Testimony before the U.S. House of Representatives, Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights and Civil Liberties
March 11, 2010

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Chairman Nadler, Ranking Member Sensenbrenner, Distinguished Committee Members, I am honored to appear before you again today. My name is Kenneth L. Marcus. I am the Lillie & Nathan Ackerman Chair in Equality & Justice in America at Baruch College of the City University of New York. In addition, I am a former General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity. I am also especially pleased to join at this table some highly respected experts whom I well remember from my time heading the U.S. Department of Housing and Urban Development's Office of Fair Housing & Equal Opportunity, including Shanna Smith of the National Fair Housing Alliance and John Relman of Relman Dane, as well as other experts whom I am pleased to meet today. The pursuit of fair housing for all Americans is indeed a matter of pressing concern, and I commend this subcommittee for its continuing oversight to ensure that the duty to affirmatively further fair housing is honored by this administration, by state and local governments, and by the whole housing community.

The problem of housing discrimination – actual, intentional bigotry based on race – remains a serious problem in the United States, although we have made dramatic and significant progress over the years. My distinguished former colleague and successor at the Office of Fair Housing and Equal Opportunity, John Trasviña, tells the story of

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HUD's recent successful settlement of an Alabama case against owners Wilbur and Julie Williams. In June 2008, as Assistant Secretary Trasviña has recently related, the Williamses drove by the house that they had rented to one Melissa Jones, and they saw her speaking to African American neighbors in their front yard. Later that day, Ms. Williams called Ms. Jones, and she alleged said, "If y'all want to have African Americans to visit, we're going to ask you to move...We're not having those people at our property. We own the property and…that's never happened and we're not going to start today with it happening." Ms. Williams alleged made other discriminatory comments as well. Such bigotry persists even today in the United States and, when it is found, it must be fought.

We know, however, that in the twenty-first century, those who harbor racial bias are seldom so overt in their expression. As racism has become socially stigmatized and legally regulated, most people who bear racial animus have learned to conceal their bias in ways that are difficult to identify or to prove. The disparate impact doctrine can be used to identify intentional discrimination which is hard to demonstrate under the doctrine of differential treatment. The Obama administration has recently announced, in various venues, that it would invoke disparate impact theories more aggressively than did the Bush Administration. Used judiciously, disparate impact can be a useful enforcement tool for identifying intentional or unconscious discrimination in circumstances where the discriminators' motivations are otherwise difficult to ascertain. Used improperly, however, it creates real problems of law and public policy.

In the fair housing context, the most obvious problem is that the applicable statute does not authorize it. The Fair Housing Act, unlike Title VII, does not expressly provide

a disparate impact cause of action. Nor does it contain language regarding "adverse[] affects" of the sort that has bolstered a disparate impact claim in other statutory contexts. Instead, its statutory language speaks in terms of discrimination "because of," "based on," or "on account of" various enumerated classifications. The Supreme Court has customarily interpreted such terms as providing an intent requirement. In this sense, reliance upon HUD's fair housing regulations unavoidably raises the prospect – absent legislation to incorporate a disparate impact theory – that its prosecutions exceed its statutory mandate. Indeed, President Ronald Reagan's signing statement for the 1988 Amendments insists "that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." In short, President Reagan admonished, "Title 8 speaks only to intentional discrimination." While HUD has long pursued disparate impact claims under Title VIII, the Supreme Court has not yet evaluated the conformity of those regulations with the underlying legislation. Several federal circuit courts have found disparate impact claims to be viable under the Fair Housing Act, but their determinations must be considered provisional until the Supreme Court settles the matter. If Congress believes that Title VIII should cover disparate impact, and wants to protect government officials from accusations that their prosecutions are *ultra vires*, it can of course amend the statute to provide an explicit basis for the use of this doctrine. If it chooses to do so, however, it should beware the broader risks posed by misuse of this doctrine.

The Supreme Court's recent decision in the so-called New Haven firefighters' case, *Ricci v. DeStefano*, raises the deeper problem that current disparate impact doctrine may violate the Equal Protection Clause of the U.S. Constitution. In that case, Justice Scalia observed that the Court's narrow opinion "merely postpones the evil day" the Court will have to decide the central, looming question: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" The same question arises with respect to the Fair Housing Act to the extent that it is interpreted to support disparate impact claims.

In a nutshell, the problem is that disparate impact doctrine, as it has evolved over the years, has come to encompass more than just intentional and unconscious discrimination. This broad doctrine has come to include a wide range of actions which have unintended adverse impacts on certain groups which are merely difficult to explain on non-racial grounds. This can lead housing providers or lenders to avoid legitimate criteria such as credit-worthiness or employment status which have legitimate (if difficult-to-prove) non-discriminatory rationales but adverse impacts on some racial groups. The problem is that these potential defendants would be forced to demonstrate a business "necessity" for the policy, and such demonstrations are hard to mount even when their validity is intuitively obvious. Some have argued that this has had a destabilizing influence on certain markets. Worse, the doctrine is sometimes used to pressure regulated entities – employers, for example, but perhaps also lenders or housing providers – to engage in quota-like behavior to avoid the prospect of disparate impact

liability. In other words, they are forced to use surreptitious means to "get their numbers right" in order to avoid disparate impact liability.

To the extent that any version of the disparate impact doctrine either constitutes or mandates race-conscious governmental actions for reasons other than the elimination of intentional or unconscious discrimination, I would submit that it is vulnerable to challenge under the Equal Protection Clause. As Justice Scalia's *Ricci* opinion acknowledges, "The question is not an easy one." It is not, however, an avoidable one. As Scalia observed, "the war between disparate impact and equal protection will be waged sooner or later... [and] it behooves us to begin thinking about how – and on what terms – to make peace between them." For this reason, I would urge that any disparate impact provision adopted by this Congress be drafted in a manner which would shield it from constitutional challenge. Mr. Chairman, I ask that my article on this topic, "The War between Disparate Impact and Equal Opportunity," 2008-2009 Cato Supreme Court Review 53-83, be included with and incorporated into my testimony. In that article, I have argued that a "good-faith" defense, if adopted by this Congress, could save disparate impact provisions from the constitutional challenges which might otherwise lead to their judicial invalidation.

While I have framed my remarks largely in terms of legal considerations, I should also observe that there are questions of equity and policy which also constrain proper uses of the disparate impact doctrine. As I have noted, the problem of actual, intentional discrimination remains a pressing one even today. It is my belief that the civil rights enforcement agencies of the United States, including the Office of Fair Housing and Equal Opportunity, have a duty to spend their scarce precious resources pursuing

precisely these forms of bigotry. To the extent that they may pursue more marginal cases, based on aggressive interpretations of law, to target disparities that are not based on either intentional or unconscious discrimination, they dilute their strength, divide their focus, and misuse their scarce precious taxpayer funds. People of good will may debate the wisdom or justice of governmental attempts to level disparities which do not arise from intentional or unconscious discrimination. Whatever their value, however, they are a different project from combating discrimination. Given the seriousness of racism, ethnic bias, and other forms of bigotry, it behooves civil rights enforcement agencies to focus their energies on their core mission of eliminating discrimination. This subcommittee can advance that mission by ensuring that legitimate law enforcement tools, including the disparate impact doctrine, are crafted and codified in a manner which focuses them on actual discrimination and shields them from legal challenge.