Secretary Vilsack updated the USDA Civil Rights Policy Statement to include gender identity and gender expression stating, “Our non-discrimination regulation for our conducted programs now adds protection from discrimination with respect to two new protected

3186 Order, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed Aug. 8, 2008), http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf; see also, Congressional Research Service, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, prepared by Tadlock Cowan and Jody Feder, May 29, 2013, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> [hereinafter CRS, *The Pigford Cases*]. 3187 *Pigford v. Glickman*, No. 98-1693 (D.D.C. 1999). 3188 CRS, *The Pigford Cases*, supra note 3186; U.S. Dep’t of Justice, Office of Public Affairs, “Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA,” (Feb. 18, 2010) <https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>. 3189 CRS, *The Pigford Cases*, supra note 3186. 3190 U.S. Dep’t of Justice, Office of Public Affairs, “Press Release: Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA,” Feb. 18, 2010, <https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>. 3191 Vilsack, “The People’s Department,” supra note 3182; U.S. Dep’t of Agriculture, “Press Release: ‘Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers,’” Feb. 25, 2011, 3192 Ibid. 3193 Settlement Agreement, In re: Black Farmers Discrimination Litigation, 1:08-mc-00511 at *32 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>. 3194 A sunset provision establishes a date on which an agency or office will expire absent specific reauthorization. 3195 Settlement Agreement, In re: Black Farmers Discrimination Litigation, 1:08-mc-00511 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>; U.S. Dep’t of Agriculture, “Office of the Ombudsperson,” <https://www.usda.gov/our-agency/staff-offices/office-ombudsperson> (accessed Jun. 17, 2019).

http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf

<http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>
<https://www.justice.gov/opa/pr/departments-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.justice.gov/opa/pr/departments-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.justice.gov/opa/pr/departments-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>
<https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>
<https://www.usda.gov/our-agency/staff-offices/office-ombudsperson>

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bases: political beliefs and gender identity.”3196 The current USDA Civil Rights Policy Statement does not specifically include those terms, instead committing that “Doing right means treating all people equally, regardless of race, religion, gender, national origin, or any other characteristic.”3197 However, after Obama-era changes were implemented at OASCR, the office still reportedly faced allegations of ongoing discrimination in programs and employment. Even after making strides in reducing the backlog of complaints at OASCR, the U.S. Office of the Special Counsel in a May 2015 letter to President Obama expressed concern over “serious mismanagement” at OASCR.3198 A former USDA employee testified before Congress in December of 2016 that “[d]iscrimination, sexual harassment, abuse and mismanagement of civil rights complaints have been pervasive at the Agriculture Department for decades.”3199 Furthermore, a 2019 report published by the Center for American Progress found that systemic racism at USDA has denied black farmers equal access to credit and crop insurance, continuing the trend identified by the Commission in 1982 of black farmers being virtually eliminated from the farming industry.3200 At the Commission’s briefing, Associate Assistant Secretary for Civil Rights Winona Lake Scott described some of the recent “proactive measures” of her office, including “civil rights impact analyses on regulations that are put out by the Department.”3201 In FY 2017, OASCR received “over 56 civil rights impact analyses.”3202 In its response to the Commission’s interrogatories, OASCR reported that it has been completing 100 percent of requests for Civil Rights Impact Analyses of proposed regulations within seven days.3203 Strategic Planning & Self-Evaluation

3196 U.S. Dep’t of Agriculture, Civil Rights Policy Statement (Nov. 12, 2014), <https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretaries-CR-Policy-Statement.pdf?MOD=AJPERES>. 3197 U.S. Dep’t of Agriculture, USDA Civil Rights Policy Statement (Feb. 12, 2018), <https://www.ascr.usda.gov/sites/default/files/USDACivilRightsPolicyStatement2018.pdf>. 3198 Letter from U.S. Office of the Special Counsel to President Barack Obama (May 18, 2015) <https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>, Helena Bottemiller Evich and Catherine Boudreau, “Former USDA official: Discrimination ‘systemic and institutionalized,’” Politico, Dec. 1, 2016, <https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644> [hereinafter Evich et al., “Discrimination ‘systemic and institutionalized’”]. 3199 Evich et al., “Discrimination ‘systemic and institutionalized,’” supra note 3198. 3200 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, Apr. 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>; U.S. Comm’n on Civil Rights, The Decline of Black Farming in America, February 1982, <https://files.eric.ed.gov/fulltext/ED222604.pdf>; see also Newkirk, “The Great Land Robbery,” supra note 3171, (arguing that black farmers have been virtually eliminated from farming). 3201 Scott Testimony, Federal Civil Rights Enforcement Briefing, p. 108. 3202 Ibid. 3203 U.S. Dep’t of Agriculture, Response to USCCR Interrogatories.

<https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretaries-CR-Policy-Statement.pdf?MOD=AJPERES>
<https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretaries-CR-Policy-Statement.pdf?MOD=AJPERES>
<https://www.ascr.usda.gov/sites/default/files/USDACivilRightsPolicyStatement2018.pdf>
<https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>
<https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>
<https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644>
<https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644>
<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>
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<https://files.eric.ed.gov/fulltext/ED222604.pdf>

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USDA publishes a strategic plan every four years pursuant to the Government Performance and Results Modernization Act of 2010 which requires every federal government agency to publish a strategic report every four years.3204 USDA’s most recent strategic plan covers fiscal years 2018– 2022.3205 Neither the 2018–2022 strategic plan, nor the 2014–2018 strategic plan makes specific mention of civil rights or OASCR.3206 However, OASCR did publish its own strategic plan in 2015, covering fiscal years 2016–2020.3207 The strategic plan identifies three goals:

1. Improve civil rights complaints processing for internal and external customers in keeping with Federal laws, mandates, and Departmental Regulations and guidelines.
2. Engage leadership in preventing workplace conflict and support conflict management at the earliest stage possible.
3. Demonstrate effective engagement within USDA by ensuring all USDA employees have the necessary resources to support the civil rights of all employees and customers of USDA.3208

USDA stated its commitment to integrating environmental justice strategies with its enforcement responsibilities under Title VI, with the goal of resolving discrimination issues and complaints and working with environmental justice communities.3209 The Secretary of Agriculture is required to make an annual general report to the President and Congress, and also must make special reports on particular subjects whenever required to do so by the President or by either House of Congress or at his own discretion.3210 In addition to this general report, the Secretary is required to submit a report to Congress “on the amounts obligated and expended by the Department during that fiscal year for the procurement of advisory and assistance services.”3211 In USDA’s FY 2017 and 2018 annual reports to Congress, the agency identified as one of its goals the need to conduct more outreach to “new and beginning farmers and ranchers, local and regional food producers, minorities, women, and veterans.”3212 USDA acknowledges that outreach must

3204 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866. 3205 U.S. Dep’t of Agriculture, USDA Strategic Plan FY 2018–2022, <https://www.usda.gov/sites/default/files/documents/usda-strategic-plan-2018-2022.pdf>. 3206 U.S. Dep’t of Agriculture, USDA Strategic Plan FY 2014–2018, <https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>. 3207 U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights FY 2016 – 2020 Strategic Plan, <https://www.ascr.usda.gov/sites/default/files/2016-2020StrategicPlan.pdf> 3208 Ibid. 3209 U.S. Department of Agriculture, Environmental Justice Strategic Plan 2016–2020, pp. 20, 28, <https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>. 3210 7 U.S.C. § 2207. 3211 Id. § 2207a. 3212 U.S. Dep’t of Agriculture, 2018 Agency Financial Report, p. 159, Nov. 14, 2016, <https://www.usda.gov/sites/default/files/documents/usda-fy18-agency-financial-report.pdf> [hereinafter USDA, 2018 Agency Financial Report]; U.S. Dep’t of Agriculture, 2017 Agency Financial Report, p. 148, Nov. 14, 2017, <https://www.usda.gov/sites/default/files/documents/usda-fy17-agency-financial-report.pdf>.

<https://www.usda.gov/sites/default/files/documents/usda-strategic-plan-2018-2022.pdf>
<https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>
<https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>
<https://www.ascr.usda.gov/sites/default/files/2016-2020StrategicPlan.pdf>
<https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>
<https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>
<https://www.usda.gov/sites/default/files/documents/usda-fy18-agency-financial-report.pdf>
<https://www.usda.gov/sites/default/files/documents/usda-fy17-agency-financial-report.pdf>

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include improvements in working with communities to address past civil rights issues, and to support underrepresented groups in their agribusiness endeavors.3213 USDA is also required by Section 14010 of the Food, Conservation, and Energy Act of 2008 to publish an annual report detailing:

- a. The number of civil rights complaints filed that relate to USDA, including whether a complaint is a program complaint or an employment complaint;
- b. The length of time USDA took to process each civil rights complaint;
- c. The number of proceedings brought against USDA, including the number of complaints described in Section 14010 (1) that were resolved with a finding of discrimination; and
- d. The number and type of personnel actions taken by USDA following resolution of civil

rights complaints.3214 The most recent publicly available report available on OASCR’s website covers FY 2016, and highlights changes in complaint volume and resolutions over the previous three fiscal years.3215 USDA OASCR has not filed the requisite report for either FY 2017 or FY 2018. Proactive Compliance Evaluation According to its Departmental Manual, OASCR conducts compliance reviews, to ensure that “all programs and activities for which they are responsible are conducted, managed, and administered in a nondiscriminatory manner.”3216 In conducting these compliance reviews, OASCR establishes the criteria by which OASCR will decide whether to review an agency or agency-operated program; establishes the criteria for the conduct of the reviews; manages the implementation of negotiated Compliance Action Plans when agencies are found to be noncompliant; and may provide technical assistance and training when applicable.3217 The manual goes on to state that agencies are required to be notified at least 60 days in advance of their compliance review about the scope, required information, and deadlines.3218 Also, it states that OASCR must complete the compliance review within 180 days from the receipt of the requested data and information subject to review, and that OASCR will provide an initial report to the agency Director within 30 days of completion of the review, which may initiate voluntary compliance efforts at this time.3219 Furthermore, a final compliance review report should be issued,

3213 USDA, 2018 Agency Financial Report, supra note 3212, at 159. 3214 7 U.S.C. § 2279–2(1), Pub. L. 110-234, 122 Stat. 1447 (2006). 3215 U.S. Dep’t of Agriculture, Food, Conservation, and Energy Act of 2008 Section 14010 Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal Year 2016, April 2017, https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf; see infra notes 3246–3253. 3216 7 C.F.R. § 15.5; see USDA, Departmental Manual No. 4330-001, supra note 3217. 3217 USDA, Departmental Manual No. 4330-001, supra note 3217. 3218 Ibid. 3219 Ibid.

https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf
https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf

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which will also address any agreed-upon resolution (if applicable) or will request a proposed Compliance Action Plan within 30 days.3220 Compliance reviews may consist of a desk audit, where an agency submits documentation to OASCR to review, or an onsite visit.3221 Compliance reviews will look at civil rights resources; training for civil rights staff/officials; public notification of outreach; data collection systems; complaint processing in conducted programs; program availability and accessibility to persons with disabilities; and service to LEP persons.3222 Complaint Processing, Agency-Initiated Changes, & Litigation As former federal civil rights official Margo Schlanger has explained, “USDA’s civil rights office is . . . uniquely empowered, among federal civil rights offices. Its operative regulation . . . granted the USDA Office of the Assistant Secretary not just the authority to adjudicate complaints, but also to make “final determinations . . . as to the corrective actions required to resolve program complaint[s].”3223 Complaint Processing According to OASCR’s Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, when OASCR receives a complaint, the intake process must not take longer than 30 days from the date of receipt.3224 In order for OASCR to process the complaint, the complainant must have filed within 180 days from the date of the alleged discrimination, unless OASCR determines that the discrimination was continuing or ongoing, or OASCR waives the 180 day requirement.3225 OASCR will then determine if it has jurisdiction to process the complaint, based on an evaluation of:

- The regulatory basis for the alleged discrimination;
- The subject matter of the allegations;
- The timeliness of the complaint.3226

3220 Ibid. 3221 Ibid.; 15 C.F.R. § 15.60 et seq. 3222 15 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. 3223 Schlanger, Offices of Goodness, supra note 78, at 53, 85. See 7 C.F.R. §§ 15d.4(b) and 288.1(13). 3224 7 C.F.R. § 15.60 et seq.; U.S. Dep’t of Agriculture, Departmental Manual No. 4330-001, Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, page not numbered (Oct. 18, 2000) <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf> [hereinafter USDA, Departmental Manual No. 4330-001]; 3225 7 C.F.R. 15d(5)(a); USDA, Departmental Manual No. 4330-001, supra note 3217. 3226 USDA, Departmental Manual No. 4330-001, supra note 3217.

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf>

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If OASCR does not have jurisdiction, it will, if appropriate, refer the complaint to the agency with jurisdiction. OASCR will then administratively close the complaint and provide a closure letter to the complainant.3227 The manual also states that for complaints that are complete, OASCR will send a letter of acknowledgement to the complainant with relevant reference information about the complaint.3228 Simultaneously, OASCR will send an Agency Transmittal Memorandum to the identified USDA agency, requesting an Agency Position Statement (APS) be submitted to OASCR within 15 days from the date of the request.3229 If a complaint is incomplete, OASCR will send a letter to the complainant requesting additional information, and providing notice that absent being provided the requested information within 15 days, the complaint may be closed.3230 The manual also states that under certain circumstances, OASCR may close a complaint prior to an investigation.3231 Factors that trigger early closure in some circumstances include: an ongoing systemic investigation, withdrawal of the complaint, voluntary resolution, or a determination that the complaint is frivolous.3232 In

these cases, the complainant will be notified of the pre- investigation closure.3233 Federal regulation will require that if OASCR investigates a complaint involving allegations of discrimination based on disability status, the investigation must be completed within 180 days from the date the intake is completed.3234 The manual states that an investigator will be assigned to the complaint, who will collect, preserve, and analyze all evidence relevant to the complaint; have direct contact with both parties, witnesses, and other informants; produce findings of fact; and make recommendations for disposition or closure of the case.3235 The manual clarifies that complaints can be closed for a number of reasons, such as through a voluntary withdrawal of the complaint; a resolution agreement; lack of jurisdiction or timeliness; if litigation has commenced; or other reasons determined by the Director of OASCR.3236 For complaints that are not closed, Final Agency Decisions (FADs) will be issued, based on the merits of the complainant's allegations, and are considered administratively final.3237 FAD outcomes include:

- Finding of No Violation – if no discrimination occurred

3227 Ibid. 3228 Ibid. 3229 Ibid. 3230 Ibid. 3231 Ibid. 3232 Ibid. 3233 Ibid. 3234 Ibid.; 7 C.F.R. § 15e.170(g). 3235 USDA, Departmental Manual No. 4330-001, supra note 3217. 3236 Ibid. 3237 Ibid.

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- Corrected Violation Finding – if discrimination occurred, but the entity took steps to resolve the violation prior to the issuance of the FAD, the FAD will acknowledge voluntary compliance

- Violation Finding with Requirement for Remedial Action – if there is a finding of noncompliance, a Corrective Action Plan will be developed to ensure compliance3238

Once the FAD has been issued, settlement negotiations can proceed to agree on awarded damages or remedial actions to ensure compliance.3239 If necessary, a monitor may be assigned to track implementation of settlement agreements to ensure compliance.3240 According to a 2013 OASCR memo, after September 20, 2013, OASCR would process program complaints within 540 days, or 18 working months, from the date it accepted the complaint.3241 Within this time frame, the Program Intake Division had up to 60 days, the Early Resolution and Conciliation Division had up to 75 days, the Program Investigation Division had up to 270 days, and the Program Adjudication Division (PAD) had up to 135 days to process a complaint.3242 This memo could potentially conflict with the 180 day deadline to complete investigations of claims involving discrimination based on disability status.3243 However, USDA reported to the Commission that in FY 2016, the Program Intake Division accepted 222 complaints and took an average 31 days to process complaints overall.3244 Further, on average it took 31 days to process accepted complaints.3245 That year, the Program Intake Division processed 122 complaints within 31-60 days.3246 In FY 2017, the Program Intake Division converted 208 complaints into acceptances and took on average 32 days to process complaints overall.3247 Further, on average it took 27 days to process accepted complaints.3248 That year, the Program Intake Division processed 208 complaints within 60 days.3249 In FY 2018, the Program Intake Division converted 162 complaints into acceptances and took on average 24 days to process complaints overall.3250 Further, on average it took 27 days to process accepted complaints.3251 That year, the Program Intake Division processed 163 complaints within 60 days.3252

3238 Ibid. 3239 Ibid. 3240 Ibid. 3241 U.S. Dep't of Agriculture, response to USCCR Document Request, OASCR Policy Memorandum. 3242 Ibid. 3243 See supra note 3227. 3244 U.S. Dep't of Agriculture, Response to USCCR Document Request, Number of Program Discrimination Complaints FY2016-2018. 3245 Ibid. 3246 Ibid. 3247 Ibid. 3248 Ibid. 3249 Ibid. 3250 Ibid. 3251 Ibid. 3252 Ibid.

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Table 12.1: Number of Program Discrimination Complaints for the Program Intake Division between FY 2016 to FY 2018

Referrals FY 2016 FY 2017 FY 2018 OASCR Data Management and Records Division (DMRD) Referrals

4201 5010 1366

Food and Nutrition Service (FNS) Referrals 6392 8634 3660 Intake Processing FY 2016 FY 2017 FY 2018 Intake Correspondence Beginning Inventory N/A 2 39 Correspondence Entered in PCMS 413 403 405 Programmatic Referrals 140 115 102 Converted to Complaint/(Acceptances) 122 178 162 Closures (All Other) 95 119 161 Intake Correspondence Inventory (Current) 27 39 19 Convert to Complaint Processing FY 2016 FY 2017 FY 2018 RD MOU Referrals 105 72 78 Acceptance Letters – Sent to ADR 117 136 85 Total Convert to Complaint Acceptances 222 208 163 Average Processing Time Overall (Days) 31 32 27 Average Processing Time (Acceptances) 31 27 24 Number and Percentage of Complaints Processed within 60 Days

122 100%

208 100%

163 100%

Source: U.S. Department of Agriculture

In FY 2016, the Program Investigation Division processed and/or closed 112 complaints.3253 On average, it took the Program Investigation Division 450 days to complete Reports of Investigation (ROI), and 19 of 50 ROIs were processed within 270 days.3254 On average, it took 328 days to complete all processing actions.3255 In FY 2017, the Program Investigation Division took on average 322 days to complete ROIs, and 39 of 90 ROIs were processed within 270 days.3256 On average, it took 315 days to complete all processing actions.3257 In FY 2018, the Program Investigation Division processed and/or closed 93 complaints.3258 On average, it took the Program Investigation Division 259 days to complete ROI investigations, and 16 of 34 ROIs were processed within 270 days.3259 On average, it took 245 days to complete all processing actions.3260

3253 Ibid. 3254 Ibid. 3255 Ibid. 3256 Ibid. 3257 Ibid. 3258 Ibid. 3259 Ibid. 3260 Ibid.

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Table 12.2: Number of Program Discrimination Complaints for the Program Investigation Division between FY 2016 to FY 2018 FY 2016 FY 2017 FY 2018 Beginning Inventory 207 257 153 Open Complaints/Prior Year Ending Inventory

207 257 153

New Requests for Investigation 157 187 131 ROI's Transmitted to PAD 50 90 105 PID Closures 27 23 21 Transmitted to PAD Closures 35 100 61 Closed Expired ECOA (Sunset Acres) 12 Total Processed/Closures 112 199 Ending Inventory 257 153 85 Average Processing Time for ROI Investigations

450 322 378

Number and percent for ROIs processed within 270 days

19 (38%)

39 (43%)

43 (41%)

Average Age of Cases in Inventory 446 515 552 Average Processing Time for All Actions 328 315 292

Source: U.S. Department of Agriculture

In FY 2016, PAD issued 51 FADs, issued 36 complaint closures, received 4 Food and Nutrition Service (FNS) appeals and 1 disability appeal, and issued 17 FNS appeal decisions and 1 disability appeal decision.3261 That same year PAD took an average of 135 days to process FADs; 45/51 FADs were processed within 135 days.3262 On average, PAD took 104 days to process all decisions issued.3263 In FY 2017, PAD issued 40 FADs, issued 102 complaint closures, received 6 FNS appeals, and issued 5 FNS appeal decisions.3264 That same year PAD took an average of 103 days to process FADs; 33/40 FADs were processed within 135 days.3265 On average, PAD took 42 days to process all decisions issued.3266 In FY 2018, PAD issued 55 FADs, issued 54 complaint closures, and received 4 FNS appeals.3267 That same year PAD took an average of 175 days to process FADs; 4/55 FADs were processed within 135 days.3268 On average, PAD took 80 days to process all decisions issued.3269

3261 Ibid. 3262 Ibid. 3263 Ibid. 3264 Ibid. 3265 Ibid. 3266 Ibid. 3267 Ibid. 3268 Ibid. 3269 Ibid.

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Table 12.3: Number of Program Discrimination Complaints for the Program Adjudication Division between FY 2016 to FY 2018 FY 2016 FY 2017 FY 2018 Beginning Inventory 94 88 140 FADs issued 51 40 103

1. FAD (Finding) 3 2 1 2. FAD (No Finding) 48 38 102

Closures Issued 36 102 79 Ending Inventory 88 140 138 Beginning Inventory of Appeals 19 6 9 FNS Appeals Received 4 6 11 FNS Appeal decisions Issued 17 5 9 Disability Appeals Received 1 Disability Appeal Decisions Issued 1 Ending Appeal Inventory 6 6 8 Beginning Inventory of Noncompliance 0 Requests for Decision on Noncompliance Claims

0

Decisions Issued on Noncompliance Claims 0 Ending Inventory of Noncompliance Claims 0 Transmittals from PCD 84 190 180 Requests for Closures DNR 100 63 ROIs Received from Investigations DNR 90 117 Average Processing Time FY 2016 FY 2017 FY 2018 Average Processing Time for FADs (days) 135 103 196 Number and Percentage of FADs Processed in 135 Days

45 (88%)

33 (83%)

12 (15%)

Average Processing Time for Appellate Decisions (days)

0 82 0

Number and Percentage of Appellate Decisions (days)

0 0 0

Average Processing Time for Noncompliance Decisions

0 0 0

Number and Percentage of Noncompliance Decisions Issued Within 60 Days

0 0 0

Average Processing Time for All Decisions Issued (days)

104 42 118

Source: U.S. Department of Agriculture

In her testimony before the Commission, Associate Assistant Secretary Winona Lake Scott indicated that between FY 2016 and FY 2018, the number of complaints filed per year decreased from 364 to 271.3270 During this time, discrimination on the basis of disability was alleged in 32 percent of complaints, race in 25 percent of complaints, age in 20 percent of complaints, color in

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12 percent of complaints, and sex in 11 percent of complaints.³²⁷¹ Associate Assistant Secretary Scott noted that the time taken to process complaints also decreased significantly during this time frame, dropping from an average of 450 days to 292 days, thus increasing in timeliness by 65 percent.³²⁷² These improvements in process times appear to be necessary as the USDA civil rights office has a long history of failing to process discrimination complaints within its jurisdiction. In 2011, in the Black Farmers Discrimination Litigation, a federal judge issued an Opinion and Order approving a settlement agreement to “resolve the pending claims of approximately 40,000 plaintiffs and compensate thousands of victims of race discrimination whose complaints have gone unanswered for decades.”³²⁷³ In 1997, the original complaint alleged that “the USDA discriminated on the basis of race in allotting benefits under various federal agricultural programs, denying African-American farmers loans and other benefits that were freely granted to similarly situated white farmers.”³²⁷⁴ The complaint also explained,

[the] history of discrimination in the administration of USDA farm programs, combined with the agency’s long-standing refusal to investigate and remedy specific instances of discrimination, deprived countless farmers of desperately needed credit and payments under various federal aid programs, with the result that many farmers suffered severe financial losses and even, in many cases, lost title to their farms.³²⁷⁵

³²⁷¹ *Ibid.*, 107. ³²⁷² *Ibid.*, 107-108. ³²⁷³ Opinion, Black Farmers Discrimination Litigation, No. 08-0511 (D.D.C. Oct. 27, 2011), at 1, <https://www.blackfarmercase.com/Documents/Opinion%20Approving%20Settlement.pdf>. ³²⁷⁴ *Id.* at 3. ³²⁷⁵ *Id.*

<https://www.blackfarmercase.com/Documents/Opinion%20Approving%20Settlement.pdf>

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Table 12.4: OASCR Performance Measures 2017-2020

Source: U.S. Department of Agriculture

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OASCR may publish guidance and technical assistance in the form of USDA Civil Rights Directives. During the fiscal years studied in this report, OASCR published four directives, advising USDA employees and program participants of their civil rights and obligations under the law, ³²⁷⁶ establishing USDA civil rights impact analysis policy and procedures,³²⁷⁷ advising USDA employees and applicants of the employment discrimination complaint process,³²⁷⁸ and establishing an annual civil rights training policy for all USDA employees and administered programs.³²⁷⁹

³²⁷⁶ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 010: Civil Rights Accountability Policy and Procedures, (Dec. 28, 2016), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf. ³²⁷⁷ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 004: Civil Rights Impact Analysis (Oct. 17, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/CRIA%20DR%204300-004-final.pdf>. ³²⁷⁸ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 007: Processing Equal Employment Opportunity (EEO) Complaints of Discrimination (Jul. 12, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>. ³²⁷⁹ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4120- 001: Annual Departmental Civil Rights Training (Jun. 14, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204120-001%20Annual%20Departmental%20Civil%20Rights%20Training.pdf>.

https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf

https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204120-001%20Annual%20Departmental%20Civil%20Rights%20Training.pdf>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204120-001%20Annual%20Departmental%20Civil%20Rights%20Training.pdf>

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OASCR has a website with access to information about filing a programmatic civil rights complaint.³²⁸⁰ A “Reports” page includes downloadable versions of the division’s “Report on Civil Rights Complaints, Resolutions, and Actions,” most recently from 2016, which includes data about the number of program complaints filed and resolved.³²⁸¹ Finally, a list of civil rights directives and implementing regulations, with links to full text versions of each, is also available to the public.³²⁸² There is no detailed information available about current or past program access cases or settlements, other than the material in the annual reports (the most recent of which was from 2016). Interaction and Coordination with External Agencies and Organizations The Departmental Manual states that if OASCR determines that it does not have jurisdiction over a complaint filed with the office, OASCR will refer complaints received to the proper agency. For example, all complaints concerning employment will be referred to the EEOC.³²⁸³ Similarly, if a complainant wishes to have his or her complaint processed under the ADA, OASCR will transfer the case to the appropriate federal agency.³²⁸⁴ Furthermore, if OASCR finds a violation of civil or criminal laws not under OASCR’s jurisdiction in the course of an otherwise jurisdictional investigation, OASCR will refer the ancillary matter to the appropriate federal or state agency.³²⁸⁵ Research, Data Collections, and Reporting As required by statute and regulation, USDA OASCR collects data from federal funding recipients for the purposes of conducting oversight and evaluation.³²⁸⁶ During the Obama administration, USDA upgraded its reporting database, which allows OASCR to track internally, in real time the number and types of complaints filed, helping OASCR identify trends in civil rights enforcement.³²⁸⁷

³²⁸⁰ See U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, <https://www.ascr.usda.gov>. ³²⁸¹ “Reports,” <https://www.ascr.usda.gov/reports>; see “Report on Civil Rights Complaints, Resolutions, and Actions – Fiscal Year 2016,” https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf. ³²⁸² U.S. Dep’t of Agriculture, “Directives and Regulations,” <https://www.ocio.usda.gov/directives-and-regulations>. ³²⁸³ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁴ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁵ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁶ 7 U.S.C. § 2279-1(a) – (d); 7 C.F.R. § 15d.4(b); U.S. Dep’t of Agriculture, Departmental Regulation No. 4370- 001, Collection of race, ethnicity, and gender data for civil rights compliance and other purposes in regard to participation in the programs administered by the Farm Service Agency, the Natural Resources Conservation Service, the Risk Management Agency, the Rural Business Service, the Rural Housing Service, and the Rural Utilities Service (Oct. 11, 2011), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>. ³²⁸⁷ “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” supra note 3171, at 3.

<https://www.ascr.usda.gov/>

<https://www.ascr.usda.gov/reports>

https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf

https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf

<https://www.ocio.usda.gov/directives-and-regulations>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>

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Chapter 13: U.S. Department of the Treasury, Office of Civil Rights and Diversity Legal Authority and Responsibility Congress established the U.S. Treasury Department (Treasury) in 1789, in the First Session of Congress.³²⁸⁸ Currently, Treasury is led by Secretary Steven Mnuchin, who was sworn in as the 77th Secretary of Treasury in February 2017.³²⁸⁹ Treasury states that its mission is “to maintain a strong economy and create economic and job opportunities by promoting the conditions that enable economic growth and stability at home and abroad, strengthen national security by combating threats and protecting the integrity of the financial system, and manage the U.S. Government’s finances and resources effectively.”³²⁹⁰ Treasury’s primary function is to manage money resources, through actions such as regulating national banks, collecting taxes, issuing securities, reporting the government’s daily financial transactions, and printing money.³²⁹¹ Equal access to credit and other financial issues can involve critical civil rights issues.³²⁹² Within Treasury, the Office of Civil Rights and Diversity (OCRD) is responsible for enforcing external civil rights.³²⁹³ Regarding nondiscrimination provisions, OCRD has indicated the following:

Nondiscrimination provisions apply to all programs and activities of recipients and sub-recipients of federal financial assistance. In programs that receive financial assistance from the Department of the Treasury, discrimination is prohibited on the bases of race, color, national origin, age, sex, disability, or limited English proficiency. Reprisal actions against individuals for their prior civil rights activity are prohibited. Additionally, in Department of the Treasury programs and activities, discrimination is prohibited on the bases of disability, and limited English proficiency.³²⁹⁴

³²⁸⁸ 31 U.S.C. § 301, An Act to Establish the Treasury Department, 1 Stat. 65 (1789); U.S. Dep’t of the Treasury, “Department of the Treasury,” 2006, [https://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](https://www.treasury.gov/about/education/Documents/brochure%20(1).pdf) [hereinafter Treasury, “Department of the Treasury”]. ³²⁸⁹ 31 U.S.C. § 301(b); U.S. Dep’t of the Treasury, “The Secretary,” <https://home.treasury.gov/about/general-information/the-secretary>, (accessed Jun. 17, 2019). ³²⁹⁰ U.S. Dep’t of the Treasury, “Role of the Treasury,” <https://home.treasury.gov/about/general-information/role-of-the-treasury>, (accessed Jun. 17, 2019). ³²⁹¹ 31 U.S.C. § 321; Treasury, “Department of the Treasury,” supra note 3288. ³²⁹² See, e.g., U.S. Consumer Financial Protection Bureau, “Promoting Fair, Equitable, and Nondiscriminatory Access to Credit: 2017 Fair Lending Report,” Dec. 2018, <https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>. ³²⁹³ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 1 and No. 2, at 1-8. ³²⁹⁴ U.S. Dep’t of the Treasury, “About: Office of Civil Rights and Diversity,” <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Pages/beneficiaries.aspx> (accessed Jun. 17, 2019) [hereinafter Treasury, “About: Office of Civil Rights and Diversity”].

[https://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](https://www.treasury.gov/about/education/Documents/brochure%20(1).pdf)

<https://home.treasury.gov/about/general-information/the-secretary>

<https://home.treasury.gov/about/general-information/the-secretary>

<https://home.treasury.gov/about/general-information/role-of-the-treasury>

<https://home.treasury.gov/about/general-information/role-of-the-treasury>

<https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>

<https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>

<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Pages/beneficiaries.aspx>

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OCRD enforces the following civil rights statutes and executive orders as part of its external civil rights enforcement program:

• Title VI of the Civil Rights Act of 1964;³²⁹⁵ • Title IX of the Education Amendments Act of 1972;³²⁹⁶ • Section 504 of the Rehabilitation Act of 1973;³²⁹⁷ • Section 508 of the Rehabilitation Act;³²⁹⁸ • The Age Discrimination Act of 1975;³²⁹⁹ • American with Disabilities Act Amendments Act of 2008;³³⁰⁰ • Executive Order 13,166 (Improving Access to Services for Persons with Limited English

Proficiency);³³⁰¹ • Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs)³³⁰²

OCRD additionally has the delegated authority to enforce the following Equal Opportunity Employment civil rights laws:

• Title VII of the Civil Rights Act of 1964;³³⁰³ • Section 501 of the Rehabilitation Act of 1973;³³⁰⁴ • The Genetic Information Nondiscrimination Act of 2008;³³⁰⁵ • The Age Discrimination in Employment Act of 1967;³³⁰⁶ • The Equal Pay Act of 1963;³³⁰⁷ • The Pregnancy Discrimination Act of 1978;³³⁰⁸ • The Notification and Federal Employees Antidiscrimination and Retaliation (No FEAR)

Act of 2002;³³⁰⁹ • The Lilly Ledbetter Fair Pay Act of 2009.³³¹⁰

³²⁹⁵ 42 U.S.C. § 2000d – 2000d-7. ³²⁹⁶ 29 U.S.C. §§ 1681 – 1688. ³²⁹⁷ 29 U.S.C. § 794. ³²⁹⁸ *Id.* § 794d. ³²⁹⁹ 42 U.S.C. §§ 6101 – 6107. ³³⁰⁰ *Id.* § 12101. ³³⁰¹ Exec. Order No. 13,166, 65 Fed. Reg. 50,121. ³³⁰² Exec. Order No. 13,160, 65 Fed. Reg. 39,775. ³³⁰³ 42 U.S.C. § 2000e. ³³⁰⁴ 29 U.S.C. § 701. ³³⁰⁵ 42 U.S.C. § 2000ff. ³³⁰⁶ 29 U.S.C. §§ 621-634. ³³⁰⁷ *Id.* 206(d). ³³⁰⁸ 42 U.S.C. § 2000e. ³³⁰⁹ 5 U.S.C. § 2301. ³³¹⁰ Pub. L. No. 111-2, 123 Stat. 5.

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Two other bureaus within Treasury, the Office of the Comptroller of the Currency (OCC), and the Internal Revenue Service (IRS), have specific responsibilities for enforcing nondiscrimination laws. The IRS is required to ensure that all taxpayers, taxpayer representatives, and employees are being treated fairly and equitably regardless of race, color, national origin, age, sex, or disability through enforcement of the nondiscrimination provisions of Section 1203 of the IRS Restructuring and Reform Act of 1998.³³¹¹ OCC is charged by law with “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”³³¹² OCC has a statutory obligation to regulate national banks, federal branches and agencies of foreign banks, and federal savings associations.³³¹³ OCC is charged with assuring that banks comply with laws and regulations and that their customers have fair access to financial services.³³¹⁴ As of September 30, 2017, OCC supervised 1,347 banks.³³¹⁵ OCC reviews banks under its jurisdiction for compliance with the following laws:

Enforcement Tools The agency enforcement tools that OCRD has specific legal authority to use are:

- Complaint resolution, 3319 • Agency-initiated charges, 3320 • Proactive compliance evaluations, 3321 • Guidance or other policy documents, 3322

3311 26 U.S.C. § 7804, note, Pub. L. 105-206, 112 Stat. 720; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 3. 3312 12 U.S.C. § 1(a). 3313 Id. § 1. 3314 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 2. 3315 Ibid. 3316 42 U.S.C. § 3601 et seq. 3317 15 U.S.C. § 1691 et seq. 3318 50 U.S.C. § 3901 et seq. 3319 31 C.F.R. §§ 17.170, 22.7, 28.610. 3320 Id. § 22.7 (a) and (c). 3321 Id. §§ 22.6 (compliance information required), 22.7(a) (periodic compliance reviews) ("The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part."), 28.605 (procedures for effecting compliance). 3322 31 C.F.R. §§ 22.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 31 C.F.R. § 28.605(a) ("The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations").

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- Regulations, 3323 • Technical assistance, 3324 • Publicity, 3325 • Research, data collection, and reporting, 3326 • Collaboration/partnership with state/local agencies, 3327 • Collaboration/partnership with other federal agencies, 3328 • Strategic Plans, 3329 • Annual Reports, 3330

Budget and Staffing According to Treasury, "OCRD's budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program." 3331 Treasury dispersed \$5 - \$6 billion in federal financial assistance during the Fiscal Years studied. 3332 The following are the consolidated amounts OCRD was allocated and requested for FY 2016 to FY 2018. See Figure 13.1. For FY 2016, OCRD was allocated \$279,491. 3333 For FY 2017, OCRD was allocated \$446,317. 3334 Treasury forecasted that OCRD would require \$514,166 for FY 2018. 3335

3323 31 U.S.C. § 321(b)(1)-(2); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 3324 31 C.F.R. §§ 22.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 31 C.F.R. § 28.605(a) ("The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations"). 3325 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 3326 Id. § 42.406 (regarding data collection and information sharing) 3327 31 C.F.R. §§ 22.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 31 C.F.R. § 28.605(a) ("The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations"). 3328 28 C.F.R. § 42.413. 3329 GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). 3330 12 U.S.C. § 14 (requirement that OCC issue an annual report); 31 U.S.C. § 331(a) (requirement that Treasury issue an annual report). 3331 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 12. 3332 See supra Table 1.5. 3333 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 12. 3334 Ibid. 3335 Ibid.

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Figure 13.1: OCRD's Allocated Budget for FTE Employees Responsible for External Civil Rights Enforcement

Source: Department of Treasury, Response to Interrogatory 6, at 12. Note: OCRD indicated that "OCRD's budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program," and the figures above show costs for three FTE employees dedicated to work on external civil rights complaints.

In FY 2016, OCRD received a total of \$1.27 million for Salaries and Expenses (S&E), 3336 requested \$4.87 million through Treasury's Shared Service Program Budget (SSP), and was allocated \$4.85 million through SSP. In FY 2017, OCRD requested a total of \$1.29 million for S&E, was allocated \$1.53 million for S&E, requested \$5.31 million through SSP, and was allocated \$4.65 through SSP. For FY 2018, OCRD requested \$1.35 million for S&E and \$5.17 million through SSP, and projects that it will be allocated \$1.52 million for S&E and \$4.76 million through SSP. See Figure 13.2.

3336 Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016. U.S. Dep't of the Treas. Response to USCCR Interrogatory No. 6(d) at 13.

FY 2016	FY 2017	FY 2018 (projected)
\$279,492		
\$446,318	\$514,166	
\$-		
\$100,000		
\$200,000		
\$300,000		
\$400,000		
\$500,000		
\$600,000		

Figure 13.1: OCRD's Allocated Budget for FTE Employees Responsible for External Civil Rights Enforcement

FY 2016 to FY 2018	Allocated
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Figure 13.2: OCRD's Requested and Allocated Budget

Source: Department of Treasury, Response to Interrogatory 6, at 13-14. Note: "S&E" refers to Salaries and Expenses, and "SSP" refers to Treasury's Shared Service Program Budget. Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016.

Unlike OCRD and the IRS, which are funded through Congressional appropriations, the Office of the Comptroller of the Currency, which regulates banks, is funded through assessments, fees paid by banks, and interest charged to regulated institutions; therefore, OCC is not included in the President's budget proposal sent to Congress, and is not part of the appropriations process. 3337 In FY 2018 OCC reported revenue of \$1,247.4 million, which reflects a \$42.1 million, or 3.5 percent, increase from FY 2017 revenue of \$1,205.3 million. 3338 In response to the Commission's interrogatories, Treasury also noted that "OCRD's budget did not have non-salary amounts dedicated exclusively to the external civil rights program." 3339 Currently, there are a total of 26 employees within OCRD. 3340 Of these, there are only three OCRD full-time positions dedicated to work on external civil rights complaints (a senior level Civil Rights Program Manager and two Equal Employment Opportunity Specialists). 3341 Treasury reports that several other managers and front office assistants are also involved in supporting external as well as the greater volume of internal enforcement work. 3342 As noted above, Treasury does not have

3337 12 U.S.C. § 482, ("The Comptroller of the Currency may impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office"). See also, U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, 2018 Annual Report, 2018, pp. 33-34, <https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf> [hereinafter Treasury OCC, 2018 Annual Report]. 3338 Treasury OCC, 2018 Annual Report, supra note 3337, at 34. 3339 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 13. 3340 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10. 3341 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 5, and No. 6, at 11-12. OCRD does not employ any part-time staff or full-time/part-time contractors to enforce civil rights. Treasury's Response to USCCR Interrogatory No. 5b-5d at 11-12. The Civil Rights Program Manager is a GS-15 level federal employee. Ibid. 3342 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

FY 2016	FY 2017	FY 2018 (projected)
0		
1000000		
2000000		
3000000		
4000000		
5000000		
6000000		

Figure 13.2: OCRD's Requested and Allocated Budget FY 2016 to FY 2018

S&E Requested	S&E Allocated	SSP Requested	SSP Allocated
https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf			
https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf			

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any non-staff resources dedicated exclusively to external civil rights enforcement. 3343 Moreover, the organizational chart and other information submitted by the U.S. Department of the Treasury to the Commission indicates that external and internal civil rights enforcement are essentially combined in the OCRD. 3344 The 2016 organizational chart had some division between external and internal civil rights enforcement as follows: Figure 13.3 Organizational Structure of OCRD FY 2016

Source: U.S. Department of the Treasury

The FY 2017-2018 organizational chart shows that External Civil Rights is no longer a separately-titled office, and is now under Compliance and Reporting.

3343 See supra note 3332. 3344 U.S. Dep't of the Treasury, Response to USCCR Document Request No. 2, at 21 (referencing their attachment of this chart).

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Figure 13.4 Organizational Structure of OCRD FY 2017-2018 3345

Source: U.S. Department of the Treasury

Treasury also reported to the Commission that staffing levels for OCRD have been relatively consistent between FY 2016 and FY 2018, though there was an additional Equal Opportunity Specialist hired in March 2017. 3346 This hire

resources and will make adjustments if our compliance and enforcement needs increase.”3348 The agency added, “We are constantly assessing our 3345 Ibid. 3346 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 5, at 12. 3347 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 6, at 14. 3348 Ibid.

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Assessment Prioritization for Civil Rights Agency-wide Treasury does not structure its offices such that civil rights enforcement is part of the agency wide leadership team. OCRD is an office within the Departmental Offices of the Office of the Assistant Secretary for Management.3349 OCRD defines its mission as to “ensure that equality, fairness and diversity in employment are realized for all U.S. Department of the Treasury employees and applicants for employment.”3350 The head and Director of the Office of Civil Rights and Diversity is Mariam Harvey;3351 she reports directly to the Assistant Secretary for Management and is given authority by the Secretary of the U.S. Department of the Treasury.3352 This organizational structure at OCRD runs counter to a previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack of direct line of authority to the agency head.3353 Strategic Planning & Self-Evaluation Treasury released its most recent strategic plan in 2018, covering fiscal years 2018-2022.3354 Neither the 2018 strategic plan, nor the previous strategic plan issued for fiscal years 2014-2017 specifically mention OCRD or civil rights. 3355 Both OCC and the IRS issue their own strategic plans, separate from Treasury’s plan. In connection with the function of bank regulation, the OCC’s current strategic plan states that OCC seeks to “Promote financial inclusion and economic opportunity through fair access to financial access services and fair treatment of bank customers and communities.”3356 The IRS’ strategic plan does not mention civil rights.3357

3349 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10. 3350 Treasury, “About: Office of Civil Rights and Diversity,” supra note 3295. 3351 Ibid. 3352 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10. 3353 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. 3354 U.S. Dep’t of the Treasury, Treasury Strategic Plan 2018-2022, 2018, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf. 3355 Ibid.; see U.S. Dep’t of the Treasury, Department of the Treasury FY 2014-2017 Strategic Plan, 2014, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf. 3356 U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency, The OCC Strategic Plan: Fiscal Years 2019-2023, September 2018, p. 4, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>. The OCC’s prior plan sought to “ensure that regulated entities provide consumers fair access to financial services and treat them fairly.” U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency, The OCC Strategic Plan Fiscal Years 2015-2019, September 2014, p. 8, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>. 3357 U.S. Dep’t of the Treasury, Internal Revenue Service, Strategic Plan FY 2018-2022, 2018, <https://www.irs.gov/pub/irs-pdf/p3744.pdf>.

https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf
https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf
https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf
https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf
<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>
<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>
<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>
<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>
<https://www.irs.gov/pub/irs-pdf/p3744.pdf>

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The Secretary of the Treasury also has the obligation to submit annual financial reports to Congress, which include statements on all public receipts and expenditures, contracts, appropriations, and payments made.3358 The Secretary must also report to Congress in person or in writing on matters referred to the Secretary by Congress.3359 Treasury’s 2018 annual report does not specifically mention civil rights, nor does it evaluate the performance of OCRD over the past year.3360 However, Treasury, through OCRD, has at times issued a purportedly annual EEO, Diversity, and Civil Rights Report that highlights OCRD’s accomplishments over the previous fiscal year. The most recent report publicly available was published in 2016, and the report notes with regard to external civil rights enforcement that in FY 2016, Treasury received 31 complaints of discrimination, and provided technical assistance to two Treasury assisted programs.3361 Treasury has not made an EEO, Diversity, and Civil Rights Report publicly available on its website since 2016. OCC is required to submit its own annual report to Congress.3362 OCC’s FY 2018 annual report explains OCC’s supervisory responsibilities, and provides data on supervisory actions taken during the fiscal year, however the report does not provide specific data on supervisory actions initiated due to civil rights violations by OCC regulated entities.3363 Complaint Processing, Agency-Initiated Changes, & Litigation Complaint Processing in its Civil Rights Directive: External Civil Rights Responsibilities and Complaint Process, the U.S. Department of the Treasury has outlined its formal process of receiving and investigating complaints, which is also governed by federal regulations.3364 OCRD is directed to receive and process complaints from any individual who “believes that he or she has been subjected to

3358 31 U.S.C. § 331(a). 3359 Id. § 331(d). 3360 U.S. Dep’t of the Treasury, Agency Financial Report Fiscal Year 2018, Nov. 15, 2018, https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf. 3361 U.S. Dep’t of the Treasury, Annual EEO, Diversity and Civil Rights Report FY 2016, 2016, <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf> [hereinafter Treasury, FY 2016 EEO, Diversity and Civil Rights Report]. 3362 12 U.S.C. § 14; Treasury OCC, 2018 Annual Report, supra note 3337. 3363 Treasury OCC, 2018 Annual Report, supra note 3337, at 23. 3364 U.S. Dep’t of the Treasury, Civil Rights Directive CRD-006: External Civil Rights Responsibilities and Complaint Process (Sep. 5, 2017), <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf> [hereinafter Treasury, External Civil Rights Responsibilities and Complaint Process]. (Office of Civil Rights and Diversity has indicated in this memo that the following relevant statutes, regulations, Executive Orders, and Treasury Orders apply to this complaint process: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794-794e; Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 31 C.F.R. Part 17, 31 C.F.R. Part 22, 31 C.F.R. Part 28; Executive Orders 13160 and 13166; and Treasury Order 102-02.)

https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>

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unlawful discrimination,” or an individual who is a member of a class who “believes that any specific class of persons has been subjected to discrimination.”3365 Complaints must be filed within 180 days of the alleged act of discrimination, however this time frame can be extended by the OCRD Director if there is “good cause.”3366 The Treasury Civil Rights Directive also states that OCRD should be referred any complaints that have been filed directly with any bureau for intake and tracking.3367 When a complaint has been accepted, having been submitted in a timely manner and falling within OCRD’s jurisdiction, Treasury reports that it will then refer the complaint to the relevant bureau for investigation, for which the bureau must submit a report to detail the investigation and provide an agency position statement on the complaint.3368 Treasury states that typically, the investigation will entail interviews with the complainant, the recipient and/or recipient’s staff, agency staff, and other witnesses; and a review of the recipient’s relevant records, agency records, and building facilities; and consideration of any information or evidence gathered, and defenses asserted.3369 Further, once OCRD reviews the report, it will issue a decision “on the merits of the complainant’s allegations,” and will notify the complainant via a letter containing “findings of fact, and conclusions of law,” a description of the remedy for each violation found, and a notice of the right to appeal (if applicable).3370 Treasury reports that it will require cooperation from any agency employee who needs to participate in the investigative process, as part of the employee’s official agency duties.3371 Complaints can be resolved informally via a settlement agreement, which Treasury states will be documented in writing and will be added to the complaint file, with a copy provided to the complainant.3372 The settlement agreement must describe the subject matter of the complaint and the terms that each party has agreed to, and all settlement agreements must be approved by the Office of the General Counsel or appropriate bureau counsel.3373 If appropriate, an appeal may be filed within 60 days of the receipt of the letter of findings, and this time frame may be extended with “good cause.” The Assistant Secretary of Management or a designee is directed to make all final decisions on timely appeals.3374

3365 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364. 3366 31 C.F.R. § 22.7(b); Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364. 3367 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364, at 2. 3368 Ibid., 2-3. 3369 Ibid., 2-3. 3370 Ibid., 3. 3371 Ibid., 3. 3372 Ibid., 3. 3373 Ibid., 3. 3374 Ibid., 3.

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Table 13.1: Number of Complaints Opened, Closed, and Received by OCRD
3375 OCRD Complaints FY 2016 FY 2017 FY 2018 (as of 3/09/2018)* Number of complaints/cases received 31 30 18 Number of Complaints/Cases Investigated/Not Investigated

Number of complaints/cases investigated 5 12 0 Number of complaints/cases not investigated

26 18 03376

Complaint/Case Findings and Outcomes Complaint/case found evidence of discrimination

2 2 0

Complaint/case found no evidence of discrimination

2 5 0

Complaint/case withdrawn 1 0 0 Number of Complaints/Cases Closures Closures 31 25 8 Cases pending final decision 0 4 0 Complaints pending investigation 0 1 0 Cases/complaints in Intake Review 0 0 7 Reason and Method for Complaint/Case Closure

Merits 5 7 0 Reason for Complaint Disability 31 29 18 Disability and age 0 1 0

Source: U.S. Department of the Treasury * No complaints were accepted for investigation at the time of data collection

In FY 2016, OCRD received 31 complaints of discrimination, all of which were based on alleged discrimination against persons with disabilities.3377 Of the 31 complaints received, OCRD investigated five and did not investigate 26.3378 OCRD found evidence of discrimination in two of the five cases it investigated and no evidence in two of the five cases.3379 The remaining complaint was withdrawn.3380 In FY 2016, OCRD took between 77 to 326 days to resolve a case or complaint.3381

3375 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3376 OCRD had not yet accepted any complaints for investigation during FY 2018 at the time OCRD submitted their data to the Commission on March 9, 2018. 3377 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3378 Ibid. 3379 Ibid. 3380 Ibid. 3381 Ibid.

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In FY 2017, OCRD received 30 complaints of discrimination; 29 of the complaints were on the basis of disability and one was on the basis of disability and age.3382 Of those 30 complaints/cases, OCRD investigated 12 and did not investigate 18.3383 OCRD found evidence of discrimination in two cases it investigated, did not find evidence of discrimination in five of the 12 cases, 4 of the 12 cases were pending final decision when Treasury submitted their interrogatory responses to the Commission, and one of the 12 complaints was pending investigation as of that time.3384 In FY 2017, cases and complaints were resolved between 73 and 156 days.3385 At the point of data collection, Treasury reported that during FY 2018 OCRD had received 18 complaints/cases.3386 Each claimed disability discrimination, and OCRD had not accepted any for investigation when Treasury submitted their interrogatory responses to the Commission.3387 OCRD had closed 8 of the 18 complaints/cases.3388 OCRD closes cases because of a lack of jurisdiction or failure to pursue by the complainant. Seven of the 18 complaints/cases were awaiting Intake Review.3389 In FY 2018, OCRD received 32 complaints, two of which OCRD determined to be jurisdictional.3390 OCRD did not issue any findings of discrimination resulting from complaints in FY 2018.3391 During FY 2016-2018, OCRD indicated that it did not receive any complaints filed on the basis of sex or race.3392 Proactive Compliance Evaluation OCRD has federal regulatory responsibility to undertake proactive and periodic compliance investigations.3393 Its Title VI regulations state that, “The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part.”3394 OCRD has the authority to enforce compliance with nondiscrimination laws through administrative hearings and withholding of funds from recipients of federal funding.3395 OCRD stated that it takes a proactive role in preventing discrimination through compliance and accessibility reviews and audits of recipients of federal funding through Treasury programs.3396 In Treasury’s FY 2016 annual civil rights report, Treasury indicated that OCRD was in the process of establishing memoranda of understanding with two recipients of federal financial assistance, however Treasury did not indicate whether these memoranda resulted from complaints or

3382 Ibid.; U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 18. 3383 U.S. Dep’t of the Treasury’s Response to USCCR Interrogatory No. 7, at 14-15. 3384 Ibid. 3385 Ibid. 3386 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 17. 3387 Ibid., 18. 3388 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3389 Ibid. 3390 U.S. Dep’t of the Treasury, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 3391 Ibid. 3392 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 18. 3393 31 C.F.R. § 22.8(a). 3394 Id. § 22.7(a). 3395 Id. §§ 17.170, 22.8, 23.41, 23.46, 28.600, 28.620; U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 9, at 16-17. 3396 U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 2, at 3.

<https://www.law.com/edu/cfr/text/31/22.7>

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compliance reviews.3397 Commission staff were unable to find data regarding OCRD external compliance reviews for FY 2017 and FY 2018. OCC has the power to supervise banks' compliance with fair lending laws and regulations and performs fair lending risk assessments and examinations.3398 OCC has the authority to monitor all banks for compliance with the Fair Housing Act.3399 If OCC determines that a violation of the Fair Housing Act has occurred, it will refer the matter to HUD for further administrative action.3400 Similarly, OCC monitors compliance with the Equal Credit Opportunity Act (ECOA) for banks under the ECOA's jurisdiction. According to OCC, banks will be referred to DOJ for further action whenever the OCC has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit.3401 OCC will refer the matter to HUD if OCC believes that both ECOA and the Fair Housing Act have been violated.3402 IRS similarly has the authority to review the recipients of financial assistance under its jurisdiction for compliance with the applicable civil rights statutes.3403 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OCRD is required by regulation to provide assistance and guidance to recipients of federal funding of compliance requirements under the law.3404 OCRD stated that it focused on the following regulatory changes during the Fiscal Years 2016- 2018:

During FY 2016 and 2017, the main priority was to issue regulations implementing the requirements of Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. During FY 2017, the Department started the drafting and clearance process to issue a Title VI Guidance for Recipients, ensuring Treasury recipients of financial assistance have clear guidance of the compliance requirements. The Department's goal for FY 2018, is to complete the internal clearance of the draft Title VI guidance and submitting it for clearance by DOJ as required by Executive Order 12,250.3405

3397 Treasury, FY 2016 EEO, Diversity and Civil Rights Report, supra note 3361, at 25. 3398 12 U.S.C. § 1818; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 4-5. 3399 12 C.F.R. § 128; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4. 3400 42 U.S.C. § 3601 et seq.; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4. 3401 5 U.S.C. § 1691 et seq.; see also, U.S. Dep't of the Treasury, Comptroller of the Currency, Comptroller's Handbook: Fair Lending, p. 9, January 2018, <https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf> (accessed Jul. 30, 2019) [Treasury OCC, Comptroller's Handbook: Fair Lending]. 3402 Exec. Order No. 12,892, 59 Fed. Reg. 2,939; Treasury OCC, Comptroller's Handbook: Fair Lending, supra note 3401, at 9. 3403 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 3-4. 3404 31 C.F.R. §§ 22.6, 28.605. 3405 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 3, at 9.

<https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf>
<https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf>

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Treasury published a notice of proposed rulemaking on January 7, 2017, that would add regulatory protections for persons with disabilities in programs or activities receiving federal financial assistance from Treasury.3406 In Fiscal Year 2017, Treasury also issued final rules on nondiscrimination on the basis of age and race, color, or national origin in programs or activities receiving federal financial assistance from the department.3407 Additionally, in 2017, as described above OCRD issued guidance in the form of a Civil Rights Directive to establish OCRD's complaint processing procedures.3408 The Directive explains OCRD's complaint process for individuals and furthermore, it notifies entities receiving financial assistance through Treasury programs of their obligations under the law.3409 In August of 2018, OCC issued new guidance regarding the use of evidence of discriminatory practices in Community Reinvestment Act ratings used by OCC.3410 The new guidance advises that evidence of discriminatory or other illegal practices will lead to OCC considering lowering the financial institution's score only if there is a "logical nexus" between the discriminatory practices and the bank's lending activities.3411 The guidance advises examiners as to how they should evaluate discriminatory credit practices along these lines, and also clarifies that even if there is a logical nexus showing that the discriminatory practice impacted lending activities, there may be mitigating factors and "[f]ull consideration is given to the remedial actions taken by the bank."3412 The guidance cites to federal regulations.3413 Interaction and Coordination with External Agencies and Organizations Executive Order 12,892, which encourages cooperation in implementing the Fair Housing Act across federal agencies, requires Treasury's OCC to notify HUD of facts or information suggesting a violation of the Fair Housing Act, and to notify DOJ if such facts or information indicate a possible pattern or practice of discrimination in violation of the Act.3414 OCC also has an MOU

3406 Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of the Treasury, 82 Fed. Reg. 67 (The proposed rule will be codified as 31 C.F.R. Part 40) 3407 Treasury affected agency review; see Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance From the Department of the Treasury, Oct. 11, 2017, <https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>; Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury, Dec. 13, 2016, <https://www.federalregister.gov/documents/2016/12/13/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or>. 3408 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364, at 3. 3409 Ibid. 3410 U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, PPM 5000-43, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (Aug. 15, 2018), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf> 3411 Ibid. 3412 Ibid., 4. 3413 Ibid., passim. 3414 Exec. Order No. 12,892, 59 Fed. Reg. 2,939.

<https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>
<https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>
<https://www.federalregister.gov/documents/2016/12/13/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or>
<https://www.federalregister.gov/documents/2016/12/13/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or>
<https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf>

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with HUD under which OCC will refer complaints that allege potential violations of the Fair Housing Act to HUD.3415 Additionally, OCC must notify DOJ of suspected fair lending violations under ECOA.3416 Similarly, OCRD has the ability to refer litigation to DOJ as one of its enforcement tools for a violation or threatened violation of civil rights protections under Title VI and Title IX.3417 Research, Data Collections, and Reporting OCRD collects data regarding the types of discrimination alleged in complaints filed with OCRD.3418 OCRD does not collect racial and ethnic data from beneficiaries of Treasury programs.3419 OCRD is not required by law to collect data on civil rights issues; however Treasury stated that it plans to issue guidance to all recipients of federal funding requiring them to collect data on race and national origin.3420

3415 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 6. 3416 5 U.S.C. § 1691 et seq. 3417 See 31 C.F.R. §§ 22.8(a)(1) ("If there appears to be a failure or threatened failure to comply with this [Treasury Title VI regulation]" OCRD may refer the matter to DOJ), 28.615(a)(1) ("If there appears to be a failure or threatened failure to comply with [Treasury's] Title IX regulations" OCRD may refer the matter to DOJ). 3418 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 11, at 19. 3419 Ibid. 3420 Ibid.

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Chapter 14: U.S. Department of the Interior, Office of Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of the Interior (DOI) in 1849.3421 Currently, DOI's Secretary is David Bernhardt, who was sworn in on April 11, 2019. Secretary Bernhardt replaced Ryan Zinke, who served as President Trump's Secretary of the Interior from 2017 until December 2018.3422 According to federal regulations, the Office of Civil Rights (DOI OCR) within DOI is responsible for protecting individuals from discrimination based on race, national origin, age, sex, or disability under any program or activity funded by DOI.3423 DOI's website clarifies that: "Discrimination includes: denial of services, aids, or benefits; provision of different service or in a different manner; and segregation or separate treatment. In addition, sex discrimination is prohibited in Federally assisted educational programs."3424 Under federal law and regulations, DOI is obligated to process civil rights complaints, and is specifically required to provide assistance and guidance, in the course of implementing civil rights laws and regulations to ensure recipients of federal financial assistance administered by DOI do not discriminate on the basis of race, national origin, gender, or disability, and with regard to DOI funded educational and training activities, on the basis of sex, sexual orientation, or status as a parent.3425 Its jurisdiction also includes environmental justice.3426 Furthermore, DOI has designated civil rights coordinators in the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey.3427 These officials are responsible for processing and investigating civil rights complaints, including those against bureau conducted programs and bureau federally assisted

3421 43 U.S.C. § 1451, R. S. § 437, 9 Stat. 395 (1849). 3422 43 U.S.C. § 1451; U.S. Dep't of the Interior, "David Bernhardt – Secretary of the Interior," <https://www.doi.gov/whoweare/asbernhardt>. 3423 See generally, 43 C.F.R. § 17 (Title VI), 27 (Trans-Alaska Pipeline Authorization Act implementation of civil rights protections), 41 (Title IX); U.S. Dep't of the Interior, "Public Civil Rights," <https://www.doi.gov/pmb/eeo/public-civil-rights> [hereinafter DOI, "Public Civil Rights"]. 3424 DOI, "Public Civil Rights," supra note 3423. 3425 20 U.S.C. § 1681; 29 U.S.C. § 701 et seq.; 42 U.S.C. 2000d et seq.; see generally, 43 C.F.R. §§ 17, 27, 41; U.S. Dep't of the Interior, Civil Rights Directive 2011-01: Public Civil Rights Complaint Procedures (Mar. 14, 2011) https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf [hereinafter DOI, Public Civil Rights Complaint Procedures]; Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 3426 Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations, 59 Fed. Reg. 7,629. 3427 See infra notes 3467-3477.

<https://www.doi.gov/whoweare/asbernhardt>
<https://www.doi.gov/pmb/eeo/public-civil-rights>
https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf
https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf

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programs.3428 DOI issues millions in federal funding. In FY 2016, DOI issued over \$763 million in over 18,000 cooperative agreements.3429 DOI OCR has indicated that it externally enforces the following civil rights statutes, regulations, and executive orders:3430

• Title VI of the Civil Rights Act of 1964;3431 • The Architectural Barriers Act of 1968;3432 • Title IX of the Education Amendments of 1972;3433 • Section 504 of the Rehabilitation Act of 1973, as amended;3434 • Section 508 of the Rehabilitation Act of 1973, as amended;3435 • Age Discrimination Act of 1975, as amended;3436 • Civil Rights Restoration Act of 1987, as amended;3437 • Telecommunications Accessibility Enhancement Act of 1988;3438 • Americans with Disabilities Act of 1990;3439 • Architectural Barriers Act Accessibility Standards;3440 • Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations;3441

3428 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3429 See, e.g., Michael Doyle, "U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review," Science Magazine, Jan. 9, 2018, <https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review> [hereinafter Doyle, "U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review"]. 3430 U.S. Dep't of the Interior, Response to USCCR Interrogatory 1, at 1-2. 3431 42 U.S.C. § 2000d et seq. 3432 42 U.S.C. § 4151, Pub. L. 90-460 and implementing regulations at 43 C.F.R. §§ 17.550-551 and 17.570(f). 3433 20 U.S.C. §§ 1681-1688, Pub. L. 92-318; 86 Stat. 235; 373; 20 U.S.C. 1681-1688 as amended by Pub. L. 93- 568; 86 Stat. 1855; except sections 904 and 906 of those Amendments; U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 1, at 1. The Interrogatory response notes that this law "is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution." Id. 3434 29 U.S.C. § 794, Pub. L. 93-112; 87 Stat. 394; as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516; 88 Stat. 1617; as also amended by the Rehabilitation, Comprehensive Service, and Developmental Disabilities Act of 1978, Pub. L. 95-602; 92 Stat. 2955 and implementing regulations at 43 C.F.R. Subpart B. 3435 29 U.S.C. § 794d; as amended by the Workforce Investment Act of 1998, Pub. L. 105-220; 112 Stat. 936 and implementing regulations at 29 C.F.R. Part 1615. 3436 42 U.S.C. § 6101 et seq., Pub. L. 94-135; Title III. 3437 42 U.S.C. § 2000d, Pub. L. 100-259; 102 Stat. 28; as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166. 3438 40 U.S.C. § 762 a-d, Pub. L. 100-542; 102 Stat. 2721. 3439 42 U.S.C. § 12101 et seq, Pub. L. 101-336; and implementing regulations at 29 CFR § 35 and 29 C.F.R. § 1630. 3440 41 C.F.R. §§ 102-76.60, .70, .75, .80, .85, .90, .95 are GSA-ABA Accessibility Standards in which GSA adopts appendices C and D to 36 CFR § 1191 (ABA Chapters 1 and 2, and Chapters 3-10). 3441 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

<https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review>
<https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review>

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• Executive Order 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs;3442
• Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency;3443

Furthermore, the following are mentioned in DOI's Departmental Manual as being under the external enforcement jurisdiction of DOI OCR:

• Title VII of the Civil Rights Act of 1964, as amended;3444 • The Civil Rights Act of 1991, as amended;3445 • Age Discrimination in Employment Act, as amended;3446 • Americans with Disabilities Act Amendments Act of 2008;3447 • Equal Pay Act of 1963;3448 • The Notification of Federal Employee Anti-discrimination and Retaliation Act (No FEAR

Act of 2002);3449 • Genetic Information Nondiscrimination Act of 2008;3450 • Lilly Ledbetter Fair Pay Act of 2009;3451 • Title II of the Trans-Alaska Pipeline Authorization Act;3452 • Executive Order 11,478, Equal Employment Opportunity in the Federal Government;3453 • Other "Federal statutes and regulations that prohibit discrimination on the basis of race,

color, national origin, religion, sex, age, disability, sexual orientation, and genetic information, and that promote equal employment opportunity through a continuing affirmative program."3454

3442 Exec. Order No. 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,397. 3443 Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121. 3444 42 U.S.C. §§ 2000d-1-2000d-4; as amended, Pub. L. 92-261; 42 U.S.C. § 2000e et seq. and

implementing regulations at 29 C.F.R. § 1606. 3445 Pub. L. 102-166; as amended, 42 U.S.C. 2000e et seq.; Pub. L. 92-261. 3446 Pub. L. 93-259; 29 U.S.C. §§ 621-634 and implementing regulations at 43 C.F.R. Subpart C; § 2 of Reorganization Plan No. 1 of 1978, Exec. Order No. 12,106 § 1-101. 3447 Pub. L. 110-325; 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. § 1630. 3448 Pub. L. 88-38; 29 U.S.C. 206(d); Reorganization Plan No. 1 of 1978 and implementing regulations at 29 C.F.R. §§ 1620-1621. 3449 Pub. L. 107-174; 5 U.S.C. § 2301 and implementing regulations at 29 C.F.R. Subpart G. 3450 Pub. L. 110-233; 42 U.S.C. § 2000ff et seq. and implementing regulations at 29 C.F.R. § 1635. 3451 Pub. L. 111-2; 123 Stat. 5. 3452 43 U.S.C. § 1651, Pub. L. 93-153; 87 Stat. 576 and implementing regulations 43 C.F.R. § 27. 3453 Exec. Order No. 11,478, Equal Employment Opportunity in the Federal Government, 34 Fed. Reg. 12,985. 3454 U.S. Dep't of the Interior, Departmental Manual, Part 12, Chapter 19, pp. 1-5.

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Enforcement Tools The agency enforcement tools the DOI OCR has specific legal authority to use are:

• Complaint resolution³⁴⁵⁵ • Agency-initiated charges³⁴⁵⁶ • Proactive compliance evaluations³⁴⁵⁷ • Guidance or other policy documents³⁴⁵⁸ • Regulations³⁴⁵⁹ • Technical assistance³⁴⁶⁰ • Publicity³⁴⁶¹ • Research, data collection, and reporting³⁴⁶² • Collaboration/partnership with state/local agencies³⁴⁶³ • Collaboration/partnership with other federal agencies³⁴⁶⁴ • Strategic Plans³⁴⁶⁵ • Annual Reports³⁴⁶⁶

Budget and Staffing DOI OCR noted that from FY 2016 to FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of three FTE employees assigned to the Public Civil Rights Division.³⁴⁶⁷ After one FTE employee left in FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of just two FTE employees assigned to the Public Civil Rights Division in FY 2018.³⁴⁶⁸ These FTE employees "provide oversight and technical assistance to bureau Public Civil Rights employees in processing and responding to civil rights complaints, in addition to processing and responding to some cases by the DOI OCR Public Civil Rights Division employees directly."³⁴⁶⁹

3455 43 C.F.R. §§ 17.6, 17.7 17.280, 27.8,27.9, 41.605 3456 Id. § 17.6(a) and (c). 3457 Id. §§ 27.7, 27.8(b), 41.605, 17.5, 17.6(a), 17.280, 17.320, 17.330(a) (conduct of investigations). 3458 Id. §§ 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3459 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 3460 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3461 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information). 3462 Id. § 42.406 (regarding data collection and information sharing). 3463 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3464 28 C.F.R. § 42.413. 3465 GPRM Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). 3466 43 U.S.C. § 1465. 3467 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 6, at 5. 3468 Ibid. 3469 Ibid.

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DOI OCR requires funds in order to carry out its duties as the "focal point for policy development and administration of equal opportunity and public access civil rights programs for the Department of Interior."³⁴⁷⁰ These duties include developing policies and procedures related to civil rights programs, managing the public civil rights complaints processing system, managing the equal employment complaints processing and reporting system, and evaluating program civil rights compliance.³⁴⁷¹ DOI OCR requested \$3.418 million for FY 2016.³⁴⁷² DOI OCR was allocated \$3.453 million for FY 2016, and \$3.378 million went to Departmental Operations and \$75,000 went to Working Capital Funds, namely the EEO Complaints Tracking System and Special Emphasis Program.³⁴⁷³ For FY 2017, DOI OCR requested \$3.481 million to fund their operations.³⁴⁷⁴ DOI OCR indicated that there are currently two staff members who work on external complaints, however, this number is down from three full-time staff members, as one person left the Department in 2017.³⁴⁷⁵ These two full-time employees are focused on external civil rights enforcement. DOI OCR reports that it plans to initiate a workforce planning exercise in FY 2019 to "determine appropriate organizational design, staffing levels, identify employee development and competency gaps, and division of workload."³⁴⁷⁶ DOI OCR also indicated other DOI staff outside of DOI OCR who work on civil rights enforcement, including:

• One full-time EEO Specialist at the Bureau of Land Management • One full-time EEO Specialist at the National Park Service • One full-time EEO Specialist at the Office of Surface Mining Reclamation • Seven full-time Regional Accessibility Coordinators in the Public Civil Rights Program at

the U.S. Fish and Wildlife Service • One full-time Civil Rights Analyst at the Bureau of Reclamation • Two quarter-time staff members (one EEO Specialist and one Supervisory EEO Manager)

at the National Park Service, and in FY 2017 and FY 2018 only, three quarter-time

3470 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2018, p. 48, https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_os_budget_justification.pdf. 3471 Ibid., 48-49; see U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2019, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_os_budget_justification.pdf. 3472 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2016, https://www.doi.gov/sites/doi.gov/files/uploads/fy2016_os_budget_justification.pdf. 3473 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2017, https://www.doi.gov/sites/doi.gov/files/uploads/fy2017_os_budget_justification.pdf. 3474 Ibid. 3475 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 5, at 4-5. 3476 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 6, at 6.

https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_os_budget_justification.pdf
https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_os_budget_justification.pdf
https://www.doi.gov/sites/doi.gov/files/uploads/fy2016_os_budget_justification.pdf
https://www.doi.gov/sites/doi.gov/files/uploads/fy2017_os_budget_justification.pdf

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Supervisory EEO Managers and six quarter-time EEO Specialists at the National Park Service

• One half-time Complaints Manager and EEO Specialist; three quarter-time Regional Chiefs, Office of Diversity and Inclusion; one quarter-time Diversity Outreach Specialist; and one quarter-time EEO Specialist at the Fish and Wildlife Service³⁴⁷⁷

Assessment Prioritization of Civil Rights Agency-wide DOI's agency-wide mission and self-identified priorities do not directly identify civil rights enforcement.³⁴⁷⁸ When asked about its current civil rights policy priorities, DOI OCR indicated that its main priority is "to ensure that the public is not discriminated against based [on] all of its federally conducted and federally assisted programs and activities."³⁴⁷⁹ DOI OCR also pointed to Secretarial Order No. 3366, Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior, which initiates a new effort that aims to, in part, "proactively serve people with disabilities with respect to recreational opportunities at the Department."³⁴⁸⁰ DOI OCR does not have a direct line of authority to the agency head. DOI OCR reports directly to the Deputy Secretary of Interior, and ultimately to the Secretary.³⁴⁸¹ During the fiscal years examined, the number of cases that DOI OCR closed declined from 34 in FY 2016 to 7 in FY 2018.³⁴⁸²

3477 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 5, at 4. It was unclear from OCR's responses to USCCR's Interrogatories whether these positions were devoted to strictly internal civil rights enforcement, or if some of these positions worked on external civil rights enforcement. 3478 U.S. Dep't of the Interior, "About", <https://www.doi.gov/whoweare>. The Commission notes that this includes specific civil rights protections for Native Americans. See, e.g., USCCR, Broken Promises, supra note 341, at 12-18 (describing treaty-based and other civil rights obligations of the federal government towards Native Americans). 3479 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 3, at 3. 3480 U.S. Dep't of the Interior, Order No. 3366, Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior (April 18, 2018), https://www.doi.gov/sites/doi.gov/files/uploads/so_recreation_opps.pdf; see also U.S. Dep't of the Interior, "Press Release: Zinke Signs Secretarial Orders to Increase Recreational Opportunities on Public Lands and Waters," Apr. 18, 2018, <https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>. 3481 U.S. Dep't of the Interior, Strategic Plan for Fiscal Years 2018-2022, 2018, p. 6, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf> [hereinafter DOI, Strategic Plan FY 2018-2022]. 3482 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 7, at 6.

<https://www.doi.gov/whoweare>
https://www.doi.gov/sites/doi.gov/files/uploads/so_recreation_opps.pdf
<https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>
<https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf>

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In January 2018, DOI began requiring that its funding agreements for grants over \$50,000 align with the Secretary's priorities.³⁴⁸³ These priorities include to "actively support efforts to secure our southern border" and "utilizing our natural resources" for mining and other financial benefits, but except for listing "tribal self-determination, self-governance and sovereignty," they do not directly mention civil rights.³⁴⁸⁴ As discussed above, civil rights compliance is handled by a small staff.³⁴⁸⁵ Organizational Structure DOI OCR is located within the DOI Office of Policy, Management and Budget.³⁴⁸⁶ Tyonia Ward is the head and Acting Director of the Office of Civil Rights.³⁴⁸⁷ See Figure 14.1 for DOI OCR's Organizational Chart. DOI OCR has indicated that its "organizational structure and general civil rights-related roles/responsibilities have not changed over the fiscal years in question."³⁴⁸⁸ DOI OCR is "the focal point for all civil rights, equal opportunity programs, and affirmative employment," in DOI, and works to "develop and enforce civil rights and equal opportunity programs pursuant to existing laws, executive orders and regulations and to ensure equal opportunity for all Departmental employees and federally assisted programs by the Department."³⁴⁸⁹ DOI OCR's Public Civil Rights Division states that it handles external complaints of discrimination on the grounds of race, national origin, age or disability under "any program or activity conducted by or which receives Federal financial assistance from the Department of the Interior," and it states that: "Sex discrimination is prohibited in federally assisted educational programs."³⁴⁹⁰ DOI regulations also require that recipients of federal funding not discriminate on the basis of parental or marital status.³⁴⁹¹ Sloan Farrell is the Chief of the Public Civil Rights Division, and reports to the Acting Director of DOI OCR.

3483 See U.S. Dep't of Interior, Office of the Secretary, Memorandum to All Assistant Secretaries, Guidance for Financial Assistance Actions Effective Fiscal Year 2018 (Dec. 28, 2017), <http://apps.washingtonpost.com/g/documents/national/interior-guidance-for-fiscal-2018-grants/2698/>. See also Doyle, U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review," supra note 3429 (grants over \$50,000 will be reviewed to determine if aligned with priorities such as "actively supporting" efforts to secure our southern border, "ensuring "American energy is available to meet our security and economic needs," employing more veterans, and shifting "the balance toward providing greater public access to public lands over restrictions to access," according to accompanying memo). 3484 See "Interior's Priorities for FY 2018 Grants," The Washington Post, Jan. 9, 2018 (attaching U.S. Dep't of Interior, Office of Secretary Memorandum, Attachment: Priorities for Financial Assistance), <https://apps.washingtonpost.com/g/documents/national/interiors-priorities-for-fiscal-2018-grants/2699/>. 3485 See supra notes 3467-3477. 3486 U.S. Dep't of the Interior, "Organization Chart," <https://www.doi.gov/lbc/about-us/org-chart>. 3487 U.S. Dep't of the Interior, "Contact Us," <https://www.doi.gov/pmb/eoo/contact-us/>. 3488 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 4, at 3-4. 3489 U.S. Dep't of the Interior, "Office of Civil Rights and Chief Diversity Officer," <https://www.doi.gov/pmb/eoo>. 3490 DOI, "Public Civil Rights," supra note 3423. 3491 43 C.F.R. § 41.445.

<http://apps.washingtonpost.com/g/documents/national/interior-guidance-for-fiscal-2018-grants/2698/>
<https://apps.washingtonpost.com/g/documents/national/interiors-priorities-for-fiscal-2018-grants/2699/>
<https://www.doi.gov/lbc/about-us/org-chart>
<https://www.doi.gov/pmb/eoo/contact-us/>
<https://www.doi.gov/pmb/eoo>

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Figure 14.1: DOI OCR Organizational Chart

Source: U.S. Department of the Interior,

Strategic Planning & Self-Evaluation DOI produces a strategic plan every four fiscal years as required by the Government Performance and Results Act Modernization Act of 2010.³⁴⁹² During the time period studied, Interior operated under three strategic plans: the FY 2011 – 2016 Strategic Plan,³⁴⁹³ FY 2014-2018 Strategic Plan,³⁴⁹⁴ and the 2018-2022 Strategic Plan.³⁴⁹⁵ While none of the three plans specifically mention protection of civil rights, all plans discuss protection of Indian territorial and water rights.³⁴⁹⁶ Additionally, the 2011 Plan prioritized protecting Indian treaty and subsistence rights,³⁴⁹⁷ and the

3492 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866. 3493 U.S. Dep't of the Interior, United States Department of the Interior Strategic Plan for Fiscal Years 2011 – 2016, https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2011-FY2016_StrategicPlan.pdf [hereinafter DOI, Strategic Plan FY 2011-2016]. 3494 U.S. Dep't of the Interior, Strategic Plan FY 2014-2018, 2014, https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2014-2018-POSTED-ON-WEBSITE-4.pdf [hereinafter DOI, Strategic Plan FY 2014-2018]. 3495 DOI, Strategic Plan FY 2018-2022, supra note 3481. 3496 Ibid., 19; DOI, Strategic Plan FY 2014-2018, supra note 3494, at 19; DOI, Strategic Plan FY 2011 – 2016, supra note 3493, at 27. 3497 DOI, Strategic Plan FY 2011 – 2016, supra note 3493, at 23.

https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2011-FY2016_StrategicPlan.pdf
https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2014-2018-POSTED-ON-WEBSITE-4.pdf
https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2018-2022-POSTED-ON-WEBSITE-4.pdf

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2014 Strategic Plan prioritized the strengthening of Tribal Nations and insular communities.³⁴⁹⁸ The FY 2018-2022 strategic plan prioritizes strengthening tribal self-determination, fulfilling U.S. government fiduciary obligations to Tribal Nations, and strengthening tribal economic and health capacities.³⁴⁹⁹ The U.S. Department of the Interior is required to submit an annual report to Congress, with the only statutory requirement being that the report "not exceed a total of one thousand two hundred and fifty pages."³⁵⁰⁰ DOI's most recent annual report covering FY 2018 makes no specific mention of civil rights, nor does it establish any goals or achievements for DOI OCR.³⁵⁰¹ Complaint Processing,

Agency-Initiated Changes, & Litigation Complaints DOI OCR accepts external civil rights complaints that allege discrimination on the basis of race, color, national origin, gender, disability, religion, sexual orientation, or status as a parent.³⁵⁰² DOI OCR reported that it “investigated and resolved civil rights complaints in accordance with relevant statutes, regulations and policies to include DOI OCR civil rights directives and the Departmental Manuals.”³⁵⁰³ Depending on the outcome of the investigation, this letter could be a Letter of Resolution (when the respondent has volunteered to take action to comply with the law), A Violation Letter of No Findings (when the respondent is found to be in compliance with the law), a Violation Letter of Findings (when the respondent is found to be in non-compliance with the law and pre-findings voluntary compliance cannot be achieved), or a Letter of Concern (when there is insufficient evidence of a violation, but there are certain matters of concern with the respondent).³⁵⁰⁴ DOI OCR is responsible for setting DOI civil rights complaint policies and standardizing complaint processing procedures across all DOI bureaus.³⁵⁰⁵ For all civil rights complaints received by any bureau of DOI, a bureau EEO officer or designee is responsible for processing the complaint.³⁵⁰⁶ Complaints filed that do not fall under the jurisdiction of a specific DOI bureau will

3498 DOI, Strategic Plan FY 2014-2018, supra note 3494, at 31. 3499 U.S. Dep’t of the Interior, Strategic Plan FY 2016-2022, supra note 3481, at 32-34. 3500 43 U.S.C. § 1465. 3501 U.S. Dep’t of the Interior, 2019/2020 Annual Performance Plan & 2018 Report (APP&R), Mar. 19, 2019, https://www.doi.gov/sites/doi.gov/files/uploads/doi_final_appr_2019-2020.pdf. 3502 43 C.F.R. § 17 et seq.; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 5. 3503 U.S. Dep’t of the Interior, Response to USCCR Interrogatory No. 7, at 6. 3504 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 13-14. 3505 U.S. Dep’t of the Interior, Civil Rights Directive 2009-01: Policy for Implementing a Public Civil Rights Program (Jun. 25, 2009), pp. 1, 6-7 [hereinafter DOI, Policy for Implementing a Public Civil Rights Program]. 3506 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 4; DOI bureaus with dedicated complaint processing staff include: the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey; see supra notes 3475-3477.

https://www.doi.gov/sites/doi.gov/files/uploads/doi_final_appr_2019-2020.pdf

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be processed by DOI OCR.³⁵⁰⁷ The process is also set forth in internal directives regarding the public civil rights complaints process, which provide that upon initial receipt of a complaint, the bureau that receives the complaint must date stamp all incoming correspondence in order to “ensure the complainant’s ability to seek redress of the alleged discrimination in a timely manner.”³⁵⁰⁸ The bureau then sends a letter acknowledging receipt of the complaint that informs the complainant that the matter is being reviewed.³⁵⁰⁹ If a received complaint is filed on behalf of another individual, the bureau will contact that individual to confirm that they would like to pursue the allegations, and will either continue reviewing the complaint or close the matter, depending on the individual’s response.³⁵¹⁰ The internal directives state that the bureau that received the complaint will then review the complaint to determine whether it has jurisdiction to pursue an investigation and will either assign a case number when appropriate jurisdiction is determined, or will refer the complaint to the appropriate agency when there is no jurisdiction.³⁵¹¹ And according to federal regulations, for the bureau to have jurisdiction, the complaint must allege discrimination on one of the protected bases; it must allege discrimination that occurred in a program or activity that is federally funded or receives federal financial assistance; it must be covered by one or more of the statutes that Interior is responsible for enforcing; and the complaint must be filed in a timely manner.³⁵¹² DOI OCR will be notified if the bureau determines that they do not have the appropriate jurisdiction to accept and pursue a complaint investigation.³⁵¹³ Complaints must be filed within 180 days from the last date of the alleged discrimination.³⁵¹⁴ Internal directives provide that the bureau must also determine whether the complaint is complete, with a signed written explanation of what happened with sufficient information to understand the facts, a method of contacting the complainant, the basis of the complaint, the respondent information.³⁵¹⁵ The bureau must also identify the specific practice or service involved in the alleged discrimination to determine if there is a difference in the quality of service being provided; segregation or separate treatment in any part of the program; any restriction of the program benefits; different standards or requirements for participation; a failure to provide language assistance for LEP individuals; or the use of criteria or methods of administration that would “defeat or substantially impair the accomplishment of program objectives or would impact more heavily on members of a protected group.”³⁵¹⁶

3507 DOI, Policy for Implementing a Public Civil Rights Program, supra note 3505, at 9. 3508 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 5. 3509 *Ibid.*, 5. 3510 *Ibid.*, 6. 3511 *Ibid.*, 6. 3512 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 7. 3513 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. 3514 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. 3515 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. 3516 *Ibid.*, 8; 43 C.F.R. §§ 17.6, 17.570, 41.605.

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DOI reports that it will initiate an investigation if the bureau has completed this initial review and determined that the complaint is complete, the bureau has jurisdiction, and the complaint is timely.³⁵¹⁷ If, during this initial review, the bureau finds that a complaint does not have merit; if the same allegations/issues of the complaint have already been addressed in a recently closed investigation or court case; if there is a refusal to cooperate on the part of the complainant or if the death of a complainant makes it impossible to investigate; or if the complaint is referred to another agency for investigation, then the complaint will undergo a Pre-investigative Administrative Closure.³⁵¹⁸ A complaint resolution can be negotiated at any time, even prior to an investigation taking place.³⁵¹⁹ Particularly, Alternative Dispute Resolutions can be used when appropriate, after considering “the allegations, number of persons affected, type and extent of relief involved, cooperation of the respondent, and other factors.”³⁵²⁰ Internal directives also provide that a complaint can be reopened at any time, if the respondent has not complied with the terms of the resolution agreement.³⁵²¹ Once the investigation is completed, a letter will be issued to close the complaint.³⁵²² Depending on the outcome of the investigation, this letter could be a Letter of Resolution, A Violation Letter of No Findings, a Violation Letter of Findings, or a Letter of Concern.³⁵²³ DOI OCR provided the following information about complaints during FY 2016 to FY 2018: Table 14.1: Number of DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018 No. of Complaints

Opened No. Complaints Investigated

No. Complaints Closed

FY 2016 47 47 34 FY 2017 24 24 13 FY 2018 20 20 8

Source: Dep’t of the Interior, Response to Interrogatory 7, at 6.

DOI OCR received 47 complaints in FY 2016, 24 in FY 2017, and 20 complaints in FY 2018. For all three fiscal years, OCR reported that 100 percent of the complaints opened were investigated. In FY 2016, FY 2017, and FY 2018, OCR closed 34, 13, and 8 complaints respectively. It is not clear why the number of complaints received declined so dramatically. In its 2002 report, the Commission noted that building trust with impacted communities is essential for effective civil

3517 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 8. 3518 *Ibid.* 3519 *Ibid.*, 9; 43 C.F.R. §§ 17.6, 17.570, 41.605. 3520 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 9. 3521 *Ibid.* 3522 *Ibid.*, 13. 3523 *Ibid.*, 13-14. For further description of these outcomes, see supra notes 3503-3504.

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rights enforcement, and that at times, increasing awareness may lead to an increased number of complaints, which may be a sign of increasing efficacies.³⁵²⁴ DOI OCR also indicated that DOI bureaus and offices process external complaints under OCR as per its civil rights directives. OCR provided the following data to document these other agencies’ complaints: Table 14.2: Number of Non-DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018, by Bureau FY 2016 FY 2017 FY 2018 Opened Invest. Closed Opened Invest. Closed Opened Invest. Closed National Park Service

21 21 20 49 49 33 33 33 22

Fish and Wildlife Service

21 21 21 19 19 18 21 21 14

Bureau of Land Management

10 10 9 12 12 12 14 14 4

Office of Surface Mining Reclamation and Enforcement

5 5 4 4 4 3 3 3 2

Bureau of Indian Affairs

2 2 0 2 2 0 4 4 0

Bureau of Reclamation

2 2 2 0 0 3 3 0

Bureau of Safety and Environmental Enforcement/Bureau of Ocean Energy Management

4 4 1 2 2 0 1 1 0

Source: U.S. Dep’t of the Interior, Response to Interrogatory 7, at 7-9.

Table 14.2 (see above) displays the number of opened, investigated, and closed complaints for all the identified non- DOI OCR agencies that process civil rights complaints for the FY 2016 to FY 2018.

3524 See supra Ch. 1.

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Table 14.3: Total Number of Complaints by Type (Basis), FY 2016 to FY 2018 Basis Number of Complaints Percentage of Total Age 1 0.3% Sec. 504 Federally Conducted 74 22.5% ADA 245 74.6% Title VI 6 1.8% Title VII 1 0.3% EO 13160 1 0.3%

Source: U.S. Dep’t of the Interior, Response to Interrogatory 7, at 7-9.

See Table 14.3. DOI OCR reported that the highest number of complaints received over FY 2016 to FY 2018 from DOI OCR and non-DOI OCR agencies were ADA complaints, with a total of 227 ADA complaints opened or approximately 75 percent of all complaints. The second highest number of complaints received over the fiscal years in question were Section 504 complaints, with a total of 66 complaints opened or approximately 22 percent of all complaints. All other types of complaints made up approximately 3 percent of the total number of complaints. Proactive Compliance Evaluations Federal regulations provide that DOI OCR may initiate compliance reviews for entities that receive funding from the U.S. Department of Interior.³⁵²⁵ Recipients of federal funding may be subject to a pre-award compliance review conducted by DOI OCR, prior to the approval of any financial assistance, and a post-award compliance review for new awardees.³⁵²⁶ Specifically, DOI OCR can perform the following pre- or post-award compliance reviews:

- Onsite (“to provide the reviewer with a greater opportunity to assess compliance on a more objective basis”)
- Desk audit (offsite, to assess compliance with civil rights policies and practices)
- Follow-up (a subsequent review to determine whether the recipient has “resolved

outstanding conditions of noncompliance uncovered in previous reviews”)- Unannounced (without prior notification to the program officials)³⁵²⁷

According to internal directives, DOI OCR will select recipients to be reviewed based on criteria such as whether the recipient has ever been formally reviewed; evidence of a violation; frequency of complaints against the recipient or of violations from previous compliance reviews; or the size of the federally assisted program or amount of federal assistance provided to the recipient.³⁵²⁸ Then DOI OCR will undergo a pre-review preparation, to consult with other federal agencies, analyze other civil rights compliance reviews or complaints involving the recipient, assess statistical data

3525 43 C.F.R. § 17.330; U.S. Dep’t of the Interior, Civil Rights Directive 2011-02: Public Civil Rights Compliance Reviews (Mar. 14, 2011), p. 2 [hereinafter DOI, Public Civil Rights Compliance Reviews]. 3526 43 C.F.R. § 17.330; DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 2. 3527 43 C.F.R. § 17, *passim*; DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 5-6. 3528 DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 6.

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relevant to program participation, develop a plan for the review, and notifying the recipient and any other entities involved.³⁵²⁹ The recipient will receive a notification letter approximately 60 days in advance of the scheduled review,

will let the recipient know the purpose and scope of the review, the date of the review, and will request an appropriate meeting location as well as any pertinent information prior to the review.3530 DOI OCR will then conduct an entrance conference with the recipient's executive officer or designee, which occurs prior to the formal review.3531 During the course of the review, DOI OCR will request and analyze the recipient's records regarding their program participation, marketing/media/training materials, personnel policies, or other civil rights related plans.3532 DOI OCR will also conduct a series of interviews with the recipient and community contacts, to ascertain information about the program operations.3533 DOI OCR may also conduct random site inspections at the recipient's place of business.3534 When the review comes to a close, a closing conference will be held with the recipient to report findings, allow the recipient to comment on the findings, strive to obtain voluntary compliance, and inform the recipient of any reporting obligations.3535 A final report will be issued to the recipient, after which it will have 45 days to formally respond to the reviewing authority "on actions taken and planned along with timeframes to correct compliance violations."3536 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity DOI OCR has a specific regulatory mandate to provide assistance and guidance to recipients of federal funding to assist in voluntary compliance with civil rights laws.3537 Prior to FY 2016-2018, DOI OCR issued guidance documents in the form of civil rights directives designed to inform recipients of federal funding of their obligations under the law,3538 and to establish uniform procedures for processing complaints filed with DOI OCR.3539 DOI OCR did not issue any guidance documents during the fiscal years studied in this report.3540 DOI OCR is a subset of the Office of Policy, Management and Budget, and its website cannot be reached directly from the DOI homepage.3541 DOI OCR makes contact information for all of its

3529 Ibid., 6-7. 3530 Ibid., 7. 3531 Ibid., 7. 3532 Ibid., 8. 3533 Ibid., 8-9. 3534 Ibid., 9. 3535 Ibid., 9-10. 3536 Ibid., 10. 3537 43 C.F.R. § 17.5(a). 3538 DOI, Policy for Implementing a Public Civil Rights Program, supra note 3505. 3539 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3540 U.S. Dep't of the Interior, Response to USCCR Interrogatories, at Exs. A, B, C. 3541 From <https://www.doi.gov>, one would need to navigate to the "Office of Policy, Management & Budget" page, found under the "Bureaus & Offices" tab, then select "Civil Rights" under the "Offices" tab to arrive at the webpage for the Office for Civil Rights and Chief Diversity Officer.

<https://www.doi.gov/>

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public civil rights coordinators available on its website.3542 The Public Civil Rights program page provides information about the public civil rights enforcement and DOI OCR's complaint process.3543 DOI OCR only accepts public civil rights complaints in writing. The Public Civil Rights program is involved in education about as well as prevention of civil rights violations, so it may have some outreach and policy dissemination program, though none is visible online.3544 Interaction and Coordination with External Agencies and Organizations As a government office that enforces Section 504 of the Rehabilitation Act, DOI OCR may receive advice from the Interagency Disability Coordinating Council.3545 Section 504 of the Rehabilitation Act established the Interagency Disability Coordinating Council, composed of the "Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Assistant Secretary of the Interior for Indian Affairs, the Attorney General, the Director of the Office of Personnel Management, the Chairperson of the Equal Employment Opportunity Commission, the Chairperson of the Architectural and Transportation Barriers Compliance Board, the Chairperson of the National Council on Disability, and such other officials as may be designated by the President."3546 This interagency council is responsible for "development and implementing agreements, policies, and practices" of federal agencies with responsibilities to effectuate the Act itself as well as with responsibilities "for promoting the full integration into society, independence, and productivity of individuals with disabilities."3547 Furthermore, all agencies that have enforcement authority under Title VI are part of the Federal Interagency Working Group on Title VI, which seeks to facilitate collaboration across key areas of Title VI enforcement and compliance.3548 The Interagency Working Group also seeks to resolve jurisdictional issues when a Title VI complaint may be filed with multiple agencies.3549 DOI has the statutory authority to enter into cooperative agreements with a state or political subdivision thereof, 3550 however the Commission is unaware of collaborations, cooperation, or partnerships that DOI OCR has with state or local entities that specifically concern the enforcement

3542 U.S. Dep't of the Interior, "Public Civil Rights Coordinators," <https://www.doi.gov/pmb/eo/public-civil-rights-coordinators> (accessed Jul. 15, 2019). 3543 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3544 DOI, "Public Civil Rights," supra note 3423 passim. 3545 29 U.S.C. § 794c(b). 3546 Id. § 794c(a). 3547 Id. § 794c(b). 3548 Exec. Order No. 12,250, Leadership and Coordination of Non-discrimination Laws, 45 Fed. Reg. 72,995; 28 C.F.R. § 42 et seq.; U.S. Dep't of Justice, Memorandum: Title VI Interagency Coordination (May 20, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordination_memo_5_20_13.pdf [hereinafter DOJ, Memo: Title VI Interagency Coordination]. 3549 DOJ, Memo: Title VI Interagency Coordination, supra note 3548. 3550 43 U.S.C. § 1457b.

<https://www.doi.gov/pmb/eo/public-civil-rights-coordinators>

<https://www.doi.gov/pmb/eo/public-civil-rights-coordinators>

https://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordination_memo_5_20_13.pdf

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of civil rights. If state or local jurisdictions receive DOI funding, they are subject to OCR's jurisdiction.3551

Research, Data Collection, and Reporting DOI OCR collects data as part of the complaint process and compliance reviews of recipients of federal funding.3552 The data collected through the complaint and compliance processes are not publicly available. The Commission is unaware of any additional civil rights issue research, data collections, or reporting that DOI OCR conducts.

3551 43 C.F.R. § 17.2. 3552 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 3, at Exs. A, B.

497 Findings and Recommendations

Findings and Recommendations Findings Overarching Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics. As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. Federal enforcement of civil rights laws is subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the Executive branch. The Commission's conclusion in 2002 in our Blueprint for Civil Rights Enforcement continues to hold true today: in order to meet basic efficacy standards, federal agencies must prioritize civil rights; sufficiently fund and staff their civil rights offices; implement civil rights planning; issue policy guidance and regulations; provide technical assistance, education, and outreach; institute a complaint and case processing system; manage a compliance review system for federal funding recipients; and provide staff training. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unaddressed. Enforcement Tools Across the 13 agencies evaluated, the Commission found that agencies use enforcement tools that can be preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting). These federal civil rights offices vary in their statutory and regulatory authorization to use enforcement tools and in their effectiveness in using tools they have.

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As agency regulations have long required, agencies first must attempt to secure voluntary compliance as distinct from mandatory resolution. Agency emphasis of reliance on voluntary compliance, ignoring or denigrating compulsory enforcement as an available tool, can send a message that an agency will not use all of the tools at the agency's disposal if necessary to secure compliance. Prioritization for Civil Rights Agency-Wide Essential conditions to support effective federal civil rights enforcement involve agency-wide prioritization of civil rights, including through: structuring the agency such that the civil rights office operates in a centralized manner and the head of the civil rights office has a direct line of communication with the head of the agency; prioritizing resource allocation and staffing dedicated to external civil rights enforcement, and integrating civil rights into every component of the agency. Federal civil rights office budgets generally are currently, and have been over time, insufficient to allow for effective enforcement of their full statutory authorities. This finding of budget insufficiency for civil rights agencies is a persistent one in the Commission's federal civil rights enforcement evaluations over years. Nearly 10 percent of the Commission's 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources. In 2002, the Commission found that the greatest hindrances to fulfilling federal agency civil rights obligations over the prior decade were insufficient funding and inefficient, thus ineffective, use of available funds. The civil rights offices of some agencies (DOL CRC, DHS CRCL, EPA ECRCO, DOT DOCR, VA ORM, Treasury OCRD, and DOI OCR as well as EEOC) do not have specific staff or budgets dedicated solely to external enforcement of civil rights laws. Some of these offices have other responsibilities, for example, handling internal equal employment opportunity claims, without a clear delineation between the staff working on internal and external claims. The lack of distinction between these duties shows a lack of prioritization for external enforcement, and makes it difficult to evaluate the agency's enforcement efficacy, except with respect to EEOC, which is exclusively a civil rights enforcement agency. Generally civil rights office staffing levels fall below any reasonable bare minimum appropriate staffing for civil rights enforcement. These staffing levels have decreased overall, and in some civil rights offices precipitously, during the three fiscal years evaluated. From FY 2016 to FY 2018, the number of staff members in federal civil rights enforcement offices dropped from 5,155.5 to 4,816. This drop of more than 300 dedicated employees represents a 6% reduction in staffing for federal civil rights enforcement across the 13 agencies evaluated.

499 Findings and Recommendations

In some civil rights offices the reduction in staff has been even more stark. DOL OFCCP lost 13% of its staff and in that same time period, HHS OCR staffing decreased by more than 10% in its direct enforcement offices. Bipartisan and bicameral Congressional consensus has persisted over six decades that federal civil rights enforcement should be prioritized. Even in contemporary very challenging budgetary conditions there is a consensus from the legislative branch that holds the power of the purse that federal civil rights budgets should be protected: Despite consistent Trump Administration requests to decrease funding, Congress has maintained nearly level or increased funding for federal civil rights enforcement during the three fiscal years the Commission investigated. Only some federal agencies prioritize civil rights such that their civil rights office executives report directly to the agency secretary or head of the agency. The head of DOJ CRT does not report directly to the Attorney General, the head of EPA ECRCO does not report directly to the EPA Administrator, and the heads of HUD FHEO, DOL CRC, VA ORM, Treasury OCRD, and DOI OCR do not report directly to their respective agency Secretaries. The heads of ED OCR, HHS OCR, DHS CRCL, DOT DOCR, and USDA OASCR report directly to their respective agency Secretaries. Some agencies, such as DOJ CRT, HHS OCR, ED OCR, and EEOC, have dedicated counsel for civil rights enforcement matters. In the remaining agencies, the civil rights office must secure the agency's general counsel approval for enforcement actions, diminishing authority of the civil rights office. Strategic Planning and Self Evaluation Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Civil rights goals or performance was evaluated between FY 16 to FY 18 in the agencywide strategic plans of DOJ, ED, HHS, HUD, DOL (for OFCCP), EEOC, DHS, EPA, and DOT. The agencywide strategic plans of DOL (for CRC), VA, USDA, Treasury, and DOI did not reference particular civil rights objectives. Separate and apart from agency wide strategic plans, civil rights office strategic planning can be an important management and evaluation tool for enhancing satisfaction of the congressional charge to the civil rights office. Agency civil rights offices did not consistently engage in public-facing strategic planning. Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including ED OCR and HUD FHEO, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed

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of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics. Only some agency authorizing statutes require agencies to report to Congress or the public about the effectiveness of their civil rights office enforcement practices. Currently, Congress explicitly requires some agencies, including ED, HUD, USDA, and DHS, to report to Congress on the work of their civil rights enforcement offices and whether these offices have met their statutory responsibilities. Other agencies, such as DOJ and EEOC, report on their civil rights office enforcement practices as a part of their agency's annual performance reports. Other agencies, such as Treasury OCRD, have published annual reports but not pursuant to a particular Congressional requirement. Over the fiscal years evaluated, even when required to file annual reports with Congress, civil rights offices have failed to submit their reports in a timely fashion. Of the agencies statutorily required to submit a report to Congress, including ED, HUD, USDA, and DHS, neither ED OCR nor USDA OASCR have filed reports since FY 2016. Complaint Processing, Agency-Initiated Charges, and Litigation Variations in rates of case openings, investigations, and case closures between federal administrations suggest that a civil rights office uses different policies under different administrations to decide whether a civil rights claim merits an investigation. Insufficient resources can cause civil rights offices to decide to prioritize responding to particular civil rights complaints rather than responding to or investigating every allegation, even when investigation of every allegation is required under the relevant statute or regulation. Some civil rights offices, including ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC, utilize regional offices located throughout the country to process and investigate complaints or violations in those jurisdictions. Some civil rights offices, including HUD FHEO and EEOC, utilize outside entities, such as state and local government agencies or non-profit organizations, to handle enforcement responsibilities. Some agencies, such as DOT, VA, and DOI, have a decentralized model, where the agency's civil rights office primarily or solely coordinates or provides recommendations for civil rights offices of subagencies or bureaus of the cabinet agency. All of the agencies evaluated in this report have the ability to open their own affirmative investigations without a complaint prompting the opening of a case. Proactive Compliance Evaluation The 13 agencies evaluated distribute trillions of dollars in federal funding to support programs and activities in many sectors of society; all of these funding recipients are subject to specific nondiscrimination laws.

501 Findings and Recommendations

For some agencies, including USDA OASCR and DOL OFCCP, a compliance evaluation can entail an assessment of a funding recipient's program, including review of applicable civil rights policies, without investigating a particular instance of alleged discrimination. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Policy regulations and guidance documents, education, technical assistance, outreach, and publicity are all necessary tools for recipients of federal funding and other members of the regulated community to understand their legal obligations under federal civil rights laws. Such dissemination also helps the general public to know their rights and understand the civil rights office's role in enforcing these rights. Policy guidance documents do not change the underlying law. Without guidance from federal agencies on how they will enforce relevant laws, the laws still apply but the regulated community is left without an understanding of how civil rights offices apply the law to particular facts to protect the rights of impacted individuals. Several civil rights offices during the Trump Administration, including DOJ, HHS OCR, and DOL OFCCP, have stated policies or issued guidance favoring religious freedom over other civil rights. Unlike in the Obama Administration, in the Trump Administration several civil rights offices have acted to interpret statutory and regulatory language to not protect against discrimination on the basis of gender identity and to treat sex as exclusively assigned at birth. Enforcement of unlawful racially disparate impact is a required federal agency analytical tool, following longstanding Commission recommendation for its use, and it is critical to ensuring ongoing, prospective nondiscrimination. Interaction and Coordination with External Agencies and Organizations Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. DOJ's Assistant Attorney General for Civil Rights coordinates the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination against protected classes by federal agencies and funding recipients. Federal enforcement of civil rights laws is more effective when the agencies that enforce the same laws coordinate with each other to ensure comprehensive and consistent enforcement.

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Research, Data Collection, and Reporting The Commission has repeatedly found through its various investigations that data collection and reporting is essential to effective civil rights enforcement. The agencies that conduct research, data

collection, and reporting on discrimination or disparities in relevant programs areas, such as ED OCR, which operates the Civil Rights Data Collection, and EEOC, are able to provide information to inform effective civil rights enforcement work. Few agencies engage in the type of public data collection, research and reporting needed to understand potential civil rights concerns, to inform effective civil rights enforcement work. Agency-Specific Findings Department of Justice, Civil Rights Division The cases DOJ CRT litigates are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual. DOJ CRT resolved 143 total cases in FY16, followed by 136.5 cases in FY17, followed by 109 cases in FY18. Those resolution numbers represent a nearly 25% drop between FY16 and FY18. The drop was not consistent across the different subsections of CRT; the most significant drops were in the sections on Educational Opportunities, Housing, and Special Litigation. DOJ CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections. DOJ's current strategy favoring resolution of cases by court-ordered consent decrees, as expressed via memo from the Attorney General in November 2018, negatively impacts effective enforcement of civil rights by minimizing the availability of an important mechanism for case resolution. Department of Education, Office for Civil Rights During the period of the Commission's review, specifically from FY 2017 and FY 2018, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly. During the time period studied in this report, ED OCR resolved thousands of cases pertaining to discrimination on the basis of race, national origin, sex, disability, and retaliation.

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ED OCR measures its efficacy, and the efficacy of its employees, by the speed with which it resolves cases (within or exceeding a timeline of 180 days). In FY 2016, it resolved 78% of cases within 180 days, and in FY 2017 it resolved 80% of cases within 180 days. ED OCR does not currently self-evaluate based on effectiveness of the results it achieves, compared against its statutory and regulatory mandate. ED OCR has, during the time period studied, become faster in its resolutions and narrower in the scope of its resolutions, significantly increasing the number of administrative closures without substantive change in school practices. ED OCR issued 11 guidance documents in the Obama Administration between Fiscal Years 2016 - 2017, while the Trump Administration's only guidance activity through Fiscal Year 2018 has been to rescind guidance and in one instance replace prior administration guidance documents with interim, explicitly temporary guidance. Department of Health and Human Services, Office of Civil Rights Under the Trump Administration, HHS OCR has restructured its office and staffing in a manner to prioritize religious liberty over other civil rights protections. HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2017, which was also an increase from the rate of case openings and closures from FY 2016. HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016. In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days. In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively. In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days. In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively. HHS OCR's direct enforcement work is primarily devoted to HIPAA compliance and enforcement, only 25% of the office's enforcement work is devoted to enforcing the civil rights laws under its jurisdiction. From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created Conscience and Religious Freedom Division, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices. Notwithstanding these requests, Congress' allocation to HHS OCR remained constant at \$38.6 million.

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Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity Of the fair housing cases that are filed under federal fair housing laws, approximately 77% are handled by state and local agencies, with oversight and funding from HUD FHEO. HUD reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results. HUD FHEO has the ability to bring its own Secretary-initiated investigations, where it can take action without a precipitating complaint. Historically, this power has been used to handle systemic issues. Unlike in previous years, HUD's agency-wide strategic plan no longer includes specific prioritization of fair housing, reflecting a change in civil rights prioritization at the agency. HUD has issued no civil rights policy guidance since 2016, although HUD testimony to the Commission identified guidance as one of five current civil rights enforcement priorities for HUD FHEO and HUD is required by regulation to provide guidance to help the community comply with civil rights law. HUD has proposed a new regulation that would increase the burden of proof for disparate impact discrimination in housing, significantly narrowing the application of the enforcement tool to reduce discrimination. Department of Labor DOL OFCCP sets an office-wide target goal of handling a certain number of systemic cases. OFCCP used to measure employee performance by case closure rates, but in the Trump Administration has switched to examining the scope of each case as a key component of evaluation rather than merely counting all cases equally. DOL OFCCP only has staff capacity to audit, per year, one to two percent of contractors over whom the office has jurisdiction. Nonetheless, DOL OFCCP requested a more than \$26 million budget reduction in FY 2018, seeking to reduce its total budget to \$88 million. The primary enforcement mechanism OFCCP uses is proactive compliance investigation, not driven by complaints filed with the agency, and OFCCP prioritizes identifying systemic discrimination in these compliance reviews. Equal Employment Opportunity Commission Like the U.S. Commission on Civil Rights, EEOC is independent and bipartisan, and does not operate at the direction of any particular presidential administration.

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EEOC conducts strategic planning and self-evaluation around its work, with specific strategic planning focused on enforcement priorities. EEOC strategic goals include targeting enforcement on an individual and systemic level. EEOC evaluates its employees on the basis of resolving individual complaints as well as identifying and resolving systemic discrimination. During FY 16-18, EEOC has conducted extensive research and outreach, including holding several hearings, to draft new guidance on workplace harassment. In an important and necessary effort to evaluate the possibility of pay discrimination, EEOC is beginning to collect pay data from employers, disaggregated by sex, race, and ethnicity. EEOC increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent. EEOC reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results. Department of Homeland Security, Office for Civil Rights and Civil Liberties Weakness in the statutory design of DHS CRCL challenges its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Congress charged DHS CRCL with advising DHS internally on DHS policies' satisfaction of civil rights principles. This responsibility is solely advisory and CRCL does not have the ability, except with respect to disability rights enforcement, to compel resolution to address specific violations or to discipline violators. DHS CRCL lacks the explicit authority to report directly to Congress without the Secretary's approval. DHS CRCL receives thousands of individual complaints in a year. Based on the issues raised in the complaints, DHS CRCL identifies potential patterns of civil rights or civil liberties allegations to determine which policy issues to prioritize. DHS CRCL does not individually investigate each complaint received. DHS CRCL reports that the allegations CRCL has received are increasingly complex and that CRCL does not have sufficient resources to respond to all of them. Environmental Protection Agency, External Civil Rights Compliance Office

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In 2016, EPA moved its external civil rights enforcement function to a suboffice within the Office of General Counsel, rendering the office authority more diffuse and more removed from the Secretary than it had in the past been. EPA ECRCO has a maximum of 13 full time equivalent staff members to enforce all federal civil rights within its jurisdiction. EPA ECRCO has, in the history of the office and during the specific time period studied for this report, issued only a handful of findings of civil rights violations and in one case secured corrective action to remedy the violation. During the time period studied for this report has come under federal court jurisdiction for continuous failure to timely resolve investigations it opens. During the time period the Commission reviewed, ECRCO has taken steps to strengthen staff capacity to enforce and to systematize its enforcement reviews to maximize consistent results. Department of Transportation, Departmental Office of Civil Rights DOT's Departmental Office of Civil Rights does not itself investigate or resolve external civil rights complaints, but instead processes cases for further handling by enforcement offices specific to the subagency with relevant jurisdiction. Department of Veterans Affairs, Office of Resolution Management VA collects data via survey of all individuals who interact with the VA's programs and facilities. VA ORM reviews that survey data to determine whether there are discriminatory issues arising even in the absence of a formal complaint. VA's annual reports to Congress do not specifically discuss activities related to external civil rights enforcement. Department of Agriculture, Office of the Assistant Secretary for Civil Rights In 2018, USDA OASCR reorganized its office, with the goal of elevating the civil rights functions to the agency mission level. The reorganization did not, as initially proposed, dismantle the central civil rights office or shift its enforcement responsibilities to the agency's Inspector General. The reorganization of the office was also prompted by longstanding concerns about USDA's civil rights office, which failed to remedy discrimination in USDA programs, as USDA itself acknowledged during the time period evaluated, characterizing its record as "unfortunate and checkered . . . with regards to civil rights."

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While the office has seen some improvement, such as in the time it takes to complete complaint intake/processing and investigation, the office has increased the amount of time it takes to adjudicate a complaint, and the case backlog continues to increase in the fiscal years reviewed. USDA OASCR has not filed required annual report reports to Congress detailing civil rights enforcement for either FY 2017 or FY 2018. Department of Treasury, Office of Civil Rights and Diversity Treasury OCRD does not have any policy guidance in place to assist its grant recipients on how to comply with Title VI's antidiscrimination protections, though it is currently working on drafting such guidance. Treasury OCRD has three employees, an increase from two employees in FY 2016, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$5 billion of financial assistance awarded annually by the agency. The data provided to the Commission shows that Treasury's civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending. Treasury is required by regulation to conduct periodic compliance investigations. The Commission's review does not indicate that Treasury has conducted such investigations during the time period investigated. Department of Interior, Office of Civil Rights DOI OCR has two employees, a decrease from the three employees it had in FY 2016 and 2017, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$9 billion of financial assistance awarded by the agency; DOI's external civil rights enforcement is decentralized and also partially handled by bureau employees.

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Recommendations Enforcement Tools Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail. Congress should give DHS CRCL the authority to require that relief and remedies be granted after finding violations of any of the civil rights laws under its jurisdiction. In addition, CRCL should have the power to require affected component agencies to provide a timely and concrete response to its recommendations and the ability to escalate disagreements with component agency leadership for ultimate resolution by the DHS Secretary. CRCL's reporting to Congress should be independent and not issued with the approval of the DHS secretary, agency general counsel, or OMB. Congress should apply the statutory independent reporting language that the DHS Privacy Office and Office of the Citizenship and Immigration Services Ombudsman have to CRCL as well. The role of CRCL chief legal counsel should be revived with operational independence from the Office of the General Counsel at DHS headquarters and be as independent as the chief counsels of the operational components. Prioritization for Civil Rights Agency-Wide Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans. Congress should authorize all civil rights offices, not merely, for example, DOJ CRT, HHS OCR, ED OCR, and EEOC, to staff agency counsel with authority to make civil rights enforcement decisions, reporting through the civil rights office head and the agency secretary or executive. This authority can speed federal civil rights enforcement and ensure appropriate civil rights expertise and dedication within agency counsel.

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Strategic Planning and Self Evaluation Whether annually or on a timeline coordinated with agency strategic planning, civil rights enforcement offices should engage in strategic planning to set annual and long-term objectives. For those civil rights offices that do not operate under a requirement to report their civil rights enforcement practices directly to Congress, Congress should enact a requirement that the offices do so. Such reporting should not require clearance or amendment from the Department or OMB, and the reports should include, where relevant, failure of other within-agency components to respond timely to advice or reports from civil rights offices. Given the importance of agency reports to public understanding of agency priorities and practices and of the status of civil rights satisfaction, Congress should impose a fund withholding and hearing oversight penalty from agency appropriations if agencies fail to submit annual (and, where required in statute, quarterly) reports regarding civil rights enforcement practices. Congress should hold at least annual public oversight hearings specific to each civil rights office to review and assess the effectiveness of civil rights office satisfaction of the jurisdictional charges Congress has given them. Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics. Complaint Processing, Agency-Initiated Charges, and Litigation Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms. Agencies, especially those that operate regional offices, should take steps to ensure consistent enforcement results. Likewise, agencies that utilize state, local, or private organization partnerships to enforce civil rights laws under their jurisdiction (as in the case of HUD, with its FHAP program, and EEOC, with its FEPA program), should identify ways to manage to ensure consistent results and Congress should fund these civil rights offices sufficiently to be able to manage that work. All agencies should publish their guidance for case selection and investigation, to ensure internal consistency and promote public trust in federal civil rights enforcement. Such transparency could also guard against undue political influence in the decision to open or how to conduct a particular civil rights investigation.

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No agency should prioritize enforcement of one civil rights protection over another. Proactive Compliance Evaluation All agencies with the authority to do so should engage in proactive compliance evaluations to ensure that funding recipients, and other entities subject to the agency's jurisdiction, are in compliance with nondiscrimination laws.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Agencies should not reevaluate to withdraw disparate impact as an analytical tool. As the Commission first recommended in the 1960s, disparate impact analysis helps root out discrimination and equalize opportunity for all Americans. Agencies should recognize that federal antidiscrimination protections based on sex include discrimination based on sexual orientation and gender identity, and enforce accordingly. Agencies should issue guidance informing their regulated communities what the law is, how to comply with it, and how the agencies enforce it. Research, Data Collection, and Reporting Congress should appropriate funds for civil rights offices to engage in the public data collection, research and reporting necessary to understand where discrimination might be occurring in the program areas under the agency's jurisdiction, and to inform effective civil rights enforcement work. Such data collection, research, and reporting should include demographic data on the populations they serve, and require covered entities to collect detailed data as well. Data should be disaggregated and analyzed on multiple demographic variables to highlight where particular issues might impact individuals across identity characteristics. All agency civil rights offices should collect and publish enforcement and complaint data disaggregated by race, ethnicity, sex, ability status, religion, sexual orientation, gender identity, age.

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Commissioners' Statements, Dissents, and Rebuttals Statement of Chair Catherine E. Lhamon For six decades Congress has promised the nation what President Kennedy termed the "simple justice"¹ that federal funds would not support discrimination, first on the basis of race and over time on the additional statutory bases of sex, disability, religion, and age, among other protected identity characteristics.² Over that time, this Commission has repeatedly decried insufficient dollar resources appropriated to the federal agencies statutorily responsible for enforcing that simple justice. Based on documentation of these insufficiencies, the Commission called on Congress to provide additional funds to the agencies while also calling on the agencies themselves to better manage and deploy their resources to effectuate justice. In this report, the Commission returns to that effort, collecting current information about the staggering rates at which Americans believe themselves to be subject to discrimination, the devastating incidence and facts surrounding discrimination confirmed by federal agency investigations, the persistent federal failure to systematize or fully fund

discrimination efforts despite the prevalence of discrimination nationwide, and the human consequences of our nation's failure to fulfill our equity promises. No report could adequately capture the human toll, in lost potential and severed dreams, of unfulfilled equity promise. This report nonetheless details what it can: dollar insufficiency, staff number inadequacy, complaints uninvestigated, and systematic decision-making – when it occurs, as it does now – deliberately to minimize civil rights enforcement efficacy. Here, in addition, is what I know from experience: federal career employees in civil rights enforcement offices are overburdened and hamstrung in capacity to do their best work. Many of them stay anyway, in the hope to do as much as they can and succeed in mitigating harms in important ways across presidential administrations. I am grateful to them every day for what they do and I am grateful for having had the privilege to work among and meet so many of them during the three and a half years I enforced federal civil rights laws in schools in the Obama Administration. I made it a priority to highlight the need to add to their number to do the work Congress charged them to do and I am grateful to see that Congress continues to recognize those needs and increase funds for these critical efforts. The Commission heard compelling bipartisan testimony from current and former federal officials from both sides of the aisle, serving in Administrations of both Republican and Democratic presidents, about the significant practical impact of federal messages regarding civil rights and the

1 See U.S. Department of Justice, Civil Rights Division, Title VI of the Civil Rights Act of 1964, <https://www.justice.gov/crt/fcs/TitleVI> (quoting President John F. Kennedy in 1963 as stating, “Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.”) (last visited Oct. 1, 2019). 2 Not all agencies have the same enforcement authority to enforcement against discrimination on the basis of each identity characteristic. The U.S. Department of Education’s Office for Civil Rights, for example, lacks statutory jurisdiction to enforce against discrimination on the basis of religion.

<https://www.justice.gov/crt/fcs/TitleVI>

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value of strong, consistent results in federal civil rights enforcement. We heard bipartisan agreement about the need for an affirmative civil rights agenda, and the positive impact that can result from incorporating civil rights compliance into other agency work, ensuring that it is prioritized at a mission level for the agency.³ In addition, I know, from having reviewed case files in federal government, from having advocated as a litigator in nonprofit civil rights practice, and now from reviewing testimony the Commission receives: discrimination persists in both predictable and unpredictable ways. The harm it wields is uncompensable and incalculable and projects a social underbelly in which I am deeply ashamed to be an unwilling participant. I am committed, as I have been for the entirety of my professional life, to eradicating discrimination, recognizing the urgency and enormity of that task. I also know the unique power – and therefore responsibility – the federal government has to battle against inequities. I view this Commission report as crucially important toward that end: it collects data and evidence about what we are not doing to live up to our national commitments, and about how much hurt follows from that failure. This data and evidence forms the basis for my colleagues’ and my call on Congress and our nation to right these wrongs. Each data point in the report reflects lives lived and harms redressed, or not. Having excavated the current status of federal civil rights enforcement, I am recommitted to the importance of and necessity for a federal civil rights backstop against harm. I remain deeply concerned about the prevalence of discrimination that persists and will persist absent an expectation and reality of meaningful law enforcement. I hope very much that this report forms a record against which to measure our federal civil rights enforcement successes and from which to evaluate what more Congress needs to do, to appropriate civil rights enforcement funds, to facilitate civil rights enforcement transparency in practices, and to support meaningful oversight to ensure agencies satisfy their congressional charges.

3 See, e.g., Arne Duncan, Former Sec’y of Educ., Dep’t of Educ., Written Statement for the U.S. Comm’n on Civil Rights, at p. 1; Robert Driscoll, Former Deputy Assistant Attorney General at the Civil Rights Division at the U.S. Department of Justice and current member at McGlinchey Stafford, Briefing Transcript, unedited, at 146; Arne Duncan, Former U.S. Secretary of Education, Current Managing Partner of Emerson Collective, Briefing Transcript, unedited, at 76; Craig Leen, Director of the OFCCP, U.S. Dep’t of Labor, Briefing Transcript, unedited, pp. 56-57; Kendrick Testimony, Briefing Transcript, pp. 266-67, 274-75; Briefing Transcript at 44-45 (Testimony of former CRT Deputy Assistant Attorney General Leon Rodriguez); Margo Schlanger, Professor of Law, University of Michigan Law School, Briefing Transcript, Nov. 2, 2018, p. 247. See also Robert N. Driscoll, “This Is What a Trump Civil-Rights Agenda Should Look Like,” National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>.

<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>

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Statement of Commissioner Karen K. Narasaki Our country’s record on civil rights is not one of linear progress. Each step forward has often generated backlash and regression. In 1776, the Declaration of Independence declared “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” That was followed by a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years and laws that reduced indigenous peoples to second class citizens on their own lands and kept immigrants from Asia from becoming citizens at all. The Civil War brought reconstruction but then decades of Jim Crow segregation enforced by state and federal courts. In 2008, we made history in electing a Black man to be president and eight years later elected a president whose administration is trampling civil rights protections and empowering white Supremacists, homophobes and chauvinists. In 2015, the Supreme Court declared that same sex couples have a right to marry and in 2019 it is debating whether they can be fired for it.² The report is a robust evaluation of the civil rights enforcement activities of over a dozen federal agencies. These agencies consist of thousands of federal employees who swear an oath of office to support and defend the Constitution.³ They are further subject to standards of ethical conduct that remind oath-takers that “public service is a public trust.”⁴ The Department of Justice’s Standards of Conduct define that public trust obligation, stating that “the decisions and actions that federal employees take must be made in the best interests of the American people.” It is these public servants who work to ensure that our laws are fairly enforced regardless of the political bent of a particular administration. Elections have consequences, and it is no surprise that any change in Administration brings about different priorities and strategies. But the changes I’ve watched unfold since 2016 are truly unprecedented in the nearly 30 years I have worked in the nation’s Capital. This Administration is not just shifting enforcement priorities, they are undoing decades of civil and human rights progress. The extremity is evident in the amount of litigation successfully challenging many of these efforts in court and in the fact that Congress refused to support some of these changes, even

1 I would like to thank the Commission staff for their work researching, drafting, and revising this massive report. I would also like to thank my law clerk Erin Drolet from George Washington University Law School for her work on this report and statement, as well as my former special assistant Jason Lagria and my current special assistant Peach Soltis. 2 Bill Chappell, “Supreme Court Will Hear Cases On LGBTQ Discrimination Protections For Employees,” NPR News, April 22, 2019. <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>. 3 5 USC § 3331 “Oath of Office. An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.’” 4 5 CFR § 2635.101(a).

<https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>

<https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>

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when the President’s party controlled both the House and Senate.⁵ Further, the radical departure from decades of well accepted civil rights norms has put civil servants in the unenviable position of weighing directives from a new boss in conflict with the obligations of their oaths of office. As our report documents, this Administration’s effort to undermine civil rights enforcement is multi-pronged. First, the Administration has made strategic, process-related decisions that are intentionally designed to make federal enforcement less effective—primarily by proposing to basically eliminate some civil rights enforcement offices, or proposing dramatic budget cuts for others⁶, along with changes in procedures that sideline important enforcement tools. Second, the Administration has aggressively taken actions that allow the views of individual religious sects to supersede the civil and human rights of LGBTQ people, and has terminated the government’s efforts to protect voting rights of vulnerable minority citizens in service of naked partisan election interests. These partisan political interests went so far as to attempt to manipulate the count of minorities in the decennial census,⁷ a function so important to our democracy that it is outlined in Article 1 of our Constitution. These actions undermine the morale of hard working federal civil rights attorneys and staff. For example, in its last budget proposal, the Administration called for the elimination of EPA’s Office of Environmental Justice. This office supports efforts meant to remedy the impacts of environmental racism on historically marginalized communities.⁸ Though ultimately unsuccessful in eliminating the office through the budgetary process, the move prompted a senior official and long-term civil servant from that office, Mustafa Ali, to resign.⁹ The Administration’s budget also proposed eliminating OFCCP at DOL, claiming that its duties could be performed by another existing agency.¹⁰ In so doing, the Administration sends the message to hundreds of civil servants, and consequently the thousands of Americans benefitting from their work and to their employers who seek to skirt the law, that the protection of civil rights is not a priority. An example of this Administration’s efforts to intentionally tie the hands of federal civil rights attorneys through changes in procedure is DOJ’s newly adopted position limiting the use of consent decrees.¹¹ The memorandum outlining the new policy, authorized by former Attorney

5 Fred Barbash, “Litigation against executive branch by coalitions of states grows in response to unilateral actions by president and gridlocked Congress,” The Washington Post, August 24, 2019. 6 Report at 34. 7 Robert Barnes and Ann E. Marimow, “Supreme Court puts census citizenship question on hold,” The Washington Post, June 27, 2019. 8 Because it lacks enforcement authority, it is not discussed at length in this report. 9 Brady Dennis, EPA environmental justice leader resigns, amid White House Plans to dismantle program. Washington Post, March 9, 2017. 10 Report at 283. The Republican-controlled Senate Appropriations committee issued report language squarely dismissing the idea, stating “The Committee rejects the budget’s proposal to begin plans to merge the OFCCP with the Equal Employment Opportunity Commission.” Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2018, Report at 30. <https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf> 11 See Report at 93; Sessions Memo at n. 2 (“As used in this memorandum, the term ‘consent decree’ means a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt”).

<https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>

<https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>

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General Jeff Sessions, makes clear that DOJ leadership will view requests to sign off on consent decrees, and the use of monitors, with skepticism. This effective abandonment of consent decrees is important because they are such a powerful tool for civil rights enforcement—they are carefully negotiated, can remain effective as long as is necessary to remedy the violation (including through changes in political leadership), and they utilize the oversight authority of federal courts. They bind the parties to their obligations in the same way contracts do. Consent decrees have been used particularly successfully in cases involving law enforcement agencies and environmental violations. Publicly announcing a policy change disfavoring consent decrees will deeply undermine the negotiating position of DOJ attorneys—it sends a message to state and local governments that DOJ attorneys have little leverage to compel compliance for violations.¹² A further example is the recent rulemaking undertaken by the Department of Housing and Urban Development, limiting the ability of federal civil rights attorneys to effectively pursue disparate impact claims under the Fair Housing Act. The proposed rule, issued in August 2019, significantly raises the standard required for pleading a “disparate impact” case, a necessary tool to challenge facially neutral housing policies or practices that have a discriminatory impact on people of color, people with disabilities, or other protected groups.¹³ The proposed rule will require that challenges preemptively address and rebut possible defenses in initial pleadings, and will also provide defendants with a “safe harbor” to protect themselves from liability even if they are using discriminatory algorithms developed by a third party.¹⁴ “They have elevated the bar so high that it is virtually insurmountable,” Lisa Rice, president and chief executive of the National Fair Housing Alliance, said of the requirements proposed in the rule.¹⁵ In addition to using the budget and other processes to undermine civil rights enforcement, the Administration has also changed course in many substantive civil rights policy areas. An obvious example is this Administration’s rollback of efforts to combat LGBTQ discrimination. One strategy the Administration has used is the elimination of data collection on LGBTQ status.¹⁶ Most troubling is that the Administration pursues this agenda under the stated rationale of promoting of religious liberty—but its inconsistent application gives away that the true motivation is curbing LGBTQ protections.

12 Sari Horwitz, “In one of his final actions as attorney general, Sessions moves to restrict police reform agreements,” The Washington Post, November 9, 2018. https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a5534748762_story.html 13 Federal Register, “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” August 19, 2019. <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard> 14 Tracy Jan, “HUD raises the bar for bringing discrimination claims” The Washington Post, August 16, 2019. <https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/> 15 Id. 16 Matt Sedensky, “Federal surveys trim LGBT questions, alarming advocates,” AP News, March 20, 2017. <https://apnews.com/8443749ce29947f3b57f5e86e6c038e9>

https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a5534748762_story.html

https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a5534748762_story.html

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<https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/>

<https://apnews.com/8443749ce29947f3b57f5e86e6c038e9>

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The Administration has encouraged federal agencies to focus on protections for religious freedom, leading multiple agencies to issue memoranda and new policies that follow suit.¹⁷ One example is DOJ’s “Principles of Religious Liberty.”¹⁸ Its stated premise: “Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith, and complying with the law.” DOJ has used their authority to support the rights of a bakery owner refusing to sell a wedding cake to a same sex couple¹⁹ and the rights of a student group at a public university to discriminate against gay students.²⁰ Yet DOJ offered no assistance to the Standing Rock Sioux Tribe when they objected to a pipeline likely to pollute a sacred waterway.²¹ Even more revealing is the federal prosecution of Scott Warren, who argued that his religion compelled him to offer life-saving water and aid to undocumented immigrants, but which DOJ labeled a felony. His recent case ended in a hung jury.²² Similarly, DOJ did not intervene in a Supreme Court stay of execution request involving a Muslim death row inmate asking that an imam be present at his execution, rather than the Christian chaplain on staff generally available to other inmates. The Supreme Court denied the stay and he was executed without the presence of an imam.²³ Most recently, the Department of Justice unsuccessfully sought to convince the Equal Employment Opportunity Commission, the principle federal employment civil rights enforcement agency, to change its position and join DOJ’s Supreme Court brief arguing that businesses can discriminate against transgender employees. 24

17 Report at 137. (In 2017, DOJ issued a memorandum detailing twenty principles of religious liberty and how other agencies can implement these principles into their own practices, HHS announced a new, similar focus on religious protections, and DOL implemented new policy directives in response to Supreme Court decisions and Executive Orders about religious freedoms.) 18 Attorney General Jeff Sessions, Department of Justice Memorandum, “Principles of Religious Liberty,” October 6, 2017. <https://www.justice.gov/opa/press-release/file/1001891/download> 19 Robert Barnes, “In major Supreme Court case, Justice Dept. sides with baker who refused to make wedding cake for gay couple,” The Washington Post, September 7, 2017. https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/b64f116-93f0-

17e7-89fa-bb822a46da5b_story.html 20 Justice Department backs Christian group in U. Iowa dispute. <https://www.apnews.com/09b0dbaa7a554ec2b9df66a0705de33321> Jenni Monet, “For Native ‘water protectors, Standing Rock protest has become fight for religious freedom, human rights.” PBS NewsHour. November 3, 2016. The protests and litigation began during the Obama administration. On November 2 2017, President Obama announced an intention to explore ways to reroute the pipeline, but in January 2017, the new Administration issued an executive order to halt the inquiry into alternatives and to expedite implementation of the original plan, despite continued protests and litigation. 22 Miriam Jordan, “An Arizona Teacher Helped Migrants. Jurors Couldn’t Decide if It Was a Crime.” The New York Times, June 11, 2019. 23 Matthew S. Schwartz, “Justices Let Alabama Execute Death Row Inmate Who Wanted Imam By His Side,” NPR News, February 8, 2019. <https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side>. Contrast this decision to one decided by the Court seven weeks later, granting a stay of execution to a Buddhist inmate to accommodate his request for the presence of his Buddhist spiritual advisor, without a clear explanation for the differing outcomes. Nina Totenberg, “Supreme Court Sees 2 Similar Death Penalty Questions Very Differently,” NPR News, March 30, 2019. <https://www.npr.org/2019/03/30/708238203/supreme-court-sees-2-similar-death-penalty-questions-very-differently> 24 EEOC won a discrimination claim on behalf of the plaintiff in the Sixth Circuit in 2018. “Justice Department Urges Civil Rights Agency to Flip LGBT Stance,” Bloomberg Law, August 13, 2019. <https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>

<https://www.justice.gov/opa/press-release/file/1001891/download>
https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/b684f116-93f0-11e7-89fa-bb822a46da5b_story.html
https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/b684f116-93f0-11e7-89fa-bb822a46da5b_story.html
https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/b684f116-93f0-11e7-89fa-bb822a46da5b_story.html
<https://www.apnews.com/09b0dbaa7a554ec2b9df66a0705de333>
<https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side>
<https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side>
<https://www.npr.org/2019/03/30/708238203/supreme-court-sees-2-similar-death-penalty-questions-very-differently>
<https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>

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DOJ’s brief to the Supreme Court argued that Title VII didn’t protect a transgender employee from being fired from her job at a funeral home, where her boss justified the firing based on his Christian faith.²⁵ In addition, LGBTQ advocates are concerned about a recent rule issued by the Department of Health and Human Services that expands the circumstances under which health care workers can object to providing health care services based on religious or moral grounds.²⁶ There is particular concern around providing treatment to transgender and HIV-positive patients, as well as a lack of clarity regarding the obligation of workers to provide life-saving care in an emergency. So while this administration uses religion to legitimize the discriminatory treatment of the LGBTQ community, they arbitrarily ignore these purported principles when the religious liberty invoked falls outside their own views against disfavored minorities. The Commission examined these questions of balance in its report entitled “Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties.”²⁷ The report concluded that “Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.” In a democracy, one person’s religion cannot be used to inflict harm against those who do not share that belief and one religion cannot be favored over others. A second example of this Administration’s fundamental policy shift is the extent of its efforts to limit voting rights access, which has exacerbated the impact of the Supreme Court’s gutting of Section 5 of the Voting Rights Act in *Shelby County v. Holder*.²⁸ Removing Section 5 gave jurisdictions with a history of voter discrimination the ability to make changes to voting procedures without permission from the DOJ. Because of this, jurisdictions previously covered by Section 5 saw an increase in racial discrimination in voting and significantly higher purge rates.²⁹ The DOJ under this Administration has taken a position of silence towards rectifying these issues, and in some cases, has come to support voter purges. In 2017, in anticipation of *Husted v. A Philip Randolph Institute* in the Supreme Court, the DOJ filed an amicus brief which supported allowing the state of Ohio to implement a system that would remove voters from the voter roll because of

25 R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, Brief for the Federal Respondent Supporting Reversal, p. 3. https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf 26 “What the new religious exemptions law means for your health care,” PBS NewsHour, May 3, 2019. <https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care> 27 U.S. Commission on Civil Rights, “Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties,” September 2016, p. 26. Available at <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> 28 Report at 158. 29 U.S. Commission on Civil Rights, “An Assessment of Voting Rights Access in the United States,” September 2016, at 45; Report at 121; Joe Davidson, “Almost 16 million voters were removed from the rolls. We should be alarmed,” The Washington Post, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd.

https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf
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<https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care>
<https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>
<https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd

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their failure to vote.³⁰ Their only cited reason for changing their position was the change in administration.³¹ And despite the increase in voter purges since the ruling in *Shelby*, as of May 2019, the Civil Rights Division of the DOJ had not filed any lawsuits to prevent voting discrimination based on Section 2 of the Voting Rights Act, the section that prohibits voting procedures that discriminate based on race.³² The proposed budget cuts, the self-defeating enforcement strategies, and the dramatic policy shifts—many likely in contravention of an agency’s stated mission—have no doubt played a role in the accelerated departure of career staff since 2016.³³ The federal government was already losing institutional expertise, relationships, and memory because of a growing waive of retirements. The current Administration has accelerated the brain drain as career staff have been pushed out, in part because they are not being permitted to pursue the mission of the agency and in fact may be asked to act contrary to the historic mission of the agency.³⁴ These departures will have a detrimental impact on the effectiveness of federal agencies and their abilities to manage their civil rights caseloads.³⁵ Having a robust and functioning career staff, in any federal agency, ensures a level of consistency and experience across administration changes. The past few years have been a dark time at many federal agencies as public servants grapple with these conflicts. There are career employees who have worked hard over the past decade to advance the rights of LGBTQ people, but are suddenly being directed to carry out “religious liberty” interests at the expense of this community must surely feel like a violation of their oath of office. But as people are forced to confront these conflicts head on, many are holding true to their commitment to their agencies missions. As one civil servant stated in a recent interview, “A lot of us are banding together, not to do some ‘deep state’ takeover. . . we’re just trying to make sure all the functions of the agency that are being neglected at least continue in some form.”³⁶ History is replete with examples of courageous civil servants who worked to fulfill their oaths of office. Federal workers who sought to help the Jewish people being tortured and murdered by the

30 U.S. Comm’n on Civil Rights, “The U.S. Commission on Civil Rights Raises Concern about Reversal of Department of Justice Position in Key Voting Rights Case,” Aug. 18, 2017. 31 Id. 32 Joe Davidson, “Almost 16 million voters were removed from the rolls. We should be alarmed,” The Washington Post, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd. 33 Report at 30-32. 34 Report at 318; Brian Naylor, “Why the Federal Workforce Morale Is at an All-Time Low,” NPR, Jan. 29, 2018, <https://www.npr.org/2018/01/29/581674922/why-the-federal-workforce-moral-is-at-an-all-time-low>. 35 Rachel M. Cohen, “I Fully Intend to Outlast These People’: 18 Federal Workers on What It’s Really Like to Work for the Trump Administration,” The Washingtonian, April 7, 2019.

https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
<https://www.npr.org/2018/01/29/581674922/why-the-federal-workforce-moral-is-at-an-all-time-low>

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Nazis.³⁷ Federal workers who risked their lives³⁸ to enforce the Voting Rights Act of 1965 in the Deep South where lynchings were once so routine that white southerners brought their kids and picnic baskets.³⁹ Federal workers who became whistle blowers in the interest of protecting the American people.

I had the opportunity to visit the Equal Justice Institute’s Legacy Museum and the Memorial for Peace and Justice in Montgomery, Alabama. The museum and the memorial powerfully document the hundreds of thousands of Black people who were enslaved and the thousands who were lynched and murdered by whites through 1950. I recommend that all Americans visit both. Unfortunately, our dark days are not behind us and the legacy of slavery, Jim Crow, and current racism, xenophobia, sexism, bigotry and homophobia are still present and require vigorous government intervention. As Dr. Martin Luther King, Jr. once observed, “It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.”⁴⁰

37 The United States Holocaust Memorial Museum, online exhibit “Americans and the Holocaust,” featuring stories of Henry Morgenthau Jr., Raymond Geist, Hiram Bingham Jr., and Frances Perkins. <https://exhibitions.ushmm.org/americans-and-the-holocaust/stories/americans-who-dared> 38 Steven H. Wright, “Voter Discrimination Just Got Easier,” NYR Daily, July 29, 2014. “For almost fifty years, the US government has had an especially effective tool for ensuring fair elections: sending teams of federal observers to polling stations across the country. Though relatively little known, the program has been crucial in dismantling the discriminatory practices that disenfranchised voters of color. In the program’s early days, federal monitors risked their lives to collect evidence courts needed to outlaw the electoral mechanisms of Jim Crow.” 39 “Lynching In America: Confronting the Legacy of Racial Terror,” Equal Justice Initiative, fn 163. <https://lynchinginamerica.eji.org/report/> 40 Martin Luther King, Jr., excerpt from speech at Western Michigan University, December 18, 1963. <https://wmich.edu/sites/default/files/attachments/MLK.pdf>

<https://exhibitions.ushmm.org/americans-and-the-holocaust/stories/americans-who-dared>
<https://lynchinginamerica.eji.org/report/>
<https://wmich.edu/sites/default/files/attachments/MLK.pdf>

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Statement of Commissioner Michael Yaki President Trump and his Administration have pursued and permitted actions that have sought to restrict or deny the hard won and hard fought civil liberties of lesbian, gay, bisexual, and transgender (LGBT) people. As recently as August 2019, after garnering his first endorsement from the Log Cabin Republican group,¹ Trump shared his belief that “I’ve done very well with [the LGBT] community and some of my biggest supporters are of that community, and I talk to them a lot about it. I think I’ve done really very well with that community.”² Despite this curious self-perception, seemingly no other President has so blatantly and deliberately targeted the rights of the LGBT community. In his apparent zeal to appease an intolerant segment of his supporters, his Administration has trotted out a familiar attack on the LGBT community couched in a dubious First Amendment wrap -- the elevation of “religious freedoms” over other civil liberties.³ The families, careers, and, in fact, actual lives of the LGBT community are at stake. The Commission’s FY 2019 Statutory Enforcement Report examines a number of civil rights issues, all of which are subject to federal agency oversight, and many of which are of critical importance to LGBT people.⁴ Further, the Enforcement Report exposes President Trump’s

1 NBC News, Trump Ducks LGBTQ Discrimination Question, Says Gays “Like the Job I’m Doing,” August 20, 2019, <https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>. 2 Washington Blade, Trump: “I’ve Done Very Well” With LGBT Community, August 20, 2019, <https://www.washingtonblade.com/2019/08/20/trump-ive-done-very-well-with-lgbt-community/>. 3 For the Commission’s recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, see U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Rights, September 2016, <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> (“Peaceful Coexistence”). 4 These include

immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns. [original footnotes omitted.]

U.S Commission on Civil Rights, Are Rights Reality? Federal Civil Rights Enforcement: A Study of Thirteen Agencies from FY 2016 – FY 2018, November 2019, p. 59 (“USCCR Enforcement Report”). The Commission correctly emphasizes that

[o]ver the past few years, the Trump Administration . . . made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers, older adults, foster youth and parents, crime victimization, and disease prevention. [original footnotes omitted.]

<https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>
<https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>
<https://www.washingtonblade.com/2019/08/20/trump-ive-done-very-well-with-lgbt-community/>
<https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>

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Department of Justice's Civil Rights Division for "removing priorities to protect the rights of ... LGBT individuals from discrimination, harassment, and violence." "5 Meeting the goals of the President's ultra-conservative followers is a common theme among these issues, be it expressed implicitly or explicitly.⁶ Among these many concerns, those which specifically invoke religious freedoms as a justification for limiting LGBT rights merit special attention. For example, the Administration has announced plans to allow adoption agencies, including those which receive federal funding, to stand under the umbrella of religious liberties to discriminate against prospective adoptive parents based upon the prospective parents' sexual orientation or gender identity.⁷ This is an issue about which I have previously written some years back. There, I cited the scientific consensus that same-sex couples are as fit and suited for adoption as heterosexual couples.⁸ There is no rationale based on the best interests of a child that merit such

Ibid., p. 66. 5 Ibid., p. 62. 6 Overall,

Trump and his aides have issued a wave of regulations, executive orders, legal briefs and personnel appointments aimed at reversing large parts of the Obama administration's civil rights agenda, winning plaudits from religious conservatives who form the bedrock of Trump's political support. ... The Trump administration has sided against LGBT activists on a host of issues over the past two years, including banning transgender troops from serving in the military and arguing in court that civil rights laws do not protect employees from discrimination based on sexual orientation or gender identity.

The Washington Post, Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections, May 31, 2019, https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html. The National Center for Transgender Equality has compiled a comprehensive and disturbing list of anti-LGBT actions by President Trump and his Administration from February 22, 2017 forward. See National Center for Transgender Equality, Trump's Record of Action Against Transgender People: Anti-Transgender and Anti-LGBTQ Actions, <https://transequality.org/the-discrimination-administration>. GLAAD has maintained a similarly informative compilation. See GLAAD, Donald Trump: President of the United States, Presidency, <https://www.glaad.org/tap/donald-trump>. 7 Axios, Scoop: Trump's Plan to Let Adoption Agencies Reject Same-Sex Parents, May 24, 2019, <https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>. 8 For a detailed history and explication of the history of barriers to the adoption of foster children by same-sex couples in the U.S., see U.S. Commission on Civil Rights, The Multiethnic Placement Act: Minorities in Foster Care, Statement of Commissioner Yaki (Rebuttal), July 2010, p. 148, https://www.usccr.gov/pubs/docs/MEPABriefingFinal_07-01-10.pdf. Regarding the immediate needs large number of foster children awaiting adoption by loving parents, I stated that

https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
<https://transequality.org/the-discrimination-administration>
<https://www.glaad.org/tap/donald-trump>
<https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>
<https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>
https://www.usccr.gov/pubs/docs/MEPABriefingFinal_07-01-10.pdf

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a policy change by the Administration. There is only a rationale based on phobia that deprives innocent children of a chance at a family life.⁹ President Trump also has prioritized the reversal and curbing of employment protections for LGBT people. The rights of LGBT people to be protected from animus-based discrimination in the workplace are not secure except where states and localities have chosen to provide legal protections and in limited jurisdictions by judicial decision.¹⁰ The Enforcement Report discusses in detail President Trump's August 2019 proposed rule seeking to allow federal contractors to discriminate against LGBT employees and job applicants solely on the basis of sexual orientation under the rubric of religious freedom.¹¹ Again, with no apparent rationale tied to business

[t]he does not stand still for children, and we have a duty to recruit and explore all appropriate alternatives for these children. The United States Department of Health and Human Services should assist in this effort by developing education and outreach programs targeted at helping adoption agencies which want to recruit prospective families headed by lesbians and gay men. Politicians and bureaucrats may have the luxury of time in which to dither and waffle. For children whose development is benefited by having caring, supportive, and permanent families [including LGBT parents], time is not a luxury they can afford.

9 The American Civil Liberties Union filed a pre-emptive lawsuit in May 2019. See American Civil Liberties Union, Trump's Anti-LGBTQ Agenda Will Keep Foster Children From Having a Loving Home, May 30, 2019, <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>. 10 In the first instance, LGBT people are not explicitly protected by the U.S. Civil Rights Act of 1964. See P.Law 88-352, 78 Stat. 241. However, Title VII of the Civil Rights Act does protect people from discrimination based upon sex. Therefore, in recent years, the U.S. Equal Employment Opportunity Commission has determined that Title VII protects LGBT people from workplace discrimination. A number of courts have followed this interpretation and held that Title VII of the U.S. Civil Rights Act protects LGBT people from workplace discrimination. For a full discussion of these issues as of 2017, including the EEOC's relevant actions, see U.S. Commission on Civil Rights, Working for Inclusion, November 2017, "USCCR Working Report," https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf. More recently, the U.S. Solicitor General is seeking to reverse progress by asking the United States Supreme Court to rule that the protections against sex discrimination afforded by Title VII of the Civil Rights Act of 1964 pertain to "biological sex" only and do not include sexual orientation or gender identity discrimination. See, e.g., R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission, et al., Brief for the Federal Respondent Supporting Reversal, https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; Gerald Lynn Bostock c. Clayton County, Georgia and Altitude Express, Inc. et al v. Melissa Zarda, et al. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf; and The New York Times, Can Someone Be Fired for Being Gay? The Supreme Court Will Decide., September 23, 2019, <https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>. 11 USCCR Enforcement Report, p. 300. For the Commission's recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, see Peaceful Coexistence, supra note 3. In addition to what the Enforcement Report presents,

<https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>
<https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>
https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf
https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf
<https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>
<https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>

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necessity other than providing a justification for discrimination, the use of federal authority to turn back the clock on federal rights is a well-used implement in the Administration's anti-LGBT toolbox. President Trump's Department of Justice also may be initiating a pattern of involvement in individual anti-LGBT religious freedom discrimination cases in state courts. As recently as September 27, 2019, the Administration filed a "United States Statement of Interest" in an Indiana state court case involving a gay teacher fired by a Catholic school. Here, the Administration expressed its "interest" in ensuring that religious freedom is held above civil rights for LGBT people.¹² This follows the Administration's prior intervention in the Colorado bakery case, where

[t]he Department of Labor said the rule is proposed in order to provide "the broadest protection of religious exercise, for companies that compete for federal contracts. ... The proposal is expansively written and makes clear that the 'religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose,'" and also makes clear that "employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases." And, crucially, the proposed rule relies on an array of legal opinions to construct a new, national legal test of whether a company is "religious." The company need not be primarily religion-oriented. It need only to declare itself to be, for instance, religious "in response to inquiries from a member of the public or a government entity."

NBC News, Labor Dept. Proposes Expanding "Religious Exemption" in Hiring, August 14, 2019, <https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>. See also American Civil Liberties Union, ACLU comment on Department of Labor Proposal to License Discrimination in The Name of Religion, August 14, 2019, <https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>. 12 U.S. Department of Justice, Justice Department Files Statement of Interest in Indiana Lawsuit Brought by Former Teacher Against Archdiocese, September 27, 2019, <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>. See also United States Department of Justice, The United States' Statement of Interest, in the Marion Superior Court, Civil Division #1, State of Indiana, County of Marion, Joshua Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc., Cause No. 49D01-1907-PL- 027726, September 27, 2019, <https://www.justice.gov/opa/press-release/file/1205506/download>. Historical context regarding the federal government's treatment of LGBT employees is critical here. The actions of the Administration represent a conscious step backwards to the virulently anti-LGBT component of the repressive McCarthy Era. Although the Executive Order did not specifically bar LGBT people from federal employment, it banned any persons deemed to be at risk of blackmail. See Executive Order 10450, Security Requirements for Government Employment, 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, August 23, 1957, <https://www.archives.gov/federal-register/codification/executive-order/10450.html>. The painful irony here is that President Eisenhower created this very United States Commission on Civil Rights by signing the Civil Rights Act of 1957, Public Law 85-315, 71 Stat. 634, see <https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>, in August of that year, a mere four months after he signed Executive Order 10450 and thereby sparked the fire that became known as "the Lavender Scare."

<https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>
<https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>
<https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>
<https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>
<https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>
<https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>
<https://www.justice.gov/opa/press-release/file/1205506/download>
<https://www.archives.gov/federal-register/codification/executive-order/10450.html>
<https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>
<https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>

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Due to criminalization and severe societal stigma of non-heterosexual orientations at the time of Executive Order 10450's issuance, the concern about susceptibility to blackmail was interpreted to include LGBT people. The history is lengthy and complex, and the resultant "Lavender Scare" is estimated to have purged thousands of federal workers, forced outings, ruined careers, and driving some people to suicide. See, e.g., David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in The Federal Government, The University of Chicago Press Books, 2004. See also David Carter, Stonewall at 50: The Movement for LGBT Civil Rights, Remarks Before the U.S. Commission on Civil Rights, June 7, 2019, <https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>. Decades later, in 2017, U.S. Secretary of State John Kerry apologized for his department's discrimination against LGBT diplomats during the period of the Lavender Scare. See Secretary of State John Kerry, Apology for Past Discrimination Toward Employees and Applicants Based on Sexual Orientation, January 9, 2017, <https://2009-2017.state.gov/secretary/remarks/2017/01/266711.htm>. The President and his Administration are seeking to limit LGBT rights in addition to those to which it explicitly ties religious freedom. For example, the issue of public bathroom use by transgender people which remains politically contentious, first took a seat in the national political arena in 2015. See, e.g., Time, Everything You Need to Know About the Debate Over Transgender People and Bathrooms, July 28, 2015, <https://time.com/3974186/transgender-bathroom-debate/>. In 2016, while referring to the anti-transgender North Carolina legislation known as HB2, Candidate Trump opined that everyone should be able to "use the bathroom they feel is appropriate." ABC News, Trump Administration Reverses Transgender Bathroom Guidance, February 22, 2017, <https://abcnews.go.com/Politics/trump-administration-issue-guidance-transgender-bathrooms/story?id=45663275>. In 2017, however, President Trump's Department of Education "rescinded a guidance issued to schools by the Obama administration to allow students to use bathrooms that match their gender identity rather than the sex indicated on their birth certificate." See, e.g., ABC News, Donald Trump's Past Statements About LGBT Rights, July 26, 2017, <https://abcnews.go.com/Politics/donald-trumps-past-statements-lgbt-rights/story?id=48658527>. The Department's guidance, or "Dear Colleague letter," may be found at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>. The President and his Administration have also put significant effort into excluding transgender people from serving in the U.S. Military. In 2000, now-President Trump voiced support for the end of the U.S. military's ban on service by openly or outed LGBT people, commonly known as "Don't Ask, Don't Tell." ABC News, Donald Trump's Past Statements About LGBT Rights, supra. However, on July 26, 2017, the President tweeted:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....."Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....."victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you!]

Donald J. Trump (@realDonaldTrump), Twitter, July 26, 2017, https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweet&bed%7Cwtterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F.
https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweet&bed%7Cwtterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F; and https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweet&bed%7Cwtterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2FPolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128.

<https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>
<https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>
<https://2009-2017.state.gov/secretary/remarks/2017/01/266711.htm>

<https://time.com/3974186/transgender-bathroom-debate/>
<https://time.com/3974186/transgender-bathroom-debate/>
<https://abcnews.go.com/Politics/trump-administration-issues-guidance-transgender-bathrooms/story?id=45663275>
<https://abcnews.go.com/Politics/donald-trumps-past-statements-lgbt-rights/story?id=46858527>
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>
https://twitter.com/realDonaldTrump/status/890193981585444664?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890193981585444664&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890193981585444664?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890193981585444664&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890193981585444664?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890193981585444664&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2Fpolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128
https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2Fpolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128
https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwtterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2Fpolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128

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the Solicitor General argued that the bakery owner could be required to serve a gay couple because his First Amendment rights were violated “where a public accommodation law compels someone

The future of this policy remains unsettled. After federal court lawsuits across the nation sought to prevent its implementation, the U.S. Supreme Court ruled in January 2019 that “the Trump administration [could] go ahead, for now, with its plan to ban transgender military service.” NBC News, Supreme Court Allows Trump Administration to Enforce Transgender Military Ban, January 22, 2019, <https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>. The military began enforcing the ban on April 12, 2019, pending further action by the U.S. Supreme Court. The Washington Post, Military to Begin Enforcing Trump’s Restrictions on Transgender Troops, March 13, 2019, https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html. A May 2019 Department of Health and Human Services (DHS) memorandum let it be known in May 2019 that the President intends to issue a proposed rule, Centers for Medicare & Medicaid Services, Nondiscrimination in Health and Health Education Programs or Activities, Federal Register, June 14, 2019, <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>, to undo a DHS regulation facilitating health care access for transgender people. The Washington Post, Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections, supra note 5. See also National Public Radio, Trump Administration Proposes Rule to Reverse Protections for Transgender Patients, May 24, 2019, <https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patien>. In other words, homophobic or transphobic physicians will be able, without recourse, to limit the health decisions of transgender individuals. “The proposal is part of a broader effort by religious conservatives in the Trump administration to define gender restrictively. The result has been a weakening of protections for transgender people.” The Washington Post, New Trump Administration Rule Would Weaken Protections for Transgender People in Health Care, May 24, 2019, <https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>. See also PBS News Hour, Trump Administration Moves to Revoke Transgender Health Protection, May 24, 2019, <https://www.pbs.org/newshour/health/trump-administration-moves-to-revoke-transgender-health-protection> and USA TODAY, Trump Plan Would Hamper LGBTQ Health Care Access. This is Cruel and Dangerous, August 2, 2019, <https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>. On another anti-LGBT policy, in October 2018, President Trump announced via his Department of State that G-4, or “family,” visas are no longer available to same-sex couples in which one partner is a diplomat or employee of an international organization such as the United Nations. “Same-sex domestic partners of diplomats and workers who already have a G family visa must submit proof of marriage by the end of the year to qualify for a renewal.... If a couple cannot submit proof of marriage, the partner will have to leave the United States within 30 days of the year-end deadline....” The New York Times, U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners, October 2, 2018, <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>. If the ostensible rationale behind this policy change is to put same-sex couples on perceived equal footing with opposite-sex couples to whom only spousal, but not family, visas, have been available since 2009, United Nations Secretariat, Information Circular re: G-4 Visas for Domestic Partners, September 13, 2018, <https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>, the reasoning is flawed and portends dangerous outcomes. Opposite-sex couples, as a class, are relatively freely able to marry around the globe without significant negative personal consequences. Requiring same-sex marriages in this context is to force the outing of people from all over the world who may need to choose between accompanying their partners to the United States or staying closeted and separated in their home countries. Yes, perhaps same-sex couples from nations which refuse to marry them could get married upon arrival in the United States and request spousal visas. However, this policy, either by design or by ignorance, completely ignores the dangers attached to forced outing. These couples will likely be returning to their possibly-hostile home countries one day. The dangers appurtenant to forced outing under these global circumstances could result in LGBT people being jailed, corporally punished, or even executed in their home countries.

<https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>
<https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>
https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html
https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html
https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html
<https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>
<https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>
<https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patien>
<https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patien>
<https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>
<https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>
<https://www.pbs.org/newshour/health/trump-administration-moves-to-revoke-transgender-health-protection>
<https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>
<https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>
<https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>
<https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>
<https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>

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to create expression for a particular person or entity and to participate, literally or figuratively in a ceremony....”¹³ This President’s use of religious freedom to cloak the obstruction and withdrawal of LGBT rights is of immediate concern not only for LGBT people, but for all who value equality before the law. Religious freedom, as the Commission has already investigated and discussed at length, can be balanced with other civil rights.¹⁴ The irony of the President’s policy of stripping the LGBT community of rights in base obedience to a community that is steeped in homophobia and transphobia is that, abroad, the President has a so-called “global campaign to decriminalize homosexuality.” This campaign, cynically viewed, is no more than an attempt to utilize a wedge issue against Iran. One news source reported that “[n]arrowly focused on criminalization, rather than broader LGBT issues like same-sex marriage, the campaign was conceived partly in response to the recent reported execution by hanging of a young gay man in Iran, the Trump administration’s top geopolitical foe.”¹⁵ Indeed, there is some speculation that the “campaign” has its roots in right-wing opponents to Islamic immigration in Europe.¹⁶ It is a sad and cynical day when even words of praise from the President for the LGBT community must be viewed in the context of the first principle he identified throughout his campaign and began to carry out on his first week in office – his Islamophobia that resulted in his executive order banning Muslim immigration to this country.¹⁷ But when viewed in the greater frame of the enormous setbacks to LGBT rights he has set in motion during his Administration, it is not unexpected. Today, after successfully fighting for marriage equality and the repeal of prior discriminatory practices such as “don’t ask, don’t tell,” among other basic freedoms, the LGBT community finds itself once again in a familiar place – being pushed towards the outside looking in, having to summit again the rocky pathway to freedom and equality that was surmounted just scant years ago, all because of a President and an Administration that has chosen intolerance, rather than inclusion, as its first principle.

13 Reuters, Trump Administration Backs Baker Who Refused to Make Cake for Gay Couple, September 29, 2017, <https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>. 14 See U.S. Commission on Civil Rights “Peaceful Coexistence” report, supra note 3. 15 NBC News, Trump Administration Launches Global Effort to End Criminalization of Homosexuality, February 19, 2019, <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>. 16 “[T]he rhetoric Trump is using has some ugly roots: It’s essentially a European right-wing strategy to pit LGBTQ people against Muslims.... European right-wingers often use Middle Eastern countries’ horrific records on gay rights to try to foster Islamophobic sentiments among LGBTQ communities — a sentiment they can tap into to garner restrictions on immigration from predominantly Muslim countries. It’s effectively pro-gay Islamophobia.” Vox, Watch Donald Trump Reach Out to “L, G, B, T... Q” Americans, July 21, 2019, <https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-m>. See also Vox, Donald Trump’s Pro- Gay Islamophobia is Straight Out of The European Right-Wing Playbook, June 13, 2016, <https://www.vox.com/2016/6/13/11924826/donald-trump-islamophobia-muslim-lgbtq-europe-wilders>. 17 The Guardian, Is This a Muslim Ban? Trump’s Executive Order Explained, January 31, 2017, <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>.

<https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>
<https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>
<https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>
<https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>
<https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-m>
<https://www.vox.com/2016/6/13/11924826/donald-trump-islamophobia-muslim-lgbtq-europe-wilders>
<https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>

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Dissenting Statement of Commissioner Peter N. Kirsanov Introduction Let me save you the trouble of reading this 400+ page report. It can reduced to two words: Trump Bad. Whether it is HHS protecting conscience and religious liberty rights, the Department of Education attempting to reduce due process abuses in Title IX cases, or DHS attempting to secure the border - Trump Bad. There is no suggestion that people can have good faith policy disagreements, that economic costs are a valid consideration, or that hotly contested cultural issues are in fact hotly contested. (All the good people agree, you see.) In effect, this report is the progressive civil rights establishment’s primal scream about President Trump. For example, the report states:

The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration. Some champion these efforts, citing that deregulation can lead to economic growth and “improvements to quality of life from access to innovative products and services.” However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.¹

This pattern is followed throughout the report. A Trump Administration policy is described in disapproving terms. A disparaging description of purported benefits of this policy is followed by a “But others say, [insert criticism from progressive advocacy organization].” The report also engages in attempted guilt-by-association: “According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration’s restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations.”² As an initial matter, the number of reported hate crimes may not even be increasing, or at least is likely not increasing in the dramatic fashion portrayed by the media and the Commission majority. The increase in reported hate crimes may be entirely due to the increase in the number of jurisdictions reporting hate crimes to the FBI.³ Second, I am unsure what other civil rights violations the

1 Report at n. 310-312. 2 Report at n. 318. 3 Robby Soave, I Testified Before Congress About Hate Crimes and the Alt-Right. Here’s What Happened., Reason, May 16, 2019, <https://reason.com/2019/05/16/hate-crime-statistics-congress-house-subcommittee/>.

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majority is referring to, but it is worth noting that the Administration can't take a breath without being subject to legal challenge, and yet its policies are regularly upheld by the Supreme Court. Because of the length of this report, I cannot possibly address every issue or agency contained within it. I have endeavored to address issues that I think are of greatest importance. Chapter 2: U.S. Department of Justice Here, as elsewhere in the report, the Commission majority adopts wholesale criticisms of CRT leveled by former Obama Administration officials.⁴ The report states:

One way [CRT] can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators. If CRT's position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy, possibly creating a chilling effect.⁵

The report also states, "[T]he major policy considerations in the Obama Administration took expansive views of civil rights protections, and the Trump Administration's focus has been restrictive and maybe less effective for impacted communities."⁶ But is it CRT's job to expand the law? Or is it CRT's duty to enforce the law as passed by Congress? If CRT is developing "broader mandates," then at least theoretically it is placing new burdens on regulated entities – burdens that were not approved or contemplated by Congress. The report later cites a case in New York in which CRT initially filed a statement of interest in a case against a housing provider that barred individuals with criminal records, alleging that this violated the Fair Housing Act.⁷ There is simply no way that Congress intended the Fair Housing Act to mean that landlords have to individually assess the criminal records of potential tenants, rather than simply having a "no felons" policy, or even a "no murderers or rapists" policy, and run the risk of having DOJ come down on them if

While it's important to be aware that there is still hate and violence in this country, some policy makers and media figures have seized on the idea that hate crimes are actually rising. The FBI reported 7,175 crimes in 2017 vs. 6,121 crimes in 2016, which represents a 17 percent increase. But it's important to note that nearly a thousand additional municipalities submitted data to the federal government in 2017. This means the perceived increase in hate could partly be explained by the fact that we simply have more data. As the agencies involved in submitting data become more concerned with hate crimes, and more responsible about tallying them, the numbers will appear to be going up. ⁴ Report at n. 642-644. ⁵ Report at n. 481-483. ⁶ Report at n. 816. ⁷ Report at n. 696-699.

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HUD disagrees with their assessment.⁸ CRT did not even attempt to claim as much, admitting that the guidance effectively forcing landlords to rent to felons were dreamed up by HUD as part of the Obama Administration's Federal Interagency Reentry Council.⁹ This is what Robert Driscoll meant when he stated:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It's not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice.¹⁰

The majority does not consider that the Obama-era Civil Rights Division (and the other Obama-era civil rights agencies and offices) may have exceeded its statutory authority. If that is the case, adopting a narrower interpretation of civil rights is restoring CRT to its proper place. CRT and other administrative agencies are not supposed to make law, merely to interpret and enforce existing law. Nor is CRT supposed to be the supervisor for every police department in the nation, although for several years it labored under this delusion. The report states, "Former CRT head Vanita Gupta testified at the Commission's briefing that consent decrees are key to civil rights enforcement because they provide for court oversight 'regardless of political winds.'" ¹¹ Well, that is the problem. There needs to be political oversight of these decisions and political accountability. Consent decrees are a way of tying the hands of future administrations, which means that there is no way for voters to control the civil rights bureaucracy. The report also states:

[O]n October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties. This new guidance permits recipients of federal funding to make exceptions to their services based on "sincerely held religious beliefs." The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.¹²

⁸ United States of America's Statement of Interest, *Fortune Society, Inc., v. Sandcastle Towers Housing Development Fund Corp.* (E.D.N.Y.), Oct. 18, 2016, <https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>. ⁹ Id. at 1-2; Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, Dep't of Housing and Urban Development, Apr. 4, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF. ¹⁰ Driscoll Testimony, Briefing Transcript, pp. 115-117. ¹¹ Report at n. 642. ¹² Report at n. 831-833.

<https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>

<https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>

https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

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In this case, the Commission did not even bother presenting the other side. Given the many religious liberty cases that have wound up in the federal courts over the past ten years, it is clear that many Americans do see another side. Additionally, the memorandum at issue states that it is attempting to ensure that federal agencies comply with the provisions of the Religious Freedom Restoration Act (RFRA).¹³ Had the Obama Administration heeded RFRA before issuing Obamacare's contraception mandate, a lot of people and institutions (including the federal government) might have been saved a lot of time and money.¹⁴ The report also trumpets the glory of disparate impact. Disparate impact is a pernicious legal theory when not firmly tethered to smoking out intentional discrimination (or reckless disregard for equal treatment), as was ostensibly the case in *Griggs*.¹⁵ The way disparate impact has been abused to extend the power of the civil rights agencies and to force regulated entities to "get their numbers right" is shameful. And make no mistake, that is exactly what happens. The report may say:

[T]he term "disparate impact" elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest. Courts have long been clear that proving disparate impact discrimination requires more than just providing the existence of a statistical disparity in impact.¹⁶

Hogwash. Sure, the courts may say that – but you have to actually make it in front of a court in order for that requirement to be enforced. In the real world, when a statistical disparity exists, the functionary from Cubicle 17E deep in the bowels of the EEOC, or the Department of Labor, or the Department of Education suddenly perks up and takes an interest in you. And your case may not even make it to the point of attracting the interest of some Washington bureaucrat before the local activists – having been firmly told by activist organizations that the only reason for a disparity is intentional racism – are raising Cain. Much better to simply get your numbers right the first time. Hasn't anyone at the Commission read the facts in *Ricci v. DeStefano*?¹⁷

¹³ U.S. Dept. of Justice, *Implementation of Memorandum on Federal Law Protections for Religious Liberty* (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>. ¹⁴ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016). ¹⁵ *Griggs v. Duke Power*, 401 U.S. 424 (1971). ¹⁶ Report at n. 889-890. ¹⁷ *Ricci v. DeStefano*, 557 U.S. 557, 561-575 (2009). In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. . . . When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

<https://www.justice.gov/opa/press-release/file/1001886/download>

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Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed. . . . When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (department), the promotion and hiring process was governed by the city charter, in addition to federal and state law. The charter establishes a merit system. . . . The City's contract with the New Haven firefighter's union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examination, with the written exam account for 60 percent and the oral exam 40 percent of an applicant's total score. . . . After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of \$100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates. With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken. IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors. IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria. Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant. Forty-one candidates completed the captain examination—25 whites, 6 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

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The report also mischaracterizes the testimony of Joshua Thompson, an attorney at the Pacific Legal Foundation, who cautioned against focusing on disparate impact claims to the detriment of cases of intentional discrimination. The report claims, "Thompson advocated against federal enforcement of this mandatory enforcement tool."¹⁸ First, although CRT has interpreted the Supreme Court's decision in *Alexander v. Sandoval* to permit federal enforcement of disparate impact regulations, this is not a mandatory enforcement tool. These are mere regulations, and regulations can be changed. Statutes are mandatory – for example, enforcement of RFRA is mandatory. Second, Thompson did not advocate against all federal use of disparate impact. Rather, he cautioned against "over-enforcement of disparate impact" and suggested that "Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination."¹⁹ The report quotes the second statement, but somehow interprets this as "Thompson opposing enforcement of this mandatory enforcement tool." Nor does the report consider Thompson's point that seeing a disparate-impact bogeyman behind every disparity can lead to perverse results for minorities – the very people who supposedly benefit from disparate impact. Chapter 3: Department of Education This report assumes that the only legitimate interpretations of civil rights statutes are those favored by the Left. As is the case throughout this report, ED OCR's changes in policy and procedure are considered illegitimate. There is no effort made to grapple with the objections made to Obama-era innovations in the realm of Title VI and Title IX. The report states: "ED OCR enforces these civil rights laws and regulations through processing and acting upon individual complaints, through its own compliance investigations of schools receiving federal funds, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations."²⁰ The report also says, "ED OCR has dramatically

The City's contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City's counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legel. (Legel was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legel defended the examinations' validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was in line with results of the Department's previous promotional examinations. Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntary remedies—even . . . race-conscious remedies." . . . The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings [citations omitted][emphasis added]. ¹⁸ Report at n. 901. ¹⁹ Thompson statement at 2-3. ²⁰ Report at n. 1010.

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changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly."²¹ The report also approvingly quotes Fatima Goss Graves's characterization of the regulatory changes made by ED OCR as "OCR has retreated from its proactive commitment to enforce civil rights."²² Ms. Goss Graves says "proactive commitment,"¹ (and many others) say "overreach."²³ The policy changes encouraged by OCR's overreach had serious negative consequences in a variety of areas, ranging from absurd inquisitions of professors for writing articles²⁴ to students thrown out of college without the benefit of due process²⁵ to increasing disorder in schools.²⁶ The report uncritically parrots a report from the Center for American Progress (CAP) regarding ED OCR's enforcement of claims of discrimination on the basis of sexual orientation and gender identity. It is risible to treat CAP as an unbiased source. It is even sillier to do so in this instance. CAP claims that it is obvious that the Trump Administration's OCR is not enforcing Title IX as well as the

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren't ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.²⁷

I suppose this is one plausible interpretation of the data. However, we all know that if the Obama Administration found “no violation” in 6 percent of cases and the Trump Administration found

21 Report at n. 1012-1014. 22 Report at n. 1203. 23 See, e.g., H. Bader et al., “A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates,” released by the Regulatory Transparency Project of the Federalist Society, September 12, 2017, <https://regproject.org/paper/a-review-of-department-of-education-programs/>; Laura Kipnis, My Title IX Inquisition, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>; Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For all Students Under Title IX, Aug. 21, 2017, <https://dash.harvard.edu/handle/1/33789434>. 24 Laura Kipnis, My Title IX Inquisition, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf> 25 Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018). 26 See Dissenting Statement of Commissioner Peter N. Kirsanow in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 199-205, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>. 27 Report at n. 1103.

<https://regproject.org/paper/a-review-of-department-of-education-programs/>
<https://regproject.org/paper/a-review-of-department-of-education-programs/>
<http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>
<https://dash.harvard.edu/handle/1/33789434>
<http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>

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“no violation” in 12 percent of cases, the majority would claim that this proves that the Trump Administration doesn't take the complaints of gay and transgender students seriously. The CAP report also states:

Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.²⁸

Three points: 1) A two percent change tells us very little one way or the other; 2) Looking at percentages does not tell us if the right resolution was reached in individual cases – in some cases, the student’s preferred changes will be unreasonable or will not be authorized by statute or regulation; and 3) Comparing an eight-year average to a two-year average could be misleading. Professor R. Shep Melnick of Boston College testified about the problems created by OCR’s refusal during both Republican and Democrat administrations to engage in notice-and-comment rulemaking. Instead, OCR has long preferred to rely on changing enforcement in individual cases and “Dear Colleague Letters” in order to signal changes in policy. The report does not address the substance of Melnick’s critique, dismissing it in two sentences:

The Commission received testimony from Shep Melnick criticizing ED OCR’s use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that “their legal status remains ambiguous.” But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.²⁹

This is not the point Melnick was making. He did not question whether OCR had the authority to issue policy guidance. Rather, he questioned whether it would be preferable to make policy through notice-and-comment rulemaking, rather than through guidance.³⁰ Notice-and-comment rulemakings are more transparent than guidances and allow greater participation by regulated entities. The Supreme Court’s decision in *Perez v. Mortgage Bankers Association*,³¹ which the report suggests disposes of Melnick’s concerns, does not address Melnick’s second point – are these

28 Report at n. 1104. 29 Report at n. 1204-1205. 30 Melnick Statement at 2. Notice-and-comment rulemaking is designed to make room for public participation, to require extensive deliberation and consultation on the part of the agency, and to facilitate “hard look” judicial review. With DCLs [Dear Colleague Letters], regulators’ “colleagues” are told they can comment on the new requirements only after they have been announced. The justification for this avoidance of rulemaking procedures is that such “guidance” contains nothing that is new. In many cases this is obviously untrue – and everybody knows it. 31 135 S.Ct. 1199 (2015).

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guidances legally binding, or are they not?³² This was not the question at issue in *MBA*, which concerned D.C. Circuit precedent that held “that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted.”³³ In dictum that does pertain to Melnick’s point, Justice Sotomayor wrote in her majority opinion, “Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”³⁴ As Justice Scalia said in his concurring opinion, however, this does not settle the question whether guidances are legally binding. The APA says that interpretive rules are not binding. But the Supreme Court, independent of any requirement in the APA, has over the years developed a habit of deferring to an agency’s interpretation of its own regulations. If a court defers to an agency’s interpretive rule, then the interpretive rule is binding. Justice Scalia wrote:

Even when an agency’s interpretation gets deference, the Court argues, “it is the court that ultimately decides whether [the text] means what the agency says.” That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to “decide” that the text means what the agency says. The Court continues that “deference is not an inexorable command in all cases,” because (for example) it does not apply to plainly erroneous interpretations. True, but beside the point. Saying all interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying all substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretive rule must meet certain conditions before it gets deference – the interpretation must, for instance, be reasonable – but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures. ³⁵

The intervening four years have not caused the Court to look more kindly upon judicial deference to agency interpretations of regulations. This last term, all nine justices agreed in *Kisor v. Wilkie* that judicial deference to agency interpretations of regulations (known as *Auer* deference or *Seminole Rock* deference) should be severely curtailed.³⁶ The justices only disputed how far

32 Melnick Statement at 2. This truncated procedure raises an awkward question: are these various forms of guidance mere suggestions, or are they legally binding? When asked that question by Senator Alexander in 2014, two high ranking officials in the Obama Administration’s Department of Education said they were not legally binding. A third – Assistant Secretary for Civil Rights Catherine Lhamon – said they are legally binding. So does “enforcing civil rights laws” mean requiring schools to follow each command in these often lengthy guidance documents, or does it mean something less demanding? Given the huge gap between what OCR says in its sparse regulations and what it says in its lengthy guidance documents, this is no minor matter. 33 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015). 34 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015). 35 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1212 (2015)(Scalia, J., dissenting). 36 *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

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deference should be pruned back. The majority opinion, written by Justice Kagan, kept *Auer* (and *Seminole Rock*) deference alive, but “reinforce[d] its limits.”³⁷ Justice Kagan’s statements that “*Auer* deference is sometimes appropriate and sometimes not”³⁸ and “this Court has cabined *Auer*’s scope in varied and critical ways – and in exactly that measure, has maintained a strong judicial role in interpreting rules”, encourages judges to apply the requirements of *Auer* deference more energetically than they have been.³⁹ In describing situations in which *Auer* deference would not apply, Justice Kagan gives the following examples: a situation in which a court applies the traditional terms of statutory construction to determine that a rule is not genuinely ambiguous (in other words, a court can’t just take the agency’s word for it that the regulation is ambiguous)⁴⁰, the agency’s interpretation of a regulation must be reasonable⁴¹, “the agency’s interpretation must in some way implicate its substantive expertise”⁴², a new interpretation must not cause “unfair surprise” to regulated parties, and “[t]hat disruption of expectations may occur when an agency substitutes one view of a rule for another.”⁴³ Justices Gorsuch, Thomas, Kavanaugh, and Alito would have gone farther than Justice Kagan (and the Chief Justice, who provided the crucial vote for her opinion). These four would overrule *Auer*. Justice Gorsuch writes for these four justices:

Still, today’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitation on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled – in truth, zombified.⁴⁴

All of this suggests that Professor Melnick’s question about the legally binding nature of guidances from ED OCR were not answered decisively by *Mortgage Bankers Association*. And indeed, it would be surprising if they had been. After all, as a political science professor with an interest in administrative law, Professor Melnick is undoubtedly well aware of recent Supreme Court decisions in this area. In the post-*Kisor* world, interpretive rules like the *Dear Colleague Letters* that emanated from the Obama Office for Civil Rights may be more likely to run afoul of an invigorated judicial role. *Auer* deference, after all, was how the *Dear Colleague Letter* regarding transgender bathroom access initially managed to survive the Fourth Circuit. Many of Justice Kagan’s *Kisor* guidelines for when *Auer* deference should not apply would seem to apply to that

37 *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019). 38 *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019). 39 *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019). 40 *Kisor v. Wilkie*, 139 S.Ct. 2415 (2019). 41 *Kisor v. Wilkie*, 139 S.Ct. 2415-2416 (2019). 42 *Kisor v. Wilkie*, 139 S.Ct. 2417 (2019). 43 *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019). 44 *Kisor v. Wilkie*, 139 S.Ct. 2425.

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particular guidance when OCR declared that a regulation allowing separate bathroom facilities for the two sexes really means that a biological girl must be allowed access to the boys’ bathroom and locker room.⁴⁵ Such an interpretation would at a bare minimum seem to implicate “reasonableness,” “unfair surprise,” and “disruption of expectations”. Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights Policy Priorities This section of the report casts a jaundiced eye toward HHS OCR’s efforts to enforce statutes protecting religious freedom and conscience rights. The report lumps the establishment of the Conscience and Religious Freedom Division with statements from advocacy organizations claiming that LGBT people are routinely discriminated against when seeking medical treatment.⁴⁶ By lumping these two things together, the report implies that religious liberty and freedom of conscience are merely excuses to discriminate against LGBT individuals. This is another installment in the Commission’s multi-year campaign advocating for nondiscrimination to supercede religious liberty. The report says:

In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language. Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care. The result of this policy, says Shabab Mirza, an LGBT research assistant at the Center of American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers. LGBT advocates fear that creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community. Rea Carey, executive director of the National LGBTQ Task Force says that, “Health professionals have a duty to care for all their patients regardless of one’s gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are.” In a statement to the Commission, the National LGBTQA Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.⁴⁷

Unsurprisingly, the report tries to steal several bases here. Just as in the Commission’s recent school suspension report where “disability” was used to suggest children with physical disabilities

45 G.G. ex rel Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016). 46 Report at n. 1400-1419. 47 Report at n. 1414-1419.

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rather than emotionally disturbed children⁴⁸, “healthcare” here is undefined, leaving the casual reader to imagine that lesbians seeking treatment for bronchitis are routinely denied antibiotics. The cited Human Rights Watch report is more honest.

The [Obama-era rule interpreting Section 1557 of the Affordable Care Act] ensures that transgender people cannot be denied care – including transition-related care – because of their gender identity. It clarifies that transgender people should be treated in accordance with their gender identity, and that insurance providers cannot presumptively deny coverage for transition-related care or refuse treatments to transgender people in a discriminatory manner. [emphasis added]⁴⁹

The Commission majority once again uncritically adopts the party line of the transgender lobby. There is no consideration of the possibility that medical professionals can in good faith disagree with the desires of LGBT individuals, whether on medical, conscience, or religious grounds. A profoundly radical idea – that it is unremarkable and healthy to take hormones to feminize or masculinize one’s appearance, to remove healthy organs because of deep discomfort with one’s body – is presented with no discussion or debate. In fact, the Commission has never considered this, and simply presents the policy positions of transgender organizations as if they are normative. This is not speculation about what could happen in the future. Earlier this year, a biological woman who now presents as a transgender man sued a Catholic hospital in California because the hospital refused to perform a hysterectomy.⁵⁰ As the ACLU notes in its complaint, Catholic hospitals must abide by Catholic teaching as authoritatively issued by Catholic bishops, and performing a hysterectomy for transition-related purposes violates Catholic teaching for two reasons: 1) Catholic teaching forbids direct sterilization; 2) Catholic teaching forbids assisting in sex reassignment because the Church considers it a rejection of one’s God-given sex.⁵¹ The Commission majority, along with the ACLU⁵², Human Rights Watch, and similar groups, wants to make it illegal for Catholic hospitals to follow Catholic teaching. Even if one grants the debatable premise that it is best for a person suffering from gender dysphoria to remove healthy

48 See Dissenting Statement of Commissioner Gail Heriot in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S.

Commission on Civil Rights, at 186-189, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>, see also Dissenting Statement of Commissioner Peter M. Kirsanow in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 197-198, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>. 49 “You Don’t Want Second Best: Anti-LGBT Discrimination in US Health Care,” Human Rights Watch, July 23, 2018, <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>. 50 Nicole Russell, Why this transgender man sued a Catholic hospital for refusing to do a hysterectomy, Washington Examiner, March 28, 2019, <https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>. 51 Oliver Knight v. St. Joseph Northern California, Case No. DR190259, March 21, 2019, 4-6, <https://www.aclunc.org/docs/KnightvStJosephHealth.pdf>. 52 Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women’s Health and Lives, ACLU, May 2016, <https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>.

<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>
<https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>
<https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>
<https://www.aclunc.org/docs/KnightvStJosephHealth.pdf>
<https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>
<https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>

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body parts, there are non-Catholic hospitals at which a person can get this surgery. Our progressive friends want to dragoon hospitals that were established and funded by Catholic religious orders and laypeople, and force them to practice medicine the way they want. As HHS OCR noted in its response to an earlier draft of this report, it is disingenuous for the Commission to imply that protecting religious freedom and conscience diverts from HHS OCR’s core mission. The federal government has long protected rights of religious freedom and conscience. It is not a lesser civil right.⁵³ Furthermore, in the previous administration, HHS discriminated against the U.S. Conference of Catholic Bishops (USCCB) in awarding contracts to help victims of human trafficking. Catholic teaching prohibits the use of some reproductive products and services. Therefore, the USCCB did not refer victims of human trafficking for these products or services. Although the USCCB had received HHS contracts for assisting human trafficking victims since 2006, in 2011 the Obama Administration discontinued the contract. According to the Washington Post, “senior political appointees awarded the new grants to the bishops’ competitors despite a recommendation from career staffers that the bishops be funded based on scores by an independent review board.”⁵⁴ In short, HHS does not have a history of being overly solicitous of religious liberty. Additionally, HHS enforces laws that protect the conscience rights of healthcare providers, not just religious rights. This is important because, although the Commission majority does not acknowledge it, there is debate over whether hormone treatments and sex-reassignment surgery are the best treatment for individuals suffering from gender dysphoria. This is particularly true in cases where children and adolescents are suffering from gender dysphoria, because blocking puberty or administering cross-sex hormones may render these children permanently sterile.⁵⁵ It is important that HHS OCR protect the religious and conscience rights of medical professionals in regard to LGBT issues. Much like the Commission majority, there are individuals and institutions who want to force dissenters into acquiescence. For example, the former head of the

53 Correspondence from U.S. Dept of Health and Human Services to U.S. Commission on Civil Rights, Re: Technical Corrections to USCCR’s 2019 Federal Civil Rights Enforcement Report, August 19, 2019, at 2 (on file). For more than 155 years, Congress has offered protections in a variety of contexts, including: exempting religious objectors opposed to bearing arms from military service; exempting conscientious objectors from combat training or military service; exempting law enforcement employees from participating in executions “if such participation is contrary to the moral or religious convictions of the employee”; exempting education institutions from sex discrimination bans under Title IX of the Education Amendments of 1972 where such ban “would not be consistent with the religious tenets” of the institution; prohibiting coercion of persons to undergo . . . sterilization procedures by threatening loss of benefits and attaching a criminal punishment of a fine of up to \$1000, imprisonment for up to one year, or both, to violations of that prohibition; and preventing the Federal government from imposing substantial burdens on religious exercise absent a compelling government interest pursued in the manner least restrictive of that exercise. 54 Jerry Markon, Health, abortion issues split Obama administration and Catholic groups, Wash. Post, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAxV5xZM_story.html. 55 Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAxV5xZM_story.html
https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAxV5xZM_story.html
https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4
https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

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University of Louisville’s Division of Child and Adolescent Psychiatry and Psychology, Dr. Allan Josephson, is suing the university. Despite a stellar career as Division Chief, the university demoted and then fired Dr. Josephson after he served as an expert witness and spoke publicly about his view that children suffering from gender dysphoria should be given psychiatric help to hopefully reconcile them to their biological sex, rather than pursuing hormone and surgical treatments that have irreversible consequences.⁵⁶ There is no indication that Dr. Josephson’s beliefs about the proper treatment for children with gender dysphoria is religiously-based, rather than being a scientific and medical judgment. In fact, shortly before he was demoted, “Dr. Josephson outlined a proposed program for treating youth experience gender dysphoria that involved cooperation between identified leaders from child psychiatry and pediatric endocrinology.”⁵⁷ It is also worth noting that, unlike the Obama Administration’s HHS OCR, the Trump Administration’s HHS OCR is not trying to force hospitals and medical personnel to all do things a certain way. The Trump Administration’s HHS OCR is not prohibiting hospitals from conducting sex-reassignment surgeries or prohibiting doctors from prescribing hormone therapy. Section 1557 (Defining the Scope of the Meaning of Sex Discrimination) The report criticizes HHS’s decision to revise Section 1557 of the Patient Protection and Affordable Care Act (Obamacare), stating:

One of the most critical revisions proposed was the redefinition of “sex” to refer only to the biological and anatomical differences between males and females as determined at their birth. Unlike under the Obama Administration, “gender identity” would no longer be a protected class under the scope of Section 1557’s civil rights statutes and Title IX’s prohibitions of discrimination on the basis of sex.⁵⁸

This is wrong. The proposed revision of 1557 does not redefine sex “to refer only to the biological and anatomical differences between males and females as determined at their birth.”⁵⁹ Although proposed Section 1557 does repeal the definition of “on the basis of sex” that included “gender identity” as a protected class, it does not replace it with a statement that “sex” is defined on a biological or anatomical basis. The proposed rule does not define “sex”⁶⁰ because, HHS notes, the Supreme Court is likely to soon issue a decision that helps clarify whether “sex” includes gender identity.⁶¹

56 Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4. 57 Josephson v. Bendapudi at 139. 58 Report at n. 1401-1402. 59 Report at n. 1401. 60 84 FR 27857. 61 84 FR 27857; 84 FR 27855.

https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4
https://adfflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

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Housing of Illegal Immigrant Children The report states:

“The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. . . . During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities. “From October 2014 to July 2018, the HHS’ Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints.” Numbers increased after President Trump’s “zero tolerance policy” was put in place in April 2018 []. The New York Times reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, “the largest number of reports during any five-month span in the previous four years.”⁶²

Obviously everyone opposes sexual abuse of anyone, especially minors. The way this report is written, however, suggests that complaints of sexual abuse of minors are a new development in the Age of Trump. Obviously that is not the case, since the Obama Administration was in power from October 2014 until the end of January 2017. The report also fails to note that in the vast majority of complaints, the alleged perpetrator is a fellow minor detainee, not an adult staff member. According to the data published by Axios, of the cases reported to DOJ from October 2014 to July 2018, 851 complaints alleged that another minor was the perpetrator, and 178 alleged that an adult staff member was the perpetrator.⁶³ Obviously sexual abuse is terrible regardless of the identity of the perpetrator, but by only discussing a case where an adult staff member was convicted of sexual offenses, the report misleads the reader to believe this is a typical case.⁶⁴ The report also fails to note that the very New York Times article on which it relies includes a statement from Commander Jonathan White of the U.S. Public Health Service that the “vast

On April 22, 2019, the U.S. Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII’s prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. Because Title IX adopts the substantive and legal standards of Title VII, a holding by the U.S. Supreme Court on the definition of “sex” under Title VII will likely have ramifications for the definition of “sex” under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 and Title IX which are still pending in district courts. 62 Report at n. 1338-1342. 63 Caitlin Owens, Stef W. Kight, and Harry Stevens, Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody, AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>. 64 Report at n. 1344.

<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>

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majority of allegations [of sexual abuse] proved to be unfounded.⁶⁵ This may or may not be accurate, but it should at least have been noted. I was unable to find data that evaluates how many of these claims were determined to be unfounded, but in 2013 GAO released a report on allegations of detainee sexual abuse. GAO reported:

Of the 215 investigations of the allegations completed between October 2009 and March 2013, our analysis showed that 55 percent of the allegations were determined to be unsubstantiated (investigators could not determine if abuse had occurred), 38 percent unfounded (investigators determined that abuse had not occurred), and 7 percent – or 15 allegations – substantiated (investigators determined that abuse had occurred). Substantiated allegations included both allegations against staff members and allegations against fellow detainees[.]⁶⁶

Additionally, much of the deplorable increase in complaints of sexual abuse of minors is likely attributed to the increased number of minors arriving at the Southwest border. In FY 2016, the last time comparable numbers of illegal aliens were apprehended at the Southwest border, 408,870 illegal aliens were apprehended at the Southwest border. In FY 2018, 396,579 illegal aliens were apprehended at the Southwest border, following a dip to 303,916 in FY 2017. However, the demographic composition of illegal aliens changed between FY 2016 and FY 2018. In FY 2016, 59,692 unaccompanied children, 77,674 family unit members, and 271,504 single adults were apprehended at the Southwest border.⁶⁷ In FY 2018, 50,036 unaccompanied children, 107,212 members of family units, and 239,331 single adults were apprehended at the Southwest border.⁶⁸ If we assume that 40% of the individuals who showed up as part of family units were adults, that means that the number of minors arriving at the southwestern border increased from 106,296 in FY 2016 to 114,363 in FY 2018. This does not fully account for the increase in complaints from approximately 275 in the second quarter of FY 16 to 514 in the second quarter of FY 18, but it is likely a contributing factor.⁶⁹ Chapter 5: U.S. Department of Housing and Urban Development In keeping with the theme of this report, HUD’s 2015 Affirmatively Furthering Fair Housing (AFFH)⁷⁰ rule is treated as an uncontroversial clarification of what the Fair Housing Act had meant

65 Matthew Haag, Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says, N.Y. Times, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>. 66 Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse, GAO, November 2013, at 16, <https://www.gao.gov/assets/660/659145.pdf>. 67 United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>. 68 Southwest Border Migration FY 2018, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018#>. 69 <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>. 70 60 FR 42271.

<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.gao.gov/assets/660/659145.pdf>
<https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>
<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>
<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>

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for fifty years.⁷¹ In reality, AFFH is a sweeping governmental power grab that masks its radicalism in layers of bureaucrat-speak. Given the overwhelming number of topics covered in this report, the Commission staff may not have realized this is the case. Nevertheless, it is important to be clear on what AFFH is. No one, to my knowledge, alleges that there are still racial covenants in the U.S. or that landlords specify the preferred race of would-be tenants. Disparate treatment discrimination in housing is more subtle these days. However, people still tend to live in neighborhoods populated primarily by people who share their income level. Many people also prefer to live in neighborhoods zoned for single-family homes, or that have a certain lot size. And many people live in neighborhoods populated primarily by people of their own race. As long as no one is being barred from buying or renting a home because of his race or religion,

this should not be problematic. As Stanley Kurtz, a critic of AFFH, explained:

Ultimately, [AFFH] amounts to back-door annexation, a way of turning America's suburbs into tributaries of nearby cities. . . . If you press suburbanites into cities, transfer urbanites to the suburbs, and redistribute suburban tax money to cities, you have effectively abolished the suburbs. For all practical purposes, the suburbs would then be co-opted into a single metropolitan region. Advocates of these policy prescriptions call themselves "regionalists." . . . AFFH obligates grantees to conduct all of these analyses [of race, ethnicity, poverty, etc.] at both the local and regional levels. In other words, it's not enough for, say, Philadelphia's "Mainline" Montgomery County suburbs to analyze their own populations by race, ethnicity, and class to determine whether there are any imbalances in where groups live or in access to schools, parks, transportation and jobs. Those suburbs are also obligated to compare their own housing situations to the Greater Philadelphia region as a whole. So if some Montgomery County's suburbs are predominantly upper-middle-class, white, and zoned for single-family housing, while the Philadelphia region as a whole is dotted with concentrations of less-well-off African Americans, Hispanics, or Asians, those suburbs could be obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense. At that point, those suburbs would have to direct advertising to potential minority occupants in the Greater Philadelphia region. Essentially, this is what HUD has imposed on Westchester County, New York, the most famous dry run for AFFH. In other words, by obligating all localities receiving HUD funding to compare their demographics to the region as a whole, AFFH effectively nullifies municipal boundaries. Even with no allegation or evidence of intentional discrimination, the

71 Report at n. 1661-1693.

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mere existence of a demographic imbalance in the region as a whole must be remedied by a given suburb. Suburbs will literally be forced to import population from elsewhere, at their own expense and in violation of their own laws. In effect, suburbs will have been annexed by a city-dominated region, their laws suspended and their tax money transferred to erstwhile non-residents. And to make sure the new high-density housing developments are close to "community assets" such as schools, transportation, parks, and jobs, bedroom suburbs will be forced to develop mini-downtowns. In effect, they will become more like the cities their residents chose to leave in the first place.⁷²

The report also does not even try to claim that "segregation" is the result of refusals to sell or rent housing on the basis of race. Instead, the report says, "Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation. NFHA [National Fair Housing Alliance] states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods."⁷³ Well, of course. The key word here is "affluent". Of course affluent neighborhoods have more resources than poorer ones. The principal benefit of affluence is having more resources! Poverty is not a protected class. And as I have noted in the past, it is unclear why a "geographic area with significant concentrations of poverty and minority populations" (the definition of "racially or ethnically concentrated area of poverty") is a more pressing concern than a racially mixed area of concentrated poverty or a predominantly white area of concentrated poverty.⁷⁴ Racial imbalances that are the result of freely made choices are not problematic. But clearly, for the social engineers in the Obama Administration, they were. The Obama Administration's enthusiasm for racial bean-counting in the housing context manifested in bizarre ways. For instance, Dubuque, Iowa was not allowed to prefer its own residents over non-residents when providing housing assistance.⁷⁵ The people of Dubuque are too white, you see. Instead, HUD classified Dubuque as being part of the same "region" as Chicago, which is 200 miles away. HUD's racial alchemists then forced Dubuque to advertise the availability of public housing assistance in Chicago, where people in need of assistance were more likely to be African-American.⁷⁶ Never mind that Dubuque had plenty of its own residents languishing on the waiting list. Somehow this is going to usher in utopia.

⁷² Stanley Kurtz, Attention America's Suburbs: You Have Just Been Annexed, National Review, July 20, 2015, <https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/>. ⁷³ Report at n. 1701-1702. ⁷⁴ 80 FR 42355. ⁷⁵ Letter of Findings of Noncompliance, Civil Rights Compliance Review of the City of Dubuque's CDBG and Section 8 Programs, June 17, 2013, <https://nlhrc.org/sites/default/files/Dubuque-LOF.pdf>, see also Our opinion: National Review right about HUD, Telegraph Herald, Jan. 17, 2016, http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html. ⁷⁶ Voluntary Compliance Agreement Between the U.S. Dept of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 18, <http://cityofdubuque.org/DocumentCenter/View/22707>.

<https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/>
<https://nlhrc.org/sites/default/files/Dubuque-LOF.pdf>
http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html
<http://cityofdubuque.org/DocumentCenter/View/22707>

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Similarly, Westchester County in New York ran afoul of HUD because the county was reluctant to strong-arm towns into changing their zoning requirements in order to build low-income housing.⁷⁷ HUD argued that local zoning practices excluded blacks and Hispanics. In HUD's view, the county also was insufficiently obsessed with ensuring the exact same racial balance in all the towns within its borders. The National Low-Income Housing Coalition, which is supportive of AFFH, described the dispute between HUD and Westchester County this way:

[Assistant U.S. Attorney] Mr. Kennedy also noted that the Als [Analysis of Impediments] failed to address why minority populations were so low in many of the towns compared to the minority population as a whole. For example, several towns have a minority population of 1.5% or less, while Westchester County's African-American population alone is 14.6% of the total. The federal attorney pointed out that there is a connection between the likelihood that minority families would need and use multifamily housing, while there is an absence of multifamily housing in many towns. Even when the County's "cherry-picked" data are considered, minority populations declined as lot sizes grew larger.⁷⁸

In other words, HUD and the low income housing lobby want to use AFFH to force towns to build multifamily housing, even when the towns don't want to. There are pros and cons to building multifamily housing in areas previously zoned only for single-family housing, but without evidence that the refusal to change the zoning is motivated by racism, this should not be considered a violation of the FHA. Nor should it be any of the federal government's business. Zoning is as local an issue as it comes. If the residents of a town want to only have single-family housing because they want a less crowded, traditionally suburban way of life, that is their prerogative. As is so often the case, the report repeatedly refers to "patterns of segregation", as did HUD when promulgating AFFH.⁷⁹ This is galactically dishonest. First, legal segregation is dead and gone, but using the term automatically conjures up thoughts of the Jim Crow era. As used by AFFH and this report "segregation" doesn't even mean areas that were predominantly populated by African-Americans before passage of the Fair Housing Act and that continue to be predominantly populated by African-Americans today. Instead, it essentially means any person who is not a white, able-bodied male. The final rule defines "segregation" thus:

The Affordable Housing section shall also include specific one year goals to Affirmatively Further Fair Housing, by including a plan to increase the number of minorities, specifically African American households, to be provided affordable housing through activities that provide rental assistance, family self-sufficiency programs, or homeownership assistance. This may include marketing and information sharing of the programs availability and participation benefits. ⁷⁷ It took Westchester County 11 attempts over 8 years to receive approval for its fair housing plans. See Joseph De Avila, Westchester County Wins HUD OK in Housing Dispute, Wall St. J., July 18, 2017, <https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638>. ⁷⁸ New Developments in Westchester County AFFH Court Settlement, National Low Income Housing Coalition, Apr. 30, 2019, <https://nlhrc.org/resource/new-developments-westchester-county-affh-court-settlement>. ⁷⁹ Report at n. 1663, 1691.

<https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638>
<https://nlhrc.org/resource/new-developments-westchester-county-affh-court-settlement>

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Segregation means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act⁸⁰

This is clear in the Analysis of Impediments submitted by Westchester County, which painstakingly details the percentage of black and Hispanic residents in different parts of the county.⁸¹ Given the massive demographic changes in the United States following immigration changes in the 1960s, the vast majority of non-whites who are not African-American never experienced racial covenants or legal segregation. Nor did their parents or grandparents, at least in this country. People live where they can afford to live. It is HUD, not these municipalities, that has a fixation on race. Fortunately, HUD has announced its intention to revise AFFH. When HUD asked for comments on how to reduce the regulatory burden, "136 (45% of the total) discussed the AFFH rule."⁸² Contrary to what the Commission majority might think, opposition to AFFH was not expressed only by coldhearted Dickensian landlords. A number of individuals who work for housing authorities wrote to express frustration with AFFH. The Director of Compliance and Training at the Dallas, Texas Housing Authority wrote, "[T]here is a mismatch between the depth of data and research required, and the expertise and funding with which housing agencies are equipped to pursue this analysis. . . . [T]he takeaway is that as it currently stands, this rule is impossible to satisfy for the majority of housing agencies without additional resources or funding."⁸³ The National Association for County Community and Economic Development wrote, "While we fully support AFFH as well as supported approaches to satisfying AFFH, the rule in its current state is overly burdensome and impracticable for many communities to implement."⁸⁴ The General Counsel from the Vermont Department of Housing and Community Development (Vermont, of

⁸⁰ 80 FR 42355. ⁸¹ Westchester County Analysis of Impediments, Supplement to Chapter 12 – Zoning Analysis, July 13, 2017, <https://homes.westchestergov.com/images/stories/Alreport/ZACHap1220170713.pdf>. ⁸² 83 FR 40714. ⁸³ Jeni Webb, Director of Compliance and Training, Dallas Housing Authority, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 8, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>. ⁸⁴ Laura DeMaria, Executive Director, National Association for County Community and Economic Development, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>.

<https://homes.westchestergov.com/images/stories/Alreport/ZACHap1220170713.pdf>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>

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all states) recommended that AFFH be amended to "eliminate the requirement that States prepare an Assessment of Fair Housing":

The Assessment of Fair Housing Tool developed by HUD for use by entitlement jurisdictions does not translate well to states. The local data that forms the basis of the Tool cannot be interpreted on the state level in the same way that it can within the densely populated environs of a city. We are concerned that the effort required to comply with this regulatory requirement will detract from our ability to perform our most important functions. In our view, the resources that would be needed to complete the Assessment of Fair Housing should be devoted to addressing the severe lack of affordable housing and funding other economic and community development projects. HUD estimates that the assessment will take 1500 hours, or 37 weeks of work for a full-time employee. That time and money could be better spent. . . . We are strongly committed to affirmatively furthering fair housing, but we do not see how this Tool will help us with those efforts. Additionally, in a state with a relatively low growth rate, the facts on the ground do not change rapidly enough to justify anew[sic] assessment once every five years, especially not where that assessment will divert the full-time attention of one of our very small staff for most of a year.⁸⁵

Chapter 6: Department of Labor The report notes that OFCCP has taken steps to protect the religious liberty of federal contractors. The report, of course, regards such actions with a jaundiced eye. The report notes that OFCCP recently issued a proposed rule to clarify the scope of the religious exemption available to federal contractors, which the report claims "would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics."⁸⁶ This is spectacularly wrong, but perhaps it is understandable that the Commission got it wrong, since it relied on that well-known legal journal, Buzzfeed, for an explanation of the proposed rule. The introduction to the proposed rule states, "religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate on other protected bases."⁸⁷ This is discrimination on the

⁸⁵ Dale Azaria, General Counsel, Vermont Department of Housing and Community Development, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>. ⁸⁶ Report at n. 2032. ⁸⁷ 84 FR 41679.

<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>

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basis of conduct and belief, not status. If an employee of a Baptist-run homeless shelter is proselytizing for the Seventh-Day Adventists while working with clients of the homeless shelter, the shelter is well within its rights to fire the person. Similarly, if the USCCB is running a program for unaccompanied alien children, and the "getting your life back on track" program includes "abstain from sexual activity until marriage, and especially while you are a minor," and the unmarried program director shows up pregnant – well, that is going to undermine the program's message. This is why the proposed rule "proposes defining Religion to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice."⁸⁸ Otherwise, someone whose lifestyle choices violate their religion's moral teachings will claim that they are entitled to continue to be employed by the religious organization because they self-identify as a member of the religion. And on the other hand, someone whose religious beliefs are at odds with the organization's religious beliefs will claim that they are entitled to continued employment because they agree with the secular aspects of the organization's mission (this is what happened in *Spencer v. World Vision*).⁸⁹ It is also important to note that OFCCP did not make up this exemption out of whole cloth. Rather, the proposed rule is based on a Ninth Circuit case, *Spencer v. World Vision*,⁹⁰ that set out a test for establishing whether an entity qualifies for Title VII's religious exemption.⁹¹ The fact that the proposed exemption is available to for-profit corporations as well as non-profit corporations is not nefarious. All entities that want to receive the religious exemption must meet a three-part test to qualify:

1) "[T]he contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose."

2) “[T]he contractor must hold itself out to the public as carrying out a religious purpose.” 3) “[T]he contractor must exercise religion consistent with, and in furtherance of, a religious

purpose.” In short, my colleagues need not fear that Lockheed or Booz Allen Hamilton are suddenly going to seek and exercise religious exemptions. The report also says ominously that, “The proposed rule conflicts with a 2014 Executive Order that prohibited discrimination based on sexual orientation and gender identity by federal contractors.”⁹² Well, that’s the thing about Executive Orders – they aren’t laws. They only last as long as the executive branch cares to enforce them. In this instance, the executive branch has decided to add a regulation explaining how it will evaluate religious exemption claims. Religious

88 84 FR 41679. 89 Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011). 90 Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011). 91 84 FR 41682. 92 Report at n. 2034.

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exemptions are required by Title VII, which is an actual statute, rather than an executive order. This proposed regulation will not affect the 2014 Executive Order as applied to contractors that do not seek a religious exemption. Chapter 7: U.S. Equal Employment Opportunity Commission Sometimes I wonder if the memory of anyone at the Commission extends more than a year into the past. Three pages into the section on the EEOC, the Commission states:

These laws [Title VII, etc.] protect individuals from discrimination in employment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability, and genetic information. [emphasis added]⁹³

The problem is that a mere two years ago, the Commission issued a report entitled “Working for Inclusion” in which the Commission majority found that there are no federal statutes explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, and stated that some federal courts have said that Title VII covers sexual orientation and gender identity while other federal courts disagree, and that DOJ now takes the position that Title VII does not encompass sexual orientation.⁹⁴ The entire point of the report was to urge Congress to pass legislation prohibiting discrimination on the basis of sexual orientation and gender identity.⁹⁵ The issue remains sufficiently unsettled that the Supreme Court is hearing a case this fall regarding whether Title VII covers discrimination on the basis of gender identity. Yet for some reason the Commission now blithely asserts that federal anti-discrimination laws cover sexual orientation and gender identity. I am aware that EEOC takes this position, but it is not based in the actual text – nor did the Commission think it was based in the text two years ago. The Commission notes that EEOC issued proposed guidance in January 2017 defining sex-based harassment as encompassing gender identity, which it stated “includes using a name or pronoun inconsistent with the individual’s gender identity in a persistent or offensive manner.”⁹⁶ Perhaps the anti-discrimination laws should cover sexual orientation and gender identity. But that is a decision for Congress, not agencies. Agencies can only enforce statutes passed by Congress, and they should only enforce the statutes as written, not as unelected bureaucrats within agencies wish to amend them. The Commission majority should not give agencies cover for abusing their authority.

93 Report at n. 2090. 94 Working for Inclusion at 71-72. 95 Working for Inclusion at 73. 96 Report at n. 2527.

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Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties No one should be surprised that the chapter of this report concerning DHS CRCL is primarily concerned with the illegal immigration crisis at the border. If you approach this section with the assumption that the majority of the Commission prefers to eviscerate the immigration laws, everything will make sense. As far as the Commission is concerned, family separation at the border is entirely the fault of the Trump administration. The individuals who choose to cross the border illegally have no agency whatsoever. The report states:

This [zero-tolerance policy] impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters. The Administration’s new policy of “metering,” or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.⁹⁷

This is misleading for at least two reasons. First, having “fled dangerous conditions” is not grounds for asylum. As it turns out, we have this somewhat radical thing called a “law” that spells out the circumstances in which individuals are eligible for asylum:

The term “refugee” means (A) any such person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable to unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing and who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁸

“My country is violent” is not grounds for seeking asylum, but that is the strongest reason the would-be asylum seekers (and their coaches in the open borders crowd here in the U.S.) can come up with. Individuals are only eligible for asylum if they are being persecuted on account of race, religion, nationality, membership in a particular social group, or opinion. There is no indication that the individuals flocking to our southern border differ, as a group, in race, religion, nationality, membership in a particular social group, or opinion from much of the rest of the population in Central American countries. Maybe they could claim “we have membership in a particular social group because we don’t belong to gangs,” but it isn’t as if the entire population of Guatemala or

97 Report at n. 2376-2377. 98 Pub. L. 96-212.

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El Salvador belong to gangs. We all know that what is really happening is that Central American countries are poor and they would rather live in the United States. As I have had occasion to remark elsewhere in this dissent, “Poverty is not a protected class.” Nor is it grounds for asylum. If living in a country poorer than the United States was grounds for asylum, Germans would be eligible for asylum. Indeed, almost every human being on earth would be eligible for asylum. Second, not only are the vast majority of these people not eligible for asylum no matter when or where they enter the U.S., but “metering” is not prohibiting them from ever entering the U.S. and making their asylum case.⁹⁹ It is only a way to control the flow of people into the United States. Additionally, the report claims that “The Administration’s new policy of ‘metering,’ or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.”¹⁰⁰ This is flatly dishonest. The very government document cited for the proposition that metering may have increased the number of unauthorized crossings states that CBP has utilized metering at least since 2016. In other words, not only is metering not a new practice, but it started during the Obama Administration, not the Trump Administration.¹⁰¹ And it is hardly an excuse to say that metering has caused people to cross illegally. The vast majority of the people arriving at the southern border do not have legitimate asylum claims, and they know it. Not only are they unwilling to wait in line to immigrate legally, but many of them are not even willing to wait in the much shorter line at the southern border to be processed in an orderly fashion. No one is forcing them to cross the border illegally. They choose to break the law. The Commission majority would likely dispute my assertion that many of those claiming asylum at the southern border do not have a valid claim. Only 44.5 percent of asylum applicants who pass a credible fear interview show up in court to apply for asylum.¹⁰² If you are truly worried that you will be subjected to physical persecution if you are returned to a country, you would be a little more on top of ensuring that you actually applied for asylum. After all, as we are told many times, these people undertake a treacherous journey from Central America to arrive at our southern border. If you can make it from Honduras to the United States, you can definitely show up in court to make your asylum claim – if you believe your claim is likely to be granted. If you know it is unlikely to be granted, you will probably vanish into the interior of the United States and hope to avoid removal. And this is exactly what the majority of those who have passed a credible fear interview do.

99 Anna Giaritelli, DHS secretary defends metering asylum seekers at border: “We’re not turning anybody around,” Wash. Examiner, March 6, 2019 (“All asylum seekers have the opportunity to present their case. We’re not turning anybody around,” Nielsen said. “What we are doing is exercising the statutory authority that enables us to, in conjunction with Mexico, to return to Mexico migrants who have arrived from that country, to await processing.”), <https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>. 100 Report at n. 2377. 101 DHS OIG, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, 5-6, OIG-18-84 (Sept. 2018) (“CBP was regulating the flow of asylum-seekers at ports of entry through ‘metering,’ a practice CBP has utilized at least as far back as 2016 to regulate the flow of individuals at ports of entry.”), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>. 102 Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>.

<https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>
<https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>
<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>
<https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>

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Of those who do show up for their hearing after passing a credible fear interview, DHS notes that “many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders.”¹⁰³ Furthermore, the number of those who do not show up for hearings or removal has ballooned. According to EOIR (Executive Office for Immigration Review), in 2006 there were 573 final orders issued in absentia for cases originating as credible fear claims. In FY 2017, this had exploded to 4,038 – which actually was a marked decline from FY 2016, in which 8,999 such orders were issued.¹⁰⁴ Only 16 percent of adults who initially receive credible fear determinations are ultimately granted asylum.¹⁰⁵ Other parts of this section of the report are so dumb that anyone with an ounce of common sense can spot the problem.

The overwhelming majority of persons crossing that [southern] border are persons of color, primarily from Latin America. For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border. Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,068 (8.1%) were from Honduras, and 11,600 (0.01%) were from India. Those detained have been disparaged by the President’s xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants, and implicating equal protection based on national origin. Their rights to family integrity are also at stake.¹⁰⁶

Let me take a wild stab at this: the vast majority of arrests are made at the southern border because hundreds of thousands of Canadians are not rushing our northern border and vanishing into the interior of the United States, never to return. I’m not sure how the national origin of those crossing

103 83 FR 45520. 104 Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 5, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, A One-Sided Study on Detention of Illegal-Immigrant Families, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>. 105 Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 9, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, A One-Sided Study on Detention of Illegal-Immigrant Families, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>. 106 Report at n. 2386-2391.

https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
<https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>
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https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
<https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>
<https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>
<https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>

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the border illegally is supposed to affect our immigration enforcement decisions. “Oops, let that guy go, he’s from El Salvador. We have to arrest a thousand more white Canadians today before we arrest anyone else from Mexico or Central America.” (I will also note that the fact that almost 12,000 people arrested by the Border Patrol were from India, which is literally an ocean and a continent away, is evidence that those worried that our lax border security attracts lawbreakers from around the world have a point.) If people from Mexico and Central America are disproportionately inclined to break our immigration laws, how is the fault of the United States, Border Patrol, or President Trump? The report also says, “Their rights to family integrity are also at stake.”¹⁰⁷ Sorry, no they are not. People go to jail and prison all the time, and that means they are separated from their children. Their right to family integrity isn’t at stake because they broke the law. When Willie Sutton goes to prison for ten years for bank robbery, no one claims his right to family integrity is being violated. A decision from the Southern District of California, cited in this report, claims that the right to family integrity is being violated because the parents are separated from their children while awaiting adjudication of their asylum claims.¹⁰⁸ But that is simply because the government does not have sufficient family detention facilities, and we all have a strong interest in detaining these individuals, given the large percentage that abscond when released. The Commission majority, of course, would almost certainly not be satisfied by expanded family detention facilities so that families can be held together. Our 2015 report on detention facilities concerned (in part) family detention facilities, and the majority was unhappy about that too.¹⁰⁹ Furthermore, many people who arrive at the border claiming to be families are not actually related. ICE instituted a pilot program earlier this year in which they did rapid DNA tests of adults and children whom they suspected might not be related. Thirty percent of those tested were not in fact related.¹¹⁰ During one week in July, 102 tests were administered, and 17 of the tests showed no familial relationship.¹¹¹ The rest of this section can be boiled down to, “No one should ever be deported, ever” – an approach that the majority believes applies to DACA recipients and TPS (Temporary Protected Status) recipients. The report states that “Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status (“TPS”) from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns,

107 Report at n. 2391. 108 Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F. Supp.3d 1149 (S.D. Cal. 2018). 109 With Liberty and Justice for All: The State of Civil Rights in Immigration Detention Facilities, U.S. Comm’n on Civil Rights, Sept. 2015, at 127 (“DHS should look at alternative to detaining families, such as releasing the families to custodial agents in the United States.”), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf 110 Anna Giarielli, DNA tests reveal 30% of suspected fraudulent migrant families were unrelated, Washington Examiner, May 18, 2019, <https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated> 111 Priscilla Alvarez, ICE ramps up DNA testing for migrant families along the southern border, CNN, July 22, 2019, <https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html>.

https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf
<https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated>
<https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated>
<https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html>

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including allegations that the retraction of TPS being motivated by racial animus.¹¹² Clearly the reader must believe these allegations, because of my goodness, those countries are populated by People of Color! If the termination of Temporary Protected Status is due to racism, DHS is doing a pretty poor job of it. On August 1, 2019, Acting DHS Secretary Kevin McAleenan extended TPS for Syrian nationals for 18 months.¹¹³ On March 18, 2019, then-DHS Secretary Kirstjen Nielsen extended TPS for South Sudan for 18 months.¹¹⁴ On July 19, 2018, then-Secretary Nielsen extended TPS for Somalia for 18 months¹¹⁵, and on July 5, 2018, she extended TPS for Yemen for 18 months.¹¹⁶ The only countries that are currently designated for TPS (some of which are currently mired in litigation due to the Secretary’s efforts to terminate TPS) are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. Notice that there is not a single European or majority-white country on that list, and only one Asian country. DHS isn’t treating people who are colloquially considered “white” with TPS status better than people of color with TPS status because there aren’t any people in the former category. Furthermore, the countries for which DHS has extended Temporary Protected Status are all countries populated by “people of color.” DHS must have the most incompetent racists ever. Furthermore, Temporary Protected Status is meant to be just that – temporary. The underlying statute repeatedly makes this clear: “the Attorney General . . . may grant the alien temporary protected status,”¹¹⁷ “the Attorney General finds that there has been an earth, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,”¹¹⁸ “the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state,”¹¹⁹ “the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety”.[emphasis added]¹²⁰

112 Report at n. 2437. 113 Acting DHS Secretary McAleenan Announces Extension of Temporary Protected Status for Syria, Department of Homeland Security, August 1, 2019, <https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>. 114 Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for South Sudan, Department of Homeland Security, March 8, 2019, <https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>. 115 Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Somalia, Department of Homeland Security, July 19, 2018, <https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>. 116 Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Yemen, July 5, 2018, <https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen>. 117 8 U.S.C. § 1254a(a)(1). 118 8 U.S.C. § 1254a(b)(1)(B)(i). 119 8 U.S.C. § 1254a(b)(1)(B)(ii). 120 8 U.S.C. § 1254a(b)(1)(C).

<https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>
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<https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>
<https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>
<https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen>
<https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen>

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The underlying statute also provides for the termination of Temporary Protected Status.¹²¹ The statute also specifies that TPS is a nonimmigrant status, stating, “the alien shall not be considered to be permanently residing in the United States under color of law,”¹²² and “for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”¹²³ Temporary Protected Status for Nicaragua and Honduras was first issued on January 5, 1999 because of damage caused by Hurricane Mitch.¹²⁴ When the Secretary issued the termination of TPS status for Nicaragua, it had been almost 19 years since the designation was issued. Whatever condition Nicaragua is in now, this is as good as it is going to get as far as Hurricane Mitch goes. According to the notice provided by the Secretary, conditions have markedly improved over the past decade – for instance, “Electrification of the country has increased from 50% of the country in 2007 to 90% today. . . . Internet access is also now widely available.”¹²⁵ Likewise, although Honduras faces challenges, those challenges are unrelated to Hurricane Mitch and overall conditions have improved in recent years.¹²⁶ If Temporary Protected Status can’t be terminated now, it can never be terminated.¹²⁷ Much as in other aspects of immigration, the argument against terminating TPS benefits depends heavily on emotional appeals to the difficulties such a termination would cause U.S. citizen children of TPS beneficiaries.¹²⁸ The majority’s default position seems to be that the immigration laws cannot be enforced if doing so might affect U.S. citizen children. This is the problem with not enforcing the immigration laws. If TPS for these countries had not been extended for decades beyond any reasonable “temporary” time frame, it would not be so disruptive for people to return to their countries. This makes it even more imperative to end more recent grants of TPS (like Nepal) in a timely manner. There should not be an assumption that TPS status will be extended indefinitely, which seems to be the desire of the Commission majority.¹²⁹ There is nothing wrong with a U.S. citizen child returning to live with their parents in their parent’s country of origin. No one is permanently barring them from the U.S. U.S. citizen children live in

121 8 U.S.C. § 1254a(b)(3)(B). 122 8 U.S.C. § 1254a(f)(1). 123 8 U.S.C. § 1254a(f)(4). 124 64 FR 526; 82 FR 59637; 83 FR 26074. 125 82 FR 59637. 126 83 FR 26076 (stating that Honduras is currently the third largest producer of Arabica coffee beans in the world and that drought conditions have improved in recent years). 127 Similarly, Nepal was first granted TPS following an earthquake in 2015, but, as DHS notes, recovery efforts have succeeded to such an extent that more tourists visit Nepal now than prior to the earthquake. 83 FR 23706. Sudan may be a more arguable case for extending TPS benefits, as the termination of TPS status for Sudan admits that there is still fighting in two areas of Sudan, though not in the entire country. On the other hand, Sudan was first granted TPS in 1997, so again, after 22 years, this may be as good as it is going to get. 82 FR 47229. 128 Ramos v. Nielsen, 336 F.Supp.3d 1075 (N.D. Cal. 2018). 129 This is also why it is imperative to return the “asylum seekers” at the southern border to their countries of origin forthwith. The longer they remain here, the more pleading there will be that it is simply too disruptive to return them to their countries of origin.

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their parents’ (non-U.S.) countries of origin all the time, and children who are citizens of other countries (legally) live in the U.S. with their parents all the time. In closing, I note that I do not blame the beneficiaries of TPS from trying to remain in the country, even though I don’t think they have a leg to stand on. I wouldn’t want to live in Nicaragua, Haiti, El Salvador, Nepal, etc. Yet it is ironic that the same people who are in high dudgeon over President Trump referring to “****hole countries” simultaneously insist that we must never, ever, under any circumstances, return people to these wonderful countries in which everyone is clamoring to live. Chapter 11: U.S. Department of Agriculture The report mentions lawsuits brought on behalf of black, Hispanic, Native American, and female farmers that were settled during the Obama Administration. These settlements are commonly referred to as “Pigford.”¹³⁰ The report does not mention that these programs were riddled with fraudulent claims and abuses. No less a progressive institution than the New York Times investigated the settlement and reported:

In 16 ZIP codes in Alabama, Arkansas, Mississippi and North Carolina, the number of successful claimants exceeded the total number of farms operated by people of any race in 1997, the year the lawsuit was filed. Those applicants received nearly \$100 million. In Maple Hill, a struggling town in southeastern North Carolina, the number of people paid was nearly four times the total number of farms. More than one in nine African-American received checks. In Little Rock, Ark., a confidential list of payments shows, 10 members of one extended family collected a total of \$500,000, and dozens of other successful claimants shared addresses, phone numbers or close family connections. [emphasis added]¹³¹

Pigford I was rife with fraud – as journalist Jim Bovard wrote, USDA “expected only a few thousand legitimate claims” from the Pigford I settlement.¹³² USDA was in for a surprise:

[M]ore than 90,000 blacks asserted that they were wrongly denied farm loans or other USDA benefits in the 1980s and 1990s. This was surprising because there were at most 33,000 black-operated farms nationwide in that period. But that number itself was wildly inflated by USDA methodology. Anyone who sells more

130 Report at n. 3183-3195. 131 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 132 James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>.

https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0
<https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>

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than \$1,000 in agricultural commodities – the equivalent of 150 bushels of wheat or one horse – is categorized by USDA [as] as bona fide farmer.¹³³

The appropriate response to being fleeced was apparently, “Thank you sir, may I have another?” The government spent \$1.25 billion in the Pigford II settlement, ostensibly to compensate still more black farmers who had not been compensated in Pigford I. \$195 million was paid out to Hispanic and female farmers, and \$680 million was paid out to Native American farmers.¹³⁴ To make it even worse, not enough Native American farmers could even be found to distribute all the money. The remaining \$400 million was left “in the control of plaintiffs’ lawyers to be distributed among a handful of nonprofit organizations serving Native American farmers.”¹³⁵ Just because an organization is a non-profit doesn’t mean someone isn’t profiting. This is also an example of why former Attorney General Sessions was wise to end the practice of including payments to non-governmental third parties in settlement agreements.¹³⁶ It might seem difficult for this story to smell worse, but it does. The settlement with Hispanic and female farmers was unnecessary. The Department of Agriculture had defended itself for ten years, and the plaintiffs had lost at every stage of litigation, including the Supreme Court. But the Obama Administration couldn’t allow this to happen. Racial spoils for one non-white group must be available to all non-white groups. “New settlements would provide ‘a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers,’ an internal department memorandum stated in March 2010.”¹³⁷ As the Times reported:

On the heels of the Supreme Court’s ruling, interviews and records show, the Obama administration’s political appointees at the Justice and Agriculture Departments engineered a stunning turnabout: they committed \$1.33 billion to compensate not just the 91 plaintiffs but thousands of Hispanic and female farmers who had never claimed bias in court. The deal, several current and former government officials said, was fashioned in White House meetings despite the vehement objections – until now undisclosed – of career lawyers and agency officials who had argued that there was no credible evidence of widespread discrimination. What is more, some protested, the template for the deal – the \$50,000 payouts to black farmers – had proved a magnet for fraud.¹³⁸

133 James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>. 134 Report at 3186-3192. 135 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 136 Memorandum, Prohibition on Settlement Payments to Third Parties, Office of the Attorney General, June 5, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>. 137 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 138 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

<https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>
https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0
<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>
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https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0

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A report cited by the Commission claims that “systemic racism at USDA has denied black farmers equal access to credit and crop insurance”.¹³⁹ The report – again from the Center for American Progress – does not provide any evidence of continuing systemic discrimination against black farmers. The report only cites one recent case of alleged discrimination, in which a family of cane farmers claim that a bank and USDA denied them crop loans.¹⁴⁰ Legislation sponsored by Sen. Tim Scott allows “heirs’ property,” which is landed inherited by family members without a formal will, to receive assistance from USDA.¹⁴¹ The CAP report also notes that black farmers have increased as a percentage of farmers, and they own more land.¹⁴²

139 Report at n. 3200. 140 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>. 141 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>. 142 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>
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<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>
<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>
<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>

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Rebuttal of Commissioner Peter N. Kirsanow Commissioner Narasaki writes that the Declaration of Independence was followed by, “a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years.” N.b. The Constitution was ratified on June 21, 1788.1 Slavery was formally abolished throughout the United States by the 13th Amendment, which was ratified on December 6, 1865.2

1 The day the Constitution was ratified, National Constitution Center, June 21, 2019, <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>. 2 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865), Our Documents Initiative, <https://www.ourdocuments.gov/doc.php?flash=false&doc=40>.

<https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>
<https://www.ourdocuments.gov/doc.php?flash=false&doc=40>

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APPENDIX A Department of Justice Civil Rights Division Cases – Total Cases Resolved FY 2016-20180F3757 CRT SEC DRS EOS ELS IER HCE SPL VOT TOTAL/FY 2016 16 6 6 61 41 8 3 143 2017 8 14 3 57 46 4.5 4 136.5 2018 14 5 5 49 28 3 5 109 TOTAL 38 27 14 167 115 15.5 12 388.5 CRT SEC VOT SPL IER HCE ELS EOS DRS TOTAL Settlements 6 8.5 166 44 3 14 25 266.5 Consent Decrees 4 5 64 9 10 12 104 Judicial Decisions 2 2 1 7 2 3 1 18 TOTAL 388.5

3757Methodology and definitions are described in Chapter 2.

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Appellate Section Cases (FY 2016-2018)

Case Issue Brief Date Doc

Decision Date or other subsequent action

Doc

FY 2016 (33 cases) Flores v. U.S. Department of Education (4th Cir.) – Respondent Education 10/8/2015

Motion to Dismiss 10/19/2015

Court of Appeals Order

Green v. Brennan (S. Ct.) - Respondent

Employment Discrimination (Race, National Origin, Sex, and Religion)

10/25/2015 Reply Brief as Respondent 5/23/2016 Supreme Court Decision

Midwest Fence Corporation v. U.S. Department of Transportation (7th Cir.) - Appellee

Affirmative Action 10/26/2015 Brief as Appellee 11/4/2016 Court of Appeals Decision, reported at 840 F.3d 932

G.G. v. Gloucester County School Board (4th Cir.) – Amicus Education 10/28/2015 Brief as Amicus 4/19/2016

Court of Appeals Decision, reported at 822 F.3d 709

Fisher v. University of Texas (S. Ct.) - Amicus

Affirmative Action, Education 11/2/2015 Brief as Amicus 6/23/2016

Supreme Court Decision, reported at 136 S. Ct. 2198

Harris v. Arizona Independent Redistricting Commission (S. Ct.) - Amicus

Voting 11/2/2015 Brief as Amicus 4/20/2016 Supreme Court Decision, reported at 136 S. Ct. 1301

Heffernan v. City of Paterson (S. Ct.) - Amicus

Employment (Race, National Origin, Sex, and Religion)

11/23/2015 Brief as Amicus 4/26/2016 Supreme Court Decision, reported at 136 S.Ct. 1412

<https://www.justice.gov/crt/case-document/flores-v-department-education-motion-dismiss-0>
<https://www.justice.gov/crt/case-document/flores-v-department-education-motion-dismiss-0>
<https://www.justice.gov/crt/case-document/flores-v-department-education-court-appeals-order>
<https://www.justice.gov/crt/case-document/flores-v-department-education-court-appeals-order>
<https://www.justice.gov/crt/case-document/green-v-brennan-reply-brief-respondent>
<https://www.justice.gov/crt/case-document/green-v-brennan-reply-brief-respondent>
<https://www.justice.gov/crt/case-document/green-v-brennan-supreme-court-decision>
<https://www.justice.gov/crt/case-document/green-v-brennan-supreme-court-decision>
<https://www.justice.gov/crt/case-document/midwest-fence-corporation-v-us-department-transportation>
<https://www.justice.gov/crt/case-document/gg-v-gloucester-county-school-board-brief-amicus>
<https://www.justice.gov/crt/case-document/gg-v-gloucester-county-school-board-court-appeals-decision>
<https://www.justice.gov/crt/case-document/gg-v-gloucester-county-school-board-court-appeals-decision>
<https://www.justice.gov/crt/case-document/gg-v-gloucester-county-school-board-court-appeals-decision>
<https://www.justice.gov/crt/case-document/fisher-v-university-texas-brief-amicus>
<https://www.justice.gov/crt/case-document/fisher-v-university-texas-supreme-court-decision>
<https://www.justice.gov/crt/case-document/fisher-v-university-texas-supreme-court-decision>
<https://www.justice.gov/crt/case-document/fisher-v-university-texas-supreme-court-decision>
<https://www.justice.gov/crt/case-document/harris-v-arizona-independent-redistricting-commission-brief-amicus>
<https://www.justice.gov/crt/case-document/harris-v-arizona-independent-redistricting-commission-supreme-court-decision>
<https://www.justice.gov/crt/case-document/harris-v-arizona-independent-redistricting-commission-supreme-court-decision>
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<https://www.justice.gov/crt/case-document/heffernan-v-city-paterson-brief-amicus>
<https://www.justice.gov/crt/case-document/heffernan-v-city-paterson-supreme-court-decision>
<https://www.justice.gov/crt/case-document/heffernan-v-city-paterson-supreme-court-decision>
<https://www.justice.gov/crt/case-document/heffernan-v-city-paterson-supreme-court-decision>

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Revock v. Cowpet Bay West Condominium Association (3d Cir.)

American With Disabilities Act (ADA) and § 504 of the Rehabilitation Act (§ 504); Housing

11/23/2015 Brief as Amicus 3/31/2017 Court of Appeals Decision, reported at 853 F.3d 96

United States v. Rushin, et al. (11th Cir.) - Appellee Criminal 12/10/2015 Brief as Appellee 12/21/2016

Court of Appeals Decision, reported at 844 F.3d 933

Shelby County v. Lynch (S.Ct.) - Respondent Voting 1/6/2016

Brief in Opposition 1/25/2016

Certiorari Denied, reported at 136 S.Ct. 981

Chadam v. Palo Alto Unified School District (9th Cir.) – Amicus ADA and § 504 1/21/2016 Brief as Amicus 11/15/2016

Court of Appeals Decision, available at 666 F. App'x 615

Rothe Development Corp. v. United States Department of Defense (5th Cir., Fed. Cir., D.C. Cir.) – Appellee

Affirmative Action 1/28/2016 Brief as Appellee 1/13/2017 Court of Appeals Order

Wittman v. Personhuballah (S.Ct.) - Amicus Voting 2/3/2016 Brief as Amicus 5/23/2016

United States v. Secretary, Florida Department of Corrections (11th Cir.) - Appellee

Institutionalized Persons, Religion 2/24/2016 Brief as Appellee 7/14/2016

Court of Appeals Decision, reported at 828 F.3d 1341

Michigan Protection and Advocacy Service, Inc. v. Flint Community Schools (6th Cir.) – Amicus

ADA, § 504 and Individuals with Disabilities Education Act

4/14/2016 Brief as Amicus 2/3/2017 Dismissed

Drayton v. McIntosh County (S.D. Ga.) - Intervenor ADA and § 504 4/21/2016

Intervenor's Response in Opposition to Motion to Dismiss

6/17/2016 District Court Order

<https://www.justice.gov/crt/case-document/revcock-v-cowpet-bay-west-condominium-association-brief-amicus>
<https://www.justice.gov/crt/case-document/revcock-v-cowpet-bay-west-condominium-association-brief-amicus>
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<https://www.justice.gov/crt/case-document/united-states-v-rushin-et-al-court-appeals-decision>
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<https://www.justice.gov/crt/case-document/shelby-county-v-lynch-0>
<https://www.justice.gov/crt/case-document/shelby-county-v-lynch-0>
<https://www.justice.gov/crt/case-document/chadam-v-palo-alto-unified-school-district-brief-amicus>
https://www.justice.gov/crt/about/app/briefs/rothe_brief.pdf
<https://www.justice.gov/crt/case-document/wittman-v-personhuballah-brief-amicus>
<https://www.justice.gov/crt/case-document/wittman-v-personhuballah-supreme-court-decision>
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<https://www.justice.gov/crt/case-document/united-states-v-secretary-florida-department-corrections-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-secretary-florida-department-corrections-court-appeals-decision>
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<https://www.justice.gov/crt/case-document/michigan-protection-advocacy-service-inc-v-flint-community-schools-brief-amicus>
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Watkins v. Secretary, Florida Department of Corrections (11th Cir.) – Amicus

Institutionalized Persons, Religion 4/22/2016 Brief as Amicus 10/28/2016

Court of Appeals Decision , available at 669 F. App'x 982

Tucker v. Idaho (Idaho) – Amicus Access to Justice 5/11/2016 Brief as Amicus 4/28/2017 State Court Decision, reported at 394 P.3d 54

Exodus Refugee Immigration, Inc. v. Pence (7th Cir.) - Amicus Immigration 5/16/2016 Brief as Amicus 10/3/2016

Court of Appeals Decision, reported at 838 F.3d 902

Clark v. Virginia Department of State Police (Va.) - Amicus Servicemember 5/17/2016 Brief as Amicus 12/1/2016

State Court Decision, reported at 793 S.E.2d 1

Cazares v. United States (S.Ct.) - Respondent Criminal 5/18/2016

Brief in Opposition 6/20/2016

Certiorari denied, reported at 136 S. Ct. 2484

United States v. North Carolina (4th Cir.) - Appellant Voting 5/19/2016 Brief as Appellant 7/29/2016

Court of Appeals Decision, reported at 831 F.3d 204

Doe v. Mercy Catholic Medical Center (3d Cir.) – Amicus Education 6/9/2016 Brief as Amicus 3/7/2017

Court of Appeals Decision, reported at 850 F.3d 545

Silva v. Baptist Health South Florida, Inc. (11th Cir.) – Amicus ADA and § 504 6/23/2016 Brief as Amicus 5/8/2017

Court of Appeals Decision, reported at 856 F.3d 824

United States v. Cortes-Meza (11th Cir.) - Appellee Criminal 6/24/2016 Brief as Appellee 4/13/2017

Court of Appeals Decision, available at 665 F. App'x 731

Rodella v. United States (S. Ct.) - Respondent Criminal 7/15/2016

Brief in Opposition 10/3/2016

Certiorari Denied, reported at 137 S. Ct. 37

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<https://www.justice.gov/crt/case-document/cazares-v-united-states-brief-opposition>
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Boston v. United States (S. Ct.) – Respondent Criminal 11/16/2016

Brief in Opposition 3/6/2017

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Motion to Dismiss 7/27/2017

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American With Disabilities Act and Section 504 of the Rehabilitation Act

10/18/2017 Brief as Appellant 3/1/2018 Reply Brief

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Brief as Intervenor 5/2/2018

Court of Appeals Decision, reported at 889 F.3d 471

Davis v. Guam (9th Cir.) – Amicus Voting 11/28/2017 Brief as Amicus

Bratwaite v. Broward County School Board (11th Cir.) - Amicus

Employment Discrimination (Race, National Origin, Sex, and Religion)

12/7/2017 Brief as Amicus

Valencia v. City of Springfield (7th Cir.) – Amicus Housing 12/18/2017 Brief as Amicus 3/1/2018

Court of Appeals Decision, reported at 883 F.3d 959

United States v. Givhan (6th Cir.) - Appellee Criminal 12/20/2017 Brief as Appellee 6/29/2018

Court of Appeals Decision, available at 2018 WL 3202773

Smith v. School Board of Concordia Parish (5th Cir.) – Appellee Education 12/21/2017 Brief as Appellee 10/12/2018

Court of Appeals Decision, available at 2018 WL 4939471

Espinoza v. Montana Department of Revenue (Mont. Sup. Ct.) – Amicus Religion 1/18/2018 Brief as Amicus

<https://www.justice.gov/crt/case-document/united-states-v-whittington-brief-appellee>

<https://www.justice.gov/crt/case-document/us-v-whittington-court-appeals-decision>

<https://www.justice.gov/crt/case-document/us-v-whittington-court-appeals-decision>
<https://www.justice.gov/crt/case-document/ar-v-secretary-florida-agency-health-care-administration-brief-appellant>
<https://www.justice.gov/crt/case-document/ar-v-secretary-florida-agency-health-care-administration-reply-brief>
<https://www.justice.gov/crt/case-document/shaw-v-burke-statement-interest>
<https://www.justice.gov/crt/case-document/shaw-v-burke-statement-interest>
<https://www.justice.gov/crt/case-document/shaw-v-burke-district-court-order>
<https://www.justice.gov/crt/case-document/shaw-v-burke-district-court-order>
<https://www.justice.gov/crt/case-document/shaw-v-burke-district-court-order>
<https://www.justice.gov/crt/case-document/veasey-v-abbott-response-motion-lift-stay>
<https://www.justice.gov/crt/case-document/veasey-v-abbott-response-motion-lift-stay>
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<https://www.justice.gov/crt/case-document/fryberger-v-university-arkansas-brief-intervenor>
<https://www.justice.gov/crt/case-document/fryberger-v-university-arkansas-brief-intervenor>
<https://www.justice.gov/crt/case-document/fryberger-v-university-arkansas-court-appeals-decision>
<https://www.justice.gov/crt/case-document/fryberger-v-university-arkansas-court-appeals-decision>
<https://www.justice.gov/crt/case-document/fryberger-v-university-arkansas-court-appeals-decision>
<https://www.justice.gov/crt/case-document/davis-v-guam-brief-amicus>
<https://www.justice.gov/crt/case-document/bratwaite-v-broward-county-school-board-brief-amicus>
<https://www.justice.gov/crt/case-document/valencia-v-city-springfield-brief-amicus>
<https://www.justice.gov/crt/case-document/united-states-v-givhan-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-givhan-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-givhan-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-givhan-court-appeals-decision>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-brief-appellee>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-court-appeals-decision>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-court-appeals-decision>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-court-appeals-decision>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-court-appeals-decision>
<https://www.justice.gov/crt/case-document/smith-v-school-board-concordia-parish-court-appeals-decision>
<https://www.justice.gov/crt/case-document/espinoza-v-montana-department-revenue-brief-amicus>

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Young America's Foundation v. Napolitano (N.D. Cal.) - Amicus Other 1/25/2018

Statement of Interest 4/25/2018 District Court Order

Silguero v. CSL Plasma, Inc. (5th Cir.) - Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

2/6/2018 Brief as Amicus 10/23/2018 Court of Appeals Decision, available at 2018 WL 5262734

Dagher v. Washington Metropolitan Area Transit Authority (4th Cir.) - Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

2/8/2018 Brief as Amicus 4/25/2018 Dismissed

United States v. County of Lauderdale, et al. (5th Cir.) - Appellant Access to Justice 2/20/2018 Brief as Appellant 5/17/2018 Reply Brief

Abbott v. Perez (S. Ct.) - Appellee Voting 2/26/2018 Brief as Appellee Supporting Appellants

4/17/2018 Reply Brief

Edwards v. Gene Salter Properties (8th Cir.) - Amicus Housing 3/8/2018 Brief as Amicus 10/9/2018

Court of Appeals Decision, available at 2018 WL 4896179

United States v. Broussard (5th Cir.) - Appellee Criminal 3/19/2018

Supplemental Letter Brief 3/29/2018

Court of Appeals Order, Petition for Rehearing DENIED

Silberman v. Miami Dade Transit (11th Cir.) - Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

4/4/2018 Brief as Amicus

United States v. Town of Colorado City, Arizona, et al. (9th Cir.) - Appellee

Housing 4/19/2018 Brief as Appellee

United States v. Asher (6th Cir.) - Appellee Criminal 5/14/2018 Brief as Appellee

<https://www.justice.gov/crt/case-document/young-america-s-foundation-v-napolitano-statement-interest>
<https://www.justice.gov/crt/case-document/young-america-s-foundation-v-napolitano-statement-interest>
<https://www.justice.gov/crt/case-document/young-america-s-foundation-v-napolitano-district-court-order>
<https://www.justice.gov/crt/case-document/dagher-v-washington-metropolitan-area-transit-authority-brief-amicus>
<https://www.justice.gov/crt/case-document/us-v-county-lauderdale-et-al-brief-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-county-lauderdale-reply-brief>
<https://www.justice.gov/crt/case-document/abbott-v-perez-brief-appellee-supporting-appellants>
<https://www.justice.gov/crt/case-document/abbott-v-perez-brief-appellee-supporting-appellants>
<https://www.justice.gov/crt/case-document/abbott-v-perez-brief-appellee-supporting-appellants>
<https://www.justice.gov/crt/case-document/abbott-v-perez-reply-brief>
<https://www.justice.gov/crt/case-document/edwards-v-gene-salter-properties-brief-amicus>
<https://www.justice.gov/crt/case-document/edwards-v-gene-salter-properties-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-broussard-supplemental-letter-brief>
<https://www.justice.gov/crt/case-document/united-states-v-broussard-supplemental-letter-brief>
<https://www.justice.gov/crt/case-document/united-states-v-broussard-petition-rehearing-denied>
<https://www.justice.gov/crt/case-document/united-states-v-broussard-petition-rehearing-denied>
<https://www.justice.gov/crt/case-document/united-states-v-broussard-petition-rehearing-denied>
<https://www.justice.gov/crt/case-document/silberman-v-miami-dade-transit-brief-amicus>
<https://www.justice.gov/crt/case-document/united-states-v-town-colorado-city-arizona-et-al-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-asher>

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Sheridan v. Melendres (S. Ct.) - Respondent

Police Misconduct (Civil Cases) 5/22/2018

Brief in Opposition 6/25/2018

Certiorari Denied, available at 2018 WL 574922

United States v. Doggart (6th Cir.) - Appellee Criminal 5/24/2018 Brief as Appellee 10/18/2018

Court of Appeals Decision, available at 2018 WL 5075044

United States v. Corder (6th Cir.) - Appellee Criminal 6/11/2018

United States Waived Response to the Petition for a Writ of Certiorari

6/11/2018 Certiorari Denied, available at 2018 WL 1952577

Jesus Christ is the Answer Ministries v. Baltimore County, Maryland (4th Cir.) - Amicus

Religion 7/2/2018 Brief as Amicus

United States v. Badillo (1st Cir.) - Appellee

Employment Discrimination (Race, National Origin, Sex, and Religion)

7/3/2018 Motion to Dismiss 11/7/2018 Court of Appeals Judgment

United States v. Slager (4th Cir.) - Appellee Criminal 7/5/2018 Brief as Appellee

United States v. Royal (4th Cir.) - Appellee Criminal 7/31/2018 Brief as Appellee 11/6/2018

Court of Appeals Decision, available at 2018 WL 5809731

Ashby v. Warrick County School Corp. (7th Cir.) – Amicus ADA and § 504 8/20/2018 Brief as Amicus 11/5/2018

Court of Appeals Decision, available at 2018 WL 5784478

Furgess v. Pennsylvania Department of Corrections (3d Cir.) – Amicus ADA and § 504 8/27/2018 Brief as Amicus

<https://www.justice.gov/crt/case-document/sheridan-v-melendres-brief-opposition>
<https://www.justice.gov/crt/case-document/sheridan-v-melendres-brief-opposition>
<https://www.justice.gov/crt/case-document/united-states-v-doggart-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-doggart-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-doggart-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-doggart-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-doggart-court-appeals-decision>
<https://www.justice.gov/crt/case-document/jesus-christ-answer-ministries-v-baltimore-county-maryland-brief-amicus>
<https://www.justice.gov/crt/case-document/united-states-v-badillo-motion-dismiss>
<https://www.justice.gov/crt/case-document/united-states-v-badillo-motion-dismiss>
<https://www.justice.gov/crt/case-document/united-states-v-badillo-court-appeals-judgment>
<https://www.justice.gov/crt/case-document/united-states-v-badillo-court-appeals-judgment>
<https://www.justice.gov/crt/case-document/united-states-v-slager-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-royal-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-royal-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-royal-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-royal-court-appeals-decision>
<https://www.justice.gov/crt/case-document/united-states-v-royal-court-appeals-decision>

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Metcalf v. United States (S. Ct) - Respondent Criminal 9/14/2018

Brief in Opposition 10/29/2018

Certiorari Denied, available at 2018 WL 3008926

United States v. Brown (11th Cir.) - Appellee/Cross-Appellant Criminal 9/20/2018

Brief as Appellee/Cross- Appellant

United States v. Antico (11th Cir.) - Appellee/Cross-Appellant Criminal 9/24/2018

Brief as Appellee/Cross- Appellant

United States v. Puerto Rico (1st Cir.) - Appellee

Police Misconduct (Civil Cases), Third Party Intervention in Civil Rights Cases

10/9/2018 Response to Court Order to Show Cause

Disability Rights Section Cases (FY 2016-2018)

Cases Date Document FY 2016 (16 cases) County of Riverside (CA) 10/8/2015 Consent Decree Pikes Peak Wrestling League (CO) 10/29/2015 Consent Decree

<https://www.justice.gov/crt/case-document/metcalf-v-united-states-brief-opposition>
<https://www.justice.gov/crt/case-document/metcalf-v-united-states-brief-opposition>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
https://www.ada.gov/riverside_ca/riverside_ca_cd.html
https://www.ada.gov/pikes_peak/pikes_peak_cd.html

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Augusta County (VA) 11/4/2015 Consent Decree Bolivar County (MS) 11/17/2015 Consent Decree North Florida OB/GYN Associates (FL) 1/7/2016 Settlement Agreement Two Men and a Truck 1/28/2016 Settlement Agreement Greyhound Lines, Inc. 2/10/2016 Consent Decree Arlington-Mansfield Area YMCA (TX) 2/24/2016 Settlement Agreement Pain Management Care, P.C. 4/7/2016 Consent Decree Columbia, South Carolina Police Department (SC) 5/3/2016 Settlement Agreement Mid-America Center 5/5/2016 Settlement Agreement Philadelphia Freedom Valley YMCA – Rocky Run Branch 5/19/2016 Settlement Agreement Omaha Performing Arts Society 7/14/2016 Settlement Agreement YMCA of the Triangle 7/27/2016 Settlement Agreement Humboldt County (CA) 9/13/2016 Consent Decree 30 Hop Restaurant 9/19/2016 Consent Decree FY 2017 (8 cases) Miami University, et al. 10/17/2016 Consent Decree City of Florence (KY) 10/26/2016 Consent Decree

Sheriff Woody & City of Richmond (VA) 11/12/2016

Judicial Decision, new Administration agreed to stipulated motion to dismiss (EDVA decided in favor of Defendant 11/22/16; notice of appeal filed 1/18/17)

Gualtieri 11/16/2016 Settlement Agreement Ohio Department of Rehabilitation & Correction 1/3/2017 Settlement Agreement Palm Beach County Supervisor of Elections 1/19/2017 Settlement Agreement City of Philadelphia (PA) 2/17/2017 Consent Decree Washington Metropolitan Area Transit Authority 3/1/2017 Consent Decree FY 2018 (14 cases) City of New Albany (IN) 10/4/2017 Settlement Agreement Bar-T Year Round Programs for Kids 10/10/2017 Settlement Agreement Louisiana State Penitentiary (LA) 11/14/2017 Settlement Agreement When Pigs Fly BBQ Pit 1/18/2018 Settlement Agreement Claremore VFW & Auxiliary 2/6/2018 Settlement Agreement

https://www.ada.gov/augusta_county/augusta_cd.html
https://www.ada.gov/arlington_vmca.html
https://www.ada.gov/columbia_pd/columbia_pd_sa.html
https://www.ada.gov/mid-america_sa.html
https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html
https://www.ada.gov/miami_university_cd.html
https://www.ada.gov/florence_ky/florence_ky_cd.html
https://www.ada.gov/richmond_sheriffs_complaint.html
https://www.ada.gov/palm_beach_sa.html
https://www.ada.gov/vmata/vmata_cd.html
https://www.ada.gov/bar-t_sa.html
https://www.ada.gov/lsp_sa.html
https://www.ada.gov/wpf_bbq_sa.html
https://www.ada.gov/claremore_vfw_sa.html

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Atlantis Events, LLC 2/20/2018 Settlement Agreement Learning Care Group, Inc. 3/20/2018 Settlement Agreement Union Parish Detention Center 3/22/2018 Settlement Agreement South Carolina Department of Corrections (SC) 3/29/2018 Settlement Agreement Teachers Test Prep, Inc. 6/27/2018 Settlement Agreement The Pawn Shop 7/24/2018 Settlement Agreement Saint Joseph Hospital and SCL Health 7/31/2018 Settlement Agreement Philadelphia Police Department (PA) 8/2/2018 Settlement Agreement City of Minneapolis (MN) 8/14/2018 Settlement Agreement

https://www.ada.gov/atlantis_events_sa.html
https://www.ada.gov/lcg_sa.html
https://www.ada.gov/union_parish_sa.html
https://www.ada.gov/south_carolina_doc_sa.html
https://www.ada.gov/tp_sa.html
https://www.ada.gov/the_pawn_shop_sa.html
https://www.ada.gov/sjh_lof.html
https://www.ada.gov/ppd_sa.html
https://www.ada.gov/minneapolis_t1_sa.html

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Educational Opportunity Section Cases (FY 2016-2018) Cases Basis Type of Resolution Date of Resolution FY 2016 FY 2016 (8 cases) Monroe City SB (LA) Race (deseg) Consent Order 4/14/2016

Arizona DEO (AZ) National Origin (ELL & FLEP) Settlement (amended 6/30/16 in 1 aspect) 4/22/2016

Univ. Tennessee Health Science Center (TN) Disability Settlement 7/25/2016 Wheaton College (MA) Sex (sexual harassment; Title IX) Settlement 9/21/2016 Worcester P.S. (MA) National Origin (ELL & FLEP) Settlement 10/7/2016 Palm Beach County (S.D. Fla.) National Origin (ELL & FLEP) Settlement 10/11/2016

Univ. of New Mexico (NM) Sex (sexual assault/discrimination; Titles IV & IX) Settlement 10/17/2016

California DOE (CA) National Origin (ELL) Settlement 9/8/2016 FY 2017 FY 2017 (12 cases) St. Johns County SD (M.D. Fla) Race (deseg) Judicial Order 19/26/16 St. Martin Parish SD (LA) Race (deseg) Consent Order 11/16/2016

SD of Philadelphia (PA) Race (deseg) Consent Order 1/18/2017

BEO of Hendry County (FL) Race (deseg)

Consent Order - of stipulated facts & ongoing monitoring needs 1/23/2017

St. James Parish SB (LA) Race (deseg) Consent Order 1/30/2017 Covington IPS (KY) Disability Settlement 3/13/2017

Kansas State Univ. (KS) Sex (sexual assault/harrasment, Title IX) Judicial Opinion 3/14/2017

Wicomico County SD (MD) Race (Black & Latino)/Disability Settlement 3/20/2017 SB of the City of Suffolk (VA) Race (deseg) Consent Order 3/20/2017

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Bolivar County BOE #4 (MS) Race (deseg) Consent Order (fy 2016 Judicial Opinion) 5/25/2017

State of Georgia (McDuffie SD)(GA) Race (deseg) Consent Order 5/25/2017 Gallup-McKinley County Schools (NM)

Race (Native American, Title VI disparate impact regs) Settlement 6/16/2017

Horry County Schools (SC) National Origin (ELL) Settlement 8/24/2017 FY 2018 FY 2018 (6 cases) Westminster Public Schools (CO) National Origin (ELL) Settlement 3/1/2018 Union County P.S. (OK) National Origin (ELL) Settlement 7/5/2018 Jackson County SB (FL) Race (deseg) Consent Order 2/23/2016 Providence Schools (RI) National Origin (ELL) Settlement 8/9/2018 South Bend Community School Corp. (IN) Race (deseg)

Consent Order - updated by stipulation 9/4/2018

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Employment Litigation Section Cases (FY 2016-2018)

Defendant Name Type of Resolution Date of Resolution Basis Issue

FY 2016 (6 cases)

City of Chicago Board of Education (IL) Consent Decree 12/17/2015 Title VII (sex)

Title VII: §706 (Sex - gender & pregnancy) (settlement based on consent entered by court as court order)

Niagara County (NY) Consent Decree 1/7/2016 Title VII (sex)

Title VII: §706 (Sex & pregnancy)(CD signed in Dec. 2015, entered into court Jan. 2016)

City of Somerville & Commonwealth of Massachusetts (MA) Settlement 2/4/2016 USERRA

USERRA (stipulated settlement with dismissal)

State of Hawaii (HI) Judicial Findings 4/14/2016 Title VII (sex)

Title VII § (jury found State of Hawaii discriminated against individual on basis of sexual harassment)

Laborers' Local #1149 (IL) Consent Decree 4/20/2016 USERRA USERRA

City of Chicago (IL)

Consent Decree - stipulated consent judgement 6/8/2016 Title VII (N.O.)

Title VII: §§706/707 (National origin discrimination based on 10-year continuous residence requirement for probation officer positions)

FY 2017 (3 cases)

City of Lubbock (TX) Consent Decree 14-Nov-16 Title VII (sex & ethnicity/race)

Title VII: pattern or practice of discrimination against Hispanic and female applicants on the basis of national origin and sex in selection process for position of probationary police officer under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII").

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City of Florence (KY) Consent Decree 19-Dec-16 Title VII (sex) & ADA

Title VII & ADA Section I - Discrimination based upon sex (pregnancy) - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 & disability

School Board of Palm Beach County (FL) Consent Decree 17-Jan-17 Title VII (sex)

Discrimination based upon sex - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000

FY 2018 (5 cases)

Rhode Island (RI) Consent Decree 20-Oct-17 Title VII (race/N.O)

Titel VII: §707(defendant engaged in pattern or practice of employment discrimination against African American and Hispanic applicants for entry-level positions)

University of Baltimore (MD) Settlement 22-Feb-18 Title VII (sex & pregnancy)

EEOC charge - violation of Title VII b/c refusing to hire a pregnant woman

Wyoming Military Department (WY) Judicial Findings 21-Mar-18

Title VII (sex/harassment) Sexual harassment under Title VII

Commonwealth of Puerto Rico (PR) Settlement 21-May-18 USERRA

USERRA (case dismissed w/prejudice, attaching settlement)

Jacksonville & Jacksonville Ass'n of Firefighters (FL) Consent Decree 7/26/2018 Title VII (race) Title VII (disparate impact regs) (race)

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Federal Coordination and Compliance Section Cases (FY 2016-2018)

Party Type of Resolution Date of Resolution Basis FY 2016 (3 cases) Washington State DOL (by DOJ & DOL) Settlement 10/1/2015 LEP (workers) Kentucky Courts Settlement 6/22/2016 LEP (public users) Los Angeles Superior Court Settlement 9/20/2016 LEP (public users) FY 2017 (1 cases) Washington State Courts Partnership 7/18/2017 LEP (public users) Pennsylvania State Courts Settlement 4/20/2017 LEP (public users) FY 2018 (1 cases) Eau Claire County, WI, Circuit Court Settlement 6/13/2018 LEP (public users)

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Housing and Civil Enforcement Section Cases (FY 2016-2018)

Defendant Type of Resolution Date of Resolution Basis

FY 2016 (41 cases) 41 cases in FY 16 Fifth Third Bank (S.D. Ohio) Consent Order 10/1/2015 Race Eagle Bank and Trust Co (E.D. Mo.) Consent Order 10/1/201 Race Sayville Development LLC (E.D.N.Y.) Consent Order 10/2/2015 Disability Collier (W.D. La.) Consent Order 10/7/2015 Race Lincolnshire (N.D. Ill.) Consent Order 10/19/2015 Disability

Housing Authority of Baltimore City (D. Md.) Consent Decree (Supplemental) 10/29/2015 Disability

Dawn Properties, Inc. (S.D. Miss.) Consent Order 11/3/2015 Disability Hudson City Savings Bank, F.S.B. (D.N.J.) (DOJ with CFPB) Consent Order 11/4/2015 National Origin The Durst Organization (S.D.N.Y.) Consent Decree (Partial) 11/13/2015 Disability Sage Bank (D. Mass.) Consent Order 12/1/2015 Race Southwind Village, LLC (M.D. Fla.) Consent Decree (Partial) 12/15/2015 Familial Status Twin Oaks Mobile Home Park, Inc. (W.D. Wis.) Consent Decree 12/17/2015 Familial Status United States v. Christensen (D. S.D.) Consent Order 1/7/2016 Disability United States v. Applewood of Cross Plains (W.D. Wis.) Consent Decree 1/20/2016 Disability United States v. Evolve Bank & Trust (W.D. Tenn.) Consent Order 1/21/2016 Disability Brooklyn Park 73rd Leased Housing Assoc., LLC (D. Minn.) Consent Decree 1/22/2016 Disability

United States v. Countrywide Financial Corp. (C.D. Cal.) Consent Order (Amended) 1/25/2016 National Origin/Fair Lending

United States v. Schimmich (D. Minn.) Consent Decree 2/8/2016 Disability United States v. Toyota Motor Credit Corp. (C.D. Cal.) Consent Order 2/11/2016 Race Pendygraft (E.D. Ky.) Consent Decree 2/26/2016 Sex Fort Worth, Texas (N.D. Tex) Consent Decree 3/7/2016 Disability

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Rappuhn (N.D. Ala.) Consent Order 3/8/2016 Disability United States v. Mere Consent Order 3/15/2016 Race United States v. Bryan Company (Byran II) (S.D. Miss.) Consent Order (Supplement) 4/19/2016 Disability United States v. Avatar Properties, Inc. (D. N.H.) Consent Decree 5/3/2016 Disability United States v. Glenwood Management Corporation (S.D.N.Y.) Consent Order 5/18/2016 Disability United States v. Gentle Manor Estates, LLC (N.D. Ind.) Consent Decree 5/18/2016 Familial Status United States v. Brinson (D. Nev.) Consent Order 6/14/2016 Familial Status City of Beaumont, Texas (E.D. Tex.) Consent Decree 6/16/2016 Disability United States v. Noble Homes (N.D. Ohio) Consent Decree 6/23/2016 Disability BancorpSouth Bank (N.D. Miss.)(DOJ with CFPB) Consent Order 7/25/2016 Race United States v. Blass (D. Kan.) Consent Order 8/2/2016 Disability United States v. Loecher Consent Order 8/8/2016 Familial Status United States v. Encore Management Company, Inc. (S.D. W. Va.) Consent Order 8/12/2016 Sex HSBC Auto Finance (N.D. Ill.) Consent Order 8/18/2016 Servicemembership Parkside East, Inc. (E.D. Mich.) Consent Decree 9/1/2016 Familial Status Hillside Park Real Estate, LLC (N.D.N.Y.) Consent Decree 9/12/2016 Disability Kent State University (N.D. Ohio) Consent Decree 9/20/2016 Disability

Ginsburg Development, LLC (S.D.N.Y.) Judicial Decision (Preliminary Injunction) 9/28/2016 Disability

NALs Apartment Homes (D. Utah) Consent Order 9/28/2016 Disability

Plaza Home Mortgage (S.D. Cal.) Consent Order (Granting Extension of) 9/29/2016 National Origin

FY 2017 (46 cases) 46 cases in FY 17 Kormanik (W.D. Pa.) Consent Order 10/3/2016 Familial Status Wells Fargo Bank, N.A., d/b/a Wells Fargo Dealer Services, Inc. (C.D. Cal.) Consent Order 10/4/2016 Servicemembership Housing Authority of Bossier City (W.D. La.) Consent Decree 10/6/2016 Disability & Race

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Charter Bank (S.D. Tex.) Consent Order 10/12/2016 National Origin First Federal Bank of Florida (M.D. Fla.) Consent Decree 10/12/2016 Sex Pittsfield Charter Township (E.D. Mich.) Consent Order 10/14/2016 Religion Nistler (Nistler II) (D. Mont.) Consent Order 10/28/2016 Disability San Diego Family Housing, LLC (S.D. Cal.) Consent Order 11/1/2016 Servicemembership

Southwind Village, LLC (M.D. Fla.) (Carl Bruckler) Judicial Decision (Default Judgement) 11/18/2016 Familial Status

City of Port Jervis (S.D.N.Y.) Consent Decree 11/23/2016 Religion Dawn Properties, Inc. (S.D. Miss.) Consent Order 12/2/2016 Disability Goss (M.D. Fla.) Consent Order 12/12/2016 Race/testing program Wygul (W.D. Tenn.) Consent Order 12/15/2016 Sex Charter Bank (S.D. Tex.) Consent Order 1/3/2017 National Origin Guardian Savings Bank & Union Savings Bank (S.D. Ohio) Consent Order 1/3/2017 Race United States v. Silverstein Properties, Inc. (S.D.N.Y.) Consent Decree 1/12/2017 Disability JPMorgan Chase Bank, N.A. (S.D.N.Y.) Consent Order 1/20/2017 Race United States v. Webster AV Management, LLC (S.D.N.Y.) (formally United States v. Strulovitch (S.D.N.Y.)

Judicial Decision (Preliminary Injunction) 1/26/2017 Disability

Albanese Organization, Inc. (S.D.N.Y.) Consent Decree (Partial) 2/13/2017 Disability Edmunds (D. Minn.) Consent Order 2/23/2017 Race United States v. Friedman Residence, LLC (S.D.N.Y.) Consent Decree 2/24/2017 Disability City of Sterling Heights (E.D. Mich.) Consent Order 3/1/2017 Religion Trumbull Housing Authority (N.D. Ohio) Consent Order 3/2/2017 Disability

Encore Management (S.D. W.Va.) (James) Judicial Decision (Default Judgement) 3/20/2017 Sex

Town of Colorado (D. Ariz) Judicial Decision (Order Granting Injunctive Relief) 4/18/2017 Religion

United States v. Katz (D. Mont.) Judicial Decision (Verdict) 5/17/2017 Disability

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Bernards Township (D. N.J.) Settlement Agreement 5/30/2017 Religion Pritchard (D. Kan.) Settlement Agreement 6/2/2017 Familial Status City of Des Plaines, Illinois (N.D. Ill.) Settlement Agreement 6/6/2017 Religion Dominic Properties (D. Minn.) Settlement Agreement 6/7/2017 Familial Status Crowe (M.D. Ala.) Settlement Agreement 6/16/2017 Servicemembership City of Jackson (S.D. Miss.) Consent Decree 6/26/2017 Disability City of Jacksonville (M.D. Fla.) Consent Decree 6/29/2017 Disability J & R Associates (D. Mass.) Settlement Agreement 7/6/2017 Race COPOCO Community Credit Union (E.D. Mich.) Settlement Agreement 7/6/2017 Servicemembership

Walden (N.D. W. Va.) Consent Decree (last one during FY 16-18) 7/10/2017 Sex

Trump Village Section IV Inc. (E.D.N.Y.) Settlement Agreement 7/18/2017 Disability 505 Central Avenue Corp. (S.D.N.Y.) Settlement Agreement 7/20/2017 Disability Bensalem Township (E.D. Pa.) Settlement Agreement 9/1/2017 Religion Appleby (W.D. Wash.) Settlement Agreement 9/6/2017 Familial Status Garden Grove, LLC (D. Minn.) Settlement Agreement 9/12/2017 Disability Housing Authority of the City of Anderson, Indiana (S.D. Ind.) Settlement Agreement 9/14/2017 Sex & Disability CitiFinancial Credit Co. (N.D. Tex.) Settlement Agreement 9/18/2017 Servicemembership Westlake Services, LLC (C.D. Cal.) Settlement Agreement 9/27/2017 Servicemembership VP2, LLC (D. Minn.) Settlement Agreement 9/28/2017 Disability Kansas City, Kansas Housing Authority (D. Kan.) Settlement Agreement 9/29/2017 Sex FY 2018 (28 cases) 28 cases in FY 18 Tjoelker Settlement Agreement 10/3/2017 Sex Euramex Management Group, LLC (Wesley Apartment Homes, LLC) Settlement Agreement 10/20/2017 Race United States v. DeRaffele (D. Mass.) Judicial Decision 10/30/2017 Familial Status United States v. Salem (D. S.D.) Settlement Agreement 11/23/2017 Disability Park City Communities, (fka Bridgeport H.A. (D. Conn.) Settlement Agreement 11/28/2017 Disability

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MSM Brothers, Inc. d/b/a White Cliffs at Dover (D. N.H.) Settlement Agreement 12/12/2017 Familial Status Jarrah; aka Yurman, Land Guardian, Inc., f/d/b/a Gaslamp, d/b/a 360 Midtown (S.D. Tex.) Settlement Agreement 2/1/2018 Race PHH Mortgage Corp. (D. N.J.) Settlement Agreement 2/6/2018 Servicemembership City and County of Honolulu, PM Autoworks Inc, d/b/a All Island Towing (D. Haw.) Settlement Agreement 2/15/2018 Servicemembership BMW Financial Services (D. N.J.) Settlement Agreement 2/22/2018 Servicemembership Kips Bay Towers Condominium, Inc. (S.D.N.Y.) Settlement (Stipulated) 2/28/2018 Disability Fairfax Manor Group, LLC (W.D. Tenn.) Settlement Agreement 3/19/2018 Disability Webb (E.D. Mo.) Settlement Agreement 3/19/2018 Sex Lawrence Downtown Holdings LLC (formerly United States v. Equity Residential) (S.D.N.Y.)

Settlement (Stipulated w/Dismissal) 3/23/2018 Disability

Westview Park Apartments, L.P. (D. Minn.) Settlement Agreement 4/11/2018 Disability Belshaw (C.D. Cal.) Settlement Agreement 4/11/2018 Servicemembership Gingsburg Development, LLC (S.D.N.Y.) Settlement Agreement 4/12/2018 Disability Riexinger (E.D. Wash.) Settlement Agreement 4/12/2018 Disability Notre Dame de Namur University (N.D. Cal.) Settlement Agreement 4/19/2018 Disability KleinBank (D. Minn.) Settlement Agreement 5/8/2018 Race Kelly (D. S.D.) Settlement Agreement 6/29/2018 Sex Pacific Mercantile Bank Settlement Agreement 7/18/2018 Race & National Origin

The Home Loan Auditors (N.D. Cal.) Settlement Agreement (Partials on 8/2 and 8/21) 8/2/2018 National Origin

Irvin (W.D. Okla.) Settlement Agreement 8/10/2018 Disability Village of Tinley Park, Illinois (N.D. Ill.) Settlement Agreement 8/24/2018 Race Twin Creek Apartments, LLC d/b/a/ Pavilion at Twin Creek (D. Neb.) Settlement Agreement 9/11/2018 Servicemembership Northwest Trustee Services, Inc. (W.D. Wash) Settlement Agreement 9/26/2018 Servicemembership United Communities LLC (D. N.J.) Settlement Agreement 9/27/2018 Servicemembership

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Criminal Section: Hate Crimes Cases (FY 2016-2018)

Case Date Charge or Conviction FY 2016 (20 cases) United States v. Garza, et al. 2/17/2016 Settlement Agreement (Plea) US v. James Hill 1/19/2016 Charge (Indictment) 1/23/2018 Conviction US v. Ted Hakey 2/11/2016 Conviction US v. Martin Schnitzler 2/12/2016 Conviction US v. Randy Metcalf 3/30/2016 Conviction US v. Jedediah Stout 4/18/2016 Conviction US v. Omar Martinez, et al. 4/27/2016 Charge US v. Gil Payne 5/13/2016 Conviction US v. John Vangastal 5/19/2016 Conviction US v. Matthew Gust 5/19/2016 Conviction US v. Jose Saucedo, et al. 7/7/2016 Charge 4/5/2018 Conviction US v. Charles Butler, et al. 7/29/2016 Charge United States v. Butler 11/9/2016 Settlement Agreement (Plea) 11/9/2016 Conviction US v. Curtis Allen, et al. 10/14/2016 Charge US v. Robert Paschalis 11/22/2016 Conviction US v. Ryan Kyle 11/28/2016 Charge United States v. Kyle 2/23/2017 Settlement Agreement (Plea) Conviction US v. Armando Sotelo 11/29/2016 Conviction US v. Daniel Fisher 11/30/2016 Conviction US v. Justin Whittington 12/5/2016 Conviction United States v. Vallum 11/2/2016 Settlement Agreement (Plea) US v. Joshua Vallum 12/21/2016 Conviction

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FY 2017 (16 cases) United States v. Martinez 11/26/2016 Settlement Agreement (Plea) 3/17/2017 Conviction United States v. Schneider 1/4/2017 Settlement Agreement (Plea) 2/7/2017 Conviction US v. Dylann Roof 12/15/2016 Conviction 1/10/2017 Court Order US v. James Jones 1/23/2017 Charge 2/8/2017 Conviction US v. Robert Daggart 2/16/2017 Conviction US v. Shane Rucker 2/16/2017 Charge US v. William Dennis, et al. 3/10/2017 Conviction 4/4/2017 Conviction US v. Michael Kadar 4/21/2017 Charge US v. Samuel Whitt 5/24/2017 Charge US v. Gerald Wallace 6/15/2017 Charge 10/18/2017 Conviction US v. Marq Perez 6/22/2017 Charge 7/16/2018 Conviction US v. James Medina 8/16/2017 Conviction US v. Mark Porter 9/15/2017 Charge 3/22/2018 Conviction United States v. Burgess 3/16/2017 Charge 11/28/2017 Conviction US v. Ray Legend 12/1/2017 Conviction US v. Preston Howard 12/13/2017 Charge 5/9/2018 Conviction 3/28/2018 Conviction

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FY 2018 (21 cases) US v. David Howard 2/8/2018 Charge 2/27/2018 Conviction US v. Merced Cambero 2/16/2018 Conviction US v. William Syring 2/21/2018 Charge US v. Michael Kadar 2/28/2018 Charge US v. Izmir Koch 3/21/2018 Charge 12/17/2018 Conviction

US v. Christopher Beckham 4/4/2018 6/4/2018

Charge Court Order (Residential Treatment Program)

US v. Patrick Stein et al. 4/18/2018 Conviction US v. John Taylor 6/21/2018 Charge 8/30/2018 Court Order (Not Guilty) US v. Michael Hari, et al. 6/21/2018 Charge US v. Glenn Halfin 6/22/2018 Charge US v. James Fields, Jr. 6/27/2018 Charge US v. Dustin Hughes 6/29/2018 Conviction US v. Terry Knope, et al. 7/26/2016 Charge US v. Nolan Brewer 8/16/2018 Charge US v. Maurice Diggins, et al. 8/27/2018 Charge US v. Chadwick Grubbs 9/13/2018 Charge

United States v. Nucera 11/1/2017 10/31/2017 Charge

United States v. Shelton 1/4/2018 Settlement Agreement (Plea) US v. Chancler Encalade 9/18/2017 Conviction US v. Adam Purinton 6/9/2017 Charge United States v. Purinton 5/21/2018 Conviction Settlement Agreement (Plea)

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Criminal Section: Color of Law Cases (per Press Releases) (FY 2016-2018)

Name of Case Resolution Date FY Type of Resolution Link to DOJ Press Release

U.S. v. Robert McGee 10/13/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-mamou- louisiana-police-chief-sentenced-second-former- police-chief-pleads-guilty-firing>

U.S. v. Bliss Barber Worrell 10/26/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-st-louis- assistant-prosecutor-pleads-guilty-concealing-police- officers-assault>

U.S. v. Randy T. Doss 10/29/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-tate-county- mississippi-sheriff-s-deputy-pleads-guilty-unlawful- tasing>

Investigation into death of Anastasio Hernandez Rojas 11/6/2015 FY16

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials- close-investigation-death-anastasio-herandez-rojas>

Investigation into death of Dontre Hamilton 11/10/2015 FY16

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials- close-review-death-dontre-hamilton>

U.S. v. Chris Miles 11/17/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-tallassee- alabama-assistant-police-chief-pleads-guilty-beating- suspect-during>

U.S. v. Jeanette Sue Barnes 11/18/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

U.S. v. Eddie Rodas- Castro 1/13/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

U.S. v. William Houghton 1/13/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

U.S. v. Justin Watson 1/20/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation>

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hermandez-rojas>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hermandez-rojas>

<https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton>

<https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation>

<https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation>

<https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation>

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U.S. v. Robert C. Nalley 2/1/2016 FY16 guilty plea <https://www.justice.gov/opa/pr/former-maryland-circuit-court-judge-pleads-guilty-civil-rights-violation>

U.S. v. Shawn D. Shaw 2/5/2016 FY16 bench conviction

<https://www.justice.gov/opa/pr/new-jersey-correctional-officer-sentenced-25-years-prison-sexual-abuse-detainee>

U.S. v. Theodore Robert 2/8/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-south-bend-indiana-police-officer-pleads-guilty-violating-civil-rights-arrestee>

U.S. v. James Beckham 2/26/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

U.S. v. Robert E. Burns 2/29/2016 FY16 guilty plea

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

U.S. v. Byron Benjamin Lassalle 2/29/2016 FY16 guilty plea

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

U.S. v. Wade Bergeron 2/29/2016 FY16 guilty plea

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

U.S. v. Bret Klein Broussard 2/29/2016 FY16 guilty plea

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

U.S. v. Wesley Hayes 2/29/2016 FY16 guilty plea

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

U.S. v. Matthew McConnel 3/2/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

U.S. v. Berthum Allen 3/3/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-alcorn-state-university-police-officer-pleads-guilty-assaulting-former-student>

<https://www.justice.gov/opa/pr/former-maryland-circuit-court-judge-pleads-guilty-civil-rights-violation>

<https://www.justice.gov/opa/pr/former-maryland-circuit-court-judge-pleads-guilty-civil-rights-violation>

<https://www.justice.gov/opa/pr/new-jersey-correctional-officer-sentenced-25-years-prison-sexual-abuse-detainee>

<https://www.justice.gov/opa/pr/new-jersey-correctional-officer-sentenced-25-years-prison-sexual-abuse-detainee>

<https://www.justice.gov/opa/pr/former-south-bend-indiana-police-officer-pleads-guilty-violating-civil-rights-arrestee>

<https://www.justice.gov/opa/pr/former-south-bend-indiana-police-officer-pleads-guilty-violating-civil-rights-arrestee>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html

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U.S. v. Randel Branscum 3/3/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

U.S. v. Thomas Carroll 4/6/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-st-louis-police-officer-pleads-guilty-violating-civil-rights- assaulting-arrestee>

Investigation into death of Jamal Clark 6/1/2016 FY16

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials- decline-prosecution-death-jamar-clark>

U.S. v. Anthony Heath 6/29/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/berrien-county- georgia-sheriff-pleads-guilty-using-excessive-force- against-arrestees>

U.S. v. Daniel Winters 7/14/2016 FY16 jury conviction

<https://www.justice.gov/opa/pr/stevenson-alabama- police-chief-sentenced-assaulting-and-failing-protect- arrestee>

U.S. v. Matthew Corder 7/22/2016 FY16 jury conviction

<https://www.justice.gov/opa/pr/former-deputy-bullitt- county-kentucky-sheriff-s-office-convicted-civil- rights-violations>

U.S. v. Willie Fred Knowles 8/5/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-homer- louisiana-police-officer-pleads-guilty-civil-rights- violation>

U.S. v. Mark A. Cowden 10/17/2016 FY17 jury conviction

<https://www.justice.gov/opa/pr/former-hancock- county-west-virginia-sheriff-s-deputy-convicted- using-excessive-force>

U.S. v. Gerald Savoy 10/27/2016 FY17 guilty plea

<https://www.justice.gov/opa/pr/judge-sentences-three- law-enforcement-officer-defendants-iberia-parish- louisiana-civil-rights>

U.S. v. Deonte Pate 11/17/2016 FY17 guilty plea <https://www.justice.gov/opa/pr/former-mississippi- corrections-officer-pleads-guilty-cover-inmate-assault>

U.S. v. Romander Nelson 11/17/2016 FY17 guilty plea

<https://www.justice.gov/opa/pr/mississippi- corrections-officers-sentenced-inmate-assault-and- cover>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

<https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault>

<https://www.justice.gov/opa/pr/former-st-louis-police-officer-pleads-guilty-violating-civil-rights- assaulting-arrestee>

<https://www.justice.gov/opa/pr/former-st-louis-police-officer-pleads-guilty-violating-civil-rights- assaulting-arrestee>

<https://www.justice.gov/opa/pr/former-st-louis-police-officer-pleads-guilty-violating-civil-rights- assaulting-arrestee>

<https://www.justice.gov/opa/pr/federal-officials- decline-prosecution-death-jamar-clark>

<https://www.justice.gov/opa/pr/federal-officials- decline-prosecution-death-jamar-clark>

<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>

<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>

<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>

<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>

<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>

<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>

<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>

<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>

<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>

<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>

<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>

<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>

<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>

<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>

<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>

<https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights>

<https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights>

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<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>

<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>

<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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Investigation into SRO Benjamin Fields 1/13/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials- close-investigation-use-force-school-resource-officer- spring-valley-south>

U.S. v. Lawardrick Marsher 2/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/mississippi- corrections-officers-plead-guilty-inmate-assault-and- cover>

U.S. v. Robert Sturdivant 2/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/mississippi- corrections-officers-plead-guilty-inmate-assault-and- cover>

U.S. v. William Kostopoulos 2/3/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/miami-dade-police- detective-convicted-civil-rights-offenses-stealing- property-motorists-and>

U.S. v. Wayne Barnes 2/9/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-jail- administrator-pleads-guilty-civil-rights-violation- depriving-inmate-medical-care>

U.S. v. Kevin Asher 4/12/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/kentucky-deputy- jailer-convicted-jury-assault-inmate-and-obstruction- justice>

U.S. v. Peggy Kendrick 4/26/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/two-former-arkansas- juvenile-detention-officers-plead-guilty-conspiracy- assaulting-juvenile>

U.S. v. Dennis Fuller 4/26/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/two-former-arkansas- juvenile-detention-officers-plead-guilty-conspiracy- assaulting-juvenile>

U.S. v. Michael Slager 5/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-north- charleston-south-carolina-police-officer-michael- slager-pleads-guilty-federal>

Investigation into death of Alton Sterling 5/3/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials- close-investigation-death-alton-sterling>

U.S. v. Shylene Lopez 5/8/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-puerto-rico- police-officer-pleads-guilty-civil-rights-violation- assaulting-juvenile>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

<https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and>

<https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and>

<https://www.justice.gov/opa/pr/miami-made-police-officer-convicted-civil-rights-offenses-stealing-property-motorists-and>
<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>
<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>
<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>

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U.S. v. Jeremy Walker 5/9/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>

U.S. v. William Curtis Howell 5/12/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>

U.S. v. Adam Joseph Neal Graham 5/19/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee>

U.S. v. John Sanders 9/6/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/another-former-correctional-officer-pleads-guilty-beating-handcuffed-and-shackled-inmate>

Investigation into death of Freddie Gray 9/12/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>

U.S. v. Richard Scavone 9/29/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force>

U.S. v. Edgar Daniel Johnson 10/4/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-georgia-prison-guard-pleads-guilty-sexual-assault-female-inmates-obstruction-and>

U.S. v. Philip Antico 11/21/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/boynton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>

U.S. v. Michael Brown 11/21/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/boynton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>

U.S. v. Gregory McLeod 11/22/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>

U.S. v. Dwight Hamilton 11/22/2017 FY18 guilty plea <https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>

<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee>
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<https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>
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<https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force>
<https://www.justice.gov/opa/pr/former-georgia-prison-guard-pleads-guilty-sexual-assault-female-inmates-obstruction-and>
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<https://www.justice.gov/opa/pr/boynton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>
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<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>
<https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>

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U.S. v. Jerry Lynn Gragg 11/30/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>

U.S. v. Steve C. Jones 12/6/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>

U.S. v. Daniel Davis 1/27/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>

U.S. v. David Prejan 2/21/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0>

U.S. v. Mark Frederick 3/2/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee>

U.S. v. Jason Benton 4/4/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>

U.S. v. Anthony Maldonado 4/19/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>

U.S. v. Christopher M. Holbrook 4/19/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>

U.S. v. Edward Gibson 5/8/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>

U.S. v. Alex Huntley 6/12/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>

U.S. v. William Dukes Jr. 6/18/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest>

U.S. v. Michael Kaim 7/2/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>
<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>
<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>
<https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0>
<https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0>
<https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee>
<https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee>
<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>
<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>
<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>
<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>
<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>
<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest>
<https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>

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U.S. v. Guillermo Ravelo 7/26/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>

U.S. v. Charlie Dayoub 8/3/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>

U.S. v. Raul Fernandez 8/3/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>

U.S. v. Gary Ola 9/12/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/tennessee-jail-supervisor-pleads-guilty-making-false-statements-fbi>

U.S. v. Raimundo Atesiano 9/14/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>

U.S. v. Timothy Williams 9/18/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-st-bernard-parish-correctional-officer-pleads-guilty-violating-civil-rights-inmate>

U.S. v. Cordero Cody 10/30/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>

U.S. v. Ana Angelica Pedro-Juan 12/14/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>

U.S. v. Granville Robinson 2/3/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/tennessee-man-pleads-guilty-role-new-orleans-based-sex-trafficking-scheme>

U.S. v. Ana Angelica Pedro Juan 2/29/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>

U.S. v. Miguel A. Hernandez 5/11/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel>

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
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<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>
<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>
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<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>
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<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>
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<https://www.justice.gov/opa/pr/indian-nationals-sentenced-roles-alien-harboring-scheme-involving-labor-exploitation-nebraska>
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<https://www.justice.gov/opa/pr/two-alien-plead-guilty-connection-labor-trafficking-scheme-targeted-guatemalan-national>
<https://www.justice.gov/opa/pr/two-alien-plead-guilty-connection-labor-trafficking-scheme-targeted-guatemalan-national>
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<https://www.justice.gov/opa/pr/oregon-man-pleads-guilty-forced-labor-and-related-crimes-connection-scheme-coerce-thai>
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<https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation>
<https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation>
<https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation>
<https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation>
<https://www.justice.gov/opa/pr/south-carolina-man-pleads-guilty-forced-labor-compelling-man-intellectual-disability-work>
<https://www.justice.gov/opa/pr/south-carolina-man-pleads-guilty-forced-labor-compelling-man-intellectual-disability-work>
<https://www.justice.gov/opa/pr/south-carolina-man-pleads-guilty-forced-labor-compelling-man-intellectual-disability-work>

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U.S. v. Tanya Jumroon 6/14/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/oregon-woman-pleads-guilty-role-forced-labor-and-visa-fraud-scheme-involving-thai-restaurant>

U.S. v. Rashad Sabree 7/25/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction>

U.S. v. Pablo Duran Ramirez 9/17/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>

U.S. v. Bridget Lambert 9/18/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>

<https://www.justice.gov/opa/pr/oregon-woman-pleads-guilty-role-forced-labor-and-visa-fraud-scheme-involving-thai-restaurant>
<https://www.justice.gov/opa/pr/oregon-woman-pleads-guilty-role-forced-labor-and-visa-fraud-scheme-involving-thai-restaurant>
<https://www.justice.gov/opa/pr/oregon-woman-pleads-guilty-role-forced-labor-and-visa-fraud-scheme-involving-thai-restaurant>
<https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction>
<https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction>
<https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction>
<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
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<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
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<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>
<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>

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Immigration and Employee Rights Section Cases (FY 2016-2018)

Defendant or Case Date of Resolution Type of Case

Civil Penalty to US

Back Pay (or fund for) & related claims to Charging Party

FY 2016 (20 total)(all settlements) North American Shipbuilding, LLC 1/15/15 Retaliation \$1,750.00 \$15,000.00 Yellow-Checker-Star Transportation 10/1/15 Unfair Documentary Practices 445,000 The School Board of Miami-Dade County, Florida 10/1/15 Unfair Documentary Practices 90,000 125,000 Postal Express, Inc. 10/14/15 Unfair Documentary Practices School Board of Miami 10/22/15 Unfair Documentary Practices \$90,000 \$30,000 McDonald's USA, LLC 11/1/15 Unfair Documentary Practices 335,000 Sunny Grove Landscaping & Nursery, Inc. 11/1/15 Unfair Documentary Practices 7,500 Rio Grande Pak Foods, Ltd. 1/1/16 Unfair Documentary Practices \$1,800.00 7,200 Freedom Home Care, Inc. 1/19/16 Unfair Documentary Practices \$400 \$832.00

Barrios Street Realty LLC 3/21/16

Citizenship Status (H-2B abuses/discrimination v. qualified US workers) \$30,000.00 \$15,000.00

NetJets Services, Inc. 5/13/16 Unfair Documentary Practices \$41,480 Villa Rancho Bernardo Care Center 5/31/16 Unfair Documentary Practices \$24,000

Podiatry Residency Programs 6/1/16

Citizenship Status (LPRs & other work-authorized immigrants) \$65,000 \$141,500

Macy's West Stores, Inc. 6/1/16 Unfair Documentary Practices \$8,700 \$523.90 Montgomery County Public Schools 6/15/16 Unfair Documentary Practices 0 \$4,450 Powerstaffing, Inc. 6/23/16 Unfair Documentary Practices \$153,000 Crookham Company 6/27/16 Unfair Documentary Practices \$200,000 Hartz Mountain Industries 8/9/16 Citizenship Status \$1,400 Eastridge Workforce Solutions 8/15/16 Unfair Documentary Practices \$175,000

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Atwork Cumberland Staffing 9/1/16 Unfair Documentary Practices (requiring US birth certificate) \$1,200

FY 2017 (13 total)(all settlements)

American Cleaning Company 10/17/16 Unfair Documentary Practices (requiring US birth certificate) \$195,000

Denver Sheriff's Department 11/1/16 Citizenship Status \$10,000 Aldine Independent School District 11/22/16 Citizenship Status \$14,000 1st Class Staffing, LLC 12/13/16 Unfair Documentary Practices \$17,600 J.E.T. Holding Co., Inc. 1/17/17 Citizenship Status \$12,000 \$40000 back pay fund Levy Restaurants 2/2/17 Unfair Documentary Practices \$2,500 Paragon Building Maintenance, Inc. and Pegasus Building Services Company, Inc. 3/13/17 Unfair Documentary Practices \$115,000 Pizzerias, LLC 3/20/17 Unfair Documentary Practices \$140,000 Brickell Financial Services Motor Club, Inc. d/b/a Road America Motor Club, Inc. (Unfair Documentary Practices) 4/6/17 Unfair Documentary Practices 34200 Provisional Staffing Solutions 5/9/17 Unfair Documentary Practices 16290

Carrillo Farm Labor, LLC 5/23/17 Citizenship Status (H2-B/US workers) 5000 44000

Panda Restaurant Group, Inc. 6/28/17 Unfair Documentary Practices 400000 200000 Sellari's Enterprises, Inc. 6/30/17 Unfair Documentary Practices 12000 FY 2018 (18 total)(17 settlements & 1 judicial order) CitiStaff Solutions, Inc. and CitiStaff Management Group, Inc. 10/6/17 Unfair Documentary Practices 200,000 InMotion Software, LLC 10/11/17 Retaliation 3621 Ark Rustic Inn LLC d/b/a Rustic Inn Crabhouse 10/13/17 Unfair Documentary Practices 4000 Washington Potato Company and Pasco Processing, LLC 11/14/17 Unfair Documentary Practices 100000

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Freeze Pack 11/16/17 Unfair Documentary Practices 200000 100000

Crop Production Services, Inc. 12/18/17 Unfair Documentary Practices 10500 Omnicare Health 1/23/18 Citizenship Status 3621 Ichiba Ramen 2/20/18 National Origin 2000 1760

West Liberty Foods, LLC 3/10/18 Unfair Documentary Practices 200000 52100

Themesoft, Inc. 4/20/18 Citizenship Status (asylee) 4543.25 12000

University of California, San Diego 5/10/18 Unfair Documentary Practices 200000 4712.4

Setpoint Systems, Inc. 6/19/18 Unfair Documentary Practices 200000 17475

J.C. Penney 6/25/18 Unfair Documentary Practices 200000 14430 11177.6

Triple H Services, Inc. 6/26/18 Citizenship Status (US workers) 15600 85000

Technical Marine Maintenance Texas 6/28/18 Unfair Documentary Practices 757,868 Clifford Chance US LLP 8/1/18 Citizenship Status (dual citizen) 13200

Rose Acre Farms, Inc. 8/1/18 Unfair Documentary Practices 200000 70000

Palmetto Beach Hospitality, LLC 9/1/18 Citizenship Status (US citizens) 42000 TOTAL 3,302,622.65

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Immigrant and Employee Rights Cases (FY 2016-2018), Including Letters of Resolution

Fiscal Year Letters of Resolution Other IEC Cases Total Cases FY 2016 41 20 61 FY 2017 44 13 57 FY 2018 31 18 49 116 51 167

Special Litigation Section Cases (FY 2016-2018) Defendant Type of Case Type of Resolution Date of Resolution FY 2016 (8 total)

Westchester County Jail (NY) Settlement Agreement 11/24/2015 Disability Rights Idaho v. Sonnenberg Disability Judicial Memorandum Decision and Order 3/7/2016 City of Miami Police Department (FL) Law Enforcement Settlement Agreement 3/10/2016 City of Ferguson Law Enforcement Consent Decree 4/19/2016 City of Newark Law Enforcement Consent Decree 5/5/2016 Georgia State Hospitals and Georgia Mental Health and Developmental Disabilities Systems (GA) Disability

Consent Order entering extension of Settlement Agreement 5/27/2016

Alamance County Sheriff's Office Law Enforcement Settlement Agreement 8/17/2016 Hinds County Adult Detention Center (MS) Corrections Consent Decree 7/19/2016 FY 2017 (4.5 total) Yonkers (NY) Law Enforcement Settlement Agreement 11/14/2016 St. Louis County Family Court (MO) Juvenile Justice Settlement Agreement 12/14/2016

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Chicago Police Department (IL) Law Enforcement

Agreement in principle for CD- later opposed in 10/12/18 Statement of Interest Opposing Proposed Consent Decree (counted as 0.5 Settlements) 1/13/2017

Baltimore Police Department (MD) Law Enforcement Consent Decree (and related Judicial Memo/Order)(case counted as CD) 4/7/2017

United States v. Town of Colorado City (AZ) Law Enforcement Judicial Decision 4/18/2017 FY 2018 (3 total)

City of Ville Platte (LA) Law Enforcement Settlement Agreement 5/31/2018 Evangeline Parish Sheriff's Office (LA) Law Enforcement Settlement Agreement 6/4/2018 Louisiana Use of Nursing Facilities for People with Mental Health Disabilities (LA) Disability Settlement Agreement 6/6/2018

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Voting Section Cases (FY 2016-2018) Cases Date Basis Type FY 2016 (3 enforcement matters resolved) United States and the State of Alabama 11/12/2015 NVRA Settlement United States and Napa County, California 5/31/2016 VRA sec 203 Settlement United States and the State of Connecticut 8/5/2016 NVRA Settlement FY 2017 (4 enforcement matters resolved)

NC State NAACP v. North Carolina State Board of Elections 5/15/2017 VRA sec 2

Judicial Resolution (denial of certiorari)

The United States and the Palm Beach County Supervisor of Elections

1/19/2017 1/10/2017 HAVA Settlement

United States and the State of New York 6/20/2017 NVRA Settlement United States v. State of Louisiana 8/21/2017 NVRA Settlement FY 2018 (5 enforcement matters resolved) Common Cause New York and United States v. Board of Elections in the City of New York 12/14/2017 NVRA Consent Decree U.S. v. State of Arizona 2/15/2018 UOCAVA Consent Decree U.S. v. State of Wisconsin 6/20/2018 UOCAVA Consent Decree United States v. Commonwealth of Kentucky (Judicial Watch v. Grimes) 7/3/2018 NVRA Consent Decree

United States v. Texas (Veasey v. Abbott) 9/17/2018 VRA sec 2

Judicial Resolution (Unappealed final judgment)

Source: CRT Website; Commission Staff Research

<https://www.justice.gov/crt/case-document/file/1083941/download>
<https://www.justice.gov/crt/case-document/napa-county-memorandum-agreement>
<https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava>
<https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava>
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<https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nvnvra2016>
<https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nvnvra2016>
https://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#az_uocava18
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 - Chapter 5: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity
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 - Prioritization of Civil Rights Agency-Wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, and Litigation
 - Proactive Compliance Evaluations
 - Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- o Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Staffing and Budget
 - Assessment
 - Prioritization for Civil Rights Agency-wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges and Litigation
 - Evaluating Compliance of Funding Recipients
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity
 - Effectiveness of Interaction and Coordination with Other Agencies and Stakeholders
 - Use of Research, Data Collecting, and Reporting
- o Chapter 9: U.S. Environmental Protection Agency, External Civil Rights Compliance Office
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization for Civil Rights Agency-Wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, and Litigation
 - Proactive Compliance Evaluation
 - Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity
 - Effectiveness of Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- o Chapter 10: U.S. Department of Transportation, Departmental Office of Civil Rights
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-Wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, and Litigation
 - Proactive Compliance Evaluation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- o Chapter 11: U.S. Department of Veterans Affairs, Office of Resolution Management
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-Wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, and Litigation
 - Effective Use of Enforcement Tools: Proactive Compliance Evaluation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Effectiveness of Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- o Chapter 12: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Proactive Compliance Evaluation
 - Complaint Processing, Agency-Initiated Charges, & Litigation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collections, and Reporting
- o Chapter 13: U.S. Department of the Treasury, Office of Civil Rights and Diversity
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization for Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, & Litigation
 - Proactive Compliance Evaluation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collections, and Reporting
- o Chapter 14: U.S. Department of the Interior, Office of Civil Rights
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, & Litigation
 - Proactive Compliance Evaluations
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- o Findings and Recommendations
- o Commissioners' Statements, Dissents, and Rebuttals
 - Statement of Chair Catherine E. Lhamon
 - Statement of Commissioner Karen K. Narasaki
 - Statement of Commissioner Michael Yaki
 - Dissenting Statement of Commissioner Peter N. Kirsanow
- o Rebuttal of Commissioner Peter N. Kirsanow
- o APPENDIX A

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[EXTERNAL] Re: finding time to talk about federal civil rights enforcement planning? I'm sorry that had not occurred to me; I will look forward to a possible future conversation.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Gautam Raghavan <gaurag@gmail.com> Sent: Saturday, August 15, 2020 10:01 AM To: Catherine Lhamon Cc: Rukku Singla; munoz@newamerica.org Subject: [EXTERNAL] Re: finding time to talk about federal civil rights enforcement planning?

CAUTION: This email is from outside USCCR.

Dear Catherine,

It is so nice to hear from you! Thanks for reaching out.

I am such a big admirer of your leadership over the years and would normally love to be able to have this conversation, but unfortunately we are currently limited in terms of our ability to engage USG officials. I wish it were otherwise! But I'll be very happy to circle back if/when things change.

Until then, please stay well. We are glad you are where you are.

Best, Gautam

On Aug 14, 2020, at 3:03 PM, Catherine Lhamon <clhamon@usccr.gov> wrote:

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal
<mailto:clhamon@usccr.gov>

Hi Gautam and Cecilia. I hope these email addresses are ok to use for this outreach. I'd love to find time to talk with you, or with the person you think would be right, about recent U.S. Commission on Civil Rights evaluation of federal civil rights enforcement across 13 federal civil rights agencies. The Commission report, which I've attached here, aims to set a blueprint for what effective federal enforcement should look like. As I know you know that topic is close to my heart so I would love to talk with you or your team about planning for ways to fulfill federal civil rights promises most effectively. Please let me know if we could find some time.

I hope you are both taking care in this intense time.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook. <11-21-Are-Rights-a-Reality.pdf>

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Date : 8/17/2020 6:09:27 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Martin, Emily" emartin@nwc.org Subject : Re: In Preparation for our Small Discussion re: Systems of Sexual Misconduct Accountability for Candidates/Nominees yes of course. See you Wednesday

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Martin, Emily <emartin@nwc.org> Sent: Monday, August 17, 2020 2:19 PM To: Catherine Lhamon Subject: [EXTERNAL] Fw: In Preparation for our Small Discussion re: Systems of Sexual Misconduct Accountability for Candidates/Nominees

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In our conversation on Wednesday, would you be willing to do five minutes-- literally, so super short-- on a promising element from federal employee processes, or what a shortcoming of fed employee processes suggest in terms of a promising element re response?

From: Martin, Emily <emartin@nwc.org> Sent: Friday, August 14, 2020 4:52 PM To: jmprf@comcast.net <jmprf@comcast.net>; Catherine Lhamon <clhamon@usccr.gov>; 'Jenny Yang' <jennyryang@gmail.com>; Nancy Cantalupo <nancy.chi.cantalupo@gmail.com>; Jocelyn Frye <jfrye@americanprogress.org>; jff@uoregon.edu <jff@uoregon.edu>; marina.angel@temple.edu <marina.angel@temple.edu> Cc: Anita Hill <ahill@brandeis.edu>; Graves, Fatima Goss <fgraves@nwc.org>; Halim Rizk <hrizk@nwc.org> Subject: In Preparation for our Small Discussion re: Systems of Sexual Misconduct Accountability for Candidates/Nominees We are looking forward to our conversation on Wednesday at 3 p.m. Eastern/noon Pacific. A calendar invite will be forthcoming with Zoom info. In preparation for our conversation, we ask that you review the attached documents and pages 30-55 of the report at this link--

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

<https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf>. They provide some background that will let us use our 90 minutes together more efficiently. A draft agenda--which is subject to further tweaking-- is below.

Goal: begin to identify key elements/principles to guide a process to address allegations of sexual misconduct against candidates/nominees

I. Introductions--10 minutes II.Problems we are trying to solve for--15 minutes We have seen in recent years that journalism and shaming are insufficient engines for factfinding and accountability when allegations of sexual misconduct are made in the context of elections and federal nominations; we will begin with some table setting identifying shortcomings of available processes and the particular challenges of these contexts that must be solved for. III. Models from other contexts--20 minutes Short popcorn presentations re promising elements from a few different institutional accountability models, e.g., the complaint process for sitting federal judges/federal employee EEO protections/higher ed models IV. Building something better--25 minutes Break out discussion identifying key elements that work for fact finding, with the goal of identifying 3 elements that hold promise in the context of candidates or nominees and the problems that they solve for. V. Report backs--10 minutes VI. Wrap up--10 minutes Identify any consensus points and key questions requiring further research or discussion; identify any next steps for this group.

Thanks so much and I look forward to our conversation.

Emily J. Martin (she/hers) Vice President for Education & Workplace Justice National Women's Law Center

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View this email in your browser

Date : 8/27/2020 2:32:27 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Adams-Taylor, Sharon" sadams@aasa.org Subject : Re: EQUITY: COVID Vaccine thank you

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Adams-Taylor, Sharon <sadams@aasa.org> Sent: Thursday, August 27, 2020 2:10 PM To: Catherine Lhamon; Robert Boyd Subject: [EXTERNAL] Fwd: EQUITY: COVID Vaccine

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In case you are interested.

Sharon Sent from my iPhone

From: NASEM Health and Medicine <HMDnews-list@nas.edu> Date: August 27, 2020 at 1:03:31 PM EDT To: "Adams-Taylor, Sharon" <sadams@aasa.org> Subject: COVID-19 Vaccine Allocation - Public Listening Session & Comment Period Reply-To: NASEM Health and Medicine <HMDnews-list@nas.edu>

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<mailto:clhamon@usccr.gov>
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HEALTH AND MEDICINE

Public Listening Session

Sept. 2 | 12 to 5 pm ET

Register Now >>

Written Comment Period

Sept. 1 - Sept. 4

More Information >>

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Date : 9/1/2020 7:56:35 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Phela Townsend" townsend@thenext100.org Cc : "Emma Vadehra" vadehra@thenext100.org, "Rukku Singla" rsingla@uscrr.gov Subject : Re: [EXTERNAL] Following up re: data privacy and civil rights Thank you for this note Phela, and it was so nice to zoom-meet you today. We haven't yet voted on what topics to take up next at the Commission. If we vote to take up the artificial intelligence topic I will certainly reach out to connect with you on your research. I've copied my phenomenal Special Assistant, Rukku Singla, who works on all Commission projects with me.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Phela Townsend <townsend@thenext100.org> Sent: Tuesday, September 1, 2020 5:24 PM To: Catherine Lhamon Cc: Emma Vadehra Subject: [EXTERNAL] Following up re: data privacy and civil rights

CAUTION: This email is from outside USCCR.

Hi Catherine, it was such a pleasure to have with us today. As Emma knows, I don't get to make all of the sessions when we bring guests in, so I'm really happy that I was able to make it today!

As you mentioned, I would love to follow up with you about your possible future work on data/privacy and civil rights.

Please let me know how best to connect with you. I look forward to speaking.

Thank you! Phela

-- Phela Townsend twitter: @phelatownsend Policy Entrepreneur

<mailto:clhamon@uscrr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

Pieces I have written while at Next100: What Have the COVID-19 Pandemic and Recent Protests Taught Us about Digital Organizing? <https://thenext100.org/what-have-the-covid-19-pandemic-and-recent-protests-taught-us-about-digital-organizing/> Data Privacy Is Not Just a Consumer Issue: It's Also a Labor Rights Issue <https://thenext100.org/data-privacy-is-not-just-a-consumer-issue-its-also-a-labor-rights-issue/> Preparing to Protect Workers' Rights against the Risks of Artificial Intelligence <https://thenext100.org/preparing-to-protect-workers-rights-against-the-risks-of-artificial-intelligence/> We've Been Here Before: Embracing All of What Today's Labor Movement Has to Offer <https://thenext100.org/weve-been-here-before-embracing-all-of-what-todays-labor-movement-has-to-offer/> Bending Technology to Empower Workers <https://thenext100.org/bending-technology-to-empower-workers/> Letter to the Editor in the New York Times on Lack of Diversity in the Economics Field <https://thenext100.org/phela-townsend-writes-letter-to-the-editor-in-the-new-york-times-on-lack-of-diversity-in-the-economics-field/> Next100Sig.png

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Date : 9/10/2020 2:00:28 AM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Dugue, Monalisa" Monalisa.Dugue@mail.house.gov Subject : Re: [EXTERNAL] Women/Girls' Bill Thank you so much for sending this note and attaching the draft bill. I plan to review the bill text in detail this weekend.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Dugue, Monalisa <Monalisa.Dugue@mail.house.gov> Sent: Tuesday, September 8, 2020 6:10 PM To: Catherine Lhamon Subject: RE: [EXTERNAL] Women/Girls' Bill

CAUTION: This email is from outside USCCR.

Hello Catherine, I hope this message finds you well! I am the counsel that processed the Cmsn on Black Men and Boys bill for the Committee. And I agree with your concerns expressed in your letter, which is why we reached out to your office to speak with your staff directly. I had an opportunity to speak with your Staff Director and others to better understand your positions. It would have been ideal to have a study on all Black people in one bill, but unfortunately, I was not successful in that plea. But given the staggering statistics found by both the USCCR and other reputable bipartisan organizations on the issue of Black women and girls, it was imperative that we, as a Cmte, address this segment of the population as well. Hence, we have taken care to address all the concerns expressed in your letter, in order to ensure the structure for the study on Black women and girls remain within the existing Cmsn, rather than creating a new Cmsn with the Office of the Staff Director. Also, we have spoken with Appropriations to ensure a funding stream is available to carry out the tasks in both Secs 3 and 4, and that is reflected in the bill. We acknowledge that your ability to conduct a comprehensive study requires that you have access to more than mere publicly available information, and thus, we did not place any limitations on that, as reflected in both, the finding and in Sec. 4(c).

<mailto:clhamon@uscrr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

I am also attaching here for you, an updated copy of that bill, which is not being widely distributed, pending introduction. Kindest Regards, Monalisa Dugue From: Catherine Lhamon <clhamon@uscrr.gov> Sent: Thursday, July 16, 2020 3:49 PM To: Dugue, Monalisa <Monalisa.Dugue@mail.house.gov> Subject: Re: [EXTERNAL] Women/Girls' Bill Thank you for reaching out. I'm sorry that I don't know a useful answer to this question.

On Jul 16, 2020, at 12:06 PM, Dugue, Monalisa <Monalisa.Dugue@mail.house.gov> wrote:

CAUTION: This email is from outside USCCR.

Hi Ms. Lhamon, I hope this message finds you well! I am reaching out to you by way of Lisalyn Jacobs, as she suggested if anyone would know the answer to my question it'd be you. I would like to know which office/s/dept/s within Dept of Ed would be best situated to deal with the mandated provisions in the attached Education excerpt of the bill I am working on re Black women and girls. Please also let me know if your schedule would permit a conversation either today or tomorrow. Thanks immensely in advance! Kindest Regards, Monalisa Dugué Deputy Chief Counsel U.S. House of Representatives Committee on the Judiciary Crime, Terrorism, & Homeland Security (202) 225-3951 Monalisa.dugue@mail.house.gov <EDUCATION Excerpt from Women-Girls bill.docx>

<mailto:Monalisa.Dugue@mail.house.gov>
<mailto:Monalisa.dugue@mail.house.gov>

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Date : 9/11/2020 5:25:18 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Lisalyn Jacobs" lrjust.solutions@gmail.com Subject : Re: [EXTERNAL] Fwd: Introduced copy of H.R. 8196 thank you

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Lisalyn Jacobs <lrjust.solutions@gmail.com> Sent: Friday, September 11, 2020 5:20 PM To: Catherine Lhamon Subject: [EXTERNAL] Fwd: Introduced copy of H.R. 8196

CAUTION: This email is from outside USCCR.

Madam Chair --

Hope this finds you well.

I thought this might be of interest to you.

Best,

-- LRJ

Lisalyn R. Jacobs, CEO Just Solutions Bringing in justice to counteract injustice. https://about.me/lisalyn_jacobs

----- Forwarded message ----- From: Dugue, Monalisa <Monalisa.Dugue@mail.house.gov> Date: Fri, Sep 11, 2020 at 4:48 PM Subject: Introduced copy of H.R. 8196

<mailto:clhamon@uscrr.gov>
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<mailto:Monalisa.Dugue@mail.house.gov>

Monalisa Dugué Deputy Chief Counsel U.S. House of Representatives Committee on the Judiciary Crime, Terrorism, & Homeland Security (202) 225-3951 Monalisa.dugue@mail.house.gov

<mailto:Monalisa.dugue@mail.house.gov>

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Date : 9/17/2020 1:45:39 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Shaw, Christine" CShaw@marincounty.org Cc : "Rukku Singla" rsingla@uscrr.gov Subject : Re: Release of Commission report on Subminimum Wages
Attachment : image001.jpg;image002.png;image003.png;image004.jpg;image005.png;image006.png; We will be delighted to add you. Thank you for your interest.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Shaw, Christine <CShaw@marincounty.org> Sent: Thursday, September 17, 2020 1:37 PM To: Catherine Lhamon Subject: [EXTERNAL] FW: Release of Commission report on Subminimum Wages

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Hello, I work with the Marin Human Rights Commission in California and the Commissioners would like to be added to your distribution. Can you add me to your distribution list and I will send it out to the current Commissioners. Let me know if you have any questions. Thank you, Chris

..... Chris Shaw Pronouns: She/Her/Hers EQUAL EMPLOYMENT SPECIALIST

County of Marin Department of Human Resources 3501 Civic Center Drive, Suite 415

<mailto:clhamon@uscrr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

San Rafael, CA 94903 415-473-6189 T 415-473-3669 F CRS Dial 711 CShaw@MarinCounty.org STAY CONNECTED:

Begin forwarded message: From: Catherine Lhamon <clhamon@uscrr.gov> Subject: Release of Commission report on Subminimum Wages Date: September 17, 2020 at 5:51:14 AM PDT Today, the U.S. Commission on Civil Rights released Subminimum Wages: Impacts on the Civil Rights of People with Disabilities. The report examines an exemption under the Fair Labor Standards Act—the section 14(c) waiver program—which permits employers to pay less than the minimum wage to individuals with disabilities, and the federal enforcement of the civil rights of individuals in the program. The Commission found persistent failures in regulation and oversight by the Department of Labor and Department of Justice of the 14(c) program that have allowed, and continue to allow, it to operate without satisfying its legislative goal to meet the needs of people with disabilities. The Commission further examined the program as a whole and determined it was inconsistent with the civil rights protections to which people with disabilities are entitled. The Commission today calls for the end of the Section 14(c) program because it continues to limit people with disabilities from realizing their full potential. In addition the program suffers from wildly insufficient federal oversight and civil rights review, and apparently routine noncompliance, begging the question why we as a nation continue its operation. Key findings from the Commission majority include:

- Persistent failures in regulation and oversight of the 14(c) program by government agencies, including the Department of Labor and Department of Justice, allow the program to operate without satisfying its legislative goals.
- The Commission took in bipartisan testimony in favor of keeping the 14(c) program and to end the 14(c) program. Notably, in 2016, both major party platforms included support for legislation ending the payment of subminimum wages to people with disabilities.
- State-level phaseouts of the 14(c) program have been designed to ensure that a competitive integrated employment model does not result in a loss of critical services to individuals with disabilities, including former 14(c) program participants.

Key recommendations from the Commission majority include:

- Congress should repeal Section 14(c) with a planned phaseout period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.

<mailto:CShaw@MarinCounty.org>
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- The phased repeal of 14(c) should reconceptualize how the federal government can enhance the possibilities for success and growth for people with disabilities.
- Congress should expand funding for supported employment services and prioritize capacity building in states transitioning from 14(c) programs.
- Congress should assign civil rights oversight responsibility and jurisdiction, with necessary associated fiscal appropriations to conduct the enforcement, either to the Department of Labor or to the Department of Justice Civil Rights Division.
- Congress should also require that the designated civil rights agency issue an annual report on investigations and findings regarding the 14(c) program.
- During the phaseout period, Congress should provide stringent reporting and accountability for 14(c) certificate holders, and following the phaseout, Congress should continue to collect data on employment outcomes of former 14(c) employees.

We hope you find the report useful, and share it with your networks. You can post about the report on social media using #SubminimumWage or #DisabilityRights, and . Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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Date : 9/22/2020 3:25:21 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Strasser, Madeline" Madeline.Strasser@mail.house.gov Cc : "Rukku Singla" rsingla@uscrr.gov, "Valdez, Anthony" Anthony.Valdez@mail.house.gov, "Emmons, William" Will.Emmons@mail.house.gov Subject : Re: [EXTERNAL] Webex Training Thank you. I think you are asking about my availability tomorrow (and that Karyn is a typo). I don't have any availability in those time windows tomorrow. I could do it between 1 and 2 pm EST or I could do it today before 8 pm EST. Please let me know if those windows can work

On Sep 22, 2020, at 12:19 PM, Strasser, Madeline <Madeline.Strasser@mail.house.gov> wrote:

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Hi Catherine, To prepare for Thursday's hearing we are requiring all witnesses to participate in a Webex practice session. This session should only be 15 minutes and I will be able to answer any technical or logistical questions you may have for the hearing. Please let me know if Karyn has any availability tomorrow morning before 1:00pm or after 5:00pm. Best, Madeline Strasser Chief Clerk House Committee on the Judiciary 202-697-1091

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Date : 9/22/2020 5:33:52 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Valdez, Anthony" Anthony.Valdez@mail.house.gov, "Strasser, Madeline" Madeline.Strasser@mail.house.gov Cc : "Rukku Singla" rsingla@uscrr.gov, "Emmons, William" Will.Emmons@mail.house.gov Subject : Re: [EXTERNAL] Webex Training I am waiting for the host to admit me

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Valdez, Anthony <Anthony.Valdez@mail.house.gov> Sent: Tuesday, September 22, 2020 5:26 PM To: Strasser, Madeline; Catherine Lhamon Cc: Rukku Singla; Emmons, William Subject: RE: [EXTERNAL] Webex Training

CAUTION: This email is from outside USCCR.

Hi all, For our webex today at 5:30pm please use this link instead: <https://ushr.webex.com/meet/ray.colbert> Thank you, -- Anthony Valdez Legislative Aide/Professional Staff Member House Committee on the Judiciary Subcommittee on Immigration and Citizenship P: 202-740-2316 From: Strasser, Madeline <Madeline.Strasser@mail.house.gov> Sent: Tuesday, September 22, 2020 3:50 PM To: 'Catherine Lhamon' <clhamon@uscrr.gov> Cc: Rukku Singla <rsingla@uscrr.gov>; Valdez, Anthony <Anthony.Valdez@mail.house.gov>; Emmons, William <Will.Emmons@mail.house.gov> Subject: RE: [EXTERNAL] Webex Training

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Great, I will send a webex invite shortly. Attached are also some best practices for webex from our digital team. From: Catherine Lhamon <clhamon@uscrr.gov> Sent: Tuesday, September 22, 2020 3:48 PM To: Strasser, Madeline <Madeline.Strasser@mail.house.gov> Cc: Rukku Singla <rsingla@uscrr.gov>; Valdez, Anthony <Anthony.Valdez@mail.house.gov>; Emmons, William <Will.Emmons@mail.house.gov> Subject: Re: [EXTERNAL] Webex Training Yes perfect. Thank you

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Best, Madeline Strasser Chief Clerk House Committee on the Judiciary 202-697-1091

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Date : 9/22/2020 5:40:50 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Valdez, Anthony" Anthony.Valdez@mail.house.gov, "Strasser, Madeline" Madeline.Strasser@mail.house.gov Cc : "Rukku Singla" rsingla@uscrr.gov, "Emmons, William" Will.Emmons@mail.house.gov Subject : Re: [EXTERNAL] Webex Training Thank you so much. That was so helpful!

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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<mailto:Will.Emmons@mail.house.gov>
<mailto:Madeline.Strasser@mail.house.gov>

Best, Madeline Strasser Chief Clerk House Committee on the Judiciary 202-697-1091

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Date : 9/22/2020 3:48:30 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Strasser, Madeline" Madeline.Strasser@mail.house.gov Cc : "Rukku Singla" rsingla@uscrr.gov, "Valdez, Anthony" Anthony.Valdez@mail.house.gov, "Emmons, William" Will.Emmons@mail.house.gov Subject : Re: [EXTERNAL] Webex Training Yes perfect. Thank you

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<mailto:Madeline.Strasser@mail.house.gov>

Best, Madeline Strasser Chief Clerk House Committee on the Judiciary 202-697-1091

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Date : 9/28/2020 12:54:59 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Kenney, Sally J" skenney@tulane.edu Subject : Re: Pushout Thank you for the hope in this note. I'm so glad you and your book club found the book engaging. And I'm so glad to read about the colloquium you are teaching. That New Orleans trip feels so long ago now, and I crave that time again. Please take care of you.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Kenney, Sally J <skkenney@tulane.edu> Sent: Monday, September 28, 2020 12:16 PM To: Catherine Lhamon Subject: [EXTERNAL] Pushout

CAUTION: This email is from outside USCCR.

Dear Catherine: Still reeling from the loss of Ginsburg and the Republican Senate's hypocrisy. But I write today to thank you for recommending Morris's book, which our reading group just read and discussed. It makes a powerful argument. It seems like another lifetime that we were dining together in New Orleans after your magnificent lecture. Am teaching a freshman honors colloquium on dismantling rape culture. Trying to keep the flame burning. Sincerely, Sally Sally J. Kenney Newcomb College Endowed Chair Executive Director, Newcomb Institute Professor of Political Science 43 Newcomb Place New Orleans, Louisiana 70118 Phone: 504-865-5422 (fax) 504-862-8589 skenney@tulane.edu tulane.edu/newcomb/sallykenney

Gender and Justice Why Women in the Judiciary Really Matter

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By Sally J. Kenney, Series: Perspectives on Gender Order Information

From: Catherine Lhamon <clhamon@uscrr.gov> Date: Friday, May 8, 2020 at 5:09 PM Subject: Updates from U.S. Commission on Civil Rights (May 2020)

I write to share updates from the U.S. Commission on Civil Rights. Today, the Commission unanimously issued recommendations to secure nondiscrimination in the COVID-19 pandemic context, and specifically to address anti-Asian racism and xenophobia. In April, Senators Warren, Hirono, Duckworth, Cantwell, Markey, Sanders, Van Hollen, Blumenthal, Harris, Booker, Klobuchar, and Rosen requested the Commission issue recommendations to reduce the dangerous & hateful spread of anti-Asian sentiment that appears to be on the rise during the pandemic. As an independent, bipartisan, fact-finding federal agency, our mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws. As the nation's civil rights watchdog, we have a unique responsibility during times of crisis to speak out on behalf of communities who are directly or indirectly impacted by the crisis. All federal civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. It is also necessary for the federal government to communicate and act in a manner that demonstrates to communities that it will protect all Americans regardless of race, national origin, or other protected characteristics. Given the rise in anti-Asian sentiment reported in recent weeks and months, it is important that the federal government is conscious of the particular needs of the Asian American community. The Commission has identified widespread concerns about discrimination impacting Asian Americans in relation to education, employment, hate crimes, health, housing, and immigration enforcement. Efforts to address these concerns must always take into account the critical requirement to provide for language access for limited English proficient populations. According to Census data, Asian Americans and Pacific Islanders make up 22 percent of the limited English proficient population in the United States.

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You can read the full set of recommendations here: <https://www.uscrr.gov/press/2020/05-08-Anti-Asian-Discrimination.pdf>. The Commission also, by majority vote, announced opposition to executive branch action shutting down virtually all permanent-residence seekers into the United States. There is no national relationship between the stated reasons for this policy action and the COVID 19 pandemic or protecting American jobs. What this proposed policy makes clear is that this is nothing more than a brazen attempt to vilify and misdirect people's real and understandable fears about the COVID 19 pandemic. It will likely have the effect of foreclosing opportunity and directing enmity at a class of individuals who are often characterized by discrete racial, ethnic, or national origins. Moreover, the proclamation not only discriminates against these immigrants but also has the foreseeable collateral consequence of heightening the risks to Americans who share these racial, ethnic, or national origin backgrounds. You can read the full statement here: <https://www.uscrr.gov/press/2020/05-08-Immigration-Shutdown.pdf>. The Commission's Advisory Committees have also been active in raising concerns about the civil rights implications of the COVID-19 pandemic. Our Massachusetts and Connecticut Advisory Committees issued recommendations to better address the pandemic in correctional facilities in those states. You can access those full statements here: <https://www.uscrr.gov/pubs/2020/05-04-MA-SAC-Statement-of-Concern.pdf> and <https://www.uscrr.gov/pubs/2020/04-29-CT-SAC-Statement-of-Concern-on-Incarcerated%20People-and-COVID-19.pdf>. I hope you are all staying healthy and safe, and hope these materials prove useful to you and your networks as we all fight this pandemic and its full implications for our well-being. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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Date : 9/28/2020 12:53:29 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Alexandra D. Korry" korrya@sullcrom.com Cc : "RPanovka@WLRK.com" RPanovka@WLRK.com, "David Mussatt" dmussatt@uscrr.gov, "Mauro Morales" mmorales@uscrr.gov, "Rukku Singla" rsingla@uscrr.gov Subject : deep gratitude for your service to civil rights Alexandra, I understand you continue your health fight, in hospice care now. I write to thank you, so much, for your work over multiple terms as chair of the New York advisory committee to the Commission to safeguard and promote civil rights in your state and to lead for the country in those core protections. We have richly benefited from your fierce commitment to equity in the detailed and careful investigations you led and in the thorough reporting you have produced as chair. Please know you set a powerful example. Thank you for volunteering your time in this important work we both so love.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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Date : 9/29/2020 11:16:46 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Sherrilyn Ifill" sifill@naacpldf.org Subject : Re: [EXTERNAL] RE: quick call Yes of course. Anytime after 1 pm pst (4 pm est) would work for me tomorrow. If that doesn't give you an open window let me know some other times that could work please. My cell is 213-400-1344.

On Sep 29, 2020, at 7:34 PM, Sherrilyn Ifill <sifill@naacpldf.org> wrote:

CAUTION: This email is from outside USCCR.

Catherine: How are you? Might you have time for a call with me? I'm looking for your advice about federal education policy. Let me know when a call might work for you. Best, Sherrilyn Sherrilyn Ifill President & Director-Counsel NAACP Legal Defense & Educational, Fund, Inc. (LDF) 40 Rector Street 5th Floor New York, NY 10006 212-965-2201 sifill@naacpldf.org

mailto:sifill@naacpldf.org

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Date : 9/30/2020 1:26:37 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Lisa Maatz" lisamaatz@gmail.com Subject : Re: [EXTERNAL] Re: serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? Thank you for letting me know. The Advisory Committees must be bipartisan and at the moment we don't have sufficient applicants who are Republican or conservative to move forward with appointing that Committee. If you know Republican or conservative candidates in Ohio with civil rights expertise and interest whom you would recommend I would very much welcome your recommendations.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Lisa Maatz <lisamaatz@gmail.com> Sent: Tuesday, September 29, 2020 1:15 PM To: Catherine Lhamon Subject: Re: [EXTERNAL] Re: serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights?

CAUTION: This email is from outside USCCR.

Hey sister -- Just wanted to let you know I did apply several weeks back. Haven't heard anything... and no worries about that just an FYI for you. Hope you are hanging in there.... the loss of RBG cuts deep, exp on top of John Lewis. 2020 is a trial.

Miss you.

On Thu, Jul 30, 2020 at 3:31 PM Catherine Lhamon <clhamon@uscrr.gov> wrote: Hurrah. It's great to hear from you, too.

On Jul 29, 2020, at 10:28 PM, Lisa Maatz <lisamaatz@gmail.com> wrote:

mailto:clhamon@uscrr.gov
https://twitter.com/USCCRGov
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal
mailto:clhamon@uscrr.gov
mailto:lisamaatz@gmail.com

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YES!!!! Sounds perfect, and I really appreciate your thinking of me. I am doing pretty well in the slower pace of Ohio...new job...taking care of mom...cottage on the lake...cute pup. But I've been a bit restless...and this could be the way to put my federal civil rights knowledge to work in the state. I'm jazzed... Will work on the app this weekend. Looks like Ohio has openings starting in November. :)

As for the job, I'm knee deep in the \$60mill federal bribery and corruption case that just saw our state Speaker of the House and others arrested. Working on progressive reforms of course. Good stuff.

Best, Lisa

Lisa M. Maatz lisamaatz@gmail.com 202/306-4421 (texting or email is always the best way to reach me) Twitter: @LisaMaatz LinkedIn.com/in/LisaMaatz

sent by AOL dialup

On Tue, Jul 28, 2020, 6:44 PM Catherine Lhamon <clhamon@uscrr.gov> wrote:

Hi Lisa. Might you have interest in serving on the Ohio Advisory Committee to the U.S. Commission on Civil Rights? In the hope that you might, I've pasted below application information. I hope you're taking care.

The U.S. Commission on Civil Rights seeks applicants for our Advisory Committees in Arkansas, California, Colorado, District of Columbia, Indiana, Iowa, New Mexico, Ohio, Pennsylvania, and Wyoming. Our Advisory Committees are bipartisan and we seek candidates from all perspectives and viewpoints to serve on the Committee. The Commission encourages potential applicants to apply immediately as applications are evaluated on a rolling basis. Interested applicants can learn more about the Commission's Advisory Committees on the Commission's website, https://www.usccr.gov/pubs/sac.php. Further information about serving is here: https://www.usccr.gov/pubs/2019/SAC-FAQs.pdf.

mailto:lisamaatz@gmail.com
mailto:clhamon@uscrr.gov
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Candidates may submit their applications via the online application portal at https://www.surveymonkey.com/tr/S7WCLL6. Inquiries regarding whether a particular state committee remains open for applications can be directed to David Mussatt, Supervisory Chief of the Regional Programs Coordination Unit, at dmussatt@uscrr.gov.

The Commission has 51 Advisory Committees for every state and DC, who serve as the Commission's eyes and ears on the ground across the country, investigating and researching civil rights issues specific to their jurisdiction. Advisory Committees have recently examined civil rights impacts of civil asset forfeiture, racially disparate incarceration rates, education funding, payday lending, solitary confinement policies in prisons, fair housing, human trafficking, immigration policies, policing practices, seclusion and restraint of students with disabilities, and voting rights, among other topics. In addition to advising the Commission directly, Advisory Committee reports may lead to policy changes at the national, state, or local levels. Recent examples where reports were cited as a source for such changes include reports on solitary confinement policies in Connecticut, the conditions of women's prisons in New Hampshire, and seclusion and restraint policies of students with disabilities in Kansas.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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-- Best, Lisa

Lisa M. Maatz lisamaatz@gmail.com (email is always the best way to reach me) Twitter: @LisaMaatz LinkedIn.com/in/LisaMaatz

<mailto:lisamaatz@gmail.com>

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Date : 9/30/2020 12:22:43 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Panovka, Robin" RPanovka@WLRK.com Cc : "Alexandra D. Korry" korrya@sullcrom.com, "David Mussatt" dmussatt@uscrr.gov, "Mauro Morales" mmorales@uscrr.gov, "Rukku Singla" rsingla@uscrr.gov Subject : Re: deep gratitude for your service to civil rights I hope you take care of yourselves in this deeply painful time. Thank you for letting us know, and I share your wish that Alexandra's memory will be an ongoing blessing.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Panovka, Robin <RPanovka@WLRK.com> Sent: Wednesday, September 30, 2020 6:24 AM To: Catherine Lhamon Cc: Alexandra D. Korry; David Mussatt; Mauro Morales; Rukku Singla Subject: [EXTERNAL] Re: deep gratitude for your service to civil rights *** CAUTION: This email is from outside USCRR. ***

I'm sorry to tell you that Alexandra passed away peacefully last night, with Rebecca, Sarah and me at her side. She was surrounded by love. May her memory be a blessing.

Robin Panovka Wachtell Lipton Rosen & Katz 51 West 52nd St<-x-apple-data-detectors://0/1> New York, NY 10019<-x-apple-data-detectors://0/1>

+1 212 403 1352<tel:+1%2%A0212%C2%A0403%C2%A01352> (office) +1 917 969 7133 (mobile) RPanovka@wlrk.com<mailto:RPanovka@wlrk.com>

On Sep 28, 2020, at 12:53 PM, Catherine Lhamon <clhamon@uscrr.gov> wrote:

*** EXTERNAL EMAIL ***

Alexandra, I understand you continue your health fight, in hospice care now. I write to thank you, so much, for your work over multiple terms as chair of the New York advisory committee to the Commission to safeguard and promote civil rights in your state and to lead for the country in those core protections. We have richly benefited from your fierce commitment to equity in the detailed and careful investigations you led and in the thorough reporting you have produced as chair. Please know you set a powerful example. Thank you for volunteering your time in this important work we both so love.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov<mailto:clhamon@uscrr.gov>

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Date : 9/30/2020 6:33:31 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Sherrilyn Ifill" sifill@naacpldf.org Subject : Re: quick call Attachment : 11-21-Are-Rights-a-Reality (4).pdf, Thanks for talking today. I've attached the Commission report I mentioned.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: Sherrilyn Ifill <sifill@naacpldf.org> Sent: Tuesday, September 29, 2020 10:34 PM To: Catherine Lhamon Subject: [EXTERNAL] RE: quick call

CAUTION: This email is from outside USCRR.

Catherine: How are you? Might you have time for a call with me? I'm looking for your advice about federal education policy. Let me know when a call might work for you. Best, Sherrilyn Sherrilyn Ifill President & Director-Counsel NAACP Legal Defense & Educational, Fund, Inc. (LDF) 40 Rector Street 5th Floor New York, NY 10006 212-965-2201 sifill@naacpldf.org

<mailto:clhamon@uscrr.gov>
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<mailto:sifill@naacpldf.org>

U.S. COMMISSION ON CIVIL RIGHTS

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Evaluating Federal Civil Rights Enforcement

Are Rights a Reality?

November 2019 Statutory Report

www.usccr.gov

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.¹

142 U.S.C. §1975a.

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U.S. Commission on Civil Rights

1331 Pennsylvania Avenue, NW

Washington, DC 20425

(202) 376-8128 voice

TTY Relay: 711

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Are Rights A Reality? Evaluating Federal

Civil Rights Enforcement

2019 Statutory Enforcement Report

Letter of Transmittal November 21, 2019 President Donald J. Trump Vice President Mike Pence Speaker of the House Nancy Pelosi On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*. The report is also available in full on the Commission’s website at www.usccr.gov. Congress charges the federal government with enforcing federal civil rights laws providing protection from discrimination on the bases of race, color, religion, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, education, and public accommodations. Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. In this report, the Commission evaluates the most essential elements for effective federal civil rights enforcement, examining thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency’s external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

- U.S. Department of Justice, Civil Rights Division • U.S. Department of Education, Office for Civil Rights • U.S. Department of Labor, Office of Federal Contract Compliance Programs and Civil Rights Center and Civil Rights Center • U.S. Department of Health and Human Services, Office for Civil Rights • U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity • U.S. Equal Employment Opportunity Commission • U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties • U.S. Environmental Protection Agency, External Civil Rights Compliance Office • U.S. Department of Transportation, External Civil Rights Programs Division of the Departmental Office of Civil Rights

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ii Evaluating Federal Civil Rights Enforcement

- U.S. Department of Veterans Affairs, Office of Resolution Management • U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights • U.S. Department of the Treasury, Office of Civil Rights and Diversity • U.S. Department of the Interior, Office of Civil Rights

The Commission majority approved key findings including the following: the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed. Key Commission majority recommendations include the following: Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency’s external civil rights enforcement function should include evaluation of the amount of federal funding distributed and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should give civil rights offices that now lack such authority the authority to compel resolution from noncompliant entities within an agency’s jurisdiction, to allow for efficient investigation of allegations of civil rights harms. Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. No agency should prioritize enforcement of one civil rights protection over another. We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled. For the Commission,

Catherine E. Lhamon Chair

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x ACKNOWLEDGEMENTS

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1 Evaluating Federal Civil Rights Enforcement

Executive Summary Many times over our 62-year existence, the Commission has examined effectiveness of civil rights enforcement among federal agencies.¹ Congress charges the federal government with enforcing civil rights under the U.S. Constitution,² as well as federal civil rights statutes such as the Civil Rights Acts of 1957 and 1964,³ and subsequent civil rights statutes such as the Voting Rights Act,⁴ the Fair Housing Act,⁵ Section 794 of the Rehabilitation Act,⁶ the Americans with Disabilities Act,⁷ Title IX of the Education Amendments Act of 1972,⁸ the Age Discrimination Act,⁹ and many others. These laws provide federal protections from discrimination on the bases of race, color, religion or conscience, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, voting, education, and public accommodations.¹⁰ Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. The specific jurisdiction of federal agencies’ civil rights offices varies; but generally their charges include receiving and adjudicating civil rights complaints, monitoring compliance by federally funded and other covered entities and

1 See, e.g., U.S. Comm’n on Civil Rights, Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume One: A Blueprint for Civil Rights Enforcement, 2002, <http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf> [hereinafter USCCR, Ten-Year Check-Up Vol. 1: A Blueprint]; U.S. Comm’n on Civil Rights, A Bridge to One America: The Civil Rights Performance of the Clinton Administration, 2001, <http://www2.law.umaryland.edu/marshall/usccr/documents/clintoncivirt.pdf>; U.S. Comm’n on Civil Rights, Funding Federal Civil Rights Enforcement, 1995, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12f96.pdf> [hereinafter USCCR, Funding for Civil Rights Enforcement 1995]; U.S. Comm’n on Civil Rights, The Federal Civil Rights Enforcement Effort: Two Years Later, 1973, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>; U.S. Comm’n on Civil Rights, The Federal Civil Rights Enforcement Effort: Seven Months Later, 1971, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>; U.S. Comm’n on Civil Rights, Federal Civil Rights Enforcement Effort, 1970, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf>. See also U.S. Comm’n on Civil Rights, Enforcing Title IX, 1980, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf> (focused on Title IX enforcement by the Department of Health, Education, and Welfare); U.S. Comm’n on Civil Rights, Federal Enforcement of Equal Employment Requirements, 1987, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11093z.pdf> (focused on equal employment enforcement by the Equal Employment Opportunity Comm’n, the Department of Justice Civil Rights Division’s Employment Section, and the Department of Labor’s Office of Federal Contract Compliance Programs). 2 See U.S. Const. amend. XIII, § 1; U.S. Const. amend. XIV, § 1; U.S. Const. amend. XV, § 1; U.S. Const. amend. XV, § 1; see also infra notes 16-20 (discussing the fundamental protections of these Reconstruction Amendments). 3 Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4. 4 Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101). 5 Fair Housing Act, 42 U.S.C. § 3601. 6 Rehabilitation Act, 29 U.S.C. § 794. 7 Americans with Disabilities Act, 42 U.S.C. § 12101. 8 Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88. 9 Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07. 10 See infra notes 21-30 (discussing statutes enforced by federal civil rights offices). Because since 1983 the Commission’s statute specifically prohibits “the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about the laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion,” the Commission may not use any of its resources to study this issue.

- <http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf>
- <http://www2.law.umaryland.edu/marshall/usccr/documents/clintoncivirt.pdf>
- <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12f96.pdf>
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- <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>
- <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11093z.pdf>

2 Evaluating Federal Civil Rights Enforcement

persons, and other activities ranging from issuing guidance to public reporting to investigating and administratively resolving or litigating in federal court to remedy civil rights violations. Congress has charged the Commission with monitoring these federal civil rights enforcement efforts.¹¹ The last time the Commission reported on federal civil rights enforcement generally, across multiple agencies, was in 2002.¹² In this current report, the Commission draws from methods and conclusions in prior Commission reports for metrics to evaluate the most essential elements for effective civil rights enforcement. For this report, the Commission examines thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency’s external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

- U.S. Department of Justice, Civil Rights Division • U.S. Department of Education, Office for Civil Rights • U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center • U.S. Department of Health and Human Services, Office for Civil Rights • U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity • U.S. Equal Employment Opportunity Commission • U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties • U.S. Environmental Protection Agency, External Civil Rights Compliance Office • U.S. Department of Transportation, Departmental Office of Civil Rights • U.S. Department of Veterans Affairs, Office of Resolution Management • U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights • U.S. Department of the Treasury, Office of Civil Rights and Diversity • U.S. Department of the Interior, Office of Civil Rights¹³

The Commission bases conclusions in this report on information received through interrogatories and document requests sent to these agencies,¹⁴ independent research, and testimony and public comments received during and following a public briefing the Commission held in November 2018, at which current and former federal agency officials, advocates, legal scholars, and community members testified. Chapter 1 of this report discusses the history of federal civil rights law and the Commission’s statutory role in evaluating the effectiveness of federal civil rights enforcement since 1957. Chapter 1 also explains scope and methodology of this report. In reviewing the efficacy of 13 federal agencies’ external civil rights enforcement programs, the

11 Civil Rights Comm’n Act, 42 U.S.C. § 1975a(c)(1). 12 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 1 (evaluating 10 federal agencies). 13 In 2002, the Commission evaluated 11 agencies. Ten of the agencies on the current list were included in 2002; the difference being that the 2002 report did not evaluate the DHS, the VA, or Treasury, and it did evaluate the Small Business Administration. *Ibid.*, 2. 14 Interrogatories and Document Requests are specific questions and requests for documents that the Commission sent to each of the 13 agencies under the Commission’s statutory authority to do so. 42 U.S.C. § 1975a(e).

3 EXECUTIVE SUMMARY

Commission identified and analyzed three core factors against which to measure federal civil rights offices: (1) the office’s legal authority and responsibility, (2) the enforcement tools the office has at its disposal, and (3)its budget and staffing. Furthermore, the Commission reviewed seven essential elements of effective civil rights enforcement programs:

1. Prioritization for Civil Rights Agency-Wide, 2. Strategic Planning and Self-Evaluation, 3. Complaint Processing, Agency-Initiated Charges, and Litigation, 4. Proactive Compliance Evaluation, 5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity, 6. Interaction and Coordination with External Agencies and Organizations, 7. Research, Data Collection, and Reporting.

Chapter 1 reports general results of the Commission’s research. Chapters 2 through 14 examine data from FY 2016 to FY 2018 from each federal agency in depth. The research shows that most of the civil rights office in each of the agencies have sufficient legal authority, fairly clear responsibility, and a range of civil rights enforcement tools. In addition, the Commission received bipartisan testimony supporting the view that civil rights laws should be enforced consistently. The report reflects many highlights of effective civil rights enforcement efforts during each of the fiscal years. However, a variety of factors hinder consistent performance and efficacy of federal civil rights offices. The Commission’s research shows trends including insufficient resources, reduced staffing levels, failure to process complaints in a timely manner, vague complaint processing mechanisms, a tapering off of agency-initiated charges and systemic litigation in some key areas, backtracking in affirmative civil rights policy guidance, a lack of coordination in the face of emerging civil rights crises, and a need for more data collection, research, and public reporting. Key Commission findings and recommendations based on this evidence and analysis include:

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Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics. As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed.

Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including HUD OCR and HUD FLETC, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics. Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans.

5 EXECUTIVE SUMMARY

Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics. Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms.

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7 Chapter 1: Introduction

Chapter 1: Introductory History, Research Scope and Methodology, and Analysis of Key Factors and Essential Elements for Effective Federal Civil Rights Enforcement

This chapter will first briefly summarize the origins of federal civil rights law and the Commission's past work evaluating the efficacy of federal civil rights enforcement. It will then summarize the methodology of the current report as well as major factors and elements evaluated, adding information about some of the major research findings. Origins of Federal Civil Rights Law and Enforcement Congress established the U.S. Department of Justice in 1870, shortly after the Civil War,¹⁵ with the founding purpose to enforce the Reconstruction Amendments.¹⁶ These Constitutional amendments generally established that every person born or naturalized in the United States is a citizen of the U.S., that every person in the U.S. is entitled to due process of law and equal protection under the law, and that all citizens have the right to vote.¹⁷ Resultant progress was later significantly curtailed during the Jim Crow era beginning in 1877 and lasting through the Civil Rights Movement in the 1950s.¹⁸ During the Jim Crow era, pervasive state laws sought to discourage or prevent black citizens from exercising their right to vote through poll taxes and literacy tests, and they segregated every aspect of public life leaving black people specifically and people of color generally in separate and less equal circumstances.¹⁹ Concern over this regression, as expressed in the burgeoning civil rights movement, supported the need for the federal government to have more authority to protect the civil rights guaranteed by the Reconstruction Amendments.²⁰ The Civil Rights Act of 1957 established the Civil Rights Division of the U.S. Department of Justice, which at the time focused on protecting the right to vote through direct enforcement of

15 Act to Establish the Department of Justice, ch. 150 § 5, 16 Stat. 162 (1870). 16 Id. 17 U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XV, § 1. See U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report*, 2018 [hereinafter USCCR, *Minority Voting*] ("[I]t was not until 1924, when Congress passed the Indian Citizenship Act, that Native Americans were entitled to U.S. citizenship and voting rights (and that this entitlement did not impair the individual's right to remain a tribal member).") See also U.S. CONST. amend. XIX (1919) (extending the right to vote to women). 18 USCCR, *Minority Voting*, supra note 17, at 17-18. 19 *Ibid.*, 17 n. 39. 20 *Ibid.*, 20-23. See also Patricia M. Wald, "To Feel the Great Forces": The Times of Burke Marshall, 105 *Yale L.J.* 611, 613-14 (1995); Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 *Harv. C.R.-C.L. L. Rev.* 309, passim (1984). But cf. infra note 549 (former Atty General Sessions' memo discussing federalism and states' rights arguments); Joshua Thompson, Senior Attorney, Pacific Legal Foundation, *Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights*, Nov. 2, 2018, at 3-4 (discussing federalism concerns in relation to voting rights and legacy desegregation cases) [hereinafter Thompson Statement].

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federal civil rights laws.²¹ The 1957 Act also provided for the creation of the bipartisan U.S. Commission on Civil Rights (the Commission), charging the Commission to investigate facts as well as federal laws and policies regarding civil rights in the U.S. and to send reports to the President and Congress.²² The 1957 Act also provided the Commission with the authority to hold hearings and receive testimony.²³ The passage of the Civil Rights Act of 1964 (the 1964 Civil Rights Act) then expanded modern federal civil rights enforcement. Title VI of this Act barred discrimination on the bases of race, color, and national origin in all federal funding, and specifically provided for an increased federal role in civil rights enforcement.²⁴ The Act charges all federal agencies that distribute federal funding with ensuring compliance.²⁵ Title VII of this Act prohibits employment discrimination on the bases of race, color, religion, sex, and national origin.²⁶ In 1966, Congress granted the United States Attorney General the authority "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."²⁷ Successive U.S. Attorneys General have widely used this statute not just to file original lawsuits on behalf of the U.S., but also to file amicus briefs and statements of interest in actions brought by private parties that concern the civil rights interests of the federal government.²⁸ In 1968, Congress passed the Civil Rights Act of 1968, and along with adding civil rights protections for Native Americans,²⁹ Title VIII added comprehensive protections and enforcement mechanisms to protect individuals from housing discrimination on the bases of race, color, religion, and national origin, with subsequent amendments that added sex, familial status, and disability status as protected classes.³⁰ During the 1960s and 1970s, the federal government made significant gains in expanding civil rights enforcement, as Congress also expanded federal protections and enforcement powers.³¹ More agencies became not only required to enforce, but more involved in enforcing civil rights law.³² In 1970, the Commission attempted to "evaluate for one moment in time the status of the entire Federal civil rights enforcement effort—to determine how effectively the Federal government as

21 See infra notes 372-442 (discussing the Civil Rights Division and its legal authorities). 22 The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. I, §§ 101 and 104. 23 Id. § 102. 24 42 U.S.C. § 2000d (1964). 24 Id. 25 Id. 26 42 U.S.C. § 2000e (1964). 27 Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 *Harv. C.R.-C.L. L. Rev.* 227, 231 n.17 (2017) (quoting U.S.C. § 517 (2014)). 28 Id. at 231-234. 29 25 U.S.C. §§ 1301-1304. 30 42 U.S.C. §§ 3601-3631. 31 See U.S. Comm'n on Civil Rights, *Ten-year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?*, p. ix, 2002, <https://www.usccr.gov/pubs/archives/10yr02/vol2/vol2.pdf> [hereinafter USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*]. 32 *Ibid.*

<https://www.usccr.gov/pubs/archives/10yr02/vol2/vol2.pdf>

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a whole has geared itself to carrying out civil rights responsibilities pursuant to the various constitutional, congressional, and presidential mandates which govern their activities."³³ The Commission's research "disclosed a number of inadequacies common to nearly all Federal departments and agencies—inadequacies in agency recognition of the nature and scope of their civil rights responsibilities, in the methods used to determine civil rights compliance, and in the use of enforcement techniques to eliminate noncompliance."³⁴ During the 1980s and 1990s, there were more debates about the scope and meaning of federal civil rights protections; however, enforcement continued to expand due to federal government actions as well as those of private litigants. As the Commission summarized in a previous comprehensive report on federal civil rights enforcement (issued in 2002):

Presidential executive orders and congressional actions in the 1970s and 1980s resulted in an array of government programs designed to enforce civil rights laws. For examples, the Voting Rights Act Amendments of 1975 and the Civil Rights Restoration Act of 1987 were enacted. In the 1990s, despite calls proclaiming that equality had been achieved on all fronts, the nation continued to struggle to ensure equal participation for all its citizens. However, legislative action was necessary to protect the civil rights of people with disabilities. Thus, the Americans with Disabilities Act of 1990 was passed into law.³⁵

Today, there are many civil rights laws that the various federal agencies enforce that the Commission has examined in this report, beyond what was mentioned in the brief historical background summarized above. In addition to statutory changes Congress made, federal enforcement of civil rights laws is also subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the executive branch.³⁶ At the Commission's November 2018 briefing regarding federal civil rights enforcement, the Commission heard testimony indicating that federal civil rights enforcement has changed from the Obama to the Trump Administration, as well as testimony describing what effective federal civil

33 Letter of Transmittal from Rev. Theodore M. Hesburgh, C.S.C. Chair, with fellow Commissioners and Staff Director, U.S. Comm'n on Civil Rights, to U.S. President and U.S. Congress in *Federal Civil Rights Enforcement Effort: A Report*, 1970, p. ii, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf> [hereinafter USCCR, *Federal Civil Rights Enforcement Effort*]. 34 *Ibid.* 35 USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, supra note 31, at 23. 36 Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 67 *N.Y.U. L. Rev.* 1339, 1360-61 (2012) [hereinafter Johnson, *Beyond the Private Attorney General*]. See also Stephen S. Worthington, *Beacon or Bludgeon? Use of Regulatory Guidance by the Office for Civil Rights*, 2017 *BYU Educ. & L.J.* 161 (2017); see also Kate Andrias, *The President's Enforcement Power*, *N.Y.U. L. Rev.* 88, 1031-25 (2013).

<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf>

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rights enforcement should look like, untethered to a specific Presidential Administration.³⁷ The Commission's research below will study and evaluate data about how enforcement may have varied during FY 2016, FY 2017, and FY 2018.³⁸ This evaluation also provides a critical look at federal civil rights enforcement in both the Trump and Obama Administrations, with a lens toward providing recommendations regarding effective satisfaction of the relevant Constitutional protections as well as the laws Congress has enacted. The importance of the Federal Role Although civil rights law can at times be enforced by private parties or by state attorneys general, Congress has provided the broadest and most specific authority to enforce civil rights laws to federal agencies.³⁹ In their joint letter submitted for the November 2018 briefing, seventeen State Attorneys General who have been active in civil rights enforcement stated that

These [civil rights] causes of action, with powerful remedies to redress and prevent violations that affect many people, are reserved to the federal government. If the federal government declines to enforce these laws, the states are not positioned to pick up the slack. These matters were largely committed to federal enforcement authorities by Congress.⁴⁰

The Commission's work to evaluate federal civil rights enforcement has long recognized the value of a strong federal role to ensure adequate protections for Americans across the country.⁴¹

37 See, e.g., Margo Schlanger, Wade H. and Doree M. McCree Collegiate Professor of Law, University of Michigan Law School, *Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights*, Nov. 2, 2018, at 1 [hereinafter Schlanger Statement] (recommending structural changes); see also Robert Driscoll, Member, McGlinchey Stafford and former Deputy Assistant Atty General, *Civil Rights Division, U.S. Department of Justice, testimony, Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights*, Washington, DC, Nov. 2, 2018, transcript, pp. 115-117 and 119-20 [hereinafter Federal Civil Rights Enforcement Briefing] (describing the continuous obligation to enforce civil rights laws). 38 The federal government's Fiscal Year begins on October 1 of the preceding calendar year. Therefore, the time period studied in this report is from October 1, 2015 through September 30, 2018. 39 See, e.g., 42 U.S.C. § 1983-88 (providing for private rights of action but with enhanced authority of the Attorney General); U.S. Dep't of Justice, Title VI Legal Manual (updated Mar. 18, 2019) § III, Department of Justice Role Under Title VI, <https://www.justice.gov/crt/fcs/T6manual> (describing DOJ and other agencies' role in issuing guidance and regulations, review applications for federal funding, monitor compliance, and enforce civil rights laws against recipients) [hereinafter DOJ, Title VI Legal Manual]. See also Katzenbach v. Morgan, 384 U.S. 641, 645 (1966) (although the Tenth Amendment permits states to determine voting qualifications, they cannot do so in violation of the Fourteenth Amendment or any other constitutional provision). 40 Ellen F. Rosebaum, Oregon Attorney General, joined by State Attorneys General from California, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington State, *Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights*, Dec. 17, 2018, at 6 [hereinafter State Attys General Statement]. 41 See USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, supra note 1, at 16, 19-20.

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Past Commission Reports on Federal Civil Rights Enforcement The Commission's authorizing statute requires the Commission to submit at least annual reports that monitor federal civil rights enforcement efforts in the United States.⁴² The Commission has issued various reports analyzing the efficacy of federal civil rights enforcement and offering findings and recommendations for federal agencies to improve their enforcement efforts. These reports include:

- Federal Civil Rights Enforcement Effort: A Report (1970)⁴³ • HEW and Title VI: A Report on the Development of the Organization, Policies, and

Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964 (1970)⁴⁴

- Federal Civil Rights Enforcement Effort: Seven Months Later a Report (1971)⁴⁵ • Federal Civil Rights Enforcement Effort: One Year Later (1971)⁴⁶ • Federal Civil Rights Enforcement Effort: A Report (1971)⁴⁷ • Federal Civil Rights Enforcement Effort: A Reassessment (1973)⁴⁸ • Enforcing Title IX: A Report of the U.S. Commission on Civil Rights (1980)⁴⁹ • Funding Federal Civil Rights Enforcement (1995)⁵⁰ • Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs

(1996)⁵¹ • Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights

Recommendations? Volume I: A Blueprint for Civil Rights Enforcement (2002)⁵² • Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights

Recommendations? Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation⁵³

42 42 U.S.C. § 1975a(c)(1). 43 USCCR, *Federal Civil Rights Enforcement Effort*, supra note 33. 44 U.S. Comm'n on Civil Rights, *HEW and Title VI: A report on the Development of the Organization, Policies, and Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964, 1970*, <https://babel.hathitrust.org/cgi/pt?id=uc1.b316627;view=1up;seq=11>. 45 U.S. Comm'n on Civil Rights, *Federal Civil Rights Enforcement*

Seven Months Later a Report, 1971, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>. 46 U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later, 1971. 47 *Id.* 48 U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: a Reassessment, 1973, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>. 49 U.S. Comm'n on Civil Rights, Enforcing Title IX: a Report of the U.S. Commission on Civil Rights, 1980, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>. 50 USCCR, Funding Federal Civil Rights Enforcement, 1995, *supra* note 1. 51 U.S. Comm'n on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs: A Report of the U.S. Commission on Civil Rights, 1996, <https://babel.hathitrust.org/cgi/pt?id=uc1.31210012722623;view=1up;seq=3> [hereinafter USCCR, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs]. 52 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1. 53 USCCR, Ten-Year Check-up Vol. II: An Evaluation, *supra* note 31.

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<https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>
<https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>
<https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>
<https://babel.hathitrust.org/cgi/pt?id=uc1.31210012722623;view=1up;seq=3>

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• Funding Federal Civil Rights Enforcement: 2000-2003 (2002)54 • Funding Federal Civil Rights Enforcement: 2004 (2003)55 • Funding Federal Civil Rights Enforcement: The President's 2006 Request (2005)56

These reports illustrate ongoing deficiencies in effective civil rights enforcement. What the Commission made clear in the first comprehensive report in 1970 on federal civil rights enforcement bears re-emphasizing:

[T]he inadequacies described herein have deep roots in the past. They did not originate with the current Administration, nor was there any substantial period in the past when civil rights enforcement was uniformly at a high level of effectiveness. Rather, the inadequacies are systemic to the federal bureaucracy and it is only through systemic changes that the great promises of civil rights laws will be realized.⁵⁷

While it is certain that progress has been made since the Commission's 1970 report, the present data the Commission collected from 13 agencies spanning three fiscal years and two administrations show that much work still remains to be done. Scope and Methodology This report reviews the efficacy of external (not internal) federal civil rights enforcement by the civil rights offices of 13 federal agencies.⁵⁸ External enforcement encompasses working towards compliance with federal civil rights law in programs and activities administered within the regulated community, as distinct from within the particular federal agency itself. Many civil rights statutes broadly prohibit any recipient or beneficiary of federal financial assistance from discriminating against individuals on the bases of race, color, national origin,⁵⁹ sex,⁶⁰ disability,⁶¹ or age.⁶² In the administration of these programs and activities. Relevant federal laws also prohibit

54 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement: 2000-2003, 2002, <https://www.usccr.gov/pubs/archives/crfund02/report.pdf>. 55 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement 2004, 2003, <https://babel.hathitrust.org/cgi/pt?id=osu.32437122009356;view=1up;seq=5>. 56 U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement: The President's 2006 Request, 2005, <https://www.usccr.gov/pubs/archives/crfund06/crfund06.pdf>. 57 USCCR, Federal Civil Rights Enforcement Effort, *supra* note 33. 58 In this context, internal civil rights enforcement refers to personnel matters involving federal government staff. 59 42 U.S.C. §§2000d-2000d-4. 60 20 U.S.C. §§ 1661-66. 61 29 U.S.C. § 794. 62 42 U.S.C. §§ 6101-07.

<https://www.usccr.gov/pubs/archives/crfund02/report.pdf>
<https://babel.hathitrust.org/cgi/pt?id=osu.32437122009356;view=1up;seq=5>
<https://www.usccr.gov/pubs/archives/crfund06/crfund06.pdf>

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employment discrimination by private employers and state and local government entities.⁶³ In addition, many other civil rights statutes, executive orders, and regulations exist to protect individuals from discrimination in these federally funded programs and activities on various other protected bases.⁶⁴ Furthermore, other civil rights law protections apply to state and local jurisdictions or individuals and entities, including private employers, regardless of whether they receive federal funding.⁶⁵ These protections include most criminal civil rights statutes, but also some other civil rights statutes such as the Americans with Disabilities Act and the Voting Rights Act.⁶⁶ To have meaning, these statutes must be enforced (whether through voluntary or other measures), and as discussed herein, the main enforcement responsibilities pertain to the agencies of the federal government and are primarily enforced through agencies' civil rights offices.⁶⁷ The Commission therefore evaluated the external civil rights enforcement offices of the following 13 agencies:

• U.S. Department of Justice (DOJ), Civil Rights Division (CRT) • U.S. Department of Education (ED), Office for Civil Rights (ED OCR) • U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs

(OFCCP) and the Civil Rights Center (CRC) • U.S. Department of Health and Human Services (HHS), Office for Civil Rights (HHS

OCR) • U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and

Equal Opportunity (FHEO) • U.S. Equal Employment Opportunity Commission (EEOC) • U.S. Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties

(CRCL) • U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office

(ECRCO) • U.S. Department of Transportation (DOT), Departmental Office of Civil Rights (DOCR)

⁶³ See, e.g., Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), 42 U.S.C. § 2000e(a) and (b) (defining "persons" as including state and local governments, and defining employers prohibited from violating civil rights protections as "any person engaged in industry affecting commerce who has fifteen or more employees"); and see U.S. Comm'n on Civil Rights, In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes, November 2019, at 9-14, <https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf> (discussing federal criminal civil rights laws applicable to individuals and state and local governments). ⁶⁴ See *infra* Legal Authority and Responsibility sections of each of the following agency chapters. ⁶⁵ See, e.g., 18 U.S.C. §§ 241 (Conspiracy against rights), 242 (Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs). ⁶⁶ *Id.* See, e.g., 8 U.S.C. § 1324b (Immigration and Nationality Act's anti-discrimination provision); 42 U.S.C. § 3604 (Fair Housing Act's prohibition against discrimination in sale or rental of housing); 42 U.S.C. §§ 10301 to 10702 (Voting Rights Act of 1965); 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019) (U.S. Dep't of Education's enforcement authority under the Americans with Disabilities Act, even for entities that are not recipients of federal financial assistance). ⁶⁷ See *infra* the Legal Authority and Responsibility sections of each of the following agency chapters.

<https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf>

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• U.S. Department of Veterans Affairs (VA), Office of Resolution Management (ORM) • U.S. Department of Agriculture (USDA), Office of the Assistant Secretary for Civil Rights

(OASCR) • U.S. Department of the Treasury (Treasury), Office of Civil Rights and Diversity (OCD) • U.S. Department of the Interior (Interior), Office of Civil Rights (DOI OCR)⁶⁸

The Commission sent interrogatories and document requests to each of the 13 federal civil rights offices, for which each agency provided responses and supplementary information about its scope of jurisdiction, organizational structure, budget, staffing, caseload, process of enforcement, policy directives, policy changes, and other relevant information to help measure their efficacy. The Commission reviewed and analyzed information the agencies submitted, conducted independent research, and identified some overarching themes that characterize status of federal civil rights enforcement during the fiscal years in question. For six of the agencies with the largest civil rights offices (DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC), the Commission conducted a more in-depth review to substantively evaluate the efficacy of those agencies' civil rights enforcement work. The Commission also took into account information received during a public briefing held on November 2, 2018, when the Commission received testimony from 22 expert witnesses including current and former federal civil rights enforcement officials, academic and legal experts, and advocates. The briefing was followed by a public comment session that included a state Attorney General and a representative from the office of another state Attorney General, representatives of several nonprofit advocacy groups, and members of the public who offered their perspectives on civil rights enforcement effectiveness. The Commission also received 39 written public comments from individuals, community and advocacy groups, as well as state Attorneys General. The Commission used a consistent set of factors to evaluate each of the 13 civil rights offices. These consist of three core measurement factors: First, each chapter evaluates the legal authority and responsibilities for civil rights enforcement that the civil rights office has. Second, this report evaluates the enforcement tools that each civil rights office has the authority to use. Third, each chapter examines the relevant budget and staffing levels for the civil rights enforcement offices, while also assessing the workload of each office from FY 2016 to FY 2018. The Commission then analyzes civil rights enforcement efficacy through the lens of seven components of effective civil rights enforcement, which are described below.

⁶⁸ In 2002, the Commission evaluated 11 agencies. Ten of the agencies on the current list were included in 2002; the difference being that the 2002 report did not evaluate the DHS, the VA or Treasury, and it did evaluate the Small Business Administration. See USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 2.

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Analysis of Components of Effective Civil Rights Enforcement Programs and Barriers to Effective Enforcement The agency chapters that follow present data and information for each of the 13 agencies' civil rights offices that the Commission investigated, covering the period from FY 2016 to FY 2018. Legal Authority and Responsibility, Budget and Staffing, and Enforcement Tools The first three sections of each agency chapter present the following information about each agency civil rights office:

• The legal authority and responsibility of each agency civil rights office • The enforcement tools that each agency civil rights office has the legal authority to use • Budget and staffing levels of each agency civil rights office

Some of the 13 federal civil rights offices have clear responsibilities with statutes and regulations stating that they "must" or "shall" enforce the law, whereas others have authority to enforce without clear responsibilities; moreover, this level of responsibility can vary depending on the particular statute. For example, a DHS regulation states that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days. Title VI regulations require that all covered⁶⁹ agencies "shall" perform periodic compliance reviews.⁷⁰ Title VI regulations are not as clear about the timing for complaint resolutions, and instead only require that agencies try to resolve complaints in 180 days.⁷¹ The Commission's research shows that agencies generally do not meet this aspirational goal.⁷² Some agencies decreased in their satisfaction of the goal during the time period the Commission reviewed. For example, between FY 2016 and 2018, the number of complaints that the U.S. Department of Transportation was able to close within a 180-day timeframe decreased by approximately 20 percent.⁷³ Most agencies operate under federal civil rights statutes that apply only to recipients of federal funding,⁷⁴ but for example, the U.S. Department of Justice's Civil Rights Division and the U.S. Equal Employment Opportunity Commission have statutory authority to enforce civil rights laws against state and local jurisdictions, private employers, or individuals, regardless of whether they

⁶⁹ For purposes of this report, all included agencies are "covered" agencies with the exception of EEOC, which is not a covered agency under Title VI. See generally 29 C.F.R. § 1691. ⁷⁰ See *infra* note 445. See also 28 C.F.R. § 42.407. ⁷¹ See *infra* note 446. See also 28 C.F.R. § 42.408. ⁷² See *infra* notes 1368-76 (HHS); 1614-17 (HUD); 2207-9 (EEOC workload); 2472-81 and 2510-16 (DHS); 2715- 30 (EPA); 2906-8 (DOT); and 3234-53 (USDA). ⁷³ See *infra* notes 2906-8. ⁷⁴ See *infra* notes 372-442, 1017-1028, 1241-1272, 1447-1475, 1788-1842, 2085-2094, 2299-2326, 2620-2630, 2779-2808, 2943-3004, 3097-3118, 3268-3318, and 3421-3454 (Legal Authority and Responsibility sections of each of the following chapters).

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have received federal funding.⁷⁵ Some agencies' civil rights offices, such as DHS CRCL, DOL CRC, and DOT DOCR also have jurisdiction or responsibility to evaluate internal agency policy and actions for compliance with civil rights laws, on behalf of the public.⁷⁶ (For further information, see Legal Authority and Responsibility in each of the following chapters.) Regarding budget and staffing, for each of the agencies herein, the report examines the degree to which current budgets and staffing allow the offices to perform their statutory and regulatory functions. For some agencies, the report also evaluates the management practices in place in the offices to determine whether these practices are sufficient to meet the volume of civil rights issues within the civil rights offices' jurisdiction. (For further information, see Tables 1.2, 1.3 and 1.4 and subsequent analysis in this chapter, as well as the more specific Budget and Staffing sections in each of the following chapters.) Regarding enforcement tools, Congress has charged federal agencies' civil rights offices with receiving and processing civil rights complaints, engaging in compliance monitoring, providing policy guidance and issuing regulations, and other enforcement activities such as coordination with other agencies and litigation in federal court.⁷⁷ University of Michigan Law Professor Margo Schlanger, who is also the former head of DHS CRCL, has written that the power and authority of civil rights offices often differ, as some have enforcement power and some may only provide recommendations.⁷⁸ Civil rights offices have a number of tools available to them that are preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting).⁷⁹

⁷⁵ See, e.g., U.S. Dep't of Justice, Civil Rights Division, Jurisdiction, *infra* notes 372-442. For example, the Voting Rights Act provides for federal enforcement authority with regard to state and local entities, whether or not they receive federal funding, and Section 11(b) provides for jurisdiction over persons who intentionally interfere with the right to vote. 52 U.S.C. § 10301 (jurisdiction over state and local jurisdictions); 52 U.S.C. § 10308 (civil and criminal sanctions against "whoever" deprives or attempts to deprive any person of the right to vote). Another example is that the Department of Education's Office for Civil Rights jointly enforces the Americans with Disabilities Act, regardless of whether the entity in question received federal funds. 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019); see also, e.g., Equal Employment Opportunity Comm'n, Legal Authority and Responsibility Section at *infra* notes 2067-2094. ⁷⁶ See U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Legal Authority and Responsibility Section at *infra* notes 2299-2326. ⁷⁷ See, e.g. Education Authorization Act (authorizing OCR at ED— Section 203(c)(2) of the Dep't of Educ. Organization Act, 20 U.S.C. § 3413, Pub. L. 96-88, 93 Stat. 668 states: "There shall be in the Department an Office for Civil Rights" and "the Secretary shall delegate to the Assistant Secretary for Civil Rights all functions, other than administrative and support functions, transferred to the Secretary under section 301(a)(3).". See also Arne Duncan, Former Sec'y of Educ., Dep't of Educ., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 n.5 [hereinafter Duncan Statement]; The Homeland Security Act of 2002, 6 U.S.C. § 345(a)(4), Pub. L. 107-296, § 705(a)(1), 116 Stat. 2135, 2220 (2002). ⁷⁸ Margo Schlanger, Commentary, Offices of Goodness: Influence Without Authority in Federal Agencies, 36 Cardozo L. Rev. 2, 85 (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322797 [hereinafter Schlanger, Offices of Goodness]. ⁷⁹ *Id.* at 92-101.

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The Commission developed a universal list of existing potentially available federal civil rights enforcement tools, in order to establish a basis for evaluation of each agency. This universal list appears in each agency chapter, with the Commission's research evaluating whether the agency has specific legal authority (based on federal law or regulation or Executive Order) to use each of the tools on this list. This authority may be delegated from the agency head. The universal list evaluates whether the agency civil rights office has specific legal authority for:

- Complaint Resolution – to receive, investigate, and resolve civil rights complaints that allege violations of the civil rights laws that the agency civil rights office enforces.
- Agency-Initiated Charges – to initiate enforcement actions that are not in response to the filing of a complaint.
- Litigation – to pursue litigation as a means of resolving a complaint of discrimination. While some agencies have legal authority to refer complaints to DOJ for litigation, the Commission interpreted this particular enforcement tool to authorize the agency civil rights office the power to litigate in court independently of DOJ or any other agency, outside of the framework of its administrative process of complaint resolution.
- Proactive Compliance Reviews or Evaluations – to initiate compliance reviews for recipients or contractors in order to monitor compliance with the civil rights laws that the agency civil rights office enforces.
- Testing – to conduct undercover testing by sending individuals to apply for services or benefits and gather objective information about an entity's business practices or compliance with the civil rights laws that the agency enforces.
- Observation – to assign staff to observe as a means to assess whether a process has run in compliance with the civil rights laws that the agency civil rights office enforces.
- Issuance of Policy Guidance – to issue and disseminate policy guidance • Issuance of Regulations – to issue regulations through the formal rulemaking process. • Technical Assistance – to advise recipients or contractors about how to achieve compliance

with the civil rights laws that the agency civil rights office enforces in specific fact circumstances.

- Publicity – to publicize information, including complaint resolutions, litigation, or policy directives.
- Community outreach to stakeholders – to conduct outreach, particularly to educate recipients, contractors, or the general public about their rights and responsibilities under the civil rights laws that the agency civil rights office enforces.
- Research, data collection, and reporting – to conduct civil rights research, collect data, and issue reports to publicize any research and data conducted, relevant to the laws and protections offered under the civil rights laws that it enforces.
- Collaboration with states/local agencies – to collaborate or partner with states or local agencies with regard to enforcing the civil rights laws within its jurisdiction.
- Collaboration with other federal agencies – to collaborate or partner with federal agencies with regard to enforcing the civil rights laws within its jurisdiction.

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- Strategic Plan – to issue a strategic plan that outlines specific civil rights enforcement goals and priorities for enforcing the civil rights laws under its jurisdiction.
- Annual reports – to issue an annual report that charts the agency civil rights office's progress in enforcing the civil rights laws under its jurisdiction.

The Commission notes that the information presented in this section only documents the agency civil rights office's specific legal authority or obligation to use each of the enforcement tools listed and does not detail whether the agency actively utilizes these particular tools. Moreover, whether or not an agency has specific legal authority, it may still actively utilize some of the tools on this universal list. For example, a civil rights office may not have specific legal authority to send federal observers, but as part of its activities, it may send staff or consultants to observe whether a regulated entity is in compliance. Such further analysis is presented within each of the following chapters. The agencies' civil rights offices examined have the following set of specific legal authorities:

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Table 1.1: Specific Legal Authorities for Civil Rights Enforcement Tools Enforcement Tools DOJ ED HHS HUD

DOL OFCCP

DOL CRC EEOC DHS EPA DOT VA USDA Treasury Interior

Complaint Resolution X X X X X

X X X X X X X X X

Agency- initiated Charges X X X X X

X X X X X X X X X

Litigation X X Proactive Compliance Evaluations X X X X X

X X X X X X X X

Testing X X X Observation X Guidance or Other Policy Docs X X X X

X X X X X X X X

Regulations X X X X X

X X X X X X X X X

Technical Assistance X X X X

X X X X X X X X X

Publicity X X X X X X X X X X X X X X Outreach X X X X X Research, Data Collection, and Reporting X X X X

X X X X X X X X X

Collaboration w/State and Local Agencies X X X X

X X X X X X X X X

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Collaboration w/Other Federal Agencies X X X X X

X X X X X X X X X

Strategic Planning X X X X X

X X X X X X X X X

Annual Reports X X X X X

X X X X X X X X X

SOURCE: Commission Staff Research (see citations in each chapter)

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Seven Essential Elements of Effective Federal Civil Rights Enforcement Each agency chapter also includes an analysis of the data presented and research regarding what the Commission has determined to be essential elements of effective federal civil rights enforcement. These are:

1. Prioritization for Civil Rights Agency-Wide
2. Strategic Planning and Self-Evaluation
3. Complaint Processing, Agency-Initiated Charges, and Litigation
4. Proactive Compliance Evaluation
5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
6. Interaction and Coordination with External Agencies and Organizations
7. Research, Data Collection, and Reporting

The Commission identified these components based on the Commission's body of work in this field over six decades, investigating and reporting on federal civil rights enforcement effectiveness. As charged by Congress, the Commission has routinely evaluated federal civil rights enforcement and determined that there are many components to an effective civil rights enforcement program.⁸⁰ As early as 1970, the Commission determined that key components included prioritization of civil rights, effective methods to determine compliance, and effective enforcement techniques.⁸¹ For the current report, the Commission relies mainly on factors identified in a 2002 Commission report, which is the Commission's most recent, before now, comprehensive cross-federal agency evaluation of civil rights enforcement. In that report, the Commission brought together the recommendations from 16 prior Commission reports evaluating 11 different agencies over the course of the previous decade. The Commission thus had a great deal of data based on past reports about the 11 agencies studied, and the Commission used that comprehensive dataset to analyze comparative and overarching factors or elements of effective civil rights performance.⁸² Specifically, the Commission reviewed the over 1,100 recommendations the Commission had made regarding those 11 agencies over time and evaluated whether the agencies had implemented them.⁸³ Drawing on these conclusions from those 11 agency reports, the Commission found that: Without establishing priority of civil rights and gaining sufficient funding and staffing, federal agencies will struggle to even implement a civil rights enforcement system. However, once the priority of civil rights is recognized and resources are provided, the agency must implement civil

⁸⁰ 42 U.S.C. § 1975a; see also supra notes 43-56 (bullet point list of major prior commission reports). ⁸¹ USCCR, Federal Civil Rights Enforcement Effort, supra note 33. ⁸² USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at iv. ⁸³ Ibid. (The agencies were: the Equal Opportunity Employment Commission, the Departments of Justice, Education, Health and Human Serv's, Hous. and Urban Dev., Labor, Transportation, Agriculture, and the Interior, the Environmental Protection Agency, and the Small Business Administration.)

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rights planning, policy guidance and regulations, technical assistance, education and outreach, a complaint processing system, a compliance review system for federal funding recipients, and staff training.⁸⁴ The Commission recognized that these elements would only provide the "basic components" of a civil rights enforcement office. "Superior" enforcement offices, then, would optimize their efficacy by "integrating [civil rights enforcement] throughout the agency, delegating responsibility, establishing oversight for others performing civil rights responsibilities, coordinating civil rights enforcement activities with other federal agencies, streamlining them, and involving the affected community in their

development.”⁸⁵ Against this backdrop, the Commission evaluated federal civil rights enforcement during FY 2016 through FY 2018. Mission research indicates that some civil rights enforcement agencies determined that their enforcement tools should be selectively used in order to best solve the precise civil rights problems at hand.⁸⁶ At the Commission’s briefing, Leon Rodriguez, Partner at Seyfarth Shaw and former Director of HHS OCR, affirmed that “[a]fter many years in various prosecutorial and government leadership positions, I came to my role at [HHS] OCR with a hard-earned understanding that compliance is best promoted by use of all the tools at our disposal: enforcement, education, engagement and audit.”⁸⁷ But Curt Decker, who leads National Disability Rights Network, underscored the importance of enforcement: “Enforcement is what ensures that the rights of all people are respected and implemented, especially for those who are disadvantaged and in the minority. Without vigorous oversight and enforcement efforts led by the federal government, alongside private entities, these rights have no value or meaning.”⁸⁸ In 2002, the Commission also developed a Checklist for Evaluating Federal Agencies’ Civil Rights Enforcement.⁸⁹ Many of the items on the checklist continue to be relevant and are included in various parts of the current report below.⁹⁰ The data the Commission collected for the current study—based upon testimony, interrogatories, document requests, and independent research of 13 agencies—is more limited than the data evaluated in 2002, when the Commission had greater

⁸⁴ *Ibid.*, 46. ⁸⁵ *Ibid.* ⁸⁶ See *infra* notes 1534-5 (HUD); 1931-1933 (DOL); and 2479-2487 (DHS). ⁸⁷ Leon Rodriguez, Former Director, U.S. Dep’t of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Rodriguez Statement]. ⁸⁸ Curtis L. Decker, Executive Director, National Disability Rights Network, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 1. ⁸⁹ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 73-78 (Appendix C). ⁹⁰ Some of the items on the checklist are not as relevant to the current study. In this category are factors such as whether Congress has expanded agencies’ civil rights responsibilities (it has typically not since 2002), along with factors that represent the level of detail that was possible considering the 2002 data based on 11 separate agency reports, as well as Commission resources. However, comparing the 2002 checklist, the main categories are included in the Commission’s current analysis below.

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resources. Nonetheless, the research herein demonstrates that the seven key factors of effective civil rights enforcement that the Commission identified in 2002 remain applicable today. In establishing and evaluating these factors, the Commission contributes to a critical evaluation of what effective federal civil rights enforcement entails. Shared consensus around this issue is difficult to maintain, as priorities ebb and flow with the changing political environment. Margo Schlanger, Law Professor at the University of Michigan and former Officer of DHS CRCL testified that the office she formerly led requires structural changes in order to effectively fulfill its congressional mandate.⁹¹ Robert Driscoll, former Deputy Assistant Attorney General, argued that federal civil rights enforcement functions effectively as per its various legal mandates.⁹² Fatima Goss-Graves, President and CEO of the National Women’s Law Center, recommended recalling a shared moral consensus in the absence of a shared enforcement consensus:

[O]ne of the things that I think would be really useful right now is to have, either together or separately, the heads of each of the civil rights enforcement agencies communicate very strongly the values around why they’re in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative.⁹³

The Degree to Which the Relevant Agency Prioritizes Civil Rights Agency-Wide Factors that can indicate an agency’s prioritization of civil rights include the placement of the civil rights enforcement office in the agency, the structure of the enforcement office itself, whether the agency conducts strategic planning with civil rights objectives, whether an agency conducts self-evaluations on the expenditures and staffing needed for civil rights responsibilities, how much enforcement authority the office has, and critically, the resources (in funding and staffing) dedicated to civil rights enforcement.⁹⁴

⁹¹ Schlanger Statement, at 1-5. ⁹² Driscoll Testimony, Federal Civil Rights Enforcement Briefing, pp. 115-17. ⁹³ Fatima Goss Graves, President and CEO, National Women’s Law Center, Federal Civil Rights Enforcement Briefing, Testimony, pp. 193-94. ⁹⁴ *Ibid.*, 68-70; see also Duncan Statement; Aderson Francois, Professor of Law and Director of Institute for Public Representation, Civil Rights Clinic, at Georgetown University Law Center, testimony, Federal Civil Rights Enforcement Briefing, pp. 226-27; Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep’t of Hous. and Urban Dev., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Greene Statement].

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Whether the civil rights enforcement office head has a direct line of communication with the head of the agency can speak to the level of influence that the civil rights enforcement office has over the actions of the agency overall. The Commission, in its 2002 evaluation of federal civil rights enforcement across multiple agencies, found that civil rights offices in several agencies “were often void of clear authority, responsibility, and accountability.”⁹⁵ The evaluation explained:

Whether authority for civil rights activities was centralized in one office or distributed throughout several, civil rights personnel often had no direct line of authority to the Department Secretary or agency head. The organizational placement of the office and staff in charge of civil rights often impaired the staff’s ability to gain the funding and resources needed to carry out the office mission and failed to provide the office the authority to ensure that civil rights concerns were fully integrated into all departmental or agency programs.⁹⁶

The Commission recommended in 2002 that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”⁹⁷ Further, regarding effective organizational structure, the Commission stated that: “The first element to foster civil rights enforcement is a primary civil rights office organizationally placed to ensure primacy within the agency. One way to achieve this primacy is for the civil rights unit to have a direct line of authority to the departmental Secretary or agency head.”⁹⁸ Many agencies place the civil rights enforcement office to report directly to the Secretary of the agency. For instance, HHS OCR reports to the Office of the Secretary of HHS;⁹⁹ similarly, ED OCR reports to the Office of the Secretary¹⁰⁰ and at the U.S. Department of Transportation, the Director of the Departmental Office of Civil Rights acts as the “designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation.”¹⁰¹ This is also true of the Officer of Civil Rights and Civil Liberties of the U.S. Department of Homeland Security.¹⁰² However, other agencies place the enforcement office as one of several subcomponents of a larger office dedicated to equal opportunity, diversity, and inclusion, without a direct line or reporting to the Secretary or agency head. For instance, at Treasury, the External Civil Rights program, led by a Civil Rights Program Manager, is housed within Treasury’s Office of Civil Rights and Diversity.¹⁰³ The Civil Rights Program Manager reports to the Office of Civil Rights and Diversity Director and Deputy Director, who reports to the Assistant Secretary for Management, who reports

⁹⁵ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 47. ⁹⁶ *Ibid.* ⁹⁷ *Ibid.* ⁹⁸ *Ibid.*, 13. ⁹⁹ 42 U.S.C. § 3501; 45 C.F.R. § 80.1. ¹⁰⁰ Dep’t of Educ. Organization Act, Section 203(c)(2); see also Duncan Statement, at 2. ¹⁰¹ U.S. Dep’t of Transportation, “About DOCR,” <https://www.transportation.gov/civil-rights/about-docr> [hereinafter DOT, “About DOCR”]. ¹⁰² See *infra* notes 2350-2353. ¹⁰³ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

<https://www.transportation.gov/civil-rights/about-docr>

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to the Treasury Secretary.¹⁰⁴ And at EPA, ECRCO is located within the office of and reports to the General Counsel of the agency.¹⁰⁵ At DOJ, each of the sections of the Civil Rights Division reports through the Assistant Attorney General for Civil Rights, and the Assistant Attorney General for Civil Rights reports to an Associate Attorney General and not to the Attorney General herself or himself.¹⁰⁶ Former Secretary of Education Arne Duncan testified to the Commission that he included the Assistant Secretary for Civil Rights (the lead civil rights enforcer at ED OCR) as part of his “executive team.”¹⁰⁷ To Duncan, prioritizing civil rights among the agency executive team resulted in the prioritization of civil rights, and civil rights enforcement, as a core mission of the agency, signaling internally and externally how valued the work is.¹⁰⁸ Robert Driscoll testified similarly, stating that it “always pays to have experienced civil rights enforcers in the room when you’re making decisions, even policy decisions, so that they can add that perspective.”¹⁰⁹ However, the DOJ Civil Rights Division does not report directly to the agency head.¹¹⁰ Leon Rodriguez discussed the incorporation of civil rights enforcement with the agency mission: “As [HHS] Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another.”¹¹¹ Rodriguez went on to use the example of language access in health care services as demonstrative of this alignment in mission: “When doctors and patients, when healthcare providers and patients do not communicate effectively, people die, people get inferior healthcare. And so it’s the same thing as the mission of the Department of Health and Human Services’ mission. It is to improve the health status access to social services to all Americans.”¹¹² Critically, particularly given the resource-starved nature of most enforcement offices, Rodriguez testified that he believes that making civil rights a priority is “zero dollars. That’s free. That’s just making a commitment.”¹¹³ Some agency enforcement offices are working towards a higher-level integration of civil rights enforcement. Winona Lake Scott, Acting Deputy Assistant Secretary of USDA OASCR, testified to the Commission that one of the agency priorities at USDA was to “elevat[e] the reporting

¹⁰⁴ *Ibid.*, 10. U.S. Dep’t of the Treasury, “About,” <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>. ¹⁰⁵ See U.S. Environmental Protection Agency chapter, *infra* notes 2620-2779; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. ¹⁰⁶ U.S. Dep’t of Justice, “Organizational Chart,” <https://www.justice.gov/agencies/chart> (accessed May 17, 2016) [hereinafter DOJ, “Organizational Chart”]. ¹⁰⁷ Arne Duncan, Former Sec’y of Educ. at the Dep’t of Educ., current Managing Partner of Emerson Collective, testimony, Federal Civil Rights Enforcement Briefing, p. 76; see also Duncan Statement, at 1. ¹⁰⁸ Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 75. ¹⁰⁹ Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 147. ¹¹⁰ See *infra* note 484. ¹¹¹ Leon Rodriguez, Former Director, U.S. Dep’t of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, testimony, Federal Civil Rights Enforcement, p. 44. ¹¹² *Ibid.*, 45. ¹¹³ *Ibid.*, 91.

<https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>

<https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>

<https://www.justice.gov/agencies/chart>

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structure of civil rights functions to the mission area level” and “strengthen[] the role of [her] office in providing supervision to the mission area civil rights functions.”¹¹⁴ And as one former HUD official noted, “[T]he enforcement of civil rights law through civil rights divisions of various agencies . . . is only one aspect of protecting or advancing civil rights. It is also critical to look deeply at how agencies enforce and advance civil rights in the implementation of their programs, the programmatic side, not the civil right[s] side.”¹¹⁵ Relatedly, the structure of the civil rights offices studied varies widely across different agencies. Some of the larger offices have a headquarters office focused on policy development and management with some enforcement staff, with regional offices placed around the country to handle enforcement cases in those geographic areas. ED OCR,¹¹⁶ HHS OCR,¹¹⁷ EEOC,¹¹⁸ HUD FHEO,¹¹⁹ and DOL OFCCP¹²⁰ all follow this model, for example. In addition to the enforcement offices supervised by leadership from headquarters, some agencies also fund outside organizations (state and local agencies, or state and local non-governmental organizations) to handle some cases. HUD FHEO121 and EEOC122 both utilize this model. This model offers the benefit of increasing the number of complaints that can be addressed in the subject area jurisdiction of these agencies (housing and employment, respectively), but as both agencies testified to the Commission, outsourcing this work also requires greater coordination for consistent enforcement.¹²³ Establishing coordination amongst these outside entities was one of the top five priority areas HUD FHEO highlighted in its testimony to the Commission.¹²⁴ EPA ECRCO appears to be setting up a similar program in its office, with the Cooperative Federalism initiative, which is a pilot project that will initiate partnerships with EPA Regional Offices to “engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other

¹¹⁴ Winona Lake Scott, Associate Assistant Secretary for Civil Rights, U.S. Dep’t of Agriculture, testimony, Federal Civil Rights Enforcement Briefing, p. 106. As discussed in the chapter specific to USDA, this effort to change and strengthen the civil rights office role at USDA appears to be ongoing and still to deviate in practice from the aspiration of the goal. ¹¹⁵ Barbara Sard, Former Senior Advisor on Rental Assistance, U.S. Dep’t of Hous. and Urban Dev., testimony, The Role of the Federal Government in Protecting Your Civil Rights Panel Hearing at American Univ. Washington College of Law, Oct. 26, 2018, transcript (submitted as public comment to the Commission), p. 69. ¹¹⁶ U.S. Dep’t of Educ., “About OCR,” <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (accessed May 24, 2019) [hereinafter ED, “About OCR”]. ¹¹⁷ U.S. Dep’t of Health and Human Services, “Regional Offices,” <https://www.hhs.gov/about/agencies/iea/regional-offices/index.html> (last accessed May 24, 2019). ¹¹⁸ Equal Employment Opportunity Comm’n, “EEOC Office List and Jurisdictional Map,” (accessed May 24, 2019). <https://www.eeoc.gov/field/> ¹¹⁹ U.S. Dep’t of Hous. and Urban Dev., “Contact FHEO,” https://www.hud.gov/program_offices/fair_housing_equal_opp/contact_fheo (accessed May 24, 2019). ¹²⁰ U.S. Dep’t of Labor, “OFCCP Key Personnel – Regional Offices,” <https://www.dol.gov/ofccp/contacts/regkey.htm> (accessed May 24, 2019). ¹²¹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 3-5. ¹²² Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, pp. 1-3. ¹²³ Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep’t of Hous. and Urban Dev., testimony, Federal Civil Rights Enforcement Briefing, p. 74; Carol Miaskoff, Acting Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Comm’n, testimony, Federal Civil Rights Enforcement Briefing, p. 74. ¹²⁴ Greene Statement, at 3.

<https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>

<https://www.hhs.gov/about/agencies/iea/regional-offices/index.html>

<https://www.hhs.gov/about/agencies/iea/regional-offices/index.html>

<https://www.eeoc.gov/field/>

https://www.hud.gov/program_offices/fair_housing_equal_opp/contact_fheo

<https://www.dol.gov/ofccp/contacts/regkey.htm>

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states could model.”¹²⁵ ECRCO reports that once these programs are in place and effectively implemented at the state level, “many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs.”¹²⁶ In 2002, the Commission recommended that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions. Accordingly, these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”¹²⁷ Not all civil rights offices maintain this recommended separation. For example, the current organizational chart of Treasury’s Office of Civil Rights and Diversity shows that external and internal civil rights enforcement have been essentially combined.¹²⁸ Similarly, DOL CRC combines internal and external civil rights enforcement functions into one office.¹²⁹ Another critical factor for assessing an agency’s prioritization of civil rights is the authority the enforcement office exercises over the rest of the agency, any office subcomponents, funding recipients and other persons or entities, or other federal agencies. Some agencies’ civil rights enforcement offices are imbued with independent authority to enforce the civil rights laws under their jurisdiction, while other offices are limited to advisory authority only to influence compliance with civil rights laws. For instance, the Fair Housing Act gives HUD the direct authority to administer and enforce the provisions of that law,¹³⁰ though this authority does not extend to actions by other executive branch agencies.¹³¹ On the other end of the spectrum, DHS CRCL “lacks authority either to prosecute or to discipline” other agency components and therefore their complaint handling is meant to provide a “foundation” for “systematic recommendations.”¹³² This is despite Congress’ providing DHS CRCL with authority to review agency policy before it is implemented.¹³³ Professor Schlanger believes that there are other factors needed to maximize efficacy. In her testimony before the Commission, she stated that civil rights offices need to have both influence within the agency and commitment, both of which depend heavily on external reinforcement, and noted that these offices “exist to bring into their agencies not just a value that is not primary, but one that constrains or even conflicts with the agency’s *raison d’être*” . . . and these offices face

125 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 126 Ibid. 127 USC, Ten-Year Check-Up: Volume 1, supra note 1, at 47. 128 U.S. Dep't of the Treasury, Response to USCCR Document Request No. 2, p. 21 (referencing their attachment of this chart). 129 See infra note 1815. 130 42 U.S.C. § 3608 and supporting regulations, discussed infra at Chapter 4. 131 See Authority of Department of Hous. and Urban Dev. to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, 18 Op. O.L.C. 101 (1994). 132 Schlanger, Offices of Goodness, supra note 78, at 96-99 (also noting that CRCL does have enforcement authority for disability complaints brought under Section 504 of the Rehabilitation Act). 133 See infra notes 2360-2366 (discussing purposes of this authority under the Homeland Security Act).

<https://www.justice.gov/file/20346/download>
<https://www.justice.gov/file/20346/download>

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"Continual pressure to slide into disempowered irrelevance or to be tamed by capture or assimilation."¹³⁴ Therefore, these civil rights offices' tools "must be carefully prepared, and its influence and commitment purposefully produced and maintained."¹³⁵ She added that, in order to be effective, civil rights offices also need:

- Information
- Right of consultation
- A voice external to the agency
- Adequate resources
- The ability to safeguard their own investigations.¹³⁶

Robert Driscoll asserted in his testimony before the Commission that federal civil rights enforcement should be a law enforcement function, not a partisan endeavor, explaining:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It's not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice. . . . [I]t is important to recognize that some of the most important work, civil rights work that is done in the country has nothing to do with our political differences but, rather, rule of law that tries to make our intellectual agreements, statutory promises, and constitutional convictions a reality for all of us.¹³⁷

Also during the Commission's briefing, Joshua Thompson, a senior attorney at the Pacific Legal Foundation, asserted what he believes to be "unintended consequences" stemming from the "over-enforcement" of civil rights laws.¹³⁸ He contended that disparate impact regulations under Title VI lead to discrimination against traditionally targeted communities when over-enforced.¹³⁹ In

134 Schlanger, Offices of Goodness, supra note 78, at 103-104. 135 Id. at 117. 136 Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School, testimony, Federal Civil Rights Enforcement Briefing, p. 247. 137 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, pp. 115-17. Driscoll has elsewhere published recommendation that "an affirmative civil-rights agenda, one that is consistent with conservative principles, can and should be pursued . . . for the good of the nation." Robert N. Driscoll, This is What a Trump Civil-Rights Agenda Should Look Like, National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>. See also John Yang, President and Executive Director, Asian Americans Advancing Justice | A.A.J.C., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 3 ("We expect civil rights enforcement offices to investigate complaints of civil rights violations and act to enforce civil rights laws, not selectively but across the board."). 138 Joshua Thompson, Senior Atty, Pacific Legal Foundation, Testimony, Federal Civil Rights Enforcement Briefing, p. 174. 139 Ibid., 174-75.

<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>
<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>

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addition, Thompson stated that "continued enforcement of 'zombie' desegregation orders comes with significant costs."¹⁴⁰ He went on to argue that: "As the Commission evaluates the best ways to maximize the benefits of civil rights enforcement, it should be mindful of focusing resources on non-mandated disparate impact regulations under Title VI as well as the decades-old desegregation orders that often work to the detriment of the nation's most needy children."¹⁴¹ The Commission notes that Thompson later acknowledged that the federal government is obliged to enforce disparate impact regulations, undermining Thompson's own description of the law quoted here.¹⁴² However, the Commission's research also shows that unless agencies have sufficient resources to enforce all civil rights laws over which they have jurisdiction evenly,¹⁴³ then agencies will have incentive to use resources selectively to maximize efficiencies. The Commission received further testimony from Arne Duncan and Leon Rodriguez on these points. Duncan said in his written testimony that he thinks it is an "impossible task" to prioritize some civil rights issues over others because "picking one or a handful of issues to focus on" communicates inappropriately that the other issues in an agency's jurisdiction are less important.¹⁴⁴ But Rodriguez testified in writing and orally about leading his staff to prioritize; and written testimony from Bryan Greene, who at the time of his testimony was the General Deputy Assistant Secretary of HUD FHEO, included specific agency priorities. Consistent with that preference for prioritization within HUD, Kim Kendrick, former Assistant Secretary of HUD FHEO, testified that, in retrospect, she wishes she had prioritized systemic remedies over focusing on the number of complaints filed each year.¹⁴⁵ The Commission's decades of research show that civil rights enforcement offices have been inadequately funded, with negative impacts on their ability to enforce civil rights law. In 2002, the Commission reported that nearly 10 percent of its 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources.¹⁴⁶ The Commission also consistently found a need to increase staffing for civil rights enforcement.¹⁴⁷ In 2002, the Commission found that:

Commission reviews of civil rights implementation, compliance, and enforcement at several agencies over the past decade revealed a system that was often unequal

140 Ibid., 179. 141 Ibid., 179. 142 In fact, Thompson later stated that the federal government is obliged to enforce disparate impact regulations. See infra note 1043 ("In his written statement, Thompson acknowledged that the current DOJ enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool."). 143 See infra notes 1530-4, 1546-58, 1928-33 and 2475-84 (regarding budget limitations forcing agencies to selectively enforce civil rights protections). 144 Duncan Statement, at 2. 145 Kim Kendrick, Former Assistant Sec'y for Fair Hous. and Equal Opportunity, U.S. Dep't of Hous. and Urban Dev., Current Partner, Leftwich LLC, Testimony, Federal Civil Rights Enforcement Briefing, p. 236. 146 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 11. 147 Ibid., 11-12.

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to the task. The greatest hindrances to fulfilling the civil rights obligations were insufficient funding and inefficient, thus ineffective, use of available funds.¹⁴⁸

The Commission therefore recommended in 2002 that Congress allocate more funding and resources for civil rights enforcement activities.¹⁴⁹ The Commission's current research shows that budgets and staffing of civil rights enforcement offices vary widely among different agencies, and based on the data the Commission reviewed, some are insufficiently resourced. See Tables 1.2, 1.3, and 1.4.

148 Ibid., 46, Finding 1.1. 149 Ibid., 46, Recommendation 1.1.

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Table 1.2. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2016

Agency	Budget Requested	Budget Appropriated	Employees+ Number of complaints received*
DOJ Civil Rights Division	\$175.00	\$148.20	606 N/A
ED OCR	\$130.69	\$107.00	563 16,720
HHS OCR++	\$42.70	\$38.79	243 4,380
HUD FHEO	\$152.10	\$135.52	484 8,460
DOL OFCCP	\$113.68	\$105.47	581 588 1,696*
DOL CRC	\$7.99	\$6.88	13 813
EEOC	\$373.11	\$364.50	2,202 91,503**
DHS CRCL	\$20.95	\$21.80	85 3,067
EPA ECRCO150	Not available		
	\$2.02	11.5	31
DOT DOCR	\$9.67	\$9.67	30 342
VA ORM	\$43.70	\$43.70	296 28
USDA OASCR†	\$24.44	\$24.07	36 413
Treasury OCRD	Not available		
	\$0.27	2	31
DOI OCR†	\$3.41	\$3.45	3 47
TOTAL	\$1,097.44	\$1,011.34	5,155.5

SOURCE: documented in subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP's primary enforcement mechanism is compliance evaluations, so the numbers reflected in the "number of complaints received" column reflect the number of complaints received (top number) and the number of compliance reviews completed (bottom number) by OFCCP. **Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs. DOJ did not provide the Commission with information about number of complaints received and only stated that it receives "thousands of complaints each year." Moreover, DOJ CRT primarily uses agency-initiated charges to enforce the civil rights laws under its jurisdiction.

150 EPA ECRCO was created in 2016, after a restructuring of the former Office of Civil Rights. See infra Chapter 9 on EPA; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

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Table 1.3. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2017

Agency	Budget Requested	Budget Appropriated	Employees+ Number of complaints received*
DOJ Civil Rights Division	\$155.60	\$148.00	606
ED OCR	\$137.70	\$108.50	579 12,837
HHS OCR++	\$42.70	\$38.70	243 6,469
HUD FHEO	\$144.23	\$136.52	496 8,262
DOL OFCCP	\$114.16	\$104.47	563 686 1,142*
DOL CRC	\$8.04	\$6.88	13 733
EEOC	\$376.64	\$364.50	2,082 84,254**
DHS CRCL	\$21.40	\$22.57	86 3,523
EPA ECRCO	Not available	\$2.28	12.5
DOT DOCR†	\$9.75	\$9.75	30 288

SOURCE: documented in subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP’s primary enforcement mechanism is compliance evaluations, so the number reflected in the “number of complaints received” column reflects the number of compliance reviews received by OFCCP. **Number represents EEOC’s private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as “employees.” The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs.

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Table 1.4. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2018

Agency Budget Requested	Budget Appropriated	Employees+ Number of complaints received*
DOJ Civil Rights Division	\$148.10	\$147.20 593
ED OCR	\$106.79	\$117.00 529 12,435 HHS OCR++ \$32.53 \$38.79 243 7,692 HUD FHEO \$135.10 \$134.64 484 7,781
DOL OFCCP	\$88.00	\$103.47 508 1,418 *812
DOL CRC	\$6.86	\$6.88 14 670 EEOC \$363.80 \$379.50 1,968 76,418**
DHS CRCL	\$21.96	\$23.57 93 (projected) 1,477 (as of April 11, 2018)
EPA ECRCO	\$2.19	12 15 DOT DOCR† \$9.50 \$9.50 30 332 VA ORM† \$0.00 \$47.68 296 28
USDA OASCR†	\$23.30	\$24.04 36 405
Treasury OCRD Not available	\$0.51	3 18 (as of March 9, 2018)
DOI OCR† Not available	Not available	2 20 TOTAL \$935.94 \$1,034.87 4,816

SOURCE: subsequent chapters. NOTE: Dollar amounts in millions. *OFCCP’s primary enforcement mechanism is compliance evaluations, so the number reflected in the “number of complaints received” column reflects the number of compliance reviews received by OFCCP. **Number represents EEOC’s private sector charges only. The number does not include its federal sector enforcement work. +The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as “employees.” The individual agency chapters provide more specific detail about the staffing levels that are reported here. †These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work. ++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD. ††DOJ staffing information represents the number of FTEs.

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For federal agencies’ civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data, 151 nine agencies’ budget requests for their civil rights offices experienced an overall decrease from FY 2016 to FY 2018. 152 These were: DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP and CRC, EEOC, DOT DOCR, VA ORM, and USDA OASCR. DHS’ Office for Civil Rights and Civil Liberties was the only civil rights office that saw an overall increase in the requested budget amount from FY 2016 to FY 2018. The Commission did not obtain data on the budget requests for EPA ECRCO, Treasury, and DOI OCR for the fiscal years in question. For federal agencies’ civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data, four federal agencies experienced overall decreases in their allocated budgets for their civil rights offices from FY 2016 to FY 2018. These agencies were DOJ CRT, HUD FHEO, DOL OFCCP, and DOT DOCR. Seven agencies’ (ED OCR, EEOC, DHS CRCL, EPA ECRCO, VA ORM, USDA OASCR, and Treasury) allocated budgets increased during fiscal years 2016 to 2018. DOL CRCL’s and HHS OCR’s allocated budgets overall remained relatively constant during that period of time. 153 The Commission did not obtain data on the budget allocations for DOI OCR. For federal agencies’ civil rights offices for which the Commission was able to obtain complete staffing data, five agencies’ civil rights offices experienced overall decreases in staffing levels from FY 2016 to FY 2018. 154 These agencies included DOJ CRT, ED OCR, DOL OFCCP, EEOC, DOI OCR. Four agencies’ civil rights offices (DOL CRC, DHS CRCL (projected), EPA ECRCO, and Treasury OCRD) experienced overall increases in staffing levels from FY 2016 to FY 2018.

151 The Commission sent interrogatories to each agency and requested budget data, including the requested and allocated budget amounts for FY 2016, FY 2017, and FY 2018. Some agencies were not able to offer information about their budget requests for the fiscal years in question. The individual agency chapters describe the individual agencies’ budgets in greater detail, and in some cases, can provide insight into why this information is unavailable. 152 Please note that some agencies may have experienced an increase in the requested budget from FY 2016 to FY 2017, or from FY 2017 to FY 2018, but all of these agencies saw an overall decrease when comparing their FY 2016 budget request to their FY 2018 request. See infra notes 465-72 (DOJ), Figure 3.1 and notes 1041-51 (ED); 1290- 1304 and Figure 4.1 (HHS); notes 1508-23 and Figure 5.3 (HUD); Figure 6.2 and notes 1869-74 (DOL OFCCP); notes 1890-1900 (DOL CRC); 2115-24 (EEOC); 2344-9 (DHS); 2648-51 (EPA); 2822-34 (DOT); 3019-21 and Figure 11.1 (VA); 3137-44 (USDA); 3331-9 (Treasury); and 3472-4 (Interior) (analysis of available budget data for all agencies). Notes regarding methodology: out of 13 agencies evaluated, the Commission was only able to obtain requested budget numbers for 9 agencies. Also, budget data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses. 153 Unless a budget increase keeps pace with increased expenses, it functions as a budgetary cut. Note that given the proportion of these budgets allocated to salaries, the cost of which almost always increases annually, that means that for civil rights offices whose budgets remained stagnant, the real value of the budget allocation has likely decreased. 154 See infra notes 462-64, 474-75 (DOJ); 1053-67 and Figure 3.2 (ED); notes 1301-10 (HHS); 1524-8 (HUD); 1877-8 (DOL OFCCP); 1886-9 (DOL CRC); 2125-34 and Figure 7.2 (EEOC); 2347-77 (DHS); 2644-7 (EPA); 2842-8 (DOT); 3022-29 (VA); 3133-6 (USDA); 3340-7 (Treasury); and 3467-81 (Interior) (analysis of available staffing data for all agencies). Notes regarding methodology: staffing data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses.

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Five agencies’ civil rights offices staffing levels remained constant during that period of time (HHS OCR, HUD FHEO, DOT DOCR, VA ORM, and USDA OASCR). When comparing requested budget amounts to allocated budget amounts for the fiscal years in question, on average, agency civil rights offices were allocated approximately 93 percent of their total requested budget amounts in FY 2016. 155 In FY 2017, on average, agency civil rights offices were allocated approximately 94 percent of their total requested budget amounts, a slight increase from FY 2016. 156 In FY 2018, on average, agency civil rights offices were allocated approximately 106 percent of their total requested budget amounts, increasing sharply from the previous fiscal years. 157 However, this may be attributed to the fact that the majority of agencies that provided budget request information saw an overall decrease of the total requested budget amounts from FY 2016 to FY 2018. At the same time, the majority of agencies’ civil rights offices experienced an increase in their total allocated budgets from FY 2016 to FY 2018. Federal civil rights agencies have struggled to manage their caseloads. For example, in June 2018, a federal court required EPA’s civil rights office to timely process any pending and future race based discrimination complaints submitted by the Plaintiffs and accepted by EPA for investigation, for a period of five years from the date of the Judgment. 158 When fully staffed, ECRCO only had between 11.5 and 12.5 full time equivalent employees during FY 2016-2018 to address all civil rights violations nationwide. 159 In light of the federal court requirement for ECRCO to submit to its oversight and ensure timely complaint processing in the future, ECRCO has further noted that it “received funding to support its budget request,” and “has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question.” 160 Similarly, another federal court recently held that DHS CRCL was not timely processing complaints. 161 The pertinent DHS regulation states that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days. 162 But a federal district court found that CRCL’s 2.75-year delay in processing a civil rights complaint by an individual with disabilities regarding his treatment at the airport by DHS’ Transportation Security Agency (TSA) was “unreasonable” where DHS and TSA offered “no justification or

155 This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation. 156 This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation. 157 Judgment, *Californians for Renewable Energy v. U.S. Dep’t of Environmental Protection*, No. 15-3292, 2 (N.D. Cal. Jun. 13, 2018). 158 See infra notes 2644-2647 (discussing ECRCO’s staffing levels from FY 2016-2018). 160 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6. 161 SAI v. Dep’t of Homeland Sec., 149 F. Supp. 3d 99 (D.D.C. 2015). 162 162 6 C.F.R. § 15.70(g).

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explanation.” 163 Furthermore, during the Commission’s briefing, CRCL reported that they had insufficient resources to process over 3,000 complaints regarding separation of migrant children from their parents or other adult family members at the border, and that they rely on a system of choosing a small number (23 out of over 3,000) of what they consider to be representative complaints to investigate. 164 CRCL’s Deputy Officer also told the Commission that they need more resources to improve complaint processing times. 165 During the course of the Commission’s review, other agency leaders in federal civil rights offices stated that declining or insufficient resources present challenges to maintaining an effective civil rights enforcement program. 166 For example, Bryan Greene noted in his testimony before the Commission that when there are budget constraints, responding to civil rights complaints effectively and pursuing systematic compliance monitoring can be challenging. “FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate [in a given time period] and how fast we can investigate them depends on staff resources.” 167 During a briefing of the Illinois Advisory Committee to the Commission in May 2019, focused on fair housing, Sara Pratt, the former Deputy Assistant Secretary for Fair Housing Enforcement and Programs and Senior Advisor to the Assistant Secretary at HUD put it even more starkly: “Today’s staffing levels are so low that it’s easy to believe that understaffing of the civil rights function is a deliberate action designed to undermine effectiveness of work.” 168 Former ED Secretary Arne Duncan asserted in his testimony before the Commission that budgets for civil rights enforcement can speak to the values and priorities of the agency, and “when you cut staff, you’re walking back those commitments” to civil rights. 169 Dexter Brooks, Associate Director of Federal Sector Programs at the Office of Federal Operations, EEOC, testified before the Commission that more funding at the EEOC could enable it to manage data and track trends in real time that could help identify problem areas. 170 Margo Schlanger testified that there is no accepted understanding of how many staff members the civil rights enforcement offices should have to be able to enforce consistent with the jurisdictions afforded to them — and that a sufficient time has passed since Congress enacted Title VI at least to

163 149 F. Supp. 3d at 120. 164 Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Security, testimony, Federal Civil Rights Enforcement Briefing, p. 126. 165 See infra notes 244-285 (testimony of Deputy Officer Venture); and see note 2442 (post-briefing statement of CRCL’s new Deputy Officer for Programs and Compliance Peter Mina, discussing need for more funding). 166 Greene Statement, at 2; Venture, Testimony, Federal Civil Rights Enforcement Briefing, p. 125; Schlanger Testimony, Federal Civil Rights Enforcement Briefing, p. 247. 167 Greene Statement, at 1-3. 168 Sara Pratt, Counsel at Relman, Dane & Colfax PLLC, testimony, Fair Housing Briefing before the Illinois Advisory Committee of the U.S. Comm’n on Civil Rights, May 3, 2019, transcript, p. 37 [hereinafter Illinois SAC Fair Housing Briefing]. 169 Duncan Statement, at 77. 170 Dexter Brooks, Associate Director of Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission, testimony, Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing Before the U.S. Comm’n on Civil Rights, May 9, 2019, transcript, pp. 66-68 [hereinafter Sexual Harassment in Government Workplaces Briefing].

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be able to set that measure now. 171 The Commission’s resources do not currently enable the Commission to help determine that number; however, the research shows that many of the civil rights offices are under-performing due to insufficient resources. Aderson Francois, Professor of Law at Georgetown Law School, explained in his testimony to the Commission that since the 1980s, he has observed that federal civil rights offices have had the tendency to turn into “ghost agencies” that “cease to function according to their statutes and regulations” 172 under certain conditions. He noted several warning signs, identified below, including a shrinking budget. Professor Francois noted that a few of the civil rights offices that the Commission is examining, namely ED OCR, HHS OCR, and DOL OFCCP, are exhibiting many of these warning signs, experiencing budget and staff reductions. 173 As discussed herein, the Commission’s research shows that between FY 2016 and FY 2018, ED OCR has asked for less funding but in FY 2018, Congress provided \$10 million more than ED OCR requested (an increase from the prior fiscal year). 174 ED OCR did experience a 6% staff reduction during this time period, notwithstanding the significant Congressional increase in appropriations to the agency. A similar pattern is seen with HHS OCR: in FY 2018 HHS asked for less funding but Congress provided a slight increase to HHS OCR, bringing the funding allocations back to the level of FY 2016. 175 DOL OFCCP did experience a decrease in both requested and allocated budgets, with the requested amount decreasing by \$25.7 million between FY 2016 and FY 2018, and the amount Congress allocated decreasing by \$2 million. 176

171 Schlanger Testimony, Federal Civil Rights Enforcement Briefing, pp. 279-81. Harvey Johnson, Director, U.S. Dep’t of Veterans Affairs, Office of Resolution Management, claimed he secured budget increases for VA OCR “based on a sound business case that we built using data science to show here is what I need in order to properly execute a civil rights program, whether it be internal or external.” Harvey Johnson, Director, U.S. Dep’t of Veterans Affairs, Office of Resolution Management, testimony, Federal Civil Rights Enforcement Briefing, pp. 126-27. Johnson did not explain the basis of the data science the office used. 172 Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 226. 173 Ibid., 229. 174 See infra Figure 3.1 (Requested and Allocated Budget for ED OCR FY 2016 to FY 2018). 175 See infra Figure 4.1 (Requested and Allocated Budget for HHS OCR FY 2016 to FY 2018). 176 See infra Figure 6.2

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Professor Francois also noted several consequences to agencies becoming “ghost agencies” which include:

- The communities that these agencies are designed to serve are ultimately not getting the justice they deserve.
- There is a loss of institutional memory, and agencies will “forget” how to properly engage in effective civil rights enforcement work.¹⁷⁷
- There is a “loss of deterrence effect,” which disincentivizes certain entities to uphold their responsibilities under the law.
- There is a loss of “doctrinal development,” which is an incredibly important role of civil rights offices to play in their specific area of focus, as courts tend to give them more leeway in the course of litigation than is given to private litigants.¹⁷⁸

In early 2017, the Trump Administration announced a proposal to merge DOL’s OFCCP with EEOC and create a single agency working on employment discrimination, which the Administration cited as a way to promote government efficiency.¹⁷⁹ The proposal also sought to reduce OFCCP’s budget by \$17 million and reduce its staff by approximately 25 percent.¹⁸⁰ The Senate Appropriations Committee rejected the proposal, but the committee did encourage OFCCP to look for ways to become more efficient as its funding would be reduced.¹⁸¹ As discussed in more detail in Chapter 6, OFCCP is aiming to reach a much higher percentage of contractors

177 The institutional memory loss Professor Francois describes here operates in practice not as actual memory loss but as patterns of engagement that calcify as agency practice, requiring affirmative change to alter. See, e.g. Society for History in the Federal Government, “Historical Programs in the Federal Government,” 1992, <http://www.shfg.org/Historical-Programs-Guide> (noting that “Government decision makers unacquainted with the history of their organizations are comparable to amnesia victims who do not remember people, places, and events in their past,” and “[o]ften, these officials’ lack of institutional memory affects their perceptions of the character and mission of their organizations and the past pattern of agency decisions”); see also, e.g. Larry Schwartzol, “DOJ’s War on Competence,” Huffpost, May 25, 2011, https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAANFOPV4tmfP2iaQm1ydW822vqRGD5xJRRfQ3vuNFg1kwx5rBb1el38kTDWuIXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZsiWDOqgIEs3TKdBp-pzF5ZiY2kFallsz7FEcXlh_MqXFsbcdzEsl3jU5zXa6sckP_6AVg4xWqKrq437tp (discussing how DOJ was “populated [with] key components of DOJ partisan operatives, many of whom lack substantive qualification for their jobs,” who remain “embedded in the government—and shielded by civil service protections against new bosses who want to oust them,” has “resulted in an alarming exodus of career attorneys—the longtime backbone of the [Civil Rights] Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws”); see also, e.g. Katherine Barrett & Richard Greene, “Higher the Rank, Higher the Turnover,” Governing the States and Localities, Jun. 23, 2016 (discussing how higher-ranking positions often experience the highest rate of turnover in state government, noting that “[s]uch a high turnover is hazardous to a state’s smooth functioning” and “you lose institutional knowledge” which is one key to success). 178 Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 230. 179 See infra notes 1904-1914 and 2122-4 (discussing proposed merger between DOL and EEOC). 180 Lawrence Z. Lorber, Annette Tyman, and Michael L. Childers, “President Trump’s Budget Includes Proposed Merger of EEOC and OFCCP,” Seyfarth Shaw LLP, May 23, 2017, https://www.seyfarth.com/publications/OMM052317-LE#_ftn1. 181 See Suzanne Keys, “EEOC and OFCCP Merger Stalled..For Now,” BALANCEview, Sep. 26, 2017, <https://www.berkshireassociates.com/balanceview/eooc/ofccp-merger-stalled-for-now>.

<http://www.shfg.org/Historical-Programs-Guide>
https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAANFOPV4tmfP2iaQm1ydW822vqRGD5xJRRfQ3vuNFg1kwx5rBb1el38kTDWuIXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZsiWDOqgIEs3TKdBp-pzF5ZiY2kFallsz7FEcXlh_MqXFsbcdzEsl3jU5zXa6sckP_6AVg4xWqKrq437tp
https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAANFOPV4tmfP2iaQm1ydW822vqRGD5xJRRfQ3vuNFg1kwx5rBb1el38kTDWuIXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZsiWDOqgIEs3TKdBp-pzF5ZiY2kFallsz7FEcXlh_MqXFsbcdzEsl3jU5zXa6sckP_6AVg4xWqKrq437tp
https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAANFOPV4tmfP2iaQm1ydW822vqRGD5xJRRfQ3vuNFg1kwx5rBb1el38kTDWuIXQ7EY5uZUDSfZS_OfxeZM-wNmJkoZsiWDOqgIEs3TKdBp-pzF5ZiY2kFallsz7FEcXlh_MqXFsbcdzEsl3jU5zXa6sckP_6AVg4xWqKrq437tp
https://www.seyfarth.com/publications/OMM052317-LE#_ftn1
<https://www.berkshireassociates.com/balanceview/eooc/ofccp-merger-stalled-for-now>
<https://www.berkshireassociates.com/balanceview/eooc/ofccp-merger-stalled-for-now>

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through compliance assistance, and compliance verification and incentives.¹⁸² OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, which requires more resources.¹⁸³ Additionally, USDA solicited formal comments on a proposed reorganization of OASCR, in line with Executive Order 13781 which called for reorganization within the executive branch agencies.¹⁸⁴ The agency stated that the reorganization was designed to consolidate civil rights management functions across USDA to improve customer service and maximize efficiency.¹⁸⁵ The plan has raised concern from various civil rights advocates as to the elimination of certain positions that would come with this restructuring. The USDA Office of Inspector General (OIG) itself cautioned USDA to consider “OIG’s unique mission and independence,” when considering realignment, and indicated it would continue to examine “the effectiveness of this realignment as part of our future audit planning process.”¹⁸⁶ The USDA has a documented history of discrimination in past decades in the delivery of programs and the treatment of employees, and during the period from 2001-2008, OASCR only found merit to one complaint of program discrimination out of more than 14,000 complaints filed during that time.¹⁸⁷ Whether and How Effectively the Civil Rights Office Engages in Strategic Planning and Self-Evaluation In the 2002 review of federal civil rights enforcement, the Commission stressed the importance of clearly communicating prerogatives in order to increase effectiveness, recommending “all federal agencies should include civil rights objectives and goals in their strategic plans.”¹⁸⁸ Leaders of civil rights organizations made clear in their testimony before the Commission that a lack of transparency remains an issue hampering civil rights enforcement on the federal level. At the Commission’s briefing, Fatima Goss Graves noted that in the absence of effective agency communication, “there are sort of basic and longstanding concerns and a real worry that the wrong communication is going out there.”¹⁸⁹ Vanita Gupta, President of Leadership Conference on Civil and Human Rights and former head of the DOJ Civil Rights Division, followed up on this point, stating “it’s really important that the public have access to critical data on civil rights enforcement.”¹⁹⁰ She suggested this transparency would aid agencies in the essential work of articulating “their law enforcement objectives and goals and mandates.”¹⁹¹

182 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 183 *Ibid.* 184 See infra notes 3151-69 and Figures 12.2 and 12.3. 185 See Strengthening Civil Rights Management, 83 Fed. Reg. 10,825 (Mar. 13, 2018). 186 Phyllis K. Fong, USDA Inspector General, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10825 (Mar. 23, 2018), <https://www.regulations.gov/document?D=USDA-2018-0002-0006> (comment from Amy Lowenthal attaching letter from Inspector General Fong). 187 See infra note 3173. 188 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. 189 Goss Graves Testimony, Federal Civil Rights Enforcement Briefing, p. 194. 190 Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights, Testimony, Federal Civil Rights Enforcement Briefing, p. 195. 191 *Ibid.* See also Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp.197-98.

<https://www.regulations.gov/document?D=USDA-2018-0002-0006>
<https://www.regulations.gov/document?D=USDA-2018-0002-0006>

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Strategic plans for civil rights enforcement may be issued at the agency and/or civil rights office level. The agency civil rights offices evaluated herein differ in whether they conduct strategic planning with civil rights objectives. Some of the larger civil rights offices, such as DOJ CRT, EEOC, and ED OCR, issue strategic plans or conduct strategic planning as a part of their budget planning process. These plans have explicit civil rights objectives, though they vary in their specificity. For example, DOJ’s CRT has identified combatting hate crimes and sexual harassment, among other goals, in its CRT-specific FY 2018 strategic plan.¹⁹² Some federal agencies include civil rights objectives in their agency-wide strategic planning. For instance, HUD’s Strategic Plan for 2014-2018 included several strategic objectives related to fair housing that addressed the efforts of FHEO as well as integrating principles of fair housing into HUD’s other programs.¹⁹³ HUD’s Strategic Plan 2018-2022, however, does not mention fair housing or civil rights enforcement among its priorities for the next four years.¹⁹⁴ HUD remains focused on its strategic goals of advancing economic opportunity, protecting taxpayer funds, and streamlining operations, but chose not to include any fair housing-related strategic goals or objectives.¹⁹⁵ The omission of fair housing in this most recent strategic plan reflects a change in civil rights prioritization at HUD. Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Similarly, the lack of inclusion of civil rights-focused priorities also communicates a particular message to the public. But Bryan Greene identified FHEO’s priorities in his testimony before the Commission. The five identified priorities were: timely, effective investigations; issuance of clear, helpful assistance- animal guidance; combatting of sexual harassment in housing; meaningful, less burdensome implementation of the Fair Housing Act’s “affirmatively furthering” equal access to housing

192 See infra note 501. 193 U.S. Dep’t of Hous. and Urban Dev., Fiscal Year 2016 Annual Performance Report, p. 65, https://www.hud.gov/sites/documents/FY_2016_APR.PDF [hereinafter HUD, 2016 Annual Performance Report]. 194 U.S. Dep’t of Hous. and Urban Dev., Strategic Plan 2018-2022, February 2018, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf> [hereinafter HUD, FY 2018-2022 Strategic Plan]; see also U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). HUD commented:

HUD has clarified that there is no change in prioritization. The 2018-2022 plan simply takes it as axiomatic that HUD’s bedrock mission is fighting discrimination and then uses the strategic goals section to delineate methods of improving operational efficiency. The core language from the 2014-2018 strategic plan on discrimination was not eliminated, rather it was moved to the introductory section articulating HUD’s purpose where it is front and center. The first line of the 2018-2022 report reads: “HUD is working to . . . build inclusive and sustainable communities free from discrimination.”

Ibid. 195 HUD, FY 2018-2022 Strategic Plan, supra note 194, at 2.

https://www.hud.gov/sites/documents/FY_2016_APR.PDF
<https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf>

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mandate; and greater oversight of Fair Housing Assistance Program (FHAP) and Fair Housing Initiatives Program (FHIP) to promote higher quality work.¹⁹⁶ Given the agency-level nature of its civil rights enforcement mission, EEOC has issued a strategic plan for FY 2018-2022 that focuses on goals of combatting and preventing employment discrimination through the strategic application of EEOC’s law enforcement authorities; preventing employment discrimination and promoting inclusive workplaces through education and outreach; and achieving organizational excellence.¹⁹⁷ In addition, EEOC noted that it “solicited and received comments from a wide range of stakeholders and the public.”¹⁹⁸ EEOC also issued a strategic enforcement plan for FY 2017-2021, which focuses on its enforcement priorities, which include (but are not limited to) protecting vulnerable workers and underserved communities, equal pay, and systemic workplace harassment.¹⁹⁹ The Commission has previously recommended that strategic plans should include “(1) specific short-term goals and long-term objectives, (2) timeframes for meeting goals and objectives and (3) consideration of both available and projected resources and budget constraints.”²⁰⁰ However, in researching this report and in the responses to the Commission’s interrogatories, staff found an overall dearth of data about agency performance and effectiveness (with a few notable exceptions).²⁰¹ For example, information about DOJ CRT’s hundreds of cases was fairly accessible, but Criminal Section cases were not published on the website and there were other major gaps in the data about CRT’s activities.²⁰² The Office of Inspector General also critiqued the CRT for lack of transparency about how it handles complaints about police misconduct.²⁰³ Congress explicitly requires some agencies, such as ED OCR, HUD FHEO, USDA OASCR, and DHS CRCL, to report to Congress the work of their civil rights enforcement office and whether these offices have met their statutory responsibilities.²⁰⁴ As of this writing, the last report from ED OCR under this requirement was from 2016, and the last report from HUD FHEO and from DHS

196 Greene Statement, at 3. 197 See infra notes 2148-2153 (discussing EEOC’s FY 2018-2022 strategic plan goals). 198 U.S. Equal Employment Opportunity Comm’n, Strategic Plan for Fiscal Years 2018-2022, p. 1, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf [hereinafter EEOC, FY 2018-2022 Strategic Plan]. 199 See infra notes 2165-2171 (discussing EEOC’s FY 2017-2021 strategic enforcement plan goals). 200 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 21. 201 See, e.g., supra notes 1227-1239 (discussing ED OCR’s research and data collection efforts). 202 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). DOJ noted that “Federal Rule of Criminal Procedure 6 prohibits disclosure of grand jury sensitive information. Moreover, unlike civil cases, criminal cases do not result in public settlements. In any event, the Criminal Section issues press releases about significant developments in criminal cases, such as indictments and convictions, that are available on the DOJ CRT website.” *Ibid.* 203 U.S. Dep’t of Justice, Office of the Inspector General, Audit of the Department of Justice’s Efforts to Address Patterns or Practices of Police Misconduct and Provide Technical Assistance on Accountability Reform to Police Departments, February 2018, p. 5, <https://oig.justice.gov/reports/2018/a1814.pdf> [hereinafter DOJ, Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct]. See also infra note 613-614 (regarding some subsequent improvements). 204 See Duncan Statement, at 3 (citing section 203(b)(1) of the Department of Educ. Organization Act, 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1).

https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf
<https://oig.justice.gov/reports/2018/a1814.pdf>

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from 2017, notwithstanding the statutory requirement that these reports be annual.205 When done, such public reporting not only demonstrates that agency civil rights offices are engaging in self-reflection and self-evaluation, but also displays a transparency that informs the public of the civil rights values and practices of the agency. Fatima Goss-Graves stated in her testimony before the Commission that it's important for the heads of civil rights offices to "communicate very strongly the values around why they're in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative."²⁰⁶ Such reporting or strategic planning can also provide critical information to leadership on how to better train their staff to address any weaknesses in the efficacy of their offices. Enforcement offices differ in whether they evaluate their own efficacy, either as a part of their strategic planning process or otherwise. Some offices also use particular standards or metrics to evaluate the efficacy of their staff on an individual basis. Some agencies use case closure rates as one measure of office success, including ED OCR and HUD FHEO.²⁰⁷ The Commission received testimony identifying additional measures to self-evaluate agency efficacy. Bryan Greene stated that there's been a "sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive."²⁰⁸ Greene said he thinks the key is "having staff resources to go in and do quality assurance."²⁰⁹ Craig Leen, Director of DOL OFCCP, said he has changed OFCCP's measure of success; whereas previous Administrations used a closed case indicator as the metric, now OFCCP is looking at adopting an index that "also rewards more the bigger cases."²¹⁰ Additionally, DOL requires that all staff performance management plans link to the respective agency's operating plan. Carol Miaskoff, Associate Legal Counsel at EEOC, testified that individual employee evaluations are linked to the strategic and strategic enforcement plans of the agency.²¹¹ These reportedly focus on identifying and resolving systemic discrimination (in addition to individual complaints).²¹² Following EEOC's 2005 adoption of a Systemic Task Force, a 2016 internal report reviewing its systemic enforcement programs discussed the achievements of its systemic program declaring that

205 U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities," <https://www2.ed.gov/about/offices/list/ocr/congress.html> (accessed Oct. 15, 2019) [hereinafter U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities"]; U.S. Dep't of Homeland Security, "CRCL Annual Reports to Congress," <https://www.dhs.gov/publication/crcl-annual-reports>. 206 Fatima Goss-Graves, President and CEO of the National Women's Law Center, Testimony, Federal Civil Rights Enforcement Briefing, p. 196. 207 See infra notes 1086-1106 (discussing in part the ED OIG inspection report's concern that case closure as metric could incentivize staff to close cases without effective evaluation); see Greene Statement, at 1 (discussing HUD). 208 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 73. 209 Ibid. 210 Craig Leen, Director of the Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, testimony, Federal Civil Rights Enforcement Briefing, p. 72. 211 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, pp. 70-71. 212 See infra notes 2169-2171 (discussing EEOC's focus on systemic discrimination).

<https://www2.ed.gov/about/offices/list/ocr/congress.html>
<https://www.dhs.gov/publication/crcl-annual-reports>

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EEOC had "made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program."²¹³ The report also noted that:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.
- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.
- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.
- Over 80 percent of systemic resolutions raised identified national priority issues in FY 2015.
- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.
- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.
- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006).²¹⁴

EEOC has also noted that one of its strategic goals is to educate members and covered employers in the public and government sectors of the public about employment discrimination laws, and to achieve more inclusive work environments.²¹⁵ In contrast to this detailed self-evaluation, the Commission's research shows that DOJ's Civil Rights Division's metric centers on the success rate of its cases – it sets a goal of 85 percent of cases being successful, and reports that it has well exceeded that goal in the last three fiscal years.²¹⁶ By focusing on percent, this metric does not take into account the number of enforcement actions or cases resolved, or whether those cases address systemic discrimination, or whether the Division is equally active and effective across all of its component sections. However, the Commission's research indicates that CRT is currently very effective in some of the areas it has set forth in its strategic plan, particularly in bringing enforcement actions against alleged perpetrators of hate crimes and sexual harassment.²¹⁷ Simultaneously, from FY 2016 to FY 2018, CRT decreased in the number of enforcement actions against law enforcement agencies allegedly

213 U.S. Equal Employment Opportunity Comm'n, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, Jul. 7, 2016, p. iv, <https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf> [hereinafter EEOC, *A Review of the Systemic Program*]. 214 Ibid., iv-v. 215 See infra note 2148. 216 See infra note 492. 217 See infra notes 508-509 and 529-531.

<https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf>

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engaged in patterns or practices of constitutional violations,²¹⁸ and this parallels the fact that those actions which were part of the FY 2017 strategic plan were omitted in subsequent plans.²¹⁹ Effective Use of Enforcement Tools: Complaint Processing, Agency-Initiated Charges, and Litigation Many civil rights offices have the authority to adjudicate complaints administratively and to bring agency-initiated charges (defined as the authority to investigate self-initiated charges, absent the filing of a specific complaint).²²⁰ Some may take further steps towards litigation, but with the exception of EEOC, agency civil rights offices generally must defer to DOJ's authority to prosecute civil rights violations in federal court.²²¹ EEOC has the authority to bring affirmative litigation for the issues under its jurisdiction.²²² Each of the three steps of this essential enforcement tool are addressed in chronological order below. In 2002, the Commission found that after reviewing the civil rights complaint processing procedures of several agencies during the prior 10 years, there were ongoing challenges and insufficiencies.²²³ The Commission went on to state that due to these challenges:

The Commission has thus made many recommendations for charge processing and complaint resolution. Generally, the recommendations have focused on ensuring that agencies have a comprehensive process to resolve complaints efficiently and expeditiously to achieve maximum results. Another key theme has been improving customer service by creating systems that are easy to navigate for potential charging parties and publicizing policies and procedures.²²⁴

Current Commission research shows that some civil rights offices process every complaint that passes an initial screening for jurisdiction (e.g., ED OCR, HHS OCR,²²⁵ HUD FHEO),²²⁶ whereas others only process a small portion or have a system to select representative complaints (e.g., DHS CRCL).²²⁷ At EEOC, the agency investigates all charges that are filed.²²⁸

218 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases. 219 See infra notes 501-502 and 530-531. 220 See infra notes 446-448, 1029-31, 1273-75, 1476-80, 1843-45, 1850-52, 2095-7, 2327-9, 2631-3, 2809-11, 3006-8, 3119-21, 3319-21, 3455-7 (referencing the enforcement tools sections in each chapter, specifically to the bullets discussing complaint processing, agency initiated charges, and litigation). 221 See infra note 376 (discussing 28 C.F.R. § 0.50(g)) (1969) and notes 954-6 (DOJ and EEOC). 222 See infra note 2097. 223 USCCR, *Ten-Year Check-Up: Volume 1*, supra note 1, at 34. 224 Ibid. 225 U.S. Dep't of Health and Human Services, *Response to USCCR Affected Agency Review* (Jun. 19, 2019) (on file) (noting that "HHS OCR processes and investigates every complaint that passes an initial screening for jurisdiction"). 226 34 C.F.R. § 100.7(e), 104.61, 106.71, 108.9, 110.34. 227 See U.S. Dep't of Homeland Security, *Response to USCCR Interrogatory No. 9*, at 19. As discussed in the chapters that follow, these agencies lack jurisdictional authority so to prioritize their cases. Nonetheless, in practice the agencies do select and long have selected which cases to investigate. 228 See infra notes 2172-88 (discussion of EEOC procedures and practices under 29 C.F.R. § 1614).

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But in evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction that come to them, leaving allegations of civil rights violations unaddressed. For example, with rare exceptions, DOJ CRT has no known procedures to process complaints, and has no duty to respond to the "thousands" of complaints it told the Commission it receives each year.²²⁹ Moreover, whereas the Commission has recommended "streamlining the intake process and formalizing intake procedures to ensure consistency across offices," CRT has no known uniform procedures across its nine sections to inform complainants of the status of any enforcement actions that might be taken in response to their complaints.²³⁰ A recent DOJ OIG report recommended that the Special Litigation Section improve its procedures, and some improvements have been made; however the Commission was not provided with nor could the Commission find any indication that these improvements have been made in all of the other CRT sections.²³¹ Some agency leaders have acknowledged that they have to prioritize, or find alternate ways of working with the limited resources that they have.²³² The Prioritization section earlier in this chapter discussed various panelists' testimonies that explained how agencies have to use their resources selectively to maximize their efficiency, and while some opt to advance agency policy priorities, some believe that prioritization is an "impossible task" due to the importance of all civil rights issues.²³³ The Deputy Director of DHS CRCL testified to the Commission that they use the total number of complaints to gauge how significant a civil rights issue might be, but then only select a representative number to address directly.²³⁴ CRCL told the Commission that it receives over 4,000 complaints per year while only processing a representative sample, and it is not clear how CRCL communicates with the remaining complainants about the status of their claim or how it is resolved.²³⁵ Other agencies decide on a set number of issue-based priorities, and focus on resolving complaints that fall within those designated priorities.²³⁶ The data provided to the Commission shows that Treasury's civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending.²³⁷

229 See infra notes 536-7 (regarding thousands of complaints), 538 (Justice Manual generalized processes on how complaints may be investigated) and 602-19 (Special Litigation Section processes, contrasted with other sections). 230 USCCR, *Ten-Year Check-Up: Volume 1*, supra note 1, at 34; see infra notes 538 and 602-19. 231 See infra notes 602-19. 232 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 32. 233 See supra note 144. 234 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 235 See infra notes 2472-8. 236 See supra notes 144-145 and 164-165. 237 See infra notes 3377

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Whether an agency can initiate charges based on their findings is also critically important. By agency-initiated charges, the Commission means the authority to self-initiate enforcement, absent the filing of a specific complaint.²³⁸ The Commission also found in 2002 that agency-initiated charges are "useful for identifying systemic discrimination."²³⁹ The Commission's investigation reflects that this truism still persists today. For example, Treasury's external civil rights enforcement office only received 30 complaints in FY 2017, and they were all filed under one basis, disability.²⁴⁰ But with billions of federal funding from Treasury going to state, local, and private financial institutions (see Table 1.4), there are likely to be other civil rights issues such as racially discriminatory credit practices, which the 30 complaints filed with Treasury do not give the civil rights office the opportunity to address.²⁴¹ Agency-initiated charges and compliance reviews could address such issues not coming in to the agency through complaints. Whether enforcement actions are developed by individual complaints or agency-initiated charges, agencies' Title VI, Title IX and Section 504 regulations require an attempt to resolve complaints by informal means whenever possible, prior to taking other enforcement actions.²⁴² DOJ and many other agencies highly rely on settlements, mediation, or other informal means of complaint resolution.²⁴³ For instance, one of DOJ CRT's FY 2017 resolutions was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.²⁴⁴ CRT told the Commission that it used this resolution type because Title VI "is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together

238 USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, supra note 1, at 35. Note that this definition is similar to how ED OCR structures its proactive compliance evaluations, which may not become enforcement actions if ED OCR's compliance evaluation results in finding no violations. 239 Ibid. 240 See infra notes 3382 (although one complaint of the 30 mentioned was filed on the basis of disability and age). 241 See infra Table 1.5 (\$5-6 billions of dollars issued in FY 2016-18) and notes 3411-21 (Treasury civil rights compliance approaches) and note 978 (DOJ prosecution of discriminatory lending practices). 242 See, e.g., 28 C.F.R. § 42.107 ("if an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible"); see also, e.g., 24 C.F.R. § 103.300 ("During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint"); 40 C.F.R. § 7.120(d)(2) ("OCR shall attempt to resolve complaints informally whenever possible"); 29 C.F.R. § 1601.24(a) ("Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion"); 49 C.F.R. § 21.11(d)(1) ("if an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible"). 243 See infra notes 633-41 (DOJ); 1116-25 (ED); 1376 (HHS); 1581 (HUD); and 2188-90 (EEOC). 244 See U.S. Dep't. of Justice, "Press Release: Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals," Jul. 18, 2017, <https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court> [hereinafter DOJ, "Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals"].

<https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court>
<https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court>

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jointly."²⁴⁵ CRT added that "by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime."²⁴⁶ As another example, a GAO report indicates that when OFCCP finds violations, it will generally resolve them through conciliation agreements, and "between fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations."²⁴⁷ Lilian Dorka, Director of the Environmental Protection Agency's External Civil Rights Compliance Office (ECRCO) emphasized reliance on informal complaint resolution methods. She testified: "We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations."²⁴⁸ Although settlements are an effective tool, and they allow an agency to increase productivity and decrease backlogs by resolving more cases, deciding to settle rather than pursue litigation or formal administrative finding can in particular instances indicate or reflect civil rights offices' choice not to use authorities and/or enforcement tools they have.²⁴⁹ The EPA, for example, notably did not ever make a single formal finding of discrimination or Title

Voluntary compliance is not successful, the vast majority of federal agencies examined (except for EEOC) may refer complaints to DOJ to initiate litigation in federal court to enforce Title VI or

245 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT's website which was referenced in response to the Commission's Interrogatories. 246 Ibid. 247 U.S. Government Accountability Office, Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance, September 2016, p. 24, <https://www.gao.gov/assets/680/679960.pdf> [hereinafter GAO, Strengthening Oversight]. 248 Lillian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 3 [hereinafter Dorka Statement]. 249 See USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38 (explaining how mediation and settlement may fail to resolve underlying or systemic causes of discrimination); infra notes 549-61 and 565-84; Ian MacDougall, "Why Jeff Sessions' Final Act Could Have More Impact Than Expected," ProPublica, Nov. 12, 2018, <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>. 250 U.S. Comm'n on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898, September 2016, p. 40, https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf [hereinafter, USCCR, Environmental Justice]. 251 Californians for Renewable Energy v. U.S. Dep't of Environmental Protection, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Nicholas Iovino, "Judge Rules EPA Improperly Delayed Racial Bias Probes," Courthouse News Service, Apr. 2, 2018, <https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/> [hereafter Iovino, "Judge Rules EPA Improperly Delayed Racial Bias Probes"].

<https://www.gao.gov/assets/680/679960.pdf>
<https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>
https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf
<https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/>
<https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/>

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other federal civil rights laws.²⁵² The discretion of whether to prosecute them generally rests with DOJ.²⁵³ Perhaps critically, DOJ focuses more on systemic civil rights litigation under the civil rights statutes it enforces.²⁵⁴ In 2002, the Commission stated that rooting out discrimination is an essential goal of civil rights enforcement, and that litigation is sometimes necessary to meet that goal.²⁵⁵ The Commission commented in 2002 that:

Many agencies consider litigation a last resort for resolving complaints of discrimination. While the Commission recognizes the resource demands in litigating cases, it also recognizes the importance of doing so to develop case law, to obtain appropriate relief, and to send a message to potential violators about the strength of the agency's enforcement program. Thus, many of the Commission's recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped.²⁵⁶

Moreover, the Commission stated that "because few complaints result in litigation, enforcement agencies must have strong litigation strategies. The Commission recommended that litigation be central to an enforcement strategy but advised agencies to seek and litigate cases that set legal precedent and to mediate other cases. The Commission also advised agencies to seek input from stakeholders in developing litigation strategy."²⁵⁷ Regarding FY 2016 – 2018, community input was rarely documented in the data agencies provided to the Commission.²⁵⁸ Regarding EEOC's litigation efforts, because of resource limitations, it "can only file lawsuits in a very small number of the charges where [EEOC] find[s] reasonable cause to believe that there was discrimination."²⁵⁹ EEOC explained that: Recognizing its resource limitations, the [EEOC] has long emphasized that the litigation program should focus on cases that have the potential to impact multiple workplaces or large groups of applicants or employees, emerging issues where the agency's expertise may be especially critical to achieving a successful outcome, and individual cases where broader law enforcement goals can be advanced with the successful resolution of the case. In addition, the litigation program focuses on population groups and geographic locations where private enforcement of anti-discrimination laws is rare, and individuals have minimal access to the legal system to protect their rights.²⁶⁰

²⁵² See, e.g., infra notes 1157 (ED), 1386 (HHS), 1584 and 1599 (HUD), 2701 (EPA), 2879 (DOT) and 3047 (VA). ²⁵³ See infra notes 371-84, 532-743 (referencing DOJ CRT Legal Authority and Responsibility and Complaint Processing sections). ²⁵⁴ See infra notes 541-64. ²⁵⁵ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38, 256 Ibid., 38, 257 Ibid. ²⁵⁶ For documented instances, see infra notes 969, 979 and 981 (DOJ); 1223 and 1239-40 (ED); 1738-43 (HUD); 2605-8 (DHS); 2770-4 (EPA); and 3074-7 (VA). ²⁵⁹ Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 32. ²⁶⁰ U.S. Equal Employment Opportunity Comm'n, Fiscal Year 2020 Congressional Budget Justification, March 2019, p. 40, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf> [hereinafter EEOC, FY 2020 Budget Justification].

<https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>

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In addition, EEOC has the authority to initiate investigations through Commissioners' charges that can lead to litigation in federal court.²⁶¹ The Commission also heard testimony that, "[o]ne of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people."²⁶² During FY 2016 – FY 2018 DOJ CRT mainly engaged in agency-initiated charges and systemic litigation.²⁶³ It enforces several civil rights statutes that authorize federal enforcement action if state or local jurisdictions engage in a pattern or practice of systemic discrimination.²⁶⁴ Under these statutes, either a policy or a systemic practice that results in discriminatory treatment may be considered as evidence of illegal pattern or practice discrimination.²⁶⁵ In addition, many other DOJ CRT cases seek systemic remedies such as modifying voting practices and procedures to remedy Voting Rights Act violations.²⁶⁶ HUD also noted that "[m]any Fair Housing Act cases initiated by the Civil Rights Division are actually initiated when HUD files an administrative charge of discrimination and one of the parties elects to proceed in federal court. In these circumstances, the Fair Housing Act specifies that DOJ "shall" initiate a lawsuit in federal court."²⁶⁷ Commission research shows that CRT's enforcement actions have generally decreased (by 23.7 percent) between FY 2016 through FY 2018.²⁶⁸ The following chart (Figure 1.1) shows the number of civil rights enforcement actions CRT has resolved per fiscal year:

²⁶¹ See infra notes 2096, 2176, 2181-3 (discussing EEOC's authority to issue Commissioners' charges). ²⁶² Greene Statement, at 2; Kendrick Testimony, Federal Civil Rights Enforcement Briefing, pp. 273-74; Francois Testimony, Federal Civil Rights Enforcement Briefing, pp. 271-72. ²⁶³ See Appendix A and see infra notes 541-48 and 564-67 for further analysis. ²⁶⁴ See infra notes 541-45 (describing DOJ's pattern or practice enforcement authorities). ²⁶⁵ Ibid. ²⁶⁶ See infra notes 546-61 and 565-7. ²⁶⁷ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). ²⁶⁸ See infra notes 626-9 and Figure 2.3 (analyzing DOJ CRT cases from Fiscal Years 2016-18). Chapter 2 details the methodology of researching the 388.5 cases resolved by CRT through settlement, consent decree or judicial decisions during FY 2016 – 2018, with data disaggregated by type of case and type of resolution.

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Figure 1.1: CRT Cases Resolved Per Fiscal Year

SOURCE: CRT Website; Commission Staff Research

In 2002, the Commission also emphasized that the remedies secured in resolving cases is critically important, stating that "the Commission recognizes that for effective enforcement, remedies must address the root of discrimination."²⁶⁹ The report warned that "[m]ediation or other settlement agreements, if not performed carefully, may ignore the larger picture in the interest of resolving the complaint at hand."²⁷⁰ The report went on to explain that in order "[t]o avoid this, the Commission recommended that mediation only be used when it is appropriate to the nature of the complaint, and mediation staff should ensure that settlements include provisions for changes in employer practices or policies that might have a discriminatory effect."²⁷¹ The Commission's research for this report shows that DOJ's current strategy disfavoring resolution of cases by court-ordered consent decrees is likely to have a negative impact on effective enforcement of civil rights.²⁷² Comparing settlements, former Attorney General Sessions stated that out-of-court settlements are different because they require a new lawsuit to enforce them.²⁷³ In contrast, the consent decrees that CRT is able to secure in federal court are more readily enforceable and may include ongoing monitoring with more systemic reform measures that would address the root of discrimination.²⁷⁴ But since former Attorney General Sessions issued a directive memo in November 2018 disfavoring the use of consent decrees to resolve cases, the rate at which

²⁶⁹ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. ²⁷⁰ Ibid., 38. ²⁷¹ Ibid. ²⁷² See infra notes 572-82. ²⁷³ See infra note 549 (citing Sessions Memo at n. 2 (defining settlement as "an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract.")). Compare DOJ's statement to the Commission that "A settlement agreement is enforceable through court action and is just as 'enforceable' as a consent decree." See also infra note 572 (CRT stated: "The Sessions memo represents Department policy binding on CRT."). ²⁷⁴ See infra notes 551-58 and 565-71.



FY 2016 FY 2017 FY 2018

CRT Cases Resolved Per Fiscal Year

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CRT has resolved cases through consent decrees (rather than out-of-court settlements) has plummeted.²⁷⁵ Effective Use of Enforcement Tools: Proactive Compliance Evaluation In 2002, the Commission noted the importance of monitoring compliance, recommending that federal agencies monitor compliance through pre- and post-award reviews, through data supplied by recipients and other data sources, as well as on-site visits, desk audits, and other methods.²⁷⁶ The impact of civil rights compliance monitoring may be large or small, depending on the efficacy of federal agency monitoring. Trillions of dollars in federal funding supports programs and activities in many sectors of society, which are impacted by how agencies decide to monitor compliance. The following table demonstrates how much federal funding and financial assistance has been awarded to recipients over the fiscal years in question (FY 2016-2018). As noted below, this funding may be awarded to a company, an organization, a government entity (i.e., state, local, tribal, federal, or foreign), or an individual, and this funding may be obligated in the form of a contract, grant, loan, insurance, direct payment, or by other means.²⁷⁷ See Table 1.5. Table 1.5: Amount of federal funding and financial assistance by federal agency, FY 2016- 2018 Agency Fiscal Year 2016 Fiscal Year 2017 Fiscal Year 2018 DOJ \$11,677 \$11,691 \$14,245 ED \$76,758 \$74,663 \$79,573 HUD \$31,950 \$53,862 \$57,779 HHS \$1,155,715 \$1,214,140 \$1,231,669 Labor \$9,690 \$10,446 \$10,020 EEOC \$48 \$50 \$56 EPA \$5,263 \$5,181 \$5,688 Transportation \$69,962 \$68,116 \$74,719 Treasury \$6,323 \$5,990 \$5,102 DHS \$26,738 \$26,815 \$44,255 VA \$198,028 \$203,124 \$192,987 Agriculture \$134,602 \$122,980 \$121,410 Interior

\$9,890 \$9,683 \$10,455

Source: USASPENDING.gov Note: Amounts in millions of dollars Note: All data from usaspending.gov, using complete category of "Award," which usaspending.gov defines as "Money the federal government has promised to pay a recipient. Funding may be awarded to a company, organization, government entity (i.e., state, local, tribal, federal, or foreign), or individual. It may be obligated (promised) in the form of a contract, grant, loan, insurance, direct payment, etc."

²⁷⁵ See infra notes 574-79, 583, 636-37 and Figure 2.6. ²⁷⁶ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 39-41. ²⁷⁷ USASPENDING.gov, <https://www.usaspending.gov>.

<https://www.usaspending.gov/>

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The vast majority of civil rights enforcement offices examined have legal authority as well as responsibility to engage in proactive compliance evaluations. For example, Commission staff research found that the agency's regulations require DOJ, ED, HHS, HUD, DHS, EPA, DOT, the VA, USDA, Treasury, and DOI to conduct periodic compliance investigations; and in contrast, EEOC's regulations do not include this requirement.²⁷⁸ The same 11 of the 13 agencies that are required to conduct periodic compliance evaluations have authority under their regulations to enforce based on the findings.²⁷⁹ Regulations require that investigations go through a voluntary compliance process for resolution, but if that is not effective, they can lead to withholding of funds without the need for a complaint from an impacted individual.²⁸⁰ In sum, in most agencies, federal law and regulations provide some basic responsibilities and discretion for agency-initiated monitoring and enforcement. DOJ federal regulatory guidelines summarize the responsibility that comes with this agency discretion as follows:

Primary responsibility for prompt and vigorous enforcement of title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in

each agency authority and the duty to select, from among the available sanctions, in the decision to terminate or refuse assistance is to be made by the agency head or his designated representative.²⁸¹

Based on available information, the way the agencies use this discretion varies. For example, DOL OFCCP noted that its “primary enforcement mechanism is neutrally scheduled compliance evaluations (i.e., not prompted by complaints), and OFCCP prioritizes identifying systemic discrimination.”²⁸² Furthermore, “OFCCP’s model is largely proactive, consisting of broad compliance reviews... without the need for a complaint.”²⁸³ DOL OFCCP stated that it is only able to audit about 1 to 2 percent of contractors a year,²⁸⁴ and OFCCP has specifically been focusing on conducting compliance reviews that might result in “big findings.”²⁸⁵ This Trump Administration approach is consistent with the approach taken during the Obama Administration;

278 6 C.F.R. § 21.11(a) and (c) (DHS); 7 C.F.R. § 15.5(a) (USDA); 24 C.F.R. § 1.7(a) and (c) (HUD); 28 C.F.R. § 42.107(a) and (c) (DOJ); 31 C.F.R. § 22.7 (a) and (c) (Treasury); 34 C.F.R. § 100.7(a) and (c) (Ed); 38 C.F.R. § 18.7(a) and (c) (VA); 40 C.F.R. §§ 7.105, 7.115(a) and (b) (EPA); 43 C.F.R. 17.6(a) and (c) (Interior); 45 C.F.R. § 80.7(a) and (c) (HHS); 49 C.F.R. § 21.11(a) and (c) (DOT). DOL has the authority to conduct compliance evaluations, but is not required to do so by regulation, see 41 C.F.R. §§ 60-1.20(a), 60-1.26. 279 See infra notes 449 (DOJ), 1031 (ED), 1275 (HHS), 1480 (HUD), 2329 (DHS), 2633 (EPA), 2811 (DOT), 3008 (VA), 3121 (USDA), 3321 (Treasury) and 3457 (DOJ). DOL also has this authority. See infra notes 1845 and 1952. 280 See, e.g. 28 C.F.R. § 42.108(a) (“If there appears to be a failure or threatened failure to comply with this [DOJ Title VI regulation] and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this [DOJ Title VI regulation].”) 281 28 C.F.R. § 50.3(b). 282 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 283 Ibid. 284 Leen Testimony, Federal Civil Rights Enforcement Briefing, p. 24. 285 Ibid., p. 51.

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in FY 2016, OFCCP reduced the total number of compliance reviews and focused on big results.²⁸⁶ With several new initiatives, OFCCP has a goal of reaching a much higher percentage of contractors through compliance assistance efforts, compliance verification, and compliance incentives.²⁸⁷ OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, while making compliance reviews and assistance more focused, faster, and less burdensome. OFCCP plans to triple the number of evaluations it schedules in the coming year.²⁸⁸ Although some of the reviews will be abbreviated (focused reviews and compliance checks), the agency will be reminding many more contractors of their EEO obligations.²⁸⁹ Furthermore, OFCCP has recently focused on the establishment of global resolutions and monitoring programs in an effort to expand worker protections to more workplaces. The agency now encourages Early Resolution Procedures to promote early and efficient supply and service compliance.²⁹⁰ The agency is also developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.²⁹¹ The VERP will officially recognize the outstanding efforts of its top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations.²⁹² Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity In order to identify what policy guidance materials are, the Commission relies in part on 2015 Government Accountability Office (GAO) testimony to the U.S. Senate regarding Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes. In her testimony before the relevant Senate subcommittee, GAO’s Director of Strategic Issues Michelle Sager explained that:

One of the main purposes of guidance is to explain and help regulated parties comply with agencies’ regulations. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies’ reliance on large volumes of guidance documents and because

286 U.S. Dep’t of Labor, Agency Financial Report Fiscal Year 2016, pp. 14-15, https://www.dol.gov/sites/dolgov/files/legacy-files/media_07_Sec/2016annualreport.pdf. 287 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 288 U.S. Dep’t of Labor, “OFCCP has released the FY2019 Supply & Service Scheduling List.” <https://www.dol.gov/ofccp/scheduling/index.html> [hereinafter DOL, “OFCCP has released the FY2019 Supply & Service Scheduling List”]. 289 See 41 CFR §§ 60-1.20, 60-300.60, and 60-741.60. 290 U.S. Dep’t of Labor, OFCCP, Directive 2019-02, Early Resolution Procedures, Nov. 30, 2018, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html [hereinafter DOL, Early Resolution Procedures]. 291 U.S. Dep’t of Labor, OFCCP, Directive 2019-04, Voluntary Enterprise-wide Review Program (VERP), Feb. 13, 2019, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_04.html [hereinafter DOL, Voluntary Enterprise-wide Review Program]. 292 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

https://www.dol.gov/sites/dolgov/files/legacy-files/media_07_Sec/2016annualreport.pdf
<https://www.dol.gov/ofccp/scheduling/index.html>
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_04.html

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the guidance can prompt changes in the behavior of regulated parties and the general public.²⁹³

The GAO Strategic Director also explained how guidance fits in the hierarchy of the federal legal system. At the top level are statutes, in which Congress provides authority to agencies; statutes are legally binding. Next, there are federal regulations, which implement statutes and are legally enforceable. Third, guidance may be issued by agencies, through which agencies “may explain how regulations are implemented,” but guidance is not legally binding.²⁹⁴ At the more granular level, civil rights enforcement offices may also use a range of other policy- related tools to assure civil rights protections. In 2002, the Commission considered the following types of policy guidance essential to effective civil rights enforcement: “clear and pertinent policy guidance, including internal procedures, external policy, and current regulations,” as well as technical assistance to help recipients of federal funding “establish policies and procedures that comply with antidiscrimination laws,” and “education and outreach, such as helping victims of discrimination and the public understand their civil rights and how to obtain assistance if discrimination occurs.”²⁹⁵ The Commission also found that effective civil rights enforcement requires promoting a national understanding of discrimination, and that policy was a key component of ensuring this promotion of national understanding.²⁹⁶ In 2002, the Commission took note that over one-third of the 1,100 recommendations the Commission had made in the past ten years concerned policy. Common themes included the need to update regulations, and the Commission also made a specific recommendation on the need for a specialized policy unit in each agency, unencumbered with civil rights enforcement responsibilities. The Commission found that “[t]he lack of updated and clear policy guidance, and the inadequate resources devoted to it, are among the primary reasons for poor civil rights enforcement.”²⁹⁷ The Commission’s 2002 report found that technical assistance may consist of “educational forums, advice, or written policy documents.”²⁹⁸ The Commission encouraged federal agencies responsible for enforcing civil rights laws to implement robust technical assistance programs to assist recipients of federal financial assistance in voluntary compliance with civil rights protections.²⁹⁹

293 U.S. Gov’t Accountability Office, Statement of Michelle A. Sager, Director, Strategic Issues, Testimony Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes, GAO-15-834-T, What GAO Found (introductory page), Sept. 23, 2015, <https://www.gao.gov/assets/680/672667.pdf>. 294 Ibid., 6, Figure 1: Hierarchy of Statutory and Regulatory Authority. 295 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 3. 296 Ibid., 1, xi. 297 Ibid., 25. 298 Ibid., 32. 299 Ibid., 32-33.

<https://www.gao.gov/assets/680/672667.pdf>

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During the Commission’s briefing Robert Driscoll made a distinction between civil rights enforcement and civil rights policy:

I know we currently have a Republican President and a Conservative Attorney General, a situation [with] which I am very familiar, having served under President George W. Bush and Attorney General John Ashcroft and thus, there is controversy and disagreement at a policy level among the civil rights community. As I have alluded to previously, conservatives, including conservative civil rights lawyers, such as myself, tend to feel bound by statutory and constitutional text. As such, advocacy groups and others that want, in the absence of statutory authority, to advance certain issues... are sometimes disappointed. I’m sure there’s a member of this panel or members of the group today who are disappointed with some of the current federal civil rights enforcers. So these disagreements, in my mind, highlight the distinction between civil rights enforcement, the topic of today’s panel, and civil rights policy. Federal civil rights enforcers do not write with a free hand.³⁰⁰

In the current evaluation, the Commission observed some trends in policy shifts that have occurred. While the following section does not document every observed trend, it does highlight several noteworthy trends in policy changes that have occurred across these agencies from FY 2016 to FY 2018, to establish a basis for understanding this policy evolution on a macro level. The Commission’s analysis is limited to whether policy is being issued, and to changes in policy that would either expand or restrict the effectiveness of civil rights enforcement. The Commission found that many of the agencies studied in this report are specifically required to issue guidance and technical assistance to recipients of federal financial assistance, which clarifies recipients’ obligations under federal civil rights laws.³⁰¹ Moreover, many civil rights offices (e.g., DOJ CRT, ED OCR, DOL OFCCP, HHS OCR, EPA ECRCO) issue guidance documents that may assist recipients of federal funding (such as schools, housing providers, hospitals, etc.) to comply with federal civil rights law.³⁰² Furthermore, in at least one of the relevant statutes, Congress

300 Driscoll, Federal Civil Rights Enforcement Briefing, pp. 119-20. 301 See, e.g., 28 C.F.R. § 41, Exec. Order 12,250 (1980); 7 C.F.R. § 15.5(a) (requiring USDA to issue guidance and technical assistance); 24 C.F.R. § 1.6(a) (requiring HUD to issue guidance and technical assistance); 29 C.F.R. § 31.5(a) (requiring DOL CRC to issue guidance and technical assistance); 31 C.F.R. § 22.6(a) (requiring Treasury to issue guidance and technical assistance); 34 C.F.R. § 100.6(a) (requiring ED to issue guidance and technical assistance); 40 C.F.R. § 7.20(b) (requiring EPA to issue guidance and technical assistance); 43 C.F.R. § 17.5(a) (requiring DOI to issue guidance and technical assistance); 45 C.F.R. § 80.6(a) (requiring HHS to issue guidance and technical assistance). 302 See, e.g., infra notes 803-27, 831, 835-40, 843, 845-859 (relevant DOJ guidance); 1996-1218 (ED); 1393-1422 (HHS); 2006-43 (DOL); and 2754-7 (EPA).

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intended to increase effective civil rights enforcement by providing the civil rights office (DHS CRCL) with authority to review agency policy before it is implemented.³⁰³

In its 2003 annual report, ED OCR highlighted the importance of issuing policy guidance, stating: “OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information.”³⁰⁴ However, during FY 2017 and 2018, ED OCR rescinded more policy guidance than it issued.³⁰⁵ Executive Order 12,250, issued in 1980 and later codified in federal regulations, requires DOJ to “coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions” in Title VI, Title IX, Section 504 and any provision of federal law prohibiting discrimination on the basis of race, national origin, disability, religion or sex.³⁰⁶ According to DOJ’s Title VI Legal Manual, if two federal agencies issue conflicting policy guidance or regulations, DOJ is authorized to determine the final government-wide position on the matter.³⁰⁷ DOJ is also required to issue model Title VI and other civil rights regulations and provide policy guidance to other agencies.³⁰⁸ In addition to its coordination role, DOJ has also issued a number of policy guidance materials and directives regarding civil rights, which are discussed in Chapter 2 of this report.³⁰⁹ The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration.³¹⁰ Some champion these efforts, citing that deregulation can lead to economic growth and “improvements to quality of life from access to innovative products

303 See infra notes 2360-4 (discussing purposes of this authority under the Homeland Security Act). 304 U.S. Dep’t of Educ., Office for Civil Rights Annual Report to Congress FY 2003, p. 19, <https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>. 305 See infra notes 1200-06. 306 Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), § 1-201 Coordination of Nondiscrimination Provisions, <https://www.justice.gov/crt/executive-order-12250>; 29 C.F.R. § 0.51(b). 307 DOJ, Title VI Legal Manual, supra note 39, at 4. 308 See infra notes 787-9. 309 See infra notes 806-14 (DOJ Title VI guidance) and 821-57 (other DOJ civil rights guidance documents issued FY 2016-2018). 310 Diane Katz, “Here’s How Much Red Tape Trump Has Cut,” The Heritage Foundation, Oct. 17, 2018, <https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut>. This article notes that as per guidance from the White House, only “significant” regulatory actions count towards this cap; see also Memorandum Re: Guidance Implementing Executive Order 13,771, Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> (that provides specific guidelines for what constitutes a “significant guidance document” for the purposes of EO 13771).

<https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>
<https://www.justice.gov/crt/executive-order-12250>
<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

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and services.”³¹¹ However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.³¹²

In January 2017, President Trump signed Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs.³¹³ This order highlighted the new Administration’s focus on “financial responsibility” in the management of public funds, public spending, and the budgeting process, noting that “it is essential to manage the costs associated with the governmental imposition on private expenditures required to comply with Federal regulations.”³¹⁴ Specifically, for every one new regulation issued, it called for the identification of at least two prior regulations for elimination to offset any incremental costs associated with the implementation of the new regulations.³¹⁵ At the end of FY 2017, the Administration reported that for every “significant” regulation passed, twelve they deemed “outdated, unnecessary, or duplicative” regulations were eliminated,³¹⁶ exceeding the two-for-one order. In testimony submitted to the Commission, YWCA strongly denounced these policy changes, stating that:

These and other recent actions exacerbate systemic barriers, reinforce gender and racial stereotypes, and send a clear message that the federal government will no longer fulfill its critical role of protecting and vindicating civil rights. And the true irony is that these rollbacks are occurring at a time when women have heightened

311 Neomi Rao, “The Trump administration’s deregulation efforts are saving billions of dollars,” The Washington Post, Oct. 17, 2018, https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceaad2ab1_story.html?noredirect=on&utm_term=.a24d532ab006; Thomas A. Firey, “Dire Fears of Trump Deregulation,” Cato at Liberty, Mar. 13, 2017, <https://www.cato.org/blog/dire-fears-trump-deregulation>; Thomas A. Hemphill, “Manufacturing Benefits from Trump’s Deregulation Agenda,” The Heartland Institute, Feb. 13, 2019, <https://www.heartland.org/news-opinion/news/manufacturing-benefits-from-trumps-deregulation-agenda>; “Trump’s Deregulation Binge is Lightening The Economy’s Load,” Investor’s Business Daily, Dec. 15, 2017, <https://www.investors.com/politics/editorials/trumps-deregulation-binge/>. 312 Julie Appleby, “High Stakes, Entrenched Interests And The Trump Rollback Of Environmental Regs,” Kaiser Health News, Nov. 12, 2018, <https://khn.org/news/high-stakes-entrenched-interests-and-the-trump-rollback-of-environmental-regs/>; Scott Sumner, “Opinion:

market economists aren't impressed with Trump's deregulation efforts," Market Watch, Dec. 19, 2018, <https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>; Laura Meckler and Devlin Barrett, "Trump administration considers rollback of anti-discrimination rules," The Washington Post, Jan. 3, 2019, https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74 [hereinafter Meckler et al., "Trump administration considers rollback of anti-discrimination rules"]; 313 Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017), 314 Id. 315 Id. 316 The White House, "Regulatory Relief Efforts Deliver \$23 Billion In Regulatory Cost Savings," Oct. 17, 2018, <https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>.

https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fced2ab1_story.html?noredirect=on&utm_term=.a24d532ab006
https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fced2ab1_story.html?noredirect=on&utm_term=.a24d532ab006
https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fced2ab1_story.html?noredirect=on&utm_term=.a24d532ab006
<https://www.cato.org/blog/dire-fears-trump-deregulation>
<https://www.heartland.org/news-opinion/news/manufacturing-benefits-from-trumps-deregulation-agenda>
<https://www.investors.com/politics/editorials/trumps-deregulation-binge/>
<https://khn.org/news/high-stakes-entrenched-interests-and-the-trump-rollback-of-environmental-reg/>
<https://khn.org/news/high-stakes-entrenched-interests-and-the-trump-rollback-of-environmental-reg/>
<https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>
<https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>
https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74
https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74
<https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>
<https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>

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concerns about discrimination, safety and economic security [as documented in recent survey data YWCA submitted to the Commission].³¹⁷

The Commission received significant testimony about the negative impacts on effective civil rights enforcement of recent policies restricting civil rights. It also received some testimony favoring a tightening of civil rights policies. According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration's restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations.³¹⁸ This is despite ongoing prosecution of hate crimes by CRT in the Trump Administration.³¹⁹ Some also contend that Trump Administration regulatory and guidance changes in civil rights areas have made impacted persons fearful of approaching the federal government to protect them against violations.³²⁰ Anthony Varona, Professor of Law at American University, Washington College of Law, distilled this view: "[k]ey federal agencies now are aggressively undermining the recognition and protection of the civil rights of millions of Americans that depend on them."³²¹ Seventeen State Attorneys General submitted comments critiquing the Trump Administration's policy changes regarding federal civil rights, and summarized their view as follows:

317 YWCA, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 2. 318 John Yang, President and Executive Director, Asian Americans Advancing Justice | AAJC, testimony, Federal Civil Rights Enforcement Briefing, pp. 182-88. 319 See supra note 217 (discussing research findings), citing infra notes 508-09. 320 Asian and Pacific Islander American Health Forum, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 1-2 (discussing how various rollbacks in civil rights protections for limited-English proficient and communities of color chill participation and deter access to federal health care programs); Center for American Progress, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 5 (discussing need to build community trust with law enforcement); End Rape on Campus, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 2 (discussing "the Department of Education's recent and impending decision-making to rescind previous guidance on Title IX enforcement and replacing it with a dangerous regulation that will chill reporting and prevent students everywhere from accessing their civil rights under Title IX"); South Asian Americans Leading Together, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 1-2 (regarding fear of reporting hate crimes); NAACP Legal Defense and Educational Fund, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 8, notes 27-28 (regarding fear of Census participation); National Urban League, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 5 (rollbacks in civil rights to protect against police violence "places our communities and their civil rights at further risk"); Partnership for Inclusive Disaster Strategies, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 4 (discussing issues chilling access, stating that: "We are much less concerned with which federal entity is responsible for enforcement, and far more concerned with who we can look to for enforcement of civil rights obligations currently harming children and adults with disabilities and those who will be harmed as soon as the next disaster."); 321 Anthony Varona, Professor of Law, American University Washington College of Law, testimony, Federal Civil Rights Enforcement Briefing, pp. 254-55.

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As the chief law officers of our states, we urge this commission to report with impartiality the tangible threat to civil rights enforcement in America today. We stand ready to take action when and wherever we are needed to protect the rights of the people in our states from assaults on their freedoms and civil rights. But without the genuine partnership of the federal government, the tools we have to conduct that enforcement are limited. To put an even finer point on it: The federal government should partner with us in protecting civil rights, rather than posing a constant and dangerous threat to them.³²²

Burth Lopez, Senior Attorney at the Mexican American Legal Defense and Educational Fund (MALDEF), also contended that "under the [Trump] administration it has become clear that executive priorities have shifted away from the enforcement of civil rights in areas that are critical to Latinos, workers, students and voters."³²³ Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law, testified before the House Committee on the Judiciary that:

By abandoning full enforcement of our federal civil rights laws, this Justice Department has also sent a dangerous message that the rights of vulnerable communities simply do not matter.³²⁴

The National LGBTQ Task Force also expressed concern about policy changes impacting the communities they represent, in the areas of immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns.³²⁵ The Task Force concluded that:

There has been an unprecedented rollback and lack of enforcement of civil rights protections in the past two years, with many of them directly impacting LBGTQ people and families. LBGTQ people need to know that the law protects them, and does so regardless of our race, national origin, or immigration status.

322 State Attys General Statement, at 8. 323 Burth Lopez, Senior Atty at the Mexican American Legal Defense and Educational Fund, testimony, Federal Civil Rights Enforcement Briefing, p. 187. 324 Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Comm. on the Judiciary, 111th Cong. (2019) (statement of Kristen Clarke, President and Executive Director, Lawyers' Committee for Civil Rights Under Law at 2-3), <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>. 325 National LGBTQ Task Force, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018 [hereinafter National LGBTQ Task Force Statement] (passim).

<https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>
<https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>

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In addition to these well-documented civil rights enforcement issues, there has been a lack of transparency, consistency, process, and collaboration across agencies and with the public. The most vulnerable people in our communities have been the most impacted by these actions. With more input through Notice and Comment Rulemaking or regular listening sessions, the most impacted people can be heard.³²⁶

The Commission also studied how agencies use publicity to promote their policy priorities and educate the public about protections granted by civil rights laws. The U.S. Department of Transportation, for example, established a Civil Rights Learning Center, a collaboration between all of DOT's civil rights offices to "foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders."³²⁷ Additionally, DOT DOCR's website makes a number of learning resources available to the public explaining external civil rights, including podcasts, videos, learning hubs, online training modules, and guidance for funding recipients from DOT and its OAs.³²⁸ Further details about how other agency's civil rights offices use these tools are discussed in the relevant section of each of the following chapters. Effectiveness of Interaction and Coordination with External Agencies and Organizations. Agency civil rights enforcement offices also differ in the extent to which they coordinate with other federal agencies, and other stakeholders of the enforcement work, including the individuals who are subject to the offices' oversight, regulated entities, and the general public. Some agencies with subject-matter expertise and legal authority under federal statutes or regulations are required to coordinate with each other. For example, according to the EEOC:

Approximately 30 Federal departments and agencies provide Federal financial assistance. These agencies are responsible for ensuring that recipients of Federal financial assistance comply with: Section 504 of the Rehabilitation Act on the basis of disability, Title VI of the Civil Rights Act of 1964 on the bases of race, color, and national origin, and Title IX of the Education Amendments of 1972 on the basis of sex. EEOC regulations at 29 C.F.R. Part 1640 (issued jointly with the Department of Justice, 28 C.F.R. Part 37) address how EEOC will handle charges/complaints of disability discrimination that also may be covered under Section 504; 29 C.F.R. Part 1691 (also issued jointly with Justice, 28 C.F.R. Part 42) addresses Titles VI and IX. In addition, EEOC Management Directive 1002 addresses coordination of

326 National LGBTQ Task Force Statement, at 15. 327 U.S. Dep't of Transportation, "Civil Rights Learning Center (CRLC)," <https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc> [hereinafter DOT, "Civil Rights Learning Center"]. 328 U.S. Dep't of Transportation, "Learning Resources," <https://www.transportation.gov/civil-rights/civil-rights-learning-center/learning-resources> [hereinafter DOT, "Learning Resources"].

http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1640_00.html
http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1691_00.html
http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1691_00.html
<https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc>
<https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc>
<https://www.transportation.gov/civil-rights/civil-rights-learning-center/learning-resources>
<https://www.transportation.gov/civil-rights/civil-rights-learning-center/learning-resources>

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complaints/charges against recipients of Federal financial assistance. DOJ's Coordination and Review Section, Civil Rights Division, works with EEOC to coordinate enforcement of these laws.

Employers that are Federal government contractors or subcontractors also may be covered by Executive Order 11246, which prohibits discrimination on the basis of race, color, national origin, religion, and sex, and section 503 of the Rehabilitation Act, which prohibits disability discrimination. The Department of Labor, Office of Federal Contract Compliance Programs, administers and enforces these workplace prohibitions.³²⁹

There are other examples of coordination that are not mandatory. Based on a presidential directive, DOJ, DHS, HHS, HUD and DOT issued joint agency guidance to recipients of federal financial assistance on the nondiscrimination protections of Title VI in emergency and disaster preparedness, response, and recovery. The guidance provides an overview of the application of Title VI in emergency and disaster management and examples of promising practices that recipients of federal financial assistance can take in advance of emergencies and disasters, to ensure Title VI compliance.³³⁰

Then in September 2016, the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties, in collaboration with the Federal Emergency Management Agency's Office of Equal Rights and the Office of Disability Integration and Coordination, issued a notice about this guidance and protections under Section 504 of the Rehabilitation Act to U.S. Department of Homeland Security recipients on their obligations to ensure nondiscrimination in the provision of federally assisted services to disaster survivors.³³¹ Likewise, in the Obama Administration ED and DOJ entered a formal memorandum of understanding regarding how the agencies would coordinate Title IX enforcement activities to better ensure effective enforcement.³³² Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. This is also a role that the Commission has encouraged in the past,

329 U.S. Equal Opportunity Employment Comm'n, "How Other Federal Agencies Address Civil Rights Issues," <https://www.eeoc.gov/federal/whatothersdo.cfm> (accessed May 20, 2019). 330 See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination and Compliance Section, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, Aug. 16, 2016, <https://www.justice.gov/crt/fcs/EmergenciesGuidance>; see also infra notes 803-04 (discussing joint agency collaboration and release date). 331 Ibid. 332 White House Task Force to Protect Students From Sexual Assault, Not Alone, April 2014, p. 20, <https://www.justice.gov/archives/ovw/page/file/905942/download> [hereinafter White House Task Force to Protect Students From Sexual Assault, Not Alone]; U.S. Dep't of Education, Office for Civil Rights, Memorandum of Understanding Between the United States Department of Education, Office for Civil rights, and the United States Department of Justice, Civil Rights Division, Apr. 29, 2014, http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleIX-04-29-2014.pdf.

<http://www.usdoj.gov/crt/cor/index.htm>
<http://www.usdoj.gov/crt/cor/index.htm>

<http://www.dol.gov/esa/regs/statutes/ofccp/epo11246.htm>
<http://www.dol.gov/esa/regs/compliance/ofccp/sec503.htm>
<http://www.dol.gov/esa/regs/compliance/ofccp/sec503.htm>
<http://www.dol.gov/esa/OFCCP/index.htm>
<http://www.dol.gov/esa/OFCCP/index.htm>
<https://www.justice.gov/crt/file/685401/download>
<https://www.dhs.gov/publication/notice-recipients-nondiscrimination-during-disasters>
<https://www.eeoc.gov/federal/whatothersdo.cfm>
<https://www.justice.gov/crt/cs/EmergenciesGuidance>
<https://www.justice.gov/archives/ovw/page/file/905942/download>
http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleX-04-29-2014.pdf

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to improve coordination and enforcement of antidiscrimination laws governing recipients of federal funding.³³³ Executive Order 12,250, “Leadership and Coordination of Nondiscrimination Laws,” which defines DOJ’s role, is codified within DOJ’s Title VI regulations. These regulations provide that the Assistant Attorney General for Civil Rights “shall” coordinate the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination on the bases of race, color, national origin, handicap, religion, or sex under any program or activity receiving federal financial assistance.³³⁴ Coordination regulations also require that agencies must notify DOJ if they are unable to resolve findings of noncompliance.³³⁵ DOJ asserts that: “DOJ is the federal government’s litigator,” and that “[a]gencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution).”³³⁶ Several witnesses at the Commission’s briefing spoke to the need for coordination among federal agencies, to ensure consistent results across the federal government. Some agencies have more formal systems set up for this engagement. Carol Miaskoff testified to the Commission that EEOC’s Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they “clash” with civil rights laws.³³⁷ Leon Rodriguez spoke to the Commission about the Civil Rights Investigator Academy, which was an effort to provide skills and training to civil rights staff across different agencies, and ensure consistent approaches and results across the federal government.³³⁸ As Brian Greene stated, “[m]ost of our coordination is directly with the Department of Justice, in part, because the Department of Justice shares civil rights enforcement authority under the Fair Housing Act. We handle individual complaints. They have pattern [or] practice authority.”³³⁹

³³³ See *infra* notes 940-4 (discussing USCCR, Ten-Year Check-Up Vol. II: An Evaluation, *supra* note 31, at 6-8 and U.S. Comm’n on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, 1996, at 132-34). ³³⁴ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995; 29 C.F.R. § 0.51 (b). The only exception is that: “Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment.” Id. § 1 – 503; 29 C.F.R. § 0.51 (a). ³³⁵ Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-84. ³³⁶ 28 C.F.R. § 42.411(a). ³³⁷ DOJ, Title VI Legal Manual, *supra* note 39, at § III.B. ³³⁸ Id. at 82. ³³⁹ Id. at 83-84. ³³⁹ Greene Statement, at 80-81.

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Use of Research, Data Collection, and Reporting Some civil rights enforcement offices have statutory responsibility to collect data. In 2002, the Commission found that having sufficient data to identify civil rights violations and determine whether there is compliance with federal civil rights laws is important.³⁴⁰ Since then, the Commission has repeatedly found that data collection and reporting are essential to effective civil rights enforcement, and that a lack of effective civil rights data collection is problematic. For example, the Commission reported in 2018 that there is currently no system in place to collect or report victimization and crime data in Indian Country and that many tribes lack computerized systems for collecting such data.³⁴¹ The Commission also found that tribal nations need accurate data in order to plan and evaluate their law enforcement and judicial programs. Although federal law enforcement agencies are required to report crime data to the Uniform Crime Reporting Program, participation of tribal law enforcement is merely voluntary. As a result, Native American crime statistics likely are underreported, which creates challenges in fully understanding crime and law enforcement issues in Indian Country.³⁴² The Commission’s report also discussed a lack of data about Native Americans in general, with regard to health, education, and other federal civil rights issues. The Commission majority also found that the collection of data was essential for the federal government’s fulfillment of its treaty obligations: “The federal government has also failed to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, making monitoring of federal spending to meet its trust responsibility difficult.”³⁴³ The Commission recommended that:

Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.³⁴⁴

Also in 2018, the Commission found that accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database capturing rates of police use of force exists, creating a void in effective civil rights enforcement.³⁴⁵

³⁴⁰ USCCR, Ten-Year Check-Up Vol. I: A Blueprint, *supra* note 1, at 41. ³⁴¹ U.S. Comm’n on Civil Rights, Broken Promises: Continuing Federal Funding Shortfall for Native Americans (2018) at 56, <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [hereinafter USCCR, Broken Promises]. ³⁴² *Ibid.*, 57. ³⁴³ *Ibid.*, 2. ³⁴⁴ *Ibid.* ³⁴⁵ U.S. Comm’n on Civil Rights, Police Use of Force: An Examination of Modern Policing, 2018, p. 137, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf> [hereinafter USCCR, Police Use of Force].

<https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>
<https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>

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Therefore, the Commission recommended that:

Congress should condition cities’ receipt of federal law enforcement funds on the cities’ collection and reporting of data regarding police use of force practices to the Department of Justice in a format that is aggregable and comparable nationally. [and that] Congress should require the Department of Justice to release to the public twice each year the names of departments and jurisdictions that fail to report use of force information in the manner in requires.³⁴⁶

These are just two examples of recent reports in which the Commission has considered the need for data collection to be paramount.³⁴⁷ The Commission also notes that some civil rights statutes require data collection because Congress considered this collection important to advance the agency civil rights enforcement offices’ overall mission of effective civil rights enforcement.³⁴⁸ For example, the 2013 Death in Custody Reporting Act includes enforcement mechanisms, similar to those of the 2003 Prison Rape Elimination Act. DOJ does collect PREA data.³⁴⁹ Regarding the Death in Custody Act, states’ DOJ Safe Streets funding would be reduced by 10 percent if states fail to report deaths in custody.³⁵⁰ The DOJ Office of Inspector General reports that DOJ has not yet begun collecting data but plans to do so in 2020.³⁵¹ More broadly, the Commission heard testimony of continuing disparities and discrimination within the purview of OCRs from a variety of stakeholders, emphasizing the need for accurate data collection and reporting. Bryan Greene at HUD noted: “Ongoing segregation in America, regular reports of sexual harassment in housing, and newly constructed properties inaccessible to people with disabilities, are just some examples that underscore that we have not yet conquered housing discrimination.”³⁵² A former Deputy Assistant Attorney General testified that complaints of sexual

³⁴⁶ *Ibid.*, 139. ³⁴⁷ USCCR, Broken Promises, *supra* note 341, at 6 (data on Native American and Native Hawaiians and Other Pacific Islander racial groups are often incomplete, inaccurate, old, or not tracked by the federal government. . . there is a critical need for more accurate and current data collection for these communities), p. 11 (the Commission has emphasized the importance of data collection and has recommended increased data collection efforts). ³⁴⁸ See e.g. *infra* notes 983-8 (discussing DOJ’s reporting requirements under the Equal Credit Opportunity Act, the Civil Rights of Institutionalized Persons Act, Title VI, and former reporting requirements of state and local jurisdictions under Section 5 of the Voting Rights Act). ³⁴⁹ See, e.g. Ramona R. Rantala, Sexual Victimization Reported by Adult Correctional Authorities, 2012-15, Bureau of Justice Statistics, July 2018, <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>. ³⁵⁰ 34 U.S.C. 60105. ³⁵¹ U.S. Dep’t of Justice, Office of the Inspector General, Review of the Department of Justice’s Implementation of the Death in Custody Act of 2013, Dec. 2018, p. i, <https://oig.justice.gov/reports/2018/e1901.pdf> (“We found that, despite the DCRA requirement to collect and report state arrest-related death data by fiscal year (FY) 2016, the Department does not expect to begin its collection of this data until the beginning of FY 2020. This is largely due to the Department having considered, and abandoned, three different data collection proposals since 2016.”). ³⁵² Greene Testimony, Federal Civil Rights Enforcement Briefing, pp. 21-22.

<https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>
<https://oig.justice.gov/reports/2018/e1901.pdf>

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harassment against landlords increased significantly in response to HUD outreach on the issue, citing the increase in complaints as a positive step in civil rights enforcement because the increase reflects greater public awareness of the issue.³⁵³ Arne Duncan specifically mentioned the importance of collecting “A massive amount of data. A treasure trove of data telling us all kinds of things.”³⁵⁴ He noted this data’s importance came not only in confirming educational discrimination the department already suspected, but in identifying inequalities previously unperceived.³⁵⁵ The Commission’s research showed that few agencies engage in the type of public data collection, research and reporting needed to inform effective civil rights enforcement work. Congress charged ED OCR with data collection and analysis;³⁵⁶ ED OCR’s Civil Rights Data Collection exists to fulfill this purpose. DHS CRCL also has the statutory authority to perform data collection and public reporting.³⁵⁷ Additionally, Dexter Brooks testified to the Commission about research from EEOC social scientists on topics such as harassment in the workplace and achieving cultural change, stating that EEOC considers these types of reports an important enforcement tool.³⁵⁸ U.S. Department of Transportation’s DOCR, for instance, requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT-funded program/project may have a disparate impact upon certain racial/ethnic populations.³⁵⁹ Furthermore, some agencies have broad powers to collect data (within the limits of privacy law) and publish research results and have published civil rights studies.³⁶⁰ For example, the VA published a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, examining the impacts of delayed or missed care.³⁶¹ The study found a high level of harassment, and that “[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need.”³⁶²

³⁵³ Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 118. ³⁵⁴ Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 36. ³⁵⁵ *Ibid.*, 35-40. ³⁵⁶ 20 U.S.C. 3413(c). ³⁵⁷ See 6 U.S.C. § 345(a)(2) and 6 U.S.C. § 345(b). ³⁵⁸ Brooks Testimony, Sexual Harassment in Government Workplaces Briefing, pp. 66-68. ³⁵⁹ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 11, at 13. ³⁶⁰ See *supra* Table 1.1, Publicity. ³⁶¹ Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care, Women’s Health Issues 29-2 (2019), pp. 107-115, [https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf). ³⁶² *Ibid.*, 113.

[https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf)
[https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf)

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Over the past few years, the Trump Administration also made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers,³⁶³ older adults,³⁶⁴ foster youth and parents,³⁶⁵ crime victimization,³⁶⁶ and disease prevention.³⁶⁷ ***** The following chapters will explore the above three key factors and seven essential elements of effective civil rights enforcement in greater detail with regard to each of the 13 agencies studied, and will delve into a thorough examination of the efficacy of current federal civil rights enforcement efforts of each of these thirteen agencies, based on agency provided data and testimony the Commission received as well as Commission staff’s independent research of hundreds of cases, enforcement data and trends, policy changes, and other relevant factors (in FY 2016, 2017, and 2018). Additionally, the final chapter of this report will provide a series of Commission findings and recommendations for the examined agencies.

³⁶³ Hansi Lo Wang, “Census Bureau Caught in Political Mess over LGBT Data,” National Public Radio, Jul. 18, 2017, <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>. ³⁶⁴ Sejal Singh, Laura E. Durso, and Aaron Tax, “The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults,” Center for American Progress, Mar. 20, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>. ³⁶⁵ Julie Moreau, “Health Department Proposes Nixing Data Collection on LGBTQ Foster Youth,” NBC News, Apr. 18, 2019, <https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>. ³⁶⁶ In this case, the administration stopped directing the survey to youth under 18 (rather than eliminating a LGBTQ-related question), but activists argue that this disproportionately affects minor victims of crime who identify as LGBTQ. “Trump Administration Continues Erasing LGBTQ People in Data Collection,” Anti-Violence Project Action Brief, Apr. 13, 2018, <https://avp.org/words-matter-2/>. ³⁶⁷ Chris Johnson, “Trump’s CDC to Roll Back LGBT Data Collection: Report,” Washington Blade, May 18, 2018, <https://www.washingtonblade.com/2018/05/18/trumps-cdc-to-rollback-lgbt-health-data-collection-report/>.

<https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>
<https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>
<https://www.americanprogress.org/about/staff/durso-laura/bio/>
<https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>
<https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>
<https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>
<https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>
<https://avp.org/words-matter-2/>
<https://www.washingtonblade.com/2018/05/18/trumps-cdc-to-rollback-lgbt-health-data-collection-report/>

67 Chapter 2: U.S. Department of Justice

Chapter 2: U.S. Department of Justice, Civil Rights Division This chapter analyzes the U.S. Department of Justice (DOJ) Civil Rights Division's (CRT) activities in enforcing civil rights in the period of FY 2016 to FY 2018. As the chapters that follow do for other agencies, the chapter summarizes CRT's jurisdiction, enforcement tools, and resources. It then analyzes data collected about CRT based upon the seven key elements of effective civil rights enforcement identified in Chapter 1. The former head of CRT Vanita Gupta, who served in the Obama Administration, testified extensively about CRT before the Commission, emphasizing that the Civil Rights Division is "charged with upholding the civil and constitutional rights of all people in America."³⁶⁶ Former Deputy Assistant Attorney General and CRT Chief of Staff Robert Driscoll, who served in the George W. Bush Administration, similarly stated that: "[F]ederal civil rights enforcement is not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences."³⁶⁹ Instead they must "well and faithfully discharge the duties of the office."³⁷⁰ Publicly available data shows that CRT (in the Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections) resolved 388.5 civil rights cases during FY 2016-2018, primarily through court-ordered consent decrees and out-of-court settlement agreements, although some cases went to trial.³⁷¹ A chart of these cases is in Appendix A, and the litigation section of this chapter below includes other charts and graphs showing data patterns over time. A description of the relevant methodology is also found in the litigation section of this chapter. Legal Authority and Responsibility In summarizing CRT's legal authority and responsibility, the Commission emphasized in 2002 that:

It is mainly through its Civil Rights Division (Division) that DOJ protects the civil rights of all citizens in areas such as housing, education, employment, immigration, disabilities, law enforcement, and voting. The Division also carries out the Department's coordination and oversight responsibilities with respect to other federal agencies' civil rights enforcement responsibilities, including the implementation of Title VI.³⁷²

³⁶⁶ Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 170. ³⁶⁹ Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 116. ³⁷⁰ 5 U.S.C. § 3331 (Oath of office); see also U.S. Dep't of Justice, Justice Manual (March 2018), § 1 – 4.010, <https://www.justice.gov/jm/8-1000-civil-rights-division> [hereinafter DOJ Justice Manual] ("Government ethics rules implement this common value: public service is a public trust, meaning that the decisions and actions that federal employees take must be made in the best interests of the American people."). ³⁷¹ See Appendix A, Chart of CRT Cases Resolved, FY 2016-2018; and see *infra* notes 621-744 (discussing the specific data). ³⁷² USCCR, Ten-Year Check-Up Vol. II: An Evaluation, *supra* note 31, at 5.

<https://www.justice.gov/jm/8-1000-civil-rights-division>

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The Commission's current research shows that this structure of CRT's legal authority and responsibilities is largely unchanged. Much of this authority comes directly from federal civil rights statutes and regulations. The Civil Rights Act of 1957 established CRT to enforce the civil and constitutional rights that prohibit discrimination.³⁷³ DOJ CRT is the nation's oldest federal civil rights enforcement agency. DOJ CRT has considerable power and influence; not only does it enforce many civil rights statutes, but under Executive Order 12,250 (1980), the Attorney General also coordinates across the federal government the enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and all other statutes that prohibit discrimination against protected classes by federal agencies and federal fund recipients.³⁷⁴ DOJ codified the provisions of this Executive Order in federal regulations.³⁷⁵ Its power is also established by its statutory ability to litigate to enforce civil rights statutes (including those also enforced by other agencies) in federal court.³⁷⁶ Pursuant to the Civil Rights Act of 1957, an order of then-Attorney General William Rogers in December 1957 established the CRT within DOJ. That order provided that CRT shall be headed by an Assistant Attorney General, and under the Assistant Attorney General's "general supervision and direction," be charged with:

(a) Enforcement of all Federal statutes affecting civil rights, and authorization of such enforcement, including criminal prosecutions, and civil actions and proceedings on behalf of the Government; and appellate proceedings in all such cases.

(b) Requesting, directing and reviewing of investigations arising from reports or complaints of public officials or private citizens with respect to matters involving civil rights.

(c) Conferring with individuals and groups who call upon the Department in connection with civil rights matters, advising such individuals and groups thereon, and initiating appropriate action.

(d) Coordination within the Department of Justice on all matters affecting civil rights. (e) Research on civil rights matters, and the making of recommendations to the Attorney

General as to proposed policies and legislation therefor. (f) Upon their request, assisting the Commission on Civil Rights and other similar Federal

bodies in carrying out research and formulating recommendations.³⁷⁷

³⁷³ U.S. Dep't of Justice, Civil Rights Division, "About Division Overview," <https://www.justice.gov/crt/about-division-overview> (accessed Jun. 21, 2018). The full list of civil and criminal civil rights statutes enforced by CRT is available in Title 8 of the DOJ Justice Manual, *supra* note 370. ³⁷⁴ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995. The only exception is that: "Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment." *Id.* § 1 – 503; see also Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-84; and further discussion of Executive Order 11250 at *infra* notes 940-43. ³⁷⁵ 28 C.F.R. § 0.51. ³⁷⁶ *Id.* § 0.50(a). ³⁷⁷ U.S. Dep't of Justice, Office of the Atty General, Establishment of the Civil Rights Division in the Department of Justice, Order No. 155-57 (Dec. 9, 1957), <https://www.justice.gov/crt/creation-and-role-civil-rights-division> (accessed Mar. 11, 2019).

<https://www.justice.gov/crt/about-division-overview>

<https://www.justice.gov/crt/about-division-overview>

<https://www.justice.gov/crt/creation-and-role-civil-rights-division>

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DOJ also codified these duties as federal regulations that clearly list these same activities as functions that "shall be conducted, handled, or supervised by" the Assistant Attorney General for CRT.³⁷⁸ DOJ regulations have since expanded the list of civil rights statutes under the enforcement authority of CRT in item (a) above, and added the following additional duties:

• Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights.

• Representation of Federal officials in private litigation arising under 42 U.S.C. 2000d or under other statutes pertaining to civil rights.

• Administration of sections 3(c) and 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973a(c), 1973c).

• Administration of section 105 of the Civil Liberties Act of 1988 (50 U.S.C. App. 1989b). • Certifications under 18 U.S.C. 245. • Enforcement and administration of the Americans with Disabilities Act of 1990, Public

Law 101-336. • Community education, enforcement, and investigatory activities under section 102 of the

Immigration Reform and Control Act of 1986, as amended. • Certifications under 18 U.S.C. 249, relating to hate crimes.³⁷⁹

DOJ CRT presently enforces the following civil rights statutes:

A. CIVIL STATUTES. 8 U.S.C. § 1324b (Immigration and Nationality Act's anti-discrimination provision); 15 U.S.C. §§ 1691 to 1691f (Equal Credit Opportunity Act); 18 U.S.C. § 248 [redacted]; 20 U.S.C. §§ 1681 to 1688 (Title IX of the Educational Amendments of 1972), 1706 to 1710 (Equal Educational Opportunities Act of 1974); 29 U.S.C. §§ 794 to 794g (Section 504 of the Rehabilitation Act of 1973); 34 U.S.C. § 12601 (Pattern or Practice of Unlawful Conduct by Law Enforcement or in the Administration of Juvenile Justice), 10226 (Safe Streets Act); 38 U.S.C. §§ 708(c) and 4301 to 4335 (USERRA); 42 U.S.C. §§ 1997 to 1997 (Civil Rights of Institutionalized Persons Act), 2000a to 2000a-6 (Title II of the Civil Rights Act of 1964), 2000b to 2000b-3 (Title III of the Civil Rights Act of 1964), 2000c to 2000c-9 (Title IV of the Civil Rights Act of 1964), 2000d to 2000d-7 (Title VI of the Civil Rights Act of 1964), 2000e to 2000e-7 (Title VII of the Civil Rights Act of 1964), 2000h-2 (Title IX of the Civil Rights Act of 1964), 2000cc to 2000cc-5 (Religious Land Use and Institutionalized Persons Act), 2000ff to 2000ff-11 (Genetic Information Nondiscrimination Act), 3601 to 3619 (Fair Housing Act), 12101 to 12213 (Americans with Disabilities Act); 50 U.S.C. §§ 3901 to 4043 (Servicemembers Civil Relief Act), 52 U.S.C. §§ 10101 (Civil Rights Act of 1957), 10301 to 10702 (Voting Rights Act of 1965); 20101 to 20107 (Voting Accessibility for the Elderly and Handicapped Act of 1984), 20301 to 20311 (Uniformed and Overseas Citizens Absentee

378 28 C.F.R. § 0.50 (emphasis added). 379 *Id.* § 0.50(e), (g), (h) and (j) – (l).

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Voting Act of 1986), 20501 to 20511 (National Voter Registration Act of 1993), 20701 to 20706 (Civil Rights Act of 1960), 21081 to 21085, 21111 (Help America Vote Act of 2002).

B. CRIMINAL STATUTES. 18 U.S.C. §§ 241 (Conspiracy against rights), 242

(Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs), 248 [redacted], 249 (Hate crime acts), 594 (Intimidation of voters), 875 (Interstate communications), 876 (Mailing threatening communications), 1351 (Fraud in foreign labor contracting), 1504 (Influencing juror by writing), 1508 (Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting), 1510 (Obstruction of criminal investigations), 1519 (Destruction, alteration, or falsification of records in federal investigations and bankruptcy), 1531 [redacted], 1581 (Peonage), 1582 (Vessels for slave trade), 1583 (Enticement into slavery), 1584 (Involuntary servitude), 1585 (Seizure, detention, transportation or sale of slaves), 1586 (Service on vessels in slave trade), 1587 (Possession of slaves aboard vessel), 1588 (Transportation of slaves from United States), 1589 (Forced labor), 1590 (trafficking with respect to servitude), 1592 (Document servitude), 1593 (Restitution), 1593A (Benefitting financially from trafficking), 1594 (General provisions, including attempts and conspiracies), 1597 (Unlawful conduct with respect to immigration documents), 1621-1623 (Perjury), 2421 (Transportation for purposes of prostitution); 42 U.S.C. §§ 300a-8 [redacted], 2000e-8 and e-10 (Certain wrongdoing by EEOC), 3631 (Criminal provisions of Fair Housing Act); 52 U.S.C.A. § 10307 (Refusal of person, acting under color of law, to permit vote of qualified voter), 10308, 10501-10503, 10505 (Relating to voting), 10701 (Enforcement of 26th Amendment), 20701 and 20702 (Related to record keeping in elections).³⁸⁰

It also enforces the following Executive Orders and federal regulations:

C. EXECUTIVE ORDERS. 12,250 (Leadership and Coordination of Nondiscrimination Laws), 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs), and 13,166 (Improving Access to Services for Persons with Limited English Proficiency).

D. CODE OF FEDERAL REGULATIONS. 28 C.F.R. §§ 35.101 to 35.190 (Title II of the

Americans with Disabilities Act); 28 C.F.R. §§ 36.101 to 36.608 (Title III of the Americans with Disabilities Act); 28 C.F.R. §§ 42.101 to 42.112 (Department of Justice Title VI implementing regulations); 28 C.F.R. §§ 42.201 to 42.215 (Safe Streets Act implementing regulations); 28 C.F.R. §§ 44.100 to 44.305 (regulations implementing Immigration and Nationality Act's anti-discrimination provision); 28 C.F.R. §§ 54.100 to 54.605

380 DOJ Justice Manual, *supra* note 370, at § 8 – 1.100.

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(Department of Justice Title IX implementing regulations); 28 C.F.R. §§ 51.1 to 51.67 (Procedures for the Administration of Section 5 of the Voting Rights Act); 28 C.F.R. §§ 55.1 to 55.24 (Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups); 38 C.F.R. §§ 4301 to 4323 (USERRA Enforcement).³⁸¹

This authority may be co-extensive with other agencies that may enforce the same statutes, such as Title VI or the Fair Housing Act or the Americans with Disabilities Act.³⁸² (Interaction with other federal agencies is discussed in the section on Interaction and Coordination with External Agencies and Organizations below.³⁸³) In the modern era, sections of CRT have carried out these duties.³⁸⁴ DOJ created the Appellate Section (APP) as a separate component of CRT in 1974. APP works cooperatively with other CRT sections in representing the U.S. in matters before federal courts of appeals.³⁸⁵ According to the Justice Manual as reissued in March 2018, CRT "has a strong interest in ensuring that the Department of Justice presents consistent arguments nationwide on civil rights issues."³⁸⁶ The Criminal Section (CRM) prosecutes criminal matters, while the other sections focus on civil matters. It works closely with the Federal Bureau of Investigation (FBI), which conducts most of its investigations.³⁸⁷ The Criminal Section enforces the United States Constitution and over 25

381 *Ibid.*, corrected by U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ³⁸² See *infra* notes 395-9 and 419-26. ³⁸³ See *infra* notes 929-77. ³⁸⁴ See, e.g., DOJ Justice Manual, *supra* note 370, at §§ 8 – 2.000 – 2.601, Enforcement of Civil Rights Statutes (describing the duties and authorities of each of these CRT sections). ³⁸⁵ U.S. Dep't of Justice, Civil Rights Division, "Appellate Section," <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019) [hereinafter DOJ CRT, "Appellate Section"]. ³⁸⁶ DOJ Justice Manual, *supra* note 370, at § 8 – 2.150. A local U.S. Attorney's Office may also handle an appeal that occurs in the jurisdiction, but DOJ practice is that the decision of whether it will be handled locally or by the Appellate Section of CRT must be made by the Assistant Attorney General for CRT "or his or her designee, usually the Section Chief of the Appellate Section." DOJ Justice Manual, *supra* note 370, at § 8-2.150. Even then, if a U.S. Attorney's Office takes on a federal civil rights case, DOJ practice is that the Appellate Section must approve all substantive appellate pleadings. *Ibid.* The Appellate Section also "works with the Solicitor General in developing the government's position in Supreme Court cases involving civil rights issues," and "provides legal counsel to other components of the Division regarding civil rights issues." DOJ CRT, "Appellate Section," *supra* note 385. ³⁸⁷ See DOJ Justice Manual, *supra* note 370, at § 8 – 3.150 ("The United States Attorneys' Offices may decline cases by orally advising the FBI or other lead federal investigative agency of the declination. The declination should then be reflected in the investigative report submitted by the FBI or other lead federal investigative agency."); and § 8 – 3.190 (procedures for closing an investigation after the final FBI report).

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federal statutes related to protecting civil rights.³⁸⁸ These include civil rights protections against hate crimes,³⁸⁹ criminal damage to religious property,³⁹⁰ human trafficking,³⁹¹ criminal interference with housing or other civil rights,³⁹² civil rights conspiracy,³⁹³ and deprivation of rights under color of law.³⁹⁴ The Disability Rights Section (DRS) administers and enforces the Americans with Disabilities Act (ADA),³⁹⁵ coordinates the implementation and enforcement of Section 504 of the Rehabilitation Act of 1973,³⁹⁶ and enforces the Genetic Information Nondiscrimination Act.³⁹⁷ The Special Litigation and Educational Opportunities Sections of the Civil Rights Division also enforce Title II of the Americans with Disabilities Act under certain circumstances.³⁹⁸ DRS promulgates regulations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (which prohibits disability discrimination in federally conducted programs or activities, as well as programs or activities receiving federal financial assistance). DRS also coordinates implementation of these laws by federal agencies. The Section's coordination authority under Section 504, established by Executive Order 12,250, includes review and approval of federal agencies' regulations and policy guidance regarding Section 504. DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.³⁹⁹ According to its website, the Employment Litigation Section (ELS) enforces two main laws and an Executive Order:⁴⁰⁰ Title VII of the Civil Rights Act of 1964 (barring workplace discrimination on the basis of sex, race, color, national origin, or religion),⁴⁰¹ the Uniformed Services Employment and Reemployment Rights Act (USERRA) (barring workplace discrimination on the

³⁸⁸ These are: 8 U.S.C. § 1324 (Bringing and harboring certain aliens); 8 U.S.C. § 1328 (Importation of aliens for immoral purpose); 18 U.S.C. §§ 241-242 (Infringement of rights); 18 U.S.C. § 245(b)(2) (Federally protected activities); 18 U.S.C. § 247 (Damage to religious real property); 18 U.S.C. § 248 (Freedom of access to clinics); 18 U.S.C. § 249 (Hate crimes prevention); 18 U.S.C. § 1351 (Fraud in foreign labor contracting); 18 U.S.C. § 1546 (Visa fraud); 18 U.S.C. § 1581 (Peonage); 18 U.S.C. § 1584 (Involuntary servitude); 18 U.S.C. §§ 1589-1594 (Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 18 U.S.C. §§ 1596, 3271 (Extra-territorial jurisdiction); 18 U.S.C. §§ 2421-2422 (Interstate transportation of persons related to prostitution); 42 U.S.C. § 3631 (Criminal interference with right to fair housing); 389 18 U.S.C. § 245(b)(2); 18 U.S.C. § 249. 390 18 U.S.C. § 247. 391 8 U.S.C. §§ 1324, 1328; 18 U.S.C. §§ 1351, 1546, 1581, 1584, 1589-1594, 1596, 2421-2422, 3271. 392 42 U.S.C. § 3631 (Criminal provisions of Fair Housing Act); 18 U.S.C. §§ 245(b)(2), (b)(4), & (b)(5) (interference with other federally-protected activities such as in federally-funded programs and activities, and voting). 393 18 U.S.C. § 241. 394 Id. § 242. 395 42 U.S.C. §§ 12101 et seq. 396 29 U.S.C. § 794(a). 397 42 U.S.C. § 2000f et seq. 398 See DOJ Justice Manual, supra note 370, at § 8-2.400 (Disability Rights Section). 399 Ibid. 400 U.S. Dep't of Justice, Civil Rights Division, "Laws Enforced by the Employment Litigation Section," <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017). 401 42 U.S.C. § 2000e et seq.

<https://www.justice.gov/crt/laws-enforced-employment-litigation-section>

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basis of military service or status as a veteran),⁴⁰² and Executive Order 11,246 (barring federal contractors from engaging in workplace discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin).⁴⁰³ ELS also works with the U.S. Department of Labor's Civil Rights Center and Office for Federal Contract Compliance Programs, which may refer complaints to CRT for possible enforcement.⁴⁰⁴ The Educational Opportunities Section (EOS) enforces federal statutes and court decisions that prohibit discrimination against students on the bases of race, color, sex, national origin, language, religion, and disabilities in elementary and secondary schools and higher education institutions. The statutes it enforces include Title IV of the Civil Rights Act of 1964 (covering discrimination on the bases of race, color, national origin, sex, and religion in public schools),⁴⁰⁵ Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, and national origin by recipients of federal financial assistance); Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in education programs and activities receiving federal financial assistance); the Equal Education Opportunities Act of 1974 (requiring, among other things, that state and local educational agencies take appropriate action to overcome the language barriers of English Language Learner students),⁴⁰⁶ the Individuals with Disabilities in Education Act,⁴⁰⁷ Section 504 of the Rehabilitation Act of 1973,⁴⁰⁸ and Titles II and III of the Americans with Disabilities Act of 1990.⁴⁰⁹ EOS also has the ability to intervene in private suits involving alleged violations of certain anti-discrimination statutes and the 14th Amendment.⁴¹⁰ DOJ established the Federal Coordination and Compliance Section (FCS) in 1970. Formerly called the Federal Programs Section, DOJ renamed the section with its current title in 2010, "in part to more accurately capture the Section's administrative enforcement role with respect to both DOJ-funded entities and other agencies' dockets."⁴¹¹ As of March 2018, DOJ reassigned the Justice Manual stating that FCS has principal responsibilities for: (1) "coordinating and ensuring consistent and effective enforcement by all executive agencies of laws that prohibit discrimination on the basis of race, color, national origin, sex, or religion by recipients of federal financial assistance," as well as by the federal government; and (2) investigating "allegations of discrimination based on race, color, national origin (including limited English proficiency), sex,

⁴⁰² 38 U.S.C. § 4301 et seq. ⁴⁰³ Exec. Order No. 11,246, Nondiscrimination in Government Employment, 30 Fed. Reg. 12,319 (Sep. 28, 1965). DOJ notes that these provisions have been incorporated into federal legislation. DOJ Justice Manual, supra note 370, at § 8 – 2.212 ("The text of Executive Order 11246, as amended, is set forth immediately following Section 2000e of Title 42 of the United States Code."). ⁴⁰⁴ See infra notes 1954-5 and 2053-8 (discussing DOL's jurisdiction and ability to refer). ⁴⁰⁵ 20 U.S.C. § 1681 et seq. ⁴⁰⁶ Id. § 6301 et seq. ⁴⁰⁷ Id. § 1400 et seq. ⁴⁰⁸ 29 U.S.C. § 701 et seq. ⁴⁰⁹ 42 U.S.C. § 12131 et seq. ⁴¹⁰ U.S. Dep't of Justice, Civil Rights Division, "Educational Opportunities Section Overview," <https://www.justice.gov/crt/educational-opportunities-section-overview> (accessed Jul. 28, 2017). ⁴¹¹ Ibid.

<https://www.justice.gov/crt/educational-opportunities-section-overview>

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or religion against recipients receiving financial assistance from the Department of Justice."⁴¹² These duties also stem from Executive Order 12,250 of 1980, and are codified in federal regulations.⁴¹³ FCS performs these duties by investigating agency referrals to CRT and complaints.⁴¹⁴ FCS also "plays a central role in coordinating compliance with Executive Order 13,166, which relates to access by limited English proficiency (LEP) individuals to federal government services, and Executive Order 13,160, which prohibits discrimination on a number of bases in federally conducted education and training programs."⁴¹⁵ The Justice Manual clarifies that neither of these Executive Orders confers a private right of action against the federal government.⁴¹⁶ "Executive Order 13,160 does, however, provide for administrative enforcement by individual agencies receiving complaints alleging discrimination in agency-conducted education and training programs."⁴¹⁷ When those complaints involve DOJ-funded activities, FCS undertakes Title VI compliance review. In his written statement to the Commission, Leon Rodriguez, Former Director of HHS OCR, stated that during his tenure, FCS also facilitated "creating a unified professional community among the Offices for Civil Rights."⁴¹⁸ The Housing and Civil Enforcement Section (HCE) prosecutes discrimination in housing under the Fair Housing Act,⁴¹⁹ and in public accommodations under Title II of the Civil Rights Act.⁴²⁰ The Section also enforces the Equal Credit Opportunity Act,⁴²¹ and the Servicemembers Civil Relief Act, which provides for temporary suspension of judicial and administrative proceedings in housing, credit and taxes for military personnel while they are on active duty.⁴²² Finally, the Section enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits local governments from adopting land use provisions that burden religious practice.⁴²³ CRT can file a complaint under the Fair Housing Act (FHA) when there is evidence that a person or entity has displayed a "pattern or practice" of civil rights violations or has discriminated against a group that raises an issue of "general public importance."⁴²⁴ The Attorney General has the discretion to decide what "general public importance" entails and courts generally defer to the Attorney General's decision.⁴²⁵ As then HUD FHEO General Deputy Assistant Secretary Bryan Greene testified to the Commission, HUD FHEO splits authority for enforcement of the Fair

⁴¹² DOJ Justice Manual, supra note 370, at § 8 – 2.240. ⁴¹³ 28 C.F.R. § 0.51 (codifying the provisions of Executive Order 12,250). ⁴¹⁴ DOJ Justice Manual, supra note 370, at § 8 – 2.241. ⁴¹⁵ Ibid. at § 8 – 2.242. ⁴¹⁶ Ibid. ⁴¹⁷ Ibid. ⁴¹⁸ Rodriguez Statement, at 2. ⁴¹⁹ 42 U.S.C. § 3601 et seq. ⁴²⁰ Id. § 2000a et seq. ⁴²¹ 15 U.S.C. § 1691 et seq. ⁴²² 50 U.S.C. § 3901 et seq. ⁴²³ 42 U.S.C. § 2000cc, et seq. ⁴²⁴ U.S. Dep't of Justice, Civil Rights Division, "A Pattern or Practice of Discrimination," <https://www.justice.gov/crt/pattern-or-practice-discrimination> (accessed Aug. 6, 2015). ⁴²⁵ Ibid.

<https://www.justice.gov/crt/pattern-or-practice-discrimination>

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Housing Act, with HUD FHEO generally handling individual complaints and DOJ handling systemic cases, although the FHA provides that HUD may initiate and refer systemic cases.⁴²⁶ The Immigrant and Employee Rights (IER) Section enforces the anti-discrimination provisions of the Immigration and Nationality Act (INA), which prohibit discrimination in hiring, firing, or recruiting on the basis of citizenship status and national origin, unfair documentary practices, and retaliation or intimidation.⁴²⁷ The INA's antidiscrimination provisions specifically prohibit discrimination based on citizenship or national origin in hiring, firing or referral for a fee, unfair documentary practices during the employment eligibility process, and retaliation or intimidation for engaging in protected activity, such as contesting a perceived violation, filing a charge of discrimination with the IER, or cooperating with an investigation.⁴²⁸ The Special Litigation (SPL) Section enforces several major statutes protecting the rights of institutionalized persons, including the Civil Rights of Institutionalized Persons Act (CRIPA) which protects the civil rights of people in institutional facilities.⁴²⁹ SPL also enforces the Omnibus Crime and Safe Streets Act, which prohibits discrimination by any law enforcement agency receiving federal funds.⁴³⁰ and the Violent Crime and Law Enforcement Act of 1994 (VCLEA), which prohibits "pattern or practice" violations in which law enforcement, or officials of government agencies involved with juvenile justice, deprive individuals of their constitutional rights.⁴³¹ The Supreme Court has held that a pattern or practice exists where violations are repeated and not isolated.⁴³² SPL also enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires state and local governments or persons acting under color of law to not place impermissible restrictions on religious practice.⁴³³ This jurisdiction is shared with HCE.⁴³⁴ The SPL Section may also enforce other federal statutes, such as Title VI of the Civil Rights Act, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Developmentally Disabled Assistance and Bill of Rights Act and Protection and Advocacy for Individuals with Mental Illness,⁴³⁵ and enforce these statutes in collaboration with the Disability Rights Section.

⁴²⁶ Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 80-81; see also infra notes 1598-1608 (discussion of statutory and regulations governing this split jurisdiction) (in HUD Chapter). ⁴²⁷ 8 U.S.C. § 1324b. ⁴²⁸ U.S. Dep't of Justice, Civil Rights Division, "Immigrant and Employee Rights Section," <https://www.justice.gov/crt/immigrant-and-employee-rights-section> [hereinafter DOJ CRT, "Immigrant and Employee Rights Section"]. ⁴²⁹ 42 U.S.C. § 1997 et seq. ⁴³⁰ 34 U.S.C. § 10701. ⁴³¹ Id. § 12601. ⁴³² A pattern or practice exists where violations are repeated rather than isolated. Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977) (noting that the phrase "pattern or practice" "was not intended as a term of art," but should be interpreted according to its usual meaning "consistent with the understanding of the identical words" used in other federal civil rights statutes). ⁴³³ 42 U.S.C. § 2000cc, et seq. ⁴³⁴ See Appendix A (listing cases jointly prosecuted by HCE and SPL). ⁴³⁵ See U.S. Dep't. of Justice, Statement of Interest, Disability Rights Idaho v. Sonnenberg, No. 1:14-cv-369 (D. Id. July 20, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/30/idaho_soi_7-20-15.pdf.

<https://www.justice.gov/crt/immigrant-and-employee-rights-section>

https://www.justice.gov/sites/default/files/crt/legacy/2015/07/30/idaho_soi_7-20-15.pdf

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The Voting Section (VOT) enforces the Voting Rights Act of 1965 (VRA),⁴³⁶ the National Voter Registration Act of 1993 (NVRA),⁴³⁷ and the Help America Vote Act of 2002 (HAVA).⁴³⁸ It also enforces the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁴³⁹ Voting Accessibility for the Elderly and Handicapped Act of 1985,⁴⁴⁰ as well as pertinent sections of the Civil Rights Acts of 1957 and 1964.⁴⁴¹ CRT also includes a Policy & Strategy Section, whose work this chapter describes in the Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity section.⁴⁴² Enforcement Tools Under the broad mandate set forth in Executive Order 12,250, as codified in federal regulations, CRT "shall" issue policy guidance, provide technical assistance, conduct research, provide educational materials to the public as well as impacted entities, consult with other agencies (federal, state and local), and investigate compliance with federal civil rights laws.⁴⁴³ Federal statutes also provide DOJ CRT with significant litigation authority, and federal regulations state that it "shall" enforce civil rights laws.⁴⁴⁴ Each of these CRT enforcement tools—which are duties that "shall" be done⁴⁴⁵—is listed below, then analyzed as relevant in the subsections of this chapter below assessing the efficacy of CRT's work.

⁴³⁶ 52 U.S.C. § 10301 et seq. ⁴³⁷ Id. § 20501 et seq. ⁴³⁸ Id. § 20901 et seq. ⁴³⁹ Id. § 20301 et seq. ⁴⁴⁰ Id. § 20101 et seq. ⁴⁴¹ Id. §§ 10101, 20701. ⁴⁴² See infra notes 784-926. ⁴⁴³ 28 C.F.R. § 0.50. ⁴⁴⁴ See supra notes 377-379; and see 28 C.F.R. §§ 0.50(a) and (g). ⁴⁴⁵ 28 C.F.R. § 0.50; see also supra notes 377-79 (discussing that the regulatory language of "shall" and the language of Exec. Order No. 12,250 illustrate that these are obligations).

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The Commission has identified which agency enforcement tools DOJ CRT has specific legal authority to use. Among all agencies reviewed, it is the only civil rights office that has specified legal authority to use all of the enforcement tools that the Commission reviewed. These are:

• Complaint Resolution⁴⁴⁶ • Agency-Initiated Charges⁴⁴⁷ • Litigation⁴⁴⁸ • Proactive Compliance Reviews or Evaluations⁴⁴⁹ • Testing⁴⁵⁰ • Observation⁴⁵¹ • Issuance of Policy Guidance⁴⁵² • Issuance of Regulations⁴⁵³ • Technical Assistance⁴⁵⁴ • Publicity⁴⁵⁵ • Community Outreach to Stakeholders⁴⁵⁶ • Research, Data Collection, and Reporting⁴⁵⁷ • Collaboration with States/Local Agencies⁴⁵⁸ • Collaboration with other Federal Agencies⁴⁵⁹

⁴⁴⁶ 28 C.F.R. § 0.50(b) ("The following functions are assigned to and shall be conducted, handled or supervised by the Assistant Attorney General, Civil Rights Division... (b) requesting and reviewing investigations arising from reports or complaints of public officials or private citizens with respect to matters affecting civil rights"); see also 28 C.F.R. § 35.171 (obligating CRT to review all ADA complaints it receives); DOJ Justice Manual, supra note 370, at §§ 8-1.20-8-2.130 (outlining CRT's complaint and investigation procedures). ⁴⁴⁷ 28 C.F.R. § 0.50(a) (Assistant Atty General "shall" "conduct" "Enforcement of all Federal statutes affecting civil rights," except for certain criminal statutes); and see, e.g., 34 U.S.C. § 12601; 42 U.S.C. § 12101 et seq. (examples of authority to enforce federal civil rights statutes under its jurisdiction). ⁴⁴⁸ 28 C.F.R. § 0.50(a). ⁴⁴⁹ Id. § 50.3; see also 28 C.F.R. §§ 0.50(b) and 36.502. ⁴⁵⁰ U.S. Dep't of Justice, Civil Rights Division, "Fair Housing Testing Program," <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 19, 2019). ⁴⁵¹ 52 U.S.C. § 10305. ⁴⁵² 28 C.F.R. § 0.50(a). ⁴⁵³ 42 U.S.C. § 2000d-1; Exec. Order No. 12,250 §§ 1-1 and 1-202 -207, 28 C.F.R. app. A §1-303 (DOJ CRT's authority to coordinate, ensure consistency and review Title VI, Title IX and Section 504 regulations of other agencies); but see 5 U.S.C. § 301 (only heads of agencies may prescribe regulations); but see 28 C.F.R. § 0.50(f) (Assistant Atty General of CRT "shall" "conduct" "Research on civil rights matters, and the making of recommendations to the Attorney General as to proposed policies and legislation relating thereto."); ⁴⁵⁴ See, e.g., DOJ Justice Manual, supra note 370, at § 8-2.240. ⁴⁵⁵ 28 C.F.R. § 42.405. ⁴⁵⁶ Id. §§ 0.50(c) and 0.53(b)(5). ⁴⁵⁷ Id. § 50.3 (research on civil rights matters). ⁴⁵⁸ Id. § 0.50(e) (Assistant Atty General "shall" "handle" "Consultation with and assistance to ... State and local agencies on matters affecting civil rights"). ⁴⁵⁹ Exec. Order No. 12,250, 28 C.F.R. app. A §1-207; 28 C.F.R. § 0.50(e)(Assistant Atty General "shall" "handle" "Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights") and (f) ("Upon request, assisting, as appropriate, the Commission on Civil Rights or other similar Federal bodies in carrying out research and formulating recommendations.");

<https://www.justice.gov/crt/fair-housing-testing-program-1>

<https://www.justice.gov/crt/fair-housing-testing-program-1>

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• Strategic Plan⁴⁶⁰ • Annual Reports⁴⁶¹

Staffing and Budget As per its FY 2019 Budget request, CRT currently employs 566 full-time equivalent persons, 422 of whom are attorneys.462 CRT staffing has declined each year since 2016, although its funding has remained relatively at the same level.463 CRT noted that it was subject to a department-wide hiring freeze from February 2017 through early 2019.464 See Figure 2.1. Figure 2.1

SOURCE: Reproduced from U.S. Dep't of Justice, Civil Rights Division, FY 2019 Budget Request at a Glance, at 1.

CRT told the Commission that in its FY 2017 Budget Request, it requested \$3.1 million as "adjustments to base," meaning an increase to keep current with ongoing expenses. In addition, the Division requested \$4.2 million in budget enhancements to expand specific enforcement areas.⁴⁶⁵ The Budget Request stated the increase would have included \$2.7 million designated for program changes to policing and criminal justice work "to investigate and prosecute discriminatory and unconstitutional conduct, increase community confidence in the police, and improve public safety."⁴⁶⁶ Congress not only denied CRT this increase, but also decreased its budget.⁴⁶⁷ The President's budget request for CRT also asked for an increase of \$833,000 for FY 2018,⁴⁶⁸ which Congress denied. The President's budget request did not request any increase in CRT funding for FY 2019.⁴⁶⁹

460 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. §1115(b). 461 28 U.S.C. § 529. 462 U.S. Dep't of Justice, Civil Rights Division, FY 2019 Budget Request at a Glance, p. 1, <https://www.justice.gov/jmd/page/file/1033091/download> [hereinafter DOJ CRT, FY 2019 Budget Request at a Glance]. 463 Ibid. 464 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 465 Ibid. 466 Ibid. 467 U.S. Dep't of Justice, Civil Rights Division, FY 2018 Budget Request at a Glance, <https://www.justice.gov/jmd/page/file/968381/download>. 468 Ibid. 469 DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462.

<https://www.justice.gov/jmd/page/file/1033091/download>
<https://www.justice.gov/jmd/page/file/968381/download>

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Congress decreased CRT's budget by \$200,000 in FY 2017, and by \$800,000 in FY 2018.⁴⁷⁰ In addition, there were no proposed "Program Changes" in CRT's FY 2018 and 2019 Budget Requests, which has only happened one other time since FY 2009.⁴⁷¹ CRT told the Commission that it does not budget section-by-section, so the amount of funding per section is not available.⁴⁷² Moreover, DOJ argued that: "CRT's work is not comparable to the other civil rights offices analyzed in this report because it is not an agency OCR; the Office of Civil Rights within the Office of Justice Programs [OJP] is DOJ's OCR. CRT has responsibility for government-wide coordination of federal funding nondiscrimination statutes under EO [Executive Order] 12,250, and shares a relatively smaller portion of the responsibility of the administration enforcement for those statutes as to DOJ recipients, with OJP OCR."⁴⁷³ CRT's public records indicated that in 2016, there were 80 positions (57 attorneys) responsible for "policing and Criminal Justice," but it is unclear which of those were assigned to the Criminal Section or to SPL.⁴⁷⁴ According to a DOJ Office of Inspector General report, as of April 2016, there were 33 full-time employees in the Special Litigation Section assigned to its Police Practice Group, which expended \$6.7 million (46% of the Section's budget for 2016).⁴⁷⁵ A January 4, 2017 report CRT issued, The Civil Rights Division's Pattern and Practice Police Reform Work, indicated that CRT did not then have enough resources to open investigations for all law enforcement entities that meet the basic criteria for a pattern or practice investigation, so it reportedly has had to prioritize.⁴⁷⁶ A February 2018 DOJ OIG report found that 17 law enforcement misconduct investigations were undertaken between 2011-2016, and that attorneys worked an average of 6,354 hours per case.⁴⁷⁷ From 2011 to 2016, the CRT's systems logged 8,605 referrals or complaints received by the SPL that related to state or local law enforcement agencies.⁴⁷⁸

470 Ibid. 471 Ibid. 472 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 473 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Oct. 1, 2019) (on file). 474 U.S. Dep't of Justice, Civil Rights Division, FY 2017 Budget and Performance Summary, <https://www.justice.gov/jmd/file/822036/download>. 475 DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 5. 476 U.S. Dep't of Justice, Civil Rights Division, The Civil Rights Division's Pattern and Practice Police Reform Work, January 2017, pp. 6-7, <https://www.justice.gov/crt/file/922421/download> [hereinafter DOJ CRT, CRT's Pattern and Practice Police Reform Work]. The two factors for whether a pattern or practice investigation are appropriate are: 1) "Would the allegations, if proven, establish a violation of the Constitution or federal laws?" and 2) "Would the allegations, if proven, constitute a pattern or practice, as opposed to sporadic or isolated violations of the Constitution or federal laws?" id. at 5. See U.S. Dep't of Justice, "Press Release: Justice Department Releases Report on Civil Rights Division's Pattern and Practice Police Reform Work," Jan. 4, 2017, <https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>. 477 DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 8. 478 Ibid., 9-10.

<https://www.justice.gov/jmd/file/822036/download>
<https://www.justice.gov/crt/file/922421/download>
<https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>
<https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>

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Assessment Prioritization for Civil Rights Agency-wide Considering that CRT's statutory authority and responsibilities to enforce federal civil rights laws have not significantly changed during the fiscal years studied, the above-described budget challenges are critical.⁴⁷⁹ as they may be linked to decreases in the number of cases brought and precedents set.⁴⁸⁰ CRT's primary mission is external enforcement against state and local governments or private actors who are required to comply with federal civil rights law, and it may also exercise its authority to defend other federal agencies and actors who have been accused of civil rights violations. One way that it can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators.⁴⁸¹ If CRT's position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy.⁴⁸² possibly creating a chilling effect.⁴⁸³ CRT does not have a direct line of authority to the head of the agency, the Attorney General. The Assistant Attorney General for Civil Rights (AAG for CRT) does not report directly to the Attorney General (who is the head of the agency), but instead reports to an Associate Attorney General.⁴⁸⁴ CRT noted that, "CRT has the same organizational position and reporting structure as every other civil litigating component in DOJ, such as Civil, Antitrust, Tax, or ENRD."⁴⁸⁵ In addition to civil rights enforcement authority, including the authority to litigate in federal court, the AAG for CRT may make recommendations to the Attorney General regarding proposed policies and legislation.⁴⁸⁶ coordinates in the DOJ "all matters affecting civil rights,"⁴⁸⁷ and is delegated "Leadership and Coordination of Nondiscrimination laws" within the federal

479 In 2002, the Commission found that increasing statutory authority without increasing the budget and staffing of agency civil rights offices was problematic. USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 46-47. Similarly, keeping the same authority but decreasing budget and staffing could be problematic. 480 See infra notes 622-9 (decrease in number of cases brought) and 630-7 (decrease in consent decrees and increase in out-of-court settlements). 481 See infra notes 562-64 (discussing the Commission's 2002 assessment of efficacies in litigation and comparing them to various current CRT litigation practices). 482 If setting a broad precedent through systemic litigation increases efficacy, then logically setting a limiting or very narrow precedent would decrease efficacy. See also Francois Testimony, Federal Civil Rights Enforcement Briefing, p. 231 (discussing a "loss of doctrinal development" because "each of these agencies have a tremendously important role to play in the way that doctrine in their particular area develops, because courts tend to give them far more leeway in the course of litigation. And the moment that they step out from enforcing, that role cannot be fully fulfilled by private litigants, so we lose, if you will, the way the doctrine itself develops."). 483 See Yang Testimony, Federal Civil Rights Enforcement Briefing, pp. 182-88. 484 See, e.g., DOJ, "Organizational Chart," supra note 106; see also 28 C.F.R. § 0.1. 485 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 486 28 C.F.R. § 0.50(f). 487 Id. § 0.50(d).

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government.⁴⁸⁸ However, this delegation of authority for leadership and coordination of nondiscrimination laws is limited to issuing regulations, and specifically does not include "approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972."⁴⁸⁹ Only the Attorney General may approve such regulations; however this regulation still provides significant authority to CRT to issue federal regulations under the Civil Rights Act of 1964.⁴⁹⁰ and section 902 of the Education Amendments of 1972.⁴⁹¹ Strategic Planning and Self-Evaluation The agency has developed a strategic plan to accomplish civil rights activities with measures of performance, performance goals, and assessments of the accomplishments; however, its metrics are broad. According to this broad metrics set, the agency has met its strategic goals. According to the DOJ-wide Annual Performance Report and Performance Plan for FY 2016-2017, the only stated civil rights performance measure was to "favorably resolve" 85 percent of both civil and criminal civil rights cases, and CRT achieved this goal in 2016 and 2017.⁴⁹² DOJ's Annual Performance Report for FY 2018 reported an additional CRT performance measure under the objective to "[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens, and serves the national interest." The performance measure for this objective sets a target of successfully resolving 75 percent of INA Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.⁴⁹³ DOJ's FY 2018 performance report also adds a new strategic objective to "Defend First Amendment rights to exercise religion and free speech," tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁴⁹⁴

488 Id. § 0.51(a). 489 Id. (citing Executive Order 12,250's specific delegation of those authorities to the Atty General). 490 Id. (citing Executive Order 12,250 and 28 C.F.R. § 0.180, requiring such regulations to be issued by the Attorney General). 491 CRT commented to the Commission that: "Under Title VI and Title IX, each federal agency department and agency is 'authorized and directed' to issue implementing rule, regulations, and orders of general applicability to effectuate the provisions of these statutes. The Coordination Regulations state that each federal agency that issues or amends its regulation implementing Title VI or Title IX is required to submit the proposed regulation or amendment and receive approval by the AAG. 28 C.F.R. 42.403. The Atty General has the delegated authority of the President, pursuant to EO 12,250, to approve them." U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 492 U.S. Dep't of Justice, Office of the Atty General, FY 2016 Annual Performance Report and FY 2018 Annual Performance Plan, May 2017, <https://www.justice.gov/doi/page/file/968516/download>; [hereinafter DOJ CRT, FY 2016 Annual Performance Report]; U.S. Dep't of Justice, Office of the Atty General, FY 2017 Annual Performance Report and FY 2019 Annual Performance Plan, February 2018, p. 27, <https://www.justice.gov/doi/page/file/1033761/download> [hereinafter DOJ CRT, FY 2017 Annual Performance Report]. 493 U.S. Dep't of Justice, Office of the Atty General, FY 2018 Annual Performance Report and FY 2020 Annual Performance Plan, <https://www.justice.gov/doi/page/file/1148176/download>. 494 Ibid., 51.

<https://www.justice.gov/doi/page/file/968516/download>
<https://www.justice.gov/doi/page/file/1033761/download>
<https://www.justice.gov/doi/page/file/1148176/download>

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CRT also set an internal goal of reaching a certain amount of trainings on human trafficking for law enforcement partners, but its performance reports include incomplete and inconsistent information.⁴⁹⁵ DOJ defined the term "favorably resolve" to "include those cases that resulted in court judgments favorable to the government, as well as settlements."⁴⁹⁶ DOJ's reported results for civil rights cases are below (see Table 2.1): Table 2.1

SOURCE: DOJ Annual Performance Reports

CRT itself releases an annual "Performance Budget" report that outlines the division's mission, its performance in the last year in reaching set measures in line with strategic goals, a strategic plan for achieving the next year's performance benchmarks, and justifications for any requested budget increases. The budget requests for CRT also include specific focus areas. According to the FY 2019 Budget Request, CRT's strategy from FY 2017 to 2019 shared several focus areas over the three years.⁴⁹⁷ The language and overall summary of these areas were largely consistent. However, in FY 2017, the budget requests included "ensuring constitutional policing and advancing criminal justice reform," and in FY 2018 and 2019, the budget requests omitted these focus areas.⁴⁹⁸ Other changed language included removing priorities to protect the rights of people with disabilities, and to protect LGBT individuals from discrimination, harassment, and violence.⁴⁹⁹

495 See DOJ CRT, FY 2019 Performance Budget Congressional Justification, p. 32, <https://www.justice.gov/file/1034196/download> [hereinafter DOJ CRT, FY 2019 Performance Budget Justification]; U.S. Dep't of Justice, Civil Rights Division, FY 2018 Performance Budget Congressional Justification, pp. 3-4, <https://www.justice.gov/file/968731/download> [hereinafter DOJ CRT, FY 2018 Performance Budget Justification]; U.S. Dep't of Justice, Civil Rights Division, FY 2017 Performance Budget Congressional Justification, pp. 35-36, <https://www.justice.gov/jmd/file/820981/download> [hereinafter DOJ CRT, FY 2017 Performance Budget Justification]. 496 DOJ CRT, FY 2017 Annual Performance Report, supra note 492, at 30. 497 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25-26; DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35-36. 498 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495; DOJ CRT, FY 2017 Performance Budget Justification, supra note 495. 499 Ibid.

Strategic Measure FY 2016 FY 2017 FY 2018 "Percent of civil rights cases favorably resolved: criminal cases"

85% 98% N/A

"Percent of civil rights cases favorably resolved: civil cases"

100% 98% N/A

<https://www.justice.gov/file/1034196/download>
<https://www.justice.gov/file/968731/download>
<https://www.justice.gov/jmd/file/820981/download>

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FY 2018's report added a strategic area to "promote equal education opportunities," which was not included in the prior or subsequent years. Also, in its FY 2019 and 2018 Performance Budget Reports, CRT stated that one of its strategic focus areas is IER's prioritization of the anti-discrimination provision of the INA, "to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders."⁵⁰⁰ To illustrate the process further, below are what CRT listed as key enforcement areas listed under CRT's FY 2020 Strategy:

• Prosecute Hate Crimes. CRT will prioritize hate crimes enforcement to ensure that individuals and communities are protected from crimes that are motivated by racial, religious, or other bias.

• Prosecute Human Trafficking. CRT will continue its highly successful human trafficking program. Prosecuting human trafficking presents unique challenges.

• Protect the Rights of U.S. Workers. CRT will continue to combat workplace discrimination. In FY 2020, CRT will prioritize enforcement of the Immigration and Nationality Act to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders.

• Protect Religious Freedom. The Division will continue to combat religious discrimination under the Religious Land Use & Institutionalized Persons Act (RLUIPA). In the last year, the Division filed a record number of eight RLUIPA lawsuits and initiated a record number of 31 RLUIPA investigations, resulting in a 30 percent increase in the number of cases, and a 50 percent increase in the number of investigations initiated over FY 2017.

• Ensure the Rights of Military Servicemembers. Servicemembers make tremendous sacrifices for our nation. When their duties call them far away from home, the Division stands ready to protect their rights, specifically with regard to employment, voting, and fair lending. CRT will build on its successes as it continues these efforts on behalf of the nation's military service men and women, and veterans. Safeguard Voting Rights for All Americans. CRT will continue to protect voting rights through efforts to detect and investigate voting practices that violate federal laws and through affirmative litigation to enjoin such practices.

• Combat Sexual Harassment in Housing. CRT will continue pursuing sexual harassment in housing through its Sexual Harassment Initiative introduced in FY 2018. The Division has recently filed and settled a number of path-breaking cases providing significant compensation and relief to thousands of victims of discrimination.

• Combat Discrimination Motivated by Race and National Origin. In FY 2020, the Division will dedicate additional resources to civil investigations and suits involving allegations that individuals suffered discrimination because of their race or national origin.

500 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25.

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The Division enforces several statutes that it can use to address such discrimination in employment, housing, education, and other areas.⁵⁰¹

Each of the above “key enforcement areas,” except the last, was included in the FY 2019 Strategy,⁵⁰² in which no program changes were requested. In the interim, as DOJ has decided to reorganize the Community Relations Services by transferring its most important outreach duties, CRT’s FY 2020 budget request includes “absorbing the functions of the Community Relations Service (CRS) with 15 positions, including 2 attorneys.”⁵⁰³ Under its strategic plan for FY 2018-2022, CRT’s only reported performance measure is “successful disposition of 90 percent of Immigration and Nationality Act (INA) Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.”⁵⁰⁴ This measure is a part of the DOJ’s broader goal to “[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens and serves the national interest.”⁵⁰⁵ As described above, in 2019, DOJ added CRT-specific performance measures for future years, tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁵⁰⁶ Beyond filing “a record 161 cases” in 2017, CRT summarized its criminal enforcement efforts over FY 2016 and FY 2017 in its FY 2019 Performance Budget report as follows:

In FY 2016 and FY 2017, the Division exceeded its performance goals. During those two years, the Division, in conjunction with United States Attorneys’ Offices: charged 681 defendants with criminal civil rights violations; filed 322 criminal civil rights cases, the highest number compared with any other two-year period since counting began in 1993; filed 200 human trafficking cases, the highest number in any two-year period since counting began in 1993.⁵⁰⁷

These statistics reflect a broad range of enforcement of criminal civil rights protections. CRT’s stated goal in connection with hate crimes in its FY 19 Performance Budget report was to ensure that “individuals and communities are protected from crimes that are motivated by racial, religious or other bias.”⁵⁰⁸ As of February 2018, CRT had charged 16 defendants and obtained 15 hate crimes convictions since 2016.⁵⁰⁹

⁵⁰¹ U.S. Dep’t of Justice, Civil Rights Division, FY 2020 Budget Request at a Glance, <https://www.justice.gov/jmd/page/file/1142376/download>. [hereinafter DOJ CRT, FY 2020 Budget Request at a Glance]. ⁵⁰² DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462. ⁵⁰³ DOJ CRT, FY 2020 Budget Request at a Glance, supra note 501. (The budget also requests a 3.2% funding increase and 15 new positions.) ⁵⁰⁴ U.S. Dep’t of Justice, Department of Justice Strategic Plan for 2018 – 2022, pp. 28-29, <https://www.justice.gov/jmd/page/file/1071066/download>. ⁵⁰⁵ *Ibid.*, 14. ⁵⁰⁶ *Ibid.*, 51. ⁵⁰⁷ DOJ CRT, FY 2019 Budget Request at a Glance, supra note 462, at 18. ⁵⁰⁸ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32. ⁵⁰⁹ *Ibid.*, at 5 (This statistic was reported in 2019 Performance Budget report released in March 2018).

<https://www.justice.gov/jmd/page/file/1142376/download>
<https://www.justice.gov/jmd/page/file/1071066/download>

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According to DOJ’s FY 2016 Annual Report to Congress, in 2016, CRT announced a pilot Servicemembers and Veterans Initiative to support its enforcement efforts and related military member protections.⁵¹⁰ It provided funding through the end of 2018 to increase the number of attorneys and support staff tasked with enforcing the SCRA and to appoint Initiative Liaisons to work with local military members.⁵¹¹ In each of its last three performance reports, CRT has acknowledged the difficulty and intensive nature of investigating and prosecuting human trafficking, which it planned to counter by dedicating “time, resources, and specialized skill in jurisdictions across the country.”⁵¹² In 2012, DOJ was one of three co-chair agencies releasing a Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013–2017, which set forth “a 5-year path for further strengthening coordination, collaboration, and capacity across governmental and nongovernmental entities dedicated to providing support to the victims of human trafficking.”⁵¹³ CRT’s FY 2019 Performance Budget states that its focus on combatting human trafficking has led to an increase in charges and convictions. In conjunction with U.S. Attorneys’ Offices, CRT filed 200 human trafficking cases in 2016–2017, the highest two-year total since counting began in 1993 and close to the 5-year total of 235 from 2008–2012.⁵¹⁴ According to CRT’s 2019 Performance Budget, CRT also surpassed its projection of human trafficking complaints reviewed, by over 60 percent.⁵¹⁵ In its FY 2018 Performance Budget report, one of CRT’s new stated “Strategic Focus Areas” was a general goal to “promote equal educational opportunities.”⁵¹⁶ CRT was more specific in its FY 2019 Performance Budget report, and stated three key areas of focus for EOS moving forward: (1) enforcing *Brown v. Board of Education* through school desegregation cases; (2) combatting religious discrimination; (3) confronting harassment and hate incidents in school settings.⁵¹⁷ In FY 2014 and 2015, EOS resolved 19 cases, opened 26 investigations of alleged discrimination, negotiated eight settlements for English Learner (ELL) student protections and continued to enforce about 180 desegregation cases.⁵¹⁸ In FY 2015 and 2016 EOS resolved 25 cases, opened 28 investigations of alleged discrimination, negotiated 9 agreements related to ELL students, and

⁵¹⁰ U.S. Dep’t of Justice, Civil Rights Division, Attorney General’s 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, <https://www.justice.gov/crt/page/file/996791/download>, at 7. ⁵¹¹ *Ibid.* ⁵¹² DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35; DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25; DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 32. ⁵¹³ Coordination, Collaboration, Capacity: Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013–2017, <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>. ⁵¹⁴ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 4–5, 18. ⁵¹⁵ *Ibid.*, 14. ⁵¹⁶ DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25–26. ⁵¹⁷ *Ibid.* ⁵¹⁸ DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 29.

<https://www.justice.gov/crt/page/file/996791/download>
<https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>

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continuously monitored 163 school desegregation cases.⁵¹⁹ Similar information was not available in CRT’s 2019 Performance Budget, although it noted EOS continued to monitor and enforce the approximately 170 longstanding desegregation cases.⁵²⁰ In CRT’s recent Performance Budget reports, it emphasized an effort to focus on the enforcement of the USERRA to bring about the re-employment of veterans and promotional opportunities.⁵²¹ Notably, there is no other mention of the Employment Litigation Section in its focus areas or larger Division strategic goals.⁵²² In its FY 2019 Performance Budget Request, CRT stated its intention to increase resources for Crisis Intervention Team (CIT) officers that are trained to respond to calls of people with substance abuse or mental health issues who are in crisis.⁵²³ CRT reported that because they are often not sufficiently trained, police officers responding to calls involving individuals in crisis can often lead to injuries to police or police using excessive force.⁵²⁴ In FY 2017, CRT enforced agreements in seven jurisdictions to increase CIT training.⁵²⁵ One of CRT’s stated focus areas for 2017 in its Performance Budget Report was to “Promote Fair Lending and Fair Housing,” in part because housing access influences an individual’s and family’s access to education, transportation and job opportunities and its close correlation with credit accessibility.⁵²⁶ Promoting fair housing was also listed as a goal in the FY 2018 Performance Budget Report’s focus areas, though not fair lending.⁵²⁷ Its FY 2019 performance budget clarified that to “Combat Sexual Harassment in Housing” was a goal that CRT is aggressively pursuing.⁵²⁸ The data below shows that CRT’s Housing Section has been productive and effective in this area.⁵²⁹ CRT’s focus on protecting the rights of children and adults in institutions, as stated in its FY 2019 Performance Budget Report involves two main goals: (1) redressing sexual abuse of those in institutions by using the Prison Rape Elimination Act as a framework for CRIPA investigations and settlements; and (2) protecting the rights of children with disabilities by ensuring they receive adequate services in the most integrated setting that is appropriate.⁵³⁰ This is a shift away from its 2017 report where it emphasized the Special Litigation Section’s increased efforts “to ensure effective, constitutional, and accountable policing.”⁵³¹

⁵¹⁹ DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 20. ⁵²⁰ See DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 24. ⁵²¹ *Ibid.*, 22. ⁵²² *Ibid.* ⁵²³ *Ibid.*, 30. ⁵²⁴ *Ibid.* ⁵²⁵ *Ibid.* ⁵²⁶ DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 35. ⁵²⁷ DOJ CRT, FY 2018 Performance Budget Justification, supra note 495, at 25. ⁵²⁸ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495; see also Cases Involving Sexual Harassment in Housing Resolved by CRT’s Housing and Civil Enforcement Section (FY 2016–2018), *infra* notes 679–91. ⁵²⁹ See *infra* notes 679–91. ⁵³⁰ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 20. ⁵³¹ DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 28.

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Complaint Processing, Agency-Initiated Charges, and Litigation First, this section describes the results of the Commission’s research about CRT’s overall complaint, investigation, and litigation processes. Second, this section analyzes data about CRT’s litigation. CRT’s main enforcement tool is litigation;⁵³² therefore with regard to CRT, the Commission mainly evaluates the 388,553 cases acted upon and resolved by certain sections of CRT during Fiscal Years 2016–2018,⁵³⁴ as well as the cases litigated by the Appellate and Criminal Sections. It then analyzes data and trends showing the scope and impacts of this main tool among DOJ’s civil rights enforcement efforts. With the exception of ADA complaints, CRT is not under any obligation to investigate each complaint it receives.⁵³⁵ There is little available information on CRT’s specific complaint and investigation process, and in response to the Commission’s interrogatories, Acting Attorney Gore referred the Commission to its website.⁵³⁶ The website states that:

There are many ways that the Division learns about potential civil rights violations. Each year, it receives thousands of letters, emails and phone calls from individuals, public officials and organizations about potential civil rights violations. In addition, other government agencies such as the Federal Bureau of Investigation (FBI), Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), Department of Housing and Urban Development (HUD) and the Navajo Nation Human Rights Commission send the Division information about potential civil rights violations. The Division also uses publicly available information from newspapers, television and other media to learn about potential civil rights violations.⁵³⁷

⁵³² 28 C.F.R. § 0.50(a). ⁵³³ One of the cases is counted as half of a case resolution, because a January 13, 2017 agreement in principle to enter into a consent decree with Chicago regarding police practices, was later opposed on October 12, 2018 in DOJ’s Statement of Interest Opposing Proposed Consent Decree. See Agreement in Principle Between the United States Department of Justice and the City of Chicago, Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/opa/file/925901/download>; and see United States Statement of Interest Opposing Proposed Consent Decree, State of Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. Oct. 12, 2018). ⁵³⁴ See Appendix A, Chart of CRT Cases Resolved, FY 2016–18 (analyzing enforcement actions from CRT’s Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections). ⁵³⁵ See 28 C.F.R. 35.171 (discussion of DOJ obligations regarding ADA complaints received). ⁵³⁶ Letter from Acting Attorney General John M. Gore (Mar. 26, 2018) (responding to the Commission’s February 9 Interrogatories and Document Requests)[hereinafter CRT Response to USCCR Interrogatories]. ⁵³⁷ U.S. Dep’t. of Justice, Civil Rights Division, “How Does the Division Find Out About Possible Civil Rights Violations,” <https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations> (accessed Mar. 6, 2019).

<https://www.justice.gov/opa/file/925901/download>
<https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations>

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The Justice Manual states that:

Information that may indicate an investigation under a federal civil rights statute is appropriate may come to the Civil Rights Division or a United States Attorney’s Office through a variety of channels, including referrals or complaints from other federal agencies, victims or community organizations, private attorneys, media coverage, and other sources. Upon receiving such information, the Civil Rights Division or the United States Attorney’s Office may engage in a pre-investigation review to determine whether an investigation is appropriate. Pre-investigation review includes taking actions such as speaking to and reviewing materials received from a complainant and reviewing publicly available information.⁵³⁸

The U.S. Department of Justice’s 93 U.S. Attorneys⁵³⁹ may also enforce civil rights protections, but the Justice Manual (applicable to all DOJ attorneys including those in U.S. Attorney’s Offices) clarifies that major decisions, such as whether to bring a complaint or settle a civil rights case, must be authorized by the Assistant Attorney General.⁵⁴⁰ In this report, the Commission reviews the work of the CRT and not that of U.S. Attorneys. Sometimes the agency’s litigation is systemic. Similar to the Fair Housing Act, under the Equal Credit Opportunity Act (ECOA), CRT can file a lawsuit against a lender that has displayed a “pattern or practice” of discrimination.⁵⁴¹ CRT may also bring pattern or practice cases under the Violent Crime and Law Enforcement Act of 1994, to address systemic problems that have led to patterns or practices of civil rights violations by law enforcement agencies or in the incarceration of juveniles or administration of juvenile justice or the Civil Rights of Institutionalized Persons Act, to address allegations that state or local governments subject people confined in residential institutions to unlawful conditions pursuant to a “pattern or practice.”⁵⁴² In January 2017, CRT reported that it prioritizes pattern or practice cases involving police based upon whether the issue involves core issues common to many similar law enforcement agencies (unlawful use of force,

538 DOJ Justice Manual, supra note 370, at § 8-2.110 (CR AAG reserves right to determine when a civil rights investigation should be opened), § 8-2.120 (“In most instances, the Assistant Attorney General for the Civil Rights Division shall authorize the filing of a complaint in civil rights cases, and in most cases the complaint must be signed by the Assistant Attorney General for the Civil Rights Division. Some civil rights statutes also require the complaint to be signed by the Attorney General.”), § 8 – 2.130 (“As described in greater detail in other sections of this Title of the United States Attorney’s Manual, the Civil Rights Division will work cooperatively with United States Attorney’s Offices to determine the most appropriate assignment of responsibilities for the preparation of pleadings and other legal documents in connection with the litigation and trial of civil rights cases. Unless specifically delegated, ultimate responsibility for the conduct and resolution of civil rights cases remains with the Assistant Attorney General for the Civil Rights Division.”). 539 U.S. Attorneys are appointed by the president to “ensure that the laws are faithfully executed” in each federal district. See U.S. Dep’t. of Justice, “U.S. Attorneys,” <https://www.justice.gov/usao/about-offices-united-states-attorneys> (accessed Mar. 13, 2019). “The United States Attorney is the chief federal law enforcement officers in their districts, and is also involved in civil litigation where the United States is a party.” *Ibid.* 540 DOJ Justice Manual, supra note 370, at § 8-2.100. 541 U.S. Dep’t of Justice, Civil Rights Division, “The Equal Credit Opportunity Act,” <https://www.justice.gov/crt/equal-credit-opportunity-act-3> (accessed Nov. 8, 2017). 542 42 U.S.C. § 14141.

<https://www.justice.gov/usao/about-offices-united-states-attorneys>
<https://www.justice.gov/usao/about-offices-united-states-attorneys>
<https://www.justice.gov/crt/equal-credit-opportunity-act-3>

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racial profiling, etc.), whether “allegations represent an emerging or developing issue,” and whether or not other federal intervention is available.⁵⁴³ “A high-profile incident—such as a shooting death, a use of excessive force, or a false arrest—standing alone never warrants opening a pattern-or-practice investigation . . . the focus of a pattern or practice case is on systemic reform of widespread police practices and institutional change.”⁵⁴⁴ CRT also told the Commission that these cases involve “institutional reform” and therefore take much longer to develop, prosecute, and monitor for subsequent compliance than some other cases.⁵⁴⁵ Even among cases that are not “pattern or practice” cases, due to the nature of the statutes it enforces against state or local governments or private entities that allegedly discriminate against protected classes, CRT’s cases are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual. These include all hate crimes cases, which are always prosecuted against an individual.⁵⁴⁶ But typically, CRT’s litigation involved systemic remedies requiring state or local jurisdictions to make changes in their policies and procedures.⁵⁴⁷ Even cases of discrimination brought against private businesses have required systemic remedies.⁵⁴⁸ The relief CRT procures through its cases may be ordered by a judge through a court opinion or entry of a consent decree, or it may be agreed upon by the parties in an out-of-court settlement, or in some cases, through a letter agreement—and the efficacy of each of these tools varies in levels of enforceability and impact in setting precedent and sending a message to potential violators. Judicial opinions are more effective in developing civil rights law as they set binding precedent on subsequent decisions in the same jurisdiction (and offer persuasive authority to similar cases in other jurisdictions). Out-of-court settlements are at the other end of the spectrum because they are not always enforceable in court.⁵⁴⁹ Consent decrees are in the middle as they provide enforceability because they are federal court orders.⁵⁵⁰ The criteria for and value of consent decrees as a form of civil rights enforcement may also depend on the particular federal civil rights statute’s requirements and the circumstances of the case at

543 DOJ CRT, CRT’s Pattern and Practice Police Reform Work, supra note 476, at 6-7. 544 *Ibid.*, 8. 545 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 546 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Hate Crimes Cases. 547 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section and Voting Section Cases. 548 See, e.g., Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights Cases. 549 U.S. Dep’t of Justice, Office of the Atty General, Memorandum from Attorney General Sessions to Heads of Civil Litigating Components and U.S. Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), n. 2, <https://www.justice.gov/opa/press-release/file/1109621/download> [hereinafter Sessions Memo] (defining settlement as “an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract”). 550 See, e.g., USCCR, Minority Voting, supra note 17, at 239, 258-59, and 268.

<https://www.justice.gov/opa/press-release/file/1109621/download>

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hand. For example, under current interpretation from the Attorney General,⁵⁵¹ federal election observers may only be ordered by a court and “as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment,” and not if the violations are few in number, have been eliminated, or are not likely to be repeated. ⁵⁵² Therefore, this tool is only available if CRT is able to demonstrate serious VRA violations and procure a consent decree or judicial decision, rather than an out-of-court settlement.⁵⁵³ If there are conflicts with state or local law (such as zoning laws or practices that may violate the Fair Housing Act⁵⁵⁴ or the RLUIPA, which “protects religious institutions from unduly burdensome or discriminatory land use regulations”⁵⁵⁵), a court order might be needed for the state or local jurisdiction to be fully empowered to follow federal civil rights law, without violating state law.⁵⁵⁶ During a recent briefing on Women in Prison: Seeking Justice Behind Bars, the Commission received testimony from a state correction official that even without a conflict of law, consent decrees may be needed to give local officials the court-ordered authority to procure the resources and support of the state to reform their institutions to come into compliance with federal civil rights law.⁵⁵⁷ There are other

551 The language of the Voting Rights Act authorizes federal observers to “(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” 52 U.S.C. § 10305(d). For further analysis of the statute and DOJ’s interpretation of their authority under it, see USCCR, Minority Voting, supra note 17, at 269. 552 52 U.S.C. § 12302(a) (“Federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendment: “(1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.”). For further discussion of DOJ’s ability to send federal observers, see 553 *Id.* (observers may only be ordered by federal judges and based on the above criteria); and see supra note 549 citing Sessions’ Memo at 2 (defining settlement as requiring a lawsuit to enforce it). 554 See, e.g., U.S. Dept. of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, Nov. 16, 2016, <https://www.justice.gov/opa/file/912366/download> [hereinafter DOJ, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act] (including various examples of local land use and zoning laws that may conflict with the Fair Housing Act). 555 U.S. Dep’t of Justice, Civil Rights Division, Federal Religious Land Use Protections, <https://www.justice.gov/crt/page/file/1070736/download> [hereinafter DOJ, Federal Land Use Protections]. 556 See, e.g., Memorandum Order Denying Motion to Dismiss, United States v. Bensalem Township, PA, No. 16- 3938 (E.D.P.A. Nov. 14, 2016), <https://www.justice.gov/crt/case-document/file/912191/download> (preceding a settlement requiring that The Township “amend its Zoning Ordinance in a way that, to the satisfaction of the United States, will assure that the Zoning Ordinance is in compliance” with the RLUIPA, and if the Township wishes, “taking into consideration the decision of the United States District Court for the Eastern District of Pennsylvania in First Korean Church of New York, Inc. v. Cheltenham Township, No. 05-6389, 2012 WL 645986 (Feb. 29, 2012), *aff’d* 2013 WL 362619 (3d Cir. Jan. 24, 2013).” Settlement Agreement, ¶ 8.5 at 557 At the Commission’s February 2019 briefing on the status of women in prison, Wendy Williams, Alabama Department of Correction’s Deputy Commissioner of Women’s Services, testified that without the consent decree, Tutwiler would not have been able to secure funds from the state in order to make the systemic changes needed to come into compliance with the Prison Rape Elimination Act. Wendy Williams, Alabama Department of Correction’s Deputy Commissioner of Women’s Services, testimony, Women in Prison: Seeking Justice Behind Bars Briefing Before the U.S. Comm’n on Civil Rights, Washington, D.C., Feb. 22, 2019, transcript, pp. 240-41.

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factors, such as the need to ensure both immediate and long-term enforceability in federal court, that argue for consent decrees.⁵⁵⁸ These factors all depend on the circumstances of the case, and in other cases, settlements may be more effective in terms of procuring a quicker and less resource- intensive remedy, if the jurisdiction is willing to come into compliance.⁵⁵⁹ In 2002, the Commission recognized the value of settlements, but also warned against their over-use as “some concerns about the implementation of these methods have prompted a series of recommendations.”⁵⁶⁰ Concerns included addressing the root causes of discrimination found in policies and practices with disparate impact, and recommendations included that settlements “should only be seen and used as one of the strategies” to eliminate unfair practices.⁵⁶¹ With regard to litigation, in 2002, while the Commission recognized the resource demands involved, the Commission also recognized litigation’s importance in developing case law, among other factors: “[f]hus, many of the Commission’s recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped.”⁵⁶² The importance of litigation to developing case law is in part due to the nature of the U.S. legal system in which the law is developed through precedents set by judges; impact in efficacy can be magnified if CRT resolves a case through a judicial decision or opinion. Moreover, these precedents have further impact if, through the work of the Appellate Section, they are upheld by the judiciary at the federal Courts of Appeals and Supreme Court levels.⁵⁶³ The data below shows that CRT resolves its cases

558 See, e.g., American Univ. Washington College of Law, The Role of the Federal Government in Protecting Your Civil Rights, Transcript of Panel Hearing Conducted on Oct. 26, 2018 (submitted as public comment to the Commission), Testimony of Chiraag Bains (Legal Director, Demos, and former senior DOJ CRT attorney) (critiquing the recent decrease in enforcement actions against police departments and the attempts to pull out of consent decrees in Baltimore and Chicago, and noting that during the Obama Administration: “There were 19 agreements reached and 15 of those were consent decrees, court-ordered agreements with a monitor and the power of sanctions to be brought if the defendant didn’t complete the requirements of the consent decree.”) at 57, 60; see also infra note 642 (testimony of Vanita Gupta). 559 See, e.g., USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 560 *Ibid.*, 38. 561 *Ibid.*, 38, n. 268; see also infra notes 655-63 (discussing mediation under the ADA). 562 *Ibid.*, 38. 563 See USCCR, Minority Voting, supra note 17, at 255 n. 1425.

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through judicial decisions much less often than through other methods, but some cases do go to trial and CRT has had a highly effective record of winning nearly all of its cases both at the trial court level and after any appeals.⁵⁶⁴ One important feature of CRT consent decrees and federal judicial decisions is that they typically require ongoing monitoring by the federal government or a court-ordered monitor to ensure that the state or local jurisdiction come into compliance.⁵⁶⁵ This is also a feature of some out-of-court settlement agreements, but as former Attorney General Sessions has made clear, settlements require filing a lawsuit in order to be enforced.⁵⁶⁶ CRT told the Commission that it also expends resources monitoring compliance after cases are resolved by settlement, consent decree or judicial decision, emphasizing that:

The compliance side of CRT’s work is substantial in institutional reform cases involving law enforcement agencies, correctional facilities, and governmental agencies that serve people with disabilities. Cases involving a pattern or practice of law enforcement misconduct, for example, come to an end only after the law enforcement agency has fully complied with the consent decree or settlement, which typically requires the agency to revamp its policies, training, supervision, and accountability systems, and demonstrate real improvement in outcomes like uses or force and stops, searches, and arrests. These reforms take years. By excluding this work and treating institutional reform settlements the same as settlements with individual actors, this metric [of cases resolution] understates the

Hon. John M. Walker, Jr., Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, “The Role of Precedent in the United States,” Stanford Law School China Guiding Cases Project, Commentary, Nov. 15, 2016. (“A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases. The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into “circuits” with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. A court may consider decisions by other, non-superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts.”).

564 See, e.g., supra notes 492-93 (reporting that CRT has had over 85% rate of “successful” cases). 565 See, e.g., USCCR, Police Use of Force, supra note 345, at 4 (recommending use of consent decrees) and 86-96 (researching efficacy of consent decrees in CRT law enforcement cases). 566 Sessions Memo, supra note 549, at n. 2 (defining settlement as “an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract.”).

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investment that CRT has made in enforcing civil rights laws and the work of the Special Litigation Section in particular.⁵⁶⁷

One major shift during the period of this report was a November 2018 DOJ-wide memorandum that creates a new presumption against using consent decrees and creates new rules for review of proposed consent decrees and out-of-court settlements.⁵⁶⁸ This new memo originated with then Attorney General Sessions’ concerns about CRT consent decrees in cases involving patterns or practices of civil rights violations by state or local law enforcement.⁵⁶⁹ Former Attorney General Sessions had previously called for a department-wide review of all consent decrees already in place to ensure that they follow the administration’s principles regarding federalism, and to ensure that their terms are reasonable.⁵⁷⁰ At that time, the Commission issued a statement urging DOJ to continue to use all mechanisms, including consent decrees, to ensure constitutional policing.⁵⁷¹ Attorney General Sessions’ subsequent November 2018 memo (which sets forth department policy binding on CRT)⁵⁷² did not rule out all consent decrees, but it did create a new requirement that all CRT lawyers as well as all federal attorneys in U.S. Attorney’s Offices must memorialize the reasons that a consent decree is needed and procure approval of the Assistant Attorney General based on a showing of factors regarding federalism concerns.⁵⁷³ This requirement strongly signaled that DOJ now disfavors use of consent decrees. The Commission’s research shows that of the 388.5 cases CRT resolved during FY 2016-2018, 26.8 percent (104) of the cases CRT brought were resolved by consent decrees,⁵⁷⁴ indicating that the impact of the memo is substantial. Moreover, since the November 8, 2018 Sessions memo, CRT has entered into only a few consent

567 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 568 Jessica Huseman & Annie Waldman, “Trump

ProPublica, Jun. 15, 2017, <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>. 569 Sessions Memo, supra note 549. 570 Ibid.; see U.S. Dep't of Justice, Memorandum for Heads of Department Components and United States Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>. 571 U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments To Ensure Constitutional Policing (Apr. 24, 2017), https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf. 572 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file) ("The Sessions memo represents Department policy binding on CRT[.]") 573 Sessions Memo, supra note 549, at 1-2. 574 See infra notes 631-4.

<https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>
<https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>
<https://www.justice.gov/opa/press-release/file/1109681/download>
https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf

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decrees (as of June 17, 2019).575 CRT told the Commission that it has entered into one new consent decree, conducted a "final filing" of one consent decree, and proposed to the federal court another consent decree, since the issuance of the memo.576 Counting each of these consent decrees, even one that is only a final entry of a prior consent decree approved by a federal court, and one that is currently only proposed to a federal court,577 at the current rate, CRT is on track to have resolved 5-6 cases by consent decree in 12 months since the Sessions memo. In comparison, data from the last three fiscal years shows that CRT resolved an average of 34.6 cases/year by consent decree.578 Moreover, between FY 2016 and FY 2018, there have been significantly fewer consent decrees procured per year, and particularly through the work of CRT in certain sections.579 Sessions' memo states that it:

requires that the Department provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; requires special caution before using a consent decree to resolve disputes with state or local governmental entities; provides guidance on the limited circumstances in which such a consent decree may be appropriate; limits the terms for consent decrees and settlement agreements with state and local governmental entities, including terms requiring the use of monitors; and amends the process for the approval of these mechanisms in cases in which they are permissible.580

The Sessions memo also issued rules about when CRT can enter into out-of-court settlements. According to that memo, in contrast to a consent decree, "[t]he term 'settlement agreement' means an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract."581 The memo clarified that CRT leadership must approve every settlement of every federal civil rights case that would:

(1) place the Department or another federal agency in a long-term position of monitoring compliance by a state or local governmental entity; (2) create long-term

575 In June 2019, CRT stated that it entered into Consent Order, *United States v. 3rd Generation, Inc. & California Auto Finance*, No. 8:18-cv-00523 (C.D. Cal. Mar. 12, 2019), <https://www.justice.gov/crt/case-document/file/1142566/download>, which the Commission verified. CRT also told the Commission that the Voting Section has proposed a consent decree to the court in one of its cases, but that consent decree is not yet accepted by the court. See Complaint, *United States v. Eastpointe*, No. 2:17-cv-10079 (E.D. Mich. Jan. 10, 2017), <https://www.justice.gov/crt/case-document/file/1149711/download>; and that its prior consent decree with the City of Jacksonville has been recently filed in final form with the court. U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 576 Ibid. 577 Ibid. 578 104/3 = 34.6. 579 See infra notes 635-7 and Figure 2.8 (declining use of consent decrees in Housing Section), and notes 637-8 and Figure 2.9 (declining use in the Special Litigation Section). 580 Sessions Memo, supra note 549, at 1 and n. 1 (noting that: "As used in this memorandum, the term 'state and local governmental entities' also includes territorial and tribal entities, as federal consent decrees and settlements with such entities raise many of the same concerns regarding democratic autonomy and accountability."). 581 Ibid., n. 2.

<https://www.justice.gov/crt/case-document/file/1142566/download>
<https://www.justice.gov/crt/case-document/file/1142566/download>
<https://www.justice.gov/crt/case-document/file/1149711/download>

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structural or programmatic obligations, or long-term, indeterminate financial obligations, for a state or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. The Office of the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified and consulted before any such agreement is finalized.582

The impact of this new policy is substantial, as 266.5 (68.6%) of the 388.5 CRT cases resolved during FY 2016-2018 were resolved by out-of-court settlements.583 Added to its impact on consent decrees, this data shows that the memo's impact is relevant to over 95 percent of all CRT cases.584 Federal law also authorizes DOJ to file Statements of Interest or amicus briefs in federal court cases in which the U.S. has an interest.585 Statements of Interest may be filed by the Appellate Section, by U.S. Attorneys, or by the substantive law sections of CRT, with the approval of the Appellate Section.586 CRT told the Commission that Statements of Interest are usually filed at the federal district court level by the trial litigation sections, and that amicus briefs are usually filed in courts of appeals or the Supreme Court by the Appellate Section, although the Appellate Section may sometimes also file or assist with Statements of Interest in district courts.587 Through these briefs, CRT may choose to act in cases brought by other parties that "involve developing or problematic areas of civil rights law or that may significantly affect the Division's enforcement responsibilities."588 These cases have also been identified through the Appellate Section's monitoring of civil rights litigation throughout the nation.589 CRT has made wide use of Statements of Interest or amicus briefs as a method to explain the government's position on civil rights issues and to help courts and the American people understand rights and obligations under civil rights laws.590 The Appellate Section may also act through an intervention that, if approved by the court, leads to the DOJ becoming a third party participating in another federal civil rights case not brought by DOJ, but of interest to CRT.591 Several civil rights statutes specifically allow the CRT to intervene in a private case.592 Federal Rules of Civil Procedure also provide for intervention by government officers or agencies that administer or enforce the statutes and regulations at issue in

582 Ibid., 6. 583 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Grand Totals. 584 68.6% (settlements) + 26.8% (consent decrees) = 95.4%. 585 28 U.S.C. § 517; see also Fed. R. App. Proc. § 29 (a)(2) ("The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing[.]"). 586 DOJ Justice Manual, supra note 370, at § 8 - 2.170. 587 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 588 DOJ CRT, "Appellate Section," supra note 385. 589 Ibid. 590 See Victor Zapana, Note, The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.-C.L. Rev. 227, 228, 237 (2017). 591 See, e.g., U.S. Dep't of Justice, Civil Rights Division, Appellate Section, "Third Party Intervention in Civil Rights Cases," <https://www.justice.gov/crt/appellate-briefs-and-opinions-5> (accessed Mar. 19, 2019). 592 28 U.S.C. §§ 517, 2403(a).

<https://www.justice.gov/crt/appellate-briefs-and-opinions-5>

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a private case.593 In an intervention, DOJ may become part of the ongoing litigation.594 However, Statements of Interest or amicus briefs are more common.595 CRT told the Commission that "the Appellate Section usually only intervenes on appeal in the first instance (and then files an "intervenor brief") when the constitutionality of a statute is being challenged, consistent with the Department's authority under 28 U.S.C. § 2403(a)."596 CRT may also defend federal agencies in constitutional challenges to federal civil rights statutes and agency programs. For example, CRT reported that during the fiscal years studied, "the Appellate and Employment Litigation Sections have done work to defend federal agency affirmative action programs."597 Commission staff research confirmed that when the U.S. was sued by a contractor challenging the U.S. Department of Transportation's affirmative action procedures, the Appellate Section defended the policies during both the Obama and Trump Administrations.598

593 F.C.R.P. § 24(b)(2)(a) and (b). 594 See F.C.R.P. Title IV (Parties), § 24(a)(Intervention of Right if statute so provides) and § 24(b)(2)(B)(Permissive Intervention by a Government Officer or Agency). 595 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Section. 596 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report, citing authority of the United States to intervene in cases involving constitutional questions, under 28 U.S.C. § 2403(a)) (on file). 597 Ibid.; see also DOJ Justice Manual, supra note 370, at § 8 - 2.214 ("The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration's 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs."). 598 See Brief for the United States as Appellee, *Midwest Fence Corp. v. United States Department of Transportation*, No. 15-1827, 5, 14-16 (8th Cir. Oct. 26, 2015) (CRT Obama Administration brief arguing that DOT's regulatory requirements with an aspirational goal at least 10% of federal highway funds be awarded to small businesses "owned and controlled by socially and economically disadvantaged individuals" and related regulations are narrowly tailored to meet a compelling government interest and therefore constitutional); and see Brief for the Federal Respondents (Brief in Opposition to Petition for Certiorari), *Midwest Fence Corp. v. United States Department of Transportation*, No. 16-975, 12 (S.Ct. May 23, 2017) (CRT Trump Administration brief arguing that, "The decision below rejecting petitioner's facial and as-applied equal-protection challenges to the federal DBE regulations does not warrant further review. In this Court, petitioner does not challenge the court of appeals' holding that the regulations on their face are narrowly tailored to a compelling governmental interest. That holding accords with decisions of every other court of appeals to address the issue."). The Supreme Court declined to review the case on September 26, 2017 (reported at 137 S. Ct. 2292).

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CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections. All available information indicates that CRT sections have no known specific intake, investigatory or decision-making procedures about whether and how to prosecute.599 Moreover, as Leon Rodriguez has discussed, a federal court once had to compel CRT to enforce *Brown v. Board of Education's* nationwide mandate to desegregate schools, resulting in an order requiring CRT to adjudicate every related complaint in a timely fashion.600 He also commented that President Nixon forced out former CRT Director Leon Panetta after Panetta took a stance in favor of enforcing the law requiring schools to desegregate, but that it is important to enforce civil rights law, and added that:

So even in times when you think you are behind the eight ball, you are in fact very likely creating conditions that down the line will actually strengthen the ability of a law enforcement agency to do its job.601

A February 2018 report by DOJ's Office of Inspector General (OIG) concluded that CRT's Special Litigation Section could "enhance its case selection procedures to better memorialize decisions to move or not with investigations" and "refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns."602 The OIG tied SPL's case selection process with overall efficacy issues, and stated that "[c]onsidering CRT's mission, we believe it is important that it refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns" in its decisions about investigations.603 "Although CRT has increased the transparency of how it selects jurisdictions to investigate for police misconduct practices, the OIG found that SPL's case selection systems and procedures could be enhanced."604 The OIG found that CRT leadership did not always document decisions to open pattern or practice investigations and did not maintain draft memoranda prepared by CRT attorneys in a central depository.605 At the time of the audit, CRT's Police Practice Group (PPG) had not established written policies to guide its attorneys, who did not use CRT tracking systems, on how to initially assess complaints and referrals in the process of beginning investigations of potential patterns or practices of police misconduct.606 CRT utilized factors requiring objective information to select cases, but its attorneys subjectively weighed the importance of each factor in deciding the merits

599 U.S. Dep't of Justice, Response to USCCR Interrogatories, at 3-4 (referring the Commission to the CRT website). 600 Leon Rodriguez, Hearing before American University, Washington College of Law, pp. 67-68. 601 Ibid., 68. 602 DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at ii. ("Moreover, the CRT did not maintain these draft memoranda in a central depository. An archive of deferred or declined draft justification memoranda, along with the general reasons why the CRT leadership deferred or declined to open an investigation, would improve the CRT's institutional memory and help its attorneys identify potentially at-risk agencies for future consideration.") 603 Ibid. 604 Ibid., 5. 605 Ibid., 10. 606 Ibid., 10.

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of a case.607 Although CRT-approved justification memoranda (J-memos) on the matter consistently applied the facts of allegations to statutory requirements, they did not clearly delineate or analyze other decision factors consistently.608 Moreover, CRT SPL did not track or maintain J- memos that were not approved by CRT leadership.609 OIG recommended that CRT SPL establish a depository of J-memos regarding police for use on subsequent matters and adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made.610 OIG also found that although some improvements had been made in by the Special Litigation Section, CRT should improve its case selection procedures to better memorialize decisions to move forward or not with investigations.611 CRT noted to the Commission that the audit only reviewed how SPL initiated investigations of law enforcement agencies under 34 U.S.C. § 12601, and not how SPL or CRT initiated any other kind of investigation;612 however, based on the dearth of information about the processes of other sections, the Commission cannot determine whether their processes are effective. During the audit, the Special Litigation Section reported in early January, 2017 that it would standardize and document (or log) referrals and complaints about alleged police misconduct, and process them through a uniform system that could result in a J-memo recommending investigation and potential enforcement action.613 In June 2019, CRT reported to the Commission that since the OIG report, "SPL has now implemented all of OIG's recommendations, including:

- Establishing priorities for enforcing the law enforcement misconduct provisions of 34 U.S.C. § 12601, and reviewing those priorities on an annual basis;
- Establishing guidelines for evaluating whether to initiate a preliminary inquiry; • Establishing requirements for law enforcement misconduct investigation justification

memoranda ("J memos");

607 Ibid., 13. 608 Ibid. 609 Ibid., 14. 610 Ibid., 15. 611 Ibid., ii. 612 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file). 613 DOJ, Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 9-10:

CRT developed separate processes and procedures to receive, catalog, and assess complaints and referrals of police misconduct that are largely dependent on the source and fall into one of two categories, controlled or non-controlled. CRT specially designates complaints or investigation requests from elected federal, state, and local officials, as well as any communication addressed to the Attorney General, as controlled correspondence. CRT tracks such controlled correspondence in the Intranet Quorum system, maintained by the Justice Management Division's Departmental Executive Secretariat. Correspondence from the public addressed directly to the CRT or its personnel, as well as referrals from local advocacy groups, federal law enforcement agencies, Assistant U.S. Attorneys, research groups, litigators, and whistleblowers within state and local police departments, are designated as non-controlled. CRT staff scan and log non-

controlled correspondence into the Correspondence Tracking System (CTS) database. Additionally, the CRT uses investigative journalism reports and media coverage of significant police misconduct as a source of potential allegations. However, CRT does not specifically track such news stories.

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- Establishing a repository of previous J-memos;
- Establishing a policy for making referrals of law enforcement misconduct;
- Establishing a process for retaining documentation of decisions to deny or defer

recommendations to open law enforcement investigations under 34 U.S.C. § 12601.⁶¹⁴ It is not clear if SPL has implemented OIG’s additional recommendations to “adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made,”⁶¹⁵ or if CRT implemented any of these recommendations in other sections of CRT outside of SPL, even though the OIG’s review was limited to SPL. CRT clarified to the OIG that complaints about police would go through the below process (see Figure 2.2):⁶¹⁶ Figure 2.2

Source: U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

614 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 615 DOJ, Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct, supra note 203, at 15. 616 *Ibid.*, 9.

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In addition to complaints or agency-initiated investigations to enforce the civil rights statutes under its jurisdiction, under Title VI, “DOJ also serves as the federal government’s litigator. Title VI authorizes DOJ to enforce Title VI through the filing of civil actions. DOJ, on behalf of Executive agencies, may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations or recipients’ noncompliance to DOJ for judicial enforcement.”⁶¹⁷ DOJ has interpreted this charge expansively, asserting in its Title VI manual that:

In this regard, the Coordination Regulations direct agencies to advise DOJ if they are unable to achieve voluntary compliance and to request that DOJ assist in seeking resolution of the matter. Id. § 42.411(a). Agencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution). FCS provides assistance to agencies in making determinations of noncompliance, including providing pre-enforcement legal counsel when it appears it may be difficult to obtain a voluntary resolution.⁶¹⁸

There are not any known comparable written procedures for any other sections of CRT, but there are specific procedures for requesting a CRT amicus brief. Through the CRT Appellate Section’s Amicus Curiae Program, amicus briefs may be requested by a private party and are more likely to be undertaken by the section if the case presents “one or more important legal questions involving the interpretation or application of a statute that the Civil Rights Division enforces.”⁶¹⁹ The guidelines for accepting an amicus state that “Amicus participation by the Civil Rights Division generally should be limited to cases:

- in which a court requests participation by the Civil Rights Division;
- which challenge the constitutionality of a federal civil rights statute (cf. 28 U.S.C.

§ 2403(a));

the Department of Justice promulgated or that the Department of Justice (or another federal agency) is empowered to enforce;

- which raise issues whose resolution will likely affect the scope of the Civil Rights Division’s enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);

- which raise constitutional challenges of public importance under the First or Fourteenth Amendment of the U.S. Constitution;

- which raise issues that could significantly affect private enforcement of the statutes the Civil Rights Division enforces; or

617 DOJ, Title VI Legal Manual, supra note 39, at III.B, Department of Justice Role Under Title VI. 618 *Id.* 619 U.S. Dep’t. of Justice, Civil Rights Division, Appellate Section, “Amicus Curiae Program,” <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019).

<https://www.justice.gov/crt/appellate-section>

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- in which a special federal interest is clear and is not likely to be well-served by private litigants.⁶²⁰

Data Regarding CRT Cases The following sections evaluate the efficacy of CRT enforcement through analyzing publicly available data about its litigation efforts as well as further information CRT provided to the Commission.⁶²¹ This chapter analyzes comprehensive data about the hundreds of cases CRT resolved during Fiscal Years 2016-2018. The chapter also analyzes data from the various sections of CRT to demonstrate trends in the level and focus of enforcement activities. Cases Resolved To evaluate the efficacy of CRT’s litigation, the Commission looked to cases resolved from FY 2016 – 2018, as resolved cases represent actual remedies agreed to or ordered to redress civil rights violations. Commission staff identified 388.5 cases resolved among seven CRT sections that bring civil actions to enforce the nation’s civil rights laws during FY 2016-2018.⁶²² This number did not include Appellate or Criminal Section cases, as these cases are resolved differently.⁶²³ nor did it count the compliance agreements generated by the work of the Federal Coordination & Compliance Section, as that section’s work is discussed in the Proactive Compliance Evaluation part of this chapter, below. Moreover, the Commission did not have sufficient information to evaluate the Criminal Section cases; however, limited information about those cases are discussed in further detail below.⁶²⁴ On the other hand, the enforcement actions resolved by the seven other sections can be identified by cases resolved through out-of-court settlements, consent decrees, or judicial opinions at the district court level. Moreover, due to resource limitations, CRT’s post-agreement or post-judgment monitoring was not counted in this category. The great majority of these cases had some positive results in which defendants agreed or were compelled to take measures to come into compliance with civil rights law.⁶²⁵ Based on reviewing the civil cases CRT resolved at the non-appellate level during FY 2016-2018, the Commission was able to measure some trends in the quantity and impact of civil rights enforcement, as discussed below.

620 DOJ Justice Manual, supra note 370, at § 8-2.170. 621 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report, including information about cases not provided in response to the Commission’s Interrogatories and not available on the CRT website) (on file). 622 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018. 623 See supra note 202 (DOJ comments that Criminal Section cases are not comparably resolved) and infra notes 585-96 (explanation of how Appellate cases are different as many involve filing Statements of Interest in private cases rather than direct DOJ enforcement actions). 624 See infra notes 722-32 (Appellate Section cases) and 732-44 (Criminal Section cases). 625 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

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The Commission’s review of these cases shows that the total number of cases resolved dropped during FY 2018, although some sections have resolved more cases. Each of the cases is listed and categorized in Appendix A of this report. Table 2.2 shows the number of cases resolved per section per fiscal year. The Commission notes that the work of some sections, such as the Special Litigation Section, is often more complex than others as pattern or practice or other more systemic cases can entail more complex investigation and enforcement actions.⁶²⁶ Table 2.2: CRT Cases Resolved Per Section, FY 2016-18 CRT SECTION DRS EOS ELS IER HCE SPL VOT TOTAL by FY 2016 16 6 6 61 41 8 3 143 2017 8 14 3 57 46 4 5 4 136.5 2018 14 5 5 49 28 3 5 109 TOTAL 38 27 14 167 115 15.5 12 388.5

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,”www.justice.gov/crt/search-cases-and-matters with further information received from U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis. Chart of CRT Cases Resolved FY 2016-2018. On the chart above, CRT SEC = CRT Section; APP = Appellate Section; CRIM = Criminal Section; DRS = Disability Rights Section; ED = Educational Opportunities Section; EMP = Employment Rights Section; IER = Immigrant & Employee Rights Section; HCE = Housing & Civil Section; SPL = Special Litigation Section; VOT = Voting Section.

Figure 2.3: CRT Cases Resolved Per Fiscal Year

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,”www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018. This represents a decrease of 23.6 percent from Fiscal Year 2016 to Fiscal Year 2018.⁶²⁷

626 See supra notes 567; see also infra notes 637-46 and 709-18 (Special Litigation Section cases). 627 143 – 109 = 34 and 34/143 = 23.8%.

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120

140

160

FY 2016 FY 2017 FY 2018

CRT Cases Resolved Per Fiscal Year

<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.4: CRT Cases Resolved by Section, FY 2016-18

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,”www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

As the data illustrated above shows, the Special Litigation Section had a decrease in the number of cases resolved from FY 2016 to FY 2018.⁶²⁸ Other sections, such as the Educational Opportunities, Housing, and Immigrant and Employee Rights Sections, had an increase from FY 2016 to FY 2017, with a decrease in FY 2018.⁶²⁹ Although the Voting Section had fewer cases resolved than other sections, it also showed a slight increase in FY 2018. Some cases and trends are discussed in further detail below. Data Regarding Type of Resolution of CRT Cases The following pie chart and table show the percentage of cases resolved by consent decree, settlement, or judicial decision, by CRT section.

628 See, e.g., infra notes 637-46 and 709-18 (for more information on Special Litigation cases); and notes 719-22 (for more information on Voting Section cases). 629 See, e.g., infra notes 663-68 (for more information on Educational Opportunities and Housing Section cases); and 635-7 and 678-700 (for more information on Housing and Civil Enforcement Section cases).

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DRS EOS ELS IER HCE SPL VOT

CRT Cases Resolved by Section FY 2016-18

2016 2017 2018

<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.5: Consent Decrees, Settlements and Judicial Decisions by CRT Sections (Excluding Appellate and Criminal), FY 2016-18630

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Further, the data also shows that the amount of consent decrees per year has decreased over time. The number of consent decrees has incrementally decreased over the fiscal years in question.⁶³¹ In FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018.⁶³²

⁶³⁰ One settlement is only counted as half (0.5), because the Obama Administration's agreement in principle to enter into a consent decree regarding Chicago police practices was later changed by the Trump Administration. See infra notes 710-13. ⁶³¹ See infra notes 633-8 (documenting that FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018, and documenting number of consent decrees per section per fiscal year). ⁶³² U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters [hereinafter DOJ CRT, "Search Cases and Matters"]; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

266.5

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18

Type of Resolution of CRT Cases FY 2016-18

Settlements Consent Decrees Judicial Decisions

<http://www.justice.gov/crt/search-cases-and-matters>

<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.6: CRT Total Consent Decrees, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Of the 104 consent decrees entered into in federal court by CRT from FY 2016-2018, 57 (54.8%) were in FY 2016, 39 (37.5%) were in FY 2017, and 8 (7.7%) were in FY 2018.⁶³³ These data also illustrate that some sections have used consent decrees more than others, and some sections used settlements more than others. For example, IER resolved all but one of their 166 cases by out-of-court settlements (including Letters of Resolution), and the one that was resolved in court was through a judicial decision (not a consent decree). They had zero consent decrees. The Disability Rights Section resolved more than twice as many cases by settlement (12 cases by consent decree, and 25 by settlement).⁶³⁴

⁶³³ Appendix A, Chart of CRT Cases Resolved FY 2016-2018. ⁶³⁴ Ibid.

0

10

20

30

40

50

60

FY 2016 FY 2017 FY 2018

Total CRT Consent Decrees/Year

<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.7: Percent Consent Decrees, Settlements and Judicial Decisions by CRT Section, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

The Housing, Education and Employment Sections resolved relatively more cases by consent decree, with the Housing Section resolving the most (64 cases, 55.6%) by consent decree, but with zero consent decrees in FY 2018.⁶³⁵ Seven of the 115 HCE cases were resolved by judicial decisions, while 64 were resolved by consent decrees and 44 by settlements. The last consent decree entered into by HCE was in an FHA sex discrimination case resolved by a federal court ordering the decree in July 2017.⁶³⁶ The following data illustrates how this section's use of consent decrees has diminished, going from 40 in FY 2016 to zero in FY 2018, while settlements went from zero to 27 in the same time period.

⁶³⁵ Ibid. ⁶³⁶ See Consent Decree, United States v. Walden, No. 1:16-cv-00042 (N.D.W.V. July 10, 2017); Cf. Appendix A, Chart of CRT Cases Resolved, Housing Section Cases (FY 2016 – 18).

0%

20%

40%

60%

80%

100%

VOT SPL IER HCE ELS EOS DRS

% Type of Resolution by CRT Section FY 2016-18

Settlements Consent Decrees Judicial Decisions

<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.8: Type of Resolution CRT Housing Cases FY 2016-2108

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

The Special Litigation Section entered into a total of five consent decrees during FY 2016-2018; four were in FY 2016, one was in FY 2017, and there were none in FY 2018.⁶³⁷ Data for the current report, from FY 2016-2018, shows that SPL has decreased its use of consent decrees, consistent with DOJ leadership direction. The following graph shows the types of resolution of cases, including all types of SPL cases resolved. The Commission considers that 8.5 cases resolved during this time period were resolved through settlement, two were resolved through judicial decisions, and four were resolved by consent decrees.

⁶³⁷ Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

0

17
27
40
24
00
5
10
15
20
25
30
35
40
45

2016 2017 2018
Type of Resolution of HCE Cases FY 2016-2018

Settlement Judicial Dec. Consent Decree
<http://www.justice.gov/crt/search-cases-and-matters>

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Figure 2.9: Type of Resolution of SPL Cases FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission's November 2018 report on Police Use of Force: An Examination of Modern Policing Practices discussed that SPL has brought law enforcement misconduct "pattern or practice" cases since they gained jurisdiction through the VCCLEA in 1994, and documented that the Bush II administration tended to resolve these cases through settlements, while the Obama administration not only investigated more cases,⁶³⁸ but also preferred to resolve them through court-ordered consent decrees.⁶³⁹ The Commission's research also showed several positive impacts of consent decrees, although it also showed that DOJ didn't have the capacity to effectively monitor and measure the results of consent decrees.⁶⁴⁰ The Commission recommended that DOJ "should return to vigorous enforcement of constitutional policing, including pursuant to 42 U.S.C. § 14141 and use of consent decrees as necessary where constitutional policing standards are not being upheld."⁶⁴¹ Former CRT head Vanita Gupta testified at the Commission's briefing that consent decrees are key to civil rights enforcement because they provide for court oversight "regardless of political winds."⁶⁴² Professor Sam Bagenstos, who served as a CRT career attorney from 1994-1997 and then later as a Deputy Assistant Attorney General in the Obama Administration has written that,

638 U.S. Comm'n on Civil Rights, Police Use of Force: An Examination of Modern Policing Practices, (2018), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>, at n. 529 ("According to a January 13, 2017 statement on the DOJ website: "Since 2009, the Special Litigation Section of the Justice Department has opened 25 investigations into law enforcement agencies. The section is enforcing 20 agreements with law enforcement agencies, including 15 consent decrees and one post-judgment order."). 639 *Ibid.*, 87. 640 *Ibid.*, 86-95. 641 *Ibid.*, 4. 642 Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 170.

0
0.5
1
1.5
2
2.5
3
3.5
4
4.5
FY 2016 FY 2017 FY 2018

Type of Resolution of SPL Cases FY 2016-2018
Settlements Consent Decrees Judicial Decision
<http://www.justice.gov/crt/search-cases-and-matters>
<https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>

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overall, CRT's authority to bring pattern or practice cases "lay largely dormant" during the Bush administration.⁶⁴³ That changed, with more transformative consent decrees, as follows:

The Obama Administration, by contrast, aggressively used the pattern-and-practice statute to reform police departments[] The [Civil Rights] Division initiated investigations that were unprecedented in their number and scope; it entered into consent decrees to transform law enforcement in major cities such as New Orleans, Seattle, Cleveland, and Ferguson, Missouri, and it filed contested litigation in Maricopa County, Arizona. Those decrees addressed issues such as use of excessive force, racial profiling, and the failure to protect victims of gender-based and LGBT- based violence.⁶⁴⁴

Also at the Commission's briefing, former CRT Chief of Staff during the Bush Administration Robert Driscoll testified that there have been mixed results with consent decrees, stating that "they've been expensive and you've ended up with increased crime and they even increased civil rights violations," but "in some places it's worked well where . . . there has been a more collaborative approach."⁶⁴⁵ Driscoll recommends that a study be done to determine which approaches are most effective.⁶⁴⁶ Other Sample Data Trends from CRT Cases CRT's legal authority and responsibility to litigate disparate impact claims is documented in a later section of this chapter.⁶⁴⁷ At the Commission's briefing, Georgetown Law Professor Aderson François stated that: "[U]nless government agencies play an active role in civil rights enforcement, the law is never going to develop the way it was originally intended."⁶⁴⁸ In addition to its built-in credibility as the nation's civil rights prosecutor, DOJ CRT has specific jurisdiction to enforce disparate impact that private parties and State Attorney Generals lack,⁶⁴⁹ further bolstering its importance as a backstop against harm Americans otherwise suffer from a form of discrimination DOJ's longstanding regulatory authority has recognized and continues to recognize as pernicious and in need of federal enforcement. Data the Commission reviewed yielded examples of civil rights enforcement trends specific to the individual CRT sections, discussed section by section below.

643 See, e.g. Samuel R. Bagenstos, "Civil Rights Déjà Vu, Only Worse," *American Prospect*, Dec. 12, 2016, <https://prospect.org/article/civil-rights-déjà-vu-only-worse>. 644 *Ibid.* (adding that: "In the past couple of years [as of Dec. 2016], the division has expanded its work to target practices that entrench economic inequality in the criminal justice system."). 645 Driscoll Testimony, Federal Civil Rights Enforcement Briefing, p. 131. 646 *Ibid.* 647 See *infra* notes 870-900 (analyzing CRT Title VI Manual and disparate impact law, including Supreme Court and other federal legal precedents). 648 François Testimony, Federal Civil Rights Enforcement Briefing, p. 279. 649 See *infra* note 885 (discussing the Sandoval case); and see State Atty's General Statement, at 1, 8.

<https://prospect.org/article/civil-rights-d%C3%A9j%C3%A0-vu-only-worse>

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During FY2016 - 2018, CRT's Disability Rights Section (DRS) was active in protecting the rights of individuals with disabilities. DRS resolved 25 cases through settlement, another 12 through consent decrees, and 1 by judicial decision.⁶⁵⁰ In litigation in Florida, DRS collaborated with the Special Litigation Section (SPL) to defend on appeal the agency's authority to enforce the ADA against state and local entities.⁶⁵¹ This was similar to litigation conducted by the SPL in a multi-week trial in Texas to defend the rights of individuals with disabilities to receive services in integrated, home- and community-based settings rather than institutions.⁶⁵² Additionally, DRS prevailed on a motion to enforce a 2012 settlement agreement in North Carolina addressing the unnecessary institutionalization of adults with serious mental illness,⁶⁵³ and negotiated a supplemental agreement in New York to resolve ambiguities in a 2013 agreement about the unnecessary segregation of adults with serious mental illness.⁶⁵⁴ DRS also entered into a new, five-year settlement agreement in Louisiana, to resolve allegations of unnecessary segregation of adults and children with serious mental health conditions.⁶⁵⁵ In enacting the ADA, Congress specifically encouraged the use of alternative means of dispute resolution, including mediation, to resolve ADA disputes. For example, DOJ's ADA Mediation Program seeks to resolve Title II and Title III ADA complaints through funding mediation, which is intended to decrease the time and cost of reaching a resolution. ⁶⁵⁶ If CRT believes a complaint is appropriate for mediation and the complainant agrees, it will refer the issue to trained mediators across the country.⁶⁵⁷ In 2002, the Commission's federal civil rights enforcement report noted that mediation may be useful to increase efficiencies, but also warned that "mediation may ignore the larger picture in interest of resolving the complaint at hand."⁶⁵⁸ In order to be effective at the essential goal of rooting out discrimination, the Commission recommended that "mediation only be used when it is appropriate as to the nature of the complaint, and mediation staff should ensure that settlement agreements include provisions for changes in... practices and policies that might

650 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Disability Rights Cases. In the case resolved by judicial decision, CRT lost at the trial level in November 2016, and on behalf of the United States, filed a notice of appeal to the Fourth Circuit January 18, 2017. Memorandum Opinion, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (E.D. Va., Nov. 11, 2016); Notice of Appeal, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (E.D. Va., Jan. 18, 2017) (signed by DRS Chief, Deputy Chief, and CRT leadership). But after the change in administration, the federal government filed a motion to voluntarily dismiss the complaint, and the court dismissed the appeal, leaving the negative decision to stand. Order, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (4th Cir., Jul. 28, 2017). 651 A.R. v. Secretary, Florida Agency for Health Care Admin., No. 17-13595-BB (11th Cir. Oct. 18, 2017). 652 Guillermo Contreras, "Trial wraps up in lawsuit against the state by developmentally disabled Texans" My San Antonio, Nov. 15, 2018, <https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>. 653 Order, *United States v. North Carolina*, No. 5:12-cv-557-D (E.D.N.C. Sep. 21, 2017). 654 *United States v. New York*, No. 1:13-cv-04165 (E.D.N.Y. Mar. 12, 2018). 655 Settlement Agreement, *United States v. State of Louisiana*, No. 3:18-cv-00608 (M.D. La. June 6, 2018), <https://www.justice.gov/crt/case-document/file/1072816/download>. 656 U.S. Dep't of Justice, Civil Rights Division, Resolving ADA Complaints Through Mediation: An Overview, September 2016, https://www.ada.gov/mediation_docs/mediation-brochure.pdf. 657 *Ibid.* 658 USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, *supra* note 1, at 38.

<https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>
<https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>
<https://www.justice.gov/crt/case-document/file/1072816/download>

have a discriminatory effect.”⁶⁵⁹ As discussed above, these recommendations also apply to settlements of cases.⁶⁶⁰ According to the 2019 CRT Performance Budget, in 2016, the ADA Mediation Program referred 353 matters, completed 291 matters and successfully resolved 79 percent of the completed matters.⁶⁶¹ In 2017, the Program referred 195 matters, completed 143 matters and successfully resolved 83 percent of completed cases.⁶⁶² CRT told the Commission, “The ADA mediation program has successfully resolved thousands of ADA disputes resulting in increased access for people with disabilities.”⁶⁶³ In contrast, the Educational Opportunities Section (EOS) resolved relatively more cases with consent decrees; however, they were all entered into in legacy desegregation cases. During this time period, 10 EOS cases were resolved by consent decrees, of which all were legacy desegregation cases, 14 were resolved by out-of-court settlements, and relatively few cases (4) went to trial and were resolved by judicial decisions.⁶⁶⁴ The data additionally show that the types of cases brought to resolution also varied a bit. For example, race and national origin claims were resolved in all three fiscal years, but no claims based on sex or status of individuals with disabilities were resolved in FY 2018. The Commission notes that in FY 2017, there were two cases resolving dual claims of race or national origin discrimination, with claims involving allegations of discrimination against persons with disabilities.⁶⁶⁵

⁶⁵⁹ Ibid. ⁶⁶⁰ See supra note 249 (regarding settlements and consent decrees and citing the Commission’s 2002 report at page 38). ⁶⁶¹ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 23-24. ⁶⁶² Ibid., 30. ⁶⁶³ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁶⁶⁴ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases. Of the four judicial decisions, after the issuance of a judicial opinion in FY 2016, one of the cases was thereafter resolved by consent decree in FY 2017, and since each case may only be counted once, it is coded as being resolved by consent decree. See Opinion and Order, Cowan and United States (as Intervenor-Plaintiff) v. Bolivar County, MS, No. 2:65-cv-31 (N.D. Miss. May 13, 2016), <https://www.justice.gov/crt/case-document/file/1002091/download>; and see Modification Order for Consent Decree, Cowan and United States v. Bolivar County, MS, No. 2:65-cv-31 (N.D. Miss. Mar. 13, 2017), <https://www.justice.gov/crt/case-document/file/1002106/download>. See also Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (United States v. School Dist. of Philadelphia; United States v. Kansas State Univ.). ⁶⁶⁵ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (T.R., et. al. v. School Dist. of Philadelphia, No. 2:15-cv-04782 (E.D. Pa. Nov. 30, 2016) (regarding race/national origin and disability); Settlement Agreement between United States and Wicomico County, Maryland Public Schools (Jan. 23, 2017), <https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement> (Settlement Agreement regarding race/national origin and disability).

<https://www.justice.gov/crt/case-document/file/1002091/download>
<https://www.justice.gov/crt/case-document/file/1002106/download>
<https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement>

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Figure 2.10: Types of Cases Brought by EOS, By Fiscal Year (FY 2016-2018)

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,” www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases.

Most (11 out of 13) of EOS’ racial discrimination cases were legacy school desegregation cases. Of these, 10 were resolved by ongoing consent decrees, which may explain the high number of consent decrees for this CRT section.⁶⁶⁶ DOJ initiated these cases after the Supreme Court’s decision in *Brown v. Board of Education* in 1954.⁶⁶⁷ The legacy cases generally began in the late 1960s and throughout the 1970s and are cases in which the United States is a party. EOS is responsible for their ongoing litigation with regard to the rights to equal access to educational opportunities and programs until vestiges of segregation no longer remain.⁶⁶⁸ The Employment Litigation Section (ELS) also resolved the majority of its cases with consent decrees. The section resolved 6 cases in FY 2016, 3 in FY 2017, and 5 in FY 2018.⁶⁶⁹ Of these 14

⁶⁶⁶ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (United States v. Monroe City (LA); United States v. St. Martin Parish (LA); United States v. Cotton Plant S.D. #1 (AR); United States v. Bd. of Educ. of Hendry Cty. (FL); United States v. St. James Parish (LA); United States v. School Bd. of the City of Suffolk (VA); United States v. Bolivar Cty. Bd. of Educ. (MS); United States v. State of Georgia, McDuffie S.D. (GA); United States v. Jackson Cty. S.B. (FL); United States v. South Bend Community School Corp. (IN)). ⁶⁶⁷ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) (striking down state laws that segregated public schools because they violated the 14th Amendment); *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 349 U.S. 294, 300-01 (1955) (“*Brown II*”); see also *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 436-37 (1968) (discussing need to effectively remove obstacles to a unitly, nonracial public education system); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 17-18 (1971); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 169, 197-209 (1973). ⁶⁶⁸ But see Nikole Hannah Jones, “Lack of Order: The Erosion of a Once-Great Force for Integration,” *ProPublica*, May 1, 2014, <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> (detailing the inaccuracy of the Justice Department’s list of active desegregation orders and failure to respond to questions about “how it monitors, enforces, and litigates desegregation cases”). ⁶⁶⁹ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Employment Litigation Section.



<http://www.justice.gov/crt/search-cases-and-matters>
<https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration>

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total cases, it resolved 3 (21.4%) with settlements, 9 (62.3%) with consent decrees, and 2 (14.3%) were resolved by judicial decisions.⁶⁷⁰ Eleven of these 14 cases (78.6%) were brought to enforce Title VII of the 1964 Civil Rights Act and other federal law protections that prohibit employment practices that discriminate on the grounds of race, sex (including pregnancy), religion, and national origin.⁶⁷¹ Eight were brought to enforce protections against sex discrimination; of these one prosecuted pregnancy discrimination and another prosecuted sexual harassment, and another was a case prosecuting both sex and ethnicity/race discrimination.⁶⁷² They resulted in nine cities, counties, and state governments, as well as the Commonwealth of Puerto Rico and the University of Baltimore, agreeing to enter into settlements or court-supervised consent decrees that require changing their practices to come into compliance with Title VII.⁶⁷³ The Federal Coordination and Compliance (FCS) focused on Statements of Interests and settlements or other resolutions of Title VI and Title IX cases. In FY 2016, FCS was involved in submitting a Statement of Interest in four Title VI cases,⁶⁷⁴ and one in a Title IX case.⁶⁷⁵ There is no indication that FCS has been involved in submitting Statements of Interest or amicus briefs in similar cases in FY 2017 or FY 2018.⁶⁷⁶ FCS was also active in several language access in courts matters to enforce Title VI’s protections against national origin discrimination with regard to DOJ funding recipients, which are discussed in the Proactive Compliance Evaluation section of this chapter.⁶⁷⁷ In terms of the number of cases resolved, the Housing and Civil Enforcement section (HCE) was one of the most productive sections of CRT in FY 2016 and FY 2017, though some of its productivity dropped off in FY 2018.

⁶⁷⁰ Ibid. ⁶⁷¹ Ibid. ⁶⁷² Ibid. ⁶⁷³ Ibid. ⁶⁷⁴ U.S. Dep’t of Justice, Civil Rights Division, “Department of Justice Title VI Briefs,” <https://www.justice.gov/crt/fcs/Title-VI-Briefs>. ⁶⁷⁵ U.S. Dep’t of Justice, Civil Rights Division, “Title IX of the Education Amendments of 1972,” <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination>. ⁶⁷⁶ Ibid. ⁶⁷⁷ See infra notes 753-65. FCS is also significantly involved in policy dissemination and coordination with other federal agencies, and so its work is also discussed in those sections of this chapter. See infra notes 800-12 (regarding policy dissemination) and 929-45 (regarding coordination).

<https://www.justice.gov/crt/fcs/Title-VI-Briefs>
<https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination>

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Figure 2.11: Total CRT Housing Cases Resolved FY 2016-2018

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,” www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

As discussed above, in FY 2018, CRT spearheaded a Sexual Harassment Initiative with the goal of enforcing rights to freedom from harassment in housing, and reported that it has already procured relief for impacted persons.⁶⁷⁸ The following cases involving allegations of sexual harassment in housing were resolved by HCE during FY 2016-2018: Cases Involving Sexual Harassment in Housing Resolved by CRT’s Housing and Civil Enforcement Section, FY 2016-2018 (With Amount of Civil Penalties and Compensatory Damages) Fiscal Year 2016:

• Consent Decree between the United States and Pendygraft (\$5,000 in damages)⁶⁷⁹ • Consent Decree between the United States and Encore Management Company, Inc. (\$110,000 in damages and \$10,000 in civil penalty)⁶⁸⁰

Fiscal Year 2017: • Consent Decree between the United States and Wygul (\$15,000 in damages)⁶⁸¹ • Judicial Decision (Default Judgement) United States v. Encore Management Company, Inc. (\$55,000 in civil penalty against Defendant Anthony James, \$30,000 in civil penalty)

⁶⁷⁸ See supra notes 501 and 526. ⁶⁷⁹ Consent Decree, United States v. Pendygraft, No. 5:15-cv-00293-JMH (E.D. Ky. 2016). ⁶⁸⁰ Consent Decree, United States v. Encore Management Co., No. 2:14-cv-28101 (S.D. W. Va. 2016). ⁶⁸¹ Consent Decree, United States v. Wygul, No. 1:14-cv-2680-JDB-egb (W.D. Tenn. 2016).



Total HCE Cases Resolved Per FY

<http://www.justice.gov/crt/search-cases-and-matters>

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against Defendant Christopher Terrill James, and \$5,000 in civil penalty against Defendant Kisha James682

- Consent Decree between the United States and Walden (\$500,000 in damages and \$100,000 in civil penalty)683
- Settlement Agreement between the United States and Housing Authority of the City of Anderson, Indiana (\$70,000 in damages)684
- Settlement Agreement between the United States and Kansas City, Kansas City Housing Authority(\$360,000 in damages and \$5,000 in civil penalty)685

Fiscal Year 2018:

- Settlement Agreement between the United States and Tjoelker (\$140,000 in damages and \$10,000 in civil penalty)686
- Settlement Agreement between the United States and Webb (\$600,000 in damages and \$25,000 in civil penalty)687
- Consent Decree between the United States and Webb (\$27,500.00)688 These cases illustrate the impact of utilizing strategic planning to meet the Commission's recommendations to use litigation to "develop case law, to obtain appropriate relief and to send a message to potential violators about the strength of an agency's enforcement program."689 Although the above cases have not resulted in judicial decisions that would develop case law, HCE's ongoing investigations and resulting litigation may do so.690 Furthermore, the settlements and consent decrees include monetary compensation for victims, and otherwise meet the goal of sending a message to potential violators about the strength of the agency's enforcement program. HCE's other cases also resulted in compensatory damages and civil penalties.691 HCE also utilizes unique testing programs as part of its litigation strategies. HCE developed the Fair Housing Testing Program in 1992, to uncover hidden discriminatory practices as a part of its enforcement efforts of the FHA.692 This program tests whether housing providers are complying with fair housing laws by sending individuals to properties to pose as prospective renters or buyers

682 United States v. Encore Management Co., No. 2:14-cv-28101 (S.D. W. Va. 2017). 683 Consent Decree, United States v. Walden, No. 1:16-cv-42 (N.D. W. Va. 2017). 684 Settlement Agreement, United States v. Housing Authority of the City of Anderson, Indiana (S.D. Ind. 2017). 685 Settlement Agreement, United States v. Kansas City, Kansas City Housing Authority (D. Kan. 2017). 686 Settlement Agreement, United States v. Tjoelker, (W.D. Mich. 2017). 687 Settlement Agreement, United States v. Webb (E.D. Mo. 2018). 688 Settlement Agreement, United States v. Webb, No. 4:16-cv-01400-SNLJ (E.D. Mo. 2018). 689 USSCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 690 See supra notes 501 and 528. 691 See, e.g., Complaint, United States v. Trump Village, No. 15-CV-7306 (E.D.N.Y. Dec. 23, 2015); Settlement Agreement, United States v. Trump Village, No. 15-CV-7306 (E.D.N.Y. July 18, 2017) (including \$10,000 in civil penalties and \$40,000 in compensatory damages for complaints, in case resolving allegations of discrimination against persons with disabilities through policies prohibiting support animals). 692 U.S. Dept of Justice, Civil Rights Division, "Fair Housing Testing Program," <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 19, 2018).

<https://www.justice.gov/crt/fair-housing-testing-program-1>
<https://www.justice.gov/crt/fair-housing-testing-program-1>

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and gather information.693 The most recent case brought after housing testing was United States v. Goss, resolved in late 2016 though a court-ordered consent decree with a Florida landlord to prohibit discrimination against black applicants.694 CRT's FY 2019 Performance Budget stated that HCE will extend the testing tools and methods of the Fair Housing Testing Program into the lending context.695 In 2016, HCE filed a Statement of Interest challenging Sandcastle Towers, a New York landlord that did not provide housing for persons with criminal convictions. CRT's amicus brief in this private case against a federally-funded affordable housing provider, stated that, "The United States thus has a strong interest in ensuring the correct interpretation and application of the FHA in this case [about disparate impact law], thereby promoting the dismantling of unlawful barriers to housing for formerly incarcerated individuals."696 In 2016, CRT argued that "FHA bars criminal records bans that have a disparate impact on applicants based on race or national origin unless they are supported by a legally sufficient justification."697 However, since then, CRT has not been involved in that case, and no further substantive filings have been made.698 This may be because of the reported desire of the current administration to shift positions on disparate impact.699 The Housing Section's recent Statements of Interest have focused more on Religious Land Use Rights. CRT attorneys filed a brief supporting the Catholic Church's application to expand their buildings in Kansas, and another in support of the religious land use rights of the Jagannath Organization for Global Awareness to build a temple in Howard County, Maryland on land that was already zoned for religious uses.700 The Immigrant and Employee Rights (IER) section was highly productive, but resolved the great majority of its cases using out-of-court settlements and letter agreements, although it did win one important judicial order. In addition to 116 Letters of Resolution,701 from FY 2016-2018, IER

693 Ibid. 694 See Consent Order, United States v. Goss, 8:16-cv-02802 (M.D. Fla. Dec. 12, 2016). 695 DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 29. 696 Ibid., 8. 697 Ibid., 12. 698 See U.S. Dist. Ct. E.D.N.Y. (Brooklyn), Civil Docket for Case No. 1:14-cv-06410, The Fortune Society v. Sandcastle Towers Housing Development Fund Corp. et. al., https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1 (accessed Mar. 16, 2019) (on file). The United States continues to be listed as Interested Party represented by an Assistant U.S. Attorney from the Eastern District of New York. Id. 699 See infra notes 870-900 (Disparate Impact Policy). 700 Statement of Interest of the United States, Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church's suit under RLUIPA arguing their religious exercise was substantially burdened by City of Mission Woods after being denied a land use permit to convert a residential house adjacent to the Church's property into meeting house to allow for additional programming and meeting space.) Statement of Interest of the United States, Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff's suit under RLUIPA alleging Howard County's complete denial of JOGA's land use application and petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA's ability to practice their religion. At the time the suit was filed, there was no Jagannath temple anywhere in the State of Maryland.). 701 These Letters of Resolution are considered in the Commission's calculations as a form of settlement.

https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1
https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1

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resolved 50 cases, with 49 (98%) of those resolved through out-of-court settlements. Another feature of this section's enforcement work is that its settlements (but not its Letters of Resolution) typically included civil fines to be paid to the federal government, and for those brought on behalf of individuals, back pay for the persons who lost wages due to the alleged discrimination.702 During FY 2016-2018, of the 50 out-of-court settlements, 49 IER enforcement actions resulted in agreements to pay \$3,302,622.65 in civil penalties.703 According to the Commission's review of the settlement agreements on the CRT IER Section's website, there was only one case in which no civil penalties were awarded. Furthermore, in FY 2018, in litigation before the Executive Office of Immigration Review (which adjudicates cases under the INA), CRT won a judicial order finding pattern or practice violations and ordering further proceedings to determine sanctions.704 Based upon the FY 2018 order establishing the violations and calling for sanctions, in December 2018, CRT won "high civil penalties" in the amount of \$757,868 to be paid by the defendant companies for "knowing, pervasive and, continuing" discriminatory document practices, including asking hundreds of U.S. citizens and Lawful Permanent Residents, as well as asylees and refugees, for unnecessary documentation, discriminating based on citizenship status, as well as "flagrant bad-faith and callous disregard of responsibility."705 The final order also included injunctive relief that the companies cease and desist their discriminatory practices and take remedial measures including training their staff and being subjected to federal monitoring and reporting requirements.706 Table 2.3: IER Cases Resolved FY 2016-2018 Fiscal Year Number of Cases Resolved Settlements Other FY 2016 20 20 FY 2017 13 13 FY 2018 18 17 1 judicial order TOTAL 51 50 1

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

702 See, e.g., Settlement Agreement, United States and J.E.T. Holding Co., Inc. (Jan. 17, 2017) (settlement of \$12,000 to U.S. Government and establishment of \$40,000 back pay fund for citizenship status discrimination); Settlement Agreement, United States and 1st Class Staffing, L.L.C. (Dec. 13, 2016) (civil penalty of \$17,600 and \$720 payment to charging party, for document discrimination; employer required more or different documents from noncitizens compared to citizens). 703 See Appendix A, Chart of CRT Cases Resolved, FY 2016 – 18, Immigrant and Employee Rights. 704 United States v. Technical Marine Maintenance Texas, LLC, & GulfCoast Workforce, LLC, 13 OCAHO No. 1312, at 11 (2018). 705 United States v. Technical Marine Maintenance and Gulf Coast Workforce, OCAHO No. 17B00089, 4-5, 7-9 (EOIR, Dec. 10, 2018). 706 Id.

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Most of the IER cases brought from FY 2016-FY 2018 were about unfair documentary practices, in which employers ask workers for more documentation than what is specified under the relevant federal statute, limit the types of documentation a worker can show, or reject valid documentation, based on a worker's citizenship status or national origin. This was the basis for CRT prosecution in 35 out of the 50 (70.0%) cases resolved. There were also 12 (24.0%) cases about citizenship status discrimination, in which employers unjustifiably limited persons they would hire to citizens, or conversely, to non-citizens.707 Additionally, IER issues letters of resolution to employers who voluntarily reach an agreement with the aggrieved party resolving discrimination charges or to conclude independent investigations where the employer has voluntarily corrected its practices and no victims were identified.708 Like settlement agreements, these letters often require the employer's high-level officials' participation in an IER webinar, its commitment to comply with the laws and regulations of the INA moving forward and, in some cases, include back pay to the aggrieved party.709 However, unlike settlement agreements, the letters are not published on the website and do not include any indication of findings of violations or claims that were resolved. See Table 2.4. Table 2.4: IER Letters of Resolution Fiscal Year IER Letters of Resolution FY 2016 41 FY 2017 44 FY 2018 31

SOURCE: CRT Website; DOJ Agency Review; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

The Special Litigation (SPL) section enforces one of the often complex types of civil rights law, and the section resolved eight cases in FY 2016, 4.5 in FY 2017, and three in FY 2018. The majority of cases have been "pattern or practice" cases regarding systemic law enforcement misconduct.

707 See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights. 708 U.S. Dept of Justice, Civil Rights Division, "IER Letters of Resolution FY 2018," <https://www.justice.gov/crt/ier-letters-resolution-fy-2018> (accessed Jul. 13, 2019). 709 Ibid.

<https://www.justice.gov/crt/ier-letters-resolution-fy-2018>

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Figure 2.12: Types of SPL Cases FY 2016-18

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission notes that one FY 2017 settlement agreement, regarding Chicago police, was only an Agreement in Principle to enter into a consent decree.710 That agreement in principle was later opposed by former Attorney General Sessions and dropped by DOJ,711 although private litigation resulted in a consent decree.712 The DOJ agreement to enter into a consent decree that was dropped is coded as 0.5 or half of a settlement agreement in the Commission's research. The other SPL consent decrees during this time frame were with the Cities of Ferguson and Newark regarding policing (both in April 2016), Baltimore police (in April 2017), and Georgia state hospitals (in May 2016).713 SPL was also active in filing Statements of Interest in cases related to law enforcement practices. For example, in October 2015, it filed a Statement of Interest in a case brought by the parents of students with disabilities against School Resource Officers, stating that "children – particularly children with disabilities – risk experiencing lasting and severe consequences if SROs unnecessarily criminalize school-related misbehavior by taking a disproportionate law

710 Agreement in Principle Between The United States Department of Justice and the City of Chicago Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/925921/download> (signed by former Principal Deputy Atty General Vanita Gupta and SPL career attorneys). 711 See United States Statement of Interest Opposing Proposed Consent Decree, State of Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. Oct. 12, 2018). 712 Consent Decree, State of Illinois v. City of Chicago, 1:17-cv-06260 (N.D. Ill. Jan. 31, 2019), <https://www.justice.gov/opa/press-release/file/1100631/download>. 713 Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180 (E.D. Mo. April 19, 2015); Consent Decree, United States v. City of Newark, No. 2:16-cv-01731 (D.N.J. May 5, 2016).

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FY 2016 FY 2017 FY 2018

Types of SLC Cases FY 2016-18

Corrections Disability Juvenile Justice Law Enforcement

<https://www.justice.gov/crt/case-document/file/925921/download>
<https://www.justice.gov/opa/press-release/file/1100631/download>

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enforcement response to minor disciplinary infractions.”⁷¹⁴ SPL argued that such unnecessary responses including handcuffing the children above the elbows posed the risk of “last and severe consequences” for children, “particularly children with disabilities,”⁷¹⁵ and told the court that the ADA applies to interactions between school resource officers and children with disabilities, and that law enforcement agencies must make reasonable modifications when necessary to avoid disability-based discrimination.⁷¹⁶ SPL and Disability Rights Section attorneys signed the brief telling the court that the case implicated DOJ’s civil rights enforcement efforts and that: “The Defendant Sheriff’s Office also had a duty to create policies and administer those policies in a way that does not have the effect of discriminating against children with disabilities; the Court should reject Defendants’ attempt to avoid that duty.”⁷¹⁷ The Division also filed, together with DOJ’s Access to Justice office, a Statement of Interest in *Stinnie v. Holcomb*, a case challenging Virginia’s practice of suspending a person’s license for failure to pay court fines and fees.⁷¹⁸ During the fiscal years studied, the Voting Section resolved 12 cases, fewer cases than other civil CRT sections. The following graph shows the number of cases resolved per fiscal year. Figure 2.13: Voting Cases Resolved FY 2016-18

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

The data also shows that the Voting Section’s cases were mostly resolved through settlements (6), and though an additional four were resolved through consent decrees and two by judicial

⁷¹⁴ Statement of Interest of the United States, S.R. & L.G. v. Kenton County, No. 252:15-cv-143, 1 (E.D. Ky. Oct. 2, 2015), <https://www.justice.gov/crt/file/780706/download>. ⁷¹⁵ Id. ⁷¹⁶ Id. at 2. ⁷¹⁷ Id. ⁷¹⁸ Statement of Interest of the United States, *Stinnie v. Holcomb*, No. 13-cv-00044 (W.D. Va. Nov. 7, 2016), <https://www.justice.gov/crt/case-document/file/917681/download>.

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FY 2016 FY 2017 FY 2018

Voting Cases Resolved FY 2016-2018

<https://www.justice.gov/crt/file/780706/download>
<https://www.justice.gov/crt/case-document/file/917681/download>

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decisions.⁷¹⁹ The Voting Section also filed eight (8) Statements of Interest during this time period, and some cases included a change in position.⁷²⁰ The type of Voting Section cases also varied, with one VRA case and two NVRA cases brought in each of the three fiscal years, one HAVA case brought in FY 2017, and three UOCAVA cases brought in FY 2018.⁷²¹ The Voting Section also filed eight Statements of Interest during FY 2016- 2018.⁷²² Appellate Section activities were not included in the total measure of CRT cases resolved (by judicial decision, consent decree or out-of-court settlement), because their nature is different. First, the date of a final judicial decision is not the best measure of this section’s enforcement efforts in any particular year, as these cases often take many years, and second, the section files Statements of Interests in private cases in which the impact is difficult to measure as it may be that the court cites the DOJ’s brief, or it may be that the court takes it into account and takes a position somewhat, but not entirely, consistent with the DOJ’s brief. At the same time, CRT’s appellate litigation work is impactful as these cases set a higher level of precedent than those resolved at the lower (federal district) court level.⁷²³ At the federal level, they can set precedents in the nation’s 13 courts of appeals that generally govern the 94 district courts in various states, or they may assist in setting a Supreme Court precedent.⁷²⁴ The Commission based its assessment of this section’s work during FY 2016-2018 on the date of briefs filed, which the Appellate Section filed in the Supreme Court, courts of appeals, district

⁷¹⁹ DOJ CRT, “Search Cases and Matters,” supra note 632; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. ⁷²⁰ See also USCCR, Minority Voting, supra note 17, at 239-275 (Ch. 5) (discussing Voting Section’s declining number of cases brought to enforce the provisions of the Voting Rights Act in recent years, despite documented increase in discrimination in voting and VRA cases brought by private parties having quadrupled during the five years since the Supreme Court’s 2013 decision in *Shelby County v. Holder*). ⁷²¹ DOJ CRT, “Search Cases and Matters,” supra note 632; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; see Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. ⁷²² See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases. ⁷²³ See USCCR, Minority Voting, supra note 17, at 64 n. 340:

For a description of federal courts of appeals, see United States Courts, “Court Role and Structure,” <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (accessed Jul. 26, 2018) (“There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court’s task is to determine whether or not the law was applied correctly in the trial court.”); see also U.S. Courts, How Appellate Courts are Different from Trial Courts, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> (accessed Jul. 26, 2018). (“At a trial in a U.S. District Court, witnesses give testimony and a judge or jury decides who is guilty or not guilty—or who is liable or not liable. The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decision in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.”)

⁷²⁴ *Ibid.*

<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>

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courts and state courts.⁷²⁵ CRT referred the Commission to its website for that information.⁷²⁶ Among the cases published on the CRT website, based on the date of filing of the briefs, the Appellate Section filed 33 cases in FY 2016, 39 in FY 2017, and 38 in FY 2018, with a total of 110 of these briefs filed during the fiscal years studied. Of those 110 briefs, 44 (40%) were in cases involving federal civil rights law in representation of the U.S. upon appeal.⁷²⁷ But also during FY 2016-18, 66 (60%) of the Appellate Section’s enforcement actions were based on Statements of Interest in cases brought by other parties—either amicus briefs or briefs in intervention.⁷²⁸ Supreme Court decisions were issued in ten of these cases.⁷²⁹ Of these, four involved voting rights, two involved the rights of individuals with disabilities, two involved employment rights, one involved education and one involved housing.⁷³⁰ DOJ later reported to the Commission that “according to the Appellate Section’s internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147.”⁷³¹ Based on information from the Appellate Section’s website, the Commission verified there were 110 briefs filed during FY 2016 – 2018, however, information about the 37 additional cases from the Appellate Section’s internal data was not provided.⁷³² Criminal Section cases were extensive, but difficult to evaluate, in large part because DOJ does not publish the legal documents from these cases on its website.⁷³³ Unlike other CRT sections, the Criminal Section does not provide public links to the major legal filings and decisions in their cases and these cases can only be located through paid legal databases (e.g., Westlaw and

⁷²⁵ This methodology is also consistent with that suggested by the DOJ CRT in its agency review of the draft report. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file). ⁷²⁶ U.S. Dep’t of Justice, Response to USCCR Interrogatories, at 2. ⁷²⁷ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Briefs by Date of Filing. ⁷²⁸ *Ibid.* ⁷²⁹ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision. ⁷³⁰ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision: Green v. Brennan, Postmaster General, 136 S. Ct. 1769 (2016); Fisher v. University of Texas, 136 S. Ct. 2198 (2016); Harris v. Arizona Independent Redistricting Commission, 136 S. Ct. 1301 (2016); Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016); Wittman v. Personhuballah, 136 S. Ct. 1732 (2016); Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2016); Bethune-Hill v. Virginia State Board of Elections, 137 S. Ct. 788 (2016); Bank of America v. Miami; Wells Fargo v. Miami, 137 S. Ct. 1296 (2017); Cooper (McCroory) v. Harris, 137 S. Ct. 1455 (2017); Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017). ⁷³¹ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁷³² CRT commented that “according to the Appellate Section’s internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147. They include filings in the Supreme Court, courts of appeals, district courts, and state courts.” Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file). Some cases were provided to the Commission, but among those, various were not filed during Fiscal Years 2016-2018. On July 18, Commission staff requested information about cases that were not on the Appellate Section’s website that may have also fallen within these fiscal years. (On file.) These cases were not received from CRT and therefore the Commission has no information about them to analyze. ⁷³³ See U.S. Dep’t of Justice, Civil Rights Division, “Criminal Section,” <https://www.justice.gov/crt/criminal-section> (accessed Jul. 18, 2019) [hereinafter DOJ CRT, “Criminal Section”].

<https://www.justice.gov/crt/criminal-section>

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PACER).⁷³⁴ It does issue press releases but they typically do not include links to the legal documents, and during a 2018 briefing on hate crimes, the Commission and a coalition of civil rights groups urged CRT to provide more information regarding its hate crimes litigation.⁷³⁵ Lack of transparency regarding federal efforts to combat hate crimes can hinder public awareness about these crimes. At the hate crimes briefing, Former Deputy Assistant Attorney General Roy Austin testified that “you can’t underestimate the importance of public awareness over hate crimes. The condemnation, the shame that goes with that. And how that impacts whether or not someone is going to commit one in the future.”⁷³⁶ Criminal prosecution of hate crimes may also send a message to the targeted communities that law enforcement care.⁷³⁷ The Commission was able to procure information about hate crimes cases from CRT (including case numbers so that Commission staff could review legal documents), through which they provided information about 57 hate crimes cases (20 in FY 2016, 16 in FY 2017, and 21 in FY 2018).⁷³⁸ In FY 2016, there were 6 charges, 3 plea agreements, and 16 convictions.⁷³⁹ In FY 2017, there were 9 charges, 3 plea agreements, and 15 convictions.⁷⁴⁰ In FY 2018, there were 15 charges, 1 plea agreement, 10 convictions, 1 court decision of not guilty, and 1 charged resolved by the court ordering residential treatment.⁷⁴¹ This is an area of civil rights performance where there was a high level of impact in the number of convictions in FY 2016 and FY 2017, with a drop (by 1/3) in FY 2018. However, as DOJ provided the Commission with information about charges, it is notable that the number of charges in hate crimes cases has increased each fiscal year.

⁷³⁴ U.S. Dep’t of Justice, Civil Rights Division, “Press Releases,” <https://www.justice.gov/crt/press-releases>; see also <https://www.justice.gov/crt/search-cases-and-matters> (displaying links to cases from other sections, but not the Criminal section) (accessed Jul. 10, 2019). ⁷³⁵ See Lena Masri, National Litigation Director, Council on American-Islamic Relations, testimony, In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes Briefing before the U.S. Commission on Civil Rights, Washington, D.C., May 11, 2018, transcript, p. 220 [hereinafter Hate Crimes Briefing]; Hate Crimes Coalition, “Post-Charlottesville Hate Crimes Summit Coalition Recommendations to the Department of Justice,” The Leadership Conference on Civil & Human Rights, Sep. 15, 2017, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>; and see Muslim Public Affairs Council, Public Statement to U.S. Commission on Civil Rights, Jun. 25, 2018, at 2, <https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>. ⁷³⁶ Roy Austin, partner at Harris, Wittshire & Grannis, LLP and former Deputy Assistant Atty General of the Civil Rights Division, U.S. Dep’t of Justice, testimony, Hate Crimes Briefing, p. 281. ⁷³⁷ *Ibid.*, 280. ⁷³⁸ This information was not received in response to the Commission’s Interrogatories, which only referred the Commission to the CRT website. The website only provides incomplete information about its cases in the DOJ’s press releases. The Criminal Section website also does not include the federal case number, nor links to plea agreements or judicial decisions, which could only be found on PACER (a paid service to procure non-privileged information about federal court filings) with a case number. After receiving the draft report, CRT provided information about some, but not all, of its Criminal Section cases. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file); see also Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases). ⁷³⁹ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases). ⁷⁴⁰ *Ibid.* ⁷⁴¹ *Ibid.*

<https://www.justice.gov/crt/press-releases>
<http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>
<http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>
<https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>

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The Commission also received from DOJ information about 70 “color of law” cases brought against officials (mainly state and local law enforcement) 742 accused of intentionally violating civil rights while acting under the color of law, during FY 2016-2018.743 This information was only provided through press releases. The Criminal Section’s press releases show that there were 25 convictions in color of law cases in FY 2016, 19 in FY 2017, and 23 in FY 2018. However, the lack of publication of the underlying legal documents hindered the Commission’s ability to research these cases further. Also according to their press releases, the Criminal Section has also been active in actions brought to enforce protections against human trafficking and forced labor. The Criminal Section’s press releases show that there were 7 convictions in human trafficking and forced labor cases in FY 2016, 13 in FY 2017, and 13 in FY 2018. As with the color of law cases, CRT’s lack of publication of the underlying legal documents hindered the Commission’s ability to research these cases further. The concerns raised about lack of transparency in hate crimes cases are equally applicable to color of law and trafficking cases. Proactive Compliance Evaluation The Civil Rights Division has some duties with regard to external enforcement of Title VI, Title IX and Section 504. The Office of Justice Programs distributes DOJ funding, and its Civil Rights Office provides technical assistance and conducts compliance monitoring for most grantees.744 For this report, the Commission concentrated the current evaluation on CRT.745 CRT’s duties with regard to compliance evaluation include: coordinating compliance under Executive Order 12,250 (which is also discussed in the Interaction and Coordination section of this chapter); investigating allegations of discrimination based on race, color, national origin (including limited English proficiency), sex, or religion against recipients receiving financial assistance from the U.S. Department of Justice;746 monitoring compliance with the requirements of Executive Order 13,166 requiring meaningful access for persons with limited-English proficiency (LEP) in state and local court systems; maintaining the LEP.gov website to assist other agencies in monitoring compliance; and providing advice and assistance to other agencies in how to comply with Title VI, Title IX and Section 504. These duties are primarily performed by the Federal Coordination & Compliance Section (FCS). In addition, CRT receives referrals for litigation to ensure compliance with the relevant statutes from other agencies; defends the constitutionality of relevant statutes when agencies are sued, and litigates enforcement actions on behalf of other agencies and the DOJ itself. CRT’s election monitoring may be another form of monitoring for compliance, similar to CRT’s

742 In its agency review, CRT noted that “CRT CRM prosecutes federal officials alleged to have committed criminal civil rights violations.” Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file). 743 See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (color of law cases) 744 See U.S. Dep’t of Justice, Office of Justice Programs, Civil Rights Requirements Associated with OJP Awards, <https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm> (accessed Jul. 23, 2019). 745 See Letter from U.S. Comm’n on Civil Rights to Acting Assistant Atty General John Gore (Feb. 9, 2018), attaching Interrogatories and Document Requests regarding the Civil Rights Division (on file). No similar letter was sent to the Office of Justice Programs. 746 DOJ Justice Manual, supra note 370, at § 8.2.240 (Federal Coordination & Compliance Section).

<https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm>

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monitoring of compliance with the terms of cases resolved through settlements, consent decrees, and judicial decisions. This latter set of duties is mostly performed by the specific litigating section. FCS Proactive Compliance Evaluation Activities CRT told the Commission that monitoring compliance with civil rights statutes was the responsibility of the Office of Justice Programs, but OJP was not the subject of evaluation in this report.747 With regard to investigations, the Federal Coordination and Compliance Sections has five Title VI Letters of Findings on its website, and none are within FY 2016-2018.748 Executive Order 12,250 charges DOJ with coordinating compliance with Title VI and other federal statutes requiring nondiscrimination by recipients of federal funding. DOJ has issued policy guidelines, codified in federal regulations, indicating that agencies should take the lead on compliance for federal funding recipients.749 But DOJ’s regulations also state that:

While primary responsibility for enforcement of title VI rests directly with the head of each agency, in order to assure coordination of title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.750

The Commission was unable to evaluate this activity.751 However, the Commission notes that assisting other agencies in compliance monitoring is an important function of DOJ, as noted in the Commission’s 2002 report,752 and that some information about how this function is performed should be made public. For example, it would be helpful to know how often FCS is consulted by which agencies, and if and generally how it responds, whether it performs outreach, and whether its advice is based on any best practices. Regarding LEP compliance monitoring, the FCS’s website indicates that it reached three settlement agreements with state courts to remove language barriers or otherwise provide for equal access for LEP individuals in FY 2016.753 It also issued a Letter of Resolution a month after its settlement with Kentucky state courts, telling the jurisdictions that the investigation was closed as

747 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 748 U.S. Dep’t of Justice, Civil Rights Division, Federal Coordination and Compliance Section, “Department of Justice Title VI Letters of Finding: Investigations,” <https://www.justice.gov/crt/fcs/TitleVI-LOF>. 749 28 C.F.R. § 50.3. 750 28 C.F.R. § 50.3(c)(v). 751 This was due to lack of publicly available information. See U.S. Dep’t of Justice, Civil Rights Division, “Federal Coordination and Compliance Section,” <https://www.justice.gov/crt/fcs> (accessed Oct. 21, 2019). 752 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 6-7. 753 U.S. Dep’t of Justice, Civil Rights Division, “Federal Coordination and Compliance Section News,” <https://www.justice.gov/crt/federal-coordination-and-compliance-section-news>.

<https://www.justice.gov/crt/fcs/TitleVI-LOF>

<https://www.justice.gov/crt/fcs>

<https://www.justice.gov/crt/federal-coordination-and-compliance-section-news>

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it had taken affirmative steps to address the complaint allegations and come into compliance.754 The FCS asked that the jurisdiction provide quarterly updates for a period of two years.755 FCS reached two further agreements in FY 2017, and one other in FY 2018.756 One of the FY 2017 agreements was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.757 After that, FCS and Washington State Courts developed a model LEP plan through their partnership, which includes ongoing technical assistance.758 CRT told the Commission that it used this resolution type because Title VI “is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together jointly.”759 CRT added that “by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime.”760

754 See Letter to Director of Kentucky Administrative Office of the Court, Acting Chief of FCS Christine Stoneman (Jun. 22, 2016), <https://www.justice.gov/crt/file/871056/download>. Also, a prior Memorandum of Understanding with the state courts of Colorado was closed by letter in FY 2016, as FCS determined that the jurisdiction had come into compliance. Letter to Colorado State Court Administrator, Acting Chief of FCS Christine Stoneman (Jun. 21, 2016), <https://www.justice.gov/opa/file/868651/download>. 755 Ibid. 756 Ibid. 757 See DOJ, “Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals,” supra note 244. 758 Ibid. 759 U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT’s website which was referenced in response to the Commission’s Interrogatories. 760 Ibid.

<https://www.justice.gov/crt/file/871056/download>

<https://www.justice.gov/opa/file/868651/download>

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Table 2.5: FCS Resolved Cases FY 2016-2018 Party Type of Resolution Date of Resolution Basis FY 2016 Washington State DOL (by DOJ & DOL) Settlement 10/1/2015 LEP (workers) Los Angeles Superior Court Settlement 9/20/2016 LEP (public users) Kentucky Courts Settlement 6/22/2016 LEP (public users) FY 2017 Washington State Courts Partnership 7/18/2017 LEP (public users) Pennsylvania State Courts Settlement (MOU) 4/20/2017 LEP (public users) FY 2018 Eau Claire County, WI, Circuit Court Settlement 6/13/2018 LEP (public users) SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,” www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Federal Compliance & Coordination.

CRT told the Commission FCS uses a variety of resolution methods and has undertaken other compliance reviews and discussions to help entities come into voluntary compliance with these obligations.761 One example is a Voluntary Resolution Agreement entered into April 2014 (prior to the Fiscal Years studied in this report),762 which was closed in April 2016.763 The Commission notes that during the two years of this agreement, FCS worked closely with the Rhode Island state courts to help them come into compliance with their obligations to provide meaningful access to LEP persons,764 as required under Title VI.765 The FCS website states that FCS reviews and approves each federal agency’s internal and external LEP guidelines, which are implementation plans designed to ensure LEP persons have access to that agency’s programs—as well as the programs of an agency’s recipient of federal funds.766

761 Ibid. 762 Voluntary Resolution Agreement Between the United States and the Rhode Island Judiciary, Dep’t of Justice No. 171-66-2 (Mar. 26, 2014), https://www.lep.gov/resources/MOA_RI_040914_signed.pdf. 763 Letter from Acting Chief of Federal Coordination & Compliance Section to the Chief Justice of the Supreme Courts of Rhode Island (Apr. 21, 2016), https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf. 764 Ibid. 765 See, e.g., Lau v. Nichols, 414 U.S. 563, 568 (1974). 766 See, e.g., U.S. Dep’t of Justice, Office of the Atty General, Memorandum of the Attorney General to Heads of Federal Agencies, General Counsels and Civil Rights Heads, Federal Government’s Commitment to Language Access Under Executive Order 13166 (Feb. 17, 2011), p. 2, https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf [hereinafter DOJ, Memorandum: Federal Government’s Commitment to Language Access].

<http://www.justice.gov/crt/search-cases-and-matters>

https://www.lep.gov/resources/MOA_RI_040914_signed.pdf

https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf

https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf

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Proactive Compliance Monitoring by Other CRT Sections Another compliance-based enforcement tool is on-the-ground monitoring for potential civil rights violations. In the case of federal election monitoring to observe compliance with federal voting rights laws, such monitoring can have a calming effect on discriminatory activity, or it can lead to further CRT investigation that may result in new or additional enforcement action.767 The Voting Rights Act provides for federal observers, certified by the Attorney General through CRT and recruited through the Office of Personnel Management (OPM) government-wide, to enter polling places and monitor elections according to specific standards.768 But as the Commission reported last year: “Although the Shelby County [2013 Supreme Court] decision did not directly address the issue of federal observers, DOJ has interpreted Shelby County to mean that DOJ could no longer deploy federal observers to the jurisdictions formerly covered under Section 5 [of the VRA], except under the limited circumstances of a court order.”769 CRT may still send federal observers if they are ordered by a federal judge, in cases where there is a significant need to protect against constitutional violations.770 Additionally, CRT still sends its own staff to monitor elections on a regular basis, although they do not have a statutory right to observe elections from inside the polling places.771 Prior to Shelby County, the Attorney General certified and sent federal observers to 153 jurisdictions in 11 states.772 In a 2018 report, An Assessment of Access to Minority Voting Rights, the Commission found that the Shelby County decision had a negative impact on CRT’s ability to observe elections and collect information about possible unlawful voting practices or procedures.773 Current data shows similar patterns:

• In FY 2016, DOJ sent 211 federal observers and 93 staff election monitors to observe elections. In comparison, in FY 2012, DOJ sent 460 OPM federal observers and 123 staff election monitors. 774 This amounts to fewer than half the number of observers and 75.6 percent of staff election monitors present in FY 2016, compared with FY 2012.

• In FY 2017 (which included the 2016 November general election) it sent 143 OPM federal observers and 452 staff election monitors to over 76 jurisdictions in 29 states. In comparison in FY 2013 (which included the 2012 November general election) DOJ sent

767 See, e.g., USCCR, Minority Voting, supra note 17, at 30, 58, 138 n. 809, 176-77, and 191 (and testimony and data therein). 768 52 U.S.C. § 10305(a)(2) and (b) – (e). 769 USCCR, Minority Voting, supra note 17, at 256. 770 Ibid. (also includes analysis of the scope of the Attorney General’s authority to order federal observers and the observers’ own authorities and duties, under Section 8 of the Voting Rights Act); see also supra notes 551-53 (discussing 52 U.S.C. § 12302(a), under which federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendments). 771 USCCR, Minority Voting, supra note 17, at 254-60. 772 U.S. Dep’t of Justice, Civil Rights Division, Voting Section, “Federal Observers,” <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (accessed Mar. 15, 2017). 773 USCCR, Minority Voting, supra note 17, at 254. 774 Ibid., 256; updated by U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

<https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>

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780 federal observers and 259 staff election monitors to 78 jurisdictions in 23 states.775 Even though the number of jurisdictions covered was comparable (76 and 78, respectively), the number of persons monitoring compliance on the ground decreased significantly between the 2012 and 2016 general elections, amounting to DOJ sending only 18.3 percent (143/780 x 100) of the number of observers and 57.3 percent (259/452 x 100) the number of staff monitors during the 2016 elections, compared with 2012.

This updated data shows that there was an ongoing overall decrease in CRT’s election monitoring activities, even in the use of CRT staff monitoring, which is a less-resource intensive form of election monitoring.776 Civil rights compliance also is performed by CRT in most other civil cases, after they are resolved through settlement, consent decree or judicial decision, in the hundreds of cases CRT resolves each year. Post-resolution monitoring by CRT, or a court-appointed monitor, helps ensure that entities come fully into compliance with the terms of the case resolution, before the monitoring is ended and the case can be closed.777 This is especially important in what CRT terms “institutional reform” cases.778 In addition to its compliance monitoring through DOJ’s Office of Civil Rights of the Office of Justice Programs, which distributes DOJ funding,779 CRT effectuates compliance with Title VI, Title IX and Section 504 by acting on matters referred to DOJ for litigation on behalf of other agencies,780 or to enforce these civil rights laws against recipients of DOJ funding.781 These cases are part of CRT’s active litigation docket discussed in the Complaints Processing, Agency-Initiated Charges, and Litigation section of this chapter.

775 USCCR, Minority Voting, supra note 17, at 258; updated by U.S. Dept of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 776 USCCR, Minority Voting, supra note 17, at 259. 777 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 778 See supra note 567 (discussing Special Litigation Section "pattern or practice" cases). 779 U.S. Dep't of Justice, Response to USCCR Interrogatories. 780 See, e.g., Complaint, United States v. Housing Authority of the City of Bridgeport, No. 3:17-cv-1922 (D. Conn., Nov. 15, 2017)(ADA/504 referral from HUD, civil action filed by CRT); <https://www.justice.gov/crt/case-document/file/1011841/download>. 781 See, e.g., Complaint, United States v. Maricopa County, AZ, Maricopa County Sheriff's Office, and Sheriff Joseph M. Arpaio, No. 2:10-cv-01878, ¶2 (D. Ariz. Sept. 2, 2010) ("Accountability for taxpayer funds is a fundamental element of Title VI, its implementing regulations, and the contractual assurance agreements that all recipients sign as a condition of receiving federal financial assistance. As recipients of federal financial assistance, Defendants are required by law, regulation, and contract to provide the United States with access to documents, other sources of information, and facilities in connection with Title VI investigations or compliance reviews."). This Title VI compliance enforcement action also included pattern or practice statutory and constitutional claims regarding racial profiling of Latino drivers, and it reached the Ninth Circuit Court of Appeals, which held that Sheriff Arpaio was liable under Title VI. United States v. Maricopa County, 869 F. 3d 648, 653 (9th Cir. 2018); cert. denied sub nom. Maricopa Cty., Ariz. v. United States, 139 S. Ct. 1373 (2019).

<https://www.justice.gov/crt/case-document/file/1011841/download>
<https://www.justice.gov/crt/case-document/file/1011841/download>

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In addition, if other federal agencies are challenged in their authority to ensure compliance with federal civil rights laws, CRT will defend them,782 and may also defend federal civil rights laws (including compliance rules and enforcement actions) if they are challenged.783 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity Regulations CRT has an important coordinating role under federal law, particularly under Title VI and other civil rights laws applicable to recipients of federal funding.784 This tool is designed to standardize enforcement and share information about how to comply with the regulated community.785 According to the Title VI Manual issued by CRT, it has an important role and authority in compliance for federal funding recipients, to "ensure consistent and effective enforcement across the federal government."786 First, it must approve and has clearance authority over other agencies' Title VI regulations.787 CRT has broadly interpreted this Title VI regulatory requirement to mean CRT must approve "comprehensive regulations that govern, in part, a federal agency's Title VI implementation or enforcement," and:

In addition, federal implementing directives (whether in the nature of regulations or implementing guidance) that agencies issue under any of the laws covered by Executive Order 12,250 are "subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect." Id. § 1-402. These documents include regulations issued to effectuate statutes that "provide in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Id. § 1-201(d). The authority to review such guidance documents has been delegated to the Assistant Attorney General for Civil Rights, 28 C.F.R. § 0.51(a) ("The Assistant Attorney General in charge of the Civil Rights Division shall, except as reserved herein, exercise the authority vested in and perform the functions assigned to the Attorney General by Executive Order 12,250 ("Leadership and Coordination of Nondiscrimination Laws").788

782 See, e.g., Motion to Dismiss, Su v. United States Dep't of Educ., Office for Civil Rights, Region XV, No. 13-3093 (6th Cir. Apr. 12, 2012) (CRT brief). 783 See, e.g., King v. Marion County Circuit Court, No. 16-3726 (11th Cir. Feb. 17, 2017) (CRT Brief as Intervenor defending Title II of the ADA). 784 See infra notes 940-45. 785 See supra notes 306-08. 786 DOJ, Title VI Legal Manual, supra note 39, at III.A, Department of Justice Role Under Title VI. 787 Ibid. 788 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file), citing Exec. Order No. 12,250 at §1-402.

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CRT has also clarified that while it must review and approve certain federal agency regulations, it only "may require that policy guidance issued under any of the laws covered by EO 12,250 [Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations] be "submitted for approval before taking effect."789 Policy Guidance In 2002, the Commission clearly found that guidance is needed for effective civil rights enforcement.790 and the DOJ Title VI Legal Manual affirms this conclusion by finding that DOJ CRT is at the very least required to issue Title VI guidance.791 Former Deputy Assistant Attorney General Eve Hill supports the use of affirmative guidance as a tool for effective civil rights enforcement. Ms. Hill stated that "technical assistance [through DOJ guidance] around the ADA is vital for everyone involved," and that "when people don't understand that law, access to services can be threatened, and the courts become the only recourse."792 And after DOJ withdrew a relevant guidance, Disability Rights Counsel Susan Mizner of the ACLU commented that:

Withdrawing this guidance does not change the legal responsibilities of state and local governments. States must still comply with the ADA, and must still promote integrated employment for people with disabilities. If the Justice Department won't do its job, the disability rights community will. The ACLU will continue to remind employers of the law, states of their obligations, and people with disabilities that we are all worthy of being part of our country and our workforce.793

789 Ibid. 790 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 25. 791 DOJ, Title VI Legal Manual, supra note 39, at III.A, Department of Justice Role Under Title VI. 792 David M. Perry, "Companies that Exploit Disabled People Have a Friend in Jeff Sessions," Pacific Standard, Jan. 4, 2018, <https://psmag.com/economics/jeff-sessions-roll-back-disability-rights> [hereinafter Perry, "Companies that Exploit Disabled People Have a Friend in Jeff Sessions"]; (Also commenting that: "The Americans With Disabilities Act was never meant to be run by lawsuits. Instead, since 1992, the Department of Justice (DOJ) has been releasing technical assistance documents in order to explain disability-related civil rights obligations in plain language. The goal is to preemptively answer questions, but also to provide a model for consistency across the country.") 793 "ACLU Statement on DOJ Withdrawal of Disabilities Guidance," ACLU, Dec. 22, 2017, <https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance> [hereinafter "ACLU Statement on DOJ Withdrawal of Disabilities Guidance"].

<https://psmag.com/economics/jeff-sessions-roll-back-disability-rights>
<https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance>

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As discussed in Chapter 1, federal policy guidance can be an impactful tool for civil rights enforcement.794 The Commission considers it as among the "essential elements for effective civil rights enforcement."795 In 1996 and 2002 reports,796 the Commission focused on Title VI and the need for CRT to issue updated policy guidance and regulations regarding recipients of federal funding by other agencies:

Since the Commission's 1996 report, CORS [now called FCS] has issued a policy guidance titled "The Enforcement of Title VI of the Civil Rights Act and Related Statutes in Block-Grant Type Programs." CORS attributes its development to recommendations made by the Commission and other advisory groups.797

In 2002, the Commission found that CRT did not provide updated policy guidance, and it did not have a formal Title VI technical assistance program,798 and recommended that it improve these functions.799 Under federal law, DOJ is charged with developing "formal and informal guidance regarding implementation of Title VI, including legal interpretations of the statute and regulations," and this work is done mainly through FCS.800 Federal courts give special deference to DOJ's Title VI guidance documents.801 DOJ also acts as a federal agency coordinator and clearinghouse of information, and provides oversight and coordination of Title VI implementation, mainly through FCS.802 FCS released several guidance documents in FY 2016 that covered guidance on language access in state courts, and emergency preparedness, response and recovery.803 In the past, CRT's guidance on language access policies had been expansive and FCS offered technical assistance, which it may still be providing.804 In FY 2017, FCS released guidance on Title VI requirements with regard to child welfare systems.805 Prior to the fiscal years studied in this report, in August 2016, FCS led

794 See supra notes 178 and 321 (discussing testimony of Professors Anthony Varona and Aderson Francios). 795 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 2. 796 USCCR, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, supra note 51, at 141-144; USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 15. 797 USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 15. 798 Ibid., 7. 799 Ibid., 8. 800 See DOJ, Title VI Legal Manual, supra note 39, at III.A.2. 801 Ibid., III.A.2, citing "See, e.g., United States v. Maricopa Cty., 915 F. Supp. 2d 1073, 1080 (D. Ariz. 2012) (citing Consol. Rail Corp. v. Darrone, 485 U.S. 624, 634 (1984); Andrus v. Sierra Club, 442 U.S. 347, 357-58 (1979))." 802 DOJ, Title VI Legal Manual, supra note 39, at III.A.3 and 4. 803 U.S. Dep't of Justice, "Press Release: Federal Agencies Issue Joint Guidance to Help Emergency Preparedness, Response and Recovery Providers Comply with Title VI of the Civil Rights Act," Aug. 16, 2016, <https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>. 804 CRT told the Commission that this information was privileged. U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 805 U.S. Dep't of Justice, "Press Release: Departments of Justice and Health and Human Services Issue Joint Guidance for Child Welfare Systems," Oct. 19, 2016, <https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>.

<https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>
<https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>
<https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>
<https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>

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federal agencies in releasing a joint guidance regarding the need to provide language access during emergencies. DOJ together with Homeland Security (DHS), Housing and Urban Development (HUD), Health and Human Services (HHS), and Transportation (DOT), issued the guidance to "ensure" that persons "affected by disasters do not face unlawful discrimination on the basis of race, color, or national origin (including limited English proficiency) in violation of Title VI of the Civil Rights Act of 1964 (Title VI)."806 It concluded by emphasizing that:

Hurricane Katrina and subsequent emergencies and disasters highlight a recurring lesson: we need to take proactive measures to ensure that all members of our communities are appropriately incorporated into emergency management activities. We invite you to contact the civil rights office of your federal funding agency or DOJ's Federal Coordination and Compliance Section in the Civil Rights Division for additional technical assistance on compliance with Title VI and other federal civil rights laws.807

Another important function of FCS is maintaining the LEP.gov website, which provides extensive guidance on the implementation of Executive Order 13,166, which requires federal agencies to ensure LEP persons have meaningful access to their services, and that the agencies work to ensure that recipients of federal funding provide meaningful access to persons who are limited-English proficient.808 In 2019, the federal government's LEP.gov website says that FCS has "taken the lead in coordinating and implementing this Executive Order," but that agencies and recipients of federal funding do not necessarily have to submit an LEP plan to FCS.809 Specifically, the current language states that:

Q. Do recipients of federal funds have to submit written language access plans to the Department of Justice or to their federal funding agency each year? A. No. While planning is an important part of ensuring that reasonable steps are taken to provide meaningful access to LEP individuals seeking services, benefits, information, or assertion of rights, there is no blanket requirement that the plans themselves be submitted to federal agencies providing federal financial assistance. In certain circumstances, such as in complaint investigations or compliance

806 DOJ, DHS, HUD, HHS and DOT, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, 1 (Aug. 16, 2015), <https://www.justice.gov/crt/file/885401/download>. 807 Ibid., 16. 808 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file); see also Exec. Order No. 13,166, Improving Access to Service for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>, and see, e.g., Lau v. Nichols, 414 U.S. 563, 568 (1974) (regarding meaningful access). 809 "Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals," Limited English Proficient (LEP), LEP.gov, A Federal Interagency Website, <https://www.lep.gov/faqs/faqs.html#OneQ7> (accessed Jul. 21, 2019) [hereinafter "Commonly Asked Questions," LEP.gov].

<https://www.justice.gov/crt/file/885401/download>
<https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>
<https://www.lep.gov/faqs/faqs.html#OneQ7>

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reviews, recipients may be required to provide to federal agencies a copy of any plan created by the recipient.810

In 2011, as compliance with Title VI's protections against national origin discrimination was spotty, Attorney General Holder specifically requested that each federal agency submit an LEP compliance plan to the FCS, and that agencies that issued federal assistance require their grantees to submit LEP compliance plans, among other steps.811 But currently, the website does not display a required submission of a plan, although it does provide information about why it is important to have such a plan and why it should be continuously updated, and it states that "agencies that conduct activities overseas must still submit a plan for making their domestic activities accessible to people who are limited English proficient."812 In addition to those issued by FCS, policy guidance may sometimes be issued by other CRT sections. The Educational Opportunities Section has only published one new guidance document during FY 2016-2018.813 Comparatively, between 2014 and 2016, EOS and ED OCR released at least eight such documents, related to Asian American and Pacific Islander student rights, ELL students' equal access to education, and non-discriminatory school discipline.814 Other types of guidance and technical assistance and its dissemination through publicity are discussed in this chapter's section on Interaction and Coordination with External Agencies and Stakeholders, as they have resulted from interaction with other agencies as well as stakeholders. For example, after several roundtables on religious discrimination in schools, with a Dear Colleague letter from former CRT head Vanita Gupta, DOJ released its final report on Combating Religious Discrimination Today, which included recommendations and increased resources and guidance, for agencies, schools, and community leaders.815 DOJ has also issued policy guidance impacting civil rights. As discussed below, the major policy changes in the Obama Administration took expansive views of civil rights protections, and the Trump Administration's focus has been restrictive and may be less effective for impacted communities.816

810 Ibid., Question 8. 811 DOJ, Memorandum: Federal Government's Commitment to Language Access, supra note 766, at 2. 812 "Commonly Asked Questions," LEP.gov, supra note 810, at Question 12 (agencies with overseas activities), D (why it's important to have an LEP plan, citing DOJ, Memorandum: Federal Government's Commitment to Language Access, supra note 766) and E (why it's important to update LEP plans). 813 See U.S. Dep't of Justice, Civil Rights Division, "Guidance and Resources," <https://www.justice.gov/crt/guidance-and-resources> (accessed Jul. 5, 2018). 814 Ibid. 815 See U.S. Dep't of Justice, Combating Religious Discrimination Today: Final Report, July 2016, https://www.justice.gov/Combating_Religious_Discrimination [hereinafter DOJ, Combating Religious Discrimination Today]. 816 See supra notes 317-26 (comments of civil rights groups).

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During FY 2016, on December 15, 2015, DOJ issued new guidance on preventing gender bias in law enforcement responses to sexual assault and domestic violence.⁸¹⁷ On March 14, 2016, DOJ released guidance (including a dear colleague letter that DOJ later rescinded) encouraging state and local governments to engage in fine and fee reform efforts.⁸¹⁸ On May 13, 2016, DOJ and ED released a joint guidance, which summarized a school's Title IX obligations regarding transgender students and explained how DOJ and ED evaluate a school's compliance with those obligations.⁸¹⁹ On July 1, 2016, as a part of the DOJ's ADA Voting Initiative, CRT released new guidance documents about ADA requirements with respect to polling places.⁸²⁰ FY 2017 spanned two presidential administrations, the end of the Obama Administration, and the beginning of the Trump Administration. On October 31, 2016, DOJ released a statement discussing the application of the integration mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to state and local governments' employment service systems for individuals with disabilities.⁸²¹ On November 10, 2016, with HUD, DOJ issued an updated Joint Statement on the application of the Fair Housing Act to State and Local Land Use Practices.⁸²² Citing a recently issued Supreme Court decision, the Joint Statement clarified that:

Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* The Court stated that "[t]hese unlawful practices include zoning laws and other housing

⁸¹⁷ U.S. Dep't. of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, Dec. 15, 2015, <https://www.justice.gov/opa/file/799366/download>. ⁸¹⁸ U.S. Dep't. of Justice, "Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices," Mar. 14, 2016, <https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>. In 2017, the Commission released a report, *Targeted Fines and Fees Against Communities of Color*, which found that the imposition of fine and fees have disproportionately impacted communities and people of color. See U.S. Comm'n on Civil Rights, *Targeted Fines and Fees Against Communities of Color*, September 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf. ⁸¹⁹ U.S. Dep't of Justice & Dep't of Education, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. ⁸²⁰ U.S. Dep't of Justice, "Press Release: Justice Department Issues Updated Guidance on the Americans with Disabilities Act Checklist for Polling Places," Jul. 1, 2016, <https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>. ⁸²¹ U.S. Dep't of Justice, *Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. to State and Local Governments' Employment Services Systems for Individuals with Disabilities* (Oct. 31, 2016), http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf [hereinafter DOJ, *Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead v. L.C.*]. ⁸²² DOJ, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, supra note 554, at 4.

<https://www.justice.gov/opa/file/799366/download>

<https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>

<https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>

https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

<https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>

<https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>

http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf

http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf

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restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."⁸²³

Just prior to that, in October 2016, the CRT Housing Section had filed an amicus brief in a case in New York, strongly defending the disparate impact standard in a case alleging that a landlord's exclusion of applicants with criminal records discriminated against black and Latino applicants.⁸²⁴ This example illustrates how policy guidance and litigation may be utilized together to develop the law and send messages to potential violators. In December 2016, CRT released updated guidance for election officials on how to comply with Section 203 of the VRA.⁸²⁵ The most recent Census Bureau determinations of which jurisdictions were subject to Section 203 of the VRA, which requires that election materials and assistance be provided in languages spoken by minority voters if their community reaches a certain threshold number or percentage of eligible voters, were made on December 5, 2016 when 263 jurisdictions were determined to be covered by Section 203.⁸²⁶ On December 15, 2016, DOJ issued a guidance letter to State, County, and Municipal Officials explaining obligations under the Religious Land Use and Institutionalized Persons Act.⁸²⁷ In FY 2018, the Housing Section filed two Statements of Interest with federal courts regarding this statute,⁸²⁸ again illustrating how policy and litigation may coordinate to develop the law. On January 20, 2017, the presidential administration changed as Donald J. Trump was sworn in as President of the U.S. On February 22, 2017, ED and DOJ rescinded joint Title IX guidance clarifying protections under the law with regard to transgender students.⁸²⁹ This issue is further discussed in the U.S. Department of Education chapter of this report.⁸³⁰

⁸²³ *Ibid.* ⁸²⁴ United States of America's Statement of Interest, *The Fortune Society v. Sandcastle Towers Housing*, No. 1:14-cv-06410, (E.D.N.Y. Oct. 8, 2016), 825 28 C.F.R. Pt. 55 (2016), 826 81 Fed. Reg. 87,532-38 (Dec. 5, 2016). ⁸²⁷ U.S. Dept. of Justice, *Letter Re: The Religious Land Use and Institutionalized Persons Act* (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download>. ⁸²⁸ *Statement of Interest of the United States, Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas*, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church's suit under RLUIPA arguing their religious exercise was substantially burdened by the City after being denied a land use permit to convert a residential house adjacent to the Church's property into meeting house to allow for additional programing and meeting space); *Statement of Interest of the United States, Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland*, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff's suit under RLUIPA alleging Howard County's complete denial of JOGA's petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA's ability to practice their religion, particularly as there was no Jagannath temple anywhere in the State of Maryland.). ⁸²⁹ U.S. Dep't of Justice and ED, *Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence*. ⁸³⁰ See *infra* notes 1200-03 (discussing the impact of the rescission).

<https://www.justice.gov/crt/page/file/918596/download>

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

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Moving on to fiscal year 2018, on October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties.⁸³¹ This new guidance permits recipients of federal funding to make exceptions to their services based on "sincerely held religious beliefs."⁸³² The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.⁸³³ Craig Leen, Director of OFCCP, noted that OFCCP's decision to implement new guidance with respect to the religious exemption of Executive Order 11,246 was in part prompted by the Attorney General's memorandum on religious liberty.⁸³⁴ Two days later, the Justice Department also reversed a policy that previously clarified that transgender workers are protected under Title VII of the Civil Rights Act of 1964.⁸³⁵ During the fiscal years studied, implementation of these changes has occurred in DOL and is underway in HHS (see DOL and HHS chapters of this report).⁸³⁶ On November 16, 2017, then-Attorney General Sessions issued a memorandum to all components of the U.S. Department of Justice prohibiting the issuance of letters or guidance documents that serve to take the place of the regulatory process or modify the law stating, "[d]epartment components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch."⁸³⁷ However, this guidance made no substantive change to existing DOJ or agency practice.⁸³⁸ Sessions' memorandum also withdrew several dozen guidance documents pursuant to recommendations made by the U.S. Department of Justice Regulatory Reform Task Force during fiscal year 2018 that had been previously issued by DOJ. On December 21, 2017, DOJ withdrew 25 guidance documents, including *inter alia* guidance on fines and fees, guidance on ADA construction compliance, and guidance pertaining to protecting the rights of legal permanent

⁸³¹ U.S. Dept. of Justice, Office of the Atty General, *Implementation of Memorandum on Federal Law Protections for Religious Liberty* (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>. ⁸³² *Ibid.* ⁸³³ Varona Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 255-58; National LGBTQ Task Force Statement, at 8-9. ⁸³⁴ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 87-88. ⁸³⁵ U.S. Dept. of Justice, *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, Oct. 4, 2017, <https://www.justice.gov/ag/page/file/1006981/download>. ⁸³⁶ See *infra* notes 1395-1419 and 2020-36 (regarding HHS and DOL, especially with regard to reversal a policy clarifying that transgendered workers are protected under Title VII of the Civil Rights Act of 1964 on Oct. 4, 2017). ⁸³⁷ U.S. Dept. of Justice, *Memorandum: Prohibition on Improper Guidance Documents* (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>. ⁸³⁸ See *Administrative Conference of the United States, Guidance in the Rulemaking Process*, Rec. No. 2014-3 (Jun. 24, 2014), <https://www.acus.gov/recommendation/guidance-rulemaking-process>.

<https://www.justice.gov/opa/press-release/file/1001886/download>

<https://www.justice.gov/ag/page/file/1006981/download>

<https://www.justice.gov/opa/press-release/file/1012271/download>

<https://www.acus.gov/recommendation/guidance-rulemaking-process>

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residents.⁸³⁹ The Commission strongly criticized the withdrawal of these guidance documents.⁸⁴⁰ DOJ did not replace these guidance documents with new guidance about how to satisfy the law the rescinded documents described. On July 3, 2018, the Justice Department withdrew a further 24 guidance documents including *inter alia* guidance on federal protections against national origin discrimination, joint DOJ and ED guidance on the use of race by educational institutions.⁸⁴¹ This set of withdrawals included outdated policy guidance documents that were replaced, such as an outdated version of public outreach material discussing refugees' and asylees' rights to work that was replaced by CRT's Immigrant & Employee Rights Section in December with an updated version.⁸⁴² On April 6, 2018, Attorney General Sessions notified all U.S. Attorneys of the administration's zero-tolerance policy towards immigrants crossing the southern border of the U.S., leading to thousands of Central American children being separated from their parents at the border.⁸⁴³ During the Commission's briefing, the Executive Director of Asian Americans Advancing Justice testified that the positions of the Trump Administration had a chilling effect on immigrant communities' reporting potential civil rights violations to the federal government.⁸⁴⁴ On June 13, 2018 DOJ announced its Place to Worship Initiative, "which will focus on protecting the ability of houses of worship and other religious institutions to build, expand, buy, or rent facilities" as protected by RLUIPA.⁸⁴⁵ The initiative intends to include hosting community outreach events, educating and training organizations about RLUIPA requirements, and providing additional resources to federal prosecutors.⁸⁴⁶ DOJ hosted a community outreach event on June 25, 2018,⁸⁴⁷ released a RLUIPA Q&A document that outlined the law's requirements, scope, and interpretation.⁸⁴⁸ This document emphasized that, in the passage of RLUIPA:

⁸³⁹ U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 25 Guidance Documents," Dec. 21, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>. ⁸⁴⁰ U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions' Withdrawal of Critical Civil Rights Guidance, (Jan. 19, 2018). ⁸⁴¹ See also United States' Statement of Interest, *Students for Fair Admissions v. Harvard*, No. 1:14-cv-14176 (D. Mass., Aug. 30, 2018), <https://www.justice.gov/opa/press-release/file/1090856/download>. ⁸⁴² U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 24 Guidance Documents," Jul. 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>; see also U.S. Dep't of Justice, *Civil Rights Division, Immigrant & Employee Rights Section, Information About Refugees and Asylees About Form I-9*, December 2018, <https://www.justice.gov/crt/page/file/1119566/download>. ⁸⁴³ U.S. Dept. of Justice, Office of the Atty General, *Memorandum for Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (April 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [hereinafter DOJ, *Zero-Tolerance Memorandum*]. ⁸⁴⁴ Yang Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 182-88. ⁸⁴⁵ U.S. Dep't of Justice, "Press Release: Department of Justice Announces Place to Worship Initiative," Jun. 13, 2018, <https://www.justice.gov/opa/pr/department-justice-announces-place-worship-initiative-0>. ⁸⁴⁶ *Ibid.* ⁸⁴⁷ *Ibid.* ⁸⁴⁸ U.S. Dep't of Justice, *Civil Rights Division, Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)* (Jun. 13, 2018), <https://www.justice.gov/crt/page/file/1071246/download>.

<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>

<https://www.justice.gov/opa/press-release/file/1090856/download>

<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>

<https://www.justice.gov/crt/page/file/1119566/download>

<https://www.justice.gov/opa/press-release/file/1049751/download>

<https://www.justice.gov/opa/press-release/file/1049751/download>

<https://www.justice.gov/opa/pr/department-justice-announces-place-worship-initiative-0>

<https://www.justice.gov/crt/page/file/1071246/download>

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Congress... heard testimony that, as a whole, religious institutions were treated worse than comparable secular institutions by zoning codes and zoning authorities. As RLUIPA's Senate sponsors, Senator Hatch and the late Senator Kennedy, said in their joint statement issued upon the bill's passage: "Zoning codes frequently exclude churches in places where they permit theaters, meetings halls, and other places where large groups of people assemble for secular purposes. . . . Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes."⁸⁴⁹

CRT also released a shorter informational document about RLUIPA and DOJ's role in its enforcement.⁸⁵⁰ CRT had announced a similar, broader initiative in 2016, the Combatting Religious Discrimination Today Initiative, which brought together community and religious leaders for roundtable discussions across the country.⁸⁵¹ That initiative led to the production of a report about what the DOJ would focus on moving forward to help combat religious discrimination.⁸⁵² One of the themes was the lack of education and awareness about RLUIPA, which yielded a recommendation to increase outreach and education for local officials and religious communities on RLUIPA.⁸⁵³ Campaign for Youth Justice has

mentioned that they were concerned that in June 2018, DOJ's Office of Juvenile Justice and Delinquency Prevention issued new, reduced compliance requirements for states to demonstrate that they are addressing disproportionate minority contact in the juvenile justice system; the new requirements have states assessing themselves rather than reporting sufficient data for DOJ to assess whether states are meeting their responsibilities.⁸⁵⁴ Also in 2018, citing President Trump's Executive Order 13,777 calling for reduction in government regulation, then-Attorney General Sessions rescinded ten ADA guidance documents.⁸⁵⁵ Some experts believe that rescission of many of these documents will not have much effect on disability rights enforcement or compliance.⁸⁵⁶ Whether or not that view is accurate, without question the rescission of a 2016 Olmstead guidance has been widely described as

849 *Ibid.*, 1. 850 DOJ, Federal Religious Land Use Protections, *supra* note 555. 851 Letter from Vanita Gupta, Principal Deputy Assistant Atty General, to State, County and Municipal Officials (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download> (re: the Religious Land Use and Institutionalized Persons Act). 852 DOJ, Combating Religious Discrimination Today, *supra* note 615. 853 *Ibid.*, 23. 854 Campaign for Youth Justice, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Dec. 17, 2018, at 2. 855 "DOJ Rescinds 10 ADA Guidance Documents," Ballard Spahr, Jan. 3, 2018, <https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>. 856 *Ibid.*; see also Michelle Diamant, "Justice Department Scraps ADA Guidance," Disability Scoop, Jan. 4, 2018, <https://www.disabilityscoop.com/2018/01/04/justice-scraps-ada-guidance/24546/>.

<https://www.justice.gov/crt/page/file/918596/download>
<https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>
<https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>
<https://www.disabilityscoop.com/2018/01/04/justice-scraps-ada-guidance/24546/>

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concerning.⁸⁵⁷ This guidance document outlined the integration mandate of Title II of the ADA. The integration mandate requires allowing people with disabilities to live integrated lives and avoid unnecessary, and unlawful segregation from society,⁸⁵⁸ and, more specifically, requires public entities to administer their services, including their employment programs, in the manner "that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."⁸⁵⁹ The Supreme Court in *Olmstead* held that public entities are required to provide community-based services to persons with disabilities when appropriate, when agreed to by these individuals, and when reasonable accommodations can be made.⁸⁶⁰ The Code of Federal Regulations requires that: "To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination."⁸⁶¹ ADA's integration mandate is a statutory requirement that cannot be overturned by a guidance.⁸⁶² Nor can a guidance overturn a Supreme Court opinion or federal regulations,⁸⁶³ so the related rules were not overturned by the Sessions guidance. CRT told the Commission that, "Enforcement actions are far more important than any guidance document, which cannot change the law[.]" and "that the Division continued its work with *Olmstead* settlements, trials, and actions under the Trump Administration.⁸⁶⁴ The value of this guidance was shown by it being complemented by enforcement actions as well as interaction and coordination with other agencies. After the *Olmstead* decision, CRT brought

857 U.S. Dep't of Justice, Withdrawal of the Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments' Employment Service Systems for Individuals with Disabilities (Dec. 21, 2017), https://www.ada.gov/withdrawn_olmstead.html [hereinafter DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead*]; "ACLU Statement on DOJ Withdrawal of Disabilities Guidance," *supra* note 793; Perry, "Companies that Exploit Disabled People Have a Friend in Jeff Sessions," *supra* note 792. 858 The guidance summarized the statutory and regulatory provisions as follows:

[T]he ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, *supra* note 821, at 2.

859 *Ibid.* ("Therefore, the ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 860 *Ibid.*, note 8, citing *Olmstead*, 527 U.S. at 607. 861 *Ibid.*, note 9, citing 28 C.F.R. § 35.130(b)(7). 862 See, e.g., Order, *Texas v. E.E.O.C.*, No. 513-CV-255-C, at *4 (N.D. Tex. Feb. 1, 2018), <http://www.naacpldf.org/files/about-us/Doc.%20117.pdf> (explaining that a guidance is only as enforceable as the underlying law). 863 *Id.* 864 U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

https://www.ada.gov/withdrawn_olmstead.html
<http://www.naacpldf.org/files/about-us/Doc.%20117.pdf>

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two cases against states for ADA violations over non-integrative and discriminatory employment practices, procuring a consent decree in Rhode Island in 2014,⁸⁶⁵ and after CRT intervention in a private case, a court-approved settlement agreement in Oregon in 2015.⁸⁶⁶ CRT led an Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities, based on the DOJ's *Olmstead* enforcement and the Obama Administration's prioritization of this issue.⁸⁶⁷ Based on these cases as well as the underlying law discussed above, in 2016, CRT took the position that the ADA integration mandate required that public entity workshops had to make sufficient opportunity for qualified individuals with disabilities to work in integrated settings, where they would receive wages the same as non-disabled workers.⁸⁶⁸ As discussed in Chapter 1, the Commission has previously found that affirmative policy guidance helps send a message that the federal government will protect civil rights, whereas restrictive guidance may send the opposite message and therefore be ineffective.⁸⁶⁹ Disparate Impact Policy In January 2019, the Washington Post reported that internal memoranda directed Justice Department officials to consider the impact of modifying or removing disparate impact regulations. 870 The Post also reported the Education Department and HUD were considering changes in their policies on enforcing "disparate impact" protections against discrimination,⁸⁷¹ and HUD had already announced its intentions and by April 2019, the proposed rulemaking public meeting process had begun.⁸⁷² Although the Commission cannot independently verify the Washington Post report about internal DOJ memoranda, as discussed in Chapter 5, HUD has now issued a notice of proposed rulemaking weakening disparate impact enforcement. CRT has over time, actively enforced the disparate impact body of civil rights law.

865 Order Approving Consent Decree & Consent Decree, United States v. Rhode Island, No. 1:14-cv-00175 (D.R.I. April 9, 2014), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana. 866 United States of America's Motion to Intervene, Lane v. Kitzhaber, No. 3:12-cv-00138-ST (D. Ore. Mar. 27, 2013); Settlement Agreement, Lane v. Brown (formerly Lane v. Kitzhaber), No. 3:12-cv-00138-ST (D. Ore. Sept. 8, 2015), approved by U.S. Magistrate Judge Janice Stewart (Dec. 29, 2018); and see Independent Reviewer, 2016 Report to the Court, Lane v. Brown (Jan. 1 – Dec. 31, 2016), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana. 867 U.S. Dep't of Justice, Civil Rights Division, Presentation: Department of Justice Olmstead Enforcement: Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *passim*. (Jan. 23, 2015), <https://www.doi.gov/odep/topics/date/SheilaForan.pdf>. 868 Perry, Companies that Exploit Disabled People, *supra* note 793; DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead*, *supra* note 857; DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, *supra* note 821. 869 See *supra* notes 295-96. 870 See Meckler et al., "Trump Administration Considers Rollback of Anti-discrimination Rules," *supra* note 312. 871 *Ibid.* 872 See Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standards, 83 Fed. Reg. 28,560 (proposed Jun. 20, 2018); and See Office of Management and Budget, EO 12866 Meeting 2529-AA98, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (FR-6111-P-01), Proposed Rule Stage (Apr. 25, 2019), <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>.

https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana
https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana
<https://www.doi.gov/odep/topics/date/SheilaForan.pdf>
<https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>
<https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>

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Disparate impact discrimination can be unintentional discrimination that stems from policies that are neutral as written, but have an unlawful adverse and discriminatory effect on a particular protected class of individuals.⁸⁷³ Since the Commission called for use of the disparate impact standard when developing the first regulations implementing the 1964 Civil Rights Act, which agencies incorporated, and Congress and agencies incorporated it into later civil rights laws and regulations,⁸⁷⁴ the disparate impact standard has been an enforcement tool available to federal civil rights offices. The standard helps to "ensure that there isn't discrimination that whether intentionally or inadvertently is having an impact on particular protected classes of people in this country."⁸⁷⁵ Many federal civil rights statutes recognize the use of disparate impact to root out unintentional discrimination.⁸⁷⁶ Some of these statutes govern governmental agencies and some private actors.⁸⁷⁷ Additionally, recipients of federal funding are subject to disparate impact regulations, so regulatory changes or changes in federal enforcement of disparate impact protections could have a sweeping impact. Twenty-six federal funding agencies have Title VI regulations prohibiting not only intentional discrimination, but also prohibiting certain types of discrimination based on disparate impact caused by legally questionable policies or practices.⁸⁷⁸ The 26 agencies with Title VI disparate impact regulations include 12 of the 13 agencies studied in this report.⁸⁷⁹ The remaining agency, EEOC, enforces federal disparate impact statutory protections and regulations under Title VII, which the Supreme Court upheld in 1971.⁸⁸⁰

873 "Disparate Impact," Legal Information Institute, https://www.law.cornell.edu/wex/dispurate_impact. 874 See Olatunde C.A. Johnson, The Agency Roots of Disparate Impact, 49 Harv. C.R.-C.L. L. Rev. 125, 139 (2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship (describing how, after Title VI passed in 1964, the Commission worked on a task force with the White House, the Department of Justice, and the Bureau of Budget to draft the final regulations first "for the Department of Health, Education, and Welfare, which then became the model for all other federal agencies."); 875 Gupta Testimony, Federal Civil Rights Enforcement Briefing, p. 198. 876 See 52 U.S.C. § 10101(a)(1) [previously 42 § 1971] (Civil Rights Act); 52 U.S.C. § 10301(a) (Voting Rights Act); 42 U.S.C. § 12112(a), 42 U.S.C. § 12112(b)(3), 42 U.S.C. § 12112(b)(2), 42 U.S.C. § 12112(b)(6), 42 U.S.C. § 12182, 42 U.S.C. § 12182(b)(3)(A) (Americans With Disabilities Act); 42 U.S.C. § 2000c-6(a) (Civil Rights Act, Title IV); 42 U.S.C. § 12132 (Americans With Disabilities Act Title II); 15 U.S.C. § 1691(a) (Equal Credit Opportunity Act); 42 U.S.C. § 2000a(a) (Civil Rights Act of 1964, Title II); 42 § 3604(a), 42 § 3604(b), 42 U.S.C. § 3606, 42 U.S.C. § 3607 (Fair Housing Act); 42 U.S.C. § 2000e-2(b), 42 U.S.C. § 2000e-2(c)(3), 42 U.S.C. § 2000e-2(k) (Civil Rights Act of 1964, Title VII); 34 U.S.C. § 10228 [previously 42 U.S.C. § 3789D] (Omnibus Crime Control and Safe Streets Act). See also The Editorial Board, "The Latest Front Against Civil Rights," *The New York Times*, Jan. 4, 2019, <https://www.nytimes.com/2019/01/04/opinion/dispurate-impact-discrimination-trump.html>. 877 See, e.g., 42 U.S.C. § 10301 (Section 2 of the Voting Rights Act, providing that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State... in a manner which results in denial or abridgement of the right of any United States citizen to vote on account of race or color[.]") 878 DOJ, Title VI Legal Manual, *supra* note 39, at Section VII.A. 879 See 7 C.F.R. § 15.3(b)(2)-(3) (USDA); 34 C.F.R. § 100.3(b)(2)-(3) (ED); 40 C.F.R. § 7.35(b)-(c) (EPA); 45 C.F.R. § 80.3(b)(2)-(3) (HHS); 6 C.F.R. § 21.5(b)(2)-(3) (DHS); 24 C.F.R. § 1.4(b)(2)(i)-(3) (HUD); 43 C.F.R. § 17.3(b)(2)-(3) (DOI); 28 C.F.R. § 42.104(b)(2)-(3) (DOJ); 29 C.F.R. § 31.3(b)(2)-(3) (DOL); 49 C.F.R. § 21.5(b)(2)-(3) (DOT); 31 C.F.R. § 22.4(b)(2) (Treasury); 38 C.F.R. § 18.3(b)(2)-(3) (VA). 880 See Equal Employment Opportunity Comm'n, Employment Tests and Selection Procedures, https://www.eeoc.gov/policy/docs/factemployment_procedures.html (discussing *Griggs v. Duke Power*, 401 U.S. 424 (1971)).

https://www.law.cornell.edu/wex/dispurate_impact
https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship
<https://www.nytimes.com/2019/01/04/opinion/dispurate-impact-discrimination-trump.html>
https://www.eeoc.gov/policy/docs/factemployment_procedures.html

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While other federal agencies have engaged in efforts to limit the use of disparate impact in their enforcement efforts,⁸⁸¹ they contrast sharply with the revision of the DOJ's Title VI legal manual that leaves intact the strong admonition that agencies must use the disparate impact legal standard in their Title VI (race discrimination) civil rights enforcement work, in part because the tool is exclusively available to federal administrative agencies for enforcement.⁸⁸² This legal manual continues to strongly endorse the disparate impact legal tool and discusses the lawfulness and practical utility of the tool.⁸⁸³ The legal manual also states that since the Supreme Court ruled in 2001 that private parties may not enforce disparate impact regulations, the role of the federal government is vital.⁸⁸⁴ In addition, several statutes the Justice Department enforces prescribe discrimination that is shown through disparate impact.⁸⁸⁵ The Americans with Disabilities Act, Title VII of the Civil Rights Act, the Fair Housing Act, and the Voting Rights Act contain language that either explicitly authorizes, or has been interpreted to authorize, disparate impact claims.⁸⁸⁶ Courts have also interpreted the Equal Credit Opportunity Act as encompassing disparate impact claims, while they have had differing views with regard to Title II of the Civil Rights Act.⁸⁸⁷

881 Meckler et al., "Trump administration considers rollback of anti-discrimination rules," *supra* note 312. 882 DOJ, Title VI Legal Manual, *supra* note 39, at § VII.B. The website states "updated March 18, 2019." *Id.* CRT told the Commission that the Title VI Legal Manual has not been updated since Jan. 12, 2017. U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). 883 *Ibid.* 884 In the 2001 case of *Alexander v. Sandoval*, the Supreme Court held that private parties may not enforce Title VI disparate impact regulations, and that only the federal government can enforce them. 532 U.S. 275 (2001). CRT pointed out in its Title VI manual (according to DOJ website, "Updated March 18, 2019") that federal "agencies' critical role [in enforcing Title VI disparate impact regulations] only increased after the Supreme Court's 2001 decision in *Alexander v. Sandoval*." DOJ, Title VI Legal Manual, *supra* note 39, at § VII.B (citing 532 U.S. 275 (2001)). The Manual explains that:

Following *Sandoval*, the Civil Rights Division issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although *Sandoval* foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them. Nor does *Sandoval* affect the disparate impact provisions of other laws, such as Title VII or the Fair Housing Act. The agencies' Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism. *Ibid.*

885 See Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012); Omnibus Crime Control and Safe Streets Act, 34 U.S.C. § 10228 (2012); The Civil Rights Act, 42 U.S.C. §§ 12112, 12132 (2012); The Civil Rights Act, 42 U.S.C. § 10101 (2012); The Voting Rights Act, 52 U.S.C. § 10301 (2012). 886 See Civil Rights Act, 42 U.S.C. §§ 3604, 3606, 3607 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12132 (2012); The Civil Rights Act, 42 U.S.C. § 10101 (2012); Fair Housing Act, 42 U.S.C. § 2000e-2(b), (c), (k) (2012); Voting Rights Act, 52 U.S.C. § 10301(a) (2012); Americans with Disabilities Act, 42 U.S.C. § 12112(b) (2012). Fair Housing Act, 42 U.S.C. §§ 3604-3605. 887 See *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1340-41 (2d Cir. 1974) (applying disparate impact analysis to a claim under Title II of the Civil Rights Act); *Natl' Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co.*, 635 F.Supp.2d 1096, 1104 (C.D. Cal. 2009) (finding disparate impact claims cognizable under the Equal Credit Opportunity Act and Fair Housing Act). See also *Akiyama v. U.S. Judo Inc.*, 181 F.Supp.2d 1179, 1185-86 (W.D. Wash. 2002) (declining to apply disparate impact analysis to a

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The Supreme Court has repeatedly upheld disparate impact regulations.⁸⁸⁸ Moreover, the term “disparate impact” elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest.⁸⁸⁹ Courts have long been clear that proving disparate impact discrimination requires more than just proving the existence of a statistical disparity in impact.⁸⁹⁰ For example, in the Inclusive Communities housing case, the Supreme Court recently held that a showing that the defendant’s policies unfairly and directly caused the disparate impact is required.⁸⁹¹ In addition, discrimination claims based on Title VI disparate impact regulations (which 12 of the agencies reviewed in this report enforce) can be defeated when the policies are necessary for a “legitimate, nondiscriminatory goal.”⁸⁹² Moreover, the DOJ Title VI legal manual states that the disparate impact standard used under the Fair Housing Act “is substantially similar to the Title VI... standard.”⁸⁹³ This holds true for Title VII employment discrimination claims as well.⁸⁹⁴ That means that across these agencies, if a policy with disparate impact is not needed to further a legitimate goal, it may be unlawful. The former head of CRT Vanita Gupta has opined that, “Disparate-impact liability can uncover disguised discriminatory intent and/or unconscious prejudices. And unconscious bias can have the same effect as overt bias: it can undermine equal opportunity.”⁸⁹⁵ On the other hand, at the Commission’s briefing, Pacific Legal Foundation’s Joshua Thompson posited that using a disparate impact theory of enforcement is not the best use of agency resources.⁸⁹⁶ At the Commission’s briefing, Thompson remarked that, “Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination. The question of intent, rather than incidental effect, ought to be at the heart of disparate impact enforcement... [R]egarding it as an end in itself perverts a law against racial discrimination into a law that can require racial

⁸⁸⁸ See infra notes 892 and 894 (discussing Supreme Court cases). ⁸⁸⁹ See Texas Dep’t. of Housing & Community Affairs v. Inclusive Communities, 135 S. Ct. 2507, 2512 (2015) (“A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.”). ⁸⁹⁰ Id.; see also Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993). ⁸⁹¹ Inclusive Communities, 135 S. Ct. at 2519, 2522-24. ⁸⁹² U.S. Dep’t of Educ., Office for Civil Rights, “Dear Colleague Letter: Preventing Racial Discrimination in Special Education,” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>. See also Elston, 997 F.2d at 1412 (explaining that, in disparate impact cases under Title VI, “defendants attempting to meet the ‘substantial legitimate justification’ burden have commonly been required to demonstrate the ‘educational necessity’ of their practices, that is, to show that their challenged practices ‘bear a manifest demonstrable relationship to classroom education’”) (quoting Georgia State Conf. of Branches of NAACP v. State of Ga., 775 F.2d 1403, 1418 (11th Cir. 1985)). ⁸⁹³ DOJ, Title VI Legal Manual, supra note 39, at § VII.B. ⁸⁹⁴ See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (upholding disparate impact employment discrimination claims when there was past purposeful discrimination and a new eligibility test that was not related to job performance). ⁸⁹⁵ Adam Serwer, “Trump Is Making It Easier to Get Away With Discrimination,” The Atlantic, Jan. 4, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/disperate-impact/579466/> [hereinafter Serwer, “Trump Is Making It Easier to Get Away With Discrimination”]. ⁸⁹⁶ See Thompson Statement, at 3; Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp. 176-77.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>
<https://www.theatlantic.com/ideas/archive/2019/01/disperate-impact/579466/>

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discrimination.”⁸⁹⁷ Thompson also argued that “plausible disparate impact claims can be raised from any host of benign policies or practices”⁸⁹⁸ and that “racial disparities can often simply be caused by the laws of chance.”⁸⁹⁹ In his written statement, Thompson acknowledged that the current CRT enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool.⁹⁰⁰ Nonetheless, Thompson advocated against federal enforcement of this mandatory enforcement tool. Technical Assistance CRT told the Commission that

One of the central missions of the Federal Coordination and Compliance Section is providing technical assistance, to federal agency partners and to recipients of federal financial assistance. For example, FCS runs the federal clearinghouse for language access-related TA to both federal agencies and recipient entities. LEP.gov, which is managed and curated by FCS, receives approximately 60,000 hits a year and is a major resource for language access technical assistance. This is only one example of the myriad technical assistance projects that FCS has spearheaded over the years – from training videos to in person technical assistance to technical assistance publications. Beyond LEP, FCS has also provided child welfare, environmental justice, emergencies, and other public-facing technical assistance between October 2015–September 30, 2018.⁹⁰¹

Further, since FCS also works in coordination and interaction with other federal agencies, more of its work, particularly in the area of interacting with those agencies regarding LEP issues in relation to federal emergency response, is described in that section of this chapter. Some other CRT sections provide technical assistance to help entities know how to comply and come into compliance with civil rights law. For example, IER provides the public information about the INA’s anti-discrimination provision through its hotlines, public education materials, and other outreach to the public.⁹⁰² DRS operates the ADA Technical Assistance Program, which provides free information and technical assistance to businesses, governments and people with disabilities to promote voluntary compliance with the ADA.⁹⁰³

⁸⁹⁷ Ibid.; see also Thompson Testimony, Federal Civil Rights Enforcement Briefing, pp. 176-77. ⁸⁹⁸ Thompson Testimony, Federal Civil Rights Enforcement Briefing, p. 177. ⁸⁹⁹ Ibid. ⁹⁰⁰ See Thompson Statement, at 2 and n. 6. ⁹⁰¹ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁹⁰² DOJ CRT, “Immigrant and Employee Rights Section,” supra note 428. ⁹⁰³ U.S. Dep’t of Justice, Civil Rights Division, “Disability Rights Section,” <https://www.justice.gov/crt/disability-rights-section> (accessed Oct. 22, 2019).

<https://www.justice.gov/crt/disability-rights-section>
<https://www.justice.gov/crt/disability-rights-section>

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Another example is when CRT provides technical assistance through a letter. For example, in 2012, CRT’s former Special Litigation Section Chief wrote to the Escambia County Sheriff’s Office that he appreciated their cooperation with CRT’s investigation and that:

While we are closing our investigation without a finding, we did conclude that there are systemic deficiencies relating to the way in which ECSO officers use force that, if left unaddressed, may result in civil rights violations. The following recommendations, if implemented, will reduce the risk of future violations.⁹⁰⁴

More recent examples of such letters may be found in the FCS partnership and other CRT communications through agreements that include CRT’s provision of technical assistance, discussed above.⁹⁰⁵ CRT may also provide technical assistance through strategic initiatives and interaction with stakeholders. For example, through the Multi-family Accessibility Initiative, “HCE is developing plans to collaborate with developers, architects, code officials, accessibility advocates and other stakeholders” to increase accessible housing for persons with disabilities and ensure compliance with Fair Housing Act accessibility standards.⁹⁰⁶ DOJ reported to Congress that as part of the DOJ-wide Religious Discrimination Initiative and in line with its focus on religious discrimination in schools, EOS trains U.S. Attorneys to partner and support community school leaders to be more responsive to possible religious discrimination.⁹⁰⁷ Publicity This section discusses only a few examples of how CRT disseminates information about civil rights through outreach and publicity. In July 2016, DOJ released its final report on Combatting Religious Discrimination Today, compiled after conducting several roundtables with various other federal agencies and with community groups across the country.⁹⁰⁸ In addition to several common trends in education settings that arose from roundtable discussions, the report had various recommendations to improve on the “noticeable uptick” of religious discrimination in schools.⁹⁰⁹ These focused on providing increased resources for education, guidance regarding students’ understanding of religions and stakeholders’ awareness of their religious rights, and training for

⁹⁰⁴ U.S. Dep’t of Justice, Civil Rights Division, Technical Letter from Special Litigation Section Chief to Sheriff (Sep. 4, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/05/escambia_taleter_9-4-12.pdf. ⁹⁰⁵ See supra note 902. ⁹⁰⁶ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 28-29. ⁹⁰⁷ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 24. ⁹⁰⁸ DOJ, Combatting Religious Discrimination Today, supra note 815, at 9 (“Agencies that participated in the roundtables include the Departments of Education, Homeland Security (DHS), and Labor (DOL); the Equal Employment Opportunity Commission (EEOC); the White House Initiative on Asian Americans and Pacific Islanders; the White House Office of Faithbased and Neighborhood Partnerships; and within the Justice Department, the Civil Rights Division, Federal Bureau of Investigation (FBI), Office of Justice Programs, Executive Office for U.S. Attorneys, and Community Relations Service.”). ⁹⁰⁹ Ibid., 12.

https://www.justice.gov/sites/default/files/crt/legacy/2012/09/05/escambia_taleter_9-4-12.pdf

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supervisors and teachers.⁹¹⁰ Reportedly, this initiative led EOS and U.S. Attorney’s Offices to open six investigations into religious discrimination in schools.⁹¹¹ However, EOS has not resolved any cases about religious discrimination in school since then.⁹¹² IER’s work includes public outreach and education to inform the public, employers and organizations about rights and responsibilities under the INA.⁹¹³ IER has an extensive list of educational materials on its website for both workers and employers. It has 16 worker-related educational or guidance documents (but only one of which was written in 2017 and another in 2018),⁹¹⁴ and 15 employer related documents (two of which were written or revised in 2017 and one that was written in 2018).⁹¹⁵ Additionally, IER hosts regular webinars for workers and employers.⁹¹⁶ For example, it had five webinars scheduled and available for free registration on its website between July 9 and August 27, 2018.⁹¹⁷ It also hosts joint webinars regarding workers’ rights and how to complete the I-9 employment verification process.⁹¹⁸ IER provides information about the INA and its obligations, and attempts to informally resolve disputes using its hotline.⁹¹⁹ Improvements could be made to the data CRT reports about its own work. As discussed above, information about cases resolved can generally be found on the CRT website for most of the CRT sections.⁹²⁰ The public information is most complete for cases that have been resolved by settlement, consent decree, or judicial opinions. However, the Criminal Section does not publish this information on the CRT website, and instead only publishes press releases about its cases without links to the litigation documents.⁹²¹ making it exceedingly difficult to find information about the details of CRT’s criminal civil rights enforcement work.⁹²² In criminal cases, grand jury information is privileged; however, plea agreements, court orders and decisions, and most CRT briefs are not as they are published on websites that require the case numbers, which the Criminal

⁹¹⁰ Ibid., 14-16. ⁹¹¹ Ibid. ⁹¹² See supra notes 666-68 (listing EOS cases by type). ⁹¹³ Ibid. ⁹¹⁴ U.S. Dep’t of Justice, Civil Rights Division, “Worker Information,” <https://www.justice.gov/crt/worker-information> (accessed Jul. 16, 2018). ⁹¹⁵ U.S. Dep’t of Justice, Civil Rights Division, “Employer Information,” <https://www.justice.gov/crt/page/file/1080256/download> (accessed Jul. 16, 2018). ⁹¹⁶ U.S. Dep’t of Justice, Civil Rights Division, “Webinars,” <https://www.justice.gov/crt/webinars> (accessed Jun. 29, 2018). ⁹¹⁷ Ibid. ⁹¹⁸ Ibid. ⁹¹⁹ U.S. Dep’t of Justice, Civil Rights Division, “Frequently Asked Questions,” <https://www.justice.gov/crt/frequently-asked-questions-faqs> (accessed Jan. 31, 2017). ⁹²⁰ See supra notes 536 and 622-25. ⁹²¹ DOJ CRT, “Criminal Section,” supra note 733. ⁹²² Cases were located mainly on PACER and Westlaw, which are paid legal research services. The CRT website only provides press releases on cases, which do not include links to legal documents. Only a few of the court documents needed to research these cases were free and publicly available on the DOJ website. See U.S. Dep’t of Justice, Civil Rights Division, Criminal Section, “Press Releases,” <https://www.justice.gov/crt/press-releases>; see also DOJ CRT, “Search Cases and Matters,” supra note 632 (showing cases from other DOJ CRT sections, but no cases from the Criminal Section) (accessed Oct. 30, 2019).

<https://www.justice.gov/crt/worker-information>
<https://www.justice.gov/crt/worker-information>
<https://www.justice.gov/crt/page/file/1080256/download>
<https://www.justice.gov/crt/webinars>
<https://www.justice.gov/crt/frequently-asked-questions-faqs>
<https://www.justice.gov/crt/press-releases>

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Section does not provide on its website’s press releases, and these websites require paid access that members of the public should not have to rely on to review these important cases. In addition to access to basic and non-privileged legal documents such as complaints, briefs, and consent decrees or settlements along with judicial decisions in the case, some sections provide information about investigations, when the statute requires that investigative findings be issued.⁹²³ and others provide information about complaints filed,⁹²⁴ whereas others do not.⁹²⁵ This variation in transparency hampers external evaluation of the important work of CRT,⁹²⁶ and dilutes the ability of CRT to “send a message to potential violators about the strength of the agency’s enforcement program,” which the Commission considers an important goal of systemic civil rights litigation.⁹²⁷ Furthermore, it is not clear how CRT chooses the issues to investigate or the cases it will litigate, making it difficult to evaluate if CRT makes appropriate choices and uses its resources to effectively enforce civil rights.⁹²⁸ Interaction and Coordination with External Agencies and Organizations FCS issues Title VI reports, which are summarized in the following section of this chapter,⁹²⁹ provides information about Title VI and Title IX regulations in all relevant federal agencies,⁹³⁰ and includes links to agencies’ Title VI delegation agreements (in which they may delegate enforcement authority),⁹³¹ as well as these four Title VI collaboration agreements:

⁹²³ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, “Special Litigation Section,” <https://www.justice.gov/crt/special-litigation-section> (accessed May 21, 2019). ⁹²⁴ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, Voting Section, “Voting Section Litigation,” <https://www.justice.gov/crt/voting-section-litigation> (including complaints filed) (accessed May 21, 2019); U.S. Dep’t of Justice, Civil Rights Division, Employment Litigation Section, “Complaints Filed,” <https://www.justice.gov/crt/employment-litigation-section-cases#compl> (accessed May 21, 2019). ⁹²⁵ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, Educational Opportunities Section, “Educational Opportunities Cases,” <https://www.justice.gov/crt/educational-opportunities-cases> (accessed May 21, 2019). ⁹²⁶ See, e.g., Rob Arthur, “Exclusive: Trump’s Justice Department is Investigating 60 Percent Fewer Cases Than Obama’s,” VICE, Mar. 6, 2019, https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas (“VICE News analyzed the public information posted online by five of the division’s eight civil rights sections — Voting, Education, Disability Rights, Housing, and Special Litigation — and confirmed with multiple DOJ sources that the data posted by those sections was complete. Three sections — Criminal, Employment, and Immigrant and Employee Rights — had incomplete data and were left out of the analysis.”). ⁹²⁷ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 38. ⁹²⁸ See supra notes 599-616. ⁹²⁹ See infra notes 995-6. ⁹³⁰ U.S. Dep’t of Justice, Civil Rights Division, “Federal Agency Specific Regulations,” https://www.justice.gov/crt/fcs/Agency_Regulations (accessed Aug. 1, 2019). ⁹³¹ Ibid.

<https://www.justice.gov/crt/special-litigation-section>
<https://www.justice.gov/crt/voting-section-litigation>
<https://www.justice.gov/crt/employment-litigation-section-cases#compl>
<https://www.justice.gov/crt/educational-opportunities-cases>
https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas
https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas

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Table 2.6: Memoranda Of Understanding

Department of Agriculture and Department of Housing and Urban Development

Department of Education, Office of Civil Rights and Department of Justice, Civil Rights Division

Department of Health & Human Services, Office for Civil Rights & Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section

Department of Defense and Department of Health, Education, and Welfare

SOURCE: U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Federal Agency Specific Regulations," https://www.justice.gov/crt/fcs/Agency_Regulations (accessed May 20, 2019).

On January 9, 2017, before the change in federal administrations, FCS and the U.S. Department of Health and Human Services entered into a Memorandum of Understanding that established agreed upon procedures for coordination, information sharing, and delegation of authority relating to the agencies' civil rights efforts.⁹³² FCS also utilizes materials from its technical assistance work in ensuring meaningful access to federal and federally assisted program, discussed in the previous subsection, to promote consistency and collaboration amongst agencies who are engaged in the same effort.⁹³³ Furthermore, FCS regularly shares interagency information through newsletters about Title VI developments including investigations, resolutions, regulatory updates, new agency guidance, directives, initiatives, reports, outreach, and training. It issued these newsletters seasonally (Winter, Spring, Summer, Fall) up until Winter 2017.⁹³⁴ During the Fiscal Years studied, CRT published information about seven Title VI agency policy regulations or guidance documents proposed or issued in FY 2016 and two in FY 2017.⁹³⁵ At the Commission's briefing, former Deputy Assistant Attorney General Leon Rodriguez testified that during the Obama Administration, FCS used its authority in a broad and powerful manner, including providing training on civil rights laws to federal employees in other agencies, to ensure their consistent application.⁹³⁶

⁹³² U.S. Dep't of Justice, Civil Rights Division & U.S. Department of Health and Human Services, Office for Civil Rights, Memorandum of Understanding Between the U.S. Departments Of Health And Human Services And Justice (Jan. 9, 2017), <https://www.justice.gov/crt/page/file/924161/download>. (The memo sought "to maximize effort, promote efficiency, and eliminate duplication and inconsistency in the enforcement of civil rights laws in child welfare and in other areas of mutual interest or overlapping jurisdiction.") ⁹³³ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁹³⁴ See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Title VI Newsletters," <https://www.justice.gov/crt/fcs/newsletters> (the most recently posted newsletter was issued in Winter 2017). ⁹³⁵ *Ibid.* ⁹³⁶ Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 83-94 (Leon Rodriguez regarding the importance of coordination, civil rights offices being "infinitely more powerful if coordinated," as well as the Civil Rights Training Institute he helped establish for unified training at the National Advocacy Center).

https://www.justice.gov/crt/fcs/Agency_Regulations
<https://www.justice.gov/crt/page/file/924161/download>
<https://www.justice.gov/crt/fcs/newsletters>

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In April 2018, Acting Assistant Attorney General Gore issued a memo to all federal agency civil rights directors and general counsels, drafted by FCS, reiterating that Executive Order 12,250 requires federal agencies to gain the Attorney General's approval for enacting, amending or repealing any regulation that effectuates Title VI, Title IX, and Section 504 of the Rehabilitation Act to ensure that agencies are fulfilling their civil rights obligations and that there is consistent implementation across the federal government.⁹³⁷ The memo asserts that CRT may require clearance of any other regulation that implements other nondiscrimination provisions or laws.⁹³⁸ Also in April 2018, Gore issued another memo clarifying the Department's exclusive authority to issue technical assistance and regulations implementing Title II, Subtitle A of the ADA and the need for consistency in interpretation between Title II and Section 504.⁹³⁹ DOJ CRT's former Coordination and Review Section primarily conducted the duties of coordinating compliance under Executive Order 12,250. In 2002, the Commission emphasized that CORS had "responsibility to make certain that designated federal agencies meet their responsibility for nondiscrimination under Title VI."⁹⁴⁰ In 1996, the Commission issued a report assessing DOJ's Title VI enforcement activities, and found that DOJ "lacked commitment" to Title VI enforcement, as changes in its budget and resources dedicated to Title VI showed that DOJ's civil rights priorities had shifted.⁹⁴¹ Specifically, the Commission reported that:

DOJ transferred CORS staff to other sections and reduced drastically the resources available for Title VI enforcement activities. The Commission noted that CORS lacked adequate resources and funding to support Title VI enforcement and because of the Department's poor planning could not carry out the enforcement of Title VI effectively. As a result, the Commission found CORS' Title VI work inadequate and recommended changes in the organizational structure of the section.⁹⁴²

Those changes included clearly defining CORS' responsibility to coordinate and monitor agency delegation agreements, and improving its litigation referral and support duties as it had only referred a couple of case for litigation and did not participate in substantive advice or review of briefs based on Title VI expertise.⁹⁴³ In 2002, the Commission recommended that CORS "provide

⁹³⁷ U.S. Dep't of Justice, Civil Rights Division Acting Ass't Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations and Policy Guidance Documents (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>. ⁹³⁸ *Ibid.*, 1-2. ⁹³⁹ U.S. Dep't of Justice, Civil Rights Division Acting Ass't Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁹⁴⁰ USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 6 (emphasis added). ⁹⁴¹ *Ibid.*, 7. ⁹⁴² *Ibid.*, 7. ⁹⁴³ USCCR, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, supra note 51, at 132-34.

<https://www.justice.gov/crt/page/file/1060276/download>
<https://www.justice.gov/crt/page/file/1060276/download>

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information to the public on Title VI and consult with stakeholders regularly."⁹⁴⁴ CRT told the Commission that it is active, especially in training agencies on compliance, but as discussed above, it considers much of its work with other agencies privileged.⁹⁴⁵ Some other CRT sections also have specific coordination roles with other agencies. The Criminal Section works in coordination with the U.S. Department of Labor and DHS to combat human trafficking.⁹⁴⁶ CRT has operated a Human Trafficking Prosecution Unit (HTPU) since 2008.⁹⁴⁷ In addition to prosecution, HTPU also provides "victim assistance resources, legal guidance and coordination between prosecuting districts overlapping criminal networks."⁹⁴⁸ HTPU leads the Anti-Trafficking Coordination Team Initiative, an effort that convenes agents and prosecutors from the FBI, U.S. Attorneys' Office, DHS, and U.S. Department of Labor together with CRT in "combinatively selected districts to develop high-impact human trafficking investigations and prosecutions."⁹⁴⁹ Phase I ran from 2011-2013 and reportedly resulted in an 86 percent increase in convictions of human trafficking violations in six selected districts compared to an increase of just 14 percent in other districts.⁹⁵⁰ There was also an increase of 119 percent in cases filed and of 114 percent in defendants charged in selected districts, compared to increases of just 18 percent and 12 percent in the same categories in non-selected districts. Phase II began in December 2015, but similar information is not yet available.⁹⁵¹ Under Executive Order 12,250, CRT, through DRS has authority that includes review and approval of federal agencies' regulations and policy regarding Section 504; DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.⁹⁵² CRT also told the Commission that:

In 2017, DRS convened an Interagency Working Group on Service Animals to identify issues of concern regarding the use of service animals and to better ensure that Federal agencies are taking a consistent approach under Section 504. The working group has been meeting on a quarterly basis and recently expanded its scope to matters arising under Section 504 more generally. Representatives from over 20 Federal agencies have participated in this working group.

⁹⁴⁴ USCCR, Ten-Year Check-Up Vol. II: An Evaluation, supra note 31, at 8. ⁹⁴⁵ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁹⁴⁶ U.S. Dep't of Justice, Civil Rights Division, "Human Trafficking Prosecution Unit (HTPU)," <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> (accessed Jul. 28, 2017). ⁹⁴⁷ *Ibid.* ⁹⁴⁸ DOJ CRT, FY 2019 Performance Budget Justification, supra note 495, at 5. ⁹⁴⁹ U.S. Dep't of Justice, "Press Release: Departments of Justice, Labor and Homeland Security Announce Phase II of Anti-Trafficking Coordination Team Initiative," Jun. 25, 2015, <https://www.justice.gov/opa/pr/departments-justice-labor-and-homeland-security-announce-phase-ii-anti-trafficking>. ⁹⁵⁰ *Ibid.* ⁹⁵¹ See DOJ Justice Manual, supra note 370, at § 6-2.400 (Disability Rights Section).

<https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu>
<https://www.justice.gov/opa/pr/departments-justice-labor-and-homeland-security-announce-phase-ii-anti-trafficking>
<https://www.justice.gov/opa/pr/departments-justice-labor-and-homeland-security-announce-phase-ii-anti-trafficking>

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DRS also partners with the EEOC to enforce Title I of the ADA against state and local government employers ⁹⁵³

ELS partners with the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL) to enforce the civil rights protections under its jurisdiction.⁹⁵⁴ Under Title VII, EEOC receives the initial claims about alleged violations by state or local governments, and "may" refer them to DOJ CRT for "appropriate legal proceedings" if they are "unable to obtain compliance."⁹⁵⁵ ELS may also initiate pattern or practice suits against state or local employers (even if EEOC has not referred the case). Title VII allegations against private employers fall under EEOC's authority, and allegations against federal government entities are primarily resolved by EEOC.⁹⁵⁶ However, in conjunction with U.S. Attorney's Offices, CRT's ELS is responsible for defending federal contractors or grantees charged with discrimination in federal court.⁹⁵⁷ Similarly, DOL has primary responsibility for resolving complaints of discrimination by service members under USERRA, but it is not up to DOL to refer them if litigation is needed. Instead:

If the Department of Labor does not resolve a complaint, regardless of whether it determines the complaint to have merit, it will refer the complaint to the Employment Litigation Section upon the request of the servicemember who filed the complaint. When the Employment Litigation Section receives an unresolved USERRA complaint from the Department of Labor, the Section reviews the Department of Labor's investigative file accompanying the complaint to determine whether to extend representation to the complainant.⁹⁵⁸

⁹⁵³ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). ⁹⁵⁴ U.S. Dep't of Justice, Civil Rights Division, "Laws Enforced by the Employment Litigation Section," <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017). ⁹⁵⁵ DOJ Justice Manual, supra note 370, at § 6-2.212 (Affirmative Suits Under Executive Order 11,246, As Amended). ⁹⁵⁶ *Id.* at § 6-2.211 ("The Department of Justice shares enforcement authority under Title VII with the Equal Employment Opportunity Commission (EEOC). The Department of Justice has authority to seek to remedy employment discrimination by state and local governments and their agencies and political subdivisions. The EEOC has authority to seek to remedy employment discrimination by private employers. The EEOC also has primary enforcement responsibility with respect to allegations of discrimination by the federal government.") See also *infra* notes 2179-90 (discussing EEOC cases of this type). ⁹⁵⁷ See DOJ Justice Manual, supra note 370, at § 6-2.214 ("The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration's 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs.") ⁹⁵⁸ DOJ Justice Manual, supra note 370, at § 6-2.213 (Affirmative Suits Under the USERRA).

<https://www.justice.gov/crt/laws-enforced-employment-litigation-section>

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Moreover, CRT retains discretion to provide direct legal representation in federal court to USERRA claimants in both state and federal cases.⁹⁵⁹ HCE partners with several federal agencies (HUD, the Federal Trade Commission, Consumer Finance Protection Board), state and local officials, and bank regulatory agencies to promote fair housing and lending.⁹⁶⁰ The Housing Section was also part of a Federal Interagency Reentry Council that DOJ convened in 2011, "to discuss and implement strategies to remove barriers to successful reentry of formerly incarcerated individuals so that they can compete for jobs, attain stable housing, support their children and families, and contribute to their communities."⁹⁶¹ CRT announced the Sexual Harassment in Housing Initiative on October 17, 2017 and reportedly seeks to increase CRT's efforts in protecting women against harassment by property owners, managers, or other individuals who have control over property.⁹⁶² On April 12, 2018, 963 DOJ led an inter-agency initiative through a HUD-DOJ Task Force to Combat Sexual Harassment in Housing intended to leverage the combined information, resources, and expertise of the two departments to further the initiative's goal of combatting sexual harassment.⁹⁶⁴ The other major components involve outreach to stakeholders. DOJ released an outreach toolkit designed to facilitate individuals reaching out to others in their community to raise awareness of the issue and answer common questions and concerns regarding the subject.⁹⁶⁵ DOJ also started a public awareness campaign to help victims of harassment be aware of the resources available to them and report the harassment.⁹⁶⁶ HCE's website indicates that it filed two cases in 2016 that included

⁹⁵⁹ *Ibid.* ("USERRA provides that the Attorney General, through the Employment Litigation Section, may represent a claimant in federal district court if he or she determines that the claimant is entitled to the rights or benefits being sought. In USERRA suits involving local government and private employers, the Attorney General is authorized by statute to provide direct legal representation to individuals by filing a lawsuit on the individual's behalf. In USERRA suits involving state government employers, the Attorney General may file suit in the name of the United States to recover relief that benefits the complainant.") ⁹⁶⁰ DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 15. ⁹⁶¹ The White House and U.S. Dep't of Justice, The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future, August 2016, pp. 50-52, <https://csjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry->

report.pdf (discussing the Federal Interagency Reentry Council's accomplishments and actions in the context of housing). 962 U.S. Dept of Justice, Civil Rights Division, "Sexual Harassment in Housing Initiative," <https://www.justice.gov/crt/sexual-harassment-housing-initiative> (accessed Apr. 13, 2018); U.S. Dept of Justice, "Press Release: Justice Department Announces Initiative to Combat Sexual Harassment in Housing," Oct. 3, 2017, <https://www.justice.gov/opa/pr/justice-department-announces-initiative-combat-sexual-harassment-housing>. 963 U.S. Dept of Justice, "Press Release: Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing," Apr. 12, 2018, <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing> [hereinafter DOJ, "Justice Dept Announces Nationwide Initiative to Combat Sexual Harassment in Housing"]. 964 *Ibid.* 965 *Ibid.* See also U.S. Dept of Justice, Civil Rights Division, Sexual Harassment in Housing Partnership Toolkit, <https://www.justice.gov/crt/page/file/1055011/download>. 966 DOJ, "Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing," supra note 963.

<https://csjjusticecenter.org/wp-content/uploads/2016/06/FIRC-Reentry-Report.pdf>
<https://csjjusticecenter.org/wp-content/uploads/2016/06/FIRC-Reentry-Report.pdf>
<https://www.justice.gov/crt/sexual-harassment-housing-initiative>
<https://www.justice.gov/opa/pr/justice-department-announces-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing>
<https://www.justice.gov/crt/page/file/1055011/download>

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allegations of sexual harassment, four similar cases in 2017 and three in 2018.⁹⁶⁷ At the Commission's briefing, former Assistant Attorney General Driscoll submitted written testimony about the success of this initiative, stating that "recent effective publicity and enforcement by the Civil Rights Division has driven huge increases in enforcement, with complaints increasing by almost 500 percent. This kind of success gains little notoriety because the proposition that residents should not be sexually harassed by their landlords has widespread agreement."⁹⁶⁸ In addition, although the increase in complaints highlights the widespread scope of the problem, Driscoll argued that the fact that CRT's initiative led to increasing complaints should also be considered a "success."⁹⁶⁹ As noted above, the Commission's research confirms that the Housing Section has secured civil fees and compensatory damages in a number of sexual harassment cases during FY 2016 – 2018.⁹⁷⁰ ECOA grants regulatory and oversight authority over lenders to different federal agencies,⁹⁷¹ and requires that those agencies refer matters they believe constitute a discriminatory "pattern or practice" to the DOJ for possible prosecution.⁹⁷² In 1996, DOJ sent a guidance document to the participating agencies that outlined the factors that the agencies should consider when deciding whether a complaint or other observed practices would constitute a possible discriminatory "pattern or practice" that would allow the DOJ to file charges.⁹⁷³ 2016 CRT reports related to fair lending enforcement referred to these guidelines.⁹⁷⁴ IER has also entered agreements with foreign ministries and consulates to form partnerships aimed at educating foreign nationals from the other signing country working in the U.S. about their rights as U.S. workers and the anti-discrimination provisions of the INA.⁹⁷⁵ IER has entered into five such agreements with five different countries (Ecuador, El Salvador, Mexico, Honduras, Peru), all of which occurred during the Obama administration (1 in Dec. 2015, 3 in 2016 and 1 in Jan. 2017).⁹⁷⁶ CRT sent the Commission information about the Department-wide Hate Crimes Enforcement and Prevention Initiative led by CRT's Policy Section (POL) which coordinates all of the Department's anti-hate crime efforts. According to CRT:

967 U.S. Dept of Justice, Civil Rights Division, "Housing and Civil Enforcement Cases," <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex> (accessed Jul. 11, 2018) (date of first filed complaint in the action as provided on the HCE website was used to determine when HCE filed the case). 968 Robert Driscoll, Member, McGlinchey Stafford, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2. 969 *Ibid.* 970 See supra notes 678-91 (listing cases). 971 15 U.S.C. § 1691c (a). 972 *Id.* §§ 1691e (g)-(h). 973 U.S. Dept of Justice, Identifying Lender Practices That May Form the Basis of a Pattern or Practice Referral to the Department of Justice, 1996, <https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/regguide.pdf>. 974 See DOJ CRT, Attorney General's 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, supra note 510. 975 DOJ CRT, FY 2017 Performance Budget Justification, supra note 495, at 17. 976 U.S. Dept of Justice, Civil Rights Division, "Partnerships," <https://www.justice.gov/crt/partnerships> (accessed May 11, 2018).

<https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex>
<https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/regguide.pdf>
<https://www.justice.gov/crt/partnerships>

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Managed by POL, the Initiative is charged with coordinating the Department's efforts to eradicate hate crimes, and facilitating training, outreach, and education to law enforcement agencies and the public at the federal, state, local and tribal levels. The Initiative reflects the combined and sustained efforts of multiple DOJ elements in addition to CRT, including the Office of Community Oriented Policing Services (COPS Office), the Community Relations Service (CRS), the Federal Bureau of Investigations (FBI), the Office of Justice Programs (OJP), and U.S. Attorney's Offices (USAOs). Recent Initiative accomplishments include the following:

- In October 2018, POL and the COPS office co-developed the first-ever law

enforcement roundtable on improving the identification and reporting of hate crimes, a 1.5 day event that brought together law enforcement and other leaders from around the country to explore successful practices and challenges in identifying, reporting, and tracking hate crimes. Attendees and presenters included police chiefs of major cities and leaders of major policing organizations.

- POL spearheaded with CRS the launch of a new hate crimes website, a one-stop portal for the general public, law enforcement officials, educators, public officials, media, and other stakeholders to access Department resources about hate crimes. See <https://www.justice.gov/hatecrimes/>. The website aggregates Department resources about effective hate crime laws, prevention programs, best police policies and procedures, community awareness building practices, victim service resources, and law enforcement training initiatives, as well as information about reporting hate crimes and a summary of recent hate crimes prosecutions. See <https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>.

- POL also worked with components to develop other deliverables advancing the fight against hate crimes, including extension of the COPS Office's Collaborative Reform Technical Assistance Center program, a partnership with the International Association of Chiefs of Police (IACP), and eight leading law enforcement leadership and labor organizations, to cover hate crimes, allowing law enforcement to access significant resources to build and improve their hate crimes investigation and reporting practices. See 10/29/18 press releases for details: See <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.⁹⁷⁷

977 U.S. Dept of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

<https://www.justice.gov/hatecrimes/>
<https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>
<https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>
<https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>
<https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>

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Research, Data Collection, and Reporting With some gaps, many CRT sections make their cases generally easily accessible on the CRT website.⁹⁷⁸ Some CRT sections include pamphlets or other information such as FAQs about civil rights protections.⁹⁷⁹ And DRS provides technical assistance materials for ADA compliance on ADA.gov.⁹⁸⁰ In addition to the publications listed above, CRT has maintained a periodic email update, "Religious Freedom in Focus," about its religious liberty and religious discrimination cases from February 2004 through April 2019 (its latest update, Volume 79).⁹⁸¹ As discussed previously in this chapter, in January 2017, CRT released a comprehensive report regarding its Pattern and Practice Police Reform Work: 1994-Present.⁹⁸² Some CRT reports are required by statute or regulation. For example, the Equal Credit Opportunity Act (ECOA) Amendments of 1976 require that HCE report its overall enforcement efforts and include some information about related efforts related to the FHA Servicemembers Civil Relief Act lending provisions, in an Annual Report to Congress.⁹⁸³ These reports must discuss the administration of HCE's functions under the ECOA and include a summary of enforcement actions taken.⁹⁸⁴ HCE must also include an assessment of the extent to which compliance with the requirements of ECOA is being achieved.⁹⁸⁵ In 2016, the annual ECOA report showed that CRT received 22 ECOA and FHA referrals from agencies (all but one of which played a role in a lawsuit), 8 of which led to a CRT investigation and 12 of which were returned to the agency pursuant to the 1996 guidelines for administrative enforcement.⁹⁸⁶ In total CRT opened 18 fair lending investigations, filed 7 fair lending lawsuits (settling six of them), and obtained nearly \$37 million in relief.⁹⁸⁷ At the end of 2016, it had 33 open investigations.⁹⁸⁸ The report also emphasized CRT's focus on education and training, citing its participation in 17 outreach events related to fair lending practices and SCRA enforcement in 2016.⁹⁸⁹ In 2017, the annual ECOA report showed that CRT opened 7 fair lending investigations, filed 3 fair lending lawsuits, and settled two, obtaining nearly \$63 million in relief.⁹⁹⁰ At the end of the year, CRT had 22 open fair lending

978 See, e.g., DOJ CRT, "Search Cases and Matters," supra note 632. 979 U.S. Dept of Justice, Civil Rights Division, "Publications," <https://www.justice.gov/crt/publications> (accessed May 20, 2019) [hereinafter DOJ CRT, "Publications"]. 980 See "ADA.gov, Information and Technical Assistance on the Americans With Disabilities Act," <https://www.ada.gov/>. 981 U.S. Dept of Justice, Civil Rights Division, "Publications," supra note 979. 982 See supra note 476. 983 15 U.S.C. §1691f. 984 See DOJ CRT, Attorney General's 2016 Annual Report to Congress, supra note 510. 985 *Ibid.* 986 *Ibid.*, 11-13. 987 *Ibid.*, 3, 11. 988 *Ibid.*, 5. 989 *Ibid.*, 11. 990 U.S. Dept of Justice, Civil Rights Division, The Attorney General's 2017 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, September 2018, p. 3, <https://www.justice.gov/crt/page/file/1097406/download>.

<https://www.justice.gov/crt/publications>
<https://www.ada.gov/>
<https://www.justice.gov/crt/page/file/1097406/download>

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investigations.⁹⁹¹ Information on CRT's 2018 fair lending enforcement efforts are not yet available, as the annual report has not been released. The Civil Rights of Institutionalized Persons Act (CRIPA) requires that DOJ must report its annual CRIPA enforcement efforts to Congress.⁹⁹² Each report must include information on all actions instituted pursuant to CRIPA, as follows:

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of Title 28

(1) a statement of the number, variety, and outcome of all actions instituted

pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.⁹⁹³

The Commission's research shows that CRT has been in compliance with these reporting requirements from FY 2016-2018.⁹⁹⁴ Similarly, Title VI regulations include specific reporting requirements that pertain to DOJ as an agency that distributes federal funding.⁹⁹⁵ For example, all Title VI agencies must collect compliance data from applicants for and recipients of federal assistance "sufficient to permit effective enforcement of title VI."⁹⁹⁶ Publicly available information is insufficient to determine whether CRT is in compliance with this data collection requirement.

991 *Ibid.*, 4. 992 42 U.S.C. § 1997f. 993 *Id.* 994 See DOJ CRT, "Publications," supra note 979; Commission Staff summary. 995 28 C.F.R. § 42.403. 996 *Id.* § 42.406.

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Regarding collection of data about race and ethnicity, there are no known statutory requirements for CRT to collect or demand such data, except in the development of a particular enforcement action where it would be useful as evidence. Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder*, under federal regulations, the Voting Section was required to collect, and covered jurisdictions were required to provide, data about whether proposed changes in voting procedures (such as restricting, or moving a polling place, or changing the rules of voter registration and access) would have a racially discriminatory impact.⁹⁹⁷ However, since that decision eviscerating the preclearance requirements of the Voting Rights Act, that data is no longer required to be collected.⁹⁹⁸

997 See USCCR, Minority Voting, supra note 17, at 29 (citing 28 C.F.R. § 51.27n (required contents of submission of voting changes for preclearance included racial impact data) and 59 (impact of post-Shelby County loss of preclearance)). 998 *Ibid.*

159 Chapter 3: U.S. Department of Education

Chapter 3: U.S. Department of Education, Office for Civil Rights⁹⁹⁹ Congress established the U.S. Department of Education (ED) in 1979,¹⁰⁰⁰ although its origins date back to 1867, when Andrew Jackson signed legislation creating the Department in order to collect information about local schools.¹⁰⁰¹ Congress abolished the Department of Education one year later in 1868, and assigned its remaining duties into the Office of Education under the authority of the

Department of the Interior.¹⁰⁰² That Office was later placed in the Department of Health, Education, and Welfare (now the Department of Health and Human Services).¹⁰⁰³ After the expansion of civil rights through decisions such as *Brown v. Board of Education* in 1954,¹⁰⁰⁴ and federal funding for education in the 1950s, 1960s, and 1970s that created programs to assist low-income students, students of color, women, people with disabilities, and Limited English Proficiency (LEP) students gain equal access to educational opportunity,¹⁰⁰⁵ Congress reestablished the Department in October 1979 with the enactment of the Department of Education Organization Act.¹⁰⁰⁶ Among the Congressional findings were that “education is fundamental to the development of individual citizens and the progress of the Nation,” and that “there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex[.]”¹⁰⁰⁷ In creating the Department of Education, Congress declared the purposes of the department:

999 Pursuant to Commission procedures, the Commission gave all agencies studied in this report an opportunity to review a draft of this report and provide feedback before the final internal draft, however ED OCR did not provide any comments or feedback in response to the Commission’s draft. 1000 20 U.S.C. § 3411, Department of Educ. Act, Pub. L. No. 96-88 § 210, 93 Stat. 668 (1979). 1001 Dep’t of Educ. Establishment Act 14 Stat. 434 (1867); U.S. Dep’t of Education, “An Overview of the U.S. Department of Educ.,” September 2010, <https://www2.ed.gov/about/overview/focus/what.html> [hereinafter ED, “An Overview”]. 1002 Department of Educ. Abolition Act of 1868; ED, “An Overview,” supra note 1001. 1003 *Ibid.* 1004 Under the U.S. Constitution, there is no specific right to public education, but there are rights to equal access to public education. As the Supreme Court clarified in *Brown v. Board of Education*, because education is so critical to every person’s ability to become literate and succeed in life and participate in civic society, providing lesser education to persons based on their race violates the Equal Protection clause of the Fourteenth Amendment, which prohibits discrimination based on race. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (racial segregation of students violated the right of African-American students to “equal educational opportunities,” emphasizing that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”); see also *Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982) (Constitution does not provide a fundamental right to education) but if the state provides it, status-based discrimination violates Equal Protection, *id.* at 221; and see U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Introduction: Relevant Civil Rights Laws, July 23, 2019, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [hereinafter USCCR, *Beyond Suspensions*]. The legislation that today sets forth the civil rights laws that ED enforces flow from the seminal *Brown* case and are based on the Fourteenth Amendment including the Congressional authority to enact appropriate legislation to ensure its enforcement. *Ibid.*; cf. *infra* notes 1016-28 (laws that OCR enforces). 1005 ED, “An Overview,” supra note 1001. 1006 20 U.S.C. § 3400 et. seq., Dep’t of Educ. Organization Act, Pub. L. 96-88, 93 Stat. 668 (1979). 1007 20 U.S.C. § 3401 (1) and (2).

https://en.wikipedia.org/wiki/Act_of_Congress
<http://legislink.org/us/pl-96-88>
<https://www.congress.gov/bills/96th-congress/senate-bill/210>
https://en.wikipedia.org/wiki/United_States_Statutes_at_Large
<http://legislink.org/us/stat-93-668>
<https://www2.ed.gov/about/overview/focus/what.html>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>

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1. to strengthen the Federal commitment to ensuring access to equal educational opportunity for very individual;
2. to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;
3. to encourage the increased involvement of the public, parents, and students in Federal education programs;
4. to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;
5. to improve the coordination of Federal education programs; 6. to improve the management and efficiency of Federal education activities, especially with

respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and

7. to increase the accountability of Federal education programs to the President, the Congress, and the public.¹⁰⁰⁸

Along these lines, ED states that its mission is “to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”¹⁰⁰⁹ As will be discussed herein, ED OCR enforces civil rights laws and regulations under its jurisdiction through processing and acting upon individual complaints, through its own compliance investigations of educational institutions receiving federal funds, through providing technical assistance, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations.¹⁰¹⁰ The Commission received testimony from a 25-year career executive within ED OCR who worked in civil rights enforcement through multiple presidential administrations, underscoring the importance that “OCR must continue to use all of the regulatory, policy, enforcement, and technical assistance tools available to it as a federal civil rights law enforcement agency to promote and ensure compliance with the federal laws prohibiting harassment in education.”¹⁰¹¹ During the period of the Commission’s review, as will be discussed below, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of

1008 20 U.S.C. § 3402 1009 U.S. Dep’t of Educ., “Mission,” <https://www2.ed.gov/about/overview/mission/mission.html> (accessed May 29, 2019). 1010 See *infra* notes 1029-40. 1011 Debbie Osgood, Partner at Hogan Marren Babbo & Rose, and former National Enforcement Director at the Office for Civil Rights, U.S. Department of Education, Written Statement for the In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes Briefing before the U.S. Comm’n on Civil Rights, May 11, 2018, pp. 1, 6 [hereinafter Osgood Statement] (noting her 25 years in Office for Civil Rights).

<https://www2.ed.gov/about/overview/mission/mission.html>

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guidance,¹⁰¹² reducing the scope and number of investigations conducted,¹⁰¹³ and seeking to curtail its budget capacity significantly.¹⁰¹⁴ A journalist who reviewed the history of ED OCR at the beginning of the Trump Administration predicted, accurately, that “the strategies that [Secretary] DeVos might well follow” for ED OCR would follow those of prior history when President “Reagan did restrain the power of the Office for Civil Rights [at ED] by cutting back its funding, reducing investigations and reviews, and rescinding guidance.”¹⁰¹⁵ Legal Authority and Responsibility The Department of Education Organization Act of 1979 created the agency’s Office for Civil Rights (ED OCR).¹⁰¹⁶ Congress tasked ED OCR with external civil rights enforcement.¹⁰¹⁷ The Department of Education Organization Act also created the position of Assistant Secretary for Civil Rights to lead ED OCR.¹⁰¹⁸ ED OCR defines its mission as “to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”¹⁰¹⁹ ED OCR is responsible for enforcing the following civil rights laws in the context of education:¹⁰²⁰

• Title VI of the Civil Rights Act of 1964¹⁰²¹ • Title IX of the Education Amendments Act of 1972¹⁰²² • Section 504 of the Rehabilitation Act of 1973¹⁰²³ • Age Discrimination Act of 1975¹⁰²⁴ • Title II of the Americans with Disabilities Act of 1990¹⁰²⁵ • Boy Scouts of America Equal Access Act of 2001¹⁰²⁶

1012 See *infra* notes 1196-1214. 1013 See *infra* notes 1086-1183. 1014 See *supra* Figure 3.1. 1015 James S. Murphy, “The Office for Civil Rights’s Volatile Power,” *The Atlantic*, Mar. 13, 2017, <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/> (cited in: Duncan Statement at 6-7). 1016 20 U.S.C. § 3413, Department of Educ. Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 673 (1979). 1017 Dep’t of Educ. Organization Act, 20 U.S.C. § 3413(c); 34 C.F.R. § 100.1. 1018 20 U.S.C. § 3413. 1019 ED, “About OCR,” supra note 116. 1020 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 1, at 6. 1021 42 U.S.C. §§ 2000d-2000d-4. 1022 20 U.S.C. §§ 1681-88. 1023 29 U.S.C. § 794. 1024 42 U.S.C. §§ 6101-07. 1025 28 C.F.R. § 35. 1026 20 U.S.C. § 7905 (prohibiting discrimination under any education program or activity receiving Federal financial assistance on the basis of sex, with some limited exceptions for conferences, fraternities and sororities, and other activities).

<https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>

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These laws protect students in American schools and education programs from discrimination based on race, color, national origin, sex, disability, and age.¹⁰²⁷ ED OCR has described its jurisdiction as follows:

Under Title VI, Title IX, Section 504, and the Age Discrimination Act, OCR has jurisdiction over institutions that receive Federal financial assistance from ED, including state education agencies, public elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums. Under Title II, OCR has jurisdiction over public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools) and public libraries. Under the Boy Scouts Act, OCR has jurisdiction over public elementary schools, public secondary schools, local educational agencies, and State agencies that receive funds made available through ED.¹⁰²⁸

Enforcement Tools The enforcement tools ED OCR has specific legal authority to use are:

• Complaint resolution¹⁰²⁹ • Agency-initiated charges¹⁰³⁰ • Proactive compliance evaluations¹⁰³¹ • Guidance or other policy documents¹⁰³² • Regulations¹⁰³³ • Technical assistance¹⁰³⁴ • Publicity¹⁰³⁵

1027 ED, “About OCR,” supra note 116. 1028 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 1, at 6. 1029 34 C.F.R. §§ 100.7(c), 104.61, 105.41(b), 106.71. 1030 *Id.* § 100.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process). 1031 *Id.* § 100.7(a) (conduct of investigations). 1032 *Id.* § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1033 20 U.S.C. § 3474 (Secretary authorized to prescribe regulations); see also 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations); 28 C.F.R. § 41.4 (Agency duty to issue Rehabilitation Act Section 504 regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1034 34 C.F.R. § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1035 28 C.F.R. § 41.5(b)(1) (requirements for notification of rights under Section 504 of the Rehabilitation Act); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information); 28 C.F.R. § 54.140 (requirements for public dissemination of Title IX information).

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• Research, data collection, and reporting¹⁰³⁶ • Collaboration/partnership with state/local agencies¹⁰³⁷ • Collaboration/partnership with other federal agencies¹⁰³⁸ • Strategic Plans¹⁰³⁹ • Annual Reports¹⁰⁴⁰

While ED OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits ED OCR from engaging in, for example, outreach to regulated communities and in fact ED OCR regularly does exactly that, as described in further detail below. Budget and Staffing See Figure 3.1. In FY 2016, OCR requested a total of \$130.6 million, and Congress appropriated \$107.0 million, which represented a 10% increase from the previous appropriation. In FY 2017, OCR’s budget request increased to \$137.7 million, yet the Congressional appropriation only rose to \$108.5 million. In FY 2018, the first budget request of the Trump Administration, OCR’s budget request decreased significantly to \$106.7 million, down \$31 million from the FY 2017 request level and down \$1.8 million from the previous year’s Congressional appropriation, yet the FY 2018 actual Congressional appropriation increased significantly to \$117.0 million. Figure 3.1: OCR Requested and Allocated Budget

Source: U.S. Dep’t of Educ., Office for Civil Rights, Fiscal Year 2019 Budget Request, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, Fiscal Year 2018

1036 20 U.S.C. § 3413(c)(1) (Assistant Secretary authorized “to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights”); 28 C.F.R. § 42.406 (regarding data collection and information sharing). 1037 34 C.F.R. § 100.6(a) (“The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.”); see also 34 C.F.R. § 104.5; 34 C.F.R. § 106.4. 1038 28 C.F.R. § 42.413. 1039 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1040 20 U.S.C. § 3413(b)(1).

FY 2016 FY 2017 FY 2018 Requested \$130,691,000 \$137,708,000 \$106,797,000 Allocated \$107,000,000 \$108,500,000 \$117,000,000

\$0

\$50,000,000

\$100,000,000

\$150,000,000

Figure 3.1: OCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>

Budget Request, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>; U.S. Dep't of Educ., Fiscal Year 2018 Budget Summary and Information, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>; U.S. Dep't of Educ., Fiscal Year 2018 Congressional Action, Mar. 27, 2018, p. 14, U.S. Dep't of Educ., <https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>; Fiscal Year 2017 Budget Summary and Information, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep't of Educ., Fiscal Year 2016 Budget Summary and Information, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>; U.S. Dep't of Education, Response to Interrogatory No. 9, at 13-14.

ED OCR noted that its budget “does not include a separate listing of funds designated for enforcement activities versus other activities,” nor does it “include a separate listing of funds designated for use on investigating civil rights concerns that OCR raises proactively or that do not arise from complaints.”¹⁰⁴¹ A key distinction between the Trump Administration’s budget request in FY 2018 and the FY 2016 request is that the FY 2016 budget request included a separate listing of an additional 192 investigators and 8 additional non-investigative staff ED planned to hire if Congress appropriated additional funds. Between 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent, while ED OCR staffing decreased by 11 percent during the same ten year period.¹⁰⁴² The FY 2016 budget request stated that a total increase in 200 full time equivalent (FTE) staff was necessary to reduce the “anticipated case level per staff from 28 to 19.”¹⁰⁴³ For FY 2016, the agency asked for an additional 30 million dollars to cover the requested increase in OCR personnel.¹⁰⁴⁴ In contrast, the FY 2018 budget request stated that “OCR staff must handle its increased complaint workload while maintaining existing operations,” yet the report acknowledges that OCR may find it difficult to meet the performance target levels to resolve complaints within 180 days.¹⁰⁴⁵ ED OCR’s FY 2018 budget request noted that in FY 2016, the case load per staff was 41 cases, and that this ratio “will likely continue to increase through FY 2018 due to fewer staff.”¹⁰⁴⁶ To compensate for the decreasing staff levels and the steady increase in the number of complaints received by ED OCR, the agency’s FY 2018 budget request stated that, “OCR must make difficult choices, including cutting back on initiating proactive investigations.”¹⁰⁴⁷ Further, the Trump Administration’s FY 2019 budget request highlighted that in FY 2018, ED OCR reduced the number of FTEs from 569 to 529, and made changes to ED OCR’s case processing manual in order to allow for a smaller number of FTEs to handle a larger caseload.¹⁰⁴⁸ The FY

¹⁰⁴¹ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 9, at 13. ¹⁰⁴² See infra notes 1086-1185. ¹⁰⁴³ U.S. Dep't of Educ., Fiscal Year 2016 Budget Request, p. 14, <https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>. ¹⁰⁴⁴ *Ibid.*, 11 (“The total FY 2016 request is \$130.691 million, supporting a full-time equivalent (FTE) level of 754. This request is a \$30.691 million, or 31 percent, increase above the 2015 level. The majority of the increase is for an additional 200 FTE, which the Department believes is essential for OCR to deliver on its mission of fulfilling the promise of the Civil Rights law by ensuring equal access to educational opportunities.”) ¹⁰⁴⁵ U.S. Dep't of Educ., Fiscal Year 2018 Budget Request, p. Z-12, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf> [hereinafter ED, FY 2018 Budget Request]. ¹⁰⁴⁶ *Ibid.*, Z-15. ¹⁰⁴⁸ U.S. Dep't of Educ., Fiscal Year 2019 Budget Request, p. Z-10, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf> [hereinafter ED, FY 2019 Budget Request].

<https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>
<https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>
<https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>

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2019 budget request also stated that the reduction in staff during FY 2018 resulted from attrition, including offering early retirement or voluntary separation incentives.¹⁰⁴⁹ But unlike ED during the Obama Administration, in its FY 2019 budget request, ED predicted that a reduced number of OCR FTEs would adequately be able to process all of ED OCR’s cases due to anticipated reductions in the number of cases filed per year.¹⁰⁵⁰ Though Congress ultimately appropriated approximately 10 million dollars in funds above what the administration requested, ED’s FY 2018 budget request for ED OCR of approximately 107 million dollars marks a significant reduction in ED’s requested budget for ED OCR compared to previous budget requests of approximately 130.7 million dollars in FY 2016 and 137.7 million dollars in FY 2017.¹⁰⁵¹ ED OCR provided staffing data for fiscal years 2016 and 2017, during which time the number of full-time staff devoted to civil rights investigations and enforcement declined from 403 FTE in FY 2016 to 370 FTE in FY 2017.¹⁰⁵² At the Commission’s briefing, Executive Director of the National Disability Rights Network Curt Decker testified that during the Trump Administration so far, ED OCR has lost 11 percent of its workforce, and “[t]hese reductions were so drastic that Congress stepped in, directing more money to maintaining the staffing levels.”¹⁰⁵³ Former Secretary of Education Arne Duncan testified that cutting staff is tantamount to “walking back commitments to civil rights.”¹⁰⁵⁴ In his written testimony to the Commission, Duncan further noted that “budgets express policy judgments” and that “the Trump Administration takes steps to starve civil rights enforcement that could, if unchecked, last well after the end of the current presidency.”¹⁰⁵⁵

¹⁰⁴⁹ *Ibid.* ¹⁰⁵⁰ *Ibid.* ¹⁰⁵¹ See supra Figure 3.1. ¹⁰⁵² U.S. Dep't of Educ., Response to USCCR Interrogatory No. 8, at 12. Note that ED OCR staff totals were appreciably higher in both years as discussed below; the text totals here refer only to staff devoted to investigations and enforcement, excluding policy and administrative staff, for examples. ¹⁰⁵³ Curtis L. Decker, Executive Director, National Disability Rights Network, testimony, Federal Civil Rights Enforcement Briefing, p. 226; Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 (2018); Andrew Kreighbaum, “Under DeVos, a Smaller Department of Education,” *Inside Higher Ed*, Jun. 13, 2018, <https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>. ED reportedly “purchased more than \$28,000 worth of training related to how to plan and conduct a ‘reduction in force’ action – which is bureaucratic parlance for laying off employees.” Michael Stratford, “North Carolina opens investigation into for-profit law school,” *Politico*, Apr. 24, 2017, <https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>. ¹⁰⁵⁴ Duncan Testimony, Federal Civil Rights Enforcement Briefing, p. 77 (“To see the current administration actually get rid of civil rights attorneys, I think speaks -- it tells you everything you need to know about their values. And I would say budgets tell you values, not words, and when you cut staff, you’re walking back those commitments by definition.”) ¹⁰⁵⁵ Duncan Statement, at 6.

<https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>
<https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>
<https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>
<https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>

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In FY 2017, ED requested 753 FTEs for ED OCR, which was comparable to FY 2016, when ED requested 754 FTEs for ED OCR.¹⁰⁵⁶ In alignment with the decreased budget request for FY 2018, President Trump’s first proposed budget only requested funds for 523 FTEs for ED OCR.¹⁰⁵⁷ These proposals contrast with ED OCR’s actual staffing levels, with 563 FTEs in FY 2016, 579 FTEs in FY 2017, and 529 FTEs in FY 2018 through the annualized continuing resolution.¹⁰⁵⁸ Regarding their roles, in response to the Commission’s Interrogatories, ED OCR reported that for FY 2016 and FY 2017, 403 FTEs and 370 FTEs (including General Attorneys, Investigators, Equal Opportunity Specialists, and Equal Opportunity Assistants) were assigned to work exclusively on enforcement-related activities.¹⁰⁵⁹ In addition to the full-time enforcement staff, a total of 14 and 11 investigative staff members worked part-time on enforcement-related activities in FY 2016 and FY 2017 respectively, including General Attorneys and Equal Opportunity Specialists.¹⁰⁶⁰ ED OCR did not have any outside contractors working on enforcement activities during FY 2016 or FY 2017.¹⁰⁶¹ ED OCR also told the Commission that it finalizes its staffing levels after it receives notification of its appropriated funds for a given fiscal year, and staffing levels are “set in a manner to allow [ED] OCR to best meet its mission while operating within its appropriated budget.”¹⁰⁶² Moreover, several other factors may affect staffing levels, such as appropriations or hiring freeze directives, or attrition,¹⁰⁶³ and according to ED OCR, “[ED] OCR continually assesses its staffing needs in light of its complaint receipts, and for FY2018 has initiated the process of hiring for 65 positions.”¹⁰⁶⁴ In its FY 2016 annual report, ED OCR stated that its general staffing level has historically decreased over time, despite the fact that its complaint volume has “exponentially increased.”¹⁰⁶⁵ Between FY 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent.¹⁰⁶⁶ During that same time period, ED OCR staffing levels decreased by 11 percent.¹⁰⁶⁷

¹⁰⁵⁶ U.S. Dep't of Educ., Fiscal Year 2017 Budget Summary and Background Information, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep't of Educ., Fiscal Year 2016 Budget Summary and Background Information, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>. ¹⁰⁵⁷ U.S. Dep't of Educ., Fiscal Year 2018 Budget Summary and Background Information, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>. ¹⁰⁵⁸ *Ibid.*; U.S. Dep't of Educ., Fiscal Year 2019 Budget Summary and Background Information, p. 58, <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>. ¹⁰⁵⁹ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 8, at 12 (noting that “[Office of Civil Rights] staffing fluctuates and responses to Interrogatory 8 reflect end-of-fiscal year data.”) ¹⁰⁶⁰ *Ibid.*, 12-13. ¹⁰⁶² U.S. Dep't of Educ., Response to Interrogatory 9, p. 14. ¹⁰⁶³ *Ibid.* ¹⁰⁶⁴ *Ibid.* ¹⁰⁶⁵ U.S. Dep't of Educ., Office of Civil Rights, Fiscal Year 2016, Securing Equal Educational Opportunity: Report to the President and Secretary of Education, p. 8, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, FY 16 Securing Equal Educational Opportunity]. ¹⁰⁶⁶ *Ibid.*, 7. ¹⁰⁶⁷ *Ibid.*, 8.

<https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>
<https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>
<https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>
<https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>

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Figure 3.2: ED OCR Staffing Levels vs. Complaints Received FY 1981-2016

Source: U.S. Dep't of Education

Assessment Prioritization for Civil Rights Agency-wide In 2002, the Commission recommended that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”¹⁰⁶⁸ Organizational Structure As the Commission has noted in the past, with the passage of the Department of Education Organization Act in 1979, Congress ensured that the Assistant Secretary of Education for Civil Rights would have a direct line to the Secretary of Education, and tasked the Assistant Secretary with providing civil rights leadership throughout ED.¹⁰⁶⁹

¹⁰⁶⁸ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. ¹⁰⁶⁹ 20 U.S.C. § 3413.

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ED OCR is currently led by Kenneth L. Marcus, Assistant Secretary of Education for Civil Rights, whom the U.S. Senate confirmed on June 7, 2018.¹⁰⁷⁰ The Assistant Secretary reports directly to the Secretary of Education, and is the principal advisor on civil rights matters, providing “overall direction, coordination, and leadership,” which indicates an effort to integrate civil rights into every component of the organization.¹⁰⁷¹ ED OCR enforces external civil rights matters at its headquarters in Washington, DC, as well as through its 12 regional offices around the country in:

• Atlanta • Boston • Chicago • Cleveland • Dallas • Denver • Kansas City • New York • Philadelphia • San Francisco • Seattle • DC Metro¹⁰⁷²

When all positions are filled, each regional office has a Regional Director and a Program Manager, a Chief Attorney, Team Leaders, Attorneys, Equal Opportunity Specialists, and administrative support positions.¹⁰⁷³

¹⁰⁷⁰ U.S. Dep't of Educ., “Kenneth L. Marcus, Assistant Secretary for Civil Rights — Biography,” <https://www2.ed.gov/news/staff/bios/marcus.html> (accessed May 20, 2019) (Assistant Secretary Marcus served as the Staff Director of the Commission from 2004 to 2008; Marcus was appointed to the Commission Staff Director position in the second term of the George W. Bush Administration). ¹⁰⁷¹ 20 U.S.C. § 3413 (a), (c); U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 10-11. ¹⁰⁷² ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 6. ¹⁰⁷³ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 7, at 10.

<https://www2.ed.gov/news/staff/bios/marcus.html>

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Figure 3.3: Organizational Structure of OCR

Source: U.S. Department of Education, Office for Civil Rights

Figure 3.3 displays ED OCR’s organizational structure in August of 2018.¹⁰⁷⁴ In its response to the Commission’s Interrogatories, ED OCR clarified that the Resource Management Team, the Program Legal Group, and all Enforcement Divisions report to the Assistant Secretary for Civil Rights, and there is a Deputy Assistant Secretary for Policy and Development, a Deputy Assistant Secretary for Management and Planning, a Deputy Assistant Secretary for Enforcement, a Deputy Assistant Secretary for Management, and senior counsel.¹⁰⁷⁵ ED OCR also noted that it had a Chief of Staff as a part of its senior staff in FY 2016 and FY 2017, and when vacancies in senior positions occur, staff may be designated to fill these vacancies on an “acting” basis.¹⁰⁷⁶

¹⁰⁷⁴ U.S. Dep't of Educ., Response to Document Request No. 2, OCR Org Chart Dated Aug. 2018. ¹⁰⁷⁵ The Resource Management Team and the Budget and Planning Support Team are responsible for “planning, developing, and implementing budget, operational, and administrative policy for OCR.” The Program Legal Group “provides a range of legal services that can include: developing technical assistance materials, regulation development, developing policy guidance, consulting on novel cases from the enforcement offices, and helping to ensure that civil rights issues are appropriately addressed within the Department’s programs and initiatives and among federal agencies,” and administers

RESOURCE MANAGEMENT

TEAM

PROGRAM LEGAL GROUP

TEAM I

TEAM II

TEAM III

SAN FRANCISCO REGION

DENVER REGION

CHICAGO REGION

CLEVELAND REGION

ATLANTA REGION

BOSTON REGION

OFFICE FOR

CIVIL RIGHTS

ENFORCEMENT DIVISION

A

ENFORCEMENT DIVISION

B

ENFORCEMENT DIVISION

C

ENFORCEMENT DIVISION

D

PHILADELPHIA REGION

METRO (DC) REGION

DALLAS REGION KANSAS CITY REGION SEATTLE REGION

NEW YORK REGION

CUSTOMER SERVICE AND TECHNOLOGY

TEAM

BUDGET AND PLANNING SUPPORT

TEAM

HUMAN RESOURCES

TEAM

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Strategic Planning and Self-Evaluation ED as a whole published a Strategic Plan for fiscal years 2018-2022.¹⁰⁷⁷ This follows ED's previous strategic plan spanning fiscal years 2014-2018.¹⁰⁷⁸ The 2014-2018 plan includes equity as one of the six strategic goals for the four year period the plan covers.¹⁰⁷⁹ The 2018-2022 plan includes equal access to high-quality educational opportunities as a strategic objective under the larger strategic goal of supporting state and local efforts to improve learning outcomes for all preschool through grade 12 students in every community.¹⁰⁸⁰ The Assistant Secretary for Civil Rights is statutorily required to report annually to the Secretary of Education and the President summarizing the compliance and enforcement activities of the office.¹⁰⁸¹ The report must also identify significant civil rights or compliance problems for which the Assistant Secretary has recommended corrective action, but has not seen adequate progress made in the judgement of the Assistant Secretary.¹⁰⁸² ED OCR has released every report since 1995 to the public, including the most recent report available which covers FY 2016.¹⁰⁸³ However, Commission research indicated that ED OCR has not published an FY 2017 or FY 2018 annual report, in violation of its statutory obligation.¹⁰⁸⁴ The Commission received written testimony from Fatima Goss Graves, President and CEO of the National Women's Law Center, expressing her concerns about the absence of recent annual reports from ED OCR, and stating that annual reports are an important civil rights enforcement tool, as they allow the public to see how ED OCR enforces statutes and regulations, facilitate Congressional oversight over agency enforcement efficacy, describe what the agency considers important about the state of civil rights, and facilitate agency self-evaluation which is critical to effective enforcement.¹⁰⁸⁵

¹⁰⁷⁷ U.S. Dep't of Educ., Strategic Plan for Fiscal Years 2018-2022, <https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf> [hereinafter ED, Strategic Plan FY 2018- 2022]. ¹⁰⁷⁸ U.S. Dep't of Educ., Strategic Plan for Fiscal Years 2014 – 2018, <https://www2.ed.gov/about/reports/strat/plan2014-18/strategic-plan.pdf>. ¹⁰⁷⁹ Ibid. ¹⁰⁸⁰ ED, Strategic Plan FY 2018-2022, supra note 1077. ¹⁰⁸¹ 20 U.S.C. § 3413(b). ¹⁰⁸² Id. § 3413(b)(1). ¹⁰⁸³ U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities," supra note 205. ¹⁰⁸⁴ 20 U.S.C. § 3413(b)(1). ¹⁰⁸⁵ Id.; see also Fatima Goss Graves, President and CEO, National Women's Law Center, Written Statement for the Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2019, at 4 [hereinafter Goss Graves Statement] ("[ED] OCR's reports are an important tool to inform the Department, Congress, the President, and the public of [ED] OCR's priorities and enforcement efforts."). See also Shahab Ahmed Mirza and Frank J. Bewkes, "Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students," Center for American Progress, Jul. 29, 2019, <https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/> [hereinafter CAP, Civil Rights of LGBTQ Students] (noting that ED OCR has not published any annual reports during the Trump Administration, rendering it "not possible" to specifically analyze complaints in particular categories).

<https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf>
<https://www2.ed.gov/about/reports/strat/plan2014-18/strategic-plan.pdf>
<https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/>
<https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/>

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Complaint Processing, Agency-Initiated Charges, & Litigation In FY 2016, ED's independent Office of the Inspector General (ED OIG) published an audit of the effectiveness of ED OCR's case resolution work stating that:

We found that OCR generally resolves discrimination complaints in a timely and efficient manner and in accordance with applicable policies and procedures. Specifically, we determined that OCR resolves discrimination complaints in a timely fashion at a high overall rate and does not have a large backlog of unresolved cases. The primary factors that contribute to OCR's timely and efficient resolution of complaints include efficient case resolution methods, consistency in case investigation practices, and effective case tracking and information management systems.¹⁰⁸⁶

The Inspector General also concluded that:

OCR has generally developed clearly defined procedures that allow regional staff to follow established policy when resolving the different types of discrimination complaints and allow management to provide clear direction to regional staff when complications or questions arise. We also noted OCR management has created a control environment that ensures the investigative teams understand the importance of compliance with policies and procedures. As a result, OCR is able to ensure that complaints are processed and resolved consistently, efficiently, and effectively across the regions, in line with OCR's statutory and regulatory responsibilities.¹⁰⁸⁷

ED OIG's semiannual report to Congress covering the first half of FY 2016 summarized the findings quoted above from the audit of ED OCR, and noted that an increasing workload combined with decreasing resources "could have a negative effect on complaint resolution," because staff may not be able to maintain their levels of productivity. ¹⁰⁸⁸ The ED OIG evaluation finding high levels of efficacy is notable given the high volume of investigations ED OCR processed during the time period it examined. In FY 2016, ED OCR received 16,720 complaints and initiated 13 proactive investigations.¹⁰⁸⁹ ED OCR stated that this complaint volume was a record high and was partly attributed to a single individual who filed

¹⁰⁸⁶ U.S. Dep't of Educ. Office of the Inspector General, The Resolution of Discrimination Complaints by the Department's Office for Civil Rights, p. 2, Dec. 10, 2015, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf> [hereinafter ED OIG, Resolution of Discrimination Complaints by OCR]. ¹⁰⁸⁷ Ibid., 3. ¹⁰⁸⁸ Ibid. ¹⁰⁸⁹ U.S. Dep't of Educ., Office for Civil Rights, Fiscal Year 2016 Report to the President and Secretary of Education, p. 5, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, FY 16 Report to the President and Secretary] (ED OCR uses the term "proactive investigation" to indicate a compliance review of a recipient of federal financial assistance).

<https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf>
<https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>
<https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>

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6,201 Title IX complaints against elementary and secondary schools and school districts.¹⁰⁹⁰ In comparison, in FY 2015, ED OCR received 10,392 total complaints.¹⁰⁹¹ In FY 2017, the total number of complaints ED OCR received decreased to 12,837.¹⁰⁹² In FY 2018 ED OCR received 12,435 complaints.¹⁰⁹³ The number of cases ED OCR investigated for FY 2016 and FY 2017 were 7,396 and 8,577 respectively.¹⁰⁹⁴ In FY 2018, ED OCR resolved 14,074 complaints, a number that includes cases that resulted in dismissal, administrative closure, a finding of no violation, an early complaint resolution, or a resolution agreement, including cases received prior to FY 2018.¹⁰⁹⁵ These numbers differ slightly from case numbers that ED OCR provided USCCR in its Interrogatory/document request responses. ED OCR reported to USCCR that it opened 16,733 cases in FY 2016 and 12,839 cases in FY 2017.¹⁰⁹⁶ ED OCR reported that it resolved 8,631 cases in FY 2016, and in sharp contrast, resolved 17,821 cases—more than double—in FY 2017.¹⁰⁹⁷ As of the close of FY 2016 and FY 2017 (September 30), 12,055 cases and 7,107 cases were pending respectively.¹⁰⁹⁸ See figure 3.4.

¹⁰⁹⁰ Ibid., 24. ¹⁰⁹¹ Ibid., 24. ¹⁰⁹² Ibid., 24. ¹⁰⁹³ U.S. Dep't of Educ., "Press Release: New Data Show Secretary DeVos' Reforms to the Office for Civil Rights are Driving Better Results for Students," Jul. 10, 2019, <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students> [hereinafter ED, "Reforms to OCR are Driving Better Results for Students"]. ¹⁰⁹⁴ ED OIG, Resolution of

Discrimination against individuals with supra note 1086. “[T]he selection of investigated cases is based on cases either still pending or cases that progressed beyond dismissal and were resolved with administrative closure, no violation, Early Complaint Resolution, or change with or without a resolution agreement”). 1095 ED, “Reforms to OCR are Driving Better Results for Students,” supra note 1093. 1096 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1. 1097 Ibid. 1098 Ibid. As discussed above, the number of pending cases reported means cases that were not resolved by the end of the fiscal year.

<https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>
<https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>

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Figure 3.4: OCR Status of Complaints for FY 2016 and FY 2017

According to the figures ED OCR reported to the Commission, in FY 2016, the largest number of complaints received (7,072) were Title IX complaints (regarding sex discrimination), which coincides with the information presented in the FY 2019 Budget Request that reported a single

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individual who filed 6,201 Title IX complaints against elementary and secondary schools and school districts.1099 In FY 2017, the largest number and percent of complaints received (5,569/43.4 percent) were complaints alleging discrimination against individuals with disabilities.1100 In contrast with the FY 2016 ED OIG report concluding that at that time ED OCR generally effectively and timely resolved complaints in accord with the law, a more recent evaluation from the Center for American Progress focused specifically on ED OCR resolution of sexual orientation and gender identity [SOGI] specific complaints concluded that “SOGI-related complaints were more than nine times less likely to result in corrective action under the Trump Administration than under the Obama Administration.”1101 The report noted that in the Obama Administration ED OCR found no violation or insufficient evidence of a violation in 12.2 percent of sexual orientation and gender identity discrimination complaints, compared to 6.1 percent of such findings in the Trump Administration.1102 These data reflect that the Obama Administration found no violation twice as often as the Trump Administration does for this category of cases. As the report explained:

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren’t ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.1103

The report also took issue with ED OCR’s public claim that it is delivering more change through its current practices:

While [ED] OCR claimed in a July 2019 press release that “instead of seeing every case as an opportunity to advance a political agenda, [OCR is] focused on the needs of each individual student and on faithfully executing the laws [...],” Assistant Secretary for Civil Rights Kenneth Marcus’s claim is countered by the very data published in the release. Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.1104

1099 See supra Figure 3.4. 1100 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1. 1101 CAP, Civil Rights of LGBTQ Students, supra note 1085. 1102 Ibid. 1103 Ibid. 1104 Ibid. Indeed, the report noted that SOGI complaints were “nine times less likely to result in corrective action [in the Trump Administration] than under the Obama Administration.” Ibid.

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ED OCR noted in its response to the Commission’s Interrogatories that it had dismissed or administratively closed 6,492 complaints in FY 2016, and that number more than doubled in FY 2017, with 14,785 complaints dismissed or administratively closed.1105 See Figure 3.4. These case closure rates have raised concern among analysts who have evaluated ED OCR case resolution data during the time period investigated. For example, the Center for American Progress reported that ED OCR during the Trump Administration closed 91.5 percent of complaints related to sexual orientation and gender identity through dismissal or administrative closure, whereas in the Obama Administration ED OCR closed 65.4 percent of such cases through these means.1106 A ProPublica analysis of more than 40,000 ED OCR cases resolved during the time period the Commission studied for this report characterized ED OCR in the Trump Administration as having “scuttled” cases on the ground that “efficiency is the Trump Administration’s priority.”1107 ED OCR also noted that “[p]rior to the March 5, 2018 revision of OCR’s [Case Processing Manual], there was a category for administrative closures, as well as dismissals, but effective March 5, 2018, circumstances that previously would have resulted in an administrative closure are included among the reasons for dismissal.”1108 Prior to March 5, 2018, ED OCR would administratively close a complaint if any of the following criteria were met:

(a) The same complaint allegations have been filed by the complainant against the same recipient with another federal, state, or local civil rights enforcement agency or through a recipient’s internal grievance procedures, including due process proceedings, and 1. for pending complaint allegations, OCR anticipates that there will be a comparable resolution process under comparable legal standards; i.e., all allegations will be investigated, appropriate legal standards will be applied, and any remedies secured will meet OCR’s standards. OCR will advise the complainant that she or he may re-file within 60 days of the completion of the other entity’s action. Generally, OCR will not conduct its own investigation; instead, OCR reviews the results of the other entity’s determination and determines whether the other entity provided a comparable process and met appropriate legal standards. 2. for resolved complaint allegations, the resolution meets OCR regulatory standards; i.e., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR’s standards.

1105 Ibid. 1106 Ibid. 1107 Annie Waldman, “DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama,” ProPublica, Jun. 21, 2018, <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama> (accessed Oct. 16, 2019) [hereinafter Waldman, “DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama”]. 1108 U.S. Dep’t of Educ., Response to USCCR Interrogatory 11, at 17, n.12.

<https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>
<https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>

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(b) The same allegations have been filed by the complainant against the same recipient with state or federal court. An OCR complaint may be re-filed within 60 days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint allegations. (Dismissal with prejudice is considered a decision on the merits.) (c) The complaint allegations are foreclosed by previous decisions of the federal courts, the U.S. Secretary of Education, or the U.S. Department of Education’s Civil Rights Reviewing Authority. (d) The complaint allegations are foreclosed by OCR policy determinations. (e.g., OCR’s policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened pursuant to Section 504, or to refrain from assessing the appropriateness of pedagogical decisions.) (e) OCR obtains credible information indicating that the allegations raised by the complaint have been resolved, and there are no class-wide allegations. In such a case, OCR will attempt to ascertain the apparent resolution. If OCR determines that there are no current allegations appropriate for further complaint resolution, the complaint will be closed. (f) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by the complainant’s or injured party’s refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint. (g) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by its inability to contact the complainant in order to obtain information that is necessary for investigation of the complaint. The Office will include documentation in the case file of its efforts to contact the complainant by phone, in writing, or via electronic mail to request the necessary information. OCR will not close the complaint until more than 20 calendar days have passed since the date of OCR’s attempt to contact the complainant.1109

ED OCR noted in its response to interrogatories that any basis that would have previously resulted in an administrative closure would now be grounds for ED OCR to dismiss the complaint under the updated CPM procedures.1110

1109 U.S. Dep’t of Educ., “OCR Case Processing Manual (CPM) Archived Information,” Art. I § 110 (Jan. 2010) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#fnref4> [hereinafter ED OCR, “Case Processing Manual (Archived)”]. 1110 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 11, at 16-17; see also U.S. Dep’t of Educ., Office for Civil Rights, Case Processing Manual, Nov. 19, 2018, pp. 9-12, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereafter ED OCR, Case Processing Manual].

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#fnref4>
<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

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During the time period studied in this report, ED OCR resolved thousands of cases of allegations of discrimination on the basis of race, national origin, sex, disability, and/or retaliation. For example, after an ED OCR investigation identified civil rights concerns, including that black students were consistently overrepresented in the district’s disciplinary actions, in April 2016, Oklahoma City Public Schools agreed to reform their school discipline policies.1111 ED OCR’s review of the district’s discipline practices revealed concerns about incomplete or inconsistent recordkeeping, data collection, provision of due process rights, administration of discipline, and information provided to parents of suspended students, as well as a lack of clarity in misconduct resulting in disciplinary sanctions such as “defiance of authority” or “disrespect.”1112 In its agreement with ED OCR, the district committed to implement several changes including staff training, a reevaluation of disciplinary policies, and measures to change the culture within the district.1113 In November of 2016, ED OCR resolved a case with East Hartford Public Schools in Connecticut, after finding that the district discriminated against limited English proficient (LEP) parents and guardians, including that the district had highlighted in red on its website that LEP families seeking to register their children in their district should bring their own translators, facially violating Supreme Court precedent in Plyler v. Doe requiring that school districts not deny students education based on national origin.1114 An ED OCR agreement with the district committed the district to develop a uniform policy for assisting LEP parents and notifying them of the availability of free translation services.1115 In March of 2017, ED OCR signed an agreement with Wittenberg University mandating several changes to the University’s Title IX investigation and hearing process including revisions to Title IX policies and procedures and offering to reimburse two students adversely affected by the University’s policies for counseling. In November 2016, ED OCR entered into an agreement with Yonkers Public Schools after an ED OCR investigation finding that the district discriminated against students with disabilities by failing to place them in a regular educational environment even when students would have been able to participate in that environment with the help of supplementary aids or services.1116 The ED OCR resolution agreement required that the district remind all teachers and administrators about district policies regarding students with disabilities and implement new training.1117

1111 U.S. Dep’t of Educ., “Oklahoma City Public Schools, U.S. Education Department Reach Settlement to Address Disproportionate Discipline of Black Students,” Apr. 20, 2016, <https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>. 1112 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 22-23. 1113 Ibid. 1114 U.S. Dep’t of Educ., Resolution Letter: Case No. 01-15-5001 East Hartford Public Schools, Nov. 30, 2016, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01155001-a.pdf> [hereinafter ED, Resolution Letter: Case No. 01-15-5001]; see also Plyler v. Doe, 457 U.S. 202 (1982). 1115 ED, Resolution Letter: Case No. 01-15-5001, supra note 1114. 1116 Ibid. 1117 Ibid.

<https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>
<https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>
<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01155001-a.pdf>

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In November 2017, ED OCR entered into a resolution agreement with the Loleta Union Elementary School District, in California, over alleged verbal and physical harassment and discriminatory discipline of Native American students, including students with disabilities.1118 Students and their families reported that harassment by school administrators and staff was part of a pattern of racial discrimination that included discriminatory discipline practices and a failure to provide special education services to Native American students with disabilities. ED OCR found repeated cases of “unwelcome physical behaviors and derogatory statements made by the former principal, and/or staff members to Native American students.”1119 The investigation found many incidents of disparate treatment. For example, a Native American student was suspended six times in a single school year without a disability evaluation even though his student file included a note from a teacher saying his “behavior is keeping him from learning” and a staff member had recommended evaluation and testing.1120 The letter also described a fourth-grade Native American student who had 43 behavioral incidents in a single school year, 38 of which the school described as “major” but whom the school did not evaluate for a disability even though her teacher noted the student had problems focusing and repeated behavioral issues ranging from tantrums to breaking down in tears in class.1121 ED OCR investigators also found that there was a statistically significant difference in the number of discipline referrals to school officials, the number of in-school and out-of-school suspensions, and Native students were overrepresented in the number of referrals to law enforcement—these students made up 30 percent of the student body in 2011-12 and 8 percent in 2012-13, but 100 percent of the referrals from 2011-2013.1122 The Resolution Agreement included consultants, experts and a stakeholder equity committee along with reporting requirements and data-based corrective action plans to help the district come into compliance with its civil rights obligations to provide equal access to education for all, and to ensure against discrimination and harassment based on race or national origin.1123 In August 2018, ED OCR entered into a voluntary resolution agreement with Florence City School District in Alabama to ensure that announcements sent by the school district were published in an accessible format.1124 The agreement required, in part, that the school district develop accessibility features for its website, and required the district to periodically send updates to ED OCR demonstrating that the district remained in compliance with the agreement.1125

1118 See U.S. Dep’t of Educ., Office for Civil Rights, Letter to Superintendent John Sutter for the Loleta Union Elementary School District (Nov. 22, 2017), p. 8, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf> [hereafter ED OCR, Loleta Union Letter to Superintendent]; U.S. Dep’t of Educ., Office for Civil Rights, Resolution Agreement, Loleta Union Elementary School District, Case No. 09-14-1111, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf> [hereinafter ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111]. 1119 ED OCR, Loleta Union Letter to Superintendent, supra note 1118, at 8. 1120 Ibid., 26-27. 1121 Ibid., 27. 1122 Ibid., 12 (enrollment), 13 (disciplinary referrals), 13-15 (suspensions), 17 (law enforcement referrals). 1123 ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111, supra note 1118. 1124 U.S. Dep’t of Educ. Office for Civil Rights, Resolution Agreement, Florence County School District Complaint Number 04-18-1249, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04181249-b.pdf>. 1125 Ibid.

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf>
<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf>

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Consistent with its regulatory requirements, 1126 ED OCR has a formalized complaint resolution process that begins with complainants submitting written information for ED OCR to examine, “pursuant to applicable statutes and regulations.” 1127 ED OCR’s Case Processing Manual states that it will provide reasonable assistance to complainants with disabilities and LEP individuals. 1128 When ED OCR receives written information, it must undergo an evaluation process to determine whether the information constitutes a “complaint” and requires a further investigation. 1129

1126 28 C.F.R. § 42.406. 1127 ED OCR, Case Processing Manual, supra note 1110, at 4. 1128 Ibid. 1129 Ibid.

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Figure 3.5: ED OCR Complaint Process

Source: U.S. Dep’t of Education

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Under its current practices, ED OCR will not pursue a further investigation if: • Correspondence received is anonymous • Only courtesy copies of information/complaints filed with another entity or person were

received • Written information is seeking advice or information from ED OCR • Information is communicated orally, and not in writing • Subject matter of the allegations falls outside of ED OCR’s jurisdiction • Written information relies exclusively on statistical data to present an allegation of

discrimination. 1130 The Case Processing Manual goes on to state that if ED OCR determines that the subject matter of the allegations falls outside its jurisdiction, it will determine if the complaint should be investigated by another federal government agency and if so, will forward it to the appropriate agency and notify the complainant. 1131 The following types of complaints may be referred to other agencies:

- Complaints against proprietary schools, or “privately owned, profit-making enterprises that teach a trade or skill” may be delegated to the U.S. Department of Veterans Affairs; 1132
- Complaints against proprietary schools operated by a hospital must be delegated to the U.S. Department of Health and Human Services; 1133
- Complaints claiming a service violation of the Age Discrimination Act of 1975 may be delegated to the Federal Mediation and Conciliation Service; 1134
- Complaints claiming a violation of the Americans with Disabilities Act that OCR does not have jurisdiction over are referred to the DOJ, and OCR will notify DOJ if they receive a complaint claiming discrimination “by a recipient against which DOJ represents the United States as a party in pending litigation.” 1135

1130 ED OCR, Case Processing Manual, supra note 1110, at 4-6; Andrew Kreighbaum, “Education Department Updates Manual for Civil Rights Investigations,” Inside Higher Ed, Nov. 21, 2018, <https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations> (The Department of Education’s Office for Civil Rights case processing manual was updated significantly during the Trump Administration, including adding a controversial provision, later removed, that allowed Department of Education’s Office for Civil Rights to dismiss complaints from people who filed multiple complaints under the same or similar bases); see also Laura Meckler, “Education Department’s civil rights office retreats, will consider claims filed en masse,” The Washington Post, Nov. 20, 2018, https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920. 1131 34 C.F.R. § 100.2 (2000); 34 C.F.R. § 105 (2000); 34 C.F.R. § 108.2 (2000); ED OCR, Case Processing Manual, supra note 1110, at 6. 1132 38 C.F.R. § 18a.1(a) (1989); ED OCR, Case Processing Manual, supra note 1110, at 26. 1133 38 C.F.R. § 18a.1(a); ED OCR, Case Processing Manual, supra note 1110, at 26. 1134 34 C.F.R. § 110.32(a) (2000); ED OCR, Case Processing Manual, supra note 1110, at 25. 1135 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 4, at 9; see also Ch. 1, Department of Justice Civil Rights Division, Federal Coordination and Compliance Section.

<https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations>
<https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations>
https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920
https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920

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ED OCR’s complaint processing manual states that it notifies complainants when it evaluates written information and determines the information to constitute a complaint under its jurisdiction. 1136 ED OCR will then determine whether the allegations in the complaint are timely, which based on federal regulations, means that the complaint was filed within “180 calendar days of the date of the alleged discrimination.” 1137 If the complaint was not timely, the complainant has the opportunity to request a waiver, which can be granted if “the time for filing is extended by the responsible Department official or his designee.” 1138 Investigations may be opened through the complaint process, or through agency-initiated compliance reviews. 1139 Available data indicates that most arrive through complaints as in FY 2016, ED OCR reported that it initiated 13 proactive compliance evaluations while resolving 8,625 cases overall. 1140 Federal regulations require:

The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part [Title VI]. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part. 1141

Importantly, this regulatory language mandates that ED OCR must investigate “whenever” information indicates a possible failure to comply with the civil rights laws ED OCR enforces. 1142 The marked increase in case dismissal and closure rates in Fiscal Years 2017 and 2018 raise questions about whether ED OCR is meeting this regulatory mandate. The current complaint processing manual provides that during the evaluation stage, an allegation or a complaint can be dismissed if it does not fall under one of the laws or regulations that ED OCR enforces, lacks factual detail, or is “so speculative, conclusory or incoherent that ED OCR

1136 34 C.F.R. § 100.7 (2000); ED OCR, Case Processing Manual, supra note 1110, at 7. 1137 Ibid., 8; 34 C.F.R. § 100.7(b) (2000) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; see also 34 C.F.R. § 100.7(b) (2019). 1138 34 C.F.R. § 100.7(b); ED OCR, Case Processing Manual, supra note 1110, at 8-9. 1139 34 C.F.R. § 100.7(a) and (b). 1140 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 5. As noted above, ED OCR did not publish an FY 2017 or FY 2018 Annual Report. See supra notes 1084, 1141 34 C.F.R. § 100.7(c). These requirements similarly apply to ED OCR’s investigation of discrimination on the basis of disability and sex. See 34 C.F.R. § 104.61 (stating that “The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 100.6-100.10 and part 101 of this title and 34 C.F.R. § 106.71 (stating that “The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101). 1142 Id.

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

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cannot infer that discrimination or retaliation may have occurred or may be occurring.” 1143 Complaints or allegations may also be dismissed if they are not timely and a waiver is not granted, if ED OCR lacks jurisdiction, or for other administrative reasons. 1144 If an allegation is dismissed, ED OCR will notify the complainant in writing. 1145 When ED OCR dismisses a complaint or allegation, it is considered resolved and the complaint will be closed. 1146 If the allegation is not dismissed, ED OCR’s current complaint processing manual provides that ED OCR can open the complaint allegations for investigation or utilize the Rapid Resolution Process (RRP), where a case resolution is expedited during the evaluation stage or after issuing a letter of notification. 1147 This is a departure from the earlier ED OCR process in the previous version of the Case Processing Manual issued in February 2015, in which RRP was only available in substantive areas deemed by ED OCR to be appropriate for RRP resolution. 1148 ED OCR’s current practice as described in its updated complaint processing manual results in the Rapid Resolution Process being available for any case not dismissed during the evaluation stage of the complaint, which is a significant change from previous ED OCR practice that only allowed RRP in limited circumstances. 1149 Another path to resolution is through mediation. If ED OCR determines that a complaint is appropriate for mediation, ED OCR starts by facilitating a dialogue between the parties involved through the process entitled Facilitated Resolution Between the Parties. 1150 During this process, ED OCR serves as “an impartial, confidential facilitator” between the parties that encourages both parties to “work expeditiously and in good faith toward a mutually acceptable resolution.” 1151 In FY 2016, the most recent fiscal year for which data was publicly available, ED OCR resolved 309 complaints through its mediation process. 1152 If the informal resolution process fails:

[C]ompliance with this part [Title VI] may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law. 1153

1143 34 C.F.R. § 100.7(c); ED OCR, Case Processing Manual, supra note 1110, at 10. 1144 ED OCR, Case Processing Manual, supra note 1110, at 10. 1145 Ibid., 9. 1146 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 11, p. 16. 1147 ED OCR, Case Processing Manual, supra note 1110, at 12. 1148 ED OCR, “Case Processing Manual (Archived),” supra note 1110, at 16-17. 1149 34 C.F.R. § 100.7. 1150 ED OCR, Case Processing Manual, supra note 1110, at 13. 1151 Ibid.; 34 C.F.R. § 100.7(d). 1152 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 21. 1153 34 C.F.R. § 100.8; see also, 34 C.F.R. § 104.61 (providing that complaints and compliance investigations initiated under Section 504 of the Rehabilitation Act will follow procedures applicable to Title VI of the Civil Rights Act of

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Whether through a compliance investigation or a complaint-initiated process, if ED OCR discovers that an entity is noncompliant with a resolution agreement or the laws and regulations it enforces, ED OCR says that it will issue a notice of deficiencies and request that appropriate action is taken to remediate such deficiencies. 1154 Where ED OCR has secured a resolution agreement with a recipient, ED OCR will continue monitoring the recipient until ED OCR has determined that the recipient has “fully and effectively implemented the terms of the resolution agreement.” 1155 If ED OCR determines that the entity has failed to comply with the terms and obligations of the agreement, then ED OCR may take action to enforce the agreement. 1156 If ED OCR and the entity cannot reach an agreement, or if the entity violates an agreement, then ED OCR has authority to initiate enforcement actions, and may suspend, terminate, or refuse to grant or continue financial assistance, or refer the case to DOJ for litigation. 1157 But before any enforcement action, ED OCR must first seek voluntary compliance. 1158 This is true in the case of investigations prompted by complaints or proactive compliance evaluation. 1159 Once ED OCR shares a proposed resolution agreement with the recipient, then the recipient has 90 days to reach a formal resolution agreement with ED OCR. 1160 In this circumstance, the complaint is resolved when the recipient “enters into and fulfills the terms of the resolution agreement.” 1161 If an education recipient of federal funds does not comply voluntarily, ED OCR may initiate an enforcement action after first providing the federal funds recipient with notice and an opportunity for formal administrative hearing before a hearing examiner. 1162 The hearing examiner would either issue an initial decision, from which a federal funds recipient could appeal to the Secretary or another authority designated by the Secretary, 1163 or the federal funds recipient could certify the record for decision by the reviewing authority. 1164 Any adverse decision from a hearing examiner or reviewing authority would identify findings and the requirement or requirements with which the federal funds recipient is found not to comply. 1165 If the Secretary were not the reviewing authority, either the federal funds recipient or ED OCR could request Secretary review of the

1964 at 34 C.F.R. §§ 100.6-100.10, 101); 34 C.F.R. § 106.71 (providing that complaints and compliance investigations initiated under Title IX of the Education Amendments of 1972 will follow procedures applicable to Title VI of the Civil Rights Act of 1964 at 34 C.F.R. §§ 100.6-100.10, 101). 1154 ED OCR, Case Processing Manual, supra note 1110, at 22-23. 1155 Ibid., 22. 1156 34 C.F.R. § 100.8; ED OCR, Case Processing Manual, supra note 1110, at 23. 1157 34 C.F.R. § 100.8(a); ED OCR, Case Processing Manual, supra note 1110, at 22. 1158 20 U.S.C. § 1682 (for Title IX; there are analogous statutory provisions for Title VI and the other statutes OCR enforces); 34 C.F.R. § 100.8(a), (c). 1159 34 C.F.R. §§ 100.7 – 100.8. 1160 ED OCR, Case Processing Manual, supra note 1110, at 18. Of note, ED OCR instituted this 90-day limit on negotiations in 2014 as a means to ensure effective civil rights enforcement. See White House Task Force to Protect Students From Sexual Assault, Not Alone, supra note 332, at 19. 1161 ED OCR, Case Processing Manual, supra note 1110, at 19. 1162 34 C.F.R. §§ 100.8(c), 100.9. 1163 Id. § 100.13(d). 1164 Id. § 100.10(a)-(c). 1165 Id. § 100.10(d).

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decision, or the Secretary could choose on his or her own to review the decision. 1166 Following this administrative review process, a federal funds recipient that did not succeed through this process could seek judicial review, 1167 including “at any time” requesting full restoration of fund eligibility. 1168 To secure fund eligibility, the federal funds recipient would need to show either that the recipient had satisfied the terms and conditions of the Department’s final decision or that the recipient had come into statutory compliance and would continue in future so to comply. 1169 Performance Criteria ED OCR strives to resolve complaints within 180 days of receipt, noting that the Government Performance and Results Act of 1993 (GPRA) performance measures it has chosen for itself are based upon the percentage of complaints resolved within that time frame, and the percentage of complaints that are pending past that 180 day mark. 1170 In its response to the Commission’s Interrogatories, ED OCR reported that it resolved 76 percent of its complaints due within 180 days in FY 2016, and resolved 80 percent of its complaints within 180 days in FY 2017. 1171 Furthermore, it reported that 11,936 complaints were pending 1172 at the end of FY 2016, and this number fell to 7,020 pending complaints at the end of FY 2017. 1173 Further ED OCR told the Commission that it measures its efficacy through indicators regarding its case processing, such as internal management matters and the performance of staff, 1174 which includes tracking the number of cases assigned and investigated per staff member. 1175 To help make ED OCR more efficient, “[E]D OCR increased staff training opportunities and reduced associated costs by shifting from live training and meetings to more cost-efficient online training and videoconferencing.” 1176 They also established an online presence by updating their website, publishing an “OCR Frequently Asked Questions Hub,” 1177 and publishing policy guidance as well as case documents to “maximize [E]D OCR enforcement staff time on compliance activities” and transparency. 1178 A ProPublica investigation of case closure rates during the time period the Commission studied reflects dramatic reduction in time to close cases and notably less systematic investigation

1166 Id. § 100.10(e). 1167 20 U.S.C. § 1683 (for Title IX); 34 C.F.R. § 100.11. 1168 34 C.F.R. § 100.10(g)(2). 1169 Id. § 100.10(g)(1). 1170 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 16, at 22. 1171 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1. 1172 See supra Figure 3.4. 1173 Ibid. 1174 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 17, at 23. 1175 ED, FY 2019 Budget Request, supra note 1049, at Z-14. 1176 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 8. 1177 U.S. Dep’t of Educ., “Frequently Asked Questions,” <http://www2.ed.gov/about/offices/list/ocr/faqs.html> (accessed Jun. 3, 2019).

<http://www2.ed.gov/about/offices/list/ocr/faqs.html>

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associated with less comprehensive resolution.1179 “Under Obama, 51 percent of cases that took more than 180 days culminated in findings of civil rights violations, or corrective changes. Under the Trump administration, that rate has dropped to 35 percent.”1180 The ProPublica investigation noted that these patterns are consistent across substantive issue areas: Outcomes on specific topics reflect this pattern. For instance, 70 percent of complaints of discrimination against students with limited proficiency in the English language were upheld under Obama, compared to 52 percent under the current administration. The proportion of complaints substantiated regarding the individualized educational needs of students with disabilities has dropped from 45 percent to 34 percent, regarding sexual harassment and violence, from 41 percent to 31 percent; and regarding racial harassment, from 31 percent to 21 percent.1181 As the ProPublica investigation explained:

These differences reflect the contrasting approaches of the Obama and Trump administrations to civil rights enforcement, according to people familiar with both. Under Obama, the Office for Civil Rights looked into instances of discrimination against individuals, but also made it a priority to carry out more time-consuming and systemic investigations into disparate treatment of students based on race, disability, or other factors. On the other hand, efficiency is the Trump administration’s priority. It has restricted the time and scope of investigations, concentrating on individual complaints that can be handled quickly, and seeking to clear a backlog of more expansive cases. As a result, it has resolved about 3,250 cases that lasted more than six months, compared to about 1,150 during the last 15 months of the Obama administration. Because of this high volume, the raw number of cases concluded with findings of wrongdoing has increased under DeVos, although the percentage is considerably lower.1182

ED OCR has, over time, considered whether other indicators of performance effectiveness would be appropriate, conceding that timeliness, while important, is only one way to measure performance. ED OCR’s FY 2001 and 2002 report to Congress noted that:

OCR’s current performance indicators measure timeliness of case processing and program outputs, such as percentages of OCR-directed technical assistance and resource materials for recipients and parents. These indicators address only a

1179 Waldman, “DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited From Obama,” supra note 1107. The ProPublica investigation studied the first 15 months of the Trump Administration compared with the final 15 months of the Obama Administration. 1180 *Ibid.* 1181 *Ibid.* 1182 *Ibid.*

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portion of OCR’s enforcement activities, and we are collecting data and working to develop additional indicators to reflect more fully the work that we do.1183

Proactive Compliance Evaluation Recipients of federal funding through ED programs are required to comply with applicable nondiscriminatory civil rights provisions.1184 In practice this requirement means that every K-12 public school and nearly all public and private colleges and universities must comply with federal nondiscrimination provisions because all these entities receive federal funding.1185 Federal regulations require that funding recipients keep sufficient records so that ED OCR can ascertain whether the entity is in compliance.1186 In FY 2016, the most recent year for which data was publicly available, ED OCR initiated 13 proactive compliance reviews, including seven Title VI compliance reviews and four Title IX compliance reviews.1187 During FY 2016, ED OCR resolved one Title VI compliance review, four Title IX compliance reviews, and one compliance review initiated on the basis of disability.1188 ED OCR has not reported since that time on its conduct of compliance reviews but its budget request documents have noted that ED OCR expected to reduce the number of proactive compliance reviews it would initiate because ED OCR sought fewer investigative staff and would, because of that choice, have fewer staff available to conduct compliance reviews.1189 The compliance reviews ED OCR resolved in FY 2016 included an ED OCR review of Toledo, Ohio public schools following an investigation to “assess whether the district was providing black students with equal access to educational resources.”1190 ED OCR and the district entered into a resolution agreement that required the district to ensure all students have equal access to resources, including equal access to teachers with advanced degrees, ensuring equitable distribution of

1183 U.S. Department of Educ., Office for Civil Rights, Annual Report to Congress: Fiscal Years 2001 and 2002, July 2003, <https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html> [hereinafter ED OCR, FY 2001 and 2002 Annual Report]. 1184 34 C.F.R. § 100.6. 1185 See, e.g., U.S. Department of Educ., Office for Civil Rights, “Sex Discrimination: Frequently Asked Questions,” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (accessed Aug. 22, 2019) (“Are all school districts, colleges, and universities covered by Title IX? Generally yes. All public school districts are covered by Title IX because they receive some federal financial assistance and operate education programs. All public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs. There are some private schools that do not receive any federal assistance, and Title IX does not apply to them. Additionally, there are some schools that are specifically exempt from certain parts of Title IX, such as an educational institution that is controlled by a religious organization but only to the extent the application of Title IX would not be consistent with the religious tenets of such organization.”). 1186 34 C.F.R. § 100.6(b). 1187 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 5, 18, and 24. 1188 *Ibid.*, 42. 1189 ED, FY 2018 Budget Request, supra note 1045, at Z-15. 1190 ED OCR, FY 16 Securing Equal Educational Opportunity, supra note 1065, at 20.

<https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html>

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html>

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experienced teachers throughout the district, and providing more live instruction for students.1191 ED OCR also resolved a compliance review of Montana State University Billings after launching an investigation to determine whether the university was discriminating against female students by denying them equal opportunity to participate in athletics, “and whether the university discriminates against male or female students by not awarding athletic financial assistance in proportion to the number of students of each sex participating in the university’s athletic programs.”1192 Under the resolution agreement, the university must develop a plan to meet the interests and abilities of the underrepresented sex, and submit the plan to ED OCR for review and approval.1193 ED OCR also conducted a compliance review of the San Bernardino County Office of Education in California and entered into a resolution agreement after finding that the county did not have adequate procedures in place to identify students with disabilities.1194 The resolution agreement stipulated that the county ensure that all students with disabilities are appropriately identified and that students with disabilities are provided with appropriate access to public education.1195 Comparative compliance review data for FY 2017 and 2018 was not publicly available at the time of publication of this report. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity Guidance ED OCR issued 38 guidance documents during the Obama Administration.1196 Of these 38, ED OCR issued five during FY 2016 and six in FY 2017 before the change in administration.1197 In comparison, ED OCR during the Trump Administration has issued two guidance documents as of the publication of this report.1198 Secretary DeVos has undertaken a deregulatory push at ED, seeking to roll back many previously issued guidance documents.1199 In both instances of issuing new guidance, as well as in two other instances where it did not affirmatively issue new guidance, the Trump Administration rescinded previously issued guidance. The Trump Administration ED OCR rescinded Title IX guidance on transgender students, guidance on sexual violence and campus sexual misconduct, and several Title VI guidance documents on school discipline and diversity in higher education, among other topics, some of which were previously issued jointly

1191 *Ibid.* 1192 *Ibid.*, 30. 1193 *Ibid.* 1194 *Ibid.*, 35. 1195 *Ibid.* 1196 U.S. Dep’t of Educ., Office for Civil Rights, “Policy Guidance,” <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>. (accessed Jul. 19, 2019) [hereinafter ED OCR, “Policy Guidance”]. 1197 *Ibid.* 1198 *Ibid.* 1199 USCCR, Beyond Suspensions, supra note 1004, at 147-50; Andrew Kreighbaum, “DeVos to Announce New Push for Deregulation, Innovation,” Inside Higher Ed, Jul. 30, 2018, <https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>

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by ED OCR and DOJ.1200 In only two of these instances has the Trump Administration affirmatively issued replacement guidance: in September 2017, ED OCR issued interim guidance while withdrawing prior guidance related to campus sexual violence,1201 and in December 2018 ED OCR issued a questions and answers document related to race discrimination in school discipline while withdrawing prior guidance on the same issue.1202 Fatima Goss Graves, President and CEO of the National Women’s Law Center, characterized the rescission of guidance as ED OCR not meeting its duty to protect students from discrimination, writing that “since February 2017, OCR has retreated from its proactive commitment to enforcing civil rights.”1203 The Commission received testimony from Shep Melnick criticizing ED OCR’s use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that “their legal status remains ambiguous.”1204 But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.1205 Also, as Judge Posner has noted, “Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.”1206 While guidance documents are not themselves legally binding1207—binding parties depends on the underlying law they rely on1208—the Commission has found that they are an important tool for effective civil rights enforcement.1209 In April 2017, President Trump signed an Executive Order aimed at decreasing the federal government’s role in education, directing the Secretary of Education to study federal overreach in

1200 U.S. Dep’t of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Guidance on Sexual Violence and Issues Q&A on Campus Sexual Misconduct (Sep. 22, 2017); DOJ and ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence, supra note 829; U.S. Dep’t of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>. U.S. Dep’t of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Jul. 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>. 1201 ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence, supra note 829. 1202 ED OCR, “Policy Guidance,” supra note 1196. 1203 Goss Graves Statement at 2. 1204 Shep Melnick, Thomas P. O’Neill, Jr. Professor of American Politics, Boston College, testimony, Federal Civil Rights Enforcement Briefing, p. 242. 1205 See *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. at 1203-04. 1206 *Hocutt v. U.S. Dep’t of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996). 1207 U.S. Gov’t Accountability Office, Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices, p. 2 (Mar. 14, 2018) <https://www.gao.gov/assets/700/690650.pdf>. 1208 See, e.g., USCCR, Beyond Suspensions, supra note 1004, at n. 23 (“While these [Dear Colleague or guidance] letters do not set legal precedents, they help to inform the public and education officials of the Education Department’s (and, where appropriate, the Justice Department’s) stance on major issues, the legal standards and requirements of schools, and solutions that the Department believes educational institutions should implement. See U.S. Dep’t of Educ., “U.S. Dep’t of Education Releases Guidance on Civil Rights of Students with Disabilities” (Dec. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities> (explaining that “[t]hese guidance documents clarify the rights of students with disabilities and the responsibilities of educational institutions in ensuring that all students have the opportunity to learn”). 1209 *Ibid.*; see USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 48-49.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>

<https://www.gao.gov/assets/700/690650.pdf>

<https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities>

<https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities>

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education.1210 As a result, ED appointed a Regulatory Reform Task Force to analyze and identify Department regulations and policy guidance for “potential repeal, modification, or replacement.”1211 In October 2018, ED announced that it was in the process of withdrawing approximately 600 “out-of-date” pieces of subregulatory guidance, including OCR guidance, which ED announced have either been replaced or have been determined to be no longer in effect.1212 The Policy Dissemination section below provides further details. In written testimony to the Commission, Debbie Osgood, partner at the law firm of Hogan Marren Babbo & Rose, Ltd and former National Enforcement Director at ED OCR, indicated how helpful it is to school communities to know what the law is and how OCR will enforce it in order to assist in voluntary compliance with the law.1213 Similarly, former supervisory attorney at ED OCR and current Of Counsel at Ballard Spahr LLP, Olabisi Okubadejo noted that guidance documents published by ED OCR are beneficial to schools in that guidance provides notice of educational institutions’ obligations under the law.1214 Technical Assistance ED OCR is required by regulation to provide “assistance and guidance to recipients to help them comply voluntarily” with the requirements of Title VI of the Civil Rights Act of 1964.1215 Pursuant to that requirement, ED OCR makes available civil rights tutorials and technical assistance on its website.1216 ED OCR provides technical assistance in the form of frequently asked questions regarding race and national origin discrimination, sex discrimination, disability discrimination, and age discrimination.1217 As ED OCR noted in its 2003 annual report, “[ED] OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information.”1218

1210 Mary Emily O’Hara, “Trump Signs Executive Order Reviewing Federal Role in Education,” NBC News, Apr. 26, 2017, <https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>. 1211 U.S. Dep’t of Educ., “Department of Education Withdraws Outdated Subregulatory Guidance,” Oct. 27, 2017, <https://content.govdelivery.com/accounts/USED/bulletins/1c07774>. 1212 *Ibid.* 1213 Osgood Statement, at 5-6. 1214 *Ibid.*, 3-4. 1215 34 C.F.R. § 100.6. 1216 U.S. Dep’t of Educ., “Civil Rights Tutorials and Technical Assistance” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/cr-ta.html> (accessed Jul. 19, 2019). 1217 *Ibid.* 1218 U.S. Dep’t of Educ., Office for Civil Rights Annual Report to Congress FY 2003, December 2004, p. 15, <https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>.

<https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>

<https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>

<https://content.govdelivery.com/accounts/USED/bulletins/1c07774>

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/cr-ta.html>

<https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>

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Outreach ED OCR engages in outreach to its regulated community and potentially affected populations through various program. According to ED OCR’s FY 2016 annual report, for example, the office convened university presidents to discuss racial harassment on college and university campuses.1219 Additionally, in FY 2016, “OCR provided more than 295 technical assistance sessions to a wide range of stakeholders – including schools and districts, state education

agencies, colleges and universities, parent groups and advocacy organizations – and conducted other outreach to galvanize action on important civil rights topics.”1220 Information about ED OCR outreach was not similarly available for FY 2017 or FY 2018.1221 Interaction and Coordination with External Agencies and Organizations In ED OCR’s most recent available annual report covering FY 2016, the office noted that at that time it had several agreements with other federal agencies, including hosting a conference with the U.S. Department of Housing and Urban Development and U.S. Department of Transportation “to engage in a dialogue about the value of diversity and opportunity in schools and neighborhoods, and to identify effective paths to increase and sustain healthy, non-discriminatory, racially and socioeconomically diverse school environments.”1222 ED OCR also participated in the Obama Administration’s United State of Women Summit, the White House Task Force to Protect Students from Sexual Assault, and the Asian American and Pacific Islander Bullying Prevention Task Force.1223 ED OCR has not released an annual report since the FY 2016 report, making it difficult to determine whether ED OCR continues to engage in interaction and coordination with other federal government agencies, or if any of the above initiatives remain operative. ED OCR has agreements with several other agencies related to enforcement of civil rights laws. For example, ED OCR and DOJ CRT signed a memorandum of understanding in 2014 agreeing to a “collaborative interagency effort to vigorously enforce Title IX.”1224 Also, ED OCR delegates the authority to processes certain complaints against proprietary schools to either the U.S. Department of Veterans Affairs or the U.S. Department of Health and Human Services depending on the type of school.1225 ED OCR cited in its Interrogatory response an agreement to share data and information with HHS regarding ongoing investigations at Michigan State University.1226 Furthermore, for any complaints received by ED OCR alleging certain violations of the ADA over

1219 ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 11. 1220 *Ibid.*, 5. 1221 See infra Chapter 3, Interaction and Coordination with External Agencies and Organizations. 1222 ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 11. 1223 *Ibid.*, 11. 1224 U.S. Dep’t of Educ. and U.S. Dep’t of Justice, Memorandum of Understanding between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (Apr. 29, 2014) https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf. 1225 U.S. Dep’t of Educ., Response to USCCR Interrogatories, at 8. 1226 *Id.*

https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf
https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf

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which ED OCR does not have jurisdiction, or when ED OCR is unable to negotiate a resolution agreement with a funding recipient, ED OCR will refer the matter to DOJ.1227 Research, Data Collections, and Reporting Since 1968, ED has conducted the Civil Rights Data Collection (CRDC) to collect information on civil rights issues in public schools, including enrollment information, educational programs, limited English proficiency, and disability.1228 Authority for the CRDC comes directly from its statute, however ED OCR is not explicitly required to conduct the biannual data collection.1229 During the Obama Administration, ED OCR stated that it improved the CRDC including making the collection more inclusive of key indicators of equity and opportunity.1230 In July of 2017, ED OCR published notice in the Federal Register of proposed modifications to ED OCR’s data collection procedures through CRDC in preparation for the biannual CRDC.1231 ED stated the changes aim to reduce the burden data collection places on school districts. The purpose of data collection through CRDC is to obtain data regarding implementation of civil rights laws that provide equal educational opportunity to all.1232 The 2017-2018 CRDC added data collection on computer science classes and school internet access, while eliminating the need for schools to provide data on high school equivalency course exam results, Advanced Placement course exam results, and student chronic absenteeism.1233 Data collected through CRDC is publicly available through the CRDC Reporting Tool.1234 During the Obama Administration, ED OCR expanded the CRDC to be more accessible to the public for the purpose of transparency.1235 This boost in transparency provides a resource for institutions and the public to see the data collected by ED OCR.

1227 *Id.* 1228 U.S. Dep’t of Educ., “Civil Rights Data Collection,” Sep. 25, 2018, <https://www2.ed.gov/about/offices/list/ocr/data.html?src=r>. 1229 20 U.S.C. 3413(c)(1); see also 34 C.F.R. §§ 100.6(b), 106.71, 104.61 (requiring recipients of ED OCR’s federal financial assistance to submit to ED OCR “complete and accurate compliance reports at such times, and in such form and containing such information” as ED OCR “may determine to be necessary to enable [ED OCR] to ascertain whether the recipient has complied or is complying” with these laws and implementing regulations). 1230 U.S. Dep’t of Educ., Office for Civil Rights, Achieving Simple Justice: Highlights of Activities, Office of Civil Rights 2009–2016, 2016, pp. 2–3 <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf> [hereinafter ED OCR, Achieving Simple Justice]; ED OCR, FY 16 Report to the President and Secretary, supra note 1089, at 12. 1231 Mandatory Civil Rights Data Collection, 82 Fed. Reg. 33,860 (Jul. 21, 2017). ED OCR publishes notice in the Federal Register ahead of each CRDC to note changes made from the previous CRDC. 1232 *Id.* 1233 U.S. Dep’t of Educ., “Civil Rights Data Collection,” <https://ocrdata.ed.gov/>. 1234 *Ibid.* 1235 ED OCR, Achieving Simple Justice, supra note 1230, at 2.

<https://www2.ed.gov/about/offices/list/ocr/data.html?src=r>
<https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>
<https://ocrdata.ed.gov/>

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ED OCR also collects data during the complaint process through ED OCR’s case management system, which ED OCR fully implemented in 2003.1236 The case management system collects demographic information, as well as the bases upon which complaints were filed and other factual information gathered during the investigation of a complaint.1237 The raw data gathered by ED OCR’s case management system is not publicly available, although information gathered from the case management system may be used in publicly available ED OCR reports.1238 The Collection of Racial and Ethnic Data and Data Disaggregation During FY 2016 to FY 2018, ED OCR revised its racial and ethnic data collection in case investigations. This revision was based in part on Executive Order 13,515 of 2009, which called for increased participation of Asian Americans and Pacific Islanders (AAPI) in federal programs, and aimed to, among other things, advance research, data collection, and data analysis for AAPI populations and subpopulations.1239 With respect to collecting and analyzing data pertinent to case/complaint processing in relation to Executive Order 13,515, ED OCR indicated the following:

In investigating and resolving cases, ED OCR’s data requests and analysis of data, including racial and ethnic data, depends on the allegations and the matters pertinent to the case. ED OCR does not, however, read Executive Order 13,515 as requiring ED OCR, in its collection and analysis of data in case investigations, to collect and disaggregate its data on certain racial and ethnic populations, including Asian Americans and Pacific Islanders, where such information and analysis is not relevant to the allegations of a particular case.1240

1236 U.S. Dep’t of Educ., Privacy Impact Assessment for the Case and Activity Management System, Jun. 26, 2017, p. 2, <https://www2.ed.gov/notices/pia/cams.pdf> [hereinafter ED, Privacy Impact Assessment]; ED OCR, FY 2001 and 2002 Annual Report, supra note 1183. 1237 ED, Privacy Impact Assessment, supra note 1236, at 2. 1238 See, e.g., ED OCR, Achieving Simple Justice, supra note 1230. 1239 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 14, 2009). 1240 U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 14, at 20.

<https://www2.ed.gov/notices/pia/cams.pdf>

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Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Health and Human Services (HHS) in April 1953 through the Reorganization Plan No. 1 of 1953.1241 The Secretary of Health and Human Services, Alex M. Azar II, who was sworn in on January 29, 2018, currently leads HHS.1242 HHS’ Strategic Plan defines its mission as to “enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.”1243 HHS has a number of operating divisions such as the Administration for Children and Families (ACF), Centers for Disease Control (CDC), Centers for Medicaid and Medicare Services (CMS), Indian Health Services (IHS), and the National Institutes of Health (NIH), among others.1244 Through the Administration for Children and Families, HHS also administers the Office of Refugee Resettlement (ORR);1245 some of the civil rights issues arising under ORR’s housing of migrants and refugees are discussed in Chapter 8 (U.S. Department of Homeland Security’s Office for Civil Rights and Civil Liberties).1246 The Office for Civil Rights (HHS OCR) told the Commission that it is the only HHS office with authority to enforce civil rights laws against external entities as well as enforce civil rights authorities that apply to HHS.1247 HHS OCR enforces laws that prohibit discrimination based on race, color, national origin, disability, age, sex, religion, and the exercise of conscience for individuals who receive services from HHS-funded or HHS-administered programs, including healthcare providers.1248 In May 2019, HHS OCR updated its mission statement:

As an HHS law enforcement agency, OCR investigates complaints, conducts compliance reviews, vindicates rights, develops policy, promulgates regulations, provides technical assistance, and educates the public concerning our nation’s civil rights, conscience and religious freedom, and health information privacy and security laws. OCR accomplishes this by:

1241 42 U.S.C. §3501, Pub. L. No. 88-426, 67 Stat. 631 (1953) (HHS was originally called the Department of Health, Education, and Welfare). 1242 U.S. Dep’t of Health and Human Services, “HHS Secretary,” <https://www.hhs.gov/about/leadership/secretary/index.html> (accessed Jun. 5, 2019). 1243 U.S. Dep’t of Health and Human Services, “Introduction: About HHS,” <https://www.hhs.gov/about/strategic-plan/introduction/index.html> (accessed Jul. 30, 2019). 1244 See U.S. Dep’t of Health and Human Services, “HHS Agencies & Offices,” <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (accessed Jul. 30, 2019). 1245 See U.S. Dep’t of Health and Human Services, Administration for Children & Families, Office of Refugee Resettlement, “Office of Refugee Resettlement,” <https://www.acf.hhs.gov/orr> (accessed Jul. 30, 2019). 1246 See infra notes 2368-2425 (discussing Zero Tolerance and Family Separation; Detention of Migrant Children). 1247 U.S. Dep’t of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1248 See generally, 45 C.F.R. §§ 80, 83; 84; 85; 86; 88; 91 and 92.

<https://www.hhs.gov/about/leadership/secretary/index.html>
<https://www.hhs.gov/about/strategic-plan/introduction/index.html>
<https://www.hhs.gov/about/strategic-plan/introduction/index.html>
<https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html>
<https://www.acf.hhs.gov/orr>

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Ensuring that recipients of HHS federal financial assistance comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex and religion. Ensuring that HHS, state and local governments, health care providers, health plans, and others comply with federal laws that guarantee the protection of conscience and free exercise of religion and prohibit coercion and religious discrimination in HHS-conducted or funded programs. Ensuring the practices of health care providers, health plans, healthcare clearinghouses, and their business associates adhere to federal privacy, security, and breach notification regulations under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, through the investigation of complaints, self-reported breaches, compliance reviews, and audits.1249

HHS OCR has independent duties and jurisdiction to enforce a wide variety of civil rights laws.1250 HHS OCR currently describes its role as ensuring that “individuals receiving services from HHS-funded programs are not subject to unlawful discrimination, providers and others can exercise their conscience rights, and individuals can exercise their rights to access their health information and can trust the privacy and security of their health information.”1251 HHS OCR states that it advances its mission by “rooting out invidious discrimination and removing unlawful barriers to HHS-funded services.”1252 Furthermore, following creation of a new unit it terms the “conscience protection unit” in 2018, HHS OCR indicates that “by ensuring individuals and institutions can exercise their conscience rights, HHS OCR furthers justice and tolerance in a pluralistic society.”1253

1249 U.S. Dep’t of Health and Human Services, “OCR Leadership,” <https://www.hhs.gov/ocr/about-us/leadership/index.html> (accessed Jul. 22, 2019); see infra note 1322. 1250 See 45 C.F.R. §§ 80.1-80.13 (1964). 1251 U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1. 1252 *Ibid.* 1253 *Ibid.*

<https://www.hhs.gov/ocr/about-us/leadership/index.html>
<https://www.hhs.gov/ocr/about-us/leadership/index.html>

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Through HHS OCR, HHS enforces the following major civil rights statutes:

• Title VI of Civil Rights Act of 19641254 • Section 504 of the Rehabilitation Act1255 • Title IX of the Education Amendments Act of 19721256 • The Age Discrimination Act of 19751257 • Titles VI and XVI of the Public Health Service Act1258 • Section 1557 of the Patient Protection and Affordable Care Act1259 • The Americans with Disabilities Act1260

HHS OCR also enforces several additional civil rights laws:1261

• Section 508 of the Rehabilitation Act of 1973, which requires federal departments to ensure that persons with disabilities have equal access to publicly available electronic information and technology.1262

• Section 1808(c) of the Small Business Job Protection Act of 1996, which prohibits federally funded child welfare entities from discrimination on the basis of race, color, and national origin when making child placement decisions in adoption and foster care.1263

• Sections 794 and 855 of the PHSA, which prohibit sex-based discrimination in federally assisted health training programs.1264

1254 42 U.S.C. § 2000d. 1255 29 U.S.C. § 794. 1256 20 U.S.C. § 1681. 1257 42 U.S.C. § 6101. 1258 *Id.* §§ 291, 291a. 1259 *Id.* § 18116 (codifying section 1557 of the ACA).

Except as otherwise provided for in this title [the ACA] (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by

an Executive Agency or any other entity established under this title (or amendments) to the enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

1260 42 U.S.C. § 12132. 1261 See U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 10-16. 1262 29 U.S.C. § 794. 1263 42 U.S.C. § 1996b. 1264 Id. §§ 295m, 296g.

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- Section 508 of the Social Security Act, which bans discrimination based on race, color, national origin, sex, disability, and religion in the Maternal and Child Health Services Block Grant.1265
- Section 533 of the PHSA, which prohibits discrimination based on race, color, national origin, sex, disability, and religion in the Projects for Assistance in Transition from Homelessness program.1266
- Section 1908 of the PHSA, which prohibits discrimination based on race, color, national origin, sex, disability, and religion programs and services funded by Preventative Health and Health Services Block Grants.1267
- Section 1947 of the PHSA, which prohibits discrimination on the basis of age, race, color, national origin, disability, sex, (and, in the case of a woman, pregnancy), and religion in programs and activities funded by Community Mental Health Services Block Grants and Substance Abuse Prevention and Treatment Block Grants.1268
- Family Violence Prevention and Services Act, which bans discrimination based on age, race, color, national origin, disability, sex, and religion in services funded by the statute, such as programs to prevent incidents of family, domestic, and dating violence, to provide support services for victims of such violence, and to provide specialized services for children exposed to such violence.1269
- Low-Income Home Energy Assistance Act of 1981, which bans discrimination based on race, color, national origin, and sex in programs and activities funded by the statute (including grants to states to assist low-income households and those that pay a high proportion of their income for home energy).1270
- Community Services Block Grant, which bans the discrimination on the basis of age, race, color, national origin, and sex in programs and activities funded by the block grant.1271

• Communications Act of 1934, which prohibits discrimination on the basis of age, race, color, national origin, and sex by federally funded public telecommunications entities who conduct demonstration projects for developing techniques of using non-broadcast telecommunications facilities.1272

Enforcement Tools The agency enforcement tools HHS OCR has specific legal authority to use are:

- Complaint resolution1273

1265 Id. § 708. 1266 Id. § 290cc-33. 1267 Id. § 300w-7. 1268 Id. § 300x-57. 1269 Id. § 10406. 1270 Id. § 8625. 1271 Id. § 9918. 1272 Id. § 398. 1273 45 C.F.R. §§ 80.7(b); 83.20; 84.61; 85.61(d); 86.71; 88.2; 91.42; 92.301.

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- Agency-initiated charges1274 • Proactive compliance evaluations1275 • Testing1276 • Guidance or other policy documents1277 • Regulations1278 • Technical assistance1279 • Publicity1280 • Research, data collection, and reporting1281 • Collaboration/partnership with state/local agencies1282 • Collaboration/partnership with other federal agencies1283 • Strategic Plans1284 • Annual Reports1285

While HHS OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits HHS OCR from engaging in, for example, outreach to regulated communities, as described in further detail below. Budget and Staffing HHS's budget is earmarked for HHS OCR's role within the department for the purposes of: defending the public's right to nondiscriminatory access to HHS funded health and human services, conscience and religious freedom, and access to, and the privacy and security of, individually identifiable health information.1286

1274 Id. § 80.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process). 1275 Id. §§ 80.7(a); 85.62(b); 91.46; 92.303(c) (conduct of investigations). 1276 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23 ("Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws."). 1277 45 C.F.R. § 80.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 1278 Id. § 90.31; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1279 45 C.F.R. § 80.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 1280 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information). 1281 Id. § 42.406 (regarding data collection and information sharing). 1282 45 C.F.R. § 80.6(a) ("The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."). 1283 28 C.F.R. § 42.413. 1284 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010). 1285 Id. § 1115(b). 1286 U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2019 Congressional Justification, 2019, p. 7, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf> [hereinafter HHS, OCR FY 19 Congressional Justification].

<https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>

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According to HHS, money allocated to HHS OCR's Civil Rights Division (CRD) is used primarily for civil rights policy development, but HHS stated that CRD also functions as an integral part of HHS OCR's overall civil rights enforcement program by addressing novel issues of law and enforcement policy, training HHS OCR's civil rights investigators, coordinating enforcement with other Federal civil rights enforcement agencies, and ensuring that HHS' civil rights authorities are enforced uniformly across all regional offices – which consumes about 25% of CRD's time and resources.1287 Approximately 25% of money allocated to the Operations and Resources Division (ORD) (HHS OCR's direct enforcement offices) is used for civil rights enforcement; the remaining 75% of money allocated to ORD is used for enforcement of HIPAA (health care privacy act) claims.1288 In contrast, 100% of money allocated to HHS OCR's newly created Conscience and Religious Freedom Division (CRFD) is used for civil rights enforcement.1289 See Figure 4.1 and Table 4.1. In FY 2016, HHS requested a total of \$42.70 million for HHS OCR.1290 Congress allocated to HHS OCR a total of \$38.79 million,1291 which included allocations of \$3.65 million to CRD and \$31.49 million to ORD.1292 In FY 2017, HHS requested a total of \$42.70 million for OCR, the same as FY 2016.1293 In FY 2017, Congress allocated to HHS OCR a total of \$38.70 million,1294 which included allocations of \$4.525 million to CRD and \$30.027 million to ORD.1295 Between FY 2016 and FY 2017, funds for CRD (policy development) increased by \$873,000 and funds decreased for ORD (direct investigations) by \$1.468 million.1296 In FY 2018, HHS requested a total of \$32.53 million for HHS OCR.1297 In FY 2018, Congress appropriated to HHS OCR a total of \$38.79 million,1298 which included allocations of \$4.565 million to CRD, \$28.566 million to ORD, and \$602,000 to support the creation of CRFD.1299 For FY 2018, HHS OCR requested \$602,000 in federal funding for CRFD's budget.1300

1287 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1288 Ibid. 1289 Ibid., 48. 1290 U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2016 Congressional Justification, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>. 1291 U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2018 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf [hereinafter HHS, OCR FY 2018 Congressional Justification]. 1292 Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. (2015); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1293 U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2017 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf. 1294 HHS, OCR FY 19 Congressional Justification, supra note 1286, at 13. 1295 Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1296 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47. 1297 HHS, OCR FY 2018 Congressional Justification, supra note 1291, at 12. 1298 U.S. Dep't of Health & Human Servs., Fiscal Year 2020 Justification of Estimates for Appropriations Committees, p. 9, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>. 1299 HHS, OCR FY 2018 Congressional Justification, supra note 1291, at 7; U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48. 1300 U.S. Dep't of Health and Human Servs., Response to Interrogatory No. 9, at 48.

<https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>

https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf

https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf

<https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>

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Figure 4.1: Requested and Allocated Budget for HHS OCR

Source: U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2016 Congressional Justification, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>; U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2017 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf; U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2018 Congressional Justification, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf; U.S. Dep't of Health & Human Servs., OCR Fiscal Year 2019 Congressional Justification, p. 13, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>; U.S. Dep't of Health & Human Servs., Fiscal Year 2020 Justification of Estimates for Appropriations Committees, p. 9, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created CRFD, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices, however, Congress' allocation to HHS OCR remained constant at \$38.8 million. From FY 2016 to FY 2018, HHS OCR staffing has remained relatively constant for its policy development office, but decreased by more than 10 percent in its enforcement offices. Within HHS OCR's enforcement offices, approximately 25 percent of the work is dedicated to civil rights enforcement, and 75 percent to HIPAA compliance and enforcement.1301 HHS OCR reported that 142 staff members and 69 contractors located throughout HHS OCR work part time on civil rights issues, along with eight full time contractors at Headquarters.1302

1301 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49; U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1302 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

\$42,705,000	\$42,705,000
\$32,530,000	
\$38,798,000	\$38,708,000
\$38,798,000	\$38,798,000
\$0	
\$5,000,000	
\$10,000,000	
\$15,000,000	
\$20,000,000	
\$25,000,000	
\$30,000,000	
\$35,000,000	
\$40,000,000	
\$45,000,000	
FY 2016	FY 2017
FY 2018	

Figure 4.1: Requested and Allocated Budget for HHS OCR FY 2016 to FY 2018

Requested Allocated

<https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>

<https://www.hhs.gov/sites/default/files/2017-budget-justification-ocr-1.pdf>
https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf
https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf
<https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>
<https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>

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Table 4.1: Staffing Levels in CRD, ORD, and CRFD between FY 2016 and FY 2018 FTE Staffing End of FY16 End of FY17 End of FY18 CRD 17 15

(-2) 16 (+1)
ORD 126 114 (-12)
110 (-4)
CRFD1303 0 0 1 (+1)

Source: U.S. Department of Health and Human Services

In FY 2016, CRD had a total of 17 employees and ORD had a total of 126 employees.¹³⁰⁴ In FY 2017, CRD had two fewer employees at a total of 15 and ORD had 12 fewer employees at 114.¹³⁰⁵ In FY 2018, CRD had one more employee at a total of 16, ORD had four fewer employees at a total of 110, and CRFD had one employee.¹³⁰⁶ However, HHS OCR asserts the decreases in personnel have not affected the effectiveness of the divisions impacted between FY 2016 and FY 2017.¹³⁰⁷ In June of 2019, HHS OCR employed 24 staff members who work full time on civil rights enforcement who are based at HHS OCR Headquarters and are assigned to the Conscience and Religious Freedom Division and the Headquarters Civil Rights Division.¹³⁰⁸ Their positions are described in the table below.

Table 4.2: Staffing Levels at HHS OCR Headquarters 2018-2019 Title & Grade 2018 2019 Deputy Director, SES 2 2 Associate Deputy Director, GS-15 1 Senior Advisor 1 2 Supervisory Civil Rights Analyst, GS-15 4 7 Civil Rights Analyst, GS-14 5 7 Civil Rights Analyst, GS-13 1 1 Civil Rights Analyst, GS-12 1 2 Civil Rights Analyst, GS-11 1 1 Civil Rights Analyst, GS-9 1 Program Support Assistant, GS-11 1 1 Total 17 24

Source: U.S. Dep't of Health and Human Services. "GS" stands for "General Schedule" and refers to the classification and pay system that applies to the majority of federal employees. Office of Personnel Management, Pay & Leave, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> (accessed Aug. 15, 2019).

¹³⁰³ See HHS, OCR FY 19 Congressional Justification, supra note 1286. ¹³⁰⁴ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48. ¹³⁰⁵ Ibid. ¹³⁰⁶ Ibid. ¹³⁰⁷ Ibid. ¹³⁰⁸ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

<https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/>

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As of February 2018, HHS OCR stated that it had hired one staff member for CRFD and that it intended to add more career staff "in the near future" for CRFD.¹³⁰⁹ In contrast, staffing in the HHS OCR's Operations and Resources Division (ORD) was reduced by two employees.¹³¹⁰ Assessment Prioritization for Civil Rights Agency-wide HHS OCR is a department within the HHS Office of the Secretary, and is led by a Director, rather than an Assistant Secretary. The Director of HHS OCR reports to the Secretary of Health and Human Services. The Director of HHS OCR is appointed by the President and does not require Senate confirmation.¹³¹¹ HHS OCR is led by its current Director, Roger Severino, whom President Trump appointed to the position in early 2017.¹³¹² The current organizational structure of OCR is as follows (see Figure 4.2):

¹³⁰⁹ Ibid. ¹³¹⁰ Ibid. ¹³¹¹ 45 C.F.R. § 85.3 (the Director of the Office for Civil Rights serves concurrently as the Special Assistant to the Secretary for Civil Rights). ¹³¹² U.S. Dep't of Health & Human Servs., "Roger Severino," <https://www.hhs.gov/about/leadership/roger-severino/index.html> (accessed Jun. 10, 2019); Heather Landi, "Trump Administration Appoints Roger Severino to Head Office for Civil Rights," Healthcare Innovation, Mar. 27, 2017, <https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>. (This position does not require Senate confirmation.)

<https://www.hhs.gov/about/leadership/roger-severino/index.html>
<https://www.hhs.gov/about/leadership/roger-severino/index.html>
<https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>
<https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>

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Figure 4.2: Organizational Chart for OCR

Source: U.S. Dep't of Health and Human Services, "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>.

The Director is supported by the Principal Deputy Director, General Counsel Civil Rights Division, and five other Senior Executives who lead four OCR divisions and eight regional offices.¹³¹³ The following offices and personnel report to the Office of the Director:

• Principal Deputy Director • Office of the Chief of Staff • Office of the Deputy Director of Civil Rights • Office of the Deputy Director for Conscience and Religious Freedom • Office of the Deputy Director for Health Information Privacy • Office of the Deputy Director for Operations and Resources¹³¹⁴

¹³¹³ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 9. ¹³¹⁴ U.S. Dep't of Health & Human Servs., "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html> (accessed Jun. 10, 2019).

<https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>
<https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>

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The majority of HHS OCR's enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR's eight regional offices, which are all a part of HHS OCR's Operations and Resources Division (ORD):

• New England: Connecticut; Maine, Massachusetts; New Hampshire; Rhode Island; Vermont

• Eastern and Caribbean: New Jersey; New York; Puerto Rico; Virgin Islands • Mid-Atlantic: Delaware; District of Columbia; Pennsylvania; Virginia; West Virginia • Southeast: Alabama; Atlanta; Florida; Georgia; Kentucky; Mississippi; North Carolina;

South Carolina; Tennessee • Midwest: Illinois; Indiana; Iowa; Kansas; Michigan; Minnesota; Missouri; Nebraska;

Ohio; Wisconsin • Southwest: Arkansas; Louisiana; New Mexico; Oklahoma; Texas • Rocky Mountain: Colorado; Montana; North Dakota; South Dakota; Utah; Wyoming • Pacific: Alaska; American Samoa; Arizona; California; Commonwealth of the Northern

Mariana Islands; Federated States of Micronesia; Guam; Hawaii; Idaho; Marshall Islands; Nevada; Oregon; Republic of Palau; Washington

In January 2018, HHS OCR announced that it had changed its organizational structure to reflect its focus on conscience and religious freedom protections, by adding the CRFD.¹³¹⁵ HHS OCR stated that CRFD was a new division "dedicated exclusively to enforcing laws that protect conscience and religious exercise, and that prohibit coercion and religious discrimination in health care and human services."¹³¹⁶ In May of 2019, HHS OCR changed its mission statement to define itself as a law enforcement agency, and to emphasize the agency's commitment to religious freedom and to health information privacy.¹³¹⁷ According to news reports, officials cited an increase in the number of complaints filed regarding religious freedom, stating that HHS OCR had received 36 such complaints since January 2017 compared with 10 such complaints filed between 2008 and 2017.¹³¹⁸ In HHS OCR's FY 2020 budget justification, the agency reported receiving 1,333 complaints that contained an

¹³¹⁵ Ibid.; U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44; U.S. Dep't of Health and Human Servs., "HHS Announces New Conscience and Religious Freedom Division," Jan. 18, 2018, <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>. ¹³¹⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 41. ¹³¹⁷ U.S. Dep't of Health & Human Servs., "OCR Mission and Vision," Oct. 16, 2019, <https://www.hhs.gov/ocr/about-us/mission-vision/index.html> [hereinafter HHS, "OCR Mission and Vision"]; Rachel Bergman, "HHS Office for Civil Rights overhauled its mission and vision statements on its website," Sunlight Foundation, May 1, 2019, <https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>. ¹³¹⁸ Emmarie Huettman, "At New Health Office, 'Civil Rights' Means Doctors' Right To Say No To Patients," Kaiser Health News, Mar. 5, 2018, <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>.

<https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>
<https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>
<https://www.hhs.gov/ocr/about-us/mission-vision/index.html>
<https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>
<https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>
<https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>
<https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>

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allegation of a conscience or religious freedom violation during FY 2018.¹³¹⁹ Of those 1,333, HHS OCR retained 784 complaints, 343 of which alleged conscience violations and 441 of which alleged religious freedom violations.¹³²⁰ In FY 2017, the most recent data available in HHS' FY 19 budget request, HHS OCR received 30,166 complaints overall.¹³²¹ HHS OCR previously described its mission as "to improve the health and well-being of people across the nation; to ensure that people have equal access to and the opportunity to participate in and receive services from HHS programs without facing unlawful discrimination; and to protect the privacy and security of health information in accordance with applicable law."¹³²² Strategic Planning and Self-Evaluation Every four years, HHS is required to produce a strategic plan that lays out the goals and priorities for the department over the next four fiscal years.¹³²³ HHS OCR does not have its own strategic plan, but the agency-wide strategic plan includes objectives and priorities that are handled by HHS OCR. In 2018, HHS published its strategic plan for fiscal years 2018-2022. The plan includes five strategic objectives:

• Strategic Goal 1: Reform, Strengthen, and Modernize the Nation's Healthcare System • Strategic Goal 2: Protect the Health of Americans Where They Live, Learn, Work, and

Play • Strategic Goal 3: Strengthen the Economic and Social Well-Being of Americans Across

the Lifespan • Strategic Goal 4: Foster Sound, Sustained Advances in the Sciences • Strategic Goal 5: Promote Effective and Efficient Management and Stewardship.¹³²⁴

In line with HHS OCR's move to protect health care providers' right to religious freedom, HHS Strategic Plan, FY 2018 – 2022 has identified several goals and strategies that will help advance this overarching policy priority:

• Improve health care access and expand choices of care and services options. HHS has identified a strategy to "design healthcare options that are responsive to consumer demands, while removing barriers for faith-based and other community-based

¹³¹⁹ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file); HHS OCR's FY 2020 budget justification was not publicly available on its website at the time of publication of this report. ¹³²⁰ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). ¹³²¹ U.S. Dep't of Health & Human Servs., FY 2019 Budget in Brief, Feb. 19, 2018, p. 124, ¹³²² HHS, "OCR Mission and Vision," supra note 1317. ¹³²³ GPPA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-6) (2010). ¹³²⁴ U.S. Dep't of Health & Human Servs., "Strategic Plan FY 2018 - 2022," <https://www.hhs.gov/about/strategic>

<https://www.hhs.gov/about/strategic-plan/index.html>
<https://www.hhs.gov/about/strategic-plan/index.html>

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providers.¹³²⁵ Specifically, the plan calls for HHS to implement and “vigorously enforce” Executive Order 13,796, Promoting Free Speech and Religious Liberty, to “reduce burdens on the exercise of religious and moral convictions, promote equal and nondiscriminatory participation by faith-based organizations in HHS-funded or conducted activities, and remove barriers to the full and active engagement of faith-based organizations in the work of HHS through targeted outreach, education, and capacity building.”¹³²⁶

• Strengthen and expand the healthcare workforce to meet diverse needs. HHS has identified a strategy to “support professional development of the healthcare workforce,” specifically by “remov[ing] any barriers to, and promot[ing], full participation in the health care workforce by persons and/or organizations with religious beliefs or moral convictions.”¹³²⁷

• Empower people to make more informed healthcare choices. Similarly, HHS has indicated that in order to achieve this goal, barriers to “HHS conducted, regulated, and funded programs and organizations with religious beliefs or moral convictions” must be removed.¹³²⁸

HHS OCR referred to “Executive Orders 13,771, Reducing Regulation and Controlling Regulatory Costs, and 13,777, Enforcing the Regulatory Reform Agenda,” and asserted that HHS “took required steps to reduce regulatory burden” when developing its 2018 strategic plan and civil rights policy priorities.¹³²⁹ During the time period examined in this report, HHS also operated under the FY 2014–2018 strategic plan.¹³³⁰ The strategic plan identified seven goals:

1. To help more Americans achieve the security of quality, affordable health care for themselves and for their families;
2. To keep food and medical products safe; 3. To protect against chronic and infectious diseases; 4. To help Americans find jobs; 5. To help parents access affordable child care; 6. To explore the frontiers of cutting-edge biomedical research; and 7. To fulfill our obligations to tribal communities for health care and human services.¹³³¹

¹³²⁵ U.S. Dep’t of Health & Human Servs., HHS Strategic Plan, FY 2018 – 2022 Draft, September 2017, p. 14, <https://www.vor.net/images/stories/2017-2018/hhs-draft-strategic-plan-fy2018-2022.pdf>. ¹³²⁶ *Ibid.*, 15. ¹³²⁷ *Ibid.*, 17–18. ¹³²⁸ *Ibid.*, 20. ¹³²⁹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17–18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added). ¹³³⁰ U.S. Dep’t of Health and Human Servs., HHS Strategic Plan FY 2014–2018, Mar. 10, 2014, <https://aspe.hhs.gov/system/files/pdf/258821/StrategicPlanFY2014-2018.pdf> [hereinafter HHS, Strategic Plan FY 2014–2018]. ¹³³¹ *Ibid.*, 1.

<https://www.vor.net/images/stories/2017-2018/hhs-draft-strategic-plan-fy2018-2022.pdf>
<https://aspe.hhs.gov/system/files/pdf/258821/StrategicPlanFY2014-2018.pdf>

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The 2014 strategic plan identified the need for HHS to continue to collaborate with DOJ to protect the civil rights of people with disabilities and older adults consistent with the Americans with Disabilities Act and the Supreme Court’s 1999 decision in *Olmstead*, which held that the ADA requires that states place persons with disabilities in integrated, community settings when reasonable and appropriate.¹³³² HHS releases an annual report each year and makes the report publicly available on its website.¹³³³ HHS’ FY 2018 annual report identified five goals for the coming year, consistent with the Department’s FY 2018–2022 strategic plan:

1. Reform, Strengthen, and Modernize the Nation’s Health Care System
2. Protect the Health and Well-Being of Americans Where They Live, Learn, Work, and Play
3. Strengthen the Economic and Social Well-Being of Americans across the Lifespan
4. Foster Sound, Sustained Advances in the Sciences
5. Promote Effective and Efficient Management and Stewardship¹³³⁴

Complaint Processing, Agency-Initiated Charges, and Litigation The majority of HHS OCR’s enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR’s eight regional offices.¹³³⁵ In resolving an investigation based on a complaint, HHS OCR can engage in early complaint resolution (when allegations are specific to a single injured party/group); provide technical assistance; enter into a voluntary resolution agreement or formal settlement agreement; issue a letter with violation findings, insufficient evidence for findings, or no violation findings; or rely on administrative closure under some circumstances (e.g., complainant withdraws complaint or refuses to cooperate with the investigation).¹³³⁶ After closing an investigation, HHS OCR can monitor an entity to ensure that it complies with an agreement (voluntary or otherwise). HHS OCR can engage in further enforcement action, including a suspension or termination of HHS funding if entities refuse or fail to comply after HHS OCR has issued violation findings.¹³³⁷ The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. In February 2019, Axios obtained HHS records detailing the large number of complaints alleging that children were being sexually abused while in the federal government’s custody, after being placed in HHS custody by DHS, which was charged with implementing family separation policies by the White House and

¹³³² 42 U.S.C. 12101 Pub. L. 101-336, 104 Stat. 327; *Olmstead v. L.C.*, 527 U.S. 581 (1999); HHS, Strategic Plan FY 2014–2018, *supra* note 1330, at 53. ¹³³³ U.S. Dep’t of Health and Human Services, 2018 Annual Report, 2018, <https://www.hhs.gov/sites/default/files/2018-annual-report.pdf>. ¹³³⁴ *Ibid.*, 5–6. ¹³³⁵ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44. ¹³³⁶ 45 C.F.R. §§ 80.7(d), 80.8. ¹³³⁷ *Id.* § 80.8(a); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 14.

<https://www.hhs.gov/sites/default/files/2018-annual-report.pdf>

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DOJ.¹³³⁸ During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities.¹³³⁹ “From October 2014 to July 2018, the HHS’ Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints.”¹³⁴⁰ Numbers increased after President Trump’s “zero tolerance policy” was put in place in April 2018 (this policy is further discussed in Chapter 8 of this report).¹³⁴¹ The New York Times reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, “the largest number of reports during any five-month span in the previous four years.”¹³⁴² And relevant to external civil rights enforcement, there have been widespread allegations of sexual abuse among HHS contractors. The largest contractor, Southwest Key, provided housing in Arizona, California, and Texas for over 5,000 children, who were not free to leave.¹³⁴³ It received more than \$1.3 billion in government contracts for housing immigrant children, from 2013–2018. Of the many allegations, the following is elucidating:

A ProPublica story in August [2018] detailed the charges against Leviaan Pacheco, a former Southwest Key employee who is accused of molesting eight boys at a Mesa shelter over an 11-month period. Pacheco, who is HIV-positive, [was hired] without a background check [and allowed to work] for nearly four months. He was convicted earlier this month of 10 sex offenses connected to the molestation. In response to media attention and complaints, Arizona health officials reviewed records on background checks at every Southwest Key facility across the state. Of the 13 shelters, the state found two additional facilities also had problems with background checks. . . Arizona health officials also found that Southwest Key hadn’t vetted all employees by interviewing their previous employers and hadn’t ensured all employee files contained proof of tuberculosis testing. At some facilities, officials discovered

¹³³⁸ Caitlin Ownes, Stef W. Kight & Harry Stevens, “Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody,” AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-322e230-29e1-430f-a361-d959c88c5d8c.html>. ¹³³⁹ *Ibid.* ¹³⁴⁰ *Ibid.* ¹³⁴¹ *Ibid.*; see also *infra* notes 2368–2425 (in this report’s chapter assessing the Office for Civil Rights and Civil Liberties of the DHS, discussing zero tolerance, migrant family separation, and how DHS detained and then sent thousands of Central American migrant children to be detained in HHS/ORR shelters). ¹³⁴² Matthew Haag, “Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says,” New York Times, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>. ¹³⁴³ Topher Sanders and Michael Grabbel, “Humanitarian Crisis” Looms As Arizona Threatens to Revoke Immigrant Children Shelter Licenses,” ProPublica, Sep. 21, 2018, <https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>.

<https://www.propublica.org/article/worker-charged-with-sexually-molesting-eight-children-at-immigrant-shelter>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-322e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-322e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>
<https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>

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bedroom and bathroom doors missing and problems with the size of residents’ rooms.¹³⁴⁴

Concerned state officials stepped in. After the state of Arizona revoked its permits, Southwest Key was forced to close two shelters.¹³⁴⁵ In other Southwest Key shelters run under federal government contracts, videos show physical abuse, including staff at the shelters dragging and slapping migrant children.¹³⁴⁶ Complaint Enforcement Process HHS OCR describes itself as responsible for “enforcing all HHS’ civil rights authorities,” ensuring that “everyone has access to health care and human services without discrimination or violation of conscience.”¹³⁴⁷ (This enforcement responsibility includes responsibility for enforcing HHS’ civil rights authorities in ORR-funded services.¹³⁴⁸) HHS OCR states that it achieves these responsibilities by 1) ensuring that all federal funding recipients comply with civil rights laws, 2) enforcing provisions of the ACA that prohibit discrimination in health care programs and activities, and 3) ensuring that all relevant entities comply with federal laws that guarantee “the exercise of religious beliefs and moral convictions in HHS conducted or funded programs.”¹³⁴⁹ HHS OCR regulations require that HHS OCR investigate all complaints within its jurisdiction.¹³⁵⁰ According to the HHS OCR website, the Department “reviews all complaints that it receives” and investigates all complaints for which it can assert jurisdiction.¹³⁵¹ It further states that “in some cases, OCR may determine that it cannot investigate an individual’s complaint.”¹³⁵² and in some cases OCR will investigate even untimely filed complaints if jurisdiction can be established.¹³⁵³ HHS OCR states that after it receives a complaint, staff conduct an initial review to determine whether HHS OCR has jurisdiction to review and investigate the complaint.¹³⁵⁴ If the complaint

¹³⁴⁴ *Ibid.* ¹³⁴⁵ Agnel Phillips, “Southwest Key to Close 2 Phoenix-area Migrant Shelters, Pay Fine to State,” Arizona Republic, Oct. 24, 2018, <https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>. ¹³⁴⁶ Janice Williams, “Video Shows Migrant Children Physically Abused by Staffers at Arizona Shelter,” Newsweek, Dec. 30, 2018, <https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796>. ¹³⁴⁷ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16. ¹³⁴⁸ See 45 C.F.R. § 80.2. ¹³⁴⁹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16. ¹³⁵⁰ For example, HHS’ Title VI implementing regulation states that “the responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.” 45 C.F.R. § 80.7(c). ¹³⁵¹ U.S. Dep’t of Health & Human Servs., “What [Office of Civil Rights] considers during intake and review of complaint,” <https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html> (accessed Jun. 6, 2019). ¹³⁵² *Ibid.* ¹³⁵³ *Ibid.* ¹³⁵⁴ 45 C.F.R. § 80.7(b); U.S. Dep’t of Health and Human Servs., “How does OCR investigate a civil rights complaint?” <https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>.

<https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>
<https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>
<https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796>
<https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html>
<https://www.hhs.gov/civil-rights-for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html>
<https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>
<https://www.hhs.gov/civil-rights-for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>

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is determined to be within HHS OCR’s jurisdiction, then HHS OCR states that its investigators will pursue several different avenues through which to obtain more information, such as interviews, obtaining documentation, independent research or site visits.¹³⁵⁵ HHS OCR reports that Regional Managers typically have discretion to select the most appropriate method of case resolution, based on the facts and circumstances of an individual case.¹³⁵⁶ HHS OCR’s practice is that prior to a regional office issuing a Voluntary Resolution Agreement, a Violation Letter of Findings, or a Settlement Agreement, a review must take place and HHS OCR Headquarters must approve the necessary course of action.¹³⁵⁷ HHS OCR says it uses the same criteria to assess all of its complaints, evaluating to determine whether “it has the legal authority to review and investigate the complaint”:

- Complaint is timely filed
- Complaint is against an entity covered by an authority enforced by OCR
- Complaint alleges issues that allow OCR to determine subject matter jurisdiction
- Complaint is complete¹³⁵⁸

Complaints In its response to interrogatories, HHS OCR noted that the number of civil rights complaints submitted via its online portal in 2017 was nearly double the number submitted the same way in FY 2013.¹³⁵⁹ In terms of the civil rights cases investigated and/or resolved during the relevant fiscal years, HHS OCR provided charts showing changes in numbers of cases opened, investigated, and not investigated.¹³⁶⁰ In FY 2016, HHS OCR opened 4,380 cases, investigated and closed 211 cases, and closed without investigation (i.e., designated as an administrative closure) 4,652 cases.¹³⁶¹ In FY 2017, HHS OCR opened 6,469 cases, investigated and closed 459 cases, and closed without investigation 4,797 cases.¹³⁶² In FY 2018, HHS OCR opened 7,632 cases, investigated and closed 858 cases, and closed without investigation 4,861 cases.¹³⁶³ These data indicate that HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2016 or FY 2017.¹³⁶⁴

¹³⁵⁵ 45 C.F.R. § 80.7(c). ¹³⁵⁶ 45 C.F.R. § 80.7(d); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25. ¹³⁵⁷ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25. ¹³⁵⁸

U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 12, at 55 (Office of Civil Rights has noted that a complaint is "complete" when it includes a name, signature, and contact information for the complainant; identification of the entity that allegedly violated the complainants civil rights; and a clear allegation of a violation of any laws that are enforced by Office of Civil Rights.). 1359 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56. 1360 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49. 1361 Ibid., 49. 1362 Ibid. 1363 Ibid. (note that Office of Civil Rights included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers likely changed to some extent by the time of publication). 1364 Ibid.; see infra Table 4.5, for more information about processing times for various types of claims.

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Table 4.3: Number of Complaints/Cases Opened and Carried-in/1365 between FY 2016 and FY 2018 Year Carry-Ins Cases Opened Total FY 2016 1910 4360 6290 FY 2017 1418 6469 7887 FY 2018 2630 7692 10322

Source: U.S. Department of Health and Human Services

Table 4.4: Number of Complaints/Cases Investigated and Not Investigated between FY 2016 and FY 2018

Year Number of Complaints/Cases Investigated

Number of Complaints/Cases Not Investigated*

FY 2016 211 4652 FY 2017 459 4797 FY 2018 858 4861

* This number includes cases that were closed. Source: U.S. Department of Health and Human Services

But notably, HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016.1366 In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days.1367 In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively.1368 In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days.1369 In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively.1370 See Table 4.5. Table 4.5: Length of Time to Investigate and Close/Settle Complaints/Cases between FY 2016 and FY 2018 FY 2016 FY 2017 FY 2018 Average Days Investigative 705 324 548 Average Days Administrative 102 65 243 Total Average Age 128 68 289

Source: U.S. Department of Health and Human Services

The patterns become especially striking when reviewing the numbers and types of civil rights complaints closed after investigation in FY 2016, FY 2017, and FY 2018. In FY 2016, HHS OCR

1365 HHS OCR defines carried-in cases as cases that were already open when the year began. 1366 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49. 1367 Ibid. 1368 Ibid (note that OCR included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers may have increased at the time of this writing). 1369 Ibid. 1370 Ibid.

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investigated and closed 80 civil rights complaints based on race, color, or national origin.1371 But in FY 2017, HHS OCR investigated and closed 266 civil rights complaints based on race, color, or national origin.1372 In FY 2018, HHS investigated and closed 691 complaints based on race, color, or national origin.1373 Other notable differences included investigation and closure of civil rights complaints based on age in FY 2016 (40), in FY 2017 (113), and in FY 2018 (309); investigation and closure of civil rights complaints based on general disability in FY 2016 (178), in FY 2017 (498), and in FY 2018 (1,107); and investigation and closure of civil rights complaints based on mental health-related disability in FY 2016 (46), in FY 2017 (112), and in FY 2018 (248).1374 These data show a dramatic increase in productivity in processing each of these types of complaints. The data patterns could indicate use of new and effective management strategies to resolve cases more efficiently than they had been resolved in the past. The Commission heard testimony from Leon Rodriguez, who formerly led HHS OCR, about management efficiencies instituted in his tenure and tough decisions between systemic, time-consuming cases versus routine, individual cases.1375 HHS OCR's case resolution data between FY 2016 through FY 2018 show notable increases in the number of cases closed with finding no violations (rising from 63 cases in FY 2016 to 150 cases in FY 2018), but also dramatic increases in the cases closed after the regulated entity took corrective action (increasing from 42 cases in FY 2016 to 94 cases in FY 2018), or HHS OCR provided technical assistance (increasing from 75 cases in FY 2016 to 157 cases in FY 2018).1376 Proactive Compliance Evaluation HHS OCR pointed out that some regulations "require attempts at achieving voluntary compliance of covered entities before a case is taken to enforcement."1377 Cases may be initiated through complaints or through proactive compliance monitoring.1378 HHS OCR receives most discrimination complaints from members of the public, but can also exercise its discretion to engage in testing and compliance reviews to investigate violations in the absence of complaints.1379 Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose

1371 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10(c) in Excel spreadsheet "10 Interrogatory Response US Comm CR." 1372 Ibid. 1373 Ibid. 1374 Ibid. 1375 Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 69-70. 1376 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1377 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23. 1378 See 45 C.F.R. § 80.7(a) (periodic compliance reviews of recipients of federal financial assistance); 45 C.F.R. § 80.7(b) (requiring that HHS OCR process complaints of discrimination filed with HHS OCR). 1379 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23; see also 45 C.F.R. § 80.7(a) (regarding compliance reviews).

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as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws.1380 HHS OCR stated that the primary purpose of compliance reviews is to "address comprehensive systemic issues."1381 HHS OCR periodically initiates compliance reviews to review the policies, procedures, and practices of recipients of federal financial assistance through HHS to ensure that the recipients are in compliance with federal civil rights laws enforced by HHS OCR.1382 In response to Commission Interrogatories, HHS OCR indicated that it views compliance reviews as a way to address discrimination against under-served communities that might not be addressed by individually filed complaints.1383 Moreover, the civil rights office reported that compliance reviews initiated by HHS OCR must be accompanied by a justification memorandum that explains "the purpose of the review and any indicators that a review is needed, including any preliminary evidence."1384 In some circumstances, HHS OCR will treat a filed complaint as a compliance review when the manager of an HHS OCR regional office determines that:

- The complaint, because of its scope, involves systemic issues;
- OCR identifies compliance concerns during the course of an investigation involving unrelated issues that were not raised in the original complaint;
- A compliance review would be the most effective means of addressing multiple individual complaints against the same covered entity;
- The complainant decides to withdraw a complaint that includes class allegations.1385

HHS OCR also reported to the Commission that it resolves compliance reviews through the following processes (many of which are also applicable to complaint resolution):

- **Providing Technical Assistance.** In order to assist an entity to comply with its obligations under the relevant nondiscrimination laws, HHS OCR may opt to provide technical assistance. Technical assistance can be provided at any stage of an investigation.

- **Letter Confirming Voluntary Action Taken/to Be Taken by a Covered Entity.** This is an alternative to a more formal method of case resolution, when an entity will voluntarily provide information outlining a plan of action that this entity will take in order to resolve a complaint.

- **Voluntary Resolution Agreement.** A Voluntary Resolution Agreement may be utilized when complexities of a certain complaint may make it difficult for HHS OCR to monitor

1380 U.S. Dep't of Health and Human Servs., Response to USCR Interrogatory No. 5, at 23-38. 1381 Ibid., 35. 1382 Ibid. 1383 Ibid. 1384 Ibid. 1385 Ibid., 36.

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voluntary action. The Voluntary Resolution Agreements are developed to allow for effective monitoring, accountability, and consistency with HHS OCR guidelines.

- **Violation Letter of Findings.** The Violation Letter of Findings is used when an investigation uncovers evidence that establishes a violation. HHS OCR describes this tool as particularly useful when an egregious violation is discovered, or when achieving compliance would promote HHS OCR's enforcement priorities.

- **Settlement Agreement.** A formalized agreement that outlines certain remedies to ensure that an entity will take certain actions to achieve compliance. A Settlement Agreement is typically negotiated after the Violation Letter of Findings has been issued, and will be considered resolved once the entity has performed all outlined actions to remedy the violation.

- **Insufficient Evidence of a Violation Letter.** A letter that is issued when HHS OCR has conducted its investigation and has found insufficient evidence of a violation, which will cease any further investigation into the matter.

- **No Violation Findings Letter.** When an investigation has been concluded and an entity has been found to be in compliance, a No Violation Findings Letter will be issued.

- **Closing an Investigated Case without Resolution (Administrative Closure).** An Administrative Closure will close a complaint without providing a resolution of the allegations under certain circumstances (complainant withdraws the complaint or refuses to cooperate, etc.). An Administrative Closure can occur at any point during the complaint investigation.

- **Requests for Reconsideration.** Under certain circumstances, when a complainant requests that a complaint be reconsidered, HHS OCR Headquarters has the discretion to reconsider its initial resolution, limited to the issues raised in the complaint or during the investigation, and identifying errors in OCR's consideration of the facts.

- **Monitoring.** Monitoring is utilized to ensure that all necessary steps are taken to ensure compliance, consistent with the terms of a Voluntary Resolution Agreement, a Settlement Agreement, a voluntary plan of action, or another agreed-upon action.

- **Reviews of State Transition Plans for Home and Community Based Services.** The goal of these reviews is to ensure that state transition plans (for compliance with Medicaid regulations) do not put patients at risk of unnecessary institutionalization.

- **Enforcement Action.** Enforcement action is taken when entities have refused to voluntarily comply or failed to achieve voluntary compliance after Violation Findings have been made. Enforcement action may include a suspension or termination of HHS funding or referral to DOJ for judicial processing.1386

1386 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23-38.

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Policy Priorities HHS OCR indicated that it "investigate[s] all complaints of discrimination for which it has jurisdiction" and "does not assign priority to enforcement under one civil rights authority over another."1387 However, HHS OCR acknowledged that it has intensified its focus on policy and enforcement related to "discrimination on the basis of religion and conscience."1388 Describing conscience and religious freedom as a "neglected area of policy and enforcement," HHS OCR explained its creation of CRFD, "a new Conscience and Religious Freedom Division to more vigorously and effectively enforce existing laws protecting the rights of conscience and religious freedom."1389 HHS OCR also discussed its commitment to addressing the opioid crisis and its support for child welfare agencies' abilities to comply with civil rights laws.1390 With regard to how HHS OCR's policy priorities have changed over FY 2016 to FY 2018, HHS OCR stated that "HHS's civil rights-related policy priorities have not changed over the fiscal years in question."1391 However, HHS OCR asserted that it had identified "a significant need to amend" current federal regulations governing its authority to address complaints about discrimination based on religion and conscience.1392 Policy changes in HHS OCR have included appointing a "Regulatory Reform Officer" to lead a "Regulatory Reform Task Force."1393 There were also policy changes such as limiting the interpretation of sex discrimination—as discussed herein, the Trump administration takes the legal position that sex discrimination should not include discrimination on the basis of gender identity and that providers should not have to refrain from discrimination on the basis of gender identity when providing health care.1394 Section 1557 (Defining the Scope of the Meaning of Sex Discrimination) In 2016, HHS finalized its regulations governing its enforcement of Section 1557 of the Affordable Care Act, Title IX, and other civil rights laws applicable to HHS-funded programs and activities,

1387 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17. It's regulations require that "the responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part." 45 C.F.R. § 80.7(c). 1388 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17. 1389 Ibid. 1390 Ibid. 1391 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 19. 1392 Ibid., 20. 1393 Ibid., 18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added). 1394 See infra notes 1395-1419 (Section 1557).

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to address sex discrimination.1395 The HHS rules define sex discrimination as discrimination based on, inter alia, pregnancy, false pregnancy, childbirth or related medical conditions, sex stereotyping, and gender identity.1396 HHS then

gender identity as a person's "internal sense of gender, which may be male, female, or a combination of male and female," which "may be different from an individual's sex assigned at birth," and "may or may not conform to social stereotypes associated with a particular gender."1397 HHS further specified that a transgender individual is a person "whose gender identity is different from the sex assigned" at birth.1398 However, in its response to Commission interrogatories, HHS OCR stated that as of December 31, 2016, based on a federal court injunction, it no longer enforces Section 1557's provision prohibiting discrimination based on gender identity.1399 On June 14, 2019, HHS OCR issued a proposed rule that extensively revised Section 1557 of the Patient Protection and Affordable Care Act.1400 One of the most critical revisions proposed was the redefinition of "sex" to refer only to the biological and anatomical differences between males and females as determined at their birth.1401 Unlike under the Obama Administration, "gender identity" would no longer be a protected class under the scope of Section 1557's civil rights statutes and Title IX's prohibition of discrimination on the basis of sex.1402 The comment period for this proposed rule ended August 13, 2019.1403 More than 130,000 comments were submitted and many comments made by stakeholders were critical of the proposed changes.1404 Commenters who oppose the proposed rule cited as their bases the consequences vulnerable patient populations may face as a result of this walk-back on anti-discrimination protections, such as increased barriers for patients seeking gender transition services and care, categorical exclusion by insurers of coverage for certain health care services, and differential treatment by insurers of certain vulnerable patient populations, including LGBT individuals, with respect to certain benefits.1405

1395 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016) (Section 1557 covers discrimination on the basis of race, color, national origin, disability, age, and sex); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7. 1396 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016). 1397 Id. 1398 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7; see Franciscan Alliance, Inc., et al. v. Burwell, et al., 227 F. Supp. 3d 660 (N.D. Tex. 2016). 1400 Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed Jul. 14, 2019), 1401 Id. 1402 "HHS Issues Proposed Rulemaking Drastically Revising ACA Section 1557 Nondiscrimination Regulations," Groom Law Group, Jul. 16, 2019, <https://www.groom.com/resources/hhs-issues-proposed-rulemaking-dramatically-revising-aca-section-1557-nondiscrimination-regulations/>. 1403 Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,846. 1404 "HHS Receives Thousands of Comments on Proposed Reversal of Certain Discrimination Protections," Hall Render, Aug. 20, 2019, <https://www.hallrender.com/2019/08/20/hhs-receives-thousands-of-comments-on-proposed-reversal-of-certain-discrimination-protections/> (commenters include the American Medical Association, the American Hospital Association, a coalition of 22 state Attorneys General, America's Essential Hospitals and the Association for Community Affiliated Plans, all of whom oppose the proposed changes). 1405 Ibid.

<https://www.groom.com/resources/hhs-issues-proposed-rulemaking-dramatically-revising-aca-section-1557-nondiscrimination-regulations/>
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In December of 2018, the Commission sent a letter to HHS Secretary Alex Azar urging HHS not to narrowly define gender to a biological, immutable condition determined at birth.1406 Advocacy groups critical of HHS OCR's proposed regulation have said that the policy is tantamount to pretending that transgender people simply do not exist.1407 The policy, if implemented as reported, would likely face legal challenges.1408 LGBT legal advocacy organization Lambda Legal says that the administration-wide rollback of LGBT protections raises serious legal questions, including implications under the Constitution's Equal Protection Clause.1409 The National LGBTQ Task Force, in a written comment to the Commission, expressed concern that the proposed rule would result in an increase in discrimination against the LGBTQ community.1410 At the Commission's briefing, then-American University Washington College of Law Professor Anthony Varona testified regarding rollbacks of protections for transgender persons and LGBT persons that "we are not talking about regulatory minutiae or esoteric points of legal theory when we discuss whether the federal government is satisfying its duty to advance civil rights," and further stated that:

The retrenchment and even the antagonism of federal civil rights enforcement efforts is exemplified vividly through the lens focused on the LGBT community, which is significant both in its size and in our vulnerability. For many years, through both Democratic and Republican administrations, agencies throughout the federal government have responded to the bias and harassment faced by LGBT people with meaningful measures aimed at enforcing and protecting our basic civil rights. But then came the Trump administration and what appears to be a deliberate weaponization of regulatory homophobia and transphobia.[1411

The Commission also received public comments and data from the National LGBTQ Task Force and the National Center for Transgender Equality, echoing Professor Varona's analysis and detailing the harm to the LGBT and transgender communities stemming from these federal policy

1406 Correspondence from U.S. Comm'n on Civil Rights to U.S. Dep't of Health and Human Services (Dec. 7, 2018), <https://www.usccr.gov/press/2018/12-07-Transgender-Letter-to-Health-Human-Services.pdf>. 1407 Sarah Mervosh & Christine Hauser, "At Rallies and Online, Transgender People Say They #Won'tBeErased," The New York Times, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html>?action=click&module=inline&pgtype=Article. 1408 Patricia A. Smith, Olabisi Ladeji Okubadejo, & Maraya N. Pratt, "What Remedy for Transgender Students if HHS Succeeds in Narrowly Redefining Gender Under Title IX?," National Law Review, Oct. 25, 2018, <https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>. 1409 Lambda Legal, Trump Administration Plan to Expand Religious Refusal Rights of Health Professionals: Legal Issues and Concerns, Jan. 18, 2018, <https://www.lambdalegal.org/health-care-analysis>. 1410 National LGBTQ Task Force Statement, at 13-14. 1411 Varona Testimony, Federal Civil Rights Enforcement Briefing, p. 252.

<https://www.usccr.gov/press/2018/12-07-Transgender-Letter-to-Health-Human-Services.pdf>
<https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>
<https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>
<https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>
<https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>
<https://www.lambdalegal.org/health-care-analysis>

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changes.1412 A report by the Fenway Institute also documents concerns with the rollback of LGBT nondiscrimination regulations, in health as well as education and housing.1413 In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language.1414 Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care.1415 The result of this discriminatory treatment, says Shabab Mirza, an LGBT research assistant at the Center for American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers.1416 LGBT advocates fear that HHS' creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community.1417 Rea Carey, executive director of the National LGBTQ Task Force, says that, "Health professionals have a duty to care for all their patients regardless of one's gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are."1418 In a statement to the Commission, the National LGBTQ Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.1419 Language Access in Federally Assisted and Conducted Programs HHS OCR reports that it has complied fully with Executive Order 13,166 (requiring federal agencies to issue guidance under Title VI regarding language access) and also complied fully with a 2013 memo from the Attorney General, which requested federal agencies to "join DOJ in

1412 National LGBTQ Task Force Statement; National Center for Transgender Equality, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Dec. 17, 2018. 1413 Sean Cahill, Tim Want, and Bishar Jenkins, Trump Administration Continued to Advance Discriminatory Policies and Practices Against LGBT People and People Living with HIV in 2018, The Fenway Institute, 2019, pp. 4-6, https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf. 1414 Ibid. 1415 Ibid. 1416 Chris Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," Washington Blade, Jan. 18, 2018, <https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/> [hereinafter Johnson, "New HHS division slammed as tool for anti-LGBT discrimination"]. 1417 Julie Moreau, "Trump administration 'exacerbating' LGBT health care discrimination, report says," NBC News, Jul. 24, 2018, <https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>. 1418 Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," supra note 1416. 1419 National LGBTQ Task Force Statement, at 13-14.

https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf
https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf
<https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/>
<https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/>
<https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>
<https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>

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recommitting to the implementation" of the order.1420 The 2013 memo outlined action items for each agency in "an effort to secure the federal government's full compliance with Executive Order 13,166, including establishment of agency-wide Language Access Working Groups to, among other things, develop or update agency language access plans."1421 HHS OCR explained its enforcement of national origin protections regarding entities that receive Federal funds through HHS is achieved by enforcing the Title VI statute and HHS's Title VI implementing regulations. HHS explained that its Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons "helps recipients of HHS financial assistance voluntarily comply with Title VI and thereby reduce discriminatory barriers" to services and programs.1422 In the context of public education, the Supreme Court has held, based on civil rights regulatory language that HHS still operates under,1423 that recipients of federal funding must affirmatively provide language access so that students would have meaningful access.1424 With regard to recipients of federal funds for health, compliance with the underlying rules of Title VI against national origin discrimination would also be subject to a "meaningful access" standard.1425 The meaningful access standard is codified in federal regulations, HHS OCR is obligated to enforce these regulations, as recipients of HHS funding must provide meaningful access to LEP persons.1426

1420 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1 (citing U.S. Dep't of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166 (Feb. 17, 2011), https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf). Exec. Order No. 13,166 seeks to improve access to services for persons with limited English proficiency. 1421 U.S. Dep't of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, (Feb. 17, 2011), p. 2, https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf. 1422 Ibid. 1423 At the time of the Supreme Court's decision, it evaluated the Title VI regulations of the Department of Health, Education, and Welfare (HEW). That Department has since been split into the Departments of Education and Health and Human Services; the underlying regulation, though, continues to apply to HHS. See 45 C.F.R. 80.3(b)(2) (2005). 1424 Lau v. Nichols, 414 U.S. at 568. 1425 See, e.g., Sandoval v. Hagan, 137 F.3d 484, 510-11 (11th Cir. 1999) (holding that English-only policy for driver's license applications constituted national origin discrimination under Title VI), rev'd on other grounds, 532 U.S. 275 (2001); Almendares v. Palmer, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI). 1426 45 C.F.R. § 92.201 (Meaningful access for individuals with limited English proficiency); see also 28 C.F.R. § 42.405(d) (1) (2019) ("Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.").

https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf
https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf

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At the Commission's briefing, former HHS OCR Director Leon Rodriguez discussed the office's commitment to providing language access enforcement, to avoid unlawful national origin discrimination; HHS OCR stated that this commitment is unchanged.1427 He also described cases of persons in dire health circumstances being unable to understand doctors and other health care providers and stated that data showed that providing language access saved money and saved lives.1428 He added that: "As Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another."1429 Technical Assistance HHS OCR indicated that it offers technical assistance to recipients of federal financial assistance at any stage of an investigation if it determines there appears to be a compliance concern.1430 As part of all compliance reviews, HHS OCR stated that it supplies technical assistance.1431 Technical assistance provided to HHS OCR covered entities includes "sample documents and policies; electronic links to regulations, OCR's fact sheets and website; suggested sources of helpful information from other HHS components; and explanations of regulatory requirements where needed."1432 Furthermore, HHS OCR makes some technical assistance available on its website.1433 Interaction and Coordination with External Agencies and Organizations In August 2016, HHS OCR, DOJ and HUD issued a joint statement "to remind recipients of federal financial assistance that they should not withhold certain services based on immigration status when the services are necessary to protect life or safety."1434 Prior to the scope of review of this report, in December of 2014, HHS OCR and DOJ issued joint guidance explaining states' obligations under Title II of the ADA to avoid placing individuals at serious risk of institutionalization when considering implementation options of the new Fair Labor Standards Act.1435

1427 U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 1428 Rodriguez Testimony, Federal Civil Rights Enforcement Briefing, pp. 44-45. 1429 Ibid., 44. 1430 U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 24. 1431 Ibid., 36. 1432 Ibid. 1433 See, e.g., U.S. Dep't of Health and Human Servs., "Civil Rights for Providers of Health Care and Human Services," <https://www.hhs.gov/civil-rights-for-providers/index.html> (accessed Jul. 23, 2019). 1434 U.S. Dep't of Health and Human Servs., U.S. Dep't of Hous. and Urban Dev., U.S. Dep't of Justice, Tri-Agency Joint Letter by DOJ HUD HHS on Life and Safety Services (Aug. 5, 2016), <https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf>. 1435 U.S. Dep't of Health and Human Servs., U.S. Dep't of Justice, Dear Colleague Letter from DOJ and HHS re: the Home Care Rule (Dec. 15, 2014) https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf.

<https://www.hhs.gov/civil-rights-for-providers/index.html>
<https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf>
https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf

A major civil rights issue that emerged involved thousands of migrant children who have been held in cages in former warehouses, in buildings with little light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.¹⁴³⁶ The shelters are run by HHS' Office of Refugee Resettlement.¹⁴³⁷ At the shelters, many children are not able to speak to their parents, hug their siblings who are also in custody, go to school, know when they will be released, and there are a troubling number of allegations of abuse.¹⁴³⁸ During a February 2019 Congressional hearing, Representative Pramila Jayapal questioned Scott Lloyd, the former head of the agency caring for migrant children, about an HHS child welfare expert's warning about the extremely negative psychological effects caused by separating them from their parents. ¹⁴³⁹ Lloyd, along with officials from DOJ and the Border Patrol who were also aware of the warning, testified that they did not voice concern over its impact in any other meetings.¹⁴⁴⁰ Furthermore, GAO found that the lack of coordination between DHS and HHS resulted in extreme difficulties in reuniting with their parents, even when ordered to do so by a federal court due to civil rights concerns.¹⁴⁴¹ HHS OCR indicated that it participates in 21 external groups or partnerships across the federal government, a list of which is included herein at Table 4.6.

¹⁴³⁶ Manny Fernandez, "Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children," The New York Times, Jun. 14, 2018, <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>. ¹⁴³⁷ U.S. Government Accountability Office, Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border, Oct. 2018, pp. 17-26, <https://www.gao.gov/assets/700/694963.pdf> [hereinafter GAO, Unaccompanied Children]. ¹⁴³⁸ See supra notes 1337-46. ¹⁴³⁹ "What we learned from congressional hearing on family separations," PBS, Feb. 26, 2019, <https://www.pbs.org/newshour/show/what-we-learned-from-congressional-hearing-on-family-separations> [hereinafter PBS, "What we learned from congressional hearing on family separations"]. ¹⁴⁴⁰ Ibid. ¹⁴⁴¹ GAO, Unaccompanied Children, supra note 1437, at 17-26 Oct. 2018.

<https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>
<https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>
<https://www.gao.gov/assets/700/694963.pdf>
<https://www.pbs.org/newshour/show/what-we-learned-from-congressional-hearing-on-family-separations>

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Table 4.6 External Coordination Groups or Partnerships that Include HHS OCR as a Member Name of Group Description of Group Association of Federal External Civil Rights Specialists/Officers

Inter-agency Association- best practices in Fed civil rights programs.

Child Abuse & Neglect Federal Interagency Workgroup

Share information and receive and review ACF reports on child abuse and neglect.

Child Welfare Coordinating Group Coordination between OCR, ACF and DOJ on child welfare cases.

Dept. of Education LGBT Intra-Agency Roundtable

Identifies LGBT issues of concern and agencies' enforcement positions regarding LGBT issues.

DHS Federal Civil Rights Coordination in Disasters

Civil rights offices within DHS, FEMA, HHS, and DOJ report and coordinate on disaster-related activities.

DOJ LEP Enforcement Interagency Working Group

Coordinate & Inform LEP enforcement.

DOJ LEP Interagency Working Group Promote cross agency efforts promoting LEP access.

DOJ Service Animal Interagency Working Group

Identifies issues of concern regarding the use of service animals to better ensure Federal agencies take a consistent policy and enforcement approach to service animals under section 504 and Americans with Disabilities Act.

DOJ Title IX Compliance Discussion Group Share information. DOL-HHS Coordinating Group for FLSA To coordinate re: FLSA rules (roll out

completed). Environmental Justice Title VI Interagency Working Group

Established in 1994 under EO 12892, to guide, support and enhance Federal environmental justice and community-based activities.

Home and Community Based Settings (HCBS) Workgroup

Monthly meeting between HHS (OCR, ACL, CMS) and DOJ to provide updates on the HCBS Rule (OCR) and to discuss State' progress in modifying state transition plans to ensure that Medicaid-funded services are provided in settings that exhibit home and community-based characteristics.

Human Rights Treaties - Interagency Policy Committee

Report enforcement efforts related to UN Treaties.

Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC)

Reports to Congress and federal agencies on issues related to serious mental illness and serious emotional disturbance – specifically reports on advances in research, prevention, diagnosis, etc.

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Federal Interagency Health Equity Team: National Partnership for Action to End Health Disparities (NPA)

The FIHET participates in the development and implementation of the NPA.

National Project Advisory Committee on Culturally and Linguistically Appropriate Services

Provide advice and expertise to HHS Office of Minority Health on improving culturally and linguistically appropriate services in health care.

Transforming Mental Health Care in America: Federal Partners Senior Workgroup

Interagency collaboration on mental health.

Universal Periodic Review (UPR) – Interagency Delegation

Drafts materials for U.S. delegates who attend UPR meetings re U.S. human rights activities.

Title IX STEM Interagency Working Group – Led by DOJ

Data/Information Sharing to Improve Oversight of Federal Grant-making and Title IX Compliance. <http://www.gao.gov/products/GAO-16-14>

White House Initiative on Asian Americans and Pacific Islanders Language Access Subcommittee

Share best practices and challenges; coordinate during disaster response and recovery.

White House Council on Women and Girls STEM Working Group

Information sharing.

Source: U.S. Dep't of Health and Human Services

Research, Data Collection, and Reporting in its FY 2018 budget justification to Congress, HHS OCR identified the collection of health information as essential to improving health care outcomes.¹⁴⁴² HHS OCR implemented its Complaint Portal in 2013 that tracks data related to the intake and processing of complaints.¹⁴⁴³ HHS OCR identified one change to its data collection procedures during FY 2016-2018 regarding collection of data from complaints filed under Section 1557 of the Affordable Care Act.¹⁴⁴⁴ The change was prompted by a court injunction prohibiting enforcement of some provisions of Section 1557 addressing sex discrimination.¹⁴⁴⁵

¹⁴⁴² HHS, OCR FY 2018 Congressional Justification, supra note 1291, at 25. ¹⁴⁴³ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56. ¹⁴⁴⁴ Ibid., 60. ¹⁴⁴⁵ Ibid., 60; see also *Franciscan Alliance v. Azar*, Case No. 7:16-cv-00108 (N.D. Tex. Filed Dec. 31, 2016).

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Chapter 5: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity Legal Authority and Responsibility Congress established the U.S. Department of Housing and Urban Development (HUD) in 1965.¹⁴⁴⁶ HUD is currently led by Secretary Benjamin S. Carson, who was sworn into office in March 2017.¹⁴⁴⁷ HUD's mission, as presently indicated on its website, is to:

Create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination, and transform the way HUD does business.¹⁴⁴⁸

HUD reports on its website that it strives to uphold its mission by administering federal programs and creating housing policy that can help create affordable housing opportunities in the rental and sales markets for individuals and families; combat homelessness; promote fair housing and inclusive community development; and foster sustainability.¹⁴⁴⁹ HUD reported that the Office of Fair Housing and Equal Opportunity (FHEO) is the primary office at HUD that handles external civil rights enforcement, in conjunction with the Office of the General Counsel (OGC). The mission of FHEO is to "eliminate housing discrimination, promote economic opportunity, and achieve diverse, inclusive communities by leading the nation in the enforcement, administration, development, and public understanding of federal fair housing policies and laws."¹⁴⁵⁰ In his written statement to the Commission, then General Deputy Assistant Secretary Bryan Greene distilled the need for FHEO's work: "Ongoing segregation in America, regular reports of sexual harassment in housing, and newly-constructed properties inaccessible to people with disabilities are just some examples that underscore that we have not yet conquered housing discrimination."¹⁴⁵¹ Through FHEO and OGC, HUD enforces the following statutes, executive orders, and regulations:¹⁴⁵²

¹⁴⁴⁶ 42 U.S.C. § 3532 (1965). ¹⁴⁴⁷ U.S. Dep't of Hous. and Urban Dev., "Secretary Ben Carson," https://www.hud.gov/about/leadership/ben_carson. ¹⁴⁴⁸ U.S. Dep't of Hous. and Urban Dev.t, "About HUD's Mission," <https://www.hud.gov/about/mission> (last accessed Oct. 9, 2018); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. ¹⁴⁴⁹ See generally HUD, FY 2018-2022 Strategic Plan, supra note 194. ¹⁴⁵⁰ 42 U.S.C. §§ 36101-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dep't of Hous. and Urban Dev., "About FHEO," https://www.hud.gov/program_offices/fair_housing_equal_opp (accessed Oct. 9, 2018); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. See also 24 C.F.R. pt. 115. ¹⁴⁵¹ Greene Statement, at 3. ¹⁴⁵² U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 2-3.

https://www.hud.gov/about/leadership/ben_carson
<https://www.hud.gov/about/mission>
https://www.hud.gov/program_offices/fair_housing_equal_opp

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• The Fair Housing Act;1453 • The obligation to affirmatively further fair housing under the Fair Housing Act, the

obligation for grantees to certify compliance with the Affirmatively Furthering Fair Housing (AFFH) obligation under the Housing and Community Development Act of 1974,1454 the Cranston-Gonzalez National Affordable Housing Act,1455 and the Quality Housing and Work Responsibility Act of 1998;1456

• Title VI of the Civil Rights Acts of 1964;1457 • The Age Discrimination Act of 1975;1458 • Section 504 of the Rehabilitation Act of 1973;1459 • Section 508 of the Rehabilitation Act of 1973;1460 • Title II of the American Disabilities Act;1461 • Architectural Barriers Act of 1968;1462 • Section 3 of the Housing and Urban Development Act of 1968;1463 • Section 109 of Title I of the Housing and Community Development Act of 1974;1464 • Equal Access to Housing;1465 • Title IX of the Education Amendments Act of 1972;1466 • Executive Order 11,063, as amended;1467 • Executive Order 11,246, as amended (Equal Employment Opportunity Programs);1468 • Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in

Federal Programs; Affirmatively Furthering Fair Housing);1469 • Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations);1470 • Executive Order 13,166, Improving Access to Services for Persons with Limited

English Proficiency; and1471

1453 42 U.S.C. §§3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180. 1454 42 U.S.C. § 5309. 1455 Id. § 12703. 1456 42 U.S.C. §§3608, 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16) and the implementing regulations at 24 C.F.R. §§ 5, 91, 92, 200, 570, 574, 576, and 903. 1457 42 U.S.C. § 504. 1458 42 U.S.C. §§2000d-2000d-4 and implementing regulations at 24 C.F.R. part 1. 1459 42 U.S.C. §§ 6101-07 and implementing regulations at 24 C.F.R. part 146. 1460 29 U.S.C. § 794 and implementing regulations at 24 C.F.R. parts 8 and 9. 1461 29 U.S.C. § 794(d) and 36 C.F.R. part 1194. 1462 42 U.S.C. §12131-34 and 28 C.F.R. part 35. 1463 42 U.S.C. § 4151 et seq. and implementing regulations at 24 C.F.R. part 41. 1464 12 U.S.C. § 1701u and implementing regulations at 24 C.F.R. part 135. 1465 42 U.S.C. § 5309 and implementing regulations at 24 C.F.R. part 6. 1466 24 C.F.R. parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982 (1996). 1467 20 U.S.C. §§ 1681-88 and implementing regulations at 24 C.F.R. part 3. 1468 Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962). 1469 Exec. Order No. 11,246, 30 Fed. Reg. 12,313. 1469 Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 17, 1994). 1470 Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). 1471 Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

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• Executive Order 13,217, as amended (Community-Based Alternatives for Individuals with Disabilities);1472

HUD enforces the Fair Housing Act and other laws that protect people from discrimination in housing on the basis of race, color, religion, national origin, sex, disability, and familial status (among other categories).1473 HUD reports that it also ensures that housing providers and grantees comply with other civil rights statutes, executive orders, and regulations.1474 HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.1475 Enforcement Tools The agency enforcement tools FHEO has specific legal authority to use are:

• Complaint Resolution1476 • Agency-Initiated Charges1477

o FHEO may also bring administrative proceedings to judgement before an administrative law judge1478

1472 Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (Jun. 21, 2001). 1473 42 U.S.C. 3535(d); 42 U.S.C. §§ 3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dep't of Hous. and Urban Dev., "Fair Housing Rights and Obligations," https://www.hud.gov/program_offices/fair_housing_equal_op/fair_housing_rights_and_obligations; U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. 1474 U.S. Dep't of Housing and Urban Development, Response to Interrogatory No. 1, at 1. 1475 42 U.S.C. §§ 3535(d), 3610(f), 3616; 24 C.F.R. parts 115 and 125; U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; U.S. Dep't of Hous. and Urban Dev., "Fair Housing Assistance Program (FHAP)," https://www.hud.gov/program_offices/fair_housing_equal_op/partners/FHAP [hereinafter HUD, "FHAP"]; U.S. Dep't of Hous. and Urban Dev., "Fair Housing Initiatives Program," https://www.hud.gov/program_offices/fair_housing_equal_op/partners/FHIP [hereinafter HUD, "FHIP"]; see infra notes 1536-1551. 1476 24 C.F.R. §§ 1.7, 3.605, 6.11, 8.56, 9.170 (indicating that "[t]he agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 [sic.] under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791)," however 29 C.F.R. part 1613 is nonexistent, and the HUD regulation intended to refer to these compliance procedures is 29 C.F.R. part 1615.170 (Compliance procedures)); 24 C.F.R. § 41.5(d); 24 C.F.R. Part 103; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. §§ 146.33-146.37. 1477 42 U.S.C. § 3610(a)(iii). 1478 24 C.F.R. §§ 103.400-103.410 indicates that while the HUD Assistant Secretary can "direct the issuance of a charge under § 103.405 on behalf of the aggrieved person" and can elect to initiate a civil action in lieu of an administrative proceeding, "the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court," thus clarifying that authority to initiate a civil action in federal court lies within DOJ; see also DOJ Justice Manual, supra note 370, at § 8-2.231 and see infra notes 1584-1608.

https://www.hud.gov/program_offices/fair_housing_equal_op/fair_housing_rights_and_obligations

https://www.hud.gov/program_offices/fair_housing_equal_op/partners/FHAP

https://www.hud.gov/program_offices/fair_housing_equal_op/partners/FHIP

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o FHEO may elect, in lieu of an administrative proceeding, to have the claims asserted in the charge decided in a civil action in a court of law, which would be handled by the Attorney General.1479

• Proactive Compliance Evaluations1480 • Testing1481 • Issuance of Policy Guidance1482 • Issuance of Regulations1483 • Technical Assistance1484 • Publicity1485 • Community outreach to stakeholders1486 • Research, data collection, and reporting1487 • Collaboration with states/local agencies1488

1479 24 C.F.R. § 103.410(a) discusses how "[i]f a charge is issued under §103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR part 180, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act," thus defining adjudication through the administrative process differently than an election of civil action. 24 C.F.R. § 103.500 outlines procedures for HUD to take prompt judicial action at any time following the filing of a complaint, however states that "the General Counsel may authorize the Attorney General to commence a civil action," and to "ensure that prompt initiation of the civil action, the General Counsel will consult with the Assistant Attorney General for the Civil Rights Division before making the determination that prompt judicial action is necessary," thus clarifying that the authority to initiate a civil action in federal court lies within DOJ; see also DOJ Justice Manual, supra note 370, at § 8-2.231 and see infra notes 1584-1608. 1480 24 C.F.R. § 1.7(a) (conduct of investigations); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. 108.40(b); 24 C.F.R. § 146.31. 1481 24 C.F.R. §§ 115.100(c), 115.311, 125.107. 1482 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part"); 24 C.F.R. § 8.55 ("The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 1483 24 C.F.R. §§ 10.2, 10.6; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 1484 42 U.S.C. § 3608(e)(3); 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part"); 24 C.F.R. § 8.55 ("The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 1485 24 C.F.R. § 115.308(c); 24 C.F.R. § 180.680(a); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 1486 24 C.F.R. §§ 115.300(e), 115.304(d); 24 C.F.R. § 125.301; 28 C.F.R. § 42.405. 1487 42 U.S.C. §§ 3608(e)(1)-3608(e)(2), 3608(e)(6); 24 C.F.R. § 115.307(a)(3); 28 C.F.R. § 42.406 (regarding data collection and reporting). 1488 24 C.F.R. § 1.6(a) (The responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 ("The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part"); 24 C.F.R. § 8.55 ("The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 24 C.F.R. § 103.220.

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• Collaboration with other federal agencies1489 • Strategic Plan1490 • Annual Reports1491

According to FHEO, testing "is a critical tool in the fight against housing discrimination."¹⁴⁹² Testing refers to "the use of an individual or individuals ("testers") who, without bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws."¹⁴⁹³ Paired testing is conducted when two people assume the roles of applicants with equivalent social and economic characteristics who differ only in terms of the characteristic being tested for discrimination, such as race, disability status, or marital status.¹⁴⁹⁴ Testers and the organizations conducting the tests are not allowed to have any economic or personal interests in the outcome of the tests.¹⁴⁹⁵ Budget and Staffing The Assistant Secretary, Fair Housing and Equal Opportunity leads FHEO. Anna Maria Farias currently serves as the Assistant Secretary for FHEO, having been confirmed by the Senate in August 2017.¹⁴⁹⁶ While the leadership at HUD has changed with the Trump Administration, HUD reports that its organizational structure and general roles and responsibilities of FHEO have not changed from FY 2016 through FY 2018.¹⁴⁹⁷ See Figure 5.1.

1489 24 C.F.R. § 103.220; 28 C.F.R. § 42.413. 1490 GPRM Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b); 5 U.S.C. § 306(a); see HUD, FY 2018- 2022 Strategic Plan, supra note 194. 1491 42 U.S.C. §§ 3608(e)(6), 3608(e)(2) (A), and 3608(e)(2)(B)(i-iii). 1492 U.S. Dep't of Hous. and Urban Dev., Memorandum Re: Treatment of Testing Evidence in Fair Housing Complaint Investigations, <https://apps.hud.gov/offices/theo/library/testing.pdf>. 1493 24 C.F.R. § 115.100. 1494 "Paired Testing and the Housing Discrimination Studies," Office of Policy Development and Research, HUD User, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>. 1495 24 C.F.R. § 125.107. 1496 PN860 – Anna María Farias – Department of Hous. and Urban Dev., 115th Congress (2017-2018), <https://www.congress.gov/nomination/115th-congress/680>. 1497 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 11.

<https://apps.hud.gov/offices/fheo/library/testing.pdf>

<https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>

<https://www.congress.gov/nomination/115th-congress/680>

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Figure 5.1: FHEO Organizational Chart

Source: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity

Under the Fair Housing Act, the HUD Secretary must delegate the responsibility of civil rights enforcement to the Assistant Secretary for Fair Housing and Equal Opportunity,1498 who re- delegates this responsibility to the General Deputy Assistant Secretary for the Office of Fair Housing and Equal Opportunity, the Deputy Assistant Secretary for the Office of Enforcement and Programs, and the Deputy Assistant Secretary for the Office of Policy, Legislative Initiatives, and Outreach.1499 Several of the offices listed under the aforementioned Deputy Assistant Secretaries in Figure 5.1 have a role in civil rights enforcement:

• The Office of Enforcement – conducts complaint investigations, reviews fair housing cases, reconsiders cases if a "no reasonable cause" determination is issued, drafts fair housing policies and guidance, and administers the Fair Housing Assistance Program.1500

• The Office of Programs – provides guidance and conducts compliance reviews and complaint investigations on Section 3 of the Housing and Urban Development Act; and administers the Fair Housing Initiatives Program.1501

1498 42 U.S.C. § 3608(a)-3608(c). 1499 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 12. 1500 Ibid., 13; see infra notes 1536-1551. 1501 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13; see infra notes 1536-1551.

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• The Office of Systematic Investigations – investigates systematic allegations of discrimination and handles Secretary-initiated complaints.1502

• The Office of Program Standards and Compliance – provides applicable housing-related federal civil rights guidance to other program areas.1503

• The Policy and Legislative Initiatives Division – oversees FHEO policy development by tracking legislative developments and studies.1504

• The Education and Outreach Division – initiates fair housing education and outreach.1505 • HUD Regional Offices – HUD has 10 regional offices in total around the U.S., each with

a Regional Director who oversees FHEO staff to handle the intake, processing, investigation, and determinations as to reasonable cause of complaints. Regional Offices also monitor FHAP agencies within their jurisdiction. The Regional Directors report to the Deputy Assistant Secretary for Enforcement and Programs.1506

HUD reports that FHEO's budget is earmarked to "civil rights intake, investigation[s], enforcement, compliance, and outreach."1507 In FY 2016, FHEO requested a total of \$152.1 million,1508 which decreased to \$144.2 million in FY 20171509 and \$135.1 million in FY 2018.1510 Congress appropriated to FHEO \$135.5 million in FY 2016,1511 which increased slightly to \$136.5

1502 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13. 1503 Ibid. 1504 Ibid. 1505 Ibid. 1506 Ibid., 13. 1507 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14. 1508 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2016 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2016]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1509 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2017 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2017]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1510 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF> [hereinafter HUD FHEO, Fair Housing Programs 2018 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2018]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses. 1511 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 32-2; HUD FHEO, Program Office Salaries and Expenses FY 2018, supra note 1510, at 50-1. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>
<https://www.hud.gov/sites/documents/54-FHEO.PDF>

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million in FY 2017,1512 and then decreased slightly to \$134.6 million in FY 2018.1513 See Figure 5.2. Figure 5.2: Requested and Allocated Budgets for FHEO

Source: U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019, p. 49-1, <https://www.hud.gov/sites/dfiles/CFODocuments/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>; U.S. Dep't of Housing and Urban Development, Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020, p. 48-1, https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FHEO_SE.pdf. Note: Total requested and allocated figures for each fiscal year include sum of the totals for fair housing programs and salaries & expenses.

1512 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf> [hereinafter HUD FHEO, Fair Housing Programs 2019 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019, p. 49-1, <https://www.hud.gov/sites/dfiles/CFODocuments/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf> [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2019]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses. 1513 U.S. Dep't of Hous. and Urban Dev., Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf> [hereinafter HUD FHEO, Fair Housing Programs 2020 Summary]; U.S. Dep't of Hous. and Urban Dev., Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020, p. 48-1, https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FHEO_SE.pdf [hereinafter HUD FHEO, Program Office Salaries and Expenses FY 2020]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

FY 2016 FY 2017 FY 2018 Requested Total \$152,100,000 \$144,235,000 \$135,108,000 Allocated Total \$135,521,000 \$136,527,000 \$134,643,000

\$125,000,000 \$130,000,000 \$135,000,000 \$140,000,000 \$145,000,000 \$150,000,000 \$155,000,000

Figure 5.2: Requested and Allocated Budgets for FHEO FY 2016 to FY 2018

Requested Total Allocated Total

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>
<https://www.hud.gov/sites/documents/51-FHEO.PDF>
<https://www.hud.gov/sites/documents/54-FHEO.PDF>
<https://www.hud.gov/sites/dfiles/CFODocuments/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>
https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FHEO_SE.pdf
<https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>
https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FHEO_SE.pdf
https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FHEO_SE.pdf

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FHEO's total allocated budget for FY 2016 included \$65.3 million for programs and \$70.2 million for salary and expenses.1514 FHEO's total allocated budget for FY 2017 included approximately \$65.3 million for programs and \$71.2 million for salary and expenses.1515 FHEO's total allocated budget included for FY 2018 included \$65.3 million for programs and \$69.3 million for salaries and expenses.1516 In FY 2016, FHEO requested a total of \$71.0 million for fair housing programs, which included \$45.6 million for FHIP and \$23.3 million for FHAP.1517 In FY 2016, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.1518 In FY 2017, FHEO requested a total of \$70.0 million for fair housing programs, including \$46.0 million for FHIP and \$21.9 million for FHAP.1519 In FY 2017, Congress appropriated to FHEO \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.1520 In FY 2018, FHEO requested a total of \$65.3 million for fair housing programs, which included \$39.2 million for FHIP and \$24.3 million for FHAP.1521 In FY 2018, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.6 million for FHIP and \$23.9 million for FHAP.1522 While FHEO's requested budget changed significantly from FY 2016 to FY 2018, FHEO's allocated budget remained relatively the same during that time.1523 See Figure 5.3.

1514 HUD FHEO, Program Office Salaries and Expenses FY 2016, supra note 1510, at 50-1. 1515 HUD FHEO, Program Office Salaries and Expenses FY 2019, supra note 1512, at 49-1. 1516 HUD FHEO, Program Office Salaries and Expenses FY 2020, supra note 1513, at 48-1. 1517 HUD FHEO, Fair Housing Programs 2016 Summary, supra note 1508, at 32-2. 1518 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 32-2. 1519 HUD, Fair Housing Programs 2017 Summary, supra note 1509, at 33-2. 1520 HUD FHEO, Fair Housing Programs 2019 Summary, supra note 1512, at 31-2. 1521 HUD FHEO, Fair Housing Programs 2018 Summary, supra note 1510, at 31-2. 1522 HUD FHEO, Fair Housing Programs 2020 Summary, supra note 1513, at 31-2. 1523 Ibid.

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Figure 5.3: Requested and Allocated Budgets for FHIP

Source: U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSGACTS.PDF>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives, p. 31-2, <https://www.hud.gov/sites/dfiles/CFODocuments/2020CJ-FairHousingActivities.pdf>.

HUD reported that FHEO employed 484 full-time staff in FY 2016, 496 full-time staff in FY 2017, and 484 full-time staff in FY 2018.1524 In his statement to the Commission, Bryan Greene, then General Deputy Assistant Secretary for FHEO, noted that at that time in October 2018, 253 people were dedicated to Fair Housing Act investigations.1525 HUD also reported that in addition to FHEO staff, HUD's OGC has 18 attorneys and a paralegal at headquarters in Washington, DC who do civil rights enforcement work, and additional attorneys at HUD's regional offices who work on fair housing and civil rights matters.1526 According to HUD's responses to the Commission's Interrogatories, FHEO's "staffing levels are unrelated to the budget."1527 But Greene indicated during his testimony before the Commission that "FHEO relies entirely on salaries and expenses funding for its Fair Housing Act investigations."1528

1524 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14. 1525 Greene Statement, at 1. 1526 U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 8, at 13. 1527 Ibid. 1528 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 19.

Requested FHIP Allocated FHIP Requested FHAP Allocated FHAP FY 2016 \$45,600,000 \$39,200,000 \$23,300,000 \$24,300,000 FY 2017 \$46,000,000 \$39,200,000 \$21,900,000 \$24,300,000 FY 2018 \$39,200,000 \$39,600,000 \$23,900,000

\$0 \$5,000,000

\$10,000,000 \$15,000,000 \$20,000,000 \$25,000,000 \$30,000,000 \$35,000,000 \$40,000,000 \$45,000,000 \$50,000,000

Figure 5.3: Requested and Allocated Budgets for FHIP and FHAP, FY 2016 to FY 2018

FY 2016 FY 2017 FY 2018

<https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/33-FAIRHSNGPROGRAMS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF>
<https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>
<https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>

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Whereas the FHEO budget has fluctuated minimally during the time period the Commission investigated, as described below the Commission heard compelling testimony regarding consequences of the longstanding failure to increase budget and staffing for fair housing enforcement and comparing the especially lean budget and staffing in recent years to earlier, reportedly still insufficient, budget and staffing. Assessment Prioritization of Civil Rights Agency-Wide FHEO does not have a direct line of authority to the Secretary of HUD, as the Assistant Secretary for Fair Housing and Equal Opportunity reports to the Deputy Secretary of HUD, who in turn reports to the Secretary of HUD.1529 With respect to the resources that FHEO has available to effectively execute its enforcement work, then General Deputy Assistant Secretary Bryan Greene indicated in his written testimony before the Commission that:

• “HUD’s effectiveness in carrying out its fair-housing enforcement mission depends on a robust S&E budget.”1530

• “When budgets are tight, it is challenging for HUD to respond effectively to complaints filed by individuals and pursue many Secretary-initiated cases. Still, HUD recognizes these cases as an opportunity to obtain broad relief for systemic discrimination, when resources are available.”1531

Academic literature supports Greene’s assessment, recognizing for example that “staffing and other administrative problems have historically hampered HUD’s ability to investigate discrimination claims.”1532 HUD’s Chicago office regional director testified to the Commission’s Illinois Advisory Committee in May 2019 that “[T]his Administration has made budget proposals that are significantly less in terms of staff than previous administrations have done. . . . These funding proposals ultimately result in staffing levels being established.”1533 After acknowledging that without budget increases to allow for increases in staff, HUD cannot focus on all areas in its Secretary-initiated investigations or complaints, Greene’s written testimony identified current subject area priorities for HUD FHEO.1534 Those priorities are: “[j]ssuance of

1529 U.S. Dep’t of Hous. and Urban Dev., Annual Financial Report 2017, p. 3, <https://www.hud.gov/sites/dfiles/CFO/documents/af2017.pdf>. 1530 Greene Statement, at 2. 1531 *Ibid.*, 3. 1532 Johnson, Beyond the Private Attorney General, supra note 36, at 1360 (citing 2004 GAO report). 1533 Maurice McGough, Region V Director Office of Fair Hous. and Equal Opportunity, U.S. Dep’t of Hous. and Urban Dev., testimony, Illinois SAC Fair Housing Briefing, pp. 63-64 (responding to question from Committee member Haleem). 1534 Greene statement, at 3.

<https://www.hud.gov/sites/dfiles/CFO/documents/af2017.pdf>

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clear, helpful assistance-animal guidance”, “[c]ombating of sexual harassment in housing”, and “[m]eaningful, less burdensome implementation of the Fair Housing Act’s ‘affirmatively furthering’ mandate.”1535 HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.1536 FHAP is a noncompetitive grant program that funds agencies on the state and local level that administer fair housing laws that HUD has determined to be substantially equivalent to the federal Fair Housing Act.1537 HUD is generally required to refer complaints to FHAP agencies when those complaints allege violations of state or local fair housing laws.1538 and FHAP agencies engage in enforcement activities that include complaint investigation, conciliation, administrative and/or judicial enforcement, training, implementation of data and information systems, and education and outreach.1539 FHIP provides competitive grant funding to fair housing organizations and other non-profits to process complaints of housing discrimination.1540 FHIP agencies assist victims of alleged housing discrimination to identify government agencies (i.e. HUD or a FHAP agency) that can process fair housing complaints, and can conduct a preliminary investigation of claims, which may utilize fair housing testing (a method of assessing discrimination in the housing market), and engage in education and outreach to promote fair housing laws and equal housing opportunity awareness.1541 FHIP has four specific initiatives that provide competitive grant funding for fair housing organizations and other non-profits: the Fair Housing Organizations Initiative (FHOI), the Private Enforcement Initiative (PEI), the Education and Outreach Initiative (EOI), and the Administrative Enforcement Initiative (AEI)—that promote fair housing laws and equal housing opportunity awareness.1542 According to some advocates, including the International Association of Official Human Rights Agencies (IAOHRA) and the Columbia Human Rights Institute, recent cuts in HUD funding have negatively impacted the ability of state and local agencies to enforce fair housing protections.1543 Responses to a survey of local and state human rights agencies included concern from several agencies about ongoing challenges, and “deep concern about further loss of general funding.”1544 Many local and state agencies depend on federal funding to continue their enforcement of fair

1535 *Ibid.* 1536 U.S.C. §§ 3535(d), 3601(f), 3616; 24 C.F.R. part 103 Subpart C; 24 C.F.R. parts 115 and 125; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; HUD, “FHAP,” supra note 1475; HUD, “FHIP,” supra note 1475. 1537 HUD, “FHAP,” supra note 1475; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. 1538 HUD, “FHAP,” supra note 1475. 1539 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 6. 1540 HUD, “FHIP,” supra note 1475. 1541 *Ibid.* 1542 *Ibid.* 1543 Columbia Law School Human Rights Institute and the International Association of Official Human Rights Agencies (IAOHRA), Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 8-9. 1544 *Ibid.*, 9.

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housing laws, through FHAP or FHIP partnerships. Without the requisite level of federal funding, these local agencies may shut down or minimize their fair housing work for lack of funds to support it. Bryan Greene noted in his testimony that oversight for the FHIP and FHAP programs accounts for approximately 10 percent of FHEO’s work.1545 Greene also testified that since HUD funds and supervises local enforcement (through the FHIP and FHAP programs), funding cuts to HUD undermine the capacity for that local enforcement: “[HUD’s] ongoing review of those agencies and the oversight [HUD] provide[s] to them is critical for those agencies to remain viable. When they lose certification, those cases come to HUD and tax our limited resources.”1546 Greene noted that it is important to do “mission oversight” and indicated that FHEO is “trying to establish consistency in operations across them and devote staff resources to that currently.”1547 Greene mentioned that there are “24 people [on staff] doing that for all of those agencies and several thousand cases.”1548 HUD noted that:

[Seventy-seven] percent of fair housing cases are handled by state and local agencies. Those activities are funded through FHEO’s FHIP and FHAP programs. HUD’s budget request for those two programs that are responsible for the lion’s share of the enforcement work has not changed since 2016. HUD’s total request for those two programs in both 2016 and 2018 was identical at \$63.5 million. Overall, funding for FHEO in 2019 was actually the highest since 2010, albeit only by a little because funding levels have been generally flat.1549

Additionally, Greene stated in his testimony before the Commission:

FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate and how fast we can investigate them depends on staff resources, both in FHEO and HUD’s Office of General Counsel, who provide legal support for our cases. We have a staff today of 460 persons, of which [sic] approximately 253 are dedicated to Fair Housing Act investigations. Notwithstanding declining staff, on average, each year for the last several years, HUD has reduced the time it takes to resolve cases.1550

1545 Greene Statement, at 2. 1546 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 20. 1547 *Ibid.*, 74. 1548 Greene Testimony, Testimony, Federal Civil Rights Enforcement Briefing, p. 74. 1549 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1550 Greene Statement, at 1.

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He went on to say:

HUD’s effectiveness in carrying out its fair-housing enforcement mission depends on a robust Salaries and Expenses budget that supports:

• Sufficient numbers of skilled investigators and specialists; • Travel funds to support onsite visits in most of its case investigations; • Information-technology support for field investigations, case-management,

and grants management; • Sufficient compliance staff so we don’t have to redirect staff from other

investigations; • Adequate staff for grants management and policy oversight of FHIP and

FHAP; • Sufficient numbers of experienced fair housing attorneys in HUD’s Office

of General Counsel to provide FHEO with the legal advice and support necessary for efficient, effective fair housing enforcement.

All the foregoing activities are resource-intensive. The demand-driven Fair Housing Act complaint work [acts] to draw resources from other areas (where we have more discretion), especially if we see an uptick in complaint volume, or if we must devote more resources to closing out a case backlog.1551

HUD FHEO regional staff who testified to a briefing of the Commission’s Illinois Advisory Committee held in May 2019 regarding fair housing underscored these critical points, noting that “[R]ight now there are approximately 50 of us who are responsible for doing all of that enforcement work, all of the investigation work, all of the monitoring of the grants, all of that” in the Chicago regional office.1552 Another FHEO Chicago regional office staff member answered a question whether he believes staffing levels are sufficient for a minimum level of enforcement by testifying that “When I first became regional director in 2011, we had a staff of 62” people but “currently have 50 staff persons in the Chicago region . . . cover[ing] 6 states in the industrial Midwest,” which he characterized as “ areas where there’s a great deal of housing segregation and concurrent discrimination.”1553 Also during the May 2019 Illinois Advisory Committee briefing, a former career HUD executive testified that after having worked in both Republican and Democratic administrations at HUD, her perspective now is that “[a]lthough no administration has fully staffed civil rights enforcement at HUD . . . , this [Trump] Administration has allowed staffing levels nationally to drop to historic

1551 *Ibid.*, 2. 1552 Kimberly Nevels, Director, Chicago Fair Hous. and Equal Opportunity Center for HUD, testimony, Illinois SAC Fair Housing Briefing, p. 17. 1553 McGough Testimony, Illinois SAC Fair Housing Briefing (McGough responding to a question from the Committee chair), pp. 66-67.

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levels.”1554 She shared that, as reported on the basis of open records requests and reports to Congress, the current staff level of HUD FHEO is “the lowest level since 1981” and the Trump “administration has submitted reduced staffing requests for FHEO asking for fewer people in the next year in their budget requests.”1555 She went on to state that “numerous studies and reports . . . supported a minimum staffing level of at least 750 persons . . . at the national level to effectively do the basic enforcement compliance program monitoring functions that FHEO has” even without the “add-on responsibilities, such as the obligation to enforce affirmatively furthering fair housing.”1556 Despite this record, “today, staffing levels of fair housing enforcement are so low that it’s easy to believe that understaffing of the civil rights function is a deliberate action designed to reduce the effectiveness of enforcement and the other work that FHEO does.”1557 HUD noted:

FHEO has experienced a decline in staff over many years, including, notably, a decrease from 585 to 491 staff from FY 2013 to FY 2015. It is a priority of Secretary Carson to reinvigorate FHEO’s hiring to ensure it has sufficient staff to carry out its core enforcement functions. So far this year, 68 FHEO positions have been advertised, with 18 more positions expected to be posted by August. The Secretary directed that at least 70% of FHEO’s new hiring support fair housing enforcement activities. This year FHEO will dedicate 89.7% of positions advertised for new investigators. The Department believes that FHEO’s staffing is adequate to carry out its mission.1558

Strategic Planning and Self-Evaluation HUD has a statutory obligation to issue annual reports that include data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of households that are applicants, participants, or beneficiaries of programs administered by HUD.1559 The Secretary is also obligated to report on the progress made nationally in eliminating discriminatory housing practices, what obstacles remain in the way of eliminating these practices, and recommendations for further actions.1560 HUD has issued annual performance reports for each of the fiscal years in question (FY 2016-2018). In FY 2016, HUD indicated that it achieved the following major milestones when evaluating its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

1554 Sara Pratt, Counsel at Relman Dane and Colfax, testimony, Illinois SAC Fair Housing Briefing, pp. 35-36. 1555 *Ibid.*, 36 (citing Danielle McLean, “Trump’s HUD wants to expand flawed program that is ‘privatizing public housing,’” ThinkProgress, Feb. 28, 2019, <https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>). 1556 *Ibid.*, 36. 1557 *Ibid.*, 37. 1558 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1559 42 U.S.C. § 3606(e)(6). 1560 42 U.S.C. § 3606(e)(2)(A).

<https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>
<https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>

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• Develop a measure for assessing the effect of targeted education and outreach efforts. This

Use reporting capabilities of social media platforms to “monitor the users reached, web clicks, and engagements (liked or shared)” to measure the effectiveness of gaining viewer attention; and monitoring the number of contacts, inquiries, and complaints filed “as measures of the effectiveness of a campaign to encourage subsequent action.”¹⁵⁶¹

- Incorporate fair housing topics into existing technical assistance delivery by HUD program offices. This includes incorporating technical assistance on Affirmatively Furthering Fair Housing (AFFH).

- Develop and implement internal training to increase HUD employee understanding of the role of fair housing in HUD’s mission. HUD has organized multiple staff trainings on the AFFH rule and has conducted an ongoing speaker series on general fair housing topics.¹⁵⁶²

Additionally, during that fiscal year, HUD reported:

- 7,425,156 people received remedies through FHEO’s enforcement work; • 35 cases have resulted in monetary relief in excess of \$25,000; and • 579 cases were open more than 300 days, which is a reduction of 19.5 percent since the beginning of FY 2016.¹⁵⁶⁴ In FY 2017, HUD reported the following items about its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

- 1,914,156 people received remedies through FHEO’s enforcement work; • 27 cases have resulted in monetary relief in excess of \$25,000 • 436 cases were open more than 300 days, which reduced the number of cases that had been under investigation for over 300 days by almost 25 percent¹⁵⁶⁶

¹⁵⁶¹ HUD, 2016 Annual Performance Report, supra note 193, at 65. ¹⁵⁶² Ibid. ¹⁵⁶³ As noted in HUD’s FY 2016 Annual Performance Report, “[t]he relatively high number of persons receiving relief in FY 2016 [was] due to two cases resolved through conciliation that together provided relief to an estimated 4,500 persons.” Ibid. ¹⁵⁶⁴ Ibid. ¹⁵⁶⁵ HUD noted in its FY 2017 performance report that “FHEO staff have been working during FY 2017 on creating greater consistency in how relief numbers are reported. In a few instances this has led to more conservative estimates of relief in cases involving larger housing providers, which had a significant effect on the reported results.” ¹⁵⁶⁶ U.S. Dept’t of Hous. and Urban Dev., Fiscal Year 2017 Annual Performance Report, p. 20, https://www.hud.gov/sites/dfiles/SPM/documents/FY17_APR.pdf

https://www.hud.gov/sites/dfiles/SPM/documents/FY17_APR.pdf

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In FY 2018, HUD’s annual performance report noted that HUD issued a new strategic plan for FY 2018-2022.¹⁵⁶⁷ In stark contrast to the previous strategic plan,¹⁵⁶⁸ it no longer includes “fair housing” as a strategic objective.¹⁵⁶⁹ While there is a strategic objective to “reduce barriers to affordable housing,”¹⁵⁷⁰ there is no discussion of FHEO’s enforcement responsibilities.¹⁵⁷¹ The objective description does reference the new AFFH rulemaking, but does not reference a role for FHEO, and the “objective lead” is an official in HUD’s Office of Congressional and Intergovernmental Relations.¹⁵⁷² In line with HUD’s requirement for annual reporting,¹⁵⁷³ FHEO publishes an annual report of fair housing. Over the fiscal years in question (FY 2016-2018), FHEO has published annual fair housing reports for FY 2016 and FY 2017, which provide an overview of FHEO’s activities and programs, as well as information about FHEO’s enforcement work, which includes complaint data about investigations, monetary relief, compliance with notice requirements, adjudication of Fair Housing Act complaints, and Secretary-initiated enforcement.¹⁵⁷⁴ To date, FHEO has not yet published an annual report for FY 2018. Complaint Processing, Agency-Initiated Charges, and Litigation Federal regulations require HUD to conduct a Fair Housing Act investigation once a complaint is filed against a recipient of HUD funding and other housing providers.¹⁵⁷⁵ HUD may also initiate its own investigation of housing practices at “the written direction of the Assistant Secretary.”¹⁵⁷⁶ HUD regulations contemplate systemic investigations, if FHEO “determines that the alleged discriminatory practices contained in a complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or will affect a large number of persons[.]”¹⁵⁷⁷

¹⁵⁶⁷ U.S. Dept’t of Hous. and Urban Dev., Fiscal Year 2018 Annual Performance Report, Mar. 22, 2019, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDFY2020APP-FY2018APR-3.22.2019.pdf> [hereinafter HUD, FY 2018 Annual Performance Report]. ¹⁵⁶⁸ U.S. Dept’t of Hous. and Urban Dev., Strategic Plan 2014-2018, April 2014, <https://www.huduser.gov/portal/publications/pdf/HUD-564.pdf>. ¹⁵⁶⁹ HUD, Strategic Plan 2018-2022, supra note 194. ¹⁵⁷⁰ Ibid., 25; HUD, FY 2018 Annual Performance Report, supra note 1567, at 44. ¹⁵⁷¹ Ibid. ¹⁵⁷² HUD, FY 2018 Annual Performance Report, supra note 1567, at 44. ¹⁵⁷³ See supra note 1559. ¹⁵⁷⁴ U.S. Dept’t of Hous. and Urban Dev., Office of Fair Hous. and Equal Opportunity, Annual Report to Congress FY 2016, <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF> [hereinafter HUD FHEO, Annual Report to Congress FY 2016]; U.S. Dept’t of Housing and Urban Development, Office of Fair Hous. and Equal Opportunity, Annual Report to Congress FY 2017, https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf [hereinafter HUD FHEO, Annual Report to Congress FY 2017]. ¹⁵⁷⁵ 24 C.F.R. § 103.200 (“Upon the filing of a complaint . . . the Assistant Secretary will initiate an investigation”) (emphasis added). ¹⁵⁷⁶ 24 C.F.R. § 103.200(b). ¹⁵⁷⁷ Id. § 103.205.

<https://www.hud.gov/sites/dfiles/SPM/documents/HUDFY2020APP-FY2018APR-3.22.2019.pdf>

<https://www.huduser.gov/portal/publications/pdf/HUD-564.pdf>

<https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF>

https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf

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FHEO enforces the Fair Housing Act primarily through complaint review and investigation, however indirect mechanisms of enforcement such as public education and outreach are also funded by HUD.¹⁵⁷⁸ HUD also issues guidance documents about civil rights enforcement issues.¹⁵⁷⁹ In addition, HUD reports that it also utilizes the following mechanisms for enforcing the Fair Housing Act,¹⁵⁸⁰ which are provided for under federal regulations:

- Conciliating complaints¹⁵⁸¹ • Seeking “prompt judicial action” for appropriate temporary or preliminary relief pending

final disposition of the complaint while an investigation is ongoing¹⁵⁸² • Issuing subpoenas¹⁵⁸³ • Pursuing litigation before an administrative law judge or in federal court through referral

to DOJ¹⁵⁸⁴ HUD can seek actual damages for “emotional distress and out-of-pocket losses, civil penalties, and injunctive relief.”¹⁵⁸⁵ In 2018, the maximum civil penalties ranged from \$20,521 to \$102,606¹⁵⁸⁶ depending on the nature and/or severity of the violation, and these maximum penalties are adjusted annually.¹⁵⁸⁷ In its response to the Commission’s Interrogatories, FHEO reported that typically, when HUD receives a complaint, “FHEO investigates the complaint, engages in conciliation, and, if conciliation is unsuccessful in resolving the complaint, determines whether or not there is reasonable cause to believe discrimination has occurred.”¹⁵⁸⁸ If the Secretary believes it necessary to carry out the purposes of FHA enforcement, complaints are referred to the DOJ for temporary or preliminary relief, without “findings as to reasonable cause.”¹⁵⁸⁹ The Fair Housing Act requires that if FHEO finds reasonable cause to believe that housing discrimination has occurred, HUD OGC files a charge of discrimination with HUD’s Office of

¹⁵⁷⁸ 24 C.F.R. § 103.1; U.S. Dept’t of Hous. and Urban Dev., “Learn About the FHEO Complaint and Investigation Process,” https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process [hereinafter HUD, “Learn About the FHEO Complaint and Investigation Process”]. ¹⁵⁷⁹ 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. ¹⁵⁸⁰ U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1-2. ¹⁵⁸¹ 42 U.S.C. § 3610(b). ¹⁵⁸² Id. § 3610(e). ¹⁵⁸³ Id. § 3611. ¹⁵⁸⁴ Id. § 3612. ¹⁵⁸⁵ U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 5, at 10. ¹⁵⁸⁶ HUD provided a correction to the civil penalty amounts in their agency review (as outlined above, noting that these numbers change annually). See Adjustment of Civil Monetary Penalty Amounts for 2018, 83 Fed. Reg. 32,790 (Effective: Aug. 15, 2018). ¹⁵⁸⁷ 24 C.F.R. § 180.671(a). ¹⁵⁸⁸ U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4. ¹⁵⁸⁹ 42 U.S.C. §§ 3610(e)(2), 42 U.S.C. § 3610 (g)(2)(C), and 42 U.S.C. § 3614 (a); U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4.

https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process

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Hearing and Appeals.¹⁵⁹⁰ Once the charge is filed, any party may elect for civil action and have the case heard in District Court in lieu of utilizing HUD’s administrative enforcement process.¹⁵⁹¹ If no such election is made, HUD reports that its OGC will litigate the charge of discrimination before an administrative law judge (ALJ) as part of its administrative enforcement proceedings.¹⁵⁹² HUD reports that the ALJ will conduct a hearing within 120 days of the charge¹⁵⁹³ and “make findings of fact and conclusions of law within 60 days after the end of the hearing.”¹⁵⁹⁴ If the ALJ finds a respondent responsible for engaging or attempting to engage in a discriminatory housing practice, the ALJ issues an order that may include damages to the aggrieved person.¹⁵⁹⁵ Parties adversely affected by the final decision may appeal to the U.S. Court of Appeals,¹⁵⁹⁶ and HUD or any person entitled to relief may also petition the appropriate U.S. Court of Appeals for enforcement of the final decision.¹⁵⁹⁷ Additionally, HUD may opt to refer the case to DOJ for temporary or preliminary relief pending final decision on the complaint, if necessary to enforce the civil rights laws under its jurisdiction, and it may also immediately refer systemic “pattern or practice” cases or subpoenas, or for criminal proceedings.¹⁵⁹⁸ DOJ explains the process of shared jurisdiction as follows:

In the event that the conciliation process fails, HUD may, upon finding reasonable cause to believe discrimination occurred, issue administrative charges alleging a Fair Housing Act violation. After HUD issues a charge, the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge; or (2) one of the parties to the administrative charge “elects” to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant. These suits by the Civil Rights Division on behalf of complainants are often referred to as “election” cases. Additionally, under the Fair Housing Act, HUD is required to refer to the Attorney General (1) any complaint that involves the legality of a state or local zoning or other land use law or ordinance, 42 U.S.C. § 3614(b)(1); (2) any breach of a HUD conciliation agreement, 42 U.S.C. § 3614(b)(2); (3) requests by the Secretary of HUD to enforce HUD subpoenas in federal district court, 42 U.S.C. § 3614(c); and (4) an authorization by the Secretary of HUD to file a civil action for temporary or preliminary relief relating to Fair Housing Act complaint pending with HUD, 42 U.S.C. § 3610(e)(1).

¹⁵⁹⁰ 42 U.S.C. § 3612(b); U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4. ¹⁵⁹¹ 42 U.S.C. § 3612(a). ¹⁵⁹² Id. § 3612(b); U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4. ¹⁵⁹³ 42 U.S.C. § 3612(g)(1). ¹⁵⁹⁴ Id. § 3612(g)(2); U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4-5. ¹⁵⁹⁵ U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. ¹⁵⁹⁶ 42 U.S.C. § 3612(f) and implementing regulations at 24 C.F.R. § 180.710(a). ¹⁵⁹⁷ 42 U.S.C. §§ 3216(m); 24 C.F.R. § 180.715. ¹⁵⁹⁸ 24 C.F.R. §§ 103.500, 103.510.

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Finally, in conjunction with the Civil Rights Division Appellate Section, the Housing and Civil Enforcement Section has responsibility for the enforcement of orders entered by HUD administrative law judges in Fair Housing Act cases, 42 U.S.C. § 3612(j). United States Attorney’s Offices, in coordination with the Housing and Civil Enforcement Section, also have responsibility for seeking collection of monetary judgments, when necessary. The United States Attorney’s Offices also have responsibility for enforcing administrative subpoenas issued by HUD under Section 811 of the Fair Housing Act, 42 U.S.C. § 3611. HUD will either refer these matters directly to the relevant United States Attorney’s Office or to the Housing and Civil Enforcement Section.¹⁵⁹⁹

The Fair Housing Act also includes a criminal provision, Section 901.¹⁶⁰⁰ Section 901 of the Fair Housing Act makes it unlawful for any individual(s), by the use of force or threatened use of force, to intentionally injure, intimidate, or interfere with, any person’s housing rights on the bases of race, national origin, religion, sex, disability or familial status.¹⁶⁰¹ HUD reports that it refers Section 901 complaints to the DOJ, which handles investigations through the FBI and prosecutions through the Criminal Section of the Civil Rights Division at DOJ.¹⁶⁰² DOJ confirms this in its Justice Manual,¹⁶⁰³ and through recently enforcing this section of the FHA in hate crimes cases.¹⁶⁰⁴

- Aggrieved persons or HUD may also file housing complaints under Section 504 of the Rehabilitation Act of 1973 or Title VI of the Civil Rights Acts of 1964, which protect against discrimination on the basis of disability, race, color, and national origin. After a complaint is filed, HUD reports that it conducts an investigation, which may lead to findings of discrimination.¹⁶⁰⁵ The agency then tries to reach a voluntary resolution between parties, but if that is not possible, HUD may pursue enforcement before an ALJ

¹⁵⁹⁹ DOJ Justice Manual, supra note 370, at § 8-2.231(A). ¹⁶⁰⁰ 42 U.S.C. § 3631. ¹⁶⁰¹ Id. ¹⁶⁰² Federal Bureau of Investigation, “What We Investigate,” <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>. ¹⁶⁰³ DOJ Justice Manual, supra note 370, at § 8-3.010 (enforcement of 42 U.S.C. § 3631 (Interference with Fair Housing Activities)). ¹⁶⁰⁴ See e.g., In the Name of Hate, supra note 63, at notes 854 (discussing the DOJ CRT case of United States v. Dennis, 8:16-CR-365 (M.D. Fla. 2015), conviction of defendants who attempted to intimidate their neighbors, an interracial couple, by burning a six-foot cross in their front yard); 857 (discussing United States v. Saucedo, et al., 2:16-CR-0442 (C.D. Ca. 2016), conviction of defendants who attacked the homes of black families with Molotov cocktails); 879 (discussing United States v. Halfin, 4:18-CR-142 (N.D. Tex. 2018), conviction of defendant who threatened force against black family in his apartment complex); 955 (discussing United States v. Howard, 8:18-CR- 51 (M.D. Fla. 2018), conviction of defendants who harassed, threatened and intimidated a Muslim family in attempt to deter them from buying a home in their neighborhood). ¹⁶⁰⁵ Ibid.; but see, Suzy Khimm, Laura Strickler, Hannah Rappleye and Stephanie Gosk, “Under Ben Carson, more families live in HUD housing that fails health and safety inspections,” NBCNews, Nov. 14, 2018, <https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421> (noting that “. . . more failing properties also mean that HUD has a bigger caseload of troubled homes to oversee. And rather than beefing up the department’s staff to oversee them, HUD has lost hundreds of staff members in the wake of a hiring freeze mandated by President Donald Trump. HUD’s enforcement office, tasked with going after the worst landlords, now has the lowest staff levels since 1999, according to a federal watchdog.”)

<https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>

<https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>

<https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421>

<https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421>

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or make a referral to the DOJ who may take additional action.¹⁶⁰⁶ In addition, HUD can initiate suspension or debarment proceedings,¹⁶⁰⁷ or refuse to grant or continue federal financial assistance.¹⁶⁰⁸

Figure 5.4 summarizes FHEO’s complaint and investigation process:

¹⁶⁰⁶ U.S. Dept’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5. ¹⁶⁰⁷ See, e.g., 24 C.F.R. § 8.57(a)(2). ¹⁶⁰⁸ See, e.g., Id. § 1.6(c).

Figure 5.4: FHEO Complaint and Investigation Process

Source: U.S. Dep't of Housing and Urban Development, "Learn About the FHEO Complaint and Investigation Process," https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Overview_of_FHEO's.

In contrast to some other civil rights statutes such as Title VI, 1609 the Fair Housing Act provides a private right of enforcement for protections against discrimination, including claims regarding

1609 Alexander v. Sandoval, 532 U.S. 275 (2001) (only DOJ could enforce disparate impact regulations it promulgated under Title VI).

https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Overview_of_FHEO's

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nonintentional types of prohibited discrimination.1610 This tool has led to a broader range of private claims and private civil rights litigation initiated during times when the federal government has not aggressively enforced such rights, including during recent years.1611 As the Commission has discussed, while private litigation is an important tool, the effective civil rights enforcement work of the federal government is also needed.1612 Table 5.1: Total FHEO Complaints Received, FY 2016 to FY 2018 Number of Complaints Received FY 2016 FY 2017 FY 2018 HUD 1,397 1,342 1,790 FHAP 7,063 6,920 5,991 TOTAL 8,460 8,262 7,781

Source: U.S. Dep't of Housing and Urban Development, Affected Agency Review Response, Jul. 3, 2019.

HUD reported that FHEO closed approximately 48 percent of the total number of complaints for FY 2016–2018 for “no cause,” and closed approximately 30 percent of complaints for those fiscal years due to conciliation or settlements.1613 HUD reported that in FY 2016, it took FHEO 191 days to process and close Title VIII complaints, which rose slightly in FY 2017 and FY 2018 to 202 days and 207 days respectively.1614 In contrast, for complaints filed under other authorities in FY 2016, it took FHEO an average of 464 days to process and close these cases, which decreased to 441 days in FY 2017 and 240 days in FY 2018, as of information reported on June 30, 2018.1615 Bryan Greene noted in his testimony that “[n]otwithstanding declining staff, on average, each year for the last several years, HUD has reduced the amount of time it takes to resolve cases.1616 Additionally, HUD noted that “[l]ikewise, among those cases that had [sic] could have aged beyond 100 days during the fiscal year, each year for the last three years, we are closing a higher percentage of those cases timely.”1617 As noted earlier, FHIP and FHAP agencies process approximately 77 percent of FHEO’s Fair Housing Act complaints.1618 According to HUD’s FY 2016 report submitted to Congress, that year

1610 Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507 (2015); see also infra notes 1706–1734 (discussing disparate impact under the FHA). 1611 See, e.g., Alex Gano, Disparate Impact and Mortgage Lending: A Beginner’s Guide, 88 Univ. Colo. L. Rev. 1109, 1112 (2017), http://lawreview.colorado.edu/wp-content/uploads/2017/05/13-88.4-Gano_Final.pdf; Relman Dane & Colfax, “Cases & Matters,” <https://www.relmanlaw.com/cases>. 1612 USCCR, Minority Voting, supra note 17, at 14. 1613 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatories, “Civil Rights Commission Data updated 6–1–2018.” 1614 Ibid. Although, Bryan Greene’s testimony noted different numbers for the average amount of days it takes FHEO to process fair housing complaints, specifying 247 days in FY 2016, 209 days in FY 2017, and 122 days in 2018, and noting that “[w]hile some of the cases filed in FY 2018 remain open, as the fiscal year just ended September 30, 2018, we expect the final average to still be lower than FY 2017, consistent with a five-year trend.” See Greene Statement, at 1. 1615 Ibid. 1616 Ibid. 1617 Ibid. 1618 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 74.

http://lawreview.colorado.edu/wp-content/uploads/2017/05/13-88.4-Gano_Final.pdf
<https://www.relmanlaw.com/cases>

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there were 1,366 complaints filed with HUD and 7,019 complaints filed with FHAP agencies and 8,385 complaints overall.1619 In FY 2017, the number of complaints filed with both HUD and FHAP decreased slightly to 8,186—there were 6,878 complaints filed with FHAP agencies and 1,308 complaints filed with HUD.1620 While HUD only has the authority to issue a formal charge in federal court through DOJ,1621 HUD does have the authority to initiate complaints on behalf of aggrieved persons or identify a complaint for systemic processing.1622 These complaints can be administratively litigated to judgement before an ALJ, or they can be litigated in federal court by DOJ.1623 Secretary-initiated complaints are an important enforcement tool for HUD. According to Bryan Greene, speaking of HUD FHEO, “one of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people.”1624 In 2002, the Commission recommended that agencies initiate litigation on systemic civil rights issues, reasoning that “[b]ecause few complaints result in litigation, enforcement agencies must have strong litigation strategies.”1625 The Commission’s prior recommendations that were incorporated in 2002 included “stepping up litigation in areas of law that are relatively undeveloped,” and advising agencies “to seek and litigate cases that set legal precedent and mediate other cases.”1626 In March 2018, the New York Times reported that Anna Maria Farias, Assistant Secretary of Fair Housing and Equal Opportunity at HUD, had ordered a hold on approximately half a dozen Secretary-initiated complaints “until further notice.”1627 Some of these halted Secretary-initiated complaints focused on issues of accessibility of residential dwellings; an investigation of a local ordinance in California that could hinder access to group homes for formerly incarcerated individuals; and a high-profile complaint involving advertisers on Facebook having the ability to exclude certain “ethnic affinities,” or specific racial or ethnic groups from viewing ads when social media activities have identified them as black, Hispanic, or Asian persons.1628

1619 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574, at 18. 1620 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 45. 1621 See supra notes 1477–1479. 1622 24 C.F.R. § 103.204–103.205. 1623 See Justice Manual at § 8.22.231.A (“After HUD issues a charge [of FHA violation], the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge, or (2) one of the parties to the administrative charge “elects” to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant.”). 1624 Greene Statement, at 2. 1625 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 38. 1626 Ibid. 1627 Glenn Thrush, “Under Ben Carson, HUD Scales Back Fair Housing Enforcement,” The New York Times, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtref=www.google.com>. 1628 Ibid.

<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtref=www.google.com>
<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtref=www.google.com>

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Concerning the Facebook complaint, private fair housing organizations subsequently filed a lawsuit against Facebook in March 2018,1629 for which DOJ and HUD issued a Statement of Interest filed by the U.S. Attorney for the Southern District of New York in August 2018, advising the federal court that Facebook could be held liable under the FHA if housing providers use its ad targeting functions to illegally discriminate against prospective renters that fall under protected classes.1630 Whereas Facebook argued that it was protected by the Communications Decency Act as it is “merely an interactive computer service,” HUD and DOJ told the federal court that Facebook is an internet service provider, which the Complaint alleges creates and harvests data about the demographic characteristics of “then solicits demographic and other audience preferences from advertisers and implements those preferences using Facebook’s proprietary algorithms to enable advertisers to include some customers and exclude others,” including through housing advertisements.1631 HUD also reopened its Secretary-initiated complaint against Facebook in August 2018.1632 HUD investigated the complaint and charged Facebook with violating the Fair Housing Act “by encouraging, enabling, and causing housing discrimination through the company’s advertising platform.”1633 HUD has noted that “Facebook elected to have the case heard in Federal district court rather than before a HUD Administrative Law Judge,” thus “HUD referred the case to the Department of Justice as required by the Fair Housing Act.”1634 HUD also noted that it “pursued the case even though private organizations settled their complaint with Facebook,” and that its actions “were based on the evidence in its investigation and all applicable law.”1635 It is unclear whether the reopening of this Secretary-initiated complaint was motivated by the high-profile lawsuit brought by the private fair housing organizations. In March 2019, the private fair housing organizations entered into a settlement agreement with Facebook, where Facebook agreed to pay \$1.9 million in damages and expenses to the plaintiffs, and another \$500,000 for advertising on Facebook to promote fair housing and fair lending

1629 Complaint, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>. 1630 Statement of Interest, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>; see also Katie Benner, “Justice Dept. Backs Suit Accusing Facebook of Violating Fair Housing Act,” The New York Times, Aug. 17, 2018, <https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>. 1631 Statement of Interest, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689, 2 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>. 1632 U.S. Dep’t of Hous. and Urban Dev., “HUD Files Housing Discrimination Complaint Against Facebook,” Aug. 17, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085 [hereinafter HUD, “HUD Files Housing Discrimination Complaint Against Facebook”]. 1633 U.S. Dep’t of Hous. and Urban Dev. v. Facebook, FHEO No. 01-18-0323-8, Charge of Discrimination, https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; U.S. Dep’t of Hous. and Urban Dev., “HUD Charges Facebook with Housing Discrimination over Company’s Targeted Advertising Practices,” Mar. 28, 2019, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035. 1634 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1635 Ibid.

<https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>
<https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook-First-Amended-Complaint.pdf>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
<https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>
<https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
<https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085
https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035

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educational programs and services.1636 Facebook will also “undertake far-reaching steps that will prevent discrimination in housing, employment, and credit advertising on Facebook, Instagram, and Messenger demonstrating significant progress and a commitment to advancing civil rights.”1637 The New York Times also published information with regard to another one of the complaints (against Epcor Communities, Inc., and Epcor Communities Franchising, Inc.) that was reportedly halted by FHEO Secretary Farias.1638 Since then HUD has charged Epcor Communities with housing discrimination for “failing to design and construct thirty-two multifamily housing communities throughout Ohio that meet the accessibility requirements of the Fair Housing Act.”1639 With regard to Secretary-initiated complaints, HUD has noted:

HUD takes seriously its authority to issue Secretary-initiated complaints under the Fair Housing Act. These matters often involve significant novel matters of national significance requiring substantial resources to investigate. The significance of these matters cannot be measured by the number of filings alone. During testimony, then General Deputy Assistant Secretary Greene stated that there has been a “sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive.”1640 Greene said he thinks the key is “having staff resources to go in and do quality assurance.”1641

Former FHEO Assistant Secretary Kim Kendrick stated that in retrospect, she wished that when she led FHEO from 2005 through 2009 she had prioritized systemic issues rather than “focusing on the number of complaints that FHEO filed each year.”1642 Kendrick explained that during her tenure, the Mortgage Lending Division was established to examine lending discrimination, which had “small successes that impacted a large number of holders, mortgage holders and applicants.”

1636 Settlement Agreement and Release, National Fair Housing Alliance et al. v. Facebook, Inc., No. 1:18-cv-02689, 2 (S.D.N.Y. 2019), <https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>. 1637 National Fair Housing Alliance, “Civil Rights Advocates Settle Lawsuit with Facebook: Transforms Facebook’s Platform Impacting Millions of Users,” <https://nationalfairhousing.org/facebook-settlement/>. 1638 Glenn Thrush, “Under Ben Carson, HUD Scales Back Fair Housing Enforcement,” The New York Times, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>. 1639 U.S. Dep’t of Hous. and Urban Dev. v. Epcor Communities, Inc., FHEO Nos. 05-12-0068-8 05-13-0010-8, Charge of Discrimination, <https://www.hud.gov/sites/dfiles/FHEO/documents/18ACCESSIBLE%20Epcor%20Charge%20final.pdf>; U.S. Dep’t of Hous. and Urban Dev., “HUD Charges Two Ohio Companies with Discrimination Against Residents with Disabilities,” May 17, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_042. 1640 Greene Testimony, Federal Civil Rights Enforcement Briefing, p. 73. 1641 Ibid. 1642 Kendrick Testimony, Federal Civil Rights Enforcement Briefing, p. 236.

<https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>
<https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>
<https://nationalfairhousing.org/facebook-settlement/>
<https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>
<https://www.hud.gov/sites/dfiles/FHEO/documents/18ACCESSIBLE%20Epcor%20Charge%20final.pdf>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_042

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and noted that “the impact could be felt because discriminatory practices declined.”1643 She explained that FHEO could have had “a greater impact if we directed more resources to divisions such as that, and to impact -- the fair lending investigations could certainly have a greater impact than a few fair housing complaints that have been serviced by -- that could be serviced by other fair housing agencies or even by the private sector.”1644 Testimony during the Commission’s Illinois Advisory Committee briefing on fair housing, in May 2019, highlighted the value of systemic case results when FHEO is able to achieve them. HUD’s Midwest regional director testified regarding what HUD terms a

"cross-programmatic team" investigation, involving FHEO among other HUD programs including the Office of Public Housing and the Office of General Counsel.1645 In 2016 following FHEO findings of racial segregation in housing and race discrimination in employment at the Alexander County public housing authority, among other HUD violations identified, HUD took control of the public housing authority.1646 The regional director testified: "I have been doing fair housing and housing related work for the better part of 40 years, and I can say personally from my own experiences within Alexander County I have never seen housing in the continental United States that compares [as badly] to the housing that people were living in in Alexander County."1647 An Inspector General report also notes about this investigation that "HUD was 'stunned . . . at what we saw, not just in terms of the deplorable living conditions that we encountered but at the poor, even absent record keeping, the staggering backlog of critical repairs, all of this going to the very health and safety of the residents living there' and that these deplorable conditions occurred in "segregated housing" with "broken and outdated appliances and pest infestations in housing developments occupied by African-Americans."1648 The regional director also testified that HUD had taken distressingly long to act: "HUD had been aware of the negative conditions at the housing authority since at least 2010, including the misuse of funds, conflicts of interest, and failures to comply with HUD policies and federal civil rights laws."1649 Only following what the regional director described as "significant findings" regarding race and disability based discrimination, including the maintenance of racially segregated public housing, combined with enforcement authorities from other components within HUD, did HUD ultimately take control of the housing authority in 2016 and tear down two of the public housing developments. HUD explained that it tore down the developments because they "were beyond the point of viability": the "cost of trying to bring those developments back into some sort of condition of habitability would be cost prohibitive."1650 The HUD Inspector General report elaborates that

1643 Ibid., 238. 1644 Ibid., 238. 1645 McGough Testimony, Illinois SAC Fair Housing Briefing, p. 27. 1646 Ibid., 27-29. 1647 Ibid., 26. 1648 U.S. Dep't of Housing and Urban Development, Office of Inspector General, Memorandum Re: Final Evaluation Report – HUD's Oversight of the Alexander County Housing Authority (Jul. 24, 2018), pp. 5, 7, <https://www.hudoig.gov/sites/default/files/documents/2017-OE-0014.pdf> [hereinafter HUD, Memo Re: Oversight of the Alexander County Housing Authority]. 1649 McGough Testimony, Illinois SAC Fair Housing Briefing, p. 26. 1650 Ibid., 29-30.

<https://www.hudoig.gov/sites/default/files/documents/2017-OE-0014.pdf>

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FHEO had issued findings regarding race discrimination in 2014. "FHEO's authorities enable it to act more quickly than other HUD program offices" with the Public Housing Authority "required to review the finding within a 30-day window and enter into a voluntary compliance agreement to remedy the identified negative conditions." Other HUD program offices took more time to resolve the remainder of the cross-programmatic review, taking until 2016 for effective action.1651 Ultimately the Inspector General report notes that "[w]ithout FHEO's involvement, negative conditions at ACHA [the housing authority] may have persisted longer before HUD took it into receivership."1652 Proactive Compliance Evaluation For recipients of federal financial assistance, HUD FHEO engages in periodic compliance reviews,1653 to which it currently devotes about 20 percent of its staffing resources.1654 FHEO can initiate a compliance review for funding recipients as well as some entities that are not recipients of HUD funding, if allegations of relevant statutory violations have been made,1655 based on the information submitted in a complaint or based on FHEO's own choice.1656 Compliance reviews could evaluate nondiscrimination compliance work among 5,000+ public assisted entities (Public Housing Authorities, Community Development Block Grant/HOME recipients, Rental Assistance Demonstration, AFFH, AFH marketing plans, reviews of Demolition/Disposition plans, and site and neighborhood reviews).1657 According to the FY 2017 Annual Report, "In FY 2017, the FHIP program awarded \$38 million in grants to 155 organizations to meet the objectives under one or more of the core program initiatives: enforcing the Fair Housing Act under the Private Enforcement Initiative, educating the public and industry stakeholders on fair housing under the Education and Outreach Initiative, and building organizational capacity under the Fair Housing Organizations Initiative."1658 In contrast, the FY 2017 Annual Report only described one compliance outcome, in which it negotiated a voluntary compliance agreement including a monetary award and rent a Nevada housing authority accountable for violations of Section 504 of the Rehabilitation Act and the FHA, "among the outcomes reached by HUD in FY 2017 under these [compliance] authorities."1659

1651 HUD, Memo Re: Oversight of the Alexander County Housing Authority, supra note 1648, at 11. 1652 Ibid., 12. 1653 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31. 1654 Greene Statement, at 1-2. 1655 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31. 1656 HUD, "Learn About the FHEO Complaint and Investigation Process," supra note 1578. 1657 Greene Statement, at 1-2. 1658 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 12. 1659 Ibid.

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity FHEO has the authority to issue guidance under the statutes it enforces as a tool for enforcement.1660 Sara Pratt, a longtime former career HUD executive testified to the importance of policy guidance as a civil rights enforcement tool during an Illinois Advisory Committee briefing on fair housing in May 2019: "There is a need for strong, consistent guidance, instruction, educational materials that are available consistently nationally" from HUD. She explained HUD "should have fair housing materials up online so anybody doing the work around the country could download them." But, she noted: "I am unaware of any useful civil rights guidance issued in this Administration. This is not political. It's timeframes I'm observing."1661 Bryan Greene also testified to the Commission regarding guidance as one of five current civil rights enforcement priorities for HUD FHEO, underscoring the value of the tool.1662 The Commission's review of HUD's website shows HUD has issued no civil rights guidance since 2016. In FY 2016, however, HUD issued two guidance documents on the following topics:

- Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions1663
- Fair Housing Act Protections for Persons with Limited English Proficiency1664 Also in FY 2016, HUD finalized the following rule:

Guid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act1665

FHEO publicized this guidance and rulemaking in its FY 2016 annual report.1666 Since then, HUD has engaged in other rulemaking and policy initiatives regarding civil rights during FY 2016-2018 which have demonstrated a notable policy shift. For example, in September 2016, HUD published a final rule regarding the rights of transgender persons against discrimination in federally funded emergency shelters.1667 The rule provides that persons must be provided shelter in accordance with their self-described gender identity and provided practical guidance for how to accommodate all

1660 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. 1661 Pratt Testimony, Illinois SAC Fair Housing Briefing, p. 40. 1662 Greene Statement, at 3. 1663 U.S. Dep't of Hous. and Urban Dev., Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF. 1664 U.S. Dep't of Hous. and Urban Dev., Fair Housing Act Protections for Persons with Limited English Proficiency (Sep. 15, 2016), <https://www.hud.gov/sites/documents/LEPMEMO091516.PDF>. 1665 Guid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sep. 14, 2016). 1666 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574. 1667 Equal Access in Accommodation With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sep. 21, 2016).

https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF
<https://www.hud.gov/sites/documents/LEPMEMO091516.PDF>

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persons in shelter safely.1668 Previously, HUD had clarified that rights to freedom from discrimination in housing applied to LGBT communities.1669 In May 2019, one day following Secretary Ben Carson's Congressional testimony stating that he had no plans to modify that rule, HUD published a notice of proposed rulemaking in the federal register, proposing to repeal its prior equal access shelter rule and instead to permit shelters to require facility access based on biological sex.1670 In addition, HUD has acted to clarify civil rights to mortgage lenders who were acting on the administration's other policies. In 2018, federal mortgage lenders reportedly began denying housing applications to recipients of Deferred Action for Childhood Arrivals (DACA),1671 a temporary immigration status extended by the Obama administration, which the Trump administration has opposed.1672 Soon after the reports surfaced, HUD told Congress that its rules requiring lawful immigration status to receive federal mortgage assistance had not changed, stating that "HUD has a longstanding policy regarding eligibility for non-U.S. citizens without lawful status."1673 HUD's letter to Congress clarified that legal permanent residents and nonpermanent residents with lawful status are eligible for federally backed mortgages, and that there had been no change in policy.1674 In contrast, HUD proposed a new rule in May 2019 that aims to limit access to federal public housing to households composed exclusively of U. S. citizens.1675 According to the reports, HUD's own data suggests that as many as 55,000 U.S. citizen children could be rendered homeless by this change in policy because these children and their families now reside in public housing but will be rendered ineligible based on an adult family member's immigration status.1676 Secretary Carson

1668 Ibid. 1669 Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,661 (Feb. 3, 2012). 1670 U.S. Dep't of Hous. and Urban Dev., Revised Requirements Under Community Planning and Development Housing Programs, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>; Tracy Jan, "Proposed HUD rule would strip transgender protections at homeless shelters," The Washington Post, May 22, 2019, https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.8c9f9170263d. 1671 See Ben Lane, "HUD to Lenders: We Are Not Denying Mortgages to DACA Dreamers," Housing Wire, Mar. 7, 2019, <https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers> (discussing reports of lenders denying mortgage assistance to Dreamers, after which HUD clarified that was not its policy). 1672 See infra note 2436 (discussion of DACA litigation in DHS CRCL chapter). 1673 Letter from Len Wolfson, HUD Assistant Secretary for Congressional and Intergovernmental Relations, letter to Senator Robert Menendez (Dec. 21, 2018), <https://www.housingwire.com/ext/resources/files/Editorial/Documents/Menendez-DACA-Final.pdf>. 1674 Ibid. 1675 Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (May 10, 2019); Sylvan Lane, "Carson on HUD eviction plan: 'You take care of your own first,'" The Hill, Mar. 21, 2019, <https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>. 1676 Tracy Jan, "Trump Proposal Would Evict Undocumented Immigrants from Public Housing," The Washington Post, Apr. 18, 2019, https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd083406b80.

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>
https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.8c9f9170263d
https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.8c9f9170263d
<https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers>
<https://www.housingwire.com/ext/resources/files/Editorial/Documents/Menendez-DACA-Final.pdf>
<https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>
<https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>
https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd083406b80
https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd083406b80

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testified that the change is based in "logic" rather than lack of "heart": U.S. resources, he said, should be reserved for citizens.1677 However, it has been reported that local public housing authorities that are charged with enforcing the rule are opposed to it, citing additional financial and administrative strain.1678 Tim Kaiser, the Executive Director of the Public Housing Authorities Directors Association (PHADA) said that "it feels unnecessary, and like they are changing the rules in the middle of the game," and it is "a reinterpretation of a long-standing policy, making families that we are already serving ineligible."1679 John Clarke, President of PHADA, explained that: "Removing a family is not free. It takes staff time. It takes legal resources. Staff will have to sit in court instead of screening families or going over eligibility applications. It doesn't seem like a quality way to maximize the slim resources we do have."1680 Affirmatively Furthering Fair Housing Section 808(d) of the Fair Housing Act mandates that HUD program participants affirmatively further fair housing, and stipulates:

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes. All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.1681

A major goal of the Fair Housing Act, as affirmed by the Supreme Court, is to establish integrated communities.1682 The Fair Housing Act requires recipients of HUD funding to affirmatively further fair housing by taking active steps to assess, remediate, and document the patterns and practices of segregation in their communities.1683 and failure to do so could lead to a loss of federal funding or legal exposure.1684 Formally, this rule required jurisdictions to conduct an analysis of impediments to fair housing and document the analysis and steps taken to eliminate these

1677 Ibid. 1678 Mattie Quinn, "Public Housing Agencies Oppose HUD's Plan to Evict Immigrant Families," Governing, May 21, 2019, <https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>. 1679 Ibid. 1680 Ibid. 1681 42 U.S.C. 3601 § 808(d). 1682 Trafficante v. Metro. Life Ins. Co., 409 U.S. 209 (1972). 1683 Timothy M. Smyth, Michael Allen, and Marisa Schnaith, "The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients," Journal of Affordable Housing, vol. 23, no. 2 (2015), pp. 231-258 [hereinafter Smyth et al., "The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients"]. 1684 Ibid.

<https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>
<https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>

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impediments.1685 The affirmatively furthering fair housing provision has existed since the passing of the Fair Housing Act in 1968.1686 On July 16, 2015, HUD issued the Affirmatively Furthering Fair Housing (AFFH) rule,1687 which clarifies the Fair Housing Act's requirement that HUD programs be implemented in a way that affirmatively furthers the purposes of the Act,1688 and enables HUD program participants to meet "long-standing fair housing obligations in their use of HUD funds."1689 According to HUD, the "new rule will provide communities and local decision-makers with the information, tools, and clear guidance they need to comply with their statutory duty to affirmatively further fair housing."1690 Implementation of the AFFH rule began in 2016, and required jurisdictions to submit an Assessment of Fair Housing (AFH) to HUD, for which HUD created an AFH assessment tool and made data publicly available to help program participants identify and analyze fair housing issues pertaining to patterns of segregation, concentrated poverty among racial and ethnic minorities, disparities in access to opportunity, and disproportionate housing needs.1691 The AFH process also included a review process, where HUD would have 60 days to determine whether the program participant had met all requirements for providing its analysis, assessment, and goal setting.1692 HUD would provide a notification to the program participant within 60 days if the AFH was not accepted, and would provide guidance on how to revise the AFH if it is found that any portion of the AFH is "inconsistent with fair housing or civil rights requirements

or incomplete.”1693 In January 2018, HUD issued a notice postponing the deadline for submission of an AFH by program participants, which noted that “program participants will not be required to submit an AFH using the current Office of Management and Budget (OMB)-approved version of the Assessment of Fair Housing Tool for Local Governments [], but must continue to comply with existing obligations to affirmatively further fair housing.”1694 HUD noted that it “is seeking revisions to the 2015 AFFH rule because there were substantial implementation difficulties with the 2015 AFFH rule,” highlighting that “one estimate found that HUD would need 538 full-time employees to conduct reviews of the 2019 AFFH plans, while HUD would have been able to use

1685 Smyth et al., “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” supra note 1683, at 231-258; 24 C.F.R. §§ 91.225(a) (1), 91.325(a) (1); 24 C.F.R. §§ 570.487(b), 570.601(a) (2). 1686 James A. Kushner, An Unfinished Agenda: The Federal Fair Housing Enforcement Effort, 6 Yale L. & POL’Y REV., 348, 348-60 (1988); U.S. Government Accountability Office, GAO-10-905, Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans, 2010, <http://www.gao.gov/new.items/d10905.pdf> [hereinafter GAO, Housing And Community Grants]; 1687 80 Fed. Reg. 42,271 (Jul. 16, 2015). 1688 Id. 1689 HUD, 2016 Annual Performance Report, supra note 193. 1691 U.S. Dep’t of Hous. and Urban Dev., “AFFH Fact Sheet: The Duty to Affirmatively Further Fair Housing,” <https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>. 1692 U.S. Dep’t of Hous. and Urban Dev., “The Assessment of Fair Housing,” <https://www.hudexchange.info/programs/affh/overview/>. 1693 Ibid. 1694 83 Fed. Reg. 683 (Jan. 5, 2018).

<http://www.gao.gov/new.items/d10905.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>
<https://www.hudexchange.info/programs/affh/overview/>

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as little as just 28 employees for the task.”1695 Subsequently, in September 2018, HUD issued a notice that proposed to rollback the AFFH assessment tool, which indicated:

HUD’s experience over the three years since the newly specified approach was promulgated demonstrates that it is not fulfilling its purpose to be an efficient means for guiding meaningful action by program participants. Accordingly, HUD has determined that a new approach towards AFFH is required. As HUD begins the process of developing a proposed rule to amend the existing AFFH regulations, it is soliciting public comment on changes that will: Minimize regulatory burden while more effectively aiding program participants to plan for fulfilling their obligation to affirmatively further the purposes and policies of the Fair Housing Act; create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics; provide for greater local control and innovation; seek to encourage actions that increase housing choice, including through greater housing supply; and more efficiently utilize HUD resources.1696

Prior to his appointment as HUD Secretary, Carson wrote in 2015 that this rule amounted to a “failed socialist experiment,” and noted that “government-engineered attempts to legislate racial equality create consequences that often make matters worse.”1697 The National Fair Housing Alliance (NFHA) indicated in their 2018 Fair Housing Trends Report that the delay by HUD is “an effective suspension of the rule,” viewing the AFH as the “lynchpin” of the 2015 rule, and noting that by returning to the system of conducting an analysis of impediments, HUD has “returned to a process whose faults and deficiencies are well-documented.”1698 In May 2018, the National Fair Housing Alliance, Texas Appellee, and the Texas Low Income Housing Information Service filed a lawsuit against HUD that requested a federal court to order HUD to reinstate the rule.1699 However in late August 2018, a federal judge dismissed the suit, concluding that the plaintiffs did not prove that they were harmed by HUD’s actions, and noted in the opinion that “HUD’s withdrawal of the tool does not ‘perceptibly impair’ the plaintiffs’ abilities to carry out their missions.”1700

1695 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1696 83 Fed. Reg. 40,713 (Sep. 16, 2018). 1697 Ben S. Carson, “Experimenting with failed socialism again,” The Washington Times, Jul. 23, 2015, <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/>. 1698 National Fair Housing Alliance, Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report, 2018, pp. 35-36, <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>. 1699 Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” Housing Wire, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>. 1700 Memorandum Opinion, National Fair Housing Alliance et al. v. Carson et al., No. 18-1076, 40 (D.D.C. 2018), <https://www.courtlistener.com/recap/gov.uscourts.dcd.196383/gov.uscourts.dcd.196383.47.0.pdf>; Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” Housing Wire, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>.

<https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/>
<https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>
<https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>
<https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>
<https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>
<https://www.courtlistener.com/recap/gov.uscourts.dcd.196383/gov.uscourts.dcd.196383.47.0.pdf>
<https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>
<https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>

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Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation.1701 NFHA states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods.1702 Furthermore, NFHA is concerned that delaying the AFH process will ensure that these systemic issues will continue to go unresolved.1703 At the Commission’s briefing, former Assistant Secretary for Fair Housing and Equal Opportunity during the George W. Bush Administration Kim Kendrick emphasized the importance of public education on this topic, given the absence of enforcement. To Kendrick, the affirmatively furthering fair housing requirement under the Fair Housing Act needs a rule to explain to communities what it means to affirmatively further fair housing, but in the absence of such a rule, “let’s let the communities be better by giving them the tools that they need through education, guidance, policy statements, if we’re not going to have a rule.”1704 The NAACP Legal Defense and Educational Fund stated that HUD’s delay of the Affirmatively Furthering Fair Housing regulation left “local jurisdictions confused, [gave] local residents less voice in important decisions about their communities, and reinstat[ed] an approach to fair housing that the GAO found to be ineffective and poorly administered.”1705 The National Fair Housing Alliance emphasized the signaling effect of the suspension of this rule: “it has sent the message to local governments that HUD will not take seriously the obligation to affirmatively further fair housing as required by the Fair Housing Act.”1706 Disparate Impact: Role of the Federal Government and Private Litigation in Housing Discrimination Cases In June 2018, HUD issued advance notice of proposed rulemaking, inviting public comment on potential amendments to its 2013 final rule that implemented the disparate impact standard.1707 and in August 2019 published a proposed rule amending its 2013 final rule.1708 In its 2018 advance notice, HUD noted that it “seeks to ensure that HUD’s disparate impact rule is consistent with [the

1701 Kriston Capps, “The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation,” CityLab, Jan. 4, 2019, <https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>. 1702 National Fair Housing Alliance, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at attachment 2 [hereinafter National Fair Housing Alliance Statement]. 1703 Ibid. 1704 Kendrick Testimony, Federal Civil Rights Enforcement Briefing, p. 266. 1705 NAACP Legal Defense Fund, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 5 [hereinafter NAACP Legal Defense Fund Statement]; see also GAO, Housing and Community Grants, supra note 1686. 1706 National Fair Housing Alliance Statement, at 2. 1707 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560. 1708 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug. 19, 2019).

<https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>
<https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>

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Supreme Court’s 2015 ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities.”1709 In the August 2019 Proposed Rule, HUD again reiterated that it seeks to align its regulations with the decision in Inclusive Communities, but whether such a change is in fact necessary based on that Supreme Court ruling is contested. The Supreme Court did not rely upon HUD’s disparate impact rule in Inclusive Communities (which held that disparate impact is a viable legal claim, but it must be proven by robust causation) relying instead on the statutory language of the Fair Housing Act.1710 The 2013 Final Rule contained a 3-part burden-shifting mechanism for claims alleging discrimination based on disparate impact. In contrast to claims made based on intent, in a disparate impact claim, proof of discrimination is based on the effects of a policy on particular groups. The 2013 Rule requires the plaintiff (or charging party) to prove “that a challenged practice caused or predictably will cause a discriminatory effect.”1711 If this showing is made, the defendant (or respondent) then has the burden to prove “that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”1712 In response, the plaintiff “may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”1713 In its 2019 proposed rule, HUD proposes changing this burden-shifting framework to adopt a new standard a plaintiff must allege to avoid dismissal of a disparate impact claim.1714 If adopted, under this rule the plaintiff must allege:

- (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
- (2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;
- (3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;
- (4) That the alleged disparity caused by the policy or practice is significant; and

1709 135 S. Ct. 2507 (2015). 1710 Id. at 2523 (“a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that “[f]acial imbalance ... does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 653 (1989).”) 1711 24 C.F.R. § 100.500(c)(1) 1712 Id. § 100.500(c)(2) 1713 Id. § 100.500(c)(3) 1714 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(b)).

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- (5) That there is a direct link between the disparate impact and the complaining party’s alleged injury.1715

These five elements are required as an initial showing, in contrast to the 2013 Rule, which did not contain specific requirements for how a plaintiff would show at the outset that a policy had a discriminatory effect.1716 In addition, the 2019 Rule provides for new, specified defenses against disparate impact claims. A defendant may defeat a claim by showing that “its discretion is materially limited by a third party” such as a legal or other binding requirement.1717 It may also defend the use of an algorithm or other model by showing it has conformed to specific requirements such as third-party validation and that the inputs to the model are not substitutes for protected characteristics.1718 In contrast to the 2013 Rule, the 2019 proposal eliminates the burden on the defendant to prove a challenged practice is necessary to its business. It provides a defendant may rebut a charge that a practice is arbitrary, artificial, and unnecessary “by producing evidence showing that the challenged policy or practice advances a valid interest (or interests).”1719 but does not require proof. In such a case, the plaintiff has the burden to prove “that a less discriminatory policy or practice exists that would serve the defendant’s identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”1720 Further, the updated proposed rule issued on August 19, 2019, states that “neither the discriminatory effect standard, nor any other item in HUD’s part 100 regulations, requires or encourages the collection of data with respect to protected classes and that the absence of such collection will not result in any adverse inference against a party.”1721 In its preamble to the 2019 proposal, HUD notes plaintiffs will have access to discovery when litigating only when they satisfy each of the 5 new elements, and that failure to satisfy any one will result in dismissal of the case (even if the failure to satisfy is due to a lack of data).1722 This requirement includes the showing that the defendant has no valid interest in the policy or practice under challenge, which previously was not the plaintiff’s initial responsibility to show. At the time of this writing, a number of public comments in response to the rule have already been submitted.1723 In public documents surrounding the advance notice of proposed rulemaking, HUD assured the public “it is not contemplating a disparate impact proposed rulemaking to eliminate disparate impact liability,” adding that “[i]n response to HUD’s 2018 Advance Notice of Proposed Rulemaking on disparate impact, many commenters argued that HUD should revisit its rule in

1715 Id. 1716 See 24 C.F.R. § 100.500(c). 1717 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(c)(1)). 1718 Id. (Proposed amendment to 24 C.F.R. § 100.500(c)(2)). 1719 Id. (Proposed amendment to 24 C.F.R. § 100.500(d)(1)(ii)). 1720 Id. 1721 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, § 100.5, Scope (Aug. 19, 2019). 1722 84 Fed. Reg. 42,860. 1723 Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg., 42,854 (Aug. 19, 2019), § 100.5, Scope, .

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light of the analysis provided in Inclusive Communities.”1724 “HUD is reviewing the Disparate Impact Rule to determine what changes, if any, may be necessary” in light of the decision.1725 In response to the 2018 advance notice of proposed rulemaking, more than 1,900 public comments were submitted. Comments included responses from by insurance companies and corporations arguing for less burdensome regulation of disparate impact liability, and that the robust causation rule should be included in the HUD rule. They further argued the burden of proof should be on plaintiffs, rescinding the burden-shifting framework in the 2013 Rule.1726 In addition, the U.S. Department of the Treasury issued a report in October 2017 recommending that HUD reconsider its use of the disparate impact rule that “could also impose unnecessary burdens on insurers and force them to alter practices in a manner that may not be actuarially sound.”1727 Many fair housing advocates also submitted comments to the notice, speaking in favor of retaining the 2013 rule without amendments. Comments arguing against changes to the 2013 rule take the position that nothing in Inclusive Communities requires HUD to change its regulations, as the 2013 Rule was in force at the time of that decision.1728 They also noted the Rule’s burden-shifting framework effectively implemented the Fair Housing Act’s prohibition on discriminatory housing policies, even without a showing of discriminatory intent, as the law requires.1729 The National Low Income Housing Coalition noted, in comments submitted to HUD, that the rule is a “critical tool that people in protected classes use to attempt to secure changes to policies and procedures that subtly discriminate them,” and urged HUD not to amend the rule and “instead engage in robust

1724 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 1725 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560.

1726 See, e.g., Hanover Insurance Company, Comment on the U.S. Dept of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; NJM Insurance Group, Comment on the U.S. Dept of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; International Bancshares Corporation, Comment on the U.S. Dept of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), at 3 (arguing that based on Wards Cove and Inclusive Communities, the burden of proof should be more focused on the plaintiff), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>. 1727 U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities: Asset Management and Insurance, October 2017, p. 110, <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset-Management-Insurance.pdf>. 1728 National Community Reinvestment Coalition, "Disparate Impact Reconsideration Comments," Aug. 20, 2018, <https://www.jdsupra.com/legalnews/17-state-ags-advise-hud-not-to-change-91963/>. 1729 "17 State AGs Advise HUD Not to Change Disparate Impact Rule," JDSUPRA, Sep. 10, 2018, <https://ncrc.org/disparate-impact-reconsideration-comments/>.

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>
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<https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset-Management-Insurance.pdf>
<https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset-Management-Insurance.pdf>
<https://www.jdsupra.com/legalnews/17-state-ags-advise-hud-not-to-change-91963/>
<https://ncrc.org/disparate-impact-reconsideration-comments/>

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enforcement."1730 NAACP LDF also submitted written comments, noting that this rule is crucial for effective civil rights enforcement: "The standards and provisions contained in the Disparate Impact rule protect the rights of individuals in numerous situations and makes significant differences to individuals and communities in life opportunities, public health, intergenerational poverty alleviation, and educational attainment."1731 Additional scholarship on disparate impact liability in housing includes critics who contend that HUD current regulations do not address "actual racial discrimination in housing" and that HUD's time would be better spent combating explicitly discriminatory policies and practices.1732 Supporters of HUD's 2013 disparate impact rule state that discrimination and inequality persist largely due to unconscious bias, and that the disparate impact rule combats discrimination by forcing housing providers to implement the least discriminatory policies possible.1733 Furthermore, supporters of the 2013 disparate impact rule say that discrimination whether explicit or established through evidence of disparate impact end with the same result, reducing equal opportunity for historically marginalized communities.1734 Education and Outreach through FHIP As a formalized component of its FHIP program and as authorized by law,1735 HUD funds education and outreach initiatives.1736 HUD funds local fair housing and other nonprofit organizations through the Education and Outreach Initiative (EOI), which "offers a comprehensive range of support for fair housing activities, providing funding to State and local government agencies and non-profit organizations for initiatives that educate the public and housing providers about equal opportunity in housing and compliance with the fair housing laws."1737 In FY 2016 and FY 2017, HUD awarded \$7.45 million each year to organizations for education and outreach work.1738 No data was provided on HUD's FHIP web page about FY 2018 grant totals.1739

1730 National Low Income Housing Coalition, "Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," Aug. 20, 2018, https://nlihc.org/sites/default/files/images/NLIHC_Comment_Disparate_Impact_ANPR.pdf. 1731 NAACP Legal Defense Fund Statement, at 5. 1732 Roger Clegg, "Disparate Impact' Again — This Time in Housing," National Review, Jan. 2, 2019, <https://www.nationalreview.com/corner/disparate-impact-again-this-time-in-housing/>. 1733 Derek W. Black, "Ensuring racial equality — from classrooms to workplaces — depends on federal regulations Trump could roll back," The Conversation, Mar. 6, 2019, <http://theconversation.com/ensuring-racial-equality-from-classrooms-to-workplaces-depends-on-federal-regulations-trump-could-roll-back-110868>. 1734 See, Serwer, "Trump Is Making It Easier to Get Away With Discrimination," supra note 695. 1735 24 C.F.R. § 125.301. 1736 HUD, "FHIP," supra note 1475. 1737 Ibid. 1738 U.S. Dept of Hous. and Urban Dev., "HUD Awards \$38 Million to Fight Housing Discrimination," Mar. 6, 2018, <https://archives.hud.gov/news/2016/pr16-150.cfm>; U.S. Dept of Hous. and Urban Dev., "HUD Awards \$38 Million to Fight Housing Discrimination," Mar. 6, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004. 1739 See HUD, "FHIP," supra note 1475.

https://nlihc.org/sites/default/files/images/NLIHC_Comment_Disparate_Impact_ANPR.pdf
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<https://archives.hud.gov/news/2016/pr16-150.cfm>
https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004

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Technical Assistance FHEO provides technical assistance to its grantees as required by HUD regulations,1740 and noted in its budget documents that "[i]f the grantee has failed to comply with proper procedures and grant requirements, the Department initially provides technical assistance to correct the error, but if a problem persists, FHEO will withdraw the grant and the organization's funding."1741 As part of its enforcement of the affirmatively furthering fair housing stipulation in the Fair Housing Act and in its efforts to implement the AFFH rule, HUD "plans to provide extensive guidance and training to all program participants and direct Technical Assistance (TA) where needed," and noted that "[d]evelopment of guidance and training materials will begin in fiscal year 2015, but will need to be completed and delivered in fiscal year 2016 and beyond."1742 In FY 2016, FHEO planned to provide AFFH technical assistance to approximately 1,245 Community Planning and Development jurisdictions and over 3,000 Public Housing Agencies with Assessments of Fair Housing (AFH), with the provision of significant technical assistance to approximately 83 Community Planning and Development jurisdictions and 200 Public Housing Agencies to ensure that these entities "are in the best position to submit a successful AFH."1743 In FY 2017 providing technical assistance to ensure effective implementation of its AFFH rule was also a FHEO priority.1744 In FY 2018, AFFH appears to have been deprioritized, as it was not discussed in the FHEO FY 2018 salaries and expenses budget document, however FHEO did indicate that it would continue to provide technical assistance to public housing authorities in advancing its Rental Assistance Demonstration program.1745 And previously, in FY 2017, FHEO provided technical assistance regarding the Fair Housing Accessibility FIRST program regarding FHA's accessible design and construction requirements,1746 and extensive technical assistance, including translation in various languages, to help grantees meet the needs of limited-English proficient customers.1747

1740 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55. 1741 HUD FHEO, Fair Housing Programs 2016 Summary, supra note 1508, at 32-10. 1742 HUD FHEO, Program Office Salaries and Expenses FY 2016, supra note 1508, at 50-2. 1743 Ibid., 50-3. 1744 HUD FHEO, Program Office Salaries and Expenses FY 2017, supra note 1509, at 51-2. 1745 HUD FHEO, Program Office Salaries and Expenses FY 2018, supra note 1510, at 50-4. 1746 HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 23. 1747 Ibid., 6-8.

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Publicity FHEO does publish the outcomes of its enforcement work in its annual reports,1748 posts its enforcement activity on its website,1749 and regularly issues press releases to publicize high-profile cases,1750 particularly for Secretary-initiated complaints.1751 Effectiveness of Interaction and Coordination with External Agencies and Organizations HUD has the legal authority to "seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial institutions" under the Fair Housing Act.1752 In addition to its coordination with state and local agencies and organizations through the FHIP and FHAP programs,1753 HUD has entered into several Memoranda of Understanding (MOU) with both federal agencies and non-government associations.1754 These MOUs include:

- Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations of Complaints that May Violate Both Criminal and Civil Provision of the Fair Housing Act¹⁷⁵⁵
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Consumer Financial Protection Bureau, concerning "the notification and sharing of complaints" and providing "a set of procedures for coordination of FHA and [Equal Credit Opportunity Act] enforcement investigations"¹⁷⁵⁶
- Memorandum of Understanding Between the Department of Agriculture and the Department of Housing and Urban Development, defining "procedures to coordinate the investigation and resolution of complaints alleging violations of the Fair Housing Act"¹⁷⁵⁷

1748 HUD FHEO, Annual Report to Congress FY 2016, supra note 1574, at 10; HUD FHEO, Annual Report to Congress FY 2017, supra note 1574, at 14. 1749 U.S. Dept of Hous. and Urban Dev., "Fair Housing Enforcement Activity," https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement. 1750 U.S. Dept of Hous. and Urban Dev., "Press Releases — 2019," https://www.hud.gov/press/press_releases_media_advisories. 1751 See, e.g., HUD, "HUD Files Housing Discrimination Complaint Against Facebook," supra note 1632. 1752 24 C.F.R. § 103.220. 1753 See supra notes 1537-1559. 1754 U.S. Dept of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 8-9. 1755 Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations and Complaints that May Violate Both Criminal and Civil Provision of the Fair Housing Act (Dec. 7, 1990) (on file). 1756 Memorandum of Understanding Between the Department of Housing and Urban Development and the Consumer Financial Protection Bureau (Sep. 2, 2015) (on file). 1757 Memorandum of Understanding Between the Department of Agriculture and the Department of Housing and Urban Development (on file).

https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement
https://www.hud.gov/press/press_releases_media_advisories

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- Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988¹⁷⁵⁸
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies, establishing "a set of procedures for coordination and cooperation in the investigation of complaints that allege a violation of the Fair Housing Act"¹⁷⁵⁹
- Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing¹⁷⁶⁰
- Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice, promoting "enhanced compliance with the Fair Housing Act ... for the benefit of residents of low-income housing tax credit properties and the general public"¹⁷⁶¹
- Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission¹⁷⁶²
- Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development, establishing "institutional mechanisms for communication, cooperation and joint work on affirmative enforcement of laws prohibiting housing discrimination"¹⁷⁶³
- Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors, pledging "continuing cooperation" and identifying "organizational actions that will further fair housing goals and increase minority homeownership"¹⁷⁶⁴

1758 Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988 (Dec. 7, 1990) (on file). 1759 Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies (on file). 1760 Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing (Jan. 21, 2010) (on file). 1761 Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (August 11, 2000) (on file). 1762 Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission (on file). 1763 Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development (Jun. 11, 1999) (on file). 1764 Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors (on file).

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HUD also participates in several joint task forces and interagency working groups with representatives from DOJ, Consumer Financial Protection Bureau, the Office of the Comptroller of Currency, the Federal Reserve Board, the National Credit Union Association, the Fair Housing Finance Agency, the Federal Trade Commission, the Federal Deposit Insurance Corporation, and others.1765 These joint task forces and interagency working groups work on the topics of discriminatory and predatory lending practices, sexual harassment in housing, and disability policy.1766 As discussed above, HUD engages in a complex process with DOJ in referring complaints as well as subpoenas and requests for civil actions to enforce its decisions, as well as those of administrative law judges.1767 Use of Research, Data Collection, and Reporting HUD has the legal authority to conduct "studies with respect to the nature and extent of

Discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States, and “publish and disseminate reports, recommendations, and information derived from such studies;”1766 to “make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department.”1769 HUD must also annually report to Congress, “specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this subchapter, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action.”1770 HUD indicated in its Interrogatory responses that it does not have a formal data collection process for collecting data on complainants, but does request the following information from complainants: contact information and a relevant basis for a claim.1771 This request includes the protected characteristic on which the complaint is based, for which data may be collected about race, ethnicity, disability, or other protected bases.1772 HUD also acknowledged that it does not disaggregate its data on certain racial or ethnic populations.1773 HUD indicated that for FY 2016 to FY 2018, “policy guidance and procedures for data collection and case management have not changed over the fiscal years in question.”1774 Since January 1, 2003, HUD collects, maintains,

1765 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 9-10. 1766 *Ibid.* 1767 See *supra* notes 1598-99. 1768 42 U.S.C. §§ 3608(e)(1)-3608(e)(2). 1769 *Id.* § 3608(e)(6). 1770 *Id.* §§ 3608(e)(2), 3608(e)(6). 1771 U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 14, at 19. 1772 *Ibid.* 1773 *Ibid.*, 19-20. 1774 *Ibid.*, 20.

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and reports this data in accordance with standards set forth by the Office of Management and Budget.1775 HUD reports that it actively engages in fair housing research, initiated by its Office of Policy Development and Research,1776 and makes publicly available printed and electronic copies of published HUD research.1777 HUD has funded paired testing housing discrimination studies (both national studies and pilot studies in a selection of cities) each decade since the 1970s to examine the extent to which housing discrimination in the rental and sales housing markets affects people of color,1778 people with disabilities,1779 families with children,1780 Housing Choice Voucher

1775 HUD FHEO, Annual Report to Congress FY 2016, *supra* note 1574, at 101; HUD FHEO, Annual Report to Congress FY 2017, *supra* note 1574, at 47. 1776 U.S. Dep’t of Hous. and Urban Dev., “About PD&R,” <https://www.huduser.gov/portal/about/research.html>. 1777 U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Publications,” <https://www.huduser.gov/portal/taxonomy/term/39?page=5>. 1778 Wienk, Ronald E., Clifford E. Reid, John C. Simonson, and Frederick J. Eggers, *Measuring Discrimination in American Housing Markets: The Housing Market Practices Survey*, Washington, DC: U.S. Dep’t of Housing and Urban Development, 1979; Turner, Margery, Raymond Struyk, and John Yinger, *Housing Discrimination Study Synthesis*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev. (1991); Turner, Margery, Stephen Ross, George Galster, and John Yinger, *Discrimination in Metropolitan Housing Markets: Phase 1*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2002, <https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets.PDF>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/64421/1000502-Discrimination-in-Metropolitan-Housing-Markets.pdf>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 3 – Native Americans*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets.PDF>; Margery Austin Turner, Robert Santos, Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Rob Pitingolo, Housing Discrimination Against Racial and Ethnic Minorities 2012, June 2013, https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf. 1779 Diane K. Levy, Margery A. Turner, Rob Santos, Doug Wissoker, Claudia L. Aranda, Rob Pitingolo, and Helen Ho, *Discrimination in the Rental Housing Market Against People Who Are Deaf and People Who Use Wheelchairs: National Study Findings*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2015, http://www.tilrc.org/assets/news/publications/HDS_Disabilities0615.pdf; Joy Hammel, Janet Smith, Susan Scovill, Ron Campbell, and Rui Duan, *Study of Housing Discrimination on the Basis of Mental Disabilities: Final Report*, U.S. Dep’t of Hous. and Urban Dev., August 2017, <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>; Margery Austin Turner, Carla Herbig, Deborah R. Kaye, Julie Fenderson, Diane K. Levy, *Discrimination Against Persons with Disabilities*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2005, <https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>. 1780 Laudan Aron, Claudia Aranda, Douglas Wissoker, Brent Howell, Robert Santos, with Molly Scott and Margery Austin Turner, *Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study*, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>.

<https://www.huduser.gov/portal/about/research.html>
<https://www.huduser.gov/portal/taxonomy/term/39?page=5>
<https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets.PDF>
<https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets.PDF>
<https://www.urban.org/sites/default/files/publication/64421/1000502-Discrimination-in-Metropolitan-Housing-Markets.pdf>
<https://www.urban.org/sites/default/files/publication/64421/1000502-Discrimination-in-Metropolitan-Housing-Markets.pdf>
<https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets.PDF>
<https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets.PDF>
https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf
http://www.tilrc.org/assets/news/publications/HDS_Disabilities0615.pdf
<https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>
<https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>
<https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>
<https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>

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recipients based on source of income,1781 and same sex couples and transgender people.1782 HUD has also funded paired testing research examining lending discrimination,1783 and discrimination in home insurance,1784 and other non-paired testing research.1785 Over the fiscal years in question (FY 2016-2018), HUD has funded over seven fair housing research studies1786 and there have been four national Housing Discrimination Studies released since 1977 (the latest published in 2012).1787

1781 Mary K. Cunningham, Martha M. Galvez, Claudia Aranda, Robert Santos, Douglas A. Wissoker, Alyse D. Oneto, Rob Pitingolo, James Crawford, A Pilot Study of Landlord Acceptance of Housing Choice Vouchers, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., August 2018, <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>. 1782 Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Brent Howell, Rob Pitingolo, Sarale H. Sewell, Robert Santos, A Paired-Testing Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2017, https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf; Samantha Friedman, Angela Reynolds, Susan Scovill, Florence R. Brassier, Ron Campbell, McKenzie Ballou, An Estimate of Housing Discrimination Against Same-Sex Couples, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., June 2013, https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf. 1783 Turner, Margery Austin, Freiberg, Fred, Godfrey, Erin, Herbig, Carla, Levy, Diane K., Smith, Robin Ross, All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., April 2002, <https://www.huduser.gov/portal/publications/hsgfina/aotbe.html>. 1784 Galster, George, Smith, Robin, Wissoker, Douglas, Zimmermann, Wendy, Hartnett, Kara, Testing for Discrimination in Home Insurance, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., May 1998, <https://www.huduser.gov/portal/publications/fairhsg/discrim.html>. 1785 Krysan, Maria, Crowder, Kyle, Scott, Molly M., Hedman, Carl, Adeeyo, Sade, Diby, Somalia, Latham, Sierra, Racial and Ethnic Differences in Housing Search: Final Report, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., May 2018, <https://www.huduser.gov/portal/taxonomy/term/39?page=1>; Santos, Robert, Turner, Margery Austin, Aron, Laudan, Howell, Brent, Future Directions For Research On Discrimination Against Families with Children In Rental Housing Markets, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFutureEssay.pdf>; Miller, Joshua J.Park, Kevin A., Same-Sex Marriage Laws and Demand for Mortgage Credit, February 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/Same-Sex-Marriage-Laws.pdf>; Mitchell, Maxine V., CRE, Miller, Robert E., Brett, Deborah, Kinser, Ralph, Moroney, Ann, Tatian, Peter A., Galvez, Martha, Meixell, Braydon, Daniels, Rebecca, Interface of Mobility and Sustainability: Thompson v. HUD Final Report, Washington, DC: U.S. Dep’t of Hous. and Urban Dev., October 2018, <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Thompson-Report.pdf>. 1786 See *supra* notes 1778-85 (cross referencing to the research presented in the footnotes just above this one); U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Publications,” <https://www.huduser.gov/portal/taxonomy/term/39?page=5>. 1787 “Paired Testing and the Housing Discrimination Studies,” Office of Policy Development and Research, HUD User, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html> (the four studies have been in 1977, 1989, 2000, and 2012. They have increased in scope for each study such that the latest study included testing discrimination against, blacks, Hispanics, Asians, and Native Americans.)

<https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>
<https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>
https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf
https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf
https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf
<https://www.huduser.gov/portal/publications/hsgfina/aotbe.html>
<https://www.huduser.gov/portal/publications/fairhsg/discrim.html>
<https://www.huduser.gov/portal/taxonomy/term/39?page=1>
<https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFutureEssay.pdf>
<https://www.huduser.gov/portal/sites/default/files/pdf/Same-Sex-Marriage-Laws.pdf>
<https://www.huduser.gov/portal/portal/sites/default/files/pdf/Thompson-Report.pdf>
<https://www.huduser.gov/portal/taxonomy/term/39?page=5>
<https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>

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Chapter 6: U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center Legal Authority and Responsibility in 1913, President Taft signed the Organic Act of the Department of Labor that established the U.S. Department of Labor (DOL).1788 The Organic Act provided that the purpose of DOL is “to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”1789 DOL is currently led by Acting Secretary Patrick Pizzella, who took office in July 2019.1790 According to its website, DOL describes its mission as to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”1791 DOL enforces workers’ rights through various components.1792 DOL’s external federal civil rights enforcement has been conducted primarily through the Office of Federal Contract Compliance Programs (OFCCP), which oversees federal contractors,1793 and the Civil Rights Center (CRC), which administers and enforces laws that apply to recipients of federal financial assistance and, for disability-related matters, public entities operating programs and activities related to labor and the workforce.1794 Office of Federal Contract Compliance Programs The Office of Federal Contract Compliance Programs (OFCCP) enforces equal employment opportunity laws that apply to federal contractors and subcontractors, and works to “protect

1788 Organic Act of the Department of Labor, 29 U.S.C. § 551 (1913). 1789 *Id.* 1790 U.S. Dep’t of Labor, “Acting Secretary of Labor Patrick Pizzella,” <https://www.dol.gov/osec>. 1791 U.S. Dep’t of Labor, “About Us,” <https://www.dol.gov/general/aboutdol>. 1792 See, e.g., U.S. Dep’t of Labor, Agencies and Offices, <https://www.dol.gov/general/dol-agencies> (accessed Mar. 31, 2019). At the Commission’s briefing, Atty Burth Lopez of the Mexican American Legal Defense and Educational Fund (MALDEF) testified that:

In the area of employment the Federal Government plays a vital role in protecting health and safety of workers in the workplace. The need for federal enforcement... of OSHA standards is paramount considering that in 2016 there were over 5,000 workplace related deaths and 2.9 million injuries and illnesses on the job. Of these, 900,000 individuals required some time away from the job and 120,000 of those individuals identified as Hispanic or Latino. Yet under the Trump Administration OSHA enforcement has seen an accelerated decline, both in the number of overall enforcement units,... and in the total number of OSHA inspectors[] Lopez Testimony, Federal Civil Rights Enforcement Briefing, pp. 187-188.

1793 See 41 C.F.R. ch. 60. See also *infra* notes 1796-1813 (cross reference to “authority/jurisdiction” section discussing the laws that OFCCP enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1794 See *infra* notes 1813-1842 (cross reference to “authority/jurisdiction” section discussing the laws that CRC enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

<https://www.dol.gov/osec>
<https://www.dol.gov/general/aboutdol>
<https://www.dol.gov/general/dol-agencies>

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workers, promote diversity and enforce the law.” 1795 OFCCP oversees contractors and subcontractors responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity,1796 national origin,1797 disability,1798 or status as a protected veteran.1799 OFCCP enforces these rights under the following:1800

• Executive Order 11,246 of 1965 (Equal Employment Opportunity)1801 • The Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA)1802 • Section 503 of the Rehabilitation Act of 19731803

President Johnson signed Executive Order 11,246 in September 1965. As amended, regarding external civil rights enforcement, Executive Order 11,246 requires that an equal opportunity clause be included in each covered government contract and subcontract, including the following:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.1804

1795 See U.S. Dep’t of Labor, “About OFCCP,” <https://www.dol.gov/ofccp/aboutof.html>. See also Further Amendments to Executive Order 11,476, Equal Employment Opportunity in the Federal Government, and Executive Order 11246,

Equal Employment Opportunity, Exec. Order No. 13,672, Fed. Reg. 42,971 (Jul. 27, 2014) (substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin” in several places in the executive order to “provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity”). 1796 Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1; 41 C.F.R. § 60-20.1. 1797 Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1. 1798 29 U.S.C. 793(a); Pub. L. 101-336 (July 26, 1990), as amended by Pub. L. 110-325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1. 1799 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a). 1800 U.S. Dep’t of Labor, Response to USCCR Document Request No. 1, p. 1. 1801 Exec. Order No. 11,246, 30 Fed. Reg. 12,319 and implementing regulations at 41 C.F.R. §§ 60-1 – 60-50. See also Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,933 (Sep. 11, 2015); 41 C.F.R. § 60-1; Discrimination on the Basis of Sex, final rule, 41 C.F.R. § 60-20. 1802 38 U.S.C. § 4212 and implementing regulations at 41 C.F.R. § 60-300. 1803 29 U.S.C. § 793 and implementing regulations at 41 C.F.R. § 60-741. 1804 Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(1).

<https://www.dol.gov/ofccp/aboutofccp.html>

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As per DOL regulations, the head of OFCCP has been delegated authority and has the responsibility to carry out “the responsibilities assigned to the Secretary under [Executive Order 11,246].” 1805 OFCCP’s regulations implementing Executive Order 11,246’s prohibition on sex discrimination define “sex” to include pregnancy, childbirth, and related medical conditions; gender identity; transgender status; and sex stereotyping. 1806 The regulations expressly prohibit, and provide examples illustrating, both disparate treatment discrimination¹⁸⁰⁷ and disparate impact discrimination.¹⁸⁰⁸ They also prohibit harassment on the basis of sex, which the relevant regulation defines to include “sexual harassment (including sexual harassment based on gender identity or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.”¹⁸⁰⁹ By prohibiting harassing conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment,” on the basis of sex, the agency’s hostile work environment regulations also prohibit both intentional discrimination as well as conduct that results in certain discriminatory impacts.¹⁸¹⁰ As noted above, OFCCP also enforces Section 503, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding individuals with disabilities, 1811 and VEVRAA, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding covered veterans (disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces Service Medal veterans).¹⁸¹² Civil Rights Center The CRC has both internal and external enforcement functions. This combining of functions is contrary to the Commission’s 2002 recommendation that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions.”¹⁸¹³ During fiscal years 2016 through 2018, up until August 2018, CRC had three programmatic offices in total, two of which handled external civil rights enforcement: the Office of External Enforcement (OEE),

1805 41 C.F.R. § 60-1.2. Note that the text of OFCCP’s regulations refers to the Deputy Assistant Secretary of Labor as the head of OFCCP, but this reference is obsolete. In 2009, the Department of Labor abolished the Employment Standards Administration (ESA), of which OFCCP was a subcomponent; following this change, OFCCP and the other subcomponents became stand-alone programs. See Delegation of Authority and Assignment of Responsibilities to the Director, Office of Federal Contract Compliance Programs, 74 Fed. Reg. 58,634 (Nov. 13, 2009). 1806 41 C.F.R. § 60-20.2(a). 1807 Id. § 60-20.2(b). 1808 Id. § 60-20.2(c). 1809 Id. § 60-20.8. 1810 Id. § 60 – 20.8(a)(3)(emphasis added). 1811 29 U.S.C. 793(a); Pub. L. 101-336 (July 26, 1990), as amended by Pub. L. 110-325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1. 1812 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a). 1813 USCCR, Ten-Year Check-up: Vol. 1, supra note 1, at 47.

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and the Office of Compliance and Policy (OCAP).¹⁸¹⁴ DOL reported that OEE underwent a reorganization in August 2018, and the responsibilities of OCAP and OEE were combined under the current “Office of External Enforcement” (OEE).¹⁸¹⁵ OEE is still part of CRC (and CRC still has some internal enforcement responsibilities through its Office of Internal Enforcement).¹⁸¹⁶ See Figure 6.3, CRC Organizational Chart. The laws that CRC’s external program enforces generally protect against discrimination on the bases of race, color, national origin (including “limited English proficiency”),¹⁸¹⁷ religion (including “failure to accommodate”),¹⁸¹⁸ sex (including “pregnancy and gender identity”),¹⁸¹⁹ age,¹⁸²⁰ disability (including “failure to provide accessible facilities, accommodations or modifications, or equally effective communications”),¹⁸²¹ and political affiliation or belief.¹⁸²² Some programs or activities also prohibit discrimination based on citizenship status or participation in a program/activity that receives Workforce Innovation and Opportunity Act (WIOA) Title I or Workforce Investment Act (WIA) Title I financial assistance.¹⁸²³ DOL’s website describes the mission of the Civil Rights Center (CRC) as “to promote justice and equal opportunity by acting with impartiality and integrity in administering and enforcing various civil rights laws.”¹⁸²⁴ The website states that these laws specifically protect “[i]ndividuals who apply to, participate in, work for, or come into contact with programs and activities that are conducted by or receive financial assistance from DOL, or, under certain circumstances, from other Federal agencies.”¹⁸²⁵ For disability-related matters, CRC also has jurisdiction over public entities’ operating programs and activities related to labor and the workforce.¹⁸²⁶ CRC reportedly carries out its mission by “investigating and adjudicating discrimination complaints, conducting

1814 See U.S. Dep’t of Labor, “Civil Rights Center (CRC),” <https://www.dol.gov/oasam/programs/crc/about-crc.htm>. See also U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file) (noting that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title). 1815 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1816 U.S. Dep’t of Labor, “Internal Enforcement,” <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>. 1817 29 C.F.R. § 31.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (Jun. 23, 2000); Exec. Order No. 13,166, 65 Fed. Reg. 50,121; U.S. Dep’t of Labor, “Civil Rights Center: Mission Statement,” <https://www.dol.gov/oasam/programs/crc/mission.htm> [hereinafter DOL, “CRC Mission Statement”]. 1818 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1819 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1820 29 C.F.R. §§ 35.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1821 29 C.F.R. §§ 32.1, 33.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1822 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” supra note 1817. 1823 DOL, “CRC Mission Statement,” <https://www.dol.gov/oasam/programs/crc/mission.htm>. 1824 Ibid. 1825 Ibid. 1826 Ibid.

<https://www.dol.gov/oasam/programs/crc/about-crc.htm>
<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>
<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>
<https://www.dol.gov/oasam/programs/crc/mission.htm>
<https://www.dol.gov/oasam/programs/crc/mission.htm>

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compliance reviews, providing technical assistance and training, and developing and publishing civil rights regulations, policies, and guidance.”¹⁸²⁷ The Office of External Enforcement (OEE) reportedly:

[S]upports CRC’s responsibility to administer and enforce the laws that apply to recipients of financial assistance under Title I of the Workforce Innovation and Opportunity Act and its predecessor, the Workforce Investment Act (WIA); American Job Center partners listed in WIOA/WIA Section 121(b) that offer programs or activities through the workforce development system; State and local governments and other public entities operating programs and activities related to labor and the workforce; and any recipients of financial assistance from, or programs conducted by, DOL that are not included in the categories above.¹⁸²⁸

OEE processes, investigates and adjudicates complaints that allege discrimination on any of the bases prohibited by the laws that it enforces,¹⁸²⁹ or that allege retaliation against anyone who engages in activity protected by those laws.¹⁸³⁰ As discussed above, DOL informed the Commission that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title.¹⁸³¹ However, during most of the period covered by this report, CRC’s OCAP conducted compliance reviews,¹⁸³² developed regulations,¹⁸³³ reviewed proposed legislation and provided training and technical assistance.¹⁸³⁴ OEE (now including the former OCAP), currently enforces the following laws and executive orders:

- Section 188 of the Workforce Innovation and Opportunity Act and its predecessor, Section 188 of the Workforce Investment Act of 1998, as amended¹⁸³⁵

- Title VI of the Civil Rights Act of 1964, as amended¹⁸³⁶ • Sections 504 and 508 of the Rehabilitation Act of 1973, as amended¹⁸³⁷ • Age Discrimination Act of 1975, as amended¹⁸³⁸ • Title IX of the Education Amendments of 1972, as amended¹⁸³⁹

1827 Ibid. 1828 Ibid. 1829 29 C.F.R. §§ 31.7-31.12, 32 Subpart D, 33.12-33.13, 35 Subpart D, 36.605, 37 Subpart D, 38 Subpart D. 1830 29 C.F.R. §§ 31.7(e), 32.45(g), 33.13, 35.35, 36.605, 37.11, 38.19; U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 9. 1831 U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1832 29 C.F.R. §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations). 1833 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations). 1834 29 C.F.R. § 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1835 29 U.S.C. 3248 § 188 and implementing regulations at 29 CFR pts. 37 and 38. 1836 42 U.S.C. 42 U.S.C. § 2000d-2000d-4 and implementing regulations at 29 C.F.R. pt. 31. 1837 29 U.S.C. § 794; 29 U.S.C. § 794(d) and implementing regulations at 29 CFR pts. 32 and 33. 1838 42 U.S.C. §§ 6101-6107 and implementing regulations at 29 C.F.R. pt. 35. 1839 20 U.S.C. §§ 1681-1688 and implementing regulations at 29 C.F.R. pt. 36.

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- Title II, Subpart A of the Americans with Disabilities Act of 1990, as amended¹⁸⁴⁰ • Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs¹⁸⁴¹

- Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency¹⁸⁴²

Enforcement Tools OFCCP The agency enforcement tools OFCCP has specific legal authority to use are:

- Complaint Resolution¹⁸⁴³ • Agency-Initiated Charges¹⁸⁴⁴ • Proactive Compliance Evaluations¹⁸⁴⁵ • Issuance of Regulations¹⁸⁴⁶ • Collaboration/partnership with other federal agencies¹⁸⁴⁷ • Strategic Plan¹⁸⁴⁸ • Annual Reports¹⁸⁴⁹

While DOL OFCCP does not have specific legal authority for other tools identified by the Commission, nothing prohibits DOL OFCCP from engaging in, for example, issuing guidance, providing technical assistance, and conducting outreach to regulated communities, as described in further detail below. CRC The agency enforcement tools CRC has specific legal authority to use are:

- Complaint Resolution¹⁸⁵⁰

1840 42 U.S.C. § 12131-12134 and implementing regulations at 28 C.F.R. pt. 35. 1841 Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 1842 Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 1843 41 C.F.R. §§ 60-1.21 – 60-1.24, 60-30.5, 60-50.4, 60-300.61, 60-741.61, 60-742.4 – 60-742.6. 1844 Id. § 60-1.26(a) (“Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings”). 1845 Id. §§ 60-1.20 – 60-1.35, 60-50.4, 60-300.60, 60-741.60; Dep’t of Labor, “About OFCCP: Enforcement Procedures,” <https://www.dol.gov/ofccp/aboutofccp.html>. 1846 41 C.F.R. §§ 60-1, 60-20, 60-30, 60-50, 60-300, 60-741, 60-742 passim. 1847 Id. §§ 60-1.24(a), 60-50.4, 60-742.2, 60-742.5, 60-742.6. 1848 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1849 29 U.S.C. § 560. 1850 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85.

<https://www.dol.gov/ofccp/aboutofccp.html>

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- Agency-Initiated Charges¹⁸⁵¹ • Proactive Compliance Evaluations¹⁸⁵² • Issuance of Guidance¹⁸⁵³ • Issuance of Regulations¹⁸⁵⁴ • Technical assistance¹⁸⁵⁵ • Data collection, research and reporting¹⁸⁵⁶ • Publicity¹⁸⁵⁷ • Outreach to stakeholders¹⁸⁵⁸ • Collaboration/partnership with state/local agencies¹⁸⁵⁹ • Collaboration/partnership with other federal agencies¹⁸⁶⁰ • Strategic Plan¹⁸⁶¹ • Annual Reports¹⁸⁶²

Budget and Staffing OFCCP OFCCP is currently led by Director Craig E. Leen.¹⁸⁶³ Ondray T. Harris, who was the former Director of OFCCP, vacated the position in July 2018.¹⁸⁶⁴ Figure 6.1 displays OFCCP’s organizational structure:

1851 Id. § 31.7(a) and (c). 1852 Id. §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations). 1853 Id. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1854 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations). 1855 29 C.F.R. § 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605. 1856 28 C.F.R. § 42.406. 1857 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 1858 29 C.F.R. § 33.11. 1859 Id. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”). 1860 28 C.F.R. § 42.413. 1861 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 1862 29 U.S.C. § 560. 1863 U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofccpchart.htm> [hereinafter DOL OFCCP, “Organization Chart”]. 1864 Paige Smith and Ben Penn, “Head of Federal Contractor Watchdog Office Stepping Down,” Bloomberg News, Jul. 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>.

<https://www.dol.gov/ofccp/about/ofccpchart.htm>
<https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>
<https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>

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Figure 6.1: OFCCP Organizational Chart

Source: U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofccpchart.htm>.

- Division of Program Operations • Division of Policy and Program Development • Division of Management and Administration Programs

In addition, OFCCP oversees the operations of its six regions nationwide, which include Mid- Atlantic, Midwest, Northeast, Pacific, Southeast, and Southwest and Rocky Mountain (SWARM).¹⁸⁶⁵

1865 DOL OFCCP, “Organization Chart,” supra note 1863.

<https://www.dol.gov/ofccp/about/ofcpchrt.htm>

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In FY 2016, OFCCP had 581 FTEs.¹⁸⁶⁶ This number slightly decreased to 563 FTEs in FY 2017,¹⁸⁶⁷ and decreased further to 508 FTEs in FY 2018.¹⁸⁶⁸ Figure 6.2 displays OFCCP’s requested and allocated budgets for FY 2016 to FY 2018. Figure 6.2: Requested and Allocated Budgets for OFCCP

Source: U.S. Dep’t of Labor, FY 2016 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>; U.S. Dep’t of Labor, FY 2017 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>; U.S. Dep’t of Labor, FY 2018 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2018/CBJ-2018-V2-10.pdf>; U.S. Dep’t of Labor, FY 2019 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf>; U.S. Dep’t of Labor, FY 2020 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>.

OFCCP requested a total budget of \$113.68 million in FY 2016.¹⁸⁶⁹ This requested amount increased slightly in FY 2017 to \$114.17 million,¹⁸⁷⁰ but sharply decreased in FY 2018 to only

\$68.0 million.¹⁸⁷¹ However, OFCCP’s allocated amounts have much less significantly declined between FY 2016 and FY 2018. In FY 2016, Congress appropriated to OFCCP \$105.48 million,¹⁸⁷² which declined to \$104.47 million in FY 2017,¹⁸⁷³ and \$103.48 million in FY 2018.¹⁸⁷⁴ In FY 2016, the U.S. Department of Labor indicated that the FY 2017 budget request for OFCCP would be an increase from its prior request, to create two Skilled Resource Centers and facilitate the continued modernization of its core Case Management System.¹⁸⁷⁵ The budget explained that this increase would allow OFCCP to “better align its investigative skills trainings for existing and new compliance officers with geographically concentrated business sector industries,” and “take proactive cost saving steps to reduce its existing footprint of leased office space, support more quality and timely enforcement efforts, and ultimately benefit the countless victims of discrimination.”¹⁸⁷⁶ In FY 2018, the U.S. Department of Labor proposed a sharp decrease in OFCCP staff, requesting only 440 FTEs¹⁸⁷⁷ down from 563 FTEs employed in FY 2017. OFCCP also indicated that it would decrease the number of field office locations as well, which is in direct alignment with the funding reduction.¹⁸⁷⁸ Director of OFCCP Craig Leen stated in his testimony before the Commission that he expects that OFCCP would still be able to fulfill its enforcement responsibilities, even with a substantially reduced staff due to specific management plans Leen has implemented.¹⁸⁷⁹ These plans include the Affirmative Action Program Verification Initiative where government contractors will be required to certify annually that they have an affirmative action program, discussed in further detail below.¹⁸⁸⁰ Leen testified that OFCCP will audit companies that do not certify that they have such a program.¹⁸⁸¹ Additionally, OFCCP will implement focused reviews,¹⁸⁸² where OFCCP’s review will be restricted to one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices. For example, Section 503 focused reviews will include a comprehensive review of the contractor

\$113,687,000 \$114,169,000

\$88,000,000

\$105,476,000 \$104,476,000 \$103,476,000

\$0

\$20,000,000

\$40,000,000

\$60,000,000

\$80,000,000

\$100,000,000

\$120,000,000

FY 2016 FY 2017 FY 2018

Figure 6.2: Requested and Allocated Budgets for OFCCP FY 2016 to FY 2018

Requested Allocated

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2018-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/FY2020BIB.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>

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\$88.0 million.¹⁸⁷¹ However, OFCCP’s allocated amounts have much less significantly declined between FY 2016 and FY 2018. In FY 2016, Congress appropriated to OFCCP \$105.48 million,¹⁸⁷² which declined to \$104.47 million in FY 2017,¹⁸⁷³ and \$103.48 million in FY 2018.¹⁸⁷⁴ In FY 2016, the U.S. Department of Labor indicated that the FY 2017 budget request for OFCCP would be an increase from its prior request, to create two Skilled Resource Centers and facilitate the continued modernization of its core Case Management System.¹⁸⁷⁵ The budget explained that this increase would allow OFCCP to “better align its investigative skills trainings for existing and new compliance officers with geographically concentrated business sector industries,” and “take proactive cost saving steps to reduce its existing footprint of leased office space, support more quality and timely enforcement efforts, and ultimately benefit the countless victims of discrimination.”¹⁸⁷⁶ In FY 2018, the U.S. Department of Labor proposed a sharp decrease in OFCCP staff, requesting only 440 FTEs¹⁸⁷⁷ down from 563 FTEs employed in FY 2017. OFCCP also indicated that it would decrease the number of field office locations as well, which is in direct alignment with the funding reduction.¹⁸⁷⁸ Director of OFCCP Craig Leen stated in his testimony before the Commission that he expects that OFCCP would still be able to fulfill its enforcement responsibilities, even with a substantially reduced staff due to specific management plans Leen has implemented.¹⁸⁷⁹ These plans include the Affirmative Action Program Verification Initiative where government contractors will be required to certify annually that they have an affirmative action program, discussed in further detail below.¹⁸⁸⁰ Leen testified that OFCCP will audit companies that do not certify that they have such a program.¹⁸⁸¹ Additionally, OFCCP will implement focused reviews,¹⁸⁸² where OFCCP’s review will be restricted to one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices. For example, Section 503 focused reviews will include a comprehensive review of the contractor

1871 U.S. Dep’t of Labor, FY 2018 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>. 1872 Ibid. 1873 U.S. Dep’t of Labor, FY 2019 Congressional Budget Justification Office of Federal Contract Compliance, p. 8, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>. 1874 U.S. Dep’t of Labor, FY 2020 Congressional Budget Justification Office of Federal Contract Compliance, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>. 1875 U.S. Dep’t of Labor, FY 2017 Department of Labor Budget in Brief, p. 37, https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf [hereinafter DOL, FY 2017 Budget in Brief]. 1876 Ibid. 1877 DOL, FY 2018 Budget in Brief, supra note 1866, at 26. 1878 Ibid. 1879 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-24. 1880 Ibid., 24-25. 1881 Ibid., 25. 1882 See 41 C.F.R. §§ 60-1.20(a)(4), 60-300.60(a)(4), and 60-741.60(a)(4); see also U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-04 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_04.html [hereinafter DOL OFCCP, Directive 2018- 04]; see also infra notes 1977, 1981-1985 (discussing focused reviews).

<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/CBJ-2020-V2-10.pdf>

https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf

https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_04.html

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policies and procedures as they relate solely to Section 503, which requires that contractors meet specific affirmative action and nondiscrimination obligations for people with disabilities.¹⁸⁸³ CRC is a center within the Office of the Assistant Secretary for Administration and Management (OASAM). OASAM “provides leadership and foundation for effective business operations and procurement; performance budgeting; information technology solutions; human resources and civil rights; security and emergency management; environmental sustainability; and long-term planning with a focus on results so that DOL accomplishes its mission on behalf of America’s workers,”¹⁸⁸⁴ CRC is led by its Director, Naomi Barry-Perez. Lee Perselay is the Chief of the Office of External Enforcement.¹⁸⁸⁵ See Figure 6.3.

1883 U.S. Dep’t of Labor, OFCCP, “Focused Review Frequently Asked Questions,” <https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm>. 1884 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3. 1885 U.S. Dep’t of Labor, Civil Rights Center, “Organization Chart,” <https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart> [DOL CRC, “Organization Chart”].

<https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm>

<https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart>

<https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart>

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Figure 6.3: CRC Organizational Chart

Source: U.S. Dep’t of Labor, “Civil Rights Center Organization Chart,” <https://www.dol.gov/oasam/programs/crc/orgchart.htm> (accessed Jul. 31, 2019)

In FY 2018, CRC had a total of 14 FTE staff members who worked on civil rights enforcement, up from a total of 13 FTEs in FY 2017 and FY 2016.¹⁸⁸⁶ CRC has not utilized any contractors to support its external enforcement work during the fiscal years in question.¹⁸⁸⁷ Over the fiscal years in question, CRC reports that approximately 50 percent of the Director’s time was spent on external civil rights enforcement.¹⁸⁸⁸ CRC also indicated that due to current budget levels, it has “back- filled more senior level positions with entry level positions when they were vacated and has cross- trained/rotated staff from other divisions to assist in enforcement activities.”¹⁸⁸⁹

1886 U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 8, at 7-8. 1887 Ibid. 1888 Ibid. 1889 Ibid.

<https://www.dol.gov/oasam/programs/crc/orgchart.htm>

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In FY 2016, the requested budget for CRC’s operations was \$7.99 million.¹⁸⁹⁰ This request slightly increased to \$8.04 million in FY 2017¹⁸⁹¹ and sharply decreased in FY 2018 to \$6.67 million.¹⁸⁹² Over FY 2016 to FY 2018, the allocated budget for CRC remained flat at \$6.8 million, but it was higher than the low amount requested for FY 2018.¹⁸⁹³ See Figure 6.4. Figure 6.4: Requested and Allocated Budgets for CRC

Source: U.S. Dep’t of Labor, FY 2016 Budget in Brief, p. 63, <https://www.dol.gov/sites/default/files/documents/general/budget/2016/FY2016BIB.pdf>; U.S. Dep’t of Labor, FY 2017 Budget in Brief, p. 51, https://www.dol.gov/sites/default/files/documents/general/budget/FY2017BIB_0.pdf; U.S. Dep’t of Labor, FY 2018 Budget in Brief, p. 32, <https://www.dol.gov/sites/default/files/FY2018BIB.pdf>; U.S. Dep’t of Labor, FY 2019 Budget in Brief, p. 33, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2019/FY2019BIB.pdf>; FY 2020 Budget in Brief, p. 36, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2020/FY2020BIB.pdf>.

Approximately 65 percent of CRC's allocated funding covers personnel, and of that 65 percent, 35-40 percent has been allocated to staffing both OCAP and OEE (for its External Enforcement Program).¹⁸⁹⁴ In FY 2016, approximately \$1.19 million was allocated for staffing, processing, and responding to civil rights complaints, which decreased to \$1.08 million in FY 2017 and \$1.06 million in FY 2018.¹⁸⁹⁵ This equates to approximately 72 percent, 66 percent, and 53 percent of the total budget for staffing the External Enforcement Program, respectively.¹⁸⁹⁶ Additionally in FY 2016, \$465,259 was allocated to staffing for compliance reviews, which steadily increased to \$558,963 in FY 2017 and \$940,506 in FY 2018.¹⁸⁹⁷ This equates to 28

¹⁸⁹⁰ U.S. Dep't of Labor, FY 2016 Department of Labor Budget in Brief, p. 63, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/FY2016BIB.pdf>. ¹⁸⁹¹ DOL, FY 2017 Budget in Brief, supra note 1875, at 51. ¹⁸⁹² DOL, FY 2018 Budget in Brief, supra note 1866, at 33. ¹⁸⁹³ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 9, at 9. ¹⁸⁹⁴ Ibid. ¹⁸⁹⁵ Ibid. ¹⁸⁹⁶ Ibid., 9-10. ¹⁸⁹⁷ Ibid.

\$7,996,000 \$6,041,000

\$6,867,000 \$6,880,000 \$6,880,000 \$6,880,000

\$6,200,000

\$6,400,000

\$6,600,000

\$6,800,000

\$7,000,000

\$7,200,000

\$7,400,000

\$7,600,000

\$7,800,000

\$8,000,000

\$8,200,000

FY 2016 FY 2017 FY 2018

Figure 6.4: Requested and Allocated Budgets for CRC FY 2016 to FY 2018

Requested Allocated

<https://www.dol.gov/sites/default/files/documents/general/budget/2016/FY2016BIB.pdf>
<https://www.dol.gov/sites/default/files/FY2018BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>
<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/FY2016BIB.pdf>

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percent, 34 percent, and 46 percent of the total budget for staffing the External Enforcement Program, respectively.¹⁸⁹⁸ See Figure 6.5. Figure 6.5: Staffing Budgets for Complaint and Compliance Review Processing

Source: U.S. Dep't of Labor, Civil Rights Center, Response to Interrogatory No. 9, p. 9.

CRC has noted that while its allocated budget has remained constant, its overall workload has increased due to:

[W]ork needed to effectively and efficiently implement the nondiscrimination and equal opportunity provisions of Section 188 of WIOA; mitigate the effects of attrition by back-filling more senior level positions with lower-graded/entry level positions and cross training staff from other divisions to assist in enforcement efforts; and absorb career ladder promotions and rental, salary/cost of living, quality step, and within-grade increases.¹⁸⁹⁹

CRC indicated that it has prioritized case processing efficiency, and implementation of Section 188 of WIOA.¹⁹⁰⁰

¹⁸⁹⁸ Ibid. ¹⁸⁹⁹ Ibid., 10. ¹⁹⁰⁰ Ibid., 10.

\$1,198,942 \$1,086,497 \$1,064,413

\$465,259 \$558,963

\$940,506

\$0

\$200,000

\$400,000

\$600,000

\$800,000

\$1,000,000

\$1,200,000

\$1,400,000

FY 2016 FY 2017 FY 2018

Figure 6.5: Staffing Budgets for Complaint and Compliance Review Processing

FY 2016 to FY 2018

Complaints Compliance Reviews

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Assessment Prioritization of Civil Rights Agency-Wide The Director of OFCCP reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary.¹⁹⁰¹ CRC is housed within the Office of the Assistant Secretary for Administration and Management, for which the Assistant Secretary reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary. ¹⁹⁰² Neither of these offices has a direct line of authority to the agency head, which the Commission has recommended to ensure prioritization of civil rights enforcement.¹⁹⁰³ Proposed Merger with EEOC In May 2017, the Trump Administration proposed merging OFCCP into EEOC as a way to promote government efficiency.¹⁹⁰⁴ This proposed move drew criticism that it would blunt OFCCP's work independently evaluating compliance with civil rights laws through proactive evaluation and reduce its focus on evaluating affirmative action plans.¹⁹⁰⁵ Congress rejected the proposal during the FY 2018 budget process, when it once again appropriated for OFCCP separate from EEOC.¹⁹⁰⁶ The FY 2019 budget request abandoned this plan,¹⁹⁰⁷ although DOL asked for a program decrease of \$12.66 million for OFCCP and eliminated other programs with civil rights implications by zeroing out requests for training and employment services for Indians and Native Americans and for Migrant and Seasonal Workers;¹⁹⁰⁸ however the 2019 budget continues separate funding for OFCCP.¹⁹⁰⁹

¹⁹⁰¹ U.S. Dep't of Labor, "Organizational Chart," <https://www.dol.gov/general/aboutdol/orgchart>. ¹⁹⁰² DOL CRC, "Organization Chart," supra note 1885. ¹⁹⁰³ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. ¹⁹⁰⁴ DOL, FY 2018 Budget in Brief, supra note 1866, at 3 and 26. ¹⁹⁰⁵ Jay-Anne B. Casuga and Kevin McGowan, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," Bloomberg, May 22, 2017, <https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eooc-contracting-watchdog-not-well-received> (accessed Aug. 15, 2019) [hereinafter Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received"]. ¹⁹⁰⁶ Jay-Anne B. Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog," Bloomberg, Sep. 7, 2017, <https://www.bna.com/senate-funding-bill-n73014464290/> (accessed Dec. 19, 2018) [hereinafter Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog"]. ¹⁹⁰⁷ Mike Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding; Includes Call for Paid Leave and Mandatory E-Verify," NT Lakis, Feb. 16, 2018, <http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeooc-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/> (accessed Aug. 15, 2019) [hereinafter Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding"]. ¹⁹⁰⁸ DOL, FY 2019 Budget in Brief, supra note 1867, at 7 (reductions in training for communities of color) and 29 (OFCCP). ¹⁹⁰⁹ Dep't of Defense and Labor, Health and Human Serv.s, and Educ. Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245 (2018).

<https://www.dol.gov/general/aboutdol/orgchart>
<https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eooc-contracting-watchdog-not-well-received>
<https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eooc-contracting-watchdog-not-well-received>
<https://www.bna.com/senate-funding-bill-n73014464290/>
<http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeooc-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/>
<http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeooc-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/>

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While OFCCP and EEOC cover similar issues, differences in the two offices mean a merger would not be simple.¹⁹¹⁰ For example, OFCCP enforces a requirement that contractors have Affirmative Action Plans, while there is no analogous requirement for EEOC to enforce.¹⁹¹¹ Additionally, OFCCP enforces veterans' employment rights whereas EEOC does not.¹⁹¹² EEOC enforces Title VII's prohibitions on discrimination for the same protected categories as those covered by Executive Order 11,246, with the exception that Title VII contains no explicit protection for gender identity and sexual orientation, although EEOC has taken the position discrimination on those bases constitutes discrimination on the basis of sex.¹⁹¹³ The differences stem from OFCCP's focus on affirmative action and broad-based compliance by federal contractors versus EEOC's focus on workplace discrimination and individual complaints.¹⁹¹⁴ DOL described the differences between OFCCP and EEOC with respect to external civil rights enforcement as follows:

First, EEOC operates primarily on a reactive, complaint-based model: it generally takes no action against an employer unless and until someone files a complaint of discrimination. By contrast, OFCCP's model is largely proactive, consisting of broad compliance reviews of federal contractor establishments identified through a neutral scheduling system, without the need for a complaint. This process allows OFCCP to review the entirety of a contractor's personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or "glass-ceiling" promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination, whereas EEOC's focus is primarily on individual discrimination. Second, while EEOC's jurisdiction is related to nondiscrimination alone, OFCCP's worker protection enforcement also includes the obligation that contractors take additional affirmative action to ensure equal employment opportunity. This includes requirements that contractors analyze their personnel

1910 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1905. 1911 41 C.F.R. pt. 60-2; see also U.S. Dep't of Labor, "Affirmative Action," <https://www.dol.gov/general/topic/hiring/affirmativeact>. 1912 41 C.F.R. pt. 60-300; see also U.S. Department of Labor, OFCCP, "Regulations Implementing the Vietnam Era Veterans' Readjustment Assistance Act," <https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>. 1913 Coalition Letter to Speaker of the House Paul Ryan, House Minority Leader Nancy Pelosi, Chairwoman of the House Committee on Education and the Workforce Virginia Foxx, and Ranking Member on the House Committee on Education and the Workforce Robert C. Scott, Opposing the Elimination of OFCCP (May 26, 2017), p. 2, https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf [hereinafter Coalition Letter Opposing the Elimination of OFCCP]. 1914 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1905.

<https://www.dol.gov/general/topic/hiring/affirmativeact>
<https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>
https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf

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Third, OFCCP's laws provide additional nondiscrimination protections that are not explicitly included in the laws enforced by EEOC. For instance, Executive Order 11,246 contains explicit prohibitions on discrimination on the bases of sexual orientation, gender identity, and against those discussing, disclosing, or inquiring about compensation. Additionally, OFCCP enforces VEVRAA, which prohibits discrimination against protected veterans; EEOC has no equivalent protection. Finally, there are differences in the remedies that the agencies can seek to remedy discrimination. In addition to "make-whole relief," such as back pay for victims of discrimination, OFCCP has the ability to pursue sanctions against a federal contractor that has violated the laws it enforces, including debarment from receiving future federal contracts.¹⁹¹⁵

The differences articulated here about the way that EEOC and OFCCP respectively approach compliance with federal nondiscrimination laws demonstrate the loss to effective civil rights enforcement if OFCCP were merged into EEOC without the necessary resources (in budget and staffing) to continue the same critical work that OFCCP engages in currently. Strategic Planning and Self-Evaluation OFCCP With respect to DOL's policy priorities for civil rights enforcement, DOL continues to "provide that workers have the opportunity to labor in fair and diverse workplaces."¹⁹¹⁶ In DOL's Strategic Plan Fiscal Years 2014-2018, one of the strategic objectives is to "Break down barriers to fair and diverse workplaces and narrow wage and income inequality."¹⁹¹⁷ DOL noted that "[d]iscrimination on the basis of race, color, religion, sex, national origin, disability, or status as a protected veteran not only adversely impacts America's workers and families, but also inhibits economic growth," and it is vital to ensure "that Americans work in workplaces that value diversity and are free from discrimination."¹⁹¹⁸ With this strategic objective in mind, one of OFCCP's performance goals during this period was to "[e]nforce affirmative action and nondiscrimination in Federal contractor workplaces.¹⁹¹⁹ OFCCP stated that it would carry out this goal by:

- Strengthening Enforcement of the Contractual Promise of Equal Employment Opportunity
- Reinforcing Equal Employment Opportunity Requirements through Regulatory Reform
- Expanding Stakeholder Engagement through Effective Relationships¹⁹²⁰

1915 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1916 U.S. Dep't of Labor, Strategic Plan Fiscal Years 2014-2018, p. 38 (on file). 1917 Ibid., 39. 1918 Ibid., 39. 1919 Ibid., 41-42. 1920 Ibid., 41-42.

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Additionally, OFCCP's strategic plan set a goal of completing 4,290 compliance evaluations and complaint investigations for each of the fiscal years from FY 2014 through FY 2018 and set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years.¹⁹²¹ DOL's Strategic Plan noted that "[m]any of OFCCP's strategies, initiatives, and activities for Fiscal Years 2018 through 2022 are in response to recommendations in the September 2016 Government Accountability Office (GAO) Report Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance."¹⁹²² DOL's Strategic Plan Fiscal Years 2018-2022 also has the strategic objective to "[p]romote fair and diverse workplaces for America's federal contractor employees."¹⁹²³ Therefore, DOL as a whole has indicated its areas of focus are:

- Strong Enforcement and Emphasizing High-Impact Projects
- Expanding Compliance Assistance and Stakeholder Engagement¹⁹²⁴

And similar to the previous strategic plan, OFCCP has set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years, as well as completing anywhere from 50 to 80 percent of construction evaluations from high- impact projects over the fiscal years in question.¹⁹²⁵ During FY 18, OFCCP achieved 109 percent of its target on a new measure for the fiscal year, "Percent of Discrimination Conciliation Agreements with Systemic Pay Discrimination Findings," and completed 90 percent of evaluations from high-impact construction projects.¹⁹²⁶ During the time of the Commission's review, OFCCP indicated it is undergoing a process of determining if it will continue to pursue the strategy of taking on fewer cases, but undertaking a comprehensive examination of each one, or return to handling more cases with less resource- intensive analysis. For context, during the George W. Bush Administration, OFCCP handled 4,000-5,000 cases per year.¹⁹²⁷ During the Obama Administration, caseload averages dropped to approximately 1,700 per year.¹⁹²⁸ In 2017, OFCCP maintained Obama-era policies and caseload

1921 Ibid., 43. 1922 U.S. Dep't of Labor, Strategic Plan Fiscal Years 2018-2022, pp. 26-27, <https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf> [hereinafter DOL, FY 2018-2022 Strategic Plan]. 1923 Ibid., 26. 1924 Ibid., 26-27. 1925 Ibid., 26-27. 1926 U.S. Dep't of Labor, Agency Financial Report Fiscal Year 2018, p. 19, <https://www.dol.gov/sites/dolgov/files/OPA/reports/2018annualreport.pdf>. 1927 Bill Osterdorf, "The Year in Review at OFCCP 2017: What DIDN'T Happen at OFCCP," LocalJobNetwork, Nov. 17, 2017, <https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717> (accessed Dec. 19, 2018). 1928 Ibid.

<https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf>
<https://www.dol.gov/sites/dolgov/files/OPA/reports/2018annualreport.pdf>
<https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717>
<https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717>

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levels, which reports indicate was due to a delay in installing a new Director, who was not chosen until December 2017.¹⁹²⁹ Reports also indicate a reduction in personnel and a desire to cut costs may have reduced the number of evaluations the agency took on in 2017.¹⁹³⁰ In FY2017, OFCCP stated that it had "refocused its efforts almost exclusively from systemic hiring discrimination on the basis of sex or race in low-wage jobs to systemic compensation discrimination to ensure workers also receive equal pay without discrimination. This includes placement into lower paying jobs due to gender stereotyping."¹⁹³¹ OFCCP stated that it had "reduced its case production to focus on fewer, but more complex high quality cases" across different industries and occupations.¹⁹³² Craig Leen, Director of OFCCP, testified with regard to scheduling compliance evaluations:

[T]here was a [] decision to reduce the total amount of audits and focus more on those that are audited. It's something called the deep dive, [] which has received both positive and negative responses. . . . Our goal is to take the best aspects of what's called active case management, which is really the Bush Administration approach, which had more audits. And active case enforcement, which was sort of the Obama Administration approach, [] led to less audits.¹⁹³³

1929 Bill Parker, "The Trump-Era Office of Federal Contract Compliance Programs Begins to Come Into Focus," The Federal Lawyer, May 2018, p. 1, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=.pdf. 1930 Ibid. 1931 U.S. Dep't of Labor, Agency Financial Report Fiscal Year 2017, pp. 16-17, https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2017annualreport.pdf. 1932 Ibid. 1933 Leen Testimony, Federal Civil Rights Enforcement Briefing, p. 52.

http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=.pdf
http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=.pdf
https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2017annualreport.pdf

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CRC DOL's FY 2018-2022 Strategic Plan does not outline any strategic goals for CRC,¹⁹³⁴ and DOL's Annual Performance Reports do not specifically mention the Civil Rights Center.¹⁹³⁵ CRC reported that it provides direct support to DOL's overarching strategic goals, but does not have dedicated performance measures for the goals outlined in DOL's strategic plans.¹⁹³⁶ However, CRC does have its own performance measures, and has prioritized case processing efficiency, and implementation of Section 188 of WIOA over the fiscal years 2016 to 2018.¹⁹³⁷ Complaint Processing, Agency-Initiated Charges, and Litigation Both OFCCP and CRC engage in complaint processing through an administrative process.¹⁹³⁸ However, the majority of OFCCP's enforcement work involves conducting compliance evaluations.¹⁹³⁹ For example, in FY 2016, complaint investigations constituted only 16 percent of the agency's work.¹⁹⁴⁰ OFCCP's regulations allow OFCCP to refer individual complaints raising potential Title VII violations to the EEOC, and the agency generally does so as a matter of course for all individual complaints in this category.¹⁹⁴¹ The practice is memorialized under a memorandum of understanding (MOU).¹⁹⁴² The MOU provides that OFCCP retains complaint investigations if the issue presented is a class-wide or systemic one.¹⁹⁴³ OFCCP likewise retains individual complaints alleging violations of Section 503 or VEVRAA for investigation.¹⁹⁴⁴

1934 DOL, FY 2018-2022 Strategic Plan, supra note 1922. 1935 U.S. Dep't of Labor, FY 2016 Annual Performance Report, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>; U.S. Dep't of Labor, FY 2017 Annual Performance Report, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V1-01.pdf>; U.S. Dep't of Labor, FY 2018 Annual Performance Report, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf>. 1936 U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3. 1937 Ibid. 1938 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85; 41 C.F.R. §§ 60-1.21 - 60-1.35, 60- 30.5, 60-50.4, 60-300.61 - 60-300.70, 60-741.61 - 60-741-70. 1939 See infra notes 1956-1991. 1940 Ibid. 1941 41 C.F.R. § 60-1.24 (a); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, "Who can file a complaint?," <https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployees/ForEmployeesQ6.htm> [hereinafter "DOL OFCCP, "Who can file a complaint?"]. 1942 "Pursuant to this MOU, OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints/charges simultaneously dual-filed under Title VII. . . . OFCCP will refer to EEOC allegations of discrimination of an individual nature on a Title VII basis in dual filed complaints/charges." Equal Employment Opportunity Comm'n and U.S. Dep't of Labor, Coordination of Functions: Memorandum of Understanding (Nov. 9, 2011), § (7), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm. 1943 Ibid., § (7)(b) ("OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges."); see also DOL OFCCP, "Who can file a complaint?," supra note 1941. 1944 DOL OFCCP, "Who can file a complaint?," supra note 1941.

<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V1-01.pdf>
<https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf>
<https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployees/ForEmployeesQ6.htm>
https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm

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OFCCP See Table 6.1. In FY 2016, OFCCP received 588 complaints, and closed 691 complaints including by referring 328 complaints to EEOC.¹⁹⁴⁵ That left OFCCP closing 363 complaints following investigation in FY 2016. In FY 2017, OFCCP received 686 complaints and closed 720 complaints including by referring 401 complaints to EEOC.¹⁹⁴⁶ That left OFCCP closing 319 complaints following investigation in FY 2017. In FY 2018, OFCCP received 1,418 complaints of discrimination, and resolved 1,320 complaints including by referring 786 complaints to EEOC.¹⁹⁴⁷ That left OFCCP closing 534 complaints following investigation in FY 2018. Table 6.1: OFCCP Complaints by Basis, FY 2016 to FY 2018 FY 2016 FY 2017 FY 2018 Received 588 686 1,418 Closed 691 720 1,320 Race 272 255 534

39.4% 35.4% 40.5% Sex 147 161 274

21.3% 22.4% 20.8% National Origin-Hispanic 41 58 84

5.9% 8.1% 6.4% National Origin-Other 33 46 97

4.8% 6.4% 7.3% Religion 28 34 93

4.1% 4.7% 7.0% Color 39 41 118

5.6% 5.7% 8.9% Sexual Orientation 5 14 65

0.7% 1.9% 4.9% Gender Identity 11 9 20

1.6% 1.3% 1.5% Disability 170 177 294

24.6% 24.6% 22.3% Covered Veteran 124 124 132

1945 The number of complaints closed in FY 2016 includes 328 complaints referred to EEOC. 1946 The number of complaints closed in FY 2017 includes 401 complaints referred to EEOC. 1947 The number of complaints closed in FY 2018 includes 786 complaints referred to EEOC.

<https://www.dol.gov/ofccp/BTN/index.html>

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For each fiscal year analyzed in this report, OFCCP received more discrimination complaints on the basis of race than any other basis, with 39.4 percent, 35.4 percent, and 40.5 percent of complaints filed on the basis of race in FY 2016, FY 2017, and FY 2018 respectively. Disability and sex also topped the list of bases upon which individuals filed complaints of discrimination. CRC in FY 2016, CRC received 813 complaints, accepted 24 complaints for investigation, and transferred, referred, or dismissed 563 complaints, largely as non-jurisdictional. 1948 CRC also completed 11 complaint investigations during that fiscal year. 1949 The number of complaints received decreased moderately in FY 2017 to 733 complaints; however, CRC accepted 32 complaints for investigation, and transferred, referred, or dismissed 1,259 complaints, largely as non-jurisdictional. 1950 CRC also completed 35 complaint investigations during that fiscal year. 1951 In FY 2018, CRC received a total of 670 complaints, accepted 30 complaints for investigation, and transferred, referred, or dismissed 825 complaints, again primarily as non-jurisdictional. 1952 It also completed 32 complaint investigations during that fiscal year. 1953 See Table 6.2. Table 6.2: CRC Complaints by Outcome, FY 2016 to FY 2018
FY 2016 FY 2017 FY 2018 Total CRC Complaints Received 813 733 670 Total Complaints Accepted for Investigation 24 32 30
Total Complaints Transferred, Referred, or Dismissed 563 1,259 825 Total Complaint Investigations Completed 11 35 32

Source: U.S. Dept of Labor, Civil Rights Center, Response to Interrogatory No. 10, p. 10. Note: Complaints that are accepted for investigation may have been received in prior fiscal years.

CRC has noted that a large majority of complaints it receives fall outside its jurisdiction, and are transferred to the appropriate federal, state or local authority to process where possible. 1954 Additionally, CRC has joint jurisdiction with other federal agencies with respect to certain complaints, and refers certain complaints “under circumstances specified by regulation.” 1955

1948 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10 (CRC has also noted that complaints that are accepted for investigation “may have been received in prior years.”). 1949 Ibid. 1950 Ibid. 1951 Ibid. 1952 U.S. Dept of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1953 Ibid. 1954 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10. 1955 Ibid.; see, e.g. 29 C.F.R. § 38.61.

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Proactive Compliance Evaluation OFCCP Every covered contract and subcontract must also include an agreement to oversight, including providing access to OFCCP for compliance reviews, 1956 as well as a provision stating that in the event of noncompliance “this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11,246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11,246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.” 1957 OFCCP’s regulations implementing Executive Order 11,246 also contain this equal opportunity clause. 1958 As discussed above, OFCCP told the Commission, “OFCCP’s model is largely proactive, consisting of broad compliance reviews... without the need for a complaint.” 1959 This process allows OFCCP to review the entirety of a contractor’s personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or “glass-ceiling” promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination. To ensure compliance with federal equal employment opportunity and affirmative action requirements of federal contractors, OFCCP utilizes two key approaches: enforcement and compliance assistance. 1960 In September 2016, the Government Accountability Office (GAO) issued a report on OFCCP’s work, finding that since 2010, the majority of compliance evaluations (78 percent) conducted by OFCCP identified no violations, when at the same time, only about 2 percent of compliance evaluations resulted in discrimination findings. 1961 However, GAO expressed concern that the methods used in selecting contractors may not focus evaluations on the contractors that pose the greatest likelihood of noncompliance. 1962 In conducting compliance evaluations, GAO reported that OFCCP determines which contractors to review based on neutral but non-random factors, such as alphabetical order, size of contract or contract expiration date. 1963 GAO found that OFCCP “does not use a generalizable sample that would allow for conclusions about the federal contractor population,” and therefore “does not have reasonable assurance that it is focusing its compliance efforts on those contractors with the greatest risk of noncompliance.” 1964

1956 Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(5). 1957 Id. at § 202 (6). 1958 41 C.F.R. § 60-1.4. 1959 See supra notes 283, 1915. 1960 GAO, Strengthening Oversight, supra note 247, at 10. 1961 Ibid., GAO Highlights. 1962 Ibid., GAO Highlights. 1963 Ibid., 12. 1964 Ibid., 12.

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Craig Leen, Director of OFCCP, explained in his testimony before the Commission how OFCCP altered its method of how to choose contractors to review, based on recommendations set forth in the GAO report. As the GAO report highlighted, and Director Leen confirmed in testimony to the Commission, in a single year OFCCP can only audit about 1-2 percent of contractors over which it has jurisdiction. 1965 Director Leen therefore began the Affirmative Action Program Verification Initiative, which he describes as a certification program “where government contractors have to certify whether they have an affirmative action program or not.” 1966 Director Leen explained that some audits would then be based on a lack of verification, and other audits would seek to confirm and further examine the claims made in the verification process. 1967 Additionally, GAO reported that the number of contractors OFCCP reviews each year is based on regional and district staffing levels. 1968 Contractors are assigned to regional offices for compliance evaluation based on the contractor’s physical address to account for the possibility of an on-site review, conducted in 25 percent of evaluations in 2015. 1969 At 2015 staffing levels OFCCP conducted compliance evaluations of approximately 2 percent of federal contractors. 1970 Compliance evaluations followed a process called the Active Case Enforcement (ACE) protocol until the directive implementing ACE was rescinded on November 30, 2018. 1971 This protocol was adopted in 2010 to require a more in-depth review of contractors under evaluation, where previously a case would be closed after an “abbreviated desk audit” if there were no indicators of discrimination. 1972 Under the ACE protocol, a full desk audit was required in each case under compliance evaluation. Now, with the ACE protocol rescinded, OFCCP aims to increase the number of compliance evaluations they complete annually, while shortening the length of time desk audits take and seeking to conciliate issues more efficiently. 1973 A compliance evaluation

1965 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-25. 1966 Ibid., 23-25. See also U.S. Dept of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). See U.S. Dept of Labor, OFCCP, Directive 2018-07, Affirmative Action Program Verification Initiative (Aug. 24, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html. On this topic, DOL noted in its comments to the Commission:

GSA denied OFCCP’s request. OFCCP still looks at whether individual contractors check the box, but GSA will not provide a report or access to the database that would provide information on all contractors at once.

Ibid. 1967 Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 23-25. 1968 GAO, Strengthening Oversight, supra note 247, at 12. 1969 Ibid., 19. 1970 Ibid., 15. 1971 U.S. Dept of Labor, Office of Federal Contract Compliance Programs, Directive 2019-01 (Nov. 30, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery [hereinafter DOL OFCCP, Directive 2019-01]. 1972 GAO, Strengthening Oversight, supra note 247, at 14. 1973 DOL OFCCP, Directive 2019-01, supra note 1971; U.S. Dept of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual (October 2014), https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf [hereinafter DOL OFCCP, Federal Contract Compliance Manual].

https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery
https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery
https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf

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may include one or any combination of compliance review, compliance check, focused review, and offsite review of records. 1974

- A desk audit is a review of the contractor’s written affirmative action program and supporting documentation. On-site review seeks to determine implementation of the affirmative action program and other regulatory requirements. Off-site analysis is review of the records collected during on-site review.
- Off-site review of records can also occur outside the compliance review process, consisting of review of documentation accompanying the affirmative action program as well as other documents related to the contractor’s personnel policies and employment actions. 1975
- Compliance check is a determination of the contractor’s record keeping in compliance with record retention regulations. 1976
- Focused review is a review that is limited in scope to component(s) of the organization or employment practice(s) or one or more aspects of the contractor’s employment practices. 1977

The GAO report also indicates that when OFCCP finds violations, it has generally resolved them through conciliation agreements; “[b]etween fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations.” 1978 Violations may be found in response to a complaint, through OFCCP’s compliance evaluation process, or a contractor’s refusal to comply with OFCCP’s oversight during a compliance review through not submitting records or allowing review. 1979 Matters not resolved through conciliation are referred to the Solicitor of Labor for administrative enforcement proceedings. 1980 In August 2018, OFCCP issued Directive 2018-04 which requires a portion of compliance reviews in 2019 to be comprehensive onsite, focused reviews to ensure compliance with the affirmative action obligations and nondiscrimination laws under its jurisdiction. 1981 While focused reviews had always been available to OFCCP as an enforcement tool, evidence reflects that this type of review was rarely used in the past. 1982 This Directive also orders OFCCP to develop a standard protocol for conducting these focused reviews; to provide staff training, contractor education, and technical assistance; and to publish these protocols in its Frequently Asked Questions (FAQs) to

1974 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a). 1975 Id. §§ 60-1.20(a)(2), 60-300.60(a)(2), 60-741.60(a)(2). 1976 Id. §§ 60-1.20(a)(3), 60-300.60(a)(3), 60-741.60(a)(3). 1977 Id. §§ 60-1.20(a)(4), 60-300.60(a)(4), 60-741.60(a)(4). 1978 GAO, Strengthening Oversight, supra note 247, at 24. 1979 41 C.F.R. § 60-1.26(a). 1980 § 60-1.26(b). 1981 DOL OFCCP, Directive 2018-04, supra note 1882. 1982 Farrah N.W. Rife] and Maryelena Zaccardelli, “OFCCP Notice of Significant Change in Compliance Review Procedures,” Lexology, Aug. 14, 2018, <https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474> [hereinafter Rife] et al., “OFCCP Notice of Significant Change in Compliance Review Procedures.” See also Leen Testimony, Federal Civil Rights Enforcement Briefing, pp. 26-27.

<https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474>
<https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474>

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make the information publicly available. 1983 The Directive did not specify how many focused reviews OFCCP would conduct starting in 2019. 1984 However, the scheduling list that OFCCP issued on March 25, 2019, indicates that the agency planned to conduct 500 focused reviews. 1985 In FY 2016, OFCCP scheduled 1,048 supply and service compliance reviews and 137 construction compliance reviews for a total of 1,185 scheduled compliance reviews. 1986 In that same fiscal year, OFCCP completed 1,522 supply and service compliance reviews and 174 construction compliance reviews for a total of 1,696 completed compliance reviews. 1987 In FY 2017, OFCCP scheduled 735 supply and service compliance reviews and 110 construction compliance reviews for a total of 845 scheduled compliance reviews. 1988 In that same fiscal year, OFCCP completed 1,036 supply and service compliance reviews and 106 construction compliance reviews for a total of 1,142 completed compliance reviews. 1989 In FY 2018, OFCCP scheduled 785 supply and service compliance reviews and 43 construction compliance reviews for a total of 828 scheduled compliance reviews. 1990 In that same fiscal year, OFCCP completed 713 supply and service compliance reviews and 99 construction compliance reviews for a total of 812 completed compliance reviews. 1991 See Table 6.3.

1983 DOL OFCCP, Directive 2018-04, supra note 1882. 1984 Rife] et al., “OFCCP Notice of Significant Change in Compliance Review Procedures,” supra note 1882. 1985 DOL, “OFCCP has released the FY2019 Supply & Service Scheduling List,” supra note 288. 1986 U.S. Department of Labor, “OFCCP By the Numbers,” <https://www.dol.gov/ofccp/BTN/index.html>. 1987 Ibid. 1988 Ibid. 1989 Ibid. 1990 Ibid. 1991 Ibid.

<https://www.dol.gov/ofccp/BTN/index.html>

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Table 6.3: OFCCP Supply and Service and Construction Compliance Evaluations, FY 2016 to FY 2018 Supply and Service Compliance

Evaluations Construction Compliance Evaluations

FY 2016 FY 2017 FY 2018 FY 2016 FY 2017 FY 2018

Scheduled* 1,048 735 785 137 110 43 Completed* 1,522 1,036 713 174 106 99

Associated with a Mega Construction Project

--- 86 84 89 --- 49.4% 79.2% 89.9%

Cconciliation Agreement or Consent Decree

275 202 115 83 60 53 18.1% 19.5% 16.1% 47.7% 56.6% 53.5%

EO 11246 Violation 258 195 127 82 59 53 17.0% 18.8% 17.8% 47.1% 55.7% 53.5%

Section 503 Violation 99 71 36 20 20 12 6.5% 6.9% 5.0% 11.5% 18.9% 12.1%

Section 4212 Violation

140 96 45 24 26 14 9.2% 9.3% 6.3% 13.8% 24.5% 14.1%

Discrimination Violation

36 40 47 1 1 1 2.5% 3.9% 6.6% 0.6% 0.9% 1.0%

Number of Workers in Facilities Reviewed

1,038,54 2

732,235 850,443 16,332 11,855 13,913

Source: U.S. Department of Labor, "OFCCP By the Numbers," <https://www.dol.gov/ofccp/BTN/index.html>. Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive. *Does not include administrative closures.

Transparency Initiative In September 2018, OFCCP issued Directive 2018-08,1992 extending its so-called transparency initiative to every stage of the compliance evaluation process.1993 The Directive lays out specific procedures on how compliance evaluations will proceed and includes instruction that OFCCP staff

1992 U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2018-08, Transparency in OFCCP Compliance Activities (Sep. 19, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_08.html [hereinafter DOL OFCCP, Directive 2018-08]. 1993 Pamela Wolf, "What Federal Contractors Need To Know About The OFCCP's Latest Directives," Wolters Kluwer, Sep. 20, 2018, <http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/> [hereinafter Wolf, "What Federal Contractors Need To Know About The OFCCP's Latest Directives"].

<https://www.dol.gov/ofccp/BTN/index.html>

https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_08.html

<http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/>

<http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/>

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should work to close reviews quickly, within 45 days, if there are no indications of discrimination from initial submissions.1994 The Directive specifically notes "[s]upplemental information requests must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond," indicating the agency's priority with this Directive is contractor certainty.1995 Voluntary Enterprise-wide Review Program OFCCP is developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.1996 OFCCP reports to the Commission that the VERP will "officially recognize the outstanding efforts of top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations."1997 Early Resolution Procedures OFCCP now encourages Early Resolution Procedures (ERP) to promote early and efficient compliance by supply-and-service contractors.1998 OFCCP maintains that these procedures will help contractors and OFCCP achieve their mutual goal of equal employment opportunity in federal contracting and reduce the length of compliance evaluations by resolving problems expeditiously. According to OFCCP, ERP also allows OFCCP and contractors with multiple establishments to more efficiently promote corporate-wide compliance with OFCCP's requirements. CRC In order to determine the ability of grant applicants to comply with nondiscrimination and equal opportunity provisions of the laws, orders, and regulations, OCAP (formerly part of CRC) conducted pre-approval compliance reviews.1999 OCAP also conducted post-approval compliance reviews.2000 These reviews "may focus on specific programs or activities, or one or more issues within a program or activity."2001 OCAP also reviewed Nondiscrimination Plans required of states under WIOA/WIA, which must be established and implemented by the Governor and "designed to give a reasonable guarantee that all State Program recipients will comply . . . with the nondiscrimination and equal opportunity provisions of WIOA."2002 Furthermore, OCAP

1994 Ibid. 1995 DOL OFCCP, Directive 2018-08, supra note 1992, at (7)(d)(ii); Wolf, "What Federal Contractors Need To Know About The OFCCP's Latest Directives," supra note 1993. 1996 DOL, Voluntary Enterprise-wide Review Program, supra note 291. 1997 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 1998 DOL, Early Resolution Procedures, supra note 290. 1999 U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 2. 2000 Ibid. 2001 Ibid. 2002 Ibid., 2-3.

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previously provided training and technical assistance for stakeholders and other interested parties.2003 CRC indicated that under all statutes, it will monitor the activities of the respondent after a Conciliation Agreement or settlement agreement has been negotiated and executed. Ongoing monitoring of entities receiving federal financial assistance under the laws enforced by CRC (outside of the context of a complaint investigation or compliance review conducted by CRC) is primarily the responsibility of State Governors through their Equal Opportunity Officers (to whom training and technical assistance is provided).2004 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OFCCP DOL's strategic plan for 2018-2022 indicates that one way to meet its strategic goal of "promot[ing] fair and diverse workplaces for America's federal contractor employees" is to "expand compliance assistance and stakeholder engagement."2005 Written guidance is contained in large part in the Federal Contract Compliance Manual.2006 OFCCP also provides information to contractors about its enforcement methods, priorities, and legal understandings through the use of Directives.2007 DOL's strategic plan elaborates:

OFCCP will support voluntary contractor compliance through compliance assistance tools, resources, and incentives; assisting contractors in locating victims of discrimination that are due financial or other remedies resulting from contractors entering into a conciliation agreement (CA) with OFCCP; and creating a comprehensive digital outreach strategy for improving engagement with three types of contractors and other stakeholders, including new and small contractors, construction contractors, and supply and service contractors. OFCCP strategically engages external stakeholders to educate and empower workers to make informed decisions about exercising their employment rights. OFCCP's outreach strategy emphasizes increased community engagement and establishing meaningful relationships with stakeholders to reach workers most at risk of experiencing workplace discrimination. These stakeholders include community-based organizations, advocacy groups, employee resource groups, job

2003 Ibid., 3. 2004 Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 5, at 6. 2005 DOL, FY 2018-2022 Strategic Plan, supra note 1922, at 27. 2006 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973. 2007 U.S. Dep't of Labor, "Directives," <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> [hereinafter DOL, "Directives"].

<https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm>

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placement providers, unions, and state and local government and intergovernmental agencies.2008

In addition, OFCCP published a press release in August 2018 to announce its new guidance, discussed above, as "part of the Department's efforts to maximize the effectiveness of compliance assistance outreach."2009 OFCCP actively provides technical assistance to its contractors. OFCCP maintains a website that aims to provide contractors with "clear and easy-to-access information on how to comply with federal employment laws" and provides links to various resources, as well as law-specific compliance assistance for the laws that OFCCP enforces.2010 OFCCP's compliance assistance includes technical assistance guides, which it is in the process of updating to reflect changes to OFCCP regulations.2011 OFCCP reported to the Commission that by the end of FY 2019, OFCCP plans to issue three technical assistance guides relevant to specific types of contractors: Construction, Supply & Service, and Academic Institutions.2012 In addition, OFCCP's Federal Contract Compliance Manual indicates that its compliance officers who conduct OFCCP's enforcement work are responsible for providing technical assistance during compliance reviews to "clarify the contractor's obligations and the compliance evaluation process" if any questions arise at any point during the process.2013 GAO, however, found that since 2012, OFCCP's compliance assistance activities have decreased for federal contractors and other stakeholders, and contractors and stakeholders both felt that OFCCP guidance could be clearer to help them understand their responsibilities under the law.2014 OFCCP maintains a website that "provide[s] the public with a list of any documents that are determined to be 'significant guidance documents.'"2015 That page indicates that OFCCP has not published any significant guidance documents since 2007.2016 OFCCP does actively issue directives, considered to be "interpretative guidance," and maintain a website that publicizes these directives.2017 During FY 2016-2018, OFCCP issued seven directives covering a variety of policy topics, including focused reviews of contractor compliance with EO 11,246, religious exemption

2008 Ibid. 2009 U.S. Dep't of Labor, "U.S. Department of Labor's Office of Federal Contract Compliance Programs Announces New Policies" (Aug. 24, 2018), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180824>. 2010 U.S. Dep't of Labor, "Compliance Assistance," <https://www.dol.gov/ofccp/regs/compliance/ofccpcomp.htm>. 2011 U.S. Dep't of Labor, OFCCP, Response to Document Request No. 5, at 6. 2012 U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). 2013 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973, at 14. 2014 GAO, Strengthening Oversight, supra note 247, at GAO Highlights. 2015 U.S. Dep't of Labor, "OFCCP Guidance Documents," https://www.dol.gov/ofccp/TAguides/OFCCP_SGD_Information.htm. 2016 Ibid. This page indicates that "significant guidance documents" are subject to Executive Order 12,866 as amended by Executive Order 13,422 (Jan. 18, 2007) and the Bulletin for Agency Good Guidance Practices, adopted by the Office of Management and Budget. Since then, Executive Order 13,497 was issued which revoked Executive Order 13,422. See Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Feb. 4, 2009). 2017 DOL, "Directives," supra note 2007.

<https://www.dol.gov/newsroom/releases/ofccp/ofccp20180824>

<https://www.dol.gov/ofccp/regs/compliance/ofccpcomp.htm>

https://www.dol.gov/ofccp/TAguides/OFCCP_SGD_Information.htm

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for EO 11,246 § 204(c), and affirmative action program verification.2018 In addition, OFCCP has issued and made public its Federal Contract Compliance Manual, which "provides new and experienced compliance officers the procedural framework for executing compliance evaluations and complaint investigations," and "provides procedural and technical guidance on compliance issues based on current agency procedures and processes, and improves consistency across the agency's regional and field offices," but notes that "it does not establish substantive agency policy" and "if there is an inconsistency between material in the [manual] and other OFCCP policies and its implementing regulations, the latter are controlling."2019 Religious Freedom Directive On August 10, 2018, OFCCP issued a press release to announce the implementation of new policies to ensure equal employment opportunity and protect religious freedom.2020 OFCCP issued two new policy directives, which include an equal employment opportunity directive to ensure federal contractor compliance with federal anti-discrimination laws, and a religious freedom directive to protect the rights of religious-affiliated organizations and groups.2021 OFCCP states in Directive 2018-03 that "OFCCP staff are instructed to take these [recent Supreme Court] legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246."2022 The Directive further states that OFCCP intends to include the changes incorporated in Directive 2018-03 in its next round of regulatory rulemaking.2023 OFCCP's Directive 2018-03 serves as further assurance to government contractors and subcontractors that the government will not discriminate against them because of their religious character.2024 Legal analysts have pointed out that Directive 2018-03 merely instructs OFCCP staff to consider recent Supreme Court decisions and Executive Orders when reviewing government contractor

2018 Ibid. 2019 DOL OFCCP, Federal Contract Compliance Manual, supra note 1973. 2020 U.S. Dep't of Labor, "U.S. Department of Labor Announces New Policies to Ensure Equal Employment Opportunity and Protect Religious Freedom," Aug. 10, 2018, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180810>. 2021 Ibid. 2022 U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2018-03 (Aug. 10, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf> [hereinafter DOL OFCCP, Directive 2018-03]. See also Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 1250-AA09 (Fall 2018), <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=Religious-Organization+Exemption+>. 2023 Ibid. 2024 Susan Schaecher, "OFCCP Issues 2 Directives Affecting Federal Contract Compliance Reviews," Fisher & Phillips, LLP, Aug. 21, 2018, <https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>.

<https://www.dol.gov/newsroom/releases/ofccp/ofccp20180810>

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf>

<https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=Religious-Organization+Exemption+>

<https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>

<https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>

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compliance.2025 The Directive on its face does not provide any process or means by which government contractors may claim a religious exemption.2026 However, Directive 2018-03 does indicate that it supersedes any previous guidance that does not reflect those legal developments, including the section in Frequently Asked Questions: Sexual Orientation and Gender Identity that previously addressed "Religious Employers and Religious Exemption."2027 OFCCP prioritized the issuance of this religious freedom directive and proposed this rule despite the fact that it does not typically contract with a large number of religious organizations. Craig Leen, Acting Director of OFCCP, in his testimony

before the Commission, indicated that OFCCP “doesn’t have a lot of religious organizations that are Government contractors, but we have some,” and indicated that “we would like to have more, because we want all companies to feel like they can participate in procurement and they will not be discriminated against.”²⁰²⁸ Critics of the religious freedom Directive believe that in practice, it is likely to expand the number of contractors exempt from nondiscrimination requirements for religious reasons.²⁰²⁹ and may give license to discriminate to religious organizations seeking federal contracts.²⁰³⁰ A large group of civil rights organizations stated their opposition to the Directive on the basis that the Directive undermines the executive order OFCCP has the obligation to enforce, which explicitly states religious organizations are not exempt from nondiscrimination requirements on bases other than religion.²⁰³¹ On August 15, 2019, OFCCP proposed a rule that would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics.²⁰³² The proposed rule would apply to all

2025 Annette Tyman, Lawrence Z. Lorber, and Michael L. Childers, “OFCCP Winds Down Summer By Issuing New Guidance on Religious Discrimination and Announcing New Focused Review Process,” Seyfarth Shaw, LLP, Aug. 16, 2018, <https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>. 2026 DOL OFCCP, Directive 2018-03, supra note 2022. 2027 Ibid.; see generally, U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, “Frequently Asked Questions: Sexual Orientation and Gender Identity,” https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#content. 2029 Scott T. Allen, “OFCCP Signals Emphasis on ‘Religious Liberty’ in Federal Contractor Compliance,” Foley & Lardner LLP, Aug. 20, 2018, <https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>. 2029 Scott T. Allen, “OFCCP Signals Emphasis on ‘Religious Liberty’ in Federal Contractor Compliance,” Foley & Lardner LLP, Aug. 20, 2018, <https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>. 2030 Dominic Holden, “Trump Is Giving Federal Contractors A ‘Religious Exemption’ For Discrimination,” Buzzfeed, Aug. 17, 2018, <https://www.buzzfeednews.com/article/dominicholden/trump-loophole-lgbt-discrimination>. 2031 Coalition Letter Opposing the Elimination of OFCCP, supra note 1913. 2032 Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019) (comments period to close Sept. 16, 2019); Dominic Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” BuzzfeedNews, Aug. 14, 2019, <https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate> [hereinafter Holden, Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More].

<https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>
<https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>
https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#content
<https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>
<https://www.buzzfeednews.com/article/dominicholden/trump-loophole-lgbt-discrimination>
<https://www.buzzfeednews.com/article/dominicholden/trump-loophole-lgbt-discrimination>
<https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate>
<https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate>

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religious organizations, including for-profit corporations, with federal contracts provided that they claim a “religious purpose.”²⁰³³ This proposed rule conflicts with a 2014 executive order that prohibited discrimination based on sexual orientation and gender identity by federal contractors.²⁰³⁴ This new rule would allow federal contractors to fire or refuse to hire an individual because of the person’s sexual orientation, gender identity, status as a pregnant woman or parent, or race, so long as the contractor obtained a religious exemption.²⁰³⁵ In response, employees would be able to take their employers to court over such actions, but currently there is no federal law explicitly protecting LGBT workers from discrimination.²⁰³⁶ Pay Equity Directive In August 2018, OFCCP rescinded Directive 2013-03 (previously referred to as Directive 307) on pay discrimination, replacing it with Directive 2018-05, allowing contractors a greater role in how OFCCP analyzes their compensation systems.²⁰³⁷ The rescinded directive had required OFCCP to conduct its own analysis of which employees should be considered comparable for the purpose of determining discrimination in pay practices. Under the new directive, OFCCP will attempt, where possible, to use the employer’s own compensation system groupings to compare employees. It also now more specifically identifies the statistical methodology it will use to evaluate contractors (a point of contention under the prior directive), where Directive 2013-03 used a more open-ended, case-by-case approach to determining pay discrimination.²⁰³⁸ Criticism of the rollback of Directive 2013-03 claims OFCCP needed the tools in that directive to choose which workers to compare so that it could determine, for example, if white and male employees are more likely to get promoted

2033 Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” supra note 2032. (The Trump administration has stated that the corporation needn’t focus entirely on religion to qualify, but that “The contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor’s only purpose.”)²⁰³⁴ Implementation of Executive Order 13,672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (41 CFR 60). 2035 National Center for Transgender Equality, “Department of Labor Proposes New Plan to Let Employers Discriminate Against Transgender People Using Taxpayer Dollars,” (Aug. 14, 2019), <https://transequality.org/press/releases/departement-of-labor-proposes-new-plan-to-let-employers-discriminate-against>. 2036 Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” supra note 2032. 2037 U.S. Dept’t of Labor, Office of Federal Contract Compliance Programs, Directive 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (Aug. 24, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>. 2038 Ben Penn and Porter Wells, “Labor Dept. to Relax Obama Pay Bias Policy, Hand Reins to Businesses,” Bloomberg News, Apr. 19, 2018, <https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>; David Goldstein and Meredith Shoop, “OFCCP Reins in Compensation Analysis by Rescinding Directive 307 and Issuing New Guidance,” JDSupra, Aug. 28, 2018, <https://www.jdsupra.com/legalnews/ofccp-reins-in-compensation-analysis-by-44726/> (accessed Dec. 19, 2019).

<https://transequality.org/press/releases/departement-of-labor-proposes-new-plan-to-let-employers-discriminate-against>
<https://transequality.org/press/releases/departement-of-labor-proposes-new-plan-to-let-employers-discriminate-against>
<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>
<https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>
<https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>
<https://www.jdsupra.com/legalnews/ofccp-reins-in-compensation-analysis-by-44726/>

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or receive advantageous job assignments.²⁰³⁹ Prior to rescinding the directive, OFCCP settled two large pay discrimination cases against State Street Corp. (\$5 million settlement) and Humana (\$2.5 million settlement) for gender and race disparities in pay.²⁰⁴⁰ CRC has specific legal authority to issue guidance and provide technical assistance to entities that receive federal financial assistance.²⁰⁴¹ CRC maintains a webpage that provides training and compliance assistance information about how to comply with the federal equal opportunity and nondiscrimination laws that it enforces.²⁰⁴² This webpage lists a variety of compliance information, including CRC directives that provide guidance about compliance.²⁰⁴³ Effectiveness of Interaction and Coordination with External Agencies and Organizations OFCCP OFCCP has a Memorandum of Understanding (MOU) with EEOC regarding the processing of complaints of employment discrimination between the two agencies.²⁰⁴⁴ This MOU seeks to streamline enforcement by facilitating the exchange of information between the two agencies and reducing duplication of compliance activities, and specifies:

- Prior to the investigation of a charge filed against a contractor, EEOC will contact OFCCP to “(a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC’s investigation which have been secured by the contracting agency in previous compliance reviews.”²⁰⁴⁵

- Prior to conducting a compliance review or a complaint investigation against a contractor, OFCCP will contact EEOC to “(a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor’s compliance with

2039 Alexia Fernández Campbell, “The Trump Administration Wants To Make It Easier For Federal Contractors To Hide Pay Discrimination,” Vox, Apr. 24, 2018, <https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap> (accessed Dec. 19, 2019). 2040 Ibid. 2041 See supra notes 1853, 1855. 2042 U.S. Dept’t of Labor, “Training & Compliance Assistance Tools,” <https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>. 2043 Ibid. 2044 Memorandum of Understanding, U.S. Dept’t of Labor, Office of Federal Contract Compliance and Equal Employment Opportunity Commission Concerning the Process of Complaints of Employment Discrimination as Between the Two Agencies, <https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofcc.html> [hereinafter DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination]. 2045 Ibid.

<https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap>
<https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap>
<https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>
<https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>
<https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofcc.html>

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Executive Order 11,246, as amended, and (c) obtain and review any pertinent documents.”²⁰⁴⁶

The MOU indicates that frequent communication between the two agencies should be utilized in order to effectively coordinate these enforcement efforts.²⁰⁴⁷ The MOU establishes certain procedures that both agencies will need to adhere to in order to facilitate this cooperation, such as establishing notification procedures, referral procedures, and “provides that the OFCCP will act as the EEOC’s agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII.”²⁰⁴⁸ Additionally, this MOU emphasizes that both agencies will “increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims.”²⁰⁴⁹ EEOC and OFCCP also work together as OFCCP only has coordinating authority under the Americans with Disabilities Act; EEOC handles any specific complaints of contractor discrimination on the basis of disability under the ADA.²⁰⁵⁰ CRC CRC’s regulations implementing Section 188 of WIOA require regulated state, local or nongovernmental agencies to designate Equal Opportunity (EO) officers, who are generally charged with “coordinating recipient and state-level compliance with the regulations, with state-level EO Officers being appointed by and reporting directly to the Governor.”²⁰⁵¹ Among the EO Officer responsibilities is “[s]erving as a recipient’s liaison with CRC.”²⁰⁵² CRC also works directly with DOJ’s Civil Rights Division, engaging with its Federal Coordination and Compliance Section (FCCS) and the Disability Rights Section, and the U.S. Department of Education.²⁰⁵³ For one specific systemic discrimination case over which both agencies had jurisdiction, CRC entered into a Memorandum of Agreement with FCCS to “investigate and resolve” the case.²⁰⁵⁴ CRC is required to refer certain cases to other federal agencies under certain circumstances and must refer

2046 Ibid. 2047 Ibid. 2048 Carmen Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC,” Local Job Network, Apr. 16, 2012, <https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479> [hereinafter Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC”]. 2049 Ibid. 2050 41 C.F.R. § 60.742; see also U.S. Dept’t of Labor, “The Americans with Disabilities Act of 1990, as amended (ADA),” https://www.dol.gov/ofccp/regs/compliance/ca_ada.htm. 2051 U.S. Dept’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2052 See 29 C.F.R. 38.31(a). 2053 U.S. Dept’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2054 Ibid.

<https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479>
<https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479>
https://www.dol.gov/ofccp/regs/compliance/ca_ada.htm

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certain cases to EEOC or to a federal grantmaking agency.²⁰⁵⁵ In addition, CRC participates in interagency working groups established by DOJ’s FCCS.²⁰⁵⁶ Research, Data Collection and Reporting DOL awards labor research and evaluation grants, for which the purpose is “to build evidence around issues of importance to the Department of Labor and American public, including critical issues related to worker protection, safety and human capital development.”²⁰⁵⁷ While the Commission is unaware of whether OFCCP or CRC specifically conduct their own independent research, DOL awards research grants for a variety of different labor-related research, including research surrounding civil rights violations under various laws that OFCCP and CRC enforce.²⁰⁵⁸ Some recent examples of awarded grants during the period from January 2017 to January 2019 include research about the “Initial Impact of Section 503 Rules: Understanding Good Employer Practices and the Trends in Disability Violations Among Federal Contractors” and “Analyzing Sexual Orientation and Gender Identity Discrimination in Federal Contracts.”²⁰⁵⁹ OFCCP OFCCP uses an internal case management system called the Office of Contract Compliance Programs Case Management System (OFCMS), which includes two subsystems:

- The Case Management System, which is the data collection portion of the case management system

- The Executive Information System, which is the reporting part of the system.²⁰⁶⁰ In 2014, OFCCP proposed a rule requiring government contractors to report summary data on employee compensation “by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked, and the number of employees.”²⁰⁶¹ The rule indicated that the summary compensation data “is a critical tool for eradicating compensation discrimination” and would enable OFCCP to “direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations,” ultimately seeking to enhance greater voluntary compliance and greater deterrence of noncompliant behaviors by contractors and subcontractors.²⁰⁶² The Commission does not have any evidence that OFCCP has implemented this rule.

2055 Ibid. See, e.g., 29 CFR § 35.32(a); 29 CFR § 38.81(b) and (c). 2056 U.S. Dept’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4. 2057 U.S. Dept’t of Labor, “Labor Research and Evaluation Grants,” <https://www.dol.gov/agencies/oaspe/evaluation/currentstudies/Labor-Research-and-Evaluation-Grants>. 2058 Ibid. 2059 Ibid. 2060 U.S. Dept’t of Labor, OFCCP, Response to USCCR Interrogatory No. 4, at 4. 2061 Government Contractors, Requirement To Report Summary Data on Employee Compensation, 79 Fed. Reg. 46,561 (Aug. 8, 2014). 2062 Id.

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CRC CRC has a formal intake process and gathers information pertinent to processing a complaint.2063 CRC has noted that it does not disaggregate data for racial/ethnic data with regard to the complaints it receives.2064

2063 U.S. Dept of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 14, at 17-18. 2064 *Ibid.*, 18.

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307 Chapter 7: U.S. Equal Employment Opportunity Commission

Chapter 7: U.S. Equal Employment Opportunity Commission Legal Authority and Responsibility Congress established the U.S. Equal Employment Opportunity Commission (EEOC) as part of Title VII of the Civil Rights Act of 1964 (Title VII), and EEOC began operating on July 2, 1965.2065 EEOC is a bipartisan, independent, presidentially appointed Commission, currently led by Chair Janet Dhillon, with five total members including the Chair, Vice Chair and three other Commissioners (see Figure 7.2).2066 EEOC reports that its mission is to “[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.”2067 EEOC is responsible for enforcing federal laws that prohibit discrimination against a job applicant or an employee2068 on the basis of race, color, religion,2069 sex2070 (including pregnancy,2071 gender identity,2072 and sexual orientation2073), national origin,2074 age (40 or older),2075 disability,2076 or genetic information.2077 In addition, EEOC protects against discrimination based on retaliation against individuals who complained about discrimination, filed a charge of discrimination, or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.2078 Since its creation in 1964, the EEOC’s jurisdiction has grown and now includes the following areas:

2065 42 U.S.C. § 2000e-4; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 1. 2066 U.S. Equal Employment Opportunity Comm’n, “The Commission and the General Counsel,” <https://www.eeoc.gov/eeoc/commission.cfm> [hereinafter EEOC, “The Commission and the General Counsel”]. 2067 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 8. 2068 42 U.S.C. §§ 12112, 12114, 2000e, 2000ff; 29 U.S.C. § 791; Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10; Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640; 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627. 2069 42 U.S.C. § 2000e-16(a)(1). 2070 *Id.* § 2000e-16(a)(1); Pub. L. 88-38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621. 2071 Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10. 2072 42 U.S.C. § 2000e-16(a)(1); see also U.S. Equal Employment Opportunity Comm’n, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [hereinafter EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers”] (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”). 2073 42 U.S.C. § 2000e-16(a)(1); see also EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” supra note 2072 (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”). 2074 42 U.S.C. § 2000e-16(a)(1). 2075 29 U.S.C. § 633(a); 42 U.S.C. § 2000e-16(a)(2). 2076 29 U.S.C. § 791; 42 U.S.C. §§ 12112, 12114, 2000e-16(a)(3); Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640. 2077 42 U.S.C. § 2000ff. 2078 *Id.* § 2000e-3(a).

<https://www.eeoc.gov/eeoc/commission.cfm>
https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

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- Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits employment discrimination based on race, color, religion, sex, and national origin.2079
- The Age Discrimination in Employment Act of 1967 (ADEA), as amended, prohibits employment discrimination against workers age 40 and older.2080
- The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to clarify that discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination and requires employers to treat women affected by pregnancy and pregnancy-related medical conditions the same as any other employees with temporary disabilities with respect to terms and conditions of employment, including health benefits.2081
- The Equal Pay Act of 1963 (included in the Fair Labor Standards Act), as amended, prohibits sex discrimination in the payment of wages to men and women performing substantially equal work in the same establishment.2082
- Titles I and V of the Americans with Disabilities Act of 1990 (ADA), as amended, prohibit employment discrimination based on disability by private and state and local government employers. Section 501 and 505 of the Rehabilitation Act of 1973 provide the same protections for federal employees and applicants for federal employment.2083
- Sections 102 and 103 of the Civil Rights Act of 1991, which amends Title VII and the ADA to permit jury trials, as well as compensatory and punitive damage awards in intentional discrimination cases (unless the respondent is a government, government agency or political subdivision).2084
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability in the workplace. The law also requires that employers provide reasonable accommodations for employees with disabilities when there is no undue hardship on the employer.2085
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), prohibits employment discrimination based on an applicant’s or employee’s genetic information (including family medical history).2086
- Executive Order 11,478, providing for equal employment opportunity in the federal government.2087

2079 *Id.* § 2000e and relevant guidelines at 29 C.F.R. Parts 1602, 1604, 1605, 1606, 1608, and 1614. 2080 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627. 2081 Pregnancy Discrimination Act, Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10. 2082 Equal Pay Act, Pub. L. 88-38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621. 2083 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. Parts 1630 and 1640. 2084 Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). 2085 Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640. 2086 Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 (2008) and implementing regulations at 20 C.F.R. Part 1635. 2087 Exec Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969).

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- Executive Order 12,067, providing for coordination of federal equal employment opportunity programs.2088
- Executive Order 13,164, which requires federal agencies to establish procedures to facilitate the provision of reasonable accommodations.2089

These laws protect individuals from discrimination in employment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability, and genetic information.2090 They also protect against harassment, and prohibit retaliation against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.2091 Furthermore, provisions in the ADA, the Rehabilitation Act, and GINA provide limitations on covered entities obtaining health-related information from applicants and employees and require any health-related information obtained to be kept confidential.2092 Generally, most of these laws cover the following entities (with some exceptions):

- Private, state and local government employers with 15 or more employees2093 • Labor organizations • Employment agencies • Federal government2094

Enforcement Tools Unlike most of the agencies reviewed in this report, many of which have distinct specific missions, EEOC’s primary function is the enforcement of civil rights laws. EEOC’s authority covers private sector employers, as well as the federal sector (federal agencies), and also covers the administration of its own internal EEO program for employees. This chapter focuses on its private sector enforcement efforts and tools; there may be certain enforcement tools that are used only in the

2088 Exec Order No. 12,067, 43 Fed. Reg. 28,967 (Jun. 30, 1978) and implementing regulations at 29 C.F.R. §§ 1690.101-1690.107. 2089 Exec. Order No. 13,164, 82 Fed. Reg. 654 (Jan. 3, 2017). 2090 See supra notes 2079-89; see also U.S. Equal Employment Opportunity Comm’n, “Prohibited Employment Policies/Practices,” <https://www.eeoc.gov/laws/practices/index.cfm> [hereinafter EEOC, “Prohibited Employment Policies/Practices”]. 2091 See supra notes 2079-89; EEOC, “Prohibited Employment Policies/Practices,” supra note 2090. 2092 29 U.S.C. § 705(2); 42 U.S.C. § 12112(d); 42 U.S.C. § 2000ff-1(b); 42 U.S.C. § 2000ff-5. 2093 29 U.S.C. § 206(d); 42 U.S.C. §§ 2000e(b), 2000e(e); 42 U.S.C. § 12111(5)(A); 42 U.S.C. § 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); 29 U.S.C. § 630(b); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file) (noting that “The ADEA applies to private employers with 20 or more employees, and to state and local government employers of all sizes,” and “There is no minimum employee requirement under the Equal Pay Act”). 2094 29 U.S.C. § 203(d); 29 U.S.C. § 206(d); 29 U.S.C. §§ 630(b), 630(c), 630(d), 630(e); 42 U.S.C. §§ 2000e; 42 U.S.C. § 12111(2); 42 U.S.C. § 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; Title VII and Executive Order 12,067 also authorize the EEOC to coordinate and lead the federal government’s efforts to combat workplace discrimination.

<https://www.eeoc.gov/laws/practices/index.cfm>

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federal sector, and therefore not explored fully in the text below. Though focused on the private sector, some of the data below may include activities that overlap with the federal sector (such as outreach activities) and are not necessarily disaggregated. The agency enforcement tools EEOC has specific legal authority to use are:

- Complaint Resolution2095 • Agency-Initiated Charges2096 • Litigation2097 • Issuance of Regulations2098 • Technical Assistance2099 • Publicity2100 • Community outreach to stakeholders2101 • Data collection, research, and reporting2102 • Collaboration with states/local agencies2103 • Collaboration with other federal agencies2104 • Strategic Plan2105

2095 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691. 2096 *Id.* §§ 1601.11, 1601.27. 2097 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge); 29 C.F.R. §§ 1601.27, 1620.30(a)(6), 1620.30(b), 1626.15(d), and 1626.19; see also U.S. Equal Employment Opportunity Comm’n, Office of General Counsel, Fiscal Year 2018 Annual Report, <https://www.eeoc.gov/eeoc/litigation/reports/upload/18annrpt.pdf>. In addition to initiating its own litigation, EEOC also has the ability to file amicus briefs in any lower court, including U.S. Courts of Appeal, federal district courts, state courts, and administrative courts. See U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2098 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601; 28 C.F.R. § 42.403. 2099 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; see also U.S. Equal Employment Opportunity Comm’n, Congressional Budget Justification Fiscal Year 2019, pp. 51-59, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf> [hereinafter EEOC, FY 2019 Budget Justification]. 2100 28 C.F.R. § 42.405. 2101 42 U.S.C. 200e-4(h)(2); see also EEOC, FY 2019 Budget Justification, supra note 2099, at 51-59. 2102 42 U.S.C. § 2000e-4(e) (stating that “The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed ... It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable”) and (g)(5) (stating that “The Commission shall have power ... to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public”); 29 C.F.R. § 1602; 28 C.F.R. § 42.406; EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 18. 2103 42 U.S.C. § 2000e-4(g)(1) (stating that “The Commission shall have power ... to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals”); 29 C.F.R. § 1601.13 and Subpart G; 29 C.F.R. § 1626.10; EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 6. 2104 29 C.F.R. Part 1690; 28 C.F.R. § 42.413. 2105 GPRA Modernization Act of 2010, H.R. 4122, 11th Cong. § 1115(b).

<https://www.eeoc.gov/eeoc/litigation/reports/upload/18annrpt.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>

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While EEOC does not have specific legal authority for other tools identified by the Commission, nothing prohibits EEOC from, for example, issuing policy guidance, as described in further detail below. With respect to EEOC’s enforcement authority, EEOC utilizes an administrative process to investigate and resolve charges of discrimination, which is just one of the enforcement tools that it utilizes.2107 Olatunde Johnson, Professor of Law at Columbia Law School noted that “EEOC lacks adjudicative capacity, but does have the ability to investigate claims and seek conciliation agreements between parties.”2108 However, EEOC has the authority to sue private employers in court under Title VII if the employer is “not a government, governmental agency or political subdivision.”2109 It has the power to litigate against private and governmental employers under ADEA and EPA,2110 and it has the capacity to file amicus briefs under any statute under its jurisdiction, and it primarily files them in the U.S. Court of Appeals; however it will not file them in cases against a federal defendant.2111 Under Title VII, EEOC also has the statutory authority to “issue, amend, or rescind suitable procedural regulations.”2112 However, Johnson explained that “The EEOC ... lacks substantive rulemaking power. Title VII ... grants the EEOC power to issue procedural regulations but not the power to issue substantive regulations defining the ambit of Title VII.”2113 Under other statutes that it enforces though, EEOC does appear to have substantive rulemaking power.2114 Budget and Staffing For FY 2016, the President’s Budget requested \$373.1 million for EEOC,2115 and Congress appropriated \$364.5 million.2116 The President’s Budget requested \$376.6 million for EEOC in FY

2106 42 U.S.C. § 2000e-4(e); see, e.g., EEOC, FY 2019 Budget Justification, supra note 2099, at 15-59. 2107 29 C.F.R. Part 1601. Subpart B. 2108 Johnson, Beyond the Private Employment General, supra note 36. 2109 42 U.S.C. 2000e-5(f) (1); 29 C.F.R. § 1601.27. 2110 See supra note 2097. 2111 U.S. Equal Employment Opportunity Comm'n, "Amicus Curiae Program," <https://www.eeoc.gov/eeoc/litigation/amicus.cfm>. 2112 42 U.S.C. § 2000e-12. 2113 Olatunde C.A. Johnson, Overreach and Innovation in Equality Regulation, 66 Duke Law Journal (2017), p. 1784, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3531&context=faculty_scholarship. 2114 42 U.S.C. § 2000ff-10; 26 U.S.C. § 628. 2115 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2016, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>. 2116 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2018, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf> [hereinafter EEOC, FY 2018 Budget Justification].

<https://www.eeoc.gov/eeoc/litigation/amicus.cfm>
https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3531&context=faculty_scholarship
<https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>

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2017,2117 and Congress appropriated \$364.5 million,2118 which was equal to the amount of EEOC's FY 2016 appropriated budget. In FY 2018, the President's Budget requested \$363.8 million for EEOC,2119 a decrease of approximately \$12.8 million from what was requested for FY 2017,2120 and Congress appropriated \$379.5 million for FY 2018.2121 Between FY 2016 and FY 2018, EEOC's appropriated budget increased by \$15 million. See Figure 7.1. Figure 7.1: Requested and Appropriated Budgets for EEOC

Source: U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2016, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2017, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2018, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2019, February 2018, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>; U.S. Equal Employment Opportunity Commission, Congressional Budget Justification Fiscal Year 2020, March 2019, p. 14, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>.

Proposed Merger with DOL As mentioned in Chapter 4, in May 2017, the Trump Administration proposed merging DOL's OFCCP into EEOC.2122 While EEOC and OFCCP cover similar areas, they have separate jurisdictions and play different roles, raising concerns for critics of the proposed merger.2123

2117 U.S. Equal Employment Opportunity Comm'n, Congressional Budget Justification Fiscal Year 2017, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf> [hereinafter EEOC, FY 2017 Budget Justification]. 2118 EEOC, FY 2019 Budget Justification, supra note 2099, at 12. 2119 EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2120 EEOC, FY 2017 Budget Justification, supra note 2117, at 14; EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2121 EEOC, FY 2020 Budget Justification, supra note 260, at 14. 2122 See supra note 1904-14 (discussing DOL OFCCP merger with EEOC). 2123 Casuga et al., "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," supra note 1906; Coalition Letter Opposing the Elimination of OFCCP, supra note 1913.

\$373,112,000	\$376,646,000
\$363,807,000	\$364,500,000
\$364,500,000	\$364,500,000
\$379,500,000	
\$300,000,000	\$310,000,000
\$320,000,000	\$330,000,000
\$340,000,000	\$350,000,000
\$360,000,000	\$370,000,000
\$380,000,000	\$390,000,000

FY 2016 FY 2017 FY 2018

Figure 7.1: Requested and Appropriated Budgets for EEOC FY 2016 to FY 2018

Requested Appropriated

<https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>
<https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>

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Ultimately, this proposal fell flat during the budget process, and Congress allocated EEOC and OFCCP funds separately, preempting any merger.2124 Staffing In FY 2016, EEOC had 2,202 FTE employees.2125 The number of FTE employees in FY 2017 dropped slightly to 2,082,2126 and further dropped to 1,968 FTE employees in FY 2018.2127 EEOC reported that it had 33 contractors "providing services through our Office of Information Technology," as of April 2018.2128 EEOC noted in its interrogatories to the Commission that "all EEOC employees and contractors have some role in 'work[ing] on ... enforcement of the relevant civil rights statutes.'"2129 EEOC leadership is comprised of five Commissioners, as well as the agency's General Counsel.2130 Commissioners serve staggered five-year terms, and no more than three Commissioners can be affiliated with the same party.2131 The Chair is responsible for policy administration and implementation, financial management, and organizational development of the Commission.2132 The Vice Chair and the Commissioners also participate in developing and approving Commission policies, as well as issuing charges of discrimination, and authorizing the filing of lawsuits.2133 The General Counsel supports the Commission to provide direction, coordination, and supervision to EEOC's litigation program.2134 See Figure 7.2.

2124 Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog," supra note 1906; Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding," supra note 1907; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2961 (2018). 2125 EEOC, FY 2018 Budget Justification, supra note 2116, at 10. 2126 EEOC, FY 2019 Budget Justification, supra note 2099, at 12. 2127 EEOC, FY 2020 Budget Justification, supra note 260, at 14. 2128 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 9, at 10. 2129 *Ibid.* 2130 42 U.S.C. §§ 2000e-4(a) and 2000e-4(b)(1); EEOC, "The Commission and the General Counsel," supra note 2066. 2131 42 U.S.C. § 2000e-4(a); U.S. Equal Employment Opportunity Comm'n, Performance and Accountability Report, Fiscal Year 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf> [hereinafter EEOC, FY 2017 Performance and Accountability Report]. 2132 EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 10. 2133 *Ibid.* 2134 42 U.S.C. § 2000e-4(b)(1); U.S. EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 10.

<https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>

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Figure 7.2: EEOC Organizational Chart

Source: U.S. Equal Employment Opportunity Commission, Performance and Accountability Report, Fiscal Year 2018, p. 11, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

Assessment Prioritization of Civil Rights Agency-Wide The EEOC is an independent Commission, without an agency reporting structure parallel to agency civil rights enforcement offices. The Commissioners are the head of the agency. Currently, there are two vacant Commissioner positions at EEOC, and the General Counsel position is currently vacant as well.2135 Prior to that, in January 2019, there were three Commissioner positions vacant at EEOC, which meant that there were not enough Commissioners for a quorum.2136 The lack of quorum was due to a hold on all pending EEOC nominees because Senator Mike Lee (R-Utah) objected to the reappointment of now-former Commissioner Chai Feldblum, the first openly LGBT person to sit on the Commission; his opposition was based on what he

2135 EEOC, "The Commission and the General Counsel," supra note 2066. 2136 Paige Smith, "Lacking Quorum, Civil Rights Agency Awaits Renominations," Bloomberg News, Jan. 3, 2019, <https://news.bloomberglaw.com/daily-labor-report/lacking-quorum-civil-rights-agency-awaits-renominations>.

<https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>
<https://news.bloomberglaw.com/daily-labor-report/lacking-quorum-civil-rights-agency-awaits-renominations>

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termed her "radical views on marriage."2137 Some argued that this lack of quorum hindered EEOC's ability to effectively enforce the employment antidiscrimination laws,2138 as generally decisions on big ticket lawsuits, significant spending, and other policy decisions cannot be made without a quorum.2139 However, then Acting Chair Victoria Lipnic stated, "[t]here are a lot of responsibilities delegated that are related to the normal functioning operations of the EEOC: taking in charges, investigating them, and issuing charge determinations," and has added that "[a]ll of that will continue."2140 On May 15, 2019, Janet Dhillon was sworn in as the Chair of the EEOC, after President Trump nominated her on June 29, 2017, and the Senate confirmed her on May 8, 2019.2141 The confirmation of Dhillon as Chair restored a quorum at EEOC.2142 Although in the context of federal EEO programs, which are not the subject of this report, Dexter Brooks testified to the Commission that most of EEOC's work is to address "bad actions" that have already happened, but that it would be "ideal for us to be able to have access to data and trends" to identify problem areas.2143 According to its website, EEOC has placed a high priority on the enforcement of systemic discrimination, as "a strong nationwide program is critical to fulfilling its mission of eradicating discrimination in the workplace."2144 Strategic Planning and Self-Evaluation EEOC's strategic planning process requires its leadership to "reflect upon the statutory mission of the agency, reassess prior goals and objectives, and identify any new goals and objectives that will

2137 Tim Fitzsimons, "GOP senator blocks reappointment of EEOC's only LGBTQ commissioner," NBC News, Dec. 19, 2018, <https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eeoc-s-only-lgbtq-commissioner-n949611> [hereinafter Fitzsimons, "GOP senator blocks reappointment of EEOC's only LGBTQ commissioner"]; see also Mike Lee, U.S. Sen., "Press Release: A Threat to Marriage from the EEOC," Feb. 9, 2018, <https://www.lee.senate.gov/public/index.cfm/2018/2/a-threat-to-marriage-from-the-eeoc> (discussing Senator Lee's view that "Feldblum is no typical Democrat . . . [h]er radical views on marriage and the appropriate use of government power place her far outside even the liberal mainstream," and his recommendation that "President Trump and Senate Democrats should reject Chai Feldblum's divisive agenda by finding a more mainstream candidate for the EEOC, one who respects the institution of marriage and religious freedom for all Americans."). 2138 Fitzsimons, "GOP senator blocks reappointment of EEOC's only LGBTQ commissioner," supra note 2137 (quoting a statement from Sunu Chandy, Legal Director at the National Women's Law Center, "[i]n]ot having a full commission to lead this work will hamper important civil rights efforts that are currently underway, especially in this #metoo era."). 2139 Joshua Roberts, "EEOC Delegated Duties to Work Around Lack of Quorum," Bloomberg Law, Jan. 16, 2019, <https://news.bloomberglaw.com/daily-labor-report/eeoc-delegated-duties-to-work-around-lack-of-quorum-1>. 2140 Chris Ofler, "LGBT Debate Shackles Trump Harassment Police," Dec. 3, 2018, <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>. 2141 U.S. Equal Employment Opportunity Comm'n, "Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission" (May 15, 2019). 2142 Patricia Barnes, "The EEOC is Back in Business, At The Urging Of Business," Forbes, May 31, 2019, <https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eeoc-is-back-in-business-at-the-urging-of-business/#76101060438d>. 2143 Brooks Testimony, Sexual Harassment in Government Workplaces Briefing, p. 8. 2144 U.S. Equal Employment Opportunity Comm'n, "Systemic Discrimination," <https://www.eeoc.gov/eeoc/systemic/>.

<https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eeoc-s-only-lgbtq-commissioner-n949611>
<https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eeoc-s-only-lgbtq-commissioner-n949611>
<https://www.lee.senate.gov/public/index.cfm/2018/2/a-threat-to-marriage-from-the-eeoc>
<https://news.bloomberglaw.com/daily-labor-report/eeoc-delegated-duties-to-work-around-lack-of-quorum-1>
<https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>
<https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eeoc-is-back-in-business-at-the-urging-of-business/#76101060438d>
<https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eeoc-is-back-in-business-at-the-urging-of-business/#76101060438d>
<https://www.eeoc.gov/eeoc/systemic/>

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enable the agency to meet its statutory mission," which is useful to Congress and stakeholders to identify key external factors that "may affect the agency's ability to carry out its mandate."2145 In producing the plan, the EEOC "solicited and received comments from a wide range of stakeholders and the public."2146 EEOC's current strategic plan aligns its policy priorities with its Strategic Enforcement Plan, which "do not materially differ" from EEOC's current agency policy priorities.2147 EEOC's Strategic Plan for Fiscal years 2018-2022 outlines two strategic objectives and one management objective relevant to civil rights enforcement, which are:

- Combat and prevent employment discrimination through the strategic application of EEOC's law enforcement authorities;
- Prevent employment discrimination and promote inclusive workplaces through education and outreach; and
- Achieve organizational excellence.2148 These strategic objectives have not substantively changed from those outlined in EEOC's Strategic Plan for Fiscal years 2012-2016.2149 With respect to its first Strategic Objective of judiciously utilizing its law enforcement authority, EEOC's outcome goals strive to remedy and prevent discriminatory employment practices through the strategic application of EEOC's law enforcement authorities.2150 According to its strategic plan,

In order to measure the success of this first Strategic Objective, EEOC assesses its performance by setting benchmarks for a "significant proportion" of EEOC and FEPA's resolutions containing "targeted, equitable relief; by resolving at least 9 percent of enforcement lawsuits each year; by reporting its efforts to identify and resolve systemic discrimination; by setting benchmarks for a "significant proportion" of federal agencies to improve their fair employment practices based on EEOC's oversight and recommendations; and to maintain a high quality standard for investigations, conciliations, hearings, and appeals based on established criteria.2151 With respect to its education and outreach Strategic Objective, EEOC strives for members of the public to understand employment discrimination laws and know their rights under the laws, and strives for employers, unions, and other covered entities to prevent discrimination, address EEO issues, and achieve more inclusive work environments.2152 In order to measure its success under this objective, EEOC will expand its use of technology for education and outreach; leverage collaborations with partner organizations to "assist in breaking employment barriers;" and update guidance and other educational materials to be more user-friendly resources for information.2153 With respect to its Management Objective of achieving organizational

2145 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 3. 2146 *Ibid.*, 1. 2147 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 3, at 8. 2148 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 9. 2149 U.S. Equal Employment Opportunity Comm'n, Strategic Plan for Fiscal years 2012-2016, p. 11, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf. 2150 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 9; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2151 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 10. 2152 *Ibid.*, 9. 2153 *Ibid.*

https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf

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excellence, EEOC strives to cultivate a "skilled and committed" workforce, improve the organization through advancing performance management, advance diversity and inclusion in the workplace, foster constructive employee and labor management relations, strive to implement quality practices in all programs, and model the practices it promotes.2154 In order to measure its success under this objective, EEOC assesses its performance by measuring performance improvement with respect to employee engagement and inclusiveness, utilizing survey data to provide baseline measures of the effectiveness of EEOC services, making yearly progress on the modernization of its case management systems for program offices, and budgeting to prioritize funding to achieve EEOC's strategic goals.2155 Under its statute, EEOC is required to submit a report to Congress and the President after each fiscal year detailing any actions it has taken and any money it has disbursed.2156 It also must make "further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable."2157 In all fiscal years in question (FY 2016-FY 2018), EEOC reported that it met or exceeded the majority of its performance measures as set forth in the strategic plan.2158 In its FY 2018 Performance and Accountability Report, the EEOC Inspector General's statement indicated that EEOC has had some management challenges, having met less of its Management Objective performance measures as compared to its other strategic objectives' performance measures.2159 The Inspector General noted, "EEOC faces barriers to significantly advance its mission to 'prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace,'" identifying strategic performance management, data analytics, and human capital as the specific challenges.2160 It indicated that in FY 2018, EEOC had improved its management of data analytics, and was working on "improving its human capital processes to correct serious and long-standing performance management inadequacies."2161 The Inspector General went on to say that the agency "continues to face serious challenges in managing strategic performance, particularly in strategic planning and performance measurement."2162 The Inspector General went on to state that EEOC's current performance measures were geared to measure activity rather than outcomes, and recommended that EEOC institute measures to "quantify the effectiveness of EEOC's efforts."2163

2154 *Ibid.*, 9. 2155 *Ibid.* 2156 42 U.S.C. § 2000e-4(e). 2157 *Ibid.* 2158 U.S. Equal Employment Opportunity Comm'n, Fiscal Year 2016 Performance and Accountability Report, p. 18, <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>; EEOC, FY 2017 Performance and Accountability Report, supra note 2131, at 19. 2159 U.S. Equal Employment Opportunity Comm'n, Fiscal Year 2018 Performance and Accountability Report, pp. 26-30, <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>. 2160 *Ibid.*, 52. 2161 *Ibid.*, 52. 2162 *Ibid.*, 52. 2163 *Ibid.*, 52.

<https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>

<https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>

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In addition to its strategic plan, EEOC issues a specific strategic plan for enforcement, "to set forth its continued commitment to focus efforts on those activities likely to have strategic impact [defined as "a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry"] advancing equal opportunity and freedom from discrimination in the workplace."2164 EEOC outlined certain national priority areas in its Strategic Enforcement Plan FY 2017 – FY 2021, which are:

- Eliminating Barriers in Recruitment and Hiring • Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and

- Underserved Communities from Discrimination • Addressing Selected Emerging and Developing Issues • Ensuring Equal Pay Protections for All Workers • Preserving Access to the Legal System • Preventing Systemic Harassment2165

These priority areas have not changed significantly.2166 From EEOC's previous strategic enforcement plan.2167 In 2005, the EEOC formed a task force to examine EEOC's efforts to address systemic discrimination; the task force ultimately recommended action items for initiating operational reforms, enhancing expertise, creating incentives, staffing, and additional investments to address systemic trends.2168 According to EEOC's 2016 self-evaluation, A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, since 2005,2169 EEOC has "made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program."2170 The report found:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.

- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.

2164 U.S. Equal Employment Opportunity Comm'n, Strategic Enforcement Plan FY 2017 – FY 2021, p. 1, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf> [hereinafter EEOC, FY 2017-2021 Strategic Enforcement Plan]. 2165 *Ibid.*, 6-9. 2166 For changes to the EEOC's substantive priority areas see *Ibid.*, p. 2. 2167 See U.S. Equal Employment Opportunity Comm'n, Strategic Enforcement Plan FY 2013 – FY 2016, pp. 9-10, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>. 2168 U.S. Equal Employment Opportunity Comm'n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, March 2006, pp. iv-v, https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf. 2169 EEOC, A Review of the Systemic Program, supra note 213, at iv. 2170 *Ibid.*

<https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>

<https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>

https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf

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- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.

- Over 80 percent of systemic resolutions raised identified national priority issues in FY 2015.

- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.

- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.

- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006).2171

Complaint Processing, Agency-Initiated Charges, and Litigation EEOC is responsible for enforcing federal laws that prohibit employment discrimination on protected bases.2172 In order to carry out its mission, EEOC has two major enforcement mechanisms available: administrative enforcement and litigation.2173 EEOC uses the administrative enforcement process when an individual or a Commissioner files a charge of discrimination, and EEOC may initiate an investigation and potentially a conciliation process in order to resolve the charge (including through resolution of systemic discrimination).2174 EEOC can also initiate directed investigations under the EPA and ADEA.2175 EEOC may initiate litigation when it believes that an entity (including an individual, class, and/or group) has violated one or more federal antidiscrimination law or laws that EEOC enforces, if other enforcement efforts failed to resolve the violation.2176 This applies if the respondent is a private employer; otherwise the U.S. Attorney General (DOJ) is authorized to litigate if the respondent is a state or local government employers under Title VII, the ADA, or GINA.2177 The EEOC Office of General Counsel (OGC) conducts litigation on behalf of EEOC.2178

2171 *Ibid.*, iv-v. 2172 See supra notes 2079-89. 2173 See supra notes 2095, 2097; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2. 2174 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2. 2175 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file); EEOC, A Review of the Systemic Program, supra note 213, at 4 (noting in footnote no. 22 that "Directed investigations are initiated by EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1967), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. § 211." 2176 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2. 2177 See supra, notes 2097. 2178 U.S. Equal Employment Opportunity Comm'n, "Litigation," <https://www.eeoc.gov/eeoc/litigation/index.cfm>.

<https://www.eeoc.gov/eeoc/litigation/index.cfm>

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An individual may file a private workplace discrimination lawsuit against a covered entity, but before going to court, that individual must first file a charge of discrimination with the EEOC,2179 in order to allow EEOC the opportunity to determine if there is a reasonable cause to believe that discrimination occurred and provide for a voluntary resolution when possible and appropriate.2180 Commissioners can also file a charge of discrimination on behalf of an aggrieved individual working in a covered entity, at their discretion.2181 EEOC reported to the Commission that EEOC Commissioners filing a charge typically is done only in cases in which the alleged discrimination is systemic "or of a different nature than an individual charge alleges."2182 EEOC notes that in the past five years, approximately 75 percent of Commissioner charges have focused on discrimination in hiring, as "victims typically lack information about a discriminatory hiring policy or practice."2183

During an investigation or after EEOC determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, EEOC is required to offer alternative dispute resolution to help private sector parties resolve charges of discrimination,2184 with mediation being a common form of alternate dispute resolution that EEOC offers.2185 EEOC reported to the Commission that:

EEOC offers an alternative dispute resolution process to resolve certain charges prior to the [continuation] of any investigation. The respondent and charging party are invited to voluntarily mediate these charges. During mediation, the focus of attention is not on whether the law has been violated, but rather, whether the issue can be resolved to the parties' mutual satisfaction. Charges not resolved in mediation are investigated to determine if there is reasonable cause to believe that discrimination has occurred.2186

2179 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted that this is true for all laws it enforces, with the exception of the Equal Pay Act (EPA). EEOC indicated that under the EPA, an individual doesn't need to file a charge with the EEOC first before filing an EPA lawsuit in District Court. See also U.S. Equal Employment Opportunity Comm'n, "Filing A Charge of Discrimination," <https://www.eeoc.gov/employees/charge.cfm>. 2180 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2. 2181 29 C.F.R. § 1601.11. 2182 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, A Review of the Systemic Program, supra note 213, at 16-17. 2183 *Ibid.* 2184 29 C.F.R. §§ 1601.20 (settlement prior to issuance of a determination), 1601.24 (mediation after issuance of a reasonable cause determination), 1691.9(a). 2185 This option is also available, upon request, at later points in the process. See, U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm'n, "Alternative Dispute Resolution (ADR)," https://www.eeoc.gov/federal/fed_employees/adr.cfm; U.S. Equal Employment Opportunity Comm'n, "Questions and Answers About Mediation," <https://www.eeoc.gov/eeoc/mediation/qanda.cfm> [hereinafter EEOC, "Questions and Answers About Mediation"]. 2186 U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019)(on file).

<https://www.eeoc.gov/employees/charge.cfm>

https://www.eeoc.gov/federal/fed_employees/adr.cfm

<https://www.eeoc.gov/eeoc/mediation/qanda.cfm>

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Whether EEOC offers mediation under Title VII in complaints brought against private employers will depend on a range of factors, including the nature of the case, the relationship between the parties, the case's size and complexity, and the relief sought by the charging party.2187 Both parties must voluntarily opt to mediate the charges in hopes of coming to a negotiated agreement.2188 In private sector cases, if mediation is not an effective method of obtaining a resolution then EEOC will initiate an investigation to determine if there is reasonable cause to believe discrimination occurred, and if so, will utilize conciliation as a means of remedying the alleged discriminatory practice.2189 If conciliation is not effective, then EEOC is authorized to bring a civil action against the respondent in federal court.2190 EEOC also has formalized agreements with state and local Fair Employment Practices Agencies (FEPAs), who administer state or local fair employment laws, to handle administrative enforcement (investigations, conciliation, etc.) on the state and local level.2191 EEOC currently has agreements with 92 state and local FEPAs, which have resolved over 36,000 employment discrimination charges since FY 2016.2192 EEOC also contracts with approximately 64 Tribal Employment Rights Organizations (TEROs) responsible for advocating for Native American employment issues with employers on reservations or other Native American lands.2193 EEOC has several remedies for employment discrimination. When discrimination is discovered, "the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred."2194 The remedy will depend on the nature and severity of the discriminatory act and effect on the victim, however the employer will need to

cease its discriminatory practices and ensure that discriminatory acts are prevented in the future.2195 Depending on the case, victims may be awarded remedies that include:

• Targeted Equitable Relief. This is non-monetary and non-generic relief that explicitly addresses the employment discrimination at issue in the case. Targeted equitable relief can

2187 EEOC, “Questions and Answers About Mediation,” supra note 2185. 2188 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, “Questions and Answers About Mediation,” supra note 2185. 2189 29 C.F.R. § 1601.24(a); 29 C.F.R. § 1691(a); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2-3. 2190 29 C.F.R. § 1601.27; 29 C.F.R. § 1691(b)(3); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted: “As noted in our interrogatories, there are exceptions to this statement. If the respondent is a state or local employer and the case is under Title VII, the ADA, or GINA, the U.S. Attorney General is authorized to sue.” Ibid. 2191 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 3. 2192 Ibid. 2193 Ibid. 2194 U.S. Equal Employment Opportunity Comm’n, “Remedies For Employment Discrimination,” <https://www.eeoc.gov/employees/remedies.cfm> [hereinafter EEOC, “Remedies For Employment Discrimination”]. 2195 Ibid.; see also 29 C.F.R. § 1614.501 (remedies for complaints filed against federal sector employers).

<https://www.eeoc.gov/employees/remedies.cfm>

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include training of employees and supervisors, development of policies and practices to prevent future incidents, and external monitoring of employer actions.2196

• Recovery of attorney’s fees, expert witness fees, and court costs.2197 • Compensatory and Punitive Damages. These damages may be awarded in private sector

cases when intentional unlawful discrimination has been discovered in cases involving race, color, national origin, sex, religion, disability, or genetic information. This includes Title VII cases involving intentional wage-based sex discrimination.2198 They can compensate for out-of-pocket expenses incurred or emotional harm suffered from the discrimination and can punish an employer for particularly malicious acts of discrimination.2199

• Liquidated Damages. Cases involving intentional age discrimination or intentional sex- based wage discrimination under the EPA cannot collect compensatory or punitive damages, but may be entitled to collect liquidated damages, which can be used to punish particularly malicious acts of discrimination.2200

There are limits on the amount of compensatory and punitive damages that can be awarded, based on the size of the employer.2201 The amount of liquidated damages awarded can be equal to the amount of back pay awarded to the victim.2202 With regard to EEOC’s private sector enforcement (not including charges filed with state or local FEPAs), in FY 2016, EEOC processed 91,503 new charges, and resolved a total of 97,443 charges (which includes charges from the pending inventory from previous fiscal years).2203 The number of new charges processed in FY 2017 decreased to 84,254, however while the total number of charges EEOC resolved in FY 2017 increased to 99,109.2204 In FY 2018, EEOC processed 76,418 new charges and resolved 90,558 charges (again including pending inventory from previous years).2205 The pending inventory decreased from 73,508 in FY 2016 to 61,621 in FY 2017, and now stands at 49,607 for FY 2018.2206 See Figure 7.3.

2196 By 2022, the EEOC intends that a “significant proportion of EEOC and FEPA’s resolutions contain targeted equitable relief” EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 10 and 14. 2197 EEOC, “Remedies For Employment Discrimination,” supra note 2194. 2198 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). 2199 EEOC, “Remedies For Employment Discrimination,” supra note 2194. 2200 Ibid. 2201 Ibid. A limit of \$50,000 is imposed for employers with 15-100 employees; a limit of \$100,000 is imposed for employers with 101-200 employees; a limit of \$200,000 is imposed for employers with 201-00 employees; and a limit of \$300,000 is imposed for employers with more than 500 employees. 2202 EEOC, “Remedies For Employment Discrimination,” supra note 2194. 2203 EEOC, FY 2020 Budget Justification, supra note 260, at 34. 2204 Ibid. 2205 Ibid. 2206 Ibid.

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Figure 7.3: EEOC Total New Charges, Total Resolutions, and Pending Inventory for Private Sector Enforcement

Source: U.S. Equal Employment Opportunity Commission, Congressional Budget Justification, Fiscal Year 2020, p. 34, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>. *Pending beginning inventory adjusted to reflect charge activity spanning fiscal years.

Regarding its workload, EEOC noted:

With focused attention on reducing our pending inventory, the results for FY 2017 reflect a dramatic decline of 16.2 percent, to 61,612 [pending] charges. In FY 2018, we maintained the trend of resolving more charges than our receipt levels, resulting in a 19.5 percent drop in our pending inventory, to 49,607. As a result, we project a continued decline in inventory to 43,851 charges in FY 2019. Through the leadership of [then] Acting Chair Victoria Lipnic, the EEOC has prioritized reductions in its inventory in order to build a more effective enforcement program. The focused priority of the Acting Chair led to the reductions realized in FY 2017 and FY 2018.2207

EEOC stated that it would contemplate other strategies to reduce the current workload, including renewed attention on intake interviews to “help sharpen issues” to assist the agency in evaluating the charge.2208 EEOC, however, went on to project significant concern about management of its future workload, stating that:

2207 Ibid., 31. 2208 Ibid., 31-32.

91,503 84,254

76,418

97,443 99,109 90,558

73,508

61,621

49,607

0

20,000

40,000

60,000

80,000

100,000

120,000

FY 2016 FY 2017 FY 2018

Figure 7.3: EEOC Total New Charges, Total Resolutions, and Pending Inventory for Private Sector Enforcement

FY 2016 to FY 2018

Total New Charges Total Resolutions Pending Inventory

<https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>

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without any hiring of investigators and mediators or the ability to backfill vacancies starting in FY 2019, the agency will return to a cycle of an increasing pending inventory, growing to 44,426 in FY 2020, 45,740 in FY 2021 and 47,055 in FY 2022. This will reverse the current trend, and by FY 2020, the EEOC will be receiving more charges than it resolves. The budget levels requested in FY 2020 will yield a loss of 50 investigators and mediator staffing will remain stagnant after three successive years of losses of a combined 19 positions.2209

The majority of charges in FY 2016, FY 2017, and FY 2018 resulted in a No Reasonable Cause determination (67.6 percent, 70.2 percent and 70.6 percent of all resolutions respectively). Only a small percentage of charges in FY 2016, FY 2017 and FY 2018 resulted in Reasonable Cause determinations (3.2 percent, 2.9 percent and 3.5 percent respectively). Many charges over the same period resulted in Administrative Closures (16.1 percent, 15.0 percent and 14.2 percent respectively). A slightly lower percentage of cases during the years in question led to Merit Resolutions, which are outcomes favorable for the charging party or charges with meritorious allegations (16.2 percent, 14.8 percent and 15.2 percent respectively). Settlements, withdrawals with benefits, and successful or unsuccessful conciliations fall under the rubric of Merit Resolutions, which are an important part of the EEOCs enforcement activities.2210 Successful conciliations constituted 1.4 percent, 1.2 percent and 1.4 percent of all outcomes for FY 2016, 2017, and 2018 respectively. Settlements constituted 7.4 percent, 6.4 percent and 6.1 percent of all outcomes during the same period. See Table 7.1. Table 7.1 – EEOC Charge Resolutions by Type (all statutes) FY 2016 to FY 2017 FY 2016

Number FY 2016 Percentage

FY 2017 Number

FY 2017 Percentage

FY 2018 Number

FY 2018 Percentage

Total Resolutions 97,443 99,109 90,558 Settlements 7,193 7.4% 6,357 6.4% 5,554 6.1% Withdrawals w/Benefits 5,526 5.7% 5,376 5.4% 5,090 5.6% Administrative Closures 15,729 16.1% 14,884 15.0% 12,860 14.2% No Reasonable Cause 65,862 67.6% 69,563 70.2% 63,921 70.6% Reasonable Cause 3,113 3.2% 2,909 2.9% 3,133 3.5% Successful Conciliations 1,359 1.4% 1,152 1.2% 1,289 1.4% Unsuccessful Conciliations

1,754 1.8% 1,757 1.8% 1,844 2.0%

Merit Resolutions 15,832 16.2% 14,642 14.8% 13,777 15.2% Monetary Benefits (Millions)

\$348.0 \$355.6 \$353.9

Source: U.S. Equal Employment Opportunity Commission, “All Statutes (Charges filed with EEOC) FY 1997 – FY 2018,” <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

2209 Ibid., 31. 2210 See U.S. Equal Employment Opportunity Comm’n, “Definitions of Terms,” <https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>.

<https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>

<https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>

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The EEOC achieved 7,989 successful mediations out of a total 10,461 conducted (76 percent) in FY 2016, 7,218 successful mediations out of a total 9,476 conducted in FY 2017 (76 percent), and 6,754 successful mediation out of a total of 9,437 in FY 2018 (71.5 percent).²²¹¹ The time to completion and monetary benefit resulting varied only slightly over the period. For FY 2016, EEOC completed mediations in an average of 97 days resulting in over \$163 million in benefits, in FY 2017 EEOC averaged 105 days to completion resulting in roughly the same amount (\$163 million) in benefits, and in FY 2018 EEOC averaged 99 days to completion with nearly \$166 million in benefits.²²¹²

²²¹¹ EEOC, FY 2019 Budget Justification, supra note 2099, at 36; EEOC, FY 2020 Budget Justification, supra note 260, at 36. ²²¹² EEOC, FY 2019 Budget Justification, supra note 2099, at 36; EEOC, FY 2020 Budget Justification, supra note 260, at 36.

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Figure 7.4: Number of EEOC Charges by Type/Protected Basis

Source: U.S. Equal Employment Opportunity Commission, “Charge Statistics (Charges filed with EEOC FY 1997 Through FY 2017),” <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. “2018 data has been updated on the “Charge Statistics” website, even though the title still reflects data through only FY 2017

The largest category of EEOC private sector charges filed are based on retaliation, with 41,097 retaliation charges filed in FY 2016, 42,018 in FY 2017 and 39,469 in FY 2018.²²¹³ For those fiscal years, race, disability, and sex topped the list of protected bases for which charges were filed under the private sector enforcement program. See Figure 7.4.

²²¹³ U.S. Equal Employment Opportunity Comm’n, “Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017,” <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

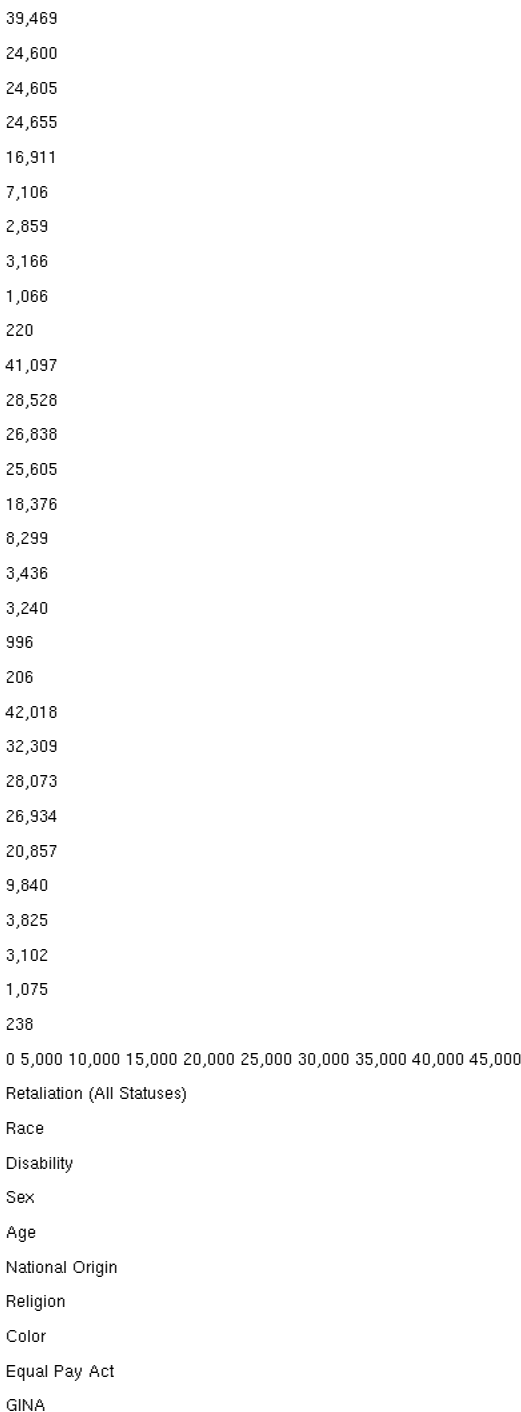


Figure 7.4 - Number of EEOC Charges by Type/Protected Basis, FY 2016 to FY 2018

FY 2016 FY 2017 FY 2018

<https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>
<https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

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In FY 2018 EEOC filed 41 workplace sexual harassment lawsuits.²²¹⁴ This is a 50 percent increase over the number of suits concerning sexual harassment filed by EEOC in FY 2017.²²¹⁵ During the same time frame, the number of charges filed with EEOC alleging sexual harassment rose by 13.6 percent, and EEOC has recovered nearly \$70 million for the victims of sexual harassment through its enforcement work, an increase of \$47.5 million in that time period.²²¹⁶ In appeals of cases involving sexual harassment of federal employees, monetary recovery increased even more dramatically during this period, by 180 percent for a total of \$443,066.²²¹⁷ EEOC has also increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to the 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent.²²¹⁸ In addition to the above mentioned EEOC charges, state and local FEPAs processed 39,129 new charges in FY 2016, 37,234 new charges in FY 2017, and 31,887 in FY 2018.²²¹⁹ State and local FEPAs resolved a total of 38,794 charges in FY 2016, 37,849 in FY 2017 and 37,138 in FY 2018, while continuing to reduce the pending inventory over those fiscal years.²²²⁰ Carol Miaskoff, Associate Legal Counsel at EEOC, testified before the Commission that oversight is important with regard to enforcement strategies and efforts in order to achieve consistency and results across the various EEOC regional offices. She noted that quarterly meetings take place between EEOC Commissioners and office directors “about the kinds of cases that they’re bringing, what they’re finding, what the results are, progress on these priorities, and what needs to be addressed and what isn’t being addressed adequately.”²²²¹ She also noted that a certain percentage of litigation from each district that is aligned with agency priorities goes to the EEOC for review.²²²² Under EEOC delegation agreements, the General Counsel has delegated authority (from EEOC Commissioners) to decide to commence or intervene in litigation, excepting a subset that go to the full EEOC for review, which are:

- Cases that may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses. This category is expected to include many systemic, pattern or-practice or EEOC Commissioner charge cases;

²²¹⁴ U.S. Equal Employment Opportunity Comm’n, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [hereinafter EEOC, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment”]. ²²¹⁵ *Ibid.* ²²¹⁶ *Ibid.* ²²¹⁷ *Ibid.* ²²¹⁸ *Ibid.* ²²¹⁹ EEOC, FY 2020 Budget Justification, supra note 260, at 39. ²²²⁰ *Ibid.* ²²²¹ Carol Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 71. ²²²² *Ibid.*

<https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm>

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• Cases that present issues in a developing area of law where the EEOC may not adopt a position through regulation, policy guidance, EEOC decision, or compliance manuals, or where the EEOC has only recently adopted a position;

• Cases that the General Counsel reasonably believes to be appropriate for submission for EEOC consideration, for example, because of their likelihood for public controversy or otherwise;

• All recommendations in favor of EEOC participation as amicus curiae.2223 Proactive Compliance Evaluations The EEOC does not have specific authority that authorizes it to conduct compliance reviews with respect to private sector employment. However, EEOC and OFCCP entered into a Memorandum of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies that aims to “reduce duplication of compliance activities” and “facilitate information exchange.”2224 EEOC and OFCCP will exchange information about compliance reviews or charges filed against a contractor in hopes of streamlining enforcement.2225 While the MOU does not specifically address whether EEOC has any authority to conduct compliance reviews, it does infer that OFCCP is taking the lead with the proactive compliance reviews conducted for federal contractors. Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity EEOC has the legal authority to disseminate policy through regulations,2226 technical assistance,2227 education/outreach,2228 and publicity.2229 EEOC disseminates policy to employers and employees through a variety of means. EEOC is obligated to conduct education and outreach activities under Title VII – including the provision of training and technical assistance – to those with rights and responsibilities under antidiscrimination laws.2230 Title VII of the Civil Rights Act of 1964 also authorizes the EEOC to provide training and technical assistance for those federal agencies with rights and responsibilities under employment antidiscrimination laws.2231 EEOC adopted an outreach strategy through a multi-year nationwide communications and outreach plan, which consisted of collaboration with state and local Fair Employment Practice Agencies, support

2223 EEOC, FY 2017-2021 Strategic Enforcement Plan, supra note 2164, at 19-20. 2224 DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, supra note 2044. 2225 Ibid. 2226 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601; 28 C.F.R. § 42.403. 2227 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15. 2228 42 U.S.C. 200e-4(h)(2). 2229 28 C.F.R. § 42.405. 2230 42 U.S.C. 200e-4(h)(2); EEOC, FY 2019 Budget Justification, supra note 2099, at 51. 2231 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; EEOC, FY 2018 Budget Justification, supra note 2116, at 16; EEOC, FY 2019 Budget Justification, supra note 2099, at 47-49.

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of private enforcement of the federal anti-discrimination laws, collaboration with other agencies, and an integration of research and data.2232 EEOC offers free and fee-based education and training.2233 The EEOC Training Institute holds seminars around the country for employers, employees, human resource professionals, attorneys, state and local officials and union officials.2234 EEOC focuses private sector education and outreach efforts on traditionally underserved communities and new or small businesses (which are unlikely to have human resources staff).2235 The commission directs approximately 32 percent of its private sector outreach towards vulnerable communities, with a particular focus on immigrants and farm workers.2236 On-site training is available to interested parties.2237 Overall, in FY 2017 EEOC provided free training to over 317,000 individuals through over 4,000 events around the country and served over 17,000 fee-paying individuals through over 430 events conducted by the Training Institute.2238 In FY 2018, the EEOC launched a new training program entitled, “Respectful Workplaces,” to address pervasive workplace harassment.2239 The EEOC reports that it is committed to improving the efficacy of its outreach and education efforts through digital technology and social media.2240 The use of technology in outreach efforts receives significant attention in EEOC’s most recent Strategic Plan, which sets the design and implementation of a technology plan for outreach and education as a goal for FY 2018.2241 EEOC posts regular updates about new and ongoing cases on its website.2242 In addition, EEOC issues press releases about its enforcement work, including reporting updates on charges/complaints and litigation, data collection, and policy updates.2243 EEOC indicates that it issues subregulatory guidance documents that provide policy updates and “are used to explain how the laws and regulations apply to specific workplace situations.”2244 These documents, which are approved by the majority of the EEOC’s Commissioners, are listed

2232 EEOC, FY 2017-2021 Strategic Enforcement Plan, supra note 2164, at 16-17. 2233 U.S. Equal Employment Opportunity Comm’n, “Federal Training and Outreach,” <https://www.eeoc.gov/federal/training/index.cfm>; U.S. Equal Employment Opportunity Comm’n, “Outreach, Education and Technical Assistance,” <https://www.eeoc.gov/eeoc/outreach/index.cfm>. 2234 U.S. Equal Employment Opportunity Comm’n Training Institute, “EEO Seminars,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=info>. 2235 EEOC, FY 2019 Budget Justification, supra note 2099, at 56. 2236 Ibid. 2237 U.S. Equal Employment Opportunity Comm’n Training Institute, “On-site Training,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=activity>. 2238 EEOC, FY 2019 Budget Justification, supra note 2099, at 54-55. 2239 Ibid., 51-52. 2240 Ibid., 52. 2241 EEOC, FY 2018-2022 Strategic Plan, supra note 198, at 19-20; EEOC, FY 2017-2021 Strategic Enforcement Plan, supra note 2164. 2242 U.S. Equal Employment Opportunity Comm’n, “Newsroom,” <https://www.eeoc.gov/eeoc/newsroom/>. 2243 U.S. Equal Employment Opportunity Comm’n, “EEOC Press Releases,” <https://www.eeoc.gov/eeoc/newsroom/release/>. 2244 U.S. Equal Opportunity Employment Comm’n, “EEOC Subregulatory Guidance,” <https://www.eeoc.gov/laws/guidance/index.cfm>.

<https://www.eeoc.gov/federal/training/index.cfm>
<https://www.eeoc.gov/eeoc/outreach/index.cfm>
<https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=info>
<https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=activity>
<https://www.eeoc.gov/eeoc/newsroom/>
<https://www.eeoc.gov/eeoc/newsroom/release/>
<https://www.eeoc.gov/laws/guidance/index.cfm>

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on EEOC’s website, and fall under two formats relevant to the private sector:2245 the Compliance Manual, which “advises staff on substantive matters of law for use during investigations and in making reasonable case determinations;”2246 and enforcement guidance, which “communicate [EEOC’s] position on important legal issues.”2247 EEOC also lists its proposed subregulatory policy documents on its website, indicating that these documents “are approved by a majority of the Commissioners for the purpose of seeking public input, but they do not establish Commission policy until the Commission approves the final version by a majority vote.”2248 Workplace Harassment Over the past few years and in the era of the #MeToo movement,2249 EEOC has ramped up its enforcement of workplace harassment, which includes a priority on preventing sexual harassment, though its enforcement efforts long predate this public focus.2250 In 1986, in Meritor Savings Bank v. Vinson, the Supreme Court affirmed that sexual harassment that is “sufficiently severe or pervasive” that creates “a hostile or abusive work environment” violates Title VII of the Civil Rights Act of 1964,2251 even if the unwelcome acts are not linked to employee benefits.2252 This decision effectively affirmed prior EEOC policy guidelines on the matter.2253 In testimony to the Commission, EEOC Associate Legal Counsel Carol Miaskoff stated that then- Acting Chair Lipnic was “frankly horrified” at the EEOC’s docket, “to see the pervasiveness of harassment of all kinds, including sexual harassment in the workplace.”2254 On January 10, 2017, after the issuance of a 2016 report from the EEOC’s Select Task Force’s on workplace harassment,2255 EEOC issued another proposed guidance and sought public comment on said guidance on the issue of harassment in the workplace.2256 This guidance included a definition of protections against discrimination on the basis of sex, which included gender identity, defined as follows:

2245 Ibid. 2246 U.S. Equal Opportunity Employment Comm’n, “Compliance Manual,” <https://www.eeoc.gov/laws/guidance/compliance.cfm>. 2247 U.S. Equal Opportunity Employment Comm’n, “Enforcement Guidances and Related Documents,” https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm. 2248 U.S. Equal Opportunity Employment Comm’n, “Proposed Subregulatory Guidance Documents,” <https://www.eeoc.gov/laws/guidance/proposed.cfm>. 2249 See Cassandra Santiago and Doug Criss, “An activist, a little girl and the heartbreaking origin of ‘Me too,’” CNN.com, Oct. 17, 2017, <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>. 2250 EEOC, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” supra note 2214. 2251 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). 2252 477 U.S. at 68, 73 (“hostile environment” theory of sexual harassment is actionable). 2253 477 U.S. at 65. 2254 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 33. 2255 See infra notes 2294-2296. 2256 U.S. Equal Employment Opportunity Comm’n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; U.S. Equal Employment Opportunity Comm’n, “EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment,” Jan. 10, 2017, <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17-a.cfm>.

<https://www.eeoc.gov/laws/guidance/compliance.cfm>
https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm
<https://www.eeoc.gov/laws/guidance/proposed.cfm>
<https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>
<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://www.eeoc.gov/eeoc/newsroom/release/1-10-17-a.cfm>

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Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual’s transgender status or the individual’s intent to transition. It also includes using a name or pronoun inconsistent with the individual’s gender identity in a persistent or offensive manner.2257

The definition also included sexual orientation, defined as:

Sex-based harassment includes harassment because an individual is lesbian, gay, bisexual, or heterosexual.2258

Since the change in presidential administrations, the new guidance has not been issued, and there are news reports that the Trump Administration objects to its implementation.2259 National Women’s Law Center’s Fatima Goss Graves noted in written and oral testimony before the Commission that the Office of Management and Budget (OMB) has blocked publication of updated EEOC sexual harassment guidance, without public explanation. She testified that as of July 2019, over two years after its proposal, the guidance remains stalled at the review stage, with no information available about its status.2260 However, EEOC Associate Legal Counsel Carol Miaskoff testified in November 2018 that the guidance is still under review with OMB.2261 As Goss Graves explained:

2257 U.S. Equal Employment Opportunity Comm’n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 7-8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; See, e.g., Jameson v. U.S. Postal Serv., EEOC Appeal No. 0120130992, 2013 WL 2366729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee’s new name or pronoun may constitute sex-based harassment). 2258 U.S. Equal Employment Opportunity Comm’n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; Baldwin v. Dept of Transp., EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (Oct. 27, 2015) (indicating that sexual orientation discrimination claim “necessarily state[s] a claim of discrimination on the basis of sex [because] it involve[s] treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex”). See also Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *4 (W.D. Wash. Sept. 22, 2014); Boutillier v. Hartford Pub. Sch., No. 3:13-cv-01303-WWE, 2016 WL 6818348, at *7-11 (D. Conn. Nov. 17, 2016); EEOC v. Scott Med. Health Ctr., No. 16-225, 2016 WL 6569233, at *5-7 (W.D. Pa. Nov. 4, 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159-61 (C.D. Cal. 2015); Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). But see Hively v. Ivy Tech Cmty. Coll., No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) (stating that Title VII does not prohibit sexual orientation discrimination), *aff’d*, 830 F.3d 698 (7th Cir. 2016), as amended (Aug. 3, 2016), reh’g en banc granted and opinion vacated, No. 15-1720, 2016 WL 6766628 (7th Cir. Oct. 11, 2016); see also Bostock v. Clayton County Board of Commissioners, 2018 WL 2149179 (11th Cir. May 10, 2018) cert. granted; Altitude Express, Inc. v. Zarda, 139 S.Ct. 1599 (2019); R.G. & G.R. Harris Funeral Homes v. EEOC, No. 18-107 S. Ct. (2019). 2259 Chris Opfer, “White House Leaves Harassment Guidance in Limbo,” Bloomberg Law, Jun. 13, 2018, <https://news.bloomberglaw.com/daily-labor-report/igtb-debate-shackles-trump-harassment-police>. 2260 See Chris Opfer, “Gag Orders in Job Misconduct Probes Ok, Labor Prosecutor Says,” Bloomberg Law, Mar. 20, 2019, <https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>; David Dayen, “Neomi Rao, Nominee To Replace Brett Kavanaugh, Heads Agency That’s Been Stalling Sexual Harassment Guidance,” The Intercept, Feb. 4, 2019, <https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>. 2261 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, pp. 64-66.

<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://www.regulations.gov/docket?D=EEOC-2016-0009>
<https://news.bloomberglaw.com/daily-labor-report/igtb-debate-shackles-trump-harassment-police>
<https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>
<https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>
<https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>
<https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/>

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In the area of sex discrimination . . . this administration has put itself at a disadvantage in enforcing the existing complaints that it is getting. And so by doing things like changing the compliance manual that make it easier to wholesale dismiss whole categories of complaints that you’re receiving – so these are individuals who are trying to find their way oftentimes by themselves and who have been told for many years we’re open for business, come to us if you have a civil rights concern, and then they get what looks like to them a form letter saying that your concern is unimportant. . . . you got to undo the things that are basically barriers for people who are trying to come forward.”2262

But on the subject of EEOC’s enforcement, Goss Graves stated: “The one area where I think you’re seeing efforts to have meaningful enforcement in the area of harassment right now that is responsive to the need is at the EEOC where they have the highest number of charges.”2263 As noted above, the EEOC has increased its enforcement efforts significantly.2264 Goss Graves pointed to one cause for this uptick in charges “tied to the cultural movement,” but testified that she “also believe[s] it’s tied to them sending messages that they’re taking this issue seriously.”2265 Interaction and Coordination with External Agencies and Organizations EEOC has entered into agreements with 92 state and local FEPAs and 64 TEROs, as described earlier in this chapter.2266 EEOC has also entered into Memoranda of Understanding with several federal agencies that detail procedures on how agencies should cooperate when there is overlap in enforcement responsibilities.2267 EEOC also has entered into Memoranda of Understanding with several foreign embassies and consulates, which enhance cooperation in instances of employment discrimination involving foreign nationals working in the U.S.2268 At the Commission’s briefing Associate Legal Counsel Carol Miaskoff said that EEOC’s Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they “clash” with civil rights laws.2269 EEOC and OFCCP have entered into a Memoranda of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies.2270 This MOU

2262 Ibid., 202. 2263 Ibid., 202-03. 2264 See supra notes 2203-2220. 2265 Goss Graves Testimony, Federal Civil Rights Enforcement Briefing, pp. 203-204. 2266 U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 4, at 8. 2267 Ibid. 2268 Ibid. 2269 Miaskoff Testimony, Federal Civil Rights Enforcement Briefing, p. 82; see also Ch. 2, DOJ CRT, Federal Coordination and Compliance Section. 2270 DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, supra note 2044.

seeks to “reduce duplication of compliance activities” and “facilitate information exchange” between EEOC and OFCCP, and specifies that:

Prior to investigation of charges filed against Government contractors subject to Executive Order 11,246, as amended, EEOC will contact OFCC to (a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC’s investigation which have been secured by the contracting agency in previous compliance reviews. Prior to conducting compliance reviews or investigations of complaints against Government contractors, OFCC will contact EEOC to (a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor’s compliance with Executive Order 11,246, as amended, and (c) obtain and review any pertinent documents. It is anticipated that these contacts will be made routinely between EEOC regional offices and regional offices of OFCC.²²⁷¹

The MOU establishes Compliance Coordination Committees, designates a Coordination Advocate, and establishes standard notice and consultation procedures.²²⁷² The MOU “clarifies the complaint and charge referral procedures for complaints filed with each agency” and “provides that the OFCCP will act as the EEOC’s agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII.”²²⁷³ Additionally, “the processes and procedures outlined in the MOU emphasize that both agencies will increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims.”²²⁷⁴ Research, Data Collection, and Reporting Regarding data collection, EEOC reported to the Commission that during the complaint intake process, EEOC staff gathers relevant information about the allegations, including what happened, when the incident occurred, names of witnesses, information about the respondents, etc.²²⁷⁵ EEOC collects the contact information from the complainant (name, address, phone number, email

²²⁷¹ Ibid. ²²⁷² Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC,” supra note 2048. ²²⁷³ Ibid. ²²⁷⁴ Ibid. ²²⁷⁵ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 14, at 14.

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address) and requests demographic information pertaining to the age, disability status, race/ethnicity, national origin/ancestry, and gender of the complainant.²²⁷⁶ EEOC reported that in FY 2011, it expanded the national origin categories for individuals who self-identify as Asian, in accordance with E.O. 13515, and disaggregates its data for the following Asian national origins: Cambodian, Chinese, Filipino, Hmong, Indian, Japanese, Korean, Laotian, Pakistani, Thai, Taiwanese and Vietnamese.²²⁷⁷ This data is not publicly reported. EEOC has electronic systems in place to assist individuals who wish to file complaints or wish to inquire about the status a complaint that has already been filed.²²⁷⁸ In March 2016, EEOC launched its Online Charge Status System, which enables individuals who have filed a charge to check the status online, and in November 2017, EEOC launched its Public Portal to enable individuals to make inquiries and appointments to file discrimination charges.²²⁷⁹ In addition, EEOC launched its Respondent Portal in January 2016, which enables respondents to “receive an electronic notice of the charge to view online, submit documents, select options to mediate, and designate representatives.”²²⁸⁰ EEOC continues to develop its capabilities in this area and is currently working to extend the access of its public portal to federal employees and agencies who utilize the federal sector EEO complaint process.²²⁸¹ The EEOC’s Strategic Enforcement Plan for 2012–2016 requires EEOC to “develop and approve” a multi-year Research and Data Plan, which was established for the years 2016–2019.²²⁸² This plan establishes guidelines for keeping an inventory of existing EEOC data, modifications/additions to EEOC’s survey collection system, and for tracking and reporting data, in addition to establishing a plan for using data for EEOC responsibilities, and outlining certain long-term research projects.²²⁸³ EEOC has begun collecting data on pay and hours worked from employers, including federal contractors.²²⁸⁴ Specifically, EEOC collects this data from all employers with 100 or more employees and federal contractors with 50 or more employees “reflecting how much the employers paid workers of different sexes, races and ethnicities.”²²⁸⁵ This data collection was originally adopted during the Obama Administration, intending to “root out gender- and race-based pay

²²⁷⁶ Ibid. ²²⁷⁷ Ibid. ²²⁷⁸ Ibid. ²²⁷⁹ Ibid. ²²⁸⁰ Ibid. ²²⁸¹ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). ²²⁸² U.S. Equal Employment Opportunity Comm’n, “Research and Data Plan for 2016–2019,” https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm. ²²⁸³ Ibid. ²²⁸⁴ U.S. Equal Employment Opportunity Comm’n, “EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection,” <https://www.eeoc.gov/employers/eeo1survey/index.cfm>. ²²⁸⁵ Melanie M. Hamilton and Jonathan Stoler, “Employers Must Provide Pay Data to EEOC by September 30,” *The National Review*, Apr. 27, 2019, <https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>.

https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm
<https://www.eeoc.gov/employers/eeo1survey/index.cfm>
<https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>
<https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>

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gaps,” but was rolled back during the Trump administration²²⁸⁶ and was the subject of litigation.²²⁸⁷ However, EEOC has now begun the collection of 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands and demographic data on race, gender and ethnicity.²²⁸⁸ EEOC collects its data via various survey forms, which employers can access via EEOC’s website.²²⁸⁹ EEOC has a specific legal authority to conduct research and produce reports on its technical studies.²²⁹⁰ Since combating workplace harassment is a policy priority for EEOC over the past several years,²²⁹¹ in 2015, EEOC created a Select Task Force on the Study of Harassment in the Workplace with members from academia, legal scholars and practitioners, employers and employee advocacy groups, and organized labor.²²⁹² Hearing testimony from over 30 witnesses and receiving numerous public comments, this Select Task Force focused on prevention of workplace harassment, and sought to examine not just actionable forms of workplace harassment, but other non-actionable conduct and behaviors that may “set the stage for unlawful harassment.”²²⁹³

²²⁸⁶ Ibid. ²²⁸⁷ Melanie M. Hamilton and Jonathan Stoler, “EEOC Announces Decision to Collect 2017 Employee Pay Data, in Addition to 2018 Pay Data, by September 30, 2019,” *The National Review*, May 6, 2019, <https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>. The article notes that:

On April 25, 2019, the district court ordered the EEOC to collect a second year of pay data from select employers, giving the EEOC until May 3, 2019 to advise whether it would collect 2017 or 2019 data. Employers have until September 30, 2019 to report 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands. The EEOC has announced that it expects to begin accepting data submissions in mid-July, to facilitate compliance with the court-mandated deadline. In the meantime, employers must still submit Component 1 demographic data on race, gender and ethnicity by May 31, 2019.)

Ibid. ²²⁸⁸ Ibid. ²²⁸⁹ U.S. Equal Employment Opportunity Comm’n, “EEO Reports / Surveys,” <https://www.eeoc.gov/employers/reporting.cfm>. ²²⁹⁰ 42 U.S.C. § 2000e-4(g)(5) (stating that “The Commission shall have power ... to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public”). ²²⁹¹ See supra notes 2249–65. ²²⁹² U.S. Equal Employment Opportunity Comm’n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, Executive Summary and Recommendations, Jun. 2016, p. 1, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf [hereinafter EEOC, Study of Harassment in the Workplace]. ²²⁹³ Ibid.

<https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>
<https://www.natlawreview.com/article/eeoc-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>
<https://www.eeoc.gov/employers/reporting.cfm>
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf

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As a result of the Select Task Force on the Study of Harassment in the Workplace,²²⁹⁴ EEOC issued a report in June 2016 with the findings of the Select Task Force, which reported:

- Workplace harassment often goes unreported, as roughly three out of four individuals who experience harassment will not report the incident to a supervisor or union representative
- Stopping and preventing workplace harassment is good business, as legal costs can be steep for businesses accused of misconduct, emotional costs are high for victims, and all employees will be affected by “decreased productivity, increased turnover, and reputational harm”
- Leadership and accountability are critical to preventing workplace harassment • Training must change to be more effective, should be tailored to the specific workplace, and new approaches to training should be explored • It’s on us to prevent workplace harassment, and everyone plays a role in combating

workplace harassment²²⁹⁵ The report also issued a number of recommendations around the prevalence of harassment in the workplace, workplace leadership and accountability, policies and procedures to prevent workplace harassment, anti-harassment compliance training, workplace civility and bystander intervention training, outreach and targeted outreach to youth, and the launch of an “It’s On Us” campaign in which “co-workers, supervisors, clients, and customers all have roles to play in stopping [] harassment.”²²⁹⁶

²²⁹⁴ EEOC, Study of Harassment in the Workplace, supra note 2292. ²²⁹⁵ Ibid., 1–3. ²²⁹⁶ Ibid., 4–8.

337 Chapter 8: U.S. Department of Homeland Security

Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties In addition to the authority to review nondiscrimination compliance of DHS funding recipients, Congress provided the Office for Civil Rights and Civil Liberties (CRCL) of the U.S. Department of Homeland Security (DHS) broad jurisdiction to advise the DHS Secretary regarding all agency policies, to review complaints about civil rights matters, and to provide public information about them.²²⁹⁷ Notwithstanding this broad jurisdiction with respect to agency programs, Congress did not assign this civil rights office authority to enforce its views of the law or to review policies before they are implemented. At the Commission’s briefing, several panelists as well as various public commenters expressed concerns with alleged civil rights violations that fall under the jurisdiction of CRCL.²²⁹⁸

Legal Authority and Responsibility

Congress established the DHS as a federal executive agency with broad duties and authorities, as part of the Homeland Security Act of 2002.²²⁹⁹ The Act combined several other federal agencies, such as the Immigration and Nationality Service (INS), which was formerly an agency of the U.S. Department of Justice, and put them under the umbrella of DHS authority.²³⁰⁰ Created in the wake of 9/11, the DHS’s mission is to prevent terrorism, as well as to “carry out all the functions of entities transferred to the Department [such as FEMA and the INS]; ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected...;”²³⁰¹ and to “ensure that the civil rights and civil

²²⁹⁷ See infra notes 2305–2306. ²²⁹⁸ See Lopez Testimony, Federal Civil Rights Enforcement Briefing, pp. 186–191; Yang Testimony, Federal Civil Rights Enforcement Briefing, pp. 182–188. The Commission also received written public comments expressing concern about current DHS policies from South Asian Americans Leading Together, the National LGBTQ Task Force, YMCA, and others. See supra notes 320–26. The Commission received similar concerns during the Commission’s recent briefing on hate crimes. See Chief Terrence Cunningham, Deputy Executive Director, International Association of Chiefs of Police, testimony, Hate Crimes Briefing, p. 69 (regarding his concerns about the Administration’s anti-immigrant rhetoric and policies); Suman Raghunathan, Executive Director of South Asian Americans Leading Together, testimony, Hate Crimes Briefing, p. 96–101, 130 (stating that: “South Asian, Muslim, Sikh, Hindu, and Middle Eastern communities are existing in a moment where we are the targets of hate that are actively spurred by the anti-immigrant, anti-Muslim, anti-people of color policies advanced by the current administration[.]” Ibid. at 97) (emphasis added); Melissa Garlick, Civil Rights National Counsel at the Anti-Defamation League, Hate Crimes Briefing, p. 103 (that: “The federal administration policies and positions defending such actions, such as a tax on so-called sanctuary cities, the Muslim ban, the transgender military ban, they all raise legitimate fears in schools and communities across the country, encourage hate, and have created an environment in which victims are afraid to report crimes or come forward as witnesses, including crimes[.]” (emphasis added). ²²⁹⁹ 6 U.S.C. § 111(a); Pub. L. 107–296, Title I, § 101 (Nov. 25, 2002). ²³⁰⁰ Exec. Order No. 13,286, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security, (Feb. 28, 2003), 68 FR 10619, 2003 WL 24028002 (Pres.). ²³⁰¹ 6 U.S.C. § 111(b)(1)(A) – (E).

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liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland[.]”²³⁰² DHS is one of the largest federal agencies, and currently has “more than 240,000 employees in jobs that range from aviation and border security to emergency response[.]”²³⁰³ According to DHS, CRCL’s main duties are to “investigate complaints, provide policy advice to Department leadership and components on civil rights and civil liberties issues, and communicate with the public about CRCL and its activities. The statute also requires coordination with the Privacy Office and Inspector General, and directs CRCL to submit an annual report to Congress.²³⁰⁴ These three duties – to investigate complaints, provide policy advice, and provide public information – are found in the statutory language below.

Congress provided that the Officer of Civil Rights and Civil Liberties (CRCL) “shall:

- (1) review and assess information concerning abuses of civil rights, civil liberties, and profiling on the bases of race, ethnicity, or religion, by employees or officials of the Department;
- (2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;
- (3) assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately

incorporated into Department programs and activities;

(4) oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;

(5) coordinate with the Privacy Officer to ensure that— (A) programs, policies, and procedures involving civil rights, civil liberties, and

privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receive appropriate reports regarding such programs, policies, and procedures; and

(6) investigate complaints and information indicating possible abuses of civil rights and civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.”2305

2302 Id. § 111(b)(1)(G). 2303 U.S. Dep’t of Homeland Security, “About DHS,” <https://www.dhs.gov/about-dhs> (accessed Nov. 27, 2018). 2304 6 U.S.C. § 345. 2305 Id. (emphasis added); see also Daniel Sutherland, Homeland Security Office for Civil Rights and Civil Liberties: A One-Year Review, The Heritage Foundation, Aug. 10, 2004, <https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review> (explaining that DHS CRCL “primarily has an internal function—assisting the senior leadership to develop policies in ways that protect and enhance our civil liberties”).

<https://www.dhs.gov/about-dhs>

<https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review>

<https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review>

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According to CRCL’s answers to the Commission’s interrogatories, 2306 applicable civil rights statutes include the Religious Freedom and Restoration Act, 2307 the Architectural Barriers Act of 1968, 2308 Rehabilitation Act of 1973, 2309 the Genetic Information Nondiscrimination Act of 2008, 2310 and the Prison Rape Elimination Act. 2311 Statutes and regulations that apply to recipients of DHS financial assistance include these same statutes, as well as Title VI of the Civil Rights Act of 1964, 2312 Title IX of the Education Amendments of 1972, 2313 the Age Discrimination Act of 1975, 2314 and the Implementing Regulations of the 9/11 Commission Act of 2007, which require that CRCL provide training to state and local agencies. 2315 A series of 13 executive orders, covering issues ranging from language access rights, 2316 the rights of persons with disabilities, 2317 and working with faith-based organizations, 2318 are also under the purview of CRCL’s compliance activities with regard to federal grantees. 2319 Under the statutory provision directing CRCL to “review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion” 2320 and to “oversee compliance with constitutional, statutory, regulatory, policy or other requirements relating to... civil rights and civil liberties,” 2321 CRCL’s subject matter jurisdiction is much broader than the above list of statutes, as it encompasses all “civil rights and civil liberties.” 2322 For example, CRCL is active in international human rights matters. 2323 Its statutory authority is also unique in that it includes high level policy review. At the Commission’s briefing, Deputy CRCL Officer Veronica Venture provided written testimony stating that:

2306 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3. 2307 42 U.S.C. § 2000bb et seq. 2308 Id. § 4151 et seq. 2309 29 U.S.C. § 701 et seq. 2310 42 U.S.C. 2000ff et seq. 2311 34 U.S.C. § 30301 et seq. 2312 This includes implementing regulations at 6 C.F.R. Part 21 and, for FEMA grantees, at 44 C.F.R. Part 7, Subpart A. U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3. 2313 This includes implementing regulations at 6 C.F.R. Part 17 and, for FEMA grantees, at 44 C.F.R. Part 19. Ibid. 2314 With implementing regulations for FEMA grantees at 44 C.F.R. Part 7, Subpart E. Ibid. 2315 See Title VIII, Privacy and Civil Liberties, Implementing Regulations of the 9/11 Commission Act of 2007, P.L. 110-53 (Aug. 3, 2007). 2316 Exec. Order No. 13,166, 50 Fed. Reg. 159, 50,121. 2317 Exec. Order No. 13,347, 69 Fed. Reg. 142, 44,573 (Jul. 26, 2004). 2318 Exec. Order No. 13,279, 67 Fed. Reg. 241, 77,141 (Dec. 16, 2016). 2319 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 1, at 3. 2320 6 U.S.C. § 345(a)(1). 2321 Id. § 345(a)(3). 2322 Id. § 345(a)(3). 2323 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 2(b), at 5 (“DHS works closely with the Department of State and other agencies to respond to questions, prepare reports, and testify before international bodies that oversee compliance with human rights treaties, many of which have a substantial overlap with domestic civil rights law, including the International Covenant on Civil and Political Rights and the Convention Against Torture, as well as the United Nations’ Universal Periodic Review. CRCL serves as the Department’s point of contact office for human rights treaty compliance.”)

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CRCL is a unique civil rights office... CRCL carries out the Department’s unique mission “to ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.” (6 USC 111(b)(1)(G).) No other agency has a statutory mission like that. 2324

She went on to emphasize that:

Where our office is unique is in all the work we do regarding DHS’s own enormous workforce and contractors to ensure compliance with the Constitution, civil rights and civil liberties laws, and our extensive policies making those broad concepts clear for our operators in the field. Consider... all the places DHS makes contact with the public: passenger screening when boarding a flight, or entering the country by land, sea, or air; immigration benefits interviews; ICE or Border Patrol apprehensions; FEMA benefits in a disaster; and even Secret Service protective activities. 2325

University of Michigan Law Professor and former CRCL Officer Margo Schlanger, presented similar testimony, asserting that:

It’s a very unusual office, because, unlike most Offices of Civil Rights (OCRs), its chief assignment is to address potential and actual civil rights violations by DHS itself... DHS’s CRCL is different: it seeks to move DHS and its components to themselves respect the civil rights of the millions of people DHS’s own activities touch—their beneficiaries, [law enforcement] targets, and everyone in between. 2326

Enforcement Tools The agency enforcement tools CRCL has specific legal authority to use are:

• Complaint Resolution 2327

• Agency-Initiated Charges 2328 • Proactive Compliance Evaluations 2329

2324 Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Security, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Venture Statement]. 2325 Venture Statement, at 2. 2326 Schlanger Statement, at 1; but C.F. [other agency CROs that also have this goal/any authority]. 2327 6 U.S.C. § 345(a)(6); 6 C.F.R. § 21.11(b). Note that DHS CRCL’s ability to resolve complaints is limited to the complaints they receive under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act. 2328 6 C.F.R. § 21.11(a) and (c). 2329 6 C.F.R. § 15.70 (for Section 504 only); Title VI and Title IX enforcement fall under the Secretary. 6 C.F.R. § 21.9 – 17 (Title VI) and 6 C.F.R. § 17.605.

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• Guidance or Other Policy Documents 2330 • Regulations 2331 • Technical Assistance 2332 • Publicity 2333 • Outreach to Regulated Community/Potential Victims 2334 • Research, Data Collection and Reporting 2335 • Collaboration/Partnership with State/Local Agencies 2336 • Collaboration/Partnership with Other Federal Agencies 2337 • Strategic Plan 2338 • Annual Reports 2339

While DHS CRCL does not have specific legal authority for other tools identified by the Commission, nothing prohibits DHS CRCL from, for example, engaging in observation, as described in further detail below.

2330 6 U.S.C. § 345(a)(3) – (5) (evaluation of CRCL’s use of this enforcement tool is discussed in the Prioritization of Civil Rights Section, infra notes 2360-2342 (discussing family separation and Muslim ban policies); 6 C.F.R. § 21.9(a). 2331 6 U.S.C. § 112(e) (Secretary authorized to prescribe regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 2332 CRCL’s authority and focus on internal agency policy is clear in the legislative history and statutory language of the PATRIOT Act, enabling it to issue written technical assistance. See 6 U.S.C. § 345(a)(3) – (4). 2333 The PATRIOT Act requires that the CRCL Officer “shall – make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer.” 6 U.S.C. § 345(a)(2); see also 28 C.F.R. § 42.405 (Public dissemination of title VI information). 2334 6 U.S.C. § 345(a)(2). 2335 CRCL must “coordinate with the Privacy Officer to ensure that—

(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receives appropriate reports regarding such programs, policies, and procedures.” 6 U.S.C. § 345(a)(5).

CRCL also reports through the Secretary of Homeland Security, who is required to:

submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report on the implementation of this section [Establishment of Officer for CRCL], including the use of funds appropriated to carry out this section, and detailing any allegations of abuses described under subsection (a)(1) and any actions taken by the Department in response to such allegations. 6 U.S.C. § 345(b); see also 28 C.F.R. § 42.406 (regarding data collection and information sharing).

2336 See Title VIII, Privacy and Civil Liberties, Implementing Regulations of the 9/11 Commission Act of 2007, P.L. 110-53 (Aug. 3, 2007) (implementing regulations requiring that CRCL provide training to state and local law enforcement). 2337 42 U.S.C. § 2000ee; Exec. Order No. 13,636, 78 Fed. Reg. 11,737 (Feb. 19, 2013), § 5; 28 C.F.R. § 42.413. 2338 5 U.S.C. § 306(a) (2017) (agency Strategic Plan required). 2339 6 U.S.C. § 345(b) (annual report required under PATRIOT Act); 42 U.S.C. § 2000ee-1(f) (semiannual report required under 9/11 Commission Act implementing regulations); see also U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, “CRCL Semiannual Reports,” <https://www.dhs.gov/publication/crcl-quarterly-reports> [hereinafter DHS, “CRCL Semiannual Reports”].

<https://www.dhs.gov/publication/crcl-quarterly-reports>

<https://www.dhs.gov/publication/crcl-quarterly-reports>

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Staffing and Budget

CRCL’s staffing and budget increased during the fiscal years studied, indicating Congressional support for the office’s potential role in advancing civil rights. Deputy CRCL Officer Venture testified that Congress authorized 95 personnel for CRCL with additional civil rights staff in several DHS components for Fiscal Year 2019. 2340 The office had 85 full-time staff in FY 2016, 86 in FY 2017, and 93 in FY 2018. 2341 According to Deputy Venture, CRCL’s work is split into three categories, each of which occupies about one-third of CRCL’s workforce. CRCL’s EEO and Diversity branch reviews personnel complaints by DHS employees, 2342 which are not the subject of the Commission’s investigation. CRCL’s compliance work entails accepting and investigating “complaints from the public, from Congress, from detainees, nongovernmental organizations, and other avenues, such as issues we see in the press.” 2343 In addition, CRCL’s

[p]rograms work, which is the final (roughly) third of the office, involves both subject-matter-specific policy experts (security, information sharing, immigration, language access, disability policy, compliance with Title VI of the Civil Rights Act, disaster preparedness, response, and recovery) and particular modes of addressing those policy areas (community engagement and training, including state and local homeland security partners). 2344

During the past three fiscal years, Congress has allocated more than CRCL has proposed through the President’s budget. That is, “CRCL has typically been assigned a President’s Budget (proposed) funding level below the actual budget allocated (enacted) after the final approval of a continuing resolution or an appropriation bill.” 2345 In FY 16, the President’s budget proposed \$20.954 million and Congress allocated to CRCL \$21.80 million; in FY 17, the President’s budget requested \$21.403 million and Congress allocated \$22.571 million; and in FY 18, the President’s budget requested \$21.967 million and Congress allocated \$23.571 million. 2346 But CRCL stated that “those increases have been unpredictable and have impacted CRCL’s ability to hire critical new positions. This is due to the uncertainty that CRCL will be able to continue to fund the positions in future years.” 2347

2340 Venture Statement, at 2; U.S. Dep’t of Homeland Security, FY 2020 Budget in Brief, p. 76, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf. 2341 Ibid. 2342 Venture Statement, at 2. 2343 Ibid., 3. 2344 Ibid. 2345 Ibid., 13. 2346 Ibid., 13. 2347 Ibid., 13.

https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf

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CRCL does not track allocated funds by program area, so it could not tell the Commission exactly how much funding was allocated for external civil rights enforcement; however, it calculated Salary and Benefits, which comprise about 70 percent of actual costs, in the relevant program areas, as follows:

Fiscal Year FY 2016 FY 2017 FY 2018* Program Branch \$4,126,773 \$5,083,527 \$5,302,052 Compliance Branch \$2,819,421 \$3,216,156 \$3,263,002

*Projected through end of FY 20182348

district court proceedings continue). In the Preliminary Injunction, the federal court noted that persons crossing the border without legal authorization are seeking asylum or crossing illegally. Id. at 3-4. See also Order Granting Plaintiff's Motion to Modify Class Definition, Ms. L. v. ICE, 333 F.R.D. 284, 392 (S.D. Cal. Mar. 8, 2019) (granting expansion of class definition based on new information from DHS Office of Inspector General report that family separation was occurring in 2017, prior to official announcement of the policy, and that potentially thousands more migrant children had been separated from their parents). 2372 DOJ, Zero-Tolerance Memorandum, supra note 843. The Attorney General's memorandum "direct[ed] each United States Attorney's Office along the Southwest Border to the extent practicable, and in consultation with DHS - adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 8 U.S.C. § 1325(a). This zero-tolerance policy shall supersede any existing policies." DOJ, Zero-Tolerance Memorandum, supra note 843. Congress made improper entry, i.e., not at a port of entry, a misdemeanor offense in 8 U.S.C. § 1325. Moreover, shortly thereafter, at the news conference in San Diego, California near the Southern border with Tijuana, Mexico, then-Attorney General Sessions acknowledged that the "zero tolerance" policy does not have exceptions for those seeking asylum or accompanying minors:

I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. ... I have no doubt that many of those crossing our border illegally are leaving difficult situations. But we cannot take everyone on Earth who is in a difficult situation." U.S. Dep't of Justice, Justice News, "Attorney General Sessions Delivers Remarks Discussing the Immigration Actions of the Trump Administration," San Diego, CA, May 7, 2018, (hereinafter DOJ, "Attorney General Session Remarks."), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>

<https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>
<https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>
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<https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>

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detention of parents, the memo would force DHS to separate them from their children.2373 On April 23, Border Patrol, USCIS and ICE asked for guidance from the Secretary "regarding various approaches for implementing DOJ's April 2018 memo." 2374. The Secretary of Homeland Security approved DOJ's recommended policy on May 4, and subsequently issued it in a memo on May 11, 2018, implementing the family separation policy.2375 This impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters.2376 The Administration's new policy of "metering," or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.2377 Under the new zero tolerance policy, any unauthorized crossings resulted in taking children from their parents and detaining them separately, often in other states or across the country.2378 Some parents were not provided with clear notice that their children were being taken from them, and some were deported without them, making reunification extremely difficult.2379 DHS officials told GAO that they did not find out about the policy until it was announced publicly by the Attorney General on May 7, 2018.2380 However, GAO found that during 2017, Office of Refugee Rights (ORR) officials noticed an increase of children sent to their shelters who had been separated from their parents, and had approached DHS officials about this trend.2381 Similarly, some DHS officials that GAO interviewed had noticed a similar trend in 2017.2382 But according to testimony, CRCL was not consulted.2383 GAO found that DHS officials were making relevant policy recommendations and issuing directives to implement the new policy in May 2018.2384 Clearly, CRCL should have been consulted, as DHS' separation of migrant children from their parents at the Southern border

2373 GAO, Unaccompanied Children, supra note 1437, at 7. 2374 Ibid. 2375 Ibid. 2376 Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1). 2377 U.S. Dep't of Homeland Security, Office of the Inspector General, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, September 2018, pp. 5-7, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [hereinafter DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy]. 2378 See "Where Are the Migrant Children Facilities? Scattered Across America," The Washington Post, Jun. 25, 2018, https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.1ab942dfb597. 2379 DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, supra note 2377, at 12-15. 2380 Ibid.; see also GAO, Unaccompanied Children, supra note 1437, at 7 ("According to DHS and HHS officials we [GAO] interviewed, the departments did not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to ORR. DHS and HHS officials told us that the agencies did not take specific planning steps because they did not have advance notice of the Attorney General's April 2018 memo. Specifically, CBP, ICE, and ORR officials we interviewed stated that they became aware of the April 2018 memo when it was announced publicly."). 2381 GAO, Unaccompanied Children, supra note 1437, at 13. 2382 Ibid. 2383 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 132. 2384 GAO, Unaccompanied Children, supra note 1437, at 16.

<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>
https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.1ab942dfb597

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(hereinafter "border")2385 raised serious civil rights concerns. The overwhelming majority of persons crossing that border are persons of color, primarily from Latin America.2386 For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border.2387 Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India.2388 Those detained have been disparaged by the President's xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants.2389 and implicating equal protection based on national origin.2390 Their rights to family integrity are also at stake.2391 Moreover, a humanitarian crisis emerged due to thousands

2385 Although the United States also has a border with Canada, hereinafter, "border" will be used to signify the Southern border of the United States, with Mexico. 2386 From 2010-2014, 71% of unauthorized immigrants in the U.S. were from Mexico and Central America, and 4% were from South America, such that 75% were from Latin American countries. Jie Zong, Jeanne Batalova, and Jeffrey Hallock, Frequently Requested Statistics on Immigrants and Immigration in the United States, Unauthorized Immigrants, Migration Policy Institute, Feb. 8, 2018, <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>. See also Dara Sharif, "Haitians and Africans Are Increasingly Among Those Stranded Among US – Mexico Border by Trump Immigration Policies," The Root, Jul. 9, 2019, <https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stranded-among-us-mexico-border-by-trump-immigration-policies/>. 2387 Transactional Records Access Clearinghouse, Syracuse Univ., "TRAC Immigration, Border Patrol Arrests, Border Patrol Sector," <https://trac.syr.edu/phptools/immigration/cbparrest/> (last accessed Jul. 11, 2019) (noting that: "The data currently begin in October 2014 and track Border Patrol apprehensions through April 2018. (Data for two months - August and September 2017 - has not as yet been received.) Additional FOIA requests are currently outstanding for more recent time periods. As more data become available, the App will continue to be updated."). 2388 Ibid. 2389 See U.S. Comm'n on Civil Rights, Texas Advisory Committee, Holding Up the Mirror 50 Years Later: Mexican Americans in Texas: 1968-2018, Reports and Recommendations to the U.S. Commission on Civil Rights, Nov. 17, 2018, Ch. 3: Civil Rights and Immigration: Fifty Years of Failed Policy; and see infra note 2438 (citing recent federal civil rights litigation and that "some of these claims are based upon statements by President Trump regarding immigration policy calling Mexicans "rapists," and immigrants "animals[.]"). see also Trauma at the Border, supra note 2366, at notes 98-102. 2390 "National origin" means "the country where a person was born, or, more broadly, the country from which plaintiff's ancestors came." Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 88-89 (1973). U.S. Department of Justice, in guidance for federal law enforcement, defines national origin as "an individual's, or his or her ancestor's, country of birth or origin, or an individual's possession of the physical, cultural or linguistic characteristics commonly associated with a particular country," and discrimination based on national origin happens when people are singled out and denied equal opportunity because "they or their family are from another country[.]" U.S. Dept. of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat'l Origin, Religion, Sexual Orientation, or Gender Identity, (December 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [hereinafter DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat'l Origin, Religion, Sexual Orientation, or Gender Identity]. The Department of Justice's Civil Rights Division defines national origin as someone's "birthplace, ancestry, culture, or language." U.S. Dept. of Justice, Civil Rights Division, Federal Protections Against National Origin Discrimination, (August, 2010), <http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf>. 2391 See infra notes 2403-07, discussing federal reports and the class action litigation of Ms. L. v. U.S. Immigration and Customs Enft, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). These claims fall under the Commission's statutory duty to submit "at least one report annually that monitors Federal civil rights enforcement efforts in the U.S." 42 USC 1975a(c)(1).

<https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>
<https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>
<https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stranded-among-us-mexico-border-by-trump-immigration-policies/>
<https://trac.syr.edu/phptools/immigration/cbparrest/>
<http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>
<http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf>

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of migrant children, including infants and toddlers, being separated from their parents and held in shelters for 6-8 months, or more, and some are still being held in government shelters.2392 The separation of these families raises issues under the broad jurisdiction of CRCL to assist the Secretary and "oversee compliance with constitutional, statutory, regulatory, policy, and other requirements related to the civil rights and civil liberties of individuals affected by the programs and activities of the Department."2393 Recently, news reports emerged about thousands of Border Patrol officials being members of a Facebook page that included posts with anti-immigrant rhetoric (including reportedly "racist, sexist and violent images") that disparaged the Latinx families being separated and the migrants who have died in the agency's custody.2394 CBP officials reportedly knew about this Facebook page and its contents for "as many as three years," and their investigation took into account members' First Amendment and privacy rights.2395 However, if the officers' statements were to be connected with an overall policy or official actions against Latin American migrants, the statements on the Facebook page implicate civil rights issues.2396 (This may also fall under CRCL's jurisdiction to review trends in complaints received by DHS Components.2397) A 60 Minutes investigation reported that former CRCL attorney "Scott Shuchart was surprised by the new policy even though he worked at Homeland Security headquarters at the Office for Civil Rights and Civil Liberties. He told us the order was so abrupt it bypassed the usual review."2398 After site visits, the DHS OIG issued a report finding that lack of preparation and lack of reliable information systems had led to parents being unable to contact or locate their children.2399 A Congressional hearing as well as reports from an internist and psychiatrist who investigate detention facilities for DHS also showed that the agency knew in advance that that traumatic damage that would be caused by taking children from their parents.2400 These two DHS medical

2392 See infra notes 2408 (discussing Feb. 2019 reports) and see Trauma at the Border, supra note 2366, at 25-6 (discussing reports and testimony from the Commission Subcommittee's May 13, 2019 Public Comment Session); Miriam Jordan, "No More Family Separations, Except These 900," New York Times, July 30, 2019, <https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>. 2393 6 U.S.C. § 345(a)(3) and (4). 2394 See, e.g., Reis Thebaud and Nick Miroff, "CBP Officials Knew About Derogatory Facebook Group Years Ago and Have Investigated Posts From It Before," The Washington Post, Jul. 5, 2019, https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d. 2395 Ibid. 2396 See DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat'l Origin, Religion, Sexual Orientation, or Gender Identity, supra note 2390. 2397 See infra note 2408. 2398 Scott Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," 60 Minutes, Nov. 26, 2019, <https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/> [hereinafter Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border"]. 2399 DHS OIG, Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, supra note 2378, at 9-12. 2400 PBS, "What We Learned from congressional hearing on family separations," supra note 1439; see also Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," supra note 2398 (interviews with Psychiatrist Dr. Pam McPherson and Internist Dr. Scott Allen).

<https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>
https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d
https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d
<https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/>
<https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/>

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consultants had reported their findings of "watching in horror" as children experienced the trauma of being separated, with a "high risk of harm" to the children and their parents, and inadequate water, food and medical care resulting in issues such as extreme weight loss and children becoming depressed due to being detained without their parents in prison-like conditions.2401 They stated that "In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers."2402 A federal court later documented evidence that in many cases, this also compounded trauma from the dangerous conditions that migrant families had fled from in Central America.2403 If CRCL was able to access the Secretary and mission-level influence envisioned in the Homeland Security Act, and subsequent amendments,2404 it should have been able to stop the family separation policy before it harmed the children. Instead, litigation by private parties was needed, and on June 26, 2018, a federal court issued a preliminary injunction ordering that migrant children who were separated be reunited with their parents within 14 or 30 days.2405 The court also required that the policy of family separation be halted, finding the policy to be "egregious," "outrageous," "brutal" and "offensive."2406 The court's decision also demonstrates the negative impact of ineffective federal civil rights enforcement for thousands of families of color, especially Central American children, finding that:

Children are at risk of suffering great emotional harm when they are removed from their loved ones. And children who have traveled from afar and made their way to this country to seek asylum are especially at risk of suffering irreversible psychological harm when wrested from the custody of the parent or caregiver with whom they traveled to the United States.2407

Numerous religious, civil rights, immigrant rights and community service groups, as well as Members of Congress and the media, responded to the ensuing crisis through contributions, legal

2401 Miriam Jordan, "Whistle-blowers Say Detaining Migrant Families Poses 'High Risk of Harm,'" The New York Times, Jul. 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>. 2402 Ibid. 2403 See Ms. L. v. U.S. Immigration & Customs Enft, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. Jun. 6, 2018) (discussing expert testimony); and see infra notes 2405-2407 for further discussion of the litigation; and see Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," supra note 2398. 2404 See supra notes 2361-64; cf. supra notes 2365-2367. 2405 Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enft, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (Ordering that children under 5 years of age be reunited with their parents within 14 days, and children over 5, within 30 days). 2406 310 F. Supp. 3d at 1145-46, citing several Supreme Court cases (internal citations omitted). 2407 310 F. Supp. 3d at 1147 (quoting expert testimony of Martin Guggenheim, the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law and Founding Member of the Center for Family Representation).

<https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>

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assistance, and investigations of the conditions and impact of family separation, which were publicly available.2400 On June 15, 2018, the Commission majority sent a letter to the Departments of Justice and Homeland Security, urging the ending of separating families at the border and the zero tolerance policy.2409 The zero tolerance policy, the Commission noted, coerced parents into withdrawing valid asylum applications and impaired their legal immigration proceedings for fear of what would happen to their children if they did not comply.2410 The Commission emphasized its concern that these policies, directed at Mexican and Central American immigrants coming to the U.S. through the border, raised questions of unwarranted discrimination of the basis of national origin.2411 In addition, the Commission noted that the policy disregarded that many of those individuals coming to the U.S. are fleeing dangerous situations in their home countries and are seeking asylum within the parameters of our nation's immigration laws.2412 On June 26, 2018, the Commission voted to reopen its 2015 Report With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities,2413 and formed a bipartisan subcommittee to facilitate discovery associated with reopening the report.2414 DHS initially implemented this policy of separating children from their parents with "no reunification plan in place,"2415 and without review by DHS' CRCL.2416 As discussed, the Homeland Security Act, as amended requires that CRCL's mission be part of the mission of the DHS, that the CRCL Officer have access to the agency head, and that CRCL "review and assess information concerning civil rights" and "periodically review Department policies and procedures to ensure . . . the protection of civil rights."2417 At the Commission's briefing, Deputy Venture was asked whether CRCL was consulted on zero tolerance and family separation, and she said no.2418

2408 Alan Gomez, "Democrats grill Trump administration officials over family separation policy on the border," USA Today, Feb. 7, 2019 <https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>; Refugee and Immigrant Center for Education and Legal Services, "CREW and RAICES Sue DHS Over Continued Family Separation Failures," Dec. 14, 2018, <https://www.raicetexas.org/2018/12/14/crew-and-raices-sue-dhs-over-continued-family-separation-failures/>; Presbyterian Disaster Assistance, "Separated Families and U.S./Mexico Border Update," Aug. 14, 2018, <https://www.presbyterianmission.org/pda-blog/2018/08/14/separated-families-and-u-s-mexico-border-update/>; 2409 Letter from the USCCR to former Atty General Sessions and former DHS Sec'y Nielsen (Jun. 15, 2018), <https://www.usccr.gov/press/2018/06-15-18-letter.pdf>; 2410 Ibid., 1. 2411 Ibid., 1-2. 2412 Ibid., 2. 2413 U.S. Comm'n on Civil Rights, With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities, September 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf; 2414 U.S. Comm'n on Civil Rights, Jun. 26, 2018 Business Meeting Transcript, at 17 In. 18-21. 2415 310 F. Supp. 3d at 1142 ("[I]t is undisputed 'ICE has no plans or procedures in place to reunify the parent with the child other than arranging for them to be deported together after the parent's immigration case is concluded.'"). 2416 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 80 (emphasis added). 2417 See supra notes 2304-2305 (discussing 6 U.S.C. §§ 345(1)(a)-(c)). 2418 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 132.

<https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>
<https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>
<https://www.raicetexas.org/2018/12/14/crew-and-raices-sue-dhs-over-continued-family-separation-failures/>
<https://www.presbyterianmission.org/pda-blog/2018/08/14/separated-families-and-u-s-mexico-border-update/>
<https://www.usccr.gov/press/2018/06-15-18-letter.pdf>
https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf

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She stated that the matter was an ongoing investigation, so she was not at liberty to comment about whether, if had CRCL been notified, the policy would have raised civil rights concerns.2419 On June 19, 2019, the Commission received correspondence from CRCL stating that the Commission's draft report "did not accurately capture CRCL's efforts to shape DHS policy," adding that:

CRCL's Programs Branch provides policy advice to the Department on civil rights and civil liberties issues in the policy development process, as well as in implementation after announcement of a new policy. That means that much of our policy work is most effective either on issues that have not yet entered public view, where incremental improvement is possible in an area that is not high profile enough to have triggered litigation, or where we are helping the department to address issues after litigation has clarified difficult legal issues. In whichever case, much of this proactive policy work is part of the deliberative process and, therefore, shielded from public view. . . . Specifically with respect to the zero tolerance policy (family separation), CRCL was not involved in the early development of the policy; however, CRCL's Compliance Branch investigated family separations and made recommendations to U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). As far back as 2016, CRCL processed complaints and voiced concerns regarding the impact of family separation on children. The [CRCL] Programs Branch, in coordination with the [CRCL] Compliance Branch, also raised concerns with the civil rights and civil liberties issues with the zero tolerance policy and the resulting family separations, as the Department of Justice and DHS were implementing the policy. Finally, CRCL is currently completing complaint investigations related to family separation by CBP. We want to emphasize that CRCL raises concerns with DHS policies and activities that impact civil rights and civil liberties issues, even if CRCL was not included in the initial policy development. Unfortunately—due to the above-referenced structural limitations—CRCL often cannot share the details of its work with the public.2420

The Commission's research shows jurisdictional issues have impeded CRCL's ability to assist in evaluating and influencing the policy of family separation. They were apparently not fully included in the advance development of the policy and while CRCL has since been participating in making policy regarding DHS' treatment of minor children and families, and it is involved in drafting regulations that the Administration recently issued to replace the Flores Settlement Agreement

2419 Ibid., 133. 2420 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

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that protects the civil rights of migrant children and families in federal detention, it is unclear the extent to which their recommendations are being implemented. In another comment, on the Commission's draft report, CRCL stated:

Unaccompanied children are in custody of HHS/ORR, so outside of CRCL's jurisdiction. Additionally, CRCL has been involved in the Department's efforts to draft regulations on detention of children, which would replace the Flores Settlement Agreement.2421 Further, CRCL has been involved for many years in reviewing the ICE Family Residential Centers that house family units.2422

However, the reported conditions of migrant children and their families in DHS custody show that CRCL has not been effective in preventing systemic civil rights violations.2423 At minimum they were not consulted in the early critical stages of planning that resulted in the disastrous decision to separate even preverbal toddlers from their parents with no plans on how they would be tracked and reunited. This contrasts with the statutory requirement that CRCL must "periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities."2424 The statutory framework does not include sufficient requirement that CRCL must review every policy change, nor that review occur prior to a new policy being implemented, nor is there any specific authority to ensure that the agency takes CRCL's advice into account.2425 Muslim Ban Deputy Venture testified that CRCL had not been consulted before introduction of the Muslim ban, clarifying that: "These are policies that were pushed out from the White House and [about which they] said to do it."2426 The Commission majority has expressed deep concern about the civil rights implications of the Administration's policy of banning the entrance or visas for

2421 For more information on the Flores Settlement Agreement, which prohibits detention of migrant children for more than 72 hours and otherwise protects their rights to appropriate care, see infra note 2521 and Trauma at the Border, supra note 2366, at notes 277-90. 2422 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73. 2423 See supra notes 2404-2407 (discussing Ms. L. litigation). 2424 6 U.S.C. § 345(a)(3). 2425 Id. § 345, passim. 2426 Venture, Federal Civil Rights Enforcement Briefing, p. 132.

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immigrants from majority Muslim countries.2427 In particular, the Commission voted to decry not only the discriminatory impact of these policies, but also the rhetoric behind them, targeting persons based upon their religion.2428 The policy was first introduced through an executive order on January 27, 2017, which banned the entry of foreign nationals from seven predominantly Muslim countries, suspended the entry of Syrian refugees indefinitely, and prohibited the entrance of any refugees from any country for 120 days.2429 Widespread protests by U.S. citizens at airports across the country met the first two iterations of the policy, and more importantly, federal courts swiftly struck down both iterations of the ban in three separate lawsuits on the grounds that the bans were discriminatory and unconstitutional.2430 The Commission received public comments from State Attorneys General who had litigated against the Muslim ban. Virginia Attorney General Mark Herring submitted the following public comment: "One of President Trump's first executive orders attempted to enact a Muslim ban that violated the constitutional rights of many living in our nation and raised fear among American Muslims and other minority communities that they could find themselves the next target of government sanctioned and mandated discrimination."2431 After the litigation, the President issued a third, amended and limited version of the policy that the Supreme Court deemed constitutional, in June 2018.2432 The White House issued these policies through the executive orders discussed above, as well as through an Agency Memo to DHS, the U.S. Department of State and the Director of National Intelligence (DNI).2433 As DHS implemented them, refugees were not allowed to enter the country,

2427 See U.S. Comm'n on Civil Rights, U.S. Comm'n on Civil Rights Expresses Concern Over Executive Orders Promoting Religious and National Origin Discrimination (Feb. 24, 2017), <https://www.usccr.gov/press/2017/statement-02-24-17-EO.pdf> ("Executive Order 13,769 sets out different treatment for persons coming to the United States from specified, Muslim-majority countries without any lawful justification or basis for that different treatment. By singling out seven overwhelmingly Muslim majority countries for exclusion, the Executive Order itself raises the specter of government endorsement of religious and possibly national origin discrimination. This infirmity is compounded by the Executive Order's prioritization of refugees who claim religious persecution, so long as they belong to "a minority religion" in their home country. Moreover, as courts have already recognized, extrinsic evidence also suggests that the EO was motivated by prohibited bias, inconsistent with the Nation's antidiscrimination principles.") 2428 See Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017); see also U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Declares Supreme Court Decision in Muslim Ban Case (July 13, 2018), <https://www.usccr.gov/press/2018/07-13-18-Statement.pdf> (majority of Commission agrees with Justice Sotomayor that the "repackaging [of the policy] does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created."). 2429 Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017) (banning entrance for persons from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen). 2430 See, e.g., Int'l Refugee Assistance Project v. Trump, 863 F.3d 233, 259-60 (4th Cir. 2018); State v. Trump, 871 F.3d 646, 654 (9th Cir. 2017); Washington v. Trump, 847 F.3d 1151, 1168 (9th Cir. 2017) (dismissing government's motion for emergency stay pending appeal). 2431 Mark Herring, Atty General of Virginia, testimony, Federal Civil Rights Enforcement Briefing, pp. 339-340. 2432 Trump v. Hawaii, No. 17-965, 2018 WL 3116337, at *24, 186 S.Ct. 2320-21 (U.S. Jun. 26, 2018) (under rational basis standard of review, "[i]t cannot be said that it is impossible to 'discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security interests, quite apart from any religious hostility, we must accept that independent justification.'"). 2433 Findings of Fact, Conclusions of Law, and Order Issuing Preliminary Injunction, Doe v. Trump, 264 F. Supp. 3d 1182, 1184-85 (W.D. Wash. 2018).

<https://www.usccr.gov/press/2017/statement-02-24-17-EO.pdf>
<https://www.usccr.gov/press/2018/07-13-18-Statement.pdf>

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and Muslim Americans with family members from the countries at issue have been forced to endure separation from their loved ones.2434 Although this litigation is ongoing, it illustrates that CRCL should have been involved as the new policies raised substantive civil rights concerns. While these policies originated from the White House, DHS' CRCL should have been consulted prior to implementation, per CRCL's statutory authority.2435 Other Civil Rights Policy Issues Apparently Not Addressed by CRCL Other major policy changes that have resulted in civil rights concerns during FY 2016-2018 include the Administration's retraction of Deferred Action for Childhood Arrivals ("DACA"), and claims pending in federal courts now regarding racially discriminatory animus and due process issues.2436 Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status ("TPS") from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns, including allegations that the retraction of TPS has been motivated by racial animus.2437 Some of these claims of racial animus are based upon statements by President Trump calling Mexicans "rapists" and immigrants "animals," and characterizing countries from which his Administration retracted TPS status "s***hole countries."2438

2434 Id. 2435 6 U.S.C. § 345(a)(3). 2436 Compare Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 514-15 (9th Cir. 2018) (holding that because USCIS retained ultimate discretionary authority over protections granted by DACA, illegal immigrants did not possess a liberty or property interest protected by due process; but upholding plaintiff's equal protection claim given that the recession of DACA was motivated by discriminatory animus) and Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 274 (E.D.N.Y. 2018) (denying a motion to dismiss plaintiff's equal protection claims where DACA can reasonably be shown to be motivated by racially discriminatory animus against Latinos and in particular, Mexicans and a due process claim for extension applicants) with Casa de Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 773-74 (D. Md. 2018) (finding that the rescission of DACA did not create entitlement to any benefits protected by procedural due process, did not "shock the conscious" to violate substantive due process rights, and did not violate the Fifth Amendment's Equal Protection Clause); see also NAACP v. Trump, 298 F. Supp. 3d 209, 222 (D.D.C. 2018) (granting motion to dismiss plaintiff's information sharing claim and deferring ruling on plaintiff's constitutional claims, finding that the recession of DACA violated the APA). 2437 See, e.g., Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018) (finding plaintiffs demonstrate serious questions on the merits of an equal protection claim and granting a preliminary injunction); Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393, 412 (D. Mass. 2018) (finding that TPS recipients adequately alleged that the change in TPS policy raised a serious question of equal protection and due process); Saget v. Trump, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018) (denying defendant's motion to dismiss as the Haitian nationals sufficiently alleged that DHS's termination of Haitian TPS violated their equal protection rights); Casa de Maryland, Inc. v. Trump, No. GJH-18-845, slip op. at *1 (D. Md. Apr. 25, 2018) (finding Salvadoran nationals plausibly alleged that the decision to end El Salvador TPS designation violated substantive due process); and see Complaint, African Communities Together, et. al. v. Trump, No. 4:19-cv-10432-TSH (D. Mass., Mar. 8, 2019); and First Motion for Preliminary Injunction (Mar. 12, 2019) (requesting expedited hearing). The hearing is set for March 28. Id., Electronic Notice Setting Motion Hearing (Mar. 13, 2019). 2438 Id.; and see, e.g., Jayashri Srikanthiah & Shirin Sinner, White Nationalism As Immigration Policy, 71 Stanford L. Rev. (Mar. 2019), <https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy>;

<https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy>

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Regarding the Trump Administration's controversial policy of separation of children from their parents at the border, Cecilia Muñoz, former Director of Domestic Policy for President Obama, commented that, "They issued an order without consulting with the agencies who were responsible for carrying out that order... [The harm to migrant children was] because these decisions were clearly made at the top and pushed down to the agencies without thinking through the ramifications and without thinking through the potential harm."2439 This concern underscores the weakness in the statutory design of DHS CRCL, challenging its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Deputy Venture vividly testified to this statutory weakness:

There are [structural challenges] in the sense that we don't have the ability to enforce. We make recommendations to say CBP or ICE. So I was talking to staffers on the Hill about their looking into possibly giving CRCL the ability to enforce more strongly, if these are not recommendations; these are here what it's going to be. And so of course that means a legislative fix.2440

CRCL's new Deputy Officer for Programs and Compliance Peter Mina has noted that "CRCL welcomes the opportunity to work with DHS leadership and Congress to expand statutory authorities and increase the office's funding level."2441 Professor Schlanger made some recommendations to improve DHS CRCL's ability to review new DHS policies in advance of implementation, but she added that:

]]n the current climate, it is not clear to me that any of this will work. I just want to be clear about this. This [CRCL] is an internal office. If there is a department that is insisting on orphaning children at the border, if there is a department that is insisting on engaging in Islamophobia... That is insisting on Islamophobic

With respect to immigration, Trump has repeatedly disparaged various groups of nonwhite immigrants. He began his presidential campaign by denouncing Mexican migrants as “rapists.” He allegedly commented that Haitian immigrants “all have AIDS” and that Nigerian immigrants would never “go back to their huts” after seeing the U.S. He repeatedly conflated Middle Eastern and Muslim immigrants with terrorists and falsely claimed that most people convicted of terrorism in the U.S. came from abroad. In addition, Trump has trafficked in age-old racist tropes, portraying immigrants as criminals, invaders, threats to women, and even subhuman. On one occasion, Trump described unauthorized immigrants as “animals,” on another, he conjured images of vermin in describing immigrants as threatening to “pour into and infest our Country.” Perhaps most infamously, he reportedly railed against immigration from “shithole countries”—an apparent reference to Haiti, El Salvador, and African nations—and asked why the U.S. couldn’t get more people from countries like Norway. *Id.* at § 1.A (citing sources).

2439 Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border,” *supra* note 2398; see also *infra* notes 2369–2426 (discussing zero tolerance and the resulting family separation policy, and related civil rights issues). 2440 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 135. 2441 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 90.

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screening protocols, if there is a department where violations of civil rights are at the core of what it sees as its role, then an internal civil rights office... might be able to slow that down, might be able to make it more embarrassing, but it is not going to be able to reverse it.”2442

Strategic Planning and Self-Evaluation

Regarding performance, CRCL’s statute requires that the agency Secretary provide an annual report about implementation of the duties of CRCL, including details of allegations concerning abuse of civil rights by employees and officials of the Department.2443 As required by the Implementing Regulations of the 9/11 Commission Act of 2007, CRCL also provides semi-annual reports to Congress.2444 That statute requires that the semi-annual reports include: “(A) information on the number and type of reviews undertaken; (B) the type of advice provided and the response given to such advice; (C) the number and nature of complaints received by the department, agency, or element concerned for alleged violations; and (D) a summary of the disposition of such complaints, the reviews and inquiries conducted, and the impact of the activities[.]”2445 The 9/11 Commission Act also requires that these reports to Congress be made “available to the public; and otherwise inform the public of the activities of such [Civil Liberties] officer,” as long as consistent with protection of classified information and applicable law.2446 CRCL semiannual reports can be found on their website and include fairly comprehensive information about investigations opened, the allegations, and the DHS Component involved.2447 Some information, such as the resolution of investigations, including CRCL review of agency policies and funding recipients, is not provided but would be useful to help evaluate the efficacy of the work of the CRCL.2448 This information would also be useful to impacted community members as well as federal, state and local officials who are concerned about protecting civil rights, to understand how CRCL is working to protect and advance civil rights and so the regulated community – such as recipients of DHS financial assistance – act in a manner consistent with federal civil rights protections.2449 Though the semiannual report does provide CRCL with one direct reporting channel to Congress, the scope and content of these semiannual reports is limited. Other components of DHS, such as the DHS Privacy Office and the Citizenship and Immigration Service Ombudsman, have direct reporting lines to Congress that provide an important level of independence, requiring that they

2442 Schlanger Testimony, Federal Civil Rights Enforcement Briefing, p. 252. 2443 6 U.S.C. § 345(b). 2444 42 U.S.C. § 2000ee-1(f); see also DHS, “CRCL Semiannual Reports,” *supra* note 2339. 2445 42 U.S.C. § 2000ee-1(f)(2). 2446 *Id.* § 2000ee-1(g). 2447 See DHS, “CRCL Semiannual Reports,” *supra* note 2339. 2448 *Ibid.*, *passim*. See also, e.g., U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Semiannual Report to Congress, Third and Fourth Quarters, FY 2018, May 31, 2018, <https://www.dhs.gov/sites/default/files/publications/fy-2018-q3-q4-semiannual-report.pdf>. 2449 See, e.g., Schlanger Statement, at 3.

<https://www.dhs.gov/sites/default/files/publications/fy-2018-q3-q4-semiannual-report.pdf>

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“submit reports directly to Congress... without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or the Office of Management and Budget.”2450 The agency’s strategic plan only includes mention of “rigorously protecting privacy and civil rights and civil liberties,” in relation to “integrating critical data sources, such as those for biometric data, by consolidating or federating screening and vetting processes.”2451 and in relation to cybersecurity or intelligence data.2452 In terms of CRCL’s strategic planning, the civil rights office told the Commission that:

DHS has not engaged in formal prioritization of planning with respect to civil rights and civil rights enforcement during the years in question. Rather, prioritization is constantly evolving based on identified needs and emerging areas. During the years in question, principal priority enforcement areas have been:

- Use of social media and biometric data in intelligence, vetting, and law enforcement;
- Ensuring language access in Department activities and programs; • Access to programs and activities for individuals with disabilities encountered and served by DHS Components, and particularly during FEMA emergencies; • Accommodation of disabilities in immigration enforcement, including credible fear screenings and immigration detention; • Community engagement on fast-moving changes in immigration and security policies; • Creation of the National Vetting Center; • Building civil rights and civil liberties protections into big data and information

sharing projects.2453 CRCL also identifies areas for proactive policy development through assessing the Department’s interest. CRCL stated that former Deputy Secretary Mayorkas took an interest in immigration detention, and that the office “made support of his efforts a priority,” and that “there has not been the same leadership interest in that subject [since his departure in November 2016], though it remains a substantial part of CRCL’s work.”2454 Similarly, “following a mass shooting in San Bernardino, California, in December 2015, the Department took a substantial interest in the way social media is used in law enforcement and security, and CRCL made support of these efforts and appropriate civil rights and civil liberties policy a priority.”2455

2450 6 U.S.C. § 142(e) and § 272(e)(2). 2451 U.S. Dep’t of Homeland Security, Fiscal Year 2014 – 2018 Strategic Plan, 16, https://www.dhs.gov/sites/default/files/publications/FY14-18%20Strategic%20Plan_0_0.PDF. 2452 *Ibid.*, 29, 33 and 41. 2453 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 3, at 7. 2454 *Ibid.* 2455 *Ibid.*

https://www.dhs.gov/sites/default/files/publications/FY14-18%20Strategic%20Plan_0_0.PDF

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To more precisely review what civil rights matters CRCL has prioritized during FY 2016–18, the Commission asked about the office’s policy priorities. In response, CRCL provided a list of 10 examples of “enforcement through proactive policy development.”2456 In addition, responding to how it enforces civil rights law, CRCL’s written testimony included information about 15 “current priorities and pressing areas in recent years.”2457 To compare the current “pressing areas” with what has resulted in proactive policy development, the table below summarizes this information side-by-side. The data shows some level of compatibility between “current priorities and pressing areas;” however, the data also shows that some current priorities are not precisely matched with proactive policy development, and some policies have been developed based on other priorities. This may be because DHS policy changes quickly, such that CRCL is in a responsive rather than proactive position.2458

2456 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 2, at 4–5. 2457 Venture Statement, at 4–5. 2458 CRCL commented that: “CRCL notes that in a fast-moving policy environment this kind of attempt to match current priorities with proactive policy development may be overly simplistic. For example, CRCL’s work may result in policy not being issued or ameliorated in a way that, due to the deliberative policy-making process, cannot be shared with the public. As the process of developing priorities lacks the benefit of hindsight and cannot account for many factors beyond CRCL’s control, we would caution against this type of comparison.” Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 58.

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Table 8.1: Comparison of CRCL Current Policies and Pressing Areas vs. Stated Areas of Proactive Policy Development

CRCL “Current Priorities and Pressing Areas”	CRCL “Areas of Proactive Policy Development”
Review and auditing classified DHS intelligence products to ensure civil rights and civil liberties (CRCL) protections.	Promulgation of a privacy and civil liberties protection policy for the Information Sharing Environment (ISE.)
Use of social media and biometrics data in intelligence, vetting, and law enforcement.	Recognition of civil rights issues through CRCL participation in policy on subjects including social media, computer data matching, the use of military training, watchlisting, vetting, and immigration enforcement during disasters and evacuations.
Support for state and local law enforcement CRCL policy development regarding: license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.	Working with the DOJ Global Justice Information Sharing Initiative’s Criminal Intelligence Coordinating Council (CICC) to develop policy guidance and templates for state and local law enforcement and justice entities on license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.
“Community engagement on fast-moving changes in immigration and security policies.”	“Community engagement initiatives by which DHS Senior Policy Advisors facilitate Quarterly Roundtables in 17 cities, and issue- specific community meetings, “to share timely, credible information; receive imperative feedback by individuals potentially impacted by Department activities; and to build trusted public/private partnerships between DHS and all levels of government, law enforcement, and the community.”

Development of CRCL training for state and local law enforcement on the issue of preventing terrorism via community partnerships.

CRCL worked with the Federal Law Enforcement Training Centers (FLETC) to develop a national training program, the Law Enforcement Awareness Briefing (LAB) on Terrorism Prevention Partnerships, which was launched in 2019 and is awaiting resources for rollout.

Investigations into family separation and family reunification; family detention by ICE and detention of other vulnerable populations; treatment of unaccompanied children in CBP custody; and processing of asylum seekers by CBP.

CRCL has investigated family separation issues that are not the subject to ongoing litigation, and recommendations have been issued to both CBP and ICE.

Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.

Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.

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Ensuring language access in DHS programs and activities; development of a DHS language access program, working group, and component-specific language access plans.

Development of a DHS language access program, working group, component-specific language access plans, training, and compliance review.

Access to programs and activities for persons with disabilities, particularly during FEMA emergencies.

CRCL, working with FEMA, conducted listening sessions to hear from the public after disasters in 2018, including Hurricane Maria. CRCL compiled feedback and developed recommendations for FEMA’s consideration.

Accommodation of disabilities in immigration enforcement.

Collaboration with Immigration and Customs Enforcement on development of new policies related to accommodating individuals with disabilities in detention. CRCL Compliance has also reviewed numerous individual claims of disability discrimination many of which resulted in a finding or resolution that included a reasonable accommodation, such as the provision of a sign language interpreter.

Updating the Privacy and Civil Liberties Policy for State and Major Urban Areas Fusion Centers; technical assistance on integration of privacy and CRCL protections in state and local intelligence products.

This was completed in March 2019 under the auspices of the Criminal Intelligence Coordinating Council (CICC), a group under the U.S. Department of Justice's (DOJ) Global Justice Information Sharing Initiative (Global) which is an advisory body to the U.S. Attorney General. CRCL was a part of the working group that updated the Privacy and Civil Liberties Policy for State and Major Urban Area Fusion Centers – a requirement for fusion center recipients of DHS funding. CRCL also plans to respond to requests for technical assistance from the national fusion center network on appropriate integration of the new policy template into existing privacy, civil rights, and civil liberties policies when resources become available.

Incorporating CRCL protections in the National Vetting Center (NVC).2459

The NVC is administered by DHS through U.S. Customs and Border Protection and governed by an interagency National Vetting Governance Board (NVGB). The NVGB is supported by a Legal Working Group and a separate Privacy, Civil Rights, and Civil Liberties (P-CRCL) Working Group which will review all activities of the NVC to ensure they comply with law and

2459 The National Vetting Center was established by a National Security Presidential Memorandum in February 2018, to coordinate Federal Government vetting efforts of persons entering or seeking to remain in the country, to “improve the Government’s ability to identify terrorists, criminals, and other nefarious actors, including those who seek a visa, visa waiver, or an immigration benefit, or a protected status; attempt to enter the United States; or are subject to an immigration removal proceedings.” U.S. Dep’t of Homeland Security, “The National Vetting Center,” Feb. 6, 2018, <https://www.dhs.gov/news/2018/02/06/national-vetting-center>.

<https://www.dhs.gov/news/2018/02/06/national-vetting-center>

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policy and protect individuals’ privacy, civil rights, and civil liberties, in accordance with U.S. law. CRCL co-chairs the P-CRCL Working Group. Further, DHS published a Privacy Impact Assessment (PIA) assessing the risks to privacy, civil rights, and civil liberties presented by the NVC and the vetting programs that will operate using the NVC. The PIA can be found at <https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>.

Improving training and processes for all DHS employees regarding the Department’s zero tolerance policy for harassment.

“Ensuring religious liberty protections, following issuance of the Attorney General’s memorandum on ‘Federal Law Protections for Religious Liberty.’”

Issuance of a Department policy for accommodating religious beliefs when collecting photographs or fingerprints

“[D]uring the summer and fall of 2017, when several hurricanes and wildfires impacted large regions of the United States and its territories, CRCL and FEMA worked to address potential civil rights issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations. CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters. And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution.”

Began development of recommendations to state, local, territorial, and tribal emergency managers to improve the delivery of disaster assistance to disaster survivors with disabilities. CRCL issued these recommendations in March 2019 in advance of the 2019 hurricane season.

Re-stating Department policy on the use of race, ethnicity, and other characteristics in law enforcement and screening

SOURCE: CRCL Testimony and Answers to Interrogatories

These data show current and pressing priorities ranging from intelligence gathering, immigration policy, family separation and reunification, detention policies, language access, access for persons with disabilities, training of state and local entities involved with DHS, internal policies against harassment, ensuring religious liberty, and access to Federal Emergency Management Association benefits. Examples of proactive policy work provided by CRCL address some, but not all, of these pressing issues. For example, CRCL did not provide information about proactive policy work

<https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>

<https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc>

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regarding family separation, and also did not answer questions about the policy, citing an ongoing investigation.2460 In addition, other proactive policy has been developed without necessarily being listed as a “current” or “pressing” area. Examples include updated policies regarding racial profiling issued by CRCL.2461

Complaint Processing, Agency-Initiated Charges and Litigation According to the DHS authorizing statute, the Officer for CRCL must “investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.”2462 CRCL told the Commission that:

This does not take into account a number of additional individual remedial compliant avenues for the public that are at the DHS Component level, such as DHS TRIP, which receives and seeks resolution regarding difficulties experienced during travel screening at transportation hubs (airports) or crossing U.S. borders. CRCL, in addition to responding to allegations filed with our office, also reviews complaints made to Component[s] for trends.2463

But as former Officer Margo Schlanger has explained, “CRCL lacks authority either to prosecute or to discipline.”2464 Congress charged DHS CRCL with “oversee[ing] compliance” for the agency with civil rights principles but did not give the office authority to require other offices within the agency to change practices consistent with that oversight,2465 except with respect to recipients of DHS funding, under Title VI and Section 504.2466 Apart from that, CRCL only has advisory authority to negotiate compliance where it cannot require it.

CRCL generally has not been effective in assuring civil rights compliance throughout DHS during the Fiscal Years studied. For example, multiple federal courts have ruled that DHS committed constitutional and civil rights violations when detaining and separating immigrant children from their parents.2467 Deputy Venture testified that CRCL received thousands of complaints about

2460 Venture, Federal Civil Rights Enforcement Briefing, p. 133. 2461 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 2, at 4. 2462 6 U.S.C. § 345(a)(6). 2463 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73. 2464 Schlanger, Offices of Goodness, supra note 78, at 54, 98. 2465 Ibid. 2466 See infra notes 2567-75. 2467 See Ms. L v. United States Immigration and Customs and Immigration Enft, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. 2018) (finding plaintiff set forth sufficient facts and legal basis to state a claim that separation from their children while contesting removal violates due process); M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 118, 121 (D.D.C. 2018) (finding a mother separated from her child was likely to succeed on a due process claim and would suffer irreparable harm in the absence of an injunction); Petition for Habeas Corpus and Complaint for Declaratory, Injunctive, and Monetary Relief, Mejia-Mejia v. United States Customs and Immigration Enft, No. 1:18-cv-01445- PLF (D.D.C. 2018) (alleging Fifth Amendment due Due process violations).

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immigrant family separation and detention, but due to resource constraints, CRCL is investigating only a small portion (23 out of over 3,000).2468 This number investigated amounts to only 0.77 percent of the total complaints filed.2469 Moreover, as discussed above, at the Commission’s briefing, Deputy Venture testified that the CRCL Officer was not consulted prior to the Trump Administration’s introduction and implementation of family separation.2470 After reviewing the draft report, another CRCL official told the Commission that:

Providing the percentage does not capture that these complaints covered the full range of issues raised. Based on these complaints and the ensuing investigation, CRCL has issued recommendations to both ICE and CBP relating to family separation that encompass and address the full range of issues raised in numerous allegations, far more than the 23 officially opened. Also, CRCL has numerous other complaints open related to family separation that support other investigations and cover specific issues, such as the care of children, the use of criteria to separate families, and coercion in separation or reunification.2471

But CRCL receives over 4,000 complaints per year from the public, Congress, DOJ, detainees, nonprofit groups and the press.2472 These complaints detail very high stakes matters, often “concerning civil rights and civil liberties abuses by DHS employees—including...alleged “profiling on the basis of race, ethnicity, or religion,”2473 and in addition to being possibly systemic, they are likely to be about issues that are currently negatively impacting the “persons” and “individuals” who are to be protected by CRCL’s statute.2474 CRCL’s responses to the Commission’s Interrogatories and Deputy Venture’s testimony both indicate a significant lack of resources impacting CRCL’s ability to address most complaints. CRCL is clearly not able to investigate all the complaints it receives.2475 It reported to the Commission that:

CRCL does not currently have sufficient staffing to support opening more investigations of complaints from the general public, or having more intensive and encompassing investigations of such allegations. The allegations CRCL has received are increasingly complex, and in many cases, are the result of reports

2468 Venture Testimony, Federal Civil Rights Enforcement Briefing, pp. 125-26. 2469 23/3,000 = 0.00767. 2470 Venture Testimony, Federal Civil Rights Enforcement Briefing, pp. 132-33; see also supra notes 2368-2435 (discussing the Muslim ban and family separation). 2471 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 2472 Venture Statement, at 3; U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 19; Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 2473 Schlanger, Offices of Goodness, supra note 78, at 54, 62. 2474 See, e.g. infra notes 2531-36 (complaint about babies at Dilley; complaint about migrants being held outside under a bridge); Cf. 6 U.S.C. § 345(a). 2475 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 19.

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requesting very large issues be thoroughly reviewed through a civil rights lens. CRCL presently only has the resources to do a few of these each year.2476

Deputy Venture testified that her office receives “over 4,000 complaints in from or allegations from the general public [annually]... We do not have the resources to actually investigate 4,000 allegations.”2477 CRCL later clarified that it “investigates approximately 25 percent of what we receive as allegations.”2478 At the Commission’s briefing, Deputy Venture testified that her office prioritizes how they address the complaints, and they do so through an “information layer.”2479 She stated that family separation was a “perfect example”2480 of that practice, and that:

We got over 3,000 complaints of family separation. We weren’t going to open 3,000 complaints. So we are looking through the database... We took a representative sample, for instance, if a person is saying I’m coming with my child, or it’s an unaccompanied child, or whatever category it was. So of the 3,000, we took 23 complaints and opened that as an investigation. That is representative of the whole. So that’s one way that we are actually using our resources properly.2481

She stated that these types of investigations lead to “recommendations to CBP or to ICE about their policies and practices,”2482 based on whether CRCL is seeing violations of law, or whether the subject-matter experts they use to review conditions of detention see lack of medical care or issues with treatment of juveniles.2483 Venture testified that, “[W]e are using the resources as wisely as we can but, in the sense we can’t do everything, we just have to be a bit more representational about the complaints that we’re looking into.”2484 CRCL told the Commission that its intake process is as follows: “CRCL meets weekly to discuss recently received allegations and decide whether they should be opened as complaints or entered into the database ‘information layer.’”2485 CRCL continued: “Generally, CRCL opens allegations that raise systemic, egregious, or novel civil rights or civil liberties issues, or allegations that do not appear to have been adequately addressed in another complaint redress forum (such as a Component or Office of Inspector General inquiry).”2486 CRCL does not directly open as complaints the matters placed in the information layer; rather, CRCL uses the information layer to “identify potential patterns of civil rights or civil liberties allegations that may result in later CRCL

2476 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 6, at 14. 2477 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 125. 2478 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68. 2479 Ibid. 2480 Ibid. 2481 Ibid., 126. 2482 Ibid. 2483 Ibid. 2484 Ibid. 2485 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. 2486 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68.

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review or investigation.”2487 After being reviewed, CRCL did not open 2,427 allegations (21 percent) as complaints for further investigation in FY 2016, 2,963 (16 percent) in FY 2017, and 1,256 (15 percent) in FY 2018 (up until April 11).2488 Furthermore, in FY 2016, CRCL opened 639 complaint investigations.2489 In this fiscal year, the office “opened more complaints...than in any year before or since.”2490 In FY 2017, CRCL opened 560.2491 In FY 2018, CRCL opened 743 and closed 749 out of 4,201 pieces of correspondence.2492 The DHS Office of Inspector General (OIG) has the right of first refusal,2493 and retained 19 of the 743 complaint investigations opened by CRCL in FY 2018.2494 During the first half of FY 2018, up until April 11, CRCL received 221 complaints.2495 As of this date, “CRCL is on pace to open a similar number of complaints in FY 2018 as it did in FY 2017.”2496 The bases of all the complaints

2487 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. 2488 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 7, at 15. 2489 Ibid., 15-17. 2490 Ibid., 15-17. 2491 Ibid., 15-17. 2492 Venture Statement, at 3. 2493 6 U.S.C. § 345(a)(6). 2494 Venture Statement, at 3; U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22-26. 2495 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 7, at 15-17. 2496 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22.

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Table 8.2: Number Complaints Received by DHS CRCL by Bases for FY 2016-18 Primary Issue of Complaint FY 2016 FY 2017 FY 2018 (up to April 11) Abuse of authority/misuse of official position 161 159 64 Conditions of Detention 447 839 278 Disability Accommodation (Section 504) 140 38 23 Discrimination/Profiling 271 271 98 Due Process 686 1154 599 Excessive or Inappropriate Use of Force 180 176 56 Fourth Amendment (search and seizure) 41 41 15 Free Speech/Association (First Amendment) 2 1 2 Hate Speech 4 5 2 Human Rights 36 14 4 Inappropriate questioning/inspection conditions (Non-TSA) 56 49 20 Inappropriate touching/search of person (Non-TSA) 15 17 14 Intimidation/threat/improper coercion 76 69 8 Language Access (Limited English Proficiency) 20 21 5 Legal Access 30 44 19 Medical/Mental Health Care 738 446 139 Privacy 9 6 4 Religious Accommodation 38 18 12 Retaliation 13 24 4 Sexual assault/abuse 80 31 93 TSA Advanced Imaging Technology (AIT) and TSA pat-downs 24 29 18 Total 3067 3523 1477

SOURCE: CRCL Responses to USCCR Interrogatory 10.c.

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Figure 8.1: Bases of CRCL Complaints Received FY 2016-18

SOURCE: CRCL Response to USCCR Interrogatory 10.c. The data shows a fairly consistent pattern, with higher levels of complaints received about conditions of detention, discrimination/profiling, due process, and medical/mental health care issues. Moreover, although CRCL received more complaints in 2017, it opened more complaints in 2016. 2497 The Commission received a public comment from South Asian Americans Leading Together (SAALT), arguing that CRCL "must have more power and resources," pointing to a complaint it filed in 2015 "regarding the treatment of more than 50 South Asian asylum seekers detained in the El Paso County Detention Facilities who were on hunger strike for a week after waiting for years for hearings even after passing credible fear tests." 2498 According to SAALT, CRCL conducted an investigation and provided its findings and recommendations to ICE, where the investigation has remained since at least 2016. 2499 CRCL later commented, "CRCL closed this investigation in June 2017, after issuing recommendations to ICE. CRCL is seeking to increase transparency in complaint investigation results going forward." 2500 SAALT recommends "an independent

2497 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 10, at 22. 2498 South Asian Americans Leading Together, Written Statement, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter SAALT Statement]. 2499 SAALT Statement, at 2. 2500 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 66.

0

200

400

600

800

1000

1200

1400

FY 2016 FY 2017 FY 2018 (up to April 11) Column1

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ombudsperson position be created to liaison between communities and CRCL to move such complaints through a transparent process and ensure the civil rights of all detainees are enforced." 2501 CRCL told the Commission that "the majority of complaints are investigated and closed without the issuance of recommendations. 2502 This usually occurs because either (1) the allegations detailed within the complaint are unsubstantiated, (2) the existing policy, training, and practices already in place are deemed satisfactory, or (3) the issues identified by CRCL's investigation have already been acknowledged by the Component." 2503 In FY 2016, CRCL closed 147 investigations with recommendations. 2504 That number was 43 in FY 2017, and was only 10 in FY 2018 (up until April 11). 2505 After receiving and reviewing allegations, the following steps occur:

If CRCL keeps the complaint for investigation, CRCL requests information from the [DHS] Component and conducts its own factual investigation. . . Recommendations made as a result of an investigation are generally made confidentially to the effected Component, however CRCL notifies complainants of the general results whenever possible and provides summaries of its recommendations in its annual and semiannual public report. 2506

The Components must have an opportunity to review CRCL recommendations, and "each recommendation requires a written response, concurring or non-concurring, within a defined timeframe, and evidence of implementation of any concurred-with recommendations." 2507 If a Component non-concurs, it must also provide an explanation, which CRCL reviews. 2508 CRCL then determines whether to continue discussions with the Component "or consider raising to leadership." 2509 DHS regulations involving federally conducted programs and activities state that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days. 2510 The agency regulations incorporate Title VI and Title IX processing

2501 SAALT Statement, at 2. 2502 U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 20-21. 2503 Ibid. 2504 Ibid. 2505 Ibid. 2506 Ibid. 2507 Ibid. 2508 Ibid. 2509 Ibid. 2510 6 C.F.R. § 15.70(g). [there is an exception for 504 EEOC procedures – this exception does not apply to CRCL's external enforcement]

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times for claims of discrimination based on sex, race or national origin; CRCL asserts there are no processing deadlines for these types of claims. 2511 The average length of time between the date complaints are received and the date closed is as follows (see Table 8.3): Table 8.3: Average Processing Time for CRCL Complaints, FY 2016-2018 FY 2016 FY 2017 FY 2018 (until April 11) 460 days 379 days 343 days

SOURCE: DHS Response to USCCR Interrogatory 7.e. In reviewing this information, CRCL pointed out Section 504 of the Rehabilitation Act is the only type of complaint that CRCL receives that is subject to a strict timeline, that Section 504 complaints represent only one percent of complaints they receive, and that 60 percent of complaints are opened and closed within one year. 2512 They added that: "Complaints where recommendations are issued often take longer as CRCL must wait for the Component to respond and begin implementation. Additionally, a small percentage are held in abeyance due to pending litigation or because the OIG has retained the matter." 2513 But after an individual filed a complaint about discrimination under Section 504, the D.C. District Court found that CRCL's 2.75 year delay in processing a civil rights complaint was "unreasonable" where DHS and TSA offered "no justification or explanation." 2514 The court also noted that, "As a basic matter, and as the Agency Defendants concede, they have failed for almost three years to process an administrative complaint that, by regulation, they were required to have processed in 180 days." 2515 DHS' Section 504 regulations clearly state that "all types of allegations on the basis of disability" must be processed by the unit that receives them (whether the Office of Inspector General or CRCL or another unit) within 180 days:

(1) Not later than 180 days from the receipt of a complete complaint over which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing:

(i) Findings of fact and conclusions of law; (ii) A description of a remedy for each violation found; and (iii) A notice of the right to appeal. 2516

The volume of complaints and complexity of civil rights issues may also impact CRCL's efficacy.

2511 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 67. 2512 Ibid. 2513 Ibid. 2514 SAI v. Dep't of Homeland Sec., 149 F. Supp. 3d 99, 120 (D.D.C. 2015). 2515 id. at 120. 2516 6 C.F.R. § 15.70(g).

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As discussed above, CRCL's responses to the Commission's interrogatories as well as their testimony during the briefing indicate that DHS processed 7.6 percent of 3,000 complaints about family separation. 2517 During the briefing, CRCL stated they could not answer any questions about whether they had provided any recommendations about family separation, due to it still being an open investigation. 2518 CRCL later added that they investigate 25 percent of allegations, and that the family separation issue is also subject to ongoing litigation, "CRCL stated that it, "CRCL "investigated complaints representative of the range of issues presented in the family separation allegations received," and "CRCL received numerous complaints regarding family separation, conducted an investigation, and has made recommendations." 2519 The only specific information provided was as follows: "CRCL promptly provided information to CBP on specific instances of separation so that reunification could happen more quickly." 2520 Another example of CRCL's complaint processing abilities is its management of cases that regard DHS's family separation policy. On March 13, 2019, The Refugee and Immigrant Center for Education and Legal Services (RAICES) sent a complaint to CRCL alleging that despite its announcement to the contrary, DHS was still holding children separated from their parents for more than 20 days and taking other actions contrary to the rules of the Flores agreement upheld by federal courts to govern conditions of migrant child detention. 2521 RAICES documented that at Karnes Detention Center in Texas, children, the youngest of whom was 5, were being held "between 41-58 days with no word from ICE about their release [to their parents]." 2522 In discussing the Flores settlement and subsequent court rulings about it, RAICES states that 20 days is the maximum time that children may be held under extenuating circumstances, and that it does

2517 See supra notes 2468-81. 2518 Venture Testimony, Federal Civil Rights Enforcement Briefing, p. 133. 2519 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 84. 2520 Ibid. 2521 See generally Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001) (Settling as enforceable law, in 1997 and updated in 2001 by the federal government, that migrant children may not be held more than 20 days, and the conditions of their detention must be safe and appropriate, including proper medical care and an education plan. Furthermore, settles that the DHS should make every attempt to locate the parents, and children should be released to their parents (or other guardians if parents cannot be located); see generally DHS & HHS, Proposed Rule: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied (DHS proposing to modify the agreement, the proposed rules have been subject to public comment but a final rule has not been issued); see generally Abbey Gruwel, "Unaccompanied Minors and the Flores Settlement Agreement: What to Know," National Conference of State Legislatures, Oct. 30, 2018, <http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx> (reporting that the new rules would permit migrant children to be held indefinitely, and exempt federal facilities from state licensing agreements.); see generally Caitlin Dickerson, "Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children," New York Times, Sep. 6, 2018, <https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html> (reporting the Trump Administration's proposed withdrawal from the agreement). 2522 RAICES of Texas, Complaint Letter to DHS CRCL Officer Cameron Quinn (Mar. 13, 2019) (on behalf of several fathers and their children detained at Karnes Detention Center), https://www.raicestexas.org/2019/03/13/raices-urges-ice-to-release-families-currently-detained-in-violation-of-flores-agreement/?ms=raices_tw_hungerstrike.

<http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx>

<http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx>

<https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html>

https://www.raicestexas.org/2019/03/13/raices-urges-ice-to-release-families-currently-detained-in-violation-of-flores-agreement/?ms=raices_tw_hungerstrike

https://www.raicestexas.org/2019/03/13/raices-urges-ice-to-release-families-currently-detained-in-violation-of-flores-agreement/?ms=raices_tw_hungerstrike

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not believe that ongoing border crossings by Central American families seeking asylum qualify as "extenuating circumstances." 2523 Citing the American Academy of Pediatrics, their current Complaint to CRCL emphasizes that:

Expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children. . . there is no evidence indicating that any time in detention is safe for children." Clinical evidence from the study of detention of unaccompanied, asylum-seeking minors shows "forced detention is associated with a high risk of posttraumatic stress disorder, anxiety disorder, depression, aggression, psychosomatic complaints, and suicidal ideation. 2524

RAICES therefore asks CRCL "to compel ICE to follow its obligations under Flores and release these children to their fathers expeditiously," and "to investigate other past and present violations of the Flores norm of releasing children and parents within 20 days at the Karnes Detention Center," and to "review any written decisions by the U.S. Department of Homeland Security to continue detention despite the existing Flores requirements and any records documenting changes in DHS policy in adhering to Flores." 2525 These issues continue to fall under the jurisdiction of CRCL. 2526 CRCL commented that, "CRCL cannot compel ICE to take action." 2527 As discussed in the previous section on prioritization of civil rights, if CRCL had been able to weigh in on this policy before it was implemented, as is contemplated under their statutory authority, federal civil rights protections may have led to a different policy more aligned with

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administration of their programs and activities.2564 DHS may suspend or terminate a grant of financial assistance if it determines it is not compliant, but this is not always done through CRCL. CRCL's statute requires that it "oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department."2565 However, as Acting Director Venture testified to the Commission, "CRCL's work is typically not remedial; an exception relates to Section 504 of the Rehabilitation Act, which prohibits discrimination against people with disabilities in programs that receive federal financial assistance."2566 Complaints regarding Section 504 are to be sent to the CRCL, which is also "responsible for coordinating implementation of this section."2567 Under DHS' Title VI regulations, compliance information, investigations, hearings, and decisions are all handled by the Secretary.2568 DHS' Title IX regulations similarly state that the same procedures from Title VI apply to the agency's enforcing compliance with Title IX.2569 Under these regulations, CRCL may be asked to participate in DHS enforcement of Title VI and Title IX, but it is not required to do so.

In its Annual Report to Congress, CRCL stated that it developed the civil rights data collection tool and a related review process, to "effectively and consistently enforce nondiscrimination requirements in federally assisted programs across DHS."2570 CRCL clarified that the evaluation tool is a technical assistance tool developed by CRCL that has been "made a part of the DHS Standard Terms and Conditions which apply to federal financial assistance awards from DHS to non-federal entities."2571 The Commission's research shows that the Civil Rights Evaluation Tool is a 2-page form that was issued in February 2018 and expires in January 2021.2572 Page one lists applicable law and states that compliance is a condition of receiving federal funding,2573 and page two requires recipients of federal financial assistance to provide information about:

2564 See U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Fiscal Year 2017 Annual Report to Congress, Dec. 6, 2017, p. 8, https://www.dhs.gov/sites/default/files/publications/crcl-fy-2017-annual-report_0.pdf [hereinafter DHS CRCL, Fiscal Year 2017 Annual Report to Congress]; see also supra notes 2306-23 (discussing relevant civil rights statutes and regulations under CRCL's jurisdiction). 2565 6 U.S.C. § 345(a)(4). 2566 Venture Statement, at 3; see also Schlanger, Offices of Goodness, supra note 78, at 54, 98. 2567 6 C.F.R. § 15.70. 2568 Id. § 21.9 (compliance information), § 21.11 (investigations), § 21.13 (procedures for effecting compliance, including DOJ referral), § 21.15 (hearings) and § 21.17 (decisions). 2569 6 C.F.R. § 17.605. 2570 DHS CRCL, Fiscal Year 2017 Annual Report to Congress, supra note 2564, at 8. 2571 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 72. 2572 U.S. Dept. of Homeland Security, Civil Rights Evaluation Tool, OMB Control No. 1601-0024, DHS Form 3095 (2/18), <https://www.dhs.gov/sites/default/files/publications/dhs-civil-rights-evaluation-tool.pdf>. 2573 *Ibid.*, 1, § 3. This form provides that:

As a condition of receipt of Federal financial assistance, the recipient is required to comply with applicable provisions of laws and policies prohibiting discrimination, including but not limited to: • Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin (including limited English proficiency). • Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability.

https://www.dhs.gov/sites/default/files/publications/crcl-fy-2017-annual-report_0.pdf
https://www.dhs.gov/sites/default/files/publications/crcl-fy-2017-annual-report_0.pdf
<https://www.dhs.gov/sites/default/files/publications/dhs-civil-rights-evaluation-tool.pdf>

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(1) total number of complaints, with their status (pending, closed with findings, closed with no findings) and bases (the form specifies "race, color; national origin, including limited English proficiency; sex; age; disability; religion"2574); (2) any civil rights compliance reviews during the two years prior to the DHS award of federal funding; (3) a statement that staff has been designated to coordinate and carry out civil rights compliance, and a description of their responsibilities; (4) the recipient's nondiscrimination policy regarding Title VI, Section 504, Title IX, the Age Discrimination Act of 1975, and DHS regulations prohibiting discrimination based on religion in social service programs; (5) the complaint process; (6) plan to ensure compliance in sub-recipient programs, including process for review; (7) policies and procedures to ensure nondiscrimination and equal opportunity for persons with disabilities; and (8) policies and procedures regarding "the requirement to provide meaningful access to programs and services to individuals with limited English proficiency (LEP)."2575

CRCL told the Commission that:

CRCL may conduct complaint investigations, compliance inspections, or other enforcement actions, with or without an allegation of wrongdoing. For example, in 2017, CRCL initiated a compliance review of recipients of federal funding in FEMA's Chemical Stockpile Emergency Preparedness Program to ensure compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and other civil rights authorities.2576

However, the compliance review for FEMA's program was done in conjunction with the FEMA Office of Equal Rights.2577 Because DHS uses a decentralized model of civil rights enforcement, it is not CRCL that obtains assurances from grantees, as that is done by the awarding offices.2578 One area where CRCL has broader duties is in the area of protections against sexual abuse of detainees. CRCL coordinates audits under the Prison Rape Elimination Act (PREA) for DHS immigration detention and holding facilities, which must occur every three years, although CRCL

• Title IX of the Education Amendments Act of 1972, which prohibits discrimination based on sex in education programs or activities. • Age Discrimination Act of 1975, which prohibits discrimination based on age. • U.S. Department of Homeland Security regulation 6 C.F.R. Part 19, which prohibits discrimination based on religion in social service programs.

2574 *Ibid.*, § 4.1. 2575 *Ibid.*, § 4. 2576 U.S. Dept. of Homeland Security, Responses to Interrogatory No. 2, at 5. 2577 *Ibid.* and see DHS CRCL, Fiscal Year 2017 Annual Report to Congress, supra note 2564, at 29. 2578 Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), 72.

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may also "request an expedited audit if it has reason to believe that an expedited audit is appropriate."2579 CRCL is further charged with developing the external auditing instrument.2580 DHS' PREA regulations require that every immigration holding detention facility, including private facilities, take measures to ensure against sexual assault and harassment of detainees.2581 Because DHS did not issue PREA regulations until 2014, ICE did not begin PREA audits until 2017.2582 CBP and ICE are both required to submit annual reports about PREA compliance.2583 The most recent CBP PREA annual report, from 2017, mentions that detainees may file complaints about sexual abuse with CRCL, but does not mention any further collaboration.2584 As discussed above, if a complaint is filed, CRCL may only make recommendations.2585 As will be discussed below, CRCL, in collaboration with five other agencies, has also issued new Title VI regulations regarding language access rights during the Fiscal Years studied by the Commission. CRCL also sent these new regulations to recipients of FEMA funding.2586

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

The Antidiscrimination Group of CRCL engages in policy work designed to ensure fair and equitable treatment of all individuals in DHS programs and activities, and it states that one of its main duties is "providing technical assistance to DHS Components and recipients of DHS financial assistance on meeting their obligations under these federal civil rights laws."2587

In its responses to the Commission's interrogatories, CRCL also stated that:

DHS provides technical assistance to grantees to ensure they are able to achieve compliance through individual correspondence and systemic guidance. For example, the Department has issued guidance on grantee obligations to ensure access for persons with limited English proficiency and on implementation of the

2579 6 C.F.R. § 115.93 and § 115.193. 2580 *Id.* § 115.201. 2581 *Id.* § 115.12 and § 115.112. 2582 See U.S. Dept. of Homeland Security, Immigration and Customs Enforcement, "PREA, Facility Implementation," <https://www.ice.gov/prea>. 2583 6 C.F.R. § 115.88 and § 115.188. 2584 U.S. Dept. of Homeland Security, Customs and Border Protection, Annual Report Assessing CBP Efforts to Prevent, Detect and Respond to Sexual Abuse in Holding Facilities, Fiscal Year 2017, p. 11, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20Annual%20Report%202017.pdf>. 2585 See supra notes 2554-59. 2586 U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Notice to Recipients on Nondiscrimination During Disasters (May. 10, 2018), p. 1, <https://www.dhs.gov/sites/default/files/publications/notice-nondiscrimination-during-disasters.pdf>. 2587 U.S. Dept. of Homeland Security, "CRCL Antidiscrimination Group," <https://www.dhs.gov/antidiscrimination-group> (accessed Jun. 20, 2019).

<https://www.ice.gov/prea>
<https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20Annual%20Report%202017.pdf>
<https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20Annual%20Report%202017.pdf>
<https://www.dhs.gov/sites/default/files/publications/notice-nondiscrimination-during-disasters.pdf>
<https://www.dhs.gov/antidiscrimination-group>
<https://www.dhs.gov/antidiscrimination-group>

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Department's regulation on participation of faith-based organizations in DHS social service programs.2588

CRCL may be called upon to assist DHS Components in developing their policies, but it has no mechanism to force its review or to force compliance with its expressed views.2589 For example, in 2017, ICE issued updated Performance Based National Detention Standards that were developed in conjunction with agency stakeholders and CRCL, with major revisions including: "full implementation of the DHS standards, disability accommodation, language access and communication assistance, disciplinary system and special management units, suicide prevention, detainees with serious mental illness, tracking and reporting assaults, identification and monitoring of pregnant detainees, religious meals, and use of force at detention facilities."2590 However, other DHS policies have been issued without CRCL participation.2591 On August 16, 2016, the Departments of Homeland Security, Justice, Housing and Urban Development, Health and Human Services, and Transportation issued guidance for disaster-management agencies that are the recipients of federal funding.2592 The guidance provided instruction on how these agencies could ensure that their emergency-relief programs do not discriminate against any individual or community on the basis of race or ethnicity in violation of Title VI of the Civil Rights Act, which states: "[n]o 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."2593 The guidance encouraged these agencies to adopt five practices that would prepare them to react to an emergency under the requirements set out in Title VI while also effectively responding to community needs: "(A) Reaffirm Commitment to Nondiscrimination Protections... (B) Engage with and include Diverse Racial, Ethnic, and Limited English Proficient Populations...(C) Provide Meaningful Access to LEP Individuals...(D) Include Immigrant Communities in Preparedness, Response, Mitigation, and Recovery Efforts...(E) Collect and Analyze Data."2594 For each of these practices, the guidance recommended tangible strategies that could be implemented in order to achieve them.2595 Regarding technical assistance, CRCL reports that it provides technical assistance to the national fusion center network on appropriate integration of privacy, civil rights, and civil liberties

2588 U.S. Dept. of Homeland Security, Response to USCCR Interrogatory No. 2, at 5. 2589 See supra notes 2360-67 and 2440-41. 2590 U.S. Department of Homeland Security, Immigration and Customs Enforcement, Progress in Implementing PRNDS Standards and DHS PREA Requirements at Detention Facilities, Fiscal Year 2017 Report to Congress, p. 3, https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%20PRNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf. 2591 See supra notes 2368-2438. 2592 See infra notes 2612-13 (list of Title VI guidance issued during FY 2016-2018). 2593 *Ibid.* 2594 *Ibid.* 2595 *Ibid.*

https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%20PRNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf
https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%20PRNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf
https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%20PRNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf

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protections in state and local intelligence products and other fusion center activities.2596 CRCL also reports that it works to improve cultural competency and awareness of Department personnel through training resources on Sikh, Arab, and Muslim cultures.2597 One of CRCL's main statutory duties is public outreach "through the Internet, radio, television, or newspaper advertisements on the responsibilities and functions of, and how to contact, the [CRCL] Officer."2598 CRCL also performs outreach for DHS through routine stakeholder roundtable meetings in cities across the U.S., distinct town halls on current issues, and subject-specific events focusing on DHS priorities. CRCL also reports that it convenes national Incident Community Coordination Team (ICCT) calls with stakeholder and relevant government leadership in the immediate aftermath of homeland security incidents.2599 CRCL explains that it consults with communities through public town hall meetings and listening sessions to hear the communities' concerns and suggestions. CRCL reports that these consultations have offered valuable input to DHS policy and have helped to develop a guide on appropriate terminology to use when describing a terrorist threat.2600 The CRCL Immigration Section engages with the public about civil and human rights implications of Department immigration programs, policies, procedures, and operations.2601 CRCL also reported that "in 2014, the Department began a Southern Border Initiative (SBI). In light of heightened civil rights concerns, CRCL expanded its community engagement roundtables and other related activity into additional communities along the border most impacted by the SBI."2602 And "during the summer and fall of 2017, several unprecedented hurricanes and wildfires impacted large regions of the United States and its territories," after which "CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters."2603 Effectiveness of Interaction and Coordination with Other Agencies and Stakeholders CRCL reports that its Immigration Section attempts to facilitate dialogue among government agencies and immigration and civil rights organizations.2604 CRCL also facilitates a training

2596 U.S. Dept. of Homeland Security, Response to USCCR Interrogatory No. 2, at 4. 2597 U.S. Dept. of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (Jun. 20, 2019). 2598 6 U.S.C. § 345(a)(2). 2599 U.S. Dept. of Homeland Security, "Office for Civil Rights and Civil Liberties Handout," p. 2, https://www.dhs.gov/sites/default/files/publications/CRCL%20Handout_Updated%208-18-17.pdf. 2600 U.S. Dept. of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (accessed Jun. 20, 2019) [hereinafter DHS, "Community Engagement"]. 2601 U.S. Dept. of Homeland Security, "CRCL Immigration Section," <https://www.dhs.gov/crcl-immigration-section> (accessed Jun. 20, 2019). 2602 U.S. Dept. of Homeland Security, Response to USCCR Interrogatory No. 3, at 7. 2603 *Ibid.*, 8. 2604 U.S. Dept. of Homeland Security, "CRCL Immigration Section,"

<https://www.dhs.gov/community-engagement>
https://www.dhs.gov/sites/default/files/publications/CRCL%20Handout_Updated%208-18-17.pdf
<https://www.dhs.gov/community-engagement>
<https://www.dhs.gov/crcl-immigration-section>
<https://www.dhs.gov/crcl-immigration-section>

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program for federal, state, and local law enforcement, which encourages collaboration between officers and the communities they serve.2605 CRCL “partners with the DHS Privacy Office and the DOJ’s Bureau of Justice Assistance to provide training at state and major urban areas fusion centers,” and “maintains a website with resources and training materials that address civil rights, civil liberties, and privacy.”2606 CRCL also works with the federal Privacy and Civil Liberties Oversight Board that is statutorily required to:

(1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.2607

Federal agencies involved in PCLOB include the DHS, U.S. Department of State, Central Intelligence Agency, DOJ, Treasury and HHS.2608 The lack of DHS interaction and coordination with other governmental agencies has, however, compounded civil rights issues arising from DHS’ separation of migrant children from their parents. While DHS implemented the separation of thousands of children from their parents, children were placed with the Office of Refugee Resettlement of HHS. Reviewing the process, GAO issued a scathing report showing that the lack of coordination between DHS and HHS regarding the identities of the children and the identities and locations of their parents resulted in a substantial information deficit that made it difficult to reunite children with their parents.2609 In January 2019, the Office of the Inspector General of the U.S. Department of Health and Human Services released a report showing that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.”2610 In the time since the separation of these thousands of children came to light, no official numbers have been released by DHS due to the “lack of a coordinated formal tracking system between the Office of Refugee Resettlement . . . and the Department of Homeland Security.”2611

2605 DHS, “Community Engagement,” supra note 2600. 2606 U.S. Dep’t of Homeland Security, “Civil Rights and Civil Liberties, Civil Rights and Civil Liberties Training at Fusion Centers,” <https://www.dhs.gov/civil-rights-and-civil-liberties-institute> (accessed Jul. 11, 2019). 2607 42 U.S.C. § 2000ee(c). 2608 Id. 2609 GAO, Unaccompanied Children, supra note 1437, at 17-26. 2610 U.S. Department of Health & Human Services, Office of Inspector General, Separated Children Placed in Office of Refugee Resettlement Care, OEI-BL-00511, January 2019, p. 1, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>. 2611 Miriam Jordan, “Family Separation May Have Hit Thousands More Migrant Children Than Reported,” New York Times, Jan. 17, 2019, <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

<https://www.dhs.gov/civil-rights-and-civil-liberties-institute>
<https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>
<https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>
<https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>
<https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>

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Following DHS’ joint issuance of guidance with DOJ, HUD, HHS, and DOT regarding guarding against discrimination in emergency relief programs that receive federal financial assistance,2612 CRCL reported to the Commission that during the summer and fall of 2017:

CRCL and FEMA worked within the coordinated federal response to address potential civil rights related issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies including the Department of Justice and the Department of Health and Human Services to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations. . . . And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution.2613

Use of Research, Data Collecting, and Reporting Aside from the reporting requirements the Homeland Security Act imposes on CRCL and the Implementing Regulations of the 9/11 Commission Act, which require some data collection and reporting about CRCL’s activities in annual and semiannual reports,2614 DHS CRCL has also issued policy documents and public information about civil rights issues,2615 and training documents for fusion centers.2616 The Commission notes that information about the thousands of complaints received by CRCL may be limited, because “CRCL does not require or collect data from complainants related to any specific information in order to file a complaint.”2617 The data is reported by type of complaint and DHS Component, rather than race, national origin, gender, or other similar information about status.2618

2612 See supra notes 2592-95. 2613 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 3, at 8. 2614 See supra notes 2443-46. 2615 See supra notes 2456-58 and 2597-2603. 2616 See supra notes 2456-58 and 2606. 2617 U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 11, at 27. 2618 See U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, Fiscal Year 2017 Annual Report to Congress, supra note 2565, at Table 2.

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Chapter 9: U.S. Environmental Protection Agency, External Civil Rights Compliance Office Congress established the U.S. Environmental Protection Agency (EPA) in 1970 as a result of President Richard Nixon’s 37-point directive regarding the environment, which responded to growing public concerns about deteriorating city air, natural areas littered with debris, and urban water supplies contaminated with dangerous impurities.2619 EPA states that its mission is “to protect human health and the environment”2620 by ensuring that:

• Americans have clean air, land and water; • National efforts to reduce environmental risks are based on the best available scientific

information; • Federal laws protecting human health and the environment are administered and enforced

fairly, effectively and as Congress intended; • Environmental stewardship is integral to U.S. policies concerning natural resources, human

health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy;

• All parts of society—communities, individuals, businesses, and state, local and tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks;

• Contaminated lands and toxic sites are cleaned up by potentially responsible parties and revitalized; and

• Chemicals in the marketplace are reviewed for safety.2621 Legal Authority and Responsibility This mission is impacted by Executive Order 12,898 of 1994, which established federal regulations requiring that Environmental Impact Statements include that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, 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.”2622

2619 See U.S. Environmental Protection Agency, “The Origins of EPA,” <https://www.epa.gov/history/origins-epa>; Reorganization Plan No. 3, 35 Fed. Reg. 15,623, 64 Stat. 2086 (1970) (presidential directive establishing the EPA and submitted to and approved by Congress), codified at 42 U.S.C.A. § 4231; see also Immigration and Naturalization Service v. Chandha, 462 U.S. 919 (1983) (confirming EPA’s legality). 2620 U.S. Environmental Protection Agency, “Our Mission and What We Do,” <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>. 2621 Ibid. 2622 Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, 59 Fed. Reg. 7,629, 1994 WL 16189208, Executive Order 12898, § 1-101.

<https://www.epa.gov/history/origins-epa>
<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>
<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>

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The External Civil Rights Compliance Office (ECRCO), located within the Office of the General Counsel at EPA, reports that it strives to advance EPA’s mission by enforcing federal civil rights laws that prohibit discrimination by applicants for recipients of federal financial assistance “through complaint investigations, compliance reviews, technical assistance, community engagement, and policy formulation.”2623 The federal civil rights laws that EPA enforces and implements through EPA’s external nondiscrimination regulations at 40 C.F.R. Parts 5 and 7, which prohibit nondiscrimination by recipients of EPA funding,2624 include:

• Title VI of the Civil Rights Act of 19642625 • Title IX of the Education Amendments of 19722626 • Section 504 of the Rehabilitation Act of 19732627 • Age Discrimination Act of 19752628 • Section 13 of the Federal Water Pollution Control Act Amendments of 19722629

Enforcement Tools The agency enforcement tools ECRCO has specific legal authority to use are:2630

• Complaint Resolution2631 • Agency-Initiated Charges2632 • Proactive Compliance Evaluations2633 • Issuance of Policy Guidance2634 • Issuance of Regulations2635

2623 U.S. Environmental Protection Agency, Response to USCCR Interrogatories No. 1 and No. 2, at 1. 2624 40 C.F.R. Parts 5 and 7. 2625 42 U.S.C. §§2000d et seq.; 40 C.F.R. Part 7. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations. 2626 20 U.S.C. §§ 1681 et seq.; 40 C.F.R. Part 5. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations. 2627 29 U.S.C. § 794; 40 C.F.R. Part 7. See also 28 C.F.R. Part 37 and 29 C.F.R. Part 1640 for procedures consistent with employment coordinating regulations. 2628 42 U.S.C. §§ 6101 et seq.; 40 C.F.R. Part 7, Subpart F. See also 28 C.F.R. Part 42 and 29 C.F.R. Part 1626 for procedures consistent with age coordinating regulations. 2629 33 U.S.C. §1251; 40 C.F.R. Part 7. 2630 40 C.F.R. Part 5; 40 C.F.R. Part 7; 28 C.F.R. Part 42 Subpart F; 29 C.F.R. Part 1626; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 2, at 1. 2631 40 C.F.R. Part 7, Subpart E; 40 C.F.R. § 5.605; see generally U.S. Environmental Protection Agency, Case Resolution Manual (January 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf [hereinafter EPA, Case Resolution Manual]. 2632 40 C.F.R. §§ 7.110(c) and 7.115. 2633 Id. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”). 2634 28 C.F.R. § 42.405; 40 C.F.R. § 7.20. 2635 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations).

https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf

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• Technical Assistance2636 • Publicity2637 • Data collection, research and reporting2638 • Collaboration with states/local agencies2639 • Collaboration with other federal agencies2640 • Strategic Plan2641 • Annual Reports2642

While EPA ECRCO does not have specific legal authority for other tools identified by the Commission, nothing prohibits EPA ECRCO from, for example, engaging in outreach to stakeholders, as described in further detail below. Budget and Staffing ECRCO currently is housed within the Office of the General Counsel (OGC), and it operates under the direction of Lilian Dorka, Director.2643 In FY 2016, ECRCO maintained 11.5 FTEs, which included two detailees from other EPA offices (each working half time).2644 This staffing level did not greatly fluctuate, increasing only slightly in FY 2017 to 12.5 FTEs, and decreasing only slightly in FY 2018 to 12 FTEs.2645 ECRCO reported that it receives programmatic assistance from an average of 4 attorneys from OGC’s Civil Rights and Finance Law Office on a part-time basis over the fiscal years 2016 to 2018.2646 In addition, although it does not track this assistance, ECRCO has noted that it frequently

2636 40 C.F.R. § 7.105; 40 C.F.R. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 5.605; 28 C.F.R. § 42.405. 2637 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 2638 28 C.F.R. § 42.406 (regarding data and information collection); 28 C.F.R. § 42.406 passim (regarding research and reporting); 40 C.F.R. Part 5 passim (regarding research and reporting); 40 C.F.R. Part 7 passim (regarding research and reporting). 2639 40 C.F.R. § 7.20 (“EPA’s Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 7.125; 40 C.F.R. § 5.605. 2640 40 C.F.R. § 7.125; 40 C.F.R. § 5.605; 28 C.F.R. § 42.413. 2641 40 C.F.R. Part 5 passim; 40 C.F.R. Part 7 passim; GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). 2642 40 C.F.R. Part 5 passim; 40 C.F.R. Part 7 passim; GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). 2643 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. 2644 U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. (A detailee is a federal employee who is on temporary detail from another office.) 2645 Id. 2646 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4.

engages with staff at program and regional offices in its enforcement activities, and receives support from Deputy Civil Rights Officers (DCROs) to help carry out its civil rights mission.2647 ECRCO's total allocated budget for FY 2016 was \$2.02 million, which rose to \$2.28 million in FY 2017, and was projected to decrease slightly to \$2.09 million in FY 2018.2648 See Figure 9.1. Figure 9.1: ECRCO Budget Resources for External Civil Rights Enforcement

Source: U.S. Environmental Protection Agency, Response to Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018). *FY 2018 amounts are projected as of June 18, 2019.

ECRCO indicated that its budget "is not itemized in such a way as to identify funds allocated for processing and responding to complaints," but rather is itemized according to personnel, travel, general expenses, contracts, Working Capital Fund, and grants.2649 The budget numbers reflected above are the total of the aforementioned budget line items.2650 Despite the reduction in funding from FY 2017 to FY 2018, ECRCO indicated that it has "received funding to support its budget request," and "has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question."2651 External sources, including a federal court opinion, call that assessment into question, as discussed further below.

2647 Ibid 2648 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 5-6, 21. 2649 Ibid., 5. 2650 See U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. 2651 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6.

FY 2016	FY 2017	FY 2018*
\$2,027,433		
\$2,285,462		
\$2,091,427		
\$1,850,000	\$1,900,000	\$1,950,000
\$2,000,000	\$2,050,000	\$2,100,000
\$2,150,000	\$2,200,000	\$2,250,000
\$2,300,000	\$2,350,000	

Figure 9.1: ECRCO Budget Resources for External Civil Rights Enforcement, Fiscal Years 2016 to 2018

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Assessment Prioritization for Civil Rights Agency-Wide In 2016, EPA restructured the functions of the former Office of Civil Rights in an effort to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.2652 ECRCO noted that during FY 2016 through FY 2018, "ECRCO has and continues to carry out the same federally mandated responsibilities to enforce several civil rights laws which, together, prohibit discrimination on the basis of race, color, or national origin (including on the basis of limited English proficiency); sex, disability and age by applicants for and recipients of financial assistance from EPA."2653 This restructuring followed the Commission's 2016 statutory report that was critical of EPA, finding that "EPA's inability to proactively ensure that recipients of financial assistance comply with Title VI is exacerbated by its lack of resources and small staff levels."2654 The Commission, in a 2002 evaluation of federal civil rights enforcement across multiple agencies, found that federal civil rights programs "were often void of clear authority, responsibility, and accountability."2655 The Commission has recommended that federal agencies "should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency."2656 ECRCO reported that: "In December 2016, EPA took steps to strengthen the agency's ability to carry out its external civil rights enforcement responsibilities by reorganizing the functions of the Office of Civil Rights (OCR) with respect to its former External Compliance and Complaints Program. The external civil rights enforcement function now resides organizationally within ECRCO, which is in EPA's OGC [Office of General Counsel]."2657 In contrast, the internal functions of the EPA's OCR, which reviews staff complaints and internal functions, is still located in the Office of the EPA Administrator (the agency head).2658 This restructuring of the external functions of the Office of Civil Rights, particularly in the wake of the Commission's critical 2016 report, runs counter to the previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack of a direct line of authority to the agency head.2659 In 2012, EPA recommended the creation of Deputy Civil Rights Officials (DCROs), comprised of senior-level officials who are responsible for ensuring accountability for civil rights compliance

2652 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. 2653 U.S. Environmental Protection Agency, "External Civil Rights Compliance Office (Title VI)", <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. 2654 USCCR, Environmental Justice, supra note 250, at 90. 2655 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. 2656 Ibid. 2657 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3. 2658 See U.S. Environmental Protection Agency, Office of Civil Rights, <https://www.epa.gov/aboutepa/about-office-civil-rights-ocr> (accessed Jun. 9, 2019). 2659 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47.

<https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>
<https://www.epa.gov/aboutepa/about-office-civil-rights-ocr>
<https://www.epa.gov/aboutepa/about-office-civil-rights-ocr>

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across the agency.2660 DCROs exist in regional offices and national programs—including environmental justice initiatives—and are charged to provide "prompt programmatic, regulatory, analytical, scientific, and technical expertise" which would ultimately assist programs in meeting EPA's civil rights responsibilities.2661 DCROs were formally established under EPA Orders 4700 and 4701 in 2013, to support its civil rights enforcement efforts.2662 Lilian Dorka, Director of ECRCO, spoke to this issue during her testimony to the Commission:

[T]hese two orders basically require the different regional offices within EPA, as well as the program offices, to identify high level, sort of at the SES level, high level persons that will coordinate with the civil rights program to ensure that civil rights is integrated throughout the agency and also to ensure that we have additional resources. ... there is what we call the Deputy Civil Rights Official, the DCROs within each regional office or program office and I can call on them when I need cooperation, or collaboration, or to know what is going on[,] on the ground. ... So those Orders, which are in fact reflected in our Case Resolution Manual and how we will work with the regional offices and different programs, pretty much put at our disposal a cadre of very, very highly skilled and trained environmental professionals that we can call on for assistance on individual cases.2663

According to ECRCO's Case Resolution Manual, DCROs are described as, "a critical resource in support of EPA's civil rights program ... who serve as civil rights champions throughout the EPA, and who provide prompt programmatic, regulatory, analytical, scientific, and technical expertise and support in addition to their vast network of critical stakeholder contacts at a regional level and in specific program areas."2664 The Manual goes on to clarify that these positions utilize "EPA's preexisting, in-house expertise" which enables EPA to "rely[] less on developing redundant competencies in ECRCO or use[] costly contracts to fill gaps in ECRCO's technical and scientific expertise to effectively investigate and resolve environmental civil rights cases consistent with the agency's commitment to sound science and civil rights law."2665 Professor Marianne Engelman Lado notes: "From the get-go, however, DCROs were a designation with responsibility, not a new hire or additional position within each region."2666 Lado points out: "In almost all cases, DCROs were deputy regional administrators or assistant regional administrators, with the additional responsibilities attendant to these titles." These positions,

2660 EPA, Case Resolution Manual, supra note 2631, at 3. 2661 Ibid. 2662 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; see also EPA, Case Resolution Manual, supra note 2631, at 3. 2663 Lilian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Testimony, Federal Civil Rights Enforcement Briefing, pp. 148-149. 2664 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; see also EPA, Case Resolution Manual, supra note 2631, at 3. 2665 Ibid.; see also EPA, Case Resolution Manual, supra note 2631, at 3. 2666 Marianne Engelman Lado, No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice, 22 Pa. J.L. & Soc. Change 281, 302 (2019) [hereinafter Lado, No More Excuses].

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therefore, do not add additional people with full time availability for civil rights enforcement; as Director Dorka testified to the Commission, these DCROs were not among her employees.2667 As explained earlier in this chapter, ECRCO noted in its response to the Commission that it had "received funding to support its budget request" for FY 2016 to FY 2018, and "commensurate with ECRCO's budget allocations, ECRCO has had sufficient staffing to effectively manage its caseload for the fiscal years in question."2668 ECRCO experienced a slight overall increase in its budget allocations from FY 2016 to FY 2018, and its staffing levels appear to have increased commensurate to those budget allocations, rising from 11.5 to 12 FTEs for the fiscal years in question.2669 Therefore, when examining its overall resources, ECRCO's capacity to manage its civil rights enforcement caseload has slightly increased over FY 2016 to FY 2018. Strategic Planning and Self-Evaluation Prior to EPA's restructuring the external civil rights enforcement functions of the former Office of Civil Rights within ECRCO, EPA issued a strategic plan solely dedicated to its external civil rights enforcement work goals for the fiscal years 2015-2020 (which was subsequently updated in January 2017, after this restructuring).2670 In the External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020, ECRCO outlines three key strategic goals:

- Goal 1: Enhance Strategic Docket Management • Goal 2: Develop a Proactive Compliance Program • Goal 3: Strengthen ECRCO's Workforce to Promote a High-Performing Organization2671

According to ECRCO, these measurable goals will help improve complaint management, enhance ECRCO's external compliance program, and strengthen ECRCO's workforce.2672 Lilian Dorka, Director of ECRCO, noted that all of these priorities are critical in advancing ECRCO's mission, and ECRCO has made efforts to strengthen its own staff capacity to accomplish its mission, including the development of an ECRCO Competency Framework and Individualized Development Plans.2673 Director Dorka testified that issuing a Complaint Resolution Manual and a Strategic Plan has increased ECRCO's ability to focus its resources on reducing its complaint docket of unresolved and over-aged complaints.2674 ECRCO has indicated that these priorities have not significantly changed "in content or focus" from FY 2016 through FY 2018, however some

2667 Dorka Testimony, Federal Civil Rights Enforcement Briefing, pp. 148-149. 2668 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6. 2669 U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. 2670 U.S. Environmental Protection Agency, External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020, January 2017 (final draft), https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf [hereinafter EPA, ECRCO Strategic Plan]. 2671 Ibid., 5; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2672 EPA, ECRCO Strategic Plan, supra note 2670, at 6. 2673 Dorka Testimony, Federal Civil Rights Enforcement Briefing, p. 122-123. 2674 Ibid., 94-96.

https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf

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initiatives have been implemented to enhance the effectiveness of these policy priorities.2675 ECRCO has indicated that when EPA funding recipients experience a "lack of foundational nondiscrimination programs including procedural safeguards required by EPA's regulations, as well as policies and procedures to ensure meaningful access to applicants' and recipients' programs and activities for persons with disabilities and limited-English proficiency,"2676 that absence can impact funding recipients' ability to comply with their federal civil rights obligations. Additionally, ECRCO has described its proactive efforts to make improvements in this area of "strategic significance" by "the routine integration of procedural safeguard and access requirements into the resolution of all pending complaints," and has indicated that these measures help to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance," similar to compliance reviews.2677 In line with its legal responsibility, EPA issues an annual performance report.2678 EPA's FY 2016 and FY 2017 Annual Performance Reports indicated a goal of "protecting human health and the environment by enforcing laws and assuring compliance," noting that its environmental justice program contributed to that goal.2679 and noted that "EPA continued to promote environmental justice (EJ) by targeting noncomplying facilities for their disproportionate impacts on low-income and minority communities."2680 EPA's FY 2018 Annual Performance Report did not indicate a similar goal, nor did it mention civil rights enforcement at all.2681 The Commission is not aware of any annual performance reports that are issued and made public by ECRCO specifically. Complaint Processing, Agency-Initiated Charges, and Litigation The foundation for EPA's civil rights complaint resolution process is EPA's nondiscrimination regulation.2682 Based upon that regulation, ECRCO developed a Case Resolution Manual in 2015 (updated in January 2017), which "provides procedural guidance to ECRCO case managers to ensure EPA's prompt, effective, and efficient resolution of civil rights cases consistent with federal

2675 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2676 Ibid. 2677 Ibid. 2678 GPRM Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 2679 U.S. Environmental Protection Agency, FY 2019 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2017 Annual Performance Report, p. 719, <https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>. 2680 U.S. Environmental Protection Agency, FY 2018 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2016 Annual Performance Report, p. 548, <https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>. 2681 U.S. Environmental Protection Agency, FY 2020 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2018 Annual Performance Report, <https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>. 2682 40 C.F.R. Parts 5 and 7. The Commission notes that the agency uses the term "nondiscrimination regulation" rather than the plural, for these regulations. U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 1, at 1.

<https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>
<https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>

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civil rights law."2683 In a public comment submitted to the Commission in 2018, Marianne Engelman-Lado, Lecturer at Yale Schools of Public Health and Forestry & Environmental Studies, commended EPA for the issuance of this Case Resolution Manual, which she believes "helped to fill the need for greater uniformity, clarity, and transparency related to the EPA's handling of complaints filed under civil rights laws."2684 As per ECRCO's Case Resolution Manual, when

Fiscal correspondence, ECRCO “will” formally acknowledge receipt, develop a strategic case management plan to “achieve prompt, effective, and efficient processing of cases,” and conduct a review of correspondence it receives to determine whether it constitutes a complaint.²⁶⁸⁵ ECRCO should also notify DCROs of incoming correspondence and the review process within the first 10 days after receipt of said correspondence.²⁶⁸⁶ However, the manual also states that “[a]ll target timeframes in this document are aspirational. They represent goals ECRCO will aim to achieve in the majority of cases.”²⁶⁸⁷ ECRCO’s case manual also reports review of correspondence will take into consideration a number of factors (e.g., subject matter and personal jurisdiction, timely allegations, and if the correspondence is in writing²⁶⁸⁸), and will help ECRCO determine whether to accept or reject the complaint.²⁶⁸⁹ This review (which includes the jurisdictional review) should take place within the first 20 days after acknowledgement of receipt of the complaint.²⁶⁹⁰ EPA regulations require that ECRCO notify the complainant and recipient of its preliminary findings within 180 days of receiving the complaint.²⁶⁹¹ The regulations have been interpreted by a federal court to require EPA to issue preliminary findings even if it has determined that a violation has not occurred, rather than only issuing preliminary findings if it has determined that a violation has occurred.²⁶⁹² If a complaint is accepted for investigation, ECRCO’s case manual states that it will issue a letter of acceptance and the assigned Case Manager will begin to draft an Investigative Plan, which will include an identification of an applicable legal theory (disparate/different treatment, disparate impact/effects, or retaliation).²⁶⁹³ The early stages of the investigation will take certain criteria into account, and if the complaint does not meet said criteria, then the complaint could be subject to

²⁶⁸³ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 9, at 12. ²⁶⁸⁴ Lado, No More Excuses, supra note 2666, at 303. ²⁶⁸⁵ EPA, Case Resolution Manual, supra note 2631, at 6. ²⁶⁸⁶ Ibid., 39. ²⁶⁸⁷ Ibid., 39, n. 1. ²⁶⁸⁸ Ibid., 7. The Case Resolution Manual notes that a complaint does not have to be written in English, as ECRCO “will take all the necessary steps to ensure that persons who have limited English proficiency can participate meaningfully in its complaint process.” Ibid. ²⁶⁸⁹ Ibid. ²⁶⁹⁰ See 40 C.F.R. § 7.120(d)(1)(i). ²⁶⁹¹ 40 C.F.R. § 7.115; 40 C.F.R. § 7.120. ²⁶⁹² *Californians for Renewable Energy v. United States Environmental Protection Agency*, 2018 WL 1586211 (N.D. Cal. 2018). ²⁶⁹³ EPA, Case Resolution Manual, supra note 2631, at 15.

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administrative closure.²⁶⁹⁴ Early Complaint Resolution could be used to resolve a complaint in the early stages of investigation, and provides an opportunity for the complainant and the recipient to reach a mutually acceptable agreement, which will be monitored for compliance.²⁶⁹⁵ Alternative Dispute Resolution is another method used to resolve complaints, involving a more formal mediation process between complainant(s) and recipient(s) involved to reach a mutually agreeable resolution.²⁶⁹⁶ Additionally, an Informal Resolution Agreement between the recipient and ECRCO could be reached.²⁶⁹⁷ If no resolution can be achieved during this stage of the investigative process, then ECRCO’s investigation will continue.²⁶⁹⁸ After the investigation is complete, ECRCO says it will make an investigative determination and will issue a letter of findings, in which ECRCO will either determine there is insufficient evidence or there are preliminary findings of non-compliance.²⁶⁹⁹ If ECRCO finds non-compliance, at this stage a respondent can enter into a Voluntary Compliance Agreement with ECRCO, which outlines action steps that a respondent can take to voluntarily remedy discrimination and achieve compliance.²⁷⁰⁰ If a respondent will not enter into a Voluntary Compliance Agreement, ECRCO may initiate administrative proceedings to “suspend, terminate, or refuse to grant or continue and defer financial assistance from the recipient,” refer the case to DOJ for judicial proceedings, or use “other means authorized by law” (e.g., litigation, etc.).²⁷⁰¹ As set forth in EPA’s nondiscrimination regulation, ECRCO must utilize informal or voluntary methods of resolution to resolve complaints of discrimination prior to initiating an enforcement action.²⁷⁰² In testimony to the Commission for this investigation, Director of ECRCO Lilian Dorka described ECRCO’s use of informal complaint resolution methods, expressing: “We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations.”²⁷⁰³ ECRCO has reported to the Commission that it received 31 complaints in FY 2016, 25 complaints in FY 2017, and 15 complaints in FY 2018.²⁷⁰⁴ Of those complaints received, ECRCO accepted 8 complaints for investigation in FY 2016, 10 complaints in FY 2017, and 2 complaints in FY

²⁶⁹⁴ Ibid., 17. ²⁶⁹⁵ Ibid., 18. ²⁶⁹⁶ Ibid., 21. ²⁶⁹⁷ Ibid., 22. ²⁶⁹⁸ Ibid., 24. ²⁶⁹⁹ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, supra note 2631, at 29. ²⁷⁰⁰ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, supra note 2631, at 30. ²⁷⁰¹ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; U.S. EPA, Case Resolution Manual, supra note 2631, at 37. ²⁷⁰² 40 C.F.R. § 7.120(d)(2); 28 C.F.R. § 42.411(a); 28 C.F.R. § 50.3 I.C. ²⁷⁰³ Dorka Statement, at 3. ²⁷⁰⁴ U.S. Environmental Protection Agency, Updated Response to Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019); see also U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 7. ECRCO has specified that EPA interprets “open” cases to be the number of cases received during the fiscal years in question. Ibid.

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²⁷⁰⁵ Furthermore, ECRCO rejected 3 complaints for investigation at the jurisdictional review stage in FY 2016, while it rejected 23 complaints in FY 2017, and rejected 31 complaints in FY 2018.²⁷⁰⁶ See Figure 9.2. Figure 9.2: Complaints Received, Accepted, and Rejected by ECRCO

Source: U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

ECRCO also noted that the number of complaints identified above that are accepted or rejected for investigation in a given fiscal year “were not necessarily received in the same fiscal year.”²⁷⁰⁷ During FY 2016 to FY 2018, ECRCO received 46 complaints on the basis of race/national origin discrimination; 17 complaints on the basis of disability discrimination; 17 complaints where there was no identified basis of discrimination; and 1 complaint on the basis of sex discrimination.²⁷⁰⁸ ECRCO further noted that some complaints allege multiple bases of discrimination.²⁷⁰⁹ In 2016, the Commission examined the EPA’s compliance with and enforcement of Title VI and Executive Order 12,898 in order to advance environmental justice.²⁷¹⁰ The Commission reported at that time that since its creation, EPA’s Office of Civil Rights²⁷¹¹ “has never made a formal

²⁷⁰⁵ Ibid. ²⁷⁰⁶ Ibid. ²⁷⁰⁷ Ibid. ²⁷⁰⁸ Ibid. ²⁷⁰⁹ Ibid. ²⁷¹⁰ USCCR, Environmental Justice, supra note 250, at 40. ²⁷¹¹ Cross reference to current note 578 (note # may change) that reads, “In 2016, the functions of the former Office of Civil Rights were restructured to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.”

31

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0

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FY 2016 FY 2017 FY 2018

Figure 9.2: Complaints Received, Accepted, and Rejected by ECRCO

Fiscal Years 2016 to 2018

No. complaints received No. complaints accepted No. complaints rejected

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finding of discrimination.”²⁷¹² As discussed further below, since that report, EPA ECRCO has found at least two violations of Title VI, and in one case secured corrective action to remedy the violation. The Commission’s report explained the EPA received over 350 Title VI complaints between 1993 and 2016, which were “broad in scope and raise a variety of environmental issues that disproportionately impact communities of color and low-income communities.”²⁷¹³ The report highlighted criticisms of EPA’s civil rights office not meeting regulatory timelines for processing these complaints, and cited multiple lawsuits filed against EPA concerning this issue.²⁷¹⁴ In 2015, five environmental groups sued EPA based on a claim that EPA had ignored a decade’s worth of Title VI complaints between 1995 and 2005 concerning the discriminatory nature of approvals for environmentally hazardous facilities to operate in predominantly minority communities in Michigan, California, Texas, New Mexico, and Alabama.²⁷¹⁵ According to federal regulations, EPA had 180 days to issue initial findings and recommendations for reaching compliance (if appropriate) after a complaint was received.²⁷¹⁶ However, the plaintiffs claimed that EPA did not issue any preliminary findings during this time frame, and sought an order to “compel agency action unlawfully withheld or unreasonably delayed.”²⁷¹⁷ Citing several prior cases, the district court judge noted that:

It is well documented that the EPA has been sued repeatedly for failing to investigate Title VI complaints in a timely manner. The EPA often takes years to act on a complaint—and even then, acts only after a lawsuit has been filed. The Ninth Circuit has strongly criticized the EPA for such delays. Despite the prior litigation involving its failures to resolve Title VI complaints in a timely manner and this Circuit’s criticism of those delays, the EPA has allowed Plaintiffs’ complaints to languish for decades. It was only during the pendency of this action that the EPA resolved each of Plaintiffs’ administrative complaints.²⁷¹⁸

The court then found that “EPA’s failure to issue preliminary findings or recommendations and any recommendations for voluntary compliance constitutes agency action unlawfully

²⁷¹² USCCR, Environmental Justice, supra note 250, at 40. Note: since the issuance of the Commission’s report, EPA ECRCO has issued at least two Title VI findings of violation. ²⁷¹³ USCCR, Environmental Justice, supra note 250, at 25 (discussing how at the time the Commission’s report was published, it was reported that EPA received 290 Title VI complaints between 1993 and 2014, 33 new complaints in 2015, and 35 new complaints in 2016). ²⁷¹⁴ Ibid., 25-26. ²⁷¹⁵ *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Iovino, “Judge Rules EPA Improperly Delayed Racial Bias Probes,” supra note 251. ²⁷¹⁶ 40 C.F.R. § 7.115. ²⁷¹⁷ *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018). ²⁷¹⁸ Id. at *15 (internal citations omitted).

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withheld.”²⁷¹⁹ The final judgement the court entered in June 2018 requires EPA to timely process any pending and future Title VI complaints submitted by those specific Plaintiffs in the CARE litigation and accepted by EPA for investigation for a period of five years from the date of the Judgment.²⁷²⁰ ECRCO reported to the Commission that it “is dedicated to consistently and appropriately managing its administrative complaint docket to ensure prompt, effective, and efficient complaint resolution.”²⁷²¹ ECRCO cited its strategic plan, noting that Goal 1 is to enhance strategic docket management.²⁷²² ECRCO indicated that during FY 2016 to FY 2018, “ECRCO has focused its office resources on reducing its complaint docket and case processing times,” which has “yielded positive results.”²⁷²³ As of the beginning of FY 2017, ECRCO had 25 complaints that were accepted and under investigation, and 39 complaints at the jurisdictional review stage, for a total of 64 complaints that were being processed during that fiscal year.²⁷²⁴ Of the 25 accepted complaints under investigation, a total of 15 were resolved (3 resolved with informal resolution agreements, 2 resolved with settlement agreements through the alternative dispute resolution process, and 10 due to administrative closure or insufficient evidence letters of findings) and 10 are still open and under investigation.²⁷²⁵ Of the 39 complaints under jurisdictional review, 22 were rejected for investigation, 9 were accepted for investigation, and 8 remained under jurisdictional review.²⁷²⁶ Additionally, ECRCO received 24 new complaints during FY 2017, 21 of which ECRCO rejected for investigation, 3 of which ECRCO accepted for investigation, and 4 of which are currently at the jurisdictional review stage.²⁷²⁷ As of the end of FY 2018, ECRCO reported that it had 26 complaints in its inventory (17 complaints under investigation and 9 under jurisdictional review), indicating a “significant reduction” from 64 total complaints at the beginning of FY 2017.²⁷²⁸ ECRCO further noted its goal of processing complaints within the 20- day allotted time frame pursuant to EPA’s nondiscrimination regulation (40 C.F.R. Part 7), and that 9 of the 15 complaints it received in FY 2018 “were processed within the 20 days allotted by regulation to accept, reject, or refer complaints.”²⁷²⁹ As of June 2019, all complaints filed in 2018 have been resolved.²⁷³⁰

²⁷¹⁹ Id. ²⁷²⁰ Judgment, *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2 (N.D. Cal. June 13, 2018). In its review of the Commission’s draft report, EPA noted that “the Court ruled in favor of EPA on Plaintiffs’ ‘pattern and practice’ claim.” *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211, *19 (N.D. Cal. Mar. 30, 2018). However, plaintiffs won their motion for summary judgement on their other five claims. Id. at *20. ²⁷²¹ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 8. ²⁷²² Ibid. ²⁷²³ Ibid. ²⁷²⁴ Ibid. ²⁷²⁵ Ibid. ²⁷²⁶ Ibid. ²⁷²⁷ Ibid., 9; see 40 C.F.R. § 7.120(d)(1)(i). ²⁷³⁰ U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

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Environmental justice groups recently criticized EPA ECRCO for dismissing a civil rights complaint in 2018 that was filed against the Alabama Department of Environmental Management (ADEM), alleging that ADEM lacked adequate

policies for processing civil rights complaints, which would be a violation of Title VI.2731 The complaint was filed under ADEM rescinded its policies for accepting civil rights complaints, following a lawsuit that was filed against ADEM alleging racial discrimination due to the reissuing of a landfill permit in a community predominantly inhabited by African American residents in Tallahassee, Alabama.2732 In July 2018, EPA ECRCO issued a letter in response to the complaint filed, indicating that it would investigate “[w]hether ADEM has adopted grievance procedures that assure the prompt and fair resolution of complaints which allege violation of the regulation [40 C.F.R. Part 7.90(a)].”2733 EPA ECRCO proceeded to dismiss the complaint in December 2018.2734 In the letter of resolution and closure, issued on December 3, 2018, EPA ECRCO indicated that it had found “insufficient evidence of current noncompliance with Title VI and EPA’s implementing regulations at 40 C.F.R. Parts 5 and 7,” noting that EPA ECRCO had “provided technical assistance to ADEM and in response ADEM updated and posted on its website, in English and other appropriate languages, grievance procedures that meet the regulatory nondiscrimination requirements.”2735 With regard to the complaint against ADEM alleging racial discrimination against the predominantly African American residents of Tallahassee, Alabama, EPA ECRCO, found “insufficient evidence of discrimination under Title VI and EPA’s nondiscrimination regulation” with respect to differential treatment and disparate impact against the African American residents on the basis of race.2736 Environmental advocates have argued that “EPA’s failure to take action reflects a persistent pattern” when it comes to enforcing civil rights, and that “EPA has yet again used any possible excuse to avoid finding a violation of civil rights law.”2737 Similarly, in March 2018, EPA closed a complaint regarding the distribution of coal ash in Uniontown, Alabama, without a finding of racial discrimination.2738 The Commission criticized the EPA for this complaint closure, indicating that EPA’s decision to allow the movement and storage of coal ash

2731 Dennis Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” Al.com, Dec. 5, 2018, <https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html> [hereinafter Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency”]. 2732 Ibid. 2733 U.S. Environmental Protection Agency, Letter to David Ludder re: Notification of Acceptance of Administrative Complaint (Jul. 2, 2018), p. 1, http://www.enviro-lawyer.com/2018/07/02_EPA_Acceptance_Complaint.pdf. 2734 Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” supra note 2731. 2735 U.S. Environmental Protection Agency, Letter to Lance R. LeFleur, Director of Alabama Department of Environmental Management re: Resolution and Closure of EPA Administrative Complaint No. 03R-18-R4 (Dec. 3, 2018), pp. 3-4, <https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>. 2736 Ibid., 21. 2737 Jeronimo Nisa, “EPA Slams Door to Justice on Historic Black Community,” Earthjustice, Dec. 12, 2018, <https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community>. 2738 Adam Dodson, “EPA closes Uniontown investigations,” Selma Times-Journal, Mar. 10, 2018, <https://www.selmatimesjournal.com/2018/03/10/epa-closes-uniontown-investigations/>.

<https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html>
<https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html>
http://www.enviro-lawyer.com/2018/07/02_EPA_Acceptance_Complaint.pdf
<https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>
<https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>
<https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community>
<https://www.selmatimesjournal.com/2018/03/10/epa-closes-uniontown-investigations/>

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in Uniontown “has adversely impacted the surrounding community” and it perpetuates “the environmental injustice the Uniontown community must endure.”2739 On January 19, 2017, on the last day of the Obama administration, ECRCO issued a letter that made a first-ever final finding of discrimination, after failed attempts to achieve informal resolution.2740 In a case that alleged the Michigan Department of Environmental Quality (MDEQ) treated African American residents of Flint in a discriminatory manner when permitting a power plant over 20 years ago.2741 The letter, signed by the current Director of ECRCO Lilian Dorka and sent to the complainant Father Phil Schmitter of the St. Francis Prayer Center in Flint, indicated evidence that “African Americans were treated less favorably than non-African Americans,” and noted that a “preponderance of the evidence in EPA’s record would lead a reasonable person to conclude that race discrimination was more likely than not the reason.”2742 EPA issued a finding of discriminatory treatment by MDEQ in the public participation process for the permit at issue. EPA also raised additional and current serious concerns about public participation and MDEQ’s nondiscrimination program, among other things, that are being examined in the context of another EPA civil rights investigation involving MDEQ.2743 On the same day, ECRCO also announced that it entered into an Informal Resolution Agreement with the New Mexico Environment Department (NMED) after a complaint that alleged discrimination based on race and national origin relating to NMED’s issuance of a storage and disposal permit without ensuring that limited-English proficient (LEP) Spanish-speaking residents were provided “a meaningful opportunity for effective public participation” or considering the possible disparate impacts on these individuals.2744 As part of the resolution, NMED agreed to take specific remedial and future actions to address the concerns of the complaint and ensure compliance with all regulations and civil rights statutes to ensure that all people have “meaningful access to all of NMED’s programs and activities.”2745 The Center for Public Integrity noted these two developments, stating that “EPA’s findings in the Michigan and New Mexico cases represent an uptick in activity by a civil-rights office – recently

2739 U.S. Comm’n on Civil Rights, Statement Regarding EPA Decision on Uniontown, Alabama (Mar. 16, 2018), p. 1, <https://www.usccr.gov/press/2018/03-16-statement-EPA.pdf>. 2740 U.S. Environmental Protection Agency, Letter to Father Phil Schmitter (Jan. 19, 2017), p. 29, <https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html> [hereinafter EPA, “Letter to Father Phil Schmitter”]. 2741 Ibid., 3; Talia Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” Center for Public Integrity, Jan. 25, 2017, <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/> [hereinafter Buford, “Rare Discrimination Finding by EPA Civil Rights Office”]. 2742 EPA, Letter to Father Phil Schmitter, supra note 2740. 2743 U.S. Environmental Protection Agency, Response to USCCR Affected Agency Review (Jan. 18, 2019); see U.S. Environmental Protection Agency, Letter to Heidi Grether, Director of the Michigan Dept of Environmental Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>. 2744 U.S. Environmental Protection Agency, Letter to Butch Tongate, Secretary-Designate of the New Mexico Environment Department (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>. 2745 Ibid., 12.

<https://www.usccr.gov/press/2018/03-16-statement-EPA.pdf>
<https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html>
<https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>
<https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipient-1-19-2017.pdf>

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moved into the agency’s Office of General Counsel – long criticized for failing to act on complaints alleging Title VI violations.”2746 Proactive Compliance Evaluation ECRCO is responsible for carrying out its compliance work through a variety of means, including agency-initiated compliance reviews.2747 ECRCO’s Case Processing Manual indicates that “to address issues of strategic significance in civil rights areas, ECRCO will identify, plan, and implement a docket of compliance reviews in consultation with the appropriate DCROs,” and considers “a number of factors, including statistical data, prior complaints, complaints that do not meet certain jurisdictional requirements, reports by other EPA offices, information shared by other federal agencies, and other specific and reliable information from communities and/or sources, which further our strategic goals. ECRCO’s objective will be to engage early and often with recipients of federal assistance to collaboratively identify resolution approaches.”2748 Director Dorka indicated that ECRCO has a “proactive compliance” program “to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance.”2749 She also noted that many recipients lack focus on what she terms “foundational nondiscrimination programs,” which include “procedural safeguards required by EPA regulations,” such as “the continuing notice of nondiscrimination; grievance procedures that assure the prompt and fair resolution of complaints which allege a violation of EPA’s nondiscrimination regulation; and the designation of at least one person to coordinate its efforts to comply with its nondiscrimination obligations.”2750 Dorka added that:

Having in place a foundational nondiscrimination program would assist recipients’ ability to comply with Title VI, Section 504 and other civil rights laws by having policies and procedures to ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.2751

ECRCO has noted that although these proactive initiatives “are not labeled as ‘compliance reviews,’ ECRCO considers that they accomplish the same proactive goal as do compliance reviews: to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information

2746 Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” supra note 2741; see supra notes 2656–2659. 2747 EPA, Case Resolution Manual, supra note 2631, at i; see 28 C.F.R. § 42.407(c); see also 40 C.F.R. §§ 7.110, 7.115; see also 40 C.F.R. § 5.605. 2748 EPA, Case Resolution Manual, supra note 2631, at 33. 2749 Dorka Statement, at 6. 2750 Ibid., 5. 2751 Ibid., 6.

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and assistance.”2752 In 2002, the Commission noted the importance of monitoring compliance, recommending that “Federal agencies should acquire a large portion of their reviews of funding recipients by imposing annual (or even quarterly) reporting requirements that allow an evaluation of the equality among the recipients’ program participants and beneficiaries.”2753 If ECRCO is missing basic data about whether recipients are providing appropriate notice, grievance procedures and having a designated coordinator as required under federal civil rights law, then collecting this basic data would be aligned with the Commission’s recommendations. These data would also be helpful to ensure that recipients of EPA funding need to take steps to come into compliance. Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity ECRCO utilizes various methods to disseminate policy to funding recipients and the general public. As stated in both its Strategic Plan and its Case Resolution Manual, ECRCO provides technical assistance to its funding recipients as part of its proactive compliance program.2754 Director Dorka testified to the Commission that providing information and compliance assistance to states and other recipients is a key part of this proactive compliance program, to “ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.”2755 ECRCO is also issuing guidance. In January 2017, ECRCO issued guidance through a “Dear Colleague” letter to introduce Chapter 1 of the U.S. EPA’s External Civil Rights Compliance Office Toolkit, which is “a clarification of existing law and policy intended to provide guidance to promote and support EPA recipients’ compliance with federal civil rights laws.”2756 The letter indicated that ECRCO is planning to issue additional chapters of the Toolkit that address other civil rights compliance areas.2757 ECRCO’s Case Resolution Manual indicates that ECRCO is “responsible for carrying out compliance with these federal nondiscrimination statutes through a variety of means,” which includes outreach activities.2758 In its efforts to develop its proactive compliance program, ECRCO had indicated in its Strategic Plan that it plans to conduct various outreach activities, and specifically will “coordinate with DCROs to bring technical assistance, training, and community

2752 Ibid., 6. 2753 USCCR, Ten-Year Check Up Vol. 1: A Blueprint, supra note 1, at 41. 2754 EPA, Case Resolution Manual, supra note 2631, at i, 26, 36; EPA, ECRCO Strategic Plan, supra note 2670, at 2, 10-12, 14. 2755 Dorka Statement, at 6. 2756 U.S. Environmental Protection Agency, Dear Colleague Letter Re: EPA’s External Civil Rights Compliance Office Toolkit (Jan. 18, 2017), p. 1, https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf. 2757 Ibid., 3. 2758 EPA, Case Resolution Manual, supra note 2631, at i.

https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf
https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

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outreach and engagement to stakeholders.”2759 In addition, ECRCO’s Strategic Plan indicated that ECRCO will “develop an outreach and communication plan that will strategically outline engagement with critical external partnerships and stakeholders,” develop technical assistance and training materials to “allow DCROs and other regional staff [] assist ECRCO in outreach to maximize the number of recipients and communities reached,” and “improve its training and outreach with all stakeholder communities by making more strategic use of [ECRCO’s] website, training videos, webinars, and social media.”2760 ECRCO’s Case Resolution Manual also notes that in the early stages of case planning, Case Managers are responsible for determining whether a “Communications and Outreach Plan” is necessary “in order to assist in handling public or media inquiries.”2761 ECRCO maintains a webpage that is devoted to highlighting and publicizing ECRCO’s civil rights compliance work.2762 This webpage largely reports on ECRCO’s casework, particularly when it has achieved a resolution to a complaint.2763 However, it also reports updates on policy guidance,2764 rulemaking,2765 and other pertinent updates from ECRCO.2766 Effectiveness of Interaction and Coordination with External Agencies and Organizations ECRCO’s Cooperative Federalism initiative is a pilot project to initiate partnerships with EPA Regional Offices to “engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other states could model.”2767 ECRCO believes that once these programs are in place and effectively implemented at the state level, “many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs.”2768 EPA’s description of the Cooperative Federalism initiative notes that “EPA is more effective in its protection of human health and the environment when it works together with states and tribes and engages local communities from a foundation of trust, transparency, and collaboration.”2769

2759 EPA, ECRCO Strategic Plan, supra note 2670, at 11. 2760 Ibid., 12. 2761 EPA, Case Resolution Manual, supra note 2631, at 15. 2762 U.S. Environmental Protection Agency, “External Civil Rights Compliance Office – New Developments” <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments> [hereinafter EPA, “ECRCO – New Developments”]. 2763 Ibid. 2764 Ibid. (reporting that on January 19, 2017, ECRCO issued Chapter 1 of its Compliance Toolkit). 2765 Ibid. (reporting that on January 1, 2017, ECRCO sent notice to the Federal Register of the withdrawal of a proposed rule to amend EPA’s nondiscrimination regulation). See also Nondiscrimination in Programs or Activities Receiving Federal Assistance From the Environmental Protection Agency, 82 Fed. Reg. 2,294 (Jan. 9, 2017). 2766 See, e.g., EPA, “ECRCO – New Developments” supra note 2762 (reporting an update on February 26, 2016 to a planned public meeting on March 1, 2016). 2767 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2. 2768 Ibid. 2769 U.S. Environmental Protection Agency, “Cooperative Federalism at EPA,” <https://www.epa.gov/home/cooperative-federalism-epa>.

<https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments>
<https://www.epa.gov/home/cooperative-federalism-epa>

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ECRCO participates in the Federal Interagency Working Group on Environmental Justice,2770 which strives to “advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns.”2771 The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,2772 and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898,2773 which formally recommitted the participating federal agencies to “addressing environmental justice through a more collaborative, comprehensive and efficient process.”2774 ECRCO’s Case Resolution Manual indicates that it “does not investigate alleged noncompliance with Executive Order 12,898.”2775 ECRCO

indicated in its strategic plan that it “will continue its regular participation in the federal interagency Working Group on Environmental Justice, and the federal Interagency Working Group on Title VI of the Civil Rights Act.2776 Research, Data Collection, and Reporting ECRCO indicated that it “does not have policy guidance and/or procedures for data collection,” however, it “collects information from complainants as necessary to determine ECRCO’s jurisdiction over the subject matter of a complaint or when requesting information from complainants for purposes of investigating a complaint.”2777 ECRCO has also indicated that it “does not collect information from individuals as a matter of routine or for general data collection purposes.”2778

2770 EPA, ECRCO Strategic Plan, supra note 2670, at 11; U.S. Dep’t of Transportation, “Environmental Justice Strategy,” <https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy> [hereinafter DOT, “Environmental Justice Strategy”]; see also Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf [hereinafter Federal Interagency Working Group on Environmental Justice, “Fact Sheet”]. Note that this report focuses on the civil rights enforcement of ECRCO and does not fully explore the efforts of the Office of Environmental Justice, which also provides a civil rights function, and has been the target of dramatic funding reductions in recent budget proposals. See U.S. Environmental Protection Agency, FY 2020 Budget in Brief, p. 62, <https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-epa-bib.pdf>. 2771 Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” supra note 2770, at 1. 2772 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2773 U.S. Dep’t of Justice, U.S. Dep’t of the Interior, U.S. Dep’t of Agriculture, U.S. Dep’t of Labor, U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Hous. and Urban Dev., U.S. Dep’t of Transportation, U.S. Dep’t of Energy, U.S. Dep’t of Environmental Protection Agency, U.S. Dep’t of Commerce, and the U.S. Dep’t of Defense, Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (2011), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf> [hereinafter Memorandum of Understanding on Environmental Justice and Executive Order 12,898]. 2774 U.S. Environmental Protection Agency, “Overview of the EJ IWG,” <https://www.epa.gov/environmentaljustice/overview-ej-iwg> [hereinafter EPA, “Overview of the EJ IWG”]. 2775 EPA, Case Resolution Manual, supra note 2631, at 11. 2776 EPA, ECRCO Strategic Plan, supra note 2760. 2777 U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 11, at 14-15. 2778 Ibid.

<https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy>
<https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy>
https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf
https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf
<https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-epa-bib.pdf>
<https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf>
<https://www.epa.gov/environmentaljustice/overview-ej-iwg>

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405 Chapter 10: U.S. Department of Transportation

Chapter 10: U.S. Department of Transportation, Departmental Office of Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Transportation (DOT) on October 15, 1966.2779 and DOT began operation on April 1, 1967.2780 Currently, DOT is led by Secretary Elaine L. Chao, who was sworn into office as the 18th Secretary of Transportation on January 31, 2017.2781 DOT states that its mission is to “serve the United States by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.”2782 To uphold their mission, DOT is responsible for enforcing and implementing federal regulations that ensure the safety of all persons travelling on land, through air, or by sea.2783 Housed within DOT’s Office of the Secretary, which oversees and establishes policy for transportation programs administered by its Operating Administrations (OAs),2784 federal regulations provide that the Departmental Office of Civil Rights (DOCR) “serves as principal advisor” and also “periodically reviews and evaluates the civil rights programs of the Operating Administrations to ensure that recipients of financial assistance meet applicable civil rights requirements.”2785 This jurisdiction covers laws and regulations that prohibit discrimination on the basis of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.2786 DOCR has two main jobs: (1) resolving internal civil rights complaints affecting DOT employees and applicants for employment and (2) resolving external civil right complaints relating to the recipients and potential recipients of transportation programs that receive funding through

2779 Department of Transportation Act of 1966, Pub. L. 89-670, 80 Stat. 931. 2780 U.S. Dep’t of Transportation, “About DOT,” <https://www.transportation.gov/about> (accessed Jun. 17, 2016) [hereinafter DOT, “About DOT”]. 2781 U.S. Dep’t of Transportation, “Meet Key Officials,” <https://www.transportation.gov/key-officials> (accessed Jan. 18, 2019). 2782 U.S. Dep’t of Transportation, “About DOT,” supra note 2780. 2783 AllGov, “Department of Transportation (DOT),” <http://www.allgov.com/departments/departments-of-transportation?detailsDepartmentID=578#>. 2784 The Operating Administrations at DOT include: the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the National Highway Traffic Safety Administration, the Federal Transit Administration, the Saint Lawrence Seaway Development Corporation, the Maritime Administration, the Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration. See U.S. Dep’t of Transportation, External Civil Rights Complaint Processing Manual (September 2007), p. 7, https://www.transportation.gov/sites/dot.gov/files/docs/externalcomplaintmanual-final_1.pdf [hereinafter DOT, Complaint Processing Manual]. 2785 49 C.F.R. § 1.40. 2786 Id.; U.S. Dep’t of Transportation, “Office of Civil Rights,” <https://www.transportation.gov/civil-rights> [hereinafter DOT, “Office of Civil Rights”].

<https://www.transportation.gov/about>
<https://www.transportation.gov/key-officials>
<http://www.allgov.com/departments/departments-of-transportation?detailsDepartmentID=578>
<http://www.allgov.com/departments/departments-of-transportation?detailsDepartmentID=578>
https://www.transportation.gov/sites/dot.gov/files/docs/externalcomplaintmanual-final_1.pdf
<https://www.transportation.gov/civil-rights>

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DOT.2787 Through DOCR, DOT enforces the following federal civil rights laws, as per its nondiscrimination regulation at 49 C.F.R. Part 21:2788

- Title VI and Title VII of the Civil Rights Act of 1964, as amended;2789 • Americans with Disabilities Act of 1990;2790 • Civil Rights Act of 1991;2791 • Section 504 of the Rehabilitation Act of 1973, as amended;2792 • Section 508 of the Rehabilitation Act of 1973, as amended;2793 • The Age Discrimination Act of 1975;2794 • Disadvantaged Business Enterprise Program;2795 • Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);2796 • Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations);2797 • Executive Order 13,166 (Improving Access to Services for Persons with Limited English

Proficiency);2798 • Executive Order 13,217 (Community-Based Alternatives for Individuals with

Disabilities);2799 • DOT Order 1000.12, Implementation of the Department of Transportation Title VI

Program;2800 • DOT Order 1000.12A, the U.S. Department of Transportation Title VI Program;2801 • DOT Order 1000.18, External Civil Rights Complaint Processing Manual;2802 • DOT Order 1050.2A, DOT Standard Title VI Assurances and Non-Discrimination

Provisions;2803

2787 DOT, “Office of Civil Rights,” supra note 2786. 2788 49 C.F.R. Part 21; DOT, “About DOCR,” supra note 101; U.S. Dep’t of Transportation, “DOT Discrimination Policy – Complaint Process,” <https://www.transportation.gov/civil-rights/complaint-resolution/complaint-process> (accessed Oct. 4, 2016). 2789 42 U.S.C. § 2000d; 49 C.F.R. Part 21 (DOT implementing regulations); 28 C.F.R. Part 42 (DOJ implementing and coordinating regulations). 2790 42 U.S.C. § 12101; 28 C.F.R. Part 35; and 49 C.F.R. Parts 27, 37, 38. 2791 42 U.S.C. § 1981. 2792 29 U.S.C. § 794. 2793 Id. § 794(d). 2794 42 U.S.C. § 6101. 2795 49 C.F.R. Parts 23 and 26. 2796 Leadership and Coordination of Nondiscrimination Laws, Executive Order 12,250, 45 Fed. Reg. 72,995. 2797 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2798 Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 2799 Community-Based Alternatives for Individuals with Disabilities, Executive Order 13,217, 66 Fed. Reg. 33,155 (Jun. 18, 2001). 2800 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2801 Ibid. 2802 Ibid. 2803 Ibid.

<https://www.transportation.gov/civil-rights/complaint-resolution/complaint-process>

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- DOT Order 1 101 .62B, Department of Transportation Organization Manual-Departmental Office of Civil Rights;2804

- DOT Order 2100.5, Policies and Procedures for Simplification, Analysis, and Review of Regulations;2805

- Additional Civil Rights Authorities, as cited in DOT Order 1000.18, Chap. 1-2;2806 In addition, each OA has its own Office of Civil Rights or certain designated official(s) that are responsible for ensuring civil rights compliance for their respective organization and program.2807 OAs’ approaches to external civil rights enforcement within the offices varies, because OAs operate and fund different types of programs, however the Complaint Processing Manual states that all offices strive “to ensure that all civil rights laws, regulations, and executive orders for which the Department is responsible are implemented and enforced consistently, correctly, and expeditiously.”2808 Enforcement Tools The agency enforcement tools DOCR and DOT’s OAs have specific legal authority to use are:

- Complaint Resolution2809 • Agency-initiated charges2810 • Proactive Compliance Evaluations2811 • Issuance of Policy Guidance2812 • Issuance of Regulations2813 • Technical Assistance2814 • Publicity2815 • Data collection, research and reporting2816 • Collaboration with state/local agencies2817

2804 Ibid. 2805 Ibid. 2806 Ibid. 2807 DOT, Complaint Processing Manual, supra note 2784, at 1. 2808 Ibid. 2809 49 C.F.R. §§ 21.11, 28.170, 25.605, and 27.123. 2810 Id. § 21.11(a) and (c). 2811 Id. §§ 21.9, 21.11 (a), 28.170, 25.605, 27.121, and 27.123. 2812 Id. §§ 21.9(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 25.605, and 27.121(a). 2813 Id. § 5.1(b). 2814 Id. § 21.9 (a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 49 CFR §§ 25.605 and 27.121(a). 2815 28 C.F.R. § 42.405. 2816 Id. § 42.406. 2817 49 C.F.R. § 21.9 (a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

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- Collaboration with other federal agencies2818 • Strategic Plan2819 • Annual Reports2820

Budget and Staffing DOT reports that it uses its budget to “carry out an affirmative civil rights program that investigates, reviews, researches, and consults on matters in which it proactively advances equal opportunities.”2821 For FY 2016, DOT requested \$9.67 million for DOCR.2822 and Congress allocated \$9.67 million to DOCR.2823 For FY 2017, DOT requested \$9.75 million for DOCR,2824 and Congress allocated \$9.75 million to DOCR.2825 For FY 2018, DOT requested \$9.50 million for DOCR,2826 and Congress allocated \$9.50 million to DOCR.2827 See Figure 10.1.

2818 28 C.F.R. § 42.413. 2819 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010). 2820 Id. § 1115(b). 2821 U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2017, p. 188, <https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf> [hereinafter DOT, 2017 Budget Estimates]. 2822 U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2016, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>. 2823 U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2018, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf> [hereinafter DOT, 2018 Budget Estimates]. 2824 DOT, 2017 Budget Estimates, supra note 2821, at Sec. 2-1. 2825 U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2019, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>. 2826 DOT, 2018 Budget Estimates, supra note 2823, at OCR-1. 2827 U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2020, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

<https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>

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Figure 10.1: DOCR Requested and Allocated Budget

Source: U.S. Dep’t of Transportation, Budget Estimates Fiscal Year 2016, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>; U.S. Dep’t of Transportation, Budget Estimates Fiscal Year

2017, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2017-cj.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2018, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2019, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>; U.S. Dep't of Transportation, Budget Estimates Fiscal Year 2020, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

DOCR's overall budget rose slightly from FY 2016 to FY 2017 and decreased to its lowest level in FY 2018 in comparison to the other fiscal years. From FY 2016 to FY 2018, DOCR was allocated 100 percent of the funds it requested each year. Because DOT's OAs are principally responsible for complaint investigation and processing, DOCR "investigates and processes complaints only to assist the OAs when the circumstances warrant."2828 Consequently, DOCR does not typically process complaints and "DOCR's budget does not allocate a specific amount for processing and responding to civil rights complaints."2829 However, DOT provided estimates of funds expended for assisting OAs respond to and process complaints, and funds expended by DOCR for helping the OAs with proactively investigating civil rights concerns.2830 See Figure 10.2.

2828 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2829 Ibid. 2830 Ibid.

Fiscal Year	Requested	Allocated
FY 2016	\$9,678,000	\$9,678,000
FY 2017	\$9,751,000	\$9,751,000
FY 2018	\$9,500,000	\$9,500,000

Figure 10.1: DOCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>

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Figure 10.2: DOCR Estimated Budget for Assisting Operating Administrations to Process Civil Rights Complaints and Proactively Investigate Civil Rights Concerns

Source: U.S. Department of Transportation, Response to Interrogatory No. 6a and 6b, at 6.

DOT estimates that for assisting OAs with processing civil rights complaints, DOCR expended \$48,775 in FY 2016, \$178,989 in FY 2017, and \$111,632 in FY 2018.2831 For assisting Operating Administrations with proactively investigating civil rights concerns, DOT estimates that DOCR expended \$202,217 in FY 2016, \$101,733, and only \$1,450 in FY 2018.2832 Since DOCR assists OAs only when the circumstances warrant, DOT clarified that DOCR funds are only expended when DOCR assistance is necessary.2833 Therefore, if DOCR assistance is not necessary, there will be no DOCR expenditures.2834 Organizational Structure DOCR resides within DOT's Office of the Secretary (OST).2835 The Director of the Departmental Office of Civil Rights is the head of DOCR and acts as the "designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation."2836 The current Director of DOCR is Charles E. James, Sr.2837

2831 Ibid. 2832 Ibid. 2833 U.S. Dep't of Transportation, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 2834 Ibid. 2835 DOT, "About DOCR," supra note 101. 2836 Ibid. 2837 U.S. Dep't of Transportation, "Director," <https://www.transportation.gov/civil-rights/about-docr/director>.

Fiscal Year	Proactive Investigations	Complaint Processing
FY 2016	\$202,217	\$48,775
FY 2017	\$101,733	\$178,989
FY 2018	\$1,450	\$111,632

\$-

\$50,000

\$100,000

\$150,000

\$200,000

\$250,000

\$300,000

Figure 10.2: DOCR Estimated Budget for Assisting Operating Administrations to Process Civil Rights Complaints and Proactively

Investigate Civil Rights Concerns FY 2016 to FY 2018

Complaint Processing Proactive Investigations

<https://www.transportation.gov/civil-rights/about-docr/director>

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See Figure 10.3. The Disadvantaged Business Enterprise Program Division, formerly known as the External Civil Rights Programs Division, is the office within DOCR that supports OAs' civil rights offices in handling DOT's external civil rights enforcement work.2838 DOCR indicated that its roles and responsibilities have not changed between FY 2016 and FY 2018.2839 Figure 10.3: Organizational Structure of DOCR

Source: U.S. Department of Transportation, Department of Transportation Organizational Manual, Departmental Office of Civil Rights, DOT 1101.62B, DOT000153.

The agency's Organizational Manual states that the mission of the Disadvantaged Business Enterprise Program Division is to "ensure compliance with acceptable civil rights policies, regulations, statutes, guidelines, and procedures by external entities receiving Federal financial assistance from DOT."2840 This Division helps to develop external civil rights regulations and/or policies and communicates them to other Operating Administrations (e.g., Federal Aviation Administration) within DOT or external customers; provides technical assistance; coordinates with other government agencies to ensure uniform implementation of civil rights laws; makes "legally binding appeals decisions concerning denial of certification or improper certification under the Disadvantaged Business Enterprise Program;" and coordinates/interacts with other divisions, administrations, federal/state/local agencies, legislators, advocacy organizations, and others pertaining to civil rights programs and compliance with the relevant civil rights laws that DOT enforces.2841 DOT reported that in 2018 154 employees worked full-time within DOT on enforcement of relevant civil rights statutes, executive orders, and regulations.2842 Of those 154 employees, 30

2838 U.S. Department of Transportation, Departmental Office of Civil Rights, DOT 1101.62B, DOT000152, Department of Transportation Organizational Manual, p. DOT000152 [hereinafter DOT, Organizational Manual]. 2839 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 4, at 4. 2840 DOT, Organizational Manual, supra note 2838, at DOT000156. 2841 Ibid., DOT000156. 2842 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 5, at 4.

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worked full-time for DOCR.2843 A total of eight employees within DOT worked part-time on enforcement of the relevant civil rights statutes, executive orders, and regulations.2844 There were four full-time contractors who worked on civil rights enforcement for DOCR and two contractors who worked part-time on civil rights enforcement for the Federal Aviation Administration.2845 DOT also reported that staffing within DOCR remained the same between FY 2016 and FY 2018.2846 However, they noted that during this time, "16 employees departed DOCR and 11 employees were hired."2847 Also, in FY 2018 gained one civil rights enforcement employee and the Federal Aviation Administration lost four civil rights enforcement employees.2848 DOCR did not specify how many of the aforementioned employees were allocated to the Disadvantaged Business Enterprise Program Division. Assessment Prioritization of Civil Rights Agency-Wide As noted earlier, DOCR is the principle civil rights advisor to the Secretary, as well as for Secretarial Officers, OAs, and senior-level DOT officials.2849 DOCR explained to the Commission that it "provides oversight, leadership, guidance, technical assistance, and training to the OAs to ensure proper and effective administration of the programs."2850 Additionally, DOCR "refers and monitors complaints of discrimination by members of the public to the OA civil rights offices and serves as the primary liaison with external and internal stakeholders concerning civil rights matters."2851 The authority and responsibility for civil rights enforcement activities at DOT is decentralized and is shared among DOCR and the civil rights offices in the various OAs across DOT.2852 This is counter to the Commission's 2002 recommendations regarding civil rights enforcement offices. In 2002, the Commission stated that "the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions" and "these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another."2853

2843 Ibid. 2844 Ibid., 5. 2845 Ibid., 5. 2846 Ibid., 5. 2847 Ibid., 5. 2848 Ibid., 5. 2849 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2850 Ibid. 2851 Ibid. 2852 See supra notes 2784-2787, 2807-2808, and 2828-2830. 2853 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47.

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DOCR has both internal (EEO) and external functions, and has noted that its budget "does not allocate a specific amount for civil rights enforcement."2854 Furthermore, it appears that in some cases, the civil rights offices of DOT's OAs are set up similarly to handle both internal (EEO) and external functions,2855 and in some cases their budgets do not break out internal and external enforcement line items.2856 But given that the data about external civil rights enforcement is not available, it is difficult to assess the level of prioritization of external civil rights enforcement in this agency that in FY 2018 reportedly distributed more than \$63 billion in transportation investments and \$1.6 billion in discretionary funds, amounting to approximately 80% of DOT's annual budget.2857 Strategic Planning and Self-Evaluation DOT indicated that its civil rights policy priority is to "enforce the civil rights laws, regulations, and executive orders for which it is responsible so as to eliminate discrimination on a prohibited basis and ensure that all communities are provided with equal access to the programs and activities that receive financial assistance from DOT."2858 During FY 2016-2018, DOT issued three strategic plans: for FY 2012-2016,2859 FY 2014-2018,2860 and FY 2018-2022.2861 DOT's strategic plan for FY 2012-2016 specifically included information about civil rights enforcement, which identified a strategic goal to "promote transportation policies and investments that bring lasting and equitable economic benefits to the nation and its citizens," and indicates that DOT will "investigate and resolve civil rights-related complaints made by air travelers in a timely manner," as a strategy for meeting this goal for its aviation program.2862 In its strategic plan for FY 2014-2018, DOT identified strategies to increase access for persons with disabilities to meet its goal of fostering improved quality of life in communities, and indicated that it would "enforce the ADA through rigorous compliance reviews, ADA Transition Plans, and regular engagement with federally-funded transportation recipients to address transportation policies and programs that adversely

2854 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2855 See, e.g., U.S. Dep't of Transportation, Federal Aviation Administration, "Office of Civil Rights (ACR)," https://www.faa.gov/about/office_org/headquarters_offices/acr/. 2856 See, e.g., U.S. Dep't of Transportation, Federal Aviation Administration, Budget Estimates Fiscal Year 2018, pp. 11-12, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281191/faq-fy-2018-cj-final.pdf>. 2857 U.S. Dep't of Transportation, "U.S. DOT Provides More Than \$63 Billion to Major Transportation Infrastructure Investments Across America in 2018," <https://www.transportation.gov/briefing-room/dot6718>; "Department of Transportation Appropriations: FY 2019," EveryCRSReport.com, at Notes (Sep. 25, 2018), <https://www.everycrsreport.com/reports/R45321.html>. 2858 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 3, at 3. 2859 U.S. Dep't of Transportation, Transportation for a New Generation: Strategic Plan Fiscal Years 2012-2016, https://www.transportation.gov/sites/dot.gov/files/docs/990_355_DOT_StrategicPlan_508lowres.pdf [hereinafter DOT, Strategic Plan 2012-2016]. 2860 U.S. Dep't of Transportation, Transportation for a New Generation: Strategic Plan Fiscal Years 2014-2018, https://www.transportation.gov/sites/dot.gov/files/docs/2014-2018-strategic-plan_0.pdf [hereinafter DOT, Strategic Plan 2014-2018]. 2861 U.S. Dep't of Transportation, Strategic Plan for FY 2018-2022, February 2018, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/304886/dot-strategic-planfy2018-2022508.pdf> [hereinafter DOT, Strategic Plan 2018-2022]. 2862 DOT, Strategic Plan 2012-2016, supra note 2859, at 37.

https://www.faa.gov/about/office_org/headquarters_offices/acr/
<https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281191/faq-fy-2018-cj-final.pdf>
<https://www.transportation.gov/briefing-room/dot6718>
<https://www.everycrsreport.com/reports/R45321.html>
https://www.transportation.gov/sites/dot.gov/files/docs/990_355_DOT_StrategicPlan_508lowres.pdf
https://www.transportation.gov/sites/dot.gov/files/docs/2014-2018-strategic-plan_0.pdf

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impact the accessibility of transportation systems for individuals with disabilities.”2863 In its strategic plan for FY 2018-2022, DOT did not discuss external civil rights enforcement directly. DOT indicated that its first strategic goal for infrastructure is “Project Delivery, Planning, Environment, Funding, and Finance” and outlined a strategy to achieve that goal is to streamline the environmental review process, noting that DOT “remains committed to ensuring that all communities, including minority populations, low-income populations, and the disability community, have meaningful input into the transportation planning and decision-making processes, and that transportation projects avoid or minimize impacts to communities and the environment to the greatest extent possible.”2864 For all of these strategic plans, it appears that any mentions of civil rights priorities, objectives, or strategies fall under other more broad strategic goals and/or strategies that concern the agency’s programs generally, not just the agency’s civil rights enforcement program. Per the Government Performance and Results Act of 1993 (GPRA),2865 DOT is required to publish agency-wide annual Performance and Accountability Reports (PARs), however none are currently publicly available on their website for the fiscal years in question (FY 2016-2018).2866 DOT also issues agency-wide annual performance plans.2867 While external civil rights enforcement has not been a specific area of focus for the fiscal years in question, the FY 2016 and FY 2017 performance plans have indicated expanding access and choice to improve the quality of life in communities as a strategic goal, specifically to ensure that “all programs, activities, and services are examined to identify barriers to access for persons with disabilities.”2868 The Commission is not aware of any specific PARs or performance plans that have been issued specifically by DOCR, however some OAs do issue their own PARs.2869 For example, FAA publishes annual PARs,2870 and also has published a business plan for its civil rights office, with outlines a series of targets and goals for external enforcement, compliance, and technical assistance.2871

2863 DOT, Strategic Plan 2014-2018, supra note 2860. 2864 DOT, Strategic Plan 2018-2022, supra note 2861, at 20. 2865 Government Performance and Results Act of 1993 (GPRA), Pub. L. 103-62 (1993); U.S. Dep’t of Transportation, “DOT Budget and Performance Documents,” <https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents> [hereinafter DOT, “Budget and Performance Documents”]. 2866 See DOT, “Budget and Performance Documents,” supra note 2865. 2867 Ibid. 2868 U.S. Dep’t of Transportation, FY-2015 Annual Performance Report / FY-2017 Annual Performance Plan, [pages not numbered], <https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>; U.S. Dep’t of Transportation, FY-2014 Annual Performance Report/FY-2016 Annual Performance Plan, p. 100, https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf. 2869 See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, “Plans and Reports,” https://www.faa.gov/about/plans_reports/. 2870 Ibid. 2871 U.S. Dep’t of Transportation, Federal Aviation Administration, FY2018 ACR Business Plan, https://www.faa.gov/about/plans_reports/media/2018/acr_business_plan.pdf.

<https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents>
<https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>
<https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>
https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf
https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf
https://www.faa.gov/about/plans_reports/
https://www.faa.gov/about/plans_reports/media/2018/acr_business_plan.pdf

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Complaint Processing, Agency-Initiated Charges, and Litigation DOCR and DOT’s OAs have the ability to resolve complaints through a variety of means, including alternative dispute resolution (formal mediation),2872 investigation,2873 or administrative proceedings.2874 Any of these processes may result in informal resolutions (prior to issuance of a finding),2875 compliance monitoring,2876 voluntary compliance agreements (settlements),2877 withholding or termination of funds,2878 or referral to DOJ for litigation.2879 DOT’s nondiscrimination regulations authorize DOT to enforce civil rights laws with regard to funding recipients.2880 DOT has stated that it enforces civil rights laws “primarily through the administration of transportation-related programs designed to eliminate prohibited discrimination by recipients of federal financial assistance from DOT.”2881 The OAs charged with administering the pertinent programs are principally responsible for investigating and responding to complaints.2882 DOCR “investigates and processes complaints only to assist the OAs when the circumstances warrant.”2883 The process DOT (specifically DOCR or the OAs) utilizes to investigate and process complaints as per its Complaint Processing Manual is as follows:2884 Public complainants who believe they have been discriminated against by DOT or a DOT funding recipient can report the allegation to either the civil rights office within an OA or DOCR.2885 Complaints are defined as “a written or electronic statement concerning an allegation of discrimination that contains a request for the receiving office to take action”2886 and must be written and filed within 180 days of the alleged act of discrimination in order to be investigated by DOT.2887

2872 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 5, 36-37. 2873 49 C.F.R. §§ 21.11 (c), 25.605, and 27.123(c); DOT, Complaint Processing Manual, supra note 2784, at 21-35. 2874 49 C.F.R. §§ 21.13, and 25.605; DOT, Complaint Processing Manual, supra note 2784, at 44-47. 2875 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 36. 2876 49 C.F.R. §§ 21.11 (a), 25.605, and 27.123(a); DOT, Complaint Processing Manual, supra note 2784, at 42-43. 2877 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, supra note 2784, at 42-43, 42. 2878 49 C.F.R. §§ 21.13 (c), 25.605, and 27.125(b); DOT, Complaint Processing Manual, supra note 2784, at 45. 2879 49 C.F.R. §§ 21.13 (a), 25.605, and 27.125(a)(1); DOT, Complaint Processing Manual, supra note 2784, at 44-45. 2880 49 C.F.R. § 21.11, 28.170, 25.605, and 27.123. 2881 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2882 Ibid. 2883 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 6, at 6. 2884 The Commission is reviewing DOCR specifically, however, when references are made to “DOT” in this section, it applies primarily to the OAs, but also to DOCR. DOCR has noted that the OAs’ civil rights offices are the primary entities that process complaints and conduct other enforcement work, and DOCR only investigates and processes complaints to assist the OAs in certain circumstances. 2885 U.S. Dep’t of Transportation, “Public Complaint Process,” <https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process> (accessed Jan., 14 2016) [hereinafter DOT, “Public Complaint Process”]. 2886 DOT, Complaint Processing Manual, supra note 2784, at 9. 2887 DOT, “Public Complaint Process,” supra note 2885.

<https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process>
<https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process>

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If DOT determines that the complaint falls under DOT’s jurisdiction, then DOT reports that it sends the complainant a letter within 10 days of DOT receiving the complaint stating “that the complaint will be evaluated to determine whether DOT will investigate the allegations and that further communications about the complaint will occur in the future.”2888 If DOT determines the complaint is within the jurisdiction of another agency, then DOT reports that it sends the complainant a “dismissal” letter stating that the complaint was referred to another agency.2889 Complaints DOT accepts are then checked for completion.2890 A complaint DOT deems complete includes the following information:

- “Sufficient information to understand the facts that led the complainant to believe discrimination occurred and when the discrimination took place
- A way to contact the complainant (a mailing address, and if applicable, a telephone number and e-mail address)
- Identification of the person or group injured by the alleged discrimination • Identification of the person or organization alleged to have discriminated • The basis for the alleged discrimination, e.g., race, national origin, or disability.” 2891

If DOT determines the complaint is incomplete, DOT reports that it contacts the complainant for more information.2892 If the information is not provided to DOT within 30 days of it being requested, DOT reports that it then closes the case.2893 If DOT determines the complaint is to be investigated, then it notifies the complainant and draws up an Investigative Plan that depends on the complexity and elements of the case.2894 DOT reports that it then collects data to answer the following questions:

1. What happened? 2. Why did it happen? 2895

DOT collects this data through interviews, on-site visits, and requested information.2896 Once the investigation is complete, staff prepare an Investigative Report, also known as an Investigative Summary, and use the data to recommend “corrective or remedial action.”2897 The findings of the investigation are sent as a letter to the complainant and the recipient.2898 Then, the complainant

2888 DOT, Complaint Processing Manual, supra note 2784, at 11. 2889 Ibid., 11-12. 2890 Ibid., 12. 2891 DOT, “Public Complaint Process” supra note 2885. 2892 DOT, Complaint Processing Manual, supra note 2784, at 12-13. 2893 Ibid. 2894 Ibid., 22-23. 2895 Ibid., 25. 2896 Ibid., 27. 2897 Ibid., 34. 2898 Ibid., 37-40.

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and recipient may negotiate a Settlement Agreement, which must be approved and signed by a DOT representative, and DOT determines monitoring practices of the recipient (if applicable).2899 DOT staff aim to resolve complaints within 180 days, unless extenuating circumstances arise during the investigation.2900 If the recipient does not comply with the terms of the agreement or cannot agree on a settlement, then DOT reports that it will “initiate administrative enforcement proceedings, or pursue other means authorized by law, including referral to the Department of Justice with a recommendation that appropriate enforcement proceedings be brought.”2901 Also, in response to the Commission’s interrogatories, DOCR noted that because it does not typically investigate and process complaints, it was only able to provide information contained within its agency-wide complaint tracking platform for complaints investigated and processed during FY 2016 to FY 2018.2902 DOCR reported to the Commission that in FY 2016, DOT opened 342 external civil rights complaints, closed 255 complaints, and kept open 54 cases at the end of the fiscal year.2903 In FY 2017, DOT opened 288 complaints, closed 272 complaints, and kept open 47 cases by the end of the fiscal year.2904 And in FY 2018, DOT opened 332 complaints, closed 253 complaints, and kept open 170 cases at the end of the fiscal year.2905 See Table 10.1. Table 10.1: Number of External Civil Rights Complaints Opened and Closed between FY 2016 and FY 2018 FY 2016 FY 2017 FY 2018 Number of Complaints Opened 342 288 332 Number of Complaints Closed 255 272 253 Number of Cases that Remained Open at the End of the Fiscal Year

54 47 170

Source: U.S. Department of Transportation, Response to Interrogatories 7a, 7f, and 7h, at 7-9.

In FY 2016, DOT closed 189 of the complaints that were opened within 180 days, with 74.12% of complaint closures meeting the 180 day requirement.2906 In FY 2017, DOT closed 163 of the complaints opened within 180 days, with 59.93% of complaint closures meeting the 180 day requirement.2907 And in FY 2018, DOT closed 138 of the complaints that were opened during FY 2018 within 180 days, with 54.55% of complaint closures meeting the 180 day requirement.2908 The rate in which DOT is able to close complaints within a 180 day timeframe decreased by approximately 20 percent from FY 2016 to FY 2018.

2899 Ibid., 42-43. 2900 Ibid., 35. 2901 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2902 U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 7, at 7. 2903 Ibid., 8-9. 2904 Ibid. 2905 Ibid. 2906 Ibid. 2907 Ibid. 2908 Ibid.

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Table 10.2: Types of External Civil Rights Complaints Opened between FY 2016 and FY 2018 FY 2016 FY 2017 FY 2018 ADA/504 301 260 301 Title VI 26 18 9 Disadvantaged Business Enterprise (DBE) 10 8 14 External EEO 2 1 8 Unknown/Other 3 1 - Age Discrimination Act - - -

Source: U.S. Department of Transportation, Response to Interrogatory 7c, at 7.

See Table 10.2 above. The majority of complaints DOT receives are ADA or Section 504 disability-related complaints, with 88 percent, 90 percent, and 90 percent of complaints opened being ADA/Section 504 complaints for FY 2016, FY 2017, and FY 2018 respectively. Behind ADA/Section 504 complaints, DOT frequently receives Title VI complaints and Disadvantaged Business Enterprise (DBE) complaints. DBE complaints fall under the set of federal transportation regulations governing recipients of federal funding, which are designed to provide opportunity to groups that have been historically disadvantaged in the sector, including women and other socially and economically disadvantaged individuals.2909

2909 See 49 C.F.R. Part 23 and 49 C.F.R. Part 26.

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Table 10.3: Outcomes for External Civil Rights Complaints Closed between FY 2016 and FY 2018 FY 2016 FY 2017 FY 2018 Administrative Closure 81 110 80 Administrative Closure – Compliance Review 17 14 38 Administrative Closure – Complainant Not Responsive

21 34 27

Administrative Closure – Untimely 3 4 2 Administrative Closure – Litigation 3 1 1 Violation Letter of Finding 11 10 7 Violation Letter of Finding – Corrective Action Monitoring

2 5 2

Violation Letter – Corrective Action Monitoring Ongoing

No Violation Letter of Finding 46 36 43 No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding

14 15 6

Resolved Before Issuing Letter of Finding 20 21 27 Source: U.S. Department of Transportation, Response to Interrogatory 7d, at 8.

See Table 10.3 above. DOT administratively closed the majority of complaints during FY 2016, FY 2017, and FY 2018 (53.8 percent, 62.6 percent, and 60.9 percent respectively), due to several reasons including the unresponsiveness of the complainant, the initiation of a compliance review, lack of complaint timeliness, initiation of related litigation, or for other unspecified reasons.2910 DOT closed a significant number of complaints with a No Violation Letter of Finding (46 complaints in FY 2016, 36 complaints in FY 2017, and 43 complaints in FY 2018), or resolved them before issuing a Letter of Finding (20 complaints in FY 2016, 21 complaints in FY 2017, and 27 complaints in FY 2018).2911 DOT closed a smaller number of complaints with a No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding (14 complaints in FY 2016, 15 complaints in FY 2017, and 6 complaints in FY 2018), with a Violation Letter of Finding – Corrective Action Monitoring Ongoing (14 complaints in FY 2016, and 10 complaints each in FY 2017 and FY 2018), with a Violation Letter of Finding (11 complaints in FY 2016, 10 complaints in FY 2017, and 7 complaints in FY 2018), or with a Violation Letter of Finding – Corrective Action (2 complaints in FY 2016, 5 complaints in FY 2017, and 2 complaints in FY 2018).2912 Proactive Compliance Evaluation DOCR and DOTs OAs have federal regulatory authority to periodically conduct reviews of a funding recipient's programs or activities to determine and/or ensure that that recipient is in

2910 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 7, at 8. 2911 Ibid. 2912 Ibid.

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compliance with the applicable nondiscrimination laws that it enforces.2913 In its responses to the Commission's interrogatories, DOCR stated that OAs charged with administering the pertinent programs are responsible for conducting post-award compliance audits.2914 DOCR indicated in its External Civil Rights Complaint Processing Manual that the guidelines that apply for the complete investigation of a discrimination complaint also should be followed when conducting a compliance review.2915 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity DOCR told the Commission that as the "principal civil rights advisor to the Secretary, Secretarial Officers, OAs, and senior level DOT officials, [DOCR] provides oversight, leadership, guidance, technical assistance, and training to the OAs to ensure the proper and effective administration of the programs."2916 DOCR's website also indicates that it "[p]rovide[s] guidance, expertise, and technical assistance on civil rights issues identified through Departmental policy, programming, or procedure," and "conducts extensive outreach to civil rights stakeholders throughout the country to ensure that communities protected by civil rights laws and impacted by transportation infrastructure decisions have meaningful engagement in the decision-making process."2917 DOCR issued an External Civil Rights Complaint Processing Manual, which is "designed to provide guidance on processing discrimination complaints against U.S. Department of Transportation (DOT) Federal financial assistance recipients."2918 While the manual indicates that it is "for internal agency use," DOCR has made it public via a link to its website.2919 DOT established its Civil Rights Learning Center, a collective initiative of the civil rights offices at DOT, to "foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders."2920 The Civil Rights Learning Center "assists stakeholders with exploring, integrating, and applying civil rights learning to their work and their community," with the goal of "provid[ing] resources that will aid learners in effectively responding to evolving needs and issues regarding civil rights administration and application."2921 DOCR's website also lists a number of "learning resources" on its website for external civil rights, including audiocasts, podcasts, videos, learning hubs, online training modules, and guidance for

2913 49 C.F.R. § 21.11(a); DOT, Complaint Processing Manual, supra note 2784, at 21. 2914 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 2, at 3. 2915 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 12; DOT, Complaint Processing Manual, supra note 2784, at 22. 2916 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 1, at 2. 2917 DOT, "Understanding the Departmental Office of Civil Rights (DOCR)," <https://www.transportation.gov/transition/%E2%80%8Bcivil-rights/office-civil-rights> [hereinafter DOT, "Understanding DOCR"]. 2918 DOT, Complaint Processing Manual, supra note 2784, at i. 2919 U.S. Dep't of Transportation, "External Civil Rights Processing Manual," <https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual> (accessed Nov. 5, 2019). 2920 DOT, "Civil Rights Learning Center," supra note 327. 2921 Ibid.

<https://www.transportation.gov/transition/%E2%80%8Bcivil-rights/office-civil-rights>
<https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual>
<https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual>

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funding recipients from DOT and its OAs.2922 In addition, DOCR has a Civil Rights Library resource, which is a legal tool to assist "grant recipients and people who utilize transportation services funded through [DOT] grants."2923 The Civil Rights Library lists legal resources including civil rights laws (U.S. Codes, federal regulations, and public laws), executive orders, and policies that are enforced by DOCR and the civil rights offices in DOT's OAs.2924 The Commission is not aware of whether DOCR or DOT's OAs publicize the resolution of their enforcement efforts (complaints, compliance reviews, litigation, etc.) as a method of disseminating policy. Interaction and Coordination with External Agencies and Organizations DOCR's website indicates that it "coordinate[s] with federal agencies to collaborate on joint policy and to address intersecting enforcement and compliance efforts."2925 DOCR lists its civil rights partners on its website.2926 including DOT's Center for Alternative Dispute Resolution (housed in the Office of the General Counsel),2927 DOT's Disability Resource Center,2928 the U.S. Department of Veterans Affairs' Office of Small and Disadvantaged Business Utilization,2929 and the General Services Administration Advantage program.2930 DOT also participates in the Federal Interagency Working Group on Environmental Justice,2931 which strives to "advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns."2932 The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,2933 and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (that DOCR enforces),2934 which formally recommitted the

2922 DOT, "Learning Resources," supra note 328. 2923 U.S. Dep't of Transportation, "Civil Rights Library," <https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>. 2924 Ibid.; U.S. Dep't of Transportation, "Policies," <https://www.transportation.gov/civil-rights/civil-rights-library/policies>. 2925 DOT, "Understanding DOCR," supra note 2917. 2926 U.S. Dep't of Transportation, "Civil Rights Offices and Partners," <https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>. 2927 U.S. Dep't of Transportation, "Office of the General Counsel, Center for Alternative Dispute Resolution," <https://www.transportation.gov/CADR>. 2928 U.S. Dep't of Transportation, "Disability Resource Center," <https://www.transportation.gov/drc/disability-resource-center>. 2929 U.S. Department of Veterans Affairs, "Office of Small and Disadvantaged Business Utilization," <https://www.va.gov/osdbu/>. 2930 General Services Administration, "Advantage," https://www.gsaadvantage.gov/advantage/main/start_page.do. 2931 DOT, "Environmental Justice Strategy," supra note 2770; see also Federal Interagency Working Group on Environmental Justice, "Fact Sheet," supra note 2770. 2932 Federal Interagency Working Group on Environmental Justice, "Fact Sheet," supra note 2770, at 1. 2933 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2934 Memorandum of Understanding on Environmental Justice and Executive Order 12,898, supra note 2773.

<https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>
<https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>
<https://www.transportation.gov/civil-rights/civil-rights-library/policies>
<https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>
<https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>
<https://www.transportation.gov/CADR>
<https://www.transportation.gov/drc/disability-resource-center>
<https://www.transportation.gov/drc/disability-resource-center>
<https://www.va.gov/osdbu/>
https://www.gsaadvantage.gov/advantage/main/start_page.do

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participating federal agencies to "addressing environmental justice through a more collaborative, comprehensive and efficient process."2935 Many of DOT's grantees are State Transportation Agencies, and DOCR or the civil rights offices of the OAs interact with them to enforce federal civil rights law. For example:

The Disadvantaged Business Enterprise Program (DBE) is a legislatively mandated [DOT] program that applies to Federal-aid highway dollars expended on federally-assisted contracts issued by [DOT] recipients such as State Transportation Agencies (STAs). The U.S. Congress established the DBE program in 1982 to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- Help remove barriers to the participation of DBEs in DOT-assisted contracts, and
- Assist the development of firms that can compete successfully in the marketplace outside

of the DBE program.

The DBE program ensures that federally assisted contracts for highway, transit and aviation projects are made available for small business concerns owned and controlled by socially and economically disadvantaged individuals... Every three years, STAs are required to set an overall DBE goal that they must either meet, or show that they used good faith efforts to meet, annually. This goal is in the form of a percentage of federal funds apportioned annually to each STA and is calculated based upon the relative availability of DBE firms as compared to all firms in the relevant geographic market area. STAs that do not meet their goal in any given year, must submit a document to their operating administrations, such as [the Federal Highway Administration], identifying and analyzing the reasons why the goal was not met and creating specific steps to correct the problems going forward.2936

Research, Data Collection, and Reporting DOCR indicated that when DOCR directly receives a complaint, it collects "all relevant information necessary to resolve any compliance issues raised by the complainant, ascertained from the information provided by the complainant, or discovered during the investigation."2937 This information includes demographic data, among other items such as the basis for the complaint, the complainant's contact information, and pertinent facts about the discrimination that occurred.2938 DOCR indicated that it disaggregates demographic data concerning racial and ethnic populations, including Asian American and Pacific Islander populations, in accordance with E.O. 13,515 (which requires that federal programs strive to "work to advance relevant evidence-based research, data collection, and analysis" for Asian American and Pacific Islander populations and

2935 EPA, "Overview of the EJ IWG," supra note 2774. 2936 U.S. Department of Transportation, Federal Highway Administration, Civil Rights, "Disadvantaged Business Enterprise Program (DBE) Program," <https://www.fhwa.dot.gov/civilrights/programs/dbe/> (accessed Jul. 11, 2019). 2937 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 12. 2938 Ibid.

<https://www.civilrights.dot.gov/disadvantaged-business-enterprise>
<https://www.fhwa.dot.gov/civilrights/programs/dbe/>

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subpopulations)2939 when collecting and analyzing this data.2940 DOCR also requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT- funded program/project may have a disparate impact upon certain racial/ethnic populations.2941 DOCR indicated there were no changes in policy guidance surrounding data collection during FY 2016-2018.2942

2939 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009). 2940 U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 12. 2941 Ibid, 13. 2942 Ibid.

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Chapter 11: U.S. Department of Veterans Affairs, Office of Resolution Management Legal Authority and Responsibility President Hoover established the U.S. Department of Veterans Affairs (VA) on July 21, 1930 as an independent agency under Executive Order 5,398 and, on March 15, 1969, Congress redesignated the agency as an executive department in the Cabinet.2943 VA describes its mission as "to fulfill President Lincoln's promise 'to care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's veterans."2944 To uphold its mission, VA provides America's Veterans and their families with benefits and services such as compensation, veteran's pension, survivor's benefits, rehabilitation and employment assistance, education assistance, home loan guaranties, life insurance coverage, vocational rehabilitation and employment services, healthcare, and final resting places to commemorate those who have fallen while serving their country.2945 With over 350,000 employees, VA is the second largest federal agency.2946 VA's Office of Resolution Management (ORM) is responsible for enforcing civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age for veterans and their families.2947 The three major administrations at VA that deliver programs for veterans include the Veterans Health Administration (VHA), the Veterans Benefits Administration (VBA) and the National Cemetery Administration (NCA).2948 ORM works with the external civil rights offices at these three VA administrations, as well as other VA administration offices, to facilitate the enforcement of civil rights.2949

2943 U.S. Dep't of Veterans Affairs Act of 1988, Pub. L. 100-527, 102 Stat. 2635 (codified as amended at 38 U.S.C. §301). 2944 U.S. Dep't of Veterans Affairs, "About VA," https://www.va.gov/ABOUT_VA/index.asp (accessed Mar. 22, 2018). 2945 U.S. Dep't of Veterans Affairs, "Veterans Benefits Administration," <https://benefits.va.gov/benefits/> (accessed Feb. 4, 2019). 2946 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3;

Note: According to VA's Response VA's response to USCCR Interrogatory No. 5b-5e, at 10-11 Staffing levels for the offices and administrations listed but not changed and VA does not employ contractors or part-time workers on enforcement of civil rights statutes, executive orders, and regulations. 2947 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R. § 18; 20 U.S.C. § 1661-88 and implementing regulations at 38 C.F.R. § 23 subpart A; 29 U.S.C. § 794 and implementing regulations at 38 C.F.R. § 15; 42 U.S.C. §§ 6101 et seq.; U.S. Dep't of Veterans Affairs, "Office of Resolution Management (ORM)," <https://www.va.gov/ORM/>. 2948 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3-4; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. ORM noted that "[u]nder 38 C.F.R. § 18.1 the authority for "obtaining evidence of voluntary compliance," is also delegated to VBA and VHA. Ibid. 2949 38 U.S.C. § 308(b)(7); U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9.

https://www.va.gov/ABOUT_VA/index.asp
<https://benefits.va.gov/benefits/>
<https://www.va.gov/ORM/>

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ORM's Resolution Support Center (RSC) is a primary resource for Veterans and their families regarding any complaints of discrimination and unfair treatment in VA benefits and services,2950 but investigations are handled by other offices within the VA administrations. ORM's RSC oversees the initial processing of external complaints that it receives, and is responsible for forwarding these complaints to the appropriate administration for processing, depending on the basis of the complaint.2951 According to ORM's External Complaints Standard Operating Procedures, it is the responsibility of these administrations (VHA, VBA, and NCA) to investigate civil rights complaints that are referred to them.2952 In addition, VA's Office of the General Counsel (OGC) is responsible for providing legal guidance to ORM and VA's administrations as needed on matters concerning external civil rights enforcement.2953 With respect to schools, hospitals, and health care and other facilities' programs or activities under the purview of VA's nondiscrimination regulations,2954 ORM is responsible for ensuring that recipients of federal funding2955 comply with the following civil rights statutes, executive orders, and regulations:2956

• Title VI of the Civil Rights Act of 1964;2957 • Age Discrimination Act of 1975;2958 • Section 504 of the Rehabilitation Act of 1973;2959 • Title IX of the Education Amendments of 1972;2960 • Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);2961 • Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs);2962

• Executive Order 11,246 (Equal Employment Opportunity);2963 • Executive Order 11,063 (Equal Opportunity in Housing);2964

2950 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5. 2951 U.S. Dep't of Veterans Affairs, External Complaints Processing Standard Operating Procedure, Jun. 2014, p. 3- 5 (on file) [hereinafter VA, External Complaints Processing SOP]. 2952 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (updated Jun. 19, 2019). 2953 Ibid. 2954 38 C.F.R. § 18.1 Subparts A-E; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 2955 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 2956 Ibid., 10 (indicating that this authority is delegated by the Secretary of Veterans Affairs). 2957 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R. § 18. 2958 42 U.S.C. §§ 6101 et seq. 2959 29 U.S.C. § 794 and implementing regulations at 38 C.F.R. § 15. 2960 20 U.S.C. § 1661 and implementing regulations at 38 C.F.R. § 23 subpart A. 2961 Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995. 2962 Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 2963 Equal Employment Opportunity, Exec. Order No. 11,246, 30 Fed. Reg. 12,319. 2964 Equal Opportunity in Hous., Exec. Order No. 11,063, 27 Fed. Reg. 11,527.

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• Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing);2965

• Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);2966

• Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency);2967

• Executive Order 13,217 (Community-Based Alternatives for Individuals with Disabilities);2968

• Executive Orders 11,478 (Equal Employment Opportunity in the Federal Government);2969 • Executive Order 13,087 (Equal Employment Opportunity in the Federal Government);2970 • Executive Order 13,152 (Equal Employment Opportunity in the Federal Government);2971 • Executive Order 13,163 (Increasing the Opportunity for Individuals With Disabilities To

Be Employed in the Federal Government);2972 • Executive Order 13,164 (Establishing Procedures to Facilitate the Provision of Reasonable

Accommodation);2973 • Executive Order 13,145 (To Prohibit Discrimination in Federal Employment Based on

Genetic Information);2974 • Executive Order 10,925 (Establishing the President's Committee on Equal Employment

Opportunity);2975 • Executive Order 11,625 (Prescribing Additional Arrangements for Developing and

Coordinating a National Program for Minority Business Enterprise);2976 • Executive Order 11,701 (Employment of Veterans by Federal Agencies and Government

Contractors and Subcontractors);2977 • Executive Order 12,067 (Providing for Coordination of Federal Equal Employment

Opportunity Programs);2978

2965 Exec. Order No. 12,892, 59 Fed. Reg. 2,939. 2966 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 2967 Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121. 2968 Community-Based Alternatives for Individuals with Disabilities, Exec. Order No. 13,217, 66 Fed. Reg. 33,155. 2969 Equal Employment Opportunity in the Federal Government, Exec. Order No. 11,478, 34 Fed. Reg. 12,937 amended by Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998) and further amended by Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000). 2970 Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998). 2971 Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000). 2972 Increasing the Opportunity for Individuals With Disabilities To Be Employed in the Federal Government, Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (Jul. 28, 2000). 2973 Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Exec. Order No. 13,164, 65 Fed. Reg. 46,565 (Jul. 28, 2000). 2974 Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 10, 2000). 2975 Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961). 2976 Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 14, 1971). 2977 Exec. Order No. 11,701, 38 Fed. Reg. 2,675 (Jan. 29, 1973). 2978 Exec. Order No. 12,067, 43 Fed. Reg. 28,967.

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• Executive Order 12,106 (Transfer of certain equal employment enforcement functions);2979 • Executive Order 13,078 (Increasing Employment of Adults with Disabilities);2980 • Executive Order 13,125 (Increasing Participants of Asian Americans and Pacific Islanders

in Federal Programs);2981 • Executive Order 13,162 (Federal Career Intern Program);2982 • Executive Order 13,171 (Hispanic Employment in the Federal Government);2983 • Executive Order 13,175 (Consultation and Coordination with Indian Tribal

Governments);2984 • Executive Order 13,187 (The President's Disability Employment Partnership Board);2985 • Executive Order 13,199 (Establishment of White House Office of Faith-Based and

Community Initiatives);2986 • Executive Order 13,216, addendum to Executive Order 13,125 (Increasing Opportunity

and Improving Quality of life of Asian Americans and Pacific Islanders);2987 • Executive Order 13,230 (President's Advisory Commission on Educational Excellence for

Hispanic Americans);2988 • Executive Order 13,256 (Presidents Board of Advisors on Historically Black Colleges and

Universities);2989 • Executive Order 13,592 (Improving American Indian and Alaska Native Educational

Opportunities and Strengthening Tribal Colleges and Universities);2990 • Executive Order 13,339 (Increasing Economic Opportunity and Business Participation of

Asian Americans and Pacific Islanders);2991

2979 Exec. Order No. 12,106, 44 Fed. Reg. 1,053 (Jan. 3, 1979). 2980 Increasing Employment of Adults with Disabilities, Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (Mar. 18, 1998). 2981 Increasing Participants of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,125, 64 Fed. Reg. 31,105 (Jun. 10, 1999). 2982 Federal Career Intern Program, Exec. Order No. 13,162, 65 Fed. Reg. 43,211 (Jul. 12, 2000). 2983 Hispanic Employment in the Federal Government, Exec. Order No. 13,171, 65 Fed. Reg. 61,251 (Oct. 16, 2000). 2984 Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). 2985 The President's Disability Employment Partnership Board, Exec. Order No. 13,187, 66 Fed. Reg. 3,857 (Jan. 17, 2001). 2986 Establishment of White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 31, 2001). 2987 Increasing Opportunity and Improving Quality of life of Asian Americans and Pacific Islanders, Exec. Order No. 13,216, 66 Fed. Reg. 31,373 (Jun. 11, 2001). 2988 President's Advisory Commission on Educational Excellence for Hispanic Americans, Exec. Order No. 13,230, 66 Fed. Reg. 52,841 (Oct. 17, 2001). 2989 Presidents Board of Advisors on Historically Black Colleges and Universities, Exec. Order No. 13,256, 67 Fed. Reg. 6,823 (Feb. 14, 2002). (This Exec. Order was revoked by: White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010).) 2990 Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011). 2991 Increasing Economic Opportunity and Business Participation of Asian Americans and Pacific Islanders, Exec. Order, Exec. Order No. 13,339, 69 Fed. Reg. 28,037 (May 17, 2004).

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• Executive Order 13,342 (Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives);2992

• Executive Order 13,403 (Amendments to Executive Orders 11,030, 13,279, 13,339, 13,381, and 13,389, and Revocation of Executive Order 13,011);2993

• Executive Order 13,569 (Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13,498, and Revocation of Executive Order 13,507);2994

• Executive Order 13,511 (Continuance of Certain Federal Advisory Committees);2995 • Executive Order 13,515 (Increasing Participation of Asian Americans and Pacific Islanders

in Federal Programs);2996 • Executive Order 13,518 (Employment of Veterans in the Federal Government);2997 • Executive Order 13,522 (Creating Labor-Management Forums to Improve Delivery of

Government Services);2998 • Executive Order 13,548 (Increasing Federal Employment of Individuals with

Disabilities);2999 • Executive Order 13,532 (White House Initiative on Historically Black Colleges and

Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities);3000

• Executive Order 13,555 (White House Initiative on Educational Excellence for Hispanics);3001

• Executive Order 13,562 (Recruiting and Hiring Students and Recent Graduates);3002

2992 Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (Jun. 3, 2004). 2993 Exec. Order No. 13,403, 71 Fed. Reg. 28,543 (May 16, 2006). 2994 Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13,498, and Revocation of Executive Order 13,507, Exec. Order No. 13,569, 76 Fed. Reg. 19,891 (Apr. 8, 2011). 2995 Continuance of Certain Federal Advisory Committees, Exec. Order No. 13,511, 74 Fed. Reg. 50,909 (Oct. 1, 2009). 2996 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009). 2997 Employment of Veterans in the Federal Government, Exec. Order No. 13,518, 74 Fed. Reg. 58,533 (Nov. 13, 2009). 2998 Creating Labor-Management Forums to Improve Delivery of Government Services, Exec. Order No. 13,522, 74 Fed. Reg. 66,203 (Dec. 14, 2009). 2999 Increasing Federal Employment of Individuals with Disabilities, Exec. Order No. 13,548, 75 Fed. Reg. 45,039 (Jul. 30, 2010). 3000 White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010). 3001 White House Initiative on Educational Excellence for Hispanics, Exec. Order No. 13,555, 75 Fed. Reg. 65,417 (Oct. 22, 2010). 3002 Recruiting and Hiring Students and Recent Graduates, Exec. Order No.

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- Executive Order 13,583 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);3003
- Executive Order 13,592 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities).3004

Enforcement Tools The agency enforcement tools ORM, in conjunction with the various civil rights offices housed within VA's administrations, has specific legal authority to use are:3005

- Complaint Resolution3006 • Agency-Initiated Charges3007 • Proactive Compliance Evaluations3008 • Issuance of Policy Guidance3009 • Issuance of Regulations3010 • Technical Assistance3011 • Publicity3012 • Data collection, research and reported3013 • Collaboration with states/local agencies3014 • Collaboration with other federal agencies3015

3003 Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 23, 2011). 3004 Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011). 3005 38 C.F.R. Part 18; 38 C.F.R. § 23.605; 28 C.F.R. Part 42 Subpart F. 3006 38 C.F.R. §§ 18.7(b), 18.542, and 23.605. 3007 Id. §§ 18.7(a) and (c). 3008 38 C.F.R. §§ 18.7(a), 18.405(e)(2), 18.541, and 23.605. 3009 Id. §§ 18.6 (This is required as follows: "Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."), and 23.605 ("The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 38 CFR 18.6 through 18.11."). 3010 28 C.F.R. § 42.403 ("Any federal agency subject to title VI which has not issued a regulation implementing title VI shall do so as promptly as possible and, no later than the effective date of this subpart, shall submit a proposed regulation to the Assistant Attorney General pursuant to paragraph (c) of this section."); 38 C.F.R. § 23.605. 3011 38 C.F.R. §§ 18.6 ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.") and 23.605. 3012 Id. § 18.7(a); 28 C.F.R. § 42.405 (requirement for public dissemination of Title VI information). 3013 28 C.F.R. § 42.406. 3014 38 C.F.R. § 18.6(a) ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."). 3015 28 C.F.R. § 42.413.

- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- https://www.law.cornell.edu/topn/civil_rights_act_of_1964
- <https://www.law.cornell.edu/uscode/text/42/2000d>
- <https://www.law.cornell.edu/cfr/text/38/23.605>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/28/42.403>
- <https://www.law.cornell.edu/cfr/text/28/42.403>
- <https://www.law.cornell.edu/cfr/text/28/42.403>
- <https://www.law.cornell.edu/cfr/text/28/42.403>
- <https://www.law.cornell.edu/cfr/text/28/42.403#c>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>
- <https://www.law.cornell.edu/cfr/text/38/18.6>

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- Strategic Plan3016 • Annual Reports3017

Budget and Staffing ORM's budget for external civil rights enforcement as well as federal EEO functions are combined,3018 and therefore does not break down specific allocations for external civil rights enforcement. In FY 2016, ORM had an allocated budget of \$43.70 million, which rose to \$47.67 million in FY 2017 and \$47.66 million in FY 2018.3019 In FY 2016 and FY 2017, ORM's allocated budget was in line with its requested budget, having requested \$43.70 million in FY 2016 and \$47.66 million in FY 2017.3020 ORM's budget request in FY 2018 was \$0, as VA requested that the office's activities be moved to the Office of Accountability and Whistleblower Protection, however it received an allocation equal to its FY 2017 allocation and the restructuring did not occur.3021 See Figure 11.1.

3016 GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b). 3017 38 U.S.C. §§ 527, 529. 3018 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019). 3019 U.S. Dep't of Veterans Affairs, FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2016, p. GenAd-329 [hereinafter VA, FY2017 Budget Submission]; U.S. Dep't of Veterans Affairs, FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, May 2017, p. GenAd-355 [hereinafter VA, FY2018 Budget Submission]; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2018, p. GenAd-317 [hereinafter VA, FY2019 Budget Submission]; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 12 (updated Jun. 19, 2019). 3020 U.S. Dep't of Veterans Affairs, FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, p. GenAd-323; VA, FY2017 Budget Submission, supra note 3019, at GenAd-329. 3021 VA, FY2018 Budget Submission, supra note 3019, at GenAd-355; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission, supra note 3019, at GenAd-317.

<https://www.va.gov/budget/products.asp>

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Figure 11.1: ORM Allocated Budget

Source: U.S. Dep't of Veterans Affairs, FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, p. GenAd-323; U.S. Dep't of Veterans Affairs, FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2016, p. GenAd-329; U.S. Dep't of Veterans Affairs, FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, May 2017, p. GenAd-355; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2018, p. GenAd-317 [hereinafter VA, FY2019 Budget Submission]; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Interrogatory No. 6, p. 12 (updated Jun. 19, 2019).

During FY 2016 to FY 2018, ORM employed a total of 296 FTEs who specifically work on civil rights enforcement.3022 ORM indicated that the staffing levels have not changed during the fiscal years in question, despite slight fluctuations in its funding levels.3023 ORM also identified staffing levels at VBA, VHA, and NCA—the three major administrations at VA—for FTEs who specifically work on civil rights enforcement, which is broken down as follows:

- 66 FTEs at VBA • 220 FTEs at VHA • 3 FTEs at NCA3024

ORM is headed by Deputy Assistant Secretary and Acting Executive Director for the Office of Diversity and Inclusion at the U.S. Department of Veterans Affairs, Harvey Johnson.3025 ORM's organizational structure did not change between FY 2016 and FY 2018.3026 See Figure 11.2.

3022 U.S. Dep't of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 3023 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 5, at 11 (updated Jun. 19, 2019). 3024 Ibid., Exhibit 1, at 93-95. 3025 U.S. Dep't of Veterans Affairs, "About ORM", <https://www.va.gov/ORM/index.asp>; U.S. Dep't of Veterans Affairs, "Department of Veterans Affairs senior executive Biography," https://www.va.gov/ORM/docs/BIO_DAS_ORM_Harvey_Johnson_12_18_2.pdf. 3026 U.S. Dep't of Veterans Affairs, response to USCCR Interrogatories, Executive Summary, at 3.

\$43,700,000	\$47,668,000
\$0	
\$43,700,000	\$47,668,000
\$47,668,000	\$47,668,000
\$0	
\$10,000,000	
\$20,000,000	
\$30,000,000	
\$40,000,000	
\$50,000,000	
\$60,000,000	

FY 2016 FY 2017 FY 2018

Figure 11.1: ORM Allocated Budget FY 2016 to FY 2018

Requested Allocated

- <https://www.va.gov/budget/products.asp>
- <https://www.va.gov/ORM/index.asp>
- https://www.va.gov/ORM/docs/BIO_DAS_ORM_Harvey_Johnson_12_18_2.pdf

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Figure 11.2: ORM Organizational Chart

Source: U.S. Dep't of Veterans Affairs, Response to Interrogatories, Exhibit 5.

ORM reported to the Commission that it provides "general oversight, coordination, and liaison activities for the external civil rights program," and VA has staff responsible for investigating external civil rights complaints in its administrations and staff offices, including VBA, VHA, and the National Cemetery Administration (NCA).3027 VA noted that it "does not maintain a separate external civil rights office" similar to some other federal agencies, and "external civil rights functions and Federal EEO functions are managed jointly by ORM and within the applicable NCA, VBA, or VHA components."3028 ORM also noted that VA's Office of the General Counsel "will provide as needed legal guidance to ORM as well as other VA administrations or entities on external civil rights related issues."3029

3027 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 4, at 10. 3028 Ibid. 3029 Ibid.

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Assessment Prioritization of Civil Rights Agency-Wide As noted earlier, ORM is VA's liaison with DOJ, to which it refers complaints for litigation if needed, and "is responsible for receiving external complaints, forwarding these complaints

to the proper [VA] administration for investigation”3030 Similar to DOT, the authority and responsibility for enforcement activities at VA is decentralized, and is shared among ORM and the major administrations (VHA, VBA, and NCA) and various administrations offices across VA. Counter to Commission recommendations, noting that “the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions” and “these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”3031 ORM has both internal (EEO) and external functions, and has noted that “VA’s Civil Rights and Federal EEO functions and programs are jointly combined and funded.”3032 Strategic Planning and Self-Evaluation VA has issued two agency-wide strategic plans during the fiscal years in question, one for FY 2014-2020, and one for FY 2018-2024.3033 In these strategic plans, there are no civil rights-specific strategic goals outlined, however the strategic plan for FY 2014-2020 indicated that VA would “increase support to our Veterans with disabilities,” as a strategy for meeting its strategic objective of improving veteran wellness and economic security.3034 The Commission is not aware of any existing VA agency-wide strategic plans or strategic plans published by ORM that specifically have civil rights-related strategic goals or objectives, as per the recommendations of the Commission.3035 VHA, VBA, and NCA each have issued individual strategic plans.3036 In its strategic plan for FY 2013-2018, the VHA indicated that it would “provide veterans personalized, proactive, patient- driven health care” as one of its goals and objectives, specifically with “quality and equity” to

3030 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 3031 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. 3032 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019). 3033 U.S. Dep’t of Veterans Affairs, FY 2014-2020 Strategic Plan, https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/va_sp_fy14-20.pdf [hereinafter VA, FY 2014-2020 Strategic Plan]; U.S. Dep’t of Veterans Affairs, FY 2018-2024 Strategic Plan, May 31, 2019, <https://www.va.gov/oei/docs/va2018-2024strategicplan.pdf>. 3034 VA, FY 2014-2020 Strategic Plan, supra note 3033. 3035 USCCR, Ten-Year Check-Up Vol. I: A Blueprint, supra note 1, at 47. Although the VA was not one of the 11 agencies reviewed by the Commission in its research leading up to its 2002 report, the Commission believes that the recommendations are applicable to all federal agencies. *Ibid.*, 2 (Methodology). 3036 U.S. Dep’t of Veterans Affairs, Veterans Health Administration, VHA Strategic Plan FY 2013-2018, https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf.

https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/va_sp_fy14-20.pdf
<https://www.va.gov/oei/docs/va2018-2024strategicplan.pdf>
https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf
https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf

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allow veterans to “receive timely, high quality, personalized, safe effective and equitable health care, irrespective of geography, gender, race, age, culture or sexual orientation.”3037 Neither VBA’s strategic plan for FY 2014-2020 nor NCA’s strategic plan for FY 2018-2022 mention any specific civil rights enforcement-related goals or objectives. VA is required to submit an annual report to Congress that provides a financial accounting of funds received and expended during the fiscal year and reports on programmatic activities, which is to be made public.3038 VA issues an annual performance plan and report to chart the agency’s progress, however the reports for the fiscal years in question do not specifically discuss activities related to external civil rights enforcement.3039 Complaint Processing, Agency-Initiated Charges, and Litigation VA regulations authorize ORM and other VA administrations that handle civil rights complaints to receive and investigate complaints, as well as perform periodic compliance reviews.3040 According to the VA’s External Complaints Processing Standard Operating Procedures, ORM’s RSC is responsible for overseeing the processing of external complaints, and receives all written or phone complaints, and is responsible for referring complaints to the various VA administrations, depending on the basis of the complaint.3041 VHA, VBA, and NCA all have dedicated staff “who are responsible for investigating external civil rights complaints” that are referred to them.3042 VA’s OGC is to provide “legal guidance as well as other VA administrations or entities on external civil rights related issues.”3043 VA regulations require that if an investigation “indicates a failure to comply ... the matter will be resolved by informal means whenever possible.”3044 VA ORM stated that it prioritizes “commitment to a comprehensive and collaborative approach to civil rights.”3045 Additionally, when informal resolution is unattainable, ORM indicated in its interrogatory responses that VA effectuates compliance as per the procedure outlined under 38 C.F.R. § 18.6.3046 This procedure for effectuating compliance may involve the “suspension or termination of or refusal to grant or

3037 *Ibid.*, 2. 3038 38 U.S.C. §§ 527, 529. 3039 U.S. Dep’t of Veterans Affairs, FY 2018/FY2016 Annual Performance Plan and Report, May 2017, <https://www.va.gov/budget/docs/VAApprFY2018.pdf>; U.S. Dep’t of Veterans Affairs, FY 2019/FY2017 Annual Performance Plan and Report, February 2018, https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf; U.S. Dep’t of Veterans Affairs, FY 2020/FY2018 Annual Performance Plan and Report, March 2019, <https://www.va.gov/oei/docs/va2020appr.pdf>. 3040 38 C.F.R. § 18.7; 38 C.F.R. § 18.542; 38 C.F.R. § 23.605. 3041 VA, External Complaints Processing SOP, supra note 2951, at 3-5. 3042 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 10 (Updated Jun. 19, 2019). 3043 *Ibid.* 3044 38 C.F.R. § 18.7(d). 3045 Harvey Johnson, Deputy Ass’t Sec’y, Office of Resolution Management & Diversity and Inclusion, Dep’t of Veteran Affairs, Written Statement for the U.S. Comm’n on Civil Rights, at p. 3. 3046 38 C.F.R. § 18.6; U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (Updated Jun. 19, 2019).

<https://www.va.gov/budget/docs/VAApprFY2018.pdf>
https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf
https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf
<https://www.va.gov/oei/docs/va2020appr.pdf>

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continue Federal financial assistance or by any other means authorized by law,” which may include referral to DOJ for litigation, or “any applicable proceeding under State or local law.”3047 During FY 2016-2018, VBA, VHA, and NCA processed 127 external civil rights complaints.3048 See Table 11.1. In FY 2016, VA administrations processed 36 total external complaints, 23 of which were referred to VHA, 13 were referred to VBA, and 0 were referred to NCA for processing.3049 In FY 2017, VA administrations processed a total of 63 complaints, 38 of which were referred to VHA, 24 referred to VBA, and 1 referred to NCA for processing.3050 In FY 2018, VA administrations processed a total of 28 complaints, 5 of which were referred to VHA, 60 referred to VBA, and 0 referred to NCA for processing.3051 ORM did not directly process any complaints during FY 2016-2018.3052 Table 11.1: External Civil Rights Complaint Referrals to VA Administrations, FY 2016 to FY 2018 Fiscal Year

ORM VHA VBA NCA Total Referrals for FY

2016 0 23 13 0 36 2017 0 38 24 1 63 2018 0 5 23 0 28 Total 0 66 60 1 127

Source: U.S. Dep’t of Veterans Affairs, Corrections submitted during agency review, Jun. 19, 2019.

Of the total number of complaints processed by VHA, VBA, and NCA, the highest number of complaints were filed on the basis of disability.3053 Although VA’s complaint data is not fully disaggregated, it shows a consistent level of complaints filed on the basis of sex during FY 2016- 2018.3054 At the briefing before the Commission, Harvey Johnson, Deputy Assistant Secretary, ORM at VA testified to the measures the VA ORM has taken to uphold civil rights. Deputy Assistant Secretary Johnson also said during his testimony that ORM received 87 external complaints in the past year, none of which resulted in a finding that discrimination had occurred.3055 He further stated that his office’s budget grew in the past year and is slated to be increased again after the next round of

3047 38 C.F.R. § 18.6(a). 3048 U.S. Dep’t of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 3049 *Ibid.* 3050 *Ibid.* 3051 *Ibid.* 3052 *Ibid.* 3053 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96-103 (updated Jun. 19, 2019). 3054 *Id.* 3055 *Id.* at 102-03; U.S. Dep’t of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019), at 2 (noting that the total number of complaints referenced by Director Johnson should be 91 instead of 87, accounting for the addition of FY 2018 complaints, as Mr. Johnson was just referring to FY 2016-2017 complaints in his testimony).

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appropriations.3056 He attributed the growth in his budget to the “business case” he has made for civil rights enforcement.3057 From FY 2016 – FY 2018, the Veterans Health Administration opened a total of 66 cases based on complaints, of which 22 included sex as one of the bases of the complaint.3058 Sixty-two of the cases had been closed as of time of the VA’s response. The complaint was resolved in 5 out of the 62 cases. In the remaining cases, there was no evidence to support the claim of discrimination, the complainant failed to respond, or the complainant withdrew.3059 In 2018, the VA’s Inspector General issued a report describing how veterans are routinely denied benefits related to claims for posttraumatic stress disorder related to military sexual trauma.3060 The report found that the VA incorrectly processed approximately 49% of denied claims related to military sexual trauma between April 2017 and September 2017.3061 According to the annual report required under the Prison Rape Elimination Act (PREA), of the sexual assaults in the military reported in FY 2018, “the Department estimates 20,500 Service members, representing about 13,000 women and 7,500 men, experienced some kind of contact or penetrative sexual assault in 2018, up from approximately 14,900 in 2016.”3062 The Inspector General’s report recommended that the VA implement protections and additional levels of review to ensure that claims are properly evaluated.3063 Effective Use of Enforcement Tools: Proactive Compliance Evaluation ORM indicated that pursuant to 38 U.S.C. § 308(b)(7), ORM works with the VA administrations (VHA, VBA, and NCA) as well as other administration offices “to facilitate the enforcement of Civil Rights statutes, executive orders, and regulations,” and indicated that the use of compliance reviews is a tool for enforcement.3064 ORM also stated that it forwards external civil rights complaints to VA administrations to investigate.3065

3056 Johnson Testimony, Federal Civil Rights Enforcement Briefing, p. 127. 3057 *Ibid.* Note that Johnson, at the Commission’s briefing, stated that he expected his budget to increase in the coming year because of this business case. This appears to be in contradiction with the budget request that was made by the Trump Administration for the office, which was for a budget of \$0. 3058 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96 (updated Jun. 19, 2019). 3059 *Id.* at 100. 3060 U.S. Dep’t of Veterans Affairs, Office of Inspector General, Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma, Report #17-05248-241, pp. i-ii (Aug. 21, 2018), <https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>. 3061 *Ibid.* 3062 U.S. Dep’t of Defense, Annual Report on Sexual Assault in the Military, Fiscal Year 2018, p. 3, https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. 3063 *Ibid.*, 14. 3064 See 38 U.S.C. § 308(b)(7); U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9 (updated Jun. 19, 2019); see also supra note 3008. 3065 See supra note 3030.

<https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>
https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

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Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity ORM has statutory authority to so issue guidance and regulations.3066 In his testimony before the Commission, Director Johnson stated that ORM has recently adopted the “It’s on Us” campaign.3067 as part of its effort to combat sexual harassment within the VA’s programs, and introduced both conscious and unconscious bias training.3068 The VA has struggled with addressing “an entrenched, sexist culture at many veterans [sic] hospitals” and other medical treatment centers as the agency is adapting to the needs of an increasing number of female veterans.3069 Some female veterans have stated that rather than face harassment at VA medical centers, they have sought treatment at private medical facilities, often at their own expense.3070 During the decade between 2005 and 2015, the percentage of female veterans seeking treatment at VA facilities has increased from 31.2% of female veterans to 41.1%.3071 Additionally, LGBT women seeking treatment at VA facilities have reported harassment at higher rates than non-LGBT women veterans.3072 ORM informed the Commission that VA’s Secretary received a letter from the House of Representatives Committee on Veterans Affairs in May 2019, inquiring as to VA’s progress on implementation of the “End Harassment” campaign “to ensure a safe and welcoming environment for both veterans and employees.”3073 The Center for Minority Veterans conducts outreach activities with minority Veteran stakeholders and coordinates outreach activities.3074 This outreach includes engaging with communities with a high-minority Veteran population, consulting with key representatives from major Veteran Service Organization, local agencies, and other Federal Agencies to increase outreach activities to designated minority Veteran groups.3075 Likewise, the Center for Women Veterans monitors outreach efforts targeting women veterans, other stakeholders, and Federal/state/community partners.3076 This includes ensuring that outreach material portray and target women veterans with inclusive images, messages, and branding in the media.3077

3066 38 C.F.R. § 18.6; 38 C.F.R. § 23.605. 3067 It’s On Us, <https://www.itsonus.org/>. 3068 Johnson Testimony, Federal Civil Rights Enforcement Briefing, pp. 101-02. 3069 Jennifer Steinhauer, “Treated Like a ‘Piece of Meat’: Female Veterans Endure Harassment at the V.A.,” *The New York Times*, Mar. 12, 2019, <https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>. 3070 Richard Sisk, “VA Struggles to Curb Harassment of Female Veterans at Medical Centers,” *Military.com*, Mar. 10, 2019, <https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>. 3071 *Ibid.* 3072 *Ibid.* 3073 Letter to Robert Wilkie, Secretary of Veterans Affairs, Re: Implementation of “End Harassment” campaign (May 10, 2019), p. 1 [hereinafter Letter to Wilkie Re: “End Harassment”]. 3074 U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Section VIII, Veterans Civil Rights Related Centers, Offices and Programs, at 62. 3075 *Ibid.* 3076 *Ibid.*, 63. 3077 *Ibid.*, 63.

<https://www.itsonus.org/>
<https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>
<https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>
<https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>
<https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>

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ORM indicated that VA provides cultural competency, unconscious bias/implicit association, diversity and inclusion training to the VA workforce, including training focused on Veteran, disability, LGBT issues, generational issues, and emerging diversity and inclusion issues.3078 The VA also has launched education campaigns about civil rights issues. For example, the VA recently launched a new education campaign to raise awareness about sexual harassment, which involved VA facilities putting up posters reminding staff and other veterans using the facility that certain words or phrases constitute harassment.3079 Effectiveness of Interaction and Coordination with External Agencies and Organizations ORM is VA’s liaison with DOJ for external civil rights complaints received under the various civil rights laws it enforces.3080 As the liaison, ORM “is responsible for receiving external complaints, forwarding these complaints to the proper administration for investigation based on the nature of the complaint, and ensuring complaints in some cases are resolved by informal means.”3081 ORM indicated that VA’s Office of Diversity and Inclusion runs Special Emphasis Programs intended “to ensure that agencies take affirmative steps to provide equal opportunity to minorities, women, and people with disabilities in all areas of employment” through internal and external initiatives.3082 In addition, VA’s Centers for Minority Veterans and Women Veterans have federal, state, and community partners that help conduct education and outreach to minority and women veterans.3083 Research, Data Collection, and Reporting ORM receives data on discrimination that does not necessarily result in a formal complaint from surveys that are distributed to every person who received services at a VA facility.3084 At the Commission’s briefing, Director Johnson emphasized that even if someone does not file a formal complaint, the person may write about an issue on that survey. The agency collects that data, and Johnson’s office has access to that data. The office will use that data to anticipate where they

may be issues bubbling up before "a gross violation."3065 VA reported that complaint information is tracked via an Excel spreadsheet/SharePoint case tracking system.3066 Information and data is collected, including name, contact information, basis

3078 Ibid., Section IXI, VA Diversity and Inclusion (D&I) Strategic Plan FY 2017-2020, at 74. 3079 See supra note 3073. 3080 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5. 3081 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. 3082 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 6 (updated Jun. 19, 2019). 3083 See supra notes 3074-3077. 3084 Johnson Testimony, Federal Civil Rights Enforcement Briefing, pp. 153-156. 3085 Ibid. 3086 U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 11, at 17.

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for complaint, issues, witnesses who can support the allegation(s), and remedy sought to resolve issue(s) or allegation(s).3087 VA reported that racial and ethnic data collected from complainants is not disaggregated.3088 VA also reported that its data collection procedures and case management protocol did not change over the fiscal years in question (FY 2016-2018).3089 The VA has an Office of Research and Development, which conducts research that aims to improve Veterans' health and wellbeing, to help develop effective care solutions for Veterans, among other things.3090 In February 2019, VA issued the results of a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, also examining the impacts of delayed or missed care.3091 The study found that a high level of harassment, and that "[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need,"3092 but it only covered 12 locations in its randomized sample.3093 The House of Representatives Committee on Veterans Affairs applauded recent published research that VA funded,3094 examining the prevalence of harassment on women veterans and the impacts on their medical care, and recognized VA for its swift response with the initial implementation of its "End Harassment" campaign.3095 However, the House Committee letter pointed out that "training regarding harassment of or by veterans is not mandatory, and that it is possible there are employees across VA that have been untouched by direct intervention programs," and "[f]urthermore, because all reporting is done locally, there is no accountability regarding facilities that continue to fail to respond to sexual harassment."3096

3087 Ibid., 18. 3088 Ibid., 18. 3089 Ibid., 18. 3090 VA, "About the Office of Research & Development," <https://www.research.va.gov/about/default.cfm>. 3091 Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care, Women's Health Issues 29-2 (2019), pp. 107-115, [https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf). 3092 Ibid. 113. 3093 Ibid., passim. 3094 See supra note 3073. 3095 Letter to Wikie Re: "End Harassment," supra note 3073, at 1. 3096 Ibid., 1-2.

<https://www.research.va.gov/about/default.cfm>
[https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf)
[https://www.whjournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whjournal.com/article/S1049-3867(18)30194-4/pdf)

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Chapter 12: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of Agriculture (USDA) in 18623097 with the mission to:

[A]cquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants.3098

In 1994, Congress created the position of Assistant Secretary of Agriculture for Civil Rights within USDA, and delegated to the Assistant Secretary responsibility for:

(1) ensuring compliance with all civil rights and related laws by all agencies and under all programs of the Department; (2) coordinating administration of civil rights laws (including regulations) within the Department for employees of, and participants in, programs of the Department; and (3) ensuring that necessary and appropriate civil rights components are properly incorporated into all strategic planning initiatives of the Department and agencies of the Department.3099

USDA is currently led by Secretary Sonny Perdue, who was sworn into office on April 25, 2017.3100 The Office of the Assistant Secretary for Civil Rights (OASCR) provides guidance for USDA's civil rights programs and enforces laws and regulations that prohibit discrimination on the bases of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.3101

3097 7 U.S.C. §2201, Pub. L. 92-419, 12 Stat. 387, U.S. Dep't of Agriculture, "USDA Celebrates 150 Years," <https://www.usda.gov/our-agency/about-usda/history>. 3098 7 U.S.C. §2201. 3099 Id. § 6918(c), Pub. L. 103-354, 108 Stat. 3212 (1994). 3100 7 U.S.C. § 2202, 25 Stat. 659 (1889) (establishing the Dept of Agriculture and the position of Secretary of Agriculture); U.S. Dep't of Agriculture, "Sonny Sworn in as 31st U.S. Secretary of Agriculture," <https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn-31st-us-secretary-agriculture>. 3101 7 U.S.C. § 6918, PUB. L. 107-171, 116 STAT. 516 (2002).

<https://www.usda.gov/our-agency/about-usda/history>
<https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn-31st-us-secretary-agriculture>

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Through OASCR, USDA enforces the following regulations, executive orders, and statutes:3102

• Title VI of the Civil Rights Act of 1964, as amended3103 • Title VII of the Civil Rights Act of 19643104 • Section 504 of the Rehabilitation Act of 19733105 • Americans With Disabilities Act of 19903106 • The Age Discrimination Act of 19753107 • Title IX of the Education Amendments Act of 19723108 • Civil Rights Restoration Act of 1987, as amended3109 • Title VIII of the Civil Rights Act of 1968, as amended3110 • Food Stamp Act of 1977, as amended3111 • Equal Credit Opportunity Act of 19743112 • Title VII of the Consumer Protection Act of 19743113 • 7 C.F.R. § 2, Subpart C, Section 2.25 – Delegations of Authority by the Secretary of

Agriculture to the Assistant Secretary for Civil Rights • 7 C.F.R. § 2, Subpart P, Delegation of Authority by the Assistant Secretary of Agriculture • 7 C.F.R. § 15, Nondiscrimination • 7 C.F.R. § 15a, Education Programs or Activities Receiving Federal or Benefitting From

Federal Financial Assistance • 7 C.F.R. § 15b, Nondiscrimination on the Basis of Handicap in the Programs and Activities

Receiving Federal Financial Assistance • 7 C.F.R. § 15c, Nondiscrimination on the Basis of Age in Programs and Activities

Receiving Federal Financial Assistance • 7 C.F.R. § 15d, Nondiscrimination in Programs or Activities Conducted by the United

States Department of Agriculture

3102 U.S. Dep't of Agriculture, Office of Civil Rights, Departmental Regulation No. 4330-002, Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance From USDA, (Mar. 3, 1999), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4330-002.htm>; U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4330-003, Nondiscrimination in USDA- Conducted Programs and Activities, (Oct. 5, 2015), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf> [hereinafter USDA_OASCR, Departmental Regulation No. 4330-003]. 3103 42 U.S.C. §§ 2000d-7 and implementing regulations at 7 C.F.R. Part 15. 3104 42 U.S.C. § 2000e et. seq. and implementing regulations at 29 C.F.R. Part 1601. 3105 29 U.S.C. § 794 and implementing regulations at 7 C.F.R. Part 15b. 3106 42 U.S.C. § 12101 et. seq. 3107 Id. § 6101 et. seq. and implementing regulations at C.F.R. Part 15c. 3108 20 U.S.C. §§ 1681-88 and implementing regulations at 7 C.F.R. Part 15a. 3109 Pub. L. 100-259, as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166. 3110 42 U.S.C. § 3601 et. seq. 3111 7 U.S.C. § 2011 et. seq. 3112 15 U.S.C. § 1691 et. seq. and implementing regulations at 12 C.F.R. Part 1002 3113 15 U.S.C. §§ 1691-1691f.

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4330-002.htm>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf>

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• 7 C.F.R. § 15e, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the United States Department of Agriculture

• 12 C.F.R. § 1002, Equal Credit Opportunity Regulation B • 45 C.F.R. § 90 – Nondiscrimination on the Basis of Age in Programs and Activities

Receiving Federal Financial Assistance • 28 C.F.R. § 42, Subpart F – Coordination of Enforcement of Nondiscrimination in

Federally Assisted Programs • 28 C.F.R. § 50.3 – Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964 • 28 C.F.R. § 35 – Nondiscrimination on the Basis of Disability in State and Local

Government Services • 29 C.F.R. § 1691; 28 C.F.R. § 42, Subpart H – Procedures for Complaints of Employment

Discrimination Filed Against Recipients of Federal Financial Assistance • 28 C.F.R. § 1640 – Procedures for Coordinating the Investigation of Complaints or charges

of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973

• 28 C.F.R. § 41 – Implementation of Executive Order 12,550, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs

• 28 C.F.R. § 35, Subpart F – Compliance Procedures • Executive Order 12,250, Leadership and Coordination of Nondiscrimination Laws3114

Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations3115

• Executive Order 13,216, Amendment to Executive Order 13,125, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs.3116

• Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs 3117

• Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency.3118

Enforcement Tools The agency enforcement tools OASCR has specific legal authority to use are:

• Complaint resolution3119 • Agency-initiated charges3120

3114 Exec. Order No. 12,250, 45 Fed. Reg. 72,995 and implementing regulations at 28 C.F.R. Part 41. 3115 Exec. Order No. 12,898, 59 Fed. Reg. 7,629. 3116 Exec. Order No. 13,216, 66 Fed. Reg. 31,373. 3117 Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 3118 Exec. Order No. 13,166, Fed. Reg. 50,121. 3119 7 C.F.R. §§ 15.6, 15.8(a) 15a.605, 15b.42, 15c.7(e), 15d.5, 15e.17(d). 3120 Id. § 15.8(a).

<https://www.federalregister.gov/executive-order/13125>

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• Proactive compliance evaluations3121 • Guidance or other policy documents3122 • Regulations3123 • Technical assistance3124 • Publicity3125 • Research, data collection, and reporting3126 • Collaboration/partnership with state/local agencies3127 • Collaboration/partnership with other federal agencies3128 • Strategic Planning3129 • Annual Reports3130

While USDA OASCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits USDA OASCR from, for example, engaging in outreach to stakeholders, as described in further detail below. Budget and Staffing Budget USDA's federal budget documents include funding requests for the "Office of Civil Rights (OCR)" at USDA, which indicate that "OCR seeks innovative methods to make progress towards meeting the regulatory standards for processing the Department's Equal Employment Opportunity (EEO) and program complaints."3131 USDA's budget documents did not break down the amount of funds dedicated specifically to the processing of external complaints. However, testimony indicates that in 2018, 36 out of approximately 126 OASCR employees were dedicated to external civil rights enforcement (or "program complaints"),3132 indicating that perhaps up to 30 percent of the budget below may be spent on external enforcement.

3121 Id. §§ 15.5, 15b.42, 15c.5, 15d.4, 15a.605. 3122 Id. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3123 7 U.S.C. § 6918(c); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 3124 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3125 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). 3126 7 C.F.R. § 15d.4(b); 28 C.F.R. § 42.406 (regarding data collection and information sharing) 3127 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance

and guidance to recipients to help them comply voluntarily with this part.” 3128 26 C.F.R. § 42.413 3129 Modernization Act of 2010, H.R. 2162, 11th Cong. § 1115(b), 3130 7 U.S.C. § 2207, 3131 U.S.C. § 2018, 2018 President’s Budget, Office of Civil Rights, p. 11-1, <https://www.obpa.usda.gov/11ocrexnotes2018.pdf> [hereinafter USDA, 2018 President’s Budget]. 3132 See infra note 3136 (discussing testimony of Associate Asst. Secretary for Civil Rights Winona Lake Scott regarding 36 employees dedicated to “program” complaints processing and related issues); Cf. infra notes 3133- 3136.

<https://www.obpa.usda.gov/11ocrexnotes2018.pdf>

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As of September 30, 2016, OASCR had 131 FTEs, all located in Washington, DC.3133 As of September 30, 2017, this number was 133 FTEs.3134 The number of FTEs for FY 2018 was projected to decrease slightly to 126.3135 In her testimony before the Commission, Associate Assistant Secretary for Civil Rights Winona Lake Scott indicated in November 2018 that OASCR had 36 employees devoted to external or program enforcement activities, “ensuring compliance with civil rights statutes, executive orders, and regulations through our core enforcement functions, such as complaint processing, civil rights impact analyses, compliance reviews, and training.”3136 As illustrated in Figure 12.1, in FY 2016, OASCR requested \$24.44 million,3137 which increased slightly in FY 2017 to \$24.75 million,3138 and fell to \$23.30 million in FY 2018.3139 In FY 2016, Congress allocated OASCR \$24.07 million,3140 which rose slightly to \$24.20 million in FY 2017,3141 and Congress allocated an estimated \$24.04 million in FY 2018 through the annualized continuing resolution.3142 Figure 12.1: OASCR Requested and Allocated Budget

Source: Dep’t of Agriculture, FY 2016 Explanatory Notes, Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocr2016notes.pdf>; Dep’t of Agriculture, FY 2017 President’s Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2017notes.pdf>; Dep’t of Agriculture, FY 2018 President’s Budget Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocrexnotes2018.pdf>; Dep’t of Agriculture, FY 2019 President’s Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2019notes.pdf>.

3133 USDA, 2018 President’s Budget, supra note 3131, at 11-1. 3134 U.S. Dep’t of Agriculture, 2019 President’s Budget, Office of Civil Rights, p. 11-1, <https://www.obpa.usda.gov/11ocr2019notes.pdf> [hereinafter USDA, 2019 President’s Budget]. 3135 Ibid. 3136 Scott Testimony, Federal Civil Rights Enforcement Briefing, p. 107. 3137 USDA, 2018 President’s Budget, supra note 3131, at 11-3. 3138 Ibid., 11-4. 3139 Ibid., 11-3. 3140 USDA, 2019 President’s Budget, supra note 3134, at 11-4. 3141 Ibid. 3142 Ibid.

FY 2016 FY 2017 FY 2018 Requested \$24,443,000 \$24,750,000 \$23,304,000 Allocated \$24,070,000 \$24,206,000 \$24,042,000

\$24,443,000 \$24,750,000

\$23,304,000

\$24,070,000 \$24,206,000 \$24,042,000

\$22,500,000

\$23,000,000

\$23,500,000

\$24,000,000

\$24,500,000

\$25,000,000

Figure 12.1: OASCR Requested and Allocated Budget FY 2016 to FY 2018

Requested Allocated

<https://www.obpa.usda.gov/11ocr2016notes.pdf>

<https://www.obpa.usda.gov/11ocr2017notes.pdf>

<https://www.obpa.usda.gov/11ocrexnotes2018.pdf>

<https://www.obpa.usda.gov/11ocr2019notes.pdf>

<https://www.obpa.usda.gov/11ocr2019notes.pdf>

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During fiscal years 2016 and 2017, OASCR requested more than it was allocated (\$24,443,000 vs. \$24,070,000 in FY 2016 and \$24,750,000 vs. \$24,206,000 in FY 2017).3143 In response to Commission interrogatories, OASCR indicated that it believes it has sufficient budget and staffing levels to manage its caseload, and that its allocated budget has not deviated significantly from the requested budget for the agency.3144 Assessment Prioritization of Civil Rights Agency-wide USDA Departmental Regulation No. 4330-003 indicates that “OASCR shall provide the overall leadership, coordination, and direction in USDA’s civil rights programs,” which includes cooperation with the various divisions of the agency to investigate complaints and resolving any other issues of noncompliance.3145 Congress created the position of Assistant Secretary of Agriculture for Civil Rights by passing the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.3146 On January 26, 2019, Secretary Perdue appointed Naomi Earp as Deputy Assistant Secretary for Civil Rights, a position that does not require Senate confirmation,3147 and she was sworn in as Deputy Assistant Secretary for Civil Rights on February 6, 2019.3148 Ms. Earp now leads OASCR in her capacity as Deputy Assistant Secretary, as no Assistant Secretary has been confirmed by the Senate.3149 Because an Assistant Secretary has not been confirmed, OASCR communicates through the Deputy Assistant Secretary directly to the Secretary of USDA.3150 As will be discussed herein, after proposing shutting down the office altogether, the Trump Administration instead reorganized OASCR effective October 1, 2018.3151 The memorandum announcing the reorganization included an updated OASCR organizational chart, which does not include the appointed position of Deputy Assistant Secretary for Civil Rights, the position that Ms. Earp, the most senior official at OASCR, currently holds.3152

3143 See supra notes 3137-3142. 3144 U.S. Dep’t of Agriculture, Response to USCCR Interrogatories, at 5. 3145 USDA OASCR, Departmental Regulation No. 4330-003, supra note 3102, at 4-5. 3146 7 U.S.C. § 6918, Pub. L. 103-354, 108 Stat. 3212 (1994). 3147 U.S. Dep’t of Agriculture, “Purdue Selects Three Senior Leaders at USDA,” <https://www.usda.gov/media/press-releases/2019/01/26/perdue-selects-three-senior-leaders-usda>. 3148 U.S. Dep’t of Agriculture, <https://www.ascr.usda.gov/>; see also Dan Flynn, “Brashears, Earp, Hutchins start work today at USDA,” Food Safety News, Jan. 29, 2019, <https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>. 3149 U.S. Dep’t of Agriculture, “OASCR Leadership and Organization,” <https://www.ascr.usda.gov/oascr-leadership-and-organization> (accessed Jun. 17, 2019). 3150 U.S. Dep’t of Agriculture, “USDA Organization Chart,” <https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf>. 3151 U.S. Dep’t of Agriculture, Memorandum Re: Office of the Assistant Secretary for Civil Rights Reorganization (Nov. 8, 2018), <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf> [hereinafter USDA, OASCR Reorganization Memorandum]; see also infra notes 3153-3169. 3152 USDA, OASCR Reorganization Memorandum, supra note 3151.

<https://www.usda.gov/media/press-releases/2019/01/26/perdue-selects-three-senior-leaders-usda>

<https://www.usda.gov/media/press-releases/2019/01/26/perdue-selects-three-senior-leaders-usda>

<https://www.ascr.usda.gov/>

<https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>

<https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>

<https://www.ascr.usda.gov/oascr-leadership-and-organization>

<https://www.ascr.usda.gov/oascr-leadership-and-organization>

<https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf>

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

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In March 2018, USDA solicited formal comments on a proposed realignment of the OASCR, with the professed objective to “improve customer service, better align functions within the organization, and ensure improved consistency, resource management, and strategic decision- making.”3153 USDA indicated that this proposal was in line with Executive Order 13,781, the Comprehensive Plan for Reorganizing the Executive Branch,3154 and uses the authority of the Secretary to reorganize.3155 The reorganization plan, which ultimately was not adopted in full, proposed redistributing OASCR’s civil rights duties to various departments throughout the agency, including the Office of the Inspector General (OIG).3156 This proposed action would have eliminated the Deputy Assistant Secretary for Civil Rights, the Policy Division, the Training and Cultural Transformation Division, and the Early Resolution and Complaint Division. It would have reclassified the Senior Executive Service (SES) Director for the Office of Adjudication as the SES Executive Director for Civil Rights Enforcement who would have been responsible for additional tasks beyond civil rights complaint management, such as budget, contracting and procurement, human resources management, facilities management, strategic planning, and Continuity of Operations.3157 Some critics of this reorganization raised concerns that USDA was proposing to eliminate a number of positions, but had not done a thorough assessment of need, making the elimination of positions premature.3158 Some critics are concerned that USDA did not adequately justify why certain positions or departments are being eliminated or consolidated. The USDA Inspector General submitted comments regarding this restructuring, encouraging USDA to keep in mind “OIG’s unique mission and independence” when considering this realignment, and indicated that OIG will continue to examine “the effectiveness of this realignment as part of our future audit planning process.”3159 OASCR was reorganized effective October 1, 2018.3160 Figure 12.2 displays OASCR’s previous organizational structure, prior to October 1, 2018, and figure 12.3 displays what has changed with the reorganization. Notably, the reorganization did not include the proposed dilution of OASCR’s enforcement authority. 3161 The reorganization also elevated the civil rights enforcement functions of OASCR, indicating a prioritization of complaint investigation and enforcement. According to a memorandum from Winona Lake Scott, Acting Deputy Assistant Secretary for Civil Rights, to the Subcabinet Officials, the reorganization was meant to “meet Secretary Perdue’s vision for a more

3153 Strengthening Civil Rights Management, 83 Fed. Reg. 10,825. 3154 Executive Order 13,781, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13,959 (Mar. 16, 2017). 3155 Reorganization Plan No. 2 of 1953 § 4(a), as amended, Pub. L. 103-354, title II, §218(e)(1), 108 Stat. 3213 (Oct. 13, 1994). 3156 Strengthening Civil Rights Management, 83 Fed. Reg. 10,825. 3157 Id. 3158 David Lipsetz, Housing Assistance Council, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 24, 2018). 3159 Phyllis K. Fong, USDA Inspector General, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 23, 2018). 3160 USDA, OASCR Reorganization Memorandum, supra note 3151. 3161 7 U.S.C. § 6918.

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efficient and effective business operation” and “streamline the delivery of equal employment opportunity and program complaint services at the Mission Area level and ensure USDA projects a unified voice on civil rights issue which touch program recipients, customers, applicants and employees.”3162 The memorandum further explains that the 2018 restructuring was meant to target the following eight priorities:

- 1) Elevating the USDA Agency reporting structure of civil rights functions to the mission area-level; 2) Strengthening OASCR’s role in providing leadership to the mission area civil rights functions; 3) Implementing a timely, fair, transparent and consistent approach to addressing all complaints; 4) Directing effective, robust and compliant mandatory civil rights training; 5) Monitoring and evaluating the implementation of reasonable accommodation throughout the Department; 6) Collaborating with Human Resources on appropriate issues affecting civil rights; 7) Determining optimum staffing levels to implement civil rights functions department- wide; and 8) Empowering mission areas and staff offices to implement civil rights mandates.3163

After the October 2018 reorganization, OASCR consists of five divisions: 3164

• Conflict Complaints Division (CCD)3165 • Center for Civil Rights Enforcement (CCRE);3166 • Center for Civil Rights Operations (CCRO);3167 • Data and Records Management (DRMD);3168 • Program Planning and Accountability (PPAD).3169

3162 U.S. Dep’t of Agriculture, “Office of the Assistant Secretary for Civil Rights,” <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>. 3163 Ibid. 3164 U.S. Dep’t of Agriculture Response to USCCR Affected Agency Review (Jul. 8, 2019) (on file). 3165 CCD monitors agreement compliance; manages and administers the EEO complaint process only for conflict of interest complaints filed against the Office of the Secretary and other senior leaders; drafts Final Agency Decisions (FAD) and Civil Rights Impact Analyses (CRIA); supports EEOC Management Directive; provide guidance to the office. See U.S. Dep’t of Agriculture, “Conflict Complaints Division,” <https://www.ascr.usda.gov/conflict-complaints-division>. 3166 CCRE manages the Employment Complaints Division (ECD), the Employment Investigation Division (EID), the Program Complaints Division (PCD), and the Program Adjudication Division (PAD). 3167 “CCRO provides policy, compliance, training and data and record management services and manages the Compliance Division, Policy Division, and Training Division. 3168 DRMD oversees the Civil Rights Enterprise System (CRES) which tracks all employment and program complaints of discrimination, fields all email and telephonic requests for status updates on complaints, and serves as the repository for all electronic and paper files in OASCR. 3169 PPAD is responsible for coordinating all OIG and GAO audits and performs human resources functions.

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

<https://www.ascr.usda.gov/conflict-complaints-division>

<https://www.ascr.usda.gov/conflict-complaints-division>

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Source: U.S. Department of Agriculture, "OASCR Organizational Chart," [https://www.ascr.usda.gov/sites/default/files/OASCR- Off_Organization_Chart_7-31-15_508.pdf](https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf).

Figure 12.3: OASCR Organizational Structure Effective October 1, 2018

Source: U.S. Dept of Agriculture, "Office of the Assistant Secretary for Civil Rights," 2, <https://www.ascr.usda.gov/sites/default/files/OASCR- Reorganization.pdf>.

https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf
https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf
<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>
<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>

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As discussed below, OASCR has had mixed success in prioritizing civil rights enforcement throughout USDA over the years, as evidenced by civil rights class action lawsuits brought against USDA, resulting during the Obama Administration in over one billion dollars paid out to farmers and ranchers whom USDA discriminated against in various programs.³¹⁷⁰ Commission reports published in 1965, 1982, and 1990 found discrimination in both program delivery and employment at USDA, and "that civil rights abuses at the USDA were actively contributing to the decline in minority farm ownership."³¹⁷¹ USDA itself published a pamphlet noting that:

For decades, the United States Department of Agriculture had an unfortunate and checkered history with regards to civil rights. Reports going as far back as the 1960s have found discrimination at USDA in both program delivery and the treatment of employees, and we are the subject of a number of lawsuits brought by minority farmers and ranchers alleging discrimination.³¹⁷²

USDA added that "between 2001 and 2008, the [George W.] Bush Administration OASCR found merit to only one complaint of program discrimination" out of more than 14,000 civil rights program complaints filed at USDA during that same time period.³¹⁷³ The George W. Bush Administration ended field investigations of discrimination complaints in favor of conducting investigations solely over the phone.³¹⁷⁴ This change, in part, contributed to most pending administrative complaints being dropped by USDA due to the statute of limitations expiring.³¹⁷⁵ In April of 2009, GAO testified before Congress regarding recommendations to the new administration to address long-standing civil rights issues at USDA.³¹⁷⁶ The testimony, and a report on the same topic issued by GAO in October of 2008, recommended that OASCR better manage strategic planning, with an emphasis on more stakeholder input and linking funding to

³¹⁷⁰ See infra notes 3171-3172. ³¹⁷¹ "Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration," p. 11, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf [hereinafter "Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration"]. For discussion of contemporary effects of this longstanding race discrimination perpetrated by USDA without mitigation from its civil rights office, see also Vann R. Newkirk II, "The Great Land Robbery," *The Atlantic*, September 2019, <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> [hereinafter Newkirk, "The Great Land Robbery"]; ³¹⁷² "Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration," supra note 3171, at 1. ³¹⁷³ *Ibid.*, 2. ³¹⁷⁴ *Ibid.*, 11. ³¹⁷⁵ *Ibid.*, 11. ³¹⁷⁶ U.S. Government Accountability Office, Testimony as prepared Before the Subcommittee on Department Operations, Oversight, Nutrition and Forestry, Committee on Agriculture, House of Representatives: U.S. Department of Agriculture Recommendations and Options Available to the New Administration and Congress to Address Long-Standing Civil Rights Issues, Apr. 29, 2009, <https://www.gao.gov/assets/130/122370.pdf>.

https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf
<https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>
<https://www.gao.gov/assets/130/122370.pdf>

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anticipated civil rights results.³¹⁷⁷ The report also recommended that Congress take action by implementing a statutory performance agreement that would require OASCR to meet certain performance goals by law.³¹⁷⁸ GAO suggested that Congress provide for an oversight board to oversee performance of USDA civil rights activities.³¹⁷⁹ Finally, the GAO report recommended that the Secretary of USDA explore appointing an ombudsman to address external and internal civil rights concerns.³¹⁸⁰ During the Obama Administration, in response to long-standing civil rights deficiencies at USDA, then-Secretary Vilsack commissioned a separate, independent civil rights assessment of USDA which was published in 2011.³¹⁸¹ After receiving the results of the independent assessment, USDA took several steps to improve its civil rights programs, including upgrading OASCR's complaint tracking and processing system, and reducing the number of open civil rights complaints at OASCR.³¹⁸² During the Obama Administration, USDA settled several long-standing class action lawsuits brought by women, black, Latino, and Native American farmers in an effort to remedy some of the longstanding discriminatory practices at USDA.³¹⁸³ The 2010 Keepseagle consent decree made \$600 million available to over 3,600 Native American farmers, who alleged that they had been unfairly denied loans by the USDA.³¹⁸⁴ The agreement addressed discrimination claims made between 1981 and 1999, and contained a number of substantive requirements USDA must fulfill, including creating a debt forgiveness policy, establishing moratoria on foreclosures of claimants' farms, and implementing a range of programmatic relief measures.³¹⁸⁵ Also in 2010, USDA entered into the Pigford II (In re Black Farmers Discrimination Litigation) court-ordered settlement agreement, which totaled \$1.25 billion, including payments of \$870

³¹⁷⁷ U.S. Government Accountability Office, Report to Congressional Requesters: U.S. Department of Agriculture, Recommendations and Options to Address Management Deficiencies in the Office of the Assistant Secretary for Civil Rights, October 2008, pp. 5-6, <https://www.gao.gov/assets/290/282835.pdf>. ³¹⁷⁸ *Ibid.*, 6-7. ³¹⁷⁹ *Ibid.*, 7. ³¹⁸⁰ *Ibid.*, 7. ³¹⁸¹ U.S. Department of Agriculture, Independent Assessment of the Delivery of Technical and Financial Assistance Civil Rights Assessment, Mar. 31, 2011, http://www.federationsoutherncoop.com/pigford/research/Civil_Rights_Assessment_Executive_Summary.pdf. ³¹⁸² Tom Vilsack, "The People's Department: A New Era for Civil Rights at USDA," *Medium*, Aug. 2, 2016, <https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49> [hereinafter Vilsack, "The People's Department"]; "Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration," supra note 3171, at 3. ³¹⁸³ Vilsack, "The People's Department," supra note 3182. ³¹⁸⁴ Order on Plaintiffs' Motion for Final Approval of Settlement, *Keepseagle v. Vilsack*, No. 99-3119 (D.D.C. filed April 28, 2011); Bill Chappell, "U.S. Reaches \$600M Deal With Native American Farmers," *NPR*, Oct. 19, 2010, <https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers>. ³¹⁸⁵ U.S. Dept of Justice, Office of Public Affairs, "Attorney General Holder and Agriculture Secretary Vilsack Announce Settlement Agreement with Native American Farmers Claiming Discrimination by USDA," (Oct. 19, 2010) <https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>.

<https://www.gao.gov/assets/290/282835.pdf>
http://www.federationsoutherncoop.com/pigford/research/Civil_Rights_Assessment_Executive_Summary.pdf
<https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49>
<https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers>
<https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>
<https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>

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million to 18,310 black farmers and ranchers.³¹⁸⁶ When eligible farmers did not meet the claims deadline of the settlement agreement of Pigford I (Pigford v. Glickman³¹⁸⁷), which compensated black farmers for USDA's discrimination against them in the 1980s and 1990s, Congress extended relief for claimants who had submitted a late-filing request and had not yet received a merits determination.³¹⁸⁸ These individuals were grouped into a new, single class and became the Plaintiffs of Pigford II.³¹⁸⁹ In addition to the \$1.25 billion compensation scheme, the agreement required a moratorium on foreclosures of claimants' farms.³¹⁹⁰ In 2011, USDA entered into a third settlement, addressing discrimination claims of Latino and women farmers and ranchers, and paying out over \$195 million to 3,144 claimants.³¹⁹¹ The settlement required establishment of a loan forgiveness program for successful claimants, among other terms.³¹⁹² Pursuant to the settlement agreement in re: Black Farmers Discrimination Litigation, USDA established an Office of the Ombudsman dedicated to helping identify systemic issues related to farmers and ranchers for USDA programs.³¹⁹³ However the office sunset³¹⁹⁴ on April 26, 2019, after final disbursements in the case were approved in 2013, and does not appear to be active at the time of this report's writing.³¹⁹⁵ USDA's civil rights policy statement has changed dramatically in recent years. During the Obama Administration, then-Secretary Vilsack updated the USDA Civil Rights Policy Statement to include gender identity and gender expression stating, "Our non-discrimination regulation for our conducted programs now adds protection from discrimination with respect to two new protected

³¹⁸⁶ Order, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed Aug. 8, 2008), http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf; see also, Congressional Research Service, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, prepared by Tadlock Cowan and Jody Feder, May 29, 2013, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> [hereinafter CRS, *The Pigford Cases*]. ³¹⁸⁷ *Pigford v. Glickman*, No. 98-1693 (D.D.C. 1999). ³¹⁸⁸ CRS, *The Pigford Cases*, supra note 3186; U.S. Dept of Justice, Office of Public Affairs, "Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA," (Feb. 18, 2010) <https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>. ³¹⁸⁹ CRS, *The Pigford Cases*, supra note 3186. ³¹⁹⁰ U.S. Dept of Justice, Office of Public Affairs, "Press Release: Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA," Feb. 18, 2010, <https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>. ³¹⁹¹ Vilsack, "The People's Department," supra note 3182; U.S. Dept of Agriculture, "Press Release: Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers," Feb. 25, 2011. ³¹⁹² *Ibid.* ³¹⁹³ Settlement Agreement, In re: Black Farmers Discrimination Litigation, 1:08-mc-00511 at *32 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>. ³¹⁹⁴ A sunset provision establishes a date on which an agency or office will expire absent specific reauthorization. ³¹⁹⁵ Settlement Agreement, In re: Black Farmers Discrimination Litigation, 1:08-mc-00511 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>, U.S. Dept of Agriculture, "Office of the Ombudsman," <https://www.usda.gov/our-agency/staff-offices/office-ombudsman> (accessed Jun. 17, 2019).

http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf
<http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>
<https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.justice.gov/opa/pr/departement-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>
<https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>
<https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>
<https://www.usda.gov/our-agency/staff-offices/office-ombudsman>

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bases: political beliefs and gender identity."³¹⁹⁶ The current USDA Civil Rights Policy Statement does not specifically include those terms, instead committing that "Doing right means treating all people equally, regardless of race, religion, gender, national origin, or any other characteristic."³¹⁹⁷ However, after Obama-era changes were implemented at OASCR, the office still reportedly faced allegations of ongoing discrimination in programs and employment. Even after making strides in reducing the backlog of complaints at OASCR, the U.S. Office of the Special Counsel in a May 2015 letter to President Obama expressed concern over "serious mismanagement" at OASCR.³¹⁹⁸ A former USDA employee testified before Congress in December of 2016 that "[d]iscrimination, sexual harassment, abuse and mismanagement of civil rights complaints have been pervasive at the Agriculture Department for decades."³¹⁹⁹ Furthermore, a 2019 report published by the Center for American Progress found that systemic racism at USDA has denied black farmers equal access to credit and crop insurance, continuing the trend identified by the Commission in 1982 of black farmers being virtually eliminated from the farming industry.³²⁰⁰ At the Commission's briefing, Associate Assistant Secretary for Civil Rights Winona Lake Scott described some of the recent "proactive measures" of her office, including "civil rights impact analyses on regulations that are put out by the Department."³²⁰¹ In FY 2017, OASCR received "over 56 civil rights impact analyses."³²⁰² In its response to the Commission's interrogatories, OASCR reported that it has been completing 100 percent of requests for Civil Rights Impact Analyses of proposed regulations within seven days.³²⁰³ Strategic Planning & Self-Evaluation

³¹⁹⁶ U.S. Dept of Agriculture, Civil Rights Policy Statement (Nov. 12, 2014), <https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretaries-CR-Policy-Statement.pdf?MOD=AJPERES>. ³¹⁹⁷ U.S. Dept of Agriculture, USDA Civil Rights Policy Statement (Feb. 12, 2018), <https://www.ascr.usda.gov/sites/default/files/USDACivilRightsPolicyStatement2018.pdf>. ³¹⁹⁸ Letter from U.S. Office of the Special Counsel to President Barack Obama (May 18, 2015) <https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>, Helena Bottemiller Evich and Catherine Boudreau, "Former USDA official: Discrimination 'systemic and institutionalized,'" *Politico*, Dec. 1, 2016, <https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644> [hereinafter Evich et al., "Discrimination 'systemic and institutionalized'"]; ³¹⁹⁹ Evich et al., "Discrimination 'systemic and institutionalized,'" supra note 3198. ³²⁰⁰ Abril Castro and Zoe Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, Center for American Progress, Apr. 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>; U.S. Comm'n on Civil Rights, *The Decline of Black Farming in America*, February 1982, <https://files.eric.ed.gov/fulltext/ED222604.pdf>; see also Newkirk, "The Great Land Robbery," supra note 3171, (arguing that black farmers have been virtually eliminated from farming). ³²⁰¹ Scott Testimony, Federal Civil Rights Enforcement Briefing, p. 108. ³²⁰² *Ibid.* ³²⁰³ U.S. Dept of Agriculture, Response to USCCR Interrogatories.

<https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretaries-CR-Policy-Statement.pdf?MOD=AJPERES>
<https://www.ascr.usda.gov/sites/default/files/USDACivilRightsPolicyStatement2018.pdf>
<https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>
<https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>
<https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644>
<https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644>
<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>
<https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>

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USDA publishes a strategic plan every four years pursuant to the Government Performance and Results Modernization Act of 2010 which requires every federal government agency to publish a strategic report every four years.³²⁰⁴ USDA's most recent strategic plan covers fiscal years 2018– 2022.³²⁰⁵ Neither the 2018-2022 strategic plan, nor the 2014-2018 strategic plan makes specific mention of civil rights or OASCR.³²⁰⁶ However, OASCR did publish its own strategic plan in 2015, covering fiscal years 2016-2020.³²⁰⁷ The strategic plan identifies three goals:

1. Improve civil rights complaints processing for internal and external customers in keeping with Federal laws, mandates, and Departmental Regulations and guidelines.
2. Engage leadership in preventing workplace conflict and support conflict management at the earliest stage possible.
3. Demonstrate effective engagement within USDA by ensuring all USDA employees have the necessary resources to support the civil rights of all employees and customers of USDA.³²⁰⁸

USDA stated its commitment to integrating environmental justice strategies with its enforcement responsibilities under Title VI, with the goal of resolving discrimination issues and complaints and working with environmental justice communities.³²⁰⁹ The Secretary of Agriculture is required to make an annual general report to the President and Congress, and also make special reports on particular subjects whenever required to do so by the President or by either House of Congress or at his own discretion.³²¹⁰ In addition to this general report, the Secretary is required to submit a report to Congress "on the amounts obligated and expended by the Department during that fiscal year for the procurement of advisory and assistance services."³²¹¹ In USDA's FY 2017 and 2018 annual reports to Congress, the agency identified as one of its goals the need to conduct more outreach to "new and beginning farmers and ranchers, local and regional food producers, minorities, women, and veterans."³²¹² USDA acknowledges that outreach must

³²⁰⁴ 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866. ³²⁰⁵ U.S. Dep't of Agriculture, USDA Strategic Plan FY 2018-2022, <https://www.usda.gov/sites/default/files/documents/usda-strategic-plan-2018-2022.pdf>. ³²⁰⁶ U.S. Dep't of Agriculture, USDA Strategic Plan FY 2014-2018, <https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>. ³²⁰⁷ U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights FY 2016 – 2020 Strategic Plan, <https://www.ascr.usda.gov/sites/default/files/2016-2020StrategicPlan.pdf> ³²⁰⁸ *Ibid.* ³²⁰⁹ U.S. Department of Agriculture, Environmental Justice Strategic Plan 2016-2020, pp. 20, 28, <https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>. ³²¹⁰ 7 U.S.C. § 2207. ³²¹¹ *Id.* § 2207a. ³²¹² U.S. Dep't of Agriculture, 2018 Agency Financial Report, p. 159, Nov. 14, 2018, <https://www.usda.gov/sites/default/files/documents/usda-fy18-agency-financial-report.pdf> [hereinafter USDA, 2018 Agency Financial Report]; U.S. Dep't of Agriculture, 2017 Agency Financial Report, p. 148, Nov. 14, 2017, <https://www.usda.gov/sites/default/files/documents/usda-fy17-agency-financial-report.pdf>.

- <https://www.usda.gov/sites/default/files/documents/usda-strategic-plan-2018-2022.pdf>
- <https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>
- <https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>
- <https://www.ascr.usda.gov/sites/default/files/2016-2020StrategicPlan.pdf>
- <https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>
- <https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%206162572%20signed.pdf>
- <https://www.usda.gov/sites/default/files/documents/usda-fy18-agency-financial-report.pdf>
- <https://www.usda.gov/sites/default/files/documents/usda-fy17-agency-financial-report.pdf>

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include improvements in working with communities to address past civil rights issues, and to support underrepresented groups in their agribusiness endeavors.³²¹³ USDA is also required by Section 14010 of the Food, Conservation, and Energy Act of 2008 to publish an annual report detailing:

- a. The number of civil rights complaints filed that relate to USDA, including whether a complaint is a program complaint or an employment complaint;
- b. The length of time USDA took to process each civil rights complaint; c. The number of proceedings brought against USDA, including the number of complaints

described in Section 14010 (1) that were resolved with a finding of discrimination; and d. The number and type of personnel actions taken by USDA following resolution of civil

rights complaints.³²¹⁴ The most recent publicly available report available on OASCR's website covers FY 2016, and highlights changes in complaint volume and resolutions over the previous three fiscal years.³²¹⁵ USDA OASCR has not filed the requisite report for either FY 2017 or FY 2018. Proactive Compliance Evaluation According to its Departmental Manual, OASCR conducts compliance reviews, to ensure that "all programs and activities for which they are responsible are conducted, managed, and administered in a nondiscriminatory manner."³²¹⁶ In conducting these compliance reviews, OASCR establishes the criteria by which OASCR will decide whether to review an agency or agency-operated program; establishes the criteria for the conduct of the reviews; manages the implementation of negotiated Compliance Action Plans when agencies are found to be noncompliant; and may provide technical assistance and training when applicable.³²¹⁷ The manual goes on to state that agencies are required to be notified at least 60 days in advance of their compliance review about the scope, required information, and deadlines.³²¹⁸ Also, it states that OASCR must complete the compliance review within 180 days from the receipt of the requested data and information subject to review, and that OASCR will provide an initial report to the agency Director within 30 days of completion of the review, which may initiate voluntary compliance efforts at this time.³²¹⁹ Furthermore, a final compliance review report should be issued,

³²¹³ USDA, 2018 Agency Financial Report, *supra* note 3212, at 159. ³²¹⁴ 7 U.S.C. § 2279-2(1), Pub. L. 110-234, 122 Stat. 1447 (2008). ³²¹⁵ U.S. Dep't of Agriculture, Food, Conservation, and Energy Act of 2008 Section 14010 Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal Year 2016, April 2017, https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf; see *infra* notes 3246-3253. ³²¹⁶ 7 C.F.R. § 15.5; see USDA, Departmental Manual No. 4330-001, *supra* note 3217. ³²¹⁷ USDA, Departmental Manual No. 4330-001, *supra* note 3217. ³²¹⁸ *Ibid.* ³²¹⁹ *Ibid.*

- https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf
- https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report__4-26-2017_Final.pdf

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which will also address any agreed-upon resolution (if applicable) or will request a proposed Compliance Action Plan within 30 days.³²²⁰ Compliance reviews may consist of a desk audit, where an agency submits documentation to OASCR to review, or an onsite visit.³²²¹ Compliance reviews will look at civil rights resources; training for civil rights staff/officials; public notification of outreach; data collection systems; complaint processing in conducted programs; program availability and accessibility to persons with disabilities; and service to LEP persons.³²²² Complaint Processing, Agency-Initiated Changes, & Litigation As former federal civil rights official Margo Schlanger has explained, "USDA's civil rights office is . . . uniquely empowered, among federal civil rights offices. Its operative regulation . . . granted the USDA Office of the Assistant Secretary not just the authority to adjudicate complaints, but also to make "final determinations . . . as to the corrective actions required to resolve program complaint[s]."³²²³ Complaint Processing According to OASCR's Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, when OASCR receives a complaint, the intake process must not take longer than 30 days from the date of receipt.³²²⁴ In order for OASCR to process the complaint, the complainant must have filed within 180 days from the date of the alleged discrimination, unless OASCR determines that the discrimination was continuing or ongoing, or OASCR waives the 180 day requirement.³²²⁵ OASCR will then determine if it has jurisdiction to process the complaint, based on an evaluation of:

- The regulatory basis for the alleged discrimination; • The subject matter of the allegations; • The timeliness of the complaint.³²²⁶

³²²⁰ *Ibid.* ³²²¹ *Ibid.*; 15 C.F.R. § 15.60 et seq. ³²²² 15 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, *supra* note 3217. ³²²³ Schlanger, Offices of Goodness, *supra* note 78, at 53, 85. See 7 C.F.R. §§ 15d.4(b) and 288(a)(13). ³²²⁴ 7 C.F.R. § 15.60 et seq.; U.S. Dep't of Agriculture, Departmental Manual No. 4330-001, Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, page not numbered (Oct. 18, 2000) <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf> [hereinafter USDA, Departmental Manual No. 4330-001]; ³²²⁵ 7 C.F.R. 15d(5)(a); USDA, Departmental Manual No. 4330-001, *supra* note 3217. ³²²⁶ USDA, Departmental Manual No. 4330-001, *supra* note 3217.

- <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf>
- <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf>

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If OASCR does not have jurisdiction, it will, if appropriate, refer the complaint to the agency with jurisdiction. OASCR will then administratively close the complaint and provide a closure letter to the complainant.³²²⁷ The manual also states that for complaints that are complete, OASCR will send a letter of acknowledgement to the complainant with relevant reference information about the complaint.³²²⁸ Simultaneously, OASCR will send an Agency Transmittal Memorandum to the identified USDA agency, requesting an Agency Position Statement (APS) be submitted to OASCR within 15 days from the date of the request.³²²⁹ If a complaint is incomplete, OASCR will send a letter to the complainant requesting additional information, and providing notice that absent being provided the requested information within 15 days, the complaint may be closed.³²³⁰ The manual also states that under certain circumstances, OASCR may close a complaint prior to an investigation.³²³¹ Factors that trigger early closure in some circumstances include: an ongoing systemic investigation, withdrawal of the complaint, voluntary resolution, or a determination that the complaint is frivolous.³²³² In these cases, the complainant will be notified of the pre- investigation closure.³²³³ Federal regulations require that if OASCR investigates a complaint involving allegations of discrimination based on disability status, the investigation must be completed within 180 days from the date the intake is completed.³²³⁴ The manual states that an investigator will be assigned to the complaint, who will collect, preserve, and analyze all evidence relevant to the complaint, have direct contact with both parties, witnesses, and other informants; produce findings of fact; and make recommendations for disposition or closure of the case.³²³⁵ The manual clarifies that complaints can be closed for a number of reasons, such as through a voluntary withdrawal of the complaint; a resolution agreement; lack of jurisdiction or timeliness; if litigation has commenced; or other reasons determined by the Director of OASCR.³²³⁶ For complaints that are not closed, Final Agency Decisions (FADs) will be issued, based on the merits of the complainant's allegations, and are considered administratively final.³²³⁷ FAD outcomes include:

- Finding of No Violation – if no discrimination occurred

³²²⁷ *Ibid.* ³²²⁸ *Ibid.* ³²²⁹ *Ibid.* ³²³⁰ *Ibid.* ³²³¹ *Ibid.* ³²³² *Ibid.* ³²³³ *Ibid.* ³²³⁴ *Ibid.*; 7 C.F.R. § 15e.170(g). ³²³⁵ USDA, Departmental Manual No. 4330-001, *supra* note 3217. ³²³⁶ *Ibid.* ³²³⁷ *Ibid.*

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- Corrected Violation Finding – if discrimination occurred, but the entity took steps to resolve the violation prior to the issuance of the FAD, the FAD will acknowledge voluntary compliance
- Violation Finding with Requirement for Remedial Action – if there is a finding of noncompliance, a Corrective Action Plan will be developed to ensure compliance³²³⁸

Once the FAD has been issued, settlement negotiations can proceed to agree on awarded damages or remedial actions to ensure compliance.³²³⁹ If necessary, a monitor may be assigned to track implementation of settlement agreements to ensure compliance.³²⁴⁰ According to a 2013 OASCR memo, after September 20, 2013, OASCR would process program complaints within 540 days, or 18 working months, from the date it accepted the complaint.³²⁴¹ Within this time frame, the Program Intake Division had up to 60 days, the Early Resolution and Conciliation Division had up to 75 days, the Program Investigation Division had up to 270 days, and the Program Adjudication Division (PAD) had up to 135 days to process a complaint.³²⁴² This memo could potentially conflict with the 180 day deadline to complete investigations of claims involving discrimination based on disability status.³²⁴³ However, USDA reported to the Commission that in FY 2016, the Program Intake Division accepted 222 complaints and took an average 31 days to process complaints overall.³²⁴⁴ Further, on average it took 31 days to process accepted complaints.³²⁴⁵ That year, the Program Intake Division processed 122 complaints within 31-60 days.³²⁴⁶ In FY 2017, the Program Intake Division converted 208 complaints into acceptances and took on average 32 days to process complaints overall.³²⁴⁷ Further, on average it took 27 days to process accepted complaints.³²⁴⁸ That year, the Program Intake Division processed 208 complaints within 60 days.³²⁴⁹ In FY 2018, the Program Intake Division converted 162 complaints into acceptances and took on average 24 days to process complaints overall.³²⁵⁰ Further, on average it took 27 days to process accepted complaints.³²⁵¹ That year, the Program Intake Division processed 163 complaints within 60 days.³²⁵²

³²³⁸ *Ibid.* ³²³⁹ *Ibid.* ³²⁴⁰ *Ibid.* ³²⁴¹ U.S. Dep't of Agriculture, response to USCCR Document Request, OASCR Policy Memorandum. ³²⁴² *Ibid.* ³²⁴³ See *supra* note 3227. ³²⁴⁴ U.S. Dep't of Agriculture, Response to USCCR Document Request, Number of Program Discrimination Complaints FY2016-2018. ³²⁴⁵ *Ibid.* ³²⁴⁶ *Ibid.* ³²⁴⁷ *Ibid.* ³²⁴⁸ *Ibid.* ³²⁴⁹ *Ibid.* ³²⁵⁰ *Ibid.* ³²⁵¹ *Ibid.* ³²⁵² *Ibid.*

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Table 12.1: Number of Program Discrimination Complaints for the Program Intake Division between FY 2016 to FY 2018

Referrals FY 2016 FY 2017 FY 2018 OASCR Data Management and Records Division (DMRD) Referrals

4201 5010 1366

Food and Nutrition Service (FNS) Referrals 6392 8834 3660 Intake Processing FY 2016 FY 2017 FY 2018 Intake Correspondence Beginning Inventory N/A 2 39 Correspondence Entered in PCMS 413 403 405 Programmatic Referrals 140 115 102 Converted to Complaint/(Acceptances) 122 178 162 Closures (All Other) 95 119 161 Intake Correspondence Inventory (Current) 27 39 19 Convert to Complaint Processing FY 2016 FY 2017 FY 2018 RD MOU Referrals 105 72 78 Acceptance Letters – Sent to ADR 117 136 85 Total Convert to Complaint Acceptances 222 208 163 Average Processing Time Overall (Days) 31 32 27 Average Processing Time (Acceptances) 31 27 24 Number and Percentage of

Complaints Processed within 60 Days

122 100%

208 100%

163 100%

Source: U.S. Department of Agriculture

In FY 2016, the Program Investigation Division processed and/or closed 112 complaints.³²⁵³ On average, it took the Program Investigation Division 450 days to complete Reports of Investigation (ROI), and 19 of 50 ROIs were processed within 270 days.³²⁵⁴ On average, it took 328 days to complete all processing actions.³²⁵⁵ In FY 2017, the Program Investigation Division took on average 322 days to complete ROIs, and 39 of 90 ROIs were processed within 270 days.³²⁵⁶ On average, it took 315 days to complete all processing actions.³²⁵⁷ In FY 2018, the Program Investigation Division processed and/or closed 93 complaints.³²⁵⁸ On average, it took the Program Investigation Division 259 days to complete ROI investigations, and 16 of 34 ROIs were processed within 270 days.³²⁵⁹ On average, it took 245 days to complete all processing actions.³²⁶⁰

³²⁵³ Ibid. ³²⁵⁴ Ibid. ³²⁵⁵ Ibid. ³²⁵⁶ Ibid. ³²⁵⁷ Ibid. ³²⁵⁸ Ibid. ³²⁵⁹ Ibid. ³²⁶⁰ Ibid.

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Table 12.2: Number of Program Discrimination Complaints for the Program Investigation Division between FY 2016 to FY 2018
FY 2016 FY 2017 FY 2018 Beginning Inventory 207 257 153 Open Complaints/Prior Year Ending Inventory 207 257 153

New Requests for Investigation 157 187 131 ROI's Transmitted to PAD 50 90 105 PID Closures 27 23 21 Transmitted to PAD Closures 35 100 61 Closed Expired ECOA (Sunset Acres) 12 Total Processed/Closures 112 199 Ending Inventory 257 153 85 Average Processing Time for ROI Investigations

450 322 378

Number and percent for ROIs processed within 270 days

19 (38%)

39 (43%)

43 (41%)

Average Age of Cases in Inventory 446 515 552 Average Processing Time for All Actions 328 315 292

Source: U.S. Department of Agriculture

In FY 2016, PAD issued 51 FADs, issued 36 complaint closures, received 4 Food and Nutrition Service (FNS) appeals and 1 disability appeal, and issued 17 FNS appeal decisions and 1 disability appeal decision.³²⁶¹ That same year PAD took an average of 135 days to process FADs; 45/51 FADs were processed within 135 days.³²⁶² On average, PAD took 104 days to process all decisions issued.³²⁶³ In FY 2017, PAD issued 40 FADs, issued 102 complaint closures, received 6 FNS appeals, and issued 5 FNS appeal decisions.³²⁶⁴ That same year PAD took an average of 103 days to process FADs; 33/40 FADs were processed within 135 days.³²⁶⁵ On average, PAD took 42 days to process all decisions issued.³²⁶⁶ In FY 2018, PAD issued 55 FADs, issued 54 complaint closures, and received 4 FNS appeals.³²⁶⁷ That same year PAD took an average of 175 days to process FADs; 4/55 FADs were processed within 135 days.³²⁶⁸ On average, PAD took 60 days to process all decisions issued.³²⁶⁹

³²⁶¹ Ibid. ³²⁶² Ibid. ³²⁶³ Ibid. ³²⁶⁴ Ibid. ³²⁶⁵ Ibid. ³²⁶⁶ Ibid. ³²⁶⁷ Ibid. ³²⁶⁸ Ibid. ³²⁶⁹ Ibid.

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Table 12.3: Number of Program Discrimination Complaints for the Program Adjudication Division between FY 2016 to FY 2018
FY 2016 FY 2017 FY 2018 Beginning Inventory 94 88 140 FADs issued 51 40 103

1. FAD (Finding) 3 2 1 2. FAD (No Finding) 48 38 102

Closures Issued 36 102 79 Ending Inventory 88 140 138 Beginning Inventory of Appeals 19 6 9 FNS Appeals Received 4 6 11 FNS Appeal decisions Issued 17 5 9 Disability Appeals Received 1 Disability Appeal Decisions Issued 1 Ending Appeal Inventory 6 6 8 Beginning Inventory of Noncompliance 0 Requests for Decision on Noncompliance Claims

0

Decisions Issued on Noncompliance Claims 0 Ending Inventory of Noncompliance Claims 0 Transmittals from PCD 84 190 180 Requests for Closures DNR 100 63 ROIs Received from Investigations DNR 90 117 Average Processing Time FY 2016 FY 2017 FY 2018 Average Processing Time for FADs (days) 135 103 196 Number and Percentage of FADs Processed in 135 Days

45 (88%)

33 (83%)

12 (15%)

Average Processing Time for Appellate Decisions (days)

0 82 0

Number and Percentage of Appellate Decisions (days)

0 0 0

Average Processing Time for Noncompliance Decisions

0 0 0

Number and Percentage of Noncompliance Decisions Issued Within 60 Days

0 0 0

Average Processing Time for All Decisions Issued (days)

104 42 118

Source: U.S. Department of Agriculture

In her testimony before the Commission, Associate Assistant Secretary Winona Lake Scott indicated that between FY 2016 and FY 2018, the number of complaints filed per year decreased from 364 to 271.³²⁷⁰ During this time, discrimination on the basis of disability was alleged in 32 percent of complaints, race in 25 percent of complaints, age in 20 percent of complaints, color in

³²⁷⁰ Scott Testimony, Federal Civil Rights Enforcement Briefing, p. 107.

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12 percent of complaints, and sex in 11 percent of complaints.³²⁷¹ Associate Assistant Secretary Scott noted that the time taken to process complaints also decreased significantly during this time frame, dropping from an average of 450 days to 292 days, thus increasing in timeliness by 65 percent.³²⁷² These improvements in process times appear to be necessary as the USDA civil rights office has a long history of failing to process discrimination complaints within its jurisdiction. In 2011, in the Black Farmers Discrimination Litigation, a federal judge issued an Opinion and Order approving a settlement agreement to “resolve the pending claims of approximately 40,000 plaintiffs and compensate thousands of victims of race discrimination whose complaints have gone unanswered for decades.”³²⁷³ In 1997, the original complaint alleged that “the USDA discriminated on the basis of race in allotting benefits under various federal agricultural programs, denying African-American farmers loans and other benefits that were freely granted to similarly situated white farmers.”³²⁷⁴ The complaint also explained,

[the] history of discrimination in the administration of USDA farm programs, combined with the agency’s long-standing refusal to investigate and remedy specific instances of discrimination, deprived countless farmers of desperately needed credit and payments under various federal aid programs, with the result that many farmers suffered severe financial losses and even, in many cases, lost title to their farms.³²⁷⁵

³²⁷¹ Ibid., 107. ³²⁷² Ibid., 107-108. ³²⁷³ Opinion, Black Farmers Discrimination Litigation, No. 08-0511 (D.D.C. Oct. 27, 2011), at 1, <https://www.blackfarmercase.com/Documents/Opinion%20Approving%20Settlement.pdf>. ³²⁷⁴ Id. at 3. ³²⁷⁵ Id.

<https://www.blackfarmercase.com/Documents/Opinion%20Approving%20Settlement.pdf>

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Table 12.4: OASCR Performance Measures 2017-2020

Source: U.S. Department of Agriculture

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OASCR may publish guidance and technical assistance in the form of USDA Civil Rights Directives. During the fiscal years studied in this report, OASCR published four directives, advising USDA employees and program participants of their civil rights and obligations under the law, ³²⁷⁶ establishing USDA civil rights impact analysis policy and procedures,³²⁷⁷ advising USDA employees and applicants of the employment discrimination complaint process,³²⁷⁸ and establishing an annual civil rights training policy for all USDA employees and administered programs.³²⁷⁹

³²⁷⁶ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 010: Civil Rights Accountability Policy and Procedures, (Dec. 28, 2016), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf. ³²⁷⁷ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 004: Civil Rights Impact Analysis (Oct. 17, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/CRIA%20DR%204300-004-final.pdf>. ³²⁷⁸ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300- 007: Processing Equal Employment Opportunity (EEO) Complaints of Discrimination (Jul. 12, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>. ³²⁷⁹ U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4120- 001: Annual Departmental Civil Rights Training (Jun. 14, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204120-001%20Annual%20Departmental%20Civil%20Rights%20Training.pdf>.

https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf

https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf

<https://www.ocio.usda.gov/sites/default/files/docs/2012/CRIA%20DR%204300-004-final.pdf>

<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>

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OASCR has a website with access to information about filing a programmatic civil rights complaint.³²⁸⁰ A “Reports” page includes downloadable versions of the division’s “Report on Civil Rights Complaints, Resolutions, and Actions,” most recently from 2016, which includes data about the number of program complaints filed and resolved.³²⁸¹ Finally, a list of civil rights directives and implementing regulations, with links to full text versions of each, is also available to the public.³²⁸² There is no detailed information available about current or past program access cases or settlements, other than the material in the annual reports (the most recent of which was from 2016). Interaction and Coordination with External Agencies and Organizations The Departmental Manual states that if OASCR determines that it does not have jurisdiction over a complaint filed with the office, OASCR will refer complaints received to the proper agency. For example, all complaints concerning employment will be referred to the EEOC.³²⁸³ Similarly, if a complainant wishes to have his or her complaint processed under the ADA, OASCR will transfer the case to the appropriate federal agency.³²⁸⁴ Furthermore, if OASCR finds a violation of civil or criminal laws not under OASCR’s jurisdiction in the course of an otherwise jurisdictional investigation, OASCR will refer the ancillary matter to the appropriate federal or state agency.³²⁸⁵ Research, Data Collections, and Reporting As required by statute and regulation, USDA OASCR collects data from federal funding recipients for the purposes of conducting oversight and evaluation.³²⁸⁶ During the Obama administration, USDA upgraded its reporting database, which allows OASCR to track internally, in real time the number and types of complaints filed, helping OASCR identify trends in civil rights enforcement.³²⁸⁷

³²⁸⁰ See U.S. Dept of Agriculture, Office of the Assistant Secretary for Civil Rights, <https://www.ascr.usda.gov>. ³²⁸¹ “Reports,” <https://www.ascr.usda.gov/reports/>; see “Report on Civil Rights Complaints, Resolutions, and Actions – Fiscal Year 2016,” https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf. ³²⁸² U.S. Dept of Agriculture, “Directives and Regulations,” <https://www.ascr.usda.gov/directives-and-regulations/>. ³²⁸³ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁴ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁵ 7 C.F.R. § 15.60 et seq.; USDA, Departmental Manual No. 4330-001, supra note 3217. ³²⁸⁶ 7 U.S.C. § 2279-1(a) – (d); 7 C.F.R. § 15d.4(b); U.S. Dept of Agriculture, Departmental Regulation No. 4370-001, Collection of race, ethnicity, and gender data for civil rights compliance and other purposes in regard to participation in the programs administered by the Farm Service Agency, the Natural Resources Conservation Service, the Risk Management Agency, the Rural Business Service, the Rural Housing Service, and the Rural Utilities Service (Oct. 11, 2011), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>. ³²⁸⁷ “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” supra note 3171, at 3.

<https://www.ascr.usda.gov/>
<https://www.ascr.usda.gov/reports/>
https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf
https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf
<https://www.ascr.usda.gov/directives-and-regulations/>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>
<https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>

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Chapter 13: U.S. Department of the Treasury, Office of Civil Rights and Diversity Legal Authority and Responsibility Congress established the U.S. Treasury Department (Treasury) in 1789, in the First Session of Congress.³²⁸⁸ Currently, Treasury is led by Secretary Steven Mnuchin, who was sworn in as the 77th Secretary of Treasury in February 2017.³²⁸⁹ Treasury states that its mission is “to maintain a strong economy and create economic and job opportunities by promoting the conditions that enable economic growth and stability at home and abroad, strengthen national security by combating threats and protecting the integrity of the financial system, and manage the U.S. Government’s finances and resources effectively.”³²⁹⁰ Treasury’s primary function is to manage money resources, through actions such as regulating national banks, collecting taxes, issuing securities, reporting the government’s daily financial transactions, and printing money.³²⁹¹ Equal access to credit and other financial issues can involve critical civil rights issues.³²⁹² Within Treasury, the Office of Civil Rights and Diversity (OCRD) is responsible for enforcing external civil rights.³²⁹³ Regarding nondiscrimination provisions, OCRD has indicated the following:

Nondiscrimination provisions apply to all programs and activities of recipients and sub-recipients of federal financial assistance. In programs that receive financial assistance from the Department of the Treasury, discrimination is prohibited on the bases of race, color, national origin, age, sex, disability, or limited English proficiency. Reprisal actions against individuals for their prior civil rights activity are prohibited. Additionally, in Department of the Treasury programs and activities, discrimination is prohibited on the bases of disability, and limited English proficiency.³²⁹⁴

³²⁸⁸ 31 U.S.C. § 301, An Act to Establish the Treasury Department, 1 Stat. 65 (1789); U.S. Dept of the Treasury, “Department of the Treasury,” 2006, [https://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](https://www.treasury.gov/about/education/Documents/brochure%20(1).pdf) [hereinafter Treasury, “Department of the Treasury”]. ³²⁸⁹ 31 U.S.C. § 301(b); U.S. Dept of the Treasury, “The Secretary,” <https://home.treasury.gov/about/general-information/the-secretary/>, (accessed Jun. 17, 2019). ³²⁹⁰ U.S. Dept of the Treasury, “Role of the Treasury,” <https://home.treasury.gov/about/general-information/role-of-the-treasury/>, (accessed Jun. 17, 2019). ³²⁹¹ 31 U.S.C. § 321; Treasury, “Department of the Treasury,” supra note 3288. ³²⁹² See, e.g., U.S. Consumer Financial Protection Bureau, “Promoting Fair, Equitable, and Nondiscriminatory Access to Credit: 2017 Fair Lending Report,” Dec. 2018, <https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>. ³²⁹³ U.S. Dept of the Treasury, Response to USCCR Interrogatory No. 1 and No. 2, at 1-8. ³²⁹⁴ U.S. Dept of the Treasury, “About: Office of Civil Rights and Diversity,” <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Pages/beneficiaries.aspx> (accessed Jun. 17, 2019) [hereinafter Treasury, “About: Office of Civil Rights and Diversity”].

[https://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](https://www.treasury.gov/about/education/Documents/brochure%20(1).pdf)
<https://home.treasury.gov/about/general-information/the-secretary/>
<https://home.treasury.gov/about/general-information/the-secretary/>
<https://home.treasury.gov/about/general-information/role-of-the-treasury/>
<https://home.treasury.gov/about/general-information/role-of-the-treasury/>
<https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>
<https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Pages/beneficiaries.aspx>

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OCRD enforces the following civil rights statutes and executive orders as part of its external civil rights enforcement program:

• Title VI of the Civil Rights Act of 1964;³²⁹⁵ • Title IX of the Education Amendments Act of 1972;³²⁹⁶ • Section 504 of the Rehabilitation Act of 1973;³²⁹⁷ • Section 508 of the Rehabilitation Act;³²⁹⁸ • The Age Discrimination Act of 1975;³²⁹⁹ • American with Disabilities Act Amendments Act of 2008;³³⁰⁰ • Executive Order 13,166 (Improving Access to Services for Persons with Limited English

Proficiency);³³⁰¹ • Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National

Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs)³³⁰²

OCRD additionally has the delegated authority to enforce the following Equal Opportunity Employment civil rights laws:

• Title VII of the Civil Rights Act of 1964;³³⁰³ • Section 501 of the Rehabilitation Act of 1973;³³⁰⁴ • The Genetic Information Nondiscrimination Act of 2008;³³⁰⁵ • The Age Discrimination in Employment Act of 1967;³³⁰⁶ • The Equal Pay Act of 1963;³³⁰⁷ • The Pregnancy Discrimination Act of 1978;³³⁰⁸ • The Notification and Federal Employees Antidiscrimination and Retaliation (No FEAR)

Act of 2002;³³⁰⁹ • The Lilly Ledbetter Fair Pay Act of 2009.³³¹⁰

³²⁹⁵ 42 U.S.C. § 2000d – 2000d-7. ³²⁹⁶ 20 U.S.C. §§ 1681 – 1688. ³²⁹⁷ 29 U.S.C. § 794. ³²⁹⁸ Id. § 794d. ³²⁹⁹ 42 U.S.C. §§ 6101 – 6107. ³³⁰⁰ Id. § 12101. ³³⁰¹ Exec. Order No. 13,166, 65 Fed. Reg. 50,121. ³³⁰² Exec. Order No. 13,160, 65 Fed. Reg. 39,775. ³³⁰³ 42 U.S.C. § 2000e. ³³⁰⁴ 29 U.S.C. § 701. ³³⁰⁵ 42 U.S.C. § 2000ff. ³³⁰⁶ 29 U.S.C. §§ 621-634. ³³⁰⁷ Id. 206(d). ³³⁰⁸ 42 U.S.C. § 2000e. ³³⁰⁹ 5 U.S.C. § 2301. ³³¹⁰ Pub. L. No. 111-2, 123 Stat. 5.

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Two other bureaus within Treasury, the Office of the Comptroller of the Currency (OCC), and the Internal Revenue Service (IRS), have specific responsibilities for enforcing nondiscrimination laws. The IRS is required to ensure that all taxpayers, taxpayer representatives, and employees are being treated fairly and equitably regardless of race, color, national origin, age, sex, or disability through enforcement of the nondiscrimination provisions of Section 1203 of the IRS Restructuring and Reform Act of 1998.³³¹¹ OCC is charged by law with “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”³³¹² OCC has a statutory obligation to regulate national banks, federal branches and agencies of foreign banks, and federal savings associations.³³¹³ OCC is charged with assuring that banks comply with laws and regulations and that their customers are have fair access to financial services.³³¹⁴ As of September 30, 2017, OCC supervised 1,347 banks.³³¹⁵ OCC reviews banks under its jurisdiction for compliance with the following laws:

• The Fair Housing Act;³³¹⁶ • The Equal Credit Opportunity Act;³³¹⁷ • The Servicemembers Civil Relief Act.³³¹⁸

Enforcement Tools The agency enforcement tools that OCRD has specific legal authority to use are:

• Complaint resolution;³³¹⁹ • Agency-initiated charges;³³²⁰ • Proactive compliance evaluations;³³²¹ • Guidance or other policy documents.³³²²

³³¹¹ 26 U.S.C. § 7804, note, Pub. L. 105-206, 112 Stat. 720; U.S. Dept of the Treasury, Response to USCCR Interrogatory No. 1, at 3. ³³¹² 12 U.S.C. § 1(a). ³³¹³ Id. § 1. ³³¹⁴ U.S. Dept of the Treasury, Response to USCCR Interrogatory No. 1, at 2. ³³¹⁵ Ibid. ³³¹⁶ 42 U.S.C. § 3601 et seq. ³³¹⁷ 15 U.S.C. § 1691 et seq. ³³¹⁸ 50 U.S.C. § 3901 et seq. ³³¹⁹ 31 C.F.R. §§ 17.170, 22.7, 28.610. ³³²⁰ Id. §§ 22.7 (a) and (c). ³³²¹ Id. §§ 22.6 (compliance information required), 22.7(a)(periodic compliance reviews)(“The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part.”), 28.605 (procedures for effecting compliance). ³³²² 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”).

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• Regulations;³³²³ • Technical assistance;³³²⁴ • Publicity;³³²⁵ • Research, data collection, and reporting;³³²⁶ • Collaboration/partnership with state/local agencies;³³²⁷ • Collaboration/partnership with other federal agencies;³³²⁸ • Strategic Plans;³³²⁹ • Annual Reports.³³³⁰

Budget and Staffing According to Treasury, “OCRD’s budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program.”³³³¹ Treasury dispersed \$5 – \$6 billion in federal financial assistance during the Fiscal Years studied.³³³² The following are the consolidated amounts OCRD was allocated and requested for FY 2016 to FY 2018. See Figure 13.1. For FY 2016, OCRD was allocated \$279,491,333. For FY 2017, OCRD was allocated \$446,317,333. Treasury forecasted that OCRD would require \$514,165 for FY 2018.³³³⁵

³³²³ 31 U.S.C. § 321(b)(1)-(2); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). ³³²⁴ 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”). ³³²⁵ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information). ³³²⁶ Id. § 42.406 (regarding data collection and information sharing). ³³²⁷ 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”). ³³²⁸ 28 C.F.R. § 42.413. ³³²⁹ GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). ³³³⁰ 12 U.S.C. § 14 (requirement that OCC issue an annual report); 31 U.S.C. § 331(a) (requirement that Treasury issue an annual report). ³³³¹ U.S. Dept of the Treasury, Response to USCCR Interrogatory No. 6, at 12. ³³³² See supra Table 1.5. ³³³³ U.S. Dept of the Treasury, Response to USCCR Interrogatory No. 6, at 12. ³³³⁴ Ibid. ³³³⁵ Ibid.

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Figure 13.1: OCRD’s Allocated Budget for FTE Employees Responsible for External Civil Rights Enforcement

Source: Department of Treasury, Response to Interrogatory 6, at 12. Note: OCRD indicated that “OCRD’s budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program,” and the figures above show costs for three FTE employees dedicated to work on external civil rights complaints.

In FY 2016, OCRD received a total of \$1.27 million for Salaries and Expenses (S&E),³³³⁶ requested \$4.87 million through Treasury’s Shared Service Program Budget (SSP), and was allocated \$4.85 million through SSP. In FY 2017, OCRD requested a total of \$1.29 million for S&E, was allocated \$1.53 million for S&E, requested \$5.31 million through SSP, and was allocated \$4.85 through SSP. For FY 2018, OCRD requested \$1.35 million for S&E and \$5.17 million through SSP, and projects that it will be allocated \$1.52 million for S&E and \$4.76 million through SSP. See Figure 13.2.

3336 Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016. U.S. Dep't of the Treas. Response to USCCR Interrogatory No. 6(d) at 13.

\$279,492

\$446,318 \$514,166

\$-

\$100,000

\$200,000

\$300,000

\$400,000

\$500,000

\$600,000

FY 2016 FY 2017 FY 2018 (projected)

Figure 13.1: OCRD's Allocated Budget for FTE Employees Responsible for External Civil Rights Enforcement

FY 2016 to FY 2018

Allocated

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Figure 13.2: OCRD's Requested and Allocated Budget

Source: Department of Treasury, Response to Interrogatory 6, at 13-14. Note: "S&E" refers to Salaries and Expenses, and "SSP" refers to Treasury's Shared Service Program Budget. Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016.

Unlike OCRD and the IRS, which are funded through Congressional appropriations, the Office of the Comptroller of the Currency, which regulates banks, is funded through assessments, fees paid by banks, and interest charged to regulated institutions; therefore, OCC is not included in the President's budget proposal sent to Congress, and is not part of the appropriations process.³³³⁷ In FY 2018 OCC reported revenue of \$1,247.4 million, which reflects a \$42.1 million, or 3.5 percent, increase from FY 2017 revenue of \$1,205.3 million.³³³⁸ In response to the Commission's interrogatories, Treasury also noted that "OCRD's budget did not have non-salary amounts dedicated exclusively to the external civil rights program."³³³⁹ Currently, there are a total of 26 employees within OCRD.³³⁴⁰ Of these, there are only three OCRD full-time positions dedicated to work on external civil rights complaints (a senior level Civil Rights Program Manager and two Equal Employment Opportunity Specialists).³³⁴¹ Treasury reports that several other managers and front office assistants are also involved in supporting external as well as the greater volume of internal enforcement work.³³⁴² As noted above, Treasury does not have

³³³⁷ 12 U.S.C. § 482, ("The Comptroller of the Currency may impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office"). See also, U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, 2018 Annual Report, 2018, pp. 33-34, <https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf> [hereinafter Treasury OCC, 2018 Annual Report]. ³³³⁸ Treasury OCC, 2018 Annual Report, supra note 3337, at 34. ³³³⁹ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 13. ³³⁴⁰ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10. ³³⁴¹ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 5, and No. 6, at 11-12. OCRD does not employ any part-time staff or full-time/part-time contractors to enforce civil rights. Treasury's Response to USCCR Interrogatory No. 5b-5d at 11-12. The Civil Rights Program Manager is a GS-15 level federal employee. ³³⁴² U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

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FY 2016 FY 2017 FY 2018 (projected)

Figure 13.2: OCRD's Requested and Allocated Budget FY 2016 to FY 2018

S&E Requested S&E Allocated SSP Requested SSP Allocated

<https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf>

<https://www.occ.gov/annual-report/download-the-full-report/2016-annual-report.pdf>

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any non-staff resources dedicated exclusively to external civil rights enforcement.³³⁴³ Moreover, the organizational chart and other information submitted by the U.S. Department of the Treasury to the Commission indicates that external and internal civil rights enforcement are essentially combined in the OCRD.³³⁴⁴ The 2016 organizational chart had some division between external and internal civil rights enforcement as follows: Figure 13.3 Organizational Structure of OCRD FY 2016

Source: U.S. Department of the Treasury

The FY 2017-2018 organizational chart shows that External Civil Rights is no longer a separately- titled office, and is now under Compliance and Reporting.

³³⁴³ See supra note 3332. ³³⁴⁴ U.S. Dep't of the Treasury, Response to USCCR Document Request No. 2, at 21 (referencing their attachment of this chart).

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Figure 13.4 Organizational Structure of OCRD FY 2017-2018³³⁴⁵

Source: U.S. Department of the Treasury

Treasury also reported to the Commission that staffing levels for OCRD have been relatively consistent between FY 2016 and FY 2018, though there was an additional Equal Opportunity Specialist hired in March 2017.³³⁴⁶ This hire occurred because OCRD "did not believe it had sufficient staff to effectively manage the caseload and other external civil rights enforcement work during FY 2016 and FY 2017."³³⁴⁷ The agency added, "We are constantly assessing our resources and will make adjustments if our compliance and enforcement needs increase."³³⁴⁸

³³⁴⁵ *Ibid.* ³³⁴⁶ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 5, at 12. ³³⁴⁷ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 14. ³³⁴⁸ *Ibid.*

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Assessment Prioritization for Civil Rights Agency-wide Treasury does not structure its offices such that civil rights enforcement is part of the agency wide leadership team. OCRD is an office within the Departmental Offices of the Office of the Assistant Secretary for Management.³³⁴⁹ OCRD defines its mission as to "ensure that equality, fairness and diversity in employment are realized for all U.S. Department of the Treasury employees and applicants for employment."³³⁵⁰ The head and Director of the Office of Civil Rights and Diversity is Mariam Harvey;³³⁵¹ she reports directly to the Assistant Secretary for Management and is given authority by the Secretary of the U.S. Department of the Treasury.³³⁵² This organizational structure at OCRD runs counter to a previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack a direct line of authority to the agency head.³³⁵³ Strategic Planning & Self-Evaluation Treasury released its most recent strategic plan in 2018, covering fiscal years 2018-2022.³³⁵⁴ Neither the 2018 strategic plan, nor the previous strategic plan issued for fiscal years 2014-2017 specifically mention OCRD or civil rights. ³³⁵⁵ Both OCC and the IRS issue their own strategic plans, separate from Treasury's plan. In connection with the function of bank regulation, the OCC's current strategic plan states that OCC seeks to "Promote financial inclusion and economic opportunity through fair access to financial access services and fair treatment of bank customers and communities."³³⁵⁶ The IRS' strategic plan does not mention civil rights.³³⁵⁷

³³⁴⁹ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10. ³³⁵⁰ Treasury, "About: Office of Civil Rights and Diversity," supra note 3295. ³³⁵¹ *Ibid.* ³³⁵² U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10. ³³⁵³ USCCR, Ten-Year Check-Up Vol. 1: A Blueprint, supra note 1, at 47. ³³⁵⁴ U.S. Dep't of the Treasury, Treasury Strategic Plan 2018-2022, 2018, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf. ³³⁵⁵ *Ibid.*; see U.S. Dep't of the Treasury, Department of the Treasury FY 2014-2017 Strategic Plan, 2014, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf. ³³⁵⁶ U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, The OCC Strategic Plan: Fiscal Years 2019-2023, September 2018, p. 4, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>. The OCC's prior plan sought to "ensure that regulated entities provide consumers fair access to financial services and treat them fairly." U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, The OCC Strategic Plan Fiscal Years 2015-2019, September 2014, p. 8, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>. ³³⁵⁷ U.S. Dep't of the Treasury, Internal Revenue Service, Strategic Plan FY 2018-2022, 2018, <https://www.irs.gov/pub/irs-pdf/p3744.pdf>.

https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf

https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf

https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf

https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf

<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>

<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>

<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>

<https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>

<https://www.irs.gov/pub/irs-pdf/p3744.pdf>

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The Secretary of the Treasury also has the obligation to submit annual financial reports to Congress, which include statements on all public receipts and expenditures, contracts, appropriations, and payments made.³³⁵⁸ The Secretary must also report to Congress in person or in writing on matters referred to the Secretary by Congress.³³⁵⁹ Treasury's 2018 annual report does not specifically mention civil rights, nor does it evaluate the performance of OCRD over the past year.³³⁶⁰ However, Treasury, through OCRD, has at times issued a purportedly annual EEO, Diversity, and Civil Rights Report that highlights OCRD's accomplishments over the previous fiscal year. The most recent report publicly available was published in 2016, and the report notes with regard to external civil rights enforcement that in FY 2016, Treasury received 31 complaints of discrimination, and provided technical assistance to two Treasury assisted programs.³³⁶¹ Treasury has not made an EEO, Diversity, and Civil Rights Report publicly available on its website since 2016. OCC is required to submit its own annual report to Congress.³³⁶² OCC's FY 2018 annual report explains

supervisory responsibilities, and provides data on supervisory actions taken during the fiscal year, however the report does not provide specific data on supervisory actions initiated due to civil rights violations by OCC regulated entities.3363 Complaint Processing, Agency-Initiated Changes, & Litigation Complaint Processing in its Civil Rights Directive: External Civil Rights Responsibilities and Complaint Process, the U.S. Department of the Treasury has outlined its formal process of receiving and investigating complaints, which is also governed by federal regulations.3364 OCRD is directed to receive and process complaints from any individual who "believes that he or she has been subjected to

3358 31 U.S.C. § 331(a), 3359 Id. § 331(d), 3360 U.S. Dep't of the Treasury, Agency Financial Report Fiscal Year 2018, Nov. 15, 2018, https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf. 3361 U.S. Dep't of the Treasury, Annual EEO, Diversity and Civil Rights Report FY 2016, 2016, <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf> [hereinafter Treasury, FY 2016 EEO, Diversity and Civil Rights Report]. 3362 12 U.S.C. § 14; Treasury OCC, 2018 Annual Report, supra note 3337. 3363 Treasury OCC, 2018 Annual Report, supra note 3337, at 23. 3364 U.S. Dep't of the Treasury, Civil Rights Directive CRD-006: External Civil Rights Responsibilities and Complaint Process (Sep. 5, 2017), <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf> [hereinafter Treasury, External Civil Rights Responsibilities and Complaint Process]. (Office of Civil Rights and Diversity has indicated in this memo that the following relevant statutes, regulations, Executive Orders, and Treasury Orders apply to this complaint process: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794-794e; Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 31 C.F.R. Part 17, 31 C.F.R. Part 22, 31 C.F.R. Part 28; Executive Orders 13160 and 13166; and Treasury Order 102-02.)

https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>
<https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf>

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unlawful discrimination," or an individual who is a member of a class who "believes that any specific class of persons has been subjected to discrimination."3365 Complaints must be filed within 180 days of the alleged act of discrimination, however this time frame can be extended by the OCRD Director if there is "good cause."3366 The Treasury Civil Rights Directive also states that OCRD should be referred any complaints that have been filed directly with any bureau for intake and tracking.3367 When a complaint has been accepted, having been submitted in a timely manner and falling within OCRD's jurisdiction, Treasury reports that it will then refer the complaint to the relevant bureau for investigation, for which the bureau must submit a report to detail the investigation and provide an agency position statement on the complaint.3368 Treasury states that typically, the investigation will entail interviews with the complainant, the recipient and/or recipient's staff, agency staff, and other witnesses; and a review of the recipient's relevant records, agency records, and building facilities; and consideration of any information or evidence gathered, and defenses asserted.3369 Further, once OCRD reviews the report, it will issue a decision "on the merits of the complainant's allegations," and will notify the complainant via a letter containing "findings of fact, and conclusions of law," a description of the remedy for each violation found, and a notice of the right to appeal (if applicable).3370 Treasury reports that it will require cooperation from any agency employee who needs to participate in the investigative process, as part of the employee's official agency duties.3371 Complaints can be resolved informally via a settlement agreement, which Treasury states will be documented in writing and will be added to the complaint file, with a copy provided to the complainant.3372 The settlement agreement must describe the subject matter of the complaint and the terms that each party has agreed to, and all settlement agreements must be approved by the Office of the General Counsel or appropriate bureau counsel.3373 If appropriate, an appeal may be filed within 60 days of the receipt of the letter of findings, and this time frame may be extended with "good cause." The Assistant Secretary of Management or a designee is directed to make all final decisions on timely appeals.3374

3365 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364. 3366 31 C.F.R. § 22.7(b); Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364. 3367 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364, at 2. 3368 *Ibid.*, 2. 3369 *Ibid.*, 2-3. 3370 *Ibid.*, 3. 3371 *Ibid.*, 3. 3372 *Ibid.*, 3. 3373 *Ibid.*, 3. 3374 *Ibid.*, 3.

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Table 13.1: Number of Complaints Opened, Closed, and Received by OCRD3375 OCRD Complaints FY 2016 FY 2017 FY 2018 (as of 3/09/2018)* Number of complaints/cases received 31 30 18 Number of Complaints/Cases Investigated/Not Investigated

Number of complaints/cases investigated 5 12 0 Number of complaints/cases not investigated

26 18 03376

Complaint/Case Findings and Outcomes Complaint/Case found evidence of discrimination

2 2 0

Complaint/case found no evidence of discrimination

2 5 0

Complaint/case withdrawn 1 0 0 Number of Complaints/Cases Closures Closures 31 25 8 Cases pending final decision 0 4 0 Complaints pending investigation 0 1 0 Cases/complaints in Intake Review 0 0 7 Reason and Method for Complaint/Case Closure

Merits 5 7 0 Reason for Complaint Disability 31 29 18 Disability and age 0 1 0

Source: U.S. Department of the Treasury * No complaints were accepted for investigation at the time of data collection

In FY 2016, OCRD received 31 complaints of discrimination, all of which were based on alleged discrimination against persons with disabilities.3377 Of the 31 complaints received, OCRD investigated five and did not investigate 26.3378 OCRD found evidence of discrimination in two of the five cases it investigated and no evidence in two of the five cases.3379 The remaining complaint was withdrawn.3380 In FY 2016, OCRD took between 77 to 326 days to resolve a case or complaint.3381

3375 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3376 OCRD had not yet accepted any complaints for investigation during FY 2018 at the time OCRD submitted their data to the Commission on March 9, 2018. 3377 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3378 *Ibid.* 3379 *Ibid.* 3380 *Ibid.* 3381 *Ibid.*

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In FY 2017, OCRD received 30 complaints of discrimination; 29 of the complaints were on the basis of disability and one was on the basis of disability and age.3382 Of those 30 complaints/cases, OCRD investigated 12 and did not investigate 18.3383 OCRD found evidence of discrimination in two cases it investigated, did not find evidence of discrimination in five of the 12 cases, 4 of the 12 cases were pending final decision when Treasury submitted their interrogatory responses to the Commission, and one of the 12 complaints was pending investigation as of that time.3384 In FY 2017, cases and complaints were resolved between 73 and 156 days.3385 At the point of data collection, Treasury reported that during FY 2018 OCRD had received 18 complaints/cases.3386 Each claimed disability discrimination, and OCRD had not accepted any for investigation when Treasury submitted their interrogatory responses to the Commission.3387 OCRD had closed 8 of the 18 complaints/cases.3388 OCRD closes cases because of a lack of jurisdiction or failure to pursue by the complainant. Seven of the 18 complaints/cases were awaiting Intake Review.3389 In FY 2018, OCRD received 32 complaints, two of which OCRD determined to be jurisdictional.3390 OCRD did not issue any findings of discrimination resulting from complaints in FY 2016.3391 During FY 2016-2018, OCRD indicated that it did not receive any complaints filed on the basis of sex or race.3392 Proactive Compliance Evaluation OCRD has federal regulatory responsibility to undertake proactive and periodic compliance investigations.3393 Its Title VI regulations state that, "The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part."3394 OCRD has the authority to enforce compliance with nondiscrimination laws through administrative hearings and withholding of funds from recipients of federal funding.3395 OCRD stated that it takes a proactive role in preventing discrimination through compliance and accessibility reviews and audits of recipients of federal funding through Treasury programs.3396 In Treasury's FY 2016 annual civil rights report, Treasury indicated that OCRD was in the process of establishing memoranda of understanding with two recipients of federal financial assistance, however Treasury did not indicate whether these memoranda resulted from complaints or

3382 *Ibid.*; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 10, at 18. 3383 U.S. Dep't of the Treasury's Response to USCCR Interrogatory No. 7, at 14-15. 3384 *Ibid.* 3385 *Ibid.* 3386 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 10, at 17. 3387 *Ibid.*, 18. 3388 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15. 3389 *Ibid.* 3390 U.S. Dep't of the Treasury, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file). 3391 *Ibid.* 3392 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 10, at 18. 3393 31 C.F.R. § 22.8(a). 3394 Id. § 22.7(a). 3395 Id. §§ 17.170, 22.8, 23.41, 23.46, 28.600, 28.620; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 9, at 16-17. 3396 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 3.

<https://www.law.cornell.edu/cfr/text/31/22.7>

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compliance reviews.3397 Commission staff were unable to find data regarding OCRD external compliance reviews for FY 2017 and FY 2018. OCC has the power to supervise banks' compliance with fair lending laws and regulations and performs fair lending risk assessments and examinations.3398 OCC has the authority to monitor all banks for compliance with the Fair Housing Act.3399 If OCC determines that a violation of the Fair Housing Act has occurred, it will refer the matter to HUD for further administrative action.3400 Similarly, OCC monitors compliance with the Equal Credit Opportunity Act (ECOA) for banks under the ECOA's jurisdiction. According to OCC, banks will be referred to DOJ for further action whenever the OCC has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit.3401 OCC will refer the matter to HUD if OCC believes that both ECOA and the Fair Housing Act have been violated.3402 IRS similarly has the authority to review the recipients of financial assistance under its jurisdiction for compliance with the applicable civil rights statutes.3403 Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity OCRD is required by regulation to provide assistance and guidance to recipients of federal funding of compliance requirements under the law.3404 OCRD stated that it focused on the following regulatory changes during the Fiscal Years 2016- 2018:

During FY 2016 and 2017, the main priority was to issue regulations implementing the requirements of Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. During FY 2017, the Department started the drafting and clearance process to issue a Title VI Guidance for Recipients, ensuring Treasury recipients of financial assistance have clear guidance of the compliance requirements. The Department's goal for FY 2018, is to complete the internal clearance of the draft Title VI guidance and submitting it for clearance by DOJ as required by Executive Order 12,250.3405

3397 Treasury, FY 2016 EEO, Diversity and Civil Rights Report, supra note 3361, at 25. 3398 12 U.S.C. § 1818; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 4-5. 3399 12 C.F.R. § 128; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4. 3400 42 U.S.C. § 3601 et seq.; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4. 3401 5 U.S.C. § 1691 et seq.; see also, U.S. Dep't of the Treasury, Comptroller of the Currency, Comptroller's Handbook: Fair Lending, p. 9, January 2018, <https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf> (accessed Jul. 30, 2019) [Treasury OCC, Comptroller's Handbook: Fair Lending]. 3402 Exec. Order No. 12,892, 59 Fed. Reg. 2,939; Treasury OCC, Comptroller's Handbook: Fair Lending, supra note 3401, at 9. 3403 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 3-4. 3404 31 C.F.R. §§ 22.6, 28.605. 3405 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 3, at 9.

<https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf>
<https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf>

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Treasury published a notice of proposed rulemaking on January 7, 2017, that would add regulatory protections for persons with disabilities in programs or activities receiving federal financial assistance from Treasury.3406 In Fiscal Year 2017, Treasury also issued final rules on nondiscrimination on the basis of age and race, color, or national origin in programs or activities receiving federal financial assistance from the department.3407 Additionally, in 2017, as described above OCRD issued guidance in the form of a Civil Rights Directive to establish OCRD's complaint processing procedures.3408 The Directive explains OCRD's complaint process for individuals and furthermore, it notifies entities receiving financial assistance through Treasury programs of their obligations under the law.3409 In August of 2018, OCC issued new guidance regarding the use of evidence of discriminatory practices in Community Reinvestment Act ratings used by OCC.3410 The new guidance advises that evidence of discriminatory or other illegal practices will lead to OCC considering lowering the financial institution's score only if there is a "logical nexus" between the discriminatory practices and the bank's lending activities.3411 The guidance advises examiners as to how they should evaluate discriminatory credit practices along these lines, and also clarifies that even if there is a logical nexus showing that the discriminatory practice impacted lending activities, there may be mitigating factors and "[f]ull consideration is given to the remedial actions taken by the bank."3412 The guidance cites to federal regulations.3413 Interaction and Coordination with External Agencies and Organizations Executive Order 12,892, which encourages cooperation in implementing the Fair Housing Act across federal agencies, requires Treasury's OCC to notify HUD of facts or information suggesting a violation of the Fair Housing Act, and to notify DOJ if such facts or information indicate a possible pattern or practice of discrimination in violation of the Act.3414 OCC also has an MOU

3406 Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of the Treasury, 82 Fed. Reg. 67 (The proposed rule will be codified as 31 C.F.R. Part 40) 3407 Treasury affected agency review; see Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance From the Department of the Treasury, Oct. 11, 2017, <https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>; Nondiscrimination on the Basis of race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury, Dec. 13, 2016, <https://www.federalregister.gov/documents/2016/12/13/2016-29629/regulation-regarding-nondiscrimination-on-the-basis->

of race-color-or-national-origin-in-programs- or. 3408 Treasury, External Civil Rights Responsibilities and Complaint Process, supra note 3364, at 3. 3409 U.S. Dep't of the Treasury, Office of the Currency, PPM 5000-43, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (Aug. 15, 2018), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf> 3411 Ibid. 3412 Ibid., 4. 3413 Ibid., passim. Order No. 12,892, 59 Fed. Reg. 2,939.

<https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>
<https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>
<https://www.federalregister.gov/documents/2016/7/21/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or>
<https://www.federalregister.gov/documents/2016/7/21/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or>
<https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf>

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with HUD under which OCC will refer complaints that allege potential violations of the Fair Housing Act to HUD.3415 Additionally, OCC must notify DOJ of suspected fair lending violations under ECOA.3416 Similarly, OCRD has the ability to refer litigation to DOJ as one of its enforcement tools for a violation or threatened violation of civil rights protections under Title VI and Title IX.3417 Research, Data Collections, and Reporting OCRD collects data regarding the types of discrimination alleged in complaints filed with OCRD.3418 OCRD does not collect racial and ethnic data from beneficiaries of Treasury programs.3419 OCRD is not required by law to collect data on civil rights issues; however Treasury stated that it plans to issue guidance to all recipients of federal funding requiring them to collect data on race and national origin.3420

3415 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 6. 3416 5 U.S.C. § 1691 et seq. 3417 See 31 C.F.R. § 22.8(a)(1) ("if there appears to be a failure or threatened failure to comply with this [Treasury Title VI regulation]" OCRD may refer the matter to DOJ), 28.615(a)(1) ("if there appears to be a failure or threatened failure to comply with [Treasury's] Title IX regulations" OCRD may refer the matter to DOJ). 3418 U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 11, at 19. 3419 Ibid. 3420 Ibid.

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Chapter 14: U.S. Department of the Interior, Office of Civil Rights Legal Authority and Responsibility Congress established the U.S. Department of the Interior (DOI) in 1849.3421 Currently, DOI's Secretary is David Bernhardt, who was sworn in on April 11, 2019. Secretary Bernhardt replaced Ryan Zinke, who served as President Trump's Secretary of the Interior from 2017 until December 2018.3422 According to federal regulations, the Office of Civil Rights (DOI OCR) within DOI is responsible for protecting individuals from discrimination based on race, national origin, age, sex, or disability under any program or activity funded by DOI.3423 DOI's website clarifies that: "Discrimination includes: denial of services, aids, or benefits; provision of different service or in a different manner; and segregation or separate treatment. In addition, sex discrimination is prohibited in Federally assisted educational programs."3424 Under federal law and regulations, DOI is obligated to process civil rights complaints, and is specifically required to provide assistance and guidance, in the course of implementing civil rights laws and regulations to ensure recipients of federal financial assistance administered by DOI do not discriminate on the basis of race, national origin, gender, or disability, and with regard to DOI funded educational and training activities, on the basis of sex, sexual orientation, or status as a parent.3425 Its jurisdiction also includes environmental justice.3426 Furthermore, DOI has designated civil rights coordinators in the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey.3427 These officials are responsible for processing and investigating civil rights complaints, including those against bureau conducted programs and bureau federally assisted

3421 43 U.S.C. § 1451, R. S. § 437, 9 Stat. 395 (1849). 3422 43 U.S.C. § 1451; U.S. Dep't of the Interior, "David Bernhardt – Secretary of the Interior," <https://www.doi.gov/whoweare/asbernhardt>. 3423 See generally, 43 C.F.R. § 17 (Title VI), 27 (Trans-Alaska Pipeline Authorization Act implementation of civil rights protections), 41 (Title IX); U.S. Dep't of the Interior, "Public Civil Rights," <https://www.doi.gov/pmb/eeo/public-civil-rights> [hereinafter DOI, "Public Civil Rights"]. 3424 DOI, "Public Civil Rights," supra note 3423. 3425 20 U.S.C. § 1681; 29 U.S.C. § 701 et seq.; 42 U.S.C. 2000d et seq.; see generally, 43 C.F.R. § 17, 27, 41; U.S. Dep't of the Interior, Civil Rights Directive 2011-01: Public Civil Rights Complaint Procedures (Mar. 14, 2011) https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf [hereinafter DOI, Public Civil Rights Complaint Procedures]. Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775. 3426 Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations, 59 Fed. Reg. 7,629. 3427 See infra notes 3467-3477.

<https://www.doi.gov/whoweare/asbernhardt>
<https://www.doi.gov/pmb/eeo/public-civil-rights>
https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf
https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf

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programs.3428 DOI issues millions in federal funding. In FY 2016, DOI issued over \$763 million in over 18,000 cooperative agreements.3429 DOI OCR has indicated that it externally enforces the following civil rights statutes, regulations, and executive orders:3430

• Title VI of the Civil Rights Act of 1964;3431 • The Architectural Barriers Act of 1968;3432 • Title IX of the Education Amendments of 1972;3433 • Section 504 of the Rehabilitation Act of 1973, as amended;3434 • Section 508 of the Rehabilitation Act of 1973, as amended;3435 • Age Discrimination Act of 1975, as amended;3436 • Civil Rights Restoration Act of 1987, as amended;3437 • Telecommunications Accessibility Enhancement Act of 1988;3438 • Americans with Disabilities Act of 1990;3439 • Architectural Barriers Act Accessibility Standards;3440 • Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations;3441

3428 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3429 See, e.g., Michael Doyle, "U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review," Science Magazine, Jan. 9, 2018, <https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review> [hereinafter Doyle, "U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review"]. 3430 U.S. Dep't of the Interior, Response to USCCR Interrogatory 1, at 1-2. 3431 42 U.S.C. § 2000d et seq. 3432 42 U.S.C. § 4151, Pub. L. 90-480 and implementing regulations at 43 C.F.R. § 17.550-551 and 17.570(f). 3433 20 U.S.C. §§ 1681-1688, Pub. L. 92-318; 86 Stat. 235; 373; 20 U.S.C. 1681-1688 as amended by Pub. L. 93- 568; 88 Stat. 1855; except sections 904 and 906 of those Amendments; U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 1, at 1. The Interrogatory response notes that this law "is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution." Id. 3434 29 U.S.C. § 794, Pub. L. 93-112; 87 Stat. 394; as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516; 88 Stat. 1617; as also amended by the Rehabilitation, Comprehensive Service, and Developmental Disabilities Act of 1978, Pub. L. 95-602; 92 Stat. 2955 and implementing regulations at 43 C.F.R. Subpart B. 3435 29 U.S.C. § 794d; as amended by the Workforce Investment Act of 1998, Pub. L. 105-220; 112 Stat. 936 and implementing regulations at 29 C.F.R. Part 1615. 3436 42 U.S.C. § 6101 et seq., Pub. L. 94-135; Title III. 3437 42 U.S.C. § 2000d, Pub. L. 100-259; 102 Stat. 28; as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166. 3438 40 U.S.C. § 762 a-d, Pub. L. 100-542; 102 Stat. 2721. 3439 42 U.S.C. § 12101 et seq., Pub. L. 101-336; and implementing regulations at 28 CFR § 35 and 29 C.F.R. § 1630. 3440 41 C.F.R. §§ 102-76.60, .70, .75, .80, .85, .90, .95 are GSA-ABA Accessibility Standards in which GSA adopts appendices C and D to 36 CFR § 1191 (ABA Chapters 1 and 2, and Chapters 3-10). 3441 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

<https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review>
<https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review>

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• Executive Order 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs;3442

• Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency;3443

Furthermore, the following are mentioned in DOI's Departmental Manual as being under the external enforcement jurisdiction of DOI OCR:

• Title VII of the Civil Rights Act of 1964, as amended;3444 • The Civil Rights Act of 1991, as amended;3445 • Age Discrimination in Employment Act, as amended;3446 • Americans with Disabilities Act Amendments Act of 2008;3447 • Equal Pay Act of 1963;3448 • The Notification of Federal Employee Anti-discrimination and Retaliation Act (No FEAR

Act of 2002);3449 • Genetic Information Nondiscrimination Act of 2008;3450 • Lilly Ledbetter Fair Pay Act of 2009;3451 • Title II of the Trans-Alaska Pipeline Authorization Act;3452 • Executive Order 11,478, Equal Employment Opportunity in the Federal Government;3453 • Other "Federal statutes and regulations that prohibit discrimination on the basis of race,

color, national origin, religion, sex, age, disability, sexual orientation, and genetic information, and that promote equal employment opportunity through a continuing affirmative program."3454

3442 Exec. Order No. 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,397. 3443 Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121. 3444 42 U.S.C. §§ 2000d-1-2000d-4; as amended, Pub. L. 92-261; 42 U.S.C. § 2000e et seq. and implementing regulations at 29 C.F.R. § 1606. 3445 Pub. L. 102-166; as amended, 42 U.S.C. 2000e et seq.; Pub. L. 92-261. 3446 Pub. L. 93-259; 29 U.S.C. §§ 621-634 and implementing regulations at 43 C.F.R. Subpart C; § 2 of Reorganization Plan No. 1 of 1978, Exec. Order No. 12,106 § 1-101. 3447 Pub. L. 110-325; 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. § 1630. 3448 Pub. L. 88-36; 29 U.S.C. 206(d); Reorganization Plan No. 1 of 1978 and implementing regulations at 29 C.F.R. §§ 1620-1621. 3449 Pub. L. 107-174; 5 U.S.C. § 2301 and implementing regulations at 29 C.F.R. Subpart G. 3450 Pub. L. 110-233; 42 U.S.C. § 2000f et seq. and implementing regulations at 29 C.F.R. § 1635. 3451 Pub. L. 111-2; 123 Stat. 5. 3452 43 U.S.C. § 1651, Pub. L. 93-153; 87 Stat. 576 and implementing regulations 43 C.F.R. § 27. 3453 Exec. Order No. 11,478, Equal Employment Opportunity in the Federal Government, 34 Fed. Reg. 12,985. 3454 U.S. Dep't of the Interior, Departmental Manual, Part 12, Chapter 19, pp. 1-5.

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Enforcement Tools The agency enforcement tools the DOI OCR has specific legal authority to use are:

• Complaint resolution3455 • Agency-initiated charges3456 • Proactive compliance evaluations3457 • Guidance or other policy documents3458 • Regulations3459 • Technical assistance3460 • Publicity3461 • Research, data collection, and reporting3462 • Collaboration/partnership with state/local agencies3463 • Collaboration/partnership with other federal agencies3464 • Strategic Plans3465 • Annual Reports3466

Budget and Staffing DOI OCR noted that from FY 2016 to FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of three FTE employees assigned to the Public Civil Rights Division.3467 After one FTE employee left in FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of just two FTE employees assigned to the Public Civil Rights Division in FY 2018.3468 These FTE employees "provide oversight and technical assistance to bureau Public Civil Rights employees in processing and responding to civil rights complaints, in addition to processing and responding to some cases by the DOI OCR Public Civil Rights Division employees directly."3469

3455 43 C.F.R. §§ 17.6, 17.7, 17.280, 27.8,27.9, 41.605 3456 Id. § 17.6(a) and (c). 3457 Id. §§ 27.7, 27.8(b), 41.605, 17.5, 17.6(a), 17.280, 17.320, 17.330(a) (conduct of investigations). 3458 Id. §§ 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3459 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations). 3460 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3461 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information). 3462 Id. § 42.406 (regarding data collection and information sharing). 3463 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"). 3464 28 C.F.R. § 42.413. 3465 GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b). 3466 43 U.S.C. § 1465. 3467 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 6, at 5. 3468 Ibid. 3469 Ibid.

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DOI OCR requires funds in order to carry out its duties as the "focal point for policy development and administration of equal opportunity and public access civil rights programs for the Department of Interior."3470 These duties include developing policies and procedures related to civil rights programs, managing the public civil rights complaints processing system, managing the equal employment complaints processing and reporting system, and evaluating program civil rights compliance.3471 DOI OCR requested \$3.418 million for FY 2016.3472 DOI OCR was allocated \$3.453 million for FY 2016, and \$3.378 million went to Departmental Operations and \$75,000 went to Working Capital Funds, namely the EEO Complaints Tracking System and Special Emphasis Program.3473 For FY 2017, DOI OCR requested \$3.481 million to fund their operations.3474 DOI OCR indicated that there are currently two staff members who work on external complaints, however, this number is down from three full-time staff members, as one person left the Department in 2017.3475 These two full-time employees are focused on external civil rights enforcement. DOI OCR reports that it plans to initiate a workforce planning exercise in FY 2019 to "determine appropriate organizational design, staffing levels, identify employee development and competency gaps, and division of workload."3476 DOI OCR also indicated other DOI staff outside of DOI OCR who work on civil rights enforcement, including:

• One full-time EEO Specialist at the Bureau of Land Management • One full-time EEO Specialist at the National Park Service • One full-time EEO Specialist at the Office of Surface Mining Reclamation • Seven full-time Regional Accessibility Coordinators in the Public Civil Rights Program at

the U.S. Fish and Wildlife Service • One full-time Civil Rights Analyst at the Bureau of Reclamation • Two quarter-time staff members (one EEO Specialist and one Supervisory EEO Manager)

at the National Park Service, and in FY 2017 and FY 2018 only, three quarter-time

3470 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2018, p. 46, https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_os_budget_justification.pdf. 3471 Ibid., 48-49; see U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2019, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_os_budget_justification.pdf. 3472 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2016, https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_OS_Greenbook.pdf. 3473 U.S. Dep't of the Interior, The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2017, https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_OS_Budget_Justification.pdf. 3474 Ibid. 3475 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 5, at 4-5. 3476 U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 6, at 6.

https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_os_budget_justification.pdf
https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_os_budget_justification.pdf
https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_OS_Greenbook.pdf
https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_OS_Budget_Justification.pdf

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Supervisory EEO Managers and six quarter-time EEO Specialists at the National Park Service

• One half-time Complaints Manager and EEO Specialist; three quarter-time Regional Chiefs, Office of Diversity and Inclusion; one quarter-time Diversity Outreach Specialist; and one quarter-time EEO Specialist at the Fish and Wildlife Service³⁴⁷⁷

Assessment Prioritization of Civil Rights Agency-wide DOI's agency-wide mission and self-identified priorities do not directly identify civil rights enforcement.³⁴⁷⁸ When asked about its current civil rights policy priorities, DOI OCR indicated that its main priority is "to ensure that the public is not discriminated against based [o]n all of its federally conducted and federally assisted programs and activities."³⁴⁷⁹ DOI OCR also pointed to Secretarial Order No. 3366, Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior, which initiates a new effort that aims to, in part, "proactively serve people with disabilities with respect to recreational opportunities at the Department."³⁴⁸⁰ DOI OCR does not have a direct line of authority to the agency head. DOI OCR reports directly to the Deputy Secretary of Interior, and ultimately to the Secretary.³⁴⁸¹ During the fiscal years examined, the number of cases that DOI OCR closed declined from 34 in FY 2016 to 7 in FY 2018.³⁴⁸²

³⁴⁷⁷ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 5, at 4. It was unclear from OCR's responses to USCCR's Interrogatories whether these positions were devoted to strictly internal civil rights enforcement, or if some of these positions worked on external civil rights enforcement. ³⁴⁷⁸ U.S. Dep't of the Interior, "About", <https://www.doi.gov/whoare>. The Commission notes that this includes specific civil rights protections for Native Americans. See, e.g., USCCR, Broken Promises, supra note 341, at 12-18 (describing treaty-based and other civil rights obligations of the federal government towards Native Americans). ³⁴⁷⁹ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 3, at 3. ³⁴⁸⁰ U.S. Dep't of the Interior, Order No. 3366, Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior (April 18, 2018), https://www.doi.gov/sites/doi.gov/files/uploads/so_recreation_opps.pdf; see also U.S. Dep't of the Interior, "Press Release: Zinke Signs Secretarial Orders to Increase Recreational Opportunities on Public Lands and Waters," Apr. 18, 2018, <https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>. ³⁴⁸¹ U.S. Dep't of the Interior, Strategic Plan for Fiscal Years 2018-2022, 2018, p. 6, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf> [hereinafter DOI, Strategic Plan FY 2018-2022]. ³⁴⁸² U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 7, at 6.

<https://www.doi.gov/whoare>
https://www.doi.gov/sites/doi.gov/files/uploads/so_recreation_opps.pdf
<https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>
<https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>
<https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf>

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In January 2018, DOI began requiring that its funding agreements for grants over \$50,000 align with the Secretary's priorities.³⁴⁸³ These priorities include to "actively support efforts to secure our southern border" and "utilizing our natural resources" for mining and other financial benefits, but except for listing "tribal self-determination, self-governance and sovereignty," they do not directly mention civil rights.³⁴⁸⁴ As discussed above, civil rights compliance is handled by a small staff.³⁴⁸⁵ Organizational Structure DOI OCR is located within the DOI Office of Policy, Management and Budget.³⁴⁸⁶ Tyvonia Ward is the head and Acting Director of the Office of Civil Rights.³⁴⁸⁷ See Figure 14.1 for DOI OCR's Organizational Chart. DOI OCR has indicated that its "organizational structure and general civil rights-related roles/responsibilities have not changed over the fiscal years in question."³⁴⁸⁸ DOI OCR is "the focal point for all civil rights, equal opportunity programs, and affirmative employment," in DOI, and works to "develop and enforce civil rights and equal opportunity programs pursuant to existing laws, executive orders and regulations and to ensure equal opportunity for all Departmental employees and federally assisted programs by the Department."³⁴⁸⁹ DOI OCR's Public Civil Rights Division states that it handles external complaints of discrimination on the grounds of race, national origin, age or disability under "any program or activity conducted by or which receives Federal financial assistance from the Department of the Interior," and it states that "Sex discrimination is prohibited in federally assisted educational programs."³⁴⁹⁰ DOI regulations also require that recipients of federal funding not discriminate on the basis of parental or marital status.³⁴⁹¹ Sloan Farrell is the Chief of the Public Civil Rights Division, and reports to the Acting Director of DOI OCR.

³⁴⁸³ See U.S. Dep't of Interior, Office of the Secretary, Memorandum to All Assistant Secretaries, Guidance for Financial Assistance Actions Effective Fiscal Year 2018 (Dec. 28, 2017), <http://apps.washingtonpost.com/g/documents/national/interior-guidance-for-fiscal-2018-grants/2698/>. See also Doyle, U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review," supra note 3429 (grants over \$50,000 will be reviewed to determine if aligned with priorities such as "actively support[ing] efforts to secure our southern border," ensuring "American energy is available to meet our security and economic needs," employing more veterans, and shifting "the balance toward providing greater public access to public lands over restrictions to access," according to accompanying memo). ³⁴⁸⁴ See "Interior's Priorities for FY 2018 Grants," The Washington Post, Jan. 9, 2018 (attaching U.S. Dep't of Interior, Office of Secretary Memorandum, Attachment: Priorities for Financial Assistance), <https://apps.washingtonpost.com/g/documents/national/interiors-priorities-for-fiscal-2018-grants/2698/>. ³⁴⁸⁵ See supra notes 3467-3477. ³⁴⁸⁶ U.S. Dep't of the Interior, "Organization Chart," <https://www.doi.gov/ibc/about-us/org-chart>. ³⁴⁸⁷ U.S. Dep't of the Interior, "Contact Us," <https://www.doi.gov/pmb/eoo/contact-us/>. ³⁴⁸⁸ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 4, at 3-4. ³⁴⁸⁹ U.S. Dep't of the Interior, "Office of Civil Rights and Chief Diversity Officer," <https://www.doi.gov/pmb/eoo>. ³⁴⁹⁰ DOI, "Public Civil Rights," supra note 3423. ³⁴⁹¹ 43 C.F.R. § 41.445.

<http://apps.washingtonpost.com/g/documents/national/interior-guidance-for-fiscal-2018-grants/2698/>
<https://apps.washingtonpost.com/g/documents/national/interiors-priorities-for-fiscal-2018-grants/2698/>
<https://www.doi.gov/ibc/about-us/org-chart>
<https://www.doi.gov/pmb/eoo/contact-us/>
<https://www.doi.gov/pmb/eoo>

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Figure 14.1: DOI OCR Organizational Chart

Source: U.S. Department of the Interior,

Strategic Planning & Self-Evaluation DOI produces a strategic plan every four fiscal years as required by the Government Performance and Results Act Modernization Act of 2010.³⁴⁹² During the time period studied, Interior operated under three strategic plans: the FY 2011 – 2016 Strategic Plan,³⁴⁹³ FY 2014-2018 Strategic Plan,³⁴⁹⁴ and the 2018-2022 Strategic Plan.³⁴⁹⁵ While none of the three plans specifically mention protection of civil rights, all plans discuss protection of Indian territorial and water rights.³⁴⁹⁶ Additionally, the 2011 Plan prioritized protecting Indian treaty and subsistence rights.³⁴⁹⁷ and

³⁴⁹² 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866. ³⁴⁹³ U.S. Dep't of the Interior, United States Department of the Interior Strategic Plan for Fiscal Years 2011 – 2016, https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2011-FY2016_StrategicPlan.pdf [hereinafter DOI, Strategic Plan FY 2011-2016]. ³⁴⁹⁴ U.S. Dep't of the Interior, Strategic Plan FY 2014-2018, 2014, <https://www.doi.gov/sites/doi.gov/files/migrated/pmb/ppp/upload/DOI-Strategic-Plan-for-FY-2014-2018-POSTED-ON-WEBSITE-4.pdf> [hereinafter DOI, Strategic Plan FY 2014-2018]. ³⁴⁹⁵ DOI, Strategic Plan FY 2018-2022, supra note 3481. ³⁴⁹⁶ Ibid., 13; DOI, Strategic Plan FY 2014-2018, supra note 3494, at 19; DOI, Strategic Plan FY 2011 – 2016, supra note 3493, at 27. ³⁴⁹⁷ DOI, Strategic Plan FY 2011 – 2016, supra note 3493, at 23.

https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2011-FY2016_StrategicPlan.pdf
<https://www.doi.gov/sites/doi.gov/files/migrated/pmb/ppp/upload/DOI-Strategic-Plan-for-FY-2014-2018-POSTED-ON-WEBSITE-4.pdf>
<https://www.doi.gov/sites/doi.gov/files/migrated/pmb/ppp/upload/DOI-Strategic-Plan-for-FY-2014-2018-POSTED-ON-WEBSITE-4.pdf>

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2014 Strategic Plan prioritized the strengthening of Tribal Nations and insular communities.³⁴⁹⁸ The FY 2018-2022 strategic plan prioritizes strengthening tribal self-determination, fulfilling U.S. government fiduciary obligations to Tribal Nations, and strengthening tribal economic and health capacities.³⁴⁹⁹ The U.S. Department of the Interior is required to submit an annual report to Congress, with the only statutory requirement being that the report "not exceed a total of one thousand two hundred and fifty pages."³⁵⁰⁰ DOI's most recent annual report covering FY 2018 makes no specific mention of civil rights, nor does it establish any goals or achievements for DOI OCR.³⁵⁰¹ Complaint Processing, Agency-Initiated Changes, & Litigation Complaints DOI OCR accepts external civil rights complaints that allege discrimination on the basis of race, color, national origin, gender, disability, religion, sexual orientation, or status as a parent.³⁵⁰² DOI OCR reported that it "investigated and resolved civil rights complaints in accordance with relevant statutes, regulations and policies to include DOI OCR civil rights directives and the Departmental Manuals."³⁵⁰³ Depending on the outcome of the investigation, this letter could be a Letter of Resolution (when the respondent has volunteered to take action to comply with the law), A Violation Letter of No Findings (when the respondent is found to be in compliance with the law), a Violation Letter of Findings (when the respondent is found to be in non-compliance with the law and pre-findings voluntary compliance cannot be achieved), or a Letter of Concern (when there is insufficient evidence of a violation, but there are certain matters of concern with the respondent).³⁵⁰⁴ DOI OCR is responsible for setting DOI civil rights complaint policies and standardizing complaint processing procedures across all DOI bureaus.³⁵⁰⁵ For all civil rights complaints received by any bureau of DOI, a bureau EEO officer or designee is responsible for processing the complaint.³⁵⁰⁶ Complaints filed that do not fall under the jurisdiction of a specific DOI bureau will

³⁴⁹⁸ DOI, Strategic Plan FY 2014-2018, supra note 3494, at 31. ³⁴⁹⁹ U.S. Dep't of the Interior, Strategic Plan FY 2018-2022, supra note 3481, at 32-34. ³⁵⁰⁰ 43 U.S.C. § 1465. ³⁵⁰¹ U.S. Dep't of the Interior, 2019/2020 Annual Performance Plan & 2018 Report (APP&R), Mar. 19, 2019, https://www.doi.gov/sites/doi.gov/files/uploads/doi_final_appr_2019-2020.pdf. ³⁵⁰² 43 C.F.R. § 17 et seq.; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 5. ³⁵⁰³ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 7, at 6. ³⁵⁰⁴ DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 13-14. ³⁵⁰⁵ U.S. Dep't of the Interior, Civil Rights Directive 2009-01: Policy for Implementing a Public Civil Rights Program (Jun. 25, 2009), pp. 1, 6-7 [hereinafter DOI, Policy for Implementing a Public Civil Rights Program]. ³⁵⁰⁶ DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 4; DOI bureaus with dedicated complaint processing staff include: the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey; see supra notes 3475-3477.

https://www.doi.gov/sites/doi.gov/files/uploads/doi_final_appr_2019-2020.pdf

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be processed by DOI OCR.³⁵⁰⁷ The process is also set forth in internal directives regarding the public civil rights complaints process, which provide that upon initial receipt of a complaint, the bureau that receives the complaint must date stamp all incoming correspondence in order to "ensure the complainant's ability to seek redress of the alleged discrimination in a timely manner."³⁵⁰⁸ The bureau then sends a letter acknowledging receipt of the complaint that informs the complainant that the matter is being reviewed.³⁵⁰⁹ If a received complaint is filed on behalf of another individual, the bureau will contact that individual to confirm that they would like to pursue the allegations, and will either continue reviewing the complaint or close the matter, depending on the individual's response.³⁵¹⁰ The internal directives state that the bureau that received the complaint will then review the complaint to determine whether it has jurisdiction to pursue an investigation and will either assign a case number when appropriate jurisdiction is determined, or will refer the complaint to the appropriate agency when there is no jurisdiction.³⁵¹¹ And according to federal regulations, for the bureau to have jurisdiction, the complaint must allege discrimination on one of the protected bases; it must allege discrimination that occurred in a program or activity that is federally funded or receives federal financial assistance; it must be covered by one or more of the statutes that Interior is responsible for enforcing; and the complaint must be filed in a timely manner.³⁵¹² DOI OCR will be notified if the bureau determines that they do not have the appropriate jurisdiction to accept and pursue a complaint investigation.³⁵¹³ Complaints must be filed within 180 days from the last date of the alleged discrimination.³⁵¹⁴ Internal directives provide that the bureau must also determine whether the complaint is complete, with a signed written explanation of what happened with sufficient information to understand the facts, a method of contacting the complainant, the basis of the complaint, the respondent information.³⁵¹⁵ The bureau must also identify the specific practice or service involved in the alleged discrimination to determine if there is a difference in the quality of service being provided; segregation or separate treatment in any part of the program; any restriction of the program benefits; different standards or requirements for participation; a failure to provide language assistance for LEP individuals; or the use of criteria or methods of administration that would "defeat or substantially impair the accomplishment of program objectives or would impact more heavily on members of a protected group."³⁵¹⁶

³⁵⁰⁷ DOI, Policy for Implementing a Public Civil Rights Program, supra note 3505, at 9. ³⁵⁰⁸ DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 5. ³⁵⁰⁹ Ibid., 5. ³⁵¹⁰ Ibid., 5. ³⁵¹¹ Ibid., 6. ³⁵¹² 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 7. ³⁵¹³ DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. ³⁵¹⁴ 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. ³⁵¹⁵ DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 6. ³⁵¹⁶ Ibid., 8; 43 C.F.R. §§ 17.6, 17.570, 41.605.

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DOI reports that it will initiate an investigation if the bureau has completed this initial review and determined that the complaint is complete, the bureau has jurisdiction, and the complaint is timely.³⁵¹⁷ If, during this initial review, the bureau finds that a complaint does not have merit, if the same allegations/issues of the complaint have already been addressed in a recently closed investigation or court case; if there is a refusal to cooperate on the part of the complainant or if

the death of a complainant makes it impossible to investigate; or if the complainant is referred to investigation; or if the complainant will undergo a Pre-investigative Administrative Closure.³⁵¹⁸ A complaint resolution can be negotiated at any time, even prior to an investigation taking place.³⁵¹⁹ Particularly, Alternative Dispute Resolutions can be used when appropriate, after considering “the allegations, number of persons affected, type and extent of relief involved, cooperation of the respondent, and other factors.”³⁵²⁰ Internal directives also provide that a complaint can be reopened at any time, if the respondent has not complied with the terms of the resolution agreement.³⁵²¹ Once the investigation is completed, a letter will be issued to close the complaint.³⁵²² Depending on the outcome of the investigation, this letter could be a Letter of Resolution, A Violation Letter of No Findings, a Violation Letter of Findings, or a Letter of Concern.³⁵²³ DOI OCR provided the following information about complaints during FY 2016 to FY 2018: Table 14.1: Number of DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018 No. of Complaints

Opened No. Complaints Investigated

No. Complaints Closed

FY 2016 47 47 34 FY 2017 24 24 13 FY 2018 20 20 8

Source: Dep’t of the Interior, Response to Interrogatory 7, at 6.

DOI OCR received 47 complaints in FY 2016, 24 in FY 2017, and 20 complaints in FY 2018. For all three fiscal years, OCR reported that 100 percent of the complaints opened were investigated. In FY 2016, FY 2017, and FY 2018, OCR closed 34, 13, and 8 complaints respectively. It is not clear why the number of complaints received declined so dramatically. In its 2002 report, the Commission noted that building trust with impacted communities is essential for effective civil

3517 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 8. 3518 Ibid. 3519 Ibid., 9; 43 C.F.R. §§ 17.6, 17.570, 41.605. 3520 DOI, Public Civil Rights Complaint Procedures, supra note 3425, at 9. 3521 Ibid. 3522 Ibid., 13. 3523 Ibid., 13-14. For further description of these outcomes, see supra notes 3503-3504.

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rights enforcement, and that at times, increasing awareness may lead to an increased number of complaints, which may be a sign of increasing efficacies.³⁵²⁴ DOI OCR also indicated that DOI bureaus and offices process external complaints under OCR as per its civil rights directives. OCR provided the following data to document these other agencies’ complaints: Table 14.2: Number of Non-DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018, by Bureau FY 2016 FY 2017 FY 2018 Opened Invest. Closed Opened Invest. Closed Opened Invest. Closed National Park Service

21 21 20 49 49 33 33 33 22

Fish and Wildlife Service

21 21 21 19 19 18 21 21 14

Bureau of Land Management

10 10 9 12 12 12 14 14 4

Office of Surface Mining Reclamation and Enforcement

5 5 4 4 4 3 3 3 2

Bureau of Indian Affairs

2 2 0 2 2 0 4 4 0

Bureau of Reclamation

2 2 2 0 0 3 3 0

Bureau of Safety and Environmental Enforcement/Bureau of Ocean Energy Management

4 4 1 2 2 0 1 1 0

Source: U.S. Dep’t of the Interior, Response to Interrogatory 7, at 7-9.

Table 14.2 (see above) displays the number of opened, investigated, and closed complaints for all the identified non- DOI OCR agencies that process civil rights complaints for the FY 2016 to FY 2018.

3524 See supra Ch. 1.

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Table 14.3: Total Number of Complaints by Type (Basis), FY 2016 to FY 2018 Basis Number of Complaints Percentage of Total Age 1 0.3% Sec. 504 Federally Conducted 74 22.5% ADA 245 74.6% Title VI 6 1.8% Title VII 1 0.3% EO 13160 1 0.3%

Source: U.S. Dep’t of the Interior, Response to Interrogatory 7, at 7-9.

See Table 14.3. DOI OCR reported that the highest number of complaints received over FY 2016 to FY 2018 from DOI OCR and non-DOI OCR agencies were ADA complaints, with a total of 227 ADA complaints opened or approximately 75 percent of all complaints. The second highest number of complaints received over the fiscal years in question were Section 504 complaints, with a total of 66 complaints opened or approximately 22 percent of all complaints. All other types of complaints made up approximately 3 percent of the total number of complaints. Proactive Compliance Evaluations Federal regulations provide that DOI OCR may initiate compliance reviews for entities that receive funding from the U.S. Department of Interior.³⁵²⁵ Recipients of federal funding may be subject to a pre-award compliance review conducted by DOI OCR, prior to the approval of any financial assistance, and a post-award compliance review for new awardees.³⁵²⁶ Specifically, DOI OCR can perform the following pre- or post-award compliance reviews:

- Onsite (“to provide the reviewer with a greater opportunity to assess compliance on a more objective basis”)
- Desk audit (offsite, to assess compliance with civil rights policies and practices)
- Follow-up (a subsequent review to determine whether the recipient has “resolved outstanding conditions of noncompliance uncovered in previous reviews”)
- Unannounced (without prior notification to the program officials)³⁵²⁷

According to internal directives, DOI OCR will select recipients to be reviewed based on criteria such as whether the recipient has ever been formally reviewed; evidence of a violation; frequency of complaints against the recipient or of violations from previous compliance reviews; or the size of the federally assisted program or amount of federal assistance provided to the recipient.³⁵²⁸ Then DOI OCR will undergo a pre-review preparation, to consult with other federal agencies, analyze other civil rights compliance reviews or complaints involving the recipient, assess statistical data

3525 43 C.F.R. § 17.330; U.S. Dep’t of the Interior, Civil Rights Directive 2011-02: Public Civil Rights Compliance Reviews (Mar. 14, 2011), p. 2 [hereinafter DOI, Public Civil Rights Compliance Reviews]. 3526 43 C.F.R. § 17.330; DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 2. 3527 43 C.F.R. § 17, passim; DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 5-6. 3528 DOI, Public Civil Rights Compliance Reviews, supra note 3525, at 6.

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relevant to program participation, develop a plan for the review, and notifying the recipient and any other entities involved.³⁵²⁹ The recipient will receive a notification letter approximately 60 days in advance of the scheduled review, which will let the recipient know the purpose and scope of the review, the date of the review, and will request an appropriate meeting location as well as any pertinent information prior to the review.³⁵³⁰ DOI OCR will then conduct an entrance conference with the recipient’s executive officer or designee, which occurs prior to the formal review.³⁵³¹ During the course of the review, DOI OCR will request and analyze the recipient’s records regarding their program participation, marketing/media/training materials, personnel policies, or other civil rights related plans.³⁵³² DOI OCR will also conduct a series of interviews with the recipient and community contacts, to ascertain information about the program operations.³⁵³³ DOI OCR may also conduct random site inspections at the recipient’s place of business.³⁵³⁴ When the review comes to a close, a closing conference will be held with the recipient to report findings, allow the recipient to comment on the findings, strive to obtain voluntary compliance, and inform the recipient of any reporting obligations.³⁵³⁵ A final report will be issued to the recipient, after which it will have 45 days to formally respond to the reviewing authority “on actions taken and planned along with timeframes to correct compliance violations.”³⁵³⁶ Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity DOI OCR has a specific regulatory mandate to provide assistance and guidance to recipients of federal funding to assist in voluntary compliance with civil rights laws.³⁵³⁷ Prior to FY 2016-2018, DOI OCR issued guidance documents in the form of civil rights directives designed to inform recipients of federal funding of their obligations under the law,³⁵³⁸ and to establish uniform procedures for processing complaints filed with DOI OCR.³⁵³⁹ DOI OCR did not issue any guidance documents during the fiscal years studied in this report.³⁵⁴⁰ DOI OCR is a subset of the Office of Policy, Management and Budget, and its website cannot be reached directly from the DOI homepage.³⁵⁴¹ DOI OCR makes contact information for all of its

3529 Ibid., 6-7. 3530 Ibid., 7. 3531 Ibid., 7. 3532 Ibid., 8. 3533 Ibid., 8-9. 3534 Ibid., 9. 3535 Ibid., 9-10. 3536 Ibid., 10. 3537 43 C.F.R. § 17.5(a). 3538 DOI, Policy for Implementing a Public Civil Rights Program, supra note 3505. 3539 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3540 U.S. Dep’t of the Interior, Response to USCCR Interrogatories, at Exs. A, B, C. 3541 From <https://www.doi.gov>, one would need to navigate to the “Office of Policy, Management & Budget” page, found under the “Bureaus & Offices” tab, then select “Civil Rights” under the “Offices” tab to arrive at the webpage for the Office for Civil Rights and Chief Diversity Officer.

<https://www.doi.gov/>

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public civil rights coordinators available on its website.³⁵⁴² The Public Civil Rights program page provides information about the public civil rights enforcement and DOI OCR’s complaint process.³⁵⁴³ DOI OCR only accepts public civil rights complaints in writing. The Public Civil Rights program is involved in education about as well as prevention of civil rights violations, so it may have some outreach and policy dissemination program, though none is visible online.³⁵⁴⁴ Interaction and Coordination with External Agencies and Organizations As a government office that enforces Section 504 of the Rehabilitation Act, DOI OCR may receive advice from the Interagency Disability Coordinating Council.³⁵⁴⁵ Section 504 of the Rehabilitation Act established the Interagency Disability Coordinating Council, composed of the “Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Assistant Secretary of the Interior for Indian Affairs, the Attorney General, the Director of the Office of Personnel Management, the Chairperson of the Equal Employment Opportunity Commission, the Chairperson of the Architectural and Transportation Barriers Compliance Board, the Chairperson of the National Council on Disability, and such other officials as may be designated by the President.”³⁵⁴⁶ This interagency council is responsible for “development and implementing agreements, policies, and practices” of federal agencies with responsibilities to effectuate the Act itself as well as with responsibilities “for promoting the full integration into society, independence, and productivity of individuals with disabilities.”³⁵⁴⁷ Furthermore, all agencies that have enforcement authority under Title VI are part of the Federal Interagency Working Group on Title VI, which seeks to facilitate collaboration across key areas of Title VI enforcement and compliance.³⁵⁴⁸ The Interagency Working group also seeks to resolve jurisdictional issues when a Title VI complaint may be filed with multiple agencies.³⁵⁴⁹ DOI has the statutory authority to enter into cooperative agreements with a state or political subdivision thereof, ³⁵⁵⁰ however the Commission is unaware of collaborations, cooperation, or partnerships that DOI OCR has with state or local entities that specifically concern the enforcement

3542 U.S. Dep’t of the Interior, “Public Civil Rights Coordinators,” <https://www.doi.gov/pmb/eo/public-civil-rights-coordinators> (accessed Jul. 15, 2019). 3543 DOI, Public Civil Rights Complaint Procedures, supra note 3425. 3544 DOI, “Public Civil Rights,” supra note 3423 passim. 3545 29 U.S.C. § 794c(b). 3546 Id. § 794c(a). 3547 Id. § 794c(b). 3548 Exec. Order No. 12,250, Leadership and Coordination of Non-discrimination Laws, 45 Fed. Reg. 72,935; 28 C.F.R. § 42 et seq.; U.S. Dep’t of Justice, Memorandum: Title VI Interagency Coordination (May 20, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordination_memo_5_20_13.pdf [hereinafter DOJ, Memo: Title VI Interagency Coordination]. 3549 DOJ, Memo: Title VI Interagency Coordination, supra note 3548. 3550 43 U.S.C. § 1457b.

<https://www.doi.gov/pmb/eo/public-civil-rights-coordinators>

<https://www.doi.gov/pmb/eo/public-civil-rights-coordinators>

https://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordination_memo_5_20_13.pdf

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of civil rights. If state or local jurisdictions receive DOI funding, they are subject to OCR's jurisdiction.³⁵⁵¹

Research, Data Collection, and Reporting DOI OCR collects data as part of the complaint process and compliance reviews of recipients of federal funding.³⁵⁵² The data collected through the complaint and compliance processes are not publicly available. The Commission is unaware of any additional civil rights issue research, data collections, or reporting that DOI OCR conducts.

3551 43 C.F.R. § 17.2. 3552 U.S. Dept of the Interior, Response to USCCR Interrogatory No. 3, at Exs. A, B.

497 Findings and Recommendations

Findings and Recommendations Findings Overarching Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics. As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. Federal enforcement of civil rights laws is subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the Executive branch. The Commission's conclusion in 2002 in our Blueprint for Civil Rights Enforcement continues to hold true today: in order to meet basic efficacy standards, federal agencies must prioritize civil rights; sufficiently fund and staff their civil rights offices; implement civil rights planning; issue policy guidance and regulations; provide technical assistance, education, and outreach; institute a complaint and case processing system; manage a compliance review system for federal funding recipients; and provide staff training. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unaddressed. Enforcement Tools Across the 13 agencies evaluated, the Commission found that agencies use enforcement tools that can be preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting). These federal civil rights offices vary in their statutory and regulatory authorization to use enforcement tools and in their effectiveness in using tools they have.

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As agency regulations have long required, agencies first must attempt to secure voluntary compliance as distinct from mandatory resolution. Agency emphasis of reliance on voluntary compliance, ignoring or denigrating compulsory enforcement as an available tool, can send a message that an agency will not use all of the tools at the agency's disposal if necessary to secure compliance. Prioritization for Civil Rights Agency-Wide Essential conditions to support effective federal civil rights enforcement involve agency-wide prioritization of civil rights, including through: structuring the agency such that the civil rights office operates in a centralized manner and the head of the civil rights office has a direct line of communication with the head of the agency; prioritizing resource allocation and staffing dedicated to external civil rights enforcement, and integrating civil rights into every component of the agency. Federal civil rights office budgets generally are currently, and have been over time, insufficient to allow for effective enforcement of their full statutory authorities. This finding of budget insufficiency for civil rights agencies is a persistent one in the Commission's federal civil rights enforcement evaluations over years. Nearly 10 percent of the Commission's 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources. In 2002, the Commission found that the greatest hindrances to fulfilling federal agency civil rights obligations over the prior decade were insufficient funding and inefficient, thus ineffective, use of available funds. The civil rights offices of some agencies (DOL CRC, DHS CRCL, EPA ECRCO, DOT DOCR, VA ORM, Treasury OCRD, and DOI OCR as well as EEOC) do not have specific staff or budgets dedicated solely to external enforcement of civil rights laws. Some of these offices have other responsibilities, for example, handling internal equal employment opportunity claims, without a clear delineation between the staff working on internal and external claims. The lack of distinction between these duties shows a lack of prioritization for external enforcement, and makes it difficult to evaluate the agency's enforcement efficacy, except with respect to EEOC, which is exclusively a civil rights enforcement agency. Generally civil rights office staffing levels fall below any reasonable bare minimum appropriate staffing for civil rights enforcement. These staffing levels have decreased overall, and in some civil rights offices precipitously, during the three fiscal years evaluated. From FY 2016 to FY 2018, the number of staff members in federal civil rights enforcement offices dropped from 5,155.5 to 4,816. This drop of more than 300 dedicated employees represents a 6% reduction in staffing for federal civil rights enforcement across the 13 agencies evaluated.

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In some civil rights offices the reduction in staff has been even more stark. DOL OFCCP lost 13% of its staff and in that same time period, HHS OCR staffing decreased by more than 10% in its direct enforcement offices. Bipartisan and bicameral Congressional consensus has persisted over six decades that federal civil rights enforcement should be prioritized. Even in contemporary very challenging budgetary conditions there is a consensus from the legislative branch that holds the power of the purse that federal civil rights budgets should be protected: Despite consistent Trump Administration requests to decrease funding, Congress has maintained nearly level or increased funding for federal civil rights enforcement during the three fiscal years the Commission investigated. Only some federal agencies prioritize civil rights such that their civil rights office executives report directly to the agency secretary or head of the agency. The head of DOJ CRT does not report directly to the Attorney General, the head of EPA ECRCO does not report directly to the EPA Administrator, and the heads of HUD FHEO, DOL CRC, VA ORM, Treasury OCRD, and DOI OCR do not report directly to their respective agency Secretaries. The heads of ED OCR, HHS OCR, DHS CRCL, DOT DOCR, and USDA OASCR report directly to their respective agency Secretaries. Some agencies, such as DOJ CRT, HHS OCR, ED OCR, and EEOC, have dedicated counsel for civil rights enforcement matters. In the remaining agencies, the civil rights office must secure the agency's general counsel approval for enforcement actions, diminishing authority of the civil rights office. Strategic Planning and Self Evaluation Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Civil rights goals or performance was evaluated between FY 16 to FY 18 in the agencywide strategic plans of DOJ, ED, HHS, HUD, DOL (for OFCCP), EEOC, DHS, EPA, and DOT. The agencywide strategic plans of DOL (for CRC), VA, USDA, Treasury, and DOI did not reference particular civil rights objectives. Separate and apart from agency wide strategic plans, civil rights office strategic planning can be an important management and evaluation tool for enhancing satisfaction of the congressional charge to the civil rights office. Agency civil rights offices did not consistently engage in public-facing strategic planning. Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including ED OCR and HUD FHEO, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed

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of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics. Only some agency authorizing statutes require agencies to report to Congress or the public about the effectiveness of their civil rights office enforcement practices. Currently, Congress explicitly requires some agencies, including ED, HUD, USDA, and DHS, to report to Congress on the work of their civil rights enforcement offices and whether these offices have met their statutory responsibilities. Other agencies, such as DOJ and EEOC, report on their civil rights office enforcement practices as a part of their agency's annual performance reports. Other agencies, such as Treasury OCRD, have published annual reports but not pursuant to a particular Congressional requirement. Over the fiscal years evaluated, even when required to file annual reports with Congress, civil rights offices have failed to submit their reports in a timely fashion. Of the agencies statutorily required to submit a report to Congress, including ED, HUD, USDA, and DHS, neither ED OCR nor USDA OASCR have filed reports since FY 2016. Complaint Processing, Agency-Initiated Charges, and Litigation Variations in rates of case openings, investigations, and case closures between federal administrations suggest that a civil rights office uses different policies under different administrations to decide whether a civil rights claim merits an investigation. Insufficient resources can cause civil rights offices to decide to prioritize responding to particular civil rights complaints rather than responding to or investigating every allegation, even when investigation of every allegation is required under the relevant statute or regulation. Some civil rights offices, including ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC, utilize regional offices located throughout the country to process and investigate complaints or violations in those jurisdictions. Some civil rights offices, including HUD FHEO and EEOC, utilize outside entities, such as state and local government agencies or non-profit organizations, to handle enforcement responsibilities. Some agencies, such as DOT, VA, and DOI, have a decentralized model, where the agency's civil rights office primarily or solely coordinates or provides recommendations for civil rights offices of subagencies or bureaus of the cabinet agency. All of the agencies evaluated in this report have the ability to open their own affirmative investigations without a complaint prompting the opening of a case. Proactive Compliance Evaluation The 13 agencies evaluated distribute trillions of dollars in federal funding to support programs and activities in many sectors of society, all of these funding recipients are subject to specific nondiscrimination laws.

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For some agencies, including USDA OASCR and DOL OFCCP, a compliance evaluation can entail an assessment of a funding recipient's program, including review of applicable civil rights policies, without investigating a particular instance of alleged discrimination. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Policy regulations and guidance documents, education, technical assistance, outreach, and publicity are all necessary tools for recipients of federal funding and other members of the regulated community to understand their legal obligations under federal civil rights laws. Such dissemination also helps the general public to know their rights and understand the civil rights office's role in enforcing these rights. Policy guidance documents do not change the underlying law. Without guidance from federal agencies on how they will enforce relevant laws, the laws still apply but the regulated community is left without an understanding of how civil rights offices apply the law to particular facts to protect the rights of impacted individuals. Several civil rights offices during the Trump Administration, including DOJ, HHS OCR, and DOL OFCCP, have stated policies or issued guidance favoring religious freedom over other civil rights. Unlike in the Obama Administration, in the Trump Administration several civil rights offices have acted to interpret statutory and regulatory language to not protect against discrimination on the basis of gender identity and to treat sex as exclusively assigned at birth. Enforcement of unlawful racially disparate impact is a required federal agency analytical tool, following longstanding Commission recommendation for its use, and it is critical to ensuring ongoing, prospective nondiscrimination. Interaction and Coordination with External Agencies and Organizations Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. DOJ's Assistant Attorney General for Civil Rights coordinates the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination against protected classes by federal agencies and funding recipients. Federal enforcement of civil rights laws is more effective when the agencies that enforce the same laws coordinate with each other to ensure comprehensive and consistent enforcement.

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Research, Data Collection, and Reporting The Commission has repeatedly found through its various investigations that data collection and reporting is essential to effective civil rights enforcement. The agencies that conduct research, data collection, and reporting on discrimination or disparities in relevant programs areas, such as ED OCR, which operates the Civil Rights Data Collection, and EEOC, are able to utilize this work to inform effective civil rights enforcement work. Few agencies engage in the type of public data collection, research and reporting needed to understand potential civil rights concerns, to inform effective civil rights enforcement work. Agency-Specific Findings Department of Justice, Civil Rights Division The cases DOJ CRT litigates are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual. DOJ CRT resolved 143 total cases in FY16, followed by 136.5 cases in FY17, followed by 109 cases in FY18. Those resolution numbers represent a nearly 25% drop between FY16 and FY18. The drop was not consistent across the different subsections of CRT; the most significant drops were in the sections on Educational Opportunities, Housing, and Special Litigation. DOJ CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections. DOJ's current strategy disfavoring resolution of cases by court-ordered consent decrees, as expressed via memo from the Attorney General in November 2018, negatively impacts effective enforcement of civil rights by minimizing the availability of an important mechanism for case resolution. Department of Education, Office for Civil Rights During the period of the Commission's review, specifically from FY 2017 and FY 2018, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly. During the time period studied in this report, ED OCR resolved thousands of cases pertaining to discrimination on the basis of race, national origin, sex, disability, and retaliation.

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ED OCR measures its efficacy, and the efficacy of its employees, by the speed with which it resolves cases (within or exceeding a timeline of 180 days). In FY 2016, it resolved 78% of cases within 180 days, and in FY 2017 it resolved 80% of cases within 180 days. ED OCR does not currently self-evaluate based on effectiveness of the results it achieves, compared against its statutory and regulatory mandate. ED OCR has, during the time period studied, become faster in its resolutions and narrower in the scope of its resolutions, significantly increasing the number of administrative closures without substantive change in school practices. ED OCR issued 11 guidance documents in the Obama Administration between Fiscal Years 2016 - 2017, while the Trump Administration's only guidance activity through Fiscal Year 2018 has been to rescind guidance and in one instance replace prior administration guidance documents with interim, explicitly temporary guidance. Department of Health and Human Services, Office of Civil Rights Under the Trump Administration, HHS OCR has restructured its office and staffing in a manner to prioritize religious liberty over other civil rights protections. HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2017, which was also an increase from the rate of case openings and closures from FY 2016. HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016. In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days. In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively. In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days. In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively. HHS OCR's direct enforcement work is primarily devoted to HIPAA compliance and enforcement; only 25% of the office's enforcement work is devoted to enforcing the civil rights laws under its jurisdiction. From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created Conscience and Religious Freedom Division, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices. Notwithstanding these requests, Congress' allocation to HHS OCR remained constant at \$38.8 million.

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Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity Of the fair housing cases that are filed under federal fair housing laws, approximately 77% are handled by state and local agencies, with oversight and funding from HUD FHEO. HUD reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results. HUD FHEO has the ability to bring its own Secretary-initiated investigations, where it can take action without a precipitating complaint. Historically, this power has been used to handle systemic issues. Unlike in previous years, HUD's agency-wide strategic plan no longer includes specific prioritization of fair housing, reflecting a change in civil rights prioritization at the agency. HUD has issued no civil rights policy guidance since 2016, although HUD testimony to the Commission identified guidance as one of five current civil rights enforcement priorities for HUD FHEO and HUD is required by regulation to provide guidance to help the community comply with civil rights law. HUD has proposed a new regulation that would increase the burden of proof for disparate impact discrimination in housing, significantly narrowing the application of the enforcement tool to reduce discrimination. Department of Labor DOL OFCCP sets an office-wide target goal of handling a certain number of systemic cases. OFCCP used to measure employee performance by case closure rates, but in the Trump Administration has switched to examining the scope of each case as a key component of evaluation rather than merely counting all cases equally. DOL OFCCP only has staff capacity to audit, per year, one to two percent of contractors over whom the office has jurisdiction. Nonetheless, DOL OFCCP requested a more than \$26 million budget reduction in FY 2018, seeking to reduce its total budget to \$88 million. The primary enforcement mechanism OFCCP uses is proactive compliance investigation, not driven by complaints filed with the agency, and OFCCP prioritizes identifying systemic discrimination in these compliance reviews. Equal Employment Opportunity Commission Like the U.S. Commission on Civil Rights, EEOC is independent and bipartisan, and does not operate at the direction of any particular presidential administration.

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EEOC conducts strategic planning and self-evaluation around its work, with specific strategic planning focused on enforcement priorities. EEOC strategic goals include targeting enforcement on an individual and systemic level. EEOC evaluates its employees on the basis of resolving individual complaints as well as identifying and resolving systemic discrimination. During FY 16-18, EEOC has conducted extensive research and outreach, including holding several hearings, to draft new guidance on workplace harassment. In an important and necessary effort to evaluate the possibility of pay discrimination, EEOC is beginning to collect pay data from employers, disaggregated by sex, race, and ethnicity. EEOC increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent. EEOC reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results. Department of Homeland Security, Office for Civil Rights and Civil Liberties Weakness in the statutory design of DHS CRCL challenges its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Congress charged DHS CRCL with advising DHS internally on DHS policies' satisfaction of civil rights principles. This responsibility is solely advisory and CRCL does not have the ability, except with respect to disability rights enforcement, to compel resolution to address specific violations or to discipline violators. DHS CRCL lacks the explicit authority to report directly to Congress without the Secretary's approval. DHS CRCL receives thousands of individual complaints in a year. Based on the issues raised in the complaints, DHS CRCL identifies potential patterns of civil rights or civil liberties allegations to determine which policy issues to prioritize. DHS CRCL does not individually investigate each complaint received. DHS CRCL reports that the allegations CRCL has received are increasingly complex and that CRCL does not have sufficient resources to respond to all of them. Environmental Protection Agency, External Civil Rights Compliance Office

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In 2016, EPA moved its external civil rights enforcement function to a suboffice within the Office of General Counsel, rendering the office authority more diffuse and more removed from the Secretary than it had in the past been. EPA ECRCO has a maximum of 13 full time equivalent staff members to enforce all federal civil rights within its jurisdiction. EPA ECRCO has, in the history of the office and during the specific time period studied for this report, issued only a handful of findings of civil rights violations and in one case secured corrective action to remedy the violation. During the time period studied for this report has come under federal court jurisdiction for continuous failure to timely resolve investigations it opens. During the time period the Commission reviewed, ECRCO has taken steps to strengthen staff capacity to enforce and to systematize its enforcement reviews to maximize consistent results. Department of Transportation, Departmental Office of Civil Rights DOT's Departmental Office of Civil Rights does not itself investigate or resolve external civil rights complaints, but instead processes cases for further handling by enforcement offices specific to the subagency with relevant jurisdiction. Department of Veterans Affairs, Office of Resolution Management VA collects data via survey of all individuals who interact with the VA's programs and facilities. VA ORM reviews that survey data to determine whether there are discriminatory issues arising even in the absence of a formal complaint. VA's annual reports to Congress do not specifically discuss activities related to external civil rights enforcement. Department of Agriculture, Office of the Assistant Secretary for Civil Rights In 2018, USDA OASCR reorganized its office, with the goal of elevating the civil rights functions to the agency mission level. The reorganization did not, as initially proposed, dismantle the central civil rights office or shift its enforcement responsibilities to the agency's Inspector General. The reorganization of the office was also prompted by longstanding concerns about USDA's civil rights office, which failed to remedy discrimination in USDA programs, as USDA itself acknowledged during the time period evaluated, characterizing its record as "unfortunate and checkered . . . with regards to civil rights."

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While the office has seen some improvement, such as in the time it takes to complete complaint intake/processing and investigation, the office has increased the amount of time it takes to adjudicate a complaint, and the case backlog continues to increase in the fiscal years reviewed. USDA OASCR has not filed required annual report reports to Congress detailing civil rights enforcement for either FY 2017 or FY 2018. Department of Treasury, Office of Civil Rights and Diversity Treasury OCRD does not have any policy guidance in place to assist its grant recipients on how to comply with Title VI's antidiscrimination protections, though it is currently working on drafting such guidance. Treasury OCRD has three employees, an increase from two employees in FY 2016, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$5 billion of financial assistance awarded annually by the agency. The data provided to the Commission shows that Treasury's civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending. Treasury is required by regulation to conduct periodic compliance investigations. The Commission's review does not indicate that Treasury has conducted such investigations during the time period investigated. Department of Interior, Office of Civil Rights DOI OCR has two employees, a decrease from the three employees it had in FY 2016 and 2017, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$9 billion of financial assistance awarded by the agency; DOI's external civil rights enforcement is decentralized and also partially handled by bureau employees.

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Recommendations Enforcement Tools Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail. Congress should give DHS CRCL the authority to require that relief and remedies be granted after finding violations of any of the civil rights laws under its jurisdiction. In addition, CRCL should have the power to require affected component agencies to provide a timely and concrete response to its recommendations and the ability to escalate disagreements with component agency leadership for ultimate resolution by the DHS Secretary. CRCL's reporting to Congress should be independent and not issued with the approval of the DHS secretary, agency general counsel, or OMB. Congress should apply the statutory independent reporting language that the DHS Privacy Office and Office of the Citizenship and Immigration Services Ombudsman have to CRCL as well. The role of CRCL chief legal counsel should be revived with operational independence from the Office of the General Counsel at DHS headquarters and be as independent as the chief counsels of the operational components. Prioritization for Civil Rights Agency-Wide Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans. Congress should authorize all civil rights offices, not merely, for example, DOJ CRT, HHS OCR, ED OCR, and EEOC, to staff agency counsel with authority to make civil rights enforcement decisions, reporting through the civil rights office head and the agency secretary or executive. This authority can speed federal civil rights enforcement and ensure appropriate civil rights expertise and dedication within agency counsel.

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Strategic Planning and Self Evaluation Whether annually or on a timeline coordinated with agency strategic planning, civil rights enforcement offices should engage in strategic planning to set annual and long-term objectives. For those civil rights offices that do not operate under a requirement to report their civil rights enforcement practices directly to Congress, Congress should enact a requirement that the offices do so. Such reporting should not require clearance or amendment from the Department or OMB, and the reports should include, where relevant, failure of other within-agency components to respond timely to advice or reports from civil rights offices. Given the importance of agency reports to public understanding of agency priorities and practices and of the status of civil rights satisfaction, Congress should impose a fund withholding and hearing oversight penalty from agency appropriations if agencies fail to submit annual (and, where required in statute, quarterly) reports regarding civil rights enforcement practices. Congress should hold at least annual public oversight hearings specific to each civil rights office to review and assess the effectiveness of civil rights office satisfaction of the jurisdictional charges Congress has given them. Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics. Complaint Processing, Agency-Initiated Charges, and Litigation Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms. Agencies, especially those that operate regional offices, should take steps to ensure consistent enforcement results. Likewise, agencies that utilize state, local, or private organization partnerships to enforce civil rights laws under their jurisdiction (as in the case of HUD, with its FHAP program, and EEOC, with its FEPA program), should identify ways to manage to ensure consistent results and Congress should fund these civil rights offices sufficiently to be able to manage that work. All agencies should publish their guidance for case selection and investigation, to ensure internal consistency and promote public trust in federal civil rights enforcement. Such transparency could also guard against undue political influence in the decision to open or how to conduct a particular civil rights investigation.

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No agency should prioritize enforcement of one civil rights protection over another. Proactive Compliance Evaluation All agencies with the authority to do so should engage in proactive compliance evaluations to ensure that funding recipients, and other entities subject to the agency's jurisdiction, are in compliance with nondiscrimination laws.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity Agencies should not reevaluate to withdraw disparate impact as an analytical tool. As the Commission first recommended in the 1960s, disparate impact analysis helps root out discrimination and equalize opportunity for all Americans. Agencies should recognize that federal antidiscrimination protections based on sex include discrimination based on sexual orientation and gender identity, and enforce accordingly. Agencies should issue guidance informing their regulated communities what the law is, how to comply with it, and how the agencies enforce it. Research, Data Collection, and Reporting Congress should appropriate funds for civil rights offices to engage in the public data collection, research and reporting necessary to understand where discrimination might be occurring in the program areas under the agency's jurisdiction, and to inform effective civil rights enforcement work. Such data collection, research, and reporting should include demographic data on the populations they serve, and require covered entities to collect detailed data as well. Data should be disaggregated and analyzed on multiple demographic variables to highlight where particular issues might impact individuals across identity characteristics. All agency civil rights offices should collect and publish enforcement and complaint data disaggregated by race, ethnicity, sex, ability status, religion, sexual orientation, gender identity, age.

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Commissioners' Statements, Dissents, and Rebuttals Statement of Chair Catherine E. Lhamon For six decades Congress has promised the nation what President Kennedy termed the "simple justice"¹ that federal funds would not support discrimination, first on the basis of race and over time on the additional statutory bases of sex, disability, religion, and age, among other protected identity characteristics.² Over that time, this Commission has repeatedly decried insufficient dollar resources appropriated to the federal agencies statutorily responsible for enforcing that simple justice. Based on documentation of these insufficiencies, the Commission called on Congress to provide additional funds to the agencies while also calling on the agencies themselves to better manage and deploy their resources to effectuate justice. In this report, the Commission returns to that effort, collecting current information about the staggering rates at which Americans believe themselves to be subject to discrimination, the devastating incidence and facts surrounding discrimination confirmed by federal agency investigations, the persistent federal failure to systematize or fully fund nondiscrimination efforts despite the prevalence of discrimination nationwide, and the human consequences of our nation's failure to fulfill our equity promises. No report could adequately capture the human toll, in lost potential and severed dreams, of unfulfilled equity promise. This report nonetheless details what it can: dollar insufficiency, staff number inadequacy, complaints uninvestigated, and systematic decision-making – when it occurs, as it does now – deliberately to minimize civil rights enforcement efficacy. Here, in addition, is what I know from experience: federal career employees in civil rights enforcement offices are overburdened and hamstrung in capacity to do their best work. Many of them stay anyway, in the hope to do as much as they can and succeed in mitigating harms in important ways across presidential administrations. I am grateful to them every day for what they do and I am grateful for having had the privilege to work among and meet so many of them during the three and a half years I enforced federal civil rights laws in schools in the Obama Administration. I made it a priority to highlight the need to add to their number to do the work Congress charged them to do and I am grateful to see that Congress continues to recognize those needs and increase funds for these critical efforts. The Commission heard compelling bipartisan testimony from current and former federal officials from both sides of the aisle, serving in Administrations of both Republican and Democratic presidents, about the significant practical impact of federal messages regarding civil rights and the

¹ See U.S. Department of Justice, Civil Rights Division, Title VI of the Civil Rights Act of 1964, <https://www.justice.gov/crt/fcs/TitleVI> (quoting President John F. Kennedy in 1963 as stating, "Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.") (last visited Oct. 1, 2019). ² Not all agencies have the same enforcement authority to enforcement against discrimination on the basis of each identity characteristic. The U.S. Department of Education's Office for Civil Rights, for example, lacks statutory jurisdiction to enforce against discrimination on the basis of religion.

<https://www.justice.gov/crt/fcs/TitleVI>

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value of strong, consistent results in federal civil rights enforcement. We heard bipartisan agreement about the need for an affirmative civil rights agenda, and the positive impact that can result from incorporating civil rights compliance into other agency work, ensuring that it is prioritized at a mission level for the agency.³ In addition, I know, from having reviewed case files in federal government, from having advocated as a litigator in nonprofit civil rights practice, and now from reviewing testimony the Commission receives: discrimination persists in both predictable and unpredictable ways. The harm it yields is uncompensable and incalculable and projects a social underbelly in which I am deeply ashamed to be an unwilling participant. I am committed, as I have been for the entirety of my professional life, to eradicating discrimination, recognizing the urgency and enormity of that task. I also know the unique power – and therefore responsibility – the federal government has to battle against inequities. I view this Commission report as crucially important toward that end: it collects data and evidence about what we are not doing to live up to our national commitments, and about how much hurt follows from that failure. This data and evidence forms the basis for my colleagues' and my call on Congress and our nation to right these wrongs. Each data point in the report reflects lives lived and harms redressed, or not. Having excavated the current status of federal civil rights enforcement, I am recommitted to the importance of and necessity for a federal civil rights backstop against harm. I remain deeply concerned about the prevalence of discrimination that persists and will persist absent an expectation and reality of meaningful law enforcement. I hope very much that this report forms a record against which to measure our federal civil rights enforcement successes and from which to evaluate what more Congress needs to do, to appropriate civil rights enforcement funds, to facilitate civil rights enforcement transparency in practices, and to support meaningful oversight to ensure agencies satisfy their congressional charges.

³ See, e.g., Arne Duncan, Former Sec'y of Educ., Dep't of Educ., Written Statement for the U.S. Comm'n on Civil Rights, at p. 1; Robert Driscoll, Former Deputy Assistant Attorney General at the Civil Rights Division at the U.S. Department of Justice and current member at McGlinchey Stafford, Briefing Transcript, unedited, at 146; Arne Duncan, Former U.S. Secretary of Education, Current Managing Partner of Emerson Collective, Briefing Transcript, unedited, at 76; Craig Leen, Director of the OFCCP, U.S. Dep't of Labor, Briefing Transcript, unedited, pp. 56-57; Kendrick Testimony, Briefing Transcript, pp. 266-67, 274-75; Briefing Transcript at 44-45 (Testimony of former CRT Deputy Assistant Attorney General Leon Rodriguez); Margo Schlanger, Professor of Law, University of Michigan Law School, Briefing Transcript, Nov. 2, 2016, p. 247. See also Robert N. Driscoll, "This Is What a Trump Civil-Rights Agenda Should Look Like," National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>.

<https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>

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Statement of Commissioner Karen K. Narasaki Our country's record on civil rights is not one of linear progress. Each step forward has often generated backlash and regression. In 1776, the Declaration of Independence declared "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." That was followed by a Constitution that condoned the ownership, sale, and

enslavement of Black men, women, and children for over 200 years and laws that reduced indigenous peoples to second class citizens on their own lands and kept immigrants from Asia from becoming citizens at all. The Civil War brought reconstruction but then decades of Jim Crow segregation enforced by state and federal courts. In 2008, we made history in electing a Black man to be president and eight years later elected a president whose administration is trampling civil rights protections and empowering white Supremacists, homophobes and chauvinists. In 2015, the Supreme Court declared that same sex couples have a right to marry and in 2019 it is debating whether they can be fired for it. The report is a robust evaluation of the civil rights enforcement activities of over a dozen federal agencies. These agencies consist of thousands of federal employees who swear an oath of office to support and defend the Constitution. They are further subject to standards of ethical conduct that remind oath-takers that "public service is a public trust." The Department of Justice's Standards of Conduct define that public trust obligation, stating that "the decisions and actions that federal employees take must be made in the best interests of the American people." It is these public servants who work to ensure that our laws are fairly enforced regardless of the political bent of a particular administration. Elections have consequences, and it is no surprise that any change in Administration brings about different priorities and strategies. But the changes I've watched unfold since 2016 are truly unprecedented in the nearly 30 years I have worked in the nation's Capital. This Administration is not just shifting enforcement priorities, they are undoing decades of civil and human rights progress. The extremity is evident in the amount of litigation successfully challenging many of these efforts in court and in the fact that Congress refused to support some of these changes, even

1 I would like to thank the Commission staff for their work researching, drafting, and revising this massive report. I would also like to thank my law clerk Erin Drolet from George Washington University Law School for her work on this report and statement, as well as my former special assistant Jason Lagria and my current special assistant Peach Solits. 2 Bill Chappell, "Supreme Court Will Hear Cases On LGBTQ Discrimination Protections For Employees," NPR News, April 22, 2019. <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>. 3 5 USC § 3331 "Oath of Office. An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 4 5 CFR § 2635.101(a).

<https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>
<https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>

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when the President's party controlled both the House and Senate. Further, the radical departure from decades of well accepted civil rights norms has put civil servants in the unenviable position of weighing directives from a new boss in conflict with the obligations of their oaths of office. As our report documents, this Administration's effort to undermine civil rights enforcement is multi-pronged. First, the Administration has made strategic, process-related decisions that are intentionally designed to make federal enforcement less effective—primarily by proposing to basically eliminate some civil rights enforcement offices, or proposing dramatic budget cuts for others, along with changes in procedures that sideline important enforcement tools. Second, the Administration has aggressively taken actions that allow the views of individual religious sects to supersede the civil and human rights of LGBTQ people, and has terminated the government's efforts to protect voting rights of vulnerable minority citizens in service of naked partisan election interests. These partisan political interests went so far as to attempt to manipulate the count of minorities in the decennial census, a function so important to our democracy that it is outlined in Article 1 of our Constitution. These actions undermine the morale of hard working federal civil rights attorneys and staff. For example, in its last budget proposal, the Administration called for the elimination of EPA's Office of Environmental Justice. This office supports efforts meant to remedy the impacts of environmental racism on historically marginalized communities. Though ultimately unsuccessful in eliminating the office through the budgetary process, the move prompted a senior official and long-term civil servant from that office, Mustafa Ali, to resign. The Administration's budget also proposed eliminating OFCCP at DOL, claiming that its duties could be performed by another existing agency. In so doing, the Administration sends the message to hundreds of civil servants, and consequently the thousands of Americans benefitting from their work and to their employers who seek to skirt the law, that the protection of civil rights is not a priority. An example of this Administration's efforts to intentionally tie the hands of federal civil rights attorneys through changes in procedure is DOJ's newly adopted position limiting the use of consent decrees. The memorandum outlining the new policy, authorized by former Attorney

5 Fred Barbash, "Litigation against executive branch by coalitions of states grows in response to unilateral actions by president and gridlocked Congress." The Washington Post, August 24, 2019. 6 Report at 34. 7 Robert Barnes and Ann E. Marimow, "Supreme Court puts census citizenship question on hold." The Washington Post, June 27, 2019. 8 Because it lacks enforcement authority, it is not discussed at length in this report. 9 Brady Dennis. EPA environmental justice leader resigns, amid White House Plans to dismantle program. Washington Post, March 9, 2017. 10 Report at 283. The Republican-controlled Senate Appropriations committee issued report language squarely dismissing the idea, stating "The Committee rejects the budget's proposal to begin plans to merge the OFCCP with the Equal Employment Opportunity Commission." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2018, Report at 30. <https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriation%20-%20Report%20115-150.pdf> 11 See Report at 93; Sessions Memo at n. 2 ("As used in this memorandum, the term 'consent decree' means a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt").

<https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>
<https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>

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General Jeff Sessions, makes clear that DOJ leadership will view requests to sign off on consent decrees, and the use of monitors, with skepticism. This effective abandonment of consent decrees is important because they are such a powerful tool for civil rights enforcement—they are carefully negotiated, can remain effective as long as is necessary to remedy the violation (including through changes in political leadership), and they utilize the oversight authority of federal courts. They bind the parties to their obligations in the same way contracts do. Consent decrees have been used particularly successfully in cases involving law enforcement agencies and environmental violations. Publicly announcing a policy change disfavoring consent decrees will deeply undermine the negotiating position of DOJ attorneys—it sends a message to state and local governments that DOJ attorneys have little leverage to compel compliance for violations. A further example is the recent rulemaking undertaken by the Department of Housing and Urban Development, limiting the ability of federal civil rights attorneys to effectively pursue disparate impact claims under the Fair Housing Act. The proposed rule, issued in August 2019, significantly raises the standard required for pleading a "disparate impact" case, a necessary tool to challenge facially neutral housing policies or practices that have a discriminatory impact on people of color, people with disabilities, or other protected groups. The proposed rule will require that challenges preemptively address and rebut possible defenses in initial pleadings, and will also provide defendants with a "safe harbor" to protect themselves from liability even if they are using discriminatory algorithms developed by a third party. "They have elevated the bar so high that it is virtually insurmountable," Lisa Rice, president and chief executive of the National Fair Housing Alliance, said of the requirements proposed in the rule. In addition to using the budget and other processes to undermine civil rights enforcement, the Administration has also changed course in many substantive civil rights policy areas. An obvious example is this Administration's rollback of efforts to combat LGBTQ discrimination. One strategy the Administration has used is the elimination of data collection on LGBTQ status. Most troubling is that the Administration pursues this agenda under the stated rationale of promoting of religious liberty—but its inconsistent application gives away that the true motivation is curbing LGBTQ protections.

12 Sari Horwitz, "In one of his final actions as attorney general, Sessions moves to restrict police reform agreements," The Washington Post, November 9, 2018. https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a55347f48762_story.html 13 Federal Register, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," August 19, 2019. <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard> 14 Tracy Jan, "HUD raises the bar for bringing discrimination claims" The Washington Post, August 16, 2019. <https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/> 15 Id. 16 Matt Sedensky, "Federal surveys trim LGBT questions, alarming advocates," AP News, March 20, 2017. <https://apnews.com/6443749ce29947f3b57f5e866ec038e9>

https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a55347f48762_story.html
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<https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/>
<https://apnews.com/6443749ce29947f3b57f5e866ec038e9>

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The Administration has encouraged federal agencies to focus on protections for religious freedom, leading multiple agencies to issue memoranda and new policies that follow suit. One example is DOJ's "Principles of Religious Liberty." Its stated premise: "Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith, and complying with the law." DOJ has used their authority to support the rights of a bakery owner refusing to sell a wedding cake to a same sex couple and the rights of a student group at a public university to discriminate against gay students. Yet DOJ offered no assistance to the Standing Rock Sioux Tribe when they objected to a pipeline likely to pollute a sacred waterway. Even more revealing is the federal prosecution of Scott Warren, who argued that his religion compelled him to offer life-saving water and aid to undocumented immigrants, but which DOJ labeled a felony. His recent case ended in a hung jury. Similarly, DOJ did not intervene in a Supreme Court stay of execution request involving a Muslim death row inmate asking that an imam be present at his execution, rather than the Christian chaplain on staff generally available to other inmates. The Supreme Court denied the stay and he was executed without the presence of an imam. Most recently, the Department of Justice unsuccessfully sought to convince the Equal Employment Opportunity Commission, the principle federal employment civil rights enforcement agency, to change its position and join DOJ's Supreme Court brief arguing that businesses can discriminate against transgender employees. 24

17 Report at 137. (In 2017, DOJ issued a memorandum detailing twenty principles of religious liberty and how other agencies can implement these principles into their own practices, HHS announced a new, similar focus on religious protections, and DOL implemented new policy directives in response to Supreme Court decisions and Executive Orders about religious freedoms.) 18 Attorney General Jeff Sessions, Department of Justice Memorandum, "Principles of Religious Liberty," October 6, 2017. <https://www.justice.gov/opa/press-release/file/1001891/download> 19 Robert Barnes, "In major Supreme Court case, Justice Dept. sides with baker who refused to make wedding cake for gay couple," The Washington Post, September 7, 2017. https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/fb84f116-93f0-11e7-89fa-bb822a46da5b_story.html 20 Justice Department backs Christian group in U. Iowa dispute. AP News, December 21, 2018. <https://www.apnews.com/09b0dbaa7a554ec2b9df66a0705de333> 21 Jenni Monet, "For Native 'water protectors,' Standing Rock protest has become fight for religious freedom, human rights." PBS NewsHour, November 3, 2016. The protests and litigation began during the Obama administration. On November 2 2017, President Obama announced an intention to explore ways to reroute the pipeline, but in January 2017, the new Administration issued an executive order to halt the inquiry into alternatives and to expedite implementation of the original plan, despite continued protests and litigation. 22 Miriam Jordan, "An Arizona Teacher Helped Migrants. Jurors Couldn't Decide if It Was a Crime." The New York Times, June 11, 2019. 23 Matthew S. Schwartz, "Justices Let Alabama Execute Death Row Inmate Who Wanted Imam By His Side," NPR News, February 8, 2019. <https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side> 24 Contrast this decision to one decided by the Court seven weeks later, granting a stay of execution to a Buddhist inmate to accommodate his request for the presence of his Buddhist spiritual advisor, without a clear explanation for the differing outcomes. Nina Totenberg, "Supreme Court Sees 2 Similar Death Penalty Questions Very Differently," NPR News, March 30, 2019. <https://www.npr.org/2019/03/30/708238203/supreme-court-sees-2-similar-death-penalty-questions-very-differently> 24 EEOC won a discrimination claim on behalf of the plaintiff in the Sixth Circuit in 2018. "Justice Department Urges Civil Rights Agency to Flip LGBT Stance," Bloomberg Law, August 13, 2019. <https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>

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DOJ's brief to the Supreme Court argued that Title VII didn't protect a transgender employee from being fired from her job at a funeral home, where her boss justified the firing based on his Christian faith. In addition, LGBTQ advocates are concerned about a recent rule issued by the Department of Health and Human Services that expands the circumstances under which health care workers can object to providing health care services based on religious or moral grounds. There is particular concern around providing treatment to transgender and HIV-positive patients, as well as a lack of clarity regarding the obligation of workers to provide life-saving care in an emergency. So while this administration uses religion to legitimize the discriminatory treatment of the LGBTQ community, they arbitrarily ignore these purported principles when the religious liberty invoked falls outside their own views against disfavored minorities. The Commission examined these questions of balance in its report entitled "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties." The report concluded that "Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires." In a democracy, one person's religion cannot be used to inflict harm against those who do not share that belief and one religion cannot be favored over others. A second example of this Administration's fundamental policy shift is the extent of its efforts to limit voting rights access, which has exacerbated the impact of the Supreme Court's gutting of Section 5 of the Voting Rights Act in Shelby County v. Holder. Removing Section 5 gave jurisdictions with a history of voter discrimination the ability to make changes to voting procedures without permission from the DOJ. Because of this, jurisdictions previously covered by Section 5 saw an increase in racial discrimination in voting and significantly higher purge rates. The DOJ under this Administration has taken a position of silence towards rectifying these issues, and in some cases, has come to support voter purges. In 2017, in anticipation of Husted v. A Philip Randolph Institute in the Supreme Court, the DOJ filed an amicus brief which supported allowing the state of Ohio to implement a system that would remove voters from the voter roll because of

25 R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, Brief for the Federal Respondent Supporting Reversal, p. 3. https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_16-107btsUnitedStates.pdf 26 "What the new religious exemptions law means for your health care," PBS NewsHour, May 3, 2019. <https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care> 27 U.S. Commission on Civil Rights, "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties," September 2016, p. 26. Available at <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> 28 Report at 158. 29 U.S. Commission on Civil Rights, "An Assessment of Voting Rights Access in the United States," September 2018, at 45; Report at 121; Joe Davidson, "Almost 16 million voters were removed from the rolls. We should be alarmed," The Washington Post, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd.

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<https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care>
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their failure to vote.³⁰ Their only cited reason for changing their position was the change in administration.³¹ And despite the increase in voter presence since the ruling in Shelby, as of May 2019, the Civil Rights Division of the DOJ had not filed any lawsuits to prevent voting discrimination based on Section 2 of the Voting Rights Act, the section that prohibits voting procedures that discriminate based on race.³² The proposed budget cuts, the self-defeating enforcement strategies, and the dramatic policy shifts—many likely in contravention of an agency’s stated mission—have no doubt played a role in the accelerated departure of career staff since 2016.³³ The federal government was already losing institutional expertise, relationships, and memory because of a growing wave of retirements. The current Administration has accelerated the brain drain as career staff have been pushed out, in part because they are not being permitted to pursue the mission of the agency and in fact may be asked to act contrary to the historic mission of the agency.³⁴ These departures will have a detrimental impact on the effectiveness of federal agencies and their abilities to manage their civil rights caseloads.³⁵ Having a robust and functioning career staff, in any federal agency, ensures a level of consistency and experience across administration changes. The past few years have been a dark time at many federal agencies as public servants grapple with these conflicts. There are career employees who have worked hard over the past decade to advance the rights of LGBTQ people, but are suddenly being directed to carry out “religious liberty” interests at the expense of this community must surely feel like a violation of their oath of office. But as people are forced to confront these conflicts head on, many are holding true to their commitment to their agencies’ missions. As one civil servant stated in a recent interview, “A lot of us are banding together, not to do some ‘deep state’ takeover. . . we’re just trying to make sure all the functions of the agency that are being neglected at least continue in some form.”³⁶ History is replete with examples of courageous civil servants who worked to fulfill their oaths of office. Federal workers who sought to help the Jewish people being tortured and murdered by the

30 U.S. Comm’n on Civil Rights, “The U.S. Commission on Civil Rights Raises Concern about Reversal of Department of Justice Position in Key Voting Rights Case,” Aug. 18, 2017, 31 Id. 32 Joe Davidson, “Almost 16 million voters were removed from the rolls. We should be alarmed,” The Washington Post, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd. 33 Report at 30–32. 34 Report at 318; Brian Naylor, “Why the Federal Workforce Morale Is at an All-Time Low,” NPR, Jan. 29, 2018, <https://www.npr.org/2018/01/29/581674922/why-the-federal-workforce-morale-is-at-an-all-time-low>. 35 Report at 35, 164. 36 Rachel M. Cohen, “I Fully Intend to Outlast These People’: 16 Federal Workers on What It’s Really Like to Work for the Trump Administration,” The Washingtonian, April 7, 2019.

https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd
<https://www.npr.org/2018/01/29/581674922/why-the-federal-workforce-morale-is-at-an-all-time-low>

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Nazis.³⁷ Federal workers who risked their lives³⁸ to enforce the Voting Rights Act of 1965 in the Deep South where lynchings were once so routine that white southerners brought their kids and picnic baskets.³⁹ Federal workers who became whistle blowers in the interest of protecting the American people.

I had the opportunity to visit the Equal Justice Institute’s Legacy Museum and the Memorial for Peace and Justice in Montgomery, Alabama. The museum and the memorial powerfully document the hundreds of thousands of Black people who were enslaved and the thousands who were lynched and murdered by whites through 1950. I recommend that all Americans visit both. Unfortunately, our dark days are not behind us and the legacy of slavery, Jim Crow, and current racism, xenophobia, sexism, bigotry and homophobia are still present and require vigorous government intervention. As Dr. Martin Luther King, Jr. once observed, “It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.”⁴⁰

37 The United States Holocaust Memorial Museum, online exhibit “Americans and the Holocaust,” featuring stories of Henry Morgenthau Jr., Raymond Geist, Hiram Bingham Jr., and Frances Perkins. <https://exhibitions.ushmm.org/americans-and-the-holocaust/stories/americans-who-dared> 38 Steven H. Wright, “Voter Discrimination Just Got Easier,” N.Y.R. Daily, July 29, 2014. “For almost fifty years, the US government has had an especially effective tool for ensuring fair elections: sending teams of federal observers to polling stations across the country. Though relatively little known, the program has been crucial in dismantling the discriminatory practices that disenfranchised voters of color. In the program’s early days, federal monitors risked their lives to collect evidence courts needed to outlaw the electoral mechanisms of Jim Crow.” 39 “Lynching in America: Confronting the Legacy of Racial Terror,” Equal Justice Initiative, fn 163. <https://lynchinginamerica.eji.org/report/> 40 Martin Luther King, Jr., excerpt from speech at Western Michigan University, December 16, 1963. <https://wmich.edu/sites/default/files/attachments/MLK.pdf>

<https://exhibitions.ushmm.org/americans-and-the-holocaust/stories/americans-who-dared>
<https://lynchinginamerica.eji.org/report/>
<https://wmich.edu/sites/default/files/attachments/MLK.pdf>

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Statement of Commissioner Michael Yaki President Trump and his Administration have pursued and permitted actions that have sought to restrict or deny the hard won and hard fought civil liberties of lesbian, gay, bisexual, and transgender (LGBT) people. As recently as August 2019, after garnering his first endorsement from the Log Cabin Republican group,¹ Trump shared his belief that “I’ve done very well with [the LGBT] community and some of my biggest supporters are of that community, and I talk to them a lot about it. I think I’ve done really very well with that community.”² Despite this curious self-perception, seemingly no other President has so blatantly and deliberately targeted the rights of the LGBT community. In his apparent zeal to appease an intolerant segment of his supporters, his Administration has trotted out a familiar attack on the LGBT community couched in a dubious First Amendment wrap -- the elevation of “religious freedoms” over other civil liberties.³ The families, careers, and, in fact, actual lives of the LGBT community are at stake. The Commission’s FY 2019 Statutory Enforcement Report examines a number of civil rights issues, all of which are subject to federal agency oversight, and many of which are of critical importance to LGBT people.⁴ Further, the Enforcement Report exposes President Trump’s

1 NBC News, Trump Ducks LGBTQ Discrimination Question, Says Gays “Like the Job I’m Doing,” August 20, 2019, <https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>. 2 Washington Blade, Trump: “I’ve Done Very Well” With LGBT Community, August 20, 2019, <https://www.washingtonblade.com/2019/08/20/trump-ive-done-very-well-with-lgbt-community/>. 3 For the Commission’s recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, see U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Rights, September 2016, <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> (“Peaceful Coexistence”). 4 These include

immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns. [original footnotes omitted.]

U.S. Commission on Civil Rights, Are Rights Reality? Federal Civil Rights Enforcement: A Study of Thirteen Agencies from FY 2016 – FY 2018, November 2019, p. 59 (“USCCR Enforcement Report”). The Commission correctly emphasizes that

[o]ver the past few years, the Trump Administration . . . made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers, older adults, foster youth and parents, crime victimization, and disease prevention. [original footnotes omitted.]

<https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>
<https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>
<https://www.washingtonblade.com/2019/08/20/trump-ive-done-very-well-with-lgbt-community/>
<https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>

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Department of Justice’s Civil Rights Division for “removing priorities to protect the rights of . . . LGBT individuals from discrimination, harassment, and violence.”⁵ Meeting the goals of the President’s ultra-conservative followers is a common theme among these issues, be it expressed implicitly or explicitly.⁶ Among these many concerns, those which specifically invoke religious freedoms as a justification for limiting LGBT rights merit special attention. For example, the Administration has announced plans to allow adoption agencies, including those which receive federal funding, to stand under the umbrella of religious liberties to discriminate against prospective adoptive parents based upon the prospective parents’ sexual orientation or gender identity.⁷ This is an issue about which I have previously written some years back. There, I cited the scientific consensus that same-sex couples are as fit and suited for adoption as heterosexual couples.⁸ There is no rationale based on the best interests of a child that merit such

Ibid., p. 66. 5 Ibid., p. 82. 6 Overall,

Trump and his aides have issued a wave of regulations, executive orders, legal briefs and personnel appointments aimed at reversing large parts of the Obama administration’s civil rights agenda, winning plaudits from religious conservatives who form the bedrock of Trump’s political support. . . The Trump administration has sided against LGBT activists on a host of issues over the past two years, including banning transgender troops from serving in the military and arguing in court that civil rights laws to do not protect employees from discrimination based on sexual orientation or gender identity.

The Washington Post, Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections, May 31, 2019, https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html. The National Center for Transgender Equality has compiled a comprehensive and disturbing list of anti-LGBT actions by President Trump and his Administration from February 22, 2017 forward. See National Center for Transgender Equality, Trump’s Record of Action Against Transgender People: Anti-Transgender and Anti-LGBTQ Actions, <https://transequality.org/the-discrimination-administration>. GLAAD has maintained a similarly informative compilation. See GLAAD, Donald Trump: President of the United States, Presidency, <https://www.glaad.org/tap/donald-trump>. 7 Axios, Scoop: Trump’s Plan to Let Adoption Agencies Reject Same-Sex Parents, May 24, 2019, <https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>. 8 For a detailed history and explication of the history of barriers to the adoption of foster children by same-sex couples in the U.S., see U.S. Commission on Civil Rights, The Multiethnic Placement Act: Minorities in Foster Care, Statement of Commissioner Yaki (Rebuttal), July 2010, p. 148, https://www.usccr.gov/pubs/docs/MEPA_Briefing_Final_07-01-10.pdf. Regarding the immediate needs large number of foster children awaiting adoption by loving parents, I stated that

https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html
<https://transequality.org/the-discrimination-administration>
<https://www.glaad.org/tap/donald-trump>
<https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>
<https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>
https://www.usccr.gov/pubs/docs/MEPA_Briefing_Final_07-01-10.pdf

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a policy change by the Administration. There is only a rationale based on phobia that deprives innocent children of a chance at a family life.⁹ President Trump also has prioritized the reversal and curbing of employment protections for LGBT people. The rights of LGBT people to be protected from animus-based discrimination in the workplace are not secure except where states and localities have chosen to provide legal protections and in limited jurisdictions by judicial decision.¹⁰ The Enforcement Report discusses in detail President Trump’s August 2019 proposed rule seeking to allow federal contractors to discriminate against LGBT employees and job applicants solely on the basis of sexual orientation under the rubric of religious freedom.¹¹ Again, with no apparent rationale tied to business

[I]me does not stand still for children, and we have a duty to recruit and explore all appropriate alternatives for these children. The United States Department of Health and Human Services should assist in this effort by developing education and outreach programs targeted at helping adoption agencies which want to recruit prospective families headed by lesbians and gay men. Politicians and bureaucrats may have the luxury of time in which to dither and waffle. For children whose development is benefited by having caring, supportive, and permanent families [including LGBT parents], time is not a luxury they can afford.

9 The American Civil Liberties Union filed a pre-emptive lawsuit in May 2019. See American Civil Liberties Union, Trump's Anti-LGBTQ Agenda Will Keep Foster Children From Having a Loving Home, May 30, 2019, <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>. 10 In the first instance, LGBT people are not explicitly protected by the U.S. Civil Rights Act of 1964. See P.Law 88-352, 78 Stat. 241. However, Title VII of the Civil Rights Act does protect people from discrimination based upon sex. Therefore, in recent years, the U.S. Equal Employment Opportunity Commission has determined that Title VII protects LGBT people from workplace discrimination. A number of courts have followed this interpretation and held that Title VII of the U.S. Civil Rights Act protects LGBT people from workplace discrimination. For a full discussion of these issues as of 2017, including the EEOC's relevant actions, see U.S. Commission on Civil Rights, Working for Inclusion, November 2017, "USCCR Working Report," https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf. More recently, the U.S. Solicitor General is seeking to reverse progress by asking the United States Supreme Court to rule that the protections against sex discrimination afforded by Title VII of the Civil Rights Act of 1964 pertain to "biological sex" only and do not include sexual orientation or gender identity discrimination. See, e.g., R.G & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission, et al., Brief for the Federal Respondent Supporting Reversal, https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; Gerald Lynn Bostock c. Clayton County, Georgia and Altitude Express, Inc. et al v. Melissa Zarda, et al Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf; and The New York Times, Can Someone Be Fired for Being Gay? The Supreme Court Will Decide, September 23, 2019, <https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>. 11 USCCR Enforcement Report, p. 300. For the Commission's recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, see Peaceful Coexistence, supra note 3. In addition to what the Enforcement Report presents,

<https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>
<https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>
https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf
https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf
https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf
<https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>
<https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>

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necessity other than providing a justification for discrimination, the use of federal authority to turn back the clock on federal rights is a well-used implement in the Administration's anti-LGBT toolbox. President Trump's Department of Justice also may be initiating a pattern of involvement in individual anti-LGBT religious freedom discrimination cases in state courts. As recently as September 27, 2019, the Administration filed a "United States Statement of Interest" in an Indiana state court case involving a gay teacher fired by a Catholic school. Here, the Administration expressed its "interest" in ensuring that religious freedom is held above civil rights for LGBT people.¹² This follows the Administration's prior intervention in the Colorado bakery case, where

[t]he Department of Labor said the rule is proposed in order to provide "the broadest protection of religious exercise, for companies that compete for federal contracts. ... The proposal is expansively written and makes clear that the 'religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose.'" And also makes clear that "employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases." And, crucially, the proposed rule relies on an array of legal opinions to construct a new, national legal test of whether a company is "religious." The company need not be primarily religion-oriented. It need only to declare itself to be, for instance, religious "in response to inquiries from a member of the public or a government entity."

NBC News, Labor Dept. Proposes Expanding "Religious Exemption" in Hiring, August 14, 2019, <https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>. See also American Civil Liberties Union, ACLU comment on Department of Labor Proposal to License Discrimination in the Name of Religion, August 14, 2019, <https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>. 12 U.S. Department of Justice, Justice Department Files Statement of Interest in Indiana Lawsuit Brought by Former Teacher Against Archdiocese, September 27, 2019, <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>. See also United States Department of Justice, The United States' Statement of Interest, in the Marion Superior Court, Civil Division #1, State of Indiana, County of Marion, Joshua Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc., Cause No. 49D01-1907-PL-027728, September 27, 2019, <https://www.justice.gov/opa/press-release/file/1205506/download>. Historical context regarding the federal government's treatment of LGBT employees is critical here. The actions of the Administration represent a conscious step backwards to the virulently anti-LGBT component of the repressive McCarthy Era. Although the Executive Order did not specifically bar LGBT people from federal employment, it banned any persons deemed to be at risk of blackmail. See Executive Order 10450, Security Requirements for Government Employment, 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, August 23, 1957, <https://www.archives.gov/federal-register/codification/executive-order/10450.html>. The painful irony here is that President Eisenhower created this very United States Commission on Civil Rights by signing the Civil Rights Act of 1957, Public Law 85-315, 71 Stat. 634, see <https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>, in August of that year, a mere four months after he signed Executive Order 10450 and thereby sparked the fire that became known as "the Lavender Scare."

<https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>
<https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>
<https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>
<https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>
<https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>
<https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>
<https://www.justice.gov/opa/press-release/file/1205506/download>
<https://www.archives.gov/federal-register/codification/executive-order/10450.html>
<https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>
<https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>

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Due to criminalization and severe societal stigma of non-heterosexual orientations at the time of Executive Order 10450's issuance, the concern about susceptibility to blackmail was interpreted to include LGBT people. The history is lengthy and complex, and the resultant "Lavender Scare" is estimated to have purged thousands of federal workers, forced outings, ruined careers, and driving some people to suicide. See, e.g., David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in The Federal Government, The University of Chicago Press Books, 2004. See also David Carter, Stonewall at 50: The Movement for LGBT Civil Rights, Remarks Before the U.S. Commission on Civil Rights, June 7, 2019, <https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>. Decades later, in 2017, U.S. Secretary of State John Kerry apologized for his department's discrimination against LGBT diplomats during the period of the Lavender Scare. See Secretary of State John Kerry, Apology for Past Discrimination Toward Employees and Applicants Based on Sexual Orientation, January 9, 2017, <https://2009-2017.state.gov/secretary/remarks/2017/01/266711.htm>. The President and his Administration are seeking to limit LGBT rights in addition to those to which it explicitly ties religious freedom. For example, the issue of public bathroom use by transgender people which remains politically contentious, first took a seat in the national political arena in 2015. See, e.g., Time, Everything You Need to Know About the Debate Over Transgender People and Bathrooms, July 28, 2015, <https://time.com/3974186/transgender-bathroom-debate/>. In 2016, while referring to the anti-transgender North Carolina legislation known as HB2, Candidate Trump opined that everyone should be able to "use the bathroom they feel is appropriate." ABC News, Trump Administration Reverses Transgender Bathroom Guidance, February 22, 2017, <https://abcnews.go.com/Politics/trump-administration-issue-guidance-transgender-bathrooms/story?id=45663275>. In 2017, however, President Trump's Department of Education "rescinded a guidance issued to schools by the Obama administration to allow students to use bathrooms that match their gender identity rather than the sex indicated on their birth certificate." See, e.g., ABC News, Donald Trump's Past Statements About LGBT Rights, July 26, 2017, <https://abcnews.go.com/Politics/donald-trump-past-statements-lgbt-rights/story?id=48858527>. The Department's guidance, or "Dear Colleague letter," may be found at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>. The President and his Administration have also put significant effort into excluding transgender people from serving in the U.S. Military. In 2000, now-President Trump voiced support for the end of the U.S. military's ban on service by openly or outed LGBT people, commonly known as "Don't Ask, Don't Tell." ABC News, Donald Trump's Past Statements About LGBT Rights, supra. However, on July 26, 2017, the President tweeted:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....."Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....."Victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you!]

Donald J. Trump (@realDonaldTrump), Twitter, July 26, 2017, https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F; https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F; and https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2FPolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128.

<https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>
<https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>
<https://2009-2017.state.gov/secretary/remarks/2017/01/266711.htm>
<https://time.com/3974186/transgender-bathroom-debate/>
<https://time.com/3974186/transgender-bathroom-debate/>
<https://abcnews.go.com/Politics/trump-administration-issue-guidance-transgender-bathrooms/story?id=45663275>
<https://abcnews.go.com/Politics/donald-trump-past-statements-lgbt-rights/story?id=48858527>
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>
https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
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https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F
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https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2FPolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128

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the Solicitor General argued that the bakery owner could be required to serve a gay couple because his First Amendment rights were violated "where a public accommodation law compels someone

The future of this policy remains unsettled. After federal court lawsuits across the nation sought to prevent its implementation, the U.S. Supreme Court ruled in January 2019 that "the Trump administration [could] go ahead, for now, with its plan to ban transgender military service." NBC News, Supreme Court Allows Trump Administration to Enforce Transgender Military Ban, January 22, 2019, <https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>. The military began enforcing the ban on April 12, 2019, pending further action by the U.S. Supreme Court. The Washington Post, Military to Begin Enforcing Trump's Restrictions on Transgender Troops, March 13, 2019, https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html. A May 2019 Department of Health and Human Services (DHS) memorandum let it be known in May 2019 that the President intends to issue a proposed rule, Centers for Medicare & Medicaid Services, Nondiscrimination in Health and Health Education Programs or

access for transgender people The Washington Post, Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections, supra note 5. See also National Public Radio, Trump Administration Proposes Rule to Reverse Protections for Transgender Patients, May 24, 2019, <https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patients>. In other words, homophobic or transphobic physicians will be able, without recourse, to limit the health decisions of transgender individuals. “The proposal is part of a broader effort by religious conservatives in the Trump administration to define gender restrictively. The result has been a weakening of protections for transgender people.” The Washington Post, New Trump Administration Rule Would Weaken Protections for Transgender People in Health Care, May 24, 2019, <https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>. See also PBS News Hour, Trump Administration Moves to Revoke Transgender Health Protection, May 24, 2019, <https://www.pbs.org/newshour/health/trump-administration-moves-to-revoke-transgender-health-protection> and USA TODAY, Trump Plan Would Hamper LGBTQ Health Care Access. This is Cruel and Dangerous, August 2, 2019, <https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001>. On another anti-LGBT policy, in October 2018, President Trump announced via his Department of State that G-4, or “family,” visas are no longer available to same-sex couples in which one partner is a diplomat or employee of an international organization such as the United Nations. “Same-sex domestic partners of diplomats and workers who already have a G family visa must submit proof of marriage by the end of the year to qualify for a renewal... If a couple cannot submit proof of marriage, the partner will have to leave the United States within 30 days of the year-end deadline...” The New York Times, U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners, October 2, 2018, <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>. If the ostensible rationale behind this policy change is to put same-sex couples on perceived equal footing with opposite-sex couples to whom only spousal, but not family, visas, have been available since 2009, United Nations Secretariat, Information Circular re: G-4 Visas for Domestic Partners, September 13, 2018, <https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>, the reasoning is flawed and portends dangerous outcomes. Opposite-sex couples, as a class, are relatively freely able to marry around the globe without significant negative personal consequences. Requiring same-sex marriages in this context is to force the outing of people from all over the world who may need to choose between accompanying their partners to the United States or staying closeted and separated in their home countries. Yes, perhaps same-sex couples from nations which refuse to marry them could get married upon arrival in the United States and request spousal visas. However, this policy, either by design or by ignorance, completely ignores the dangers attached to forced outing. These couples will likely be returning to their possibly-hostile home countries one day. The dangers appurtenant to forced outing under these global circumstances could result in LGBT people being jailed, corporally punished, or even executed in their home countries.

<https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>
<https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>
https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html
https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html
<https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>
<https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>
<https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patients>
<https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patients>
<https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>
<https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>
<https://www.pbs.org/newshour/health/trump-administration-moves-to-revoke-transgender-health-protection>
<https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>
<https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>
<https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>
<https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>
<https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>

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to create expression for a particular person or entity and to participate, literally or figuratively in a ceremony...”¹³ This President’s use of religious freedom to cloak the obstruction and withdrawal of LGBT rights is of immediate concern not only for LGBT people, but for all who value equality before the law. Religious freedom, as the Commission has already investigated and discussed at length, can be balanced with other civil rights.¹⁴ The irony of the President’s policy of stripping the LGBT community of rights in base obeisance to a community that is steeped in homophobia and transphobia is that, abroad, the President has a so-called “global campaign to decriminalize homosexuality.” This campaign, cynically viewed, is no more than an attempt to utilize a wedge issue against Iran. One news source reported that “[n]arrowly focused on criminalization, rather than broader LGBT issues like same-sex marriage, the campaign was conceived partly in response to the recent reported execution by hanging of a young gay man in Iran, the Trump administration’s top geopolitical foe.”¹⁵ Indeed, there is some speculation that the “campaign” has its roots in right-wing opponents to Islamic immigration in Europe.¹⁶ It is a sad and cynical day when even words of praise from the President for the LGBT community must be viewed in the context of the first principle he identified throughout his campaign and began to carry out on his first week in office – his Islamophobia that resulted in his executive order banning Muslim immigration to this country.¹⁷ But when viewed in the greater frame of the enormous setbacks to LGBT rights he has set in motion during his Administration, it is not unexpected. Today, after successfully fighting for marriage equality and the repeal of prior discriminatory practices such as “don’t ask, don’t tell,” among other basic freedoms, the LGBT community finds itself once again in a familiar place – being pushed towards the outside looking in, having to summit again the rocky pathway to freedom and equality that was surmounted just scant years ago, all because of a President and an Administration that has chosen intolerance, rather than inclusion, as its first principle.

13 Reuters, Trump Administration Backs Baker Who Refused to Make Cake for Gay Couple, September 29, 2017, <https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>. 14 See U.S. Commission on Civil Rights “Peaceful Coexistence” report, supra note 3. 15 NBC News, Trump Administration Launches Global Effort to End Criminalization of Homosexuality, February 19, 2019, <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>. 16 “[T]he rhetoric Trump is using has some ugly roots: It’s essentially a European right-wing strategy to pit LGBTQ people against Muslims. ... European right-wingers often use Middle Eastern countries’ horrific records on gay rights to try to foster Islamophobic sentiments among LGBTQ communities — a sentiment they can tap into to garner restrictions on immigration from predominantly Muslim countries. It’s effectively pro-gay Islamophobia.” Vox, Watch Donald Trump Reach Out to “L, G, B, T... Q” Americans, July 21, 2019, <https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-rm>. See also Vox, Donald Trump’s Pro-Gay Islamophobia is Straight Out of The European Right-Wing Playbook, June 13, 2016, <https://www.vox.com/2016/6/13/11924826/donald-trump-islamophobia-muslim-lgbtq-europe-wilders>. 17 The Guardian, Is This a Muslim Ban? Trump’s Executive Order Explained, January 31, 2017, <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>.

<https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>
<https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1B1332>
<https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>
<https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>
<https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-rm>
<https://www.vox.com/2016/6/13/11924826/donald-trump-islamophobia-muslim-lgbtq-europe-wilders>
<https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>

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Dissenting Statement of Commissioner Peter N. Kirsanow Introduction Let me save you the trouble of reading this 400+ page report. It can be reduced to two words: Trump Bad. Whether it is HHS protecting conscience and religious liberty rights, the Department of Education attempting to reduce due process abuses in Title IX cases, or DHS attempting to secure the border – Trump Bad. There is no suggestion that people can have good faith policy disagreements, that economic costs are a valid consideration, or that hotly contested cultural issues are in fact hotly contested. (All the good people agree, you see.) In effect, this report is the progressive civil rights establishment’s primal scream about President Trump. For example, the report states:

The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration. Some champion these efforts, citing that deregulation can lead to economic growth and “improvements to quality of life from access to innovative products and services.” However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.¹

This pattern is followed throughout the report. A Trump Administration policy is described in disapproving terms. A disparaging description of purported benefits of this policy is followed by a “But others say, [insert criticism from progressive advocacy organization].” The report also engages in attempted guilt-by-association: “According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration’s restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations.”² As an initial matter, the number of reported hate crimes may not even be increasing, or at least is likely not increasing in the dramatic fashion portrayed by the media and the Commission majority. The increase in reported hate crimes may be entirely due to the increase in the number of jurisdictions reporting hate crimes to the FBI.³ Second, I am unsure what other civil rights violations the

1 Report at n. 310-312. 2 Report at n. 318. 3 Robby Soave, I Testified Before Congress About Hate Crimes and the Alt-Right. Here’s What Happened., Reason, May 16, 2019, <https://reason.com/2019/05/16/hate-crime-statistics-congress-house-subcommittee/>.

<https://reason.com/2019/05/16/hate-crime-statistics-congress-house-subcommittee/>

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majority is referring to, but it is worth noting that the Administration can’t take a breath without being subject to legal challenge, and yet its policies are regularly upheld by the Supreme Court. Because of the length of this report, I cannot possibly address every issue or agency contained within it. I have endeavored to address issues that I think are of greatest importance. Chapter 2: U.S. Department of Justice Here, as elsewhere in the report, the Commission majority adopts wholesale criticisms of CRT leveled by former Obama Administration officials.⁴ The report states:

One way [CRT] can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators. If CRT’s position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy, possibly creating a chilling effect.⁵

The report also states, “[T]he major policy considerations in the Obama Administration took expansive views of civil rights protections, and the Trump Administration’s focus has been restrictive and maybe less effective for impacted communities.”⁶ But is it CRT’s job to expand the law? Or is it CRT’s duty to enforce the law as passed by Congress? If CRT is developing “broader mandates,” then at least theoretically it is placing new burdens on regulated entities – burdens that were not approved or contemplated by Congress. The report later cites a case in New York in which CRT initially filed a statement of interest in a case against a housing provider that barred individuals with criminal records, alleging that this violated the Fair Housing Act.⁷ There is simply no way that Congress intended the Fair Housing Act to mean that landlords have to individually assess the criminal records of potential tenants, rather than simply having a “no felons” policy, or even a “no murderers or rapists” policy, and run the risk of having DOJ come down on them if

While it’s important to be aware that there is still hate and violence in this country, some policy makers and media figures have seized on the idea that hate crimes are actually rising. The FBI reported 7,175 crimes in 2017 vs. 6,121 crimes in 2016, which represents a 17 percent increase. But it’s important to note that nearly a thousand additional municipalities submitted data to the federal government in 2017. This means the perceived increase in hate could partly be explained by the fact that we simply have more data. As the agencies involved in submitting data become more concerned with hate crimes, and more responsible about tallying them, the numbers will appear to be going up. ⁴ Report at n. 642-644. ⁵ Report at n. 481-483. ⁶ Report at n. 816. ⁷ Report at n. 696-699.

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HUD disagrees with their assessment.⁸ CRT did not even attempt to claim as much, admitting that the guidance effectively forcing landlords to rent to felons were dreamed up by HUD as part of the Obama Administration’s Federal Interagency Reentry Council.⁹ This is what Robert Driscoll meant when he stated:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It’s not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice.¹⁰

The majority does not consider that the Obama-era Civil Rights Division (and the other Obama-era civil rights agencies and offices) may have exceeded its statutory authority. If that is the case, adopting a narrower interpretation of civil rights is restoring CRT to its proper place. CRT and other administrative agencies are not supposed to make law, merely to interpret and enforce existing law. Nor is CRT supposed to be the supervisor for every police department in the nation, although for several years it labored under this delusion. The report states, “Former CRT head Vanita Gupta testified at the Commission’s briefing that consent decrees are key to civil rights enforcement because they provide for court oversight ‘regardless of political winds.’”¹¹ Well, that is the problem. There needs to be political oversight of these decisions and political accountability. Consent decrees are a way of tying the hands of future administrations, which means that there is no way for voters to control the civil rights bureaucracy. The report also states:

[O]n October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties. This new guidance permits recipients of federal funding to make exceptions to their services based on “sincerely held religious beliefs.” The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.¹²

<https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>
<https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>
https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

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In this case, the Commission did not even bother presenting the other side. Given the many religious liberty cases that have wound up in the federal courts over the past ten years, it is clear that many Americans do see another side. Additionally, the memorandum at issue states that it is attempting to ensure that federal agencies comply with the provisions of the Religious Freedom Restoration Act (RFRA).¹³ Had the Obama Administration heeded RFRA before issuing Obamacare's contraception mandate, a lot of people and institutions (including the federal government) might have been saved a lot of time and money.¹⁴ The report also trumpets the glory of disparate impact. Disparate impact is a pernicious legal theory when not firmly tethered to smoking out intentional discrimination (or reckless disregard for equal treatment), as was ostensibly the case in Griggs.¹⁵ The way disparate impact has been abused to extend the power of the civil rights agencies and to force regulated entities to "get their numbers right" is shameful. And make no mistake, that is exactly what happens. The report may say:

[T]he term 'disparate impact' elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest. Courts have long been clear that proving disparate impact discrimination requires more than just providing the existence of a statistical disparity in impact.¹⁶

Hogwash. Sure, the courts may say that – but you have to actually make it in front of a court in order for that requirement to be enforced. In the real world, when a statistical disparity exists, the functionary from Cubicle 17E deep in the bowels of the EEOC, or the Department of Labor, or the Department of Education suddenly perks up and takes an interest in you. And your case may not even make it to the point of attracting the interest of some Washington bureaucrat before the local activists – having been firmly told by activist organizations that the only reason for a disparity is intentional racism – are raising Cain. Much better to simply get your numbers right the first time. Hasn't anyone at the Commission read the facts in Ricci v. DeStefano?¹⁷

13 U.S. Dept. of Justice, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>. 14 See, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Zubik v. Burwell, 136 S.Ct. 1557 (2016). 15 Griggs v. Duke Power, 401 U.S. 424 (1971). 16 Report at n. 889-890. 17 Ricci v. DeStefano, 557 U.S. 557, 561-575 (2009). In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. . . . When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

<https://www.justice.gov/opa/press-release/file/1001886/download>

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Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed. . . . When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (department), the promotion and hiring process was governed by the city charter, in addition to federal and state law. The charter establishes a merit system. . . . The City's contract with the New Haven firefighter's union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examination, with the written exam account for 60 percent and the oral exam 40 percent of an applicant's total score. . . . After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of \$100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates. With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken. IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors. IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria. Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant. Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

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The report also mischaracterizes the testimony of Joshua Thompson, an attorney at the Pacific Legal Foundation, who cautioned against focusing on disparate impact claims to the detriment of cases of intentional discrimination. The report claims, "Thompson advocated against federal enforcement of this mandatory enforcement tool."¹⁸ First, although CRT has interpreted the Supreme Court's decision in *Alexander v. Sandoval* to permit federal enforcement of disparate impact regulations, this is not a mandatory enforcement tool. These are mere regulations, and regulations can be changed. Statutes are mandatory – for example, enforcement of RFRA is mandatory. Second, Thompson did not advocate against all federal use of disparate impact. Rather, he cautioned against "over-enforcement of disparate impact" and suggested that "Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination."¹⁹ The report quotes the second statement, but somehow interprets this as "Thompson opposing enforcement of this mandatory enforcement tool." Nor does the report consider Thompson's point that seeing a disparate-impact bogeyman behind every disparity can lead to perverse results for minorities – the very people who supposedly benefit from disparate impact. Chapter 3: Department of Education This report assumes that the only legitimate interpretations of civil rights statutes are those favored by the Left. As is the case throughout this report, ED OCR's changes in policy and procedure are considered illegitimate. There is no effort made to grapple with the objections made to Obama-era innovations in the realm of Title VI and Title IX. The report states: "ED OCR enforces these civil rights laws and regulations through processing and acting upon individual complaints, through its own compliance investigations of schools receiving federal funds, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations."²⁰ The report also says, "ED OCR has dramatically

The City's contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City's counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legal. (Legal was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legal defended the examinations' validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was in line with results of the Department's previous promotional examinations. Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntary remedies—even . . . race-conscious remedies." . . . The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings [citations omitted][emphasis added]. 18 Report at n. 901. 19 Thompson statement at 2-3. 20 Report at n. 1010.

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changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly."²¹ The report also approvingly quotes Fatima Goss Graves's characterization of the regulatory changes made by ED OCR as "OCR has retreated from its proactive commitment to enforce civil rights."²² Ms. Goss Graves says "proactive commitment," I (and many others) say "overreach."²³ The policy changes encouraged by OCR's overreach had serious negative consequences in a variety of areas, ranging from absurd inquisitions of professors for writing articles²⁴ to students thrown out of college without the benefit of due process²⁵ to increasing disorder in schools.²⁶ The report uncritically parrots a report from the Center for American Progress (CAP) regarding ED OCR's enforcement of claims of discrimination on the basis of sexual orientation and gender identity. It is able to treat CAP as an unbiased source. It is even sillier to do so in this instance. CAP claims that it is obvious that the Trump Administration's OCR is not enforcing Title IX as well as the Obama Administration because ED OCR is issuing fewer findings of "no violation" or "insufficient evidence" than it did under the Obama Administration.

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren't ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.²⁷

I suppose this is one plausible interpretation of the data. However, we all know that if the Obama Administration found "no violation" in 6 percent of cases and the Trump Administration found

21 Report at n. 1012-1014. 22 Report at n. 1203. 23 See, e.g., H. Bader et al., "A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates," released by the Regulatory Transparency Project of the Federalist Society, September 12, 2017, <https://regproject.org/paper/a-review-of-department-of-education-programs/>; Laura Kipnis, My Title IX Inquisition, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-pdf>; Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For all Students Under Title IX, Aug. 21, 2017, <https://dash.harvard.edu/handle/1/33789434>. 24 Laura Kipnis, My Title IX Inquisition, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-pdf> 25 Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018). 26 See Dissenting Statement of Commissioner Peter N. Kirsanow in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 199-205, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>. 27 Report at n. 1103.

<https://regproject.org/paper/a-review-of-department-of-education-programs/>
<https://regproject.org/paper/a-review-of-department-of-education-programs/>
<http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-pdf>
<https://dash.harvard.edu/handle/1/33789434>
<http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>

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"no violation" in 12 percent of cases, the majority would claim that this proves that the Trump Administration doesn't take the complaints of gay and transgender students seriously. The CAP report also states:

Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.²⁸

Three points: 1) A two percent change tells us very little one way or the other; 2) Looking at percentages does not tell us if the right resolution was reached in individual cases – in some cases, the student's preferred changes will be unreasonable or will not be authorized by statute or regulation; and 3) Comparing an eight-year average to a two-year average could be misleading. Professor R. Shep Melnick of Boston College testified about the problems created by OCR's refusal during both Republican and Democrat administrations to engage in notice-and-comment rulemaking. Instead, OCR has long preferred to rely on changing enforcement in individual cases and "Dear Colleague Letters" in order to signal changes in policy. The report does not address the substance of Melnick's critique, dismissing it in two sentences:

The Commission received testimony from Shep Melnick criticizing ED OCR's use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that "their legal status remains ambiguous." But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.²⁹

This is not the point Melnick was making. He did not question whether OCR had the authority to issue policy guidance. Rather, he questioned whether it would be preferable to make policy through notice-and-comment rulemaking, rather than through guidance.³⁰ Notice-and-comment rulemakings are more transparent than guidances and allow greater participation by regulated entities. The Supreme Court's decision in *Perez v. Mortgage Bankers Association*³¹, which the report suggests disposes of Melnick's concerns, does not address Melnick's second point – are these

28 Report at n. 1104, 29 Report at n. 1204-1205. 30 Melnick Statement at 2. Notice-and-comment rulemaking is designed to make room for agency input for public participation, to require extensive deliberation and consultation on the part of the agency, and to facilitate “hard look” judicial review. With DCLs [Dear Colleague Letters], regulators’ “colleagues” are told they can comment on the new requirements only after they have been announced. The justification for this avoidance of rulemaking procedures is that such “guidance” contains nothing that is new. In many cases this is obviously untrue – and everybody knows it. 31 135 S.Ct. 1199 (2015).

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guidances legally binding, or are they not?32 This was not the question at issue in MBA, which concerned D.C. Circuit precedent that held “that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted.”33 In dictum that does pertain to Melnick’s point, Justice Sotomayor wrote in her majority opinion, “interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”34 As Justice Scalia said in his concurring opinion, however, this does not settle the question whether guidances are legally binding. The APA says that interpretive rules are not binding. But the Supreme Court, independent of any requirement in the APA, has over the years developed a habit of deferring to an agency’s interpretation of its own regulations. If a court defers to an agency’s interpretive rule, then the interpretive rule is binding. Justice Scalia wrote:

Even when an agency’s interpretation gets deference, the Court argues, “it is the court that ultimately decides whether [the text] means what the agency says.” That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to “decide” that the text means what the agency says. The Court continues that “deference is not an inexorable command in all cases,” because (for example) it does not apply to plainly erroneous interpretations. True, but beside the point. Saying all interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying all substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretive rule must meet certain conditions before it gets deference – the interpretation must, for instance, be reasonable – but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures. 35

The intervening four years have not caused the Court to look more kindly upon judicial deference to agency interpretations of regulations. This last term, all nine justices agreed in *Kisor v. Wilkie* that judicial deference to agency interpretations of regulations (known as Auer deference or *Seminole Rock* deference) should be severely curtailed.36 The justices only disputed how far

32 Melnick Statement at 2. This truncated procedure raises an awkward question: are these various forms of guidance mere suggestions, or are they legally binding? When asked that question by Senator Alexander in 2014, two high ranking officials in the Obama Administration’s Department of Education said they were not legally binding. A third – Assistant Secretary for Civil Rights Catherine Lhamon – said they are legally binding. So does “enforcing civil rights laws” mean requiring schools to follow each command in these often lengthy guidance documents, or does it mean something less demanding? Given the huge gap between what OCR says in its sparse regulations and what it says in its lengthy guidance documents, this is no minor matter. 33 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015). 34 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015). 35 *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1212 (2015)(Scalia, J., dissenting). 36 *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

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deference should be pruned back. The majority opinion, written by Justice Kagan, kept Auer (and *Seminole Rock*) deference alive, but “reinforce[d] its limits.”37 Justice Kagan’s statements that “Auer deference is sometimes appropriate and sometimes not”38 and “this Court has cabined Auer’s scope in varied and critical ways – and in exactly that measure, has maintained a strong judicial role in interpreting rules”, encourages judges to apply the requirements of Auer deference more energetically than they have been.39 In describing situations in which Auer deference would not apply, Justice Kagan gives the following examples: a situation in which a court applies the traditional terms of statutory construction to determine that a rule is not genuinely ambiguous (in other words, a court can’t just take the agency’s word for it that the regulation is ambiguous)40, the agency’s interpretation of a regulation must be reasonable41, “the agency’s interpretation must in some way implicate its substantive expertise”42, a new interpretation must not cause “unfair surprise” to regulated parties, and “[t]hat disruption of expectations may occur when an agency substitutes one view of a rule for another.”43 Justices Gorsuch, Thomas, Kavanaugh, and Alito would have gone farther than Justice Kagan (and the Chief Justice, who provided the crucial vote for her opinion). These four would overrule Auer. Justice Gorsuch writes for these four justices:

Still, today’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that Auer is lawful or wise. Instead, a majority retains Auer only because of stare decisis. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitation on Auer that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled – in truth, zombified.44

All of this suggests that Professor Melnick’s question about the legally binding nature of guidances from ED OCR were not answered decisively by Mortgage Bankers Association. And indeed, it would be surprising if they had been. After all, as a political science professor with an interest in administrative law, Professor Melnick is undoubtedly well aware of recent Supreme Court decisions in this area. In the post-*Kisor* world, interpretive rules like the Dear Colleague Letters that emanated from the Obama Office for Civil Rights may be more likely to run afoul of an invigorated judicial role. Auer deference, after all, was how the Dear Colleague Letter regarding transgender bathroom access initially managed to survive the Fourth Circuit. Many of Justice Kagan’s *Kisor* guidelines for when Auer deference should not apply would seem to apply to that

37 *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019). 38 *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019). 39 *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019). 40 *Kisor v. Wilkie*, 139 S.Ct. 2415 (2019). 41 *Kisor v. Wilkie*, 139 S.Ct. 2415-2416 (2019). 42 *Kisor v. Wilkie*, 139 S.Ct. 2417 (2019). 43 *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019). 44 *Kisor v. Wilkie*, 139 S.Ct. 2425.

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particular guidance when OCR declared that a regulation allowing separate bathroom facilities for the two sexes really means that a biological girl must be allowed access to the boys’ bathroom and locker room.45 Such an interpretation would at a bare minimum seem to implicate “reasonableness,” “unfair surprise,” and “disruption of expectations”. Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights Policy Priorities This section of the report casts a jaundiced eye toward HHS OCR’s efforts to enforce statutes protecting religious freedom and conscience rights. The report lumps the establishment of the Conscience and Religious Freedom Division with statements from advocacy organizations claiming that LGBT people are routinely discriminated against when seeking medical treatment.46 By lumping these two things together, the report implies that religious liberty and freedom of conscience are merely excuses to discriminate against LGBT individuals. This is another installment in the Commission’s multi-year campaign advocating for nondiscrimination to supercede religious liberty. The report says:

In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language. Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care. The result of this policy, says Shabab Mirza, an LGBT research assistant at the Center of American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers. LGBT advocates fear that creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community. Rea Carey, executive director of the National LGBTQ Task Force says that, “Health professionals have a duty to care for all their patients regardless of one’s gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are.” In a statement to the Commission, the National LGBT Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.47

Unsurprisingly, the report tries to steal several bases here. Just as in the Commission’s recent school suspension report where “disability” was used to suggest children with physical disabilities

45 G.G. ex rel Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016). 46 Report at n. 1400-1419. 47 Report at n. 1414-1419.

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rather than emotionally disturbed children48, “healthcare” here is undefined, leaving the casual reader to imagine that lesbians seeking treatment for bronchitis are routinely denied antibiotics. The cited Human Rights Watch report is more honest:

The [Obama-era rule interpreting Section 1557 of the Affordable Care Act] ensures that transgender people cannot be denied care – including transition-related care – because of their gender identity. It clarifies that transgender people should be treated in accordance with their gender identity, and that insurance providers cannot presumptively deny coverage for transition-related care or refuse treatments to transgender people in a discriminatory manner. [emphasis added]49

The Commission majority once again uncritically adopts the party line of the transgender lobby. There is no consideration of the possibility that medical professionals can in good faith disagree with the desires of LGBT individuals, whether on medical, conscience, or religious grounds. A profoundly radical idea – that it is unremarkable and healthy to take hormones to feminize or masculinize one’s appearance, to remove healthy organs because of deep discomfort with one’s body – is presented with no discussion or debate. In fact, the Commission has never considered this, and simply presents the policy positions of transgender organizations as if they are normative. This is not speculation about what could happen in the future. Earlier this year, a biological woman who now presents as a transgender man sued a Catholic hospital in California because the hospital refused to perform a hysterectomy.50 As the ACLU notes in its complaint, Catholic hospitals must abide by Catholic teaching as authoritatively issued by Catholic bishops, and performing a hysterectomy for transition-related purposes violates Catholic teaching for two reasons: 1) Catholic teaching forbids direct sterilization; 2) Catholic teaching forbids assisting in sex reassignment because the Church considers it a rejection of one’s God-given sex.51 The Commission majority, along with the ACLU52, Human Rights Watch, and similar groups, wants to make it illegal for Catholic hospitals to follow Catholic teaching. Even if one grants the debatable premise that it is best for a person suffering from gender dysphoria to remove healthy

48 See Dissenting Statement of Commissioner Gail Heriot in in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S. Commission on Civil Rights, at 188-189, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>; see also Dissenting Statement of Commissioner Peter N. Kirsanow in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S. Commission on Civil Rights, at 197-198, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>. 49 “You Don’t Want Second Best: Anti-LGBT Discrimination in US Health Care,” Human Rights Watch, July 23, 2018, <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best-anti-lgbt-discrimination-us-health-care>. 50 Nicole Russell, *Why this transgender man sued a Catholic hospital for refusing to do a hysterectomy*, Washington Examiner, March 28, 2019, <https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>. 51 *Oliver Knight v. St. Joseph Northern California*, Case No. DR190259, March 21, 2019, 4-6, <https://www.aclunc.org/docs/KnightvStJosephHealth.pdf>. 52 *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women’s Health and Lives*, ACLU, May 2016, <https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>.

<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>
<https://www.hrw.org/report/2018/07/23/you-dont-want-second-best-anti-lgbt-discrimination-us-health-care>
<https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>
<https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>
<https://www.aclunc.org/docs/KnightvStJosephHealth.pdf>
<https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>
<https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>

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body parts, there are non-Catholic hospitals at which a person can get this surgery. Our progressive friends want to dragooon hospitals that were established and funded by Catholic religious orders and laypeople, and force them to practice medicine the way they want. As HHS OCR noted in its response to an earlier draft of this report, it is disingenuous for the Commission to imply that protecting religious freedom and conscience diverts from HHS OCR’s core mission. The federal government has long protected rights of religious freedom and conscience. It is not a lesser civil right.53 Furthermore, in the previous administration, HHS discriminated against the U.S. Conference of Catholic Bishops (USCCB) in awarding contracts to help victims of human trafficking. Catholic teaching prohibits the use of some reproductive products and services. Therefore, the USCCB did not refer victims of human trafficking for these products or services. Although the USCCB had received HHS contracts for assisting human trafficking victims since 2006, in 2011 the Obama Administration discontinued the contract. According to the *Washington Post*, “senior political appointees awarded the new grants to the bishops’ competitors despite a recommendation from career staffers that the bishops be funded based on scores by an independent review board.”54 In short, HHS does not have a history of being overly solicitous of religious liberty. Additionally, HHS enforces laws that protect the conscience rights of healthcare providers, not just religious rights. This is important because, although the Commission majority does not acknowledge it, there is debate over whether hormone treatments and sex-reassignment surgery are the best treatment for individuals suffering from gender dysphoria. This is particularly true in cases where children and adolescents are suffering from gender dysphoria, because blocking puberty or administering cross-sex hormones may render these children permanently sterile.55 It is important that HHS OCR protect the religious and conscience rights of medical professionals in regard to LGBT issues. Much like the Commission majority, there are individuals and institutions who want to force dissenters into acquiescence. For example, the former head of the

53 Correspondence from U.S. Dep’t of Health and Human Services to U.S. Commission on Civil Rights, Re: Technical Corrections to USCCR’s 2019 Federal Civil Rights Enforcement Report, August 19, 2019, at 2 (on file). For more than 155 years, Congress has offered protections in a variety of contexts, including: exempting religious objectors opposed to bearing arms from military service; exempting conscientious objectors from combat training or military service; exempting law enforcement employees from participating in executions “if such participation is contrary to the moral or religious convictions of the employee”; exempting education institutions from sex discrimination bans under Title IX of the Education Amendments of 1972 where such ban “would not be consistent with the religious tenets” of the institution; prohibiting coercion of persons to undergo . . . sterilization procedures by threatening loss of benefits and attaching a criminal punishment of a fine of up to \$1000, imprisonment for up to one year, or both, to violations of that prohibition; and preventing the Federal government from imposing substantial burdens on religious exercise absent a compelling government interest pursued in the manner least restrictive of that exercise. 54 Jerry Markon, *Health, abortion issues split Obama administration and Catholic groups*, *Wash. Post*, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQA5V5xZM_story.html. 55 Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adfflegal.blob.core.windows.net/mainseite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e6936f02_4

https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQA5V5xZM_story.html
https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQA5V5xZM_story.html

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University of Louisville's Division of Child and Adolescent Psychiatry and Psychology, Dr. Allan Josephson, is suing the university. Despite a stellar career as Division Chief, the university demoted and then fired Dr. Josephson after he served as an expert witness and spoke publicly about his view that children suffering from gender dysphoria should be given psychiatric help to hopefully reconcile them to their biological sex, rather than pursuing hormone and surgical treatments that have irreversible consequences.⁵⁶ There is no indication that Dr. Josephson's beliefs about the proper treatment for children with gender dysphoria is religiously-based, rather than being a scientific and medical judgment. In fact, shortly before he was demoted, "Dr. Josephson outlined a proposed program for treating youth experience gender dysphoria that involved cooperation between identified leaders from child psychiatry and pediatric endocrinology."⁵⁷ It is also worth noting that, unlike the Obama Administration's HHS OCR, the Trump Administration's HHS OCR is not trying to force hospitals and medical personnel to all do things a certain way. The Trump Administration's HHS OCR is not prohibiting hospitals from conducting sex-reassignment surgeries or prohibiting doctors from prescribing hormone therapy. Section 1557 (Defining the Scope of the Meaning of Sex Discrimination) The report criticizes HHS's decision to revise Section 1557 of the Patient Protection and Affordable Care Act (Obamacare), stating:

One of the most critical revisions proposed was the redefinition of "sex" to refer only to the biological and anatomical differences between males and females as determined at their birth. Unlike under the Obama Administration, "gender identity" would no longer be a protected class under the scope of Section 1557's civil rights statutes and Title IX's prohibitions of discrimination on the basis of sex.⁵⁸

This is wrong. The proposed revision of 1557 does not redefine sex "to refer only to the biological and anatomical differences between males and females as determined at their birth."⁵⁹ Although proposed Section 1557 does repeal the definition of "on the basis of sex" that included "gender identity" as a protected class, it does not replace it with a statement that "sex" is defined on a biological or anatomical basis. The proposed rule does not define "sex"⁶⁰ because, HHS notes, the Supreme Court is likely to soon issue a decision that helps clarify whether "sex" includes gender identity.⁶¹

⁵⁶ Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adfflegal.blob.core.windows.net/main-site-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v.-bendapudi---complaint.pdf?sfvrsn=e8936f02_4. ⁵⁷ Josephson v. Bendapudi at 139. ⁵⁸ Report at n. 1401-1402. ⁵⁹ Report at n. 1401. ⁶⁰ 84 FR 27857. ⁶¹ 84 FR 27857; 84 FR 27855.

https://adfflegal.blob.core.windows.net/main-site-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v.-bendapudi---complaint.pdf?sfvrsn=e8936f02_4
https://adfflegal.blob.core.windows.net/main-site-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v.-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

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Housing of Illegal Immigrant Children The report states:

"The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. . . . During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities. "From October 2014 to July 2018, the HHS' Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints." Numbers increased after President Trump's "zero tolerance policy" was put in place in April 2018 []. The New York Times reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, "the largest number of reports during any five-month span in the previous four years."⁶²

Obviously everyone opposes sexual abuse of anyone, especially minors. The way this report is written, however, suggests that complaints of sexual abuse of minors are a new development in the Age of Trump. Obviously that is not the case, since the Obama Administration was in power from October 2014 until the end of January 2017. The report also fails to note that in the vast majority of complaints, the alleged perpetrator is a fellow minor detainee, not an adult staff member. According to the data published by Axios, of the cases reported to DOJ from October 2014 to July 2018, 851 complaints alleged that another minor was the perpetrator, and 178 alleged that an adult staff member was the perpetrator.⁶³ Obviously sexual abuse is terrible regardless of the identity of the perpetrator, but by only discussing a case where an adult staff member at a contract facility was convicted of sexual offenses, the report misleads the reader to believe this is a typical case.⁶⁴ The report also fails to note that the very New York Times article on which it relies includes a statement from Commander Jonathan White of the U.S. Public Health Service that the "vast

On April 22, 2019, the U.S. Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII's prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. Because Title IX adopts the substantive and legal standards of Title VII, a holding by the U.S. Supreme Court on the definition of "sex" under Title VII will likely have ramifications for the definition of "sex" under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 and Title IX which are still pending in district courts. ⁶² Report at n. 1338-1342. ⁶³ Caitlin Owens, Stef W. Kight, and Harry Stevens, Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody, AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>. ⁶⁴ Report at n. 1344.

<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>

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majority of allegations [of sexual abuse] proved to be unfounded.⁶⁵ This may or may not be accurate, but it should at least have been noted. I was unable to find data that evaluates how many of these claims were determined to be unfounded, but in 2013 GAO released a report on allegations of detainee sexual abuse. GAO reported:

Of the 215 investigations of the allegations completed between October 2009 and March 2013, our analysis showed that 55 percent of the allegations were determined to be unsubstantiated (investigators could not determine if abuse had occurred), 38 percent unfounded (investigators determined that abuse had not occurred), and 7 percent – or 15 allegations – substantiated (investigators determined that abuse had occurred). Substantiated allegations included both allegations against staff members and allegations against fellow detainees[.]⁶⁶

Additionally, much of the deplorable increase in complaints of sexual abuse of minors is likely attributed to the increased number of minors arriving at the Southwest border. In FY 2016, the last time comparable numbers of illegal aliens were apprehended at the Southwest border, 408,870 illegal aliens were apprehended at the Southwest border, following a dip to 303,916 in FY 2017. However, the demographic composition of illegal aliens changed between FY 2016 and FY 2018. In FY 2016, 59,692 unaccompanied children, 77,674 family unit members, and 271,504 single adults were apprehended at the Southwest border.⁶⁷ In FY 2018, 50,036 unaccompanied children, 107,212 members of family units, and 239,331 single adults were apprehended at the Southwest border.⁶⁸ If we assume that 40% of the individuals who showed up as part of family units were adults, that means that the number of minors arriving at the Southwestern border increased from 106,296 in FY 2016 to 114,363 in FY 2018. This does not fully account for the increase in complaints from approximately 275 in the second quarter of FY 16 to 514 in the second quarter of FY 18, but it is likely a contributing factor.⁶⁹ Chapter 5: U.S. Department of Housing and Urban Development In keeping with the theme of this report, HUD's 2015 Affirmatively Furthering Fair Housing (AFFH)⁷⁰ rule is treated as an uncontroversial clarification of what the Fair Housing Act had meant

⁶⁵ Matthew Haag, Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says, N.Y. Times, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>. ⁶⁶ Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse, GAO, November 2013, at 16, <https://www.gao.gov/assets/660/659145.pdf>. ⁶⁷ United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>. ⁶⁸ Southwest Border Migration FY 2018, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018#>. ⁶⁹ <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html> 70 FR 42271.

<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>
<https://www.gao.gov/assets/660/659145.pdf>
<https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>
<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>
<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>
<https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>

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for fifty years.⁷¹ In reality, AFFH is a sweeping governmental power grab that masks its radicalism in layers of bureaucrat-speak. Given the overwhelming number of topics covered in this report, the Commission staff may not have realized this is the case. Nevertheless, it is important to be clear on what AFFH is. No one, to my knowledge, alleges that there are still racial covenants in the U.S. or that landlords specify the preferred race of would-be tenants. Disparate treatment discrimination in housing is more subtle these days. However, people still tend to live in neighborhoods populated primarily by people who share their income level. Many people also prefer to live in neighborhoods zoned for single-family homes, or that have a certain lot size. And many people live in neighborhoods populated primarily by people of their own race. As long as no one is being barred from buying or renting a home because of his race or religion, this should not be problematic. As Stanley Kurtz, a critic of AFFH, explained:

Ultimately, [AFFH] amounts to back-door annexation, a way of turning America's suburbs into tributaries of nearby cities. . . . If you press suburbanites into cities, transfer urbanites to the suburbs, and redistribute suburban tax money to cities, you have effectively abolished the suburbs. For all practical purposes, the suburbs would then be co-opted into a single metropolitan region. Advocates of these policy prescriptions call themselves "regionalists." . . . AFFH obligates grantees to conduct all of these analyses [of race, ethnicity, poverty, etc.] at both the local and regional levels. In other words, it's not enough for, say, Philadelphia's "Mainline" Montgomery County suburbs to analyze their own populations by race, ethnicity, and class to determine whether there are any imbalances in where groups live or in access to schools, parks, transportation and jobs. Those suburbs are also obligated to compare their own housing situations to the Greater Philadelphia region as a whole. So if some Montgomery County's suburbs are predominantly upper-middle-class, white, and zoned for single-family housing, while the Philadelphia region as a whole is dotted with concentrations of less-well-off African Americans, Hispanics, or Asians, those suburbs could be obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense. At that point, those suburbs would have to direct advertising to potential minority occupants in the Greater Philadelphia region. Essentially, this is what HUD has imposed on Westchester County, New York, the most famous dry run for AFFH. In other words, by obligating all localities receiving HUD funding to compare their demographics to the region as a whole, AFFH effectively nullifies municipal boundaries. Even with no allegation or evidence of intentional discrimination, the

⁷¹ Report at n. 1681-1693.

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mere existence of a demographic imbalance in the region as a whole must be remedied by a given suburb. Suburbs will literally be forced to import population from elsewhere, at their own expense and in violation of their own laws. In effect, suburbs will have been annexed by a city-dominated region, their laws suspended and their tax money transferred to erstwhile non-residents. And to make sure the new high-density housing developments are close to "community assets" such as schools, transportation, parks, and jobs, bedroom suburbs will be forced to develop mini-downtowns. In effect, they will become more like the cities their residents choose to leave in the first place.⁷²

The report also does not even try to claim that "segregation" is the result of refusals to sell or rent housing on the basis of race. Instead, the report says, "Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation. NFHA [National Fair Housing Alliance] states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods."⁷³ Well, of course. The key word here is "affluent". Of course affluent neighborhoods have more resources than poorer ones. The principal benefit of affluence is having more resources! Poverty is not a protected class. And as I have noted in the past, it is unclear why a "geographic area with significant concentrations of poverty and minority populations" (the definition of "racially or ethnically concentrated area of poverty") is a more pressing concern than a racially mixed area of concentrated poverty or a predominantly white area of concentrated poverty.⁷⁴ Racial imbalances that are the result of freely made choices are not problematic. But clearly, for the social engineers in the Obama Administration, they were. The Obama Administration's enthusiasm for racial bean-counting in the housing context manifested in bizarre ways. For instance, Dubuque, Iowa was not allowed to prefer its own residents over non-residents when providing housing assistance.⁷⁵ The people of Dubuque are too white, you see. Instead, HUD classified Dubuque as being part of the same "region" as Chicago, which is 200 miles away. HUD's racial alchemists then forced Dubuque to advertise the availability of public housing assistance in Chicago, where people in need of assistance were more likely to be African-American.⁷⁶ Never mind that Dubuque had plenty of its own residents languishing on the waiting list. Somehow this is going to usher in utopia.

⁷² Stanley Kurtz, Attention America's Suburbs: You Have Just Been Annexed, National Review, July 20, 2015, <https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/>. ⁷³ Report at n. 1701-1702. ⁷⁴ 80 FR 42355. ⁷⁵ Letter of Findings of Noncompliance, Civil Rights Compliance Review of the City of Dubuque's CDBG and Section 8 Programs, June 17, 2013, <https://nlhrc.org/sites/default/files/Dubuque-LOF.pdf>; see also Our opinion: National Review right about HUD, Telegraph Herald, Jan. 17, 2016, http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html. ⁷⁶ Voluntary Compliance Agreement Between the U.S. Dep't of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 18, <http://cityofdubuque.org/DocumentCenter/View/22707>.

<https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/>
<https://nlhrc.org/sites/default/files/Dubuque-LOF.pdf>
http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html
<http://cityofdubuque.org/DocumentCenter/View/22707>

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Similarly, Westchester County in New York ran afoul of HUD's plan to change their zoning requirements in order to build more income housing.77 HUD argued that local zoning practices excluded blacks and Hispanics. In HUD's view, the County also was insufficiently obsessed with ensuring the exact same racial balance in all the towns within its borders. The National Low-Income Housing Coalition, which is supportive of AFFH, described the dispute between HUD and Westchester County this way:

[Assistant U.S. Attorney] Mr. Kennedy also noted that the AIs [Analysis of Impediments] failed to address why minority populations were so low in many of the towns compared to the minority population as a whole. For example, several towns have a minority population of 1.5% or less, while Westchester County's African-American population alone is 14.6% of the total. The federal attorney pointed out that there is a connection between the likelihood that minority families would need and use multifamily housing, while there is an absence of multifamily housing in many towns. Even when the County's "cherry-picked" data are considered, minority populations declined as lot sizes grew larger.⁷⁸

In other words, HUD and the low income housing lobby want to use AFFH to force towns to build multifamily housing, even when the towns don't want to. There are pros and cons to building multifamily housing in areas previously zoned only for single-family housing, but without evidence that the refusal to change the zoning is motivated by racism, this should not be considered a violation of the FHA. Nor should it be any of the federal government's business. Zoning is as local an issue as it comes. If the residents of a town want to only have single-family housing because they want a less crowded, traditionally suburban way of life, that is their prerogative. As is so often the case, the report repeatedly refers to "patterns of segregation", as did HUD when promulgating AFFH.⁷⁹ This is galactically dishonest. First, legal segregation is dead and gone, but using the term automatically conjures up thoughts of the Jim Crow era. As used by AFFH and this report "segregation" doesn't even mean areas that were predominantly populated by African-Americans before passage of the Fair Housing Act and that continue to be predominantly populated by African-Americans today. Instead, it essentially means any person who is not a white, able-bodied male. The final rule defines "segregation" thus:

The Affordable Housing section shall also include specific one year goals to Affirmatively Further Fair Housing, by including a plan to increase the number of minorities, specifically African American households, to be provided affordable housing through activities that provide rental assistance, family self-sufficiency programs, or homeownership assistance. This may include marketing and information sharing of the programs availability and participation benefits. ⁷⁷ It took Westchester County 11 attempts over 8 years to receive approval for its fair housing plans. See Joseph De Avila, Westchester County Wins HUD OK in Housing Dispute, Wall St. J., July 18, 2017, <https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638>. ⁷⁸ New Developments in Westchester County AFFH Court Settlement, National Low Income Housing Coalition, Apr. 30, 2019, <https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement>. ⁷⁹ Report at n. 1663, 1691.

<https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638>
<https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement>

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Segregation means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act⁸⁰

This is clear in the Analysis of Impediments submitted by Westchester County, which painstakingly details the percentage of black and Hispanic residents in different parts of the county.⁸¹ Given the massive demographic changes in the United States following immigration changes in the 1960s, the vast majority of non-whites who are not African-American never experienced racial covenants or legal segregation. Nor did their parents or grandparents, at least in this country. People live where they can afford to live. It is HUD, not these municipalities, that has a fixation on race. Fortunately, HUD has announced its intention to revise AFFH. When HUD asked for comments on how to reduce the regulatory burden, "136 (45% of the total) discussed the AFFH rule."⁸² Contrary to what the Commission majority might think, opposition to AFFH was not expressed only by coldhearted Dickensian landlords. A number of individuals who work for housing authorities wrote to express frustration with AFFH. The Director of Compliance and Training at the Dallas, Texas Housing Authority wrote, "[T]here is a mismatch between the depth of data and research required, and the expertise and funding with which housing agencies are equipped to pursue this analysis. . . . [T]he takeaway is that as it currently stands, this rule is impossible to satisfy for the majority of housing agencies without additional resources or funding."⁸³ The National Association for County Community and Economic Development wrote, "While we fully support AFFH as well as supported approaches to satisfying AFFH, the rule in its current state is overly burdensome and impracticable for many communities to implement."⁸⁴ The General Counsel from the Vermont Department of Housing and Community Development (Vermont, of

⁸⁰ 80 FR 42355. ⁸¹ Westchester County Analysis of Impediments, Supplement to Chapter 12 – Zoning Analysis, July 13, 2017, <https://homes.westchestergov.com/images/stories/Alreport/ZACHap1220170713.pdf>. ⁸² 83 FR 40714. ⁸³ Jeni Webb, Director of Compliance and Training, Dallas Housing Authority, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 8, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>. ⁸⁴ Laura DeMaria, Executive Director, National Association for County Community and Economic Development, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>.

<https://homes.westchestergov.com/images/stories/Alreport/ZACHap1220170713.pdf>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>

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all states) recommended that AFFH be amended to "eliminate the requirement that States prepare an Assessment of Fair Housing":

The Assessment of Fair Housing Tool developed by HUD for use by entitlement jurisdictions does not translate well to states. The local data that forms the basis of the Tool cannot be interpreted on the state level in the same way that it can within the densely populated environs of a city. We are concerned that the effort required to comply with this regulatory requirement will detract from our ability to perform our most important functions. In our view, the resources that would be needed to complete the Assessment of Fair Housing should be devoted to addressing the severe lack of affordable housing and funding other economic and community development projects. HUD estimates that the assessment will take 1500 hours, or 37 weeks of work for a full-time employee. That time and money could be better spent. . . . We are strongly committed to affirmatively furthering fair housing, but we do not see how this Tool will help us with those efforts. Additionally, in a state with a relatively low growth rate, the facts on the ground do not change rapidly enough to justify anew[sic] assessment once every five years, especially not where that assessment will divert the full-time attention of one of our very small staff for most of a year.⁸⁵

Chapter 6: Department of Labor The report notes that OFCCP has taken steps to protect the religious liberty of federal contractors. The report, of course, regards such actions with a jaundiced eye. The report notes that OFCCP recently issued a proposed rule to clarify the scope of the religious exemption available to federal contractors, which the report claims "would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics."⁸⁶ This is spectacularly wrong, but perhaps it is understandable that the Commission got it wrong, since it relied on that well-known legal journal, Buzzfeed, for an explanation of the proposed rule. The introduction to the proposed rule states, "religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate on other protected bases."⁸⁷ This is discrimination on the

⁸⁵ Dale Azaria, General Counsel, Vermont Department of Housing and Community Development, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>. ⁸⁶ Report at n. 2032. ⁸⁷ 84 FR 41679.

<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>
<https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>

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basis of conduct and belief, not status. If an employee of a Baptist-run homeless shelter is proselytizing for the Seventh-Day Adventists while working with clients of the homeless shelter, the shelter is well within its rights to fire the person. Similarly, if the USCCB is running a program for unaccompanied alien children, and the "getting your life back on track" program includes "abstain from sexual activity until marriage, and especially while you are a minor," and the unmarried program director shows up pregnant – well, that is going to undermine the program's message. This is why the proposed rule "proposes defining Religion to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice."⁸⁸ Otherwise, someone whose lifestyle choices violate their religion's moral teachings will claim that they are entitled to continue to be employed by the religious organization because they self-identify as a member of the religion. And on the other hand, someone whose religious beliefs are at odds with the organization's religious beliefs will claim that they are entitled to continued employment because they agree with the secular aspects of the organization's mission (this is what happened in Spencer v. World Vision).⁸⁹ It is also important to note that OFCCP did not make up this exemption out of whole cloth. Rather, the proposed rule is based on a Ninth Circuit case, Spencer v. World Vision⁹⁰, that set out a test for establishing whether an entity qualifies for Title VII's religious exemption.⁹¹ The fact that the proposed exemption is available to for-profit corporations as well as non-profit corporations is not nefarious. All entities that want to receive the religious exemption must meet a three-part test to qualify:

- 1) "[T]he contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose."
- 2) "[T]he contractor must hold itself out to the public as carrying out a religious purpose." 3) "[T]he contractor must exercise religion consistent with, and in furtherance of, a religious

purpose." In short, my colleagues need not fear that Lockheed or Booz Allen Hamilton are suddenly going to seek and receive religious exemptions. The report also says ominously that, "The proposed rule conflicts with a 2014 Executive Order that prohibited discrimination based on sexual orientation and gender identity by federal contractors."⁹² Well, that's the thing about Executive Orders – they aren't laws. They only last as long as the executive branch cares to enforce them. In this instance, the executive branch has decided to add a regulation explaining how it will evaluate religious exemption claims. Religious

⁸⁸ 84 FR 41679. ⁸⁹ Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011). ⁹⁰ Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011). ⁹¹ 84 FR 41682. ⁹² Report at n. 2034.

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exemptions are required by Title VII, which is an actual statute, rather than an executive order. This proposed regulation will not affect the 2014 Executive Order as applied to contractors that do not seek a religious exemption. Chapter 7: U.S. Equal Employment Opportunity Commission Sometimes I wonder if the memory of anyone at the Commission extends more than a year into the past. Three pages into the section on the EEOC, the Commission states:

These laws [Title VII, etc.] protect individuals from discrimination in employment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability, and genetic information. [emphasis added]⁹³

The problem is that a mere two years ago, the Commission issued a report entitled "Working for Inclusion" in which the Commission majority found that there are no federal statutes explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, and stated that some federal courts have said that Title VII covers sexual orientation and gender identity while other federal courts disagree, and that DOJ now takes the position that Title VII does not encompass sexual orientation.⁹⁴ The entire point of the report was to urge Congress to pass legislation prohibiting discrimination on the basis of sexual orientation and gender identity.⁹⁵ The issue remains sufficiently unsettled that the Supreme Court is hearing a case this fall regarding whether Title VII covers discrimination on the basis of gender identity. Yet for some reason the Commission now blithely asserts that federal anti-discrimination laws cover sexual orientation and gender identity. I am aware that EEOC takes this position, but it is not based in the actual text – nor did the Commission think it was based in the text two years ago. The Commission notes that EEOC issued proposed guidance in January 2017 defining sex-based harassment as encompassing gender identity, which it stated "includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner."⁹⁶ Perhaps the anti-discrimination laws should cover sexual orientation and gender identity. But that is a decision for Congress, not agencies. Agencies can only enforce statutes passed by Congress, and they should only enforce the statutes as written, not as unelected bureaucrats within agencies wish to amend them. The Commission majority should not give agencies cover for abusing their authority.

⁹³ Report at n. 2090. ⁹⁴ Working for Inclusion at 71-72. ⁹⁵ Working for Inclusion at 73. ⁹⁶ Report at n. 2257.

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Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties No one should be surprised that the chapter of this report concerning DHS CRCL is primarily concerned with the illegal immigration crisis at the border. If you approach this section with the assumption that the majority of the Commission prefers to eviscerate the immigration laws, everything will make sense. As far as the Commission is concerned, family separation at the border is entirely the fault of the Trump administration. The individuals who choose to cross the border illegally have no agency whatsoever. The report states:

This [zero-tolerance policy] impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters. The Administration's new policy of "metering," or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.⁹⁷

This is misleading for at least two reasons. First, having "fled dangerous conditions" is not grounds for asylum. As it turns out, we have this somewhat radical thing called a "law" that spells out the circumstances in which individuals are eligible for asylum:

The term "refugee" means (A) any such person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country such person's nationality

Use of the phrase "a person having no nationality, within the territory of which person is habitually residing and who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁹⁸

"My country is violent" is not grounds for seeking asylum, but that is the strongest reason the would-be asylum seekers (and their coaches in the open borders crowd here in the U.S.) can come up with. Individuals are only eligible for asylum if they are being persecuted on account of race, religion, nationality, membership in a particular social group, or opinion. There is no indication that the individuals flocking to our southern border differ, as a group, in race, religion, nationality, membership in a particular social group, or opinion from much of the rest of the population in Central American countries. Maybe they could claim "we have membership in a particular social group because we don't belong to gangs," but it isn't as if the entire population of Guatemala or

97 Report at n. 2376-2377. 98 Pub. L. 96-212.

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El Salvador belong to gangs. We all know that what is really happening is that Central American countries are poor and they would rather live in the United States. As I have had occasion to remark elsewhere in this dissent, "Poverty is not a protected class." Nor is it grounds for asylum. If living in a country poorer than the United States was grounds for asylum, Germans would be eligible for asylum. Indeed, almost every human being on earth would be eligible for asylum. Second, not only are the vast majority of these people not eligible for asylum no matter when or where they enter the U.S., but "metering" is not prohibiting them from ever entering the U.S. and making their asylum case.⁹⁹ It is only a way to control the flow of people into the United States. Additionally, the report claims that "The Administration's new policy of 'metering,' or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings."¹⁰⁰ This is flatly dishonest. The very government document cited for the proposition that metering may have increased the number of unauthorized crossings states that CBP has utilized metering at least since 2016. In other words, not only is metering not a new practice, but it started during the Obama Administration, not the Trump Administration.¹⁰¹ And it is hardly an excuse to say that metering has caused people to cross illegally. The vast majority of the people arriving at the southern border do not have legitimate asylum claims, and they know it. Not only are they unwilling to wait in line to immigrate legally, but many of them are not even willing to wait in the much shorter line at the southern border to be processed in an orderly fashion. No one is forcing them to cross the border illegally. They choose to break the law. The Commission majority would likely dispute my assertion that many of those claiming asylum at the southern border do not have a valid claim. Only 44.5 percent of asylum applicants who pass a credible fear interview show up in court to apply for asylum.¹⁰² If you are truly worried that you will be subjected to physical persecution if you are returned to a country, you would be a little more on top of ensuring that you actually applied for asylum. After all, as we are told many times, these people undertake a treacherous journey from Central America to arrive at our southern border. If you can make it from Honduras to the United States, you can definitely show up in court to make your asylum claim – if you believe your claim is likely to be granted. If you know it is unlikely to be granted, you will probably vanish into the interior of the United States and hope to avoid removal. And this is exactly what the majority of those who have passed a credible fear interview do.

⁹⁹ Anna Giaritelli, DHS secretary defends metering asylum seekers at border: 'We're not turning anybody around,' Wash. Examiner, March 6, 2019 ("All asylum seekers have the opportunity to present their case. We're not turning anybody around," Nielsen said. "What we are doing is exercising the statutory authority that enables us to, in conjunction with Mexico, to return to Mexico migrants who have arrived from that country, to await processing."), <https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>. ¹⁰⁰ Report at n. 2377. ¹⁰¹ DHS OIG, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, 5-6, OIG-18-84 (Sept. 2018) ("CBP was regulating the flow of asylum-seekers at ports of entry through 'metering,' a practice CBP has utilized at least as far back as 2016 to regulate the flow of individuals at ports of entry."), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>. ¹⁰² Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>.

<https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>
<https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>
<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>
<https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>

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Of those who do show up for their hearing after passing a credible fear interview, DHS notes that "many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders."¹⁰³ Furthermore, the number of those who do not show up for hearings or removal has ballooned. According to EOIR (Executive Office for Immigration Review), in 2006 there were 573 final orders issued in absentia for cases originating as credible fear claims. In FY 2017, this had exploded to 4,038 – which actually was a marked decline from FY 2016, in which 8,999 such orders were issued.¹⁰⁴ Only 16 percent of adults who initially receive credible fear determinations are ultimately granted asylum.¹⁰⁵ Other parts of this section of the report are so dumb that anyone with an ounce of common sense can spot the problem.

The overwhelming majority of persons crossing that [southern] border are persons of color, primarily from Latin America. For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border. Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India. Those detained have been disparaged by the President's xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants, and implicating equal protection based on national origin. Their rights to family integrity are also at stake.¹⁰⁶

Let me take a wild stab at this: the vast majority of arrests are made at the southern border because hundreds of thousands of Canadians are not rushing our northern border and vanishing into the interior of the United States, never to return. I'm not sure how the national origin of those crossing

¹⁰³ 83 FR 45520. ¹⁰⁴ Credible Fear in the U.S. Immigration System, U.S. Dept of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 5, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, A One-Sided Study on Detention of Illegal-Immigrant Families, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>. ¹⁰⁵ Credible Fear in the U.S. Immigration System, U.S. Dept of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 9, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, Trump Bait the Press on Asylum No-Shows, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, A One-Sided Study on Detention of Illegal-Immigrant Families, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>. ¹⁰⁶ Report at n. 2386-2391.

https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
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https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf
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the border illegally is supposed to affect our immigration enforcement decisions. "Oops, let that guy go, he's from El Salvador. We have to arrest a thousand more white Canadians today before we arrest anyone else from Mexico or Central America." (I will also note that the fact that almost 12,000 people arrested by the Border Patrol were from India, which is literally an ocean and a continent away, is evidence that those worried that our lax border security attracts lawbreakers from around the world have a point.) If people from Mexico and Central America are disproportionately inclined to break our immigration laws, how is the fault of the United States, Border Patrol, or President Trump? The report also says, "Their rights to family integrity are also at stake."¹⁰⁷ Sorry, no they are not. People go to jail and prison all the time, and that means they are separated from their children. Their right to family integrity isn't at stake because they broke the law. When Willie Sutton goes to prison for ten years for bank robbery, no one claims his right to family integrity is being violated. A decision from the Southern District of California, cited in this report, claims that the right to family integrity is being violated because the parents are separated from their children while awaiting adjudication of their asylum claims.¹⁰⁸ But that is simply because the government does not have sufficient family detention facilities, and we all have a strong interest in detaining these individuals, given the large percentage that abscond when released. The Commission majority, of course, would almost certainly not be satisfied by expanded family detention facilities so that families can be held together. Our 2015 report on detention facilities concerned (in part) family detention facilities, and the majority was unhappy about that too.¹⁰⁹ Furthermore, many people who arrive at the border claiming to be families are not actually related. ICE instituted a pilot program earlier this year in which they did rapid DNA tests of adults and children whom they suspected might not be related. Thirty percent of those tested were not in fact related.¹¹⁰ During one week in July, 102 tests were administered, and 17 of the tests showed no familial relationship.¹¹¹ The rest of this section can be boiled down to, "No one should ever be deported, ever" – an approach that the majority believes applies to DACA recipients and TPS (Temporary Protected Status) recipients. The report states that "Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status ("TPS") from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns,

¹⁰⁷ Report at n. 2391. ¹⁰⁸ Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F.Supp.3d 1149 (S.D. Cal. 2018). ¹⁰⁹ With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities, U.S. Comm'n on Civil Rights, Sept. 2015, at 127 ("DHS should look at alternative to detaining families, such as releasing the families to custodial agents in the United States."), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf 110 Anna Giaritelli, DNA tests reveal 30% of suspected fraudulent migrant families were unrelated, Washington Examiner, May 18, 2019, <https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated> 111 Priscilla Alvarez, ICE ramps up DNA testing for migrant families along the southern border, CNN, July 22, 2019, <https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html>.

https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf
<https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated>
<https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated>
<https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html>

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including allegations that the retraction of TPS being motivated by racial animus."¹¹² Clearly the reader must believe these allegations, because of my goodness, those countries are populated by People of Color! If the termination of Temporary Protected Status is due to racism, DHS is doing a pretty poor job of it. On August 1, 2019, Acting DHS Secretary Kevin McAleenan extended TPS for Syrian nationals for 18 months.¹¹³ On March 18, 2019, then-DHS Secretary Kirstjen Nielsen extended TPS for South Sudan for 18 months.¹¹⁴ On July 19, 2018, then-Secretary Nielsen extended TPS for Somalia for 18 months¹¹⁵, and on July 5, 2018, she extended TPS for Yemen for 18 months.¹¹⁶ The only countries that are currently designated for TPS (some of which are currently mired in litigation due to the Secretary's efforts to terminate TPS) are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. Notice that there is not a single European or majority-white country on that list, and only one Asian country. DHS isn't treating people who are colloquially considered "white" with TPS status better than people of color with TPS status because there aren't any people in the former category. Furthermore, the countries for which DHS has extended Temporary Protected Status are all countries populated by "people of color." DHS must have the most incompetent racists ever. Furthermore, Temporary Protected Status is meant to be just that – temporary. The underlying statute repeatedly makes this clear: "the Attorney General . . . may grant the alien temporary protected status,"¹¹⁷ "the Attorney General finds that there has been an earth, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,"¹¹⁸ "the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state,"¹¹⁹ "the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety" [emphasis added]¹²⁰

¹¹² Report at n. 2437. ¹¹³ Acting DHS Secretary McAleenan Announces Extension of Temporary Protected Status for Syria, Department of Homeland Security, August 1, 2019, <https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>. ¹¹⁴ Secretary of Homeland Security Kirstjen M. Nielsen Announces Extension of Temporary Protected Status for South Sudan, Department of Homeland Security, March 8, 2019, <https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected>. ¹¹⁵ Secretary of Homeland Security Kirstjen M. Nielsen Announces Extension of Temporary Protected Status for Somalia, Department of Homeland Security, July 19, 2018, <https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected>. ¹¹⁶ Secretary of Homeland Security Kirstjen M. Nielsen Announces Extension of Temporary Protected Status for Yemen, July 5, 2018, <https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announces-extension-temporary-protected-status-yemen>. ¹¹⁷ 8 U.S.C. § 1254(a)(1). ¹¹⁸ 8 U.S.C. § 1254(b)(1)(B)(i). ¹¹⁹ 8 U.S.C. § 1254(b)(1)(B)(ii). ¹²⁰ 8 U.S.C. § 1254(b)(1)(C).

<https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announces-extension-temporary-protected-status-syria>
<https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announces-extension-temporary-protected-status-yemen>
<https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announces-extension-temporary-protected-status-yemen>

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The underlying statute also provides for the termination of Temporary Protected Status.121 The statute also specifies that TPS is a nonimmigrant status, stating, “the alien shall not be considered to be permanently residing in the United States under color of law,”122 and “for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”123 Temporary Protected Status for Nicaragua and Honduras was first issued on January 5, 1999 because of damage caused by Hurricane Mitch.124 When the Secretary issued the termination of TPS status for Nicaragua, it had been almost 19 years since the designation was issued. Whatever condition Nicaragua is in now, this is as good as it is going to get as far as Hurricane Mitch goes. According to the notice provided by the Secretary, conditions have markedly improved over the past decade – for instance, “Electrification of the country has increased from 50% of the country in 2007 to 90% today. . . . Internet access is also now widely available.”125 Likewise, although Honduras faces challenges, those challenges are unrelated to Hurricane Mitch and overall conditions have improved in recent years.126 If Temporary Protected Status can’t be terminated now, it can never be terminated.127 Much as in other aspects of immigration, the argument against terminating TPS benefits depends heavily on emotional appeals to the difficulties such a termination would cause U.S. citizen children of TPS beneficiaries.128 The majority’s default position seems to be that the immigration laws cannot be enforced if doing so might affect U.S. citizen children. This is the problem with not enforcing the immigration laws. If TPS for these countries had not been extended for decades beyond any reasonable “temporary” time frame, it would not be so disruptive for people to return to their countries. This makes it even more imperative to end more recent grants of TPS (like Nepal) in a timely manner. There should not be an assumption that TPS status will be extended indefinitely, which seems to be the desire of the Commission majority.129 There is nothing wrong with a U.S. citizen child returning to live with their parents in their parent’s country of origin. No one is permanently barring them from the U.S. U.S. citizen children live in

121 8 U.S.C. § 1254a(b)(3)(B). 122 8 U.S.C. § 1254a(f)(1). 123 8 U.S.C. § 1254a(f)(4). 124 64 FR 526; 82 FR 59637; 83 FR 26074. 125 82 FR 59637. 126 83 FR 26076 (stating that Honduras is currently the third largest producer of Arabica coffee beans in the world and that drought conditions have improved in recent years). 127 Similarly, Nepal was first granted TPS following an earthquake in 2015, but, as DHS notes, recovery efforts have succeeded to such an extent that more tourists visit Nepal now than prior to the earthquake. 83 FR 23706. Sudan may be a more arguable case for extending TPS benefits, as the termination of TPS status for Sudan admits that there is still fighting in two areas of Sudan, though not in the entire country. On the other hand, Sudan was first granted TPS in 1997, so again, after 22 years, this may be as good as it is going to get. 82 FR 47229. 128 Ramos v. Nielsen, 336 F.Supp.3d 1075 (N.D. Cal. 2018). 129 This is also why it is imperative to return the “asylum seekers” at the southern border to their countries of origin forthwith. The longer they remain here, the more pleading there will be that it is simply too disruptive to return them to their countries of origin.

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their parents’ (non-U.S.) countries of origin all the time, and children who are citizens of other countries (legally) live in the U.S. with their parents all the time. In closing, I note that I do not blame the beneficiaries of TPS from trying to remain in the country, even though I don’t think they have a leg to stand on. I wouldn’t want to live in Nicaragua, Haiti, El Salvador, Nepal, etc. Yet it is ironic that the same people who are in high dudgeon over President Trump referring to “****hole countries” simultaneously insist that we must never, ever, under any circumstances, return people to these wonderful countries in which everyone is clamoring to live. Chapter 11: U.S. Department of Agriculture The report mentions lawsuits brought on behalf of black, Hispanic, Native American, and female farmers that were settled during the Obama Administration. These settlements are commonly referred to as “Pigford.”130 The report does not mention that these programs were riddled with fraudulent claims and abuses. No less a progressive institution than the New York Times investigated the settlement and reported:

In 16 ZIP codes in Alabama, Arkansas, Mississippi and North Carolina, the number of successful claimants exceeded the total number of farms operated by people of any race in 1997, the year the lawsuit was filed. Those applicants received nearly \$100 million. In Maple Hill, a struggling town in southeastern North Carolina, the number of people paid was nearly four times the total number of farms. More than one in nine African-American received checks. In Little Rock, Ark., a confidential list of payments shows, 10 members of one extended family collected a total of \$500,000, and dozens of other successful claimants shared addresses, phone numbers or close family connections. [emphasis added]131

Pigford I was rife with fraud – as journalist Jim Bovard wrote, USDA “expected only a few thousand legitimate claims” from the Pigford I settlement.132 USDA was in for a surprise:

[M]ore than 90,000 blacks asserted that they were wrongly denied farm loans or other USDA benefits in the 1980s and 1990s. This was surprising because there were at most 33,000 black-operated farms nationwide in that period. But that number itself was wildly inflated by USDA methodology. Anyone who sells more

130 Report at n. 3183-3195. 131 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 132 James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>.

https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0
<https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>

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than \$1,000 in agricultural commodities – the equivalent of 150 bushels of wheat or one horse – is categorized by USDA [as] as bona fide farmer.133

The appropriate response to being fleeced was apparently, “Thank you sir, may I have another?” The government spent \$1.25 billion in the Pigford II settlement, ostensibly to compensate still more black farmers who had not been compensated in Pigford I. \$195 million was paid out to Hispanic and female farmers, and \$680 million was paid out to Native American farmers.134 To make it even worse, not enough Native American farmers could even be found to distribute all the money. The remaining \$400 million was left “in the control of plaintiffs’ lawyers to be distributed among a handful of nonprofit organizations serving Native American farmers.”135 Just because an organization is a non-profit doesn’t mean someone isn’t profiting. This is also an example of why former Attorney General Sessions was wise to end the practice of including payments to non-governmental third parties in settlement agreements.136 It might seem difficult for this story to smell worse, but it does. The settlement with Hispanic and female farmers was unnecessary. The Department of Agriculture had defended itself for ten years, and the plaintiffs had lost at every stage of litigation, including the Supreme Court. But the Obama Administration couldn’t allow this to happen. Racial spoils for one non-white group must be available to all non-white groups. “New settlements would provide ‘a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers,’ an internal department memorandum stated in March 2010.”137 As the Times reported:

On the heels of the Supreme Court’s ruling, interviews and records show, the Obama administration’s political appointees at the Justice and Agriculture Departments engineered a stunning turnaround: they committed \$1.33 billion to compensate not just the 91 plaintiffs but thousands of Hispanic and female farmers who had never claimed bias in court. The deal, several current and former government officials said, was fashioned in White House meetings despite the vehement objections – until now undisclosed – of career lawyers and agency officials who had argued that there was no credible evidence of widespread discrimination. What is more, some protested, the template for the deal – the \$50,000 payouts to black farmers – had proved a magnet for fraud.138

133 James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>. 134 Report at 3186-3192. 135 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 136 Memorandum, Prohibition on Settlement Payments to Third Parties, Office of the Attorney General, June 5, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>. 137 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0. 138 Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

<https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>
https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0
<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>
https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0
https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0

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A report cited by the Commission claims that “systemic racism at USDA has denied black farmers equal access to credit and crop insurance”.139 The report – again from the Center for American Progress – does not provide any evidence of continuing systemic discrimination against black farmers. The report only cites one recent case of alleged discrimination, in which a family of cane farmers claim that a bank and USDA denied them crop loans.140 Legislation sponsored by Sen. Tim Scott allows “heirs’ property,” which is landed inherited by family members without a formal will, to receive assistance from USDA.141 The CAP report also notes that black farmers have increased as a percentage of farmers, and they own more land.142

139 Report at n. 3200. 140 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>. 141 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>. 142 Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

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Rebuttal of Commissioner Peter N. Kirsanow Commissioner Narasaki writes that the Declaration of Independence was followed by, “a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years.” N.b. The Constitution was ratified on June 21, 1788.1 Slavery was formally abolished throughout the United States by the 13th Amendment, which was ratified on December 6, 1865.2

1 The day the Constitution was ratified, National Constitution Center, June 21, 2019, <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>. 2 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865), Our Documents Initiative, <https://www.ourdocuments.gov/doc.php?flash=false&doc=40>.

<https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>
<https://www.ourdocuments.gov/doc.php?flash=false&doc=40>

561 Commissioners’ Statements, Dissents, and Rebuttals

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563 APPENDIX A

APPENDIX A Department of Justice Civil Rights Division Cases – Total Cases Resolved FY 2016–20180F3757 CRT SEC DRS EOS ELS IER HCE SPL VOT TOTAL/FY 2016 16 8 6 61 41 8 3 143 2017 8 14 3 57 46 4 5 4 136.5 2018 14 5 5 49 28 3 5 109 TOTAL 38 27 14 167 115 15.5 12 388.5 CRT SEC VOT SPL IER HCE ELS EOS DRS TOTAL Settlements 6 8.5 166 44 3 14 25 266.5 Consent Decrees 4 5 64 9 10 12 104 Judicial Decisions 2 2 1 7 2 3 1 18 TOTAL 388.5

3757Methodology and definitions are described in Chapter 2.

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Appellate Section Cases (FY 2016-2018)

Case Issue Brief Date Doc

Decision Date or other subsequent action

Doc

FY 2016 (33 cases) Flores v. U.S. Department of Education (4th Cir.) – Respondent Education 10/8/2015

<https://www.justice.gov/crt/case-document/drayton-v-mcintosh-county>
<https://www.justice.gov/crt/case-document/drayton-v-mcintosh-county>
<https://www.justice.gov/crt/case-document/drayton-v-mcintosh-county>
<https://www.justice.gov/crt/case-document/drayton-v-mcintosh-county>

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Watkins v. Secretary, Florida Department of Corrections (11th Cir.) – Amicus

Institutionalized Persons, Religion 4/22/2016 Brief as Amicus 10/28/2016

Court of Appeals Decision, available at 669 F. App'x 982

Tucker v. Idaho (Idaho) – Amicus Access to Justice 5/11/2016 Brief as Amicus 4/28/2017 State Court Decision, reported at 394 P.3d 54

Exodus Refugee Immigration, Inc. v. Pence (7th Cir.) - Amicus Immigration 5/16/2016 Brief as Amicus 10/3/2016

Court of Appeals Decision, reported at 838 F.3d 902

Clark v. Virginia Department of State Police (Va.) - Amicus Servicemember 5/17/2016 Brief as Amicus 12/1/2016

State Court Decision, reported at 793 S.E.2d 1

Cazares v. United States (S.Ct.) - Respondent Criminal 5/18/2016

Brief in Opposition 6/20/2016

Certiorari denied, reported at 136 S. Ct. 2484

United States v. North Carolina (4th Cir.) - Appellant Voting 5/19/2016 Brief as Appellant 7/29/2016

Court of Appeals Decision, reported at 831 F.3d 204

Doe v. Mercy Catholic Medical Center (3d Cir.) – Amicus Education 6/9/2016 Brief as Amicus 3/7/2017

Court of Appeals Decision, reported at 850 F.3d 545

Silva v. Baptist Health South Florida, Inc. (11th Cir.) – Amicus ADA and § 504 6/23/2016 Brief as Amicus 5/8/2017

Court of Appeals Decision, reported at 856 F.3d 824

United States v. Cortes-Meza (11th Cir.) - Appellee Criminal 6/24/2016 Brief as Appellee 4/13/2017

Court of Appeals Decision, available at 685 F. App'x 731

Rodella v. United States (S. Ct.) - Respondent Criminal 7/15/2016

Brief in Opposition 10/3/2016

Certiorari Denied, reported at 137 S. Ct. 37

<https://www.justice.gov/crt/case-document/watkins-v-secretary-florida-department-corrections-brief-amicus><https://www.justice.gov/crt/case-document/watkins-v-secretary-florida-doc-court-appeals-decision>

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McGann v. Cinemark USA (3d Cir.) – Amicus ADA and § 504 7/18/2016 Brief as Amicus 10/6/2017

Court of Appeals Decision, reported at 873 F.3d 218

Ohio A. Philip Randolph Institute v. Husted (6th Cir.) - Amicus Voting 7/18/2016 Brief as Amicus 9/23/2016

Court of Appeals Decision, reported at 838 F.3d 699

United States v. Hill (4th Cir.) - Appellant Criminal 7/28/2016 8/18/2017

Court of Appeals Decision, available at 700 F. App'x 235

Fry v. Napoleon Community Schools (S. Ct.) – Amicus

Individuals with Disabilities Education Act

8/29/2016 Brief as Amicus 2/22/2017 Supreme Court Decision, reported at 137 S. Ct. 743

Ivy v. Morath (S. Ct.) – Amicus ADA and § 504 8/30/2016 Brief as Amicus (merits) 10/31/2016

Vacated & Remanded with instructions to Dismiss as Moot, reported 137 S.Ct. 414

Paulk v. Georgia Department of Transportation (11th Cir.) – Amicus Housing 9/6/2016 Brief as Amicus 3/14/2017 Dismissed

Bethune-Hill v. Virginia State Board of Elections (S. Ct.) - Amicus Voting 9/14/2016 Brief as Amicus 3/1/2017

Supreme Court Decision, reported at 137 S. Ct. 788

United States v. County of Maricopa (9th Cir.) - Appellee

Police Misconduct (Civil Cases), Title VI 9/16/2016 Brief as Appellee 5/7/2018

Court of Appeals Decision, reported at 889 F.3d 648

FY 2017 (39 cases)

Bank of America v. Miami, Wells Fargo v. Miami (S. Ct.) – Amicus Housing 10/7/2016 Brief as Amicus 5/1/2017

Supreme Court Decision, reported at 137 S. Ct. 1296

Cooper (McCrary) v. Harris (S. Ct.) - Amicus Voting 10/19/2016 Brief as Amicus 5/22/2017

<https://www.justice.gov/crt/case-document/mcgann-v-cinemark-usa-brief-amicus>
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<https://www.justice.gov/crt/case-document/frv-v-napoleon-community-schools-brief-amicus-merits>
<https://www.justice.gov/crt/case-document/frv-v-napoleon-community-schools-supreme-court-decision>
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<https://www.justice.gov/crt/case-document/viv-v-morath-brief-amicus-merits>
<https://www.justice.gov/crt/case-document/viv-v-morath-brief-amicus-merits>
<https://www.justice.gov/crt/case-document/paulk-v-georgia-department-transportation-brief-amicus>
<https://www.justice.gov/crt/case-document/bethune-hill-v-virginia-state-board-elections-brief-amicus>
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<https://www.justice.gov/crt/case-document/united-states-v-county-maricopa-brief-appellee>
<https://www.justice.gov/crt/case-document/united-states-v-maricopa-county-court-appeals-decision>
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<https://www.justice.gov/crt/case-document/bank-america-and-wells-fargo-v-miami-brief-amicus>
<https://www.justice.gov/crt/case-document/bank-america-and-wells-fargo-v-miami-supreme-court-decision>
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<https://www.justice.gov/crt/case-document/mccrory-v-harris-brief-amicus>
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United States v. Louisiana (5th Cir.) - Appellee Voting 10/21/2016

Motion to Dismiss 12/21/2016 Dismissed

Issa v. The School District of Lancaster (3d Cir.) – Amicus Education 10/24/2016 Brief as Amicus 1/30/2017

Court of Appeals Decision, reported at 847 F.3d 121

Francis v. Kings Park Manor (2d Cir.) – Amicus Housing 10/31/2016

Brief as Amicus in Response to Court's Invitation

Geraci and Fields v. Philadelphia (3d Cir.) - Amicus Other 10/31/2016 Brief as Amicus 7/13/2017

Order Amending Court of Appeals Decision

Baston v. United States (S. Ct.) - Respondent Criminal 11/16/2016

Brief in Opposition 3/6/2017

Certiorari Denied, reported at 137 S. Ct. 850

Andrew F. v. Douglas County School District RE-1 (S. Ct.) – Amicus

Individuals with Disabilities Education Act

11/21/2016 Brief as Amicus 3/22/2017 Supreme Court Decision, reported at 137 S. Ct. 988

Abbott v. Veasey (S. Ct.) - Respondent Voting 11/28/2016 Brief in Opposition 1/23/2017 Certiorari Denied, reported at 137 S.Ct. 612

United States v. Wilson (8th Cir. and S. Ct.) - Appellee/Respondent Criminal 12/9/2016

Court of Appeals Judgment

Andrews v. City of Hartford (11th Cir.) – Amicus ADA and § 504 12/12/2016 Brief as Amicus 6/30/2017

Court of Appeals Decision

Cowan v. Cleveland School District (5th Cir.) – Appellee Education 12/16/2016 Brief as Appellee 3/9/2017 Dismissed

Mullet, et al. v. United States (S. Ct.) - Respondent Criminal 12/22/2016

Brief in Opposition 2/21/2017

Certiorari Denied, reported at 137 S. Ct. 1065

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<https://www.justice.gov/crt/case-document/abbott-v-veasey-brief-opposition>
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<https://www.justice.gov/crt/case-document/andrews-v-city-hartford-brief-amicus>
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<https://www.justice.gov/crt/case-document/mullet-et-al-v-united-states-brief-opposition>

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United States v. Colin Boone (8th Cir.) - Appellee Criminal 1/9/2017

United States Waived Response to the Petition for a Writ of Certiorari

1/9/2017 Certiorari Denied, reported at 137 S. Ct. 676 (S. Ct.)

United States v. Michael Smith (11th Cir.) - Appellee Criminal 1/9/2017

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Smith v. United States (S. Ct.) - Respondent Criminal 5/30/2017

United States Waived Response to the Petition for a Writ of Certiorari

5/30/2017

Certiorari Denied, reported at 137 S. Ct. 2193 (United States Waived Response to the Petition for a Writ of Certiorari)

United States v. Cowden (4th Cir.) - Appellee Criminal 6/5/2017 Brief as Appellee 2/16/2018

Court of Appeals Decision, reported at 882 F.3d 464

Midwest Fence Corporation v. U.S. Department of Transportation (S. Ct.) - Respondent

Affirmative Action 6/26/2017 Certiorari Denied, reported at 137 S.Ct. 2292

Brief in Opposition - 5/23/17

United States v. Hatley (5th Cir.) - Appellee Criminal 7/3/2017 Brief as Appellee 1/26/2018

Court of Appeals Decision, available at 717 F. App'x 457

Rothe Development Corp. v. United States Department of Defense and the Air Force

Affirmative Action 7/7/2017 Brief in Opposition 10/16/2017 Cert. denied, reported at 138 S. Ct. 354

Magee v. Coca Cola Refreshments (S. Ct.) – Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

7/19/2017 Brief as Amicus 10/2/2017 Certiorari Denied, reported at 138 S. Ct. 55

In re: Asociación de Titulares de Condominio Castillo (1st-BAP Cir.) – Appellee

Housing 7/31/2017 Brief as Appellee 2/8/2018 Court of Appeals Decision, reported at 581 B.R. 346

United States v. Hines (5th Cir.) - Appellee Criminal 8/21/2017 Brief as Appellee 12/28/2017

Court of Appeals Decision, available at 707 F. App'x 803

United States v. Bergeron (5th Cir.) - Appellee Criminal 8/25/2017 Brief as Appellee 12/21/2017

Court of Appeals Decision, available at 707 F. App'x 288

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Melendres v. Maricopa County (9th Cir.) - Intervenor/Appellee

Police Misconduct (Civil Cases) 8/29/2017

Brief as Intervenor/Appellee

7/31/2018 Court of Appeals Decision, reported at 897 F.3d 1217

Walker v. City of Calhoun (11th Cir.) – Amicus Access to Justice 9/13/2017 Brief as Amicus 8/22/2018

Court of Appeals Decision, reported at 901 F.3d 1245

Uzuegbunam v. Preczewski (N.D. Ga.) - Amicus Other 9/26/2017

Statement of Interest 5/25/2018

District Court Order

Houston v. City of Atlanta (11th Cir.) - Amicus

Employment Discrimination (Race, National Origin, Sex, and Religion)

9/27/2017 Brief as Amicus 8/24/2018

Court of Appeals Decision, available at 735 F. App'x 701

FY 2018 (38 cases)

Clark v. Virginia Department of State Police (S. Ct.) - Amicus Servicemember 10/12/2017

Brief as Amicus in Response to the Court's Invitation

12/4/2017 Certiorari Denied, reported at 138 S. Ct. 500

United States v. Groce (7th Cir.) - Appellee Criminal 10/12/2017 Brief as Appellee 5/23/2018

Court of Appeals Decision, reported at 891 F.3d 260

Freyre v. Chronister (fna Gee) (11th Cir.) – Intervenor

American With Disabilities Act and Section 504 of the Rehabilitation Act

10/13/2017 Brief as Intervenor

Melendres v. Penzone (9th Cir.) - Appellee

Response to Petition for Panel Rehearing

10/24/2017 Court of Appeals Order

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United States v. Whittington (9th Cir.) - Appellee Criminal 10/16/2017 Brief as Appellee 5/1/2018

Court of Appeals Decision, available at 721 F. App'x 713

A.R. v. Secretary, Florida Agency for Health Care Administration (11th Cir.) – Appellant

American With Disabilities Act and Section 504 of the Rehabilitation Act

10/18/2017 Brief as Appellant 3/1/2018 Reply Brief

Shaw v. Burke (C.D. Cal.) - Amicus Other 10/24/2017 Statement of Interest 1/17/2018 District Court Order, available at 2018 WL 459661

Veasey v. Abbott (5th Cir.) - Appellee Voting 10/27/2017 Brief as Appellee - response in motion to lift stay

Court of Appeals Decision, 886 F.3d 792 (5th Cir. 2018)

Fryberger v. University of Arkansas (8th Cir.) – Intervenor Education 11/22/2017

Brief as Intervenor 5/2/2018

Court of Appeals Decision, reported at 889 F.3d 471

Davis v. Guam (9th Cir.) - Amicus Voting 11/28/2017 Brief as Amicus

Bratwaite v. Broward County School Board (11th Cir.) - Amicus

Employment Discrimination (Race, National Origin, Sex, and Religion)

12/7/2017 Brief as Amicus

Valencia v. City of Springfield (7th Cir.) – Amicus Housing 12/18/2017 Brief as Amicus 3/1/2018

Court of Appeals Decision, reported at 883 F.3d 959

United States v. Givhan (6th Cir.) - Appellee Criminal 12/20/2017 Brief as Appellee 6/29/2018

Court of Appeals Decision, available at 2018 WL 3202773

Smith v. School Board of Concordia Parish (5th Cir.) – Appellee Education 12/21/2017 Brief as Appellee 10/12/2018

Court of Appeals Decision, available at 2018 WL 4939471

Espinoza v. Montana Department of Revenue (Mont. Sup. Ct.) – Amicus Religion 1/18/2018 Brief as Amicus

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Young America's Foundation v. Napolitano (N.D. Cal.) - Amicus Other 1/25/2018

Statement of Interest 4/25/2018 District Court Order

Silguero v. CSL Plasma, Inc. (5th Cir.) – Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

2/6/2018 Brief as Amicus 10/23/2018 Court of Appeals Decision, available at 2018 WL 5262734

Dagher v. Washington Metropolitan Area Transit Authority (4th Cir.) – Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

2/8/2018 Brief as Amicus 4/25/2018 Dismissed

United States v. County of Lauderdale, et al. (5th Cir.) – Appellant Access to Justice 2/20/2018 Brief as Appellant 5/17/2018 Reply Brief

Abbott v. Perez (S. Ct.) – Appellee Voting 2/26/2018 Brief as Appellee Supporting Appellants

4/17/2018 Reply Brief

Edwards v. Gene Salter Properties (8th Cir.) – Amicus Housing 3/8/2018 Brief as Amicus 10/9/2018

Court of Appeals Decision, available at 2018 WL 4896179

United States v. Broussard (5th Cir.) – Appellee Criminal 3/19/2018

Supplemental Letter Brief 3/29/2018

Court of Appeals Order, Petition for Rehearing DENIED

Silberman v. Miami Dade Transit (11th Cir.) – Amicus

American With Disabilities Act and Section 504 of the Rehabilitation Act

4/4/2018 Brief as Amicus

United States v. Town of Colorado City, Arizona, et al. (9th Cir.) – Appellee

Housing 4/19/2018 Brief as Appellee

United States v. Asher (6th Cir.) – Appellee Criminal 5/14/2018 Brief as Appellee

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<https://www.justice.gov/crt/case-document/abbott-v-perez-brief-appellee-supporting-appellants>
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Sheridan v. Melendres (S. Ct.) – Respondent

Police Misconduct (Civil Cases) 5/22/2018

Brief in Opposition 6/25/2018

Certiorari Denied, available at 2018 WL 574922

United States v. Duggart (6th Cir.) – Appellee Criminal 5/24/2018 Brief as Appellee 10/18/2018

Court of Appeals Decision, available at 2018 WL 5075044

United States v. Corder (6th Cir.) – Appellee Criminal 6/11/2018

United States Waived Response to the Petition for a Writ of Certiorari

6/11/2018 Certiorari Denied, available at 2018 WL 1952577

Jesus Christ is the Answer Ministries v. Baltimore County, Maryland (4th Cir.) – Amicus

Religion 7/2/2018 Brief as Amicus

United States v. Badillo (1st Cir.) – Appellee

Employment Discrimination (Race, National Origin, Sex, and Religion)

7/3/2018 Motion to Dismiss 11/7/2018 Court of Appeals Judgment

United States v. Slager (4th Cir.) – Appellee Criminal 7/5/2018 Brief as Appellee

United States v. Royal (4th Cir.) – Appellee Criminal 7/31/2018 Brief as Appellee 11/6/2018

Court of Appeals Decision, available at 2018 WL 5809731

Ashby v. Warrick County School Corp. (7th Cir.) – Amicus ADA and § 504 8/20/2018 Brief as Amicus 11/5/2018

Court of Appeals Decision, available at 2018 WL 5784478

Furgess v. Pennsylvania Department of Corrections (3d Cir.) – Amicus ADA and § 504 8/27/2018 Brief as Amicus

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Metcalf v. United States (S. Ct.) – Respondent Criminal 9/14/2018

Brief in Opposition 10/29/2018

Certiorari Denied, available at 2018 WL 3008926

United States v. Brown (11th Cir.) – Appellee/Cross-Appellant Criminal 9/20/2018

Brief as Appellee/Cross- Appellant

United States v. Antico (11th Cir.) – Appellee/Cross-Appellant Criminal 9/24/2018

Brief as Appellee/Cross- Appellant

United States v. Puerto Rico (1st Cir.) - Appellee

Police Misconduct (Civil Cases), Third Party Intervention in Civil Rights Cases

10/9/2018 Response to Court Order to Show Cause

Disability Rights Section Cases (FY 2016-2018)

Cases Date Document FY 2016 (16 cases) County of Riverside (CA) 10/8/2015 Consent Decree Pikes Peak Wrestling League (CO) 10/29/2015 Consent Decree

<https://www.justice.gov/crt/case-document/metcalf-v-united-states-brief-opposition>
<https://www.justice.gov/crt/case-document/metcalf-v-united-states-brief-opposition>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-brown-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-antico-brief-appelleecross-appellant>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
<https://www.justice.gov/crt/case-document/united-states-v-puerto-rico-response-court-order-show-cause>
https://www.ada.gov/riverside_ca/riverside_ca_cd.html
https://www.ada.gov/pikes_peak/pikes_peak_cd.html

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Augusta County (VA) 11/4/2015 Consent Decree Bolivar County (MS) 11/17/2015 Consent Decree North Florida OB/GYN Associates (FL) 1/7/2016 Settlement Agreement Two Men and a Truck 1/28/2016 Settlement Agreement Greyhound Lines, Inc. 2/10/2016 Consent Decree Arlington-Mansfield Area YMCA (TX) 2/24/2016 Settlement Agreement Pain Management Care, P.C. 4/7/2016 Consent Decree Columbia, South Carolina Police Department (SC) 5/3/2016 Settlement Agreement Mid-America Center 5/5/2016 Settlement Agreement Philadelphia Freedom Valley YMCA – Rocky Run Branch 5/19/2016 Settlement Agreement Omaha Performing Arts Society 7/14/2016 Settlement Agreement YMCA of the Triangle 7/27/2016 Settlement Agreement Humboldt County (CA) 9/13/2016 Consent Decree 30 Hop Restaurant 9/19/2016 Consent Decree FY 2017 (8 cases) Miami University, et al. 10/17/2016 Consent Decree City of Florence (KY) 10/26/2016 Consent Decree

Sheriff Woody & City of Richmond (VA) 11/12/2016

Judicial Decision, new Administration agreed to stipulated motion to dismiss (EDVA decided in favor of Defendant 11/22/16; notice of appeal filed 1/18/17)

Gualtieri 11/16/2016 Settlement Agreement Ohio Department of Rehabilitation & Correction 1/3/2017 Settlement Agreement Palm Beach County Supervisor of Elections 1/19/2017 Settlement Agreement City of Philadelphia (PA) 2/17/2017 Consent Decree Washington Metropolitan Area Transit Authority 3/1/2017 Consent Decree FY 2018 (14 cases) City of New Albany (IN) 10/4/2017 Settlement Agreement Bar-T Year Round Programs for Kids 10/10/2017 Settlement Agreement Louisiana State Penitentiary (LA) 11/14/2017 Settlement Agreement When Pigs Fly BBQ Pit 1/18/2018 Settlement Agreement Claremore VFW & Auxiliary 2/6/2018 Settlement Agreement

https://www.ada.gov/augusta_county/augusta_cd.html
https://www.ada.gov/arlington_vmca.html
https://www.ada.gov/columbia_pd/columbia_pd_sa.html
https://www.ada.gov/mid-america_sa.html
https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html
https://www.ada.gov/miami_university_cd.html
https://www.ada.gov/florence_ky/florence_ky_cd.html
https://www.ada.gov/richmond_sheriffs_complaint.html
https://www.ada.gov/palm_beach_sa.html
https://www.ada.gov/wmata/wmata_cd.html
https://www.ada.gov/bar-t_sa.html
https://www.ada.gov/lsp_sa.html
https://www.ada.gov/wpf_bbq_sa.html
https://www.ada.gov/claremore_vfw_sa.html

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Atlantis Events, LLC 2/20/2018 Settlement Agreement Learning Care Group, Inc. 3/20/2018 Settlement Agreement Union Parish Detention Center 3/22/2018 Settlement Agreement South Carolina Department of Corrections (SC) 3/29/2018 Settlement Agreement Teachers Test Prep, Inc. 6/27/2018 Settlement Agreement The Pawn Shop 7/24/2018 Settlement Agreement Saint Joseph Hospital and SCL Health 7/31/2018 Settlement Philadelphia Police Department (PA) 8/2/2018 Settlement Agreement City of Minneapolis (MN) 8/14/2018 Settlement Agreement

https://www.ada.gov/atlantis_events_sa.html
https://www.ada.gov/lcq_sa.html
https://www.ada.gov/union_parish_sa.html
https://www.ada.gov/south_carolina_doc_sa.html
https://www.ada.gov/tp_sa.html
https://www.ada.gov/the_pawn_shop_sa.html
https://www.ada.gov/sjh_lof.html
https://www.ada.gov/ppd_sa.html
https://www.ada.gov/minneapolis_tl_sa.html

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Educational Opportunity Section Cases (FY 2016-2018) Cases Basis Type of Resolution Date of Resolution FY 2016 FY 2016 (8 cases) Monroe City SB (LA) Race (deseg) Consent Order 4/14/2016

Arizona DEO (AZ) National Origin (ELL & FLEP) Settlement (amended 6/30/16 in 1 aspect) 4/22/2016

Univ. Tennessee Health Science Center (TN) Disability Settlement 7/25/2016 Wheaton College (MA) Sex (sexual harassment, Title IX) Settlement 9/21/2016 Worcester P.S. (MA) National Origin (ELL & FLEP) Settlement 10/7/2016 Palm Beach County (S.D. Fla.) National Origin (ELL & FLEP) Settlement 10/11/2016

Univ. of New Mexico (NM) Sex (sexual assault/discrimination, Titles IV & IX) Settlement 10/17/2016

California DOE (CA) National Origin (ELL) Settlement 9/8/2016 FY 2017 FY 2017 (12 cases) St. Johns County SD (M.D. Fla) Race (deseg) Judicial Order 19/26/16 St. Martin Parish SD (LA) Race (deseg) Consent Order 11/16/2016

SD of Philadelphia (PA) National Origin (ELL)/Disability (IDEA) Judicial Opinion 11/30/2016 Cotton Plant SD #1 (AR) Race (deseg) Consent Order 1/18/2017

BEO of Hendry County (FL) Race (deseg)

Consent Order - of stipulated facts & ongoing monitoring needs 1/23/2017

St. James Parish SB (LA) Race (deseg) Consent Order 1/30/2017 Covington IPS (KY) Disability Settlement 3/13/2017

Kansas State Univ. (KS) Sex (sexual assault/harrasment, Title IX) Judicial Opinion 3/14/2017

Wicomico County SD (MD) Race (Black & Latino)/Disability Settlement 3/20/2017 SB of the City of Suffolk (VA) Race (deseg) Consent Order 3/20/2017

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Bolivar County BOE #4 (MS) Race (deseg) Consent Order (fy 2016 Judicial Opinion) 5/25/2017

State of Georgia (McDuffie SD)(GA) Race (deseg) Consent Order 5/25/2017 Gallup-McKinley County Schools (NM)

Race (Native American, Title VI disparate impact regs) Settlement 6/16/2017

Horry County Schools (SC) National Origin (ELL) Settlement 8/24/2017 FY 2018 FY 2018 (6 cases) Westminster Public Schools (CO) National Origin (ELL) Settlement 3/1/2018 Union County P.S. (OK) National Origin (ELL) Settlement 7/5/2018 Jackson County SB (FL) Race (deseg) Consent Order 2/23/2018 Providence Schools (RI) National Origin (ELL) Settlement 8/9/2018 South Bend Community School Corp. (IN) Race (deseg)

Consent Order - updated by stipulation 9/4/2018

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Employment Litigation Section Cases (FY 2016-2018)

Defendant Name Type of Resolution Date of Resolution Basis Issue

FY 2016 (6 cases)

City of Chicago Board of Education (IL) Consent Decree 12/17/2015 Title VII (sex)

Title VII: §706 (Sex - gender & pregnancy) (settlement based on consent entered by court as court order)

Niagara County (NY) Consent Decree 1/7/2016 Title VII (sex)

Title VII: §706 (Sex & pregnancy)(CD signed in Dec. 2015, entered into court Jan. 2016)

City of Somerville & Commonwealth of Massachusetts (MA) Settlement 2/4/2016 USERRA

USERRA (stipulated settlement with dismissal)

State of Hawaii (HI) Judicial Findings 4/14/2016 Title VII (sex)

Title VII § (Jury found State of Hawaii discriminated against individual on basis of sexual harassment)

Laborers' Local #1149 (IL) Consent Decree 4/20/2016 USERRA USERRA

City of Chicago (IL)

Consent Decree - stipulated consent judgement 6/8/2016 Title VII (N.O.)

Title VII: §§706/707 (National origin discrimination based on 10-year continuous residence requirement for probation officer positions)

FY 2017 (3 cases)

City of Lubbock (TX) Consent Decree 14-Nov-16 Title VII (sex & ethnicity/race)

Title VII: pattern or practice of discrimination against Hispanic and female applicants on the basis of national origin and sex in selection process for position of probationary police officer under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII").

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City of Florence (KY) Consent Decree 19-Dec-16 Title VII (sex) & ADA

Title VII & ADA Section I - Discrimination based upon sex (pregnancy) - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 & disability

School Board of Palm Beach County (FL) Consent Decree 17-Jan-17 Title VII (sex)

Discrimination based upon sex - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000

FY 2018 (5 cases)

Rhode Island (RI) Consent Decree 20-Oct-17 Title VII (race/N.O.)

Title VII: §707(defendant engaged in pattern or practice of employment discrimination against African American and Hispanic applicants for entry-level positions)

University of Baltimore (MD) Settlement 22-Feb-18 Title VII (sex & pregnancy)

EEOC charge - violation of Title VII b/c refusing to hire a pregnant woman

Wyoming Military Department (WY) Judicial Findings 21-Mar-18

Title VII (sex/harassment) Sexual harassment under Title VII

Commonwealth of Puerto Rico (PR) Settlement 21-May-18 USERRA

USERRA (case dismissed wo/prejudice, attaching settlement)

Jacksonville & Jacksonville Ass'n of Firefighters (FL) Consent Decree 7/26/2018 Title VII (race) Title VII (disparate impact regs) (race)

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Federal Coordination and Compliance Section Cases (FY 2016-2018)

Party Type of Resolution Date of Resolution Basis FY 2016 (3 cases) Washington State DOL (by DOJ & DOL) Settlement 10/1/2015 LEP (workers) Kentucky Courts Settlement 6/22/2016 LEP (public users) Los Angeles Superior Court Settlement 9/20/2016 LEP (public users) FY 2017 (1 cases) Washington State Courts Partnership 7/18/2017 LEP (public users) Pennsylvania State Courts Settlement 4/20/2017 LEP (public users) FY 2018 (1 cases) Eau Claire County, WI, Circuit Court Settlement 6/13/2018 LEP (public users)

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Housing and Civil Enforcement Section Cases (FY 2016-2018)

Defendant Type of Resolution Date of Resolution Basis

FY 2016 (41 cases) 41 cases in FY 16 Fifth Third Bank (S.D. Ohio) Consent Order 10/1/2015 Race Eagle Bank and Trust Co (E.D. Mo.) Consent Order 10/1/201 Race Sayville Development LLC (E.D.N.Y.) Consent Order 10/2/2015 Disability Collier (W.D. La.) Consent Order 10/7/2015 Race Lincolnshire (N.D. Ill.) Consent Order 10/19/2015 Disability

Housing Authority of Baltimore City (D. Md.) Consent Decree (Supplemental) 10/29/2015 Disability

Dawn Properties, Inc. (S.D. Miss.) Consent Order 11/3/2015 Disability Hudson City Savings Bank, F.S.B. (D.N.J.) (DOJ with CFPB) Consent Order 11/4/2015 National Origin The Durst Organization (S.D.N.Y.) Consent Decree (Partial) 11/13/2015 Disability Sage Bank (D. Mass.) Consent Order 12/1/2015 Race Southwind Village, LLC (M.D. Fla.) Consent Decree (Partial) 12/15/2015 Familial Status Twin Oaks Mobile Home Park, Inc. (W.D. Wis.) Consent Decree 12/17/2015 Familial Status United States v. Christensen (D. S.D.) Consent Order 1/7/2016 Disability United States v. Applewood of Cross Plains (W.D. Wis.) Consent Decree 1/20/2016 Disability United States v. Evolve Bank & Trust (W.D. Tenn.) Consent Order 1/21/2016 Disability Brooklyn Park 73rd Leased Housing Assoc., LLC (D. Minn.) Consent Decree 1/22/2016 Disability

United States v. Countrywide Financial Corp. (C.D. Cal.) Consent Order (Amended) 1/25/2016 National Origin/Fair Lending

United States v. Schminich (D. Minn.) Consent Decree 2/8/2016 Disability United States v. Toyota Motor Credit Corp. (C.D. Cal.) Consent Order 2/11/2016 Race Pendygraft (E.D. Ky.) Consent Decree 2/26/2016 Sex Fort Worth, Texas (N.D. Tex) Consent Decree 3/7/2016 Disability

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Rappuhn (N.D. Ala.) Consent Order 3/8/2016 Disability United States v. Mere Consent Order 3/15/2016 Race United States v. Bryan Company (Byran II) (S.D. Miss.) Consent Order (Supplement) 4/19/2016 Disability United States v. Avatar Properties, Inc. (D. N.H.) Consent Decree 5/3/2016 Disability United States v. Glenwood Management Corporation (S.D.N.Y.) Consent Order 5/18/2016 Disability United States v. Gentle Manor Estates, LLC (N.D. Ind.) Consent Decree 5/18/2016 Familial Status United States v. Brinson (D. Nev.) Consent Order 6/14/2016 Familial Status City of Beaumont, Texas (E.D. Tex.) Consent Decree 6/16/2016 Disability United States v. Noble Homes (N.D. Ohio) Consent Decree 6/23/2016 Disability BancorpSouth Bank (N.D. Miss.)(DOJ with CFPB) Consent Order 7/25/2016 Race United States v. Blass (D. Kan.) Consent Order 8/2/2016 Disability United States v. Loecher Consent Order 8/8/2016 Familial Status United States v. Encore Management Company, Inc. (S.D. W. Va.) Consent Order 8/12/2016 Sex HSBC Auto Finance (N.D. Ill.) Consent Order 8/18/2016 Servicemembership Parkside East, Inc. (E.D. Mich.) Consent Decree 9/1/2016 Familial Status Hillside Park Real Estate, LLC (N.D.N.Y.) Consent Decree 9/12/2016 Disability Kent State University (N.D. Ohio) Consent Decree 9/20/2016 Disability

Ginsburg Development, LLC (S.D.N.Y.) Judicial Decision (Preliminary Injunction) 9/28/2016 Disability

NALS Apartment Homes (D. Utah) Consent Order 9/28/2016 Disability

Plaza Home Mortgage (S.D. Cal.) Consent Order (Granting Extension of) 9/29/2016 National Origin

FY 2017 (46 cases) 46 cases in FY 17 Kormanik (W.D. Pa.) Consent Order 10/3/2016 Familial Status Wells Fargo Bank, N.A., d/b/a Wells Fargo Dealer Services, Inc. (C.D. Cal.) Consent Order 10/4/2016 Servicemembership Housing Authority of Bossier City (W.D. La.) Consent Decree 10/6/2016 Disability & Race

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Charter Bank (S.D. Tex.) Consent Order 10/12/2016 National Origin First Federal Bank of Florida (M.D. Fla.) Consent Decree 10/12/2016 Sex Pittsfield Charter Township (E.D. Mich.) Consent Order 10/14/2016 Religion Nistler (Nistler II) (D. Mont.) Consent Order 10/28/2016 Disability San Diego Family Housing, LLC (S.D. Cal.) Consent Order 11/1/2016 Servicemembership

Southwind Village, LLC (M.D. Fla.) (Carl Bruckler) Judicial Decision (Default Judgement) 11/18/2016 Familial Status

City of Port Jervis (S.D.N.Y.) Consent Decree 11/23/2016 Religion Dawn Properties, Inc. (S.D. Miss.) Consent Order 12/2/2016 Disability Goss (M.D. Fla.) Consent Order 12/12/2016 Race/testing program Wygul (W.D. Tenn.) Consent Order 12/15/2016 Sex Charter Bank (S.D. Tex.) Consent Order 1/3/2017 National Origin Guardian Savings Bank & Union Savings Bank (S.D. Ohio) Consent Order 1/3/2017 Race United States v. Silverstein Properties, Inc. (S.D.N.Y.) Consent Decree 1/12/2017 Disability JPMorgan Chase Bank, N.A. (S.D.N.Y.) Consent Order 1/20/2017 Race United States v. Webster AV Management, LLC (S.D.N.Y.) (formally United States v. Strulovitch (S.D.N.Y.)

Judicial Decision (Preliminary Injunction) 1/26/2017 Disability

Albanese Organization, Inc. (S.D.N.Y.) Consent Decree (Partial) 2/13/2017 Disability Edmunds (D. Minn.) Consent Order 2/23/2017 Race United States v. Friedman Residence, LLC (S.D.N.Y.) Consent Decree 2/24/2017 Disability City of Sterling Heights (E.D. Mich.) Consent Order 3/1/2017 Religion Trumbull Housing Authority (N.D. Ohio) Consent Order 3/2/2017 Disability

Encore Management (S.D. W.Va.) (James) Judicial Decision (Default Judgement) 3/20/2017 Sex

Town of Colorado (D. Ariz) Judicial Decision (Order Granting Injunctive Relief) 4/18/2017 Religion

United States v. Katz (D. Mont.) Judicial Decision (Verdict) 5/17/2017 Disability

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Bernards Township (D. N.J.) Settlement Agreement 5/30/2017 Religion Pritchard (D. Kan.) Settlement Agreement 6/2/2017 Familial Status City of Des Plaines, Illinois (N.D. Ill.) Settlement Agreement 6/6/2017 Religion Dominic Properties (D. Minn.) Settlement Agreement 6/7/2017 Familial Status Crowe (M.D. Ala.) Settlement Agreement 6/16/2017 Servicemembership City of Jackson (S.D. Miss.) Consent Decree 6/26/2017 Disability City of Jacksonville (M.D. Fla.) Consent Decree 6/29/2017 Disability J & R Associates (D. Mass.) Settlement Agreement 7/6/2017 Race COPOCO Community Credit Union (E.D. Mich.) Settlement Agreement 7/6/2017 Servicemembership

Walden (N.D. W. Va.) Consent Decree (last one during FY 16-18) 7/10/2017 Sex

Trump Village Section IV Inc. (E.D.N.Y.) Settlement Agreement 7/18/2017 Disability 505 Central Avenue Corp. (S.D.N.Y.) Settlement Agreement 7/20/2017 Disability Bensalem Township (E.D. Pa.) Settlement Agreement 9/1/2017 Religion Appleby (W.D. Wash.) Settlement Agreement 9/6/2017 Familial Status Garden Grove, LLC (D. Minn.) Settlement Agreement 9/12/2017 Disability Housing Authority of the City of Anderson, Indiana (S.D. Ind.) Settlement Agreement 9/14/2017 Sex & Disability CitiFinancial Credit Co. (N.D. Tex.) Settlement Agreement 9/18/2017 Servicemembership Westlake Services, LLC (C.D. Cal.) Settlement Agreement 9/27/2017 Servicemembership VP2, LLC (D. Minn.) Settlement Agreement 9/28/2017 Disability Kansas City, Kansas Housing Authority (D. Kan.) Settlement Agreement 9/29/2017 Sex FY 2018 (28 cases) 28 cases in FY 18 Tjoelker Settlement Agreement 10/3/2017 Sex Euramex Management Group, LLC (Wesley Apartment Homes, LLC) Settlement Agreement 10/20/2017 Race United States v. DeRaffe (D. Mass.) Judicial Decision 10/30/2017 Familial Status United States v. Salem (D. S.D.) Settlement Agreement 11/23/2017 Disability Park City Communities, (fka Bridgeport H.A. (D. Conn.) Settlement Agreement 11/28/2017 Disability

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MSM Brothers, Inc. d/b/a White Cliffs at Dover (D. N.H.) Settlement Agreement 12/12/2017 Familial Status, aka Yurman, Land Guardian, Inc., t/d/b/a 360 Davidson (S.D. Tex.) Settlement Agreement 2/1/2018 Race PHH Mortgage Corp. (D. N.J.) Settlement Agreement 2/6/2018 Servicemembership City and County of Honolulu, PM Autoworks Inc, d/b/a All Island Towing (D. Haw.) Settlement Agreement 2/15/2018 Servicemembership BMW Financial Services (D. N.J.) Settlement Agreement 2/22/2018 Servicemembership Kips Bay Towers Condominium, Inc. (S.D.N.Y.) Settlement (Stipulated) 2/28/2018 Disability Fairfax Manor Group, LLC (W.D. Tenn.) Settlement Agreement 3/19/2018 Disability Webb (E.D. Mo.) Settlement Agreement 3/19/2018 Sex Lawrence Downtown Holdings LLC (formerly United States v. Equity Residential) (S.D.N.Y.)

Settlement (Stipulated w/Dismissal) 3/23/2018 Disability

Westview Park Apartments, L.P. (D. Minn.) Settlement Agreement 4/11/2018 Disability Belshaw (C.D. Cal.) Settlement Agreement 4/11/2018 Servicemembership Gingsburg Development, LLC (S.D.N.Y.) Settlement Agreement 4/12/2018 Disability Rieking (E.D. Wash.) Settlement Agreement 4/12/2018 Disability Notre Dame de Namur University (N.D. Cal.) Settlement Agreement 4/19/2018 Disability KleinBank (D. Minn.) Settlement Agreement 5/8/2018 Race Kelly (D. S.D.) Settlement Agreement 6/29/2018 Sex Pacific Mercantile Bank Settlement Agreement 7/18/2018 Race & National Origin

The Home Loan Auditors (N.D. Cal.) Settlement Agreement (Partials on 8/2 and 8/21) 8/2/2018 National Origin

Irvin (W.D. Okla.) Settlement Agreement 8/10/2018 Disability Village of Tinley Park, Illinois (N.D. Ill.) Settlement Agreement 8/24/2018 Race Twin Creek Apartments, LLC d/b/a/ Pavilion at Twin Creek (D. Neb.) Settlement Agreement 9/11/2018 Servicemembership Northwest Trustee Services, Inc. (W.D. Wash) Settlement Agreement 9/26/2018 Servicemembership United Communities LLC (D. N.J.) Settlement Agreement 9/27/2018 Servicemembership

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Criminal Section: Hate Crimes Cases (FY 2016-2018)

Case Date Charge or Conviction FY 2016 (20 cases) United States v. Garza, et al. 2/17/2016 Settlement Agreement (Plea) US v. James Hill 1/19/2016 Charge (Indictment) 1/23/2016 Conviction US v. Ted Hakey 2/11/2016 Conviction US v. Martin Schnitzler 2/12/2016 Conviction US v. Randy Metcalf 3/30/2016 Conviction US v. Jedediah Stout 4/18/2016 Conviction US v. Omar Martinez, et al. 4/27/2016 Charge US v. Gil Payne 5/13/2016 Conviction US v. John Vangastal 5/19/2016 Conviction US v. Matthew Gust 5/19/2016 Conviction US v. Jose Saucedo, et al. 7/7/2016 Charge 4/5/2018 Conviction US v. Charles Butler, et al. 7/29/2016 Charge United States v. Butler 11/9/2016 Settlement Agreement (Plea) 11/9/2016 Conviction US v. Curtis Allen, et al. 10/14/2016 Charge US v. Robert Paschalis 11/22/2016 Conviction US v. Ryan Kyle 11/28/2016 Charge United States v. Kyle 2/23/2017 Settlement Agreement (Plea) Conviction US v. Armando Sotelo 11/29/2016 Conviction US v. Daniel Fisher 11/30/2016 Conviction US v. Justin Whittington 12/5/2016 Conviction United States v. Vallum 11/2/2016 Settlement Agreement (Plea) US v. Joshua Vallum 12/21/2016 Conviction

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FY 2017 (16 cases) United States v. Martinez 11/26/2016 Settlement Agreement (Plea) 3/17/2017 Conviction United States v. Schneider 1/4/2017 Settlement Agreement (Plea) 2/7/2017 Conviction US v. Dyllan Roof 12/15/2016 Conviction 1/10/2017 Court Order US v. James Jones 1/23/2017 Charge 2/8/2017 Conviction US v. Robert Daggart 2/16/2017 Conviction US v. Shane Rucker 2/16/2017 Charge US v. William Dennis, et al. 3/10/2017 Conviction 4/4/2017 Conviction US v. Michael Kadar 4/21/2017 Charge US v. Samuel Whitt 5/24/2017 Charge US v. Gerald Wallace 6/15/2017 Charge 10/18/2017 Conviction US v. Marq Perez 6/22/2017 Charge 7/16/2018 Conviction US v. James Medina 8/16/2017 Conviction US v. Mark Porter 9/15/2017 Charge 3/22/2018 Conviction United States v. Burgess 3/16/2017 Charge 11/28/2017 Conviction US v. Ray Legend 12/1/2017 Conviction US v. Preston Howard 12/13/2017 Charge 5/9/2018 Conviction 3/28/2018 Conviction

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FY 2018 (21 cases) US v. David Howard 2/8/2018 Charge 2/27/2018 Conviction US v. Merced Cambero 2/16/2018 Conviction US v. William Syring 2/21/2018 Charge US v. Michael Kadar 2/28/2018 Charge US v. Izmir Koch 3/21/2018 Charge 12/17/2018 Conviction

US v. Christopher Beckham 4/4/2018 6/4/2018

Charge Court Order (Residential Treatment Program)

US v. Patrick Stein et al. 4/18/2018 Conviction US v. John Taylor 6/21/2018 Charge 8/30/2018 Court Order (Not Guilty) US v. Michael Hari, et al. 6/21/2018 Charge US v. Glenn Halfin 6/22/2018 Charge US v. James Fields, Jr. 6/27/2018 Charge US v. Dustin Hughes 6/29/2018 Conviction US v. Terry Knope, et al. 7/26/2018 Charge US v. Nolan Brewer 8/16/2018 Charge US v. Maurice Diggins, et al. 8/27/2018 Charge US v. Chadwick Grubbs 9/13/2018 Charge

United States v. Nucera 11/1/2017 10/31/2017 Charge

United States v. Shelton 1/4/2018 Settlement Agreement (Plea) US v. Chancler Encalade 9/18/2017 Conviction US v. Adam Purinton 6/9/2017 Charge United States v. Purinton 5/21/2018 Conviction Settlement Agreement (Plea)

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Criminal Section: Color of Law Cases (per Press Releases) (FY 2016-2018)

Name of Case Resolution Date FY Type of Resolution Link to DOJ Press Release

U.S. v. Robert McGee 10/13/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

U.S. v. Bliss Barber Worrell 10/26/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

U.S. v. Randy T. Doss 10/29/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

Investigation into death of Anastasio Hernandez Rojas 11/6/2015 FY16

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-herandez-rojas>

Investigation into death of Dontre Hamilton 11/10/2015 FY16

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton>

U.S. v. Chris Miles 11/17/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

U.S. v. Jeanette Sue Barnes 11/18/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

U.S. v. Eddie Rodas- Castro 1/13/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

U.S. v. William Houghton 1/13/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

U.S. v. Justin Watson 1/20/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation>

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

<https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault>

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

<https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-herandez-rojas>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-herandez-rojas>

<https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton>

<https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-tallassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during>

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

<https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>

<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>
<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>
<https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees>
<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>
<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>
<https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee>
<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>
<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>
<https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations>
<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>
<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>
<https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation>
<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>
<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>
<https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force>
<https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights>
<https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights>
<https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights>
<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>
<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>
<https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover>

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Investigation into SRO Benjamin Fields 1/13/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>

U.S. v. Lawardrick Marshner 2/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

U.S. v. Robert Sturdivant 2/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>

U.S. v. William Kostopoulos 2/3/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and>

U.S. v. Wayne Barnes 2/9/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>

U.S. v. Kevin Asher 4/12/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>

U.S. v. Peggy Kendrick 4/26/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>

U.S. v. Dennis Fuller 4/26/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>

U.S. v. Michael Slager 5/2/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>

Investigation into death of Alton Sterling 5/3/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>

U.S. v. Shylene Lopez 5/8/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>

<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>
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<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>
<https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover>
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<https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and>
<https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and>
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<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>
<https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>
<https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>
<https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile>

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U.S. v. Jeremy Walker 5/9/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>

U.S. v. William Curtis Howell 5/12/2017 FY17 jury conviction

<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>

U.S. v. Adam Joseph Neal Graham 5/19/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee>

U.S. v. John Sanders 9/6/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/another-former-correctional-officer-pleads-guilty-beating-handcuffed-and-shackled-inmate>

Investigation into death of Freddie Gray 9/12/2017 FY17

closed investigation with no charges

<https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>

U.S. v. Richard Scavone 9/29/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force>

U.S. v. Edgar Daniel Johnson 10/4/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-georgia-prison-guard-pleads-guilty-sexual-assault-female-inmates-obstruction-and>

U.S. v. Philip Antico 11/21/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/boynnton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>

U.S. v. Michael Brown 11/21/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/boynnton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>

U.S. v. Gregory McLeod 11/22/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>

U.S. v. Dwight Hamilton 11/22/2017 FY18 guilty plea <https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>

<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death>
<https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee>
<https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee>
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<https://www.justice.gov/opa/pr/another-former-correctional-officer-pleads-guilty-beating-handcuffed-and-shackled-inmate>
<https://www.justice.gov/opa/pr/another-former-correctional-officer-pleads-guilty-beating-handcuffed-and-shackled-inmate>
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<https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>
<https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force>
<https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force>
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<https://www.justice.gov/opa/pr/former-georgia-prison-guard-pleads-guilty-sexual-assault-female-inmates-obstruction-and>
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<https://www.justice.gov/opa/pr/boynnton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction>
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<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
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<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it>
<https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>
<https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail>

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U.S. v. Jerry Lynn Gragg 11/30/2017 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>

U.S. v. Steve C. Jones 12/8/2017 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>

U.S. v. Daniel Davis 1/27/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>

U.S. v. David Prejan 2/21/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0>

U.S. v. Mark Frederick 3/2/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee>

U.S. v. Jason Benton 4/4/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>

U.S. v. Anthony Maldonado 4/19/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>

U.S. v. Christopher M. Holbrook 4/19/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>

U.S. v. Edward Gibson 5/8/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>

U.S. v. Alex Huntley 6/12/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>

U.S. v. William Dukes Jr. 6/18/2018 FY18 jury conviction

<https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest>

U.S. v. Michael Kaim 7/2/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing>
<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>
<https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating>
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<https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0>
<https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee>
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<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>
<https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee>
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<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>
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<https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee>
<https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest>

<https://www.justice.gov/opa/pr/convicted-police-officer-convicted-wrongful-arrest>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>
<https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans>

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U.S. v. Guillermo Ravelo 7/26/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>

U.S. v. Charlie Dayoub 8/3/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>

U.S. v. Raul Fernandez 8/3/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>

U.S. v. Gary Ola 9/12/2018 FY18 guilty plea <https://www.justice.gov/opa/pr/tennessee-jail-supervisor-pleads-guilty-making-false-statements-fbi>

U.S. v. Raimundo Atesiano 9/14/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>

U.S. v. Timothy Williams 9/18/2018 FY18 guilty plea

<https://www.justice.gov/opa/pr/former-st-bernard-parish-correctional-officer-pleads-guilty-violating-civil-rights-inmate>

U.S. v. Cordero Cody 10/30/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>

U.S. v. Ana Angelica Pedro-Juan 12/14/2015 FY16 guilty plea

<https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>

U.S. v. Granville Robinson 2/3/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/tennessee-man-pleads-guilty-role-new-orleans-based-sex-trafficking-scheme>

U.S. v. Ana Angelica Pedro Juan 2/29/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>

U.S. v. Miguel A. Hernandez 5/11/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel>

<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
<https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights>
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<https://www.justice.gov/opa/pr/tennessee-jail-supervisor-pleads-guilty-making-false-statements-fbi>
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<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>
<https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims>
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<https://www.justice.gov/opa/pr/former-st-bernard-parish-correctional-officer-pleads-guilty-violating-civil-rights-inmate>
<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>
<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>
<https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and>
<https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>
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<https://www.justice.gov/opa/pr/tennessee-man-pleads-guilty-role-new-orleans-based-sex-trafficking-scheme>
<https://www.justice.gov/opa/pr/tennessee-man-pleads-guilty-role-new-orleans-based-sex-trafficking-scheme>
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<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>
<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>
<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>
<https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg>
<https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel>
<https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel>
<https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel>

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U.S. v. Abdullah Hamidullah 6/17/2016 FY16 guilty plea

<https://www.justice.gov/opa/pr/florida-man-pleads-guilty-sex-trafficking-and-interstate-prostitution>

U.S. v. Monta Groce 7/15/2016 FY16 jury conviction

<https://www.justice.gov/opa/pr/heroin-dealer-convicted-jury-sex-trafficking-and-drug-related-offenses1F3758>

U.S. v. Paul Carter 11/22/2016 FY17 guilty plea <https://www.justice.gov/opa/pr/milwaukee-man-pleads-guilty-sex-trafficking-and-related-crimes>

U.S. v. Marcus D. Washington 12/7/2016 FY17 guilty plea

<https://www.justice.gov/opa/pr/knoxville-man-pleads-guilty-sex-trafficking-conspiracy-and-drug-offenses>

U.S. v. David Q. Givhan 12/13/2016 FY17 jury conviction

<https://www.justice.gov/opa/pr/michigan-man-sentenced-235-months-prison-sex-trafficking-and-interstate-transportation>

U.S. v. Julio Perez- Torres 1/13/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/master-s-degree-student-pleads-guilty-attempting-entice-minor>

U.S. v. Severiano Martinez-Rojas 4/19/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/fourth-defendant-convicted-role-georgia-based-mexican-sex-trafficking-ring>

U.S. v. Jovan Rendon- Reyes 4/21/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking>

U.S. v. Saul Rendon- Reyes 4/21/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking>

U.S. v. Felix Rojas 4/21/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking>

U.S. v. Odilon Martinez- Rojas 4/21/2017 FY17 guilty plea

<https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking>

U.S. v. Guillermina Rendon-Reyes 4/21/2017 FY17 guilty plea

3758 Link has become inactive (accessed Nov. 4, 2019).

<https://www.justice.gov/opa/pr/florida-man-pleads-guilty-sex-trafficking-and-interstate-prostitution>

<https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction>
<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
<https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors>
<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>
<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>
<https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities>

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Immigration and Employee Rights Section Cases (FY 2016-2018)

Defendant or Case Date of Resolution Type of Case

Civil Penalty to US

Back Pay (or fund for) & related claims to Charging Party

FY 2016 (20 total)(all settlements) North American Shipbuilding, LLC 1/15/15 Retaliation \$1,750.00 \$15,000.00 Yellow-Checker-Star Transportation 10/1/15 Unfair Documentary Practices 445,000 The School Board of Miami-Dade County, Florida 10/1/15 Unfair Documentary Practices 90,000 125,000 Postal Express, Inc. 10/14/15 Unfair Documentary Practices School Board of Miami 10/22/15 Unfair Documentary Practices \$90,000 \$30,000 McDonald's USA, LLC 11/1/15 Unfair Documentary Practices 335,000 Sunny Grove Landscaping & Nursery, Inc. 11/1/15 Unfair Documentary Practices 7,500 Rio Grande Pak Foods, Ltd. 1/1/16 Unfair Documentary Practices \$1,800.00 7,200 Freedom Home Care, Inc 1/19/16 Unfair Documentary Practices \$400 \$832.00

Barrios Street Realty LLC 3/21/16

Citizenship Status (H-2B abuses/discrimination v. qualified US workers) \$30,000.00 \$15,000.00

NetJets Services, Inc. 5/13/16 Unfair Documentry Practices \$41,480 Villa Rancho Bernardo Care Center 5/31/16 Unfair Documentary Practices \$24,000

Podiatry Residency Programs 6/1/16

Citizenship Status (LPRs & other work-authorized immigrants) \$65,000 \$141,500

Macy's West Stores, Inc. 6/1/16 Unfair Documentary Practices \$8,700 \$523.90 Montgomery County Public Schools 6/15/16 Unfair Documentary Practices 0 \$4,450 Powerstaffing, Inc. 6/23/16 Unfair Documentary Practices \$153,000 Crookham Company 6/27/16 Unfair Documentary Practices \$200,000 Hartz Mountain Industries 8/9/16 Citizenship Status \$1,400 Eastridge Workforce Solutions 8/15/16 Unfair Documentary Practices \$175,000

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Atwork Cumberland Staffing 9/1/16 Unfair Documentary Practices (requiring US birth certificate) \$1,200

FY 2017 (13 total)(all settlements)

American Cleaning Company 10/17/16 Unfair Documentary Practices (requiring US birth certificate) \$195,000

Denver Sheriff's Department 11/1/16 Citizenship Status \$10,000 Aldine Independent School District 11/22/16 Citizenship Status \$14,000 1st Class Staffing, LLC 12/13/16 Unfair Documentary Practices \$17,600 J.E.T. Holding Co., Inc. 1/17/17 Citizenship Status \$12,000 \$40000 back pay fund Levy Restaurants 2/2/17 Unfair Documentary Practices \$2,500 Paragon Building Maintenance, Inc. and Pegasus Building Services Company, Inc. 3/13/17 Unfair Documentary Practices \$115,000 Pizzerias, LLC 3/20/17 Unfair Documentary Practices \$140,000 Brickell Financial Services Motor Club, Inc. d/b/a Road America Motor Club, Inc. (Unfair Documentary Practices) 4/6/17 Unfair Documentary Practices 34200 Provisional Staffing Solutions 5/9/17 Unfair Documentary Practices 16290

Carrillo Farm Labor, LLC 5/23/17 Citizenship Status (H2-B/US workers) 5000 44000

Panda Restaurant Group, Inc. 6/28/17 Unfair Documentary Practices 400000 200000 Sellari's Enterprises, Inc. 6/30/17 Unfair Documentary Practices 12000 FY 2018 (18 total)(17 settlements & 1 judicial order) CitiStaff Solutions, Inc. and CitiStaff Management Group, Inc. 10/6/17 Unfair Documentary Practices 200,000 InMotion Software, LLC 10/11/17 Retaliation 3621 Ark Rustic Inn LLC d/b/a Rustic Inn Crabhouse 10/13/17 Unfair Documentary Practices 4000 Washington Potato Company and Pasco Processing, LLC 11/14/17 Unfair Documentary Practices 100000

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Freeze Pack 11/16/17 Unfair Documentary Practices 200000 100000

Crop Production Services, Inc. 12/18/17 Unfair Documentary Practices 10500 Omnicare Health 1/23/18 Citizenship Status 3621 Ichiba Ramen 2/20/18 National Origin 2000 1760

West Liberty Foods, LLC 3/10/18 Unfair Documentary Practices 200000 52100

Thamesoft, Inc. 4/20/18 Citizenship Status (asylee) 4543.25 12000

University of California, San Diego 5/10/18 Unfair Documentary Practices 200000 4712.4

Setpoint Systems, Inc. 6/19/18 Unfair Documentary Practices 200000 17475

J.C. Penney 6/25/18 Unfair Documentary Practices 200000 14430 11177.6

Triple H Services, Inc. 6/26/18 Citizenship Status (US workers) 15600 85000

Technical Marine Maintenance Texas 6/28/18 Unfair Documentary Practices 757,868 Clifford Chance US LLP 8/1/18 Citizenship Status (dual citizen) 13200

Rose Acre Farms, Inc. 8/1/18 Unfair Documentary Practices 200000 70000

Palmetto Beach Hospitality, LLC 9/1/18 Citizenship Status (US citizens) 42000 TOTAL 3,302,622.65

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Immigrant and Employee Rights Cases (FY 2016-2018), Including Letters of Resolution

Fiscal Year Letters of Resolution Other IEC Cases Total Cases FY 2016 41 20 61 FY 2017 44 13 57 FY 2018 31 18 49 116 51 167

Special Litigation Section Cases (FY 2016-2018) Defendant Type of Case Type of Resolution Date of Resolution FY 2016 (8 total)

Westchester County Jail (NY) Corrections Settlement Agreement 11/24/2015 Disability Rights Idaho v. Sonnenberg Disability Judicial Memorandum Decision and Order 3/7/2016 City of Miami Police Department (FL) Law Enforcement Settlement Agreement 3/10/2016 City of Ferguson Law Enforcement Consent Decree 4/19/2016 City of Newark Law Enforcement Consent Decree 5/5/2016 Georgia State Hospitals and Georgia Mental Health and Developmental Disabilities Systems (GA) Disability

Consent Order entering extension of Settlement Agreement 5/27/2016

Alamance County Sheriff's Office Law Enforcement Settlement Agreement 8/17/2016 Hinds County Adult Detention Center (MS) Corrections Consent Decree 7/19/2016 FY 2017 (4.5 total) Yonkers (NY) Law Enforcement Settlement Agreement 11/14/2016 St. Louis County Family Court (MO) Juvenile Justice Settlement Agreement 12/14/2016

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Chicago Police Department (IL) Law Enforcement

Agreement in principle for CD- later opposed in 10/12/18 Statement of Interest Opposing Proposed Consent Decree (counted as 0.5 Settlements) 1/13/2017

Baltimore Police Department (MD) Law Enforcement Consent Decree (and related Judicial Memo/Order)(case counted as CD) 4/7/2017

United States v. Town of Colorado City (AZ) Law Enforcement Judicial Decision 4/18/2017 FY 2018 (3 total)

City of Ville Platte (LA) Law Enforcement Settlement Agreement 5/31/2018 Evangeline Parish Sheriff's Office (LA) Law Enforcement Settlement Agreement 6/4/2018 Louisiana Use of Nursing Facilities for People with Mental Health Disabilities (LA) Disability Settlement Agreement 6/6/2018

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Voting Section Cases (FY 2016-2018) Cases Date Basis Type FY 2016 (3 enforcement matters resolved) United States and the State of Alabama 11/12/2015 NVRA Settlement United States and Napa County, California 5/31/2016 VRA sec 203 Settlement United States and the State of Connecticut 8/5/2016 NVRA Settlement FY 2017 (4 enforcement matters resolved)

NC State NAACP v. North Carolina State Board of Elections 5/15/2017 VRA sec 2

Judicial Resolution (denial of certiorari)

The United States and the Palm Beach County Supervisor of Elections

1/19/2017 1/10/2017 HAVA Settlement

United States and the State of New York 6/20/2017 NVRA Settlement United States v. State of Louisiana 8/21/2017 NVRA Settlement FY 2018 (5 enforcement matters resolved) Common Cause New York and United States v. Board of Elections in the City of New York 12/14/2017 NVRA Consent Decree U.S. v. State of Arizona 2/15/2018 UOCAVA Consent Decree U.S. v. State of Wisconsin 6/20/2018 UOCAVA Consent Decree United States v. Commonwealth of Kentucky (Judicial Watch v. Grimes) 7/3/2018 NVRA Consent Decree

United States v. Texas (Veasey v. Abbott) 9/17/2018 VRA sec 2

Judicial Resolution (Unappealed final judgment)

Source: CRT Website; Commission Staff Research

<https://www.justice.gov/crt/case-document/file/1083941/download>
<https://www.justice.gov/crt/case-document/napa-county-memorandum-agreement>
<https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava>
<https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava>
<https://www.justice.gov/crt/case-document/memorandum-understanding>
<https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nynvra2016>
<https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nynvra2016>
https://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#az_uocava18
https://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#wi_uocava18

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 - Research, Data Collection, and Reporting
- Chapter 11: U.S. Department of Veterans Affairs, Office of Resolution Management
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-Wide
 - Strategic Planning and Self-Evaluation
 - Complaint Processing, Agency-Initiated Charges, and Litigation
 - Effective Use of Enforcement Tools: Proactive Compliance Evaluation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Effectiveness of Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- Chapter 12: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Proactive Compliance Evaluation
 - Complaint Processing, Agency-Initiated Changes, & Litigation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collections, and Reporting
- Chapter 13: U.S. Department of the Treasury, Office of Civil Rights and Diversity
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization for Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Complaint Processing, Agency-Initiated Changes, & Litigation
 - Proactive Compliance Evaluation
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collections, and Reporting
- Chapter 14: U.S. Department of the Interior, Office of Civil Rights
 - Legal Authority and Responsibility
 - Enforcement Tools
 - Budget and Staffing
 - Assessment
 - Prioritization of Civil Rights Agency-wide
 - Strategic Planning & Self-Evaluation
 - Complaint Processing, Agency-Initiated Changes, & Litigation
 - Proactive Compliance Evaluations
 - Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
 - Interaction and Coordination with External Agencies and Organizations
 - Research, Data Collection, and Reporting
- Findings and Recommendations
- Commissioners' Statements, Dissents, and Rebuttals
 - Statement of Chair Catherine E. Lhamon
 - Statement of Commissioner Karen K. Narasaki
 - Statement of Commissioner Michael Yaki
 - Dissenting Statement of Commissioner Peter N. Kirsanow
- Rebuttal of Commissioner Peter N. Kirsanow
- APPENDIX A

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Date : 10/2/2020 6:28:59 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Carmel Martin" carmelmartin98@gmail.com Subject : Re: [EXTERNAL] Assistance I'd be delighted to talk. My cell is 213-400-1344 and I could talk today before 4:30 pst or after 6 pst or this weekend at a time that works for you

> On Oct 2, 2020, at 2:18 PM, Carmel Martin <carmelmartin98@gmail.com> wrote: > > *** CAUTION: This email is from outside USCCR. *** > > Catherine - > Hope you are well. I was wondering if you could give me your opinion with respect to the Trump admin's executive order on Title VI and religious groups? Let me know if it makes sense to hop on the phone. > Best, Carmel > 202-222-5780 > > Sent from my iPhone

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Date : 10/2/2020 9:20:39 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Praveen Fernandes" praveen@theusconstitution.org Cc : "Jocelyn Frye" jfrye@americanprogress.org, "Elizabeth Wydra" elizabeth@theusconstitution.org, "Rukku Singla" rsingla@uscrr.gov, "Robin Bleiweis" rbleiweis@americanprogress.org, "Amy Gawlak" Amy@theusconstitution.org, "Doug Pennington" pennington@theusconstitution.org Subject : Re: [EXTERNAL] THANK YOU Thank you for including me in this important event!

On Oct 1, 2020, at 4:32 PM, Praveen Fernandes <praveen@theusconstitution.org> wrote:

CAUTION: This email is from outside USCCR.

Dear Chair Lhamon, Jocelyn, and Elizabeth,

Thanks for being the outstanding expert panelists for tonight's discussion. From Chair Lhamon's inspiring keynote address to the engaged and natural conversation between Jocelyn and Elizabeth later in the evening, I was reminded of how smoothly a discussion can go with rock star speakers.

I ordinarily have an unshakable belief in handwritten thank-you notes, but given that you are working remotely and won't get a note at your offices until 2021, please accept this humble note of digital thanks. I know how busy your schedules are, and I'm aware of all the things that compete for your attention, so I'm very grateful that you chose to participate in tonight's Constitutional Accountability Center event.

Your friend and fan, Praveen

Praveen Fernandes Vice President Pronouns: he, him, his Constitutional Accountability Center 1200 18th St. NW, Ste. 501

Washington, D.C. 20036 O: 202-296-6889 ext. 309 www.theusconstitution.org

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From: Praveen Fernandes Sent: Thursday, October 1, 2020 2:31 PM To: Jocelyn Frye <jfrye@americanprogress.org>; Catherine Lhamon <clhamon@uscrr.gov>; Elizabeth Wydra <elizabeth@theusconstitution.org> Cc: Rukku Singla <rsingla@uscrr.gov>; Robin Bleiweis <rbleiweis@americanprogress.org>; Amy Gawlak <Amy@theusconstitution.org>; Doug Pennington <pennington@theusconstitution.org> Subject: FW: Scheduling a panel prep call -- Friday, 9/25 Hello, all. We're so delighted that you're part of this evening's event. I'm looking forward to seeing you in our virtual greenroom at 4:45 ET. Chair Lhamon and Jocelyn, just a gentle reminder that I need the signed speaker release forms that I sent you last week. I've attached the form once again in case this prevents you from having to search through your email. And the Streamyard link is already in the calendar invitation that Amy Gawlak sent you, but here it is just in case: <https://streamyard.com/pn8k4j8unz> Praveen Fernandes Vice President Pronouns: he, him, his Constitutional Accountability Center 1200 18th St. NW, Ste. 501 Washington, D.C. 20036 O: 202-296-6889 ext. 309 www.theusconstitution.org

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is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you. From: Praveen Fernandes Sent: Wednesday, September 23, 2020 6:00 PM To: Robin Bleiweis <rbleiweis@americanprogress.org>; Jocelyn Frye

<tel:12022966889>
https://url.emailprotection.link/?bG5BEu3h6cfONqslI0etEz7tKbH4OJAW4nUbLkYz_4VCpZN3zG6oV-DfsyIR7Snf_TNn6gY_3yep-9OdGTMtYeg~~
https://url.emailprotection.link/?bQWCIRxE24Nqgr6dCJMwBLxMKMIRT-hcxpUD5pvsDVvsR_Y339Z_ajQZhaXz4cVoyMUaVc3QbcMR7/PnRHHg~~
<tel:12022966889>
https://url.emailprotection.link/?bG5BEu3h6cfONqslI0etEz7tKbH4OJAW4nUbLkYz_4VCpZN3zG6oV-DfsyIR7Snf_TNn6gY_3yep-9OdGTMtYeg~~

<jfrye@americanprogress.org> Cc: Amy Gawlak <Amy@theusconstitution.org>; Elizabeth Wydra <elizabeth@theusconstitution.org> Subject: RE: Scheduling a panel prep call -- Friday, 9/25 We're so thrilled that you're able to participate in the panel event, "The Nineteenth Amendment and Our Unfinished Work," on Thursday, Oct 1st from 5-6 pm ET. I'm excited for the event, and also for our prep call this Friday at 11 am. Amy Gawlak sent you a calendar invitation with the link to join the virtual meeting, but I'm providing the link here as well: <https://streamyard.com/pn8k4j8unz> Also, here is a draft Run of Show. Attached is also our standard speaker release form for your review. Run of Show (All times in ET)

Time Description Participants Section 4:45 pm

Participants gather in virtual greenroom by clicking Streamyard link

ALL Pre-Show

5 pm Praveen Fernandes delivers very brief welcoming remarks and then introduces Chair of the US Commission on Civil Rights Catherine Lhamon

PF Welcome & Intro

5:04 pm

Chair Lhamon delivers keynote remarks

CL Keynote Address

5:09 pm

Praveen Fernandes thanks Chair Lhamon and introduces introduces 2 panelists

PF (possible splitscreen briefly with individuals mentioned)

Moderator

5:10 pm

PF asks Elizabeth questions

- What is the arc of constitutional progress and what role does the 19th Amendment play in that arc?
- How did the 19th Amdt reinforce the

EW Panelist #1

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fundamental nature of the right to vote?

- Who wasn't able to enjoy the 19th Amdt's protections?

5:20 pm

PF asks Jocelyn questions

- What effects did the 19th Amdt have both on who was elected to office and on what legislation had new political energy?
- What challenges still exist (in 2020) for women as they try to access the right to vote and are some disproportionately harmed? (WOC, trans women, women for whom English is not their first language, women with disabilities, etc)
- The Constitution sets a floor for protection, but not the ceiling--what more can be done to create the conditions for women exercising the right to vote in larger numbers? (CAP's report has some great policy and legislative recommendations)

JF Panelist #2

5:30 Moderated discussion. PF, EW, JF Group

pm This should be looser and will involve Elizabeth and Jocelyn engaging each other. Things I might ask about:

- RBG's legacy not only of gender equality jurisprudence, but also voting rights.
- How have recent voter suppression tactics disproportionately affected women (voter ID laws for instance)?

Discussion Preview Instructions for Audience: "And for those of you in the audience who have questions for the panelists, you can submit your questions online and we'll try to answer them at the end. If you are watching via CAC's Facebook or YouTube channel, you have to be logged in to submit a question. If you are watching through the CAC website, the stream is being fed to you via YouTube. Just expand your browser, log in, and submit your question."

5:45 pm

PF takes questions from the audience. If they are

PF, EW, JF Audience Q&A

specifically for one particular speaker, I'll pitch them accordingly, but if they are general, either EW or JF should chime in

6 pm Elizabeth closes us out and thanks the panelists and audience

EW Close

Just for easy reference, this is how the event was described in invitations, along with the complete speaking roster...

The Nineteenth Amendment and Our Unfinished Work As our nation mourns the loss of Justice Ginsburg—a stalwart champion for gender equality and voting rights—we continue to mark the 100th anniversary of the ratification of the 19th Amendment, which prohibits the federal government and the states from denying or abridging the right to vote “on account of sex.” What role does the 19th Amendment play in the arc of constitutional progress? For whom was this amendment’s promise illusory? What have the 19th Amendment’s effects been on the health and vitality of our democracy? And as we prepare for the historic election in November and future elections, what more needs to be done to ensure that the right to vote exists not only on paper, but in the lived reality of women across the nation? These questions and more will be answered in an online event on Thursday, October 1st, from 5-6pm ET, featuring a keynote address by Catherine E. Lhamon, Chair of the U.S. Commission on Civil Rights, and then a panel conversation featuring the following experts:

- Elizabeth Wydra, President, Constitutional Accountability Center; and
- Jocelyn Frye, Senior Fellow, Women’s Initiative at the Center for American Progress, and former Policy Director for First Lady Michelle Obama.

The conversation will be moderated by CAC Vice President Praveen Fernandes. From: Praveen Fernandes Sent: Wednesday, September 23, 2020 11:55 AM > > Subject: RE: Scheduling a panel prep call -- Friday, 9/25 Robin,

Thanks so much for the quick response. Elizabeth replied to me separately to let me know that 11 am works for her, too. Later today, I'll send the tick-tock document I mentioned, along with a video link (which we'll use for the video call). Separately, expect a calendar invitation from Amy Gawlak (my fantastic colleague from the Comms department) for you and Jocelyn for the Friday call. The video link will be in the calendar invite, too. Warmly, Praveen From: Robin Bleiweis <rbleiweis@americanprogress.org> Sent: Wednesday, September 23, 2020 11:47 AM > > Subject: Re: Scheduling a panel prep call -- Friday, 9/25 Hi Praveen, Jocelyn could make 11am – 12pm work, but not the other times. If this poses an issue, she may have some availability tomorrow 2-4pm or early next week. Thanks, Robin Bleiweis Research Associate, Women’s Economic Security Center for American Progress 202-461-8144 rbleiweis@americanprogress.org She/her/hers

From: Praveen Fernandes <praveen@theusconstitution.org> Date: Wednesday, September 23, 2020 at 11:34 AM To: Elizabeth Wydra <elizabeth@theusconstitution.org>; Jocelyn Frye <jfrye@americanprogress.org> > Subject: Scheduling a panel prep call -- Friday, 9/25 Dear Elizabeth and Jocelyn, You are the fabulous panelists for our October 1st online event, "The Nineteenth Amendment and Our Unfinished Work." Just so you know how the event is described, here is the link to the event (<https://www.theusconstitution.org/events/the-19th-amendment-and-our-unfinished-work/>). Registration, which is free, opened last night, so feel free to send this along to anyone who might be interested. On a practical note, we need to schedule a prep call, both to do some tech checks (troubleshooting is better done now than 30 minutes before the

<mailto:rbleiweis@americanprogress.org>
<mailto:rbleiweis@americanprogress.org>
<mailto:praveen@theusconstitution.org>
<mailto:elizabeth@theusconstitution.org>
<mailto:jfrye@americanprogress.org>
https://url.emailprotection.link/?b00AG1CQqhgocu-jus1PCKXIT3HL515rjh_zAJoKEM_dHAPAzBEgubFMhhbG05wKleHr9os900OUyrl1vy14SFJ_04iUdp02Vh9zhh03VtM6QdoQp2X11oy9Zhw4bddk3
https://url.emailprotection.link/?b00AG1CQqhgocu-jus1PCKXIT3HL515rjh_zAJoKEM_dHAPAzBEgubFMhhbG05wKleHr9os900OUyrl1vy14SFJ_04iUdp02Vh9zhh03VtM6QdoQp2X11oy9Zhw4bddk3

event) and also to answer any questions you might have. The event link that I sent you describes the questions that the event will address, but I will also send you --- by the end of today --- a tick-tock document that addresses the questions I'll pose to each speaker (to give you a sense of starting lanes) and that addresses the flow of the event. Hopefully, when you receive that document later today, everything will be clear, but we can certainly discuss any questions on our call. Please let me know if you can make a video call at any of the following times this Friday, September 25th:

- 11 am–noon • 1 pm–2 pm • 2 pm–3 pm

Please note that in all likelihood, the call will last roughly 30 minutes, but we scheduled an hour-long block just in case. Warm regards, Praveen

Date : 10/6/2020 5:38:58 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "Sarah.Groh@mail.house.gov" Sarah.Groh@mail.house.gov, "aissa.canchola@mail.house.gov" aissa.canchola@mail.house.gov Cc : "Rukku Singla" rsingla@uscrr.gov Subject : Invitation to Representative Pressley to testify to U.S. Commission on Civil Rights Attachment : Invitation Letter - Rep. Ayanna Pressley 9.16.20.pdf; Ms. Groh and Ms. Canchola, I hope you could share with Representative Pressley the attached invitation to testify to the U.S. Commission on Civil Rights at our upcoming, rescheduled (because of COVID-19) briefing on maternal mortality. We will hold the rescheduled briefing virtually on Friday, November 13, 2020 at 10:00 am EST.

Nicholas Bair from the Commission reached out in September about this briefing and I write now to follow up to underscore our strong hope for the Representative's participation. I would very much welcome benefiting from the Representative's expertise on this topic.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

<mailto:clhamon@uscrr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

September 16, 2020

Congresswoman Ayanna Pressley

United States House of Representatives

Dear Congresswoman Pressley:

The U.S. Commission on Civil Rights is holding a briefing regarding maternal health disparities. This public event will be held starting at 10:00 a.m., on Friday, November 13, 2020. Due to the ongoing COVID-19 pandemic, the briefing will be held virtually using videoconference software. The briefing will examine racial disparities that exist in maternal health care and the role of the federal government in eliminating those disparities. In particular, we are inviting you to participate on a panel that will discuss policy and legislation surrounding this issue.

The purpose of the panel is to explore the following questions:

- What do data trends suggest about maternal health outcomes of women in the U.S. and the rate of pregnancy-related/associated deaths of women in the U.S.?
- What do data trends suggest about the prevalence of racial disparities in maternal health outcomes among women in the U.S.? Which racial and/or ethnic populations experience the greatest impact of these health disparities, and how are they impacted? What are the social determinants of health outcomes (including prior systemic discrimination that may be ongoing) for impacted populations?
- What constitutional and legal obligations exist that may help prevent pregnancy-related/associated deaths for all women in the U.S., and eliminate racial disparities in maternal health outcomes and pregnancy-related/associated deaths of women in the U.S.?
 - o How do these laws protect all women in the U.S. from negative pregnancy-related/associated health outcomes and pregnancy-related/associated deaths? How do these laws protect pregnant women in the U.S. against racial disparities in maternal health outcomes and pregnancy-related/associated deaths?
 - o Are current civil rights laws sufficient to address racial disparities that affect women of color in the U.S. from negative pregnancy-related/associated outcomes and pregnancy-related/associated deaths?
 - o How effective has new legislation been in addressing racial disparities in maternal health outcomes and in pregnancy-related/associated deaths?
- What is the role of the federal government in protecting the health of pregnant women in the U.S. and preventing pregnancy-related/associated deaths? What are the specific duties of federal agencies/sub-agencies; what are they doing/what programs exist to address and prevent pregnancy-related/associated deaths, improve maternal health outcomes, and eliminate racial disparities for women in the U.S.? What partnerships with state and local entities does the federal government engage in to improve maternal health outcomes, prevent pregnancy-related/associated deaths, and eliminate racial disparities for women in the U.S.?
- Are there recommendations or best practices offered by government officials, medical professionals, scholars, community stakeholders, or others that address how to improve pregnancy-related/associated health outcomes, prevent pregnancy-related/associated deaths of women in the U.S., or eliminate racial disparities in pregnancy-related/associated health outcomes and pregnancy-related/associated deaths of women in the U.S.?

The Commission would be honored to have you or a designee from your organization participate at the upcoming briefing. Should you choose to participate, we respectfully request that you provide an electronic copy of a written statement capturing your testimony on this topic (in Microsoft Word format), a half-page biography, a headshot, and indication of any audio-visual needs or any reasonable accommodation requests. Please email this information to nbair@uscrr.gov on or before Thursday, October 15, 2020.

<mailto:nbair@uscrr.gov>

Page 2

Please note that since 1983, Congress has prohibited the Commission from taking in any information or talking about abortion. We ask that you prepare your written statement and remarks for the briefing with this restriction in mind. We note that this statutory restriction will be enforced by the Chair of the Commission during the briefing. If you have any questions, we are happy to put you in touch with our Office of General Counsel.

We hope that you or your designee will be able to participate. We kindly request that you accept or decline our invitation by Tuesday, September 29, 2020. If you cannot attend, but would like to submit a written statement, please send testimony to maternalhealth@uscrr.gov. If you have any questions, please contact our lead researcher on this matter, Nicholas Bair, Esq., at nbair@uscrr.gov. For further information on the Commission and our bipartisan civil rights work, see www.uscrr.gov.

Director, Office of Civil Rights Evaluation

U.S. Commission on Civil Rights

<mailto:maternalhealth@uscrr.gov>
<mailto:nbair@uscrr.gov>
<http://www.uscrr.gov/>

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Date : 10/8/2020 11:38:19 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Eric Tars" ETars@nlchp.org Cc : "Ann Oliva (aoliva@cbpp.org)" aoliva@cbpp.org Subject : Re: [EXTERNAL] e-intro Attachment : image001.jpg;image002.png;image003.png;image004.png;image005.png; Thank you Eric. Ann, I look forward to connecting. My cell is 213-400-1344.

On Oct 8, 2020, at 2:45 PM, Eric Tars <ETars@nlchp.org> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine, It's been a minute, but I hope all is as well as it can be with you in these challenging times. I'm writing today to e-introduce Ann Oliva, now a Senior Fellow at the Center for Budget & Policy Priorities, formerly Dep. Asst. Sec. for Special Needs at HUD, who I now realize you may actually have crossed paths with at one of our conferences where you were both speaking, though I get our years and speakers confused. In any case, Ann is now playing a coordinating role for a coalition of homeless/housing advocacy orgs we are part of, and which has taken a strong anti-racist position that puts many of our members under direct threat from the President's recent Executive Order on Race & Sex Stereotyping. We wanted to reach out to see if you/the Commission are weighing in on this, and how we might work with the Commission to address its harmful message and approach. Ann, I'll hand it to you from here, but let me know if I can be of further help! Thanks, Eric

<image001.jpg>

Eric S. Tars (he/his) | Legal Director a:2000 M Street NW, Suite 210, Washington, DC 20036 p:202-638-2535 Ext. 120 <image002.png> <image003.png> <image004.png> <image005.png> The National Law Center on Homelessness & Poverty is becoming the National Homelessness Law Center! Learn more here

<https://url.emailprotection.link/?bPF3EQAdXTeAMOVeWKz448T6zMI-ISMDUKJjH8k8KY7RaJcn0nRfQrCV-uyvB2zL24bVCQzFKTFLKdBEKJKIbp8zagMloltgapsthrvkt87jJRtqJN7evVymdjsq3RY>

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tel:202-638-2535

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Date : 10/9/2020 12:08:54 AM From : "Catherine Lhamon" clhamon@usccr.gov To : "Deuster, Suzanne E. EOP/OMB" Suzanne.E.Deuster@omb.eop.gov Subject : Accepted: OMB Discussion with USCCR

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Date : 10/19/2020 11:17:22 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "President - U of Miami" president@miami.edu Cc : "Rukku Singla" rsingla@usccr.gov, "Varona, Anthony E." avarona@law.miami.edu, "Verdeja, Adriana" averdeja@miami.edu, "Perez, Viena" v.perez2@miami.edu, "Stearns, Janet E" jstearns@law.miami.edu Subject : Re: [EXTERNAL] RE: Invitation to Accept an Honorary Degree from the University of Miami UPDATE Attachment : image001.jpg;image002.jpg; Thank you so much for this lovely invitation. I am not comfortable attending an in person gathering in December (in California where I live so doing is not permissible and it is not permissible to travel for such an event). I would be delighted to join you in May if in person gathering is permissible by then—but at the moment I don't have information that it will be. I am so sorry, for all of us, that we continue to live with this pandemic and I so appreciate your flexibility about scheduling. -Catherine Lhamon

On Oct 19, 2020, at 1:42 PM, President - U of Miami <president@miami.edu> wrote:

CAUTION: This email is from outside USCCR.

Dear Chair Lhamon, I would like to update you about the Fall 2020 Commencement, which will take place in person on December 10 and 11, 2020. I am writing to explore your willingness to receive the honorary degree and be the keynote speaker at the December ceremonies, which have been planned with physical distancing, face masks, and other safety measures. If you prefer to postpone your in-person participation, then I hope you will accept visiting our campus in May of 2021 for Spring Commencement.

Potential date (subject to change): · December 11, 2020 – Spring/Summer 2020 conferral of Law

and M.D. degrees I look forward to your reply. The pandemic continues to influence how we carry out graduation, and I deeply appreciate your understanding of the modifications we have made. With my best wishes for your health and safety, Julio Frenk, M.D., M.P.H., Ph.D. President Professor of Public Health Sciences,

Health Sector Management and Policy, and Sociology University of Miami Office: +1 305 284-5155 | Email: president@miami.edu | Twitter: @julio_frenk

Please direct all scheduling inquiries to: presidentscheduling@miami.edu <image001.jpg>

<https://medium.com/virtual-teams-for-systemic-change/the-email-charter-an-idea-worth-spreading-688b8940f692> From: Rukku Singla <rsingla@usccr.gov> Sent: Friday, April 3, 2020 11:09 AM To: President - U of Miami <president@miami.edu>; Catherine Lhamon <clhamon@usccr.gov> Cc: Varona, Anthony E. <avarona@law.miami.edu>; Verdeja, Adriana <averdeja@miami.edu>; Perez, Viena <v.perez2@miami.edu> Subject: Re: Invitation to Accept an Honorary Degree from the University of Miami on May 9, 2020

Hi President Frenk,

Chair Lhamon continues to be grateful for this opportunity to address the students and community of the University of Miami, and will be available on the rescheduled date of December 18. Please keep me posted on logistics and other details. We hope you are keeping safe and healthy in these tough times. Best, Rukku

From: President - U of Miami <president@miami.edu> Sent: Monday, March 23, 2020 8:38 AM To: Catherine Lhamon Cc: Varona, Anthony E.; Verdeja, Adriana; Rukku Singla; Perez, Viena Subject: [EXTERNAL] RE: Invitation to Accept an Honorary Degree from the University of Miami on May 9, 2020

Dear Commissioner Lhamon,

Thank you, once again, for accepting my invitation to participate in the University of Miami Spring Commencement, which was scheduled to

<mailto:presidentscheduling@miami.edu>
https://url.emailprotection.link/?bOhvJJBx0AAIQHXTP4jcbu-blv50V1ullmPjIUkNvchCYnPGXm5GhjqI83u0N1VNEIPkIly5qY-CPVEPk-0VNHV8Y00j2axPoJAYNyeN9v-zHPd73136qDTsmnfV1NuYhvlQ9knobYN3yfkSuCTGWi006Gn1sqbMQA31YKjpwWHE5BNM3witi2kzcAi2G9dvcC461_OAKwrdJuAz8O4DKIIPZu-gsXUmQe3YRxbYwKB71P7QMhTxUOB8wHCFzsYFKcMhYkM2kBEhd7XfF_t41XBjIhTHuETH7Xq6JpneolnT4fmASRke2mihVzdiNqsO9edu3JnytrR8jISUKLHZBVSsSPqn6JcCTTeWLYJk08u2olcSLTpDDx1Ljt27bwLr3Vmqmpr4-SCAOJcwlq0Jf_dYbbK-YOck_Ey8cyNrD5Mp8_T_GXV-zRf4CrLef9huTbesRvZ6H09PrYqbc4tMES1cC5OF183PptKJumRqIa1ux_kok6n_FFq-IG
<mailto:president@miami.edu>

take place this May. Our world is facing unprecedented challenges due to the COVID-19 pandemic. Following guidance from state, federal, and global agencies to suspend large events and promote social distancing, we have made the decision to postpone graduation ceremonies to protect the health and safety of our honorees, speakers, guests, and the campus community.

We hope you will be able to accept the same role on a new date, Friday, December 18, 2020, as the honorary degree recipient and keynote speaker of the School of Law Commencement.

If it is possible for you to adjust your calendar, I would be personally honored if you joined us. Please let us know at your earliest convenience so that my office can coordinate the logistics of your participation.

With my appreciation and best wishes,

Julio Frenk, M.D., Ph.D. President

Professor of Public Health Sciences

University of Miami Office: +1 305 284-5155 | Email: president@miami.edu | Twitter: @julio_frenk

Please direct all scheduling inquiries to: presidentscheduling@miami.edu

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<mailto:presidentscheduling@miami.edu>

From: President - U of Miami Sent: Friday, February 14, 2020 5:03 PM To: clhamon@usccr.gov Cc: Varona, Anthony E. <avarona@law.miami.edu>; Verdeja, Adriana (averdeja@miami.edu) <averdeja@miami.edu>; rsingla@usccr.gov Subject: Invitation to Accept an Honorary Degree from the University of Miami on May 9, 2020

Dear Commissioner Lhamon,

I join the trustees, faculty, and students of the University of Miami in respectfully inviting you to accept an Honorary Doctor of Laws and be the keynote speaker at our School of Law Commencement ceremony, which will be held at the Watson Center on our campus at 10:00 a.m. (EST) on Saturday, May 9, 2020. Our institution is located in Coral Gables, Florida.

I would be delighted to share the audience with or about 350 graduates and 3,000 guests for insight into your personal story and as a renowned public interest lawyer and champion of civil rights, I am certain your remarks will serve as words of inspiration and advice for the graduates. The ceremony, including processions, will take no more than two hours. Given the timeline and celebratory nature of this event, we request that Commencement speakers avoid topics like current controversial issues or political views, and that the remarks be up to ten minutes in length. The event will be live-streamed on the University website.

I understand that you have already been in contact with Anthony Varona, our Dean of the School of Law, to confirm your attendance. I consider it a privilege to be able to recognize your distinguished career, and honoring us with your presence at this graduation is invaluable to the University and to me personally. I very much look forward to seeing you soon.

Adriana Verdeja, Deputy Chief of Staff for my office, will be in touch with your office to make arrangements for your visit. She will need your official biography and a headshot for inclusion in the printed program.

<mailto:clhamon@usccr.gov>
<mailto:avarona@law.miami.edu>
<mailto:averdeja@miami.edu>
<mailto:averdeja@miami.edu>
<mailto:rsingla@usccr.gov>

With my best wishes,

Julio Frenk, M.D., Ph.D. President

Professor of Public Health Sciences

University of Miami Office: +1 305 284-5155 | Email: president@miami.edu | Twitter: @julio_frenk

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Date : 10/22/2020 10:50:52 AM From : "Catherine Lhamon" clhamon@usccr.gov To : "Jenny Carroll" jcarroll@law.ua.edu Cc : "David Barreras" dbarreras@usccr.gov, "David Mussatt" dmussatt@usccr.gov Subject : Re: [EXTERNAL] Center for Public Integrity cites our report Attachment : image001.png; Thanks so much for sending and for continuing to bring attention to the Committee's crucial work.

On Oct 22, 2020, at 7:40 AM, Jenny Carroll <jcarroll@law.ua.edu> wrote:

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Just a heads up, our report got good coverage by Center for Public Integrity <https://publicintegrity.org/politics/elections/us-polling-places/alabama-long-history-of-suppressing-black-voting-continues/> Also spoke to LDF folks yesterday re report and election going forward. Glad to see that the work of the committee is making a difference in our state. Jenny

Jenny E. Carroll Wiggins, Child, Quinn & Pantazis Professor of Law School of Law The University of Alabama 315 Law Center Box 870382 Tuscaloosa, AL 35487 Office: 205-346-1116 jcarroll@law.ua.edu | <https://www.law.ua.edu>

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Date : 10/30/2020 1:48:19 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Vincent A. Eng" veng@veng-group.com Cc : "Rukku Singla" rsingla@usccr.gov, "Mauro Morales" mmorales@usccr.gov, "Angelia Rorison" arorison@usccr.gov Subject : Re: [EXTERNAL] RE: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country Thank you. I also appreciate your note about the ABA webinar.

On Oct 30, 2020, at 10:11 AM, Vincent A. Eng <veng@veng-group.com> wrote:

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The word is spreading about the failed vote. _____ Vincent A. Eng VENG GROUP O +1 202 499 7027, x 101 M +1 703 981 6636 F +1 202 499 7030 veng@veng-group.com From: Vincent A. Eng Sent: October 30, 2020 9:23 AM To: Rukku Singla <rsingla@usccr.gov>; Catherine Lhamon <clhamon@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Angelia Rorison <arorison@usccr.gov> Subject: RE: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country Yes, there is great interest in the native community on this issue based on the email traffic last night. The American Bar Association will also be sending an invitation for the Chair to participate in a November webinar on this matter. I am told their recent webinars are get 2-3K viewers. I suggested they be very flexible with dates and times given the Chair's full-time duties that may also include senator selection process, in addition to COVID, fires, etc. _____ Vincent A. Eng

<mailto:veng@veng-group.com>

VENG GROUP O +1 202 499 7027, x 101 M +1 703 981 6636 F +1 202 499 7030 veng@veng-group.com From: Rukku Singla <rsingla@usccr.gov> Sent: October 30, 2020 9:14 AM To: Catherine Lhamon <clhamon@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Angelia Rorison <arorison@usccr.gov>; Vincent A. Eng <veng@veng-group.com> Subject: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country FYI, Indianz.com has posted the information about the business meeting today: <https://www.indianz.com/covid19/2020/10/30/u-s-commission-on-civil-rights-usccr/> Rukku Singla Special Assistant to Chair Catherine E. Lhamon U.S. Commission on Civil Rights 1331 Pennsylvania Avenue, NW Suite 1150 Washington D.C. 20425 M: 513-227-8558 rsingla@usccr.gov Follow us on Twitter and Facebook

<mailto:veng@veng-group.com>
<mailto:rsingla@usccr.gov>
<mailto:clhamon@usccr.gov>
<mailto:mmorales@usccr.gov>
<mailto:arorison@usccr.gov>
<mailto:veng@veng-group.com>

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Date : 10/30/2020 1:47:45 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Mauro Morales" mmorales@usccr.gov Cc : "Angelia Rorison" arorison@usccr.gov, "Vincent A. Eng" veng@veng-group.com, "Rukku Singla" rsingla@usccr.gov Subject : Re: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country Thank you. I agree with Ang on her preferred approach

On Oct 30, 2020, at 10:39 AM, Mauro Morales <mmorales@usccr.gov> wrote:

I am open to what everyone thinks is best. I am trying to get the transcript expedited so we can link to it and the public can read for themselves the debate and final vote.

Sent from my iPhone

On Oct 30, 2020, at 10:31 AM, Angelia Rorison <arorison@usccr.gov> wrote:

Thank you for the update Vincent.

Mauro and Rukku - how would you like to proceed with the update briefing materials on the website? Please see below for option on going forward:

• Leave update page as is but remove "Report: COVID-19 in Indian Country (forthcoming pending majority vote)" link

• Leave update page as is but remove "Report: COVID-19 in Indian Country (forthcoming pending majority vote)" link and replace with link to 2018 Broken Promises Report

• Remove COVID update briefing page and add COVID update information to original report briefing page (this is what we did with voting rights).

<https://www.usccr.gov/pubs/briefing-reports/2020-07-17-COVID-19-in-Indian-Country.php>

My preference is the second option as there is a clear update of information. This is because the general public who did not attend today's briefing would not necessarily know any update has been made from the title on webpage.

Let me know your thoughts,

Ang

From: Vincent A. Eng <veng@veng-group.com> Sent: Friday, October 30, 2020 1:11:48 PM To: Rukku Singla; Catherine Lhamon; Mauro Morales; Angella Rorison Subject: [EXTERNAL] RE: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country

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The word is spreading about the failed vote. _____ Vincent A. Eng VENG GROUP O +1 202 499 7027, x 101 M +1 703 981 6636 F +1 202 499 7030 veng@veng-group.com From: Vincent A. Eng Sent: October 30, 2020 9:23 AM To: Rukku Singla <rsingla@usccr.gov>; Catherine Lhamon <clhamon@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Angella Rorison <arorison@usccr.gov> Subject: RE: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country Yes, there is great interest in the native community on this issue based on the email traffic last night. The American Bar Association will also be sending an invitation for the Chair to participate in a November webinar on this

<mailto:veng@veng-group.com>

matter. I am told their recent webinars are get 2-3K viewers. I suggested they be very flexible with dates and times given the Chair's full-time duties that may also include senator selection process, in addition to COVID, fires, etc.

_____ Vincent A. Eng VENG GROUP O +1 202 499 7027, x 101 M +1 703 981 6636 F +1 202 499 7030 veng@veng-group.com From: Rukku Singla <rsingla@usccr.gov> Sent: October 30, 2020 9:14 AM >; Angella Rorison <arorison@usccr.gov>; Vincent A. Eng <veng@veng-group.com> Subject: U.S. Commission on Civil Rights (USCCR) - COVID-19 in Indian Country FYI, Indianz.com has posted the information about the business meeting today: <https://www.indianz.com/covid19/2020/10/30/u-s-commission-on-civil-rights-usccr/> Rukku Singla Special Assistant to Chair Catherine E. Lhamon U.S. Commission on Civil Rights 1331 Pennsylvania Avenue, NW Suite 1150 Washington D.C. 20425 M: 513-227-8558 rsingla@usccr.gov Follow us on Twitter and Facebook

<mailto:veng@veng-group.com>

<mailto:rsingla@usccr.gov>

<mailto:arorison@usccr.gov>

<mailto:veng@veng-group.com>

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<mailto:rsingla@usccr.gov>

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Date : 11/2/2020 8:39:04 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Smith, Cindy@scdd" Cindy.Smith@scdd.ca.gov Cc : "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Re: Briefing on US Civil Rights Commission Report for CA State Council on Developmental Disabilities Hi Cindy. I'm sorry for my delay. I should be able to do this (has the date changed to November 30 instead of December 1?). Thank you for including the report in the meeting. I've copied Rukku Singla to work on details. I can't be the point of contact on California advocacy, given my work in California. Thank you for checking on that too.

On Nov 2, 2020, at 2:07 PM, Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> wrote:

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Hi Catherine,

We are meeting this week to finalize an agenda for the Council meeting on November 30th, so I wanted to circle back to see if might be possible for you, another commissioner or staff to present the report to the Council. Thank you for considering the request.

Regards, Cindy Smith cell 916-799-8805

Sent from my iPhone

On Oct 23, 2020, at 1:04 PM, Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> wrote:

Hello Catherine, Thank you for all of the work to issue a critical report on subminimum wage. The Council has asked me to put together a short panel presentation at the Council meeting on December 1st to update them on the issuance and recommendations in the report. By chance, would you, another commissioner or staff be available to join the meeting to present the report and answer questions from Councilmembers? The meeting will be on Zoom, and we

have been meeting from about 10-3 the last few months. Happy to try to plan around your availability. On a separate note, and I recognize that you need to keep your roles separate, I am having preliminary conversations with Disability Rights California about what we may be able to do here in CA to address the subminimum wage issue. If you might be willing to strategize with us in your Chair role, we would be interested in setting up a time to chat with you in the next few weeks. Hope all is well. Thank you for considering the requests. Cindy Smith, MS, JD | Deputy Director, Policy and Public Affairs State Council on Developmental Disabilities (Mobile) 916-799-8805 www.scdd.gov

<https://url.emailprotection.link/?bcZNTsR-PFLEXx8TWdV0a9aSJ-u1CAQXIGKCXKCVGIWuw8Lhwf0zh0BfDDLp7xOyCVI6Z5CE2h7Rek26PUrW3g~~>

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Date : 11/2/2020 2:32:22 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Phela Townsend" townsend@thenext100.org Cc : "Emma Vadehra" vadehra@thenext100.org, "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Following up re: data privacy and civil rights Thanks for checking Phela. We have not voted on a new topic yet. The Commission deadlocked on votes to release our last two projects so it's tough to predict when we will vote for a new one.

On Nov 2, 2020, at 10:14 AM, Phela Townsend <townsend@thenext100.org> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine, I hope this email finds you well. I know things are probably very busy, but I just wanted to check in to see whether the Commission had made any decisions on whether to take on data privacy/ civil rights.

Anyway, take care and hope all is well. Best, Phela

On Tue, Sep 1, 2020 at 7:56 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

Thank you for this note Phela, and it was so nice to zoom-meet you today. We haven't yet voted on what topics to take up next at the Commission. If we vote to take up the artificial intelligence topic I will certainly reach out to connect with you on your research. I've copied my phenomenal Special Assistant, Rukku Singla, who works on all Commission projects with me.

Catherine E. Lhamon

Chair

U.S. Commission on Civil Rights

1331 Pennsylvania Ave NW, Suite 1150

Washington, DC 20425

<mailto:clhamon@usccr.gov>

clhamon@usccr.gov

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From: Phela Townsend <townsend@thenext100.org> Sent: Tuesday, September 1, 2020 5:24 PM To: Catherine Lhamon Cc: Emma Vadehra Subject: [EXTERNAL] Following up re: data privacy and civil rights

CAUTION: This email is from outside USCCR.

Hi Catherine, it was such a pleasure to have with us today. As Emma knows, I don't get to make all of the sessions when we bring guests in, so I'm really happy that I was able to make it today!

As you mentioned, I would love to follow up with you about your possible future work on data/privacy and civil rights.

Please let me know how best to connect with you. I look forward to speaking.

Thank you! Phela

-- Phela Townsend twitter: [@phelatownsend](https://twitter.com/phelatownsend) Policy Entrepreneur

Pieces I have written while at Next100:

What Have the COVID-19 Pandemic and Recent Protests Taught Us about Digital Organizing?

<https://thenext100.org/what-have-the-covid-19-pandemic-and-recent-protests-taught-us-about-digital-organizing/>

<mailto:clhamon@usccr.gov>

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<mailto:townsends@thenext100.org>

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Data Privacy Is Not Just a Consumer Issue: It's Also a Labor Rights Issue

<https://thenext100.org/data-privacy-is-not-just-a-consumer-issue-its-also-a-labor-rights-issue/>

Preparing to Protect Workers' Rights against the Risks of Artificial Intelligence

<https://thenext100.org/preparing-to-protect-workers-rights-against-the-risks-of-artificial-intelligence/>

We've Been Here Before: Embracing All of What Today's Labor Movement Has to Offer

<https://thenext100.org/weve-been-here-before-embracing-all-of-what-todays-labor-movement-has-to-offer/>

Bending Technology to Empower Workers

<https://thenext100.org/bending-technology-to-empower-workers/>

Letter to the Editor in the New York Times on Lack of Diversity in the Economics Field

<https://thenext100.org/phela-townsend-writes-letter-to-the-editor-in-the-new-york-times-on-lack-of-diversity-in-the-economics-field/>

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-- Phela Townsend

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Date : 11/27/2020 9:26:16 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Smith, Cindy@scdd" Cindy.Smith@scdd.ca.gov Cc : "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Re: Briefing on US Civil Rights Commission Report for CA State Council on Developmental Disabilities Terrific. I can make anytime in your window work on December 1. Let us know what will work best please. I know there are some specifics we will need to confirm with our ethics officer but I am confident we will be able to make that work. Rukku should be able to connect with you probably next week. Thank you.

On Nov 2, 2020, at 6:02 PM, Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> wrote:

CAUTION: This email is from outside USCCR.

Hello,

Thank you for the quick reply. I mistyped. The Council meets on Tues. December 1st. We do a pre-meeting with self-advocates the day before that was I was think about, but we would want you to present to the full Council. I hope that sometime on December 1st might work for you. We typically meet about 10-3, but I will know for sure on timing tomorrow. Please let me know what might work for you and I will try to arrange the agenda around your availability. Thanks so much! And, completely understand about you not being able to assist with any advocacy in CA on this topic.

Regards, Cindy Smith

From: Catherine Lhamon <clhamon@usccr.gov> Sent: Monday, November 2, 2020 5:39 PM To: Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> Cc: Rukku Singla <rsingla@usccr.gov> Subject: Re: [EXTERNAL] Re: Briefing on US Civil Rights Commission Report for CA State Council on Developmental Disabilities Hi Cindy. I'm sorry for my delay. I should be able to do this (has the date changed to November 30 instead of December 1?). Thank you for including the report in the meeting. I've copied Rukku Singla to work on details. I can't be the point of contact on California advocacy, given my work in California. Thank you for checking on that too.

On Nov 2, 2020, at 2:07 PM, Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> wrote:

CAUTION: This email is from outside USCCR.

Hi Catherine,

We are meeting this week to finalize an agenda for the Council meeting on November 30th, so I wanted to circle back to see if might be possible for you, another commissioner or staff to present the report to the Council. Thank you for considering the request.

Regards, Cindy Smith cell 916-799-8805

Sent from my iPhone

On Oct 23, 2020, at 1:04 PM, Smith, Cindy@scdd <Cindy.Smith@scdd.ca.gov> wrote:

Hello Catherine, Thank you for all of the work to issue a critical report on subminimum wage. The Council has asked me to put together a short panel presentation at the Council meeting on December 1st to update them on the issuance and recommendations in the report. By chance, would you, another commissioner or staff be available to join the meeting to present the report and answer questions from Councilmembers? The meeting will be on Zoom, and we have been meeting from about 10-3 the last few months. Happy to try to plan around your availability. On a separate note, and I recognize that you need to keep your roles separate, I am having preliminary conversations with Disability Rights California about what we may be able to do here in CA to address the subminimum wage issue. If you might be

willing to strategize with us in your Chair role, we would be interested in setting up a time to chat with you in the next few weeks. Hope all is well. Thank you for considering the requests. Cindy Smith, MS, JD | Deputy Director, Policy and Public Affairs State Council on Developmental Disabilities (Mobile) 916-799-8805 www.scdd.gov

https://url.emailprotection.link/?bnPKKYqXbLSpacqvflcbKTPa50xqXJNsF-e-ELIoacnEPilf9EWBHKR0xezVlpqX8ZY52J4LwsuhKRSaBV51--BMJDOtotUQChDwtJBL-wgtB_ezMYzIjem-yihads5Hn9CZWgQp2LaOIA0OWowjha4flWmAtchFO0ka7RVKCAyzy5xHULvroKCK2ujP5jAxdWxRjyn0XE_MXDdbr_6xJrU_J5XK5XY8PbTK0tYFvkmnjBnz9U3DWu8Tgd1YdIevB7cy5luWvpbLgcFPBLOq48eHJEDAMFSSHSc5EAtdqBIXHnI

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Date : 11/6/2020 9:16:30 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "ngracia@tfah.org" ngracia@tfah.org Subject : hope that you will participate in U.S. Commission on Civil Rights briefing Attachment : Invitation Letter - J. Nadine Gracia 10.9.20.pdf. Hi Dr. Gracia. I'm delighted to be back in touch with you after several years. I hope you are taking care in this time. And I also hope that the U.S. Commission on Civil Rights will be able to benefit from your expertise at our rescheduled briefing -- which is now virtual -- on November 13, 2020 regarding maternal mortality. I've attached here the invitation our staff sent regarding the rescheduled briefing. I would love to be able to rely on your expertise in our evaluation of the topic. And of course I would love to see you, even over a computer screen.

I hope you are well.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on [Twitter](#) and [Facebook](#).

<mailto:clhamon@usccr.gov>
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October 9, 2020

J. Nadine Gracia, MD, MSCE

Executive Vice President and COO

Trust for America's Health

Dear Dr. Gracia:

The U.S. Commission on Civil Rights is holding a briefing regarding maternal health disparities. This public event will be held starting at 10:00 a.m., on Friday, November 13, 2020. Due to the ongoing COVID-19 pandemic, the briefing will be held virtually using videoconference software. The briefing will examine racial disparities that exist in maternal health care and the role of the federal government in eliminating those disparities. In particular, we are inviting you to participate on a panel that will discuss policy and legislation surrounding this issue.

The purpose of the panel is to explore the following questions:

- What do data trends suggest about maternal health outcomes of women in the U.S. and the rate of pregnancy-related/associated deaths of women in the U.S.?
- What do data trends suggest about the prevalence of racial disparities in maternal health outcomes among women in the U.S.? Which racial and/or ethnic populations experience the greatest impact of these health disparities, and how are they impacted? What are the social determinants of health outcomes (including prior systemic discrimination that may be ongoing) for impacted populations?
- What constitutional and legal obligations exist that may help prevent pregnancy-related/associated deaths for all women in the U.S., and eliminate racial disparities in maternal health outcomes and pregnancy-related/associated deaths of women in the U.S.?
- o How do these laws protect all women in the U.S. from negative pregnancy-related/associated health

outcomes and pregnancy-related/associated deaths? How do these laws protect pregnant women in the U.S. against racial disparities in maternal health outcomes and pregnancy-related/associated deaths?

- o Are current civil rights laws sufficient to address racial disparities that affect women of color in the U.S. from negative pregnancy-related/associated outcomes and pregnancy-related/associated deaths?
- o How effective has new legislation been in addressing racial disparities in maternal health outcomes and in pregnancy-related/associated deaths?

• What is the role of the federal government in protecting the health of pregnant women in the U.S. and preventing pregnancy-related/associated deaths? What are the specific duties of federal agencies/sub-agencies; what are they doing/what programs exist to address and prevent pregnancy-related/associated deaths, improve maternal health outcomes, and eliminate racial disparities for women in the U.S.? What partnerships with state and local entities does the federal government engage in to improve maternal health outcomes, prevent pregnancy-related/associated deaths, and eliminate racial disparities for women in the U.S.?

• Are there recommendations or best practices offered by government officials, medical professionals, scholars, community stakeholders, or others that address how to improve pregnancy-related/associated health outcomes, prevent pregnancy-related/associated deaths of women in the U.S., or eliminate racial disparities in pregnancy-related/associated health outcomes and pregnancy-related/associated deaths of women in the U.S.?

The Commission would be honored to have you or a designee from your organization participate at the upcoming briefing. Should you choose to participate, we respectfully request that you provide an electronic copy of a written statement capturing your testimony on this topic (in Microsoft Word format), a half-page biography, a headshot, and indication of any audio-visual needs or any reasonable accommodation requests. Please email this information to nbair@uscrr.gov on or before Thursday, October 22, 2020.

<mailto:nbair@uscrr.gov>

Page 2

Please note that since 1983, Congress has prohibited the Commission from taking in any information or talking about abortion.¹ We ask that you prepare your written statement and remarks for the briefing with this restriction in mind. We note that this statutory restriction will be enforced by the Chair of the Commission during the briefing. If you have any questions, we are happy to put you in touch with our Office of General Counsel.

If you cannot attend, but would like to submit a written statement, please send testimony to maternalhealth@uscrr.gov. If you have any questions, please contact our lead researcher on this matter, Nicholas Bair, Esq., at nbair@uscrr.gov. For further information on the Commission and our bipartisan civil rights work, see www.uscrr.gov.

Director, Office of Civil Rights Evaluation

U.S. Commission on Civil Rights

¹ This prohibition is codified at 42 U.S.C. § 1975a(f).

<mailto:maternalhealth@uscrr.gov>
<mailto:nbair@uscrr.gov>
<http://www.uscrr.gov/>

760.pdf

760.pdf

Date : 11/9/2020 1:10:53 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "J. Nadine Gracia" ngracia@tfah.org Subject : Re: hope that you will participate in U.S. Commission on Civil Rights briefing Oh I am so disappointed not to virtually see and hear from you on Friday. Thank you for letting me know, though. If you would be interested to submit written testimony, we would welcome benefitting from that.

And in any event: I am so happy to be back in touch with you.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: J. Nadine Gracia <ngracia@tfah.org> Sent: Sunday, November 8, 2020 11:26 PM To: Catherine Lhamon Subject: [EXTERNAL] RE: hope that you will participate in U.S. Commission on Civil Rights briefing

CAUTION: This email is from outside USCCR.

Dear Catherine, It is such a pleasure hearing from you. I likewise hope that you are taking care and doing well. Thank you very much for the invitation to participate in this briefing on such a vital issue. I am honored to be invited. Regrettably, I will not be able to participate, as I have a previous commitment on November 13th. I would welcome a future opportunity for engagement with the Commission. And I would welcome an opportunity to reconnect and catch up with you. I wish you all the best for a productive briefing. Best regards, Nadine

<mailto:clhamon@uscrr.gov>
<https://twitter.com/USCCRRgov>
https://www.facebook.com/pg/USCCRRgov/posts/?ref=page_internal

J. Nadine Gracia, MD, MSCE Executive Vice President and Chief Operating Officer Trust for America's Health From: Catherine Lhamon <clhamon@uscrr.gov> Sent: Friday, November 6, 2020 9:17 PM To: J. Nadine Gracia <ngracia@tfah.org> Subject: hope that you will participate in U.S. Commission on Civil Rights briefing Hi Dr. Gracia. I'm delighted to be back in touch with you after several years. I hope you are taking care in this time. And I also hope that the U.S. Commission on Civil Rights will be able to benefit from your expertise at our rescheduled briefing -- which is now virtual -- on November 13, 2020 regarding maternal mortality. I've attached here the invitation our staff sent regarding the rescheduled briefing. I would love to be able to rely on your expertise in our evaluation of the topic. And of course I would love to see you, even over a computer screen. I hope you are well. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

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<https://url.emailprotection.link/?bEITOrvjDxDdL1-H2eKD20C9fjTNYuBWro21rsDukEX9mhKq3rbiKXUIRoEzzN--6o5zc7kPV8pEkGbjjXqfTCVeLzclXNcG47DIWnp6YOZEIsQ0gxp5dj6m8R3wvcJm>

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Date : 11/9/2020 7:07:18 PM From : "Catherine Lhamon" clhamon@uscrr.gov To : "J. Nadine Gracia" ngracia@tfah.org Subject : Re: hope that you will participate in U.S. Commission on Civil Rights briefing Thank you so much for this suggestion of an alternate! Commission staff will reach out to connect for the Friday briefing. I'm so grateful to have TFah testimony and this alternate witness. Thank you.

And I hope you will not regret inviting me to call on you any time. . . .

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@uscrr.gov Follow us on Twitter and Facebook.

From: J. Nadine Gracia <ngracia@tfah.org> Sent: Monday, November 9, 2020 4:31 PM To: Catherine Lhamon Subject: [EXTERNAL] RE: hope that you will participate in U.S. Commission on Civil Rights briefing

CAUTION: This email is from outside USCCR.

Dear Catherine, Thank you for understanding. If the Commission is open to this, our Director of Policy Development, Jeanette Kowalik, PhD, MPH, is available and can participate in the briefing. She recently joined our organization. To share her background, she most recently was the Commissioner of Health for the City of Milwaukee and was previously Associate Director of Women's and Infant Health at the Association of Maternal and Child Health Programs.. She would be a great addition to your briefing panelists. Dr. Joia Crear-Perry knows her, and I believe would also recommend her. If that is agreeable to you, I am happy to connect Dr. Kowalik to the staff at the Commission, and we can plan to submit testimony on behalf of Trust for America's Health. Please do call upon me at any time. You are leading such important work at USCCR, and I would be happy to support your efforts. The Commission is so

<mailto:clhamon@uscrr.gov>

<https://twitter.com/USCCRGov>

https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

fortunate to have your leadership. Best regards, Nadine J. Nadine Gracia, MD, MSCE Executive Vice President and Chief Operating Officer Trust for America's Health From: Catherine Lhamon <clhamon@usccr.gov> Sent: Monday, November 9, 2020 1:11 PM To: J. Nadine Gracia <ngracia@tfah.org> Subject: Re: hope that you will participate in U.S. Commission on Civil Rights briefing Oh I am so disappointed not to virtually see and hear from you on Friday. Thank you for letting me know, though. If you would be interested to submit written testimony, we would welcome benefitting from that. And in any event: I am so happy to be back in touch with you. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: J. Nadine Gracia <ngracia@tfah.org> Sent: Sunday, November 8, 2020 11:26 PM To: Catherine Lhamon Subject: [EXTERNAL] RE: hope that you will participate in U.S. Commission on Civil Rights briefing

CAUTION: This email is from outside USCCR.

Dear Catherine, It is such a pleasure hearing from you. I likewise hope that you are taking care and doing well. Thank you very much for the invitation to participate in this briefing on such a vital issue. I am honored to be invited. Regrettably, I will not be able to participate, as I have a previous commitment on November 13th.

<mailto:clhamon@usccr.gov>

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<mailto:ngracia@tfah.org>

I would welcome a future opportunity for engagement with the Commission. And I would welcome an opportunity to reconnect and catch up with you. I wish you all the best for a productive briefing. Best regards, Nadine J. Nadine Gracia, MD, MSCE Executive Vice President and Chief Operating Officer Trust for America's Health From: Catherine Lhamon <clhamon@usccr.gov> Sent: Friday, November 6, 2020 9:17 PM To: J. Nadine Gracia <ngracia@tfah.org> Subject: hope that you will participate in U.S. Commission on Civil Rights briefing Hi Dr. Gracia. I'm delighted to be back in touch with you after several years. I hope you are taking care in this time. And I also hope that the U.S. Commission on Civil Rights will be able to benefit from your expertise at our rescheduled briefing -- which is now virtual -- on November 13, 2020 regarding maternal mortality. I've attached here the invitation our staff sent regarding the rescheduled briefing. I would love to be able to rely on your expertise in our evaluation of the topic. And of course I would love to see you, even over a computer screen. I hope you are well. Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

<mailto:clhamon@usccr.gov>

<mailto:ngracia@tfah.org>

<mailto:clhamon@usccr.gov>

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Date : 11/10/2020 8:52:37 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Joy R" joy.resmovits@gmail.com Subject : Re: [EXTERNAL] Talk soon? It's so nice to hear from you and I would love to catch up sometime but am jammed this week.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Joy R <joy.resmovits@gmail.com> Sent: Tuesday, November 10, 2020 3:27 PM To: Catherine Lhamon Subject: [EXTERNAL] Talk soon?

CAUTION: This email is from outside USCCR.

Hey there,

How are you? I've been thinking about you a lot at this moment of transition.

I'm writing this week about the changes we might see to education following the end of the Trump administration. Of course, one of the things pres-elect Biden said he'd do is restore the Obama administration's OCR guidance. I'd love to talk to you, perhaps sometime tomorrow, about what it all means. And, separate from any story, I'd be delighted to catch up.

Thanks.

Best, Joy

-- Joy Resmovits @Joy_Resmovits // Seattle Times Ed Lab 516-698-9616 Education Lab newsletter // The Unmuted

<mailto:clhamon@usccr.gov>

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Date : 11/12/2020 12:54:12 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Topeka K. Sam" tksam@thelohm.org Cc : "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Re: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health Thanks so much for letting me know. We will keep you updated and if you have material you think we should consider we would love to receive it to incorporate in our investigation.

> On Nov 12, 2020, at 9:36 AM, Topeka K. Sam <tksam@thelohm.org> wrote: >> *** CAUTION: This email is from outside USCCR. *** >> Blessings, >> Thank you so much for sending this over. We are actually doing some work regarding the maternal health and wellness of incarcerated and formerly incarcerated women. >> Please keep me in the loop! >> Many Blessings ☺ Many Thanks > Topeka K. Sam > @TopekaKSAM >>> On Nov 12, 2020, at 11:43 AM, Catherine Lhamon <clhamon@usccr.gov> wrote: >>

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Date : 11/13/2020 9:43:06 AM From : "Catherine Lhamon" clhamon@usccr.gov To : "Graves, Fatima Goss" fgraves@nwlrc.org Subject : Re: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health Thank you!

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Graves, Fatima Goss <fgraves@nwlrc.org> Sent: Thursday, November 12, 2020 4:13 PM To: Catherine Lhamon Subject: [EXTERNAL] Re: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health

CAUTION: This email is from outside USCCR.

So good!

From: Catherine Lhamon <clhamon@usccr.gov> Date: Thursday, November 12, 2020 at 11:43 AM Subject: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health [EXTERNAL EMAIL]

On Friday, November 13, 2020, at 10:00 a.m. Eastern Time, the U.S. Commission on Civil Rights will hold a virtual briefing to examine the federal role in addressing racial disparities in maternal health outcomes, including negative pregnancy-related health outcomes and pregnancy-related deaths of women in the United States. I hope you'll join us for the briefing, which will be livestreamed on our YouTube channel here. The Commission will hear from subject matter experts such as government officials, academics, healthcare providers, advocates, and impacted persons. The full schedule is below. Racial Disparities in Maternal Health – November 13, 2020 Expert Panels: 10:00 am – 1:30 pm (all times Eastern Time)

<mailto:clhamon@usccr.gov>

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Hearing will be livestreamed on the USCCR YouTube channel (<https://www.youtube.com/user/USCCRGov/videos>), and the video of the briefing will be also be available here for viewing after the livestream. Introductory Remarks: Chair Catherine E. Lhamon: 10:00 – 10:05 am Panel 1: Policy and Legislation: 10:05 – 11:05 am

• U.S. Representative Ayanna Pressley (MA-07) • Jennifer E. Moore, Ph.D., R.N., F.A.A.N. – Founding Executive Director, Institute for

Medicaid Innovation • Shanna Cox – Associate Director for Science, Division of Reproductive Health,

Center for Disease Control and Prevention • Shannon Dowler, M.D. – Chief Medical Officer, North Carolina Medicaid

Break: 11:05 – 11:15 am Panel 2: Service Providers/Private Organizations: 11:15 am – 12:15 pm

• Angela Doyinsola Aina, M.P.H. – Co-Founding Executive Director, Black Mamas Matter Alliance

• Joia Adele Crear-Perry, M.D., F.A.C.O.G. – Founder and President, National Birth Equity Collaborative

• Taraneh Shirazian, M.D., F.A.C.O.G. – President and Medical Director, Saving Mothers; Associate Professor of OBGYN, Director of Global Women's Health, NYU Langone Health

• Mauricio Leone, M.P.A. – Chief Operating Officer and Senior Director, Obria Group Break: 12:15 – 12:25 pm Panel 3: Lived Experience: 12:25 – 1:25 pm

• Chanel Porchia-Albert – Board Member, March for Moms, Founder, Ancient Song Doula Services

• Nan Strauss – Managing Director, Policy, Advocacy & Grantmaking, Every Mother Counts

• Jennifer Jacoby – Federal Policy Counsel, U.S. Policy and Advocacy Program, Center for Reproductive Rights

• Nicole L. Gonzales, B.S.N., R.N., M.S.N., C.N.M. – Executive Director and Founder, Changing Women Initiative

Closing Remarks: Chair Catherine E. Lhamon: 1:25 – 1:30 pm Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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Date : 11/17/2020 2:19:50 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Fwd: [EXTERNAL] Thank You For Testifying Attachment : Lhamon Thank You Letter.pdf;2020-09-24 Lhamon Excerpt.pdf;

Begin forwarded message:

From: "Emmons, William" <Will.Emmons@mail.house.gov> Date: November 17, 2020 at 10:13:50 AM PST To: Catherine Lhamon <clhamon@usccr.gov> Subject: [EXTERNAL] Thank You For Testifying

CAUTION: This email is from outside USCCR.

Good afternoon,

Please find attached a letter from Chairman Nadler expressing his appreciation for your participation at the September 24, 2020 hearing on "Oversight of the Civil Rights Division of the Department of Justice."

Also attached for your review is your excerpt from the hearing transcript. Please send any edits to your excerpt to me no later than COB on December 1, 2020.

Additionally, as part of a new House-wide initiative to track the diversity of witnesses who testify in Congress, we ask that you consider taking this voluntary survey. All data remains anonymous and protected according to the United States House of Representatives' policy and data security practices. If you have additional questions or are having trouble accessing this survey, please contact Stephanie Palencia at stephanie.palencia@mail.house.gov.

Please confirm receipt of this email and let me know if you have any additional questions.

Best,

Will Emmons

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<mailto:stephanie.palencia@mail.house.gov>

November 17, 2020

Catherine E. Lhamon, Esq.

Chair

U.S. Commission on Civil Rights

1331 Pennsylvania Avenue NW

Suite 1150

Washington, DC 20425

Dear Ms. Lhamon:

On behalf of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, I

want to express our sincere appreciation for your participation at the hearing on "Oversight of

the Civil Rights Division of the Department of Justice." Your testimony was informative and

will assist us in future deliberations on the important issues addressed during the hearing.

Also, please find enclosed for your review a verbatim transcript of your oral testimony at

the hearing. Pursuant to House Rule XI, clause 2(e)(1)(A) and House Judiciary Committee Rule

III(e), you have the opportunity to verify the accuracy of the transcript in advance of publication.

Pursuant to this authority, you may make technical, grammatical, and typographical corrections.

Any request by you to correct errors other than errors in the transcription, or disputed errors in

transcription, will be appended to the hearing record, and the appropriate place where the change

is requested will be footnoted.

Please send your transcript edits no later than December 1, 2020, to the attention of William Emmons, Committee on the Judiciary, U.S. House of Representatives, 2138 Rayburn

House Office Building, Washington, DC 20515 or email your transcript edits to

william.emmons@mail.house.gov.

Your prompt submission of your transcript edits and responses to the questions for the

record would be much appreciated. Again, thank you for your participation.

Sincerely,

- Jerrold Nadler

Chairman

Enclosure: Transcript Excerpts

<mailto:william.emmons@mail.house.gov>

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Date : 11/18/2020 1:17:51 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Graves, Fatima Goss" fgraves@nwlc.org Subject : Re: [EXTERNAL] Re: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health We would very much welcome written testimony from NWLC to incorporate in our investigation, if you all might be interested to submit. I'd be glad to discuss.

On Nov 12, 2020, at 1:14 PM, Graves, Fatima Goss <fgraves@nwlc.org> wrote:

CAUTION: This email is from outside USCCR.

So good!

From: Catherine Lhamon <clhamon@usccr.gov> Date: Thursday, November 12, 2020 at 11:43 AM Subject: Commission briefing tomorrow 11/13: Racial Disparities in Maternal Health

[EXTERNAL EMAIL]

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• U.S. Representative Ayanna Pressley (MA-07) • Jennifer E. Moore, Ph.D., R.N., F.A.A.N. – Founding Executive

Director, Institute for Medicaid Innovation • Shanna Cox – Associate Director for Science, Division of Reproductive Health, Center for Disease Control and Prevention • Shannon Dowler, M.D. – Chief Medical Officer, North Carolina Medicaid

Break: 11:05 – 11:15 am Panel 2: Service Providers/Private Organizations: 11:15 am – 12:15 pm

• Angela Doyinsola Aina, M.P.H. – Co-Founding Executive Director, Black Mamas Matter Alliance

• Joia Adele Crear-Perry, M.D., F.A.C.O.G. – Founder and President, National Birth Equity Collaborative

• Taraneh Shirazian, M.D., F.A.C.O.G. – President and Medical Director, Saving Mothers; Associate Professor of OBGYN, Director of Global Women's Health, NYU Langone Health

• Mauricio Leone, M.P.A. – Chief Operating Officer and Senior Director, Obria Group

Break: 12:15 – 12:25 pm Panel 3: Lived Experience: 12:25 – 1:25 pm

• Chanel Porchia-Albert – Board Member, March for Moms; Founder, Ancient Song Doula Services

• Nan Strauss – Managing Director, Policy, Advocacy & Grantmaking, Every Mother Counts

• Jennifer Jacoby – Federal Policy Counsel, U.S. Policy and Advocacy Program, Center for Reproductive Rights

• Nicolle L. Gonzales, B.S.N., R.N., M.S.N., C.N.M. – Executive Director and Founder, Changing Women Initiative

Closing Remarks: Chair Catherine E. Lhamon: 1:25 – 1:30 pm

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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https://url.emailprotection.link/?bEITOrvjDxDdOL1-H2eKD20C9fTNYuBWro21rsDukEX9mhKq3rbiKXUIRoEzzN_-8o5zc7kPV8pEkQbjlXgftCVeLzclXNcG47DfWnp6YOZEIsQ0gxp5dj8m8R3wvcJm

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Date : 11/23/2020 7:11:12 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Gautam Raghavan" gaurag@gmail.com, "munoz@newamerica.org" munoz@newamerica.org Subject : Re: [EXTERNAL] finding time to talk about federal civil rights enforcement planning? Having seen the President's tweet about initiating transition steps for the President-elect, I hope we have now reached a time when we could have a conversation about federal civil rights enforcement in a next Administration. I would love to share some ideas when appropriate for you.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Gautam Raghavan <gaurag@gmail.com> Sent: Saturday, August 15, 2020 4:58 PM To: Catherine Lhamon Subject: Re: [EXTERNAL] finding time to talk about federal civil rights enforcement planning?

CAUTION: This email is from outside USCCR.

Yes please!

On Aug 15, 2020, at 4:57 PM, Catherine Lhamon <clhamon@usccr.gov> wrote:

I'm sorry that had not occurred to me; thanks for letting me know. I will look forward to a possible future conversation.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Gautam Raghavan <gaurag@gmail.com> Sent: Saturday, August 15, 2020 10:01 AM To: Catherine Lhamon Cc: Rukku Singla; munoz@newamerica.org

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal
<mailto:clhamon@usccr.gov>
<mailto:clhamon@usccr.gov>
https://url.emailprotection.link/?bVO2q0UXR235wN_vOnM0FjPj2W81Vw7EdGuMfYdp-T6N1UVXbMseUWhiSS-A4xs4-rvoHVnWLSLMx0lUmt1vyA~~
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<mailto:gaurag@gmail.com>
<mailto:munoz@newamerica.org>

Subject: [EXTERNAL] Re: finding time to talk about federal civil rights enforcement planning?

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Dear Catherine,

It is so nice to hear from you! Thanks for reaching out.

I am such a big admirer of your leadership over the years and would normally love to be able to have this conversation, but unfortunately we are currently limited in terms of our ability to engage USG officials. I wish it were otherwise! But I'll be very happy to circle back if/when things change.

Until then, please stay well. We are glad you are where you are.

Best, Gautam

On Aug 14, 2020, at 3:03 PM, Catherine Lhamon <clhamon@usccr.gov> wrote:

Hi Gautam and Cecilia. I hope these email addresses are ok to use for this outreach. I'd love to find time to talk with you, or with the person you think would be right, about recent U.S. Commission on Civil Rights evaluation of federal civil rights enforcement across 13 federal civil rights agencies. The Commission report, which I've attached here, aims to set a blueprint for what effective federal enforcement should look like. As I know you know that topic is close to my heart so I would love to talk with you or your team about planning for ways to fulfill federal civil rights promises most effectively. Please let me know if we could find some time.

I hope you are both taking care in this intense time.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook. <11-21-Are-Rights-a-Reality.pdf>

<mailto:clhamon@usccr.gov>
<mailto:clhamon@usccr.gov>
https://url.emailprotection.link/?bVO2q0UXR235wN_vOnM0FjPj2W81Vw7EdGuMfYdp-T6N1UVXbMseUWhiSS-A4xs4-rvoHVnWLSLMx0lUmt1vyA~~
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Date : 11/27/2020 6:00:40 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "TinaLouise Martin" tmartin@usccr.gov Cc : "Chris Schroeder" cschroeder@jbrpt.org, "Pam Karlan" pkarlan@jbrpt.org, "Katherine Culliton-Gonzalez" kculliton-gonzalez@usccr.gov, "Rukku Singla" rsingla@usccr.gov Subject : Re: [EXTERNAL] Biden-Harris Transition Agency Review I would love to join but unfortunately am not available at that time. Could we talk at or after 1 on EST on Monday?

On Nov 27, 2020, at 2:29 PM, TinaLouise Martin <tmartin@usccr.gov> wrote:

Good evening Mr. Schroeder, Thank you for reaching out, we are looking forward to our engagement with the Transition Team. Ms. Rudolph is no longer with our agency. The new team consist of myself and Katherine Culliton-Gonzalez (kculliton-gonzalez@usccr.gov). We are available for a call on Monday at 11 a.m. Please let me know if you would like us to set this up or whether you will send an invite. We look forward to working with you as well. Thank you. TinaLouise Martin Director of Management/Human Resources From: Chris Schroeder <cschroeder@jbrpt.org> Sent: Friday, November 27, 2020 4:15 PM To: Catherine Lhamon <clhamon@usccr.gov>; Pam Karlan <pkarlan@jbrpt.org>; TinaLouise Martin <tmartin@usccr.gov>; Maureen Rudolph <mrudolph@usccr.gov> Subject: [EXTERNAL] Biden-Harris Transition Agency Review

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Ms. Lhamon, Ms. Martin and Ms. Rudolph, On behalf of the Biden-Harris Transition Team, I am reaching out as the Agency Review Team Lead for the Commission on Civil Rights.

<mailto:kculliton-gonzalez@usccr.gov>

I look forward to engaging with you and your team, and am grateful for the time and effort that has gone into preparing transition briefings and reference materials. To start, I would like to arrange for a call or video conference to discuss next steps, including logistics for the review. Can I suggest scheduling our initial conversation for this coming Monday at 11 a.m.? That is just an opening offer; please suggest another time if that would be more convenient. A list of authorized team members can be found here, and I will keep you apprised of any modifications. This list has also been provided to the Federal Transition Coordinator, Mary Gibert. For organizational purposes, CCR has been placed under the umbrella of the Department of Justice Agency Review Team. I will be inviting Pam Karlan from our team to join us. If you are able to share any unclassified briefing or reference materials by email, I would welcome your doing so at your earliest convenience. I look forward to working with you. Thank you again. Chris Schroeder Lead, Department of Justice Agency Review Team

<https://url.emailprotection.link/?bAGMWJHxBYHniGQSZhyW4WIDEWcV5QpEsfSi5n7gp8EIRJLuWGi3fKaWpVjRksT-GgudXEecAAJFNbMAHlb4lQhyMSri9d8e0FM9ru4UJmMREW52IRMNmufGHD4VD>

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Date : 12/2/2020 5:19:58 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Fwd: [EXTERNAL] Fwd: Invitation to deliver conference keynote address Attachment : Jan. 29-30 Conference - Condensed Agenda rev. 11-21-2020 .pdf;

Begin forwarded message:

From: Catherine Lhamon <Catherine.Lhamon@gov.ca.gov> Date: December 2, 2020 at 2:18:04 PM PST To: Catherine Lhamon <clhamon@usccr.gov> Subject: [EXTERNAL] Fwd: Invitation to deliver conference keynote address

CAUTION: This email is from outside USCCR.

Get Outlook for iOS

From: Denise W. OLDHAM <doldham@berkeley.edu> Sent: Wednesday, December 2, 2020 1:44:26 PM To: Catherine Lhamon <Catherine.Lhamon@GOV.CA.GOV> Cc: denisewatkinsoldham@gmail.com <denisewatkinsoldham@gmail.com> Subject: Invitation to deliver conference keynote address Catherine Lhamon Chair, United States Civil Rights Commission Legal Affairs Secretary, Office of Governor Gavin Newsom, California

Dear Chair/Secretary Lhamon,

I hope you are well during these extraordinary and challenging times.

I am the former Title IX Officer and Director of the Office for the Prevention of Harassment and Discrimination at the University of California, Berkeley. I recall meeting you several times in the Bay Area during your tenure as Assistant Secretary at the U.S. Department of Education. Thank you for your incredible leadership then, and now.

Since my retirement from UC Berkeley in July, I've been active at the Berkeley Center on Comparative Equality and Anti-Discrimination Law. The Berkeley Center is a group of over 600 academics, advocates, and activists from six continents working together to address the problem of discrimination and inequality. Since 2018, the Center's Sexual Harassment/Violence Working Group has put on yearly conferences on sexual harassment and the worldwide #MeToo movement, published a book this year on The Global #MeToo Movement, and is working on global models for institutional sexual

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harassment response.

We are planning a January 29-30, 2021 conference on Sexual Harassment in Education and would be honored if you were willing to deliver a keynote address. We have a keynote planned for each day, and we seek your participation in the first one, focused on the broad topic of sexual harassment and systemic racism in schools. A draft agenda is attached for your reference.

A keynote address (in real time or recorded) by someone with your experience, expertise and stature, both at the federal and state level, would be an invaluable gift to the Center, bestowing much-needed inspiration to the Center's membership as we forge ahead in civil rights work after such a tumultuous period in our country's history.

Because of Covid, the two day conference will be virtual, and we expect a sizable audience consisting of CA attorneys, Title IX professionals, survivor advocates, HR practitioners, university administrators, experts from the nonprofit world, academics and also international scholars, lawyers, educators and policy-makers.

The first day will cover U.S. domestic law and policy issues, as well as sexual harassment and violence prevention topics. On the second day, we will expand our conversations to include international scholars and activists, including a number of scholars from sub-Saharan Africa, who are beginning to change their laws and policies to address sexual harassment and violence within institutions.

Unfortunately, due to circumstances beyond our control, conference planning has begun late and is therefore rushed, as January is just around the corner. I apologize for the late notice this invitation provides. In that context I hope to hear from you soon, as once I find out if you're interested and available, we can connect to discuss how I can facilitate your participation in every way that I can. Please reply all, as I'm doing the bulk of my conference organizing work from my gmail account, cc'd above.

I look forward to hearing from you soon.

With gratitude for your consideration,

Denise W. Oldham

-- Denise W. Oldham (retired) Title IX Compliance Officer Director, Office for the Prevention of Harassment and Discrimination

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Date : 12/3/2020 1:42:37 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rukku Singla" rsingla@usccr.gov Subject : Fwd: [EXTERNAL] FW: Magnet Schools Attachment : Logo-New-4x1_MSA_OG_WEB.jpg;Catherine E. Lhamon Policy Conference Invite 2021.docx;Magnet Schools of America - What You Should Know About Magnet Schools.pdf;

Begin forwarded message:

From: Catherine Lhamon <Catherine.Lhamon@gov.ca.gov> Date: December 3, 2020 at 10:04:22 AM PST To: Catherine Lhamon <clhamon@usccr.gov> Subject: [EXTERNAL] FW: Magnet Schools

CAUTION: This email is from outside USCCR.

Catherine E. Lhamon Legal Affairs Secretary Office of Governor Gavin Newsom (916) 319-9349 From: Todd Mann <todd.mann@magnet.edu> Sent: Thursday, December 3, 2020 10:03 AM To: Catherine Lhamon <Catherine.Lhamon@GOV.CA.GOV> Subject: Magnet Schools Dear Chairwoman Lhamon, Hope you have been well since we spoke late last year. After travel schedules made an appearance at our conference in Washington DC last year impossible, we are hoping that you might be able to join Magnet Schools of America for its virtual National Policy Conference on February 10, 2021. We are happy to work with your schedule to find a convenient time for you to speak. As you may recall, Magnet Schools of America represents the 4340 magnet schools throughout the country. We would be thrilled if you would be willing to speak about the Commission and its work, and the importance of protecting civil rights for all, particularly for students.

Attached is an official invitation, as well as a one-pager about magnet schools and their relevancy to the civil rights issues you address. Thank you for your consideration, and we look forward to hearing from you. Kind regards, Todd Mann Todd Mann Executive Director Magnet Schools of America 1909 K. St NW, Ste C-140 Washington, DC 20006 301.642.6665 (c) www.magnet.edu

SAVE-THE-DATES! 2021 Policy Training Conference February 10-11, 2021 VIRTUAL 2021 Annual Conference on Magnet Schools April 5-9, 2021 Clark County, Nevada

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MISSION STATEMENT

Providing leadership for high-quality innovative instructional programs that promote choice, equity, diversity, and academic excellence for all students.

The National Association for Magnet and Theme-based Schools

December 3, 2020

The Honorable Catherine E. Lhamon U.S. Commission on Civil Rights 1331 Pennsylvania Ave., NW, Suite 1150 Washington, DC 20425

Dear Chairwoman Lhamon:

On behalf of Magnet Schools of America (MSA), the national association for magnet and theme-based schools, we would like to cordially invite you to be a speaker during our annual National Policy Conference on February 10, 2021. Due to the COVID-19 pandemic, this year's Policy Conference is being held virtually, and we currently have flexibility around the exact timing of your appearance.

The event will be attended by magnet school leaders and educators from across the nation who will be participating in meetings and activities that promote federal policies that support school integration and access to high-quality magnet

programs for all students. We anticipate a large attendance from California magnet schools in the country, at more than 550.

Magnet Schools of America was founded in 1986 and represents approximately 4,340 magnet schools and nearly 3.5 million students nationwide. It supports the leaders and teachers of magnet and theme-based schools, while encouraging the development of new magnet programs and public schools of choice.

As a national leader committed to protecting civil rights and ensuring equitable educational opportunities for students, we know that you can appreciate how magnet schools have emerged as an effective way to promote school diversity and innovation in the classroom. Unfortunately, federal, state, and local support for these programs has waned over the last decade threatening to reverse years of progress to close the achievement gap, improve racial harmony, and make a lasting, positive impact on the lives of children.

We hope that you will be able to join us to deliver a powerful message that inspires the magnet school community to remain vigilant in their mission to create a public education system that supports all students and fulfills the promises and rights guaranteed by the landmark Supreme Court decision of Brown vs. Board of the Education.

Should you be able to honor this request, please feel free to contact me at 301.642.6665 or e-mail me directly at todd.mann@magnet.edu

Thank you in advance for your consideration of this invitation.

Sincerely,

Todd Mann Executive Director

<mailto:todd.mann@magnet.edu>

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Date : 12/7/2020 12:01:13 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Emma Vadehra" vadehra@thenext100.org Cc : "Zaki Smith" smith@thenext100.org, "Rukku Singla" rsingla@usccr.gov Subject : Re: A request I'm shifting this to my Commission email and looping Rukku to help facilitate for this. The project sounds great. Zaki I'm looking forward to talking.

On Dec 7, 2020, at 5:54 AM, Emma Vadehra <vadehra@thenext100.org> wrote:

Hey Catherine -- Hope all is well. Switching to official business!

I wanted to connect you with Zaki about a project he is working on. He can share more, but basically he is putting together a short film to raise awareness around collateral consequences -- the history, the impact, the path to change (as he works on it in NYS). See more here.

Given the leadership of the US Commission on Civil Rights on this topic, and the comprehensive report you put out, he'd love to interview you for the film. I'm cc'ing him here -- he can share more on what he's thinking (including by phone/zoom if that's best).

Fingers crossed this works out...And here to answer any Qs you have for me, of course.

Thanks, Emma

Emma Vadehra Executive Director

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<https://twitter.com/thenext100>
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<https://thenext100.us5.list-manage.com/subscribe?u=7103af3351935621d42f3b80a&id=fbaf699e10>

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Date : 12/7/2020 1:11:10 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Emma Vadehra" vadehra@thenext100.org Subject : Re: [EXTERNAL] Re: A request I understood that I'm fine with doing. Rukku will arrange the Commission ethics issues to confirm.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Emma Vadehra <vadehra@thenext100.org> Sent: Monday, December 7, 2020 1:10 PM To: Catherine Lhamon Subject: [EXTERNAL] Re: A request

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I am realizing below might now have been clear that he wants to interview you on camera. Which you should def do. Just FYI.

)

Emma Vadehra Executive Director

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On Mon, Dec 7, 2020 at 12:01 PM Catherine Lhamon <clhamon@usccr.gov> wrote:

I'm shifting this to my Commission email and looping Rukku to help facilitate for this. The project sounds great. Zaki I'm looking forward to talking.

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
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<mailto:clhamon@usccr.gov>

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Given the leadership of the US Commission on Civil Rights on this topic, and the comprehensive report you put out, he'd love to interview you for the film. I'm cc'ing him here -- he can share more on what he's thinking (including by phone/zoom if that's best).

Fingers crossed this works out...And here to answer any Qs you have for me, of course.

Thanks, Emma

Emma Vadehra Executive Director

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Date : 12/15/2020 2:41:46 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Skiba, Russell" skiba@indiana.edu Subject : Re: Monitoring Educational Equity report Thank you for this really nice note; it meant a lot to me to read your thanks. I had not seen news of the new report (to be released today?) and I have not read its draft. I read through the concerns you raised and they sound important but I don't have the text to weigh them against. I'm sorry I'm not a more useful sounding board here.

I hope you are taking care in this pandemic.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Skiba, Russell <skiba@indiana.edu> Sent: Friday, December 11, 2020 6:52 PM To: Catherine Lhamon Subject: [EXTERNAL] Monitoring Educational Equity report

CAUTION: This email is from outside USCCR.

Catherine, I hope you are well. Your leadership of the Commission on Civil Rights has been one of the few bright spots for me in the last four years. Thank you. I assume you received the notice (below) of the roll-out of the Monitoring Educational Equity report this coming Tuesday. As someone I trust who was involved in providing information to the panel, I'm hoping I can get your thoughts on the final report (as a colleague, not as a commissioner). It's quite an impressive lineup of funders and panelists, but as I read through the report in advance of Tuesday's rollout, it raised some serious concerns for me. I've attached a list of some of those. I'd love to know your take on the report, and especially whether you think my concerns are valid, or simply being overly critical. I look forward to the possibility of working together in a more favorable climate! Best regards, Russ

<mailto:clhamon@usccr.gov>
<https://twitter.com/USCCRGov>
https://www.facebook.com/pg/USCCRGov/posts/?ref=page_internal

_____ Russell J. Skiba, Ph.D. Professor Emeritus Department of Counseling and Educational Psychology Indiana University

From: AERA Communications <communications@aera.net> Reply-To: "communications@aera.net" <communications@aera.net> Date: Friday, December 4, 2020 at 3:01 PM To: "Skiba, Russell" <skiba@indiana.edu> Subject: [External] You're Invited—AERA-National Academies Forum on Monitoring Educational Equity on December 15 This message was sent from a non-IU address. Please exercise caution when clicking links or opening attachments from external sources.

December 15, 2020 3:30-5:00 PM EST

The American Educational Research Association and the National Academies of Science, Engineering, and Medicine are partnering on a forum on the research needs and implications of the Academies' report Monitoring Educational Equity.

During this forum, experts who served on the National Academies panel that

produced the report and attendees will explore a select set of the 16 indicators proposed in the report, including exposure to racial, ethnic, and economic

segregation; non-exclusionary disciplinary policies; access to non-academic support for students; and access to high-quality academic supports. Building educational equity systems is a compelling opportunity. But what are the steps and what does the research community need to do? Please join us and contribute to the forum.

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FORUM PARTICIPANTS

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Nancy Gonzales Dean of Natural Sciences and Foundation Professor of Psychology Arizona State University

Laura Hamilton General Manager of Research Centers ETS

Sean F. Reardon Professor of Poverty and Inequality in Education Stanford University

Karolyn Tyson Bowman and Gordon Gray Distinguished Professor University of North Carolina, Chapel Hill

***** This webinar will broadcast live on ZOOM.

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Date : 12/18/2020 2:23:16 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Robert Maranto" rmaranto@uark.edu Cc : "Ian K" iansethkingsbury@gmail.com Subject : Re: scholarly study finding that more charter school authorization regulations mean fewer minority school leaders Thanks so much for sending this material.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Robert Anthony Maranto <rmaranto@uark.edu> Sent: Thursday, December 17, 2020 3:20 PM To: Catherine Lhamon Cc: Ian K Subject: [EXTERNAL] scholarly study finding that more charter school authorization regulations mean fewer minority school leaders

CAUTION: This email is from outside USCCR.

Dear Ms. Lhamon (CC Ian), Thanks so much for your gracious meeting today. It occurred to me you might find this work of interest: <https://journals.sagepub.com/doi/10.1177/0042085920923011>. If so, Ian or I would be glad to discuss it. Thanks again, and a special thanks to David working on his birthday. Bob

Robert Maranto, Ph.D. Editor, Journal of School Choice

21st Century Chair in Leadership Department of Education Reform

From: Catherine Lhamon <clhamon@usccr.gov> Sent: Thursday, November 5, 2020 6:36 PM Cc: David Mussatt <dmussatt@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Rukku

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Singla <rsingla@usccr.gov> Subject: Congratulations on your appointment to the Arkansas Advisory Committee to the U.S. Commission on Civil Rights Hello, Congratulations on your appointment to the Arkansas Advisory Committee to the U.S. Commission on Civil Rights, as approved by the Commission on Friday October 30, 2020. I am so grateful for your willingness to serve, and I look forward to receiving the counsel from your collective advisory committee on whichever civil rights topics you choose to take up. Your appointment term will officially begin when the current committee expires later this month. You should hear soon from David Mussatt, our director of regional programs, for more details. In the meantime, we invite you to stay apprised of the Commission's work by visiting our website, <https://www.usccr.gov/>, or following us on social media, on Facebook and Twitter. We hope you are staying safe in these tough times, Chair Lhamon Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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Date : 12/22/2020 5:30:29 PM From : "Catherine Lhamon" clhamon@usccr.gov To : "Carly Rush" Carly_Rush@help.senate.gov Subject : Do you have a few minutes to talk?

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Date : 12/28/2020 9:28:59 AM From : "Catherine Lhamon" clhamon@usccr.gov To : "Rebecca Cokley" rcokley@americanprogress.org Subject : Re: [EXTERNAL] Hey I am open 5-7 EST today. Would sometime in there work?

On Dec 27, 2020, at 12:06 PM, Rebecca Cokley <rcokley@americanprogress.org> wrote:

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Do you have time to talk this next week? There's something big happening in the community tied to sexual assaults happening at federally funded training camps for the Blind and it's horrific. Could use some thoughts on what folks can do.

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Date : 12/29/2020 11:31:13 AM From : "Catherine Lhamon" clhamon@usccr.gov To : "mwebster@jbrpt.org" mwebster@jbrpt.org Cc : "catherine.lhamon@gmail.com" catherine.lhamon@gmail.com Subject : Fw: volunteering with Biden transition Meridith, in case it is helpful to see the written correspondence with the Commission's general counsel's office on the ethics of my volunteering with the Biden Transition, I've forwarded the exchange below.

Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

From: Pilar McLaughlin Sent: Monday, December 28, 2020 8:58 PM To: Catherine Lhamon Cc: Rukku Singla Subject: RE: volunteering with Biden transition Chair Lhamon: Rukku let me know that you needed a response sooner rather than later. Here is my analysis based on the information that was provided via my call with Rukku. My understanding is that the Biden-Harris Transition Team (the "Transition Team") has requested your expertise in advising the new administration's domestic policy council on civil rights policy for the incoming Biden-Harris administration. Rukku conveyed to me that there will likely be overlap between what the Transition Team is working on and issues currently before the Commission - namely the maternal mortality and the bail reform reports. Further, my understanding is that the Transition Team is currently carrying out its transition functions under a 501 (c)(4) entity and thus, your work would not be with the Biden-Harris campaign directly. Additionally, as I understand it, this an unpaid position, however, there may still be an appearance issue. Below, I have written out my thinking and, out of caution, I am granting an impartiality waiver for the pending maternal mortality and the bail reform projects. In reaching this decision, I reviewed the OGE regulations as well as my notes from my call with your Special Assistant. Please let me know if I have misunderstood the facts, if any of the facts change, and/or if you have any questions. Best,

<mailto:clhamon@usccr.gov>
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Pilar Ethics Analysis Direct Financial Conflict The general rule is that a federal government employee has a financial conflict if they are working on (or have a financial gain from) particular matters that overlap. 18 U.S.C. 208. Because the volunteer position with the Transition Team is unpaid, you do not have a financial conflict. Appearance/impartiality Subpart E of the ethics regulations requires impartiality in performing official duties. The intention of the regulation is to "ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties." One of the tests is whether "a reasonable person with knowledge of the relevant facts would question his or her impartiality in the matter." Given that the Transition Team has specifically asked for your advice on civil rights policy that is likely to touch on racial disparities in maternal mortality as well as bail reform and other issues related to mass incarceration, there is overlap with your work for the Transition Team and the pending maternal mortality and bail reform projects. It is my opinion that a reasonable person could raise a question as to impartiality. To the extent that a reasonable person may have questions about impartiality, I find that the exception in 2635.502(d) applies. Because this is not a financial conflict (but an appearance issue), I have considered the factors in this subpart, and am finding that your participation in the Commission's projects outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. In reaching this decision, I took into account: 1) your role as the Chair and a Commissioner cannot be assigned to another employee; and 2) your expertise in civil rights policy as well as the perspective you offer that may aid your fellow Commissioners better understanding the issues involved in the maternal mortality and bail reform projects before the Commission. In terms of other ethics issues, please make sure that you are conducting this work in your personal capacity and that people you are working with also know that you are participating the volunteer work for the Team in your personal capacity. Again, please let me know if you have any questions or if the facts or circumstances change. Best, Pilar From: Pilar McLaughlin Sent: Monday, December 28, 2020 6:07 PM To: Catherine Lhamon <clhamon@usccr.gov> Cc: Rukku Singla <rsingla@usccr.gov> Subject: RE: volunteering with Biden transition Chair Lhamon:

I received your request for ethics counseling. Let me look into this a little more and circle back with any questions I may have. Best, Pilar From: Catherine Lhamon <clhamon@usccr.gov> Sent: Monday, December 28, 2020 5:10 PM To: Pilar McLaughlin <pmclaughlin@usccr.gov> Cc: Rukku Singla <rsingla@usccr.gov> Subject: volunteering with Biden transition Pilar, I've been asked to volunteer with the Biden transition and I understand I need ethics/general counsel permission to do that work. Could you let me know any necessary guidelines and clearance? Catherine E. Lhamon Chair U.S. Commission on Civil Rights 1331 Pennsylvania Ave NW, Suite 1150 Washington, DC 20425 clhamon@usccr.gov Follow us on Twitter and Facebook.

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