

**PEOPLE OF AFRICAN DESCENT IN THE UNITED STATES:
ACCOMPLISHMENTS AND CHALLENGES IN COMPLYING
WITH THE INTERNATIONAL CONVENTION ON THE
ELIMINATION OF RACIAL DISCRIMINATION**

Submission of the Lawyers' Committee for Civil Rights Under Law to the
U.N. Committee on the Elimination of Racial Discrimination
for the Thematic Discussion on Racial Discrimination against People of African Descent



March 3, 2011

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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Lawyers' Committee for Civil Rights Under Law
March 1, 2011

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INTRODUCTION

The United States has made significant progress in overcoming a legacy of discrimination and is making great strides toward allowing all citizens full opportunity to participate in American society. This submission focuses on the improvements and failures to advance in the area of racial discrimination specifically pertaining to African-Americans in the United States educational opportunities, employment discrimination, environmental justice and health disparities, housing discrimination and community development challenges and voting rights and electoral reform. It discusses the application and enforcement of existing laws in the United States aimed at addressing racial discrimination, including compliance with the International Convention on the Elimination of Racial Discrimination (ICERD), with particular attention to areas where racial discrimination persists. It concludes that meaningfully incorporating the ICERD concluding observations into our domestic legal structure will contribute significantly to the realization of the goal of ending systemic racial discrimination in the United States.

The ICERD defines “racial discrimination” as “any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹ Since ICERD’s adoption, the Committee on the Elimination of Racial Discrimination (“CERD”) has periodically reviewed the signatories’ compliance with its terms. The recent observations of the ICERD, through its monitoring body the Human Rights Committee, provide the basis for a current understanding of what the international community views as racial discrimination in the United States.

In its “Concluding Observations,” ICERD noted a concern that, in the United States, *de facto* discrimination

occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.²

ICERD recommended that the United States ensures that its definition of racial discrimination “prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”³ In a similar critique of *de facto* discrimination in the United States, the Human Rights Committee pointed to the fact that “some 50% of homeless people are African American although they constitute only 12% of the United States population.”⁴ The Human Rights Committee concluded that this statistic alone indicates that the United States was not taking adequate measures or implementing adequate policies to end racial discrimination.

ADVANCEMENTS AND CHALLENGES IN EDUCATION

Relevant Laws

- ***Title VI of the Civil Rights Act of 1964:*** Title VI prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance. Title VI encouraged the desegregation of public schools and gave the Attorney General the power to file lawsuits toward that end.
- ***Equal Education Opportunities Act of 1974:*** The Equal Education Opportunities Act provides that no state deny equal educational opportunity to any student on the basis of race, color, sex, or national origin. It prohibits intentional discrimination against faculty, staff, and students, racial segregation of students, and requires school districts to work to overcome barriers to the equal participation of all students. In addition, the EEOA requires state educational agencies and school districts to take action to overcome language barriers that impede English Language Learners (ELL) students from participating equally in educational programs.
- ***Elementary and Secondary Education Act of 1965/No Child Left Behind Act (NCLB) of 2001:*** NCLB aims to improve the academic achievement of disadvantaged students; prepare, train, and recruit high-quality teachers and school principals; provide language instruction for students with limited English proficiency; promote safe and drug-free schools and communities; promote informed parental choice and innovative school programming, among other things. NCLB highlighted the achievement gap but created incentives for states to lower their standards and other unintended negative consequences. While NCLB has done much to bring more transparency and accountability to education by requiring better information about the progress of most students, much more needs to be done especially to eliminate racial disparities in schools. Moreover, more is needed to

improve the accuracy of data collection, allow for better enhancement of accountability measures and to permit greater flexibility in responding to struggling schools.

Current Challenges to Equal Educational Opportunities

A. *School Resegregation*

Unfortunately, racial segregation in schools is increasing.⁵ This segregation deprives minorities of equal educational opportunities. A number of factors contribute to racial segregation and unequal educational opportunities in the United States. They include: school attendance zones promoting segregation;⁶ consistent placement of minority students in lower level classes;⁷ failure to counteract differences in parental income and educational attainment;⁸ lower expectations by teachers and administrators for minority students;⁹ and underperforming, poorly financed schools that perpetuate underachievement due to lower teacher quality, larger class size, and inadequate facilities.¹⁰

School segregation is also aggravated by small school districts located in residentially segregated housing markets. Extreme residential segregation makes it difficult to integrate schools where school districts are completely non-diverse. The highest proportion of segregated schools is in the Northeast (51%) and Midwest (46%) regions of the U.S., and this school segregation is largely attributable to elevated residential segregation in these areas.¹¹ In fact, 26 percent of African American students in the Midwest attend extremely segregated schools comprised of 99-100 percent minority students.¹²

Racial segregation in schools also perpetuates socio-economic segregation. In the U.S., 25 percent of African Americans and only 8 percent of whites live below the poverty line.¹³ The median income for white Americans in 2009 was \$29,413, while the median income for African Americans was \$19,136.¹⁴

Most primary and secondary schools receive 25-50 percent of their funding through local property taxes.¹⁵ Thus, local sources of funding are less available in property-poor school districts than property-rich school districts. Even with equitable improvements in school funding at the state and federal levels of government,¹⁶ property-poor school districts with high concentrations of minority students remain disadvantaged by their limited local tax base.

As a result of inadequate funding, schools with higher percentages of minority students tend to have fewer educational resources.¹⁷ These schools have larger class sizes, substandard facilities, lower per-pupil spending, and fewer counseling services.¹⁸ Teachers in high poverty schools are generally less qualified and less experienced than teachers in low poverty schools.¹⁹ Other inequities facing minorities include limited curricula taught at less challenging levels, a higher prevalence of student health problems, increased enrollment turnover, higher discipline rates and more grade retention.²⁰ Schools burdened with these problems put students at a distinct academic disadvantage.

In 2007, a divided U.S. Supreme Court invalidated the voluntary student assignment plans in Seattle, Washington and Louisville, Kentucky designed to promote racial diversity and address racial isolation in K-12 education. In a 5-4 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Supreme Court applied “strict scrutiny” to strike down the Seattle and Louisville policies because they permitted individualized race-conscious classifications and were not narrowly tailored to the diversity interest asserted. However, school districts do retain the ability to use race-conscious measures designed to integrate their schools and combat the trend toward resegregation of K-12 education. Unfortunately, it appears that the decision has deterred some school districts from exploring constitutional ways to use diversity in student assignment plans to fight resegregation. Although

the Department of Justice filed a favorable brief on the use of race in *Doe v. Lower Merion School District*²¹, the federal government has failed to clarify that non-individualized race-conscious measures may be used by school districts to promote diverse learning environments.

B. *Opportunity and Achievement Gaps*

The opportunity gap in education is fueled by a series of factors that when coupled with inequitable educational resources results in minority students in the United States experiencing less academic success than white students at primary, secondary, and post secondary levels of education. Why is there an opportunity gap? Research shows that this is a function of poor health, economic disadvantage, lack of parental involvement, and limited community support systems. Opportunity gaps exist before children arrive at the schoolhouse door. But rather than organizing the educational system to ameliorate these challenges, students often encounter schools which exacerbate the problem through the inequitable distribution of educational resources. The research shows that students who begin with fewer resources continue to receive less of everything that matters in terms of receiving a quality education. This resulting achievement gap is an unsurprising result of the inequitable and inflexible distribution of resources, inequitable distribution of quality teachers, low expectations, and ineffective instructional methods.

Standardized tests, while accused by some of inherent race and cultural bias, nonetheless provide quantifiable evidence of the achievement gap at primary and secondary schools. From 1971-2008, white students have consistently outscored their African American peers in math and reading assessments at ages 9, 13, and 17.²² The length and consistency of these studies provides a clear illustration of the disparate educational opportunities for racial minorities.

The achievement gap continues as African American students prepare for post-secondary education. African American students receive lower average scores on advanced placement exams for college credit than white students.²³ White students also perform better on college entrance tests than their African American peers.²⁴

Attempts by laws such as The No Child Left Behind Act (“NCLB”) to lessen the achievement gap by tracking student and school performance on nationwide standardized tests have proven ineffective. A significant part of NCLB reform is to allow students the right to transfer out of failing schools, as defined by the statute. School districts in need of improvement are supposed to establish cooperative agreements with other school districts to provide students with school choice, but other school districts are not required to accept NCLB transfers from failing schools. As a result, approximately one percent of NCLB-eligible students transfer schools.²⁵ This makes it unlikely that NCLB will close the achievement gap until more students are allowed to take advantage of its right-to-transfer provision.

C. *School Discipline*

Minority students are adversely affected by disparate school discipline. African American students are more likely to be suspended or expelled from school.²⁶ It is possible that racial minorities are actually doubly disfavored by school administrators because exclusionary school discipline is also applied disproportionately to students from lower-socioeconomic backgrounds.²⁷ Students subject to inappropriate or excessive student discipline often perform up to two years below same age peers and often experience both low graduation and high dropout rates. The racial disparity in school discipline may explain why dropout rates for African American students are substantially higher than dropout rates of white students.²⁸

Many schools criminalize rather than educate children. This involves the growing use of zero-tolerance discipline, school-based arrests, disciplinary alternative schools, and secured detention. Such tactics impose severe discipline on students without regard to individual circumstances, and students of color are disproportionately represented at every stage of this process. Minority students are often more likely to be suspended or expelled for similar conduct as their white peers; minority students account for a disproportionate number of juvenile arrests, and because students of color may be disproportionately identified as participants of special education, those students may be especially vulnerable.

D. Higher Education and Historically Black Colleges and Universities

While most of the dialogue about human rights and educational opportunity has focused on K-12 education, the achievement gap continues to persist in higher education. Historically Black Colleges and Universities (HBCUs) play an essential role in educating minority and low-income students. HBCUs offer many African-American students their most meaningful opportunity to pursue higher education. Many prospective students view HBCUs as offering a supportive learning environment, relevant and attractive program offerings, open admissions, and low cost. HBCUs can provide positive social, psychological and developmental outcomes and promote academic success and professional development for minority students. While HBCUs represent only 3 percent of all colleges and universities, they enroll close to one-third of all Black students. HBCUs produce 21 percent of all bachelor's degrees awarded to African-Americans. Forty percent of HBCU students pursue four-year degrees in science, technology, engineering and math, and about half of all Black students in teaching attend HBCUs. Three-quarters of all Black Ph.D.s did their undergraduate studies at an HBCU, and according to the National Center for Education Statistics, the total economic impact of the nation's HBCUs in

2001 was \$10.2 billion.²⁹ And HBCUs do so with a collective endowment of over 100 HBCUs is \$2 billion compared to Harvard, whose endowment is sixteen times that of all those schools combined. At the same time, when compared to the graduation rate nationally, the average six-year graduation rate for all students is 57 percent while it is between 20 to 40 percent for African-American students. The Associated Press analyzed government data on four-year HBCUs to conclude that only 37 percent of African American students at HBCUs completed their degree within six years.³⁰

Education Discrimination and ICERD

The U.S. education system disadvantages racial minorities by placing them in segregated schools with fewer resources. These restrictions on race-based integration conflict with ICERD treaty obligations. In 2001, the CERD Compliance Committee voiced its support for affirmative action and concern about “persistent disparities in the enjoyment of, in particular, the right to ... equal opportunities for education.”³¹ The Committee stated that further measures, including affirmative action, are an obligation under Article 2(2) of ICERD to ensure adequate development of certain racial groups.³² More recently, CERD expressed additional concern after *Parents Involved in Community Schools v. Seattle School District No. 1* because the U.S. Supreme Court “further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms” and restricted the U.S.’s ability to fulfill its Article 2(2) obligation to eliminate racial discrimination.³³ Furthermore, these environmental learning disadvantages inhibit academic achievement. CERD finds the “persistent ‘achievement gap’ between students belonging to racial, ethnic or national minorities” troubling and urges the U.S. to reduce the achievement gap by “improving the quality of education provided to these students.”³⁴ ICERD mandates the elimination of racial

discrimination in education by guaranteeing the right to education and training without distinction as to race, color, national, or ethnic origin,³⁵ requiring rescission, nullification, or amendment of laws perpetuating racial discrimination,³⁶ and, permitting special measures to secure adequate advancement of racial and ethnic groups requiring such protection.³⁷

ADVANCEMENTS AND CHALLENGES IN EMPLOYMENT

Relevant Laws and Governmental Bodies

- ***National Labor Relations Act of 1935***: The National Labor Relations Act (NLRA) protects the rights of employees and employers, encourages collective bargaining, and curtails certain private sector labor and management practices that undermine the ability of employees to form or join labor unions, participate in collective bargaining, or engage in other concerted activities designed to support the demands of employees. The NLRA also established the National Labor Relations Board to investigate, review, and make decisions on related matters.
- ***The Fair Labor Standards Act of 1938 (FLSA)***: establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. While not explicitly concerned with race, it provides minimum standards which, inter alia, protect minority employees against exploitation.
- ***Executive Order 11246 of September 24, 1965 (as amended)*** generally prohibits discrimination in hiring and other employment practices by recipients of U.S. government contracts, subcontracts, or purchase orders. The Secretary of Labor is authorized to issue regulations exempting contracts below a specified amount of money or affecting fewer than a specified number of workers, or having other special characteristics. Recipients of government contracts are required to file compliance reports and their employment practices may be subject to investigation. This Order is enforced by the Office of Federal Contract Compliance Programs (OFCCP).

- ***Title VII of the Civil Rights Act of 1964:*** Title VII prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin or retaliation against employees who claim to have suffered from employer discrimination. It also prevents discrimination against an individual because of his or her association with another individual of a particular race, color, religion, sex, or national origin. Title VII also established the Equal Employment Opportunity Commission.
- ***Title VI of the Civil Rights Act of 1964:*** Title VI prohibits discrimination in employment on the basis of race, color, or national origin by recipients of grants or loans awarded by agencies or departments of the government of the United States. Grant recipients include state and local government agencies of many types. Each Federal agency administering a program providing such grants or loans is responsible for assuring compliance, and is authorized to terminate grants or loans in cases of non-compliance.
- ***Fair Credit Reporting Act of 1970:*** The Fair Credit Reporting Act “promotes the accuracy, fairness and privacy of information in the files of consumer reporting agencies.”³⁸ The Fair Credit Reporting Act provides the basis of American consumer protections and is important in the employment context because employers may use consumer reports for making decisions on hiring, promotion, reassignment, or retention. The Fair Credit Reporting Act requires that employers gain employee or potential employee permission before procuring a consumer report, that an employer tells the employee if it uses the information contained in the reports against him or her, among other things. As consumer reports have a growing place in the employment process, the Fair Credit Reporting Act become even more important to job-seekers.

- **National Labor Relations Board (NLRB):** the NLRB was established following the National Labor Relations Act of 1935. The National Labor Relations Board is an independent federal law enforcement agency that is responsible for safeguarding the right of employees to unionize and be represented by unions at labor negotiations. The NLRB also works to prevent and remedy unfair employment practices by private sector companies and unions.
- **Equal Employment Opportunity Commission (EEOC):** the EEOC was established by Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission is an independent federal law enforcement agency charged with enforcing employment laws, investigating claims of workplace discrimination, and filing - or permitting others to file - lawsuits charging the same. The EEOC is primarily concerned with charges of discrimination on the basis of “race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.”³⁹
- **Office of Federal Contract Compliance Programs, United States Department of Labor (OFCCP):** This office enforces Executive Order 11246 of September 24, 1965 (as amended), which generally prohibits discrimination in hiring and other employment practices by recipients of U.S. government contracts, subcontracts, or purchase orders.

Current Challenges to Equal Employment Opportunities

A. *Significant Racial Disparities in Unemployment Rates*

The United States experienced its most severe recession in decades beginning in late 2008, with lasting effects forecasted to continue throughout 2011. As of January 2011, the number of unemployed persons in the United States reached approximately 13.9 million for an overall unemployment rate of nine percent.⁴⁰ Although all middle-income families felt the

effects of a weakening labor market, minorities were the hardest hit. Minority workers have fewer employment opportunities and lower wages compared to their non-minority counterparts. Consequently, minorities have a lower chance of building economic strength and having a cushion to rely on when the economy weakens.

Among the major worker groups, the unemployment rate for African Americans in January 2011 was 15.7 percent—almost twice that of the unemployment rate for whites at eight percent.⁴¹ Additionally, African Americans were employed at a significantly lower rate in management, professional positions, and related occupations—African Americans constituted 8.4 percent whereas non-Hispanic whites held 78.1 percent of the then occupied positions.⁴²

Furthermore, although the unemployment rate rose for all ethnic groups, the unemployment rate for minorities has increased by a large amount. The unemployment rate for African Americans rose by 6.6 percentage points from 9.2 percent in January of 2008 to the current rate of 15.7 percent, while whites rose 3.6 percentage points to reach 8.0 percent unemployment during the same period.⁴³ Additionally, even at the worst point of unemployment during the economic downturn, January 2010, white unemployment only reached 9.7 percent in comparison to the much higher African American unemployment rate of 17.3 percent.⁴⁴

Though this administration has implemented several programs and policies to combat the devastating economic effects of the recession on the unemployment rate, it has yet to implement any programs targeted specifically at the dramatic disparity in unemployment rates of minorities to non-minorities. Any new programs to address this disparity should include a review of whether such policies meet our treaty obligations.

B. *Need to Address Improper Use of Background Check Information*

The practice of employers using background checks, including credit checks or criminal background checks in reviewing candidates for employment is spreading and is creating an increasing threat to the equal employment of minorities.

1. Criminal Background Checks

Over the last few decades, the past administration's emphasis on the "war on drugs," mandatory minimum sentences, and over-criminalization have had a disparate effect on minorities and low-income individuals, including rising numbers of women. In terms of the overall population, for every 100,000 U.S. residents in 2007, 820 inmates were white and 5,126 were African American.⁴⁵ As of 2005, African American women were more than three times as likely as white women to be in prison or jail.⁴⁶ As of 2008, African American men were 6.5 times more likely to be incarcerated than white men.⁴⁷

With more than 2.3 million people in U.S. prisons and jails, 900,000 of whom are African American and 95 percent of whom will eventually be released, widespread use of criminal background checks has the potential to create a permanent underclass of unemployable people, a group disproportionately consisting of minorities. This problem becomes even more profound when adding the nearly 5 million people who are currently on probation or parole.⁴⁸

It is encouraging that the U.S. Equal Employment Opportunity Commission recently updated its Compliance Manual to provide guidance on analyzing charges of "race and color discrimination" under Title VII. Beyond blanket exclusions by employers of employee applicants with arrest records, which are explicitly held by the EEOC to be in violation of Title VII, the federal government provides very little guidance to employers as to the appropriate use of background check information.

Criminal records have become easily accessible and widely available to employers. For a minimal cost, employers can easily download them from the internet and their use has become widespread — 80 percent of all large corporate employers engage in the practice of using criminal records checks in their hiring process.⁴⁹ The EEOC guidelines regarding the use of arrest records to screen applicants highlight a practice courts have expressed skepticism of compared to the use of conviction data.⁵⁰ The use of arrest records is particularly troubling because the applicant may not even have committed the crime, and racial profiling and other law enforcement techniques have been shown to result in arrests that disproportionately target people of color.⁵¹ Several states (Wisconsin, New York, Pennsylvania, Hawaii and Kansas) have passed prohibitions against employment discrimination based on criminal records, although not all have done much to increase job opportunities for ex-offenders, particularly persons who have been convicted of felony offenses.⁵²

The pervasiveness of the problem and the need for more vigorous enforcement by the EEOC is illustrated by the misuse of arrest records to restrict hiring for major agencies of the United States government itself. In 2009-2010 the United States Department of Commerce, in hiring temporary employees for the decennial enumeration of the population by the U.S. Bureau of the Census, adopted a policy that screened out applicants with arrest records, regardless of whether the arrest led to an actual conviction. Many private advocacy organizations joined in April, 2010, to bring a class action lawsuit on behalf of the minority applicants who were precluded from employment opportunities by this policy.⁵³

In July 2009, the U.S. Equal Employment Opportunity Commission (EEOC) sent a letter to the Bureau warning that its screening process is “overbroad and may run afoul” of the law. Then-Acting Chair of the EEOC Stuart Ishimaru went on to say that “[u]nless there is a record

that an arrest resulted in a conviction, an arrest in itself is not evidence that a person engaged in the conduct alleged. Therefore, without confirmation, the Census Bureau should not disqualify people based on an arrest record." The Bureau disregarded this warning from the EEOC. As a result, the hiring protocol prevented up to 300,000 minority workers from having an opportunity to receive a job with the agency. In the absence of clearer guidance from the EEOC and more enlightened employment practices on the part of the Department of Commerce, the victims of this discriminatory policy have been required to seek redress through private enforcement.

2. Use of Consumer Reports to Screen Applicants

The growing use of credit checks for employment purposes also has the potential to create a largely minority-populated group of unemployable people. For a variety of reasons, the economic recession has had a disproportionate affect on the credit-worthiness of minorities, including African Americans, unfairly limiting their employment opportunities.

The results of credit or consumer checks are frequently non-related to any necessary job qualities or qualifications, and the impact of these policies tends to fall disproportionately on minorities. Statistics show that credit check policies likely have a disparate impact on minorities, in potential violation of Title VII. First, studies have shown that racial and ethnic minorities, like African Americans, are more likely than whites to have low average credit scores.⁵⁴ These statistics show that any credit check policy excluding those with bad credit is likely to have a disparate impact on minorities.⁵⁵ Second, the various reasons why people tend to end up with bad credit (loss of employment, medical expenses not covered by insurance, etc.) also correlate with race, which only aggravates the problem.⁵⁶

In December, 2010, the EEOC filed suit against a major educational corporation alleging engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of black

job applicants nationwide, based on their credit history. The EEOC charged in its lawsuit that this practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity.⁵⁷ In the fall of 2009, the EEOC had filed a lawsuit accusing another employer of discriminating against African Americans, Hispanics and males by routinely rejecting job applicants based on their criminal background records and credit histories. These two lawsuits followed on the heels of another filed in 2008 by the EEOC, which alleged that a policy of excluding applicants with criminal records had a disparate impact on African Americans.⁵⁸ This enforcement activity seems to indicate a renewed interest by the EEOC regarding the use of criminal and credit records in hiring but despite these examples, the agency still has not issued formal guidance for employers. Additional enforcement is needed to ensure that employers do not use criminal background checks and credit checks as a proxy for racial discrimination. In implementing additional enforcement, an assessment should be done to determine compliance with relevant treaty obligations.

Employment Discrimination and ICERD

Article 5 of the ICERD expressly charges States Parties to “guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law notably in the enjoyment of the following rights: (e) . . . (i) The rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.” As evidenced by the current disparity in unemployment rates and the challenges of background and credit checks as further barriers to gainful employment for African Americans and other minorities, more needs to be done to guarantee that, regardless of race, every American citizen is able to procure quality work. Though the current presidential administration has implemented several

programs and policies to combat the devastating economic effects of the recession on the unemployment rate, it has yet to implement any programs targeted specifically at the dramatic disparity in unemployment rates of minorities to non-minorities. In reviewing existing programs and creating new programs that combat unemployment and promote opportunities for good jobs, policymakers should pay particular attention to whether or not said programs comply with American treaty obligations, as this would provide another opportunity to ensure that programs promote equal employment opportunities to all – regardless of race.

ADVANCEMENTS AND CHALLENGES IN HOUSING AND COMMUNITY DEVELOPMENT

Relevant Laws and Governmental Bodies

- ***Fair Housing Act of 1968, as amended in 1988:*** The Fair Housing Act is the centerpiece of United States federal legislation to combat, discrimination based on race, color, national origin, religion, sex, familial status, or disability in the housing market. In addition to broad prohibitions on discriminatory activity in the sale and rental of housing⁵⁹ and residential real estate-related transactions,⁶⁰ the statute imposes an affirmative obligation on HUD and all executive agencies to “administer the programs and activities relating to housing and urban development” to “in a manner affirmatively to further the policies” of the FHA.⁶¹ As a federal judge explained in interpreting the provision, it requires HUD “to do something more than simply refrain from discriminating themselves or from purposely aiding discrimination by others. To the contrary, action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation.”⁶² This exhortation echoes the obligations of the U.S. Government under the Convention as well.
- ***Federal Vouchers:*** Federal vouchers designed to subsidize individuals’ market rents, referred to as Section 8 vouchers, are the major bulwark of federal public housing assistance. Ideally, such vouchers empower individual recipients to choose housing adequate for their needs and to avoid segregating all public-assistance recipients into single areas.
- ***Equal Credit Opportunity Act of 1974:*** The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or because an applicant receives

income from a public assistance program or exercises rights protected under the Consumer Credit Protection Act. The Board of Governors of the Federal Reserve System has issued regulations under ECOA. Known as Regulation B, these regulations provide the substantive and procedural framework for fair lending enforcement under ECOA.

Current Challenges to Equal Access to Housing and Community Development

A. *Residential Segregation*

Over forty years after enactment of the Fair Housing Act, the United States remains residentially segregated.⁶³ According to 2005 to 2009 American Community Survey data, though African-Americans make up only 12.1 percent of the nation's households, 30 percent of the African-American population lives in Census Block Groups that are 75 percent African-American or more. Meanwhile, 75 percent of African-Americans in the country live in only 16 percent of the Census Block Groups.⁶⁴

The harms of racial segregation and concentrated poverty are well-documented. Racially isolated and economically poor neighborhoods “restrict employment options for young people, contribute to poor health, expose children to extremely high rates of crime and violence, and house some of the least-performing schools.”⁶⁵ Residential segregation confines minorities to geographically and economically isolated areas with substandard public schools and limited access to transportation, open spaces, and employment opportunities. Ensuring equal opportunity in housing and achieving desegregated neighborhoods remain major challenges to communities throughout the country.

The persistence of racial and economic segregation in the United States is the result of a long history of public and private discriminatory action. Federal government policies accelerated the suburbanization of America's urban centers, resulting in whites leaving cities for newly

constructed suburbs and concentrating minorities in older, substandard housing in the urban centers.⁶⁶ The United States Department of Housing and Urban Development (“HUD”) and its predecessors administered U.S. housing programs in a manner that was openly discriminatory and perpetuated this segregation for decades.⁶⁷

While segregation is rooted in historical practices, it is maintained and even exacerbated by continued discriminatory practices. These include ongoing discrimination in public housing; discrimination in the private rental, sales, lending, and insurance markets; exclusionary zoning policies at the state and local level; and inadequate and insufficient housing opportunities for those receiving federal housing assistance. Moreover, the duty to affirmatively further fair housing found in the FHA places a unique statutory civil rights responsibility on HUD not only to enforce the prohibition against discriminatory acts, but also to affirmatively use its grant programs to assist in ending segregation, to the point where the supply of genuinely open housing increases and residential segregation decreases.⁶⁸ But, the historical failure of HUD and recipients of federal housing assistance to meet this obligation has contributed to continued residential segregation.

B. Mortgage and Foreclosure crisis

The current mortgage and foreclosure crisis, and its impact on the nation’s economic well-being, is one of the country’s most pressing domestic issues. Given the disproportionate number of minority homeowners with subprime loans, the foreclosure crisis has fallen most heavily on minorities and caused a disproportionate loss in minority wealth. Indeed, the Center for Responsible Lending (CRL) reports that during the housing boom in the 2000s, African Americans were 150 percent more likely to receive high cost loans than whites.. A review of 2009 Home Mortgage Disclosure Act (HMDA) data shows that African-American

homeownership rate has plummeted nearly 6 percent to 46.2 percent since its peak in 2004. The CRL concludes that “African-American families [...] are less likely to receive sustainable home loans; they pay more for the mortgages they do get; they are more likely to experience foreclosure; and, the gap in homeownership is rapidly growing wider between white families and families of color.”⁶⁹ Moreover, because of the devastating and continuing impact of the foreclosure crisis, African Americans owned less property in 2008 than they did in 1920.⁷⁰ This makes the foreclosure crisis not only an economic issue, but an important civil rights issue as well.

Much has been reported on the roots of this crisis found in the growth of collateralized mortgage obligations, exotic loan products, and the deregulation of the financial services industry. Largely overlooked, yet equally important, are its roots in decades of discriminatory housing and lending practices and more recently racial discrimination in the housing and lending markets.⁷¹ The disproportionate impact of foreclosures on minority homeowners and renters is causing one of the greatest losses of wealth in the American minority community in its history.⁷²

C. Exclusionary Zoning

In addition to discrimination in the rental and housing markets, the use of zoning authority continues to have a major impact on the segregation of neighborhoods on the basis of race and ethnicity. A number of discriminatory practices have exacerbated the difficulties faced by low-income minority residents in the Gulf Coast and elsewhere. Of particular concern are exclusionary zoning practices by local governments that contribute to the segregation of neighborhoods on the basis of race and the difficulties in integrating affordable low-income housing into communities which will promote residential desegregation. For instance, in St. Bernard Parish, Louisiana, the parish has changed its zoning ordinances multiple times in an

intentionally discriminatory effort to block and prevent the rebuilding of affordable apartments that would benefit low-income, African-American community members after Hurricane Katrina.⁷³ Three years later, the Parish continues to take various actions to obstruct the construction of mixed-income apartment complexes.⁷⁴ The Fair Housing Act prohibits zoning rules that have the intent, or effect of, discriminating without a legitimate nondiscriminatory justification. Yet the federal government has not done enough to enforce this provision and it is critical that the government take stronger action to ensure that not only intentional discrimination, but activities with a disparate impact on minorities are attacked pursuant to the Fair Housing Act.

D. Transportation

Transportation policies also continue to have a discriminatory effect on the African-American population. Modes of transportation most used by African-Americans are generally underfunded as compared to modes of transportation relied on by whites. Data suggests that just three percent of whites rely on public transportation to get to work as compared to 12 percent of African-Americans.⁷⁵ While African-Americans comprise 12 percent of the total population, they comprise 31 percent of public transportation users.⁷⁶ In urban areas, African-Americans and Hispanics together comprise 54 percent of public transportation users.⁷⁷

Public transportation, however, is routinely underfunded compared with funding for roads and highways. The federal government earmarks 80 percent of funding for surface transportation to highways and just 20 percent for public transportation.⁷⁸ The emphasis on roads and highways benefits those who own cars and drive. It is estimated that only seven percent of whites do not own automobiles, as compared to 24 percent of African Americans.⁷⁹ This disparity underscores the economic burden that transportation poses. Those in the lowest income

quintile spent 36 percent of their household budget on transportation, compared with those in the highest income quintile, who spent just 14 percent.⁸⁰ In addition to the economic consequences of transportation policy, the emphasis on roads and highways contributes to a de-concentration of jobs from central cities. As more jobs move to the public-transit-poor suburbs away from cities, they exacerbate the “spatial mismatch” identified above for those who lack automobiles.⁸¹

Moreover, the investments made within public transportation are skewed to the disadvantage of African-Americans. Among different forms of public transportation, minorities are more dependent on bus transit, with African-Americans comprising 62 percent of bus riders (compared with 35 percent of subway riders, and 29 percent of commuter rail riders).⁸² Bus transit, however, is systematically under-funded as compared to subway and commuter rail transit. Moreover, the federal government requires that its transportation funds only be used on capital, and because bus transit is less capital-intensive than subway and commuter rail transit, federal funds disproportionately fund the latter forms.⁸³

Housing Discrimination, Community Development and ICERD

Residential segregation, exclusionary zoning and other challenges in housing policies lead to limitations on choice and opportunities in key overlapping areas, including education and job opportunities. The CERD Committee’s observations focus on the discriminatory impact of *de facto* segregation resulting from the disproportionate concentration of minorities in poor residential areas with substandard housing conditions, employment opportunities and schools. The Committee also expressed concern over the continued disparate impact of Hurricane Katrina on poor African-American resident’s ability to obtain adequate housing. A review of whether housing policies comply with the U.S. obligations under ICERD can only strengthen the goal of

ending discrimination in housing and provide another mechanism to ensure that policies are effective in accomplishing that task.

ADVANCEMENTS AND CHALLENGES IN VOTING RIGHTS

Relevant Laws and Governmental Bodies

- ***Voting Rights Act of 1965:*** The Voting Rights Act (“VRA”) is one of the most important civil rights laws passed by Congress. It prohibits the use of voting practices and procedures (poll tests, taxes, redistricting, etc.) that discriminate on the basis of race, color, or membership to a language minority group; requires jurisdictions with particularly egregious histories of voter discrimination to seek approval for any and all voting practice and/or procedural changes with the Attorney General or the U.S. District Court for the District of Columbia; allows the federal government to monitor elections to ensure fairness of process at polling locations; provides that certain jurisdictions with high number of language minorities provide language assistance in targeted jurisdictions; and allows voters who are blind, disabled, or who cannot read/write to have help casting their votes.
- ***National Voter Registration Act of 1993:*** National Voter Registration Act (NVRA) commonly known as the “motor voter” law allows for voter registration at motor vehicle administration offices when applying for a driver’s license or identification card or at government agencies when requesting public assistance. The National Voter Registration Act also provides strict conditions for removing voters from election rolls and ensures that voters who move within their district but fail to update their voter registration are still able to cast ballots on Election Day.
- ***Help America Vote Act of 2002:*** The Help America Vote Act (“HAVA”) seeks to improve election administration throughout the United States. HAVA provided funds to help states improve outdated election systems and established a national agency to provide information on election administration. It also mandated the availability of

provisional ballots for voters who wish to vote an election and declare that they are registered to vote, even if they do not show up on voter registration rolls, created voting system standards, mandated the creation of electronic statewide voter registration systems and established rules for the maintenance of same, and extended protections for early/absentee voters.

Current Challenges to Equal Voting Rights

A. *The Voting Rights Act of 1965*

In 2006, the U.S. Congress reauthorized temporary provisions of the Voting Rights Act of 1965 (“VRA”). This reauthorization has met with a recent wave of challenges to the constitutionality of Section 5, a core provision, of the VRA.⁸⁴ Section 5’s requires that jurisdictions with a history of voter discrimination submit voting changes either to the U.S. Department of Justice or to the District Court of the District of Columbia. This requirement requiring preapproval of voting laws before they can be implemented has deterred and prevented many voting changes that would have undermined the gains made by minority voters.⁸⁵

Shortly following reauthorization, a municipal utility district in Texas attacked the constitutionality of Section 5 of the Voting Rights Act.⁸⁶ In its June 22, 2009 decision, the U.S. Supreme Court did not decide the constitutional claim brought by the municipal district that Congress did not have the power to reauthorize Section 5 of the VRA instead deciding the case on statutory grounds.⁸⁷ However, while the Court did not rule on the constitutionality of the reenacted Section 5, the majority opinion detailed concerns about the provision’s constitutionality. Their concerns included federalism costs, improvements in the electoral conditions for minority voters in the southern U.S., Section 5’s departure from the principle of

“equal sovereignty” among the States, the putative race-conscious nature of the Section 5 requirements, and the potentially outdated nature of the Section 5 coverage formula.

Unsurprisingly, in April 2010, lawsuits challenging the constitutionality of Section 5 were filed in the District of Columbia.⁸⁸ Section 5’s pre-clearance requirement is an essential bulwark against minority voter disenfranchisement. The challenge to its constitutionality illustrates the attacks this iconic civil rights law continues to face in the U.S. today.

B. *Felony Disfranchisement*

Felony disenfranchisement laws in the United States disproportionately deny minorities the right to vote. Currently, of the 5.3 million disenfranchised voters, approximately 2 million are African American.⁸⁹ This is unsurprising and correlates with the fact that in 2007, 59% of the 1.5 million prison inmates were either African American or Hispanic.⁹⁰ The United States Supreme Court has⁹¹ held that, under the Equal Protection Clause, states need not demonstrate a compelling interest before denying the right to vote to citizens convicted of crimes, because Section 2 of the 14th Amendment expressly allowed states to deny the right to vote for participation in rebellion, or other crime. Attempts to use the Voting Rights Act to address the disproportional impact of felony disenfranchisement laws on minority voters have proven unsuccessful with federal courts ruling that the Act cannot be applied to felony disenfranchisement laws.⁹²

C. *Voting Rights for District of Columbia Residents*

Residents of the District of Columbia (“D.C.”) lack full representation in the U.S. Congress. At the present time, the District of Columbia has an African American majority comprising 55.2 percent of its population.⁹³ Legislation recently considered by the United States Congress that would allow for Congressional representation for *the District* would redress the

negative racial impact of this lack of representation.⁹⁴ The goal of this legislation, the “District of Columbia House Voting Rights Act of 2009,” was to give the current representatives of D.C. voting rights in Congress because currently those who represent the District are delegates without the voting privileges of full members. However, the legislation was pulled from the congressional calendar in May 2010 after an amendment was inserted that would have barred the District of Columbia from prohibiting or interfering with gun ownership. At present, the member of Congress representing the District of Columbia can only vote in committee but not on the floor of the House of Representatives.

D. *Deficiencies in Voter Registration and Election Administration*

There is a serious question about the quality of the American voter registration system. Restrictions on voter registration, problems with registration that prevent individuals from voting, and failure of the voting infrastructure have been extensively detailed. For example, only 71 percent of voting age citizens is registered to vote.⁹⁵ While passage of the National Voter Registration Act (“NVRA”) has greatly increased the number of voter registrations, large portions of the minority population remain unregistered to vote, along with those who are poor or without a high school diploma. The U.S. voter registration system needs to be updated to ensure that persons regardless of race, wealth, or social standing have access to vote.

Furthermore, the NVRA is not being vigorously implemented. Recent lawsuits by private organizations such as the Lawyers’ Committee have resulted in stipulations and orders to ensure full enforcement of the NVRA at public assistance agencies required to offer voter registration to their clients. Those who seek assistance at these agencies have low income and are largely minority. Remedies include increased and proper staffing and training at these agencies,⁹⁶ an implementation of a monitoring program, NVRA training for registration of

employees and increased oversight of the registration system.⁹⁷ These remedies have resulted in a significant gain in voter registration in states such as Ohio and Missouri. Example, in Ohio there was an average of 1,775 registrations a month at public assistance agencies in the state. After the reforms had been instituted, registrations averaged 16,375.⁹⁸ Similarly, in Missouri, registrations averaged 649 a month before litigation and 10,716 after litigation.⁹⁹

Voter registration is also being hampered by new restrictions enacted by the states such as citizenship verification laws or voter identification laws. These verification laws include requirements to provide additional personal information proving citizenship such as birth certificates, proof of naturalization. Recently there has been a proliferation of legislation in many states across the country seeking to pass restrictive voter identification laws. The stated purpose for these laws are to ensure that only qualified individuals are registered to vote and to deter fraud. However, numerous investigations and studies have failed to provide evidence of substantial voter fraud that would be addressed by requiring government-issued photo identification at polling places.¹⁰⁰ Instead, African Americans are disproportionately affected by these laws because they do not possess a valid, government-issued photo ID, or the required documents to obtain a photo ID (e.g. birth certificate or passport).¹⁰¹ For example, African Americans are three times as likely as whites to lack government-issued photo identification.¹⁰² Consequently such legislation only erect barriers to the ballot box a significant number of African Americans.

Voting Discrimination and ICERD

Article 5(c) of ICERD requires States Parties to undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, in the enjoyment of political

rights such as the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as the conduct of public affairs at any level and to have equal access to public service. However, at a basic level, obstacles to the ability of minorities to exercise their voting rights still exist. These obstacles are evidenced by challenges to the reauthorized Voting Rights Act – particularly in regard to Section 5, ongoing felon disenfranchisement and incomplete voting rights for District of Columbia residents – both of which overwhelmingly impact African Americans and other minorities, and incomplete implementation and enforcement of the Help America Vote Act. For that reason, using ICERD as another standard through which the U.S. government can draw authority to work toward elimination of those barriers could be a beneficial endeavor.

CONCLUSION

The U.S. has taken several positive steps indicating a greater willingness to engage in activities designed to achieve compliance with international human rights treaty obligations, including ICERD. However, as shown in the brief overview above of challenges in many sectors, the result of its continued *ad hoc* and, ultimately, unsatisfactory approach is not the best means of ensuring compliance with ICERD.

Further, the U.S. Government's policy of interpreting and limiting application of international human rights conventions only to the extent of its existing domestic laws on its minority populations limits the effectiveness of international treaties such as the ICERD. While, the U.S. has numerous federal statutes and regulations that prohibit and provide remedies for discrimination based on race, color, gender, ethnicity, and national origin, as well as protections of political rights such as the right to vote, the priorities of the Executive and Legislative branches at any particular time, as well as the current trends in judicial philosophy, can have a major impact on the practical manners in which these statutes and regulations are enforced. Therefore, it is imperative that the United States adopt a comprehensive, coordinated approach to treaty compliance that will allow for interpretation of domestic statutes in a manner that is consistent with the full scope of obligations under ICERD.

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