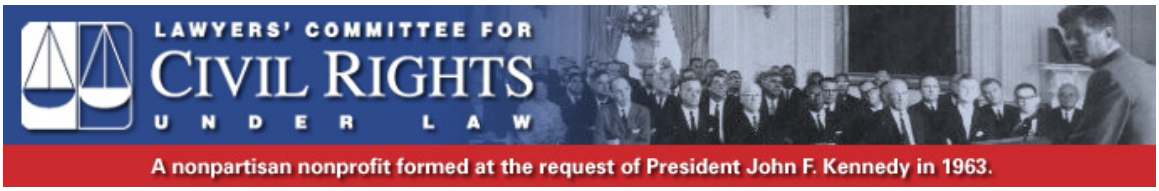

TESTIMONY OF AUDREY J. WIGGINS
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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

UNITED STATES HOUSE OF REPRESENTATIVES
JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
"ENFORCEMENT OF THE FAIR HOUSING ACT OF 1968"

June 12, 2008

I. Introduction

Good morning. I am Audrey Wiggins, Director of Fair Housing and Environmental Justice with the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). I would first like to thank Chairman Nadler, Ranking Member Franks, and the members of the Subcommittee for holding this important hearing on the enforcement of the Fair Housing Act ("FHA") at this point in history, when the subprime mortgage crisis, unprecedented foreclosure rates, and limited available affordable housing on the Gulf Coast after Hurricanes Katrina and Rita make it all the more critical that housing choice be unfettered by discrimination. In particular, thank you for providing the Lawyers' Committee with the opportunity to participate in this discussion.

The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization that has been in existence for over 40 years. It was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under the law. For 45 years, the Lawyers' Committee has advanced racial and gender equality through a highly effective and comprehensive program involving educational opportunities, fair employment and business opportunities, community development, fair housing, environmental justice, and meaningful participation in the electoral process.

My testimony today addresses the failures of the U.S. Department of Justice ("DOJ") and the U.S. Department of Housing and Urban Development ("HUD") to enforce the FHA. Communities have been obligated to act as principal prosecutors of the Fair Housing Act, as a result of DOJ's de-emphasis, if not refusal, on bringing disparate

impact cases based on race, failures in the complaint process of HUD's Office of Fair Housing and Equal Opportunity ("FHEO"), and a cut in funding to private and local government fair housing agencies, have burdened communities to act as principal enforcers of the Fair Housing Act. Although the law correctly empowers individuals to bring fair housing cases, the intent of the law does not require that individuals act alone. Indeed, DOJ and HUD have unique authority and resources to enforce the Fair Housing Act, particularly in investigating and litigating systemic, pattern and practice, as well as disparate impact cases. It is imperative that DOJ and HUD, in fulfilling their obligations under the FHA, apply their resources to challenge the systemic, widespread practices that contribute to housing discrimination.

The Lawyers' Committee, and its sister organizations in the fair housing community, now bridge the gap left by these government agencies. The docket of the Lawyers' Committee's Fair Housing project reflects the type of impact litigation that DOJ should join us in continuing to champion.

I am honored to provide this testimony as an advocate for those brave enough to challenge the discriminatory practices, particularly those committed by municipalities, which DOJ and HUD have left unchecked. My remarks today will primarily use Lawyers' Committee's litigation lens through which to illustrate how communities have emerged as private attorneys general in the enforcement of the Fair Housing Act. By sharing the experiences of our clients with you, I hope to call DOJ and HUD to action. I believe that these agencies can and should recommit resources to again focus on violations of the FHA that have a systemic and disparate impact on people of color and other protected classes under this law.

I am confident that members of this Subcommittee are already familiar with the statistics of the nature, number, and type of cases filed by the Housing Section of DOJ as well as the number of complaints received by FHEO. This testimony will focus on DOJ and HUD's missed opportunities to engage in disparate impact litigation based on race, findings by GAO on the effectiveness and timeliness of the FHEO complaint process, and how the lack of Fair Housing Initiatives Program ("FHIP) and Fair Housing Assistance Program ("FHAP") funding place private fair housing agencies as well as state and local housing agencies in jeopardy.

II. Deemphasis of Race-Based FHA Violations by DOJ and HUD

The FHA empowers DOJ to bring lawsuits where there is a "pattern or practice" of discrimination as well as cases involving acts of discrimination that raise "an issue of general public importance."[1] In addition, under the 1988 Amendments to the FHA, DOJ must commence a civil action in a United States district court within 30 days of HUD issuing a charge of discrimination on behalf of individual victims of discrimination if the aggrieved person elects to have the claims heard in federal court, rather than in an

[1] 42 U.S.C. § 3614.

administrative proceeding.[2] The 1988 Amendments also require HUD to refer all complaints alleging "the legality of any State or local zoning or other land use law or ordinance" to DOJ for appropriate action.[3]

DOJ is tasked to be the chief prosecutor against violators of the FHA. The agency's mandate to enforce both the letter and the spirit of housing laws is clear. Throughout this Administration, however, DOJ has placed a greater emphasis in disability-based housing discrimination cases and reduced FHA cases alleging discrimination against other protected classes under the FHA. Although combating housing discrimination based on disability is critical, DOJ should seek a more comprehensive and balanced approach to fair housing enforcement. In addition, DOJ's approach must not only focus on matters which arise out of acts of intentional discrimination, but also on those policies and practices which may be facially neutral, but have a disparate impact on the classes of people the FHA seeks to protect.

In 2003, DOJ announced at a HUD HUB Director's meeting that it will no longer pursue disparate impact cases involving housing discrimination.[4] In looking at the number and types of cases filed by DOJ in the past five years, it appears that the agency has kept its promise. Indeed, the Justice Department has filed fewer cases over the past five years than it filed during the period from 1999 to 2002. The DOJ filed 35 race-based pattern or practice cases between 1999 and 2002, but only filed 24 such cases between 2003 and 2007.[5] Similarly, while the Department filed 24 pattern or practice cases between 1999 and 2002 based on its testing program, it only filed 11 such cases between 2003 and 2007.[6] The reduction in enforcement is mirrored at HUD where the number of fair housing complaints has declined dramatically, falling from a peak of more than 6,500 cases in 1995 to less than 2,500 in 2007.[7]

The above numbers are alarming particularly in light of DOJ's well-publicized implementation of its "Operation Home Sweet Home" initiative in 2006. Per DOJ's website, Operation Home Sweet Home would target testing efforts in areas recovering from the effects of Hurricane Katrina and in areas where the disaster's victims have been relocated.[8].According to a press release issued in April 2008, DOJ "conducted more than 500 paired tests, 20 percent more than the number conducted in any other year since […] 1991."[9]

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[2] 42 U.S.C. § 3612.

[3] 42 U.S.C. § 3610(g)(.2)©3612

[4] National Fair Housing Alliance, Dr. King's Dream Denied;*:* Forty Years of Failed Federal Enforcement: 58 (Apr. 2008 Fair Housing Trends) ("NFHA Report (2008) (hereinafter "NFHA 2008 Fair Housing Trends Report"), p. 58[4] NFHA's report p.58.").

[5] Id. at 57.

[6] NFHA 2008 Fair Housing Trends Report Id. at 57.

[7] NFHA 2008 Fair Housing Trends Report Id. at 51.

[8] DOJ's Fact Sheet on the Operation Home Sweet Home initiative is available at http://www.usdoj.gov/opa/pr/2006/February/06_opa_079.html

[9] DOJ, *Department of Justice Celebrates 40th Anniversary of the Fair Housing Act* (Apr. 17, 2008), available online at <http://www.usdoj.gov/opa/pr/2008/April/08_crt_314.html>,

As DOJ reduced the number of race-based disparate impact cases it filed, the number of these types of suits increased on the docket of the Lawyers' Committee. Although DOJ should be the primary enforcer of discrimination by municipalities, in the cases I will now describe, neither DOJ nor HUD used its authority or resources to challenge the violations of the FHA discussed below.

Many of us still carry the visions of people trapped on the roofs of their homes and jammed in municipal arenas, as landmarks crumbled, and thousands of homes and the families were devastated after Hurricanes Katrina and Rita hit Louisiana, Mississippi and Alabama. It was with this backdrop of human crisis not seen by our country in over a century that a Louisiana Parish issued an ordinance which prevented single-family homeowners from renting to anyone with one exception -- a blood relative. The parish I described is St. Bernard, which borders Orleans and other Louisiana parishes that were pummeled by Katrina and Rita. Its population is roughly 90 % white. In essence, this "blood only" ordinance effectively limited rentals to whites only, since whites own virtually all single-family homes in the parish. (93 % white according to 2000 census data).Thus the ordinance had a disparate impact on potential renters of color. Although HUD investigated complaints concerning this ordinance, did DOJ challenge this ordinance under its authority to combat acts of discrimination which raise "an issue of general importance? NO. Unfortunately, neither HUD nor DOJ ever took any enforcement action with respect to this blatantly discriminatory ordinance. Based upon the investigation conducted by the Greater New Orleans Fair Housing Action Center, led by James Perry, the Lawyers' Committee filed a federal court complaint against St. Bernard's Parish.[10]

DOJ has the primary authority to challenge exclusionary zoning ordinances. In addition to the St. Bernard Parish case, the Lawyers' Committee bridges the gaps left by the lack of vigorous enforcement in this area by DOJ, by bringing several cases challenging discriminatory zoning. The Lawyers' Committee filed cases against the governments of Garden City and Huntington on Long Island, New York. The Garden City case[11] challenges the city's rezoning of a large parcel of County-owned real estate to prevent the development of affordable multi-family housing disproportionately needed by African-American families in Nassau County. Garden City's rezoning perpetuates segregation in the County and continues the exclusion of virtually all minorities from Garden City by preventing the development of affordable housing which would provide integrated housing opportunities for African Americans.

At issue in the Huntington case[12] is the rezoning of the largest parcel of residential real estate remaining for development in Huntington. The Town's proposed plan would create a new zoning category to develop an upscale residential community designed

[10] *Greater New Orleans Fair Housing Center v. St. Bernard Parish* (CV No. 06-7185 E.D. LA). A consent decree permanently enjoining an ordinance requiring that rentals only be made to blood relatives, or the "blood-only" ordinance, and requiring reporting by St. Bernard Parish concerning decisions on special use permits for home rentals was entered in resolution of this case,

[11] *ACORN, et al. v. Nassau County, et al* (05-2301 E.D.N.Y)

[12] *Fair Housing in Huntington Committee v. Town of Huntington*, (CV 02-2787 E.D.N.Y).

primarily for senior citizens. Approval of this plan will maintain the segregated housing patterns in the Town by concentrating low- and moderate-income housing in the racially impacted areas of the Town.

Although both HUD and DOJ have for years noted that the Town of Huntington lacked affordable multifamily housing, which may be in violation of federal laws, neither agency filed a complaint against the Town. For example:

- Since at least 1997, HUD has expressed concerns regarding the Town's compliance with fair housing and civil rights laws. Specifically, in 1997, HUD found that the Town still had not addressed the "problem of the lack of multifamily housing for low and moderate income persons outside of the racially-impacted urban renewal area . . ." In fact, HUD found that the Town did not appear to affirmatively further fair housing as indicated by its signed certification for Community Development Block Grant funds.[13]

- In 1998, HUD noted those same problems and directed the Town to address them. Specifically, HUD noted the Town's failure "to facilitate the construction of Matinecock Court, beyond carrying out the rezoning mandated by the Federal Court, or to support an 84 unit mixed-income project proposed by the Huntington Housing Authority, which could expand rental housing opportunities."[14]

- HUD's review of the Town's 1999 Action Plan prompted it to refer the matter to the United States Department of Justice "based upon information reflecting a possible pattern or practice of racial discrimination in violation of the Fair Housing Act."[15]

The "concerns" noted by DOJ and HUD should have turned into action. When the federal government fails to act, the burden falls on the shoulders of the communities that have been adversely impacted by those acts.

The failure to act in either the Garden City or Huntington situations reflect DOJ's restriction of its caseload only to suits where there is evidence of intentional discrimination and leaves policies with large discriminatory impacts, like Garden City and Huntington unchecked. Systemic exclusionary zoning cases, for example, frequently continue and exacerbate widespread residential segregation patterns that the FHA was designed to combat and often can be attacked only through a disparate impact theory of liability. DOJ's refusal to pursue such claims leaves a major gap in efforts to challenge zoning decisions which perpetuate residential segregation.

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[13] HUD Fair Housing and Equal Opportunity Monitoring Review of the Town of Huntington, New York at p. 20 (November 26, 1997)

[14] Letter from Joseph A. D'Agosta (HUD) to Frank P. Petrone (Huntington Town Supervisor) regarding the Town's 1998 Consolidated Plan (August 7, 1998).

[15] Letter from Joseph A. D'Agosta (HUD) to Frank P. Petrone (Huntington Town Supervisor) regarding the Town's 1999 Consolidated Plan (August 5, 1999).

HUD has demonstrated its lack of focus on allegations of racial discrimination under the FHA, and the agency has also failed to enforce nondiscrimination provisions in its programs which impact the availability of housing units to persons of color. Complainants for whom HUD has issued a charge of discrimination may elect an administrative proceeding, and have their cases heard by an Administrative Law Judge ("ALJ").[16] A development that reflects the federal government's de-emphasis on race-based fair housing cases is the absence of an ALJ to hear discrimination matters at HUD. In February 2008, HUD informed NFHA staff that it has NO ALJs to hear fair housing cases, so ALJs at other agencies must hear these matters.[17]

The Town of Smithtown, New York has a Section 8 program with enough applicants to require a waiting list. The Lawyers' Committee challenge to the Town's use of a residency preference exemplifies HUD's failure to enforce its nondiscrimination regulations.[18] For example, HUD regulation 24 C.F.R. § 982.207(b) requires that public housing authorities (PHAs) certify in their annual plans that their policies governing the eligibility, selection, admissions, and preferences for Section 8 vouchers will be carried out in conformity with civil rights laws such as the Fair Housing Act and Title VI of the Civil Rights Act of 1964. However, HUD has not taken action against the numerous PHAs whose use of residency preferences in their waitlist selection policies discriminate against minorities. In the *Vargas* case, it is alleged that Smithtown's residency preference is applied n a manner that intentionally prevents anyone who does not live or work in Smithtown from receiving a Section 8 housing voucher through Smithtown's Section 8 program, until *every* person on the waitlist who lives or works in Smithtown has received a voucher. Since Smithtown is more than 93% white, the result of Smithtown's residency preference is that Section 8 housing vouchers are effectively unavailable to minorities. It is incumbent upon HUD to enforce its nondiscrimination regulations and to ensure that HUD money is not provided to PHAs that promote segregation and exclude minorities from receiving federal government benefits.

Like the Section 8 program, HUD has also exhibited a lack of enforcement of the nondiscrimination provision of its CDBG program regulations. HUD should ensure that PHAs receiving federal CDBG dollars fulfill their obligations to affirmatively further fair housing with those funds. A lack of vigilance has required nongovernmental entities like the Lawyers' Committee and other nonprofit or public interest firms to act as private attorneys generals. A recent example of this phenomenon is the lawsuit brought by Relman and Dane, a civil rights boutique firm, against Westchester County, New York, challenging the County's practice of certifying compliance with fair housing laws without conducting any analysis of impediments to fair housing based on race. Relman was forced to bring a qui tam action on behalf of the United States for the County's false certifications to the federal government.

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[16] 42 U.S.C. § 3612.

[17] NFHA 2008 Fair Housing Trends Report ,, p.54

[18] *Vargas et al. v. Town of Smithtown*. (CV 07 5202 E.D.N.Y. Dec. 13, 2007).

Worse than HUD's lackluster enforcement of its certification requirements is its waiver of certain certification requirements following the destruction of Hurricane Katrina. One such egregious incident is HUD's approval of the Mississippi Development Authority's (MDA) proposed Port of Gulfport Restoration Program (Port proposal) that would divert $600 million dollars of the CDBG money previously allocated to housing assistance to restoration of the Port. The Port proposal is the most recent and most troubling example of several requests from MDA to HUD to waive the CDBG program's requirement that funds benefit low- and moderate-income persons seeking to recover from Hurricane Katrina. The Lawyers' Committee, in conjunction with its affiliate, the Mississippi Center for Justice, has filed comments in opposition to waivers sought from this requirement and to the diversion of CDBG funds desperately needed for provision of affordable rental housing that allowed revitalization of the port. Oddly, former HUD secretary Alphonso Jackson testified in a Congressional hearing on March 11, 2008, that he felt that he had no choice but to approve the waiver. He went on to state that if he had a choice he would not have approved the waiver. Surely the Housing and Community Development Act of 1974 does not require HUD to be a rubber stamp to states who want to use its dollars for something other than the development of fair housing units.

Under the special appropriation after Hurricanes Katrina and Rita, "the aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons."[19] The 50% requirement can only be waived if there is a "finding of compelling need."[20] HUD has already approved several requests by Mississippi to waive this requirement, claiming three prior waivers in other redevelopment plans based on State commitments that the needs of the low- and moderate-income population would be addressed in the future, and assertions that, when all the CDBG-funded programs have been offered, low- and moderate-income participation will have been significant. Indeed each HUD waiver includes almost identical language about these commitments. Yet, as each waiver was granted, Mississippi strayed further from its promise and from the primary purpose of the CDBG grant program. Now, after all these proposals have been submitted, 80% of the Mississippi CDBG allocation has been granted waivers from the 50% requirement.

In the Port proposal, the State strays even further from the primary purpose of the CDBG appropriation by seeking approval of the *diversion* of funds allocated to housing recovery to a non-housing project that will do nothing to address the housing crisis, and little to benefit low- and moderate-income persons.[21]

Under the Housing and Community Development Act of 1974, that recipients of Community Development Block Grants must prepare an Analysis of Impediments (AI) to

[19] 71 Fed. Reg. 7666, 7671 at ¶ 20(i) (2).
[20] Pub. L. No. 109-148, 119 Stat. 2780 (Dec. 31, 2005).
[21] Only about 11% of the Port's employees are low or moderate income persons. Mississippi claims that it will be able to hire new employees who will be 50% low and moderate income but does not explain how they will do this.

Fair Housing within their respective jurisdictions. However, estimates indicate that fewer than 10% of the CDBG entitlement jurisdictions have programs to address fair housing concerns. In addition, many jurisdictions fail to update their AIs when conditions in their communities change, to initially submit adequate AIs, or to address the issues that their AIs highlight. This gross lack of compliance with the Housing and Community Development Act's statutory requirement continues to exist because thirty-four years after its passage, HUD has yet to promulgate regulations to enforce compliance with this provision of the law.[22]

II. Inadequacies of FHEO's Complaint Process

In 2004 and 2005, the General Accounting Office issued reports analyzing the intake and investigation practices of HUD's FHEO office.[23] These reports were prompted by continued concerns about the timeliness and effectiveness of HUD's enforcement process, particularly in the 100-day investigation window mandated by the FHA. Analyzing data from 1996 to 2003, the GAO found that 39% of HUD's open investigations were over 100 days old.[24] HUD has taken an average of over 470 days to close cases.[25]

FHEO uses an automated tracking system to record contacts dealing with fair housing inquiries or intakes. FHEO analysts are supposed to interview each complainant to obtain any additional information necessary to perfect the claim and then determine if the office has jurisdiction over the complaint.

In its 2004 report, of the six recommendations GAO made to improve the management and oversight of the fair housing enforcement process,[26] GAO made only one primary request for inclusion in HUD's five-year Departmental Workforce Plan. Specifically, GAO recommended that in creating the plan "HUD fully consider a wide range of strategies to make certain that FHEO obtains and maximizes the necessary skills and competencies needed to achieve its current and emerging mission and strategic goals with the resources it can reasonably expect to be available."[27]

In its 2005 report, GAO again made several recommendations. Specifically, GAO recommended that "the HUD Secretary direct the Assistant Secretary of FHEO

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[22] NFHA 2008 Fair Housing Trends Report, Id. at 36.
[23] U.S. Gov't. Accountability Office, Publ'n No. GAO-04-463, Opportunities to Improve HUD's Oversight and Management of the Enforcement Process (April 2004), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-04-463 ("GAO Report 1"); U.S. Gov't. Accountability Office, Publ'n No. GAO-06-79, HUD Needs Better Assurance That Intake and Investigative Processes Are Consistently Thorough (October 2005), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-06-79[hereinafter "GAO (Report 2")..
[24] GAO Report 1, *supra*, note 23 at 1.
[25] Residential Segregation and Housing Discrimination in the United States, Violations of the International Convention on the Elimination of All Forms of Racial Discrimination; A Response to the 2007 Periodic Report of the United States of America, Report to the Committee on the Elimination of Racial Discrimination (2008) ("Report to CERD") p., 20.
[26] GAO Report 1, *supra*, note 23 at 57.
[27] GAO Report 1, *supra*, note 23 at 58.

to...[establish] documentation standards and appropriate controls to ensure that required notifications…are made and received, and that the 100-day letters are sent before an investigation has reached 100 days," and "[work] with FHAP agencies and others to develop best practices for offering conciliation throughout the complaint process, including at its outset…[and ensure] that investigators comply with requirements to document conciliation attempts, and complainants' or respondents' declination of conciliation assistance."[28] Even with these recommendations, problems with the FHEO complaint process are ongoing.

To illustrate this point, I want to share the story of one of our clients who filed a complaint with HUD shortly after Hurricanes Katrina and Rita. James Perry, executive director of Greater New Orleans Fair Housing Action Coalition, found what he believed to be discriminatory advertising of housing on an internet site where individuals offered space to people displaced by the hurricanes. The ads he saw agreed to house only certain people. For instance: "not racist but white only," "2 bedrooms, pvt bath, use of whole home, for white family of up to 5" and "[w]e would prefer a middle class white family."

If those words were printed in a newspaper, they would be a clear violation of Section 804(c) of the Fair Housing Act which prohibits notices, statements or advertising with respect to the sale or rental of housing "which indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin. . . ."[29] Mr. Perry, with the assistance of the Lawyers' Committee, filed several complaints with HUD about these ads in December, 2005. To date, more than two years later, Mr. Perry's complaint is still pending with FHEO.

IV. Lack of Funding Equals Lack of Enforcement

Declining budgets, a shrinking enforcement capacity and an increasingly narrow scope of enforcement are especially alarming in light of the increased need for a watchdog in the Gulf Coast as communities recover from Hurricane Katrina, as well as in other parts of the country where the biases implicit in racial hostilities reveal themselves through the exclusion of multi-family housing in municipal zoning, steering practices, and the apparent disparate impact of the policies and practices of certain lenders. For example, although the budget for FHEO has increased since 2000, these increases have not kept pace with inflation.[30]

HUD's FHIP Funding for the grant program which funds private fair housing entities, has remained relatively stagnant in nominal terms and consequently, has declined in real dollars over recent years after declining substantially from a height of

[28] GAO Report 2, *supra*, note 23 at 73.

[29] 42 U.S.C. § 3604.

[30] The Report to Cerd, 22.

$26 million in 1995.[31] As a result, nearly a quarter of Fair Housing organizations have either been forced to scale back their enforcement activities or to close altogether.[32]

In this year's budget, a cut of $1 million is proposed for state and local housing agencies funded through the Fair Housing Assistance Program, which is incredibly severe, given that agencies funded by FHIP and FHAP filed 91% of all fair housing complaints in 2007.[33] As DOJ and HUD focus their resources away from race based impact litigation, the worst thing that could happen is for communities to have the advocates they know and trust stripped of any ability to wage war against discrimination. Alarmingly, while the amount of race-based systemic litigation filed by DOJ is decreasing and the number of race-based cases processed by HUD is falling, one quarter of all fair housing centers throughout the country have either closed or are at risk.[34]

V. Implications of Ledbetter

The Lawyers' Committee has been on the forefront of advocating for a fix to the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[35] Although *Ledbetter* is a case examining the statute of limitations period for an employment discrimination case, the application of the Court's holding is now impacting how the statute of limitations periods in fair housing and fair lending matters is interpreted. The question facing the Court was whether each discriminatory paycheck received by Lilly Ledbetter from Goodyear constituted an unlawful employment practice, thus triggering the 180-day EEOC charging period, or if Ms. Ledbetter was limited to filing her Title VII sex discrimination claim within 180 days of Goodyear's initial discriminatory conduct. In a 5-4 decision, the Supreme Court found in favor of Goodyear, holding that the EEOC charging period for Title VII claims is triggered when a discrete, discriminatory act takes place.[36] The charging period does not reset after every subsequent act that results from the past discrimination.[37]

As Justice Ruth Bader Ginsburg pointed out in dissent, the *Ledbetter* decision nearly foreclosed pay discrimination challenges under Title VII because employees will rarely be able to detect pay-based discrimination within 180 days of an initial, discriminatory decision.[38] In response to *Ledbetter*, Representative George Miller (D-CA) introduced the Lilly Ledbetter Fair Pay Act,[39] to reverse the Supreme Court's severe interpretation. The Act would unambiguously allow plaintiffs to file Title VII claims with

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[31] This discussion is based on annual dollar amounts equaling the total annual FHIP appropriations less any earmarks within said appropriations that are designated for non-enforcement activities such as research. Id. at 60.
[32] NFHA 2008 Fair Housing Trends Report, p.61.
[33] National Urban League Policy Institute Housing Discrimination Fact Sheet, p. 2. Available at www.nul.org/policyinstitute.html.
[34] NFHA 2008 Fair Housing Trends Report, p.61
[35] 127 S.Ct. 2162 (2007).
[36] *Ledbetter*, 127 S.Ct. at 2169.
[37] *Id*.
[38] *Ledbetter*, 127 S.Ct. at 2178-79, 2181-82 (Ginsburg, J., dissenting).
[39] H.R. 2831.

the EEOC within 180 days of a discriminatory paycheck. The bill was passed by the House of Representatives in July 2007, but has not passed in the Senate. Without further legislative action, there is a threat that *Ledbetter* could be further perverted to reach fair housing and lending cases, severely limiting the ability of plaintiffs to challenge discriminatory conduct in the housing context.

The application of the *Ledbetter* rule to fair housing and fair lending cases would frustrate existing precedent that allows plaintiffs to challenge "continuing violations" of the FHA. For over 25 years, the U.S. Supreme Court has recognized that some housing practices involve a pattern, rather than specific incidents, of discrimination. For these continuing violations, the limitation period begins fresh with each wrong.[40]

In an en banc Ninth Circuit Court of Appeals decision issued just last month, the court applied the *Ledbetter* doctrine in the area of design and construction. In *Garcia v. Brockway*, the Ninth Circuit held that the FHA statute of limitations starts to run upon completion of design and construction of a non-complying building, rather than at the time the disabled individuals rent the inaccessible unit.[41] The Ninth Circuit's opinion demonstrates the confusion that lower courts are likely to face if they feel compelled to consider *Ledbetter* in fair housing disputes that have typically been governed under the continuing violation doctrine. Citing *Ledbetter*, the Ninth Circuit unconvincingly attempted to explain why the failure to design and construct accessible dwellings was a discrete, rather than continuous violation. The Court reasoned that "[p]laintiffs and HUD confuse a continuing violation with the continuing effects of a past violation … Here, the practice is "a failure to design and construct," which is not an indefinitely continuing practice, but a discrete instance of discrimination ...."[42]

As Judge Pregerson pointed out in the dissent, holding that these design and construction violations represent continuing violations of the law and rejecting *Ledbetter* would be more aligned with the breadth and purpose of the FHA, which is to ensure that disabled individuals have equal access to multifamily housing.[43] In short, this case is illustrative of the challenges that lower courts are likely to face, unless Congress takes action to prevent *Ledbetter* from being used to limit the rights of fair housing plaintiffs.

The continuing violation doctrine has been applied to fair lending challenges.[44] The *Ledbetter* decision, along with subsequent rulings like the *Garcia* decision described above, might endanger the standing of those who fell prey to predatory lenders.

Like pay discrimination, fair housing and fair lending violations are often incredibly difficult to detect,[45] which would make the *Ledbetter* rule of a short challenging period very destructive. In the fair lending area, given that most mortgage

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[40] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114 (1982).
[41] *Garcia v. Brockway*, 2008 U.S. APP. LEXIS 10258 (9th Cir. 2008).
[42] Id. at *12.
[43] Id. at *27 (Pregerson, J., dissenting).
[44] *Ramirez v. GreenPoint Mortgage Funding, Inc.*, 2008 WL 2051018 (N.D. Cal. 2008).
[45] See, for example, Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 Wash. U. L. Q. 1153, 1191-95 (1999).

loans run for fifteen- or thirty-year terms, it would be illogical to allow any further narrowing of a complainant's window of opportunity to challenge discriminatory treatment.

V. Why are we at odds?

I am sure that each witness you hear from today will tell you that they believe housing choice free from discrimination is fundamental to equal opportunity and a fair society. I am sure we would all tell you that whether you are Asian American in Gulfport, Mississippi, African American in Detroit, Michigan, Hispanic in Gary, Indiana or any other person of color, no one should deny you a housing unit because of your race. Then why are housing advocates and the government agencies empowered to enforce the FHA at odds?

Why is it that housing advocates want to safeguard the broad protections afforded by the FHA, while DOJ and HUD do not oppose measures and interpretations of the FHA that would narrow its scope? A growing trend, in certain district courts and two Circuit Courts of Appeals, is to reject allegations of FHA violations which occur after the completion of the rental contract or sales contract of a housing unit.[46] These rulings contravene 30 years of court precedent and HUD regulations, but it has been the Lawyers' Committee and other members of the fair housing community that have been at the forefront of challenging these attacks on the fair housing act with no participation by the federal government in defending the reach of its own regulations

Why are housing advocates sounding the alarm as to the extension of the *Ledbetter* ruling to fair housing and fair lending cases? As the enforcers of the FHA, DOJ and HUD should be participating in cases like *Garcia v. Brockway* to advocate that fair housing complainants not be stripped of their right to file a claim under a continuing violation theory. Yet, again the government played no role in this important fair housing case.

If we all agree that race should not be a barrier to fair housing, then DOJ and HUD should be a partner with the fair housing community, not an adversary.

VI. Conclusion

Either those of us in the fair housing community are right and the federal government should apply its authority and resources to ensure that the breadth of the FHA is protected and enforced in all its aspects or, DOJ and HUD are right and there is no problem with narrowing the scope of the FHA, and selectively enforcing certain provisions of the Act, because the Lawyers' Committee and other advocates will bring these cases. We cannot both be right.

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[46] *Cox v. City of Dallas,* 430 F.3d 734 (5th Cir. 2005), *cert. den.* 126 S. Ct 2037 (2007); *Halprin v. Prairie Single Family Homes,* 388 F.3d 327 (7th Cir. 2004).

We urge you, members of Congress and this Subcommittee in particular, to use the full force of your authority and influence to ensure that all who are protected under the FHA are served by their government. We beseech you to require that the staff of DOJ and HUD in this administration and the next fulfill their obligations under the FHA to investigate and litigate cases challenging race discrimination in housing – especially cases under a disparate impact theory.

Thank you for your demonstration of wisdom in passing the *Ledbetter Fair Pay Act,* and I hope your colleagues in the Senate will follow suit. Please continue the good work you began by ensuring that the U.S. Supreme Court's analysis is not applied to fair housing and fair lending cases.

It is imperative that all of us do what is within our control and influence to dismantle patterns, practices and policies that discriminate against communities of color. This methodology of challenging discrimination is the critical path to eliminating systemic forms of racism. The failure of DOJ and HUD to engage in this battle adversely impacts neighborhoods, schools, and employers. Tragically, the absence of DOJ and HUD from these battles embolden those allow many engaging in a pattern or practice of discrimination because they have the luxury to do so with impunity.

Mr. Chairman and members of the Committee, thank you again for the opportunity to testify on this important subject. I look forward to answering any questions from the Committee.