

DEPARTMENT OF JUSTICE
JOURNAL OF FEDERAL LAW AND PRACTICE



Volume 70

January 2022

Number 1

Director

Monty Wilkinson

Editor-in-Chief

Christian A. Fisanick

Managing Editor

E. Addison Gantt

Associate Editor

Philip Schneider

Law Clerks

Rachel Buzhardt
Kyanna Dawson

Rebekah Griggs

Lillian Lawrence
William Pacwa

United States Department
of Justice

Executive Office for United
States Attorneys

Washington, D.C. 20530

The Department of Justice Journal
of Federal Law and Practice is
published pursuant to
28 C.F.R. § 0.22(b).

The Department of Justice Journal of
Federal Law and Practice is published
by the Executive Office for United States
Attorneys

Office of Legal Education

1620 Pendleton Street
Columbia, SC 29201

Cite as:

70 DOJ J. FED. L. & PRAC., no. 1, 2022.

Internet Address:

[https://www.justice.gov/usao/resources/
journal-of-federal-law-and-practice](https://www.justice.gov/usao/resources/journal-of-federal-law-and-practice)

The opinions and views contained herein are those of the authors and do not necessarily reflect the views of the Department of Justice. Further, they should not be considered as an endorsement by EOUSA of any policy, program, or service.

Page Intentionally Left Blank

Civil Rights Part I: Civil Issues

In This Issue

Introduction	1
Kristen Clarke	
The Attorney General’s Pattern-or-Practice Authority: A Critical Tool for Civil Rights Enforcement	5
Barbara Schwabauer	
Applying <i>Bostock v. Clayton County</i> to Civil Rights Statutes Beyond Title VII	21
Alyssa Connell Lareau & Dylan Nicole de Kervor	
A Case Study for Using Social Media in Civil Rights Investigations	39
Elise Sandra Shore & Jimmy Anthony Rodriguez	
Civil Rights in the Digital Age: The Intersection of Artificial Intelligence, Employment Decisions, and Protecting Civil Rights	57
Natasha Babazadeh, Angela Washington, & Tiffany Brown	
Building a Civil Rights Practice for Civil Enforcement in a United States Attorney’s Office	69
Michael Goldberger, Jennifer A. Serafyn, & Michael J. Butler	
Friends of the Court: Amicus Briefs and Statements of Interest in Civil Rights Cases	85
Susan K. DeClercq & Elizabeth Parr Hecker	
Polling Place Accessibility	103
Michael J. Butler & Elizabeth Johnson	
Using the Americans with Disabilities Act to Reduce Overdose Deaths	113
David Howard Sinkman & Gregory Dorchak	
HIV Discrimination Under the ADA—A Case Study	129
Lara K. Eshkenazi	

Civil Rights Part I: Civil Issues

In This Issue

Protecting Those Who Protect Us: An Introduction to The Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act for AUSAs Interested in Starting a Servicemembers and Veterans Practice.....	143
Nicole Siegel, Andrew Braniff, Deirdre Brou, Tanya Kirwan, Torey Cummings, Amy Romero, & Zeyen Wu	
Section 12601 and Title VI: Two Powerful Department Tools to Address Systemic Police Misconduct.....	161
Nicole Porter, Christina Fogg, & Bharathi Venkatraman	
The Civil Rights of Institutionalized Persons Act— A Guide for Assistant United States Attorneys.....	183
Michael E. Champion & Christopher N. Cheng	
The Employment Litigation Section’s Sexual Harassment in the Workplace Initiative and How to Get Involved.....	199
Shayna Bloom, Jen Swedish, & Julia Quinn	
Protecting Students with Disabilities from Sexual Harassment in Education: Title IX and More.....	217
Tiffany Cummins Nick	
Sexual Harassment in Housing: Working with Local Prosecutors in Sexual Harassment Matters.....	237
Erin Meehan Richmond & Michael E. Champion	
Enforcement of the Fair Housing Act and Equal Credit Opportunity Act to Combat Redlining.....	247
Samantha Ondrade	
Testing Can Uncover Discrimination in Lending.....	261
Noah Sacks	
Addressing Discrimination Under the Immigration and Nationality Act: IER’s Investigation and Outreach.....	275
Lisa Sandoval & Tamara Hoflejzer	
Note From the Editor-in-Chief.....	291
Christian A. Fisanick	

Introduction

Kristen Clarke
Assistant Attorney General
Civil Rights Division

In 2022, the Civil Rights Division (Division) celebrates its 65th anniversary. Since the Division's creation in 1957, the landscape of federal civil rights laws and protections has evolved considerably, and so too has the Division. But through these many years, our focus has remained steady on upholding the civil rights of all people in the United States. Our work helps to safeguard the civil and constitutional rights of our nation's most vulnerable communities. For decades, U.S. Attorney's Offices (USAOs) nationwide have been exceptional and essential partners in this work.

This is the first issue of a two-part series covering civil rights—this issue discussing civil enforcement work and the next focusing on criminal topics. In these two issues, we have gathered an array of subject areas, legal perspectives, and practice tips that we hope will give readers a deeper understanding of the statutes that the Division enforces, the individuals and communities we seek to help through our work, and how USAOs can join this effort in their own districts. These articles reflect the Division's commitment to fight longstanding, systemic discrimination and inequality and to respond to new and emerging civil rights concerns.

Below is a roadmap to orient you to this issue and the wealth of information it contains.

Enforcement Authority. The articles in this issue provide an overview of the Division's statutory authority and approach to enforcement that stretches across the statutes we enforce. One article outlines the Attorney General's authority to file pattern or practice lawsuits. Another discusses how the Division uses statements of interest and amicus briefs in cases in which it is not a party to advance its mission.

Other articles focus more closely on specific areas of the Division's work, such as addressing discrimination under the Immigration and Nationality Act, systemic police misconduct under Section 12601 and Title VI, and violations of the Civil Rights of Institutionalized Persons Act.

Racial Equity and Racial Justice. Many articles reflect the Division's deep commitment to combatting discrimination on the basis

of race and national origin. One article describes the history of redlining, the practice of lenders avoiding or excluding communities of color from equal access to credit, and discusses some of the Division's successful enforcement work in this area. Another article probes the intersection of artificial intelligence and civil rights in the context of employment decisions, where using algorithms may result in discrimination on the basis of race or other protected characteristics.

Two additional articles highlight Division cases involving race discrimination. The first of these uses a public accommodation case to highlight the role that social media evidence can play in our cases. The second examines fair lending testing—where individuals pose as potential borrowers to collect information about potential violations of law—as a tool to further our enforcement of the Equal Credit Opportunity Act. This article also highlights a case involving race discrimination in the financing of used cars.

Sex Discrimination. An article on the Supreme Court's 2020 decision in *Bostock v. Clayton County* considers how the Court's holding, that discrimination "because of sex" includes discrimination because of sexual orientation or gender identity applies, to civil rights statutes beyond Title VII. And three articles discuss the Division's work to combat sexual harassment in employment, education, and housing. These articles describe our Sexual Harassment in the Workplace Initiative, provide a legal overview of our work to protect students with disabilities from sexual harassment, and offer best practices on how to work with local law enforcement when evaluating potential sexual harassment in the housing context.

Americans with Disabilities Act. Three articles show the breadth of the Americans with Disability Act—from increasing the accessibility of polling places to treating opioid use disorder to combatting discrimination based on HIV status. All three of these articles highlight the leadership role of USAOs in investigating and litigating cases and creating systemic change.

Civil Rights at USAOs. We hope that reading these articles sparks new opportunities between the Civil Rights Division and USAOs to work together to protect civil rights. Two articles—one on building a civil rights practice and one on setting up a servicemembers and veterans practice—provide an excellent framework for USAOs to get started.

These articles reflect the meaningful, mission-centered work that the Division carries out every day. We hope that you benefit from the

strategies and insights these articles offer. And we look forward to building on the great work the Division and USAOs have accomplished together to further civil rights enforcement and compliance in the years to come.

Page Intentionally Left Blank

The Attorney General's Pattern-or-Practice Authority: A Critical Tool for Civil Rights Enforcement

Barbara Schwabauer
Attorney
Appellate Section
Civil Rights Division

I. Introduction

A number of federal civil rights statutes authorize the Attorney General to seek relief against persons or entities engaging in a “pattern or practice” of discrimination or other unlawful conduct that interferes with the enjoyment of protected civil rights.¹ This pattern-or-practice authority allows the Attorney General to address discrimination or unlawful conduct that is systemic or widespread, rather than isolated or sporadic.² The Attorney General has delegated this authority to the Civil Rights Division (Division) of the Department of Justice (Department), which enforces most federal civil rights statutes.³ Pattern-or-practice cases are one of the most critical

¹ *E.g.*, Titles II & VII of the Civil Rights Act of 1964 §§ 206, 707, 42 U.S.C. §§ 2000a-5(a), 2000e-6(a); Fair Housing Act § 814, 42 U.S.C. § 3614(a); Titles I & III of The Americans with Disabilities Act §§ 107, 308, 42 U.S.C. §§ 12117(a), 12188(b)(1)(B)(i); Equal Credit Opportunity Act § 706, 15 U.S.C. § 1691e(h); Civil Rights of Institutionalized Persons Act § 3, 42 U.S.C. § 1997a(a); Violent Crime Control and Law Enforcement Act of 1994 § 210401, 34 U.S.C. § 12601.

² This article uses the term “pattern-or-practice” authority to refer to the Attorney General’s discretionary authority to address widespread or systemic discrimination. The pattern-or-practice authority is not the only discretionary authority available to the Attorney General to address civil rights violations. Several statutes also authorize the Attorney General to sue under other circumstances. *See, e.g.*, 42 U.S.C. §§ 3614(a), 12188(b)(1)(B)(II). The scope of this article is limited to pattern-or-practice authority. For a complete list of statutes enforced by the Civil Rights Division and the standards for bringing enforcement action under those statutes, see Justice Manual 8-2000.

³ 28 C.F.R. § 0.50; JUSTICE MANUAL 8.2000.

tools the Division uses to protect civil and constitutional rights, often working in partnership with the U.S. Attorney's Offices.

Because of the broad array of civil rights statutes granting pattern-or-practice authority, the Department can play a leading role in addressing systemic discrimination in numerous areas of public life. This authority also uniquely situates the Department to eradicate systemic discrimination in circumstances that may otherwise prove difficult to address through lawsuits by individual victims of discrimination.

II. The broad scope of the Attorney General's pattern-or-practice authority

The Attorney General's pattern-or-practice authority originated during the 1960s with the passage of major civil rights legislation, and Congress has expanded this authority through subsequent civil rights laws. Through this authority, the Department can investigate, litigate, and remedy systemic civil rights violations in a variety of contexts, including employment, housing, lending, places of public accommodation, institutional settings, and law enforcement.

A. Employment

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of an "individual's race, color, religion, sex, or national origin."⁴ Title VII prohibits an employer from discriminating on a prohibited basis with respect to hiring, discharge, promotion, transfers, assignments, discipline, compensation, benefits, and any other "terms, conditions, or privileges of employment."⁵ Under Title VII, the Attorney General may bring a civil action against a state or local government employer "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" provided by the statute.⁶ In such actions, the government may seek relief, including

⁴ 42 U.S.C. § 2000e-2.

⁵ 42 U.S.C. § 2000e-2(a)(1).

⁶ 42 U.S.C. § 2000e-6(a). The Civil Rights Division enforces Title VII with respect to state and local government employers, while the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. *See* 42 U.S.C. § 2000e-4(g)(6).

“reinstatement or hiring of employees,” “back pay,” and “any other equitable relief as the court deems appropriate.”⁷

Relying on Title VII’s pattern-or-practice authority, the Division has brought numerous lawsuits to eliminate discriminatory employment practices, including entry-level and promotional tests that discriminate on the basis of race, national origin, or sex;⁸ assignment policies based on sex in correctional facilities that are not justified by a bona fide occupational qualification;⁹ and the failure to accommodate religious beliefs in response to a grooming policy prohibiting beards of a certain length.¹⁰ For example, in *United States v. City of New York*, the Division successfully challenged the New York City Fire Department’s entry-level test for firefighters that had a disparate impact on Black and Hispanic applicants.¹¹ The Division was able to obtain extensive relief, including the development of a lawful entry-level test and make-whole relief for victims of the City’s discrimination, including priority hiring, retroactive seniority, and \$98 million in back pay.¹²

2. Title I of the Americans with Disabilities Act

Under Title I of the Americans with Disabilities Act (ADA), a state or local government employer is prohibited from discriminating against a “qualified individual on the basis of disability” with respect to “application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”¹³ The statute also requires an employer to make reasonable accommodations to persons with disabilities unless such accommodation would impose undue

⁷ 42 U.S.C. § 2000e-5(g)(1).

⁸ *E.g.*, Complaint, *United States v. Baltimore Cnty.*, No. 19-cv-02465 (D. Md. Aug. 27, 2019), ECF No. 1.

⁹ *E.g.*, Complaint, *United States v. Mich. Dep’t of Corr.*, No. 16-cv-12146 (E.D. Mich. June 13, 2016), ECF No. 1.

¹⁰ *E.g.*, Complaint, *United States v. Sch. Dist. of Phila.*, No. 14-cv-1334 (E.D. Pa. 2014), ECF No.1.

¹¹ *United States v. City of New York*, 637 F. Supp. 2d 77, 131–32 (E.D.N.Y. 2009).

¹² Press Release, Dep’t of Justice, Justice Dep’t Reaches Agreement in Principle with the New York City Fire Department Over Discriminatory Hiring Practices Resulting in \$98 Million in Relief (Mar. 18, 2014).

¹³ 42 U.S.C. § 12112(a)–(b).

hardship.¹⁴ Title I of the ADA imports the enforcement mechanisms provided by Title VII, including the Attorney General's pattern-or-practice authority against state and local government employers and the ability to seek the same types of relief available in a Title VII action.¹⁵

For example, in *United States v. City of Baltimore*, the Division obtained a consent decree pursuant to its pattern-or-practice authority under Title I of the ADA.¹⁶ The Division alleged that the City engaged in a pattern or practice of discrimination by requiring job applicants to its fire department to disclose disabilities and other medical information in their applications before the City made conditional employment offers.¹⁷ Under the decree, the City agreed to stop the unlawful practice and to submit to compliance monitoring and reporting to prevent any further violations of the ADA.¹⁸

3. The anti-discrimination provision of the Immigration and Nationality Act

Separate from the authority provided directly to the Attorney General, the Division's Immigration and Employee Rights Section¹⁹ also has independent authority to pursue a pattern or practice of discrimination in the workplace through the anti-discrimination provision of the Immigration and Nationality Act.²⁰ This law prohibits, among other things, discrimination on the basis of citizenship status and national origin with respect to hiring, firing, recruitment, or referral for a fee,²¹ as well as unfair documentary practices for purposes of establishing a person's eligibility to work.²² To remedy a pattern or practice of discrimination under section 1324b,

¹⁴ 42 U.S.C. § 12112(b)(5)(A).

¹⁵ 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. §§ 2000e-5, 2000e-6). The Division enforces Title I of the ADA with respect to state and local government employers, while the EEOC enforces Title I against private employers. *See* 42 U.S.C. § 2000e-4(g)(6).

¹⁶ Consent Decree at 1, *United States v. City of Baltimore*, No. 14-cv-2684 (D. Md. Aug. 21, 2014), ECF No. 4.

¹⁷ *Id.*

¹⁸ *Id.* at 2, 4.

¹⁹ *See* 28 C.F.R. § 0.53(a).

²⁰ *See* 8 U.S.C. §§ 1324b(c)(2), 1324b(d)(1).

²¹ 8 U.S.C. § 1324b(a)(1).

²² 8 U.S.C. § 1324b(a)(6).

the Division may—in addition to seeking relief for adversely affected individuals like hiring, back pay, and front pay—pursue injunctive relief to prevent future discrimination and pursue civil penalties that accrue for each victim in amounts that vary depending on the type of violation.²³

B. Housing and lending

1. The Fair Housing Act

The Fair Housing Act (FHA) prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, or against persons with disabilities.²⁴ The FHA reaches conduct in numerous areas connected to housing, including the rental or sale of housing, the provision of services connected to housing, and residential real estate-related transactions. Because of the broad scope of the conduct covered by the FHA, defendants may include governmental entities, housing providers, real estate agents, banks, and mortgage brokers to name a few.²⁵

The FHA grants the Attorney General the authority to sue in federal district court “[w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted” under the FHA.²⁶ The Department has used this authority to reach a variety of discriminatory conduct, including denying housing or offering housing on less favorable terms based on a protected category,²⁷ sexual harassment by housing providers,²⁸ and redlining, which is when lenders avoid or exclude communities of color from equal access to credit based on demographic characteristics of their neighborhoods.²⁹ In these cases, the Department may seek

²³ 8 U.S.C. §§ 1324b(g)(2)(A)–(B).

²⁴ 42 U.S.C. §§ 3604–3605.

²⁵ *Id.*

²⁶ 42 U.S.C. 3614(a).

²⁷ *E.g.*, Consent Order at 1, *United States v. Hous. Auth. of Bossier City*, No. 16-cv-1376 (W.D. La. Oct. 6, 2016), ECF No. 4.

²⁸ *E.g.*, Complaint at 3, *United States v. Dos Santos*, No. 20-cv-30191 (D. Mass Dec. 7, 2020), ECF No. 1 [hereinafter *Dos Santos* Complaint]; Complaint at 3, *United States v. Centanni*, No. 20-cv-10053 (D.N.J. Aug. 5, 2020), ECF No. 1 [hereinafter *Centanni* Complaint].

²⁹ *E.g.*, Consent Order, *United States v. Eagle Bank and Trust Co. of Mo.*, No. 15-cv-01492 (E.D. Mo. Oct. 1, 2015), ECF No. 2-1.

injunctive relief and “other relief as the court deems appropriate, including monetary damages to persons aggrieved.”³⁰ Those monetary damages include actual damages (like restitution, out-of-pocket costs, economic damages, and compensatory damages for emotional distress and other intangible harms) and punitive damages.³¹ The Department may also seek a civil penalty.³²

2. The Equal Credit Opportunity Act

The Attorney General also has pattern-or-practice authority to reach discriminatory lending practices beyond those connected to residential real-estate transactions, including auto loans, personal loans, credit cards, and other loans. The Equal Credit Opportunity Act (ECOA) makes it unlawful for a “creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age,” or because of income derived from public assistance.³³ Under ECOA, the Attorney General has authority to file a complaint in federal district court “whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of [ECOA].”³⁴ In such actions, the Department can seek relief, “including actual and punitive damages and injunctive relief.”³⁵

The Division often brings pattern-or-practice cases involving redlining in the mortgage industry under both the FHA and ECOA.³⁶ However, the Division has also used ECOA’s pattern-or-practice authority to reach discriminatory lending practices in car sales. For example, in *United States v. Guaranteed Auto Sales*, the government alleged that a used car dealership engaged in a pattern or practice of discrimination by offering financing for car purchases to Black applicants on less favorable terms than those offered to white applicants.³⁷ To remedy this discrimination, the Division obtained a

³⁰ 42 U.S.C. §§ 3614(d)(1)(A)–(B).

³¹ See, e.g., *United States v. Balistreri*, 981 F.2d 916, 928 (7th Cir. 1992).

³² 42 U.S.C. § 3614(d)(1)(C).

³³ 15 U.S.C. § 1691(a) (cleaned up).

³⁴ 15 U.S.C. § 1691e(h).

³⁵ *Id.*

³⁶ See *Dos Santos* Complaint, *supra* note 28, at 3; *Centanni* Complaint, *supra* note 28, at 3.

³⁷ Complaint at 3–5, *United States v. Guaranteed Auto Sales*, No. 19-cv-2855 (D. Md. Sept. 30, 2019), ECF No. 1.

settlement requiring the car dealership to develop and implement lawful lending procedures to ensure there is no disparity between customers on the basis of race or any other protected class.³⁸

C. Public accommodations

1. Title II of the Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 prohibits discrimination and segregation on the basis of race, color, religion, or national origin in accommodations open to the public.³⁹ The covered public accommodations include hotels, restaurants, and other entertainment venues, such as theaters, stadiums, and concert halls.⁴⁰ Like Title VII and the FHA, Title II permits the Department to file a complaint in federal court “[w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title II].”⁴¹ However, the government can only seek injunctive relief in Title II pattern-or-practice cases.⁴²

Under this authority, the Department has tackled discriminatory practices in numerous places of public accommodation. These challenged practices have included discriminatory dress codes intended to prevent customers from patronizing night clubs and restaurants on the basis of race and/or national origin,⁴³ higher deposit fees for Hispanic customers seeking to rent a reception hall,⁴⁴ and segregated seating and inferior restaurant service for Black customers.⁴⁵

³⁸ Consent Order at 2–3, *Guaranteed Auto Sales*, No. 19-cv-2855, ECF No. 13.

³⁹ 42 U.S.C. § 2000a(a).

⁴⁰ 42 U.S.C. § 2000a(b) (also requiring such accommodations to affect interstate commerce or to be “supported in their activities by State action”).

⁴¹ 42 U.S.C. § 2000a-5(a).

⁴² *See id.* (providing for only “preventive” injunctive relief rather than damages for past harms).

⁴³ *See* Complaint at 4–5, *United States v. Jarrah*, No. 16-cv-2906 (S.D. Tex. Sept. 28, 2016), ECF No. 1; Consent Decree at 1, *United States v. Davis*, No. 07-cv-430 (E.D. Va. Mar. 10, 2008), ECF No. 14.

⁴⁴ *See* Consent Decree at 2, 16, *United States v. Pasco Cnty. Fair Ass’n*, No. 10-cv-1554 (M.D. Fla. July 15, 2010), ECF No. 2.

⁴⁵ *See* Agreed Order at 5–6, *United States v. Cracker Barrel Old Country Store, Inc.*, No. 04-cv-109 (N.D. Ga. May 18, 2009), ECF No. 24.

2. Title III of the Americans with Disabilities Act

Title III of the ADA makes it unlawful for a place of public accommodation to discriminate against an individual on the basis of disability in the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations. This provision reaches a much broader range of places of public accommodation than those covered by Title II of the Civil Rights Act of 1964, including schools and daycare centers, hospitals and medical offices, service establishments like dry cleaners and barber shops, professional offices, and parks and recreational facilities, among many others.⁴⁶ Title III also gives the Attorney General authority to sue whenever there is “reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination” against persons with disabilities in places of public accommodation.⁴⁷ In cases brought under this pattern-or-practice authority, the Attorney General may seek equitable relief as well as monetary relief for aggrieved persons.⁴⁸ The Attorney General can also seek a civil penalty.⁴⁹

For example, in *United States v. Greyhound Lines Inc.*, the Department alleged that Greyhound, the nation’s largest provider of intercity bus transportation, engaged in a pattern or practice of discrimination against individuals with disabilities.⁵⁰ The Department alleged, among other things, that Greyhound failed to maintain its accessibility features, including wheelchair lifts, and failed to provide passengers with disabilities assistance boarding and exiting buses at rest stops.⁵¹ The Department negotiated a settlement with Greyhound requiring systemic reforms to improve Greyhound’s provision of services to passengers with disabilities, awarding over \$3 million to aggrieved persons, and assessing a civil penalty totaling \$75,000.⁵²

⁴⁶ 42 U.S.C. § 12181(7).

⁴⁷ 42 U.S.C. § 12188(b)(1)(B) (cleaned up).

⁴⁸ 42 U.S.C. §§ 12188(b)(2)(A)–(B).

⁴⁹ 42 U.S.C. § 12188(b)(2)(C).

⁵⁰ Complaint at 4–5, *United States v. Greyhound Lines, Inc.*, No. 16-cv-67 (D. Del. Feb. 8, 2016), ECF No. 1.

⁵¹ *Id.* at 1–2.

⁵² Press Release, Dep’t of Justice, Over \$3 Million Paid to Individuals in Disability Settlement with Greyhound (May 2, 2019).

D. Institutional settings

The Civil Rights of Institutionalized Persons Act (CRIPA) authorizes the Attorney General to bring pattern-or-practice claims against state and local government entities with respect to unconstitutional and unlawful conditions in institutional settings, including juvenile⁵³ and adult correctional facilities as well as mental health facilities, nursing homes, and other facilities for people with intellectual or developmental disabilities.⁵⁴ Under CRIPA, the Attorney General can sue when he has reason to believe persons are being subjected to institutional conditions so “egregious or flagrant” as to deprive them of their constitutional or federal statutory rights⁵⁵ and such deprivation “is pursuant to a pattern or practice of resistance” to those rights.⁵⁶

The Department has used CRIPA to address unlawful conditions in a wide variety of correctional and other facilities. In correctional facilities, the Department has sued to address systemic “fail[ures] to prevent prisoner-on-prisoner violence and sexual abuse,” to “protect prisoners from the use of excessive force by security staff,” to provide adequate and mental health care, and to ensure safe conditions of confinement.⁵⁷ Also, the Department has addressed the use of restrictive housing for prisoners with mental health disabilities solely on the basis of their mental health status.⁵⁸

Under CRIPA, the Attorney General can only seek “equitable relief as may be appropriate to insure the minimum corrective measures necessary” to prevent the deprivation of the constitutional and federal

⁵³ The Attorney General also has authority to reach juvenile detention facilities under the Violent Crime Control and Law Enforcement Act of 1994 § 210401, 34 U.S.C. § 12601.

⁵⁴ 42 U.S.C. §§ 1997a, 1997(1). CRIPA also supplies the Attorney General with civil subpoena power to facilitate investigations into potential pattern-or-practice violations. 42 U.S.C. 1997a-1.

⁵⁵ 42 U.S.C. § 1997a(a). CRIPA protects only constitutional rights in the correctional context.

⁵⁶ *Id.*

⁵⁷ Amended Complaint at 1, *United States v. Alabama*, No. 20-cv-1971 (N.D. Ala. May 19, 2021), ECF No. 37; *see* Settlement Agreement at 1, 19, *United States v. State of New Jersey*, No. 21-cv-15031 (D.N.J. Aug. 24, 2021), ECF No. 12.

⁵⁸ *See* Complaint at 2–3, *United States v. Hampton Rds. Reg'l Jail Auth.*, No. 20-cv-410 (E.D. Va. Aug. 5, 2020), ECF No. 1.

statutory rights of institutionalized persons.⁵⁹ Using this remedial authority, the Department has obtained relief including revised policies and procedures as well as monitoring to provide oversight and ensure that the rights of institutionalized persons are adequately protected.⁶⁰

E. Law enforcement

The Violent Crime Control and Law Enforcement Act of 1994 prohibits governmental entities from engaging “in a pattern or practice of conduct by law enforcement officers” that deprives persons of their constitutional and other federal rights.⁶¹ The statute authorizes the Attorney General to bring a civil action whenever he has “reasonable cause to believe” that such a violation has occurred.⁶² Under this authority in section 12601, the Department can seek “equitable and declaratory relief to eliminate the pattern or practice” of unlawful conduct.⁶³

Much of the Department’s work under section 12601 has focused on addressing “patterns of unlawful use of force; unlawful stops, searches and arrests; and racial discrimination” by law enforcement agencies.⁶⁴ These cases often result in extensive injunctive relief, including the appointment of independent monitors to oversee the implementation of injunctive relief, the development and revision of policies governing police practices, trainings, community engagement, accountability

⁵⁹ 42 U.S.C. § 1997a(a). In the corrections context, any such relief must also comply with the Prison Litigation Reform Act. *See* 18 U.S.C. § 3626.

⁶⁰ *See, e.g.*, Agreement to Resolve the Department of Justice’s Investigation of Hampton Roads Regional Jail at 3, 22, 26, Hampton Rds. Reg’l Jail Auth., No. 20-cv-410 (E.D. Va. Aug. 5, 2020), ECF No. 2-1.

⁶¹ 34 U.S.C. § 12601(a). The statute also reaches conduct in the juvenile justice and carceral system. *Id.* If a law enforcement agency receives federal funding, the Attorney General also has authority to address a “pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex” under the Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. §§ 10228(c)(2)(E), 10228(c)(3) (Safe Streets Act). In addition to providing for injunctive relief, the Attorney General may also seek the suspension or termination of federal funds for a violation of the Safe Streets Act. *Id.*

⁶² 34 U.S.C. § 12601(b).

⁶³ *Id.*

⁶⁴ DEP’T OF JUST., THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 6 (2017).

systems for officer misconduct, and officer wellness and support programs.⁶⁵ The remedies thus go beyond what any individual plaintiff who is subject to unconstitutional or illegal police practices could obtain given the limits the Supreme Court has set on injunctive relief for individuals in cases like *City of Los Angeles v. Lyons*.⁶⁶

III. Pattern-or-practice cases under *International Brotherhood of Teamsters v. United States*

The Supreme Court first articulated the standards governing the Attorney General’s pattern-or-practice authority in *International Brotherhood of Teamsters v. United States*.⁶⁷ Though that case dealt with the Attorney General’s authority under Title VII, courts have applied *Teamsters* to the pattern-or-practice authority in other civil rights statutes.⁶⁸

In *Teamsters*, the Court clarified that the phrase “pattern or practice” is not a term of art but carries its “usual meaning.”⁶⁹ The Court thus held that the government bears the burden to show that unlawful discrimination (or conduct) is the defendant’s “standard operating procedure” or “regular practice.”⁷⁰ The government may make this showing through evidence of an expressly discriminatory policy, the use of statistical evidence, or a number of similar instances of discrimination or unlawful conduct.⁷¹

⁶⁵ See *id.* at 20–21, 25–34.

⁶⁶ 461 U.S. 95 (1983).

⁶⁷ *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

⁶⁸ See, e.g., *United States v. Lansdowne Swim Club*, 894 F.2d 83, 88 (3d Cir. 1990) (applying *Teamsters* to Title II pattern-or-practice claim); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 930 (8th Cir. 1999) (FHA); *Davoll v. Webb*, 194 F.3d 1116, 1147–48 (10th Cir. 1999) (ADA); *United States v. Cnty. of Maricopa*, 151 F. Supp. 3d 998, 1030 (D. Ariz. 2015) (section 12601).

⁶⁹ *Teamsters*, 431 U.S. at 336 n.16.

⁷⁰ *Id.* at 336, 336 n.16.

⁷¹ See, e.g., *Equal Emp. Opportunity Comm’n v. Am. Nat. Bank*, 652 F.2d 1176, 1188 (4th Cir. 1981) (concluding “pattern or practice” may be shown “by statistics alone” or “by a cumulation of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination”).

The precise showing required to prove that unlawful conduct or discrimination is an entity’s “standard operating procedure” or “regular practice” varies based on the civil rights statute at issue. In pattern-or-practice cases brought under statutes that reference a pattern-or-practice “of resistance to the enjoyment of rights” provided by that statute, such as Title VII or the FHA, the government’s burden will require showing a violation of the statute’s substantive provision(s) prohibiting discrimination. For example, in an FHA pattern-or-practice case, the government may be required to show that an entity’s standard operating procedure is to “refuse to sell or rent” to persons on the basis of race in violation of section 3604(a), one of the FHA’s substantive prohibitions.⁷² Similarly, under CRIPA and section 12601, the precise showing necessary depends on the constitutional or statutory rights the government alleges are being deprived as a matter of regular practice by the jurisdiction, such as the deprivation of the constitutional right to equal protection or to be free from unreasonable searches and seizures.⁷³

IV. The benefits of pattern-or-practice authority

As an enforcement tool, the Attorney General’s pattern-or-practice authority also offers unique benefits that enable the Department to eradicate and remedy systemic discrimination.

A. Independent, self-starting authority

One of the primary benefits of pattern-or-practice authority is that it is independent and self-starting, providing the Department with discretion to initiate its own investigations and litigation of civil rights violations.

Although some additional forms of discretionary authority are available, many of the other enforcement mechanisms available require or otherwise depend on referrals of private complaints filed with, or findings of discrimination by, another government agency. For example, the Department may bring an enforcement action based on a referral of a complaint from the EEOC under Title VII⁷⁴ or Title I

⁷² 42 U.S.C. § 3604(a).

⁷³ See 34 U.S.C. § 12601(a).

⁷⁴ 42 U.S.C. § 2000e-5(f)(1).

of the ADA,⁷⁵ from the Department of Housing and Urban Development under the FHA,⁷⁶ and from financial regulators and the Consumer Financial Protection Bureau for ECOA.⁷⁷ The Department's ability to exercise this referral authority depends on factors outside the control of the Department, including the ability of an individual to make a complaint to the appropriate agency, the individual's ability to do so within any applicable statute of limitations, and the completion of any required administrative process before referral.

With the flexibility provided by the Attorney General's pattern-or-practice authority, however, the Department can undertake its own investigations and commence litigation of alleged civil rights violations without having to rely on the initiation and administrative management of an individual complaint or the finding of another agency. Because it permits investigation and analysis of a covered entity's practices in the aggregate, the Department's pattern-or-practice authority can reach systemic discrimination that may go unnoticed at the individual level and, thus, may have never prompted an individual complaint in the first instance. Finally, pattern-or-practice authority also provides the Department with the ability to expand an investigation or litigation based on its referral authority when the original investigation reveals additional victims of the same discriminatory practice or reveals that the referred complaint is otherwise part of a broader unlawful pattern or practice.

B. No need to satisfy class representation requirements to address systemic discrimination

Another benefit of pattern-or-practice authority is that it permits the Department to address systemic discrimination affecting large classes of individuals without having to satisfy the procedural requirements for a class action under Rule 23 of the Federal Rules of Civil Procedure, as an individual private plaintiff would be required to do. Many of the Department's pattern-or-practice cases involve class-action type claims—a discriminatory pattern or practice that harms large numbers of individuals in the same or similar ways.

To address systemic discrimination on behalf of similarly situated individuals in a private right of action, plaintiffs must satisfy the class

⁷⁵ 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5).

⁷⁶ 42 U.S.C. §§ 3610(c), 3610(e), 3610(g)(2)(C), 3612(o)(1), 3614(b).

⁷⁷ 15 U.S.C. § 1691e(g)–(h).

certification requirements under Rule 23. Class representative plaintiffs must demonstrate the numerosity of the class, the commonality of legal or factual issues, the typicality of claims and defenses, and the adequacy of representation to protect the interests of the class.⁷⁸ They must also show that a class action is appropriate because (1) litigating separate actions would risk inconsistent adjudications that impose incompatible standards of conduct; (2) the defendants acted, or refused to act, in a manner generally applicable to the class; or (3) common questions of law or fact predominate over individual class members' claims.⁷⁹ Rule 23 also imposes notice and other procedural requirements that impact the progression of such litigation.⁸⁰ The time and resources necessary to obtain class certification, as well as the challenging nature of the standards governing these requirements, may provide a significant deterrent for private plaintiffs to pursue class actions to address systemic discrimination.⁸¹

The Department does not have to navigate the hurdles posed by Rule 23 in private class action suits when utilizing the Attorney General's pattern-or-practice authority.⁸² As the Supreme Court has explained more generally, Rule 23 does not apply to the federal government when it brings an enforcement action under its pattern-or-practice authority because the government is not merely representative of a group of aggrieved individuals for whom it seeks relief—the government also acts in its own name “to vindicate the public interest in preventing” and remedying civil rights violations.⁸³

⁷⁸ FED. R. CIV. P. 23(a).

⁷⁹ FED. R. CIV. P. 23(b).

⁸⁰ FED. R. CIV. P. 23(c)(2), 23(d)–(g).

⁸¹ See, e.g., Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 176–77 (2015) (summarizing challenges to bringing civil rights class actions).

⁸² See *General Tel. Co. of Northwest, Inc., v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 333–34 (1980) (holding that Rule 23 does not apply to cases brought pursuant to the government's authority to institute a civil action under Title VII).

⁸³ *Id.* at 326.

C. Ability to obtain systemic relief and individual relief for non-parties

The Department's ability to seek extensive relief in pattern-or-practice cases is another significant benefit of this authority. Although private enforcement actions can address individual instances of unlawful conduct or discrimination, the private bar may lack the resources and incentives to seek broader systemic changes in response to individual circumstances. In its pattern-or-practice cases, the Department can use its authority to obtain injunctive relief addressing broader unlawful policies and practices and prevent future civil rights violations.

Additionally, although not all statutes granting pattern-or-practice authority provide for individual relief, those that do permit the Department to obtain relief for aggrieved individuals without requiring them to be a party to the litigation. This authority also permits the United States to obtain relief for such individuals even though they may be time-barred from doing so in a private action.⁸⁴ Because many victims of systemic discrimination may not have the resources or knowledge necessary to seek individual relief on their own, the Attorney General's pattern-or-practice authority can provide an important mechanism for ensuring that they are made whole, which can also serve as a powerful deterrent against future discrimination.

V. Conclusion

Given its broad scope across numerous aspects of public life, the Attorney General's pattern-or-practice authority plays a critical role in the Civil Rights Division's mission to uphold the civil and constitutional rights of all Americans. Although this authority is not the Department's only means of civil rights enforcement, it is a powerful tool for combating and remedying systemic discrimination that may not be easily reached or otherwise meaningfully addressed through individual complaints or private enforcement. The Department continues to make active use of this authority to initiate new investigations and litigation and to achieve favorable settlements

⁸⁴ See 28 U.S.C. §§ 2415, 2462 (regarding time limitations on the United States' claims that differ from those applicable to private claimants).

that remedy past harms of systemic discrimination and prevent similar harms from occurring in the future.

About the Author

Barbara Schwabauer is a senior attorney in the Civil Rights Division's Appellate Section, where she handles civil rights cases in the federal appellate courts. Before joining the Appellate Section, she served as senior trial attorney in the Division's Employment Litigation Section from 2010–2019, investigating and litigating Title VII discrimination cases, including pattern-or-practice cases. Ms. Schwabauer joined the Division through the Attorney General's Honors Program in 2010.

Applying *Bostock v. Clayton County* to Civil Rights Statutes Beyond Title VII

Alyssa Connell Lareau

Attorney

Federal Coordination and Compliance Section

Civil Rights Division

Dylan Nicole de Kervor

Section Chief

Office for Civil Rights

Department of Health and Human Services

I. Introduction

In its 2020 decision in *Bostock v. Clayton County, Georgia*,¹ the Supreme Court, for the first time, explicitly addressed the application of existing sex discrimination laws to individuals alleging discrimination on the basis of sexual orientation and gender identity. The Court held that Title VII of the Civil Rights Act,² which prohibits, among other things, discrimination in the workplace “because of . . . sex,” forbids employers from making adverse employment decisions because of an employee’s sexual orientation or gender identity.³

The *Bostock* decision itself dealt only with Title VII, and the Court made clear it was not addressing the application of its reasoning to other statutes that prohibit discrimination based on sex.⁴ As discussed below, however, most courts that have addressed the issue have concluded that *Bostock*’s reasoning applies to statutes beyond Title

¹ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

² Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1).

³ *Bostock*, 140 S. Ct. at 1740.

⁴ *Id.* at 1753 (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”).

VII, including Title IX of the Education Amendments of 1972⁵ and section 1557 of the Patient Protection and Affordable Care Act (ACA).⁶

The current administration has taken a similar approach. In Executive Order No. 13,988 (EO 13,988), President Biden stated, “Under *Bostock’s* reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”⁷ The Executive Order directed the head of each agency, within 100 days of January 20, 2021, to develop a plan to carry out actions to combat discrimination based on sexual orientation and gender identity, as appropriate and consistent with applicable law.⁸ The President directed agencies to consult with the Department of Justice (Department) in carrying out the Executive Order as appropriate.⁹ The Department is also charged with coordinating the implementation and enforcement of Title IX and other laws that prohibit sex discrimination by recipients of federal financial assistance.¹⁰

As a result of EO 13,988, several federal agencies have issued public interpretations concluding that *Bostock’s* reasoning applies with equal force to Title IX, Section 1557 of the ACA, the Fair Housing Act (FHA),¹¹ and the Equal Credit Opportunity Act (ECOA).¹² These interpretations and subsequent legal challenges, as well as related caselaw, demonstrate that the reach of the *Bostock* decision will be litigated for years to come.¹³

⁵ Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a).

⁶ Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116.

⁷ Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021).

⁸ *Id.*

⁹ *Id.*

¹⁰ See Exec. Order No. 12,250, § 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

¹¹ 42 U.S.C. § 3601–3619.

¹² Equal Credit Opportunity Act § 701, 15 U.S.C. § 1691.

¹³ The information in this article is current as of January 26, 2022. Likely, there will be additional agency interpretations and additional developments in the legal challenges to those interpretations that are not addressed in this article.

II. *Bostock v. Clayton County*

On June 15, 2020, the Supreme Court held that firing an individual for being gay or transgender constitutes unlawful discrimination because of sex in violation of Title VII.¹⁴ The Court explained that an employer who fires an employee because of the employee’s sexual orientation or transgender status does so because of “traits or actions it would not have questioned in members of a different sex,” and thus, “[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”¹⁵

The Court focused its analysis on the “express terms” of Title VII.¹⁶ Specifically, Title VII makes it unlawful for an employer to “fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”¹⁷ In reaching its conclusion, the Court focused on three specific phrases in the statute—“because of,” “discriminate against,” and “individual.”¹⁸

The Court started its analysis with a discussion of the meaning of “because of sex” in Title VII.¹⁹ In doing so, the Court analyzed the phrase in light of the surrounding statutory language as well as the causation standard(s) that language may invoke.²⁰ As to the causation standard, the Court acknowledged that Title VII allows for liability in cases where sex was a “motivating factor” in the challenged practice, but “because nothing in [the Court’s] analysis depend[ed] on the motivating factor test, [the Court] focus[ed] on the more traditional but-for causation.”²¹ In analyzing that standard, the Court explained

¹⁴ *Bostock*, 140 S. Ct. at 1737.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 2000e-2(a)(1).

¹⁸ *Bostock*, 140 S. Ct. at 1739–41. The *Bostock* decision also discussed the parties’ disputed definitions of the word “sex” and stated that nothing in the Court’s approach turned on the outcome of the parties’ dispute. *Id.* at 1739. As a result, “for argument’s sake” the Court proceeded “on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.” *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1740.

that “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”²²

The Court recognized that an event may have more than one but-for cause, so that, “[w]hen it comes to Title VII, the . . . but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.”²³ Rather, as “long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.”²⁴ This remains true even if other factors were more important to the decision than sex.²⁵ In reaching this determination, the Court observed that Congress did not choose any modifying words, such as “primarily” or “solely,” to precede “because of” in Title VII.²⁶

The Court also examined the meaning of the phrase “otherwise . . . discriminate against” as used in Title VII, as defendants argued that simply showing that an action was taken “because of” sex was insufficient to prove liability without also showing that the action taken was discriminatory.²⁷ The Court explained that “discriminate against” in the context of the statute can include “treating [an] individual worse than others who are similarly situated.”²⁸ “So,” the Court explained, “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”²⁹ In evaluating what “discriminate against” means, the Court emphasized Title VII’s application to sex discrimination against individuals, not groups.³⁰ This was important to the Court because it means it is not a

²² *Id.* at 1739.

²³ *Id.*

²⁴ *Id.*; *see also id.* at 1742.

²⁵ *Id.* at 1744.

²⁶ *Id.* at 1739.

²⁷ *Id.* at 1740.

²⁸ *Id.*; *see also id.* at 1753 (“As used in Title VII, the term ‘discriminate against’ refers to ‘distinctions or differences in treatment that injure protected individuals.’”) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)).

²⁹ *Id.* at 1740.

³⁰ *Id.* at 1740–41 (“[The statute] tells us three times—including immediately after the words “discriminate against”—that our focus should be on individuals, not groups”).

“defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall.”³¹

III. Applying *Bostock* to other federal civil rights statutes

Consistent with the President’s directive in EO 13,988, federal agencies evaluated whether *Bostock*’s reasoning applies to the statutes and authorities the federal government enforces. In each case where an agency has issued an interpretation to the public, the government concluded that *Bostock*’s reasoning applies with equal force to Title IX, the FHA, Section 1557 of the ACA, and ECOA.³²

A. Title IX

The Department coordinates the implementation and enforcement of Title IX by Executive agencies,³³ and the Attorney General has delegated that authority to the Civil Rights Division (Division).³⁴ Under that authority, on March 26, 2021, the Division issued a memorandum to federal agency civil rights directors and general counsels sharing the Division’s view that the Supreme Court’s reasoning in *Bostock* applies to Title IX.³⁵ This conclusion was based on the text of Title IX, which provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁶

³¹ *Id.* at 1741.

³² While this article focuses on *Bostock*’s application to statutes that prohibit sex discrimination, the federal government has also taken the position that *Bostock*’s analysis informs the determination of the appropriate level of scrutiny that courts should apply in cases alleging discrimination on the basis of sexual orientation and gender identity: heightened scrutiny. *See, e.g.*, Statement of Interest of the United States at 7–11, *Brandt v. Rutledge*, No. 21-cv-450 (June 17, 2021), ECF No. 19.

³³ *See* Exec. Order 12,250, § 1-2.

³⁴ *See* 28 C.F.R. § 0.51(a) (2021) and 28 C.F.R. § 42.412(a) (1981).

³⁵ *See* Letter from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen. for the C.R.Div., to Fed. C.R. Dir.s and Gen. Couns. (Mar. 26, 2021) [hereinafter “Division Memorandum”].

³⁶ 20 U.S.C. § 1681(a) (2021).

The Division’s interpretation was informed by *Bostock*’s analysis in part because Title IX and Title VII’s statutory prohibitions against sex discrimination are similar, and courts consistently look to interpretations of Title VII to inform Title IX.³⁷ In the memorandum, the Division noted that Title IX focuses on individuals when it says “[n]o person”³⁸ and that Title IX’s “on the basis of sex” language is sufficiently similar to “because of sex under Title VII” such that *Bostock*’s analysis applies to Title IX.³⁹ The similarity between “because of” and “on the basis of” can be seen in *Bostock* itself, where the Supreme Court described Title VII—which includes “*because of*” in its statutory text—as “outlaw[ing] discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin”⁴⁰ This interpretation of Title IX is consistent with the Supreme Court’s instruction that, “if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”⁴¹ In closing, the Division made clear that its interpretation did not dictate the result in a particular case: “Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement.”⁴²

The Division’s interpretation of Title IX is relevant not only to Title IX cases, but also to statutes that incorporate Title IX’s standards,

³⁷ See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

³⁸ See Division Memorandum at 2.

³⁹ See *id.*; see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate’s sex, that supervisor ‘discriminate[s] *on the basis of* sex.”) (emphasis added); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (stating that, in enacting Title IX, Congress “wanted to provide *individual* citizens effective protection against those [discriminatory] practices”) (emphasis added).

⁴⁰ *Bostock*, 140 S. Ct. at 1737 (emphasis added).

⁴¹ *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (citations and internal alterations omitted).

⁴² Division Memorandum, *supra* note 35, at 3.

such as section 1557 of the ACA, discussed *infra*, as well as other authorities that incorporate Title IX’s standards. For example, Executive Order 13,160⁴³ aims to ensure equal opportunity in all federally conducted education and training programs, based on the notion that the federal government should hold itself to at least the same principles of nondiscrimination in educational opportunities that it applies to the educational programs and activities of state and local governments or private entities receiving federal financial assistance.⁴⁴ This includes Title IX.⁴⁵ While Executive Order 13,160 has explicit protections for sexual orientation, its sex discrimination provisions also should be interpreted to cover sexual orientation and gender identity, consistent with the Division’s interpretation of sex discrimination under Title IX.⁴⁶

Similarly, the Department of Education issued a notice of interpretation clarifying that, “[c]onsistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department [of Education] interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity.”⁴⁷ The Department of Education’s interpretation was based on the Division’s interpretation, post-*Bostock* caselaw interpreting Title IX, and textual similarities between Title IX and Title VII.⁴⁸ Like the Division’s interpretation, the Department of Education clarified that its interpretation “does not determine the outcome in any particular case or set of facts.”⁴⁹

⁴³ 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, 65 Fed. Reg. 39,775 (June 27, 2000).

⁴⁴ *Id.* at § 1-101.

⁴⁵ *Id.*

⁴⁶ *Id.* at § 5 (stating that the Department is responsible for interpreting Executive Order 13,160 and setting standards for other agencies to follow).

⁴⁷ Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) [hereinafter “ED Notice”]; see also Letter from Suzanne B. Goldberg, Acting Assistant Sec’y for C.R. at the Dep’t of Educ., to Educators (June 23, 2021).

⁴⁸ ED Notice, 86 Fed. Reg. at 32,637–40.

⁴⁹ *Id.* at 32,639.

In August 2021, the Division clarified that its interpretation that *Bostock* applies to Title IX claims premised on sexual orientation and gender identity applies with equal force to discrimination against intersex people.⁵⁰ “Intersex” refers to people born with variations in physical sex characteristics—including genitals, gonads, chromosomes, and hormonal factors—that do not fit typical definitions of male or female bodies. The *Bostock* Court addressed discrimination against “persons with one sex identified at birth and another today.”⁵¹ Similarly, discrimination against intersex individuals is motivated by perceived differences between an individual’s specific sex characteristics and their sex category (either as identified at birth or some subsequent time). Additionally, discrimination based on anatomical or physiological sex characteristics is inherently sex-based. Thus, intersex traits, like gender identity and sexual orientation, are “inextricably bound up with” sex.⁵²

B. Fair Housing Act

The FHA prohibits housing providers from discriminating against a “person . . . because of . . . sex” in the sale or rental of housing.⁵³ The U.S. Department of Housing and Urban Development (HUD) has accepted and investigated complaints alleging discrimination on the basis of sexual orientation and gender identity under the FHA for over a decade. For example, HUD has issued guidance stating that complaints alleging discrimination on the basis of gender identity and sexual orientation may raise justiciable claims under the FHA.⁵⁴ HUD also articulated this position in its notice-and-comment rulemaking concerning harassment under the FHA, where the agency reaffirmed that claims of discrimination based on sexual orientation or gender identity could and should be investigated as potential sex discrimination.⁵⁵

⁵⁰ Dep’t of Just. Title IX Legal Manual, Title IX Cover Addendum post-*Bostock*, Editor’s Note.

⁵¹ *Bostock*, 140 S. Ct. at 1746.

⁵² *Id.* at 1742.

⁵³ 42 U.S.C. § 3604.

⁵⁴ Memorandum from John Trasviña, Assistant Sec’y for Fair Hous. and Equal Opportunity to Fair Hous. and Equal Opportunity Reg’l Dir. (June 15, 2010).

⁵⁵ See *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg.

On February 11, 2021, HUD issued a memorandum (HUD Memorandum) directing the Office of Fair Housing and Equal Opportunity and HUD-funded fair housing partners to “accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation” and to “administer and fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity,” consistent with the *Bostock* ruling.⁵⁶ This memorandum relied on a legal memorandum provided by HUD’s Office of the General Counsel, concluding that *Bostock* applies to the FHA, not only because Title VII and the FHA share relevant text, but because they also share a comparably broad purpose of “eradicat[ing] discriminatory practices.”⁵⁷

C. Section 1557 of the ACA

Section 1557 of the ACA prohibits discrimination in various health programs and activities “on the ground prohibited under . . . Title IX of the Education Amendments of 1972.”⁵⁸ The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) issued a final rule implementing section 1557 in 2016.⁵⁹ The rule defined “on

63,054, 63,058–59 (Sept. 14, 2016); *see also* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662–63, 5,671 (Feb. 3, 2012) (a “claim of discrimination based on nonconformity with gender stereotypes may be investigated and enforced under the Fair Housing Act as sex discrimination”); Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763, 64,770 (Sept. 21, 2016) (“reaffirm[ing] [HUD’s] view that discrimination based on gender identity is sex discrimination” and that “[d]iscrimination because of gender identity is covered within the Fair Housing Act’s prohibition of sex discrimination”).

⁵⁶ Memorandum from Jeanine M. Worden, Acting Assistant Sec’y for Fair Hous. and Equal Opportunity to Office of Fair Hous. & Equal Opportunity, Fair Hous. Assistance Program Agencies and Fair Hous. Initiatives Program Grantees (Feb. 11, 2021).

⁵⁷ *See* Memorandum from Damon M. Smith, Principal Deputy Gen. Couns., to Jeanine M. Worden, Acting Assistant Sec’y for Fair Hous. and Equal Opportunity (Feb. 9, 2021) (citing *Texas Dep’t. of Hous. and Cmty. Affairs v. Inclusive Cmlys. Project, Inc.*, 576 U.S. 519, 525 (2015)).

⁵⁸ 42 U.S.C. § 18116(a).

⁵⁹ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) (formerly codified at 45 C.F.R. pt. 92).

the basis of sex” to include discrimination “on the basis of gender identity.”⁶⁰

Several plaintiffs challenged this rule under the Administrative Procedure Act⁶¹ (APA) and the Religious Freedom Restoration Act (RFRA),⁶² and in 2019, a U.S. district court in Texas vacated the rule’s inclusion of gender identity as prohibited sex discrimination.⁶³ More recently, two decisions prospectively enjoined HHS from interpreting section 1557 against religiously affiliated plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures.⁶⁴

In 2020, HHS OCR issued a revised final rule⁶⁵ that significantly modified the 2016 final rule, including removing the definition of “on the basis of sex” in its entirety. Several groups of plaintiffs challenged the 2020 final rule in multiple courts. Two district courts enjoined OCR from enforcing its repeal of certain parts of the 2016 final rule, including the portion of the definition of “on the basis of sex” that addressed “sex stereotyping.”⁶⁶

Following the Supreme Court ruling in *Bostock* and the issuance of EO 13,988, HHS issued a notice informing the public that OCR would interpret and enforce section 1557’s prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender

⁶⁰ While the 2016 rule recognized that discrimination on the basis of sexual orientation may be prohibited under Section 1557, HHS did not include such prohibition in the regulatory language. *See id.* at 31,387–90.

⁶¹ 5 U.S.C. § 551.

⁶² 42 U.S.C. §§ 2000bb-2000bb-4.

⁶³ *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

⁶⁴ *Religious Sisters of Mercy v. Azar*, 513 F.Supp. 3d 1113 (D.N.D. 2021), *appeal docketed*, No. 21-1890 (8th Cir. Apr. 20, 2021); *Franciscan All., Inc. v. Becerra*, No. 16-cv-00108-O, 2021 WL 3492338 (N.D. Tex. Aug. 9, 2021), *appeal docketed*, No. 21-11174 (5th Cir. Dec. 6, 2021).

⁶⁵ *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020) (codified at 45 C.F.R. pt. 92).

⁶⁶ *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020).

identity.⁶⁷ The notice relied on the reasoning in *Bostock*, the Division’s interpretation, and post-*Bostock* caselaw interpreting Title IX.⁶⁸

D. ECOA

In March 2021, the Consumer Financial Protection Bureau (CFPB), responsible for administering and enforcing ECOA and its implementing regulations, issued an interpretive rule stating that the prohibition against sex discrimination in ECOA and its implementing regulations encompasses discrimination based on sexual orientation and gender identity.⁶⁹

CFPB reached this determination based several factors, including (1) “[b]efore the issuance of the *Bostock* opinion, at least twenty states and the District of Columbia prohibited discrimination on the bases of sexual orientation and/or gender identity either in all credit transactions or in certain ([for example], housing-related) credit transactions;”⁷⁰ (2) CFPB “previously had indicated that legal developments would lead to prohibitions against sex discrimination being interpreted to afford broad protection against discrimination on the bases of sexual orientation and gender identity;”⁷¹ (3) “ECOA and Title VII are generally interpreted consistently;”⁷² (4) ECOA and Title VII share textual similarities regarding causation and focus on the individual;⁷³ (5) “sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex;”⁷⁴ and (6) discrimination on the basis of “sex” also includes discrimination “motivated by perceived nonconformity with sex-based or gender-based stereotypes, including those related to gender identity and/or sexual orientation, as well as discrimination based on an applicant’s associations.”⁷⁵

⁶⁷ Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, *reprinted at* 86 Fed. Reg. 27,984 (May 25, 2021).

⁶⁸ *Id.*

⁶⁹ Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14,363 (Mar. 16, 2021).

⁷⁰ *Id.* at 14,363.

⁷¹ *Id.* at 14,364.

⁷² *Id.*

⁷³ *Id.* at 14,365.

⁷⁴ *Id.*

⁷⁵ *Id.* at 14,365–66.

IV. Looking ahead to *Bostock*'s impact in the courts beyond Title VII

Cases interpreting *Bostock*'s application to sex discrimination prohibitions beyond Title VII have come to courts in two ways: cases where private plaintiffs argue that *Bostock* applies to other statutes and cases where private plaintiffs challenge the government's interpretation regarding *Bostock*'s application to the statutes they enforce.

A. Cases addressing *Bostock*'s application to Title IX and section 1557 of the ACA

In the months following the *Bostock* decision, multiple federal courts have held that Title IX protects students from discrimination on the basis of gender identity and sexual orientation.⁷⁶ This is consistent with decisions in the Sixth and Seventh Circuits that reached this conclusion even before *Bostock*.⁷⁷

In *Grimm v. Gloucester County School Board*, the Fourth Circuit made clear that, “[a]lthough *Bostock* interprets Title VII . . . , it guides our evaluation of claims under Title IX.”⁷⁸ That case involved a school board's policy that required students to use restrooms matching their sex assigned at birth, and that provided single-stall restrooms as an

⁷⁶ See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 2021 WL 2637992 (June 28, 2021) (gender identity); *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021) (gender identity); *Koenke v. Saint Joseph's Univ.*, No. 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021) (sexual orientation), *appeal docketed on other grounds*, No. 21-1057 (3rd Cir. Jan. 12, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *5 n.61 (M.D. Pa. Oct. 9, 2020) (sexual orientation).

⁷⁷ See *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX and the Equal Protection Clause by excluding him from the boys' restroom); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (school district that sought to exclude transgender girl from girls' restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

⁷⁸ *Grimm*, 972 F.3d at 616.

“alternative” for transgender students.⁷⁹ Plaintiff Gavin Grimm, a transgender boy, sued the School Board, claiming that the policy violated Title IX and the Equal Protection Clause.⁸⁰ When evaluating Grimm’s Title IX claims, the court stated that, “[a]fter the Supreme Court’s recent decision in *Bostock*[,] . . . we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex.’”⁸¹ The court relied on the *Bostock* Court’s statement that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”⁸² “Therefore,” the court concluded, “the Board’s policy excluded Grimm from the boys [sic] restrooms ‘on the basis of sex.’”⁸³ “Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender,” and as such, the School Board’s policy discriminated against Grimm on the basis of sex in violation of Title IX.⁸⁴

Few courts have had the occasion to opine on the application of *Bostock* to section 1557 of the ACA in private litigation. For the three that have, two held that the ACA follows the reasoning set forth in *Bostock*. In the first suit to address the issue post-*Bostock*, a district court in Arizona declined to enjoin Arizona’s Medicaid agency’s exclusion of gender reassignment surgeries from coverage, finding the plaintiffs’ reliance on *Bostock* to prohibit gender identity

⁷⁹ *Id.* at 593.

⁸⁰ *Id.* As noted above, this article is focused on *Bostock*’s application to federal civil rights statutes. The *Grimm* decision, however, like several other cases evaluating allegations of sexual orientation or gender identity discrimination, includes an Equal Protection Clause analysis. In *Grimm*, the court concluded that heightened scrutiny applied “because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class.” *Id.* at 607 (emphasis in original). Applying heightened scrutiny, the court concluded that the bathroom policy was not substantially related to the School Board’s purported goal of protecting students’ privacy and was instead based on “‘misconception and prejudice’ against Grimm.” *Id.* at 613–15.

⁸¹ *Id.* at 616.

⁸² *Id.* (quoting *Bostock*, 140 S. Ct. at 1741).

⁸³ *Id.* at 616–17.

⁸⁴ *Id.* at 618–19.

discrimination under section 1557 “unpersuasive.”⁸⁵ However, just two months later, in a suit challenging a health insurer’s denial of coverage to treat gender dysphoria, a district court in Washington State held that “[i]t would be logically inconsistent with *Bostock* to find that Title IX permits discrimination for being transgender,” and thus, the plaintiff had stated a viable claim for sex discrimination on the basis of gender identity under Title IX and by extension section 1557.⁸⁶ A third case involved a transgender man who sued a hospital, alleging it had canceled his hysterectomy after learning he was transgender. In that case, the court held that *Bostock* “made clear” that the position stated in the HHS Notice interpreting section 1557 to prohibit discrimination on the basis of gender identity was “already binding law.”⁸⁷ And under the “logic and instruction of *Bostock*,” the defendant hospital “inescapably” intended to rely on plaintiff’s sex in its decision making when canceling plaintiff’s procedure.⁸⁸

B. Legal challenges to the administration’s applications of *Bostock* to other federal statutes

Plaintiffs have challenged agencies’ interpretations of *Bostock* under three primary theories: as violations of the APA, Religious Freedom Restoration Act,⁸⁹ and the Constitution.

In *School of the Ozarks v. Biden*, a private religious college sought to enjoin the HUD Memorandum, alleging the Memorandum prohibited the College’s housing policies in violation of the APA, RFRA, and

⁸⁵ *Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1044 (D. Ariz. 2021) (“The Supreme Court expressly limited its holding to Title VII claims involving employers who discriminated against employees . . . *Bostock* did not involve or purport to deal with a state Medicaid plan exclusion for surgical treatment for gender dysphoria . . .”), *appeal docketed*, No. 21-15668 (9th Cir. Apr. 19, 2021).

⁸⁶ *C.P. v. Blue Cross Blue Shield of Illinois*, 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021).

⁸⁷ *Hammons v. Univ. of Maryland Med. Sys. Corp.*, No. DKC 20-2088, 2021 U.S. Dist. LEXIS 140856, at *44 (D. Md. July 28, 2021).

⁸⁸ *Id.* at 49.

⁸⁹ 42 U.S.C. § 2000bb-4.

multiple provisions of the U.S. Constitution.⁹⁰ The court denied Plaintiff's motions, finding they had failed to show the requisite elements of injury-in-fact, causation, and redressability to establish Article III standing.⁹¹ The court noted that enjoining the HUD Memorandum would not "foreclose the possibility that [the college] could be held liable for FHA violations," as any "potential liability [it] incurs for violating the FHA would flow directly from the Act itself, as well as applicable case law including *Bostock*, and not from the Memorandum."⁹²

Other plaintiffs have challenged the HHS Notice on similar grounds. In a suit brought by two medical associations and a private physician, plaintiffs allege that the HHS Notice violates the APA, RFRA, and the First Amendment because it requires them to "either act against their medical judgment and deeply held convictions" by providing gender affirming care, or "succumb to huge financial penalties, lose participation in Medicaid and other federal funding, and, as a practical matter, lose the ability to practice medicine in virtually any setting."⁹³ A second complaint, a class action brought by two medical doctors on behalf of "all health care providers subject to section 1557," alleges violations of the APA and the Declaratory Judgment Act.⁹⁴ The plaintiffs ask the court to enjoin the Secretary from interpreting section 1557 to prohibit discrimination on the basis of sexual orientation and gender identity.⁹⁵ They also seek a declaration that neither section 1557 nor *Bostock* prohibit discrimination on the basis of sexual orientation and gender identity. They claim that existing law allows such discrimination "as long as they would have acted in the same manner had the patient had been a member of the opposite biological sex."⁹⁶ A third complaint, brought by a member organization for Christian employers, alleges HHS' notice violates RFRA, the First

⁹⁰ *Sch. of the Ozarks, Inc. v. Biden*, No. 21-03089-CV, 2021 U.S. Dist. LEXIS 105775 (W.D. Mo. June 4, 2021), *appeal argued*, No. 21-2270 (8th Cir. Nov. 17, 2021).

⁹¹ *Id.* at *6.

⁹² *Id.* at *9.

⁹³ Complaint at 2, *American College of Pediatricians v. Becerra*, No. 21-cv-195 (E.D. Tenn. Aug. 26, 2021), ECF No. 1 .

⁹⁴ Complaint, *Neese v. Becerra*, No. 21-CV-00163 (N.D. Tex. Aug. 25, 2021), ECF No. 1.

⁹⁵ *Id.* ¶ 34.

⁹⁶ *Id.* ¶ 36.

Amendment, and the APA because it violates “their medical judgment and religious beliefs” and serves to “compel and restrict based on viewpoint those providers’ speech”.⁹⁷ Plaintiff organization asks the court to enjoin HHS from a range of activities, including “compelling speech on gender identity issues,” such as use of preferred pronouns in speaking or charting.⁹⁸ There have been no opinions in these matters as of this writing.

Finally, 20 states have challenged the Department’s and the Department of Education’s interpretations of Title IX as prohibiting discrimination based on sexual orientation and gender identity.⁹⁹ The states allege the interpretations violate the APA, the Spending Clause, the First Amendment, the Tenth Amendment, and separation of powers under Article I of the Constitution.¹⁰⁰ The plaintiffs seek to have the Department of Education’s interpretation and related fact sheet set aside, a preliminary and permanent injunction prohibiting the Department and the Department of Education from enforcing the interpretation or fact sheet, a declaration that the plaintiffs are able to maintain facilities and sports teams segregated by sex assigned at birth, and a declaration that the plaintiffs are not required to use an individual’s preferred pronouns.¹⁰¹ There have been no opinions in this matter as of this writing.

V. Conclusion

The federal government’s application of *Bostock*’s reasoning to other statutes it enforces, the subsequent legal challenges to these interpretations, and private plaintiff’s lawsuits seeking to apply *Bostock* beyond Title VII ensure that the application of existing sex discrimination laws to claims based on sexual orientation, intersex traits, and gender identity will be a swiftly evolving area of law. The

⁹⁷ *Christian Emps. Alliance v. EEOC*, No. 21-cv-00195 (D.N.D. Oct. 18, 2021).

⁹⁸ *Id.*

⁹⁹ *Complaint, Tennessee, et. al, v. U.S. Dep’t of Educ.*, No. 3:21-CV-308 (E.D. Tenn. Aug. 30, 2021). The complaint also names the Equal Employment Opportunity Commission (EEOC) as a defendant and challenges EEOC’s post-*Bostock* interpretations of Title VII.

¹⁰⁰ *Id.* at ¶¶ 110–155, 188–196. Note that despite the Department of Justice being named as a Defendant and despite the Complaint’s discussion of DOJ’s March 26, 2021 interpretation, none of the Complaint’s counts name DOJ. *See id.* ¶¶ 110–196.

¹⁰¹ *Id.*, at Request for Relief and Demand for Judgment, ¶¶(A)-(I).

Civil Rights Division is available to consult with U.S. Attorneys' Offices and federal partners as questions arise.

About the Authors

Alyssa Connell Lareau (she/her) has been an attorney in the Civil Rights Division since 2009. Since 2014, Alyssa has worked as an attorney with the Federal Coordination and Compliance Section, where her work focuses on laws that prohibit discrimination in federally conducted and assisted programs and activities on the basis of race, color, national origin, sex, sexual orientation, intersex traits, and gender identity. Alyssa co-chairs the Civil Rights Division's LGBTQI+ Working Group. Alyssa received her B.A. from Wesleyan University and her J.D. from Georgetown University Law Center. She was selected as one of the National LGBT Bar Association's Best LGBT Lawyers Under 40, received the Civil Rights Division's John Dunn Award, the Department's Assistant Attorney General's Distinguished Service Award, and has published on legal issues related to unnecessary surgeries on intersex infants.

Dylan Nicole de Kervor (she/her) is a Section Chief with the U.S. Department of Health and Human Services Office for Civil Rights, where she is the team lead for section 1557 rulemaking and enforcement. Before joining HHS, Dylan served as an attorney in the Civil Rights Division's Federal Coordination and Compliance Section. Dylan received her B.A. from the University of California at San Diego and holds a J.D. and M.S.W. from the University of California at Berkeley. She has been recognized by the National LGBT Bar Association as a Best LGBT Lawyer Under 40 and has been awarded the Civil Rights Division's John Dunn Award, DOJ Assistant Attorney General's Distinguished Service Award, and HHS Secretary's Award for Distinguished Service.

* * *

The authors wish to thank their colleagues from the Civil Rights Division's Appellate Section, Educational Opportunities Section, and Employment Litigation Section for their assistance with this article.

Page Intentionally Left Blank

A Case Study for Using Social Media in Civil Rights Investigations

Elise Sandra Shore
Trial Attorney
Housing & Civil Enforcement Section
Civil Rights Division

Jimmy Anthony Rodriguez
Assistant U.S. Attorney
Southern District of Texas

I. Introduction

The power and prevalence of social media in today's society is undeniable. The term "social media" encompasses a wide range of platforms, applications, and tools, with the primary feature being the ability to connect with others and share content in a variety of forms, including comments, photos, and videos. Approximately seven-in-ten Americans use social media to connect with others, to access news content, to share information, and to entertain themselves.¹ At the global level, social media users number in the billions.² Because social media is ubiquitous, it is important for civil litigators to understand how it can be utilized as both an information-gathering tool and a potential source of evidence.³

This article explores the use of publicly available social media as a source of information for developing a civil rights matter through a case study of *United States v. Jarrah and Land Guardian, Inc. f/d/b/a Gaslamp (Gaslamp)*.⁴ Part II provides background

¹ *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

² The Sedona Conference, *Primer on Social Media*, 20 SEDONA CONF. J. 1, 8 (2019) [hereinafter *Sedona Primer on Social Media*].

³ The Sedona Conference, *Commentary on ESI Evidence & Admissibility*, 22 SEDONA CONF. J. 83, 91, 121–22 (2021) [hereinafter *Sedona Commentary on ESI Evidence & Admissibility*]; *Sedona Primer on Social Media*, *supra* note 2, at 8.

⁴ Complaint, *United States v. Jarrah*, No. 16-cv-2906 (S.D. Tex. Sept. 28, 2016), ECF No. 1 [hereinafter *United States' Complaint*].

information regarding the incident that led to extensive social media and press coverage and, ultimately, a private lawsuit challenging Gaslamp’s alleged discriminatory conduct. Part III discusses the United States’ lawsuit against Gaslamp and its owner, along with the statutory framework of Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of public accommodation.⁵ Part IV examines relevant legal considerations when social media is used to gather information and provides some practical tips.

II. The Ball incident and the social media response to Gaslamp’s alleged discriminatory conduct

The establishment known as Gaslamp was a three-story bar and lounge in Houston’s popular “Midtown” neighborhood.⁶ The alleged discriminatory actions at issue in the Gaslamp litigation first received widespread attention in September 2015. Three African-American men arrived at Gaslamp and were advised that they were required to pay a \$20 cover charge to enter the bar.⁷ They refused to pay the fee.⁸ These same men also noticed that Gaslamp employees were allowing all white patrons to enter without paying a fee.⁹ They continued to observe and saw that other non-white patrons (African-American, Asian, and Hispanic), like them, were being required to pay a cover charge to enter the bar.¹⁰ One of the men, Brandon Ball, decided to write about this experience and post it on Facebook:

⁵ Civil Rights Act of 1964 tit. 2, 42 U.S.C. §§ 2000a to 2000a-6.

⁶ United States’ Complaint at ¶ 7.

⁷ Complaint at ¶ 9, *Ball v. Texas Guardian, Inc. et al.*, No. 4:15-cv-03181 (S.D. Tex. Oct. 29, 2015), ECF No. 1 [hereinafter Private Plaintiffs’ Complaint].

⁸ *Id.* at ¶ 10.

⁹ *Id.* at ¶ 11.

¹⁰ *Id.* at ¶ 12.

Brandon Ball is with
September 11, 2015

PLEASE READ. PLEASE SHARE.

My name is Brandon Ball. I am 32 years old. I am African American. Tonight I was with my friends Dan Scarbrough (42) and Ken Piggee (43). Both are also African American. We were in the Midtown area of Houston, TX tonight and tried to go into The Gaslamp. Both Dan and Ken had on blazers. I had on a button up and slacks. When we walked up the guy at the door told us \$20 each (pictured below in the long sleeve shirt). We didn't want to pay that amount so we decided to go to the next bar down, The Dogwood, which was free.

After about 30 minutes we left The Dogwood and were walking back. As we passed The Gaslamp we noticed folks walking into The Gaslamp without having to pay. Those folks who didn't have to pay were white. I brought this to Dan's attention a few minutes later and he said we should go back and just watch from across the street to see if there was some "funny business" going on.

Ken, Dan, and I went back and watched from across the street as the guys who were working the front door of The Gaslamp (pictured) allowed white people to come in one after the other. Every black person who we watched try to go in was told there was a \$20 cover or that their attire was not proper. One black guy was told that he could not get in because he had on Polo Boots.

Dan spoke to several people who were told there was a \$20 cover and they pretty much all said the same thing. It was not just blacks they were charging. It was people of both Asian and Latin decent.

I again tried to walk in and was told there was a \$20 cover. This was right after I had just seen a group of white guys walk right in.

I finally went and spoke to the cop (also pictured) who was working the door (who is a minority himself) and asked him if he was aware and comfortable with how the door guys were conducting business. His reply was basically..."I just work and do my job and those guys over there do their job." I told him he was complicit but he blew me off.

I then took pictures of the two main guys at the front door (pictured below) and both of them began to ask if I had a problem. The one in the short sleeved shirt went as far to tell me that he hoped I didn't "run up on him in the streets because it would be a problem."

Why does this matter to me? Why is this important? If I have to answer that please just move along. This post is not meant for you. This event occurred in the late night of Sept. 11th. A day in which we as a country are supposed to come together. But events like this just tells us how far apart we are.

Please share this. Please pass along. Please read this and understand what type of establishment The Gaslamp is. If you were at The Gaslamp on this night and had a similar experience please comment and share. Don't let actions such as this continue with no recourse. If you know the guys working the door let them see this. Please let them. Remember, this is 2015.

11

¹¹ Brandon Ball, FACEBOOK (Sept. 11, 2015), <https://www.facebook.com/b0ycottGaslamp/>.

The three men ultimately filed a private lawsuit asserting, among other causes of action, claims of discrimination under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a.¹²

The circumstances surrounding Mr. Ball's post and Gaslamp's alleged discriminatory actions received significant press coverage.¹³ As a result of the attention Gaslamp's alleged discriminatory actions received, persons who believed they experienced similar discriminatory treatment began to connect on social media. To facilitate this connection, a "Boycott Gaslamp" Facebook group was formed for the purpose of providing a forum for users to share their experiences.

¹² See Private Plaintiffs' Complaint, *supra* note 7. The Ball plaintiffs filed an amended complaint captioned *Ball, Scarbrough, Piggee v. Ayman Jarrah and Land Guardian, Inc.*, in December 2015. Amended Complaint, *Ball*, No. 15-cv-03181, ECF No. 6. The case was settled and voluntarily dismissed on November 18, 2016. See Joint Voluntary Dismissal, *Ball*, No. 15-cv-02181, ECF No. 70.

¹³ See, e.g., Phaedra Cook, *Midtown Nightclub Accused of Discriminatory Practices*, HOUSTONPRESS (Sept. 14, 2015), <https://www.houstonpress.com/restaurants/midtown-nightclub-accused-of-discriminatory-practices-7762250>; Jace Larson, *Racism claims at Houston night clubs tested*, CLICK 2 HOUSTON (Oct. 29, 2015), [https://www.click2houston.com/news/2015/10/19/racism-claims-at-houston-night-clubs-tested/\(explaining results of TV station's undercover "tests" of Gaslamp's admission policies, indicating disparate treatment\)](https://www.click2houston.com/news/2015/10/19/racism-claims-at-houston-night-clubs-tested/(explaining%20results%20of%20TV%20station's%20undercover%20tests%20of%20Gaslamp's%20admission%20policies,%20indicating%20disparate%20treatment)); Craig Hlavaty, *Lawyer for Midtown's Gaslamp Releases Rebuttal Video to Recent Racial Allegations*, HOUSTON CHRON. (Sept. 18, 2015), <https://www.chron.com/entertainment/restaurants-bars/article/Lawyer-for-Midtown-s-Gaslamp-releases-rebuttal-6514225.php#photo-8655184> (reporting on Gaslamp's attorney's YouTube video defending Gaslamp policy based on purported dress code and need to maintain male/female ratio); Tamara Tabo, *Three Black Lawyers Don't Walk Into A Bar: Allegations Of Racism At A Houston Nightclub*, ABOVE THE LAW (Sept. 21, 2015), <https://abovethelaw.com/2015/09/three-black-lawyers-dont-walk-into-a-bar-allegations-of-racism-at-a-houston-nightclub/> ("The fact is federal discrimination law doesn't cover night clubs."). For an analysis on *Gaslamp*, including social media posts reporting discriminatory conduct and dress code policies in the context of the history of the Civil Rights movement and Title II, see Shaun Ossei-Owusu, *Velvet Rope Discrimination*, 107 VA. L. REV. 683, 685 (2021) (describing, *inter alia*, another incident in 2015—captured in real time on video—during which several women of color attempted to gain access into Gaslamp but were refused entry and told by Gaslamp employees to "Have a good night in the 'hood' . . . Tell Tyrone I said hi").

Individuals who had been denied admission to or had witnessed others being denied admission to Gaslamp used this group to tell their stories.¹⁴ For example, a local musician posted that she had witnessed two African-American friends who were denied admission to Gaslamp based on a purported dress code violation, while other white patrons with the same dress were permitted to enter. Another post on the Boycott Gaslamp group contained information about a news story that originally aired on a local television station (Channel 2), including a photo of Gaslamp's dress code posted outside the nightclub after the September 15, 2015, incident:



Other social media platforms, including Yelp, Travel Advisor, and Zomato websites, contained posts of similar stories about Gaslamp's alleged discriminatory door policies, some of which were re-posted on the Boycott Gaslamp Facebook group.¹⁶

¹⁴ See *Boycott Gaslamp Group*, FACEBOOK, <https://www.facebook.com/b0ycottGaslamp/> (created Sept. 16, 2015).

¹⁵ Channel 2 News, FACEBOOK (Sept. 16, 2015), <https://www.facebook.com/b0ycottGaslamp>.

¹⁶ See *id.*

III. Title II of the Civil Rights Act of 1964 and the United States' investigation of, and lawsuit against, Gaslamp

A. Title II of the Civil Rights Act of 1964

As noted above, the United States brought its lawsuit against Gaslamp under Title II of the Civil Rights Act of 1964. Title II prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation, such as restaurants, hotels, movie theaters, nightclubs, stadiums, and other places of exhibition or entertainment.¹⁷ Title II was designed to give “full effect to Congress’ overriding purpose of eliminating the affront and humiliation” involved in discriminatory denials of access to public places.¹⁸

Title II provides, in pertinent part:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.¹⁹

Under this law, the Civil Rights Division can obtain injunctive relief that changes policies and practices to remedy customer discrimination.

For the Department to file suit under Title II, Gaslamp must be a “place of public accommodation” whose “operations affect commerce,”²⁰ and the Attorney General must have reasonable cause to believe that Gaslamp is engaged in a pattern or practice of discrimination.²¹ For a

¹⁷ Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(b).

¹⁸ *United States v. DeRosier*, 473 F.2d 749, 751 (5th Cir. 1973).

¹⁹ Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(a).

²⁰ Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(b).

²¹ Civil Rights Act of 1964 § 206, 42 U.S.C. § 2000a-5(a). Individuals also have a private right of action under Title II, 42 U.S.C. § 2000a-3(a).

Discrimination that is unlawful under Title II may also give rise to claims under other federal or state laws, such as 42 U.S.C. § 1981. *See* 42 U.S.C. § 2000a-6(b) (acknowledging other remedies may be available to pursue

discussion of the Department's pattern or practice authority and the standard to demonstrate a pattern or practice, see *The Attorney General's Pattern-or-Practice Authority: A Critical Tool for Civil Rights Enforcement* in this issue.

B. Use of social media and the investigatory process in *Gaslamp*

There are several steps in the Department's investigatory process that precede filing a complaint. As *Gaslamp* demonstrates, social media evidence has the potential to play an important role at each stage.

First, during the pre-investigation stage of a case, the goal is to gather as much public information as possible to determine, among other things, whether the factual allegations could constitute a civil rights violation and whether the conduct at issue is an isolated incident or part of a pattern of potentially illegal behavior.²² The Department may become aware of a potential civil rights violation in a wide variety of ways, including complaints filed directly with the Department, media accounts of an incident, and information from community partners.²³ Upon receiving such information, the Civil Rights Division or a U.S. Attorney's office may engage in a pre-investigation review to determine whether a formal investigation is warranted.²⁴ The pre-investigation review involves speaking to complainants and reviewing complainant materials and publicly available information.²⁵

Social media may be how the Department is first made aware of a potential civil rights violation. It is also a valuable source of information for determining whether a formal investigation is warranted.²⁶ This is particularly true in today's society, where social

violation of other federal or state laws that address nondiscrimination in public accommodations).

²² See *supra*, Section III.A; JUSTICE MANUAL 8.2.110.

²³ *Supra* note 22.

²⁴ See JUSTICE MANUAL 8-2.110.

²⁵ *Id.*

²⁶ See *id.* ("Pre-investigation review includes taking actions such as . . . reviewing publicly available information.").

media is such a common and popular method of communication and the modern public square for airing grievances.²⁷

As the events in the *Gaslamp* matter show, persons complaining about alleged civil rights violations, such as experiencing discrimination, may want others to be aware of their complaints and may post them in public forums. In *Gaslamp*, there were numerous public-content posts (or re-posts from other platforms) on Facebook corroborating the Ball Plaintiffs' claims of discrimination and posts showing that their experience indicated a pattern of illegal behavior. The Department became aware of *Gaslamp* through these social media posts, including the Boycott *Gaslamp* Facebook group. Consistent with the methods discussed in Justice Manual 8-2.100,²⁸ the Department's investigation included reviewing publicly available social media and speaking with the individuals who filed the private lawsuit against *Gaslamp*, posted complaints against *Gaslamp*, or both.

Second, once a formal investigation is initiated, information and evidence must be gathered to obtain authorization to institute a civil suit against the civil rights violator.²⁹ Again, social media posts were particularly useful in the *Gaslamp* matter to demonstrate that there was a pattern and practice of unlawful behavior and that the treatment of the Ball plaintiffs was not an isolated event.

After authorization to file a lawsuit is obtained, part of the pre-suit process includes notifying the person or entity responsible for the alleged violation of the potential lawsuit and attempting to settle the dispute before filing the complaint.³⁰ Social media information, even if not in an admissible form, can also be useful to convince a party that, because the evidence against them is substantial, they should consider an early resolution of the matter.

After an investigation of *Gaslamp*'s actions and pre-suit negotiations, the Department filed a lawsuit against *Gaslamp*'s

²⁷ The percentage of American adults who use at least one social media site has risen from approximately 11% in 2006 to almost 72% in 2021. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>. In 2021, 84% of those age 18–29 reported that they use at least one social media site. *Id.*

²⁸ JUSTICE MANUAL 8-2.100.

²⁹ See JUSTICE MANUAL 8-2.130.

³⁰ See Exec. Order No. 12988, 61 Fed. Reg. 4729 (Feb. 7, 1996) (requiring pre-filing notice of complaint and use of “reasonable efforts” to attempt to achieve settlement).

owners and operators in September 2016.³¹ The suit alleged that, since at least October 2014, the defendants had engaged in a pattern or practice of discrimination on the basis of race, color, and national origin, in violation of Title II of the Civil Rights Act of 1964.³² As the Ball plaintiffs had witnessed, posted on Facebook, and alleged in their complaint, the government’s complaint alleged that Gaslamp’s owner and operator discriminated against African-American, Hispanic, and Asian-American patrons by charging them a cover charge to enter the establishment, while not charging similarly situated white persons.³³ The complaint also alleged that (1) Gaslamp had denied non-white persons the right to enter the establishment while admitting similarly situated white patrons by selectively enforcing a dress code,³⁴ and (2) Defendant Jarrah, Gaslamp’s principal operator, was responsible for, among other things, instructing employees to carry out discriminatory policies and used racial slurs when providing such instructions.³⁵

IV. Legal considerations

A. Professional responsibility issues

Attorneys must be cognizant of the applicable rules of professional conduct when accessing social media for a case. Indeed, an attorney should have the skills necessary to access and investigate social media evidence as part of an attorney’s affirmative duty to provide competent legal representation.³⁶ The need to access social media

³¹ See United States’ Complaint, *supra* note 4.

³² *Id.* at ¶ 16–20.

³³ *Id.* at ¶ 16.

³⁴ *Id.* at ¶ 19.

³⁵ *Id.* at ¶ 17.

³⁶ Model Rule of Professional Conduct 1.1 provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PRO. CONDUCT r. 1.1. Commentators have pointed out that Model Rule 1.1 arguably creates an obligation “for lawyers to inquire, where possible, into social networking information that may hold relevance for a matter . . . [And] the gathering of social networking information might, in some cases, be required to file a competent initial pleading.” Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 AM. J. TRIAL ADVOC. 473, 478–79 (2013); Agnieszka McPeak, *Social Media Snooping and Its Ethical*

platforms for information may arise in a wide variety of circumstances, which implicate a number of ethical considerations. Let us say, for example, that a person posts a narrative on a Facebook page, like the posts described above concerning Gaslamp. An attorney discovers these posts as part of their pre-investigation process. The attorney will likely want to contact and communicate with the witness, perhaps to determine if they would be willing to participate in an interview. How should this be accomplished? A person typically needs a Facebook account to communicate with someone else on Facebook, and other social media platforms function similarly. It is certainly not advisable for an attorney, or someone from their staff, to use a personal account, which may allow the person to be contacted to gain access to the attorney's or staff member's personal information and posts.³⁷ Another mistake, and potential ethical violation, would be to create a false or anonymous Facebook account, which is discussed below. The Gaslamp investigation did not employ either of these approaches.

Attorneys should be aware of which state's disciplinary rules apply to them and familiarize themselves with those rules.³⁸ Under the Model Rules of Professional Conduct, for example, a lawyer has a duty to avoid deceiving or making misrepresentations to third parties.³⁹

Bounds, 46 ARIZ. ST. L.J. 845, 875 (2014) (“The existing ethics rules should be read to affirmatively include social media content as part of the duty to investigate facts.”).

³⁷ See JUSTICE MANUAL 1-9.000 (Personal Use of Social Media. Department attorneys should avoid using social media in a way that “may cause the attorney to be called as a witness” or may implicate discovery disclosure obligations).

³⁸ See generally MODEL RULES OF PRO. CONDUCT r. 8.5 (the conduct of a lawyer is subject to the disciplinary authority of both the jurisdiction in which she is licensed, and where the lawyer's conduct occurred). Department attorneys should seek guidance as needed from their Professional Responsibility Officer (PRO) and the Professional Responsibility Advisory Office (PRAO); see Laura Carroll et. al., *Professional Responsibility: How to Keep Your Bar License*, 68 DOJ J. FED. L. & PRAC., no. 4, 2020 (“Department attorneys are encouraged to consult with their PROs and/or contact PRAO whenever they have any questions or concerns about their professional responsibility obligations.”).

³⁹ MODEL RULES OF PRO. CONDUCT r. 4.1 (Truthfulness in Statements to Others), 8.4 (Misconduct).

With respect to support staff,⁴⁰ a lawyer cannot allow an employee or agent to engage in conduct that would be in violation of the rules of professional conduct if done by the lawyer.⁴¹

The Texas Committee on Professional Ethics (Committee) has issued an opinion addressing how the state's versions of these rules relate to accessing social media.⁴² In the opinion, the Committee concluded that “the failure by attorneys and those acting as their agents to reveal their identities when engaging in online investigations, even for the limited purpose of obtaining identifying [information] . . . can constitute misrepresentation, dishonesty, deceit, or the omission of a material fact.”⁴³ In reaching this conclusion, the Committee noted that “the fact that deception is even easier in the virtual world than in person makes this an issue of heightened concern.”⁴⁴

The Committee also surveyed guidance issued in other jurisdictions (as of March 2018) addressing how an attorney may contact persons via social media as part of an investigation. The Committee opinion noted that other ethics committees had opined that a lawyer shall not “friend” an unrepresented individual using “deception” or false pretenses. This would include creating a Facebook profile using inaccurate information.⁴⁵ In its opinion, the Committee recognized that (1) certain jurisdictions require a lawyer to provide more information, and a failure to do so constitutes deception by omission; and (2) at least one jurisdiction requires a lawyer making a “friend” request to identify him or herself as a lawyer, identify the lawyer’s

⁴⁰ The ability of an investigator to use deception as part of a criminal investigation is outside the scope of this article.

⁴¹ See MODEL RULES OF PRO. CONDUCT r. 5.3 (Responsibility Regarding Nonlawyer Assistance).

⁴² See Texas Pro. Ethics Comm., Op. 671 (2018). The Texas Committee on Professional Ethics is a committee of members of the State Bar of Texas appointed by the Supreme Court of Texas to issue ethics opinions in response to ethics-related questions. See *Professional Ethics Committee*, STATE BAR OF TEX., <https://www.texasbar.com/AM/Template.cfm?Section=pec&Template=/pec/home.cfm> (last visited Jan. 4, 2022).

⁴³ Texas Pro. Ethics Comm., Op. 671, at 3.

⁴⁴ *Id.* at 2 (citing New York City Bar opinion).

⁴⁵ *Id.* at 2. Creating a profile with misleading information or using the social media platform for reasons other than those intended by the platform may violate the platform’s terms of service or terms of use.

client, and inform the witness of the lawyer's involvement in the case.⁴⁶

Based on the foregoing, the consensus view is that an attorney is permitted to communicate with an unrepresented party via social media. In so doing, the attorney must provide the witness with all the information required by the applicable jurisdiction, such as accurately identifying herself, informing the witness of the matter under investigation, and describing the attorney's involvement. Before doing so, however, the attorney should consider having a nonlawyer, such as a paralegal or investigator, make contact via social media to avoid becoming a witness, which could lead to the lawyer's disqualification.⁴⁷ Any communications with a social media user should be preserved and tracked for preservation purposes and to demonstrate that the applicable rules of professional conduct were followed. Communications in the *Gaslamp* matter were consistent with these principles.

B. Preservation of social media evidence

At every stage of the process leading up to the filing of a lawsuit, it is important to consider and to discuss with litigation support professionals how to capture and preserve the relevant social media evidence relied on. In addition to the professional responsibility considerations discussed above, one of the reasons for preserving social media evidence during the pre-suit stages of a case is the obligation to preserve Electronically Stored Information (ESI). Federal Rule of Civil Procedure 37(e) authorizes district courts to take remedial actions if ESI that should have been preserved in

⁴⁶ *Id.* (citing N.H. Bar Ass'n Ethics Committee Advisory Comm. Opinion 2012-13/ 05); *see also* NEW YORK STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES 20–22 (2019); *see, e.g.*, *Rosenay v. Taback*, No. AANCV156019447S, 2020 WL 4341767, at *7 (Conn. Super. Ct. July 2, 2020) (unpublished) (holding that an attorney violates the Connecticut Rules of Professional Conduct “if he or she sends a ‘friend’ request to an unrepresented witness without: (1) disclosing to the witness that the sender is an attorney; (2) describing his or her role in the case by identifying the party or parties he or she represents in a particular matter; and (3) stating the purpose of the of the request.”).

⁴⁷ *See* MODEL RULES OF PRO. CONDUCT r. 3.7 (a lawyer shall not act as an advocate at trial if the lawyer is a necessary witness, except for certain limited exceptions).

anticipation of litigation is lost because a party failed to take “reasonable steps” to preserve it and the ESI cannot be restored or replaced through additional discovery.⁴⁸ The *Sedona Primer on Social Media (Sedona Primer)* provides a useful resource on this topic.⁴⁹ In addition to discussing Rule 37 obligations, the *Sedona Primer* addresses important considerations when preserving and collecting social media, considering its dynamic nature.⁵⁰

C. Authentication⁵¹

As *Gaslamp* illustrates, before a complaint is filed, there may be information on social media that is useful for purposes of furthering the investigation. For example, pictures posted on public social media platforms could be helpful at the investigative stage of a case and can be captured and saved in a way that will facilitate their use as evidence later. If the information is not saved early in the investigation, it may be lost if the associated post is later removed or deleted from the social media platform in question. In addition to authentication, having social media posts admitted into evidence involves issues related to hearsay and chain of custody, among others.

Because posts on social media sites are typically not self-authenticating, an attorney must consider the traditional authentication rules.⁵² To authenticate evidence under Federal Rule

⁴⁸ FED. R. CIV. P. 37 (e)(1)–(2).

⁴⁹ *Sedona Primer on Social Media*, *supra* note 2.

⁵⁰ *Id.* at 39–51, 88–90 (discussing, *inter alia*, considerations for preserving and collecting social media, including when the obligation to preserve such information arises and the “reasonable steps” standard under FED. R. CIV. P. 37(e)).

⁵¹ This section is intended to provide a summary discussion of social media evidence and authentication issues. For a comprehensive guide to and discussion of authentication and admissibility considerations for all forms of ESI (including social media), see generally, PAUL W. GRIMM & KEVIN BRADY, *ADMISSIBILITY OF ELECTRONIC EVIDENCE* (2018); *Sedona Commentary on ESI Evidence & Admissibility*, *supra* note 3; *Authentication of Social Media Records and Communications*, 40 A.L.R. 7th, Art. 1 (2019).

⁵² See PAUL W. GRIMM, ET AL., *BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE* 16 (2016); see also *United States v. Farrad*, 895 F.3d 859, 877–80 (6th Cir. 2018) (rejecting argument that Facebook photos are self-authenticating business records under Rule 902 and holding that courts should analyze authenticity of Facebook photos under traditional 901 standards because, *inter alia*, social media companies, including Facebook,

of Evidence 901, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”⁵³ Evidence may be authenticated by either direct or circumstantial evidence, and a prima facie case is all that is necessary.⁵⁴

Rule 901(b)(1)–(10) provides a non-exhaustive list of ways in which a piece of evidence can be authenticated, including through testimony.⁵⁵ These authentication rules apply to social media evidence.⁵⁶

Rule 902 provides examples of self-authenticating evidence that require “no extrinsic evidence of authenticity in order to be admitted.”⁵⁷ Examples of self-authenticating evidence include certified copies of public records, official publications, and newspapers and periodicals.⁵⁸ In addition, websites, including social media websites, may be authenticated under Rule 901(11) and (12), if certified as a business-record hearsay exception under Rule 803(6) “by the custodian or other qualifying [person].”⁵⁹

have neither oversight nor interest in ensuring photos posted on their pages are trustworthy). *But see* United States v. Recio, 884 F.3d 230, 237–38 (4th Cir. 2018) (accepting Facebook certification from records custodian in addition to other extensive evidence that tied defendant’s alleged Facebook account, including name, email address tied to account, to defendants’ appearance in over 100 photos).

⁵³ FED. R. EVID. 901(a).

⁵⁴ Sedona *Commentary on ESI Evidence & Admissibility*, *supra* note 3, at 123, 123 n. 86; *see also* Hon. Paul W. Grimm, et al., *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 434 (2013).

⁵⁵ FED. R. EVID. 901(b)(1).

⁵⁶ *See* Sedona Conference *Commentary on ESI Evidence & Admissibility*, *supra* note 3, at 124–25 (describing the two divergent judicial approaches—skeptical and accepting—to social media evidence and gradual development of more nuanced fact-based rulings on authentication of social media evidence). For a comprehensive listing of reported cases addressing authentication of social media records and communications (“postings” and “pages”), *see Authentication of Social Media Records and Communications*, 40 A.L.R. 7th, Art. 1 (2019).

⁵⁷ FED. R. EVID. 902(1)–(14).

⁵⁸ FED. R. EVID. 902(4)–(6).

⁵⁹ *See* GRIMM ET AL., BEST PRACTICES, *supra* note 52, at 17. For a helpful discussion of Rule 902 and the 2017 amendments to the rule, *see* Paul W. Grimm, *New Evidence Rules and Artificial Intelligence*, 45 No. 1 LITIG. 6 (2018).

The type of evidence necessary to authenticate social media information depends on the purposes for which the evidence will be used. In general, if the social media evidence is offered to show that a particular person made the statement contained therein, authentication must include evidence that the social media content was in fact written by, or is otherwise attributable to, that person.⁶⁰ For example, in *United States v. Barnes*,⁶¹ the government, using Rule 901(b)(1), authenticated Facebook messages sent by the defendant through another witness. The witness testified that she had seen the defendant use Facebook, that she recognized his Facebook account, and that the Facebook messages matched the criminal defendant's manner of communicating.⁶² Thus, the *Barnes* court held that, even though the witness could not conclusively say that the defendant authored the Facebook messages, they were properly authenticated and admitted by the district court.⁶³

In contrast to the scenario in *Barnes*, if the evidentiary value of the social media information does not depend on showing (1) the truth of its contents, or (2) that a particular person wrote it, authentication under Rule 901 includes whatever facts are needed to show that the evidence is what is proponent claims it is.⁶⁴ This may include photos posted to social media sites, as in *United States v. Thomas*.⁶⁵ In *Thomas*, the Sixth Circuit upheld the district court's admission of photographs downloaded by law enforcement officers from defendant's Facebook and Instagram pages using a version of the name "Jabron Thomas," which was the defendant's name.⁶⁶ The defendant asserted there was no evidence of who created the Facebook group or whether it was authentic without laying a proper foundation.⁶⁷ The Sixth Circuit held there was "no reason to depart from the ordinary rule that photographs, including social-media photographs, are authenticated by 'evidence sufficient to support a finding that the

⁶⁰ GRIMM ET AL., Best Practices, *supra* note 52, at 19; *see also Authentication of Social Media Records and Communications*, 40 A.L.R. 7th, Art. 1 (2019).

⁶¹ 803 F.3d 209, 217 (5th Cir. 2015).

⁶² *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015).

⁶³ *Id.*

⁶⁴ GRIMM ET AL., BEST PRACTICES, *supra* note 52, at 19–20.

⁶⁵ 701 F. App'x 414 (6th Cir. 2017) (not precedential).

⁶⁶ *Thomas*, 701 F. App'x at 418–19.

⁶⁷ *Id.* at 418.

[photograph] is what the proponent claims it is,' Fed. R. Evid. 901(a)."⁶⁸

Consistent with Judge Grimm's checklist for authentication,⁶⁹ the time to consider how to authenticate social media evidence is as soon as possible, including when the information is collected, as well as during discovery, when there is sufficient time to (1) ask witnesses during depositions questions that will establish the methods of authentication identified in Rules 901(b)(1) and 902; (2) research the relevant caselaw, including any opinions issued by the judge or court presiding over the case; (3) explore the possibility of authenticity stipulations; and (4) strategize carefully about the best method to authenticate each exhibit.⁷⁰

V. Conclusion

Because social media has changed how the world communicates, civil litigators must also change by developing the skills necessary to understand social media evidence and how it can be used to develop a case. *Gaslamp* serves as an example of why attorneys must have the ability to search, identify, capture, and utilize social media evidence to successfully prosecute civil actions. The *Gaslamp* social media posts discussed in this article publicized brazen discriminatory actions that resulted in an investigation and led to a lawsuit to enforce Title II. In the absence of social media evidence, the discriminatory acts may have never come to light, or the pervasiveness of the unlawful conduct may not have been fully realized. Using social media information, however, the Department was able to gather an overwhelming amount of evidence and, ultimately, halt *Gaslamp's* discriminatory actions.

⁶⁸ *Id.* at 419 (alteration and citation in original).

⁶⁹ Grimm et al., *Authentication of Social Media Evidence*, *supra* note 54, at 466–74.

⁷⁰ As *Gaslamp* illustrates, where social media posts involve third parties, these authentication and related ESI considerations are likely to arise in litigation. See generally *supra* note 51; GRIMM ET AL., BEST PRACTICES, *supra* note 51; Sedona Commentary on ESI Evidence & Admissibility, *supra* note 3; Sedona Primer on Social Media, *supra* note 2.

About the Authors

Elise Sandra Shore is a Senior Trial Attorney in the Department's Civil Rights Division, Housing and Civil Enforcement Section. She investigates, litigates, and tries cases under Title II of the Civil Rights Act of 1964, the Fair Housing Act, and the Equal Credit and Opportunity Act. Elise has also worked as a Trial Attorney in the Civil Rights Division's Voting Section. She served as co-chair of the Division's National Origin Working Group, Outreach and Enforcement Committee. Before joining the Civil Rights Division, Elise was a Fulbright Scholar and Professor of Law in Central and South America, where she lectured and presented seminars on the U.S. legal system. She clerked for the Honorable Jaime Pieras, Jr. in the U.S. District Court for the District of Puerto Rico. She first joined the Department's Civil Division, Federal Programs Branch, through the Attorney General's Honors Program.

Jimmy Anthony Rodriguez is a Senior Litigation Counsel in the Civil Division of the U.S. Attorney's Office for the Southern District of Texas, where he handles a variety of cases, including affirmative civil rights matters. Before joining the U.S. Attorney's Office, Mr. Rodriguez served as a trial attorney in the Department's Environment and Natural Resources Division, where he received the Attorney General's Award for Distinguished Service. He joined the Department in 2003 through the Attorney General's Honors Program. Before that, he clerked for the Honorable Harry Lee Hudspeth in the U.S. District Court for the Western District of Texas.

Page Intentionally Left Blank

Civil Rights in the Digital Age: The Intersection of Artificial Intelligence, Employment Decisions, and Protecting Civil Rights

Natasha Babazadeh
Trial Attorney
Civil Rights Division, Appellate Section

Angela Washington
Legislative and Policy Analyst
Civil Rights Division, Policy and Strategy Section

Tiffany Brown
Legislative and Policy Analyst
Civil Rights Division, Policy and Strategy Section

I. Introduction

Artificial intelligence (AI) leverages computers and machines to imitate the problem-solving and decision-making capabilities of a “rational human.”¹ AI consists of a group of algorithms—a set of instructions to solve a problem—that it can modify based on learned inputs and data.² And it is increasingly being used in our everyday lives, including screening job applicants, deciding who can get a mortgage, filling rental tenancies, determining credit scores, and more. AI capabilities have also led to significant innovations, including autonomous vehicles, connected “Internet of Things” devices

¹ See JOHN S. MCCAIN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019, PUB L. NO. 115-232, 132 STAT. 1636, 1697 (defining AI as “[a]ny artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets”).

² Kaya Ismail, *AI vs. Algorithms: What’s the Difference?*, CMS WIRE (Oct. 26, 2018), <https://www.cmswire.com/information-management/ai-vs-algorithms-whats-the-difference/#:~:text=According%20to%20Mousavi%2C%20we%20should%20think%20of%20the,uses%20training%20data%20to%20make%20such%20a%20decision.>

in the home, and even robotic body parts to assist persons with disabilities with everyday functioning.³

The United States is at the forefront of using AI to “drive growth of the United States economy, enhance our economic and national security, and improve our quality of life.”⁴ And “[m]aintaining American leadership in AI requires a concerted effort to promote advancements in technology and innovation, while protecting . . . civil liberties.”⁵ At the 2021 G7 Summit, the United States and other world leaders acknowledged bias in AI systems, noting that “new forms of decision-making have surfaced examples where algorithms have entrenched or amplified historic biases, or even created new forms of bias or unfairness.”⁶ They promised “to take bold action to build more transparency in our technologies.”⁷

Without safeguards, the increasing use of AI raises serious concerns for vulnerable populations and the protection of civil rights. AI prioritizes the programmer’s preferences, and civil rights laws prioritize equal opportunity for all. So, if a programmer inputs biased data into an algorithm, the algorithm’s output is biased. Take, for example, companies like Apple, Twitter, or Slack using facial recognition technology—a type of AI. Studies have shown that certain facial recognition technology could not identify Black persons because data inputted into the algorithm consisted almost entirely of persons with light skin color—the engineers and developers of the technology who only tested it on themselves.⁸ As a result, algorithmic decision-making can disproportionately affect people of color and their ability to participate equally in employment and society generally.

This article aims to alert readers, particularly government employees, of a new legal landscape: equal employment opportunities

³ *Artificial Intelligence*, NAT’L INST. STANDARDS TECH., <https://www.nist.gov/artificial-intelligence> (last visited Nov. 15, 2021).

⁴ Exec. Order No. 13,859, 84 Fed. Reg. 3,967 (Feb. 14, 2019) (Maintaining American Leadership in Artificial Intelligence).

⁵ *Id.*

⁶ Press Release, The White House Briefing Room, Carbis Bay G7 Summit Communiqué (June 13, 2021).

⁷ *Id.*

⁸ Shane Ferro, *Here’s Why Facial Recognition Tech Can’t Figure Out Black People*, HUFFPOST (Mar. 2, 2016), https://www.huffpost.com/entry/heres-why-facial-recognition-tech-cant-figure-out-black-people_n_56d5c2b1e4b0bf0dab3371eb.

in the digital age. While many other contexts, including criminal, are also seeing civil rights issues arise from AI use, the employment context has been studied extensively and is ripe with concrete examples to demonstrate the potential for abuse and discrimination. This article provides an overview of the predominant issues arising from employment practices and discusses the work the U.S. Department of Justice (Department) and other federal agencies are doing to address those issues in that context. In addition to potentially weighing in on these types of issues, government employees are likely to see AI use in employment cases and should be mindful of the civil rights implications arising therefrom.

II. Employment

Employment decisions in hiring and management are critical to economic opportunity and growth. They determine who can access consistent work, who gets paid what, and who performs well and gets promoted. Employers have long used technology to manage these decisions, most recently turning to AI and predictive analytics—software programs based on data models that predict the future.⁹ Automation in hiring and employee management has also increased significantly in response to the COVID-19 pandemic and the transition to remote work, which has moved businesses away from in-person interactions and toward more virtual systems where AI use is accessible.¹⁰ Even before COVID-19, the number of employees working from home increased by 173% from 2005 to 2012, and by 2016, almost half of employees reported working remotely with some frequency.¹¹ During the pandemic, more than 60% of U.S. employees reported working primarily from home.¹² While these numbers will likely decrease after the pandemic, employers are transitioning to more permanent, flexible work options.¹³ In other words, in the employment

⁹ Ashley DiFranza, *Predictive Analytics: What It Is & Why It's Important*, NE. UNIV. (Feb. 17, 2021),

<https://www.northeastern.edu/graduate/blog/predictive-analytics/>.

¹⁰ Gary D. Friedman & Thomas McCarthy, *Employment Law Red Flags in the Use of Artificial Intelligence in Hiring*, AM. BAR ASS'N (Oct. 1, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/10/ai-in-hiring/.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

context, a more virtual world allowing for greater use of AI technology is here to stay.

Without transparency and adequate safeguards, this new world can come at a cost to our civil rights. Although AI can promote fairness and equality by reducing human biases in the hiring and management processes, when employers improperly use AI, they can violate state and federal antidiscrimination laws.¹⁴ This section explores generally how AI affects civil rights throughout the hiring and employee management process.

A. Overview of the legal issues

Using AI in the employment context raises legal issues resulting from possible bias in many situations, including: (1) sourcing and screening applicants; (2) personality and skills-based testing; and (3) compensation, performance evaluations, and employer wellness programs. Each of these categories is discussed below.

1. Sourcing and screening applicants

Employers are starting to use AI to solicit job candidates and screen job applicants. For example, employers can use predictive analytics to target advertisements, job postings, and individual outreach and determine who learns about which jobs and to shape the applicant pool. Employers can also use AI to screen applicants, using various merit-based criteria—educational background, geographic location, years of experience, credit, criminal or medical history, etc.—to determine which applicants they should consider. These tools can expedite the hiring process, but who the employer is targeting and which merit-based criteria it uses to weed out candidates can lead to discriminatory impact, benefiting one class of people over another.¹⁵

As critics of AI in hiring note, AI is only as good as the programmers writing the algorithm and the data they rely on. If a programmer inputs only resumes of people who the company has previously hired, and the previous hiring team harbored biases and preferences, the newly created algorithm inherits those biases and preferences in

¹⁴ See generally EXEC. OFF. OF THE PRESIDENT, *BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS* 14 (2016).

¹⁵ See Matthew Scherer, *AI In HR: Civil Rights Implications of Employers' Use of Artificial Intelligence and Big Data*, 13 *SCITECH LAW* 13–14 (2017) (noting that companies' increasing reliance on artificial intelligence systems and big data will solve the reduction of human resource departments).

screening applicants.¹⁶ For example, Amazon has used AI to identify words and phrases that commonly appeared on prior candidates' resumes over a 10-year period.¹⁷ But past candidates were overwhelmingly male, so the algorithm placed considerable significance on language used in male resumes, including “executed” and “captured,” and less significance on terms used in female resumes, like “women’s,” as in “women’s chess club captain.”¹⁸ The system disfavored, among others, candidates who graduated from two all-women’s colleges as a result.¹⁹

Employers’ use of HireVue—a prominent video interview and assessment vendor—is another cautionary tale of AI in hiring unintentionally going wrong. The tech company started in 2004 as a video interview platform, allowing candidates to record and upload answers to questions for recruiters to review and compare.²⁰ HireVue later integrated AI into its platform, using facial and voice recognition software to analyze body language, tone, and other qualities to determine whether candidates exhibit preferred traits.²¹ The reliance on AI resulted in significant backlash. In one report, experts emphasized that “[HireVue’s] method massively discriminates against many people with disabilities that significantly affect facial expression and voice: disabilities such as deafness, blindness, speech disorders, and surviving a stroke.”²² And in a complaint to the Federal Trade Commission (FTC), privacy watchdog Electronic Privacy Information Center (EPIC) argued HireVue’s AI-driven assessments produce results that are “biased, unprovable and not replicable.”²³ EPIC

¹⁶ Friedman & McCarthy, *supra* note 10.

¹⁷ Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias against women*, REUTERS (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *HireVue*, FORBES, <https://www.forbes.com/companies/hirevue/companies/hirevue/?sh=3b5be1017adf> (last visited Jan. 3, 2022).

²¹ MEREDITH WHITTAKER ET AL., *DISABILITY, BIAS, AND AI*, (2019).

²² JIM FRUCHTERMAN & JOAN MELLEA, *EXPANDING EMPLOYMENT SUCCESS FOR PEOPLE WITH DISABILITIES* 3 (2018); see also Whittaker et al., *supra* note 21.

²³ Drew Harwell, *Rights Group Files Federal Complaint Against AI-Hiring Firm HireVue, Citing ‘Unfair and Deceptive’ Practices*, WASH. POST (Nov. 6, 2019), <https://www.washingtonpost.com/technology/2019/11/06/prominent->

argued that the technology could unfairly score individuals based on prejudices or neurological differences.²⁴ While HireVue ultimately removed facial analysis from its screening assessments in January 2021,²⁵ it continues to use algorithms related to audio analysis that raise similar concerns.²⁶

2. Personality and skills-based testing

In considering a job applicant, employers sometimes require additional personality and skills-based testing. These behavioral tests analyze personalities, skills, or qualifications to determine an applicant's aptitude or creativity.²⁷ Employers are starting to utilize AI to conduct these types of behavior tests. These AI systems sometimes utilize data from applicants' social media and public profiles to predict organizational fit and success at a company.²⁸ For example, one study found that a person's "likes" on Facebook could predict intelligence or personality traits.²⁹ Employers can also have applicants play neuroscience computer games that analyze and predict a candidate's cognitive and personality traits.³⁰

rights-group-files-federal-complaint-against-ai-hiring-firm-hirevue-citing-unfair-deceptive-practices/; see also Elec. Priv. Info. Ctr., Complaint and Request for Investigation, Injunction, and Other Relief, In the Matter of HireVue, Inc. (2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf.

²⁴ Harwell, *supra* note 23.

²⁵ Will Knight, *Job Screening Service Halts Facial Analysis of Applicants*, WIRED (Jan. 12, 2021), <https://www.wired.com/story/job-screening-service-halts-facial-analysis-applicants/>.

²⁶ Lindsey Zuloaga, *Industry Leadership: New Audit Results and Decision on Visual Analysis*, HIREVUE (Jan. 11, 2021), <https://www.hirevue.com/blog/hiring/industry-leadership-new-audit-results-and-decision-on-visual-analysis>.

²⁷ *The Future of Work: Protecting Workers' Civil Rights in the Digital Age: Hearing Before the Subcomm. on Civil Rights and Human Servs. of the H. Comm. on Educ. & Labor*, 115th Cong. (2020) (statement of Jenny R. Yang, Senior Fellow, Urban Institute).

²⁸ *Id.*

²⁹ See Michal Kosinski et al., *Private Traits And Attributes Are Predictable From Digital Records of Human Behavior*, PROC. NAT'L ACAD. SCIS. (2013).

³⁰ Friedman & McCarthy, *supra* note 10; see also Aaron Konopasky, *Pre-Employment Tests of "Fit" Under the Americans with Disabilities Act*, 30:2 S. CAL. R. L. SOC. JUST. 213–18 (2021) (discussing the various forms of personality and fit-based testing in the employment context).

In the applicant screening or deliberation stage, data from this type of testing can eliminate from consideration people of color, persons with disabilities, and older adult workers.³¹ For example, Kronos, a software company used to manage employees (for example, providing attendance, payroll, and scheduling tools), created a personality test that several companies relied on in their hiring processes, and that resulted in each company rejecting an applicant undergoing treatment for bipolar disorder.³² These companies' automatic systems sifted through that individual's job application and determined him unfit for a job based on the applicant's answers to questions regarding his health in the Kronos personality assessment.³³ In November 2009, the Equal Employment Opportunity Commission (EEOC) filed suit against Kronos, arguing that the "personality test" constituted a type of mental health examination in violation of Title I of the Americans with Disabilities Act.³⁴ And the case, although it focuses solely on the personality test and not on any one company's automation and analysis of the test to make hiring decisions, demonstrates the relation between, and the implications of, AI and performance-based testing.

Screening social media data can also discriminate against women who do not participate in male-dominated activities.³⁵ Take, for example, Gild, an online tech-hiring platform that combs through job applicants' "social data"—the trace people leave behind online.³⁶ Gild analyzes this data and ranks candidates by "social capital"—the

³¹ Friedman & McCarthy, *supra* note 10.

³² Cathy O'Neil, *How Algorithms Rule Our Working Lives*, GUARDIAN (Sept. 1, 2016), <https://www.theguardian.com/science/2016/sep/01/how-algorithms-rule-our-working-lives>.

³³ *Id.*

³⁴ *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, EQUAL EMP. OPPORTUNITY COMM'N (July 27, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> (stating that ADA limits employer's ability to require medical examinations pre-offer, post-offer, and during employment); *see also* EEOC v. Kronos Inc. (*Kronos I*), 620 F.3d 287 (3d Cir. 2010); EEOC v. Kronos Inc. (*Kronos II*), 694 F.3d 351 (3d Cir. 2012).

³⁵ *See* CAROLINE CRIADO PEREZ, INVISIBLE WOMEN, DATA BIAS IN A WORLD DESIGNED FOR MEN 106–08 (1999).

³⁶ O'Neil, *supra* note 32.

extent a person is integral to, in this case, the tech community.³⁷ According to Gild’s data, frequenting a Japanese manga site—a site that displays a style of Japanese comic books and graphic novels—is “one solid predictor of strong coding” and can give an applicant a higher “social capital” score.³⁸ But “if, like most of techdom, that manga site is dominated by males and has a sexist tone, a good number of the women in the industry will probably avoid it.”³⁹ In other words, by failing to consider the ways women’s lives differ from men’s, both on and offline, and by placing greater weight on one factor that favors men over other non-biased factors, programmers can create algorithms that contain hidden bias against women.⁴⁰

3. Compensation, work evaluations, and wellness programs

Outside of hiring, employers are also beginning to rely on AI to manage employee compensation and work evaluations. They use AI to analyze data of customer ratings and feedback, as well as conversations taken over the phone.⁴¹ For example, some call centers use speech recognition technology to analyze and score an employee’s performance and sentiment during a call.⁴² Employers then factor

³⁷ *Id.*

³⁸ Alexis C. Madrigal, *Your Job, Their Data: The Most Important Untold Story About the Future*, ATL. (Nov. 21, 2013), <https://www.theatlantic.com/technology/archive/2013/11/your-job-their-data-the-most-important-untold-story-about-the-future/281733/>.

³⁹ O’Neil, *supra* note 32.

⁴⁰ PEREZ, *supra* note 35, at 107–08.

⁴¹ See Robin Gareiss, *Businesses Can Achieve 360-Degree Customer View Using AI*, TECHTARGET (Sept. 19, 2019), <https://searchcustomerexperience.techtarget.com/tip/Businesses-can-achieve-360-degree-customer-view-using-AI>; Chiradeep BasuMallick, *How AI-Driven Performance Feedback Can Make You A Better Manager*, HR TECHNOLOGIST (Oct. 22, 2019), <https://www.hrtechnologist.com/articles/performance-management-hcm/ai-driven-performance-feedback/>.

⁴² See Paul Jackson, *Conversation Intelligence Software: The Power of AI for Call Centers*, VELVETECH (Sept. 15, 2021), <https://www.velvetechnology.com/blog/conversation-intelligence-for-call-centers/>; see also Roland Hary, *Leveraging Speech Recognition Technology in a Call Center*, VCC LIVE (Feb. 1, 2019), <https://vcc.live/blog/leveraging-speech-recognition-technology/>.

that analysis into performance reviews and bonus structures.⁴³ But, again, without more, if one feeds an algorithm biased data, the results are also biased. For example, because of the performance analysis and score from the speech recognition technology, employees of color are paid less than white employees despite having the same job, experience, and skill levels, then just inputting that data into an AI-based pay system could perpetuate that same inequity.⁴⁴

Some employers also offer wellness programs to assess employees' health conditions. They can use AI to analyze data gathered from health-focused assessments, questionnaires, and other forms of health testing.⁴⁵ The employers can then use that analysis to make inferences about an individual's health, which in turn inform personnel decisions.⁴⁶ Although a number of laws govern the protection of health data—the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Affordable Care Act (ACA), etc.—no law explicitly prohibits employers from using machine learning technology that analyzes and makes decisions based off of nongenetic information.⁴⁷ This leaves a significant gap in disability rights and health privacy laws generally, leaving room for civil rights abuses; for example,

⁴³ See *supra* note 42; see also Joanne Sammer, *Bringing Artificial Intelligence into Pay Decisions*, SHRM (Dec. 10, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/bringing-artificial-intelligence-into-pay-decisions.aspx>.

⁴⁴ See Nicol Turner Lee et al., *Algorithmic Bias Detection And Mitigation: Best Practice Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> (“Bias in algorithms can emanate from unrepresentative or incomplete training data or the reliance on flawed information that reflects historical inequalities. If left unchecked, biased algorithms can lead to decisions which can have a collective, disparate impact on certain groups of people even without the programmer’s intention to discriminate.”).

⁴⁵ See generally Laner Muchin, *Recent Class Action Lawsuit Involving Yale University’s Wellness Program is A Cautionary Tale for Employers*, JDSUPRA (Aug. 19, 2019), <https://www.jdsupra.com/legalnews/recent-class-action-lawsuit-involving-11276/> (discussing anticipated legal challenges to employer wellness programs in light of the lawsuit).

⁴⁶ *Id.*

⁴⁷ Eric Horvitz & Deidre Mulligan, *Data, Privacy, and the Greater Good*, SCI. MAG., July 17, 2015, at 253–55.

making harmful employment decisions based on personal health data, similar to the situation arising from Kronos's personality test, explained above.⁴⁸

B. Government work: the Department and the EEOC

The Department's Civil Rights Division recognizes that using AI can violate civil rights laws, and the Division's Employment Litigation Section, Disability Rights Section, and Immigrant and Employee Rights Section are interested in hearing from individuals who believe that an employer's use of AI has discriminated against them on the basis of race, national origin, citizenship status, religion, age, or disability.

The EEOC also has had occasion to address some of the AI issues arising in the employment context. In 2016, the EEOC held a public meeting to hear from experts on the use of AI in employment decisions and determined that employers using AI in their hiring practices could lead to unintended discrimination and potential liability.⁴⁹ On December 8, 2020, 10 U.S. Senators sent a joint letter to the EEOC Chair, urging the Commission "to investigate and/or enforce against discrimination related to the use of" AI in hiring.⁵⁰ And in February 2021, the EEOC Chair highlighted her commitment to "strategic" efforts in her first public speech,⁵¹ which includes using AI to sort through applications; personality tests; and using terms such as "young," "energetic," "recent graduate," "men only," or "women only" in job searches.⁵²

⁴⁸ See O'Neil, *supra* note 32.

⁴⁹ See Press Release, Equal Emp. Opportunity Comm'n, Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016).

⁵⁰ Press Release, Michael Bennet U.S. Senator for Colorado, Bennet, Colleagues Call on EEOC to Clarify Authority to Investigate Bias in AI-Driven Hiring Technologies (Dec. 8, 2020).

⁵¹ See Paige Smith, *New EEOC Chair Vows Greater Push Against Systemic Discrimination*, BLOOMBERG L. (Feb. 18, 2021), <https://news.bloomberglaw.com/daily-labor-report/new-eeoc-chair-vows-greater-push-against-systemic-discrimination>.

⁵² While the EEOC has not yet announced its strategic enforcement plan for the next four years, it has updated its website to highlight new areas that the EEOC considers ripe for "strategic" actions. See *Systemic Enforcement at the*

Government attorneys should be on the lookout for employment issues arising from AI use. They can also seek guidance from, or refer matters to, the Department and the EEOC when faced with these issues. Attorneys should be mindful that, as with any hiring and employee management process, AI systems could potentially implicate Title VII of the Civil Rights Act of 1964, the ADA, the Age Discrimination in Employment Act (ADEA), and the Immigration and Nationality Act (INA). All of those laws prohibit intentional discrimination, unintentional discrimination, or both. Courts have upheld claims of intentional discrimination based on allegations of unconscious or implicit bias.⁵³ And as explained, AI systems can manifest unconscious bias based on the biases of the programmer and data input. Alternatively, employers could face liability for unintentional discrimination if using AI adversely impacts members of a protected class; for example, Amazon’s resume screening tool discriminating against women or HireVue’s voice and facial recognition software disfavoring persons based on disabilities.⁵⁴ Or, for ADA cases, employers can be held liable for screening out applicants with disabilities based on selection criteria or qualification standards;⁵⁵ for example, companies relying on Kronos’s personality testing to reject an applicant with a disability.

EEOC, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/systemic-enforcement-eeoc>.

⁵³ See *e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977); see also *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (holding plaintiff established prima facie discrimination case by relying on evidence of employer’s implicit bias).

⁵⁴ Courts might look to cases analyzing employers’ use of standardized tests in the application and promotion process, which have established that if such tests disparately impact protected groups of employees, the employer must show the tests are reasonable and job-related. See *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

⁵⁵ See *Konopasky*, *supra* note 30, at 230–49 (discussing how employers can be held liable under the ADA by using tests of fit that screen out individuals with disabilities).

III. Conclusion

AI offers many benefits to employee hiring and other personnel decisions. But without adequate protections, these benefits can come at a cost to civil rights. The legal landscape in this area is developing. By discussing the use of AI in various employment contexts and the civil rights issues that may follow, attorneys can begin identifying and taking the appropriate steps to address these issues. Lawyers and legislators are faced with the task of understanding developing technology and how its use impacts civil rights to then discern the governing legal framework and respond accordingly. And, as explained, the Department and other federal agencies are actively taking steps to participate in this process. Online or offline, we must continue to protect civil rights by tackling new obstacles that arise in our developing world.

About the Authors

Natasha Babazadeh is a trial attorney in the Civil Rights Division's Appellate Section, handling appeals for a broad range of civil rights matters. Before joining the Division, Natasha clerked on the Sixth Circuit Court of Appeals for the Hon. Jane B. Stranch and on the Northern District of Illinois for the Hon. Harry D. Leinenweber. Natasha also served as the Appellate Advocacy Fellow with EPIC. She is a graduate of New York University and of the David J. Epstein Program in Public Interest Law and Policy at the University of California, Los Angeles School of Law.

Angela Washington is a legislative and policy analyst in the Civil Rights Division's Policy and Strategy Section. Angela previously worked as a Paralegal Specialist in the Civil Rights Division's Criminal Section. Angela is a graduate of the University of Michigan and the American University Washington College of Law.

Tiffany Brown is a legislative and policy analyst in the Civil Rights Division's Policy and Strategy Section. Tiffany was formerly a Policy Analyst at the Health Resources and Services Administration (HRSA) and a health care consultant in the private sector, focusing on Medicare, Medicaid, and private insurance. She also spent time in the Department's Antitrust Division as a Paralegal Specialist. She is a graduate of Duke University and the George Washington University Law School.

Building a Civil Rights Practice for Civil Enforcement in a United States Attorney’s Office

Michael Goldberger
Chief of Civil Rights
Civil Division
Eastern District of New York

Jennifer A. Serafyn
Chief, Civil Rights Unit
District of Massachusetts

Michael J. Butler
Civil Rights Coordinator
Middle District of Pennsylvania

I. Introduction

The Department of Justice (Department) has a unique, overarching duty to protect civil rights. As the principal civil rights enforcement agency in the United States, the Department’s Civil Rights Division (Division) is responsible for investigating and prosecuting a wide range of cases touching on almost every facet of daily life—housing, employment, rights of individuals with disabilities, law enforcement conduct, voting rights, and education, among others. The Division, which Congress created through the Civil Rights Act of 1957, “enforces federal statutes prohibiting discrimination on the basis of race, color, sex . . . disability, religion, familial status, national origin, and citizenship status.”¹

A key component of the Department’s civil enforcement of civil rights is the work of talented litigators in U.S. Attorneys’ Offices (USAOs) across the country, enhanced by their knowledge of local issues and organizations, their familiarity with the judges and legal community in the district, and their honed litigation skills. Indeed, in recognition of the important contributions that USAOs offer in enforcing civil rights, on May 27, 2021, Attorney General Merrick B. Garland encouraged every USAO to designate both a civil and

¹ *About the Division*, DEP’T OF JUST., <https://www.justice.gov/crt/about-division> (updated Sept. 22, 2021).

criminal Civil Rights Coordinator, recognizing the importance of USAOs in civil enforcement of civil rights.²

This is, then, a great time to start or expand the civil rights practice in your USAO. This article offers ideas and recommendations, based on the authors' collective experience, on how to do just that. It includes tips on structuring and staffing a practice, working with Division attorneys, identifying resources, and conducting outreach. It is intended as a place to start for any USAO that wants to become involved in civil rights work or grow its practice in this important area.

II. Background

A. The USAOs' role in civil enforcement of civil rights has grown over the years

For decades, attorneys in the Division, based in Washington, D.C., performed almost all of the Department's civil enforcement of civil rights. There were, however, a few exceptions. Beginning as early as the 1970s through the 1990s, a few USAOs, including the Southern and Eastern Districts of New York and the Eastern District of Michigan, established civil rights practices with one or more Assistant U.S. Attorneys (AUSAs) assigned to spend significant time on affirmative civil rights cases. In some cases, AUSAs partnered with Division trial attorneys.

Beginning in the 1990s, the Division's Disability Rights Section partnered with dozens of USAOs to review and resolve complaints filed under the Americans with Disabilities Act (ADA) in their districts. Similarly, over two dozen USAOs worked with the Division's Housing and Civil Enforcement Section on Fair Housing Act cases where either party to an administrative complaint filed with the U.S. Department of Housing and Urban Development "elected" to have the complaint resolved in federal district court (known as "HUD election cases").³

² Memorandum from Merrick Garland, Att'y Gen., Dep't of Just. on Improving the Dep't's Efforts to Combat Hate Crimes and Hate Incidents to Dep't of Just. Emps. 3 (May 27, 2021).

³ See *The Fair Housing Act*, DEP'T OF JUST., <https://www.justice.gov/crt/fair-housing-act-1> (updated June 16, 2021); See, e.g., Consent Decree, *United States v. Shawmut Mortgage Co.*, No. 93-cv-2453 (D. Conn. Dec. 13, 1993), ECF No. 9.

USAO interest and involvement in civil enforcement of civil rights has continued to steadily grow, and civil AUSAs have increasingly been provided training and support to carry out civil rights work. Beginning in 2009, the Division institutionalized its program to partner with USAOs on matters arising in all the Division’s civil litigating sections. Over the next few years, the number of USAOs with civil rights practices boomed, and the Department funded more than 60 USAO civil rights positions, including AUSAs, intake specialists, and investigators to support their efforts. As of 2021, at least half of the 93 USAOs have active civil rights practices working cases as lead attorneys and on teams with Division trial attorneys.

B. A USAO civil rights practice, like the Division’s, is diverse and challenging

Civil rights work within the Division and across USAOs is strikingly broad. The Division has statutory authorization to enforce more than 25 statutes, including the Fair Housing Act,⁴ the ADA,⁵ Title VII of the Civil Rights Act,⁶ the Civil Rights of Institutionalized Persons Act,⁷ the Voting Rights Act,⁸ Title VI of the Civil Rights Act,⁹ and the Equal Educational Opportunities Act.¹⁰

The Division has allocated the civil enforcement of civil rights cases among the following sections: Appellate (APP), Disability Rights (DRS), Educational Opportunities (EOS), Employment Litigation

⁴ 42 U.S.C. §§ 3601–3619.

⁵ 42 U.S.C. §§ 12101–12213.

⁶ 42 U.S.C. §§ 2000e–2000e-17.

⁷ 42 U.S.C. §§ 1997–1997j.

⁸ 52 U.S.C. §§ 10301–10702.

⁹ 42 U.S.C. §§ 2000d–2000d-7.

¹⁰ 20 U.S.C. §§ 1701–1758. There are many additional types of cases that the general public considers to be “Civil Rights” cases, but for which the Department does not have authority to bring suit. For example, although the Attorney General is authorized to bring suit to address a *pattern or practice* of violations of 42 U.S.C. § 1983 under the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601, the Department does not have authority to bring suit under 42 U.S.C. § 1983 alleging that state actors violated a particular *individual’s* rights. See *Conduct of Law Enforcement Agencies*, DEP’T OF JUST., <https://www.justice.gov/crt/conduct-law-enforcement-agencies> (updated Apr. 21, 2021) (explaining that “[h]arm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws.”).

(ELS), Federal Coordination and Compliance (FCS), Housing and Civil Enforcement (HCE), Immigrant and Employee Rights (IER), Special Litigation (SPL), and Voting Rights (VOT).¹¹ The Division's Policy and Strategy Section (POL) assists USAOs and serves as a liaison between the Executive Office of U.S. Attorneys (EOUSA), USAOs, and the Division on cross-cutting issues.¹² USAOs work with all these sections.

III. To start: determine the best structure for a civil rights practice in your USAO

Starting or expanding a program for civil enforcement of civil rights not only supports the broader Department mandate to combat civil rights violations but can also benefit the USAO itself by increasing public engagement, enhancing outreach, and providing remedies not available through criminal enforcement of civil rights. Availability of resources, however, is always a factor, and each USAO must evaluate the most effective and efficient way to structure the program in its particular district. A good way to start is with a strategic plan.

A. Creating a strategic plan

If you look at the established practices across USAOs, you will see that different districts have strategically structured their civil rights enforcement programs differently. While almost every district now has a designated civil rights coordinator for civil enforcement, USAOs have flexibility in creating a structure that makes sense for them. For example, some districts have a separate unit or section with civil AUSAs and staff dedicated exclusively to civil rights work. Others include civil rights as part of a broader affirmative civil enforcement practice. Some distribute civil rights casework to generalists throughout the civil division, while others have only one AUSA, who

¹¹ *About the Division*, DEP'T OF JUST., <https://www.justice.gov/crt/about-division> (last updated Sept. 22, 2021).

¹² These sections, a description of their work, and the statutes they enforce can be found on the Division website. *Civil Rights Division*, DEP'T OF JUST., <https://www.justice.gov/crt> (last visited Jan. 13, 2022). In addition, press releases describing successful civil rights cases brought by the Division and USAOs are available at *Civil Rights Division Press Releases & Speeches*, Dep't of Just., <https://www.justice.gov/crt/civil-rights-division-press-releases-speeches> (last visited Jan. 13, 2022).

may be the Civil Rights Coordinator or the Civil Chief, performing the work. Some districts are exploring the creation of a civil rights unit that encompasses both civil and criminal civil rights work. Each USAO needs to determine which of these structures works best for them based on the office's size, available resources, and the emphasis the district wishes to place on civil rights work.¹³

Several districts beginning or expanding their civil rights practice have drafted a strategic plan or proposal. These plans outline the goals, structure, areas of focus, and an initial outreach plan for the practice. The process of developing a strategic plan and the discussions between key members of the USAO's civil division and leadership considering the proposal can build support and buy-in for the practice. The plan can also provide benchmarks to measure progress. Civil Rights Coordinators in both the Division and EOUSA can provide further information and connect USAOs with districts that have already gone through the process.

The strategic plan for structuring a new or expanded civil rights practice should also address review and supervision of civil rights work, whether by a supervisory AUSA overseeing a civil rights unit, the Civil Chief, or someone else. Consideration must also be given to coordination with the Division, whose authorization is required before you file significant documents and or take significant actions in civil rights cases.

Finally, the strategic plan should address the availability and assignment of non-AUSA staff, including legal assistants, paralegals, investigators, and outreach specialists. From community engagement, to complaint intake, to document management, and everything in between, robust civil rights programs are supported by a range of dedicated and talented staff members.

B. How to structure your civil rights practice may depend on the size of your office and available resources

A key issue in creating or expanding a civil rights practice in a district may be the size of the USAO, which may generate different challenges or benefits for a civil rights practice. EOUSA categorizes

¹³ Over the years, the Department has provided resources to USAOs to hire dedicated Civil Rights AUSAs. If new funding for AUSAs is made available, you may consider applying.

USAOs into four sizes: small, medium, large, and extra-large, based on the number of allocated attorneys. Offices like the District of Vermont and the Western District of Wisconsin are small districts; the Northern District of Florida and the Western District of Michigan are medium districts; the District of Oregon and the Western District of New York are large districts; and the Eastern District of New York and the District of Arizona are extra-large districts.

1. Small offices

Small does not mean the area the district serves is geographically small. Indeed, the District of Vermont encompasses the entire state—about 9,217 square miles—and has about 645,000 citizens.¹⁴ In contrast, the Eastern District of New York (serving Brooklyn, Staten Island, Queens, and the “suburban counties on Long Island”) may be smaller in square miles than the District of Vermont but has about 8 million residents.¹⁵ Small probably does, however, mean fewer resources. In a smaller district, there are often fewer AUSAs, and they have multiple duties and cover larger geographic areas. Some civil AUSAs in small offices also do criminal work. The Civil Rights Coordinator may also be the Deputy Security Manager, the Health Care Fraud Coordinator, and the Civil Chief. Creating a civil rights practice in such an office will require more juggling, but the good news is that, if an AUSA can already juggle four knives in the air, one more probably will not hurt—one just needs to be more careful.

2. Extra-large offices

In extra-large offices, AUSAs may specialize or be on a specialized team. The number of potential civil rights cases will probably exceed the time that one AUSA can dedicate to the practice, so extra-large USAOs may need a team of AUSAs to work on civil rights matters. For example, after several years developing their civil rights practice, the District of Massachusetts now has a stand-alone Civil Rights Unit with four AUSAs dedicated to civil rights.¹⁶ The Eastern District of New York has five AUSAs on its Civil Division Civil Rights Team,

¹⁴ *QuickFacts Vermont*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/VT>.

¹⁵ *See Home*, U.S. ATT’Y’S OFF., E. DIST. OF N.Y., <https://www.justice.gov/usao-edny> (last visited Nov. 22, 2021).

¹⁶ *See Outreach & Initiatives*, U.S. ATT’Y’S OFF., DIST. MASS., <https://www.justice.gov/usao-ma/civil-rights> (last visited Nov. 22, 2021).

with a dedicated Civil Rights Chief, a full-time investigator, and four AUSAs who concentrate on civil rights work while handling other types of cases and responsibilities.¹⁷

3. Medium and large offices

“Medium and large offices face issues similar to those of both small and extra-large offices.” A civil division in one of these offices may require AUSAs to perform numerous duties. Because they are somewhat larger than small offices, medium and large offices have the potential to develop a robust civil rights docket.

IV. Developing a civil rights practice is unlike any other work in your USAO

Successful civil rights practitioners in USAOs are part entrepreneur, part educator, and part litigator. Civil enforcement of civil rights involves numerous unique factors not found in criminal prosecution or most civil defensive or affirmative work in USAOs.

Unlike other affirmative civil practices, there are few natural sources of casework. Although agencies like HUD’s Office of Fair Housing and Equal Opportunity and the Equal Employment Opportunity Commission (EEOC) do refer some matters to the Department, USAOs often generate a large percentage of their own civil rights cases. Thus, outreach is a key component of civil enforcement of civil rights. USAOs develop sources of casework through networking and outreach with the Division, other USAOs, local and state governmental agencies, and community advocates. USAOs also conduct outreach directly to the public through mechanisms such as community meetings, social media, and press releases.

Most affirmative civil rights cases also do not have the benefit of an underlying investigation or the work of agents. Thus, AUSAs (and any available USAO investigators, analysts, or paralegals) perform their own investigations at the onset of a matter. Generally, a thorough investigation must be completed before seeking authority to litigate,

¹⁷ Press Release, U.S. Att’y’s Off., E. Dist. N.Y., Acting United States Attorney Mark J. Lesko Announces Formation of Civil Rights Team in the Office’s Civil Division (June 18, 2021); *see also Civil Division*, U.S. ATT’Y’S OFF., E. DIST. N.Y., <https://www.justice.gov/usao-edny/civil-division> (updated Sept. 8, 2021).

and you must try to settle a matter before filing suit. These matters typically move much more slowly and can be much more labor intensive than many of the civil cases that USAOs generally handle. Results often come after years of effort.

Finally, as discussed above, the Department enforces more than 25 diverse and complex statutes, far more than in any other civil affirmative practice. Thus, civil enforcement of civil rights requires an unusual breadth of knowledge.

To develop an effective civil rights practice, it is critical to foster relationships with colleagues in the Division, in your community, and with other USAOs and state and local governmental and other federal entities in your area. Below, we explain just some of the measures that USAOs around the country have employed to develop strong civil rights practices.

A. Develop a working relationship with the Division

As we noted above, the Division previously handled most civil rights cases exclusively before the push to expand partnerships with USAOs. Division attorneys may have been handling civil rights cases in your district for years. As such, it still maintains authority to approve most significant steps in civil rights cases, whether it is opening an investigation or finalizing a settlement.

Every section of the Division has a designated point of contact (POC) for the USAO community. A good initial step in developing your practice is to reach out and open the lines of communication. While Division policy now requires attorneys to notify USAOs about significant matters in their districts, personnel changes and oversight sometimes means that there may be ongoing cases in your district that are not on the district's radar. If you are lucky, you may learn of an open case or two that you can become involved in quickly. Some older cases may involve consent decrees or settlement agreements that require timely compliance, and you can offer to assist with enforcing the decree or agreement.¹⁸

¹⁸ One great way to get experience with the Division is to reach out to DRS and work on a polling place survey in your district. You will find more information about that in this issue of the *Department of Justice Journal of Federal Law and Practice*.

1. Obtain referrals and support from the Division

The Division offers significant support for USAOs doing civil rights work. The section POCs can provide valuable assistance helping you to understand Division procedures and share Division resources, such as sample documents. The POCs and the other section attorneys are also subject matter experts and can offer insights on how to handle tricky issues that can arise during investigations and litigation.

The Division also offers AUSA webinars and other training about their work and current Division initiatives. Beyond just providing information, the trainings can help identify leads for new cases.

Another benefit of working with the Division is on-the-job training. One great example is an investigation that led to settlement between the United States and the Pennsylvania Department of Education (DOE) to address allegations that the DOE discriminated against students with disabilities or who were English Language Learners.¹⁹ Between 2014 and 2019, the Division's EOS worked collaboratively with the USAOs for the Middle, Eastern, and Western Districts of Pennsylvania to achieve this far-reaching, important settlement.²⁰

The Division can also be a good source of case referrals. Disability rights cases are a great way of starting a civil rights practice. DRS's website, [Ada.gov](https://www.ada.gov), receives thousands of complaints annually.²¹ Through the U.S. Attorneys Program for ADA Enforcement, you can ask DRS to refer to you complaints made in your district. Further, because it has the oldest established USAO program, DRS has four attorneys who each cover a few judicial circuits, and they are available to assist USAOs and coordinate approvals. You can get good advice regarding the law, DRS's experience with the type of case, and the documentation needed to engage in settlement discussions or litigation. Once your USAO takes a case, you should communicate with DRS as it progresses.

¹⁹ Press Release, Dep't of Just., Pennsylvania Department of Education Agrees to Resolve Federal Civil Rights Investigation Into Alternative Education Programs and Implement Reforms (Mar. 25, 2019).

²⁰ *Id.*

²¹ See *Information and Technical Assistance on the Americans with Disabilities Act*, DEP'T OF JUST., <https://www.ada.gov/> (last visited Nov. 22, 2021).

2. Learn about the Division's Initiatives

You also would be wise to familiarize yourself with the Department's initiatives. Periodically, the Division focuses its energies nationally on particular forms of discrimination. At present, these include combatting redlining, sexual harassment in housing, medication-assisted opioid treatment, servicemembers and veterans, and service animals.²² Division attorneys typically put together a toolkit with helpful information, such as sample documents and information about how to open an investigation and litigate a matter. If you are interested in one of the Division's initiatives, contact the USAO POC in the section overseeing the initiative. The POC can help you get started by explaining how other USAOs have initiated cases and offer suggestions for how to do that in your district. In some instances, Division sections will refer a matter to the USAO to handle as the lead, while other cases may be handled by a team that includes both Division attorneys and AUSAs. The POC can also help you develop materials and presentations to educate community groups, local law enforcement, and others on these initiatives.

B. Connect with your colleagues in other USAOs

Building a civil rights practice entails not only getting to know your colleagues within the Division, but also developing relationships with your counterparts in USAOs across the country. Established civil rights coordinators or civil rights unit chiefs can offer invaluable information and samples as you develop your strategic plan and establish your practice. It can be especially helpful to get to know your counterparts in offices that are similar in size as well as in bordering districts. For example, the AUSAs doing civil rights work in the New England districts are frequently in touch to share information, bounce ideas off each other, and conduct joint outreach. Civil rights

²² See Press Release, Dep't of Just. Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021); *Sexual Harassment in Housing Initiative*, DEP'T OF JUST., <https://www.justice.gov/crt/sexual-harassment-housing-initiative> (updated Nov. 7, 2018); Memorandum from the Att'y Gen. on Dep't of Just. Strategy to Combat Opioid Epidemic to Heads of Dep't Components (Sept. 21, 2016); *Servicemembers and Veterans Initiative*, DEP'T OF JUST., <https://www.justice.gov/servicemembers> (last visited Nov. 19, 2021); *Frequently Asked Questions about Service Animals and the ADA*, DEP'T OF JUST. (July 20, 2015), https://www.ada.gov/regs2010/service_animalqa.html.

coordinators also should work with the national civil rights coordinator in EOUSA and Division POCs to join the Affirmative Civil Rights Listserve, participate in quarterly conference calls, and receive invitations to civil rights webinars and other events.

C. Reach out to federal, state, and local governmental entities

In developing a civil rights practice, some of your most valuable resources lie within other governmental agencies—federal, state, and local. Most federal agencies have an Office of Civil Rights, responsible for enforcing certain laws at the administrative level and addressing violations of, among other things, Title VI, which requires recipients of federal financial assistance, including state and local governmental entities, to comply with anti-discrimination requirements.²³ At HUD, the Office of Fair Housing and Equal Opportunity is also responsible for investigating and administratively addressing allegations by individuals of housing discrimination.²⁴

Establishing a relationship with agency staff in your region can help you to identify potential cases. Most of these agencies do not have litigation authority. Accordingly, if a matter cannot be conciliated after the agency makes a finding of discrimination, it may be referred to the Department. In certain circumstances, even before a matter is ripe for referral, the Division and USAOs work with agencies such as HUD or the EEOC during the administrative investigatory process, helping to strengthen the investigation even before it is formally referred to the Department. The Department has a Memorandum of Understanding with the EEOC to do just that.²⁵ Also, most state and local governments have civil rights enforcement agencies. Building a working relationship with these agencies can be fruitful—collaborating and exchanging ideas frequently helps identify important issues and leads to new cases or matters.

Getting to know other officials in your area who work on civil rights issues has the added benefit of increasing communication and

²³ 42 U.S.C. §§ 2000d, 2000d-4a.

²⁴ See *About FHEO*, DEP'T OF HOUS. AND URB. DEV., OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo (last visited Nov. 23, 2021).

²⁵ Memorandum of Understanding Among the Dep't of Labor, the EEOC, and the Dep't of Just. (Nov. 3, 2020).

information sharing. In New York and New Jersey, the USAOs in the Eastern District of New York, the Southern District of New York, and the District of New Jersey participate in a Civil Rights Roundtable (the Chief of Civil Rights in the EDNY Civil Division is co-Chair of the Roundtable). This informal state, local, and federal inter-agency group meets regularly to discuss mutual interests and hosts education and outreach programs with community representatives and advocates throughout the New York City and New Jersey area. AUSAs in other parts of the country have established similar groups.

D. Explore educational programs, conferences, and speaking engagements

One particularly valuable way to develop case work is by raising your practice's visibility. Such efforts can take different forms, but you can get the word out about your practice by holding educational programs and conferences and by accepting public speaking engagements. Although arranging such programs can be time consuming, they help to highlight your office's work and outreach. Other administrative staff can help with logistics, and the Division POCs and civil rights coordinators in other districts can provide model invitations, presentations, and agendas.

E. Conduct outreach to community groups, advocates, and attorneys

Doing civil rights work in a USAO is like working at a big law firm in one key aspect—you eat what you kill. In other words, you and your colleagues who handle civil rights matters are primarily responsible for bringing in cases.

As you build your office's civil rights practice, it is important to reach out to others in your district who may be involved in civil rights work. This includes civil rights organizations, human rights commissions, law enforcement, other federal and state agencies, community groups, and even law school clinics.

Keep in mind that other parts of your office also conduct outreach. Consult frequently with your office's outreach coordinator and law enforcement coordinator. Leverage their connections and relationships, and where possible, combine forces. For example, your office's outreach coordinator or law enforcement coordinator may be attending a meeting of the major city police chiefs in your district and may be able to get a spot on the agenda to talk about civil rights

issues. Optimally, the civil rights coordinator, law enforcement coordinator, and outreach coordinator work together to enhance all the program's objectives and benefit the office as a whole.

F. Let the public know about your civil rights practice

The goal of outreach is to spread the word about your USAO's civil rights practice so that the public knows where to bring their civil rights complaints. Your office website can highlight your civil rights practice, link visitors to additional sources of information, and tell them how to submit a civil rights complaint. Some USAOs use a dedicated civil rights email address, telephone line, or both. You can include a link to the Division's complaint portal,²⁶ and can also advertise significant developments in your civil rights practice, such as the establishment or expansion of the program, a new initiative, or case accomplishments, in press releases and social media postings.

It is helpful to have district-specific materials to pass out at conferences, roundtables, and other events that explain the USAO's enforcement authority priorities. Include contact information. In particular, brochures can be an effective way to highlight your civil rights practice. For example, the District of Massachusetts has a brochure for its Civil Rights Unit that provides an overview of key civil rights statutes with examples of specific matters that the USAO brought and resolved. The District also has issue-specific brochures on housing, employment, the ADA, and servicemembers' and veterans' rights. The brochure focused on servicemembers' and veterans is provided to attendees at the office's annual Veterans Day commemoration.

If you decide to create brochures, flyers, or other printed materials, be sure to coordinate with the Division and your colleagues in other districts who may have samples. Also be sure to have the printed materials translated into the other languages spoken in your district, as well as in large print.

²⁶ See *Contact Us, How to report a civil rights violation*, DEP'T OF JUST., CIVIL RTS. DIV., <https://www.civilrights.justice.gov/#report-a-violation> (last visited Nov. 23, 2021).

G. Read and watch local news

Once you become familiar with the civil rights statutes the Department enforces, you can look for potential civil rights matters yourself. One of the simplest and most valuable ways to identify new projects or cases is to make sure you are plugged into local news, including newspapers, radio, television, and online content. The authors have found some of their best cases by reading the daily newspapers and contacting attorneys or advocates interviewed in the articles. Many of the issues of the day that the press loves to cover, whether it is institutional abuse of prisoners, individuals with serious mental illness, police misconduct, or voting, can quickly translate into USAO investigations. Your local knowledge and contacts, as well as your awareness of the issues that affect the residents of your district, are invaluable assets for identifying and bringing successful civil rights cases.

V. Conclusion

In the past, the role of USAOs in civil rights enforcement was limited by policy and available resources. Today, USAOs are recognized as important force multipliers in the fight against discrimination and civil rights violations. We encourage every USAO to join the fight, and we hope this article offers a helpful roadmap to developing an effective civil rights practice for civil enforcement.

About the Authors

Michael Goldberger is Chief of Civil Rights in the Civil Division of the U.S. Attorney's Office in the Eastern District of New York. Mr. Goldberger has served as an Assistant U.S. Attorney for 26 years, the last 15 as Civil Rights Chief. In that capacity, he has litigated virtually every type of Affirmative Civil Rights case independently and collaboratively with attorneys from the Civil Rights Division. He is a graduate of the University of Pennsylvania and Fordham University School of Law.

Jennifer A. Serafyn

A civil rights litigator, **Michael J. Butler**, is currently the Civil Rights Coordinator, Diversity Chairperson, Special Emphasis Program Manager, and civil Assistant U.S. Attorney for the Middle District of Pennsylvania (Harrisburg office). He has been with the USAO since January 14, 2004, and works on affirmative civil rights matters and defends individual employees of the United States in civil litigation. Born and raised in Philadelphia, Michael received his Juris Doctorate with honors in 1997 from Widener University School of Law—Harrisburg Campus (1997). Before law school, he worked as a paralegal in the investment management division of the law firm of Drinker Biddle & Reath. At Widener, he represented impoverished clients as a student on the Civil Law Clinic, was the research assistant for two professors, provided pro bono services to the Pennsylvania Coalition Against Rape, and was a board member of the law review. After law school, Judge A. Richard Caputo of the Middle District of Pennsylvania hired him as his first law clerk. After his clerkship, Michael worked at the law firm of Montgomery, McCracken, Walker & Rhoads, representing local governments and public officials in civil rights litigation.

Page Intentionally Left Blank

Friends of the Court: Amicus Briefs and Statements of Interest in Civil Rights Cases

Susan K. DeClercq
Chief, Civil Rights Unit
Eastern District of Michigan

Elizabeth Parr Hecker
Special Litigation Counsel
Appellate Section
Civil Rights Division

I. Introduction

One of the principal roles of the Department of Justice (Department) is protecting the civil rights of all individuals in the United States. It does this primarily through investigations and enforcement actions by the Civil Rights Division (Division), in partnership with U.S. Attorney's Offices. But private individuals also bring civil rights actions in federal court. The Department has a strong interest in ensuring that these cases' federal civil rights laws are interpreted and applied consistently across the country.

Indeed, from time to time, private civil rights litigation will present a particularly novel or important issue regarding the interpretation of a federal civil rights statute or constitutional provision. In those instances, the United States may wish to formally provide its views to assist the court in reaching the correct decision. This article discusses the two ways the Department may do this without becoming a party to the litigation: filing statements of interest under 28 U.S.C. § 517 in district courts and filing amicus briefs in the federal courts of appeals under the Federal Rules of Appellate Procedure, subject to authorization by the Solicitor General's Office.

II. Statements of interest

Apart from enforcing the federal civil rights laws through its own investigations and litigation, the Department can file briefs in trial court cases brought by private parties where the United States is not a party. These briefs, typically referred to as statements of interest (SOIs), enable the Department to present its view of the law to a court without formally intervening or otherwise becoming a party in a case.

Historically, SOIs were most often used in cases involving foreign policy or “federal propriety, administrative, or institutional interests.”¹ Over the past decade, however, the Department’s use of SOIs in civil rights cases has dramatically increased, serving as an effective mechanism for the Department to influence the development of federal civil rights laws across the country.

A. Authority and use

1. Authority for filing statements of interest

The Attorney General has broad statutory authority to send “any officer of the Department of Justice . . . to any State or district in the United States 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.”² Thus, so long as the United States has an articulable interest in a pending suit, it can submit an SOI in any federal district court or state court. This authority reflects the unique role of the United States to contribute to the national dialogue on important issues, such as civil rights, where resolution of a particular case may affect thousands, or even millions, of other individuals’ civil rights.

2. Statements of interest in context

The Department may file SOIs in virtually any stage of federal district court litigation.³ Although most commonly filed in the context of motions to dismiss, they may also be filed when the court is considering a motion for preliminary injunction, a motion for summary judgment, or similar motions. In addition, the Division has filed SOIs in cases where the government has related pending

¹ See Victor Zapana, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV., 227, 232 (2017).

² 28 U.S.C. § 517.

³ See, e.g., Statement of Int. of the U.S., *Diamond v. Ward*, No. 20-cv-453 (M.D. Ga. Apr. 22, 2021), ECF No. 65 [hereinafter *Diamond v. Ward* Statement of Int.] (motion for preliminary injunction); Statement of Int. of the U.S., *Holt v. Kelley*, No. 19-cv-81 (E.D. Ark. June 24, 2020), ECF No. 64 (motion for summary judgment); Statement of Int. of the U.S., *Coleman v. Brown*, No. 90-cv-0520 (E.D. Cal. Aug. 9, 2013), ECF No. 4,736 [hereinafter *Coleman v. Brown* Statement of Int.] (motion for enforcement of court orders and affirmative relief).

investigations⁴ and where the case may have an incidental effect on Department litigation.⁵

Generally, when the Department files an SOI, that document constitutes its sole involvement in the case. Sometimes, however, filing an SOI creates opportunities for the Department to participate in other aspects of a case. For example, the Department may be allowed to participate in subsequent phases of the case when it would assist the court, such as in settlement discussions,⁶ at oral argument,⁷ or as *amicus curiae* if the case is eventually appealed.

Although there are many circumstances in which the Department files SOIs, the scope of an SOI brief itself is usually fairly narrow. For example, although SOIs are typically filed in support of one side over another, in some cases they do not take a position on which party should prevail. This is because an SOI is generally limited to articulating the correct legal rule or principle, and the particular facts to which that rule or principle applies are often disputed. Also, SOIs often address only certain legal issues, while expressly taking no position on others.⁸ And sometimes, they simply provide guidance to the court on a framework within which to decide an issue,⁹ the remedies that may be available if liability is found,¹⁰ or to draw the court's attention to positions that the Department previously took in similar matters.¹¹

⁴ See, e.g., *Diamond v. Ward* Statement of Int., *supra* note 3; Statement of Int. of the U.S., *Weckhorst v. Kansas State Univ.*, No. 16-cv-02255 (D. Kan. July 1, 2016), ECF No. 32.

⁵ See, e.g., Statement of Int. of the U.S., *Youkhanna v. City of Sterling Heights*, No. 17-cv-10787 (E.D. Mich. Apr. 13, 2017), ECF No. 20.

⁶ See, e.g., Statement of Int. of the U.S., *Padilla v. City of New York*, No. 13-cv-0076 (E.D.N.Y. Nov. 22, 2013), ECF No. 41.

⁷ For example, the United States participated in oral argument after filing an SOI (titled *Amicus Brief*) in *Albanian Associated Fund v. Township of Wayne*, No. 06-cv-3217 (D.N.J. 2009), and *Garden State Islamic Ctr. v. Vineland*, No. 17-cv-01209 (D.N.J. 2020).

⁸ See, e.g., Statement of Int. of the U.S., *Greater Birmingham Ministries v. State of Ala.*, No. 15-cv-02193 (N.D. Ala. July 1, 2016), ECF No. 75.

⁹ See, e.g., Statement of Int. of the U.S., *Martin v. City of Boise*, No. 09-cv-540 (D. Idaho Aug. 6, 2015), ECF No. 276.

¹⁰ See, e.g., Statement of Int. of the U.S., *Ball v. LeBlanc*, No. 13-cv-368 (M.D. La. Aug. 2, 2013), ECF No. 64.

¹¹ See, e.g., *Coleman v. Brown* Statement of Int., *supra* note 3; Statement of Int. of the U.S., *Ga Advoc. Off. v. Labat*, No. 19-cv-1634 (N.D. Ga. June 20,

Courts generally have been receptive to the guidance provided by the Department through SOIs. Although there is no statistical data demonstrating the Department's success rate in these matters, courts are often appreciative that the Department submitted its views and frequently mention the Department's SOIs in their opinions¹² or quote language from the SOIs to support their decisions.¹³

B. The Civil Rights Division's use of Statements of Interest

The Division's use of SOIs substantially increased under the Obama Administration as part of the efforts of then-Assistant Attorney General for Civil Rights Thomas E. Perez, who viewed the United States' participation in private litigation as part of "the Division's commitment to using all of the tools available to ensure the nation's civil rights laws are enforced to the fullest extent possible."¹⁴ Since that time, the Department has used SOIs to advance the United States' civil rights interests in a variety of contexts and ways.

Most often, the issues the Department addresses in its SOIs align with the Division's enforcement jurisdiction,¹⁵ and the Department has filed SOIs in civil rights cases that span the enforcement interests of every section of the Division.¹⁶ For example, the Department often files SOIs to ensure that the courts correctly interpret and apply a particular federal statute over which the Division has enforcement

2019), ECF No. 43; U.S. Statement of Int., *Fortune Soc'y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 14-cv-06410 (E.D.N.Y. Oct.18, 2016), ECF No. 102.

¹² See, e.g., *T.R. v. Sch. Dist. of Phila.*, 223 F. Supp. 3d 321, 327 (E.D. Pa. 2016).

¹³ See, e.g., *Congregation Etz Chaim v. City of L.A.*, No. 10-cv-1587, 2011 U.S. Dist. LEXIS 158418 (C.D. Cal. July 11, 2011).

¹⁴ Thomas E. Perez, Assistant Attorney General, Oversight of the U.S. Department of Justice, Civil Rights Division, Hearing Before the S. Comm. on the Judiciary, 111th Cong. (Apr. 20, 2010).

¹⁵ See Statement of Int. of the U.S., *Nat'l Fair Hous. All. v. Facebook, Inc.*, No. 18-cv-02689 (S.D.N.Y. Aug. 17, 2018), ECF No. 48.

¹⁶ See *About the Division*, DEPT OF JUST, <https://www.justice.gov/crt/about-division> (updated Sept. 22, 2021).

authority.¹⁷ In recent years, however, the Department has used SOIs to advance its positions on a broader range of issues, such as student expressive speech¹⁸ and the constitutionality of COVID-19 restrictions.¹⁹ The Department has also partnered with other federal agencies on SOIs in cases where there is overlapping jurisdiction or interest.²⁰

Sometimes, SOIs are submitted as part of a formally announced Division initiative or strategy. For example, since 2009, the Department has filed more than 30 SOIs in cases involving the unnecessary segregation of persons with disabilities²¹ as part of the Division's "aggressive effort to enforce the Supreme Court's decision in *Olmstead v. L.C.*"²² SOIs have also been used to shape developing areas of the law. For example, the Department has filed SOIs relating to the emerging legal issue of gender identity in schools and the

¹⁷ See Statement of Int. of the U.S., Sch. Dist. of Phila., No. 15-cv-04782, ECF No. 19; see also Statement of Int. of the U.S., *Hacker v. Cain*, No. 14-cv-0063 (M.D. La. Dec. 7, 2016), ECF No. 203.

¹⁸ See, e.g., U.S. Statement of Int., *Shaw v. Burke*, No. 17cv2386 (C.D. Cal. Oct. 24, 2017), ECF No. 39; U.S. Statement of Int., *Uzuegbunam v. Preczewski*, No. 16-cv-04658 (N.D. Ga. Sept. 26, 2017), ECF No. 37; U.S. Statement of Int., *Young Am. Found. v. Napolitano*, No. 17-cv-02255 (N.D. Cal. Jan. 25, 2018), ECF No. 44; U.S. Statement of Int., *Speech First, Inc. v. Schlissel*, No. 18-cv-11451 (E.D. Mich. June 11, 2018), ECF No. 14; U.S. Statement of Int., *Brown v. Jones Cnty. Junior Coll.*, No. 19-cv-00127 (S.D. Miss. Dec. 9, 2019), ECF No. 23.

¹⁹ See, e.g., Statement of Int. on Behalf of the U.S., *Bayley's Campground, Inc., v. Mills*, No. 20-cv-00176 (D. Me. May 29, 2020), ECF No. 19; Statement of Int. on Behalf of the U.S., *Signature Sotheby's Int'l Realty, Inc. v. Whitmer*, No. 20-cv-00360 (W.D. Mich. May 29, 2020), ECF No. 14; Statement of Int. on Behalf of the U.S., *Bailey v. Pritzker*, No. 20-cv-00474 (S.D. Ill. May 22, 2020), ECF No. 15.

²⁰ See U.S. Statement of Int., *Brown v. Jones Cnty. Junior Coll.*, No. 19-cv-00127 (S.D. Miss. Dec. 9, 2019), ECF No. 23 (submitted jointly with U.S. Department of Education).

²¹ See *Olmstead Enforcement*, DEP'T OF JUST, https://www.ada.gov/olmstead/olmstead_cases_list2.htm#tidball (last visited Dec. 1, 2021) (collecting cases).

²² *Olmstead: Community Integration for Everyone*, DEP'T OF JUST., <https://www.ada.gov/olmstead/index.html> (last visited Dec. 1, 2021).

protections under Title IX of the Education Amendments of 1972.²³ The Department also has submitted SOIs in cases involving matters arising under long-standing controversies, such as what constitutes a substantial burden under the Religious Land Use and Institutionalized Persons Act.²⁴

C. The role of U.S. Attorney's Offices

U.S. Attorney's Offices (USAOs) often play a vital role in developing and filing SOIs. Sometimes, the Division will initiate the preparation of an SOI and then contact the relevant USAO to offer that office the opportunity to review the SOI and be a signatory on the brief. More and more, Assistant U.S. Attorneys (AUSAs) who handle civil rights cases are taking an active role in developing SOIs. Located in each federal judicial district, USAOs have unique opportunities to identify civil rights issues and cases in their community. AUSAs may become aware of potential matters through local attorneys and advocates, individual community contacts, local media reports, or other sources.

If an AUSA becomes aware of a good candidate for an SOI, the AUSA should contact the relevant section(s) of the Division.²⁵ When determining whether a case would be appropriate for an SOI, AUSAs should consider the factors set forth in section III, *infra*. Practical considerations, such as timing and available resources, are also critical. Thus, the AUSA should provide as much information as possible about the case and its procedural posture to assist with the decision of whether to file an SOI, including whether the AUSA is interested in preparing the first draft of the brief.

²³ Education Amendments of 1972 tit. IX, 20 U.S.C. §§ 1681–1688V; *see, e.g.*, Statement of Int. of the U.S., B.P.J. v. West Va. State Bd. of Educ., No. 21-cv-00316 (S.D.W. Va. June 17, 2021), ECF No. 42; Statement of Int. of the U.S., G.G. v. Gloucester Cnty. Sch. Bd., No. 15-cv-00054 (E.D. Va. June 29, 2015), ECF No. 28.

²⁴ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5; *see, e.g.*, U.S. Statement of Int. in Support of Neither Party, Thai Meditation Ass'n of Ala. v. City of Mobile, No. 16-cv-00395 (S.D. Ala. May 7, 2021), ECF No.199; U.S. Statement of Int. in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment, Congregation Etz Chaim v. City of L.A., No. 10-cv-1587 (C.D. Cal. Apr. 28, 2011), ECF No. 134.

²⁵ *See* JUSTICE MANUAL 8-2.170C.

Because every SOI must be reviewed and approved by the Division's senior leadership, the AUSA should contact the Division as soon as possible. Regardless of the nature of the issue, the briefing schedule must allow enough time for the SOI to be drafted, approved, and filed. Allowing for sufficient time also gives the Division time to evaluate the case in light of similar issues that may be pending in other districts or appellate courts.

III. Amicus briefs

Like SOIs, briefs as “amicus curiae” (meaning, “friend of the court”) afford the Division an opportunity to set forth its views in cases where the United States is not a party. While SOIs are filed in trial courts, amicus briefs are filed in federal (and sometimes state) courts of appeals.²⁶ And like SOIs, amicus briefs play an important role in helping courts reach decisions and in shaping the law in cases involving the interpretation or application of a statute or constitutional provision the Division enforces. Unlike SOIs, amicus briefs require authorization from the Solicitor General's Office and are governed by the Federal Rules of Appellate Procedure.²⁷

A. Obtaining approval to file amicus briefs

The Solicitor General must approve all requests for amicus participation by the Division, as well as the arguments the Division proposes to advance. The Division's Appellate Section coordinates the process of obtaining approval from the Solicitor General.

If the Appellate Section believes amicus participation is warranted in a particular civil rights case pending in a court of appeals, it will prepare a memorandum for the Solicitor General requesting authorization to participate as amicus. The Office of the Assistant Attorney General for Civil Rights will review the memorandum and, if it agrees with the Section's recommendation, transmit the memorandum and any accompanying documentation to the Solicitor General's Office. The Solicitor General's Office should receive this information no later than 30 days before an amicus brief would be

²⁶ The Department may also file amicus briefs in the Supreme Court through the Solicitor General's Office. This article does not discuss amicus practice in the Supreme Court.

²⁷ See 28 C.F.R. § 0.20(c).

due. If the Solicitor General approves of amicus participation, the Appellate Section will draft an amicus brief.

B. Procedure for filing amicus briefs

Unlike private parties, the United States may file an amicus brief in a federal court of appeals without first seeking the court's approval.²⁸

1. Timing

The United States may file an amicus brief in support of either party to the litigation or neither party. If filing in support of a party, the United States must file its amicus brief within seven days after the party it is supporting files its principal brief.²⁹ If the United States files an amicus brief on behalf of neither party, weighing in only on a certain issue without taking a position on how the court should rule on the merits, the amicus brief must be filed within seven days after the appellant's (or petitioner's) brief is filed.³⁰

2. Participating in oral argument

When the Division files an amicus brief, it may wish to participate in oral argument. If so, the Appellate Section, typically, will contact attorneys for the party it is supporting and request to share in oral argument time. The Appellate Section will then file a motion to participate. The court must approve any participation in oral argument by any amicus curiae participant, including the United States.³¹

C. The role of U.S. Attorney's Offices

U.S. Attorney's Offices are important partners in identifying private litigation where amicus participation by the Division may be appropriate. As provided in Justice Manual 8-2.150 and 8-2.170D, if a USAO identifies a potential amicus candidate being litigated in its district, it should immediately notify the Division's Appellate Section. Shortly thereafter, it should send an email or short memorandum to the chief of the Appellate Section stating the date of entry of the judgment in the trial court, the status of the appeal, the issues on which the USAO recommends amicus participation, the

²⁸ FED. R. APP. P. 29(a)(2).

²⁹ FED. R. APP. P. 29(a)(6).

³⁰ *Id.*

³¹ FED. R. APP. P. 29(a)(8).

reasons for the recommendation, and the names of any AUSAs familiar with the case. The matter will be promptly assigned to an Appellate Section attorney and reviewer. As discussed above, if the Appellate Section believes that amicus participation is warranted, it will seek authorization from the Solicitor General to participate as amicus. The Appellate Section will transmit any recommendation from the USAO to the Solicitor General, along with the Division's memorandum seeking authorization to participate.

The Appellate Section welcomes the assistance of a USAO in crafting legal strategy and reviewing draft amicus briefs in litigation arising in a USAO's district. If the United States participates in oral argument and the USAO has been substantially involved in the research, drafting, or review of the amicus brief, the USAO will be invited to participate in moot courts.

IV. Factors considered by the Division in filing amicus briefs and statements of interest

"Civil rights" cases encompass a vast swath of private litigation, from a gender discrimination case brought by an individual against her employer, to a class action alleging unconstitutional conditions of confinement by a major city prison system, to a nonprofit's suit against a state challenging voting laws. Because the Division does not have the resources to participate in all private civil rights cases pending across the country, it must focus its resources where they are most likely to have the greatest impact.

A. Participation is generally limited to seven categories

Justice Manual 8-2.170, which governs the enforcement of civil rights statutes and, more specifically, the standards for amicus participation and SOIs, sets forth seven categories of cases where participation is appropriate.³² These categories are listed below, along with a recent amicus brief example of each.

³² The Justice Manual is ambiguous as to whether Parts A and B of 8-2.170, which set out substantive guidelines, apply only to amicus briefs filed in courts of appeals or also to SOIs filed in district courts. In any case, because the same guidelines are relevant to both kinds of filings, Department

1. A court requests the United States' participation

Sometimes, a court of appeals asks the United States to file an amicus brief in a particular case or to address a particular issue in a case. For example, the First Circuit, sitting en banc, requested the United States' views in *Cushing v. Packard*,³³ a case arising under Title II of the Americans with Disabilities Act (ADA)³⁴ and section 504 of the Rehabilitation Act (RA).³⁵ In that case, New Hampshire state legislators with disabilities that made them vulnerable to complications from COVID-19 sued the Speaker of the New Hampshire House of Representatives in his official capacity, alleging that his refusal to permit the plaintiffs to participate remotely in legislative sessions violated the ADA and section 504.³⁶ The central issue on appeal was whether the common-law doctrine of legislative immunity barred the suit.³⁷ The Division filed an amicus brief arguing that legislative immunity did not apply because the plaintiffs' claim lay against the state, whereas legislative immunity shields individuals from personal liability only when they are performing legislative functions.³⁸

2. A party challenges the constitutionality of a federal civil rights statute

Though 28 U.S.C. § 2403 authorizes the United States to intervene in cases involving a challenge to the constitutionality of a federal statute, the Department also may file an amicus brief in such cases rather than intervene. For example, the Division has filed multiple amicus briefs defending the constitutionality of federal civil rights statutes against state claims of sovereign immunity.³⁹

attorneys should consider these criteria in evaluating whether to file either an SOI or an amicus brief.

³³ *Cushing v. Packard*, 994 F.3d 51 (1st Cir. 2021).

³⁴ Americans with Disabilities Act tit. II, 42 U.S.C. §§ 12131–12165.

³⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

³⁶ *Cushing*, 994 F.3d at 51.

³⁷ *Id.*

³⁸ Brief for the U.S. as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal, *Cushing*, 994 f.3d 51 (No. 21-1177).

³⁹ See, e.g., U.S. Br. as Amicus Curiae, *Clark v. Virginia Dep't of State Police*, No. 151857 (Va. S. Ct. May 17, 2016) (urging that Congress validly subjected States to suit under the Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108 Stat. 3149 (1994), because the

3. The case involves the interpretation of a civil rights statute, Executive Order, or regulation that the Department promulgated or is empowered to enforce

The Division often participates as amicus curiae in cases involving the interpretation of a statute or regulation that the Division enforces. For example, in *Chambers v. District of Columbia*,⁴⁰ the Division filed an amicus brief addressing whether an employer’s denial of a request for a lateral transfer—that is, a transfer involving the same pay and benefits—on the basis of the requesting employee’s sex violates Title VII’s prohibition of discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment.”⁴¹ The Division argued that all forced job transfers (and denials thereof) based on an employee’s race, color, religion, sex, or national origin are actionable under Title VII.⁴²

4. The case raises issues that will likely affect the Division’s enforcement jurisdiction

Similarly, when a case may establish precedent affecting the Division’s enforcement jurisdiction, the Division is likely to participate as amicus. In *Fox v. Gaines*,⁴³ the district court held that a housing provider’s actions designed to terminate a tenancy, taken in response to the tenant’s refusal to continue providing sexual favors in return for assistance with her monthly rent, did not constitute discrimination “because of” sex in violation of section 804(b) of the Fair Housing Act (FHA)⁴⁴ because the FHA did not prohibit sexual harassment. This

legislation was enacted pursuant to Congress’s War Powers); Brief for the U.S. as Intervenor and Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance, *King v. Marion Cnty. Cir. Ct.*, 868 F.3d 589 (7th Cir. 2017) (No. 16-3726) (arguing that Congress validly abrogated States’ sovereign immunity to suits under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12165).

⁴⁰ *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 1784792 (D.C. Cir. May 5, 2021).

⁴¹ See 42 U.S.C. § 2000e-2(a)(1).

⁴² U.S. Br. as Amicus Curiae, *Chambers v. District of Columbia*, No. 19-7098 (D.C. Cir. July 7, 2021).

⁴³ *Fox v. Gaines*, 4 F.4th 1293 (11th Cir. 2021).

⁴⁴ Fair Housing Act § 804, 42 U.S.C. § 3604(b).

conclusion conflicted not only with the Division’s long-standing interpretation of the FHA, but also with its years-long initiative combating sexual harassment in housing. The Division filed an amicus brief arguing that sexual harassment—including harassment where a property manager conditions certain rental terms on a tenant’s performance of sexual favors—violates the FHA when such conditions would not have been imposed but for the tenant’s sex.⁴⁵ The court of appeals reversed the district court, holding, in line with the Division’s amicus brief, that sexual harassment is actionable under the FHA if the plaintiff demonstrates that she would not have been harassed but for her sex.⁴⁶

5. The case raises important constitutional challenges under the First or Fourteenth Amendments to the U.S. Constitution

In some circumstances, the Division is empowered by federal statute to enforce the First and Fourteenth Amendments to the Constitution. For example, Title IV of the Civil Rights Act authorizes the Attorney General to enforce the Equal Protection Clause’s ban on sex discrimination in public schools,⁴⁷ and the Civil Rights of Institutionalized Persons Act allows the Attorney General to address constitutional violations in institutional settings.⁴⁸ As such, the Department has an interest in litigation involving the interpretation of those constitutional provisions.

Relatedly, the Division has filed amicus briefs addressing Fourteenth Amendment issues relating to Executive Orders. For example, in *Corbitt v. Taylor*, plaintiffs alleged that Alabama’s policy requiring that transgender individuals undergo “gender reassignment surgery” before they may amend the sex designation on their driver licenses violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ The Division filed an amicus brief relying on its interest in enforcing Executive Order No. 13,988, Preventing and

⁴⁵ U.S. Br. as Amicus Curiae, *Fox v. Gaines*, No. 20-12620 (11th Cir. Sept. 30, 2020).

⁴⁶ *Fox*, 4 F.4th at 1297.

⁴⁷ Civil Right Act of 1964 § 407, 42 U.S.C. § 2000c-6.

⁴⁸ Civil Rights of Institutionalized Persons Act § 5, 42 U.S.C. § 1997c(a)(1).

⁴⁹ Brief of the U.S. as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. Aug. 2, 2021) [hereinafter *Corbitt* Amicus].

Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which provides in part that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”⁵⁰ The brief argued that Alabama’s policy warranted heightened scrutiny because it discriminated on the base of sex and gender identity and that the State failed to show that the policy served important governmental objectives and was substantially related to achieving those objectives.⁵¹

6. The case raises issues that could significantly affect private enforcement of statutes enforced by the Division

Most federal civil rights statutes that the Division enforces also permit suits by private litigants. The Division has an interest in ensuring that courts do not erroneously limit the ability of private litigants to bring such actions. For example, in *Doe v. Dallas Independent School District*,⁵² a plaintiff sued a school district on behalf of her daughter, a high school student with disabilities, who was raped by another student in the restroom attached to her classroom.⁵³ The plaintiff alleged that the high school acted with deliberate indifference in violation of Title IX.⁵⁴ The district court dismissed the Title IX claim for failure to administratively exhaust the claim under the Individuals with Disabilities Education Act’s (IDEA) exhaustion provision.⁵⁵ The Division filed an amicus brief arguing that the IDEA’s exhaustion provision did not apply to plaintiff’s Title IX claim.⁵⁶ The court of appeals agreed with the United States that, where a person with disabilities seeks Title IX relief that a person without disabilities could also seek and requests relief that is different from, or in addition to, a free appropriate public

⁵⁰ Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (2021) (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation).

⁵¹ *Corbitt* Amicus, *supra* note 49.

⁵² *Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224 (5th Cir. 2019).

⁵³ *Id.* at 226–227.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Brief for the U.S. as Amicus Curiae Supporting Appellant and Urging Reversal, *Dallas Indep. Sch. Dist.*, 941 F.3d 224 (No. 18-10720).

education under the IDEA, the IDEA's exhaustion requirement does not apply.⁵⁷

7. The case presents special federal interests that are clear and are unlikely to be well-served by private litigants

There are certain circumstances where either party to a case may not have sufficient experience or resources to identify and address an important civil rights issue, or where neither party in the case is advancing an argument that aligns with the Department's view of the law. In such cases, the Division may decide to participate as amicus to set forth its views on the proper interpretation and application of the law.

One context implicating the former situation is pro se cases brought by individuals who are incarcerated. For example, in *Stansell v. Grafton Correctional Institution*,⁵⁸ a pro se inmate with a disability alleged that the prison denied him a reasonable accommodation in violation of Title II of the ADA and section 504 of the RA when it refused to provide him appropriate seating during visitation hours.⁵⁹ The district court dismissed plaintiff's complaint on the ground that he did not allege a complete exclusion from the prison's visitation program, but only defects in the visitation room's design features.⁶⁰ The United States filed an amicus brief arguing, among other things, that: (1) prison visitation is a service, program, or activity covered by Title II and section 504; and (2) a plaintiff need not allege a complete exclusion from the service, program, or activity to state a Title II or section 504 claim.⁶¹ The court of appeals vacated the dismissal of Stansell's Title II and section 504 claims and remanded the case back to the district court to determine whether the plaintiff had alleged a cause of action under the correct legal standard.⁶²

⁵⁷ *Dallas Indep. Sch. Dist.*, 941 F.3d at 224.

⁵⁸ *Stansell v. Grafton Corr. Inst.*, No. 18-3765, 2019 WL 3857021 (6th Cir. Aug. 18, 2019).

⁵⁹ *Id.* at *1.

⁶⁰ *Id.*

⁶¹ Brief for the U.S. as Amicus Curiae Supporting Plaintiff-Appellant and Urging Vacatur and Remand for Further Proceedings, *Stansell*, No. 18-3765.

⁶² *Stansell*, 2019 WL 3857021 at *1.

B. Factors the Department must consider in determining whether to participate as amicus

Justice Manual 8-2.170 instructs the Division to consider the following prudential factors in determining whether to recommend amicus participation in a particular case.

1. The importance of the issue to be addressed, the level of the court in which it is posed, and the probable impact of its resolution

Obviously, the more important the legal issue, the greater the likelihood that amicus participation is appropriate. A related factor is the procedural posture of the case. If the case is on appeal on interlocutory review or at the preliminary injunction stage, the issue may be more fact-intensive and the legal issue less developed, which may weigh against participation.

Also, if there is settled precedent on the legal issue in the particular circuit, it may be unnecessary for the Department to offer its views. For example, if a case raises the issue of whether certain conduct violates Title VII, that circuit has already addressed the issue, and there is no reason to believe the court can or will deviate from its precedent, the Division is unlikely to participate. On the other hand, if the court of appeals has not addressed the issue, but other courts of appeals have, the Division may consider amicus participation to ensure consistent and proper development of the law.

2. The probability that the Division will be able to substantially contribute to the resolution, including the competence of private counsel, the state of the record, and timeliness

The Division wants to participate in those cases in which it can make a difference and be helpful to a court. If the plaintiff is pro se, or if plaintiff's counsel is inexperienced in civil rights law or has never handled a case under the particular statute, the Division might consider submitting an amicus brief to ensure that the issues in the case are adequately framed and that all relevant caselaw and legislative history is before the court.

In other situations, a privately litigated case may implicate a novel and important issue, but there are numerous substantive factual disputes, or it is unclear from the record whether the plaintiff actually advanced the legal issue below. In these circumstances, the Division

might recommend against amicus participation. Similarly, where the Division does not learn of an amicus opportunity until the week before an amicus brief would be due, the Division likely would conclude that there is insufficient time to research, draft, and get approval for the filing of the brief.

3. The wisdom of amicus participation as distinguished from intervention

Where the Division believes that its interests would be better served by becoming a party to certain litigation, it may forego amicus participation and intervene instead. For example, if the United States may obtain certain relief that private plaintiffs may not, intervention may be appropriate. Justice Manual 8-2.140 provides that a USAO should notify the Division upon learning of a case in which intervention might be appropriate or when directed by a court to intervene.⁶³ Like amicus participation, intervention is subject to authorization by the Solicitor General.

4. The Civil Rights Division's resources

Where a particular matter might otherwise warrant amicus participation but, at the time, the Division lacks the resources necessary to research and draft an amicus brief, the Division may forego amicus participation.

V. Conclusion

SOIs and amicus briefs are powerful tools for the Department in the enforcement of federal civil rights laws. SOIs and amicus briefs can reach beyond the individual cases in which they are filed, as they publicly express the position of the United States. They often are cited by parties and courts in other cases. No other entity speaks with more authority than the United States with respect to the meaning and reach of federal civil rights statutes.

SOIs and amicus briefs allow the Department to shape the law, generally using far fewer resources than it would in its own investigations and cases: The brief is usually written by a single attorney, and the Department can rely on the facts as alleged or developed in the record, eliminating the need to litigate factual disputes. And, in keeping with the Department's unique role, it can

⁶³ JUSTICE MANUAL 8.2.140.

file SOIs and amicus briefs in federal court without the consent of the parties or the court. The Division and USAOs should continue their strong efforts to make the Department's voice heard as a friend of the court on important civil rights issues through SOIs and amicus briefs.

About the Authors

Susan K. DeClercq is Chief of the Civil Rights Unit of the U.S. Attorney's Office for the Eastern District of Michigan. Before beginning her current position in 2014, she was an AUSA in the office's Civil Rights and Defensive Litigation Units. Before joining the U.S. Attorney's Office, Ms. DeClercq was an associate at the firm of Skadden, Arps, Slate, Meagher, and Flom in Washington, D.C., and a law clerk for U.S. District Court Judge Hon. Avern L. Cohn.

Elizabeth Parr Hecker is a Special Litigation Counsel in the Civil Rights Division's Appellate Section, where she briefs and argues appeals of civil rights cases. Before joining the Appellate Section, she was a Senior Counsel in the Department of Justice's Office of Legal Policy. From 2008 to 2013, Ms. Hecker was a trial attorney in the Civil Rights Division's Housing and Civil Enforcement Section. She serves as an Adjunct Professor at George Washington University Law School. Before joining the Department, Ms. Hecker worked as an associate at two national law firms. Ms. Hecker clerked for the Honorable Marjorie O. Rendell on the United States Court of Appeals for the Third Circuit.

Page Intentionally Left Blank

Polling Place Accessibility

Michael J. Butler
Civil Rights Coordinator
Assistant U.S. Attorney
Middle District of Pennsylvania

Elizabeth Johnson
Senior Trial Attorney
U.S. Attorney Program Coordinator
Disability Rights Section
Civil Rights Division

I. Introduction: rolling backwards and climbing stairs to reach polling places

During a hot spring election day in the middle of Pennsylvania, the Department of Justice (Department) conducted a survey of polling places to determine their physical accessibility for voters with disabilities under Title II of the Americans with Disabilities Act (ADA).¹ While examining a parking lot, an Assistant U.S. Attorney, on his knees in his suit and tie with a level in hand, heard grumbles from poll workers that nobody with a disability complains about this polling place. At that moment, a van arrived in the lot. Two voters, one a wheelchair user, exited the vehicle and proceeded to the polling place. Attempting to maneuver up the steep lot, the voter using the wheelchair lost control of her chair and rolled backwards; she turned white, and her face was gripped with fear. Just before tipping over, her partner rushed to catch her. The poll workers went silent and sharply observed their shoes.

Individuals with disabilities often face challenges in voting that others do not. Obstacles like a cracked sidewalk or a grass walkway up to a building entrance may seem trivial to some, but these obstructions can prevent someone with a disability from entering a polling place. Indeed, climbing several stairs is an inconsequential requirement for many voters, but many individuals with mobility disabilities cannot climb those steps. Lifting the wheelchair or even the person up the steps (yes, this happened too on that hot spring

¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Title II, § 202, 104 Stat. 337 (1990), amended by 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. Part 35.

election day) is not a workable solution for at least two reasons. First, the risk of injury to both the voter and those lifting the voter increases. Second, being carried can be humiliating to wheelchair users who value their independence.

In November 2016, “[t]here were about 35.4 million voting[]age people with disabilities in the [United States]”—almost “[one] out of [six] people of voting age.”² In 2016, almost “one-third (30 percent) of voters with disabilities reported difficulty in voting at a polling place . . . , compared to only 8 percent of voters without disabilities.”³ Some of the most common difficulties included physical barriers at the polling place, such as steps at the entrance or steep slopes on the walkway.⁴ The ADA addresses these issues and provides standards for local election officials so that they can ensure their polling places are accessible to voters with disabilities.

This article will provide you with insight on how the ADA protects the rights of voters with disabilities to exercise their fundamental right to vote at local polling places and what the Civil Rights Division and U.S. Attorneys’ Offices (USAOs) are doing across the country to enforce those rights. This good work, emanating from the partnership between the Disability Rights Section (DRS) of the Civil Rights Division and the USAOs currently doing ADA polling place reviews, should continue, and other USAOs should consider making ADA polling place reviews a part of their civil rights practice. The USAO and DRS voting work has proven to be effective and valuable, but unfortunately, the work isn’t done, and ADA violations continue to exist.

II. The ADA requires polling places to be accessible

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any

² Lisa Schur, Professor Rutgers University, Disability, Voter Turnout, and Polling Place Accessibility, Presentation to the Nat’l Acads. of Scis., Eng’g, & Med.’s Comm. on the Future of Voting (June 12–13, 2017).

³ Lisa Schur et al., *Disability, Voter Turnout, and Polling Place Accessibility*, 98 SOC. SIC. Q. no. 5, 1374, 1374 (2017).

⁴ *Id.* at 1382.

such entity.”⁵ Title II covers anything and everything a government entity does and requires state and local governments to ensure that people with disabilities have a full and equal opportunity to vote.⁶ It applies to all elections, including federal, state, and local elections; to early and absentee voting; and to all aspects of voting, from voter registration to the selection of polling places and ballot drop box sites to the casting of ballots.⁷

The ADA’s Title II regulation requires that the selection of a polling site or location must not exclude individuals with disabilities and that the polling places be “accessible to and usable by individuals with disabilities.”⁸ Title II also requires jurisdictions to administer their voting programs in the “most integrated setting appropriate to the needs of individuals with disabilities.”⁹

The Title II regulation governing physical accessibility of facilities includes the standards to determine what makes facilities accessible.¹⁰ The 2010 ADA Standards for Accessible Design (2010 Standards)¹¹ offer the minimum requirements for newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to, and usable by, individuals with disabilities. Recall our voter who came close to tipping over in her wheelchair because of a steep and uneven parking lot. The 2010 Standards address her situation and provide

⁵ 42 U.S.C. § 12132.

⁶ Courts have held that Title II applies to voting because it is a public program or service. *See* *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 197 (2d Cir. 2014); *Kerrigan v. Philadelphia Bd. of Elections*, No. 07-687, 2008 WL 3562521, at *19 (E.D. Pa. Aug. 14, 2008); *California ex rel. Lockyer v. Cnty. of Santa Cruz*, No. C-05-04708, 2006 WL 3086706, at *1 (N.D. Cal. Oct. 30, 2006) (noting ADA applies to all government programs and services, including elections).

⁷ Other federal laws protect the rights of voters with disabilities, including the Voting Rights Act of 1965, the National Voter Registration Act of 1993, the Help America Vote Act of 2002, and the Voting Accessibility for the Elderly and Handicapped Act. *See The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, DEP’T OF JUST. (Sept. 2014), https://www.ada.gov/ada_voting/ada_voting_ta.htm.

⁸ 28 C.F.R. § 35.150; *see also* 28 C.F.R. §§ 35.130(b)(4), 35.149.

⁹ 28 C.F.R. § 35.130(d).

¹⁰ 28 C.F.R. § Pt. 35, App. A; 28 C.F.R. §§ 35.149, 35.150, 35.151.

¹¹ *2010 ADA Standards for Accessible Design*, DEP’T OF JUST. (2010), <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.pdf>.

guidance to local election officials on the requirements of an accessible route to the polling place entrance.

The 2010 Standards require an accessible route from the accessible parking, passenger drop-off sites, sidewalks and walkways, and public transportation stops to get to the entrance of the polling place.¹² The accessible route must be at least 36 inches wide.¹³ It may narrow briefly to 32 inches wide, but only for a distance of up to 24 inches.¹⁴ The route must be free of abrupt changes in level, steps, high thresholds, or steeply sloped walkways.¹⁵ An accessible route is essential for people who have difficulty walking or use wheelchairs and other mobility devices to get into the polling place.

To assist elections officials, advocates, and voters, the Department created a “checklist” based on the 2010 Standards to use as a polling place accessibility guide.¹⁶ The checklist provides useful information and illustrations that allow inexperienced surveyors of facilities the ability to determine whether barriers exist to voters with disabilities at a polling place.¹⁷ The checklist focuses on those elements of the polling place necessary to conduct the voting programs and does not look to see whether the facility as a whole is accessible. Rather, the assessment is whether each facility is accessible during the election, which means that the features and elements that voters with disabilities must rely on, including parking, exterior and interior routes, circulation paths, entrances, doorways, and interior routes and spaces, are readily accessible to, and usable by, individuals with disabilities when the facilities are in use for voting.

¹² *Id.* at 206.2.1.

¹³ *Id.* at 403.5.1.

¹⁴ *Id.* (Exceptions).

¹⁵ *Id.* at 303.2, 303.3, 303.4.

¹⁶ DEPT OF JUST., ADA CHECKLIST FOR POLLING PLACES (2016).

¹⁷ Another tool to help election officials, advocates, and voters, and also based on the 2010 Standards, is *Solutions for Five Common ADA Access Problems at Polling Places*, DEPT OF JUST. (Oct. 9, 2014), https://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm. This publication can assist election officials in recognizing and remedying barriers in five commonly found areas at polling places: parking, sidewalks and walkways, building entrances, interior hallways, and the voting area itself.

III. The U.S. Attorney program for ADA enforcement

For well over two decades, USAOs from across the country have partnered with DRS to investigate and litigate a wide range of ADA issues involving state and local government programs under Title II of the ADA and public accommodations' goods and services under Title III. AUSAs independently investigate most ADA matters, with support and assistance from DRS's U.S. Attorney Program Coordinators and a DRS Architect. The DRS Program Coordinators provide model documents and assistance to AUSAs on how to conduct a polling place investigation from the initial contact with the local officials to a resolution of the polling place review. The DRS Architect provides technical assistance and assists with conducting surveys on site at polling places. With this help, USAOs have successfully handled thousands of ADA matters, often resolved by settlement agreements providing for changes in policies and procedures, training for staff, and necessary relief for individual complainants. Many of those settlements can be found on ADA.gov, the Department's ADA website.¹⁸

Over the past decade, based in part on studies indicating accessibility barriers at polling places nationwide,¹⁹ the Civil Rights Division, in coordination with USAOs, made voting accessibility a priority and have increased their efforts to review polling places to determine if they are accessible. In 2015, the Department launched the U.S. Attorney Program ADA Voting Initiative, which focuses on protecting the voting rights of individuals with disabilities. A hallmark of the ADA Voting Initiative is its collaborations with jurisdictions to increase accessibility at polling places. Through this initiative, USAOs and DRS have surveyed over 2,400 polling places

¹⁸ *Information and Technical Assistance on the Americans with Disabilities Act*, DEP'T OF JUST., <https://www.ada.gov/ta-pubs-pg2.htm> (last visited Jan. 11, 2022).

¹⁹ In 2008, for example, the U.S. Government Accountability Office (GAO) conducted a study on voter turnout for individuals with disabilities and whether barriers at polling places prevent them from voting. GAO estimated that about 73% of all polling places had impediments to those with disabilities. GOV'T ACCOUNTABILITY OFFICE, *VOTERS WITH DISABILITIES; ADDITIONAL MONITORING OF POLLING PLACES COULD FURTHER IMPROVE ACCESSIBILITY 1* (2009).

and increased polling place accessibility in counties and cities of all sizes.²⁰ USAOs have obtained a significant number of settlement agreements providing for improvements in the accessibility of polling places and board of elections offices, as well as improvements in providing functioning accessible voting machines.

A. Case study: MDPA USAO's work on the ADA voting initiative

The U.S. Attorney's Office for the Middle District of Pennsylvania (MDPA) has made polling place accessibility a district priority. Between 2015 and 2018, the MDPA, with assistance from DRS architects, reviewed a sample of approximately 235 polling places in five counties in the Middle District of Pennsylvania. The five counties—Cumberland, Dauphin, Lackawanna, Luzerne, and York—together have a population of approximately 203,000 people with disabilities according to the U.S. Census Bureau's American Community Survey.²¹ The MDPA found that, of the polling places it surveyed, only a handful of polling places in each county were accessible. This meant that most of the locations had at least one physical barrier to access for voters with disabilities.²²

²⁰ Press Release, Dep't of Just., Attorney General Garland and Civil Rights Division Assistant Attorney General Clarke Commemorate the 31st Anniversary of the Americans with Disabilities Act (July 26, 2021).

²¹ *Cumberland County, Pennsylvania*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US42041> (last visited Nov. 18, 2021); *Dauphin County, Pennsylvania*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US42043> (last visited Nov. 18, 2021); *Lackawanna County, Pennsylvania*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US42069> (last visited Nov. 18, 2021); *Luzerne County, Pennsylvania*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US42079> (last visited Nov. 18, 2021); *York County, Pennsylvania*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US42133> (last visited Oct. 15, 2021).

²² Settlement Agreements for Cumberland, Dauphin, Lackawanna, Luzerne, and York Counties provide details of the surveys and can be found at ADA.gov: https://www.ada.gov/luzerne_sa.html (Luzerne County 01/2017); https://www.ada.gov/cumberland_sa.html (Cumberland County 02/2018); https://www.ada.gov/dauphin_sa.html (Dauphin County 03/2018); https://www.ada.gov/york_pp_sa.html (York County 10/2019); https://www.ada.gov/lackawanna_sa.html (Lackawanna County 02/2020).

The MDPA successfully negotiated separate settlement agreements with each county. The relief obtained in each county included changes in the county’s policies and procedures to comply with the ADA, including the adoption of procedures for election officials to determine whether polling places are accessible or can be made accessible temporarily on Election Day and ADA training for staff, poll workers, and election officials. The agreements also require election officials to conduct their own surveys of polling places and report them to the USAO.

Many other USAOs around the country have conducted similar investigations and reached comparable agreements in recent years. For the polling place reviews to succeed, AUSAs should work with local officials to make their voting locations accessible. For example, in Dauphin and Cumberland Counties, election officials and county solicitors acknowledged the issues with their polling places immediately after the USAO’s reviews. County officials have continued to comply with the settlement agreements and have timely provided proposed polling place changes to the USAO for review. The counties’ commitment to making polling places accessible and their continuing compliance with the settlement agreements are key to making voting accessible. As former U.S. Attorney David J. Freed for the MDPA stated in a press release announcing the Dauphin County settlement, the partnerships with federal and local officials ensures “voters with disabilities will now be able to cast their ballots in person at their polling places alongside their neighbors.”²³

IV. Most polling places continue to be inaccessible to voters with disabilities

The need for the USAO ADA Voting Initiative continues. In 2016, the U.S. Government Accountability Office (GAO) studied 178 polling places in states across the country and found that approximately 60% of those examined had impediments to voting.²⁴ “The most common [obstacles] were steep ramps located outside buildings, lack of signs

²³ Press Release, U.S. Dep’t of Just., United States Attorney’s Office Reaches Settlement With Dauphin County, Pa, Over Polling Place Access For Voters (Mar. 9, 2018).

²⁴ *Voters with Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance [Reissued on December 4, 2017]*, Gov’t Accountability Off. (Dec. 4, 2017), <https://www.gao.gov/products/gao-18-4>.

indicating accessible paths, and poor parking or path surfaces. . . .”²⁵ Also in 2016, a Rutgers University study found that almost one-third of voters with disabilities reported having difficulty voting at a polling place, compared to 8% of voters without disabilities.²⁶

Recently, the U.S. Election Assistance Commission commissioned a Rutgers University study that reviewed voting accessibility in the November 2020 election. The report noted that, although difficulties voting at polling places decreased from previous elections,²⁷ people with disabilities were still less likely to vote than those without disabilities.²⁸

These studies demonstrate that, although the ADA has provided momentous changes over the last 31 years, more needs to be done. More work remains to increase public awareness about the barriers that inaccessible polling places impose on voters with disabilities. Voters with disabilities, like the wheelchair user noted above, should not have to choose between worrying about their safety (that is, tipping over on a steep walkway or being carried up a flight of stairs) and exercising their right to vote. There should be an accessible parking space, an access aisle for them to exit their vehicle, and a level path to the voting facility.

Accordingly, the partnership between USAOs and DRS, like the one with the MDPA, should continue. USAOs that have not participated in the polling place initiative should consider it. Moreover, mutually beneficial partnerships with local officials like the ones established in Pennsylvania need to be fostered and continued. When we all work

²⁵ *Id.*

²⁶ Schur et al., *supra* note 3, at 1374.

²⁷ According to disability advocates, issues remain for individuals with visual and cognitive impairments, a problem that may stem from either the polling place itself or the voting machine. See Danielle Root & Mia Ives-Ruble, *Enhancing Accessibility in U.S. Elections*, CTR. FOR AM. PROGRESS (July 8, 2021), <https://www.americanprogress.org/issues/democracy/reports/2021/07/08/501364/enhancing-accessibility-u-s-elections/>.

²⁸ The study found individuals with disabilities voted at a rate 7% lower than those without disabilities of the same age. LISA SCHUR & DOUGLAS KRUSE, *DISABILITY & VOTING ACCESSIBILITY IN THE 2020 ELECTIONS: FINAL REPORT ON SURVEY RESULTS SUBMITTED TO THE ELECTION ASSISTANCE COMMISSION* (2021); LISA SCHUR, MEERA ADYA, & DOUGLAS KRUSE, *DISABILITY, VOTER TURNOUT, AND VOTING DIFFICULTIES IN THE 2012 ELECTIONS* (2013).

together, we can provide a safe and accessible polling location for all who seek to exercise their right to vote. The ADA demands no less.

About the Authors

Michael J. Butler, a civil rights litigator, is currently the Civil Rights Coordinator, Diversity Chairperson, Special Emphasis Program Manager, and civil Assistant U.S. Attorney for the Middle District of Pennsylvania (Harrisburg office). He has been with the USAO since January 14, 2004, and works on affirmative civil rights matters and defends individual employees of the United States in civil litigation. Born and raised in Philadelphia, Michael received his Juris Doctorate with honors in 1997 from Widener University School of Law–Harrisburg Campus. Before law school, he worked as a paralegal in the investment management division of the law firm of Drinker Biddle & Reath. At Widener, he represented impoverished clients as a student on the Civil Law Clinic, was the research assistant for two professors, provided pro bono services to the Pennsylvania Coalition Against Rape, and was a board member of the law review. After law school, Judge A. Richard Caputo of the Middle District of Pennsylvania hired him as his first law clerk. After his clerkship, Michael worked at the law firm of Montgomery, McCracken, Walker & Rhoads, representing local governments and public officials in civil rights litigation.

Elizabeth Johnson is a Senior Trial Attorney and a U.S. Attorney Program for ADA Enforcement Coordinator in the Department’s Disability Rights Section, Civil Rights Division. Elizabeth has been with the Civil Rights Division for 29 years, in the Voting Section, the Special Litigation Section, and the DRS for the last 15 years. Before joining the Division, Elizabeth was the Assistant Legal Director at Southern Poverty Law Center in Montgomery, Alabama. She has spent most of her career working on voting rights issues. Elizabeth began her career as a law clerk to the Honorable Harold Baker, Chief Judge of the U.S. District Court for the Middle District of Illinois. She is a proud Spartan, receiving her B.A. degree from Michigan State University and her J.D. from the University of Michigan Law School.

Page Intentionally Left Blank

Using the Americans with Disabilities Act to Reduce Overdose Deaths

David Howard Sinkman
Assistant U.S. Attorney
Eastern District of Louisiana

Gregory Dorchak
Assistant U.S. Attorney
District of Massachusetts

I. Introduction

More Americans died in 2020 from opioid overdose than were lost in battle during the entire Vietnam War.¹ Drug overdose is now the leading cause of death for Americans under the age of 50.² Opioid overdose deaths continue to rise year after year and, in 2020, increased 38.5% from the year before.³ That is more than six times as

¹ Press Release, U.S. Dep't of Justice, Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the National Congress of American Indians (Feb. 13, 2018).

² Dean Reynolds, *Overdose now leading cause of death of Americans under 50*, CBS NEWS (June 6, 2017, 8:00 PM), <https://www.cbsnews.com/news/overdoses-are-leading-cause-of-death-americans-under-50/>; *Accidental Overdose: The Leading Cause of Death Under 50*, FREEDOM CENTER, <https://www.thefreedomcenter.com/accidental-overdose-the-leading-cause-of-death-under-50/#:~:text=According%20to%20the%20latest%20data,death%20among%20the%20overall%20population> (updated Dec. 2, 2021).

³ *Drug Overdose Deaths Remain High*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/deaths/index.html> (last visited Jan. 31, 2022) (“Opioids were involved in 49,860 overdose deaths in 2019”); *Provisional Drug Overdose Death Counts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last visited Jan. 31, 2022) (reporting 69,061 opioid overdoses as of December 2020).

many Americans who died from opioid overdose in 1999⁴ and the death toll from 2021 is expected to be much worse.⁵

The opioid epidemic is particularly acute for military veterans and those leaving jails and prisons. As VA Secretary Robert Wilkie remarked in 2019, “[v]eterans are twice as likely to die from accidental overdose compared to the general U.S. population.”⁶ Recently released prisoners are about 129 times more likely to die of an opioid overdose than the rest of the population, largely because their drug tolerances dropped while incarcerated.⁷

Despite the Department of Justice’s (Department) notable enforcement and prevention efforts, with opioid seizures increasing and opioid prescription rates falling,⁸ overdose death rates are at an

⁴ Betsy McKay, *U.S. Drug-Overdose Deaths Soared Nearly 30% in 2020, Driven by Synthetic Opioids*, WALL ST. J. (July 14, 2021, 3:56 PM), <https://www.wsj.com/articles/u-s-drug-overdose-deaths-soared-nearly-30-in-2020-11626271200>; Claire Felter, *U.S. Opioid Epidemic*, COUNCIL ON FOREIGN REL. (Sept. 8, 2021, 3:20 PM), <https://www.cfr.org/backgrounder/us-opioid-epidemic>; *The Drug Overdose Epidemic: Behind the Numbers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/opioids/data/index.html> (updated Mar. 25, 2021).

⁵ According to the most recent Centers for Disease Control and Prevention estimates, 75,673 Americans died of opioid overdose in the twelve months ending in April 2021, up nearly 35% from the previous twelve months and an all-time record high. *Drug Overdose Deaths in the U.S. Top 100,000 Annually*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm.

⁶ Press Release, Dep’t of Veterans Affs., VA equips 200,000 Veterans with lifesaving naloxone (Nov. 5, 2019); see also Amy S.B. Bohnert et al., *Accidental Poisoning Mortality Among Patients in the Department of Veterans Affairs Health System*, 49 MED. CARE 393 (2011).

⁷ Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENGLAND J. Med. no. 2, 157, 164 (2007); Sarah E. Wakeman, *Why It’s Inappropriate Not to Treat Incarcerated Patients with Opioid Agonist Therapy*, 19 AMA J. ETHICS, no. 9, 922, 923 (2017). See also MASS. DEP’T OF PUB. HEALTH, AN ASSESSMENT OF FATAL AND NONFATAL OPIOID OVERDOSES IN MASSACHUSETTS (2011–2015) 9 (2017) (describing a 120 times higher rate for formerly incarcerated).

⁸ See *U.S. Opioid Dispensing Rate Maps*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/rxrate-maps/index.html> (updated Nov. 10, 2021); Christopher Brown, *DOJ Keeps Up Pressure on Doctors Who Prescribe Opioids Illegally*, BLOOMBERG LAW (Jan. 24, 2020, 3:52 p.m.), <https://news.bloomberglaw.com/health-law-and-business/doj-keeps-up-pressure-on-doctors-who-prescribe-opioids-illegally>.

all-time high.⁹ Heroin and fentanyl supply also remains robust across the nation, according to the Drug Enforcement Administration’s (DEA) National Threat Assessments for 2018, 2019, and 2020.¹⁰

Our civil rights outreach and enforcement experience in Louisiana and Massachusetts illustrates that the Department has another powerful enforcement tool to address the opioid crisis: helping jails and prisons satisfy their obligations under the Americans with Disabilities Act (ADA) by providing all medications used to treat Opioid Use Disorder (OUD). These medications dramatically reduce opioid overdose deaths and expanded medical access is consistent with the third prong of the Department’s opioid strategy—ensuring access to treatment.¹¹ Assistant U.S. Attorneys can, as we did in Louisiana and Massachusetts, coordinate with the Disability Rights Section’s U.S. Attorney Program for ADA Enforcement to open compliance reviews of the jails and prisons in their districts and then work with those entities to meet their ADA obligations by providing these medications within a reasonable timeframe.

The data are clear: When jails and prisons meet their ADA obligations by providing all forms of FDA-approved Medications for Opioid Use Disorder (MOUD), which includes methadone, buprenorphine, and naltrexone, there is a dramatic reduction in fatal opioid overdoses. Policies and practices that deny insulin to an inmate with diabetes are bad public health policy and would likely be a per se ADA violation within the Department’s enforcement jurisdiction, yet the vast majority of the nation’s jails and prisons ban the provision of lifesaving, FDA-approved, and doctor-prescribed drug treatment to

⁹ See Ahmad FB et al., *Provisional Drug Overdose Death Counts*, NAT’L CTR. FOR HEALTH STATS., CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (Oct. 13, 2021).

¹⁰ U.S. DRUG ENF’T ADMIN., 2020 NATIONAL DRUG THREAT ASSESSMENT 8 (2021) (“Heroin availability remains high in the United States”); U.S. DRUG ENF’T ADMIN., 2019 NATIONAL DRUG THREAT ASSESSMENT 5 (2019) (“Heroin-related overdose deaths remain at high levels in the United States, due to continued use and availability, while fentanyl is increasingly prevalent in highly profitable white powder heroin markets.”); U.S. DRUG ENF’T ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT 11 (2018) (“The use of heroin has grown at an alarming rate and the death toll increases each year.”).

¹¹ See Press Release, Dep’t of Just., Department of Justice Releases Strategy Memo to Address Prescription Opioid and Heroin Epidemic (Sept. 24, 2016).

those struggling with Opioid Use Disorder.¹² Such MOUD restrictions violate the ADA and prevent hundreds of thousands of inmates each year from receiving medical treatment they are entitled to. Our experiences suggest that enforcement of the ADA to ensure expanded MOUD access in the nation's jails and prisons would thus address a critical metric: Fewer people dying from opioid overdoses.

II. MOUD reduces overdose deaths and criminal recidivism rates

OUD is a chronic brain disease defined by compulsive and prolonged opioid use for no legitimate medical purpose despite negative consequences, but which doctors can effectively treat through medication. Historically, addiction was stigmatized as a problem of willpower, not a medical condition, and the notion of drug treatment carries this legacy. This distinction creates confusion when people refer to addiction treatment because, colloquially, addiction treatment could refer to anything from dolphin-assisted therapy¹³ to using evidence-based doctor-prescribed medications. Treatment could also refer to participation in various 12-step groups, such as Narcotics Anonymous. Twelve-step groups, while anecdotally helpful for some,

¹² See SHELLY WEIZMAN ET AL., O'NEIL INST. FOR NAT'L & GLOB. HEALTH L., A NATIONAL SNAPSHOT: ACCESS TO MEDICATIONS FOR OPIOID USE DISORDER IN U.S. JAILS AND PRISONS (2021); Christine Vestal, *New Momentum for Addiction Treatment Behind Bars*, PEW (Apr. 4, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/04/04/new-momentum-for-addiction-treatment-behind-bars> ("Fewer than 1 percent of the more than 5,000 U.S. prisons and jails, housing more than 2 million inmates, allow access to the FDA-approved medication, even though medical societies, addiction experts and correctional health organizations support their use.").

¹³ Kaleigh Rogers, *Can Swimming with Dolphins Really Cure Your Meth Addiction?*, VICE (Nov. 19, 2014, 5:00 a.m.), <https://www.vice.com/en/article/4x3q9g/can-swimming-with-dolphins-really-cure-your-meth-addiction>.

are neither evidence-based treatment¹⁴ nor medical in nature.¹⁵ The use of MOUD, though, is FDA-approved and both medical and evidence based. Treatment with methadone and buprenorphine,¹⁶ demonstrated in multiple studies, reduces the chance of overdose death by 50%.¹⁷ The takeaway is that not all “treatment” creates an apples-to-apples comparison.

This distinction between medical treatment and colloquial “treatment” when talking about addiction is legally important when it comes to enforcing the ADA. Addictions such as OUD are often considered disabilities under the ADA.¹⁸ Because medical treatment

¹⁴ While recognized for being helpful for those who attend voluntarily, the peer support group format of Narcotics Anonymous does not fit a clinical standard for “treatment” as defined by the American Psychological Association, the American Society for Addiction Medicine, and the American Academy of Addiction Psychiatry. Press Release, Am. Psychiatric Assoc., Joint Public Policy Statement on Relationship Between Treatment and Mutual Support (2019). *See also* Annette Mendola & Richard L. Gibson, *Addiction, 12-step Programs, and Evidentiary Standards for Ethically and Clinically Sound Treatment Recommendations: What Should Clinicians Do?*, 18 AM. MED. ASSOC. J. ETHICS, no. 6, 646 (2016).

¹⁵ Specifically, Narcotics Anonymous is a spiritual program rather than a medical program. NARCOTICS ANONYMOUS WORLD SERVS., INC., NARCOTICS ANONYMOUS xxvi (6th ed. 2008) (“Our program is a set of spiritual principles through which we are recovering from a seemingly hopeless state of mind and body.”).

¹⁶ Buprenorphine is often more recognized by the name Suboxone, which is the brand name for a medication that includes a combination of buprenorphine and naloxone.

¹⁷ COMM. ON MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER, MEDICATIONS FOR OPIOID USE DISORDER SAVE LIVES 6 (Alan I. Leshner & Michelle Mancher eds. 2019).

¹⁸ Establishing a disability under the ADA requires showing a physical or mental impairment that substantially limits a major life activity, a record of such impairment, or being regarded as having such an impairment. 28 C.F.R. § 35.108(a)(1). In enacting the ADA Amendments Act in 2008, Congress made clear that ADA jurisprudence should focus less on establishment of disability and more on whether entities were taking steps to avoid discrimination.

28 C.F.R. § 35.101(b). To ensure this breadth of coverage, additional major life activities, including operation of major bodily functions, were added to the mix. 28 C.F.R. § 35.108(c)(1)(ii). Given OUD’s recognition within the DSM-V as a chronic brain disease, this expansive definition makes it relatively easy to establish disability based on OUD. This analysis was put most succinctly in the appendix to Title II of the ADA: “Addiction is a

for a disability is so inherently tied to the disability, courts have ruled that there is little distinction between barriers on a disability and barriers placed on medications used to treat that disability.¹⁹ Therefore, when an inmate requires a medication, such as buprenorphine, to treat OUD, the ADA protects against bans on access to that medication.

MOUD reduces overdose deaths and drug use, improves drug treatment results,²⁰ and lowers criminal recidivism rates.²¹ Rhode Island, for example, saw a 12.3% decrease in overdose deaths just one year after implementing a MOUD screening and treatment program

disability.” 28 C.F.R. app. B § 35.131. The ADA does have a carve out for those individuals currently engaged in the illegal use of drugs. Specifically, when engaged in such use, those individuals lose their ADA protections. 28 C.F.R. § 35.131(a)(1). There is a notable exception that is relevant to this article. Public entities shall not deny health services, or services provided regarding drug rehabilitation, to individuals based on that individual’s illegal use of drugs if the individual is otherwise entitled to such services. 28 C.F.R. § 35.131(b)(1). This would likely apply to jails and prisons and their provision of medications, including MOUD. Thus, if an individual were prescribed buprenorphine but had recently used illicit drugs, such as illegal benzodiazepines, the prison would not be able to withhold that person’s buprenorphine based on such current illegal use. Likewise, medical providers, such as hospitals and skilled nursing facilities, would also likely violate the ADA by refusing to provide health services to individuals who recently used illegal drugs and are otherwise entitled to such services, unless there is a showing that each individual is a direct threat to the health or safety of others, not themselves. 28 C.F.R. § 36.209(b)(1).

¹⁹ Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324 (S.D.N.Y. 2010); United States v. Asare, No. 15 Civ. 3556, 2018 WL 2465378, at *6 (S.D.N.Y. June 1, 2018).

²⁰ Natasa Gisev et al., *A cost-effectiveness analysis of opioid substitution therapy upon prison release in reducing mortality among people with a history of opioid dependence*, 110 ADDICTION 1975, 1981–82 (2015); NAT’L INST. ON DRUG ABUSE, EFFECTIVE TREATMENTS FOR OPIOID ADDICTION (2016); COMM. ON MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER, *supra* note 17.

²¹ Elizabeth A. Evans, et al., *Recidivism and mortality after in-jail buprenorphine treatment for opioid use disorder*, PUBMED (Jan. 18, 2022), <https://pubmed.ncbi.nlm.nih.gov/35063323/>. Sarah E. Wakeman & Josiah D. Rich, *Addiction Treatment Within U.S. Correctional Facilities: Bridging the Gap Between Current Practice and Evidence-Based Care*, 34 J. ADDICTIVE DISEASES 220 (2015); NAT’L SHERIFFS’ ASSOC. & NAT’L COMM’N ON CORR. HEALTH CARE, JAIL-BASED MEDICATION-ASSISTED TREATMENT: PROMISING PRACTICES, GUIDELINES, AND RESOURCES 5 (2018).

at its state prison.²² Opioid overdose deaths in France dropped 79% in four years after the country authorized any doctor to prescribe buprenorphine, an opioid addiction medication.²³ In Baltimore, annual heroin overdose deaths decreased by 37% after buprenorphine became available in the city in 2003.²⁴ Preliminary data in Maine shows that “[p]eople were 60% less likely to die of an overdose in their first year out of prison if they” received MOUD while incarcerated.²⁵ And the risk of mortality of those with OUD is two to three times lower when on methadone or buprenorphine.²⁶

Ensuring access to all forms of MOUD is thus a vital tool in the Department’s fight against the opioid epidemic. Methadone is a synthetic *opioid agonist*, binding to and activating the opioid receptors in the brain—the same receptors that other opioids, such as heroin, morphine, and opioid pain medications trigger. This eliminates withdrawal symptoms and relieves opioid cravings. Although methadone occupies and activates these opioid receptors, it does so slower than other opioids, and for an opioid-dependent person, the

²² Traci C. Green et al., *Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System*, 75 JAMA PSYCHIATRY 405, 405–06 (2018) (“Statewide in Rhode Island, there were 179 overdose deaths from January 1, 2016, to June 30, 2016, compared with 157 overdose deaths during the same period in 2017, a reduction of 12.3%.”).

²³ Olga Khazan, *How France Cut Heroin Overdoses by 79 Percent in 4 Years*, THE ATLANTIC (Apr. 16, 2018), <https://www.theatlantic.com/health/archive/2018/04/how-france-reduced-heroin-overdoses-by-79-in-four-years/558023/>.

²⁴ Robert P. Schwartz et al., *Opioid Agonist Treatments and Heroin Overdose Deaths in Baltimore, Maryland, 1995–2009*, 103 AM. J. PUB. HEALTH no. 5, 917, 919 (2013) (“Average annual heroin overdose deaths decreased by 37% after buprenorphine became available in 2003 (average number of heroin overdose deaths between 1995 and 2002 of 262 vs 165 between 2003 and 2009).”).

²⁵ Beth Schwartzapfel, *These Meds Prevent Overdoses. Few Federal Prisoners Are Getting Them*, THE MARSHALL PROJECT (Aug. 10, 2021), <https://www.themarshallproject.org/2021/08/10/these-meds-prevent-overdoses-few-federal-prisoners-are-getting-them>.

²⁶ Wakeman, *supra* note 7, at 923; *see also* Luis Sordo et al., *Mortality risk during and after opioid substitution treatment: systematic review and meta-analysis of cohort studies*, 357 BJM 1550, 1550 (2017).

treatment doses do not produce euphoria.²⁷ Buprenorphine is a partial agonist, partially activating and partially blocking the opiate receptors in the brain, thereby reducing the compulsive cravings that are a hallmark of addiction and making it difficult to get high or overdose from other opioids. “Decades of research show that [these two medicines] reduce drug use, overdose, death, crime, and risky behavior like sharing needles.”²⁸ Naltrexone is an opioid antagonist, blocking the opiate receptors and preventing the patient from getting high or overdosing.

These medications are not interchangeable.²⁹ One version of MOUD might work well for one patient but not another. This is why the ADA requires ensuring access to all three forms of MOUD in the criminal justice system.³⁰

III. The Department’s three-pronged strategy to address the opioid crisis: enforcement, prevention, and treatment

Since 2016, the Department’s efforts to address this epidemic have had three focal points: enforcement, prevention, and treatment.³¹ These three elements have been incorporated in the opioid crisis strategy of every subsequent attorney general since Attorney General Loretta Lynch.³²

Most U.S. Attorney’s Offices are familiar with the Department’s first two approaches to the opioid crisis: Enforcement and prevention.

²⁷ RICHARD P. MATTICK ET AL., METHADONE MAINTENANCE THERAPY VERSUS NO OPIOID REPLACEMENT THERAPY FOR OPIOID DEPENDENCE (REVIEW), COCHRANE DATABASE OF SYS. REVS. 2 (2009).

²⁸ Schwartzapfel, *supra* note 25.

²⁹ *Pesce v. Coppinger*, 355 F. Supp. 3d 35, 48 (D. Mass. 2018) (holding that a jail’s ban on methadone violated the ADA, in part, because “Vivitrol® and methadone are not interchangeable treatments for opioid use disorder.”).

³⁰ See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TIP 63: MEDICATIONS FOR OPIOID USE DISORDER 3-10 (2021).

³¹ See Press Release, Dep’t of Just., *supra* note 11.

³² See Press Release, U.S. Dep’t of Just., Remarks by Attorney General Sessions to Law Enforcement About the Opioid Epidemic (Sept. 22, 2017); Press Release, U.S. Dep’t of Just., Department of Justice Announces More Than \$341 Million in Grants to Combat America’s Addiction Crisis (Oct. 16, 2020).

Prosecutions in opioid-related crimes are consistent and frequent, and heroin- and fentanyl-related arrests are measured in both the kilograms of drugs taken off the streets and the potential number of people killed by those drugs. Prosecution of opioid prescription practices, both criminally and civilly, have also had a notable impact. In 2020, opioid prescription rates were at the lowest since the Centers for Disease Control and Prevention began tracking them in 2006.³³ By December 2020, prescriptions for the seven most frequently diverted opioids were down 33% since January 2017.³⁴ Prosecutions of doctors for illegal opioid distribution by the Department's Health Care Fraud Unit increased from 2 cases in 2016 to 56 in 2019.³⁵

Though the Department's enforcement and prevention efforts have been notable, these two strategies alone will not solve this public health crisis. As the DEA made clear in its 2019 Threat Assessment, "[h]eroin-related overdose deaths remain at high levels in the United States, due to continued use and availability."³⁶

In jurisdictions such as Louisiana and Massachusetts, the Department has been utilizing the third approach by enforcing ADA obligations to ensure MOUD access in jails and prisons.³⁷ The Department is the designated agency responsible for enforcing ADA obligations for all programs, services, and regulatory activities related to law enforcement and public safety, including corrections.³⁸ Our experiences in Louisiana and Massachusetts suggest that outreach to local jails and prisons and ADA enforcement can eliminate discriminatory barriers to addiction treatment. These MOUD bans are at the heart of the opioid crisis, and the ADA is a powerful tool that the Department can use to further its efforts to ensure access to addiction treatment—the third prong of the Department's opioid strategy.

³³ See *U.S. Opioid Dispensing Rate Maps*, *supra* note 8.

³⁴ Press Release, U.S. Dep't of Just., Deputy Assistant Attorney General Daniel Feith Delivers Remarks at the FDLI Enforcement, Litigation, and Compliance Conference (Dec. 15, 2020).

³⁵ Brown, *supra* note 8.

³⁶ 2019 NATIONAL DRUG THREAT ASSESSMENT, *supra* note 10, at 5.

³⁷ The department has resolved investigations of the Worcester County Sheriff, the Suffolk County Sheriff, the Essex County Sheriff, and the Massachusetts Department of Corrections, all in Massachusetts.

³⁸ See 28 C.F.R. § 35.190(b)(6).

IV. Jails and prisons are epicenters of the opioid crisis, and the ADA requires them to provide MOUD

Recently released prisoners have been shown to be up to 129 times more likely to die from an opioid overdose than the general population.³⁹ In Massachusetts, for example, nearly 1 in 11 overdose deaths between 2011 and 2015 involved a person who was formerly incarcerated.⁴⁰ Since then, the opioid crisis has worsened, and the rate of overdose deaths for those leaving jail and prisons is believed to be even higher.⁴¹

The emerging caselaw demonstrates the viability of the ADA to ensure access to all three forms of MOUD in the criminal justice system. In November 2018, for example, a federal district court in Massachusetts held, in *Pesce v. Coppinger*, that a jail's ban on methadone violated the ADA because there was no individualized inquiry into a single prisoner's specific MOUD needs, and such an individualized inquiry was required by the ADA.⁴² The legal reasoning and applicability of the ADA is relatively straightforward: Jails and prisons provide medical care, including medications, for those in custody. Medical personnel in these facilities make medical decisions as to what forms of medication should be used for treatment. When a correctional facility, such as in *Pesce v. Coppinger*, withholds a particular form of medication for administrative reasons rather than medical reasons, and when this facility also fails to assess when any prisoner's disability requires a deviation from such an administrative policy, that prisoner receives disparate treatment based on disability. The prison is treating OUD differently than other medical conditions and, thus, violating the ADA.

Shortly after *Pesce*, in March 2019, a federal district court in Maine considered a similar case and came to the same conclusion.⁴³ In *Smith*

³⁹ MASS. DEP'T OF PUB. HEALTH, *supra* note 7, at 50.

⁴⁰ *Id.* at 51.

⁴¹ *See id.* at 50–51.

⁴² *Pesce v. Coppinger*, 355 F. Supp. 3d 35, 46 (D. Mass. 2018) (citing *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274 (1st Cir. 2006)) (“Medical decisions that rest on stereotypes about the disabled rather than ‘an individualized inquiry into the patient's condition’ may be considered discriminatory.”).

⁴³ *Smith v. Aroostook Cnty.*, 376 F. Supp. 3d 146, 159–60 (D. Me. 2019) (“The Defendants’ out-of-hand, unjustified denial of the Plaintiff’s request for her

v. Aroostook County, the district court held that the Aroostook County Jail’s refusal to provide Brenda Smith, a mother of four children, with her doctor-prescribed buprenorphine violated the ADA because this treatment ban was based on stigma and stereotypes.⁴⁴ During the previous 10 years on buprenorphine, Ms. “Smith ha[d] regained custody of her . . . children, secured stable housing for her family, and obtained employment.”⁴⁵ The court granted her motion for a preliminary injunction and ordered the jail to provide MOUD.

In the short time since both *Pesce* and *Smith*, jails and prisons in Louisiana, Massachusetts, and elsewhere, likely seeing the trajectory of litigation liability as well as the public health benefits of expanded MOUD access, have begun to shift their practices.⁴⁶ Based on our experiences, these rulings make outreach much easier.

In addition, there is increasing support from law enforcement to vastly expand MOUD access in the criminal justice system, and the Bureau of Prisons (BOP), as of at least August 2020, started offering all three forms of MOUD to individuals in its care.⁴⁷ Despite this emerging consensus, the bans on MOUD in correctional facilities is still a nationwide issue. As of 2018, less than 1% of the 5,000 jails and prisons in the country provided inmates with MOUD.⁴⁸ At least a quarter of the two million people incarcerated then were addicted to

prescribed, necessary medication—and the general practice that precipitated that denial—is so unreasonable as to raise an inference that the Defendants denied the Plaintiff’s request because of her disability.”).

⁴⁴ *Id.* at 160 (“The Defendants’ representatives lacked a baseline awareness of what opioid use disorder was despite serving a population that disproportionately dies of that condition. . . . The Defendants’ statements and actions suggest the kind of ‘apathetic attitude’ towards individuals with disabilities that the ADA intends to remedy. The Defendants’ conduct is consistent with the broader stigma against MAT.”) (internal citation omitted).

⁴⁵ *Id.* at 149.

⁴⁶ “In 2018, the National Sheriffs’ Association published a resource guide arguing that more jails should provide access to buprenorphine and methadone. Hundreds of jails now do so—still a fraction of the nation’s 3,000 jails, but up dramatically from about 30 just two years ago.” Schwartzapfel, *supra* note 25.

⁴⁷ Memorandum from Jeffrey A. Burkett, Acting Senior Dep. Assistant Dir., Health Servs. Div., Dep’t of Just., to Clinical Dirs. Health Servs. Adm’rs, Medication Assisted Treatment (MAT) Interim Technical Guidance (Aug. 26, 2020).

⁴⁸ Vestal, *supra* note 12.

opioids.⁴⁹ That means roughly 500,000 people who could have benefited from MOUD or who were already receiving MOUD were denied this treatment.⁵⁰ Since 2018, the MOUD landscape has shifted slightly, and more facilities are providing all three forms of MOUD; however, the number of jails and prisons is still a tiny fraction of the more than 5,000 facilities that are required by the ADA to do so.⁵¹

V. Barriers to MOUD access: stereotypes and diversion concerns

The chief barriers to expanding MOUD access, including bans on MOUD treatment in correctional facilities, are often based on misguided stereotypes and stigmas⁵² about the treatment and diversion concerns.⁵³ Rooting out such unfounded fears is at the heart of the ADA and a key part of ADA jurisprudence.⁵⁴ Because buprenorphine and methadone, the two forms of MOUD seen as most effective to treat OUD, are themselves opioids, many law enforcement officers erroneously believe that MOUD substitutes one drug addiction for another and is a hinderance to recovery. This is incorrect. According to the Substance Abuse and Mental Health Service Administration, MOUD “does not replace one addictive drug with another. It provides a safe, controlled level of medication to overcome the use of a problem opioid.”⁵⁵

⁴⁹ *Id.*

⁵⁰ See Wakeman, *supra* note 7, at 923 (“a 2004 study estimated that 440,000 people with opioid use disorder are detained in jails annually”).

⁵¹ See WEIZMAN et al., *supra* note 12.

⁵² COMM. ON MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER, *supra* note 17, at 112–13.

⁵³ Christine Vestal, *At Rikers Island, a Legacy of Medication-Assisted Opioid Treatment*, PEW (May 23, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/23/at-rikers-island-a-legacy-of-medication-assisted-opioid-treatment>; Wakeman, *supra* note 7, at 922–23.

⁵⁴ See 28 C.F.R. § 35.130(h) (“A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, *not on mere speculation, stereotypes, or generalizations about individuals with disabilities*”) (emphasis added).

⁵⁵ DEP’T OF HEALTH AND HUMAN SERVS., THE FACTS ABOUT NALTREXONE FOR TREATMENT OF OPIOID ADDICTION 10 (2009). Congress established SAMHSA, the Substance Abuse and Mental Health Services Administration, in 1992 to make substance use and mental disorder information, research, and services

This stereotype also ignores that people who are in treatment and are prescribed the medication are not addicted to it. While they may be dependent on a medication, they are not compulsively seeking to use that medication despite negative consequences. They can lead normal lives and hold down jobs. Equating the prescription use of MOUD with an addiction overlooks the fact that most chronic diseases require long-term use of medication. While those with high blood pressure are dependent on their beta-blocker medication, they are not addicted. The same holds true for MOUD.

A second barrier to MOUD access in correctional facilities is diversion concerns. Correctional officers often fear that allowing prisoners access to legitimately prescribed buprenorphine will result in the medicine being diverted to others. Through outreach with correctional facilities that provide MOUD, such as in Rhode Island, in

more accessible. SAMSHA is not alone in its view that MOUD does not substitute one addictive drug for another. *See, e.g.*, NAT'L INST. ON DRUG ABUSE, *supra* note 20 (stating that “[m]ethadone and buprenorphine DO NOT substitute one addiction for another” and “[w]hen someone is treated for an opioid addiction, the dosage of medication used does not get them high—it helps reduce opioid cravings and withdrawal.”); DEP'T OF HEALTH & HUM. SERVS., *THE OPIOID EPIDEMIC: BY THE NUMBERS 2* (2016) (stating that MOUD “is a proven, effective treatment for individuals with an opioid use disorder” and “has been shown to increase treatment retention, and to reduce opioid use, risk behaviors that transmit HIV and hepatitis C virus, recidivism, and mortality.”); Andrew Kolodny & Thomas R. Frieden, *Ten Steps the Federal Government Should Take Now to Reverse the Opioid Addiction Epidemic*, 318 *JAMA*, no. 16, 2017, at 1538 (arguing that MOUD “should be routinely offered in primary care, emergency departments, and hospital inpatient services to increase treatment uptake, as well as in the criminal justice system, with careful attention to continuity on discharge.”); NAT'L SHERIFFS' ASSOC. & NAT'L COMM'N ON CORR. HEALTH CARE, *supra* note 21, at 6 (“Medication-assisted treatment (MAT)—utilizing the FDA-approved medications methadone, buprenorphine, or naltrexone—is considered a central component of the contemporary standard of care for the treatment of individuals with opioid use disorders.”); Memorandum from Loretta E. Lynch, U.S. Att'y Gen., to Heads of Dep't Components, Department of Justice Strategy to Combat Opioid Epidemic 8 (Sept. 21, 2016) (stating that MOUD “plays an essential role in successful treatment and provides a foundation for recovery” and “[c]riminal justice programs should incorporate [MOUD] treatment options for individuals prior to, during, after, or in lieu of incarceration.”).

Philadelphia, and at Rikers' Island in New York City, we have learned that this concern has not born out. On the contrary, because much of the demand for illicit buprenorphine is driven by the lack of access to legitimately prescribed buprenorphine, once jails and prisons began to provide this treatment, buprenorphine diversion fell. In short, the market for illicit diversion in correctional facilities went away because people were actually engaged in treatment.

From our experience, when correctional officers in Louisiana and Massachusetts hear from their counterparts at facilities where MOUD is provided, these diversion concerns are greatly reduced. The new BOP guidance on providing MOUD is also helpful in addressing these worries.⁵⁶ This is why ADA outreach is so helpful in building support for MOUD access in jails and prisons.

VI. MOUD outreach and enforcement is effective: Law enforcement officials are open to expanding treatment access and are often unaware that the ADA applies

Our outreach and enforcement efforts in Louisiana and Massachusetts suggest that eliminating these discriminatory barriers to MOUD access can be overcome after law enforcement officers speak with correctional health officials who provide such treatment and after hearing from the Department about the applicability of the ADA to MOUD access in jails and prisons. Both are tools that the Department typically uses in ADA enforcement work. Sheriffs, judges, correctional officers, and elected officials in Louisiana and Massachusetts have been open to new ideas about tackling an opioid crisis ravaging their communities. They welcome the Department's insight on the applicability of the ADA and support for providing MOUD. In addition, many were unaware that the ADA applies in this context and revisited their reluctance to MOUD after hearing about a potential civil rights investigation and litigation risk.

For example, after attending a conference the U.S. Attorney's Office (USAO) for the Eastern District of Louisiana hosted on MOUD access and the ADA, and after a few follow-up meetings, the Sheriff of Orleans Parish said the Parish is planning to provide MOUD to

⁵⁶ Memorandum from Jeffrey A. Burkett, *supra* note 47.

inmates in New Orleans’s jail. This USAO also conducted outreach with Sheriff Craig Webre of Lafourche Parish in Louisiana, including a conversation with healthcare providers with experience in providing MOUD in correctional facilities. Lafourche Parish is now providing MOUD to all inmates who were on this treatment before being incarcerated and all who have been prescribed MOUD while incarcerated in the Parish. Sheriff Webre is also interested in participating in studies or pilot programs to evaluate the efficacy of this treatment, adding that he is willing to talk with and encourage other sheriffs or wardens to provide MOUD in their jails and prisons.⁵⁷ Both sheriffs were initially unaware that the ADA covered MOUD access in their jails.

Similarly, in Massachusetts, after opening a compliance review, the USAO entered into an out-of-court agreement with the Worcester County Sheriff that provides for a reasonable amount of time for the Sheriff’s healthcare vendor to build the capacity to provide all forms of MOUD to incarcerated persons. In addition to the settlement with Worcester, the USAO in Massachusetts has worked with other county facilities as well as the state Department of Correction to ensure ADA compliance related to MOUD. Whereas, in 2017, these medications were only found in one facility in Massachusetts, all corrections facilities in the state now either provide the medications or are waiting on regulatory approval to provide the medications.

VII. Conclusion

MOUD saves lives, but the people who need it most—those with a history of OUD and who are in jails and prisons—are routinely denied this treatment in violation of their civil rights. These prisoners, of which there are hundreds of thousands across the country, leave jail and prison at a dangerous risk of overdose death—129 times more likely than the average person to die from an overdose.⁵⁸ The Louisiana and Massachusetts model for increasing access to MOUD

⁵⁷ Sheriff Webre added that “the burdens, costs and challenges of addiction and mental illness have fallen upon the shoulders of law enforcement, jails and prisons, and that public safety would be enhanced, with a corresponding reduction in recidivism and victimization, by prioritizing intervention and treatment before and then when a person enters the criminal justice system.” Telephone interview with Craig Webre, Sheriff, Lafourche Parish (Sept. 15, 2021).

⁵⁸ Wakeman, *supra* note 7, at 923.

treatment in correctional facilities through outreach and enforcement works. These methods show how USAOs can reduce overdose deaths in their districts by using the Department's authority to enforce the ADA to ensure access to treatment in correctional settings.

About the Authors

David Howard Sinkman is an Assistant U.S. Attorney in the Eastern District of Louisiana, serving as the office's Opioid Coordinator. Much of his practice focuses on the prosecution of heroin traffickers and the illegal distribution of prescription opioids, as well as using civil rights statutes to address the opioid crisis. Sinkman earned a J.D. from Georgetown University Law Center, an M.Sc. from the London School of Economics, and a B.A. from the University of Michigan. Before joining the Department, Sinkman clerked on the U.S. Court of Appeals for the Second Circuit, the U.S. District Court for the Southern District of New York, and the Supreme Court of Israel.

Gregory Dorchak is an Assistant U.S. Attorney in the District of Massachusetts's Civil Rights Unit. He has worked there since 2015, and much of his practice focuses on using civil rights statutes to address the opioid crisis. Dorchak earned a J.D. from Northeastern University School of Law and a Ph.D. from the University of Massachusetts, Amherst.

HIV Discrimination Under the ADA—A Case Study

Lara K. Eshkenazi
Deputy Chief, Civil Division
Southern District of New York

I. Introduction

Dr. Emmanuel Asare is a plastic surgeon and owner and operator of Advanced Cosmetic Surgery (Advanced Cosmetic), who specializes in gynecomastia surgery—a surgery targeted to remove fat deposits from a man’s chest. Dr. Asare, however, refused to perform surgery on patients who were living with HIV or who he perceived were living with HIV. Indeed, from May to July 2014, Dr. Asare turned away three patients for this reason. Dr. Asare also performed HIV tests on two of the three individuals without their knowledge or consent and informed one of them—incorrectly—that he was HIV positive. After receiving a complaint from one of the three victims, the U.S. Attorney for the Southern District of New York investigated the case, filed a complaint, and ultimately, prevailed at a bench trial, after which the court held that Dr. Asare and Advanced Cosmetic violated Title III of the Americans with Disabilities Act (ADA). The court awarded substantial damages for each victim, in addition to civil penalties and injunctive relief.¹

While every case is unique, the focus of this article is to use this case to provide guidance on possible strategies for proving liability and damages in cases involving medical providers discriminating against individuals living with HIV or perceived to be living with HIV and on obtaining broad injunctive relief to prevent future discrimination.

II. Case background

A. Proving discrimination under the ADA based on denial of medical treatment

Title III of the ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

¹ United States v. Asare (*Asare I*), 476 F. Supp. 3d 20, 26–42 (S.D.N.Y. 2020).

accommodations of any place of public accommodation.”² To establish a violation of the ADA, the government must establish that (1) the individual denied services is “disabled within the meaning of the ADA,” (2) the defendant is subject to the ADA, and “(3) that the defendant[] discriminated against the [individual] within the meaning of the ADA.”³ Pursuant to its enforcement obligations under the ADA, the government, unlike private individuals, may seek monetary damages on behalf of any victims of discrimination, in addition to civil penalties and injunctive relief.⁴

B. The victims

There were three victims in this case, each of whom gave detailed testimony about their interactions with Dr. Asare and the emotional impact of Dr. Asare’s discriminatory conduct. Two of those victims were living with HIV, and Dr. Asare incorrectly perceived the third to be living with HIV.

1. Mark Milano

Mark Milano is a “HIV educator, writer, and editor at a research organization focused on HIV/AIDS.”⁵ Mr. Milano was originally diagnosed with AIDS in 1982.⁶ “Starting in 2008, [Mr.] Milano began developing fat deposits in his chest,” a condition known as gynecomastia.⁷ After some research and referrals, Mr. Milano scheduled an appointment at Advanced Cosmetic.⁸

On July 14, 2014, Mr. Milano attended an initial consultation with Dr. Emmanuel Asare at Advanced Cosmetic. During the consultation, Mr. Milano asked whether an HIV medication that he had taken in the past could have caused or contributed to the gynecomastia. Upon hearing the mention of a HIV medication, Dr. Asare told Mr. Milano that it was his office’s “policy to never perform any procedures on any patients with Human Immunodeficiency Virus.”⁹ Mr. Milano responded by telling Dr. Asare that such a policy was illegal.

² Americans with Disabilities Act of 1990 § 302, 42 U.S.C. § 12182(a).

³ *Roberts v. Royal Atl. Corp.*, 542 F.3d 363, 368 (2d Cir. 2008); *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

⁴ Americans with Disabilities Act of 1990 § 308, 42 U.S.C. § 12188(b)(2).

⁵ *Asare I*, 476 F. Supp. 3d at 30.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 30–31.

⁹ *Id.* at 31.

Dr. Asare insisted that he had the right to refuse to perform surgery on Mr. Milano and stated that it was his “right as a doctor” to turn away patients that he determined were “medically inappropriate” for surgery.¹⁰

2. Victim 2

Victim 2, an opera singer, was diagnosed with HIV in 2009, and has been taking antiretroviral medication since shortly after his diagnosis.¹¹ By 2014, Victim 2’s “CD4 count, which is a measure of immune system activity, was [in a] normal range, and his HIVviral load, which identifies the measurable amount of virus in one’s system, was undetectable.”¹² In the spring of 2014, Victim 2 felt that he was ready to address his long-standing dissatisfaction with the appearance of his chest. After doing some research into potential surgeons, Victim 2 scheduled an appointment at Advanced Cosmetic with Dr. Asare.¹³

On April 2, 2014, just a few months before Mr. Milano’s appointment at Advanced Cosmetic, Victim 2 met with Dr. Asare. Victim 2 filled out the paperwork he was given, but when the form asked him to disclose his HIV status, Victim 2 declined to do so. Victim 2 explained at trial that “the thought of sharing [his] HIV status was something that . . . encompasses a lot of conflict, a lot of emotional stress and anxiety.”¹⁴ Indeed, Victim 2 had not yet shared his HIV status with his own family.¹⁵

After completing the forms, Victim 2 met with Dr. Asare to discuss the procedure, made a deposit for the surgery, and scheduled the surgery for early June.¹⁶ On May 15, 2014, Victim 2 returned to Advanced Cosmetic “to pay the balance [of the procedure,] and to have his blood drawn for pre-surgical testing.”¹⁷ At no point did Dr. Asare or employees of Advanced Cosmetic obtain Victim 2’s consent to perform an HIV test.¹⁸

¹⁰ *Id.*

¹¹ *Id.* at 26–27.

¹² *Id.* at 27.

¹³ *Id.* at 26–27.

¹⁴ *Id.* at 27.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

On May 29, 2014, the date of the scheduled surgery, Victim 2 returned to Advanced Cosmetic to meet with Dr. Asare in his office. At that point, Dr. Asare told Victim 2 “that his blood work [came back and they found out] that he had HIV, ‘and that it was [Dr. Asare’s] policy—his office’s policy—not to perform procedures on people with HIV.’”¹⁹ Victim 2 responded that he “knew he was living with HIV,” that he “was currently on antiretroviral medications, . . . had an undetectable viral load, and . . . a CD4 count in the normal range.”²⁰ Dr. Asare responded by saying “it’s really his nurses who would be freaked out. If they knew Victim 2 was HIV-positive, they would be too afraid of working on someone with HIV for fear of getting infected.”²¹ After that, Dr. Asare directed Victim 2 to go next door to speak with his assistant to get a refund.²²

After leaving Defendants’ office, Victim 2 began to experience overwhelming feelings of guilt and shame, reawakening issues regarding his family, his past experiences, and conflicts with his diagnosis that Victim 2 thought he had long overcome.²³ As a result, Victim 2 sought help from a therapist to address those issues and remained affected years later by his experience with Dr. Asare.²⁴

3. Victim 3

Victim 3, an underwriter of automotive loans, “was planning to get married in September 2014” and “was not happy” with the look of his chest.²⁵ He decided he wanted to address that issue surgically in advance of his wedding. After conducting some research, Victim 3 scheduled an initial consultation with Dr. Asare at Advanced Cosmetic in early May 2014—just weeks before Dr. Asare denied medical treatment to Victim 2.²⁶

Before the initial consult, Victim 3 was given paperwork that included questions about his medical history. Victim 3 has a blood condition known as neutrophilic leukocytosis, which is an increase in his white blood cell count, and was under the regular care of a

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (cleaned up).

²² *Id.*

²³ *Id.* at 28.

²⁴ *Id.*

²⁵ *Id.* at 28.

²⁶ *Id.*

hematology specialist.²⁷ The blood condition does not have any effects on his daily life and does not require Victim 3 to take any medications.²⁸ When Victim 3 filled out the medical history paperwork at Advanced Cosmetic, he did not disclose this condition because, in his view, “his condition was not responsive to any of the questions on the forms.”²⁹ Victim 3 was not living with HIV.³⁰

“On May 13, 2014, [Victim 3] met with Dr. Asare for an initial consult. A few days later, [Victim 3] paid for the [procedure] and scheduled a preoperative visit for May 16, 2014.”³¹ At that preoperative visit, “employees of Advanced Cosmetic performed an EKG, took vitals, and drew blood.”³² No one at Advanced Cosmetic sought consent from Victim 3 to conduct an HIV test.³³

On May 21, 2014, Victim 3 arrived at Advanced Cosmetic for his surgery.³⁴ Shortly after arriving, Victim 3 put on a medical robe, was taken into the operating area, took sedative pills, and was then given an injection of another, stronger sedative by Dr. Asare.³⁵ About five minutes later, Dr. Asare stated that he was canceling the procedure because the preoperative blood tests indicated that Victim 3 was HIV positive.³⁶ When Victim 3 protested that he could not be HIV positive because he was under the care of a hematologist, Dr. Asare reaffirmed that the procedure had to be canceled and told Victim 3 to get dressed and prepare to leave.³⁷

Normally, a patient who receives surgery at Advance Cosmetic would remain at the office for several hours before being discharged to allow the sedatives to wear off.³⁸ Yet, despite how groggy Victim 3 was feeling at this point from the preoperative sedatives he had been given, shortly after speaking with Dr. Asare, Victim 3 was driven back to his home, rather than being allowed to stay at the office until the

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 28–29.

³⁰ *Id.* at 28–30.

³¹ *Id.* at 29 (cleaned up).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

effects of the sedatives subsided.³⁹ Once he arrived home, Victim 3 had some difficulty getting into his house because of the impact of the sedatives. “After finally getting inside, [Victim 3] crawled on all fours up the stairs to his bedroom and lost consciousness.”⁴⁰ Victim 3 woke up after 11:00 p.m. that same night completely distraught; spent most of the night awake, mulling over what Dr. Asare had told him; and even contemplated suicide.⁴¹

On May 22, 2014, Victim 3 called Advanced Cosmetic hoping to get some answers about the HIV test result but was told Dr. Asare was not available.⁴² Victim 3 called his hematologist, who referred him to another medical facility for a more conclusive HIV test.⁴³ Victim 3 then scheduled an appointment and HIV test for the next day.⁴⁴

On May 23, 2014, Victim 3 was finally able to schedule a meeting with Dr. Asare, which was to take place shortly before his appointment for the HIV test.⁴⁵ At that meeting, Dr. Asare explained that he had to stop the procedure because the “they weren’t outfitted at that facility to do the surgery on someone with HIV.”⁴⁶ Dr. Asare asked no questions about Victim 3’s condition or any medication he was taking.⁴⁷ After that meeting, Victim 3 went to another facility for an HIV test.⁴⁸ The following day, he received the results of that test, indicating that he was not HIV positive.⁴⁹

C. Investigation and procedural history

On July 15, 2014, the day after Dr. Asare refused to provide medical treatment to Mr. Milano, Mr., “Milano filed a complaint with the Department of Justice alleging that [Dr. Asare] violated his rights under the ADA.”⁵⁰ The U.S. Attorney for the Southern District of New York began an investigation and requested that Dr. Asare and Advanced Cosmetics provide documents and information about

³⁹ *Id.*

⁴⁰ *Id.* at 30.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 24.

medical services provided to individuals living with HIV.⁵¹ Dr. Asare sent a letter in response admitting that “history of HIV infection” would disqualify a patient from surgery.⁵² Dr. Asare noted that he believed it was his “right as a Cosmetic Surgeon” to have “disqualifying criteria based on [his] comfort level.”⁵³

On May 6, 2015, the government filed a complaint against Dr. Asare and Advanced Cosmetic (Defendants), alleging that Dr. Asare’s policy and refusal to treat Mr. Milano violated Title III of the ADA. Mr. Milano, who obtained private counsel, intervened in the action, and asserted an additional claim under the New York City Human Rights Law.⁵⁴ During the course of discovery, the government learned of Victims 2 and 3 who were denied medical treatment by Dr. Asare due to Dr. Asare’s belief that the individuals were living with HIV.⁵⁵

After discovery, the government and Mr. Milano moved for summary judgment. Defendants admitted that they denied service to those living with HIV because of concerns associated with interaction between antiretrovirals and the combination of medications defendant Dr. Asare used during his surgical procedures (Admitted Policy).⁵⁶

The court granted the government’s (and Mr. Milano’s) motion in part, holding that Defendants’ Admitted Policy violated the ADA. The court found that the undisputed evidence established Defendants’ policy of denying individuals with HIV taking antiretrovirals constituted an application of eligibility criteria that screened out those with disabilities, and the Admitted Policy involved no individualized assessment of patients by Defendants. The court also held that there was no evidence that the Admitted Policy was necessary to the provision of Defendants’ services, or that making reasonable modifications (for example, hiring an anesthesiologist) to accommodate surgery on individuals taking antiretroviral medications would constitute a fundamental alteration to Defendants’ services.⁵⁷

⁵¹ United States v. Asare (*Asare II*), No. 15 Civ. 3556, 2018 WL 2465378, at *2 (S.D.N.Y. June 1, 2018).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *5–7.

The court found that Defendants applied this policy to Mr. Milano and granted summary judgment as to his ADA claim.⁵⁸ But the court also concluded that a material factual dispute remained with respect to the government's claims involving Victims 2 and 3, as further discussed below, such that those claims must proceed to trial.⁵⁹

The court conducted a bench trial in October 2018, at which the government prevailed on all claims. The court awarded damages to all three victims, as well as injunctive relief and civil penalties.⁶⁰

III. Proving all discriminatory conduct to achieve broad injunctive relief

Essential to proving liability and obtaining appropriate relief is identifying all discriminatory conduct. Here, while Dr. Asare certainly discriminated against individuals by refusing to provide them with medical services upon learning about their HIV status, the government was also able to prove additional discriminatory conduct—that Dr. Asare tested all prospective patients for HIV without their knowledge or consent. This additional evidence allowed the United States to obtain broader injunctive relief.

For example, establishing Dr. Asare's liability at trial with respect to Victim 2 was relatively straightforward based on Dr. Asare's Admitted Policy of denying services to individuals who are taking antiretroviral medications: Victim 2 was taking antiretroviral medications at the time of his meeting with Dr. Asare and was denied services on that basis. However, to prove that Dr. Asare discriminated against Victim 3 (who was not living with HIV and, thus, was not taking antiretroviral medications), the government had to identify additional discriminatory conduct designed to screen out all individuals perceived to be living with HIV—not just individuals taking antiretroviral medications. That additional discriminatory conduct was Dr. Asare's practice of testing every patient for HIV.⁶¹ By proving Dr. Asare's HIV testing policy was discriminatory, the government was able to obtain monetary relief for Victim 3 and injunctive relief to prevent broad HIV testing.⁶²

⁵⁸ *Id.*

⁵⁹ *Id.* at *4.

⁶⁰ *Asare I*, 476 F. Supp. 3d at 25–36.

⁶¹ *Id.* at 35.

⁶² *Id.* at 37–42.

At trial, Dr. Asare testified that he needed to conduct HIV tests “to assess whether potential patients were healthy candidates for surgery.”⁶³ To counter this defense, the government presented expert testimony that preoperative HIV screening does not provide “meaningful information about the state of a patient’s health.”⁶⁴ Specifically, the expert testimony established that a person who has an otherwise normal medical history, physical exam, and blood work has no greater risk of surgical complications when living with HIV.⁶⁵ The government’s expert further testified that an HIV test does not provide any pertinent information about the general health status of the tested individual.⁶⁶

According to testimony by the government’s expert and a court-appointed expert,⁶⁷ the scope and manner by which Dr. Asare administered HIV tests were also key factors relevant to proving that Dr. Asare screened out all individuals who tested positive for HIV. With respect to scope, the government was able to show that broad testing of all patients for HIV for the purpose of protecting medical providers from possible infection was unnecessary due to the existence of “Universal Precautions,” which are standard practices and procedures used by all medical professionals and were established approximately thirty years ago. Universal Precautions include an assumption that any patient may have an infectious condition and establish the common practice of taking appropriate precautions with each patient. Therefore, Universal Precautions render HIV testing unnecessary to determine whether providers should take additional precautions when treating patients who are living with HIV.⁶⁸

Regarding the manner of testing, while there could be valid reasons for broadly testing individuals for HIV status in a variety of settings, mainly to link the tested individuals to additional care, Dr. Asare never made any attempt to connect Victims 2 and 3 to medical care for what Dr. Asare believed were newly diagnosed cases of HIV. Indeed, according to the medical records presented at trial and Dr. Asare’s

⁶³ *Id.* at 35.

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* at 33.

⁶⁶ *Id.* at 32–33.

⁶⁷ Because the government’s expert did not practice medicine in New York State, the court appointed an expert to opine on whether Dr. Asare’s HIV testing practices complied with New York state law. *Id.* at 25–26.

⁶⁸ *Id.*

own testimony, Dr. Asare made no real effort to contact Victim 2 to ensure that he received appropriate care. Similarly, with respect to Victim 3, Dr. Asare informed him of the HIV test results while he was still under the influence of the sedation medications, and Dr. Asare made no attempt to have a more meaningful discussion with Victim 3 once the effects of the medication wore off. Such evidence was crucial to proving that the purpose of administering HIV tests to all patients was discriminatory.⁶⁹

Finally, the fact that the HIV tests were performed clandestinely further indicated that Dr. Asare intended to use the tests for discriminatory purposes. At trial, Dr. Asare acknowledged that the standard of care in New York required that he obtain and document consent for HIV testing and admitted that there was no documentation in the medical records suggesting that anyone in his office sought or obtained consent from Victim 2 or 3 before testing them for HIV. Indeed, both victims testified that they were never informed that such tests were being conducted on them.⁷⁰

Accordingly, the government persuaded the court to base its liability finding with respect to Victims 2 and 3 on Defendants' "practice of testing every preoperative patient for HIV" as the "mechanism for implementing [the] broader 'screen out' policy."⁷¹ Significantly, because the government's theory of liability was based on the Admitted Policy and Defendant's broader practice of testing all patients for HIV, the government was able to obtain broad injunctive relief enjoining this practice. Specifically, the court ordered injunctive relief enjoining Defendants from "(1) performing HIV testing on every patient as routine practice, and (2) conducting HIV testing on any patient without the patient's express consent."⁷² The court further ordered Defendants to "institute, and conduct their medical practice in accordance with, written policies ensuring ADA compliance in the patient intake and screening process."⁷³

⁶⁹ *Id.* at 35–36.

⁷⁰ *Id.* at 33.

⁷¹ *Id.* at 35.

⁷² *Id.* at 42.

⁷³ *Id.*

IV. Proving compensatory damages without corroborating testimony

To prove emotional damages, the government only presented the testimony of the victims. While emotional damages can be proven in a variety of ways, including through medical records and expert testimony, victims' testimony can be sufficient if they can specifically and compellingly describe the distress and anguish they suffered. Indeed, based solely on the victims' testimony, the court awarded each victim \$125,000, which, as the court noted, is on "the higher end of the range for 'garden-variety' claims."⁷⁴

There is little caselaw on appropriate emotional distress damages for this type of disability discrimination. While Assistant U.S. Attorneys need to rely on the standards in their respective circuits in calculating appropriate damages, in the Second Circuit, "non-economic damages can fall into one of three categories—garden variety, significant, or egregious. Awards compensating garden-variety emotional distress or mental anguish in the Second Circuit range from \$30,000 to \$125,000."⁷⁵

In garden-variety claims, the evidence of emotional harm is limited to the plaintiff's testimony, which describes his or [sic] her injuries in vague or conclusory terms, and fails to relate the severity or consequences of the injury. These claims typically lack extraordinary circumstances and are not supported by medical testimony. Significant emotional distress claims are based on more substantial harm or offensive conduct and may be supported by medical testimony, evidence of treatment by a healthcare professional, and testimony from other witnesses. Egregious emotional distress claims yield the highest awards and are warranted only where the [defendant's] conduct was outrageous and

⁷⁴ *Id.* at 38.

⁷⁵ *Lewis v. Am. Sugar Refining, Inc.*, 325 F. Supp. 3d 321, 364 (S.D.N.Y. 2018). *But see* *Quinby v. WestLB AG*, No. 04 Civ. 7406, 2008 WL 3826695, at *4 (S.D.N.Y. Aug. 15, 2008) (upholding a garden-variety emotional distress award of \$300,000 as "at or above the upper range of reasonableness").

shocking or affected the physical health of the plaintiff.⁷⁶

Thus, “[e]motional distress damages are available even where the plaintiff has not sought medical treatment or the distress does not manifest in physical symptoms.”⁷⁷

Here, while no witness testimony or other evidence was offered to corroborate the victims’ experiences, the government argued that the victims’ respective testimony regarding the emotional impact of Dr. Asare’s actions was sufficient to establish that they were entitled to the higher end of garden-variety emotional distress damages. The key to persuading the court of the importance of awarding significant damages was the sincere demeanor of the victims as they described the significant distress they suffered because of Dr. Asare’s actions. Indeed, despite the lack of corroborating evidence, the court ultimately awarded \$125,000 for each victim.⁷⁸

Specifically, with respect to Victim 2, the court was persuaded that the government presented evidence of severe emotional distress over a period of years as a result of the discriminatory conduct. The court’s conclusion was based on Victim 2’s emotional testimony regarding the humiliation he felt after years of working to overcome his understanding of society’s perception of him being “dirty” or a “deviant[]” as a result of his HIV diagnosis.⁷⁹ As he stated at trial, Dr. Asare’s treatment caused him “to re-experience the emotional pain he

⁷⁶ *DeCurtis v. Upward Bound Int’l, Inc.*, No. 09 Civ. 5378, 2011 WL 4549412, at *4 (S.D.N.Y. Sept. 27, 2011) (quoting *Maker v. Alliance Mortg. Banking Corp.*, No. 06 Civ. 5073, 2010 WL 3516153, at *2 (E.D.N.Y. Aug. 9, 2010)) (internal citations omitted).

⁷⁷ *Saber v. New York St. Dep’t of Fin. Servs.*, No. 15 Civ. 5944, 2018 WL 3491695, at *12 (S.D.N.Y. July 20, 2018) (citing *Patrolmen’s Benevolent Ass’n of City of N.Y. v. City of New York*, 310 F.3d 43, 55–56 (2d Cir. 2002); accord *Sachs v. Nunziantie*, No. 15 Civ. 1825, 2016 WL 4506731, at *4 (E.D.N.Y. July 21, 2016)).

⁷⁸ See *Lewis*, 325 F. Supp. 3d at 367–68 (awarding \$115,000 for “garden-variety” emotional distress); *Saber*, No. 15 Civ. 5944, 2018 WL 3491695, at *13 (awarding \$125,000 based on plaintiff’s testimony); *Campbell v. Celico P’ship*, No. 10 Civ. 9168, 2012 WL 3240223, at *4 (S.D.N.Y. Aug. 6, 2012) (same); *Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 2739, 2005 WL 2170659, at *16 (S.D.N.Y. Sept. 6, 2005) (awarding \$120,000 based on plaintiff’s testimony).

⁷⁹ *Asare I*, 476 F. Supp. 3d, at 38.

felt when he first learned he was HIV positive.”⁸⁰ Victim 2 further testified that, for weeks after his encounter with Dr. Asare, he “was consumed and overwhelmed by . . . feelings of shame” and that he saw a therapist for 7 to 10 sessions to cope with his feelings.⁸¹ This testimony persuaded the court to award compensation on the “higher end” range for garden-variety claims due to the “severe emotional distress” suffered by Victim 2.⁸²

Regarding Victim 3, the court noted the “psychologically painful state of uncertainty” he suffered after receiving the “shocking” news that he had tested positive for HIV.⁸³ The court considered Victim’s 3’s testimony that, when he arrived at the clinic for HIV testing after his experience with Dr. Asare, “he broke down in tears, and had to be comforted by a physician’s assistant.” The court was persuaded that the “lasting impact of this experience cannot be doubted,” and that, “to this day, [Victim 3] continues to carry [his negative HIV] test results, as a reminder that he is not living with HIV.”⁸⁴ Accordingly, the court concluded that Victim 3’s “traumatic experiences, resulting in his continuing feelings of shock, fear, nervousness, and suicidal thoughts, warrant an emotional distress award of \$125,000.”⁸⁵

V. Conclusion

The outcome of the trial against Dr. Asare and his practice illustrates the importance of identifying all forms of discriminatory conduct—even in situations where the discriminatory conduct initially seems obvious—to obtain appropriate injunctive relief to prevent future discrimination. In addition, do not be deterred by the lack of corroborating evidence when pursuing compensatory damages. This case is an example of how it is possible to obtain substantial compensatory damages on behalf of victims of discrimination based on their own compelling testimony and without any corroborating evidence.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 37–38.

⁸³ *Id.* at 39.

⁸⁴ *Id.*

⁸⁵ *Id.*

About the Author

Lara K. Eshkenazi is the Deputy Chief of the Civil Division in the U.S. Attorney's Office for the Southern District of New York. She has been an Assistant U.S. Attorney for over 18 years and has served in various supervisory positions over her tenure, including as Deputy Chief of the Civil Rights Unit from 2011 to 2014, and Co-Chief of the Civil Rights Unit from 2014 to 2018. In June 2016, she was awarded the Henry L. Stimson Medal from the New York City Bar Association for her outstanding work as an Assistant U.S. Attorney. She also received the John Marshall Award from the U.S. Attorney General in 2016 for outstanding legal achievement for participation in litigation and the Director's Award from the Director of the Executive Office of U.S. Attorneys in 2011 for superior performance as an Assistant U.S. Attorney. She received her B.A. from Vassar College and her J.D. from Boston University.

Protecting Those Who Protect Us: An Introduction to the Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act for AUSAs Interested in Starting a Servicemembers and Veterans Practice

Nicole Siegel
Acting Director
Servicemembers and Veterans
Initiative
Civil Rights Division

Andrew Braniff
Assistant Director
Servicemembers and Veterans
Initiative
Special Litigation Counsel
Employment Litigation Section
Civil Rights Division

Deirdre Brou
Assistant U.S. Attorney
Eastern District of Virginia

Tanya Kirwan
Trial Attorney
Housing and Civil Enforcement
Section
Civil Rights Division

Torey Cummings
Assistant U.S. Attorney
District of Massachusetts

Amy Romero
Assistant U.S. Attorney
District of Rhode Island

Zeyen Wu
Assistant U.S. Attorney
District of Colorado

I. Introduction

Members of our armed forces face unique burdens when they choose to serve our country. An Army Reservist may be discriminated against by an employer who is unhappy with multiple service-related absences. An Air Force pilot who placed all her belongings in a storage unit may come home to find her items auctioned off due to payment delays while deployed overseas. A national guardsman called to federal duty to assist with COVID-19 vaccine distribution may need to move and, subsequently, face excessive fees for terminating his apartment lease early.

Fortunately, the Department of Justice (Department), and the Civil Rights Division (Division) in particular, has the resources and legal authorities to help alleviate these burdens and protect servicemembers' rights. But the Division cannot do this work alone. It relies on the U.S. Attorney community to support this work by conducting outreach, identifying local needs, and assisting with cases developed within each district.

This article will provide: (1) an introduction to the Department's Servicemembers and Veterans Initiative; (2) an overview of the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act; (3) two recent success stories from the field; and (4) a guide for Assistant U.S. Attorneys (AUSAs) interested in starting a servicemembers and veterans practice. We hope that this article will inspire more U.S. Attorneys' Offices (USAOs) and AUSAs to partner with the Division in "build[ing] a comprehensive legal support and protection network focused on serving servicemembers, veterans, and their families."¹

II. The Servicemembers and Veterans Initiative

The Servicemembers and Veterans Initiative (Initiative) was announced in March 2015 and formally launched by Attorney General Loretta Lynch in October 2016. The Initiative's mission is to support the Department in its efforts to protect servicemembers and veterans through outreach, enforcement assistance, and training.

The Initiative routinely conducts outreach and training for military populations and the people who serve them, such as veteran organizations, military training schools, military legal assistance offices, and law school clinics. These trainings are focused on federal laws protecting servicemember and veteran employment, financial security, and civil rights. The Initiative also liaises with federal partners serving military populations, such as the Department of Defense, the Consumer Financial Protection Bureau, the Department of Labor, and the Equal Employment Opportunity Commission, as well as outside groups such as the American Bar Association. The Initiative also provides extensive support and training to AUSAs who

¹ *About the Initiative*, DEP'T OF JUST., <https://www.justice.gov/servicemembers/about-initiative> (last visited Jan. 14, 2022).

are interested in developing servicemember and veteran practices in their districts.

On January 5, 2021, the President signed the Servicemembers and Veterans Initiative Act of 2020 (SVI Act), which formally established the Initiative within the Division.² The SVI Act directed the initiative to promote policies to support servicemembers and veterans, to liaise with military contacts, to promote civil legal aid to the military community, and to support the enforcement of federal laws to protect servicemembers and veterans.³ This Act codified the Initiative's role within the Department and renewed the initiative's resolve to not just continue, but also enhance, its efforts to protect the civil rights of servicemembers and veterans. The Initiative is housed within the Division's Policy and Strategy Section.

III. Civil Rights Division's enforcement of servicemember and veteran rights

The Division enforces the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Servicemembers Civil Relief Act (SCRA), which work to protect the employment rights and financial security of members of the military community.⁴ The Division works collaboratively with USAOs nationwide to investigate, litigate, and resolve these cases. With the support of subject-matter experts within the Division, AUSAs frequently serve as lead attorneys on these matters and have the opportunity to work directly with the aggrieved servicemembers and veterans.

² Servicemembers and Veterans Initiative Act of 2020, Pub. L. No. 116-288, 123 Stat. 4884 (2021).

³ *Id.*

⁴ *See* Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–4335; Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4043. The Division enforces additional statutes that provide protections for servicemembers and veterans, including the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. §§ 20301–2311), the Fair Housing Act (42 U.S.C. §§ 3601–3631), and the Americans with Disabilities Act (42 U.S.C. §§ 12111–12213). While we do not cover these statutes in this article, you can contact the SVI to learn more about how these laws apply to the military community.

A. The Uniformed Services Employment and Reemployment Rights Act⁵

The Division's Employment Litigation Section (ELS) enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA protects servicemembers in their civilian employment.⁶ It provides for causes of action for discrimination, reemployment, benefits, pensions, and protection from discharge based on military service. For example, USERRA:

- makes it unlawful to terminate, fail to promote, or to take an adverse employment action against servicemembers based on their past, present, or future military service;⁷
- requires prompt reemployment for servicemembers following periods of leave from their civilian employer due to military service;⁸
- requires employers to reemploy servicemembers in a position with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed;⁹
- requires employers to fund servicemembers' pensions during periods of leave for military service as if they had remained continuously employed;¹⁰ and
- prohibits employers from terminating servicemembers, except for cause, within a year following long term military deployments.¹¹

If a servicemember believes her USERRA rights were violated, she must first file a complaint with the Department of Labor's Veterans' Employment and Training Service (DOL-VETS), which investigates and attempts to resolve the matter.¹² If DOL-VETS cannot resolve the complaint, the servicemember may ask DOL-VETS to refer the claim

⁵ 38 U.S.C. §§ 4301–4335.

⁶ See 38 U.S.C. § 4301(a).

⁷ 38 U.S.C. § 4311(a)–(b).

⁸ 38 U.S.C. § 4313(a).

⁹ *Id.*

¹⁰ 38 U.S.C. § 4318(b).

¹¹ 38 U.S.C. § 4316(c).

¹² See *Employment*, DEP'T OF JUST., <https://www.justice.gov/servicemembers/employment> (updated June 30, 2020).

to the Attorney General for review.¹³ “If the Attorney General is reasonably satisfied that the servicemember is entitled to relief, the Attorney General may commence an action in federal court on behalf of the servicemember.”¹⁴ Upon receipt of a claim, the Division will contact the USAO where the claim may be filed in federal court to collaborate with that office in prosecuting the claim. “If the employer is a state or state agency, the action is brought in the name of the United States. In all other cases, the United States files suit in the name of the servicemember” and acts as the attorney for the servicemember.¹⁵ This presents a unique opportunity for AUSAs to personally represent clients in civil actions.

The most frequent referrals from DOL-VETS involve failures to reemploy members of the National Guard (Guard) or U.S. Reserve (Reserve) forces following periods of service. Since September 11th, over one million members of the Guard and Reserve have been called up for long-term deployments. Most recently, tens of thousands of Guard and Reserve members served extended tours of duty to assist with the domestic response to the COVID-19 pandemic. USERRA protections are not only essential to these servicemembers, but also to their family members who rely on their financial support.

Since the Division assumed USERRA enforcement authority in 2004 and through the end of FY 2020, the Department “has filed 109 USERRA lawsuits and favorably resolved 200 USERRA complaints,” either through consent decrees or private settlements.¹⁶ The Division has been fortunate to work with more than 50 USAOs on these cases, ranging from Alaska to the U.S. Virgin Islands.

B. Servicemembers Civil Relief Act¹⁷

The Division’s Housing and Civil Enforcement Section (HCE) enforces the Servicemembers Civil Relief Act (SCRA), which provides certain financial and civil legal protections to servicemembers and their families. The law covers issues such as rental agreements,

¹³ *Id.*

¹⁴ *Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)*, DEPT OF JUST., <https://www.justice.gov/servicemembers/uniformed-services-employment-and-reemployment-rights-act-1994-userra> (updated July 31, 2019).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 50 U.S.C. §§ 3901–4043.

evictions, repossessions, credit card interest rates, mortgage foreclosures, civil judicial proceedings, and automobile leases. For example, the SCRA:

- makes it unlawful for a creditor to repossess a servicemember's car or foreclose on a servicemember's home without a court order, so long as the debt was incurred before military service;¹⁸
- allows a servicemember to terminate a residential or vehicle lease early and without penalty if they receive qualifying deployment or other military orders that make it impracticable for them to continue using the residence or vehicle;¹⁹
- allows servicemembers to request a 6% interest rate cap on any financial obligation incurred before military service (including mortgages, student loans, and credit card debt);²⁰ and
- prohibits creditors from obtaining default judgments against active duty servicemembers without notifying the court of the defendant's military status.²¹

The Department's SCRA settlements since FY 2009 have provided more than \$474 million in compensation to more than 120,000 servicemembers and \$925,000 in civil penalties to the United States.

IV. Success stories from the field

A. *Hunger v. Walmart, Inc.*: The District of Colorado holds retail giant accountable for discriminating against a Naval Reservist

Recently, in a collaborative effort between the District of Colorado and the ELS, the United States was able to obtain relief for Naval Petty Officer Third Class (PO3) Lindsey Hunger. PO3 Hunger has been a member of the Naval Reserve for seven years, where she worked as a machinist's mate, repairing ships for redeployment. PO3 Hunger alleged that Walmart violated her rights when it failed to offer her employment at the Walmart store located in Grand Junction,

¹⁸ 50 U.S.C. §§ 3952, 3953.

¹⁹ 50 U.S.C. § 3955.

²⁰ 50 U.S.C. § 3937.

²¹ 50 U.S.C. § 3931(b)(1).

Colorado, because of her upcoming Naval Reserve commitments.²² PO3 Hunger applied to work at Walmart online in May 2016.²³

On May 27, 2016, PO3 Hunger spoke to the hiring director and learned that the job included general customer service work and stocking.²⁴ The hiring director also explained that the position was temporary and seasonal, but there was a possibility to stay on in an overnight shift after the end of the season.²⁵ At the end of the conversation, PO3 Hunger informed the hiring director that she would need two weeks off during the summer to complete her Navy Reserve training.²⁶ PO3 Hunger was immediately told that she could not be hired because Walmart could not support two weeks off.²⁷ PO3 Hunger offered to work any position available, but she was informed that no other job was available.

Following her denial of employment, PO3 Hunger filed a claim with DOL-VETs, which determined that Walmart had likely violated the statute but could not reach a resolution. PO3 Hunger requested a referral of her matter to the Department, and the Division contacted the District of Colorado. The assigned AUSA immediately contacted PO3 Hunger, who told him she was surprised that her small case reached the level of a U.S. Attorney's Office. After interviewing the claimant and researching the statute, the AUSA determined that a USERRA violation could be established and that representation should be offered to PO3 Hunger.

As the AUSA learned, USERRA prohibits discrimination based on military service in initial employment decisions.²⁸ The definition of "employer" explicitly covers an entity "that has denied initial employment in violation of section 4311."²⁹ The House Report on USERRA also supports this view, explicitly incorporating the reasoning of *Beattie v. Trump Shuttle, Inc.*,³⁰ which held that, under the Veteran's Reemployment Rights Act, a predecessor to USERRA, an employer could not deny initial employment based on

²² Complaint at 2–3, *Hunger v. Walmart Inc.*, No. 19-cv-03090 (D. Colo. 2019), ECF No. 1.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.40.

²⁹ 38 U.S.C. § 4303(4)(A)(v).

³⁰ 758 F. Supp. 30 (D.D.C. 1991).

unavailability created by military service obligations.³¹ Based on the facts and law, the AUSA drafted a representation memo for PO3 Hunger and, once approved, signed a representation agreement, becoming her personal attorney.

On October 30, 2019, the USAO filed a complaint in the District of Colorado,³² and on January 7, 2020, the Department announced it had reached a settlement with Walmart.³³

As part of the settlement, which include[d] backpay for [PO3] Hunger, Walmart has agreed to review its employment and internal hiring policies across the corporation. [Specifically, it] [r]evis[e]d the policies to include the following language: “Walmart prohibits discrimination against individuals, including applicants, based on their military service (including required military training obligations) or membership in the uniformed services.” Walmart will also ensure that “all supervisors, managers, and administrative staff” in the Grand Junction, Colorado store at issue receive training—developed in consultation with the United States—“on the requirements of USERRA and on employees’ and service members’ rights and obligations under the statute.”³⁴

Although the Department has brought many USERRA cases before, this was the first matter in which the Department brought a claim alleging only the denial of initial employment. Because Department attorneys provide personal representation to servicemembers under USERRA, the AUSA worked closely with his client to develop the case, in addition to guiding her through the many attempted media inquiries, including from the New York Times. PO3 Hunger described the AUSA as kind and patient in their conversations, many of which occurred in the evenings after normal work hours.

³¹ H.R. REP. NO. 103-65(I), at 23 (1993); *Beattie*, 758 F. Supp. at 36.

³² Press Release, Dep’t of Just., Department of Justice Sues Walmart to Enforce Employment Rights of Naval Reservist (Oct. 30, 2019).

³³ Press Release, Dep’t of Just., Colorado U.S. Attorney Announces Settlement With Walmart Over Discrimination Claim By Naval Reservist (Jan. 7, 2020).

³⁴ *Id.*

Local AUSAs are key components to litigating USERRA matters, not only for their knowledge of the district court and judges, but also their ability to meet and confer face to face with the Department's USERRA clients and guide them through difficult times in their lives.

B. *United States v. Father & Son Moving & Storage: The District of Massachusetts and the Division enforce the SCRA rights of an Air Force Sergeant whose invaluable heirlooms were illegally auctioned off while deployed*

On July 8, 2019, Father & Son Moving & Storage in Billerica, Massachusetts, auctioned off virtually all Technical Sergeant (TSgt.) Charles Cornacchio's household and personal possessions.³⁵ TSgt. Cornacchio, a full-time active duty servicemember in the U.S. Air Force since 2007, had contracted with Father & Son to store his possessions while he was deployed to Qatar.³⁶ While TSgt. Cornacchio was serving our country overseas, Father & Son sold not only his furniture and appliances, pots and pans, lamps and rugs, but also family heirlooms and other personally meaningful items, such as military medals and mementos earned by family members, hand-carved furniture, photographs, and letters.³⁷

Section 3958 of the SCRA is a strict liability statute. It makes it unlawful for a storage company, like Father & Son, that has a lien on a servicemember's property to sell, auction off, or otherwise dispose of that property without a court order.³⁸ Under the SCRA, the United States is not required to prove that a defendant knew that a person was a servicemember before enforcing a lien against them.³⁹ In this case, however, there was little argument that Father & Son was aware that TSgt. Cornacchio was in the military. TSgt. Cornacchio told Father & Son that he needed to store his possessions because he was being deployed overseas.⁴⁰ Father & Son picked up TSgt. Cornacchio's possessions on Hanscom Air Force Base, Massachusetts, and TSgt. Cornacchio was present and in his Air Force uniform on the

³⁵ Complaint at 3–4, *United States v. Father & Son Moving & Storage*, No. 20-cv-11551 (D. Mass. 2020), ECF No. 1.

³⁶ *Id.* at 2–3.

³⁷ *Id.* at 3.

³⁸ *See* 50 U.S.C. § 3958(a).

³⁹ *See* 50 U.S.C. § 3958.

⁴⁰ Complaint, *supra* note 35, at 3.

day Father & Son assumed responsibility for his possessions.⁴¹ Father & Son even sent a notice to TSgt. Cornacchio at his former Hanscom Air Force Base address.⁴² The notice informed TSgt. Cornacchio that “his account was allegedly in arrears” and his belongings would be sold at auction, but TSgt. Cornacchio did not receive this notice, which was eventually forwarded to him in Qatar, until August 5, 2019, a month after his possessions had been sold.⁴³

TSgt. Cornacchio contacted the Armed Forces Legal Assistance Program Office for the U.S. Air Force, which referred the case to HCE. HCE reached out to the Civil Rights Unit for the District of Massachusetts, and the case was handled jointly by an AUSA and a HCE Trial Attorney. Upon opening the investigation in the fall of 2019, the AUSA was able to meet in person with TSgt. Cornacchio in Massachusetts after he returned from his deployment and worked swiftly to recover a number of his household possessions. Unfortunately, none of the family heirlooms or items of great sentimental value to TSgt. Cornacchio could be located. They remain lost, likely forever, because the third-party buyer, who had no knowledge of Father & Son’s SCRA violations, sold most of TSgt. Cornacchio’s items at a flea market.

After unsuccessful attempts to settle without litigation, the Department filed a complaint on August 18, 2020, against Father & Son in the District of Massachusetts, alleging a violation of the SCRA.⁴⁴ The complaint alleged that, contrary to the law, Father & Son had no policies relating to foreclosing or enforcing liens on property belonging to servicemembers.⁴⁵ The complaint sought monetary damages for TSgt. Cornacchio, a civil penalty to vindicate the public interest, and equitable relief.⁴⁶ In its answer to the complaint, Father & Son admitted to liability for violating the SCRA, so the only issues remaining were damages and the terms of any equitable remedies.⁴⁷

⁴¹ *Id.*

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 1.

⁴⁵ *Id.* at 4–6.

⁴⁶ *Id.*

⁴⁷ Answer of the Def., Father & Son Moving & Storage to the Pl.’s Compl., *Father & Son Moving & Storage Co.*, No. 20-cv-11551, ECF No. 6.

The Department attorneys asked TSgt. Cornacchio to make a list of his possessions that were auctioned off, estimating the value of each one. The Department used this information to make a settlement demand to Father & Son. The parties attempted to mediate the case with a Magistrate Judge over Zoom in March 2021. One advantage of the Zoom mediation was that TSgt. Cornacchio, who was stationed overseas at the time, was able to participate and to tell the judge about the items he had lost, especially the irreplaceable and sentimental ones. The mediation did not immediately result in a settlement, but the parties continued to negotiate and were eventually able to reach agreement. The parties asked the court to enter their agreement as a consent decree on September 16, 2021.⁴⁸

Under the consent decree, Father & Son must pay TSgt. Cornacchio \$60,000 in damages and the United States a \$5,000 civil penalty.⁴⁹ Father & Son must also implement new policies to prevent future SCRA violations.⁵⁰

While his family heirlooms were invaluable and irreplaceable, this was a meaningful settlement and good outcome for TSgt. Cornacchio, as well as for future servicemembers who use Father & Son's storage facility. The partnership between the USAO and HCE was key to the success of the case, because the AUSA was able to work with TSgt. Cornacchio locally and provide local expertise, while the HCE Trial Attorney, who specializes in SCRA matters, provided expertise on litigating in this area. The USAO intends to use this settlement to conduct outreach in Massachusetts, with the hope of receiving more SCRA referrals.

V. Starting a servicemembers and veterans practice

Starting a servicemembers' and veterans' rights practice within a USAO can be rewarding and fruitful and can be done with minimal resources. This type of practice can also bring significant benefits to a District in terms of case development, AUSA experience, and community engagement.

⁴⁸ Consent Order, *Father & Son Moving & Storage*, No. 20-cv-11551, ECF No. 12-1.

⁴⁹ *Id.* at 5–7.

⁵⁰ *Id.* at 2–5.

A. The benefits and resources

The Initiative's and the Division's litigating components have dedicated resources and expertise to support USAOs in conducting servicemember-related outreach and investigations. The Initiative can provide USAOs with local military contacts, trainings, and other outreach materials, while ELS and HCE are available to provide guidance, investigatory support, and sample documents for all stages of an enforcement action.

Engaging in outreach to the local military community can offer several benefits to a USAO. Outreach may lead to the discovery of a variety of federal violations of the military community's civil and consumer rights. It can also provide an excellent opportunity for a USAO to strengthen ties to the local community. Interacting with local members of the Judge Advocate General Corps (JAGC) can foster lasting relationships with USAOs that can lead to the appointment of Judge Advocates (JAs) as Special Assistant U.S. Attorneys. As the servicemembers and veterans practice expands, the USAO can develop a broader network that includes state veterans service agencies, the state bar, the state judiciary, and private organizations that assist veterans and consumers.

Finally, a servicemembers' and veterans' rights practice also allows AUSAs to develop closer working relationships and connections with other federal partners, including the Departments of Defense, Veterans Affairs, and Labor, and the Consumer Financial Protection Bureau. All these connections strengthen the USAO's ties to state, federal, and non-governmental entities within the District, which contribute to the USAO's mission of enforcing the criminal and civil rights laws of the United States, representing the interests of the United States in civil litigation, and addressing the public safety needs of the District.

B. How to get started

When developing outreach, a USAO may want to consider taking the following steps:

1. Identify local military installations

Identify the military installations, reserve units, and national guard leadership in the District.⁵¹

A broad understanding of the type and nature of the military population in the District will allow the USAO to tailor its outreach and training to suit local needs. For example, districts with large numbers of military bases (such as the Eastern District of Virginia or the Western District of Texas) are likely to have a larger number of active duty servicemembers who may encounter SCRA issues. Districts with a significant number of reserve components will likely confront USERRA issues.

2. Outreach to military installations

Contact the Office of the Staff Judge Advocate (OSJA) for each installation and set up a call with the senior attorney, ideally the Staff Judge Advocate (SJA) and the Chief of Legal Assistance.⁵²

Brief the SJA and Legal Assistance Chief on the assistance and services the USAO can provide.

Offer to provide training to the JAs and civilian attorneys in the office. All members of the JAGC have annual training requirements, which include SCRA and USERRA training, and they are frequently enthusiastic about receiving such training from Department attorneys.

Indicate the USAO's willingness to work with the OSJA to identify and address SCRA and USERRA issues that servicemembers encounter in the District.

Provide the USAO's contact information to the OSJA attorneys.

⁵¹ The SVI has packets of information that can be shared upon request. In addition, the Department of Defense has a useful resource to search for local installations. See *Military Installations*, U.S. DEP'T OF DEF., <https://installations.militaryonesource.mil/view-all> (last visited Dec. 13, 2021).

⁵² You can search for your local military legal assistance offices through the AF Legal Services Locator. *AF Legal Services Locator*, U.S. ARMED FORCES LEGAL ASSISTANCE, <https://legalassistance.law.af.mil/> (last visited Oct. 22, 2021).

3. Outreach to local bar associations

Reach out to the state bar association and offer to provide SCRA and USERRA Continuing Legal Education training to members.

Offer to provide training to sections of the state bar that focus on military and veterans law, family law, and employment law.

Contact creditors' and plaintiffs' bar organizations in the District and offer to provide training.

Contact the American Bar Association's Standing Committee on Legal Assistance for Military Personnel to identify issues within the District that affect veterans and servicemembers, as well as opportunities for collaboration.⁵³

4. Outreach to local law schools

Identify law schools in the District with veterans, consumer rights, or employment law clinics. The Initiative has contacts for the law schools with veterans clinics in each District that can be shared on request.⁵⁴

Offer to provide training on the SCRA and USERRA.

Collaborate on referral protocols with the schools.

5. Outreach to veterans service agencies, organizations, and law practitioners

Connect with attorneys in the state's veterans service agencies and brief them on the SCRA, USERRA, and assistance the USAO can provide to them.

Identify Department of Veterans Affairs entities in the District.⁵⁵

Contact Veterans Health Administration facilities in the District and offer SCRA, USERRA, Americans with Disabilities Act, Fair Housing Act, and other training to the staff, particularly to social

⁵³ *Standing Committee on Legal Assistance for Military Personnel*, AM. BAR ASSOC., https://www.americanbar.org/groups/legal_assistance_military_personnel/ (last visited Dec. 13, 2021).

⁵⁴ The National Law School Veterans Clinic Consortium is also a helpful resource. NAT'L L. SCH. VETERANS CLINIC CONSORTIUM, <https://nlsvcc.org/> (last visited Dec. 13, 2021).

⁵⁵ It is very likely that the Civil Division in the district's USAO already has contacts with the Department of Veterans Affairs through its defensive civil litigation docket. Use those contacts for starting points if you don't already have one.

workers, mental health professionals, and physicians who interact daily with veterans.

Contact Veterans Affairs Homeless Programs in the District.

Contact Veterans Justice Outreach offices in the District.

Identify and network with veterans services organizations in the District, such as the American Legion and Veterans of Foreign Wars.

Contact state veterans treatment courts in the District.

6. Outreach to state judiciary

Contact the state judiciary and offer to provide SCRA training to judges and clerks of court.

Highlight issues the USAO has identified within the District involving SCRA compliance, such as failure to comply with the SCRA's default judgment provisions.

7. Outreach to state government

Several states, including Florida, South Carolina, and Missouri, have state-level servicemembers and veterans-related agencies managed by the State Attorney General's office. The Initiative and AUSAs have coordinated with these offices to run joint federal and state outreach actions because there are frequently broader state-level remedies for violations than potential federal remedies.

VI. Conclusion

The Initiative is proud to serve the Department by coordinating a comprehensive program to enforce the rights of servicemembers, veterans, and their families. This includes devoting resources to support USAOs in starting servicemembers and veterans practices in each District. The Initiative looks forward to having more USAOs join this effort to protect those who have made significant sacrifices to protect all of us.

About the Authors

Nicole Siegel is the Acting Director of the Servicemember and Veterans Initiative at the U.S. Department of Justice. Nicole previously served as a Trial Attorney in the Housing and Civil Enforcement Section of the Civil Rights Division, where she enforced cases involving the Servicemembers Civil Relief Act and the Fair Housing Act. Before joining the Civil Rights Division, Nicole was an Attorney Advisor in the Department's Office of Legislative Affairs, where she handled legislation involving civil rights, including servicemember and veterans. Nicole holds a J.D. from Rutgers University, an M.S.W. from Columbia University, and a B.S.W. from McGill University.

Andrew Braniff is a Special Litigation Counsel for the Employment Litigation Section of the Civil Rights Division, which he joined in 2004 following a clerkship for the U.S. Court of Appeals for the Seventh Circuit. He graduated from Pepperdine Law in 2000 and holds a B.S. in Physics from Harvey Mudd College.

Deirdre Brou is an Assistant U.S. Attorney in the Civil Rights Enforcement Unit of the U.S. Attorney's Office for the Eastern District of Virginia, where she has served for five years. Before joining the U.S. Attorney's Office, Deirdre served on active duty in the U.S. Army for over 20 years and, after retiring from the Army, was a Trial Attorney for a year and a half in the Department's Criminal Division. She holds a J.D. from the University of South Carolina, an LL.M. from the Army Judge Advocate General's Legal Center and School, and a B.A. from the University of Virginia.

Torey Cummings is an Assistant U.S. Attorney for the District of Massachusetts, where she is in the Civil Rights Unit. She enforces federal civil rights statutes prohibiting discrimination in housing, education, policing, disability, and employment, and she prosecutes hate crimes. Before coming to Massachusetts, Torey was a Senior Trial Attorney in the Civil Rights Division of the U.S. Department of Justice in Washington, D.C. She has led multiple major civil rights investigations of states, universities, police departments, and school districts, among other entities. Her past cases include *United States v. North Carolina* (H.B.2 and transgender rights related to bathroom use); *United States v. Georgia* (inappropriate segregation of students with disabilities in schools); and *United States v. Anoka-Hennepin School District* (harassment of LGBT and gender nonconforming

students). Torey has a juris doctorate and a master's degree in social work from Washington University in St. Louis and a bachelor's degree from Cornell University.

Tanya Kirwan, a recipient of the 2015 Attorney General's John Marshall Award for Participation in Litigation for her SCRA work, has served as a litigating attorney for the Department of Justice's Civil Rights Division for over 20 years. While she handles cases under all of the statutes the Division's Housing and Civil Enforcement Section enforces, her SCRA work alone has resulted in aggrieved servicemembers receiving over \$100 million in compensation.

Amy R. Romero is an Assistant U.S. Attorney for the District of Rhode Island, focusing on enforcement of federal civil rights laws. Before joining the U.S. Attorney's Office, Amy represented individuals in housing and employment discrimination cases at Rhode Island Legal Services and Community Legal Aid in Worcester, Massachusetts. Amy grew up in Providence, Rhode Island, graduated from Swarthmore College and the University of Pennsylvania Law School, and clerked for the U.S. Court of Appeals for the Third Circuit.

Zeyen Wu is an AUSA for the U.S. Attorney's Office for the District of Colorado. He graduated from UCLA School of Law in 2012 and joined the District in 2013. He has been handling affirmative civil rights cases for the office since 2016, which includes evaluating complaints, conducting pre-litigation investigation, negotiating settlements, and litigating cases under a variety of federal civil rights laws, including the Americans with Disabilities Act, the Fair Housing Act, the Equal Educational Opportunities Act, Title VI of the Civil Rights Act of 1964, and USERRA. He has also handled False Claims Act cases and defended civil litigation against federal agencies in a variety of areas.

Page Intentionally Left Blank

Section 12601 and Title VI: Two Powerful Department Tools to Address Systemic Police Misconduct

Nicole Porter
Trial Attorney
Special Litigation Section

Christina Fogg
Former Assistant U.S. Attorney
Western District of Washington

Bharathi Venkatraman
Attorney, U.S. Attorney's Office Coordinator
Federal Coordination and Compliance Section

I. Introduction

Given the recent killings of George Floyd, Breonna Taylor, and others at the hands of police, many communities are looking for ways to address misconduct and hold law enforcement officers accountable. State, county, and local officials are also eager to improve their law enforcement agencies and increase transparency and legitimacy for their departments. The Department of Justice (Department) has two unique tools in its toolbox to address systemic misconduct: section 12601, which prohibits law enforcement agencies from engaging in a “pattern or practice” of misconduct, and Title VI of the Civil Rights Act of 1964, which prohibits agencies receiving federal financial assistance from engaging in discrimination.¹ These tools help ensure more effective, constitutional policing; greater police accountability; and improved trust between law enforcement and the communities they serve. This article discusses the background of section 12601 and Title VI, the roles of the Civil Rights Division’s (Division) Special Litigation and Federal Coordination and Compliance Sections in enforcing the respective laws, and how

¹ The Department also enforces the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits discrimination in programs or activities supported by federal funds. Omnibus Crime Control and Safe Streets Act of 1968 § 809, 34 U.S.C. § 10228.

enforcement has led to improvements in police operations and accountability. We hope the article provides insight into how section 12601 and Title VI matters are investigated; the applications of the statutes, including the enforcement and resolution mechanisms available; and the Department's efforts to impact the policing landscape through these two statutes.

II. Section 12601

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act.² The statute authorizes the Department to investigate law enforcement agencies that engage in a pattern or practice of conduct that deprives individuals of rights secured by the Constitution or federal law and to obtain equitable and declaratory relief to eliminate the pattern or practice.³ The Act was passed after a series of congressional hearings to determine how the federal government could address systemic police misconduct,⁴ as section 1983⁵ actions by private plaintiffs could result in monetary damages, but faced significant limitations on obtaining injunctive relief against law enforcement agencies.⁶

The Department's Special Litigation Section (SPL) enforces section 12601, sometimes in partnership with local U.S. Attorneys' Offices. SPL does this work by investigating state and local law enforcement agencies thought to have engaged in a pattern or practice of unlawful conduct, negotiating reform agreements with those agencies that SPL has found to have engaged in a pattern or practice, and enforcing the terms of any agreements reached. This work is done by SPL attorneys, investigators, community outreach specialists, and paralegals, as well as expert consultants who work alongside SPL staff and assist SPL in its efforts. (We discuss the important role of U.S. Attorneys' Offices later in this article.) Since the statute's

² Violent Crime Control and Law Enforcement Act of 1994 Pub. L. No. 103-322, 108 Stat. 1796 (1994).

³ Violent Crime Control and Law Enforcement Act of 1994 § 210401, 34 U.S.C. § 12601(a)–(b).

⁴ See H.R. REP. NO. 102-242, at 136 (1991). (House Report on Omnibus Crime Control Act of 1991).

⁵ 42 U.S.C. § 1983.

⁶ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 112–113 (1983).

passage, the Department has opened 73 investigations and entered into 40 agreements.⁷

A. Investigation

The Assistant Attorney General for Civil Rights decides whether to open an investigation. Many factors play into SPL's decision to recommend opening an investigation. An investigation can be opened based on SPL's research. SPL reviews publicly available information, including media articles, reports issued by academics and advocates, and civil lawsuits filed against the jurisdiction. SPL also may speak with community organizations or local attorneys about misconduct issues in the area. Finally, SPL can review and assess complaints filed with SPL about a particular jurisdiction. A U.S. Attorney's Office can also recommend opening an investigation by submitting a recommendation to SPL.

In determining whether an investigation should be opened, SPL considers whether the matter involving the jurisdiction is one that many law enforcement agencies are struggling with, such as issues with excessive force, unlawful search and seizure, discriminatory policing, and deficient internal and external accountability systems. Reforms successfully negotiated and adopted in one jurisdiction can serve as models for implementation for other law enforcement agencies. On the other end of the spectrum, SPL also considers whether the matter involving the jurisdiction represents a novel, developing issue that SPL has not previously investigated. Finally, an investigation can also be opened based on a request from the jurisdiction itself if the basis for the request is supported by SPL research and the other factors mentioned above.

Once an investigation is opened, SPL staff, along with its expert consultants, meet with the jurisdiction to learn more about its police operations; evaluates the agencies' policies and procedures; reviews and analyzes relevant agency data and records; and speaks with police officers, union officials, community members, plaintiff's attorneys, and advocacy groups about areas of concern within the department. SPL staff and experts also participate in ride-alongs with

⁷ See DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3 (2017). Since the issuance of that report, SPL has opened investigations into the Springfield, Massachusetts; Minneapolis, Minnesota; Louisville, Kentucky; and Phoenix, Arizona police departments.

police officers, observe police trainings, and tour police facilities. Because an investigation is thorough, comprehensive, and usually wide-ranging—for example, the number of documents reviewed for an investigation can easily range in the thousands, if not tens of thousands—it typically takes many months to complete.

At the conclusion of an investigation, based on SPL's recommendation, the Assistant Attorney General for Civil Rights determines whether (1) there is reasonable cause to believe that there is a pattern or practice of conduct in violation of the Constitution or federal law; (2) there is not a pattern or practice of conduct; or (3) there is insufficient evidence to determine whether there is a pattern or practice. To determine whether to recommend that there is a pattern or practice, SPL staff considers several factors, including the frequency of the violations, whether the violations evidence similar patterns or trends, and whether the violations are more than just sporadic acts and indicate the regular practice of the agency. If, based on SPL's recommendation, the Assistant Attorney General determines that there is insufficient evidence to determine a pattern or practice, SPL notifies the jurisdiction and closes the investigation. If, based on SPL's recommendation, the Assistant Attorney General concludes there is reasonable cause to believe there is a pattern or practice, SPL sends the jurisdiction a formal, public report detailing the steps it took to complete its investigation and the evidence supporting its conclusions. SPL then attempts to negotiate an agreement that addresses the violations and deficiencies found.

B. Negotiation

Negotiations involve complex talks that could take months to resolve. SPL speaks to community members, advocacy groups, police officers, union members, and other interested stakeholders to determine what they hope to see included in a reform agreement. Based on that information, SPL drafts an agreement that is specifically tailored to the jurisdiction and addresses the constitutional deficiencies found there. The substance of the agreement varies widely by jurisdiction and the violations found, but most agreements require the jurisdiction to revise its policies, develop or enhance its trainings, and create data systems that will improve the way the agency functions and officers engage in their policing activities. SPL works cooperatively with the jurisdiction during negotiations, as its objective (and typically the objective of the jurisdiction) is to begin the reform process as soon as possible.

Although there have been situations where litigation has been warranted,⁸ most cases have been resolved short of contested litigation. Indeed, in some cases, SPL and the jurisdiction issue a statement, called a “Statement of Intent” or “Agreement in Principle,” that signals the parties’ intent to avoid litigation and reach a negotiated agreement. The statement also sets forth a general framework for negotiations.

Consistent with guidance from the Attorney General, in determining whether a court-enforceable agreement is warranted, SPL looks at the nature of the underlying violation, the nature and scope of the proposed remedies, the Department’s interest in the form of the resolution, and the public’s interest in the violation and the remedies.⁹ SPL also has an interest in making sure that any monitor selected to enforce the agreement is “independent, highly qualified, and free from conflicts of interest.”¹⁰ The Attorney General recently issued specific recommendations on the use of monitors in future civil settlement agreements and principles that monitors and their teams must abide by to increase efficiency and efficacy.¹¹

⁸ See *United States v. Town of Colorado City*, No. 12-cv-8123 (D. Ariz. 2012) (trial verdict for the Department resulting in court injunction and decree); *United States v. Johnson*, No. 12-cv-1349 (M.D.N.C. 2012) (trial verdict for Alamance County but reform agreement reached while case was pending appeal); *United States v. Maricopa County*, No. 12-cv-981 (D. Ariz. 2012) (litigation to enforce court order requiring reforms); *United States v. City of Meridian*, No. 13-cv-978 (S.D. Miss. 2012) (suit filed after city initially declined to negotiate agreement); *United States v. City of Columbus*, No. 99-cv-1097 (S.D. Ohio 1999) (suit filed but agreement later reached resolving claims); *United States v. City of Ferguson*, No. 16-cv-180 (E.D. Mo. 2016) (suit filed after city council initially rejected negotiated consent decree); *United States v. City of New Orleans*, 12-cv-1924 (E.D. La. 2012) (suit filed to compel compliance with negotiated and agreed-upon consent decree).

⁹ See Memorandum from the Att’y Gen. to Heads of Civ. Litigating Components & U.S. Att’ys, *Civil Settlement Agreements and Consent Decrees with State and Local Government Entities* at 3–4 (Apr. 16, 2021).

¹⁰ *Id.* at 4.

¹¹ See Memorandum from the Att’y Gen. to Heads of Civ. Litigating Components & U.S. Att’ys (Sept. 13, 2021) (*Civil Settlement Agreements and Consent Decrees with State and Local Government Entities*).

C. Enforcement

Enforcement of an agreement often spans years. Agreements are expected to last up to five years or even longer, depending on the constitutional violations found and the scope of the remedies. The agreements are typically court-enforceable settlement agreements overseen by an independent monitor, although some agreements are monitored by SPL. The independent monitor is selected by the parties and, for matters where there is a court-enforceable agreement, approved by the court. Selected monitors have a wealth of experience in policing and usually have a team of experts with backgrounds in policing, data analysis, and community organizing who assist them in their work.

The monitor's primary responsibility is to observe and assess the law enforcement agency's progress in complying with the agreement and to report to the court and the public on the jurisdiction's efforts. The monitor also provides much needed technical assistance to the agency as it begins to adopt and implement reforms and serves as an intermediary to the parties to help resolve any disputes before they require court involvement.

Courts play an important role in enforcing agreements. Courts typically hold regular status conferences to assess firsthand the jurisdictions' progress in complying with the agreements. Courts also hold public hearings on various matters, such as monitor selection, for example, to ensure that the public has an opportunity to fully understand agreement-related processes and weigh in on issues of public concern. Finally, courts serve as the final arbiters for any disputes that the monitors and parties are unable to resolve.

Once the jurisdiction has substantially complied with the terms of the agreement, the agreement ends. The monitor helps determine whether the jurisdiction has reached substantial compliance by conducting compliance reviews and outcome assessments. Compliance reviews measure the jurisdiction's compliance with each of the provisions of the agreement and are typically done by audit, although some qualitative analysis is done as well. Outcome assessments measure whether implementation of the agreement by the jurisdiction has resulted in constitutional policing. The outcome assessments create a second method for assessing compliance—meaning that a jurisdiction can fail to meet substantial compliance under the compliance review mechanism but can still be found in substantial compliance if it demonstrates by its outcomes that the jurisdiction

reduced or eliminated the practices that gave rise to the constitutional violations.

III. The effect of section 12601 on the policing landscape

SPL's work in this area has been instrumental in changing the practices of several police departments across the country. Some recent examples include:

A. Seattle

In March 2011, SPL and the U.S. Attorney's Office for the Western District of Washington opened a joint investigation into the Seattle Police Department (SPD). In December 2011, SPL and the U.S. Attorney's Office (USAO) found that SPD engaged in a pattern or practice of excessive force. The investigation also raised concerns that certain SPD practices, particularly those related to pedestrian encounters, could result in discriminatory policing against minority communities. In September 2012, the parties entered into a consent decree.¹² The consent decree calls for the city and SPD to make reforms related to use of force, crisis intervention, stops and detentions, bias-free policing, supervision, and its external accountability system.¹³ The court has found that the city is in compliance with all of the enumerated consent decree provisions. Compliance reviews continue, however, to assess whether consent decree compliance was sustained during the protest events of 2020.

B. New Orleans

In May 2010, SPL opened an investigation into the New Orleans Police Department (NOPD). In March 2011, SPL found that NOPD engaged in a pattern or practice of excessive force; unlawful stops, searches, and arrests; and gender discrimination. SPL's investigation also raised serious concerns about discriminatory policing based on race, national origin, and LGBT status. In January 2013, the parties entered into a consent decree.¹⁴ The consent decree requires the

¹² See Consent Decree Regarding the New Orleans Police Department, *City of New Orleans*, No. 12-cv-1924, ECF No. 159-1.

¹³ *Id.*

¹⁴ See Settlement Agreement and Stipulated [Proposed] Order of Resolution, *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash July 27, 2012), ECF No. 3-1; Stipulation and Order for Modification and for Entry of

NOPD to make reforms related to the use of force; crisis intervention; investigatory stops and detentions, searches, and arrests; custodial interrogations; bias-free policing; community engagement; training; supervision; and accountability.¹⁵ The city is currently in compliance with the use of force, crisis intervention, and custodial interrogations provisions of the consent decree.

C. Ferguson

In September 2014, SPL opened an investigation into the Ferguson Police Department (FPD). In March 2015, SPL found that FPD engaged in a pattern or practice of excessive force; unlawful stops, searches, and arrests; and discriminatory policing. SPL further determined that FPD and the Ferguson municipal court focused on revenue generation at the expense of public safety and constitutional law enforcement. In April 2016, the parties entered into a consent decree.¹⁶ The consent decree requires the city and FPD to make reforms related to use of force; stops, searches, and arrests; bias-free policing; and ensuring due process and equal protection in the prosecution and resolution of municipal charges¹⁷. Compliance is still underway.

D. Baltimore

In May 2015, SPL opened an investigation into the Baltimore Police Department (BPD). In August 2016, SPL found that BPD engaged in a pattern or practice of excessive force; unlawful stops, searches, and arrests; and discriminatory policing against African Americans and those with mental health disabilities. SPL also identified concerns with the department's accountability system and its handling of sexual assault investigations and transport practices. In January 2017, the parties entered into a consent decree.¹⁸ The consent decree

Preliminary Approval of the Parties' Settlement Agreement and Stipulated Order of Resolution, *City of Seattle*, No. 12-cv-1282, ECF No. 13.

¹⁵ Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 14; Stipulation and Order for Modification and for Entry of Preliminary Approval of the Parties' Settlement Agreement and Stipulated Order of Resolution, *supra* note 14.

¹⁶ See Consent Decree, *City of Ferguson*, No. 16-cv-180, ECF No. 41.

¹⁷ *Id.*

¹⁸ See Consent Decree, *United States v. Police Dep't of Baltimore City*, No. 17-cv-99 (D. Md. Jan. 12, 2017), ECF No. 2-2.

requires the city and BPD to make reforms related to use of force; crisis intervention; stops, searches, and arrests; bias-free policing; misconduct investigations and discipline; handling of reports of sexual assault; and transportation of persons in custody. Since the entry of the consent decree, BPD has finalized almost all of the policies on the topics listed above and satisfied the majority of the threshold requirements regarding responding to individuals in crisis. The department has also made great strides in developing and delivering training related to use of force; stops, searches and arrests; and responding to reports of sexual assault.

IV. The role of USAOs in section 12601 matters

The involvement of USAOs in the enforcement of section 12601 is varied but, in many cases, significant. The degree to which a local USAO is involved is largely up to the discretion of the USAO itself. The decision of how much involvement a USAO may have in any section 12601 matter is often influenced by the following factors:

- the degree to which the U.S. Attorney desires his or her office to be directly involved in the matter;
- the amount of time and resources that the USAO can afford to devote to the matter;
- the USAO's relationship with the community and the community's desire for local involvement (for example, in Seattle, 34 community groups wrote to both SPL and the local USAO requesting the opening of an investigation); and
- the USAO's relationship with local law enforcement and the potential impact on that relationship from participation in the section 12601 matter.

Regardless of the extent of their role in the matter, however, the input of USAOs is important. In some districts with active section 12601 matters, the USAO acts predominantly as local counsel, providing information and guidance on local court rules and practices. In others, the USAO additionally serves to connect SPL with important stakeholders, including relevant community groups and leaders, and provides local insight regarding relevant political issues and cultural norms. In others, like the Seattle Police Department Consent Decree, the USAO serves as a full partner, engaging in an

equal share of the work in the investigation, negotiation, and compliance monitoring (or litigation) phases of the case. In Seattle, this partnership entailed the dedication of one to two Assistant U.S. Attorneys (AUSAs) in addition to the one to two SPL attorneys staffed on the case. The attorneys from both groups then worked in constant partnership and lock step with one another, including at least weekly calls to coordinate efforts. Both the USAO and SPL attorneys attended meetings, participated in drafting, and appeared before the court for hearings in the matter. The benefits of this shared work have been invaluable. The AUSAs provide not only local perspective and relationships, but also an ability to be on the ground for in-person attendance at relevant meetings and events and to manage local press inquiries and messaging. In turn, SPL attorneys provide the national perspective and subject-matter expertise in the arena of section 12601 law and practice. SPL attorneys are also able to connect people working on the matter with relevant people in other jurisdictions who have faced the same or similar issues.

SPL's work continues to move forward, with investigations recently opened into the Minneapolis, Minnesota; Louisville, Kentucky; and Phoenix, Arizona police departments. SPL will continue to use section 12601 to address systemic misconduct and create lasting change within law enforcement agencies.

V. Title VI

Title VI of the Civil Rights Act of 1964¹⁹ is another tool that the Department uses to address systemic police misconduct, often, but not always, in concert with section 12601. Title VI prohibits discrimination based on race, color, and national origin in entities that receive federal financial assistance.²⁰ Title VI is founded on the premise that people of all backgrounds contribute to the public funds that subsidize law enforcement agencies (LEAs) and other state and local government entities. Because these “recipients of federal financial assistance” benefit from public funds, Title VI attaches a nondiscrimination requirement to the receipt and use of such funds. Most state and local LEAs receive federal financial assistance from

¹⁹ Civil Rights Act of 1964 tit. VI, 42 U.S.C. § 2000d to 2000d-4a.

²⁰ 42 U.S.C. § 2000d.

the Department,²¹ and many also receive funding from other federal agencies,²² such as the Departments of Homeland Security, Agriculture, and Defense. With so many LEAs receiving federal assistance, both from the Department and other federal agencies, Title VI confers broad jurisdiction to address race and national origin discrimination in policing.

A. Jurisdiction and coordination

Each federal agency that provides grants or other federal financial assistance is responsible for enforcing Title VI. With more than two dozen agencies implementing the statute, the Department is charged with ensuring consistent interpretation, government-wide coordination, and leadership under Executive Order 12,250.²³ This Executive Order provides for the consistent and effective implementation of Title VI and other laws prohibiting discrimination in programs and activities receiving federal financial assistance. This government-wide coordination and leadership responsibility has been further delegated to the Division and, specifically, to the Federal Coordination and Compliance Section (FCS). Given its unique role under Title VI, FCS plays an integral part in advancing the Division's Title VI policing work and often works in concert with the SPL Section, USAOs, the Office of Justice Programs (OJP), and other funding components. FCS carries out its Title VI functions in a number of ways, including by leading or serving as co-counsel on Title VI investigations and enforcement activities, providing legal counsel on Title VI interpretation, through regulatory and sub-regulatory action, and by referring Title VI matters to the appropriate office.

²¹ See e.g. DEP'T OF JUST., FY 2017 BUDGET REQUEST: STATE, LOCAL AND TRIBAL ASSISTANCE, <https://www.justice.gov/jmd/file/820816/download#:~:text=By%20funding%20over%2013%2C000%20of,enforcement%20agencies%20practicing%20community%20policing>.

²² E.g. Police departments in the US: Explained, USAFACTS, https://usafacts.org/articles/police-departments-explained/?gclid=EAIaIQobChMI5KCSi8O78gIVw9SzCh0pIwfQEAMYASAAEgJuoPD_BwE (last visited Dec. 2, 2021).

²³ Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

Title VI matters come to our attention in a number of ways: through complaints filed directly with FCS²⁴ or via the Division's complaint portal,²⁵ coordination meetings with other Department sections and components, information from our USAO or federal agency partners, outreach to community organizations, news articles or other publicly available information, and similar mechanisms.

Beyond its broad Title VI leadership role under Executive Order 12,250, FCS also plays a lead role in the implementation of Executive Order 13,166,²⁶ which focuses on overcoming language barriers in both federal operations as well as in federally funded activities. These dual roles of Title VI and language access legal experts put FCS squarely at the nexus of policing and language access,²⁷ with the Section serving as a resource for both federal agencies and law enforcement communities on overcoming language barriers in police work.

Apart from language access and intentional race, color, and national origin discrimination, the Department has the authority to pursue an array of other claims under Title VI, including discrimination that has a discriminatory impact, retaliation, and access to data. Of note, while Title VI intent claims can also be enforced through private action, disparate impact cases can only be enforced by federal funding agencies²⁸ following the Supreme Court's decision in *Alexander v. Sandoval*.²⁹

B. Title VI enforcement and case examples

Once in receipt of a complaint or information alleging a Title VI violation, FCS conducts a funding check to determine which agency (or agencies) or components have jurisdiction. Within the Department, funding components include OJP, the Money Laundering and Asset Recovery Section of the Criminal Division (MLARS), the Office on

²⁴ See NOTICE ABOUT INVESTIGATORY USES OF PERSONAL INFORMATION, DEP'T OF JUST., CIV. RIGHTS DIV. (n.d.), <https://www.justice.gov/file/1259441/download>.

²⁵ U.S. DEP'T OF JUST. CIV. RIGHTS DIV., <https://civilrights.justice.gov/#report-a-violation>.

²⁶ Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

²⁷ See State and Local Government, DEP'T OF JUST., <https://www.lep.gov/state-local-government> (last visited Dec. 2, 2021).

²⁸ DEP'T OF JUST., TITLE VI LEGAL MANUAL § VII(B) (2021) [hereinafter TITLE VI LEGAL MANUAL].

²⁹ 532 U.S. 275 (2001).

Violence Against Women, and the Office of Community Oriented Policing Services (COPS). All of these components provide funding to state and local LEAs, among other entities, and several have their own internal offices that receive complaints and undertake investigations, monitor compliance with the terms of funding, or both, such as OJP's Office for Civil Rights³⁰ and the Grants Monitoring Division of COPS.³¹ Given the potential for multiple offices to have coinciding jurisdiction in Title VI matters, FCS and the funding components routinely coordinate with each other to determine where a complaint investigation is best assigned. FCS similarly coordinates with other federal agencies on jurisdictional matters. Consistent with implementing regulations, internal Departmental memoranda, and occasional agreements with other agencies, FCS handles an array of Title VI investigations itself, often in partnership with USAOs. Though USAOs do not have standalone authority, that has not served as a barrier to their full participation as co-counsel in Title VI matters.³²

As noted earlier, a vast array of conduct is regulated by Title VI. Allegations in the policing context include discriminatory enforcement, discrimination in investigative activities (crediting witness accounts in a discriminatory manner and/or unequal treatment of complainants); following up on internal affairs complaints in a discriminatory manner; retaliating against complainants; discriminatory hiring in the context of Title VI employment grants; language accessibility concerns in investigative interviews or in administering advice of rights; refusal to provide the federal granting agency access to documents and information; and many others. Just as Title VI encompasses an array of potential claims, so too does it permit a range of potential remedies, allowing for significant flexibility in fashioning a remedy that fits the conduct of concern. Many cases result in settlement agreements that contemplate policy and procedural revisions, training, data collection, and reporting. While remedies can be broad, they are also scalable

³⁰ Dep't of Just., Office for Civil Rights, Title VI of the Civil Rights Act of 1964, https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ocr_titlevi.pdf.

³¹ DEP'T OF JUST., GRANT MONITORING STANDARDS AND GUIDELINES FOR ALL COPS GRANTS AND COOPERATIVE AGREEMENTS (2014).

³² JUSTICE MANUAL 8-2.241.

and can be tailored to specific issues of concern—for example, 911 dispatch procedures; officer training; data collection; hiring procedures (in the case of employment grants); language access procedures; providing the federal granting agency with access to documents and information as required by Title VI implementing regulations; or to settle concerns limited to discrete enforcement areas like domestic violence investigations. Remedies can also include damages in select situations; however, compensatory damages are generally not available for claims based on an agency’s disparate impact regulations. Finally, agency enforcement can also result in limitations on funding or termination of federal financial assistance.

Given the range of enforcement outcomes, there is no one-size-fits-all approach in every Title VI policing matter. While certain matters may be best addressed by conducting a full investigation that may result in a letter of findings and further enforcement efforts or even fund termination, others may require more limited follow up, such as a telephone intervention, a statement of interest filing in private litigation, or working with other components or agencies that have a related open matter involving the same LEA. One constant in federal agency Title VI investigations, however, is that Title VI requires an attempt at voluntary resolution before litigation.³³ This voluntary compliance focus helps to promote the significant flexibility in addressing and resolving Title VI matters described above.

The following examples demonstrate some of the many possible uses of Title VI in law enforcement cases but by no means cover the full range of available options under Title VI. For more in-depth information on Title VI jurisdiction, uses, case examples, and FCS’s role, consult FCS’s Title VI page,³⁴ the recently revised FCS Title VI Legal Manual,³⁵ or the Justice Manual section on FCS.³⁶

³³ *See, e.g.*, 28 C.F.R. § 42.106 (Department Title VI regulations) (“[e]ach responsible Department official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this subpart and shall provide assistance and guidance to recipients to help them comply voluntarily with this subpart”).

³⁴ Title VI of the Civil Rights Act of 1964, DEP’T OF JUST., <https://www.justice.gov/crt/fcs/TitleVI> (last visited Dec. 2, 2021).

³⁵ TITLE VI LEGAL MANUAL, *supra* note 28.

³⁶ JUSTICE MANUAL 8-2.240.

1. Hazleton Police Department: policy change without pattern or practice evidence

In 2014, FCS received a complaint against the Hazleton Police Department (HPD) from a legal services organization in Pennsylvania. The complaint alleged, among other issues, that a Spanish speaking, limited English proficient (LEP) resident of Hazleton, Pennsylvania, walked into police headquarters with his 12-year-old son to report that the son was abused by his stepfather. HPD did not provide an interpreter, and the father had to rely on his son, the victim of the alleged abuse, to interpret.

Based on these allegations, FCS launched a Title VI investigation. The investigation revealed that HPD, despite policing a jurisdiction that is at least 22% Spanish speaking and LEP, had no policy on communicating with LEP individuals and no officers fluent in Spanish.

In accordance with Title VI voluntary compliance measures, FCS approached the city to discuss these concerns and negotiated a policy and standard operating procedures directly with the HPD Chief, with counsel's consent.³⁷ Because of this direct working relationship between FCS and the HPD Chief, FCS was able to tailor the draft policy to address the Chief's stated concerns and build in flexibility for the high LEP/small city context. The policy also benefited from community input, including interpreted feedback from the Spanish speaking population in Hazleton.

Unique to Title VI, recipients must agree to certain nondiscrimination obligations as a condition of receiving federal financial assistance. These conditions can serve as catalyst in encouraging voluntary compliance, and FCS has worked with funding components to encourage compliance by directing recipients to review their agreements.

2. *Padilla v. NYPD*: Targeted Department involvement in private Title VI litigation leads to reform

Apart from complaint investigations brought by the Department, another mechanism for harnessing Title VI compliance in the policing context is through targeted Department involvement in private

³⁷ Press Release, Dep't of Just., Justice Department Settles Investigation into Language Barriers in the Hazleton Police Department (May 28, 2021).

litigation, as demonstrated by the *Padilla* matter. In that case, Legal Services of New York City filed a civil action alleging that the NYPD failed to overcome language barriers in interactions with LEP individuals seeking police assistance.³⁸ Specifically, the plaintiffs alleged that responding officers often relied on abusive spouses who spoke English and ignored the accounts of (often female) LEP victims of domestic abuse and other crimes.³⁹ In several incidents, officers arrested the LEP victim without even attempting to communicate in the individual's primary language.⁴⁰ Plaintiffs' complaint alleged violations of Title VI, the Safe Streets Act, and the Equal Protection Clause.⁴¹

The Department filed a Statement of Interest (SOI) to clarify, among other things, that, under Title VI, language-based discrimination is national origin discrimination.⁴² The SOI went on to point out that the Department had made the NYPD aware of continuing problems in its interactions with LEP individuals, thereby putting the NYPD on notice, and that a failure to correct these problems despite having received notice may be proof of an intent to discriminate.⁴³ Soon after the Department filing, the parties requested a stay of the proceedings to commence settlement negotiations before an EDNY Magistrate Judge, with the Department participating. The negotiations resulted in significant reforms to the NYPD's policies, procedures, and training related to interactions with LEP individuals.⁴⁴

³⁸ Second Amended Complaint and Demand for Jury Trial, *Padilla v. City of New York*, No. 13-cv-00076 (E.D.N.Y. Sept. 12, 2013), ECF No. 33.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Statement of Interest of the U.S. Regarding Defendants' Motion to Dismiss, *Padilla*, No. 13-cv-00076, ECF No. 41.

⁴³ *Id.* at 23–24.

⁴⁴ Press Release, City of New York Police Dep't., NYPD and Legal Services NYC Announce New Language Access Policies (May 24, 2017).

3. Maricopa County Sheriff's Office and Montgomery County Police Department: Title VI as a tool to collect and analyze data

As foreshadowed at the beginning of this discussion, Title VI can be an effective tool to obtain data and access to evidence in cases involving discrimination by recipients of federal funds, either as a standalone claim or in tandem with section 12601 or other statutory or constitutional claims.

For example, in 2009, the Division launched an investigation of the Maricopa County Sheriff's Office (MCSO), a recipient of federal financial assistance, alleging that MCSO violated the national origin nondiscrimination provisions of Title VI in its treatment of LEP Latino inmates, in addition to claims under 42 U.S.C. § 14141 (now 12601) and the Fourth and Fourteenth Amendments. In March 2009, the Division sent MCSO an initial data request consisting of approximately 51 requests for documents. MCSO responded in May with a partial production responsive to 3 of the United States' 51 document requests. The United States followed up with several additional document requests, and in response, MCSO informed the United States that it would not respond further to any requests for information. On July 7, 2009, then-MCSO Sheriff Joe Arpaio held a press conference and announced publicly that MCSO would not cooperate with the United States' investigation, either by providing documents or permitting interviews with personnel.

The Department's Title VI implementing regulations (like the Title VI implementing regulations of other federal agencies) require that recipients of federal financial assistance provide the Department with access to information, personnel, and facilities. The provision states: "Access to sources of information. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance with this subpart."⁴⁵

Similarly, the assurance agreements applicable to recipients of Department funding also require cooperation from recipients.⁴⁶ Under

⁴⁵ 28 C.F.R. § 42.106(c).

⁴⁶ Dep't of Just., Certified Standard Assurances, <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/standardassurances.pdf>.

a standard assurance, a recipient agrees that “[i]t will give the awarding agency or the [Government Accountability] Office, through any authorized representative, access to and the right to examine all paper or electronic records related to the financial assistance.”⁴⁷

In response to MCSO’s refusal to respond to the United States’ document requests, FCS and SPL filed a lawsuit demanding enforcement of the access provision.⁴⁸ MCSO ultimately complied, and in June 2011, the United States and MCSO entered into an agreement to resolve the Title VI action alleging a failure to cooperate.⁴⁹ Title VI and other funding statutes, therefore, provide a unique and useful tool to ensure access to LEA records and information.

In other circumstances, Title VI investigations have led to policing reform and data collection. For instance, in 2000, the Department entered into an agreement with the Montgomery County, Maryland, Police Department (MCPD) to resolve a Title VI and Safe Streets Act investigation of more than 150 complaints from individuals alleging that MCPD officers racially discriminated against African Americans by, among other things, selecting individuals for traffic stops, pedestrian stops, and searches based on biased criteria; failing to adequately receive, investigate, and monitor complaints of discrimination filed by nonwhites; engaging in excessive use of force; and displaying discourteous conduct.⁵⁰ Following an investigation of several years, the Department team shared their findings and recommendations with the MCPD and the Montgomery County Fraternal Order of Police and negotiated a voluntary compliance agreement, which included traffic stop data collection and analysis, among other provisions.⁵¹ Of note, the MCPD resolution was significant for being the Department’s first negotiated police misconduct settlement to include a police union as a party to the resolution.

⁴⁷ U.S. Off. Mgmt. & Budget, Standard Assurance Form, <https://omb.report/icr/201907-1121-004/doc/93558101.pdf> (OMB Approval No. 1121-0140).

⁴⁸ Complaint, *United States v. Maricopa Cnty.*, No. 10-cv-01878 (D. Ariz. Sept. 2, 2010), ECF No. 1.

⁴⁹ Agreement, *Maricopa Cnty.*, No. 10-cv-01878, ECF No. 1.

⁵⁰ Memorandum of Agreement between the Dep’t of Just, Montgomery Cnty. Maryland, the Montgomery Cnty. Dep’t of Police, and the Fraternal order of Police, Montgomery Cnty. Lodge 35, Inc. (Jan 14, 2000).

⁵¹ *Id.*

C. Why Title VI?

These cases, and others, demonstrate the versatility of Title VI as a civil rights compliance tool, for example:

- Title VI applies whether there is just one or a handful of allegations (as in Hazleton), or a multitude of allegations (as in Montgomery County).
- It can be used to achieve isolated, specific outcomes (LEP access in domestic violence cases, as in *Padilla*); to address a limited issue such as training, complaint procedures, or community messaging; or to accomplish broad, system-wide changes (often in tandem with section 12601 or other applicable statutes), as in the MCSO case.
- Title VI can be deployed to gain access to records and information, as in the MCSO access litigation, and to drive record keeping and analysis.
- Owing to its private right of action for intent claims, Title VI envisions a role for communities and private parties to hold systems accountable, while preserving a discrete onramp for the federal government to participate in private litigation, as in *Padilla*.
- Title VI can promote positive relationships between LEAs and the federal government, as part of a voluntary compliance effort, but it can also be harnessed, if necessary, to withdraw federal funding or to accomplish civil rights objectives through litigation.
- State and local LEAs may be interested in voluntary compliance under Title VI to head off the time, resource, and autonomy concerns they may have with other enforcement options.
- LEAs are, in part, the architects of their own reforms, creating an investment in their success and sustainability.

USAOs have played a key role in Title VI efforts by spotting Title VI opportunities as a result of community engagement efforts; working with FCS to develop prophylactic, proactive training for LEAs, particularly on language access matters; and serving as full partners on Title VI cases, including a current investigation where the Central District of California is partnering with the Housing and Civil Enforcement Section and FCS to bring a housing case aimed at

dismantling policing activities that support segregation.⁵² USAOs have therefore been integral to the Division's efforts to deploy Title VI in innovative ways and impact the direction and development of Title VI law. As in section 12601 cases, the involvement of USAOs in Title VI efforts is limited only by the extent to which a USAO wants to, or can afford to, be involved. Also important to a USAO's calculus may be the fact that Title VI matters can resolve in any number of ways that diverge from traditional litigation pathways.

This article discusses only a small fraction of the uses of Title VI. In addition to FCS's ongoing, robust docket of Title VI cases, other federal agencies, as well as OJP's Office of Civil Rights, also conduct important Title VI enforcement work. FCS welcomes additional opportunities to discuss Title VI collaborations with the USAO community, Department funding components, and other federal agencies.

VI. Conclusion

Enforcement of section 12601 and Title VI provide opportunities for improving use-of-force and stop practices, putting measures in place to address discriminatory policing, reforming policies and practices regarding interactions with LEP individuals, and changing how LEAs interact with the public. SPL and FCS look forward to continuing to work with our partners in the Department to use section 12601 and Title VI to address systemic misconduct and ensure greater accountability and more effective policing nationwide.

⁵² First Amended Complaint and Demand for Jury Trial, *United States v. City of Hesperia*, No. 19-cv-02298 (C.D. Cal. Sept. 10, 2020), ECF No. 31.

About the Authors

Nicole Porter is a Trial Attorney with the SPL Section of the Department and has focused on police accountability issues for most of her 23-year legal career. Nicole graduated from Tennessee State University and the University of Tennessee College of Law.

Christina Fogg was an Assistant U.S. Attorney with the U.S. Attorney's Office for the Western District of Washington. She also served as the Office's Civil Rights Coordinator for Civil Enforcement.

Bharathi Venkatraman is the U.S. Attorney's Office Coordinator in the Federal Coordination and Compliance Section (FCS) of the Civil Rights Division. She has served in various positions with the Division, including as a Trial Attorney and later Special Counsel for Trafficking in Persons in the Criminal Section; Acting Deputy Chief in FCS; as well as Special Assistant U.S. Attorney in DC. She has taught courses at the National Advocacy Center and has previously written for the U.S. Attorney's Bulletin and Police Chief Magazine, among other publications. She joined the Department under the Attorney General's Honors Program in 1996.

Page Intentionally Left Blank

The Civil Rights of Institutionalized Persons Act— A Guide for Assistant United States Attorneys

Michael E. Campion
Chief
Civil Rights Unit
District of New Jersey

Christopher N. Cheng
Trial Attorney
Civil Rights Division
Special Litigation Section

A prisoner writes a U.S. Attorney's office about excessive force in a state prison. A patient in a mental health facility calls about not receiving medications for a serious medical condition. A local newspaper reports unsanitary conditions in a juvenile detention center. A federal agent observes grossly overcrowded conditions in a jail. An employee notifies a federal inspector general of patient abuse in a state center for persons with developmental disabilities. All these allegations could potentially fall under the Civil Rights of Institutionalized Persons Act (CRIPA),¹ a civil statute that protects institutionalized persons from systemic violations of their federal rights.² This article provides a basic guide to the statute. Section I discusses the scope of the statute and its procedural, certification requirements. Section II discusses the ways a U.S. Attorney's Office can work with Civil Rights Division (Division) staff on CRIPA matters.

¹ Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997–1997j.

² 42 U.S.C. § 1997a. The federal rights in question must be based on the United States Constitution when CRIPA is the basis for an action against a jail, prison, or other correctional institution. *Id.*

I. Introduction to the Civil Rights of Institutionalized Persons Act

CRIPA authorizes the United States to seek injunctive relief against a state, or a state political subdivision, when the jurisdiction engages in a pattern or practice of violating the federal rights of persons held in prisons, jails, juvenile detention centers, mental hospitals, facilities for persons with developmental disabilities, public nursing homes, and other custodial facilities.³ The statute authorizes the United States to file a new action in the name of the United States or intervene in a private action involving institutional conditions.⁴

A. CRIPA authority and scope of relief

The United States can seek CRIPA relief only for “pattern or practice” violations of federal rights.⁵

CRIPA does not create new substantive rights. The United States can obtain injunctive relief only for violations of rights under the Constitution or other federal law. The United States’ evidentiary burden, however, is no higher than a private plaintiff’s burden. The statutory language does not impose any additional proof requirements besides those that already apply to a private action based on the same fact allegations.⁶

CRIPA only applies to institutions. The statute defines an institution as any facility that “is owned, operated, or managed by, or

³ 42 U.S.C. §§ 1997, 1997(a).

⁴ See S. REP. 96-416, at 8 (1979); H.R. REP. NO. 96-897, at 9 (1980) (Conf. Rep.). Before CRIPA, the Department of Justice had already been litigating institutional conditions cases for years, but a few courts cast doubt on whether the Attorney General had inherent authority and standing to enforce constitutional claims. In response, Congress passed CRIPA.

⁵ 42 U.S.C. §§ 1997a, 1997c.

⁶ *United States v. Pennsylvania*, 863 F. Supp. 217, 218–220 (E.D. Pa. 1994). The United States’ burdens may be lower than plaintiffs to the extent a legal defense may be pre-empted by federal supremacy. See, e.g., *United States v. Cnty. of Los Angeles*, 635 F. Supp. 588, 593–594 (C.D. Ca. 1986) (state law pre-empted because application would obstruct or frustrate federal CRIPA enforcement). *But see* *United States v. State of Michigan*, 868 F. Supp. 890 (W.D. Mich. 1994) (no federal right to inspect prison without state’s consent); *see also* *United States v. Erie Cnty.*, 724 F. Supp. 2d 357 (W.D.N.Y. 2010) (no heightened pleading requirements for CRIPA claims).

provides services on behalf of any State or political subdivision of a State” and is used by persons with certain disabilities or conditions, inmates, pretrial detainees, or juveniles.⁷ Private facilities do not count as institutions if the only nexus to the state is licensing or funding from specific Social Security and supplemental security income statutes.⁸

The United States may seek any “such equitable relief as may be appropriate to insure the minimum corrective measures necessary to ensure the full enjoyment of such rights, privileges, or immunities.”⁹ The United States is authorized to enforce a range of federal laws conferring “rights, privileges, or immunities” on institutionalized persons. For healthcare facilities, that includes rights created by federal statutes, such as the Americans with Disabilities Act (ADA).¹⁰ For prisons, jails, and other correctional facilities, however, CRIPA authorizes equitable relief “insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.”¹¹ Examples of such equitable relief include court-enforceable injunctions and consent decrees requiring improvements to policies and procedures, training, staffing, accountability, and physical plant.

⁷ 42 U.S.C. § 1997. The Civil Rights Division, Special Litigation Section is the unit that is typically responsible for CRIPA investigations and litigation in the U.S. District Courts. As discussed in section II, U.S. Attorneys’ Offices often work together with the Special Litigation Section on CRIPA investigations and any resulting litigation. JUSTICE MANUAL 8-2.261. The Special Litigation Section also has “pattern or practice” authority to investigate police departments and other law enforcement agencies under 34 U.S.C. § 12601. Like with CRIPA, U.S. Attorneys’ Offices may investigate police departments and law enforcement agencies in partnership with the Special Litigation Section. JUSTICE MANUAL 8-2.262. The police misconduct statute also covers juvenile justice agencies, so allegations about juvenile incarceration can fall under both that statute and CRIPA.

⁸ 42 U.S.C. § 1997(2). Basically, this provision excludes privately owned and operated nursing homes from CRIPA.

⁹ 42 U.S.C. § 1997a(a).

¹⁰ 42 U.S.C. § 12101.

¹¹ *Id.* The Prison Litigation Reform Act also limits the scope of relief in prisoner cases. 18 U.S.C. § 3626.

The United States may also seek similar improvements through voluntary remediation and private settlement agreements.¹²

B. CRIPA procedures and certification requirements

To initiate a CRIPA lawsuit, the Attorney General must personally sign the complaint and certify that the United States complied with the statute's procedural requirements.¹³ To meet the certification requirements, the United States typically provides at least two written notices to the jurisdiction. Once the notices are given, the Attorney General can make the certification required to initiate litigation.

First, the United States gives the jurisdiction seven days' notice before commencing a formal investigation of an institution.¹⁴ The Assistant Attorney General for Civil Rights "retains final authority" to approve commencement of a formal investigation.¹⁵ After the United States issues the investigation notice letter, a Department of Justice (Department) team will review documents, interview witnesses, and conduct a facility inspection.¹⁶ The team usually includes Department attorneys, staff, and independent experts specially retained for the investigation.¹⁷ If a jurisdiction does not voluntarily cooperate with a CRIPA investigation, the United States

¹² See, e.g., *Special Litigation Section Cases and Matters*, DEP'T OF JUST., <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download> (updated Nov. 24, 2021).

¹³ 42 U.S.C. §§ 1997a, 1997b, 1997c.

¹⁴ 42 U.S.C. § 1997b. The notice of investigation is only required if the United States files a regular complaint. If the United States seeks to intervene in an existing, private lawsuit, the requirements are reduced. For instance, the United States only needs to provide 15 days' notice of the alleged conditions that violate persons' rights and the supporting facts.

¹⁵ JUSTICE MANUAL 8-2.261. The Assistant Attorney General can delegate her authority, where appropriate. When a U.S. Attorney's Office receives any delegated authority, it still needs to coordinate with the Division.

¹⁶ For a short period, the Civil Rights Division used the term "Notice Letter" when referring to the 49-day letter. Consistent with updated Division practice and to avoid confusion, this article refers to the notice of a new investigation as the "notice letter" and the 49-day letter as a "findings report." See *Special Litigation Section Cases and Matters*, *supra* note 12.

¹⁷ As discussed in more detail below in part II, a U.S. Attorney's Office may participate at this and other stages of a CRIPA case.

can subpoena records.¹⁸ CRIPA also prohibits retaliation against persons reporting unlawful conditions.¹⁹

Second, the United States notifies the jurisdiction of the conditions that violate persons' rights, the facts giving rise to the alleged conditions, and the minimum measures that, if taken, will resolve the conditions.²⁰ Typically, the United States meets this requirement by issuing a findings report that is based on the expert interviews, tours, document review, and other information obtained over the course of the investigation. Before initiating legal action, the United States must give the jurisdiction *at least* 49 days' notice of the alleged conditions that violate the rights of institutionalized persons. In other words, the United States must issue the findings report at least 49 days before filing a complaint. The 49-day period also gives the parties time to discuss settlement or other voluntary remedies.²¹ In practice, if good faith settlement discussions are making progress, they can go on for much longer than 49 days.²²

For a complaint initiating a new action, the Attorney General must also specifically certify that the Department made a "good faith effort" to consult with state officials regarding federal "financial, technical, or other assistance," which may help the state correct any violations, and that "reasonable efforts at voluntary correction have not succeeded."²³

For intervention, the Attorney General must certify "such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or

¹⁸ 42 U.S.C. § 1997a-1.

¹⁹ 42 U.S.C. § 1997d. The statute also has various miscellaneous provisions, such as requiring a report to Congress, requiring various disclaimers and notices, and a section on prisoner grievance procedures. 42 U.S.C. §§ 1997e to 1997j.

²⁰ 42 U.S.C. §§ 1997b(a)(1), 1997c(b).

²¹ *See also* 42 U.S.C. § 1997b(a)(2)(B), (C). The Attorney General's certification indicates that there has been an "opportunity for informal methods of conference, conciliation and persuasion" and that the Attorney General is satisfied that the state has had "reasonable time to take corrective action."

²² For intervention, similar findings must be made at least 15 days before filing the motion to intervene, and no motion may be filed "before 90 days after commencement of the action" unless the court shortens or waives this waiting period. 42 U.S.C. § 1997c(a).

²³ 42 U.S.C. § 1997b.

immunities secured or protected by the Constitution or laws of the United States.”²⁴

In summary, CRIPA gives the United States the authority to seek injunctive relief to address a range of unlawful conditions in state and local institutions. While the Assistant Attorney General for Civil Rights and Division staff have primary responsibility for enforcing CRIPA, U.S. Attorneys’ Offices can also play an important role in CRIPA cases. Division staff will work closely with Assistant U.S. Attorneys (AUSAs) located in the same district as a targeted institution or the offices of any responsible state officials. In doing so, Division staff frequently partner with U.S. Attorney’s Offices to jointly conduct CRIPA investigations, negotiations, monitoring of settlements, and litigation, if necessary. Because of CRIPA’s complex requirements, it is helpful to discuss in more detail how an AUSA can participate at each stage of the CRIPA process.

II. Enforcing CRIPA: the critical role of U.S. Attorneys’ Offices

U.S. Attorneys’ Offices can play a critical role in enforcing CRIPA.²⁵ This role may vary depending on the size, structure, and civil rights experience of the U.S. Attorney’s Office. This section first discusses how each office’s resources and civil rights practice can affect its participation in CRIPA matters, and second, it addresses how AUSAs can participate at each stage of the CRIPA process.

A. Civil rights practices at U.S. Attorneys’ Offices

Each U.S. Attorney’s Office can significantly contribute to enforcing CRIPA. The civil rights experience of a U.S. Attorney’s Office, however, may guide how an office allocates its resources to such cases.

In recent years, several U.S. Attorneys’ Offices created civil rights units or sections.²⁶ These offices have tasked AUSAs and staff with

²⁴ 42 U.S.C. § 1997c(b)(1)(B).

²⁵ JUSTICE MANUAL 8-2.100, 8-2.261.

²⁶ See, e.g., Press Release, Dep’t of Just., Acting United States Attorney Mark J. Lesko Announces Formation of Civil Rights Team in the Office’s Civil Division (June 18, 2021); Press Release, Dep’t of Just., Maryland U.S. Attorney’s Office Creates Civil Rights Unit to Prosecute Hate Crimes and Violations of Federal Law and to Address Discrimination in Housing, Education, and Other Sectors (Mar. 11, 2021); Press Release, Dep’t of Just.,

handling affirmative civil rights investigations and litigation. Many of these offices partner with the Division on CRIPA matters.

Other U.S. Attorneys' Offices are developing civil rights practices.²⁷ Their civil rights units are either relatively new, or the offices are still considering the best structure for a civil rights practice within their offices. Working on CRIPA cases allows their AUSAs to work closely with Division personnel. CRIPA work can further enhance the districts' civil rights enforcement capabilities. It also gives office personnel an opportunity to see what institutional reform cases require in terms of resources, and it exposes those personnel to the types of legal and administrative issues that arise in sensitive civil rights matters that may be scrutinized at the highest levels of the Department. The Division benefits from working with these offices, as they provide local contacts and additional resources, including energetic AUSAs who may be interested in working on significant civil rights issues.

Still, other U.S. Attorneys' Offices, especially smaller offices, do not have fully dedicated civil rights units or sections. Although every U.S. Attorney's Office has a Civil Rights Coordinator assigned to liaison with the Division, not every office has AUSAs who focus exclusively on civil rights enforcement. Nonetheless, in many of those offices, Civil Division AUSAs still pursue affirmative civil rights cases. Even if these offices have limited resources they can devote to affirmative civil rights cases, they can still partner with the Division on a CRIPA matter by providing targeted support.

B. CRIPA enforcement by U.S. Attorneys' Offices: beginning to end (and everything in between)

Depending on the structure of a U.S. Attorney's Office and available resources, AUSAs can work on every aspect of a CRIPA investigation. This section discusses multiple stages of a CRIPA case, the potential role of AUSAs at each stage, and examples of such work.

U.S. Attorney Announces Establishment of Civil Rights Enforcement Unit (Oct. 27, 2020); Press Release, Dep't of Just., U.S. Attorney Ortiz Announces Creation of Civil Rights Unit (Feb. 16, 2016).

²⁷ Goldberger et al., *Building a Civil Rights practice for Civil Enforcement in a United States Attorney's Office*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 69.

1. The beginning: a pre-investigation review

As the primary federal law enforcement office in its district, a U.S. Attorney's Office may be the first to learn of concerns that may warrant a CRIPA investigation. For example:

- a parent calls a U.S. Attorney's Office's civil rights hotline to report that a county jail fails to provide appropriate mental health care to her child or to other detainees;
- a federal agent may advise an AUSA of unlawful use of force at a state prison;
- the local press may contact the U.S. Attorney's Office for comment on a report about horrific, unsanitary conditions at a state psychiatric hospital;
- a county prosecutor may provide a tip to a civil rights AUSA that correction officers at a local jail fail to prevent prisoner-on-prisoner sexual abuse;
- during a community outreach event, a concerned citizen may approach an AUSA to urge the office to examine allegations that a juvenile detention system failed to keep its residents safe from physical abuse by staff;
- community stakeholders may reach out to a civil rights AUSA to express concern about alleged unlawful use of physical restraints on individuals with developmental disabilities at state hospitals; or
- a local advocacy group may advise a civil rights AUSA of a lawsuit it filed that alleges a county jail violated the Constitution through its use of race-based policies.

When receiving this type of information, a U.S. Attorney's Office may engage in a pre-investigation review to determine whether a full investigation may be appropriate.²⁸ The review often includes analyzing materials received from complainants and others, speaking with complainants, and reviewing publicly available information.²⁹ No

²⁸ JUSTICE MANUAL 8-2.110. If a U.S. Attorney's Office is unable to conduct a pre-investigation review, it should forward the complaint and other information to the Special Litigation Section. *Id.*

²⁹ *Id.*

one from the jurisdiction should be contacted at this pre-investigation stage. AUSAs who have less experience with the statute should consider contacting their Division colleagues as soon as possible. The Division's attorneys and staff may have suggestions on how to obtain information, what information is most useful for justifying an investigation, and relevant legal concerns. An office with more experienced practitioners and a longer-standing civil rights practice should still consult with the Division as soon as the office believes the matter may generate a formal investigation. At this preliminary stage, consultation does not have to be extensive. A few phone calls, e-mails, and other informal communications may, however, help an AUSA avoid some of the potential pitfalls that exist even at this stage of a CRIPA case.

If the pre-investigation review suggests an investigation may be warranted, the U.S. Attorney's Office should reach out to the Division to discuss next steps in more detail.³⁰ Where the U.S. Attorney's Office and the Division decide to partner, both offices should discuss the parameters of the partnership, including AUSAs' roles at each stage of the process.³¹ The level of involvement by an AUSA is often guided by the structure of the U.S. Attorney's Office (for example, whether it has a dedicated civil rights practice) and whether it has resources available to staff the matter. Division of responsibilities is determined on a case-by-case basis.³²

In cases where the Division conducted a pre-investigation review, the Division should notify the U.S. Attorney's Office before initiating a CRIPA investigation in the U.S. Attorney's district.³³ When notified, the U.S. Attorney's Office and the Division should consult to determine whether the offices will partner on the investigation and, if so, each office's role.³⁴

Before an investigation is formally opened, Department attorneys must first seek authority to investigate from the Assistant Attorney General for the Division.³⁵ In cases handled by U.S. Attorney's Offices, AUSAs may be tasked to prepare that recommendation and will work with the Division in finalizing the recommendation to the Assistant

³⁰ *Id.*

³¹ *Id.*

³² JUSTICE MANUAL 8-2.110, 8-2.261.

³³ JUSTICE MANUAL 8-2.110.

³⁴ JUSTICE MANUAL 8-2.110, 8-2.261.

³⁵ JUSTICE MANUAL 8-2.110.

Attorney General.³⁶ In cases primarily handled by the Division, the Division will prepare the investigation recommendation but will typically seek the U.S. Attorney's concurrence in that recommendation.

2. The Investigation

The contours of a CRIPA investigation vary from case to case. Nonetheless, most investigations include the following:

- a formal notice of investigation to the jurisdiction;
- requests for information (through document requests or a subpoena) from the jurisdiction;
- document review and analysis;
- witness interviews;
- expert interviews and review; and
- a comprehensive site tour of the institution.

In cases where AUSAs are members of a CRIPA case team, AUSAs typically share responsibility with Division trial attorneys in handling these tasks. Where the U.S. Attorney's Office is unable to fully partner, AUSAs may still provide support to the Division trial attorneys or handle specific investigatory tasks. The U.S. Attorney's Office and the Division should consult to clearly identify those tasks to be handled by AUSAs and their staff.

3. After the investigation: findings report, negotiation, and resolution

Not only do AUSAs participate in labor-intensive investigations, they may also significantly contribute to every aspect of a CRIPA matter. In most instances, where the U.S. Attorney's Office participated in an investigation, it will maintain the same level of participation after a findings determination. In other words, an AUSA who handled significant components of an investigation should expect to be involved in drafting the findings report; settlement negotiations; filing a civil action, if applicable; litigation and trial, if necessary; and monitoring compliance with the resolution.

³⁶ *Id.*

In cases where a U.S. Attorney's Office is less involved during an investigation, in appropriate cases, it could increase its involvement in the later stages of the case. Because the U.S. Attorney's Office may have experience with the defendant, local practice, and the U.S. District Court, the involvement of the U.S. Attorney's Office may enhance the Division's enforcement efforts. While contested CRIPA litigation is rare, AUSAs may be closely involved as local counsel. For example, an AUSA may be at counsels' table for the entire duration of any bench trial, which can last several weeks.

4. Compliance enforcement

Work on a CRIPA enforcement matter does not end when the parties reach a settlement or a judicial determination is reached after trial. Department attorneys expend considerable time and resources ensuring that a jurisdiction implements reforms and that the reforms are sustainable. This stage of a CRIPA matter may include review of revised policies and practices, witness interviews, additional site tours and inspections, interacting with an independent monitor, and participating in compliance hearings before the court. Where compliance is not achieved, Department attorneys may engage in post-agreement litigation to obtain additional court-ordered remedies, including orders of contempt, appointment of special masters, and other relief.

AUSAs on a CRIPA case team typically continue to work on compliance enforcement. Because achieving compliance may take several years, the U.S. Attorney's Office should be prepared to assign additional AUSAs to the matter if staffing changes become necessary.

If a U.S. Attorney's Office was less involved in the investigation or litigation stages, but it has the capacity to increase its partnership at the compliance stage, it should consult with the Division to develop a staffing plan.

5. Statements of interest

AUSAs may also draft statements of interest. Federal law authorizes the Department to file a statement of interest in any private litigation in state or federal court where the United States has an interest in the issues before the court.³⁷

³⁷ 28 U.S.C. § 517.

Some private litigation has a significant impact on the constitutional or statutory rights the Department protects in CRIPA matters. Rather than intervene in the private litigation, a statement of interest may be more appropriate to address the United States' interests related to its enforcement of the federal rights protected by CRIPA.³⁸

Where a U.S. Attorney's office identifies a case it believes is appropriate for the filing of a statement of interest, it should contact the Division as early as possible to discuss sending a recommendation to the Assistant Attorney General for Civil Rights for approval to do so.³⁹ If approved, an AUSA may be tasked to draft the submission to the court. If the AUSA is tasked to be the primary drafter, the Division should review the statement of interest before it is filed. Similarly, if the Division seeks to file a statement of interest, it should discuss collaborating with the U.S. Attorney's Office in the district where the submission will be filed.⁴⁰

6. Recent examples of CRIPA enforcement by U.S. Attorneys' Offices

In recent years, several U.S. Attorneys' Offices have partnered with the Division on CRIPA investigations, litigation, and statements of interest. The cases span the many CRIPA subject areas described in this article and illustrate the variety of ways the offices can participate in institutional reform cases. For example, in just the last three years, U.S. Attorneys' Offices have partnered with the Division in taking the following actions under CRIPA:

- The District of New Jersey and the Middle District of Florida participated in CRIPA investigations to protect the rights of prisoners to be safe from staff sexual abuse.⁴¹ In 2020, the Department issued findings reports to New Jersey and Florida.

³⁸ *Id.*; see also JUSTICE MANUAL 8-2.170(C).

³⁹ JUSTICE MANUAL 8-2.170(C). Similarly, if a U.S. Attorney's Office identifies a state or federal appellate court matter that would be appropriate for an amicus brief, it should send a recommendation to the Section Chief of the Appellate Section. JUSTICE MANUAL 8-2.170(D).

⁴⁰ JUSTICE MANUAL 8-2.100.

⁴¹ *Special Litigation Section Case Summaries*, DEP'T OF JUST., <https://www.justice.gov/crt/special-litigation-section-case-summaries/download#EdnaMahan> (updated Nov. 24, 2021).

In 2021, the District of New Jersey's case resulted in a consent decree with the State of New Jersey.

- The District of Massachusetts partnered with the Division in an investigation of mental health treatment and solitary confinement in Massachusetts' prisons. In 2020, the Department issued a findings report to the Massachusetts Department of Correction, identifying systemic failures to provide adequate mental health care and appropriate housing to prisoners in mental health crisis.⁴²
- All of the U.S. Attorneys' Offices in Alabama joined in a statewide investigation of conditions in the Alabama men's prisons. They are presently in active litigation against Alabama to remedy the state's failure to protect prisoners from prisoner-on-prisoner violence and sexual abuse and to enjoin the state from continuing to subject prisoners to unlawful use of force and unsafe and unsanitary conditions.⁴³
- The District of New Jersey joined an investigation of the Cumberland County Jail. Earlier this year, the Department issued a findings report that concluded that the Cumberland County Jail violated the constitutional rights of prisoners by failing to provide adequate suicide prevention and mental health care. The letter included a finding that the jail failed to ensure that inmates with opioid use disorder received medication-assisted treatment.⁴⁴
- In 2019, the Middle District of Georgia and the Division filed a statement of interest in a private federal action to set forth the Department's position concerning unlawful use of restrictive housing with respect to prisoners with serious mental illness.⁴⁵
- The District of South Carolina participated in an investigation of the Broad River Road Complex, a long-term juvenile commitment facility. In 2020, the Department issued a findings report that relied on CRIPA and the ADA. The Department cited state officials for failing to protect youth from harm and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

misusing isolation instead of adopting effective behavioral management tools.⁴⁶

- In 2021, the Eastern District of Arkansas joined in the filing of a statement of interest in support of protection and advocacy agencies. The statement of interest supported the agencies' right to obtain state records pursuant to CRIPA and the Protection and Advocacy for Individuals with Mental Illness Act of 1986.⁴⁷
- The Central District of California partnered with the Division in an investigation of San Luis Obispo County Jail. In August 2021, the Department issued a findings report that the jail violates the constitutional rights of prisoners by, among other things, failing to provide adequate medical and mental health care and using excessive force. The report also found that the jail violates the ADA by denying prisoners with mental health disabilities access to services, programs, and activities because of their disabilities.
- The Eastern District of Virginia has worked closely with the Division to monitor a consent decree governing conditions in the Hampton Roads Regional Jail. The District was also involved in the original investigation and settlement negotiations, which resulted in an agreement to improve isolation and mental health practices.⁴⁸
- All three U.S. Attorneys' Offices in Louisiana are working with the Division to investigate whether state prisons are detaining prisoners beyond their release dates.⁴⁹

In addition to these matters from just the past few years, U.S. Attorneys' Offices across the country are actively partnering with the Division on open CRIPA investigations, as well as compliance with CRIPA consent decrees and settlement agreements.

⁴⁶ *Id.*

⁴⁷ Department of Justice Statement of Interest, Disability Rts. Ark., Inc. v. Graves, No. 20-cv-01081 (E.D. Ark Feb. 10, 2021), ECF No. 18.

⁴⁸ Special Litigation Section Case Summaries, *supra* note 41.

⁴⁹ *Id.*

III. Conclusion

In summary, CRIPA provides the Department with an important tool for addressing unlawful conditions in public institutions. A United States Attorney's Office can play an important role at each stage of the CRIPA process. AUSAs and other office personnel have worked on investigations, negotiations, litigation, and post-judgment enforcement. The statute's procedures and the underlying substantive law can be complex, so communication between Department personnel is well-advised.

About the Authors

Michael Campion became an Assistant U.S. Attorney in the District of New Jersey in 2007. Since 2013, his practice has focused almost exclusively on handling a wide array of affirmative civil rights investigations and litigation. He is currently the Chief of the U.S. Attorney's Civil Rights Unit, a position he has held since the unit's inception in 2016.

Christopher Cheng has been a trial attorney with the Civil Rights Division, Special Litigation Section, since 1993. He has worked on a variety of CRIPA matters, including litigation over jail, prison, and hospital conditions. He has led investigations of correctional facilities, juvenile facilities, training centers, mental hospitals, and nursing homes across the country.

Page Intentionally Left Blank

The Employment Litigation Section's Sexual Harassment in the Workplace Initiative and How to Get Involved

Shayna Bloom
Trial Attorney
Employment Litigation Section
Civil Rights Division

Jen Swedish
Trial Attorney
Employment Litigation Section
Civil Rights Division

Julia Quinn
Trial Attorney
Employment Litigation Section
Civil Rights Division

Through its enforcement of Title VII of the Civil Rights Act of 1964, the Employment Litigation Section (ELS) of the Department of Justice's (Department) Civil Rights Division has long made it a priority to redress sexual harassment in state and local government workplaces. In late 2017, a national spotlight was placed on sexual harassment through several high-profile cases and grassroots movements. In 2018, seeing a need to put even greater emphasis on combating harassment at work, ELS redoubled its efforts through the creation of its Sexual Harassment in the Workplace Initiative (SHWI), which uses both time-tested and newer approaches to more effectively address and prevent sexual harassment in these environments.¹

¹ Several other sections of the Civil Rights Division also address sexual misconduct within their jurisdictions. ELS coordinates with these sections when appropriate, which include:

- The Criminal Section, which may bring criminal charges under 18 U.S.C. § 242 when an alleged harasser deprives victims of constitutional rights while acting under color of law, that is, while acting in the official capacity as a government actor. *See Fara Gold, 2022 Update: Prosecuting Sexual Misconduct by Government Actors*, DOJ J. FED. L. & PRAC., no. 2 (forthcoming Mar. 2022); Fara Gold,

This article intends to introduce the reader to SHWI and to encourage U.S. Attorney's Offices (USAOs) to get involved. To provide context for SHWI's work, the article begins with an overview of ELS and its enforcement authority under Title VII.

As described in more detail below, SHWI is aimed at preventing workplace sexual harassment on multiple fronts. Since 2018, ELS has successfully resolved several sexual harassment cases, obtaining over \$2.7 million in monetary damages and injunctive relief aimed at lasting systemic change in several state and local government workplaces. To ensure the success of ELS's injunctive relief efforts, a goal of SHWI is to identify best practices to prevent and correct sexual harassment in state and local government workplaces. Through SHWI, ELS also has engaged in outreach efforts, participating in several events intended primarily to educate state and local

Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases, 66 U.S. ATT'YS BULL., no. 1, 2018, at 77.

- The Educational Opportunities Section and the Federal Coordination and Compliance Section, which can enforce Title IX of the Education Amendments of 1972 when sexual harassment occurs at a school, college, or university receiving federal funding from the Department, or in coordination with other federal agencies that fund the institution (a discussion of Title IX is available elsewhere in this issue).
- The Educational Opportunities Section, which can also protect students from sex discrimination under Title IV of the Civil Rights Act of 1964 when sexual harassment occurs at a public school.
- The Special Litigation Section, which has authority under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, as well as 34 U.S.C. § 12601, to protect inmates or residents of jails, prisons, juvenile facilities, mental health facilities, nursing homes, and facilities for people with intellectual or developmental disabilities, as well as those who encounter the police.
- The Housing and Civil Enforcement Section, which targets sexual harassment that violates the Fair Housing Act through its Sexual Harassment in Housing Initiative (a discussion of that Initiative is available elsewhere in this issue).

These collaborative efforts allow the Civil Rights Division to combat sexual misconduct through multiple avenues, buttressing ELS's work enforcing Title VII.

government employers about their obligations under Title VII. Importantly, ELS often partners with USAOs in its litigation and outreach efforts, and this article concludes with ways that Assistant U.S. Attorneys (AUSAs) can get more involved in SHWI.

I. Introduction to the Employment Litigation Section

ELS is part of the Department's Civil Rights Division. Initially, ELS's primary purpose was to exercise the Attorney General's enforcement authority under Title VII of the Civil Rights Act of 1964, as delegated to the Assistant Attorney General for Civil Rights. Later, ELS's docket expanded to include other areas, including the enforcement of Executive Order 11,246, which prohibits employment discrimination by federal contractors, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits employers from discriminating based on military status or obligation.² ELS is based in Washington, DC, but it maintains a nationwide practice that relies heavily on its partnerships with USAOs throughout the country.

II. ELS's enforcement authority under Title VII

ELS enforces Title VII of the Civil Rights Act of 1964,³ as amended, against state and local government employers. Title VII bars employment discrimination based on race, color, sex (including pregnancy, sexual orientation, and gender identity), national origin, and religion.⁴ It proscribes many forms of differential treatment based on those protected categories, including hiring, termination, non-promotion, and disparate terms and conditions of employment, as well as retaliation for opposing a practice made unlawful under the Act.⁵ In the 1980s and 1990s, the Supreme Court clarified that Title VII

² An overview of USERRA is available elsewhere in this issue.

³ Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17.

⁴ *See* Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2.

⁵ *See id.*

outlaws sexual harassment in the workplace, as discussed in section III, *infra*.⁶

ELS and the U.S. Equal Employment Opportunity Commission (EEOC) share responsibility for the enforcement of Title VII. ELS is authorized to seek remedies for employment discrimination by state and local governments, as well as their agencies and political subdivisions, while the EEOC has enforcement authority with respect to private employers and the federal government. ELS's enforcement authority has considerable reach given the large number of public sector employees in the United States: The most recent census data suggests that over 15 million people in the United States work for state or local government employers in education, law enforcement, public health and safety, transportation, and other critical fields.⁷

ELS has authority to enforce Title VII through two frameworks: section 706 and section 707.⁸ Section 706 provides that, when an individual files a charge of discrimination with the EEOC, and the EEOC finds reasonable cause to believe Title VII was violated but is unable to conciliate the charge, the EEOC refers the charge to the Attorney General.⁹ ELS receives those charges and reviews them for possible litigation. While these section 706 cases are filed in the name of the United States, charging parties have an absolute right to intervene and often do. ELS can recover monetary damages, though not punitive damages, and wide-ranging injunctive relief in section 706 cases. When ELS declines to litigate a charge on behalf of the United States, it issues a notice of right to sue letter, which gives the charging party the ability to file a lawsuit in federal court based on the charge.

Section 707 provides ELS with a different type of authority under Title VII. Specifically, it gives the Attorney General self-starting authority to initiate a full investigation into suspected discrimination,

⁶ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁷ See *2020 ASPEP Datasets & Tables*, CENSUS BUREAU, <https://www.census.gov/data/datasets/2020/econ/apes/annual-apes.html> (last visited Dec. 17, 2021).

⁸ Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5; Civil Rights Act of 1964 § 707, 42 U.S.C. § 2000e-6.

⁹ A Commissioner's Charge may also be initiated by an EEOC Commissioner and would follow the same process. Most charges are filed by private individuals.

and where the Attorney General finds a pattern or practice of discrimination in violation of the statute, the Department can file a lawsuit without any underlying EEOC charge. Many of ELS's section 707 cases challenge employment practices that have disparate impacts on protected groups, but others focus on systemic disparate treatment.

Often, ELS brings section 707 disparate treatment cases under the framework set forth in *International Brotherhood of Teamsters v. United States*,¹⁰ with bifurcated liability and damages phases. If ELS can establish a standard operating procedure of discrimination in the first phase, the United States is immediately entitled to prospective injunctive relief, as well as a rebuttable presumption that all members of a protected group were victims of the systemic discrimination.¹¹ Thus, section 707 is a powerful tool for addressing discrimination that impacts large groups of applicants or employees and can be used to redress a wide range of harms, including systemic sexual harassment.¹²

III. Prohibited sexual harassment under Title VII

Although Title VII does not expressly prohibit harassment, the Supreme Court has interpreted the statute's prohibition on discrimination to encompass several types of harassment, including

¹⁰ 431 U.S. 324 (1977).

¹¹ *Id.* at 361 (1977).

¹² Some courts approach the *Teamsters* framework differently in sexual harassment pattern-or-practice cases, so it is important to check the case law before proceeding under this theory. *See, e.g.,* *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 876 (D. Minn. 1993) (failing to apply the rebuttable presumption of liability during the damages phase and instead maintaining plaintiff's burden of persuasion to establish that each individual victim subjectively perceived the workplace as hostile); *Equal Emp. Opportunity Comm'n v. Pitre, Inc.*, 908 F. Supp. 2d 1165, 1177–78 (D.N.M. 2012) (applying *Jenson's* Phase II approach); *Equal Emp. Opportunity Comm'n v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 937–38 (N.D. Iowa 2009) (same), *Equal Emp. Opportunity Comm'n v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 3120069, at *17 (N.D. Ill. Oct. 23, 2007) (requiring, during the damages phase, that the plaintiff establish that the harassment each victim experienced was both objectively and subjectively hostile).

sexual harassment.¹³ Since first recognizing the viability of a Title VII sexual harassment claim in its unanimous decision in *Meritor Savings Bank v. Vinson*,¹⁴ the Court has fleshed out the legal standards for determining when offensive conduct amounts to a Title VII violation and when employers may be held liable for such actionable harassment. The Court also has created an affirmative defense available to employers under certain circumstances.

Unlawful sexual harassment is unwelcome workplace conduct that is motivated by the victim's sex and that either results in a tangible employment action being taken against the victim (*quid pro quo* sexual harassment) or is severe or pervasive enough to alter the terms and conditions of the victim's employment (*hostile work environment* sexual harassment).¹⁵

Anyone can perpetrate or experience sexual harassment. The harasser can be of the same or a different sex or sexual orientation than the victim. A harasser can be a supervisor, co-worker, or even a third party, such as a customer of the employer.

IV. ELS's sexual harassment in the workplace initiative

Although ELS has always enforced Title VII's prohibitions on sexual harassment, its 2018 founding of SHWI represents a new effort to address workplace sexual harassment on multiple fronts while using new strategies.

One major reason SHWI is so important is that the state and local government employers ELS has authority to sue under Title VII present risk factors for sexually hostile work environments and workplace harassment that are different from those usually seen in the private sector. Research conducted by industrial/organizational psychologists and other scientists have identified several major risk factors for high rates of sexual harassment in the workplace. Three of these are commonly found in state and local government workplaces: (1) a high male-to-female ratio; (2) non-formal environments or

¹³ 42 U.S.C. § 2000e-2; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67, 73 (1986).

¹⁴ 477 U.S. 57 (1986).

¹⁵ *Quid pro quo* sexual harassment is when an employee's submission to, or rejection of, unwelcome sexual conduct by an individual is used as a basis for employment decisions affecting that individual. *See* 29 C.F.R. § 1604.11(a).

environments where employees embrace a casual or non-professional attitude; and (3) workplaces where there is a lack of formal procedures for reporting sexual harassment or a lack of a human resources department.

These risk factors are common among ELS's typical defendants, including fire and rescue agencies, corrections departments, and law enforcement agencies. For example, in many fire departments, firefighters sleep, eat, and live together in the firehouse while they are on shifts of 24 hours or more. And police officers may spend much of their time in patrol vehicles or walking a beat together. These non-traditional work environments can produce the type of atmosphere where uncivil behavior and harassment can flourish if employers do not take measures to prevent it.

These risk factors are borne out by surveys of women in fire and rescue agencies and law enforcement agencies in particular. When women enter a profession where they need to be included as "one of the boys," and being "one of the boys" translates into unprofessional behavior, it can create a problematic situation. Some women put up with a great deal of incivility and even illegal behavior to fit in. Indeed, a recent survey of female firefighters found that nearly 40% have experienced verbal harassment and sexual advances, almost 17% have experienced hazing, and over 5% have been sexually assaulted on the job.¹⁶

Not only is harassment in public sector workplaces prevalent, but women are also hesitant to report it. As this quote from a recent study of female police officers illustrates, women may avoid reporting based on these workplaces' particular dynamics, where working with partners or in teams is the norm: "When asked why Patricia did not report [her sexual assault,] she explained she felt like she couldn't because he was her superior and she feared that she would quickly get a negative reputation as either a 'slut' or a 'bitch,' look like a victim, and would be ostracized in the department."¹⁷ Police officers also may experience a workplace culture in which the chain of command is

¹⁶ Sara A. Jahnke, et al., *The Prevalence and Health Impacts of Frequent Work Discrimination and Harassment among Women Firefighters in the US Fire Service*, 2019 BIOMED RSCH. INT'L 1, 6 (2019).

¹⁷ Timothy C. Brown, et al., *Playing the Game: A Qualitative Exploration of the Female Experience in a Hypermasculine Policing Environment*, 23 POLICE QUARTERLY no. 2, 2020, at 161.

prioritized above all else, and if a supervisor is the harasser, that can completely foreclose avenues for complaints.

A. SHWI's components

SHWI has three distinct components aimed at combating sexual harassment at state and local government employers: (1) a focus on litigation opportunities; (2) the identification of best practices and tools to prevent and correct sexual harassment; and (3) an outreach effort to educate public employers and the public about their obligations and rights.

1. Litigation

Litigation is a key aspect of ELS's efforts to prevent and correct workplace sexual harassment. Through litigation, ELS demonstrates that it is ready and willing to bring employers into court when there is evidence of workplace sexual harassment that could have been stopped. This should put employers on notice that attention to sexual harassment prevention is crucial.

Since its inception, the SHWI has yielded eight significant pieces of litigation specifically aimed at combating workplace sexual harassment. ELS also has opened many other investigations over the years and will continue to do so wherever they arise. In many of these matters, ELS partnered with USAOs, working together from investigation to case resolution. The following examples are a few publicly reported highlights of this imperative work.

United States v. Cumberland County, Tennessee

In March 2021, ELS and the USAO for the Middle District of Tennessee brought suit against Cumberland County, Tennessee.¹⁸ In its complaint, the United States alleged that Michael Harvel, the Director of Cumberland County's Solid Waste Department, sexually harassed 10 women he supervised, including both employees and community service workers assigned to perform community service through the court system or as a condition of probation.¹⁹ This case was based on charges of discrimination referred by the EEOC in

¹⁸ Complaint, *United States v. Cumberland Cnty., Tenn.*, No. 21-cv-00012 (M.D. Tenn. Mar. 8, 2021), ECF No. 1.

¹⁹ *Id.* at 1, 3–9.

which the charging parties alleged that they and other women at the Solid Waste Department were discriminated against based on sex.²⁰

The United States alleged that Harvel's harassment constituted quid pro quo sexual harassment and created a hostile work environment.²¹ Specifically, Harvel subjected two women to quid pro quo sexual harassment when he made submission to his unwelcome sexual advances and requests for sexual favors a condition for receiving employment benefits.²² Harvel further subjected all 10 women to a hostile work environment based on sex.²³ He regularly touched them sexually without their consent, including kissing them and groping their breasts, thighs, buttocks, and vaginas.²⁴ He also made unwelcome sexual advances toward many of the women, propositioning several for oral or penetrative sex, forcing one woman to view or touch his penis, and threatening to rape another woman.²⁵ Harvel also regularly made offensive sexual remarks, commenting on their bodies and talking about what he wanted to do to them sexually.²⁶

Moreover, Cumberland County's sexual harassment policy and reporting procedures during the time of Harvel's conduct were woefully ineffective. Not only did the policy fail to require supervisors to report harassment, but the majority of the women harassed did not even know how to report their harassment.²⁷ Cumberland County disseminated its sexual harassment policy and reporting procedures only to full-time employees;²⁸ 9 of the 10 women who Harvel harassed never saw these materials because they were only part-time employees or community service workers.²⁹ Further, Cumberland County provided no training on sexual harassment whatsoever until after the women filed EEOC charges.³⁰ Following the EEOC's cause finding, Cumberland County began efforts to improve its sexual

²⁰ *Id.* at 2–3.

²¹ *Id.* at 10–11.

²² *Id.* at 11.

²³ *Id.* at 10.

²⁴ *Id.* at 6.

²⁵ *Id.* at 6–7.

²⁶ *Id.* at 7.

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ *Id.* at 4–6.

³⁰ *Id.* at 8.

harassment policy and reporting procedures and to train its employees.

The USAO actively partnered with ELS to investigate and resolve the matter. An AUSA from the Middle District of Tennessee worked with ELS attorneys during the investigation and settlement discussions. She participated in interviews and negotiations and collaborated on all court filings.

Shortly after the United States filed its complaint, the parties entered into a consent decree providing for monetary and injunctive relief.³¹ Under the decree, Cumberland County paid the 10 women approximately \$1.1 million in compensatory damages.³² As part of the settlement, Cumberland County agreed to further reforms to continue improving its sexual harassment policy, reporting procedures, and anti-harassment training.³³ Cumberland County will be under the consent decree until September 2022.³⁴

United States v. Mobile County Sheriff's Office and Mobile County Sheriff

In March 2021, ELS filed a complaint in the U.S. District Court for the Southern District of Alabama, alleging that female corrections officers working for the Mobile County Sheriff's Office were regularly subjected to severe and pervasive sexual harassment by male inmates.³⁵ The complaint arose from EEOC charges filed by 12 female correctional officers.³⁶ It alleges that male inmates at the Mobile Metro Jail frequently engage in exhibitionist masturbation, known as

³¹ Consent Decree, *United States v. Cumberland Cnty., Tenn.*, No. 21-cv-00012 (M.D. Tenn. Mar. 24, 2021), ECF No. 15.

³² *Id.* at 5.

³³ *Id.* at 4–7.

³⁴ *Id.* at 9. In July 2021, the Criminal Section and the USAO for the Middle District of Tennessee announced the unsealing of a nine-count indictment charging Harvel with civil rights violations relating to his sexual harassment of women at the Solid Waste Department. If convicted, Harvel faces a maximum sentence of up to life in prison. See Press Release, Department of Justice, Former Tennessee County Official Indicted for Kidnapping and Sexual Assault (July 16, 2021).

³⁵ Complaint, *United States v. Mobile Cnty. Sheriff's Off.*, No. 21-CV-00114 (S.D. Ala. Mar. 10, 2021), ECF No. 1; see also First Amended Complaint, *Mobile Cnty. Sheriff's Off.*, No. 21-CV-00114, ECF No. 58.

³⁶ First Amended Complaint at 2, *Mobile Cnty. Sheriff's Off.*, No. 21-CV-00114, ECF No. 58.

“gunning,” and verbally harass female officers with sexual slurs and propositions.³⁷ In its complaint, the United States also contends that inmates threaten sexual violence against, and use sexually degrading language towards, female correctional officers, and that male employees are “rarely, if ever,” subjected to any of these harassing behaviors.³⁸ The complaint alleges that, despite the employees’ hundreds of reports objecting to the harassment, the Sheriff’s Office did not take the complaints seriously, instead, dismissing their complaints and making comments such as: “You shouldn’t be looking so cute,” “If I was an inmate, I’d gun you too,” and “Put on your big girl pants.”³⁹ ELS’s complaint states that the charging parties and similarly situated female Sheriff’s Office employees suffered physical distress, emotional distress, and loss of sick leave when they were compelled to take leave to avoid or escape the incessant sexual harassment.⁴⁰ The case is currently in active litigation.

United States v. Orlando Fire Department

In March 2021, ELS and the USAO for the Middle District of Florida brought a case against Orlando, Florida.⁴¹ Charging party Dawn Sumter served as an assistant chief in the Orlando Fire Department (OFD).⁴² She was the youngest assistant chief in the history of OFD,⁴³ and it was widely expected that she would one day be OFD’s first female fire chief. Sumter contended that, after being hired by OFD, she was subjected to sexual harassment by former OFD Fire Chief Roderick Williams from at least 2015 to 2017.⁴⁴ At first, Williams and Sumter did not see each other on a regular basis, and the harassing incidents occurred three to five times per year.⁴⁵ They consisted of long hugs that Williams would give Sumter whenever they met.⁴⁶ During the hugs, Williams “would . . . whisper comments into Sumter’s ear such as ‘you look beautiful’ or ‘I wish I wasn’t

³⁷ *Id.* at 6.

³⁸ *Id.* at 8.

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 7.

⁴¹ Complaint, *United States v. City of Orlando*, No. 21-CV-00565 (M.D. Fla. Mar. 29, 2021), ECF No. 1.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

married.”⁴⁷ This behavior increased once Williams promoted Sumter to assistant chief in 2017.⁴⁸ The hugs became more frequent and persistent.⁴⁹ On two occasions shortly after her promotion, Sumter could feel Williams’s erect penis when he hugged her.⁵⁰

Sumter filed a charge of discrimination with the EEOC.⁵¹ Following the filing of her charge, Williams and other senior OFD leadership subjected Sumter to a retaliatory hostile work environment, including moving her to a less prestigious position and cutting her duties in half.⁵² The cumulative effect of the hostile work environment effectively “froze” her from decision making and eliminated her chances of future promotion, including promotion to fire chief.⁵³

Following the EEOC’s determination of reasonable cause to believe OFD violated Title VII, the United States conducted a supplemental investigation and received authorization to file a complaint against the city. Once again, the USAO was an active partner with ELS. In particular, an AUSA from the Middle District of Florida took a leading role in negotiations, including a lengthy mediation.

On March 29, 2021, the United States filed a complaint and a motion to enter a consent decree in the U.S. District Court for the Middle District of Florida⁵⁴ that resolved the United States’ complaint and a separate complaint that Sumter filed.⁵⁵ Two days later, the court entered the consent decree.⁵⁶ The consent decree provided for \$251,500 in compensatory damages to Sumter, as well as attorney’s fees to Sumter’s counsel.⁵⁷

In terms of non-monetary relief, the consent decree also provided broad-based injunctive relief that included: (1) The United States’ review of OFD’s anti-discrimination, anti-harassment, and anti-retaliation policies; (2) the United States’ review of OFD’s

⁴⁷ *Id.*

⁴⁸ *Id.* at 6.

⁴⁹ *Id.*

⁵⁰ *Id.* at 6–7.

⁵¹ *Id.* at 8.

⁵² *Id.* at 9–13.

⁵³ *Id.* at 14.

⁵⁴ Consent Decree, *City of Orlando*, No. 21-CV-00565, ECF No. 3-1.

⁵⁵ Complaint, *Sumter v. City of Orlando et al.*, No. 20-CV-02347 (M.D. Fla. Dec. 22, 2020), ECF No. 1.

⁵⁶ Order Granting 3 Motion for Entry of Consent Decree, *City of Orlando*, No. 21-CV-00565, ECF No. 4.

⁵⁷ *Id.* at 4.

complaint investigation procedures for complaints of sexual harassment and retaliation; and (3) the United States' review of OFD's anti-discrimination, anti-harassment, and anti-retaliation training materials.⁵⁸ The United States retained an expert in EEO complaint and investigation policies and procedures to assist with this review and to make recommended changes for implementation of the policies, complaint investigation procedures, and training materials where necessary. The city must also submit quarterly reports to the United States regarding complaints of sexual harassment and retaliation.⁵⁹ The consent decree is scheduled to expire in October 2022.⁶⁰

United States v. Houston

In February 2018, ELS and the USAO for the Southern District of Texas filed suit against the City of Houston.⁶¹ Two female charging parties alleged that they were subjected to a hostile work environment based on sex when they were employed as firefighters with the Houston Fire Department (HFD) at Station 54.⁶² The women experienced incidents such as men urinating on the walls, floors, and sinks of the women's bathroom and dormitory; someone disconnecting the cold water to scald the women while they were showering; and someone deactivating the female dormitory's announcement speakers so the women could not respond to emergency calls.⁶³ The charging parties further alleged that the conduct culminated in death threats and vulgar slurs written on the walls of their work and living spaces at Station 54 and on their personal possessions.⁶⁴ This conduct continued despite at least nine complaints to management. In addition, other female firefighters who previously worked at Station 54 made similar complaints to HFD about sex-based discrimination even before the charging parties worked there.⁶⁵ Unfortunately, HFD did not take meaningful steps to stop the harassment.⁶⁶

⁵⁸ *Id.* at 7–8, 14.

⁵⁹ *Id.* at 19.

⁶⁰ *Id.* at 23.

⁶¹ Complaint, *United States v. City of Houston*, No. 18-cv-00644 (S.D. Tex. Feb. 28, 2018), ECF No. 1.

⁶² *Id.* at 1.

⁶³ *Id.* at 7–8.

⁶⁴ *Id.* at 9–10, 16.

⁶⁵ *Id.* at 4–5.

⁶⁶ *Id.*

The USAO was a full partner in the litigation of this case. Two AUSAs from the Southern District of Texas served as key collaborators at every turn. They took depositions, engaged in strategy discussions, collaborated on filings, participated in settlement negotiations, and provided other invaluable assistance on the case.

In late October 2020, shortly before trial was scheduled to begin, the case settled.⁶⁷ The consent decree ordered by the court requires the city to provide training to certain supervisory staff and provide proof of compliance for up to 12 months.⁶⁸ The city also agreed to pay one charging party \$275,000 to resolve the claims of sex-based harassment and retaliation stemming from her employment with HFD.⁶⁹ In a separate settlement agreement executed in April 2020, the city agreed to pay \$67,500 to the other charging party to resolve similar claims alleged by the United States in its complaint via a separate settlement agreement.⁷⁰ The consent decree expired on December 5, 2021.⁷¹

2. Efforts to improve remedies

In addition to a renewed emphasis on bringing cases, a goal of SHWI is to improve the remedial measures that ELS uses to resolve its cases. ELS's regular practice involves implementing injunctive relief, often under a court's supervision, as a key part of any case or settlement—even when a case is brought on behalf of a single individual under section 706 of Title VII. To that end, an important part of SHWI's work is to ensure that such relief includes the most efficient and successful approaches to preventing sexual harassment in state and local government workplaces.

Members of SHWI are currently working to identify best practices to prevent and correct sexual harassment at state and local government employers. These efforts include synthesizing academic research in fields such as industrial/organizational psychology, general psychology, and human resources; using resources produced by the

⁶⁷ Consent Decree, *City of Houston*, No. 18-cv-00644, ECF No. 191.

⁶⁸ *Id.* at 4–6, 9.

⁶⁹ *Id.* at 7.

⁷⁰ Joint Motion for Dismissal with Prejudice, *City of Houston*, No. 18-cv-00644, ECF No. 192; *see also* Houston City Council Meeting Notes, Agenda Item #19 (Apr. 21, 2020), <https://houston.novusagenda.com/agendapublic/CoverSheet.aspx?ItemID=19524&MeetingID=427> (last visited Dec. 16, 2021).

⁷¹ Order, *City of Houston*, No. 18-cv-00644, ECF No. 195.

EEOC Select Task Force on the Study of Harassment in the Workplace; and applying the recommendations of experts and practitioners. In addition to working to improve employers' existing anti-harassment policies, procedures, and trainings, ELS is considering less traditional remedial measures to include in its consent decrees. These include, for example, communication strategies that demonstrate management's prioritization of anti-harassment efforts. ELS is also studying enhanced accountability measures that ensure proportionate responses to substantiated harassment allegations and that require managers and supervisors to play a role in preventing and correcting harassment. ELS is also working to identify data collection tools, such as climate surveys, to assess the effectiveness of the injunctive relief agreed on in any settlement. The end result will allow ELS to work more effectively with state and local government employers to ensure systemic change.

3. SHWI outreach efforts

Finally, ELS has engaged in concerted outreach efforts to further the goals of SHWI. Given the pervasive and widespread nature of workplace sexual harassment and ELS's dedication to preventing it, ELS has sought out opportunities to speak with groups of all kinds. In the past 3 years, ELS has conducted outreach on behalf of SHWI at 10 different events.

Because ELS understands well that USAOs, the EEOC, and professional associations have on-the-ground connections that can maximize outreach efforts, ELS has prioritized partnerships with many such entities in initiating and pursuing outreach. For example, ELS attorneys presented at the Louisville EEOC Office's Technical Assistance Program in August 2020, collaborated with the Phoenix EEOC office to hold two different events in December 2020, and joined an event in Puerto Rico hosted by the Miami EEOC office. Other audiences have included local chapters of the National Employment Lawyers' Association.

The SHWI Roundtable in Houston, Texas, in 2019 is an example of an outreach event where the USAO, EEOC, and ELS coordinated closely from inception to presentation. The USAO brought its thorough understanding of the Houston legal community and interested stakeholders, making sure potential attendees from a variety of perspectives were included. During the event, AUSAs, along with EEOC officials and staff, discussed their own work in the community to combat workplace sexual harassment. AUSAs also

described their own roles in *United States v. City of Houston*. ELS attorneys presented on the goals of SHWI, as well as the substance of Title VII's prohibitions on sexual harassment and current awareness about prevention and correction of harassment.

B. Get involved!

USAOs are valuable partners in SHWI's endeavors to tackle sexual harassment in state and local government employers, and ELS welcomes the participation of AUSAs in its cases and outreach efforts.

AUSAs are the eyes and ears of the Department within their Districts and, as such, can play an important role regarding the Attorney General's pattern or practice authority under section 707. If AUSAs are aware of a state or local government employer that may be engaging in a pattern or practice of discrimination under Title VII, ELS encourages them to identify matters for potential investigation.

Upon identification of a matter to ELS, depending on the USAOs' level of interest, their role in the matter can run the gamut. They can simply refer the matter to ELS to investigate alone. They can let ELS know of the matter and provide advice, as local counsel, as ELS conducts the investigation. Alternatively, if USAOs are interested in working closely with ELS, ELS welcomes their partnership in the investigation and any resulting litigation. Even if a matter or case is not initiated by a USAO, whenever ELS has an investigation or case in the district, ELS will reach out to the USAO and offer to work together. ELS values the input and advice of AUSAs as local counsel.

In addition, ELS particularly welcomes the participation of AUSAs in its SHWI outreach efforts. If AUSAs already engage in outreach efforts in their communities, ELS would be interested in supporting these efforts. Members of SHWI could join outreach events to help publicize SHWI, or AUSAs could discuss SHWI's work during their outreach efforts. If AUSAs do not regularly conduct outreach in their communities but are interested in doing so, ELS can work with the office to develop an outreach plan, contributing subject matter expertise to the AUSAs' familiarity with the key stakeholders in the District.

To get more involved, please contact SHWI: SH.Initiative@usdoj.gov.

About the Authors

Shayna Bloom, Jen Swedish, and Julia Quinn are trial attorneys in the Employment Litigation Section. Ms. Bloom and Ms. Swedish were original members of SHWI; Ms. Swedish and Ms. Quinn are current SHWI members. ELS Deputy Chief Clare Geller manages SHWI.

Page Intentionally Left Blank

Protecting Students with Disabilities from Sexual Harassment in Education: Title IX and More

Tiffany Cummins Nick

Trial Attorney (Detailee)/Assistant U.S. Attorney

Educational Opportunities Section/Middle District of Florida

I. Introduction

Title IX of the Education Amendments of 1972¹ is a federal civil rights law that prohibits discrimination on the basis of sex in education programs or activities that receive federal funding.² Sexual harassment can constitute discrimination on the basis of sex.³ Students with disabilities, particularly those who have difficulty communicating, can be especially vulnerable to sexual harassment.⁴

For example, in July 2020, the United States filed a statement of interest in *Doe v. Fulton County School District*, a case brought on behalf of a 14-year-old child with physical and mental disabilities who, according to the complaint, was the victim of a series of sexual assaults on a school bus that culminated in rape by one of her peers.⁵ The victim relies on assistive technology to communicate and, according to the complaint, had a monitor on her school bus to assist her, but the school district elected to remove the monitor and leave

¹ Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

² Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681–1688.

³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

⁴ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026-01, 30,082 (May 19, 2020) (“Students with disabilities are less likely to be believed when they report sexual harassment experiences and often have greater difficulty describing the harassment they experience, because of stereotypes that people with disabilities are less credible or because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.”).

⁵ U.S. Statement of Interest, *Doe v. Fulton Cnty. Sch. Dist.*, No. 20-cv-00975 (N.D. Ga. July 7, 2020), ECF No. 26.

the school bus staffed by just the bus driver.⁶ Thereafter, two male students moved to her seat, groped her, and kissed her breasts.⁷ Over the course of approximately two weeks, the sexual conduct of one of the two male students gradually escalated, including the exposure of the victim and himself and oral sex, and culminated in the student raping the victim on the school bus.⁸ The school bus driver never intervened to protect the victim and did not report either student to the school district, other than to casually mention to another employee that he had “noticed something” on his route the last day of the two-week period of escalating misconduct.⁹

Title IX, as well as Title II of the Americans with Disabilities Act¹⁰ (ADA) and section 504 of the Rehabilitation Act,¹¹ all apply in this situation. This particular victim is also a student with an Individualized Education Program (IEP) under the Individuals with Disabilities in Education Act¹² (IDEA), which assured her a “free and appropriate public education” (FAPE).¹³ While each of these laws has distinct components, there are legal elements and relevant facts that can, and often will, intersect and overlap. When reviewing an allegation of sexual harassment involving a student with a disability, it is essential to consider each of these statutes independently and together. Regardless of whether a student with disabilities has an IEP or 504 plan, the ADA and Rehabilitation Act protect the student against civil rights violations, including harassment based on disability.

U.S. Attorneys’ Offices may receive complaints or learn from local press coverage about the harassment of students with disabilities. This article provides a roadmap for identifying the salient facts and

⁶ First Amended Complaint at 5–7, *Fulton Cnty. Sch. Dist.*, No. 20-cv-00975, ECF No. 21.

⁷ *Id.* at 9–12.

⁸ *Id.*

⁹ *Id.* at 12.

¹⁰ Americans with Disabilities Act tit. II, 42 U.S.C. §§ 12131–12134, 12141–12150, 12161–12165.

¹¹ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

¹² Individuals with Disabilities Education Act Pub. L. No. 91-230, 84 Stat. 175 (1970).

¹³ *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 (1982) (interpreting 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.112).

ensuring effective pleading in Title IX sexual harassment cases, particularly those involving students with disabilities. Additionally, while this article will not cover in depth the other legal protections afforded to students with disabilities, it will touch on the intersection of sexual harassment with disability-based discrimination. Finally, it will conclude by explaining the importance of a well-pleaded complaint in Title IX cases brought on behalf of students with disabilities.

II. Title IX—legal standards for sexual harassment in education

Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹⁴ Title IX conditions an offer of federal funding on a commitment by the recipient not to discriminate on the basis of sex and, thus, operates like “a contract between the Government and the recipient of funds.”¹⁵ The United States has a significant interest in ensuring that all students, including students with disabilities, have access to an educational environment free of sex discrimination and that the proper legal standards are applied to claims under Title IX. The U.S. Department of Justice (Department) coordinates the implementation and enforcement of Title IX across all executive agencies. Where it serves as a federal funding agency, or upon referral from the Department of Education or other funding agencies, the Department also may bring suit to enforce Title IX and its implementing regulations.

While Title IX does not expressly provide for a private right of action against a school district for damages, the U.S. Supreme Court, in two separate opinions authored by Justice Sandra Day O’Connor, set forth the circumstances under which a school district may be held liable for damages in an implied right of action under Title IX.

¹⁴ Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a).

¹⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (citing *Guardians Ass’n v. Civil Serv. Comm’n of New York City*, 463 U.S. 582, 599 (1983)).

A. Teacher-on-student sexual harassment—*Gebser v. Lago Vista Independent School District*

In *Gebser v. Lago Vista Independent School District*, a high school teacher engaged in a sexual relationship with his ninth-grade student.¹⁶ School officials learned of the relationship when a police officer found the teacher and student engaging in sexual intercourse. The teacher was arrested, and the school district terminated his employment.¹⁷ The student and her mother sued the school district and the teacher and alleged, among other things, that the school district was liable under Title IX for the teacher's sexual harassment.¹⁸ The issue the Supreme Court considered in *Gebser* was whether a teacher's misconduct is attributable to the school district that employs him when Title IX was primarily designed to prevent recipients of federal financial assistance from using the funds discriminatorily. The Court held that it can be.

The *Gebser* Court refused to allow recovery based on the principles of *respondeat superior* or constructive notice, that is, without actual notice to a school district official.¹⁹ The Court explained that, “the knowledge of the wrongdoer himself is not pertinent to the analysis.”²⁰ Instead, the Court required that “an appropriate person” at the recipient school have actual knowledge of the teacher's sexual harassment and respond with deliberate indifference to that knowledge.²¹ It explained that “An ‘appropriate person’ . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.”²²

The *Gebser* petitioners could not prevail under the actual notice standard the Court set forth because no one at the school, other than the teacher at issue, had knowledge of his sexual relationship with the student.²³ Therefore, the Court did not expound upon the deliberate indifference standard or other elements of a sexual harassment claim. But it laid the groundwork for what was to come just one year later in

¹⁶ *Id.* at 277–78.

¹⁷ *Id.* at 278.

¹⁸ *Id.*

¹⁹ *Id.* at 285.

²⁰ *Id.* at 291.

²¹ *Id.* at 289.

²² *Id.* at 290.

²³ *Id.* at 291.

Davis v. Monroe County School Board,²⁴ the foundational case on an educational program’s liability to a private party for damages arising from discriminatory harassment.

B. Student-on-student sexual harassment—*Davis v. Monroe County Board of Education*

In *Davis*, a male high school student sexually harassed a female classmate over a five-month period, including verbal harassment and “numerous acts of objectively offensive touching,” but the school, despite its knowledge of the incidents, “made no effort whatsoever either to investigate or to put an end to the harassment.”²⁵ Therefore, the question at issue was whether a recipient of federal education funding could be liable under Title IX for damages “under any circumstances for discrimination in the form of student-on-student sexual harassment.”²⁶ The Supreme Court answered the question in the affirmative.²⁷ Student-on-student sexual harassment may give rise to a Title IX claim when a school district is deliberately indifferent to known sexual harassment.²⁸

In so holding, the Court set forth the legal standard to sustain a damages claim under Title IX for injuries arising from student-on-student sexual harassment. In addition to establishing that the defendant educational entity is a recipient of federal funding, a plaintiff must demonstrate that (1) the entity had actual knowledge of the sexual harassment in its programs or activities; (2) the entity was deliberately indifferent to the harassment; and (3) the sexual harassment was “so severe, pervasive, and objectively offensive that it [could] be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the” entity.²⁹

1. Actual knowledge of the harassment

Looking back to *Gebser*, the *Davis* Court explained that the school district would be held “liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining

²⁴ *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

²⁵ *Id.* at 653–54.

²⁶ *Id.* at 639.

²⁷ *Id.* at 651.

²⁸ *Id.* at 646–47.

²⁹ *Id.* at 650, 633, 647.

deliberately indifferent” to acts of harassment of which it had actual knowledge.³⁰ It is important to note that, in *Gebser*, the Supreme Court required the actual knowledge of an “appropriate person.”³¹ Absent from the *Davis* opinion, though, is any reference to the “appropriate person” requirement in its student-on-student sexual harassment analysis.

Nevertheless, lower courts have imposed the “appropriate person” requirement in student-on-student harassment cases under Title IX and have grappled with which school employees constitute “appropriate persons” whose knowledge can be imputed to the funding recipient.³² For example, courts have recognized that “an ‘appropriate person’ under Title IX means ‘a school official who has the authority to halt the known abuse,’ and this fact-based inquiry is not dependent on job title.”³³ Instead, courts “look beyond title and position to the actual discretion and responsibility held by an official, and consider the type and number of corrective measures available to an official.”³⁴ To conduct this fact-based inquiry, courts may examine, among other things, “how [a state] organizes its public schools, the authority and responsibility granted by state law to [employees] . . . , the school district’s discrimination policies and procedures, and the facts and

³⁰ *Id.* at 642 (citing *Gebser*, 524 U.S. at 290).

³¹ *Gebser*, 524 U.S. at 289.

³² On May 19, 2020, the Department of Education published Title IX regulations that define “actual knowledge” as notice “to any employee of an elementary or secondary school.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,495 (May 19, 2020) (to be codified at 34 C.F.R. Part 106) (citing section 106.30); *see also id.* at 30,109 (“[N]otice to any elementary and secondary school employee—including a teacher, teacher’s aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, or other school employee—charges the recipient with actual knowledge, triggering the recipient’s response obligations.”).

³³ *S.E.S. ex rel. J.M.S. v. Galena Unified Sch. Dist. No. 499*, No. 18-2042, 2020 WL 1166226, at *34 (D. Kan. Mar. 11, 2020) (quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999)).

³⁴ *Saphir v. Broward Cty. Pub. Sch.*, 744 F. App’x 634, 638 (11th Cir. 2018) (not precedential); *cf. Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 350 (11th Cir. 2012) (“The questions of how far up the chain of command one must look to find an ‘official’ is necessarily a fact-intensive inquiry, since an official’s role may vary from organization to organization.”).

circumstances of the particular case.”³⁵ Therefore, while *Davis* does not explicitly require an official of the recipient entity with authority to take corrective action (that is, an “appropriate person”) to have actual knowledge, the best practice is to plead with specificity all facts available to support a finding that an appropriate person had actual knowledge of the harassment at issue.

2. Standard for “deliberate indifference” to known threats or incidents of harassment

Looking back to *Gebser*, the *Davis* Court explained that funding “recipients could be liable in damages only where their own deliberate indifference effectively caused the discrimination.”³⁶ “A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.”³⁷ The Court imposed this high standard “to eliminate any ‘risk that the recipient would be liable in damages not for its own official decision[,] but instead for its employees’ independent actions.”³⁸ Additionally, the Court reasoned that, when “the misconduct occurs during school hours on school grounds, [that] misconduct is taking place ‘under’ an ‘operation’ of the recipient,” and “the recipient retains substantial control over the context in which the harassment occurs.”³⁹ If a plaintiff establishes the school district had actual knowledge of the harassment, then the plaintiff must show that the school district acted with deliberate indifference to the known threats or incidents of harassment.⁴⁰

The *Davis* Court was concerned about second-guessing the disciplinary actions made by school administrators in cases involving student sexual harassment. Accordingly, the Court held that funding recipients should be deemed deliberately indifferent “only where the recipient’s response to the harassment or lack thereof is clearly

³⁵ *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1286 (11th Cir. 2003).

³⁶ *Davis ex rel. LaShonda D.*, 526 U.S. at 642–43 (cleaned up) (citing *Gebser*, 524 U.S. at 291); see also *id.* at 645 (“The deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”) (alteration in original).

³⁷ *Id.* at 644.

³⁸ *Id.* at 643 (citing *Gebser*, 524 U.S. at 290–91); see also *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368–69 (5th Cir. 2019) (“Deliberate indifference is an extremely high standard to meet.” (citation omitted)).

³⁹ *Davis ex rel. LaShonda D.*, 526 U.S. at 630.

⁴⁰ *Id.* at 633.

unreasonable in light of the known circumstances.”⁴¹ The Court believed this standard would be “sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action.”⁴² In defending the propriety of the standard, the court explained that “Title IX does not require school districts to purge themselves of harassment, take specific disciplinary actions, nor comply with parents’ remedial demands.”⁴³

Over time, courts have expounded upon *Davis’s* deliberate indifference standard, developing “pre-assault” and “post-assault” approaches to showing liability for Title IX damages claims.⁴⁴ In a typical pre-assault claim, a plaintiff asserts that a school’s deliberate indifference to a known, substantial risk of sexual harassment caused or led to subsequent sexual harassment or assault of the plaintiff. In *Simpson v. University of Colorado Boulder*, for instance, the Tenth Circuit found that Colorado University’s (CU) failure to adequately supervise high school athletic recruits who sexually assaulted the plaintiffs could constitute deliberate indifference under Title IX.⁴⁵ The court observed that, “[b]y the time of the alleged assaults of Plaintiffs, there were a variety of sources of information suggesting the risks that sexual assault would occur if recruiting was inadequately supervised.”⁴⁶ This information derived from “reports not specific to CU regarding the serious risk of sexual assaults by student-athletes,” as well as an incident “[i]n 1997 where a high[]school girl was assaulted by CU recruits at a party hosted by a CU football player.”⁴⁷

⁴¹ *Id.* at 648.

⁴² *Id.* at 649.

⁴³ *Lewisville Indep. Sch. Dist.*, 915 F.3d at 369.

⁴⁴ *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1099 (9th Cir. 2020) (explaining that a “pre-assault claim” “relies on events that occurred before [the plaintiffs’] assaults”); *Karasek v. Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 970 (N.D. Cal. 2020) (explaining that a “post-assault claim” is premised on “a school’s response to a [plaintiff’s] complaint of sexual misconduct” after the assault); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007) (reversing summary judgment in favor of the university; facts known by the university football coach prior to the assault could meet the deliberate indifference standard).

⁴⁵ 500 F.3d at 1173.

⁴⁶ *Id.*

⁴⁷ *Id.*

Thus, CU exhibited deliberate indifference to a known risk of sexual harassment before the assault occurred, making the plaintiff more vulnerable to the attack itself.

“Post-assault” claims focus on how a recipient responded *after* it received actual notice of a plaintiff’s sexual harassment. Courts apply *Davis’s* three-part framework to such claims, and plaintiffs must allege facts showing that the school’s deliberate indifference either caused them to undergo further harassment *or* made them vulnerable to potential further harassment (or both).⁴⁸ When considering whether a funding recipient’s conduct *after* it learns of sexual harassment meets the deliberate indifference standard, courts consider whether remedial measures were taken. Did the school district investigate the incidents of which it had knowledge? Were the offending individuals disciplined? Did the school district afford protection for the victim? Title IX does not require flawless investigations or perfect solutions.⁴⁹ That said, “[w]here a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail,” or if takes no action at all, the school district likely acts with deliberate indifference.⁵⁰

⁴⁸ *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171–73 (1st Cir. 2007), rev’d on other grounds, 555 U.S. 246 (2009); *Farmer v. Kan. State Univ.*, No. 16-CV-2256, 2017 WL 3674964, at *4 (D. Kan. Aug. 24, 2017), aff’d, 918 F.3d 1094, 1104 (10th Cir. 2019) (“Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient’s deliberate indifference caused them to be ‘vulnerable to’ further harassment without requiring an allegation of subsequent actual sexual harassment.”); *Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 658 (W.D. Tex. 2017). *But see* *Kollaritsch v. Mich. St. Univ. Bd. of Trustees*, 944 F.3d 613, 623–24 (6th Cir. 2019) (requiring plaintiff to plead and prove “an incident of actionable sexual harassment, the school’s actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school’s response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment”).

⁴⁹ *Fitzgerald*, 504 F.3d at 174.

⁵⁰ *E.g.*, *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

3. Severe, pervasive, and objectively offensive deprivation of educational opportunities or benefits

In addition to the knowledge and deliberate indifference elements, a plaintiff can recover damages in a private action under Title IX for student-on-student harassment only if that harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁵¹ This element is necessary to ensure that the harassment rises to the level of discrimination actionable in a private Title IX damages suit.⁵² “The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.”⁵³ Distinguishing the facts in *Gebser* from those in *Davis*, the Court explained that “[p]eer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.”⁵⁴

Like the preceding elements of a Title IX student-on-student sexual harassment claim, this element is highly fact specific. “Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships, including but not limited to, the harasser’s and the victim’s ages and the number of persons involved.”⁵⁵ The *Davis* Court directed courts to “bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults.”⁵⁶ “[S]imple acts of teasing and name-calling among school children” will not support a private claim for damages under Title IX.⁵⁷ But, on the other end of the spectrum, numerous courts following *Davis* have concluded that sexual abuse and rape are sexual harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive a student of access

⁵¹ *Davis*, 526 U.S. at 633 (1999).

⁵² *Id.* at 650.

⁵³ *Id.* at 653.

⁵⁴ *Id.*

⁵⁵ *Id.* at 631 (internal citations omitted).

⁵⁶ *Id.*

⁵⁷ *Id.* at 652.

to educational opportunities or benefits.⁵⁸ Under such circumstances, courts need not conduct further inquiry into whether the student suffered a denial of educational resources.⁵⁹ Whether conduct between these two ends of the spectrum is sufficiently pervasive, severe, and objectively offensive is highly fact specific and is often not an issue that can be determined by summary resolution.⁶⁰

In addition to looking to the harassing conduct itself, a court's analysis of this element will also be driven by the effects on the student and whether the alleged conduct "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."⁶¹ Plaintiffs need not show actual physical exclusion by the harassment to demonstrate that the actions of another student or students deprived them of an educational opportunity on the basis of

⁵⁸ See, e.g., *Soper v. Hoben*, 195 F.3d 845, 854–55 (6th Cir. 1999) (noting that rape and sexual abuse "obviously qualify[y] as being severe, pervasive, and objectively offensive sexual harassment that could deprive [a student] of access to the educational opportunities provided by her school"); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) (finding wrongdoing was sufficiently severe, pervasive, and objectively offensive where a student "battered, undressed, and sexually assaulted" another student); *Doe v. Howard Univ.*, 396 F. Supp. 3d 126, 136 n.2 (D.D.C. 2019) (noting that "[a] single, serious sexual assault can meet the severe, pervasive, and offensive standard"); *T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11-cv-5133, 2012 WL 860367, at *8 (S.D.N.Y. Feb. 27, 2012) (same); *Bliss v. Putnam Valley Cent. Sch. Dist.*, No. 06-cv-15509, 2011 WL 1079944, at *1, *5 (S.D.N.Y. Mar. 24, 2011) (same); *Kelly v. Yale Univ.*, 01-cv-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) (same).

⁵⁹ See *Soper*, 195 F.3d at 854–55; *M. v. Stamford Bd. of Educ.*, No. 05-cv-0177, 2008 WL 2704704, at *9 (D. Conn. July 7, 2008), modified on other grounds, 2008 WL 4197047 (Sept. 9, 2008); *Kelly*, No. 01-CV-1591, 2003 WL 1563424, at *3; *Doe I v. Dallas Ind. Sch. Dist.*, No. 01-CV-1092, 2002 WL 1592694, at *6 (N.D. Tex. July 16, 2002). *But see* *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007).

⁶⁰ See *Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir. 1997) (addressing the severe and pervasive standard in the context of a hostile work environment claim based on sexual harassment (referencing *DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F. Supp. 310, 314 (E.D.N.Y. 1996)).

⁶¹ *Davis*, 526 U.S. at 651 (referencing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

sex.⁶² Plaintiffs can meet this element by demonstrating that the conduct had a negative impact on their education, such as dropping grades and absenteeism.⁶³ Evidence of the psychological effects on the victim, such as anxiety, depression, or suicidal thoughts requiring treatment, may also suffice to show sufficiently pervasive and severe discrimination under Title IX.⁶⁴

III. Title IX’s intersectionality with Title II of the ADA and section 504

Returning to the example of *Fulton*, the 14-year-old victim’s disabilities made her a particularly vulnerable target for the boys on the school bus. Based on the harassment she experienced, she pursued sex discrimination claims under Title IX and disability discrimination claims under Title II of the ADA and section 504 of the Rehabilitation Act. Courts often look to Title IX precedent for guidance when adjudicating Title II and section 504 damages claims. As further explained below, however, there is some inconsistency among the Circuits as to whether *Davis*’s deliberate indifference standard applies to disability-based harassment claims for damages. For that reason, it is important to know your court when pleading harassment cases for damages on behalf of students with disabilities.

Title II and section 504 “promise non-discriminatory access to public institutions”—specifically aiming ‘to root out disability-based discrimination, enabling each covered person . . . to participate equally to all others in public facilities and federally funded programs.’”⁶⁵ While Title II and section 504 have different causation

⁶² *Id.*

⁶³ *E.g.*, *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 823 (7th Cir. 2003).

⁶⁴ *J.H. v. Sch. Town of Munster*, 160 F. Supp. 3d 1079, 1091 (N.D. Ind. 2016).

⁶⁵ *E.g.*, *J.S., III by & through J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017) (citing *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756, 197 L.Ed.2d 46 (2017)). Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Similarly, section 504 states that “[n]o otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be

language,⁶⁶ courts often review claims under the two statutes similarly, and the Department has argued that the deliberate indifference standard applies to claims for damages under both statutes.⁶⁷ To state a claim under either Title II or section 504, a plaintiff must establish:

- (1) that [s]he is a qualified individual with a disability;
- (2) that [s]he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.⁶⁸

To receive damages, a plaintiff must also prove that the defendant engaged in intentional discrimination, which, for most courts, requires a showing of "deliberate indifference."⁶⁹ Courts have defined deliberate indifference in this context to require "both knowledge that a harm [of] a federally protected right is substantially likely, and a failure to act upon that . . . likelihood."⁷⁰

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

⁶⁶ Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity." 29 U.S.C. § 794(a) (emphasis added). Under Title II of the ADA, however, "discrimination need not be the sole reason' for the exclusion of or denial of benefits to the plaintiff." *E.g.*, *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (quoting *Soledad v. U.S. Dep't of Treasury*, 304 F.3d 500, 503–04 (5th Cir. 2002)).

⁶⁷ *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1133 (11th Cir. 2019).

⁶⁸ *Id.* at 1134. (quoting *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007)).

⁶⁹ *Compare Id.* (quoting *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012)), *with Monahan v. State of Neb.*, 687 F.2d 1164, 1171 (8th Cir. 1982) ("either bad faith or gross misjudgment" must be shown to impose liability under section 504 of the Rehabilitation Act), *and Hoekstra by & Through Hoekstra v. Indep. Sch. Dist. No. 283*, 103 F.3d 624, 626 (8th Cir. 1996) (a showing of "bad faith or gross negligence" is required to sustain ADA claim in education context).

⁷⁰ *E.g.*, *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

In student-on-student disability-based harassment claims brought under Title II and section 504, the majority of federal courts addressing the issue have applied the *Davis* Title IX framework.⁷¹ In the Title II and section 504 contexts, the *Davis* standard requires plaintiffs to show that (1) plaintiff is “an individual with a disability”; (2) plaintiff was “harassed by fellow students based on [the] disability”; (3) “the disability-based harassment was sufficiently ‘severe, pervasive, and objectively offensive’ that it effectively deprived [the plaintiff] of ‘access to educational benefits and opportunities’ at school”; (4) “the school knew about the disability-based student-on-student harassment”; and (5) the school “was deliberately indifferent to it.”⁷²

While most jurisdictions use the deliberate indifference standard for disability-based student-on-student harassment cases, some courts have required “bad faith or gross misjudgment.” This is a standard of review often used in cases involving disputes over accommodations provided to students with disabilities.⁷³ Still other cases have used both the bad faith or gross misjudgment and the deliberate indifference standard to sustain a claim for damages under Title II and section 504.⁷⁴

⁷¹ *S.B. v. Bd. of Educ. of Harford Cnty.*, 819 F.3d 69, 75–77 (4th Cir. 2016); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 995–97 (5th Cir. 2014); *see S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453–54 (6th Cir. 2008); *see also Long v. Murray Cnty. Sch. Dist.*, 522 F. App’x 576, 577 (11th Cir. 2013) (not precedential).

⁷² *E.g., S.B. ex rel. A.L.*, 819 F.3d at 76 (quoting *Davis ex rel. LaShonda D.*, 526 U.S. at 650).

⁷³ *E.g., E.M. b/n/f Guerra v. San Benito Cons. Indep. Sch. Dist.*, 374 F. Supp. 3d 616 (S.D. Tex. 2019) (using the bad faith or gross misjudgment standard to evaluate plaintiff’s claim that the district failed to provide necessary accommodations and modifications).

⁷⁴ *See, e.g., Barnwell v. Watson*, 880 F.3d 998 (8th Cir. 2018); *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 191 n.17 (D. Mass. 2016) (“Both standards have been employed by the courts of appeals.”); *cf. S.B. ex rel. A.L.*, 819 F.3d at 75 (noting that the “district court, likely in an excess of caution, applied the ‘bad faith or gross misjudgment’ standard as well as the ‘deliberate indifference’ standard”); *E.M. b/n/f Guerra*, 374 F. Supp. 3d at 625–26 (holding that plaintiff’s peer harassment claim must meet both the deliberate indifference standard and the “professional bad faith or gross misjudgment” standard); *see also Bradyn S. v. Waxahachie Indep. Sch. Dist.*, No. 18-cv-2724, 2019 WL 3859301, at *8 (N.D. Tex. Aug. 16, 2019) (in a case

Given these varying legal standards, it is important to know your jurisdiction when pleading a damages claim for disability-based student-on-student harassment under Title II or section 504. The United States has argued that the proper standard in this context is the deliberate indifference standard. But where your jurisdiction may apply the “bad faith or gross misconduct” standard, it is advisable to argue for the deliberate indifference standard while also showing that the facts meet the higher “bad faith or gross misconduct” standard.

IV. IDEA exhaustion defense

Unlike Title IX, Title II of the ADA, and section 504, which are anti-discrimination protections,⁷⁵ the IDEA is a funding statute that conditions receipt of federal funds on meeting specified procedural obligations, and that requires every state receiving federal educational assistance to have in effect a policy that assures all children with disabilities the right to a FAPE.⁷⁶ The IDEA “guarantees individually tailored educational services” for students with specific, identified disabilities.⁷⁷ It is addressed here because the denial of certain supports afforded to a student with a disability under the IDEA may be a relevant and material fact supporting damages claims for harassment under Title IX, Title II, or section 504. Unlike these statutes, however, the IDEA has an administrative exhaustion requirement that must be satisfied before a plaintiff has standing in court to pursue her right to relief for denial of FAPE.⁷⁸ According to 20 U.S.C. § 1415(l):

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available

where the district uses both the deliberate indifference standard and the “professional bad faith or gross misjudgment” standard, holding that the deliberate indifference standard applies to allegations of student-on-student harassment claims, but “[t]his court has found no Fifth Circuit authority that recognizes a cognizable claim under § 504 or the ADA for hostile environment claims based on allegations that a school district and its employees harassed a student.”).

⁷⁵ *Cf. J.S., III v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017) (citing *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017)).

⁷⁶ 20 U.S.C. §§ 1400(c), 1412(a)(1).

⁷⁷ *Fry*, 137 S. Ct. at 756.

⁷⁸ 20 U.S.C. § 1415(l).

under the Constitution, the [ADA], title V of the Rehabilitation Act [including section 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA’s administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

Defendants will often attempt to characterize a complaint filed on behalf of a student with a disability as a denial of FAPE claim under the IDEA and, thus, subject to the IDEA’s exhaustion requirement.

For any claims, including disability-based student-on-student harassment claims under either Title II or section 504, the section 1415(l) exhaustion requirement applies only if a plaintiff seeks relief available under the IDEA, and such relief is limited to a FAPE.⁷⁹ In *Fry v. Napoleon Community School*, the Supreme Court held that, to determine if the IDEA’s exhaustion requirement applies, courts should look to “the gravamen of a complaint” to see if the relief sought is something other than “IDEA’s core guarantee of a FAPE.”⁸⁰ The IDEA’s exhaustion requirement applies only if a plaintiff actually “seeks’ relief available under the IDEA—not, as a stricter exhaustion statute might require, [when] the suit ‘could have sought’ relief available under the IDEA.”⁸¹ Even though the same conduct might be a violation of Title II, section 504, and the IDEA, and could give rise to an IDEA claim, a plaintiff might “instead seek relief from simple discrimination, irrespective of the IDEA’s FAPE obligation.”⁸² So, for example, the First Circuit recently found that having a service animal in school is an accommodation under Title II and section 504, but it is not part of a FAPE.⁸³

⁷⁹ *Fry*, 137 S. Ct. at 748.

⁸⁰ *Id.*

⁸¹ *Id.* at 755. While the Supreme Court held that IDEA exhaustion is required only if the plaintiff seeks relief for the denial of a FAPE, it did not address the argument that a claim seeking damages is not subject to IDEA exhaustion because the IDEA does not provide a damages remedy.

⁸² *Id.* at 756.

⁸³ *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16 (1st Cir. 2019); *see also* *Sophie G. v. Wilson Cnty. Schs.*, 742 F. App’x 73 (6th Cir. 2018) (not precedential) (seven-year-old who required toileting assistance and was

Defendants have also raised the IDEA exhaustion defense in response to a Title IX claim alleged on behalf of a student with a disability. The United States' position is that the IDEA's exhaustion requirement does not apply to Title IX claims under any circumstances. Section 1415(l) of the IDEA refers only to claims under the Constitution, the ADA, section 504, or "other Federal laws protecting the rights of children with disabilities."⁸⁴ Where the language of the statute is "plain," like section 1415(l), the "sole function" for the court is "to enforce it according to its terms."⁸⁵ Because Title IX is not aimed at protecting children with disabilities in particular, section 1415(l) does not apply to any Title IX claims. Given the list of specific statutes identified in section 1415(l), the "other Federal laws" clause is best read to require exhaustion only for actions raising claims under statutes similar in kind to the ADA, section 504, or the IDEA itself—statutes focused on protecting the rights of persons with disabilities.⁸⁶

In 2018, the United States filed an Amicus Curiae brief in *Doe v. Dallas Independent School District* to explain this position.⁸⁷ The Fifth Circuit Court of Appeals considered the United States' argument and held that, "if a disabled person seeks Title IX relief that a non-disabled person could also seek and requests relief that is different from or in addition to a FAPE, the IDEA's exhaustion requirement does not apply."⁸⁸ While the Fifth Circuit did not go so far as to state that IDEA's administrative exhaustion requirement could never apply

denied access to the school district's after-school program for that reason did not need to exhaust under the IDEA).

⁸⁴ 20 U.S.C. § 1415(l).

⁸⁵ *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

⁸⁶ *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (explaining that when "a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words'" (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)); *Fry*, 137 S. Ct. at 750 (IDEA exhaustion requirement potentially applies to suits "under the ADA, the Rehabilitation Act, or similar laws").

⁸⁷ Brief for the U.S. as Amicus Curiae Supporting Appellant and Urging Reversal, *Doe v. Dallas Indep. Sch. Dist.*, No. 18-10720 (5th Cir. Nov. 27, 2018).

⁸⁸ *Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 227 (5th Cir. 2019).

to a Title IX claim, it agreed with the United States' argument that the requirement did not apply based on the facts before it.⁸⁹

Some courts may still find that harassment that causes a denial of FAPE by creating a hostile environment is necessarily subject to an exhaustion defense. Other courts agree that exhaustion is not required for a harassment claim. For example, a Wisconsin court ruled that a student with autism experiencing verbal and physical harassment by other students did not have to exhaust under the IDEA because all that he was seeking was what other students already had: An environment free of harassment.⁹⁰ Strong allegations in the complaint that the disability harassment to which the victim was subjected could have occurred in any public facility or could have been committed against "an employee or visitor" to the school should be sufficient to avoid dismissal based upon an exhaustion defense.⁹¹

V. Conclusion

The U.S. Supreme Court set a high but surmountable bar for recovering damages in Title IX sexual harassment suits. Title IX's protection from sexual harassment applies to all students, regardless of whether they have a disability, but a student's disability can be a critical factor in evaluating whether a funding recipient acted with deliberate indifference. A complaint should include facts necessary to support an inference that school employees who could be deemed an "appropriate person" had knowledge of the harassment sufficient to hold the school district liable. Further, when pleading a Title IX harassment claim, the funding recipient's knowledge of the needs of a student with a disability should be fully detailed in the complaint, especially where the disability makes the student more vulnerable to harassment. A rote recitation of the *Gebser/Davis* factors in a complaint risks dismissal.

When a student with a disability is subject to sexual harassment that meets the *Gebser/Davis* factors, there is a strong likelihood that the student's rights under the ADA and section 504 have also been violated. Indeed, the *Gebser/Davis* factors also apply to disability harassment claims. Whenever harassment is alleged, deliberate

⁸⁹ *See id.* at 228–29.

⁹⁰ *Bowe v. Eau Claire Area Sch. Dist.*, No. 16-cv-46, 2017 WL 1458822, at *4–5 (W.D. Wisc. Apr. 24, 2017).

⁹¹ *Fry*, 137 S. Ct. at 756.

indifference is the proper standard to evaluate whether the defendant can be held liable for damages.

Moreover, while the fact that a student with a disability may have an IEP may be an important factor to consider under *Gebser/Davis*, those facts should be pleaded with care. If the plaintiff does not intend to pursue a claim under the IDEA, the complaint allegations should make clear that the gravamen of the plaintiff's complaint is about unlawful discrimination under Title IX, Title II, or section 504, and is not about a denial of FAPE. Otherwise, courts hesitant to delve into disability-related matters in the context of public education may be inclined to dismiss a complaint for disability-based harassment for failure to exhaust the IDEA's administrative remedies.

In *Fulton*, the plaintiff alleged harassment claims against the school district under Title IX, Title II, and section 504. The school district moved to dismiss the complaint by arguing, among other things, that the school bus driver who witnessed the harassment lacked the "substantial supervisory authority" necessary to satisfy the "appropriate person" requirement under Title IX; that the facts alleged did not show deliberate indifference; and that the plaintiff's claims were barred by plaintiff's failure to exhaust her administrative remedies under the IDEA. In its statement of interest, filed to assist the court just in evaluating the sufficiency of the plaintiff's Title IX claim, the United States explained that "[a] school district official's title—standing alone—cannot be the basis for categorically excluding the official as an appropriate person."⁹² The United States pointed to myriad facts to support finding that the bus driver could be an "appropriate person" whose knowledge is imputed to the district, which included the district's policies giving authority to bus drivers to ensure the safety and control of students on their busses; imposing reporting obligations on school district staff; and recognizing that students with disabilities may be entitled to additional protections and considerations. The U.S. District Court for the Northern District of Georgia agreed and denied defendant's motion to dismiss the plaintiff's Title IX, Title II, and section 504 claims.

With well- and strategically pleaded facts, Title IX, Title II, and section 504 can be effective tools to vindicate the rights of students with disabilities and protect them from harassment. The Educational

⁹² Statement of Interest at 4, *Doe v. Fulton Cnty. Sch. Dist.*, No. 1:20-cv-00975 (N.D. Ga. July 7, 2020), ECF No. 26.

Opportunities Section (EOS) is eager to work with U.S. Attorneys' Offices to promote the success of these matters. Assistant U.S. Attorneys who learn about cases that concern the sexual harassment of students with disabilities are encouraged to contact EOS early and often for support.

About the Author

Tiffany Cummins Nick serves as an Assistant U.S. Attorney (AUSA) in the Civil Division of the U.S. Attorney's Office (USAO) for the Middle District of Florida, Orlando Division, and is currently on detail to the Educational Opportunities Section of the Department's Civil Rights Division as a Trial Attorney. As an AUSA, she principally handles civil rights investigations and litigation. Before joining the USAO in 2015, Tiffany worked in private practice doing employment class and collective action defense in Orlando, Florida, and Washington, DC, and also served as a Law Clerk to U.S. District Judge Mary S. Scriven in the Middle District of Florida. Tiffany received her law degree, *cum laude*, from the University of Florida Levin College of Law, and her undergraduate degree, *cum laude*, from Wake Forest University.

Sexual Harassment in Housing: Working with Local Prosecutors in Sexual Harassment Matters

Erin Meehan Richmond
Sexual Harassment Counsel and Coordinator
Housing and Civil Enforcement Section
Civil Rights Division

Michael E. Campion
Chief, Civil Rights Unit
District of New Jersey

I. Introduction

The Department of Justice (Department) plays a key role in enforcing the Fair Housing Act (FHA).¹ The FHA prohibits a range of discrimination in the housing context, including discrimination based on sex. Sexual harassment is a form of sex discrimination. Sexual harassment can be quid pro quo harassment: for example, when a landlord demands that a tenant engage in unwelcome sexual activity to obtain an apartment. It can also be hostile environment harassment: when the harassment is unwelcome and severe or pervasive.

Under the pattern-or-practice provision of the FHA, the Department can investigate and file civil lawsuits to remedy a pattern-or-practice of sexual harassment.² The Department may also file suit on behalf of individuals who have filed complaints of sexual harassment in housing with the Department of Housing and Urban Development (HUD). This happens after HUD investigates a complaint, finds reasonable cause to believe that discrimination took place, conciliation efforts fail, and the complainant or the respondent elects to resolve the dispute in federal court. In that event, the Department files suit on behalf of the complainant.³

While the Department has brought sexual harassment FHA cases for decades, its work in this area increased significantly after it launched its Sexual Harassment in Housing Initiative (Initiative) on

¹ 42 U.S.C. §§ 3601–3619, 3631.

² 42 U.S.C. § 3614(a).

³ See 42 U.S.C. § 3612(o).

October 3, 2017. The Housing and Civil Enforcement Section of the Civil Rights Division leads this initiative, in strong partnership with U.S. Attorneys' Offices across the country. Its goal is to address sexual harassment by landlords, property managers, maintenance workers, loan officers, and other people who have control over housing. Since the launch of the initiative, the Department has filed over 20 lawsuits and obtained over nine million dollars in relief for victims of sexual harassment. Assistant U.S. Attorneys (AUSAs) have worked with trial attorneys from the Housing and Civil Enforcement Section on many of these cases and are increasingly leading these types of matters. For example, the U.S. Attorney's Office for the District of Minnesota led the Department's pattern-or-practice investigation and lawsuit against Reese Pfeiffer, the owner and manager of numerous rental properties in and around Minneapolis.⁴ The case was resolved by a consent decree, entered on October 25, 2021, requiring the defendants to pay \$750,000 in monetary compensation, including \$736,000 to 23 aggrieved persons,⁵ and a \$14,000 civil penalty to the United States.⁶ The decree also required the engagement of an independent property manager and permanently enjoins Reese Pfeiffer from managing rental properties in the future. AUSAs interested in learning more about the Initiative and working on sexual harassment in housing matters are encouraged to reach out to the Initiative.

While conducting a civil FHA investigation, you may come across evidence of sexual harassment that might cross the line into criminal conduct. For example, you could interview a potential aggrieved person who tells you that her landlord physically forced her to touch his genitals or give him oral sex to rent an apartment or avoid eviction, and in so doing, interfered with her ability to rent or occupy her home. In such situations, it is important to know your options so you can take appropriate action. While we will briefly discuss the criminal portion of the FHA, this article will primarily focus on the Department's civil enforcement of the FHA and working with local prosecutors as they pursue the same alleged harasser for potential violations of state criminal law.

⁴ See *United States v. Pfeiffer*, No. 20-cv-1974, 2021 U.S. Dist. LEXIS 115079 (D. Minn. June 21, 2021).

⁵ Consent Decree at 8, *Pfeiffer*, No. 20-cv-1974, ECF No. 81.

⁶ *Id.* at 10.

The Criminal Section of the Civil Rights Division and the Criminal Divisions of the U.S. Attorneys' Offices enforce the criminal portion of the FHA.⁷ It is a violation of section 3631 for anyone, "by force or threat of force [to] willfully injure[], intimidate[], or interfere[] with, or attempt[] to injure, intimidate or interfere with . . . [anyone] because of his . . . sex."⁸ It is important to note that section 3631 does not have a pattern-or-practice requirement. In other words, if even one person experiences harassing conduct that rises to the level of force or threat of force, there may be a violation of section 3631. If you find evidence of sexual harassment that may cross the line into criminal conduct, you, together with the Housing and Civil Enforcement Section, should consult with the Criminal Section of the Civil Rights Division and the U.S. Attorney's Office's Criminal Division as soon as possible.

If the Criminal Section of the Civil Rights Division and the U.S. Attorney's Office's Criminal Division determine that the Department does not have jurisdiction, or choose not to exercise it, local prosecutors may be able to act. Frequently, conduct that deprives persons of federally protected rights in violation of federal law also violates state law. Consider familiarizing yourself with the criminal laws of the state in which you are investigating—laws covering groping or unwanted touching or penetration, including but not limited to rape, sexual battery, molestation, sexual assault, and sexual abuse. If the facts warrant a local prosecutor's attention, you may consider contacting the prosecutor's office. Below are several questions and answers designed to help you think through what you need to consider and do as you prepare to reach out to and work with local prosecutors in a civil FHA sexual harassment matter. These questions and answers are meant to cover matters that are in the investigative stage or in litigation. Finally, this article will direct AUSAs to resources about getting involved with the Initiative.

⁷ 42 U.S.C. § 3631.

⁸ *Id.*

II. Questions and answers

A. Is it okay to share information I obtain during my investigation with local prosecutors?

When state or local authorities are prosecuting an individual for conduct that also violates federal law, it is Department policy to cooperate with the local prosecutors unless there is a good faith basis that is supported by the law, the facts, or other established Department policy to disagree with the state's decision to prosecute or with the state's conduct in the prosecution.⁹ That said, before you share any information outside of the Department, you must consider and comply with your professional responsibility obligations. Specifically, you must comply with the rules related to the confidentiality of information. In general, all information related to our representation of the United States is confidential, whatever its source, and we may not reveal it without the consent of our client.¹⁰ You may consult with a professional responsibility officer (PRO) in your Department component or U.S. Attorney's Office, or with the Department's Professional Responsibility Advisory Office (PRAO) for advice and guidance specific to your matter.¹¹ You may also consult with your supervisors to determine who is authorized to give your client's consent to disclose confidential information to local prosecutors.

B. Once I have my client's consent, whom do I contact?

If you do not already have a relationship with the local prosecutor's office, you may want to inquire within your office to see if others have experience working with that prosecutor's office. Sections of the Civil Rights Division or the U.S. Attorney's Office that enforce criminal laws may have more opportunities to make such connections. Additionally, if you have a relationship with other federal law enforcement agencies, like HUD's Office of Inspector General, consider asking your contacts there. You may be able to gather information to help you determine not only whom to contact, but what it might be like to work with that prosecutor's office. If you cannot identify a

⁹ JUSTICE MANUAL 8-3.170.

¹⁰ See MODEL Rules of PRO. CONDUCT r. 1.6 cmt. 3.

¹¹ JUSTICE MANUAL 1-4.020.

contact, consider reaching out to the head of the sex crimes unit at the local prosecutor's office.

C. When should I reach out to local prosecutors?

The timing of when you reach out to local prosecutors will vary from case to case. You may learn that a local law enforcement office has opened a related state criminal investigation. For example, a potential aggrieved person may tell you that she filed a complaint with the local police department about being subjected to sexual harassment by her landlord and that she is scheduled to give another statement to local law enforcement. Or a federal agent might advise you that the local prosecutor's office opened a state criminal investigation with facts and allegations that overlap with your civil FHA investigation.

Conversely, you may learn of the investigation directly from a local law enforcement agency. In these instances, you should reach out to the local prosecutor's office as soon as possible. Not only could this early communication lead to useful information sharing (see below), but it could also help your office and local prosecutors avoid unnecessary confusion. Through this communication, both offices can gain a clearer understanding of the parameters of each other's cases, and both offices can make clear to victims and witnesses that two different agencies may be in touch with them for different, but related, purposes.

When you have no reason to believe local prosecutors are looking into the same conduct by the alleged harasser, you should evaluate the facts and circumstances and where you are in your investigation before reaching out to the local prosecutor's office. Does the local prosecutor's office have access to information that would advance your investigation, such as police reports that may corroborate allegations of harassment or retaliation? Such information may favor reaching out early. How egregious is the alleged conduct, and is the alleged harasser still in a position to have contact with tenants and applicants? How many victims have you identified who would be willing to speak with the local prosecutor's office? Is there any benefit to waiting until you have identified more? It is important to think through these questions when deciding when to reach out to local prosecutors. And of course, once you have made contact, it is important to stay in touch so that each office knows what the other is doing and neither office unintentionally interferes with the other's work.

D. What can or should I share with local prosecutors?

After you have connected with the local prosecutor's office, you need to decide what information to share with them. In many cases, this will be obvious. Local prosecutors will likely be interested in the names and contact information of people who experienced harassment that may have violated state criminal law. It may also be helpful to share the names and contact information of corroborating witnesses and copies of corroborating documents you obtained during your investigation.

When sharing information, be mindful of some potential limitations. Particularly consider discovery implications. Privileges may protect your communications with the local prosecutor's office, but you should thoroughly research this question before sharing anything beyond straight-forward factual information.

In addition, you may want to ask witnesses whether they have concerns about you providing their identity and contact information to a local prosecutor. By disclosing an unwilling witness's identity, you could potentially harm your relationship with the witness without providing much benefit to the local prosecutor's office. In those instances, you might refrain from identifying the witness until that person is ready to speak to the local prosecutor. In other instances, however, the facts may be so egregious and suggestive of criminal conduct that you may still believe it warranted to share that information with the local prosecutor. Therefore, in your initial and subsequent conversations with witnesses, it is important to avoid promising that you will never share their identity and contact information at a later stage. Finally, whenever you share a witness's identity and contact information with local prosecutors, make sure you inform the witness.

E. What can or should I receive from local prosecutors?

If a local prosecutor's office is investigating similar conduct by the same alleged harasser, it may be able to share highly relevant information. This, of course, includes the names and contact information of potential victims and corroborating witnesses. The local prosecutor's office may also be able to share witness statements, court transcripts, police reports, and other documentary evidence. Of course, you must consider and comply with your professional

responsibility obligations before accepting information from the local prosecutor's office. Specifically, you must comply with the rules that prohibit using methods of obtaining evidence that violate the legal rights of a person.¹² Determine whether the information the local prosecutor's office is offering to share with you is privileged or otherwise legally protected and consult with a PRO or PRAO for advice specific to your matter.

Keep in mind that the local prosecutor may have information highly relevant to your civil FHA investigation but of minimal relevance to a criminal prosecution. For instance, the prosecutor may have interviewed individuals who may not have been a victim of a crime but may have been subjected to harassing conduct that was severe or pervasive enough to create a hostile housing environment. Similarly, the prosecutor may be aware of victims who fall outside of the criminal statute of limitations but may still be aggrieved persons in your civil FHA case. Seek this information.

F. What other discovery or litigation considerations should I be thinking about when working with local prosecutors?

Some common issues arise when there are simultaneous civil and criminal proceedings. For instance, a witness may be called to testify or give sworn statements in both civil and criminal proceedings. If a witness in your civil FHA investigation is scheduled to give a sworn statement to local prosecutors in the criminal investigation, it may be helpful to communicate with the local prosecutors in advance of that statement to share what information you have in your possession related to that witness. Explore whether it is an option to observe the witness statement and confer with the local prosecutors and their team during breaks. You should also consider thoroughly preparing the witness—who quite possibly has never testified in any proceeding in any venue—on what to expect. This may help avoid pitfalls associated with giving two sworn statements. Moreover, by fully explaining the reason for the two different proceedings—and the witness's role in the proceedings—you may help alleviate some burden on the witness and clear up any confusion.

When facing two simultaneous proceedings, a defendant may seek a stay in the civil FHA case pending the outcome of the criminal

¹² See MODEL RULES OF PRO. CONDUCT r. 4.4.

prosecution. In anticipation of opposing such a motion, you may be well advised to research the relevant caselaw in your jurisdiction regarding litigation stays. Nonetheless, even if you believe you could successfully oppose such a motion, you should consider the potential benefits of a stay to your civil action.

G. What if I do not have an active sexual harassment investigation? Would it still be worth doing outreach to local prosecutors?

Yes. As part of the Department's Sexual Harassment in Housing Initiative, many U.S. Attorneys' Offices have held outreach events in their districts. Some offices have hosted community roundtables. Others have held a series of meetings with relevant stakeholders in their communities. Under either approach, most offices have reached out to local law enforcement, including local prosecutors' offices. By doing outreach to local prosecutors, you can advise them that your office conducts civil enforcement under the FHA. Then, if a local prosecutor's office subsequently learns of harassing conduct, she would know to reach out to you to pass on information that may justify a civil FHA investigation, whether or not she ultimately concludes the conduct does not give rise to a criminal charge. Additionally, through this outreach, you can develop relationships with local prosecutors, which may ultimately benefit both offices in future investigations.

III. Resources for AUSAs

The Initiative provides multiple resources for AUSAs. The Initiative has developed many helpful materials—in multiple languages—that AUSAs may distribute as part of their outreach, including flyers, palm cards, and fact sheets.¹³ Additionally, the Initiative created two public service announcements (PSAs) about working with the Department to stop sexual harassment in housing.¹⁴ Press releases about the

¹³ *Sexual Harassment in Housing Initiative—Resources*, DEP'T OF JUST., <https://www.justice.gov/crt/sexual-harassment-housing-initiative-resources> (updated Oct. 10, 2019).

¹⁴ Department of Justice, *DOJ PSA: Sexual Harassment in housing Is Illegal*, YOUTUBE (July 16, 2018), <https://www.youtube.com/watch?v=z76bA-mf7o0>; Department of Justice, *DOJ PSA: Working with DOJ to Stop Sexual Harassment in Housing* (Aug. 29, 2019), https://youtu.be/vhskfe_7DHc.

Department's sexual harassment FHA matters and summaries of many such recent cases are also available.¹⁵ Please reach out to the Initiative for additional materials designed to assist AUSAs in organizing and conducting roundtables and investigating and litigating FHA sexual harassment matters. For interested AUSAs, the Initiative holds quarterly brown bags with AUSAs across the country. To learn more about the initiative, please contact Trial Attorney Erin Meehan Richmond, Sexual Harassment Counsel and Coordinator, at (202) 307-0385 or erin.richmond@usdoj.gov.

About the Authors

Erin Meehan Richmond is a Trial Attorney in the Housing and Civil Enforcement Section of the Civil Rights Division. Since April 2021, she has served as the Section's Sexual Harassment Counsel and Coordinator. Ms. Meehan Richmond joined the Department in 2001 through the Attorney General's Honors Program.

Michael Champion became an Assistant U.S. Attorney in the District of New Jersey in 2007. Since 2013, his practice has focused almost exclusively on handling a wide array of affirmative civil rights investigations and litigation. He is currently the Chief of the U.S. Attorney's Office for the District of New Jersey's Civil Rights Unit, a position he has held since the unit's inception in 2016.

¹⁵ *Sexual Harassment in Housing Initiative—News*, DEP'T OF JUST., <https://www.justice.gov/crt/sexual-harassment-housing-initiative-news> (updated Jan. 7, 2022).

Page Intentionally Left Blank

Enforcement of the Fair Housing Act and Equal Credit Opportunity Act to Combat Redlining

Samantha Ondrade
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division

I. Introduction

This article discusses the Department of Justice’s (Department) enforcement of the Fair Housing Act¹ and the Equal Credit Opportunity Act² to combat redlining, the practice by which lenders avoid or exclude communities of color from equal access to credit based on the demographic characteristics of their neighborhoods.³ The Department has long demonstrated a strong commitment to uphold the promise of equal opportunity for all Americans, and fundamental to that promise is the right to access lending services free from discrimination. Providing communities of color with equal access to credit is the foundation for equal access to homeownership, wealth building, and social and geographic mobility.

To underscore the Department’s dedication to bringing its full resources to bear to address redlining problems, Attorney General Merrick B. Garland and Assistant Attorney General Kristen Clarke announced in October 2021 the Combatting Redlining Initiative (Initiative),⁴ through which the Civil Rights Division is partnering with U.S. Attorneys’ Offices (USAOs) nationwide to address patterns of redlining. This Initiative represents the federal government’s most

¹ Fair Housing Act, 42 U.S.C. §§ 3601–3619.

² Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f.

³ In this article, when referring to the Department’s redlining enforcement actions, the term “communities of color” refers to census tracts or neighborhoods where a majority of residents are members of one or more of the following racial, ethnic, or national origin groups, as defined by the U.S. Census Bureau: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, and Native Hawaiian or Other Pacific Islander.

⁴ Press Release, Dep’t of Just., Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021).

significant enforcement effort to address redlining and to ensure equal access to credit for all Americans.

As discussed later in this article, this Initiative is informed by the successful settlements the Department has obtained as a result of its redlining enforcement actions, which have expanded financial opportunities not only for individual borrowers and previously redlined communities, but for lenders as well.

II. Redlining: a brief background

A. The federal government's historical role in redlining

The burgeoning housing market of early and mid-twentieth century America was replete with banks and savings unions, realtors, and other private actors that discriminatorily denied loans to communities of color and sought to exclude people of color from becoming homeowners or moving into white neighborhoods. But it was the federal government that institutionalized and endorsed the practice of discriminatory redlining, beginning in the 1930s, when it launched a series of New Deal programs designed to make homeownership widely available to the American public but purposely excluded communities of color.⁵

In 1933, the federal government established the Home Owners' Loan Corporation (HOLC) to rescue distressed urban homeowners in default on their mortgages.⁶ The HOLC purchased existing mortgages and issued to homeowners new, low-interest amortized mortgages with repayment schedules of up to 25 years,⁷ ultimately making new loans to one million American homeowners between 1933 and 1936.⁸ A new innovation, the long-term, self-amortizing mortgage allowed American homeowners to gain equity while their properties were still mortgaged.⁹ To evaluate lending risk, the HOLC created color-coded

⁵ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

⁶ ROTHSTEIN, *supra* note 5, at 63.

⁷ ROTHSTEIN, *supra* note 5, at 63–64.

⁸ Amy E. Hillier, *Redlining and The Home Owners' Loan Corporation*, 29 J. URBAN HISTORY 394, 394 (2003).

⁹ ROTHSTEIN, *supra* note 5, at 63–64.

“residential security” maps of major American cities in consultation with local realtors and lenders, giving neighborhoods one of four “grades”: green for the most desirable, blue for slightly less desirable, yellow for declining neighborhoods, and red for undesirable or “hazardous” neighborhoods.¹⁰ HOLC based its color-coded grading system on a number of criteria, such as the age and condition of housing; the socioeconomic class and employment status of residents; and critically, the ethnic and racial composition of the neighborhood. Virtually all Black neighborhoods were rated hazardous and colored red on the maps.¹¹ In contrast, the white, middle-class suburb of Ladue in St. Louis, for example, was colored green because, according to the appraiser in 1940, “it had ‘not a single foreigner or negro.’”¹²

The federal government’s explicit association of predominantly Black neighborhoods with mortgage default risk were further enshrined in the underwriting practices of the Federal Housing Administration, established a year after the HOLC. The Federal Housing Administration guaranteed “bank[-issued] mortgages that covered 80 percent of purchase prices, had terms of twenty years, and were fully amortized.”¹³ Federal Housing Administration insurance thereby effectively eliminated the risk of default for banks, which, in turn, lowered interest rates for borrowers, resulting in a home ownership boom.¹⁴ To determine eligibility for insurance, the Federal Housing Administration conducted its own appraisal of subject properties, guided by a false and discriminatory principle touted by policymakers at the time: Properties in racially integrated neighborhoods and white neighborhoods located too close to Black neighborhoods were too risky to insure, as the Federal Housing

¹⁰ Jacob W. Faber, *We Built This: Consequences of New Deal Era Intervention in America’s Racial Geography*, 85 AM. SOCIO. REV. 739, 741 (2020); ROTHSTEIN, *supra* note 5, at 64; see Hillier, *supra* note 8, at 395.

¹¹ LaDale C. Winling & Todd M. Michney, *The Roots of Redlining: Academic, Governmental, and Professional Networks in the Making of the New Deal Lending Regime*, 108 J. AM. HIST. 42, 60 (June 2021) (“[A]ll Black neighborhoods were marked red, with only six known exceptions.”); see Hillier, *supra* note 8, at 395.

¹² ROTHSTEIN, *supra* note 5, at 64.

¹³ *Id.*

¹⁴ MASSEY & DENTON, *supra* note 5, at 53.

Administration believed property values declined with the growing presence of Black families.¹⁵

The Federal Housing Administration enshrined this view in two ways. First, like the HOLC, the Federal Housing Administration color-coded its own maps, using red to mark areas with concentrations of an “undesirable element,” such as racial or national origin groups.¹⁶ Second, the Federal Housing Administration’s *Underwriting Manual* included this instruction for property appraisers: “If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values.”¹⁷

To promote the racial homogeneity of neighborhoods, the Federal Housing Administration favored areas where physical barriers, such as boulevards or highways, separated Black areas from white areas and recommended that deeds to properties and subdivisions for which it issued mortgage insurance include explicit prohibitions against resale to Black individuals, reasoning in the *Underwriting Manual* that higher appraisal ratings were warranted if “[p]rotection against some adverse influences is obtained,” with one “adverse influence” being the “infiltration of inharmonious racial or nationality groups.”¹⁸ Following World War II, the newly created Department of Veterans Affairs (VA) began insuring mortgages for returning servicemembers. The VA adopted the Federal Housing Administration’s housing policies, and VA appraisers also relied on the *Underwriting Manual*.¹⁹

By 1950, the Federal Housing Administration and the VA, together, were insuring half of all new mortgages nationwide, with the vast majority directed to white, middle-class suburbs, setting white Americans on a path to build generational wealth through homeownership.²⁰ These government practices further influenced the private mortgage industry: The *Underwriting Manual* was widely publicized and distributed, incentivizing private lenders interested in

¹⁵ ROTHSTEIN, *supra* note 5, at 64–65, 93.

¹⁶ Hillier, *supra* note 8, at 402.

¹⁷ FED. HOUSING ADMIN., UNDERWRITING MANUAL § 937 (1938); see Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. 1, 2 (2020).

¹⁸ ROTHSTEIN, *supra* note 5, at 65, 83–84 (alteration in original).

¹⁹ *Id.* at 70.

²⁰ *Id.*; MASSEY & DENTON, *supra* note 5, at 53.

securing Federal Housing Administration insurance for their mortgage loans to follow its discriminatory appraisal guidelines. The percentage of families living in owner-occupied homes skyrocketed from 44% of the population in 1934 to 63% in 1969.²¹ Communities of color, however, were excluded from the housing boom that characterized mid-twentieth century America.²²

B. Redlining’s enduring legacy

Redlining—institutionalized by the federal government during the New Deal era and implemented then and now by private lenders—has had a lasting negative impact. For American families, homeownership remains the principal means of building wealth, and the deprivation of investment in, and access to, mortgage lending services for communities of color have contributed to families of color persistently lagging behind in homeownership rates and net worth compared to white families.²³ The gap in homeownership rates between white and Black families is larger today than it was in 1960, before the passage of the Fair Housing Act of 1968.²⁴ In 2021, the gap is about 30%, with only 44.6% of Black families owning their homes compared to 74.2% of white families.²⁵ Relatedly, data from 2019 show that “the typical [w]hite family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family.”²⁶ These data evince the enduring effects of redlining.

²¹ MASSEY & DENTON, *supra* note 5, at 53.

²² One analysis estimates that, from 1934 to 1968, 98% of Federal Housing Administration-backed loans were made to white applicants. George Lipsitz, *Government Policies and Practices that Increase Discrimination*, in STILL SEPARATE BUT UNEQUAL: THE STATE OF FAIR HOUSING IN AMERICA, THE NAT’L COMM’N ON FAIR HOUSING & EQUAL OPPORTUNITY 69 (2008).

²³ ROTHSTEIN, *supra* note 5, at 183–86.

²⁴ JUNG HYUN CHOI ET AL., EXPLAINING THE BLACK-WHITE HOMEOWNERSHIP GAP 1 (2019) at 11 (Figure 1 displaying Black-white homeownership gaps from 1960 to 2017).

²⁵ Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Third Quarter 2021 9 (July 27, 2021).

²⁶ Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RESERVE SYS. (Sept. 28, 2020).

III. FHA and ECOA enforcement

The Department is committed to using every tool at its disposal to take on the substantial task of addressing redlining, especially vigorous enforcement of civil rights laws. The Civil Rights Division's Housing and Civil Enforcement Section has primary responsibility for investigating violations and bringing suit to enforce the Fair Housing Act (FHA) and may work with USAOs on these investigations and any resulting litigation.²⁷ Enacted in 1968, the FHA prohibits discrimination concerning the sale, rental, and financing of housing and other residential real estate-related transactions based on race, color, religion, sex, familial status, national origin, or disability.²⁸ Although the FHA outlaws lending discrimination related to housing, other types of lending discrimination, such as discrimination in consumer or auto lending, were without federal recourse until 1974, when the Equal Credit Opportunity Act (ECOA) was enacted to prohibit creditors from discriminating "on the basis of race, color, religion, national origin, sex or marital status, age," or source of income with respect to any aspect of a credit transaction.²⁹ The Assistant Attorney General for the Civil Rights Division is authorized to bring suit to enforce ECOA, and the Housing and Civil Enforcement Section and USAOs may work together to investigate and litigate violations of ECOA.³⁰

The Department may bring civil enforcement actions under the FHA and ECOA whenever there is reason to believe that an entity is engaged in a pattern or practice of resistance to the full enjoyment of rights secured by those statutes.³¹ The FHA further authorizes the Department to bring suit when a defendant has denied rights to a group of persons and that denial raises an issue of general public importance.³² The Department has and will continue to invoke this authority to bring enforcement actions against lenders who engage in a pattern or practice of discrimination by redlining communities of color.

²⁷ JUSTICE MANUAL 8-2.230, 8-2.231.

²⁸ 42 U.S.C. §§ 3601–3619.

²⁹ 15 U.S.C. §§ 1691–1691f.

³⁰ JUSTICE MANUAL 8-2.230, 8-2.232; 28 C.F.R. § 0.50.

³¹ 42 U.S.C. § 3614(a); 15 U.S.C. § 1691e.

³² 42 U.S.C. § 3614(a).

Discriminatory redlining violates both the FHA and ECOA. Modern-day redlining practices can be as overt as the Federal Housing Administration's *Underwriting Manual* or the HOLC's red-shaded maps, but other indicia that a lender has engaged in redlining could include, but are not limited to, some of the following conduct:

- drawing an assessment area under the Community Reinvestment Act (CRA)³³ that excludes communities of color;
- failing to maintain or open branch locations in communities of color but maintaining branches in predominantly white areas;
- marketing, advertising, and conducting outreach only to predominantly white communities and avoiding communities of color; and
- generating significantly fewer mortgage loan applications and making fewer loans in communities of color when compared to peer lenders.³⁴

A. The Civil Rights Division and USAOs partner to combat redlining

Strong partnerships with U.S. Attorneys' Offices nationwide facilitate effective enforcement against redlining. USAOs can leverage their expertise, critical knowledge about the local housing market and the credit needs of communities of color, and existing relationships with key stakeholders to bolster the Department's fair-lending enforcement actions. The Housing and Civil Enforcement Section has benefited significantly from partnerships with USAOs to enforce the FHA and ECOA, and many USAO partners have expressed a desire and commitment to address potential redlining problems in districts across the country.

³³ Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901–2908. Institutions subject to the CRA and its enabling regulations must self-identify the communities that they serve in “assessment areas.” Federal regulators look at an institution's assessment area to evaluate whether that institution is meeting the credit needs of its entire community.

³⁴ For a list of the Housing and Civil Enforcement Section's prior fair-lending enforcement matters, see *Housing and Civil Enforcement Cases*, DEPT OF JUST., <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1> (last visited Dec. 9, 2021).

To that end, the Department has announced the Combatting Redlining Initiative, through which the Civil Rights Division is partnering with USAOs nationwide to analyze lending patterns across the country and investigate potential redlining activity. The creation of this Initiative reflects the Department's commitment to the aggressive enforcement of fair lending laws and an expansion of the Department's efforts to ensure equal access to credit under the leadership of Attorney General Merrick Garland.

B. The Department's redlining settlements and common relief

In the past 20 years, the Department has developed and resolved 16 redlining cases across the nation, in both rural and urban areas where historical patterns of residential racial segregation are deeply entrenched, including in Alabama, Connecticut, Illinois, Indiana, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas. The defendant lenders in these cases denied equal access to mortgage lending services to communities of color, and following Department investigations, they agreed to settle the Department's claims by changing their lending practices and providing remedies to residents of previously redlined neighborhoods for credit the lenders failed to make available to those neighborhoods.

A key remedial element in the Department's redlining settlements is the establishment of a loan subsidy fund. Through these loan subsidy funds, residents of redlined areas can receive, among other types of subsidies, a direct grant for down payment or closing cost assistance or payment on mortgage insurance premiums. These loan subsidies can enable families in redlined neighborhoods to recognize their dreams of homeownership.

The Department's redlining settlements have resulted in more than \$70 million in loan subsidies, a figure that has had tangible benefits for previously redlined communities nationwide. But these settlements also feature other, significant forms of relief designed to foster lending to residents of previously redlined areas and to deter future violations of the FHA and ECOA. Other forms of relief reached in the Department's redlining settlements include requiring the defendant lenders to:

- redraw their CRA assessment areas to include communities of color;

- establish new depository branches or loan production offices in redlined areas;
- assess the residential real estate-related credit needs of communities of color in their lending service areas;
- enact corrective outreach and advertising measures to promote products and services to previously redlined areas;
- increase access to financial literacy and credit repair programs for communities of color; and
- adopt new policies, practices, and procedures to ensure compliance with fair lending obligations.

The Department’s redlining settlements constitute a “triple win”: A win for residents of previously redlined areas, a win for communities affected by redlining, and a win for financial institutions. The relief awarded in the Department’s redlining cases expand equal access to credit and homeownership opportunities for historically underserved residents in redlined communities. These remedial measures may not only transform communities, but also may result in increased profits for the banks. Highlighted below are just a few success stories from the Department’s redlining enforcement actions.

1. *United States & CFPB v. BancorpSouth Bank*³⁵

In 2016, following a joint investigation with the Consumer Financial Protection Bureau (CFPB), the Civil Rights Division and the U.S. Attorney’s Office for the Northern District of Mississippi filed a consent order resolving FHA and ECOA claims against BancorpSouth Bank (BancorpSouth).³⁶ The complaint alleged that BancorpSouth engaged in discrimination at virtually every stage of the lending process—from how the bank solicited loan applications to the discretion it granted loan officers and underwriters to approve and price the loans.³⁷ With respect to redlining, the Department and CFPB alleged that BancorpSouth excluded nearly all majority-minority neighborhoods in the Memphis, Tennessee, area from its lending service area, located all 22 of its branches outside of majority-minority neighborhoods, and generated only 9% of its loan

³⁵ *United States v. BancorpSouth Bank*, No. 16-cv-118 (N.D. Miss. 2016).

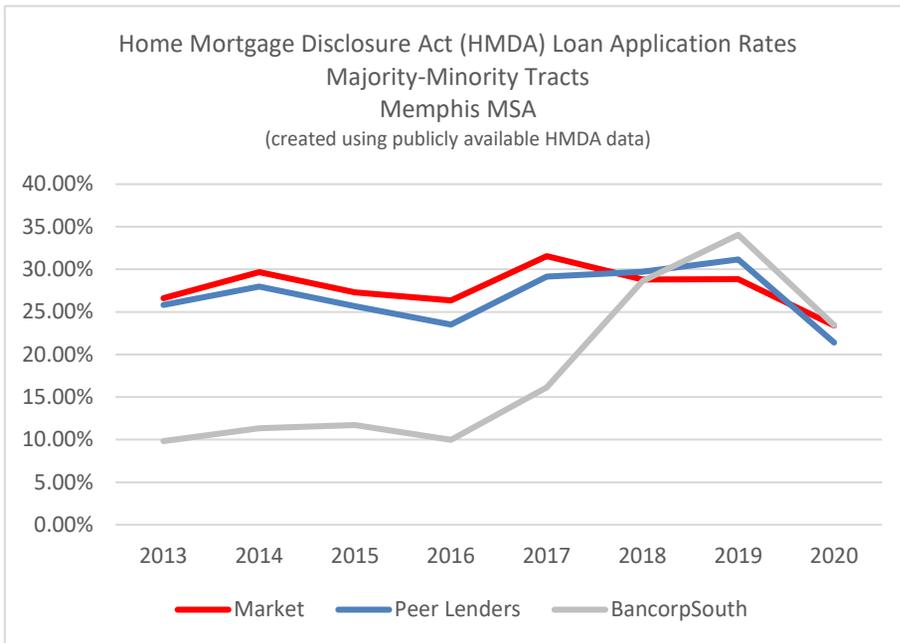
³⁶ Consent Order, *BancorpSouth Bank*, No. 16-cv-118, ECF No. 8.

³⁷ See Complaint, *BancorpSouth Bank*, No. 16-cv-118, ECF No. 1.

applications from majority-minority areas in the Memphis area, while its peers generated 27.6% of their applications from those areas.³⁸

Under the terms of the settlement it reached with the Department and CFPB, BancorpSouth agreed to pay a \$3 million civil penalty to the CFPB and nearly \$7 million in relief for impacted individuals and neighborhoods, of which \$4 million was allocated to a loan subsidy program to benefit residents of previously redlined areas in the Memphis area.³⁹ The bank also agreed to invest at least \$800,000 in advertising, outreach, and community partnership efforts; to amend its pricing and underwriting policies; to develop strong internal standards to ensure compliance with fair lending obligations; and to provide employees, senior management, and the Board of Directors with fair lending training.⁴⁰

Beyond the benefits the resolution afforded to the Memphis community and residents of previously redlined areas in Memphis, the settlement also was a “win” for BancorpSouth. In addition to improving its internal policies to promote fair lending, the bank saw increased profits from its new lending activity in communities of color.



³⁸ *Id.*

³⁹ *See* Consent Order, *supra* note 36.

⁴⁰ *Id.*

The graph above shows how, following the 2016 redlining settlement, BancorpSouth broadened its lending to previously redlined tracts in Memphis. Before 2016, the bank substantially trailed its peer lenders and all lenders in the mortgage market in Memphis. The bank's loan application rates steadily improved in majority-minority areas in Memphis after 2016, and after only a few years, the bank began outperforming its peers and all lenders in the Memphis mortgage market in receiving applications from those same neighborhoods.

2. *United States v. Midwest BankCentre*⁴¹

The resolution of the Department's redlining complaint against Midwest BankCentre (Midwest) illustrates how enforcement of the FHA and ECOA to combat redlining can transform communities. This case was handled jointly by the Civil Rights Division and the U.S. Attorney's Office for the Eastern District of Missouri. The complaint alleged that Midwest BankCentre failed to open a single branch or loan production office in majority-Black neighborhoods of St. Louis, Missouri, while maintaining seven branch locations in majority-white neighborhoods.⁴² Further, despite being on notice for several years that it was underserving communities of color based on its own annual reports, Midwest took no steps to change its conduct: In a five-year period, Midwest received less than 3% of its mortgage loan applications from majority-Black neighborhoods, even while its peers generated 10.7% of their applications from those areas.⁴³

At the time the Department settled its redlining claims against Midwest in 2011, northern St. Louis County, located outside of the city of St. Louis, had no brick-and-mortar bank branches for miles; instead, the area was overrun with payday lenders and check-cashing establishments.⁴⁴ The proportion of Black households in St. Louis that were unbanked—without a deposit or checking account—was the highest in the country.⁴⁵ After the consent order negotiated by the Department, Midwest established a \$900,000 loan subsidy fund and

⁴¹ *United States v. Midwest BankCentre*, No. 11-cv-1086 (E.D. Mo. 2011).

⁴² Complaint, *Midwest BankCentre*, No. 11-cv-1086, ECF No. 1.

⁴³ *Id.* ¶ 21.

⁴⁴ Lisa Brown, *One Year After Opening, Pagedale Bank Branch Fills Unmet Need*, ST. LOUIS POST-DISPATCH (Nov. 28, 2013).

⁴⁵ *Id.*

offered no-fee, no-minimum balance checking accounts to residents of majority-Black areas in St. Louis.⁴⁶ Under the consent order, Midwest opened a branch in the City of Pagedale, located in the heart of St. Louis County's banking desert.⁴⁷ The Pagedale branch was Pagedale's "first bank branch in its 63-year history."⁴⁸ Midwest soon found that the Pagedale branch became profitable earlier than it had expected. After Midwest opened the Pagedale branch, new commercial enterprises, including a grocery store, movie theater, and health clinic sprung up around the branch.⁴⁹ Because of this development, a few years later, Midwest voluntarily opened another branch on the ground floor of one of the largest Black churches in the area.

The beneficial effects of the resolution of this case continue: Midwest Bank is now often cited in the media for its work in investing in the previously redlined areas. In 2018, seven years after entering into the consent order with the Department, Midwest received the Independent Community Bankers National Community Service Award "for its high-impact service and economic empowerment programs that have brought mainstream banking services to more than 1,200 previously 'unbanked' or 'underbanked' families in the St. Louis, Missouri metropolitan area."⁵⁰

IV. Conclusion

Robust enforcement of the FHA and the ECOA by the Civil Rights Division and U.S. Attorneys' Offices has been shown to have a substantial, beneficial impact on residents of previously redlined areas, those communities, and lenders. By collaborating with U.S. Attorneys' Offices nationwide, the Department will continue to demonstrate its commitment to combat redlining wherever lenders engage in it.

⁴⁶ Agreed Order, *Midwest BankCentre*, No. 11-cv-1086, ECF No. 9.

⁴⁷ Brown, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Press Release, Midwest BankCentre, ICBA Names Midwest BankCentre as a National Award Recipient For the 2018 National Community Bank Service Awards (July 25, 2018).

About the Author

Samantha Ondrade is a Trial Attorney in the Housing and Civil Enforcement Section (HCE) of the Civil Rights Division. Before joining HCE, Sam worked as a litigation associate in private practice and clerked on the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the District of Columbia. She graduated from Brown University and received her J.D., *magna cum laude*, from Georgetown University Law Center.

Page Intentionally Left Blank

Testing Can Uncover Discrimination in Lending

Noah Sacks

Trial Attorney

Housing and Civil Enforcement Section

Civil Rights Division

I. Introduction

The Equal Credit Opportunity Act¹ (ECOA) prohibits discrimination in credit transactions “on the basis of race, color, religion, national origin, sex or marital status, or age.”² ECOA also prohibits a creditor from discouraging applications.³ Despite ECOA’s prohibitions, protected borrowers continue to face discrimination in obtaining credit. Detecting discrimination in the lending context can be difficult. Protected borrowers and credit applicants rarely know if they got the same deal as other similarly qualified applicants. Also, prospective borrowers who were discouraged from applying may never know that they were discouraged because of a protected characteristic.

Testing—when individuals pose as prospective renters, borrowers, or patrons for the purpose of gathering information—is a powerful tool in uncovering unlawful discrimination that might otherwise escape detection. While testing has typically been used to detect discrimination in housing, the Civil Rights Division’s Fair Housing

¹ Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1974).

² See 15 U.S.C. § 1691(a)(1). The Fair Housing Act, 42 U.S.C. §§ 3601–3619 (1968), similarly prohibits discrimination in mortgage lending and other home lending on the basis of race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3605. Accordingly, discrimination in home lending is prohibited by both the FHA and ECOA.

³ See 15 U.S.C. § 1691e(g) (providing that certain agencies with administrative enforcement authority under ECOA “shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title.”); see also 12 C.F.R. §§ 202.4(b), 1002.4(b) (“Discouragement. A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.”).

Testing Program (FHTP) also conducts testing to ferret out unlawful discrimination in the lending and public accommodation settings.

Recently, the Department of Justice (Department) resolved its first ever ECOA lawsuit based on evidence uncovered by the FHTP—*United States v. Guaranteed Auto Sales*.⁴ *Guaranteed Auto Sales* is an important case because it not only demonstrates the viability of testing for discrimination in credit, but that testing can be effective at detecting discouragement, which occurs during the pre-application stage. The pre-application stage is a period when credit discrimination likely occurs but is seldom caught.

As discussed below, numerous cases, studies, and reports indicate that discrimination occurs in the credit industry, including when obtaining a mortgage or financing a vehicle. Testing can be a valuable tool in combating credit discrimination, and there is a continuing need for testing in the credit industry.

II. Testing is a valuable tool in gathering evidence of discrimination

A. Testing methodology

Testers are individuals who, without an intent to rent or purchase a home or apartment or obtain a loan, pose as renters, purchasers, or applicants for the purpose of collecting evidence of unlawful discriminatory practices.⁵ Because it is “frequently difficult to develop proof in discrimination cases[,] . . . the evidence provided by testers is frequently valuable, if not indispensable.”⁶

Testing is typically accomplished through “matched-pair” testers—individuals who have the same or similar qualifications (for example, income, employment, credit score) and differ only in a protected characteristic, such as race, sex, national origin, or religion. In the housing rental context, matched testers each contact the same provider to inquire about the availability of units, rent, security

⁴ No. 19-cv-02855 (D. Md. 2020).

⁵ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982); *United States v. Balistreri*, 981 F.2d 916, 924 (7th Cir. 1992) (accepting “testing” as method of ferreting out discrimination and explaining how it was used to show a pattern or practice of discrimination, in violation of 42 U.S.C. § 3614).

⁶ *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

deposit, application requirements, and other rental terms.⁷ In the mortgage or lending context, testers may inquire about interest rates, down payment requirements, or loan amounts for which they may qualify.⁸ The information obtained by the testers is then compared to see if there are any material differences in how the testers are treated. For example, a housing provider may tell Black testers that there are no available units and tell white testers that there is availability,⁹ or lenders may steer home purchasers to certain neighborhoods based on their race or tell protected borrowers that they need to put more money down than comparable white borrowers.¹⁰

Courts, including the Supreme Court, have approved of testing as a means of uncovering evidence of unlawful discrimination.¹¹ Testing has been upheld over challenges based on standing,¹² whether it violates the Fourth Amendment,¹³ and whether the information it

⁷ See, e.g., *Balistrieri*, 981 F.2d at 924 (“In conducting a test, the [group conducting the testing] sends two people posing as customers, one white and one black, to a realtor, home, or apartment complex. The two people would be as close to identical in distinguishing characteristics other than race—for example, age and marital status—as possible. The two would inquire about the identical type of housing. Differences in response to the two testers—for example, quoting higher prices to a black, or giving the two testers different stories about the availability of an apartment—could indicate discrimination.”).

⁸ See, e.g., MARGERY AUSTIN TURNER ET AL., DEP’T OF HOUSING & URBAN DEV. ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS 12 (2002).

⁹ See e.g., *Balistrieri*, 981 F.2d at 929 (“Five sets of testers testified in this case. In each test, the black person was treated less favorably: he or she was either shown fewer apartments, quoted higher rents, or quoted later dates of availability; in some cases, all those occurred on the same test.”).

¹⁰ See, e.g., *Paschal v. Flagstar Bank*, 295 F.3d 565, 578 (6th Cir. 2002) (noting that evidence demonstrated that loan officers advised testers to look for homes in neighborhoods associated with tester’s race).

¹¹ *Havens*, 455 U.S. at 373; *Balistrieri*, 981 F.2d at 924.

¹² See, e.g., *Havens*, 455 U.S. at 373.

¹³ *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979) (“[T]here was no Fourth Amendment violation because Northside had no reasonable expectation of privacy with regard to the areas ‘searched’ and the items ‘seized’ by the testers The testers did no more

uncovers is admissible, relevant, or reliable.¹⁴ As discussed below, the Department and fair housing organizations have successfully used testing countless times to combat housing discrimination.¹⁵

B. The FHTP has used testing to uncover discrimination since 1992

In 1991, the FHTP was established within the Civil Rights Division's Housing and Civil Enforcement Section.¹⁶ It began testing the following year. The program currently tests providers of housing, lending, and public accommodations to identify violations of the Fair Housing Act (FHA), ECOA, Title II of the Civil Rights Act of 1964,¹⁷ the Servicemembers Civil Relief Act,¹⁸ and the Americans with

than what any member of the home-buying public is invited, and indeed welcomed, to do.”).

¹⁴ *Paschal*, 295 F.3d at 578 (finding that testing evidence was relevant and admissible over Federal Rule of Evidence 403 objections); *Richardson*, 712 F.2d at 322 (“[T]ester evidence may well receive more weight because of its source. Testers seem more likely to be careful and dispassionate observers of the events which lead to a discrimination suit than individuals who are allegedly being discriminated against.”).

¹⁵ *See, infra*, section II(2); *see also* *United States v. Fountainbleau Apartments L.P.*, 566 F. Supp. 2d 726, 731 (E.D. Tenn. 2008); Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. Rev. 587, 589 n.2 (2019) (citing cases).

¹⁶ *See Fair Housing Testing Program*, DEP'T OF JUST., <https://www.justice.gov/crt/fair-housing-testing-program-1> (updated Sept. 8, 2021) ; *see also* Bill Lan Lee, *An Issue of Public Importance: The Justice Department's Enforcement of the Fair Housing Act*, 4 CITYSCAPE, no. 3, 1999 at 38–39.

¹⁷ Civil Rights Act of 1964 tit. II, 42 U.S.C. §§ 2000a to 2000a-6. Title II prohibits discrimination on the basis of race, color, religion or national origin at places of public accommodation such as hotels, restaurants, and places of exhibition or entertainment. 42 U.S.C. § 2000a

¹⁸ Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003). The Servicemembers Civil Relief Act (SCRA) is a law designed to ease financial burdens on servicemembers during periods of military service. *See* 50 U.S.C. §§ 3901–4043. The SCRA is a federal law that provides protections for military members as they enter active duty and covers issues such as rental agreements, security deposits, prepaid rent, evictions, installment contracts, credit card interest rates, mortgage interest rates, mortgage foreclosures, civil judicial proceedings, automobile leases, life insurance, health insurance and income tax payments. *Id.*

Disabilities Act.¹⁹ The program conducts systematic testing in targeted geographic areas, as well as testing based on complaints against a particular business or housing provider, testing to support the Division's pre-investigations, and testing to determine whether defendants are complying with consent decrees. The FHTP engages in testing nationwide, from large cities to small rural towns. The program frequently conducts testing to assist various U.S. Attorneys' Offices with discrimination complaints or pre-investigations. Most of the FHTP's testers are Department employees who volunteer to assist with a particular investigation.

Since 1992, the Department has resolved 110 pattern-or-practice testing cases with evidence directly generated by the FHTP, leading to the recovery of more than \$14.3 million, including \$12 million in damages and over \$2.3 million in civil penalties.²⁰

Cases generated by the FHTP have often resulted in substantial damages and civil penalties. For example, the Division's largest settlement based on evidence uncovered by the FHTP involved allegations of race and familial status discrimination by the owners and managers of a 1,142-unit apartment complex in New Jersey and was resolved for a total of \$1.5 million, including \$1.3 million in damages and a \$200,000 civil penalty.²¹

The Department has brought lawsuits based on FHTP-generated testing evidence that demonstrates a wide variety of discrimination,

¹⁹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

²⁰ The United States is statutorily authorized to pursue "pattern or practice" cases under the FHA and ECOA. *See* 42 U.S.C. § 3614(a); 15 U.S.C. § 1691(e).

²¹ *United States v. Chandler Assocs.*, No. 97-cv-3114 (D.N.J. Jun. 25, 1997).

including in the availability of housing units,²² terms and conditions,²³ and steering.²⁴ Cases based on FHTP evidence have alleged discrimination on the basis of race, national origin, familial status,²⁵ and disability,²⁶ and in public accommodations.²⁷

²² See, e.g., *United States v. Kendall House Apartments*, No. 95-cv-2050 (S.D. Fla. Nov. 13, 1996); see also *United States v. S-2 Properties, Inc.*, No. 13-CV-1421, 2014 WL 201086, at *1 (W.D. Pa. Jan. 17, 2014) (denying defendant's motion to dismiss United States' claims that defendant violated the FHA on the basis of race by telling Black testers that no units were available); *United States v. Habersham Properties, Inc.*, 319 F. Supp. 2d 1366, 1369

(N.D. Ga. 2003) (finding that testing evidence was sufficient to create material question of fact whether defendants discriminated against prospective Black renters on the basis of race regarding availability of units); *United States v. Garden Homes Mgmt., Corp.*, 156 F. Supp. 2d 413, 416 (D.N.J. 2001) (denying defendant's motion for summary judgment on United States' FHA claims for race and familial status discrimination); *United States v. Village Realty of Staten Island, Ltd*, No. 20-cv-04647 (E.D.N.Y. April 5, 2021) (resolving allegations of race discrimination).

²³ *United States v. Pine Properties, Inc.*, No. 07-cv-11819 (D. Mass. 2008) (resolving allegations of national origin discrimination against Cambodian-American persons).

²⁴ See, e.g., *United States v. J & R Assocs.*, No. 15-cv-11748 (D. Mass. 2015) (resolving allegations that the owner was steering families with children into certain buildings, floors, and units).

²⁵ The FHA prohibits discrimination on the basis of familial status, see 42 U.S.C. §§ 3604–3606, which includes whether a person has children. See 42 U.S.C. § 3602(k); *Fountainbleau Apartments L.P.*, 566 F. Supp. 2d at 728 (granting summary judgment on liability on United States' FHA familial status claims based in part on tester evidence).

²⁶ See, e.g., *United States v. Rose*, No. 02-cv-73518 (E.D. Mich. 2005) (resolving allegations that defendant developers and architects failed to include accessible features required by the FHA and ADA in apartment complexes);

United States v. LCW Family Ltd. P'ship, No. 8-13-cv-00350 (D. Neb. July 30, 2014) (resolving allegations that housing provider refused to waive "no pets" policy for assistance animals).

²⁷ See, e.g., *United States v. Pasco Cnty. Fair Ass'n, Inc.*, No. 10-cv-01554 (M.D. Fla. 2010) (resolving allegations that defendants charged and quoted Hispanic customers and prospective customers higher deposit fees for renting banquet hall); *United States v. Satyam, L.L.C.*, No. 01-cv-0046 (S.D. Ala. 2002) (resolving allegations that hotel discriminated against African

More recently, in *United States v. Guaranteed Auto Sales*, the FHTP conducted matched-pair testing at a “buy here, pay here” used car dealership to determine whether it was discriminating on the basis of race, a violation of ECOA, against customers who sought to finance purchases.²⁸ Multiple matched pairs of Department employee volunteers each visited the dealership to inquire about financing a used car. The testers covertly audio recorded their interactions with the dealership agents so that test coordinators could easily compare the information and treatment provided to each tester.²⁹ Based on the testing work of the FHTP, the Department filed a lawsuit alleging that white testers were offered more favorable credit terms than similarly situated Black testers and that the dealership took actions to discourage Black testers at the same time it encouraged white

American guests by steering them to particular floors and rooms, charging them higher prices than white guests were charged, and denying them equal access to hotel facilities and services).

²⁸ Buy here, pay here (BHPH) dealers specialize in the subprime lending market, selling used cars to customers with poor or marginal credit. Instead of connecting customers with a bank or other institutional lender to finance their used car purchases, like a typical car dealership, BHPH dealers provide financing themselves, allowing customers to enter into installment sale contracts. BHPH dealers may earn a profit not only from selling cars, but also from financing them. BHPH finance deals often involve high-mileage, older vehicles with inflated sales prices and high interest rates. As a result, approximately 25% to 30% of BHPH customers default on their loans. See CTR. FOR RESPONSIBLE LENDING, *THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS* 64, 67, 73–74 (2012). Some BHPH dealers generate revenue by selling and repossessing the same car multiple times. See, e.g., *Williams v. Regency Fin. Corp.*, 309 F.3d 1045, 1046–47 (8th Cir. 2002) (describing one BHPH dealership’s practices—selling used cars at retail “for at least twice their cost,” charging 18% interest on installment contracts, repossessing the car upon the customer’s default, creating a deficiency through an artificial repo sale, and selling the car to another buyer to repeat the cycle); Ken Bensinger, *A Vicious Cycle in the Used-Car Business*, L.A. TIMES

(Oct. 30, 2011), <https://www.latimes.com/business/la-xpm-2011-oct-30-la-fi-buy-here-pay-here-part1-storyb-story.html> (reporting 25% default rate).

²⁹ As noted by one court, the practice of recording tests eliminates factual disputes over what occurred. See *Garden Homes Mgmt., Corp.*, 156 F. Supp. 2d at 416, n.3 (“Defendants do not controvert the Government’s version of the fair housing tests that occurred, presumably because those tests were tape-recorded.”).

testers.³⁰ For example, white testers were offered the option of splitting their down payments into two payments over a 30-day period, while Black testers were asked to make the down payment on the day they visited the lot, even though the Black testers offered more money down to the dealership.³¹ Black testers were told that they needed a higher down payment than the white testers were told for the same car (usually \$2,000 instead of \$1,500). A Black tester was quoted bi-weekly payments that were higher than what the white tester was quoted for the same car (\$150 instead of \$125).

The case was resolved with a consent order, requiring Guaranteed Auto Sales to take several steps to come into compliance with ECOA, including ECOA training, adoption of specific fair lending policies and procedures, and retention and reporting of customer and transaction data.³²

III. There is a Need for Testing in the Lending Industry

A. Discrimination continues to occur in the lending industry

Several studies conclude that Black and Hispanic borrowers face discrimination in the credit market as compared to similarly situated white borrowers. For example, a 2019 white paper from the National Bureau of Economic Research found that “accepted Latinx and African-American borrowers pay 7.9 and 3.6 basis points more in interest for home-purchase and refinance mortgages, respectively, because of discrimination.”³³ The authors estimate that this discrimination costs Black and Hispanic borrowers \$765 million in extra interest per year. This study controlled for creditworthiness and

³⁰ See Complaint and Jury Demand, *Guaranteed Auto Sales*, 19-cv-02855, ECF No. 1.

³¹ *Id.*

³² See Consent Order, *Guaranteed Auto Sales*, 19-cv-02855, ECF No. 13. The consent order did not include damages for aggrieved applicants or prospective applicants because available records were insufficient to identify customers who may have been discriminated against by the dealership.

³³ Robert Bartlett, et. al., *Consumer-Lending Discrimination in the FinTech Era 5* (Nov. 2019) (unpublished research paper). A “basis point” is one hundredth of one percent of the loan amount.

other risk-based variables, including income, loan-to-value ratio, location of property, and borrower credit score.³⁴

A recent study using data reported under the Home Mortgage Disclosure Act (HMDA)³⁵ found that prospective Black borrowers were nearly three times more likely to be denied a loan compared to white applicants with the same income and loan amount.³⁶ Other studies have also found that Black applicants are denied loans at rates much higher than comparable white applicants.³⁷ A recent study by the National Community Reinvestment Coalition, which used testing, found that banks are more likely to encourage white customers to apply for a loan than *better-qualified* Black customers.³⁸

Studies also conclude that unequal treatment regarding credit and lending may be occurring in the auto sales industry. A recent report from the National Fair Housing Alliance (NFHA), which was based on matched-pair testing, found that, in 62.5% of the tests, non-white testers—who were better qualified than their white counterparts—received more costly pricing options and that, in 75% of the tests, white testers were offered more financing options than their better-qualified, non-white counterparts.³⁹ NFHA's recent report follows an earlier 1995 report, also based on matched-pair testing, finding that Chicago-area car dealerships attempted to sell the same car for an

³⁴ *Id.* at 9–10.

³⁵ Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801–1810. HMDA and its implementing regulation, Regulation C, requires banks to collect and report applicant data, including the race and income of the applicant and whether a loan was denied. *See Id.*. Regulation C's data requirements are codified at 12 C.F.R. § 1003.4.

³⁶ EMMANUEL MARTINEZ & AARON GLANTZ, HOW REVEAL IDENTIFIED LENDING DISPARITIES IN FEDERAL MORTGAGE DATA 10 (n.d.).

³⁷ *See* Lincoln Quillian, *Racial Discrimination in the U.S. Housing and Mortgage Lending Markets: A Quantitative Review of Trends, 1976–2016*, RACE & SOC. PROBS 12, 13–28 (2020) (concluding that Black and Hispanic mortgage applicants continue to be rejected at higher rates than whites with similar characteristics and are also more likely to receive high-cost mortgage products).

³⁸ *See* ANNELESE LEDERER ET AL., NAT'l Cmty. Reinvestment Coal., LENDING DISCRIMINATION WITHIN THE PAYCHECK PROTECTION PROGRAM, NATIONAL COMMUNITY REINVESTMENT COALITION (n.d.).

³⁹ LISA RICE & ERICH SCHWARTZ JR., DISCRIMINATION WHEN BUYING A CAR, HOW THE COLOR OF YOUR SKIN CAN AFFECT YOUR CAR-SHOPPING EXPERIENCE, NATIONAL FAIR HOUSING ALLIANCE 5 (2018).

average of approximately \$1,100 more to Black males than white males.⁴⁰

B. Past ECOA enforcement by the Department has focused on pricing and redlining

The Department's past ECOA cases primarily focused on pricing discrimination and redlining. Pricing discrimination occurs when lenders charge different interest rates or fees to similarly situated borrowers based on a protected characteristic. Redlining is when banks avoid offering credit services in, or making loans to, a specific area based on the race or national origin of the residents of those areas.

In 2018, for example, the Department entered into a settlement agreement with Pacific Mercantile Bank to resolve claims that the bank engaged in a pattern or practice of discriminating in the pricing of mortgage loans on the basis of race and national origin. The agreement established a million-dollar settlement fund to compensate persons who were harmed by the bank's conduct.⁴¹ In 2015, the Department resolved a lawsuit against Sage Bank alleging that the bank discriminated on the basis of national origin and race in the pricing of residential mortgage loans, with a consent decree requiring the bank to establish a \$1,175,000 settlement fund, to amend its pricing and compensation policies, to establish a monitoring program, and to have employees undergo fair housing and fair lending training.⁴²

The Department has also done a significant amount of post-application ECOA enforcement on pricing in the auto lending industry, recovering millions of dollars for auto purchasers who were discriminated against in the terms of their vehicle financing.⁴³ In

⁴⁰ Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. no. 3, 1995, at 304–21.

⁴¹ Dep't of Just., Settlement Agreement Between the United States of America and Pacific Mercantile Bank (July 2018).

⁴² Consent Order, *United States v. Sage Bank*, 15-cv-13969 (D. Mass. Dec. 1, 2015), ECF No. 5.

⁴³ Pre-application discrimination is, for example, when a creditor discourages a customer from applying for credit on the basis of a protected characteristic. Post-application discrimination occurs when, for example, the creditor sets the terms for financing based on a protected characteristic, such as charging

2016, the Department entered into a consent order with Charter Bank, resolving claims that the bank violated ECOA by discriminating on the basis of national origin in the pricing of car loans.⁴⁴ The Department has also brought and resolved ECOA enforcement actions relating to auto finance against Toyota Motor Credit Corp.,⁴⁵ American Honda Finance Corp.,⁴⁶ and Fifth Third Bank,⁴⁷ which established settlement funds worth tens of millions of dollars to compensate borrowers injured by discriminatory pricing practices.

The Department's redlining work has not only obtained financial compensation, but also required banks to market to, and open locations in, previously unserved areas. For example, in *United States v. First Merchants Bank*,⁴⁸ a case alleging that the bank avoided serving predominantly Black neighborhoods in Indianapolis, the court approved a settlement that established a \$1.2 million loan subsidy fund, required the bank to devote \$500,000 toward advertising, community outreach and credit repair, and to open a branch in previously unserved areas of Indianapolis.⁴⁹ The Department has also partnered with the Consumer Protection Financial Bureau to fight redlining and obtained millions of dollars in relief.⁵⁰

Black or Hispanic borrowers higher interest rates than comparable white borrowers.

⁴⁴ See Consent Order, *United States v. Charter Bank*, 16-cv-413 (S.D. Tex. 2016), ECF No. 6. The Complaint is available at <https://www.justice.gov/crt/case-document/complaint-united-states-v-charter-bank-sd-tex>.

⁴⁵ Consent Order, *United States v. Toyota Motor Credit Corp.*, 16-cv-00725 (C.D. Cal. Feb. 11 2016), ECF No. 7.

⁴⁶ Consent Order, *United States v. American Honda Finance Corp.*, 15-cv-05264 (C.D. Cal. July 16, 2015), ECF No. 6.

⁴⁷ Consent Order, *United States v. Fifth Third Bank*, 15-cv-00626 (S.D. Ohio Oct. 1, 2015), ECF No. 3.

⁴⁸ *United States v. First Merchants Bank*, No. 19-cv-02365 (S.D. Ind. Aug. 12, 2019).

⁴⁹ See *Id.*

⁵⁰ See Consent Order, *Consumer Fin. Prot. Bureau v. Hudson City Savings Bank*, F.S.B., No. 15-cv-07056 (D.N.J. Nov. 2015), ECF No. 9 (consent order resolving redlining claims and requiring bank to establish a \$25 million loan subsidy fund, invest \$2.25 million for advertising, outreach, and financial education, and open two branches in previously unserved neighborhoods).

C. Pre-application testing can fill the gap

The focus on redlining and pricing enforcement leaves a potential gap in fair lending enforcement. As suggested by recent studies and by the differential treatment observed in *Guaranteed Auto Sales*, lenders may be unlawfully discouraging customers who walk in the door from applying for loans on the basis of race, sex, or national origin.⁵¹

As demonstrated by the *Guaranteed Auto Sales* case, testing can be used to fill the gap and identify discrimination occurring in the pre-application context. Matched-pair testing can be used to determine whether lenders and creditors are discouraging customers from applying for loans or credit and can lead to successful enforcement actions. Testing can uncover discrimination, including conduct that deters applicants from applying for credit in violation of ECOA, which might otherwise escape detection.

IV. Conclusion

Despite ECOA's prohibitions, protected borrowers continue to face discrimination in obtaining credit, including when trying to finance automobile purchases. Testing can be used to uncover discrimination that occurs in the credit industry at the pre-application stage—including the discouragement of customers from applying for credit.

Now in its thirtieth year, the Department's FHTP continues to investigate potential discrimination in lending, housing, and public accommodations. The FHTP welcomes U.S. Attorneys' Offices to refer potentially testable complaints, provide recommendations for systemic testing, or request testing to support a pre-investigation. In addition, the FHTP encourages Department supervisors to allow their non-attorney employees to volunteer to serve as testers in FHTP investigations.

⁵¹ See *supra*, note 33; see also ANNELISE LEDERE & SARA OROS, NAT'L CMTY. REINVESTMENT COAL., LENDING DISCRIMINATION DURING COVID-19: BLACK AND HISPANIC WOMEN-OWNED BUSINESSES, NATIONAL COMMUNITY REINVESTMENT COALITION (N.D.) (finding that non-white testers received significantly less information about PPP loan products than their white counterparts).

About the Author

Noah Sacks is a Trial Attorney in the Housing and Civil Enforcement Section. Before working at the Civil Rights Division, he was an Assistant U.S. Attorney for the District of the Virgin Islands. Noah works on fair housing, fair lending and zoning and religious land use matters.

The author wishes to thank Holly Lincoln, Director of the FHTP; Lucy Carlson, Deputy Chief of the Housing and Civil Enforcement Section; Varda Hussain, Special Litigation Counsel for Fair Lending; Carrie Pagnucco, Housing and Civil Enforcement Trial Attorney; and Greg Friel, Deputy Assistant Attorney General; for their contributions to this article.

Page Intentionally Left Blank

Addressing Discrimination Under the Immigration and Nationality Act: IER's Investigations and Outreach

Lisa Sandoval
Trial Attorney
Civil Rights Division
Immigrant and Employee Rights Section

Tamara Hoflejzer
Trial Attorney
Civil Rights Division
Immigrant and Employee Rights Section

I. Introduction

You likely remember your first day of work at the Department of Justice (Department). You met new colleagues, saw your office space for the first time, and attended orientation, where you completed a mountain of onboarding paperwork. One document that you may or may not remember completing was the Form I-9, or I-9 for short, which employers use to verify the identity and work authorization of the people they hire. For most people, it is probably a form they fill out and then promptly forget. For others, despite being authorized to work in the United States, an employer's misuse or misunderstanding of this form is a potential discriminatory barrier to employment. For instance, imagine a recently arrived refugee. She finally escapes danger and makes it to the United States. She gets a job to help support her family, and on her first day, she presents valid documents showing her permission to work. But because she isn't a U.S. citizen, her employer rejects those documents and delays her start date until she can present a driver's license and Social Security card, both of which can take weeks or months to obtain. Where does she turn for help?

The Civil Rights Division's Immigrant and Employee Rights Section (IER) may be able to help. IER enforces the anti-discrimination provision of the Immigration and Nationality Act (INA) by investigating and, when appropriate, filing an administrative lawsuit

against employers or other entities that violate this law.¹ IER also has a variety of public resources that assist both workers and employers. Section 1324b prohibits discrimination based on citizenship status (including immigration status) and national origin, “unfair documentary practices” (illustrated above through the example of the recently arrived refugee), and retaliation.

You may have worked with IER in the past, but even if you have not, IER may come knocking. IER notifies a U.S. Attorney’s Office (USAO) when it opens an investigation, settles a matter, or files a lawsuit in its district. IER also collaborates with USAOs in subpoena enforcement, which occurs when a target of an IER investigation fails to provide the information that IER requests. And USAOs have joined with IER to do outreach to stakeholders in their districts, helping to amplify IER’s public education efforts.

This article discusses IER’s history, the types of discrimination prohibited by the INA’s anti-discrimination provision, IER’s investigations—with a focus on administrative subpoena enforcement—and IER’s outreach and public resources.

II. IER’s history

IER was established through the Immigration Reform and Control Act of 1986 (IRCA),² which amended many parts of the INA. IRCA was the first federal law to prohibit employers from hiring undocumented individuals, and it imposed civil and criminal sanctions against employers for knowingly hiring such individuals. IRCA also established the employment eligibility verification process, which requires employers to verify that the people they hire are eligible to work in the United States by completing and maintaining Forms I-9. The Department of Homeland Security generally enforces these provisions of the INA (referred to as the “employer sanctions” provisions) and administers the Form I-9.

When Congress passed IRCA, it also created the anti-discrimination provision to prohibit discrimination based on a person’s national origin or citizenship status because of concerns that the newly enacted employer sanctions could result in discrimination against non-U.S.

¹ See Immigration and Nationality Act § 274B, 8 U.S.C. § 1324b (1952).

² Immigration Reform and Control act of 1986, Pub. L. No.99-603, 100 Stat. 3359.

citizens or anyone perceived as looking or sounding “foreign.”³ Indeed, Congress’s concerns were well founded. In 1990, a report by the General Accounting Office (now the Government Accountability Office (GAO)) concluded that employer sanctions resulted in widespread discrimination against non-U.S. citizens and others perceived as “foreign.”⁴

GAO’s conclusion was based, in part, on its survey of a sample of nearly 10,000 employers—representing 4.6 million employers in the nationwide survey population—to assess whether employers’ understanding (or misunderstanding) of IRCA resulted in discrimination.⁵ The GAO estimated that, as a result of IRCA’s employer sanctions, 209,000 employers began rejecting job applicants whose “foreign” appearance or accent led the employer to suspect the individual was undocumented.⁶ An estimated 346,000 employers said that they selectively verified employment authorization only for people who had a “foreign” appearance or accent.⁷ And some employers began both practices. The survey results also revealed that nearly 15% of employers began hiring *only* individuals born in the United States and implementing additional discriminatory policies.⁸

IER continues to battle these ongoing forms of discrimination through its enforcement work, hotlines, and public-facing webinars and presentations.⁹

III. Types of prohibited discrimination

The INA’s anti-discrimination provision prohibits four categories of conduct. Below are examples of each—in practice, of course, the facts constituting these forms of discrimination vary.¹⁰

³ GEN. ACCT. OFF., IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 2 (1990).

⁴ *Id.* at 3.

⁵ *Id.* at 27–28.

⁶ *Id.* at 50.

⁷ *Id.* at 6.

⁸ *Id.* at 43.

⁹ See *Settlements and Lawsuits*, DEP’T OF JUST., <http://www.justice.gov/crt/settlements-and-lawsuits> (updated Dec. 13, 2021), for more information about IER’s enforcement efforts and settlements.

¹⁰ Additional examples are available on IER’s website, including educational materials. *E.g.*, DEP’T JUSTICE., PROTECTING YOUR RIGHT TO WORK (2019).

A. Citizenship status discrimination

A staffing company hires only U.S. citizens based on an assumption about its clients' preferences.¹¹ A different company hires only U.S. citizens based on a mistaken belief that federal law requires this hiring restriction.¹² Or a farmer lays off her entire local workforce, including U.S. citizens and permanent residents, to replace them with agricultural guest-workers.¹³ Section 1324b prohibits discrimination against protected individuals based on citizenship status (including immigration status) in hiring, firing, and recruitment or referral for a fee.¹⁴ The statute defines "protected individuals" as U.S. citizens, U.S. nationals, recent lawful permanent residents, refugees, and asylees; thus, protection against citizenship status discrimination encompasses the immigration status of certain non-U.S. citizens.¹⁵ As a result, an employer might commit citizenship status discrimination by refusing to hire a protected individual, such as a refugee, based on his specific immigration status, even if the employer hires other non-U.S. citizens. The provision applies to employers that have four or more employees.¹⁶ Generally, such employers may not discriminate in hiring against protected individuals based on their citizenship (or immigration) status, unless required by law, regulation, executive order, or government contract.¹⁷

¹¹ For example, IER reached a settlement with a staffing company that imposed unlawful citizenship restrictions on certain job applicants based on assumptions about its clients' preferences. Press Release, Dep't of Just., Justice Department Settles with Texas-Based Staffing Company to Resolve Immigration-Related Discrimination (Jan. 14, 2021).

¹² IER also has reached settlements with employers who restricted hiring to U.S. citizens because of their mistaken understanding of U.S. law. *E.g.*, Press Release, Dep't of Just., Justice Department Settles Discrimination Claim Against Aerojet Rocketdyne, Inc. (May 17, 2021).

¹³ *E.g.*, Press Release, Dep't Just., Justice Department Settles Claim Against Florida. Strawberry Farm for Discriminating Against U.S. Workers (June 11, 2019).

¹⁴ 8 U.S.C. § 1324b(a)(1).

¹⁵ 8 U.S.C. § 1324b(a)(1), (a)(3); 28 C.F.R. § 44.101(c).

¹⁶ 8 U.S.C. § 1324b(a)(2)(A).

¹⁷ 8 U.S.C. § 1324b(a)(2)(C).

B. National origin discrimination

A restaurant refuses to hire a job applicant as a server because she does not have the same national origin as the country whose food the restaurant serves.¹⁸ Under Section 1324b, IER generally has jurisdiction over national origin discrimination in hiring and firing where an employer has four to fourteen employees.¹⁹ The Equal Employment Opportunity Commission (EEOC) has jurisdiction over national origin claims against employers with fifteen or more employees.²⁰

C. Unfair documentary practices

An asylee, when completing an I-9 form, provides his employer with a driver's license and unrestricted Social Security card—one possible combination of documents that, together, establish his identity and work authorization and satisfy I-9 requirements. Because the employer has a policy of requiring non-U.S. citizens to present an “immigration document,” the employer rejects these documents and requests that the asylee, instead, provide his Employment Authorization Document, commonly known as work permit. After the worker declines, the employer fires him for refusing to comply with the request for the specific document.²¹ The employer has committed what is known as an “unfair documentary practice,” the most common type of prohibited discrimination under the INA. Federal law allows all work-authorized individuals, regardless of citizenship or national origin, to choose which valid, legally acceptable documentation to present to demonstrate their identity and authorization to work in the United States.²² Unfair documentary practices occur when an employer or other entity requests specific, more, or different documents, or rejects valid documents because of an individual's

¹⁸ *E.g.*, Press Release, Dep't Just., Justice Department Settles National Origin Discrimination Claim Against New York Restaurant (Feb. 20, 2018).

¹⁹ 8 U.S.C. § 1324b(a)(1).

²⁰ 8 U.S.C. § 1324b(a)(2)(B); *see also* 42 U.S.C. § 2000e-2.

²¹ *E.g.*, Press Release, Dep't Just., Justice Department Settles with Georgia-Based Staffing Company to Resolve Immigration-Related Discrimination Claims (May 24, 2021).

²² 8 U.S.C. §§ 1324b(a)(6), 1324a(a)(1)(A).

citizenship status or national origin during the employment eligibility verification process, which involves the I-9 form.²³

Unfair documentary practices can occur during any stage of the hiring process. They may occur during the application and interview stages, onboarding, or re-verification.²⁴ For instance, an employer's request for specific documents based on citizenship status during the application stage, before any job offer is made, can constitute discrimination.²⁵

D. Retaliation

An employer suspends an employee because she called IER to ask for help addressing a concern that a company may be violating section 1324b.²⁶ Or an employer fires an employee for participating in an IER investigation. Section 1324b prohibits employers from intimidating, threatening, coercing, or retaliating against any individual for participating in an IER investigation or any other proceeding under section 1324b or otherwise asserting their rights under this law.²⁷

²³ The I-9 contains three sections: Employees complete section one, which collects background information and requires employees to attest under penalty of perjury to their citizenship or immigration status. Employers complete section two by examining documents that establish the employee's identity and work authorization. Employers complete section three to reverify an employee's work authorization that expires. The prohibition against unfair documentary practices is found at 8 U.S.C. § 1324b(a)(6).

²⁴ Re-verification is a process in which employers verify employees' work authorization again during employment, typically because employees showed documentation at hire that established temporary work authorization. 8 C.F.R. § 274a.2(b)(1)(vii).

²⁵ See *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 23 (2014); see also 28 C.F.R. § 44.101(j).

²⁶ See Press Release, Dep't Just., Justice Department Settles with Delivery Services Company. to Resolve Retaliation Claim (July 15, 2021), for an example of a recent IER settlement to resolve a retaliation claim.

²⁷ 8 U.S.C. § 1324b(a)(5).

IV. IER's investigations: obtaining the information needed to get the job done

A. Background on IER's investigative procedures

IER's investigations can originate from two sources. First, they may begin based on a charge filed by someone who believes that they have been discriminated against because of their citizenship status or national origin.²⁸ The INA's anti-discrimination provision requires IER to investigate all such charges.²⁹ Second, IER is authorized to open investigations on its own initiative.³⁰ If IER has a reason to believe that discrimination could be occurring, it may use its independent investigative authority to open an investigation or expand an existing investigation.³¹ USAOs are encouraged to contact IER if they come across possible discrimination that they believe might fall within IER's jurisdiction. IER investigates individual allegations of discrimination as well as patterns or practices thereof.

IER has access to a range of tools to carry out its enforcement mandate. The INA grants IER "reasonable access to examine evidence of any person or entity being investigated."³² The INA further authorizes IER to obtain a subpoena in aid of an investigation by applying to an administrative law judge (ALJ) at the Office of the Chief Administrative Hearing Officer (OCAHO), an administrative tribunal within the Department's Executive Office for Immigration Review. The ALJ then may issue the subpoena to IER for service on the investigated entity.³³

Employers under investigation or other third-party recipients of subpoenas may challenge a subpoena by filing a petition to revoke or modify the subpoena before OCAHO.³⁴ If an employer fails to comply with an OCAHO decision ordering compliance with a subpoena, IER

²⁸ 8 U.S.C. § 1324b(b)(1).

²⁹ *Id.*; see also 28 C.F.R. § 44.303(a).

³⁰ 8 U.S.C. § 1324b(d)(1).

³¹ *Id.*; 28 C.F.R. § 44.304(a).

³² 8 U.S.C. § 1324b(f)(2); 28 C.F.R. § 44.302(c).

³³ 8 U.S.C. § 1324b(f)(2); see also 28 C.F.R. § 68.25(a).

³⁴ 28 C.F.R. § 68.25(c).

may file an application to enforce the subpoena with the appropriate federal district court.³⁵

At the conclusion of IER's investigation, if IER finds there is reasonable cause to believe the employer has violated section 1324b, IER may attempt to settle the matter or seek authorization to file a lawsuit with OCAHO. If IER does not file a lawsuit within 120 days of receiving a charge, a charging party has the right to file suit directly with OCAHO.³⁶

B. Subpoena enforcement: IER's and USAOs' winning partnership

Before filing an application in federal district court to enforce a subpoena, IER reaches out to the USAO in the district to notify the office and discuss a plan for the USAO's role. USAOs have provided IER with invaluable assistance in this process, ranging from providing helpful insight as local counsel to participating in the litigation.

In recent years, IER and USAOs have successfully worked together on several subpoena enforcement matters, resulting in district courts' compliance orders that enabled IER to continue its investigations.³⁷

³⁵ "In case of contumacy or refusal to obey a subpoena lawfully issued under [section 1324b(f)(2)] and upon application of the administrative law judge, an appropriate district court of the United States may issue an order requiring compliance with such subpoena . . ." 8 U.S.C. § 1324b(f)(2). OCAHO case law clarifies that IER acts in OCAHO ALJ's stead in seeking enforcement in federal district court. *See In re Investigation of Creative Res. Pers., Inc.*, 12 OCAHO no. 1299 (2017); *In re Investigation of Wal-Mart Stores, Inc.*, 5 OCAHO no. 754, 264 (1995).

³⁶ 8 U.S.C. § 1324b(d)(1), (2).

³⁷ *See* Report and Recommendation of U.S. Magistrate Judge, United States v. Space Expl. Techs. Corp., No. 21-mc-00043 (C.D. Cal. Mar. 29, 2021), ECF No. 24 [hereinafter *SpaceX* Report and Recommendation]; Order Accepting Findings and Recommendations of U.S. Magistrate Judge, *Space Expl. Techs. Corp.*, No. 21-mc-00043, ECF No. 29 [hereinafter *SpaceX* Order Accepting Report and Recommendation]; Report and Recommendation of U.S. Magistrate Judge at 2, United States v. Engineered Metals Co., No. 15-cv-00933, (W.D. Tex. Jan. 31, 2017), ECF No. 19; Order Accepting Magistrate Judge's Recommendation, *Engineered Metals Co.*, No. 15-cv-0093, ECF No. 23 (holding employer in civil contempt for failure to comply with order enforcing IER subpoena and ordering employer to pay monetary penalty for certain period of non-compliance); United States v. Rodriguez, No. 19-cv-960 (E.D. Cal. Mar. 11, 2020).

1. Administrative subpoena enforcement: It's all in the relevant details

The test for administrative subpoena enforcement is well established and generally consistent across circuits; the sections below explain how the test applies to IER's subpoenas and present some recent examples of IER's work with USAOs on subpoena enforcement matters. Courts will issue an order to comply with an administrative subpoena if: (1) Congress granted the agency the authority to investigate; (2) the subpoenaed information is not too indefinite or, in a minority of circuits, the agency properly followed procedural requirements; and (3) the evidence is reasonably relevant to the investigation.³⁸

A district court's inquiry is narrow because judicial review of an investigation interferes with the proper functioning of the agency and delays resolving the ultimate question of whether the investigated entity violated the law.³⁹ Indeed, the Supreme Court has characterized a court's role as "a straightforward one": "If the charge is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer establishes that the subpoena is 'too indefinite,' has been issued for an 'illegitimate purpose,' or is unduly burdensome."⁴⁰

The first two factors, generally, are straight forward and easily met. The first factor, the agency's authority to investigate, narrowly focuses on whether section 1324b authorizes IER to investigate entities and issue subpoenas pursuant to those investigations.⁴¹ Analysis of the

³⁸ See *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)); *United States v. Fla. Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994) (internal citation omitted); see also *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) (applying the factor "procedural requirements have been followed"); Report and Recommendation, *U.S. Dep't of Just. v. Jonas*, No. 19-cv-30 (D.N.H. Nov. 1, 2018), ECF No. 11; Order, *Jonas*, No. 19-cv-30, ECF No. 18 (applying the factor "proper procedures have been employed in issuing the subpoena").

³⁹ *Fed. Express Corp.*, 558 F.3d at 848–49 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n.38 (1984)).

⁴⁰ *McLane Co. v. EEOC (McLane Co. I)*, 137 S. Ct. 1159, 1165 (2017) (citing *Shell Oil Co.*, 466 U.S. at 72 n.26).

⁴¹ 8 U.S.C. § 1324b(f)(2); 28 C.F.R. § 44.302(c); *SpaceX Report and Recommendation*, *supra* note 37, at 1; see Amended Report and

second factor is also usually straightforward—IER satisfies it when it obtains and serves a subpoena that is sufficiently definite or, in the minority of circuits, properly follows Department regulations for obtaining and serving the subpoena.⁴² In several circuits, a government official’s affidavit is sufficient to satisfy these factors, as well as relevance.⁴³

In contrast to the first two factors, relevance, the third factor, is at the heart of any subpoena enforcement matter and usually constitutes the lion’s share of a court’s analysis. While the relevance requirement is “not especially constraining,”⁴⁴ courts tend to conduct a thorough assessment of this factor. Relevance is “generously construed” to permit the agency “access to virtually any material that might cast light on the allegations against the employer.”⁴⁵ Indeed, the subpoena must be enforced unless the information sought is “plainly incompetent or irrelevant to any lawful purpose of [the agency].”⁴⁶ In some circuits, courts have found that relevance is construed even more broadly during an investigation than at trial.⁴⁷ Employers frequently argue that a subpoena seeks irrelevant information because the employer has allegedly not engaged in discrimination, and the charge or independent investigation is, therefore, meritless. But arguments attacking the merits of the complaint usually fail, as most courts heed the Supreme Court’s warning that the subpoena enforcement

Recommendation of U.S. Magistrate Judge, *Acosta v. GT Drywall, Inc.*, No. 17-mc-0006 (C.D. Cal. June 26, 2017), ECF No. 13 [hereinafter *GT Drywall, Inc.*, Amended Report and Recommendation] (finding the employer satisfied the first factor because “Congress has granted Petitioner the statutory authority to issue the Subpoena in connection with its . . . investigation”).

⁴² *Morton Salt Co.*, 338 U.S. at 652; *SpaceX* Report and Recommendation, *supra* note 37, at 1; *see also GT Drywall, Inc.*, Amended Report and Recommendation, *supra* note 41.

⁴³ *See, e.g., GT Drywall, Inc.*, Amended Report and Recommendation, *supra* note 41 (citing *FDIC v. Garner*, 126 F.3d 1138, 1142–43 (9th Cir. 1997)); *SEC v. Marin*, 982 F.3d 1341, 1357 (11th Cir. 2020); *Mazurek v. United States*, 271 F.3d 226, 230 (5th Cir. 2001); *In re McVane*, 44 F.3d 1127, 1136 (2d Cir. 1995) (“An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met.”).

⁴⁴ *Shell Oil Co.*, 466 U.S. at 68.

⁴⁵ *Id.* at 68–69.

⁴⁶ *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

⁴⁷ *EEOC v. Centura Health*, 933 F.3d 1203, 1207 (10th Cir. 2019); *EEOC v. McLane Co.*, 857 F.3d 813, 815 (9th Cir. 2017).

proceeding should not be used to “test the strength of the underlying complaint.”⁴⁸

As relevance is such a broad factor, and IER is entitled to a wide array of evidence during its investigation, the types of documents that IER seeks through a subpoena vary from investigation to investigation. Some non-exhaustive examples of evidence and witnesses that OCAHO ALJs have found to be relevant in IER subpoena litigation include Forms I-9 and associated attachments (that is, copies of the documents that employees present to prove their identity and work authorization, such as work permits, passports, and birth certificates); employers’ policies and procedures regarding their onboarding process, hiring practices, and employment eligibility verification practices; information about potential discrimination victims and other witnesses; and employers’ reasons for rejecting job candidates and terminating employees.⁴⁹

2. Defenses to subpoena enforcement

If the agency satisfies the above elements, the district court must enforce the subpoena, unless the party being investigated shows that the subpoena is either unduly burdensome or overbroad.⁵⁰ Establishing undue burden and overbreadth are high hurdles for employers to clear, and no employer has ever done so in an IER subpoena enforcement matter in federal court.

In arguing undue burden, the subject of a subpoena has the burden of proving that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.”⁵¹ Undue burden is often

⁴⁸ *McLane Co.*, 137 S. Ct. at 1165; *see also Shell Oil Co.*, 466 U.S. at 72 n.26 (“[A]ny effort by the court to assess the likelihood that the [agency] would be able to prove the claims made in the charge would be reversible error.”).

⁴⁹ *See, e.g., In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751, 238 (1995); *In re Investigation of Carolina Emps. Ass’n*, 3 OCAHO no. 455, 605 (1992); *In re Investigation of ABM Indus.*, 5 OCAHO no. 763 (1995).

⁵⁰ *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (describing the test established in *EEOC v. Child’s Hosp. Med. Ctr. Of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983)); *see McLane Co. I*, 137 S. Ct. at 1165; *see also Child’s Hosp. Med. Ctr. of N. Cal.*, 719 F.2d at 1428 (en banc) (overruled on other grounds).

⁵¹ *FTC v. Texaco, Inc.*, 555 F.2d 862, 883 (D.C. Cir. 1977); *see also EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981);

evaluated in terms of the projected financial cost of subpoena compliance, and failure to submit supporting evidence is usually fatal to an employer's argument.⁵² In distinguishing undue burden from "any burden," courts recognize that "[s]ome burden on subpoenaed parties is to be expected and is necessary" to further an agency's legitimate investigation, which is in the public's interest.⁵³ Thus, courts have not found that undue burden is established even when an employer offers credible evidence that compliance with a subpoena would involve substantial effort, including hundreds of hours of manual data gathering or review.⁵⁴

Overbreadth interrelates with relevance, which, as noted above, is broadly construed, so a subpoena is overbroad only if it seeks information so extensive that the subpoena amounts to a "fishing expedition."⁵⁵ Courts examine a subpoena's breadth in light of the agency's investigation.⁵⁶ Thus, IER subpoenas may be legitimately

FTC v. Rockefeller, 591 F.2d 182, 191 (2d Cir. 1979); New Orleans Pub. Serv. v. Brown, 507 F.2d 160, 165 (5th Cir. 1975).

⁵² Ord. Adopting the Magistrate Judge's Report and Recommendation and Granting the Petition for Enforcement at 16, *Elwell v. Bade*, No. 19-mc-00020 (S.D. Ind. June 16, 2020), ECF No. 26 ("Respondents have not offered any evidence that [subpoena compliance] will interfere with their business operations, prove too costly, or otherwise harm them."); Ord. and Memorandum at 11, *EEOC v. Sunoco, Inc.*, No. 08-MC-145 (E.D. Pa. Jan. 27, 2009), ECF No. 8 (rejecting an employer's general argument that compliance would be "'inordinate[ly]' and 'significant[ly]' cost- and time-intensive") (alteration in original); *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (declining to find undue burden where employer failed to offer specific estimate of the cost of compliance).

⁵³ *Texaco, Inc.*, 555 F.2d at 882.

⁵⁴ See *EEOC v. A'GACI, LLC*, 84 F. Supp. 3d 542, 552–53 (W.D. Tex. 2015) (explaining that undue burden is not established even where "hundreds of hours" of manual review and compilation of personnel data could be required); Order at 6–7, *EEOC v. UPS*, No. 06-MC-42 (D. Minn. Sept. 1, 2006), ECF No. 18 (no undue burden where compliance would take 400 hours).

⁵⁵ *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997) (citations omitted).

⁵⁶ See *Texaco, Inc.*, 555 F.2d at 882 ("There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations.").

broad to enable IER to obtain the information and documents necessary to conduct comprehensive investigations and determine whether employers violated section 1324b.

This issue was front and center in a recent subpoena enforcement matter in which a large employer argued IER's subpoena was overly broad because it requested certain records for all employees hired over a one-year period, specifically, copies of the documents employees had shown in the Form I-9 process.⁵⁷ The court rejected the employer's argument as a "non-starter" because such records were relevant to determining the employer's company-wide hiring practices, particularly in the context of a pattern or practice investigation.⁵⁸ The court also rejected the company's argument that the requested documents were "confidential" and, therefore, off limits.⁵⁹ While the INA places strict limits on the use of Forms I-9 and copies of documents shown in that process, IER has a statutory right to access this information, and the court held that the employer was "required by law to obtain, maintain, and disclose those I-9 records on demand."⁶⁰ The court, therefore, enforced the subpoena.⁶¹

V. IER's outreach efforts and public resources: An ounce of prevention is worth a pound of cure

Besides its investigations and other enforcement work, one of IER's most powerful tools for tackling discrimination is public education. IER is statutorily mandated to educate employers and workers about their rights, responsibilities, and remedies under the INA's anti-discrimination provision.⁶² IER, therefore, engages in substantial outreach efforts consisting of webinars and trainings and manages a hotline that both workers and employers can call with questions or

⁵⁷ See *SpaceX Report and Recommendation*, *supra* note 37, at 2.

⁵⁸ *Id.* at 8.

⁵⁹ *Id.*

⁶⁰ *Id.*; see 8 U.S.C. § 1324a(b)(3) ("[T]he person or entity must retain" a Form I-9 "and make it available for inspection by . . . the Special Counsel for Immigration-Related Unfair Employment Practices," the statutory head of IER).

⁶¹ *SpaceX Order Accepting Report and Recommendation*, *supra* note 37 (adopting magistrate judge's report and recommendation).

⁶² 8 U.S.C. § 1324b(l).

concerns about discrimination.⁶³ This outreach work has been crucial in helping to prevent unlawful discrimination. USAOs can play an important role in lifting up IER's public education efforts, and IER has appreciated USAOs' collaboration on outreach to stakeholders in their districts. USAOs can contact IER to discuss setting up presentations or disseminating information to the public about the law IER enforces and our hotlines.

On average, IER annually conducts over 100 presentations. During these events, IER discusses rights and responsibilities under the INA's anti-discrimination provisions, IER's enforcement processes, and IER's resources. IER's presentations are designed to be interactive for an audience of non-lawyers, and IER conducts many presentations in both English and Spanish.

Beyond presentations, IER's hotline is a constant resource and receives thousands of calls every year in a variety of languages.⁶⁴ Through the hotline, IER provides information and assistance to both workers and employers, and in certain situations, with a caller's consent, IER can informally reach out to an employer to resolve issues on the spot. These informal "interventions" achieve the remedies that would have otherwise taken months or years to obtain through the enforcement process. And in doing so, they save hundreds of workers' jobs a year by helping employers avoid improperly firing or failing to hire workers.

A hypothetical hotline call illustrates the effectiveness of this important resource. The recently arrived refugee, discussed at the beginning, calls IER's hotline, complaining that a hiring manager rejected her valid documentation in the Form I-9 process because she is not a U.S. citizen and won't let her work until she shows a driver's license and Social Security card, both of which can take weeks or months to obtain. An IER attorney contacts the caller's employer, with the caller's consent, to provide public information, explaining that the refugee's documentation, an I-94, is a valid type of document to show for the Form I-9, and employees get to choose which valid documents

⁶³ IER's website also has many educational resources for workers. See *Worker Information*, DEP'T OF JUSTICE, <https://www.justice.gov/crt/worker-information> (last visited Oct. 5, 2021). To find resources for employers, see *Employer Information*, DEP'T OF JUSTICE, <https://www.justice.gov/crt/employer-information> (last visited Oct. 5, 2021).

⁶⁴ In addition to IER staff who conduct work in additional languages, IER utilizes telephonic interpreters available to Department personnel.

to present during the I-9 process. The employer, wanting to hire the refugee (who was the best qualified candidate), is grateful for the information and decides to accept the refugee's documentation. The worker is thrilled to start her job without delay.

To advance public education, IER also works closely with federal, state, and municipal agencies and foreign governments. For example, IER has memoranda of understanding (MOUs) with the EEOC, the National Labor Relations Board, the U.S. Citizenship and Immigration Services, and the U.S. Department of Labor. IER also has MOUs with the embassies and consulates of five foreign governments.⁶⁵ IER's agency and consular relationships increase IER's ability to provide individuals with information about their rights and responsibilities under the INA and how to contact IER for assistance. Some of the MOUs also provide for cross-agency referrals and IER training for agency and consular staff.

VI. Conclusion

Over the years, IER has helped thousands of people facing discrimination to obtain or keep their jobs and recovered millions of dollars in back pay for victims of discrimination. IER's public education and outreach efforts help workers and employers avoid discrimination. And where prevention fails, IER's investigations help ensure that employers comply with the anti-discrimination provision of the INA. USAOs can play an important role in working with IER to get its message out and in helping to ensure that IER has access to the information it needs to complete its investigations and otherwise enforce the INA's anti-discrimination provision.

⁶⁵ Ecuador, El Salvador, México, Honduras, and Perú.

About the Authors

Lisa Sandoval has served as a trial attorney at IER since November 2019. Before joining IER, she worked at a different federal agency, where she investigated universities for compliance with Title IX, and at a boutique law firm in the private sector, where she practiced employment discrimination law. She began her career at the Department in 2012 as an Honors Attorney. She attended Vassar College and received her J.D. from American University Washington College of Law. She is admitted to practice law in New York and the District of Columbia.

Tamara Hoflejzer has been a trial attorney at IER since May 2021. Before joining IER, she served as a senior attorney at the U.S. Department of Labor's (DOL) Office of the Solicitor, where she advised agencies on issues relating to immigration law and international labor law. She began her career at DOL in 2013 as an Honors Attorney. She attended the University of California, Los Angeles, and received her J.D. from Cornell Law School. She is admitted to practice law in New York.

Note from the Editor-in-Chief

This issue on civil enforcement of civil rights is the first of two issues dealing with civil rights. As the esteemed Assistant Attorney General for the Civil Rights Division, Kristen Clarke, wrote in the Introduction, the work of the Civil Rights Division, partnered with United States Attorneys' offices nationwide, "helps to safeguard the civil and constitutional rights of our nation's most vulnerable communities." For federal attorneys, this issue will give you the blueprints for protecting these rights to prevent the victimization of individuals through police and penal misconduct; workplace, school, and housing sexual harassment; and housing, testing, lending, employment, and immigration discrimination. For the public, we hope this issue will expose you to the excellent work being done every day by those in the Department of Justice who fight the good fight.

The DOJ Journal staff would like to acknowledge Jessica Ginsburg for acting as a point of contact for this issue and the work of the Civil Rights Division in pulling everything together. These wonderful individuals recruited subject-matter experts and put together the list of topics. And thanks, of course, to our slate of authors, all outstanding in their respective areas of expertise.

In-house here at Office of Legal Education Publications, I'd like to acknowledge the hard work of Addison Gantt, Managing Editor; Phil Schneider, Associate Editor; and our law clerks Rachel Buzhardt, Kyanna Dawson, Rebekah Griggs, Lilian Lawrence, and William Pacwa. They all put in hundreds of hours to make this journal not only accurate, but also friendly to its readers.

And for all our readers, stay safe and well. We hope that'll you be around for our follow-up issue on criminal enforcement of civil rights.

Chris Fisanick
Columbia, SC
January 2022