

PERSPECTIVES ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

**IN PREPARATION FOR THE FOURTH COUNTRY REVIEW OF THE UNITED
STATES BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE**

September 2013

Copyright © Lawyers' Committee for Civil Rights Under Law
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
202-662-8600
www.lawyerscommittee.org

Acknowledgments

Many people contributed in the coordinating, researching, and writing of this document. In particular, the Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") greatly appreciates the support that Schulte, Roth & Zabel, LLP put into drafting this Submission. This Submission would not have been possible without the support and talent of many members of their staff, including Chenelle Idehen, Jae Kim, Todd Kornreich, Ronald Risdon and Parker Zhou. Attorneys at Schulte Roth put in countless hours working with the Lawyers' Committee staff to research, gather data, and write the final Submission. Additionally, this Submission would not be possible without the input of many of the Lawyers' Committee staff who provided their expertise to the drafting of various sections of it, including Barbara R. Arnwine, Jane Dolkart, Meredith Horton, Marcia Johnson-Blanco, Bob Kengle, Linda Mullenbach, Lindsey Needham, Natasha Quiroga, Joseph Rich and Brenda Shum.

Table of Contents

	Page
I. EXECUTIVE SUMMARY OF RECOMMENDATIONS	1
II. ARTICLE 2: EQUAL PROTECTION OF RIGHTS IN THE COVENANT and ARTICLE 26: PROHIBITION OF DISCRIMINATION, AND EQUALITY BEFORE THE LAW	5
A. The Scope of Article 2 & Article 26 and Focus of Submission.....	5
B. Educational Opportunities	6
1. Continuing Racial Segregation in Public Education.....	7
2. The Failure of the U.S. To Provide Equal Education Opportunities	7
A. Opportunity and Achievement Gaps.....	8
B. School to Prison Pipeline.....	10
C. Rights of English Language Learners (“ELLs”).....	11
D. Rights of Immigrant Students	12
E. Special Education Students.....	13
F. Future of Affirmative Action.....	13
3. Lawyers' Committee Recommendations	14
C. Employment Discrimination.....	17
1. Continuing Enforcement Problems with U.S. Equal Opportunity Laws	18
A. Affirmative Action and Employment Discrimination	19
B. Access to Courts for Employment Cases.....	20
C. Use of Credit Checks to Discriminate Based on Race.....	22
D. Use of Criminal Background Checks to Discriminate Based on Race ...	22
2. Lawyers' Committee Recommendations	23
D. Housing Discrimination.....	25
1. U.S. History of Residential Segregation.....	25
2. Current State of Housing Segregation	26
3. The Persistence of Housing Discrimination	28

4.	The Legal Framework of the Fair Housing Act.....	29
5.	The Duty to Affirmatively Further Fair Housing	31
6.	Recent Accomplishments of the U.S. Government	32
7.	Areas of Concern	33
8.	Lawyers' Committee Recommendations	34
III.	ARTICLE 25: ACCESS TO THE POLITICAL SYSTEM.....	36
A.	The Scope of ICCPR Article 25 And the Focus of this Submission.....	36
B.	The Need to Restore the Voting Rights Act	37
C.	The Need to Combat Voter Suppression	38
D.	The Need to Address Poor Election Administration.....	39
E.	The Need to Combat Deceptive Voter Practices and Voter Intimation	41
F.	Felon Disenfranchisement	44
G.	Lawyers' Committee's Recommendations	44

I. EXECUTIVE SUMMARY OF RECOMMENDATIONS

1. The Lawyers' Committee for Civil Rights Under Law welcomes the United States Government's Fourth Periodic Report (the "U.S. Report") to the United Nations Human Rights Committee (the "Committee"). The U.S. Report outlines the legislative, judicial, administrative, and other measures giving effect to the United States' obligations under the International Convention on Civil and Political Rights ("ICCPR" or the "Covenant") in accordance with Article 40 thereof.¹

2. While the U.S. Report highlights various advances achieved to date, it does not fully address approaches for eliminating civil rights violations that continue to plague U.S. society. This Submission focuses on and offers recommendations relating to the following key areas of concern addressed in the U.S. Report: equal educational opportunities, employment discrimination fair housing and residential segregation; and the right to vote.²

3. The Lawyers' Committee addressed areas in its July 2006 shadow report submitted in July 2006 in response to the Second/Third U.S. Periodic Report (the "2006 Shadow Report").³

4. We hope that this submission will assist the Committee in evaluating the U.S. Report and in formulating its own recommendations for the U.S. Government. This report focuses on the U.S.' implementation of and compliance with a few key provisions of the ICCPR:

¹ ICCPR, art. 40, *opened for signature* Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

² Although some of these areas were not discussed in detail in the U.S. Report and are not specifically addressed in the Committee's list of questions for the U.S., they represent critical issues under the ICCPR and merit discussion here.

³ A CRITICAL ASSESSMENT OF THE U.S. COMMITMENT TO CIVIL AND POLITICAL RIGHTS – TOWARD SECURING EQUALITY AND JUSTICE FOR ALL, in preparation for the Second/Third Country Review of the United States by the United Nations Human Rights Committee, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, July 2006.

Article 2 (equal protection of rights), Article 25 (access to the political system), and Article 26 (prohibition of discrimination and equality before the law).⁴

5. The following is a summary of recommendations from the main body of this Submission.

6. Recommendations Relating to ICCPR Article 2 and ICCPR Article 26 and Discrimination in Education

- The U.S. Government should allow the use of Title IV of the Civil Rights Act of 1964 to permit lawsuits that address past discrimination, segregation and re-segregation.
- The U.S. Government should encourage the cessation of "tracking" programs that contribute to the achievement gap between white and minority students in American public schools.
- The U.S. Government should encourage and fund school districts to voluntarily promote school integration through the use of non-discriminatory, race-conscious measures to promote educational, democratic and cultural benefits of racial and ethnic diversity in the classroom.
- The U.S. Government should support revisions of the basic Title I funding formula to encourage racial and economic integration, expansion of funding for parent involvement, and inclusion of a "private right of action" to permit parents to enforce their children's rights under the Elementary and Secondary Education Act.
- The U.S. Government should increase financial support for schools in high poverty, racially isolated districts for the desired effect of closing the opportunity gap.
- The U.S. Government should encourage the fair and equitable distribution of economic resources between high- and low-poverty schools.
- The U.S. Government should pass federal legislation that significantly restricts the use of restraint and seclusion of students except under the narrowest, most emergent circumstances. The U.S. Government should ensure all school personnel are trained annually in positive behavior supports; proactive approaches to learning, social and behavioral needs, and school-

⁴ These subjects, however, do not represent all the areas in which the Lawyers' Committee has concerns about civil rights in the United States. See generally, <http://www.lawyerscommittee.org/>.

wide emergency and crisis prevention procedures (especially applicable to interactions with Special Education students).

- The U.S. Government should encourage schools to limit the imposition of suspension or expulsion to the most serious cases of school misconduct and provide training opportunities for school resource officers deployed in school hallways.
- The U.S. Government should promote healthy and safe learning environments for all by limiting the role of School Resource Officers (“SROs”) in schools and providing student-support resources such as therapists – especially for at-risk youth such as Lesbian, Gay, Bisexual, and Transgender (“LGBT”) students.
- The U.S. Government should increase language access services for students and parents. The U.S. Government should oblige and support local school implementation of best teaching practices for English Language Learner (“ELL”) students to reach English proficiency and for English speakers to learn a second language.
- The U.S. Government should implement the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) and take affirmative steps to remove barriers to higher education for immigrant children.
- The U.S. Government should develop and provide high-quality professional development for teachers to ensure high-quality teachers are equitably distributed throughout school districts.
- The U.S. Government should support schools that adopt or maintain policies of affirmative action that do not compromise the effectiveness of achieving racial diversity.

7. Recommendations Relating to ICCPR Article 2 and ICCPR Article 26 and Discrimination in Employment

- The U.S. Government should show its commitment to protecting employment rights by using all appropriate means to ensure federal agencies protect those rights and promote equal treatment.
- The U.S. Government, in spite of narrow doctrinal interpretations by the courts, should encourage and support the enactment of laws to protect the employment rights of minorities and prevent disparate impact on minorities.
- The U.S. Government should aggressively discourage state efforts to end affirmative action programs in employment and contracting.

- The U.S. Government should use its federal funding powers as a tool to encourage state and federal agency compliance with affirmative action programs.
- The U.S. Department of Justice (“DOJ”) should enforce Title VII and Title IX of the Civil Rights Act of 1964, with a view to ending inequalities at workplaces in the United States.
- The DOJ should file more systemic employment discrimination cases on behalf of African Americans and Hispanic Americans and other protected groups.
- The U.S. Government should support adoption of employment legislation discussed in this Submission.
- The Federal Office of Personnel Management should revise its own policies with respect to credit checks when hiring and promoting government workers.

8. Recommendations Relating to ICCPR Article 2 and ICCPR Article 26 and Discrimination in Housing

- The U.S. Government should use all appropriate means to ensure that legal protections against racial discrimination in the purchase and rental of housing are enforced and that there is speedy investigation and resolution of complaints of racial discrimination by those in the housing market. This includes vigorous enforcement of laws and regulations already in place to prevent discriminatory and predatory lending practices.
- The U.S. Government must further strengthen compliance with the Fair Housing Act’s (“FHA’s”) Affirmatively Furthering Fair Housing (“AFFH”) requirement. This includes allocating public housing assistance in a way that encourages integration and diversity in both rural and metropolitan areas, as well as taking steps to increase the inventory of housing stock.
- The U.S. Government must continue to ensure that disparate impact as a standard of proof under the FHA is maintained even if new legislation is needed.

9. Recommendations Relating to ICCPR Article 25 and The Right to Vote

- The U.S. Government must work with Congress to reinstate the full protections of the Voting Rights Act.
- The U.S. Government must vigorously enforce all provisions of federal voting rights laws.

- The U.S. Department of Justice should vigorously enforce the provisions of the National Voter Registration Act to make states implement voter registration in public assistance agencies.
- The U.S. Government must actively speak out against suppressive voting laws, including detailing the impact of suppressive laws on minority and other voters. Further, it should support legislation such as the Voter Empowerment Act.
- The U.S. Government and the Presidential Commission on Election Administration must actively work with states to improve election administration such that eligible voters will not improperly be denied access to the ballot.
- The U.S. Government should support the passage of laws that punish citizens or other people who use, or attempt to use, deceptive practices and intimidation with the intention of preventing another person from exercising the right to vote in an election.
- The U.S. Government should support efforts to ensure that those disenfranchised because of felony convictions have their rights to vote restored upon completion of sentence.

II. ARTICLE 2: EQUAL PROTECTION OF RIGHTS IN THE COVENANT and ARTICLE 26: PROHIBITION OF DISCRIMINATION, AND EQUALITY BEFORE THE LAW

A. The Scope of Article 2 & Article 26 and Focus of Submission

10. Despite the statements in ICCPR Article 2 and Article 26,⁵ discriminatory practices continue to plague the educational system, the employment sector and the housing market in the United States and together with recent developments relating to affirmative action, demonstrate the failure of the United States to adequately address the issues impeding equal access to educational, employment and housing opportunities. While not addressed in the list of issues set forth by the Committee, these issues remain important topics for the Lawyers'

⁵ As noted by the United States in its U.S. Report, Articles 2 and 26 of the Covenant are not identical but overlap in their coverage of issues and concerns. *See* U.S. Report at ¶ 32. Accordingly, the Lawyers' Committee will present the issues relating to the areas of education, employment and housing in the context of both Articles 2 and 26 of the Covenant. The United States generally adheres to Article 2, subject to the understanding that: (i) Articles 2(1) and 26 are broader than what is currently permitted under U.S. federal law; for example, certain distinctions among individuals are permitted if they are rationally related to a legitimate governmental objective; and (ii) Article 4(1), which bans discrimination in times of public emergency, does not render illegal distinctions that may have a disproportionate effect upon persons of a particular status. *See* 2006 Shadow Report at 43.

Committee and the shortcomings of the U.S. in addressing concerns in these areas are highlighted in this Section of the Submission.

B. Educational Opportunities⁶

11. The Lawyers' Committee commends the recent enforcement efforts of the DOJ and the U.S. Department of Education to address ongoing and existing racial segregation, as outlined in the U.S. Report.⁷ However, students continue to be impermissibly denied equal protection of the laws in contravention of the ICCPR and U.S. law. These denials are due to zero-tolerance policies, unequal school funding and resources, and a lack of initiative to equalize education. Throughout this Section, these violations will be illuminated and illustrate that while the U.S. government has taken steps to improve diversity and equal access to quality education, the U.S. continues to struggle with providing equal education to all, as guaranteed by the ICCPR. This Section responds to Issue 14(b) of the questions posed by the Committee and also highlights several of the major issues that continue to impede equal access to quality education in the United States. Within public education currently, there exists not only an achievement gap, but an opportunity and funding gap as well, typically affecting minority, poor, English Language Learner ("ELL"), immigrant, special education, and LGBT students. The impact of this discrimination is manifested in negative school climates, high drop-out rates, and high incarceration rates among these populations. Efforts to address this disparate treatment and its implications are often hindered and not fully implemented.

⁶ In the United States, Article 2 must be read against the backdrop of the Equal Protection Clause of the United States Constitution, which bars public schools and universities from engaging in discrimination on the grounds of, *inter alia*, race, sex, religion or national origin. In addition, federal civil rights laws prohibit discrimination on the basis of race, color, national origin, religion, sex, age, and disability in education programs and activities receiving federal financial assistance. The Departments of Justice ("DOJ") and Education enforce these federal statutes. *See* U.S. Report at ¶ 55. Under Title IV of the Civil Rights Act of 1964 ("Title IV"), DOJ may bring suit against a school board that deprives children of equal protection of the laws, or against a public university that denies admission to any person on the grounds of "race, color, religion, sex or national origin." U.S. Report at ¶ 58.

⁷ *See* U.S. Report at ¶¶ 58-67.

1. Continuing Racial Segregation in Public Education

12. The public education system in the U.S. is racially segregated, not by legal mandate but by public policies that promote racial segregation.⁸ Segregation in American public schools declined substantially after the *Brown v. Board of Education* decision in 1954. However, re-segregation is occurring during a period when the U.S. is rapidly moving toward becoming a majority-minority society. If current demographic trends continue, only 46.6% of the population will be classified as white by 2050.⁹ As a result of ongoing demographic shifts, students of color now make up a greater share of children attending U.S. public schools than ever before.¹⁰

13. Residential segregation and changing policies governing school desegregation (e.g., the termination of desegregation orders in many areas of the country) have led to public schools increasingly becoming "re-segregated."¹¹ As a result, the United States must now address both racial and economic segregation in the context of providing equal educational opportunities to all students.

2. The Failure of the U.S. To Provide Equal Education Opportunities¹²

⁸ African-American Ministers in Action et al., A Joint Submission to the United Nations Ninth Session of Universal Periodic Review Working Group Human Rights Council 22 November – 3 December 2010: Racial Discrimination and Civil Rights 6 (2010).

⁹ Daniel T. Lichter, *Integration or Fragmentation? Racial Diversity and the American Future*, 50 *Demography* 359, 362 (2013).

¹⁰ Lawyers' Comm. for Civil Rights Under Law, Briefing: The Status of Educational Equity in the U.S. 1 (2013) (hereinafter, "Education Equality") (citing *Closing the Opportunity Gap, What America Must Do to Give Every Child an Even Chance* (Prudence L. Carter & Kevin G. Welner eds., Oxford University Press 2013), 1; Gary Orfield, John Kucsera, & Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students* (Civil Rights Project, September 19, 2012).

¹¹ Gregory M. Anderson, *In the Name of Diversity: Education and the Commoditization and Consumption of Race in the United States*, 37 *The Urban Review* No. 5 (Dec. 2005), published online Jan. 7, 2006.

¹² In addition to the topics discussed in detail below, the Lawyers' Committee would like to comment on the issue of safe and healthy school environments, particularly with respect to LGBT violence and bullying. A hostile school environment is the most largely cited source of bullying and general unsafety for LGBT students. It can lead to students transferring schools, feeling perpetually unsafe at school, attempting or committing suicide, and retaliatory violence. Failure to enforce effective safe school policies disproportionately affects LGBT students as they are more likely to be bullied than their non-LGBT peers. For further discussion of this issue, see Joseph G. Kosciw et al., *The Effects of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports*, 12

14. While the U.S. has made progress in some areas, courts and government agencies have largely failed to address many of the ongoing policies and practices that contribute to the unequal distribution of quality education and educational resources across the nation. As demonstrated in the discussion below, policies with a discriminatory effect, such as tracking, inequitable distributions of resources, and zero-tolerance policies – as well as a pervasive opposition to corrective policies such as affirmative action – have all contributed to the continuing lack of education equality. The Lawyers’ Committee continues to fight battles against racial discrimination in education even to this day – and their continued work proves that America as a nation has not yet achieved equality for all under Title IV of the Civil Rights Act of 1964, nor has America satisfied its obligations under the Covenant.

A. Opportunity and Achievement Gaps

15. The unequal distribution of education resources, both across and within States, contributes to disparities in academic achievement and opportunities between white students and minority students known as the "achievement gap" and the "opportunity gap."¹³ Literary scholarship on education largely indicates that high-socioeconomic status schools and neighborhoods positively affect individual academic outcomes, whereas high-poverty schools and neighborhoods negatively affect academic outcomes.¹⁴

16. Most public schools receive significant portions of their funding through local property taxes, meaning that schools in lower-income neighborhoods are frequently

J. of Sch. Violence Issue 1, 45-46 (Dec. 5, 2012); *Id.* at 46 (citing Harris Interactive & Gay, Lesbian & Straight Education Network, *From Teasing to Torment: School Climate in America, A Survey of Students and Teachers* (2005)).

¹³ Douglas Lee Lauren and S. Michael Gaddis, *Exposure to Classroom Poverty and Test Score Achievement: Contextual Effects or Selection?*, 118 Am. J. Soc. 943, 950 (2013); The Poverty and Race Research Action Council et al., *On the Right to Education*, in Submission to United Nations Periodic Review, Ninth Session of the Working Group on the UPR Human Rights Council 1 – 12 November 2010 8 (Nov. 2010) (citing A. Wilkins & The Education Trust staff, *Yes We Can: Telling Truths and Dispelling Myths About Race and Education in America* (Sept. 2006)).

¹⁴ Lauren and Gaddis, *Supra* Note 16, at 943-44.

underfunded. This adversely effects poor and minority school districts relative to white school districts, as funds are not distributed evenly within or across States.

17. Where there is adequate opportunity, students at the low end of the gap can excel. Opportunity not only includes adequate funding for high-poverty schools, but also superb instruction and support for all students. The gap exists in part because students of color are more likely to be negatively impacted by low financial resources in their school districts, less qualified, experienced and effective teachers in their schools, and lower academic standards in the classroom.¹⁵

18. Both overall school funding and teacher salary levels are highly inequitable both across and within states – generally exhibiting a ratio of 3 to 1 between high- and low-spending jurisdictions. Districts serving the highest proportions of minority and low-income students have approximately twice as many unaccredited and inexperienced teachers as do those serving the fewest.

19. However, policies with discriminatory effects, such as "tracking" and disparate handling of truancy have led to even greater inequities. Historically, the practice of tracking students emerged partially as a means to institutionalize social differences between classes. Today, minority students continue to be overrepresented in low track classes.¹⁶ In addition, educational systems that are more tracked or vocationally oriented provide more opportunities for students to enter the labor market, but continue to increase inequities in educational opportunity. Low attendance rates are a chronic problem in American public schools and are linked to academic failure, disengagement with school, school dropout and delinquency. Factors

¹⁵ The Poverty and Race Research Action Council et al., *On the Right to Education*, in Submission to United Nations Periodic Review, Ninth Session of the Working Group on the UPR Human Rights Council 1 – 12 November 2010 7-8 (Nov. 2010) (citing A. Wilkins & The Education Trust staff, *Yes We Can: Telling Truths and Dispelling Myths About Race and Education in America* (Sept. 2006)).

¹⁶ Carol Corbett Burns and Kevin G. Welner, *A Special Section on the Achievement Gap: Closing the Achievement Gap by Detracking*, 86 *Phi Delta Kappan* Vol. 8, 2 (Apr. 2005).

such as economic background, social status, neighborhood background, minority status and inequitable access to high quality teachers are highly correlated with low attendance and poor school performance.

20. As a result, lack of needed funding to high-poverty communities has led to grossly unequal opportunities for students—including fewer qualified, effective teachers, larger class size and other factors—that result in lower achievement.¹⁷

B. School to Prison Pipeline

21. The United States has noted that it has launched initiatives to address the disciplinary policies and practices that push students out of school.¹⁸ While these are commendable steps in the right direction, the unjustifiable rate of incarceration of school-aged youth across the country is proof that increased and more effective action is required.

22. Discriminatory student discipline policies and practices have undermined academic achievement and increasingly funnel students into the criminal justice system. These policies and practices have become so widespread that the phenomenon has come to be known as the "school to prison pipeline."¹⁹ As the Lawyers' Committee has noted before, "[s]tudents of color disproportionately bear the burden of harsh school discipline" due to bias on an individual level and due to exclusionary policies in predominately schools of color on a systematic level.²⁰

¹⁷ The Poverty and Race Research Action Council et al., On the Right to Education, in Submission to United Nations Periodic Review, Ninth Session of the Working Group on the UPR Human Rights Council 1 – 12 November 2010 7 (Nov. 2010).

¹⁸ For a discussion of Supportive School Discipline Initiative *see* United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR) (hereafter, the "U.S. Response") at ¶71 (2013).

¹⁹ The Pub. Policy Research Inst., Texas A&M Univ. & The Council of State Gov'ts. Justice Ctr., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates To Students' Success and Juvenile Justice Involvement* (July 2011).

²⁰ *See* Education Equality, *supra* note 13, at 6 (citing Advancement Project, *Test, Punish, and Push Out 15* (March 2010)).

23. Rather than reducing the likelihood of classroom disruption, zero tolerance and exclusionary disciplinary policies correlate with higher future rates of misbehavior and suspension among students subjected to such policies. In the long term, school suspension and expulsion are associated with a higher likelihood of school dropout and failure to graduate on time.²¹ These factors in turn correlate with higher incarceration rates in general and contribute to racial disparities in incarceration rates nationally.²²

24. Each year approximately 1.3 million young people drop out of school.²³ The National Center for Educational Statistics found that students who had been suspended 3 or more times by the 10th grade were 5 times more likely to drop out than students who had never been suspended. Students that have dropped out of school are in turn 3 times more likely to be incarcerated.²⁴ Minority students, males, and students from lower socioeconomic backgrounds are disproportionately targeted in arrests and incarcerations.

C. Rights of English Language Learners (“ELLs”)

25. Students designated as ELLs continue to suffer from educational neglect.²⁵ ELLs tend to go to public schools that have a set of characteristics generally associated with poor standardized test performance—such as high student-teacher ratios, high student enrollments and high levels of students living in or near poverty.²⁶

²¹ Russell Skiba et al., *Are Zero Tolerance Policies Effective in the School? An Evidentiary Review and Recommendations*, in A Report by the American Psychological Association Zero Tolerance Task Force 5 (2006).

²² See *supra* Note 20 at 7.

²³ Press Release, Editorial Projects in Education (EPE) Research Center, Progress on Graduation Rate Stalls; 1.3 Million Students Fail to Earn Diplomas (June 10, 2010), *available at* http://www.edweek.org/media/ew/dc/2010/DC10_PressKit_FINAL.pdf.

²⁴ See Educational Equity, *supra* note 13, at 6 (citing Danfeng Soto-Vigil Koon, *Exclusionary School Discipline: An Issue Brief and Review of the Literature* 1, 6 (Apr. 2013); Daniel J. Losen & Tia Elena Martinez, *Out of School & Off Track: The Overuse of Suspensions in American Middle and High Schools* 9 (Apr. 8 2013)).

²⁵ Richard Fry (Pew Hispanic Center), *The Role of Schools in English Language Learner Achievement Gap* 1 (June 26, 2008).

²⁶ Bernard R. Gifford & Guadalupe Valdes, *The Linguistic Isolation of Hispanic Students in California's Public Schools: The Challenge of Reintegration* 126 (2006). Often, American children of immigrant parents, although United States citizens themselves are ELLs. In addition, the high concentration of ELL students within schools

D. Rights of Immigrant Students

26. American-born children of immigrants are often affected by the dangers and uncertainties that afflict their immigrant family members, including high rates of household poverty, poor schools, and inadequate health care and limited employment prospects.²⁷ In addition, immigrant students are generally labeled as ELLs and are also a highly segregated student population.²⁸

27. Many immigrant students do not have access to affordable higher education due to their status, thus further segregating these populations.²⁹ The Development, Relief, and Education for Alien Minors Act (“DREAM Act”), proposed in the U.S. Congress as part of a comprehensive immigration reform package, would, if passed, grant legal status to many unauthorized immigrants who were brought to the United States as children. It would also improve educational opportunities by allowing eligible immigrant students to take advantage of lower in-state tuition rates for college, thereby opening up more affordable options for higher education.³⁰ In addition, several states have enacted their own versions of the DREAM Act that allow immigrant students to qualify for lower in-state tuition rates or state student loans.³¹ The Lawyers' Committee supports the passage of the federal DREAM Act and commends states that have already passed similar, important initiatives.

largely populated by other monolingual Spanish speakers, for example, makes the task of promoting proficiency among Latino/Hispanic ELLs much more difficult and contributes to the poor school performance of and lack of employment prospects for these students. *See id.*

²⁷ Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, Nev. L.J. (forthcoming), Univ. of Baltimore Sch. of Law Legal Studies Research Paper 9-10 (Apr. 18, 2013), available at SSRN: <http://ssrn.com/abstract=2253546>.

²⁸ Richard Fry (Pew Hispanic Center), *The Role of Schools in English Language Learner Achievement Gap 1* (June 26, 2008).

²⁹ *See* EDUCATIONAL OPPORTUNITIES, *supra* note 13, at 7 (citing Sudan Aud, et al. (U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics), *The Condition of Education 2013 10* (May 2013)).

³⁰ *See* DREAM Act of 2009 (introduced in Senate) S. 729; *see also* <http://dreamact.info/>; Hiroshi Motomura, *Making Legal: The Dream Act, Birthright Citizenship and Broad-Scale Legalization*, 16 Lewis & Clark L. Rev. 1127, 1127 (2012).

³¹ *See* Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 2013–2014 Nev. L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253546.

E. Special Education Students

28. Research suggests that access to general education curriculum and instruction for special education students is not equally distributed across all ethnic groups.³² Furthermore, minority students are overrepresented relative to their percentage of the general population in several disability categories.³³

29. The United States must consider the needs of this segment of the student population. Students with disabilities who are included in general education classrooms have been found to complete more assignments, show significant gains in reading performance and general academic functioning, and demonstrate improvements in social interaction, appropriate behavior, self-esteem and language development.³⁴

F. Future of Affirmative Action

30. The procedure of admitting students using race as one of the many factors in the admissions process has been scrutinized since its inception in 1964. Desegregating America's higher education institutions is "particularly important for states that have a desegregation agreement with the Office for Civil Rights for operating policies traceable to de jure segregation".³⁵ The Lawyers' Committee remains a strong supporter of the use of race-conscious affirmative action measures to mitigate the impact of the U.S.' history of discrimination, segregation and more recent re-segregation, that results in unequal educational opportunities for racial and language minorities in schools and institutions of higher learning.³⁶

³² Russell J. Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 Council for Exceptional Children No. 4, 412 (2006).

³³ *Id.*

³⁴ *Id.* at 412 (citing Nat'l Ctr. for Educ. Restructuring & Inclusion (1995); Carlson & Parshall (1996); Marston (1996); Shinn, Powell-Smith, Good, & Baker (1997); Lewis (1994)).

³⁵ Robert T. Palmer, J. Luke Wood, & Dorsey Spencer, *Diverging Interests: Balancing Racial Diversity and Race-Sensitive Policies Across State Higher Education Systems*, 44 Journal of Black Studies 1 (May 2013).

³⁶ For further discussion on these issues see U.S. Report at ¶¶ 105-108.

31. Recently, there was a significant opportunity for the Supreme Court of the United States to affirm the U.S.' commitment to eliminating racial inequality in higher education. In *Fisher v. University of Texas*, 133 S. Ct. 2411, Abigail Fisher, a white applicant to the University of Texas at Austin, challenged the constitutionality of the university's undergraduate admissions policy, which considered an applicant's race, among other factors, in order to admit a student body that is both academically qualified and broadly diverse.³⁷ In a 7-1 decision, the Court did not rule on the merits of the challenged admissions policy, but concluded that the Fifth Circuit Court of Appeals had not applied "strict scrutiny" principles consistent with past precedent. The court provided further guidance on those principles and returned the case for further action consistent with the Court's opinion.³⁸

32. As a result, the Court preserved the existing legal framework governing the use of race in higher education admissions and other enrollment decisions, but left many important questions unanswered.³⁹

33. While the *Fisher* decision may result in additional scrutiny of current and future admissions policies at American universities, race-conscious policies remain constitutional. The Lawyers' Committee recommends that the United States continue to support universities that adopt or maintain policies of affirmative action and that do not compromise the effectiveness of achieving racial diversity. The Lawyers' Committee would like to reiterate that affirmative action remains a crucial tool to ensure schools realize the benefits of diversity.

3. Lawyers' Committee Recommendations

³⁷ *Fisher v. University of Texas at Austin* No. 11-345 at 1 (Oct. 2012).

³⁸ College Board's Access and Diversity Collaborative, *Understanding Fisher v. the University of Texas: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions* 1 (July 9, 2013). For a further discussion of the *Fisher* case, see <http://www.lawyerscommittee.org/projects/education/page?id=0003>.

³⁹ *See id.* at 2-3.

34. The U.S. Government should allow the use of Title IV to permit lawsuits that address past discrimination, segregation and re-segregation.

35. The U.S. Government should encourage the cessation of "tracking" programs that contribute to the achievement gap between white and minority students in American public schools.

36. The U.S. Government should encourage and fund school districts to voluntarily promote school integration through the use of non-discriminatory, race-conscious measures to promote educational, democratic and cultural benefits of racial and ethnic diversity in the classroom.

37. The U.S. Government should support revisions of the basic Title I funding formula to encourage racial and economic integration, expansion of funding for parent involvement, and inclusion of a "private right of action" to permit parents to enforce their children's rights under the Elementary and Secondary Education Act.

38. The U.S. Government should increase financial support for schools in high poverty, racially isolated districts for the desired effect of closing the opportunity gap.

39. The U.S. Government should encourage the fair and equitable distribution of economic resources between high- and low-poverty schools.

40. The U.S. Government should pass federal legislation that significantly restricts the use of restraint and seclusion of students except under the narrowest, most emergent circumstances. The U.S. Government should ensure all school personnel are trained annually in positive behavior supports; proactive approaches to learning, social and behavioral needs, and school-wide emergency and crisis prevention procedures (especially applicable to interactions with Special Education students).

41. The U.S. Government should encourage schools to limit the imposition of suspension or expulsion to the most serious cases of school misconduct and provide training opportunities for school resource officers deployed in school hallways.

42. The U.S. Government should promote healthy and safe learning environments for all by limiting the role of SROs in schools and providing student-support resources such as therapists – especially for at-risk youth such as LGBT students.

43. The U.S. Government should increase language access services for students and parents. The U.S. Government should oblige and support local school implementation of best teaching practices for ELL students to reach English proficiency and for English speakers to learn a second language.

44. The U.S. Government should implement the DREAM Act and take affirmative steps to remove barriers to higher education for immigrant children.

45. The U.S. Government should develop and provide high-quality professional development for teachers to ensure high-quality teachers are equitably distributed throughout school districts.

46. The U.S. Government should support schools that adopt or maintain policies of affirmative action that do not compromise the effectiveness of achieving racial diversity.

C. Employment Discrimination

47. The U.S. government's approach to employment discrimination has improved under the current administration;⁴⁰ however, it continues to disappoint in its failure to adequately enforce laws prohibiting employment discrimination and to meaningfully defend affirmative action measures.⁴¹ For example, in recent years, the legal tools available for use in combating employment discrimination have been eroding in the States, the Courts and in Congress.⁴² In addition, Congress has failed to pass proposed legislation (the Employment Non-Discrimination Act) that would end discrimination on the basis of sexual orientation.⁴³ This Section highlights several major developments and issues that continue to reflect the U.S.'s sluggish response in using the legal tools at its disposal to enforce equal opportunity laws and its failure to protect its citizens from discriminatory employment practices.⁴⁴

⁴⁰ See U.S. Report beginning at ¶77, for further discussion.

⁴¹ In the 1960s, after decades of continuing discrimination against women and minority groups, the three branches of the federal government undertook a number of initiatives that form the basis of today's anti-discrimination and affirmative action schemes. Affirmative action and non-discrimination in both public and private employment in the U.S. is rooted in Executive Order 11246 ("EO11246") and Title VII of the Civil Rights Act of 1964 ("Title VII"). EO 11246 requires certain private employers who contract with the federal government to adopt affirmative action plans, including placement goals and timetables to remedy underrepresentation of women and minorities. Title VII prohibits employment discrimination on the basis of race, sex, national origin, color, and religion and applies to all public and private employers with fifteen or more employees. The Age Discrimination in Employment Act, passed in 1967, prohibits discrimination in employment against individuals who are at least 40 years of age. The Americans With Disabilities Act, passed in 1990, prohibits discrimination in employment against individuals with disabilities. While there is no affirmative statutory duty for private employers—who are not government contractors—to adopt affirmative action plans, courts may "order such affirmative action as may be appropriate" in cases where there are findings of discrimination. See 2006 Shadow Report at 43; 42 U.S.C. §2000e-5(g)(1) (2005).

⁴² Several states have passed laws in recent years that make the use affirmative action policies by state agencies illegal under state law. See, e.g., Michigan Civil Rights Initiative (amending Section 26 of Article I of the Michigan State Constitution); Nebraska Civil Rights Initiative, 424 (2008); Arizona Proposition 107; New Hampshire House Bill 623; Oklahoma Affirmative Action Ban Amendment, State Question 759 (2012). In addition, Congress appears unlikely to pass any meaningful legislation addressing important employment discrimination issues in the near future. For examples of recent legislation in this area that have been brought before Congress but that at the time of this writing seems unlikely to pass, see Fair Minimum Wage Act of 2013 (H.R. 1010); Paycheck Fairness Act of 2013 (S. 84); Employment Non-Discrimination Act of 2013 (S. 815); Pregnant Workers Fairness Act of 2013 (S. 942); Arbitration Fairness Act of 2013 (H.R. 1844); Protecting Older Workers Against Discrimination Act (POWADA).

⁴³ While an executive order ending such discrimination in federal agencies is in place, the government has failed to issue an executive order that would prohibit discrimination based on sexual orientation by government contractors.

⁴⁴ The Department of Labor ("DOL"), Office of Federal Contract Compliance Programs ("OFCCP") enforces affirmative action and employment discrimination laws against government contractors through use of audits and

1. Continuing Enforcement Problems with U.S. Equal Opportunity Laws

48. Employment statistics continue to reflect the need for meaningful affirmative action measures and enforcement of existing laws. The 2008—2009 recession (the "Recession") exacerbated the existing wealth gap between Whites and minorities. While the Recession impacted the entire population in general, the current unemployment rate for African Americans is roughly double the rate for Whites. In 2012, the national unemployment rate for Black or African Americans ages twenty-five and older was 12.3%. The unemployment rate for Whites ages twenty-five and older was 6.1%.⁴⁵ Increases in incarceration rates, particularly among minorities, have made it more difficult for the unemployed to find new employment. The widespread use of criminal background checks (discussed *infra*) has been a major contributor to this phenomenon.⁴⁶ These demographic changes have created a need for additional enforcement resources at a time when the government is facing cutbacks and is slashing funding.

49. Recently, the DOL has been more aggressive in pursuing government contractors and the EEOC has initiated well over 100 cases against private employers, including a number of systemic cases.⁴⁷

investigation of complaints to determine if there have been violations of these laws. The Equal Employment Opportunity Commission ("EEOC") is the U.S. government body charged with enforcing the provisions of Title VII and other Federal legislation as to private employers, and the DOJ Civil Rights Division performs this role as to state and local governments. Under the EEOC's guidelines, federal agencies are required to develop affirmative action plans for all employees and job applicants. 42 U.S.C. § 2000e-5(g)(1) (2012). Private employers may also voluntarily engage in affirmative action programs.

⁴⁵ BUREAU OF LABOR STATISTICS, HOUSEHOLD DATED ANNUAL AVERAGES, *available at* <http://www.bls.gov/cps/cpsaat24.pdf>.

⁴⁶ See discussion *infra* on criminal background checks.

⁴⁷ See U.S. Equal Employment Opportunity Commission, EEOC Litigation Statistics, FY 1997 through FY 2012 (last viewed July 22, 2013), *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>. and OFCCP U.S. Dept. of Labor, OFCCP & Equal Pay, *available at* http://www.dol.gov/equalpay/OFCCP_EqualPayEnforcementFactSheet.pdf ("OFCCP has substantially increased the number of enforcement actions addressing pay discrimination. In FY 2011 OFCCP more than doubled the number of conciliation agreements with financial remedies for compensation cases compared to FY 2010."); see also Josh Ulman & Christi Layman, OFCCP in Overdrive, THE HIGHER EDUCATION WORKPLACE (Spring 2012), *available at* <http://www.cupahr.org/diversity/files/OFCCP%20in%20Overdrive.pdf> (the DOL's Office of Federal Contract Compliance Programs has increased its regulatory and enforcement efforts to "unprecedented levels" during the past year and a half).

50. However, there is still a continuing problem. The Employment Litigation Section of the DOJ's Civil Rights Division has opened over forty pattern and practice investigations but has filed few systemic enforcement challenges in recent years,⁴⁸ partially because the DOJ has been overwhelmed with Uniformed Services Employment and Reemployment Rights Act ("USERRA") individual cases.⁴⁹

51. In addition, recent Supreme Court rulings have limited the ability of private plaintiffs to bring class actions,⁵⁰ highlighting the importance of government enforcement to eradicate systemic discrimination.⁵¹ However, federal budget cuts make it unlikely that the government will be able to significantly increase its enforcement efforts.

A. Affirmative Action and Employment Discrimination

52. While the Supreme Court's recent decisions on the issue have not spelled the end of affirmative action, they have made it increasingly more difficult for government employers to implement voluntary affirmative action programs. For example, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658 (2009) concerned the decision of the fire department of the city of New

⁴⁸ The DOJ Employment Litigation Division's website lists forty-one employment discrimination complaints that have been filed since 2011; however, only four of the listed cases are systemic or "pattern-or-practice" cases. DEPT. OF J., Employment Litigation Section Cases (last viewed July 25, 2013), available at <http://www.justice.gov/crt/about/emp/papers.php>.

⁴⁹ Of the forty-one complaints that the Employment Litigation Section lists on its website as having been filed since 2011, twenty were USERRA cases. See DEPT. OF J., Employment Litigation Section Cases (last viewed July 22, 2013), available at <http://www.justice.gov/crt/about/emp/papers.php>; see also U.S. Department of Justice Civil Rights Division: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 25 (2012) (statement of Thomas E. Perez, Assistant Att'y Gen., Civil Rights Division, U.S. Department of Justice) ("The Division has also been vigilant in protecting the employment rights of our men and women in uniform under the Uniformed Services Employment and Reemployment Rights Act (USERRA) . . . [t]o date in the current Administration, 43 cases have been filed under USERRA, already exceeding the 32 USERRA cases filed in the entire four years that the previous Administration had USEERRA jurisdiction.").

⁵⁰ See discussion *infra* on class actions.

⁵¹ Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012* (Jan. 28, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm> ("In fiscal year 2012, the EEOC filed 122 lawsuits including 86 individual suits, 26 multiple-victim suits (with fewer than 20 victims) and 10 systemic suits); see also Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, 5 HARV. L. & POL'Y REV. 375, 406 (2011) (the EEOC's effectiveness in bringing pattern or practice cases might be diminished as a result of limited resources and the U.S. Supreme Court decision, *Wal-Mart v. Dukes*).

Haven, Connecticut to ignore the results of a test for promotion to management because none of the Black firefighters who passed the exam scored high enough to be considered for management positions. Eighteen firefighters (seventeen who were White and one who was Hispanic) who would have been up for promotion under the discarded results brought suit against the city. The Supreme Court held that the city had violated Title VII of the Civil Rights Act of 1964 by engaging in reverse discrimination and reinstated the test results.⁵²

53. With respect to private employers, the legal standards under Title VII have steadily eroded. As Courts have imposed increasingly demanding burdens of proof, more cases are being decided against plaintiffs on summary judgment. As previously noted, the Lawyers' Committee recognizes the EEOC's recent efforts in suits against private employers,⁵³ however, the legal framework for dealing with discriminatory practices and policies with respect to both government and private employers has deteriorated markedly.

B. Access to Courts for Employment Cases

54. An alarming trend in recent years has reflected many courts' desires to shield employers from lawsuits, resulting in significantly narrowing an employee's ability to have his or her grievances heard in court. Employees (private litigants) are frequently discovering that their ability to bring class action lawsuits in court has been cut off because of the real-life impact of arbitration clauses in employment contracts and the courts subsequent interpretation of these clauses.

55. Employers are increasingly forcing new employees to sign agreements giving up their rights to go to court and instead forcing them into binding arbitration, agreements that have been upheld by the Supreme Court. Most recently, in *American Express Co. v. Italian Colors*

⁵² For discussion of the *Fisher* case, another recent affirmative action case that involved higher education, see section III (B)(2)(F).

⁵³ See discussion and sources at *supra* note 50.

Restaurant, 130 S.Ct. 2401 (2010), the Supreme Court ruled that even if a class action was the only economically feasible way to challenge an alleged illegal practice, an arbitration clause that prohibited class actions was binding and required individual arbitration. By denying employees access to courts and limiting arbitration to individual claims, employers are precluding employees from effectively vindicating their rights through collective action. This has placed additional burdens on the government to bring pattern and practice cases. In addition to precluding class actions in disputes that involve arbitration agreements, the Supreme Court's decision in *Wal-Mart v. Dukes*, 564 U.S., 131 S.Ct. 2541 (2011) has made it much harder to obtain class certification in private class action cases challenging systemic discrimination.⁵⁴

56. The Supreme Court also held that there is an increased burden of proof to prove retaliation in employment cases. In *University of Texas Southwestern Medical Center v. Nasser*, 133 S.Ct. 97 (2013), the Court addressed the issue of whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove "but-for" causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a "mixed motive" (i.e., that an improper motive was one of multiple reasons for the employment action). In a 5–4 decision, the Court held that proof of but-for causation is required to succeed on a retaliation claim under Title VII, thereby heightening the burden of proof and making it more difficult for victims of employment discrimination to bring claims in court.

⁵⁴ The passage of the Equal Employment Opportunity Restoration Act ("EEORA"), would undo many of the restrictive standards of *Wal-Mart v. Dukes*. Under EEORA, employees would be able to band together and file group action lawsuits to challenge unfair treatment in the workplace, workers could challenge subjective employment practices (hiring, firing, promotion, or pay based on anything other than an objective assessment of performance) that are discriminatory, and judges would have discretion to make certain that workers are granted the necessary compensation and remedies when claims of discrimination are proven. The Leadership Conference on Civil and Human Rights, Advocacy Letter on Cosponsor S. 3317, H.R. 5978 the Equal Employment Opportunity Restoration Act (EEORA), June 21, 2012, Sent to the U.S. Senate and the U.S. House of Representatives, Prepared by President and CEO Wade Henderson and Executive Vice President Nancy Zirkin.

C. Use of Credit Checks to Discriminate Based on Race

57. At present, 47% of employers use credit background checks during the hiring process to screen out employment applicants with poor credit. The use of poor credit to cut off employment opportunities has had a disparate impact on minorities.⁵⁵ The federal government, as one of the frequent users of credit reports as a credential for employment, is one of the worst offenders.⁵⁶ If passed, the Equal Employment for All Act (H.R. 645) would amend the Fair Credit Reporting Act to prohibit the use of credit checks in employment decisions. The Lawyers' Committee strongly discourages the use of credit reports as a means to evaluate job applicants and encourages the federal government to support the passage of legislation to eliminate this discriminatory practice.

D. Use of Criminal Background Checks to Discriminate Based on Race

58. The overbroad use of criminal background checks by employers to screen out job applicants has a disproportionate impact on minorities. Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population: in 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the population generally. In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drugs offenses even though their rate of drug use is similar to the rate of drug use for Whites.⁵⁷

⁵⁵ Amy Traub, Senior Policy Analyst, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job*, Demos, 8-9, February 2013.

⁵⁶ *See id.* at 14.

⁵⁷ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF LEGAL COUNSEL, EEOC ENFORCEMENT GUIDANCE NUMBER 915.002 at 9-10 (Apr. 25, 2012) (internal citations omitted).

59. Some employers screen out applicants with arrest records that did not lead to a conviction.⁵⁸ In 2012, the EEOC adopted enforcement guidance on the use of criminal background checks in hiring. The Guidance prohibits discrimination against persons solely because they have an arrest record that did not lead to a conviction. The Guidance generally requires that employers conduct individualized assessments based on a list of criteria to determine if an applicant's criminal record is job-related and necessary for the business.

60. While the use of criminal background checks is appropriate and necessary in some cases and for certain positions, the broad overuse of criminal background checks without any regulatory controls or fair and consistent application has had a far-reaching discriminatory impact on minorities trying to enter or re-enter the labor market. With the goal of putting an end to discriminatory hiring policies, the Lawyers' Committee has contributed to the publication of *Best Practice Standards: The Proper Use of Criminal Records in Hiring*, to advise employers on how best to implement the EEOC's most recent guidance on the use of criminal background checks.⁵⁹

61. Unfortunately, the Federal Government is one of the worst offenders in the unnecessary use of credit and criminal background checks to screen out applicants for employment. The Office of Personnel Management, which sets government personnel policies, requires that applicants for a wide swath of government positions undergo credit and criminal background checks. Thus, the United States has failed to take the necessary lead to alleviate the unnecessary use of such background checks.

2. Lawyers' Committee Recommendations

⁵⁸ Ylan Q. Mui, *Growing use of FBI Screens Raises Concerns About Accuracy, Racial Bias*, WASHINGTON POST, July 29, 2013, available at http://www.washingtonpost.com/business/economy/growing-use-of-fbi-screens-raises-concerns-over-accuracy-racial-bias/2013/07/29/d201ecda-f49f-11e2-aa2e-4088616498b4_story.html.

⁵⁹ See BEST PRACTICE STANDARDS: THE PROPER USE OF CRIMINAL RECORDS IN HIRING (2013).

62. The U.S. Government should show its commitment to protecting employment rights by using all appropriate means to ensure federal agencies protect those rights and promote equal treatment.

63. The U.S. Government, in spite of narrow doctrinal interpretations by the courts, should encourage and support the enactment of laws to protect the employment rights of minorities and prevent disparate impact on minorities.

64. The U.S. Government should aggressively discourage state efforts to end affirmative action programs in employment and contracting.

65. The U.S. Government should use its federal funding powers as a tool to encourage state and federal agency compliance with affirmative action programs.

66. The DOJ should enforce Title VII and Title IX of the Civil Rights Act of 1964, with a view to ending inequalities at workplaces in the United States.

67. The DOJ should file more systemic employment discrimination cases on behalf of African Americans, Hispanic Americans and other protected groups.

68. The U.S. Government should support adoption of employment legislation discussed in this Submission. The Federal Office of Personnel Management should revise its own policies with respect to credit checks when hiring and promoting government workers.

D. Housing Discrimination

69. The Lawyers' Committee notes that although recent trends reflect a growing diversity in neighborhoods, the effects of past discriminatory practices in the area of housing continue to permeate the American experience. Although equipped with laws to eliminate racial discrimination in housing, the U.S. government continues to struggle with its role as an enforcer. As this Section will demonstrate, the U.S. faces a difficult obstacle in overcoming its history of discriminatory housing policies, and, although the federal government has committed to equal protection in housing, the U.S. government must take further affirmative steps to reach the goals set forth under Article 2 and 26 of the Covenant.⁶⁰

1. U.S. History of Residential Segregation

70. The United States has a long history of racial and residential segregation in which the government purposefully sought to maintain racial separation among its citizens. Residential segregation and isolation of African Americans and other minorities are not an accident but rather direct consequences of past intentionally discriminatory decisions by government and private industry.⁶¹ As the U.S. has admitted in the past, "[f]or many years, the federal government itself was responsible for promoting racial discrimination in housing and residential segregation."⁶²

⁶⁰ A discussion of the U.S.'s recent accomplishments in the area of fair housing can be found at ¶¶72-76 of the U.S. Report. In addition to past discriminatory housing policies, widespread discrimination in private real estate and mortgage lending markets and through exclusionary zoning and other land use decisions by local governments continues to pose serious obstacles to promoting and achieving an improved level of residential integration.

⁶¹ The Nat'l Comm'n on Fair Hous. and Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity 6-9* (Dec. 2008), *available at* http://www.lawyerscommittee.org/admin/fair_housing/documents/files/0005.pdf; U.S. Hous. Scholars and Research and Advocacy Orgs., *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)* 4 (Jan. 2008), *available at* <http://www.prrac.org/pdf/FinalCERDHousingDiscriminationReport.pdf> (hereafter, "Residential Segregation").

⁶² U.S. Dep't of State, *Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* 49 (Sept. 2000) *available at* <http://www.ushrnetwork.org/pubs/CERD.USA.pdf>. Administration of U.S. public housing programs confined

71. The U.S. Government adopted policies that reinforced residential segregation through (i) assignment of tenants in public housing on a racial basis; and (ii) locating public housing only in minority neighborhoods in cities where minorities depend on it.⁶³ Furthermore, U.S. Government policies accelerated suburbanization of the U.S.'s urban centers, often resulting in middle class white families moving into suburbs and leaving minorities in concentrated urban areas of poverty.⁶⁴

2. Current State of Housing Segregation

72. The effects of past policies promoting racial segregation persist in many metropolitan areas today.⁶⁵ Examination of the 2010 Census indicates that although there is now some change in the level of racial segregation in the cities of the Northeast and Midwest, the slow pace of lowering black-white segregation has continued.⁶⁶ The ability to lower residential

minority beneficiaries to geographically and economically isolated ghettos. U.S. Government agencies often assigned beneficiaries of public housing assistance geographically by race. This led to increased racial residential segregation, with lower-income minorities becoming more and more concentrated in urban ghettos. Residential Segregation at 6.

⁶³ Poverty Race & Research Action Council, Brief Statement on the Issue of Housing Segregation in the United States; prepared for the 2005 North American Consultation on Women and the Right to Housing 7 (2005), <http://www.prrac.org/pdf/PRRACStatementUN.pdf>; Allard K. Lowenstein Int'l Human Rights Clinic at Yale Law School on Behalf of Poverty & Race Research Action Council, Submission on Racial Segregation and the Right to Housing, before the Inter-American Commission on Human Rights, Situation of the Right to Adequate Housing in the Americas Hearing – 122nd Period of Sessions 2, 6-7 (2005) <http://www.prrac.org/pdf/IACHRLetter2005.pdf> (describing the U.S.'s history of discriminatory housing policies).

⁶⁴ Lawyers' Comm. for Civil Rights Under Law, *Unequal Opportunity: A Critical Assessment of the U.S. Commitment to the Elimination of Racial Discrimination* 69 (2007), *available at* <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/LawyersCtteeCiviRts.pdf> (hereinafter, "Unequal Opportunity").

⁶⁵ Residential segregation is not benign. Not only does it mean that African Americans, Hispanics, Asians and whites live in isolated neighborhoods with little contact between them, but the effect of such racial and economic segregation is that African-American and Hispanic families, on average, live at a disadvantage and raise their children in communities with fewer resources. *See* John Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, Project US2010 Report Project, 1 (July 2011) at 16-17, *available at* www.s4.brown.edu/us2010/Data/Report/report0727.pdf (hereafter, "Separate and Unequal").

⁶⁶ John Logan and Brian Stults, *The persistence of segregation in the metropolis: New findings from the 2010 census*. Census Brief prepared for Project US2010 (2011) at 1-2, *available at* www.s4.brown.edu/us2010/Data/Report/report2.pdf. As black-white segregation in neighborhoods has slowly declined since 1990, blacks have become less isolated from other minority groups, such as Hispanics and Asians, but their exposure to whites has hardly changed. With only one exception (the most affluent Asians), minorities at every income level live in poorer neighborhoods than do whites with comparable incomes. There is considerable variation in these patterns across metropolitan regions. But as studies indicate, in the fifty metropolitan areas with

segregation is hindered by the persistence of large all-minority areas, the reluctance of whites to move into majority-minority neighborhoods, and white flight from some previously diverse neighborhoods.⁶⁷

73. However, the number of neighborhoods where whites, blacks, Hispanics and Asians are well represented has increased. In 2010, 38.2% of the total population lived in more diverse neighborhoods, an increase from 22.5% in 1980.⁶⁸ But trends have also indicated that there has been an increase in the types of neighborhoods where whites are notably absent. The share of African Americans living in black-dominant neighborhoods was cut in half in this period, but about half of blacks still live in all-minority neighborhoods, now mostly in combination with Hispanics or Hispanics and Asians. The share of Hispanics and Asians living in all-minority neighborhoods has also increased. As statistics and studies have shown, there has been a clear juxtaposition of two trends; one toward greater diversity, but another toward persistence or growth of all-minority neighborhoods.⁶⁹

74. African-American households are less isolated now than they were in 1990 (40.7% vs. 47.1%), but they also now have smaller percentages of white households in their neighborhoods (39.8% v. 41.7%). Additionally, these neighborhoods are seeing increased exposure to Hispanics and Asians households, the two fastest-growing segments of the U.S. population.⁷⁰ However, a central new finding is that African-American neighborhoods are separate and unequal not because African Americans cannot afford homes in better

the largest black populations, there are none where average black exposure to neighborhood poverty is less than 20 percent higher than that of whites, and only two metropolitan areas where affluent blacks live in neighborhoods that are less poor than those of the average white person. Separate and Unequal at 1.

⁶⁷ John Logan, *Global Neighborhoods: New Evidence from Census 2010*, US2010 Project (Nov. 2011) at 11-12, available at <http://www.s4.brown.edu/us2010/Data/Report/globalfinal2.pdf> (hereafter, "Global Neighborhoods").

⁶⁸ *Global Neighborhoods* at 4.

⁶⁹ *Id.* at 4.

⁷⁰ Separate and Unequal at 5.

neighborhoods, but because even when they achieve higher incomes they are unable to translate these higher incomes into residential mobility.⁷¹

75. In turn, White residential isolation remains very high, partly because white households remain the majority of the population in metropolitan America. However, even this statistic has declined in recent years, with the average white household living in neighborhoods where 83% of households were white in 1990 and this figure dropping to only 75% white in 2005-2009.⁷² Income differences do not account for this decrease in white isolation neighborhoods, as demonstrated by the fact that currently, for example, poor white households exist in neighborhoods that average 74% white, while affluent white households exist in neighborhoods that average 75.3% white. White households typically exist in predominantly white areas regardless of income level.⁷³

3. The Persistence of Housing Discrimination

76. The current statistics demonstrating continued racial segregation in residential neighborhoods is further exacerbated by discriminatory housing policies. Beginning in the late 1970s, the Department of Housing and Urban Development (HUD) has rigorously monitored trends in racial and ethnic discrimination in both rental and sales markets approximately once each decade through a series of nationwide paired-testing studies. The most recent report issued in June 2013 was based on a nation-wide testing program performed in 2012 (the "HUD Report") and found that although the most blatant forms of housing discrimination have declined since the first study in 1977, the forms of discrimination that persist result in increased costs of housing searches for minorities and restrict housing options. For example, African Americans, Hispanics and Asians learn about fewer housing options than equally qualified white applicants

⁷¹ *Id.* at 15.

⁷² *Id.* at 3.

⁷³ *Id.* at 3.

because, among other reasons, real estate agents and rental housing providers recommend and show fewer available homes and apartments to minority families.⁷⁴ Furthermore, the study concludes that is a national, not a regional, phenomenon.⁷⁵ The HUD Report notes that, looking forward, national fair housing policies must continue to adapt to address the patterns of discrimination and disparity that persist today.⁷⁶

4. The Legal Framework of the Fair Housing Act

77. The federal government has a strong tool at its disposal to combat continuing discrimination in housing matters. In 1968, the Kerner Commission, born from an inquiry launched by the National Commission on Civil Disorders, observed that the country was dividing into two nations, one white and one black, increasingly separate and unequal.⁷⁷ Shortly after this report was issued, Martin Luther King was assassinated, spurring passage of the Fair Housing Act (“FHA”), which had been stalled in Congress for two years, a week later on April 11, 1968.

78. The heart of the FHA is a broad prohibition of discrimination in housing and mortgage lending and other residential real estate transactions. Impediments to addressing residential segregation have been a core concern of the FHA since its passage because such impediments hinder advancement of the FHA’s goal of achieving “truly integrated and balanced living patterns.”⁷⁸ The FHA’s principal sponsor, Senator Walter Mondale, stated that the FHA was intended to undo the effects of past governmental discrimination and specifically noted how

⁷⁴ U.S. Dep’t of Hous. and Urban Dev. and the Urban Inst., *Housing Discrimination Against Racial and Ethnic Minorities* 2012 xi, 52, *available at* http://www.huduser.org/portal/publications/fairhsg/hsg_discrimination_2012.html (hereafter, “Housing Discrimination”).

⁷⁵ *Id.* at xi, 71.

⁷⁶ *Id.* at xi, xxiv.

⁷⁷ Nat’l Fair Hous. Alliance, *Modernizing the Fair Housing Act for the 21st Century* (2013 Fair Housing Trends Report) 1 (Apr. 11, 2013), *available at* http://www.nationalfairhousing.org/Portals/33/2013_Fair_Housing_Trends_Report.PDF.

⁷⁸ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

the exclusionary attitude of many municipalities toward subsidized housing contributed to the segregated housing patterns that the FHA was designed to eliminate.⁷⁹

79. The FHA is administered and enforced primarily by HUD and the DOJ and through private rights of action. Violations of the FHA may be proved through evidence of intentional discrimination or through what is known as disparate impact analysis. Disparate impact analysis does not require proof of intentional discrimination, and permits findings of violations of the FHA which involve unjustified and unnecessary housing or lending practices which have the practical effect of discriminating against well-qualified Americans.

80. Since shortly after the FHA became law, courts of appeals have unanimously adopted the disparate impact standard of proof in FHA cases. It has been particularly important in cases challenging exclusionary zoning and other land use decisions which obstruct efforts to overcome barriers to promoting and achieving residential integration.⁸⁰

81. However, in recent years, disparate impact has come under attack and recently the U.S. Supreme Court has agreed to address the question as to whether disparate impact claims are cognizable under the FHA.⁸¹ The Lawyers' Committee submits that this attack against disparate impact is a very serious threat to vigorous enforcement of the fair housing mandate and the ability to fight residential segregation and encourages the federal government to take an aggressive stance in this fight.

⁷⁹ 114 Cong. Rec. 2698-2703 (1968).

⁸⁰ In one of the first cases recognizing the disparate impact standard of proof, a court stated: "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

⁸¹ *Township of Mt. Holly v. Mt. Holly Citizens in Action* No. 11-1507 (Petition for Writ of Certiorari granted June 17, 2013. May 2013).

5. The Duty to Affirmatively Further Fair Housing

82. In addition to prohibiting all types of housing discrimination, the FHA also includes an affirmative duty that HUD and other federal agencies engaged in housing and urban development -- as well as all recipients of federal housing assistance -- administer housing programs in a manner that affirmatively furthers fair housing (AFFH).⁸² This requirement is intended to root out individual and systemic housing discrimination and segregation, and to promote diverse, inclusive communities throughout the U.S. The goal of the AFFH requirement is to provide individuals and families (across the spectrum of race, ethnicity and disability) the opportunity to have full access to job opportunities, a choice in the selection of schools, and a safe place to live. As such, the duty to AFFH is a unique provision in civil rights law because it requires affirmative steps to promote fair housing and residential desegregation.

83. Courts have recognized that this provision of the FHA requires HUD and the recipients of federal housing assistance to "do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."⁸³ In defining this affirmative duty, courts have emphasized the importance of both careful fair housing analysis and more diverse housing choices and outcomes.⁸⁴

84. Historically, there has been virtually no enforcement of this provision by HUD. A 2010 Government Accountability Office (GAO) report highlighted HUD's limited regulatory requirements and oversight concerning the duty to AFFH as the major reason for poor compliance by recipients of federal housing and urban development funds and recommended

⁸² 42 U.S.C. 3608(d) & (e).

⁸³ *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.); *see also Thompson v. HUD*, 348 F. Supp. 2d at 398 (offering a lengthy history of housing discrimination based on race in the Baltimore area).

⁸⁴ *United States ex rel. Anti-Discrimination Center of Metro New York v Westchester County*, 668 F. Supp. 2d 548, 552 (S.D.N.Y. 2009).

several steps for improving enforcement, including expeditiously completing a new, comprehensive regulation pertaining to the AFFH requirements.⁸⁵

6. Recent Accomplishments of the U.S. Government

85. In recent years, the Obama Administration has taken several important actions to improve the U.S. Government's fair housing activities. First, the DOJ has vigorously opposed the attack on the disparate impact standard of proof through amicus curiae briefs supporting the standard in the two U.S. Supreme Court cases that have raised the issue.⁸⁶ Moreover, HUD recently promulgated a disparate impact regulation which recognizes this longstanding standard of proof.⁸⁷

86. HUD has also taken important actions designed to strengthen compliance with the AFFH requirement. For the first time, HUD has taken meaningful action to enforce this provision in the last few years.⁸⁸ Moreover, on July 19, 2013, it responded to the GAO Report and promulgated for comment a regulation designed to improve understanding and compliance with the AFFH requirement.⁸⁹ While the regulation represents a step forward, much work remains to be done to produce a regulation that will result in improved enforcement of and compliance with the AFFH requirement.

87. HUD has also created the Sustainable Communities Initiative (SCI), a joint program among HUD, the U.S. Department of Transportation and the U.S. Environmental

⁸⁵ U.S. Gov't Accountability Office, GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans (2010) (hereafter, the "GAO Report").

⁸⁶ Brief for the United States as Amicus Curiae, *Township of Mt. Holly v. Mt. Holly Citizens in Action* No. 11-1507 (May 2013); Brief for the Respondents as Amicus Curiae, *Steve Magner v. Thomas J. Gallagher* No. 10-1032.

⁸⁷ See "Implementation of the Fair Housing Act's Discriminatory Effects Standard." 78 Fed. Reg. 11460 (Feb. 15, 2013).

⁸⁸ For further discussion, see Lawyers' Comm. for Civil Rights Under Law, Poverty & Race Research Action Council & Nat'l Fair Hous. Alliance, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card, Part II: HUD Enforcement of the Affirmatively Furthering Fair Housing Requirement, Fair Housing Requirement 1 (Mar. 2013), available at <http://www.prrac.org/pdf/HUDFirstTermReportCardPartII.pdf>.

⁸⁹ 78 Fed. Reg. 43710 (July 19, 2013).

Protection Agency, aimed at improving diversity and opportunity in neighborhoods through "regional planning efforts that integrate housing and transportation decisions, and increase[ing] state, regional and local capacity to incorporate livability, sustainability, and social equity values into land use plans and zoning."⁹⁰

88. The DOJ's Civil Rights Division, tasked with enforcement of the anti-discrimination provisions of the FHA, has successfully fought for additional funding to hire new attorneys to increase its enforcement capabilities, particularly in the fair lending areas where it created a fair lending unit that has significantly increased the enforcement of fair lending laws.⁹¹ As noted by the U.S., since the fair lending unit was created in 2010, DOJ's Civil Rights Division has filed several fair lending cases. The Lawyers' Committee commends these recent accomplishments, as discussed in the U.S. Report, but submits that continued vigilance and enforcement of the AFFH requirement remain necessary.⁹²

7. Areas of Concern⁹³

89. While the U.S. Government has taken important steps to give life to the AFFH requirement of the FHA, considerably more needs to be done to further strengthen its commitment to this mandate. This includes the following:

- Creating a formal enforcement process to provide an established mechanism to enforce compliance with the AFFH requirement;
- Improvement in the Section 8 Housing Choice Voucher program ("HCV"): this program is the largest low-income housing program in the U.S., serving over 2 million families and participants who theoretically have a choice to rent any unit

⁹⁰ Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program 1 (June 23, 2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35393.pdf

⁹¹ See Rainbow PUSH Coalition – Annual Wall Street Conference, Remarks of Assistant Attorney General Thomas Perez (Jan 14, 2010), *available at* http://www.justice.gov/crt/about/hce/tp_rainbow_push_1-14-10.pdf.

⁹² U.S. Report at ¶ 74.

⁹³ The Lawyers' Committee further expands on its recommendations in this area in this Submission, but highlights certain areas of concern at this juncture of the report.

that meets federal standards.⁹⁴ Unfortunately, HCV's design has resulted in steering low-income families into lower opportunity areas.⁹⁵ There is also a continued housing shortage with long waits due to low inventory. Voucher holders frequently encounter difficulty moving to more affluent neighborhoods, where landlords often refuse to rent to Section 8 voucher-holders.⁹⁶

- Improving the Low-Income Housing Tax Credit program ("LIHTC"): LIHTC is the largest federal low-income housing development program with 1,539,619 units placed in service between 1995 and 2009.⁹⁷ However, there is little civil rights guidance beyond an echo of Title VIII's basic nondiscrimination provision.⁹⁸ Generally, HUD site and neighborhood guidelines prohibit building new low-income housing in racially and economically isolated neighborhoods. Yet, these rules have not been formally applied in the administration of LIHTC.⁹⁹ The result is decreased residential integration and less housing available for low-income households in high opportunity areas that provide better schools in safer areas.¹⁰⁰

90. Although recent developments demonstrate that the U.S. has given renewed focus and attention to fair housing and lending issues, there continues to be a considerable lack of adequate supply of affordable housing. The continuing sequestration and slashing of the federal budget affects housing assistance programs and further exacerbates the lack of affordable housing.

8. Lawyers' Committee Recommendations

91. The U.S. Government should use all appropriate means to ensure that legal protections against racial discrimination in the purchase and rental of housing are enforced and that there is speedy investigation and resolution of complaints of racial discrimination by those in

⁹⁴ Poverty Race & Research Action Council, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card. Part 1: HUD Housing Programs (January 2013), p 8, *available at* www.prrac.org/pdf/HUDFristTermReportCard.pdf.

⁹⁵ Ingrid Gould Ellen and Keren Mertens Horn (Poverty & Race Research Council), Do Federally Assisted Households Have Access to High Performing Public Schools? (November 2012), *available at* www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf.

⁹⁶ Residential Segregation at 7.

⁹⁷ See HUD Office of Policy Development & Research, New Low Income Housing Tax Credit Data Available, Table 2, *available at* <http://www.huduser.org/portal/datasets/lihtc/topical9509.pdf>.

⁹⁸ 26 C.F.R. § 1.42-9; *see also* Residential Segregation at 8.

⁹⁹ Residential Segregation at 9.

¹⁰⁰ Elizabeth K. Julian, *Community Revitalization, Civil Rights, and the Low Income Housing Tax Credit Program*, Carolina Planning J. Vol. 38, 2013 at 25.

the housing market. This includes vigorous enforcement of laws and regulations already in place to prevent discriminatory and predatory lending practices.

92. The U.S. Government must further strengthen compliance with the FHA's AFFH requirement. This includes allocating public housing assistance in a way that encourages integration and diversity in both rural and metropolitan areas, as well as taking steps to increase the inventory of housing stock.

93. The U.S. Government must continue to ensure that disparate impact as a standard of proof under the FHA is maintained even if new legislation is needed.

III. ARTICLE 25: ACCESS TO THE POLITICAL SYSTEM

A. The Scope of ICCPR Article 25 And the Focus of this Submission

94. Since its last review, the U.S. Government has made uneven progress in fulfilling its obligation under Article 25. The Lawyers' Committee applauds the efforts by the U.S. government to advance voting rights against varied efforts to undermine access to the ballot. It has vigorously defended the constitutionality of Section 5, one of the most important provisions of the Voting Rights Act ("VRA").¹⁰¹ The Attorney General of the United States has spoken out against the wave of suppressive laws being passed in a number of states.¹⁰² And, President Obama has created the President's Commission on Election Administration to assess and propose recommendations addressing problems in voting.¹⁰³

95. Before the Supreme Court's recent decision in *Shelby County v. Holder*¹⁰⁴ nullified Section 5 of the VRA by invalidating the formula that determined the states and localities with a history and continuing pattern of discrimination that had to submit voting changes for federal review, the provision had been used to successfully strike down suppressive laws. Today, a powerful legal safeguard against voting discrimination is ineffective. In the aftermath of the *Shelby* decision, the U.S. stands at a critical juncture; not only must Congress restore the the VRA to full effectiveness; the executive and the courts must also aggressively effectuate and respect the constitutional provisions that protect the right to vote, as well as the remaining provisions of the VRA, against the wave of suppressive voting laws being passed by certain states.

96. This Section responds to Issue 26(b) of the questions posed by the Committee and discusses other pressing voting matters that the U.S. Report neglected to address,¹⁰⁵ such as the on-going

¹⁰¹ The Voting Rights Act of 1965; 42 U.S.C. §§ 1973–1973aa-6.

¹⁰² Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, Washington Post (July 25, 2013), available at http://articles.washingtonpost.com/2013-07-25/politics/40861557_1_voting-rights-act-voting-laws-civil-rights-groups; Julian Aguilar, *AG Eric Holder: We Must Uphold Voting Rights Act*, Texas Tribune, (Dec. 13, 2011), available at <http://www.texastribune.org/texas-politics/voter-id/holder-we-must-uphold-voting-rights-act/>.

¹⁰³ The Presidential Commission on Election Administration U.S. General Services Administration, Federal Dvisor Committee Charter, available at http://www.supportthevoter.gov/files/2013/06/PCEA_Establishment_Charter.pdf.

¹⁰⁴ No. 12-96, 133 S.Ct. 2612, 2013 WL 3184629 (2013).

¹⁰⁵ The discussion relating to voting rights is addressed by the U.S. in the U.S. Report beginning at ¶451.

problems in election administration and other problems of voter suppression, and offers recommendations to address these ongoing problems. As this Section discusses, minority, poor, disabled and student voters are facing barriers to the ballot and the recent weakening of vital voting rights threatens to disenfranchise voters. Even though the authority to establish voting qualifications is constitutionally delegated to state governments, these qualifications remain subject to the 14th and 15th Amendments, and the U.S. government has the authority to enforce voting laws such as the VRA and the National Voter Registration Act, and can forcefully speak out against suppressive voting laws and practices.

B. The Need to Restore the Voting Rights Act

97. An essential tool the U.S. Government has to fight against discrimination in voting is the VRA.¹⁰⁶ As noted above, one of the most important provisions of the VRA has been Section 5, which requires certain "covered jurisdictions," or those with a documented history of discriminatory voting practices and low voting turnout, to receive approval from the U.S. Department of Justice or the U.S. District Court for the District of Columbia before implementing any changes to voting procedures, a process that is known as preclearance.¹⁰⁷ Section 5 essentially prevented covered jurisdictions from altering their voting laws in ways that had the purpose or effect of discriminating against minority voters.¹⁰⁸ However, given that the Supreme Court has invalidated the coverage formula, Congress must now pass a new law for any jurisdictions to be subject to Section 5.¹⁰⁹

¹⁰⁶ The Fifteenth Amendment of the U.S. Constitution promised that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." In the face of significant discrimination in voting, the Federal Government enacted the VRA to enforce the spirit of the Fifteenth Amendment. U.S. Const. Amend. XV.

¹⁰⁷ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 195 (2009). When Section 5 of the VRA was set to expire in 2006, Congress reauthorized Section 5 of the VRA, which was set to expire, until 2031. Section 5 of the VRA is widely regarded as the cause behind increases in minority registration, voter turnout, and office-holding and has been essential in striking down state election laws which endanger free and fair elections. *Id.* at 199-200.

¹⁰⁸ For example, *see South Carolina v. Holder*, No. 12-203, 2012 WL 3538298 (D.D.C. 2012) (DOJ denied preclearance for a restrictive Voter ID law in South Carolina, and three-judge district court panel struck the law for the 2012 election but cleared a reinterpreted version of the law for future use); *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. 2012) (restrictive Voter ID law denied preclearance); *Florida v. United States*, No. 11-1428, 2012 WL 3538298 (D.D.C. 2012) (proposed law to decrease number of days for early voting shown more likely to affect African American voters than White voters in Section 5 covered counties in Florida and denied preclearance).

¹⁰⁹ *Shelby County v. Holder*, No. 12-96, 133 S.Ct. 2612, 2013 WL 3184629 (2013).

98. With the heart of the VRA rendered inoperative, states whose restrictive laws were struck down by the courts have already announced that they intend to implement those laws.¹¹⁰ Additionally, North Carolina, which was previously subject to preclearance, has passed one of the most restrictive voting laws.¹¹¹ By thus rendering Section 5 ineffective, the Supreme Court has severely limited the ability of the U.S. Government to address potentially restrictive and discriminatory voting changes in state and local governments with a history of passing discriminatory voting laws.¹¹² The Lawyers' Committee urges the U.S. Government to work with Congress to reinstate the full protections of the VRA.

C. The Need to Combat Voter Suppression

99. More and more states are passing suppressive voting laws. The U.S. acknowledged that a report discussing the 2008 presidential election noted "concerns that arose during the recent elections have yet to be fully addressed in some states, and the continuation of efforts to further enhance public confidence in the election process would be appropriate."¹¹³ Moreover, in recent years, the right to vote has been under attack as states have passed or attempted to pass laws or implement procedures that disproportionately affected voters of color, the poor, and young people. Voter suppression laws have targeted most aspects of the American voting process from voter registration to early voting to restrictive

¹¹⁰ Nick Byrne, *North Carolina Restricts Voting Access in the Name of Reform*, *The Jurist* (Aug. 27, 2013), available at <http://jurist.org/dataline/2013/08/nick-byrne-voter-ID.php>; Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, PBS Frontline, available at <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time/>; *Supreme Court Knocks Out Part of Voting Rights Act; Voter ID Now the Law in Texas, AG Says*, *Houston Chronicle* (June 25, 2013), available at <http://blog.chron.com/txpotomac/2013/06/supreme-court-strikes-down-key-provision-of-voting-rights-act-narrows-its-scope/>; R.L. Nave, *Hosemann: Mississippi Voter ID a Go as SCOTUS Guts Voting Rights Act*, *Jackson Free Press* (June 25, 2013), available at <http://www.jacksonfreepress.com/news/2013/jun/25/miss-voter-id-balance-scotus-guts-voting-rights-ac/>.

¹¹¹ See e.g., <http://politicalticker.blogs.cnn.com/2013/08/12/north-carolina-gov-mccrory-signs-voter-id-law/>; <http://www.theguardian.com/world/2013/jul/27/north-carolina-republicans-voting-rights-bill>; <http://www.bloomberg.com/news/2013-07-25/north-carolina-first-to-weight-voting-laws-after-ruling.html>.

¹¹² *Shelby County v. Holder*, No. 12-96, 133 S.Ct. 2612, 2013 WL 3184629 (2013) (Ginsburg J., *dissenting*) (stating "The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which §5 continues to protect minority voting rights.").

¹¹³ See U.S. Report at ¶453.

voter ID.¹¹⁴ These laws present a significant barrier to voting for many eligible citizens and have a disparate impact among minorities and young voters.¹¹⁵ Proponents of suppressive voting measures claim that these laws were necessary to combat voter fraud or to ensure integrity at the ballot. However, there is little evidence that these laws would address the forms of voter fraud that have been documented as genuine problems. The Supreme Court recently reviewed another suppressive law; the proof of citizenship law passed by referendum in the State of Arizona.¹¹⁶ In the time between the law's adoption in 2004 and 2008, at least 31,000 registration applications were rejected because they did not meet the requirements of the statute. The Supreme Court determined that the NVRA prevented the application of the law to the federal voter registration form.¹¹⁷

100. The Lawyers' Committee encourages the U.S. Government to actively speak out against suppressive voting laws, including detailing the impact of suppressive laws on minority and other voters.

D. The Need to Address Poor Election Administration

101. Poor election administration creates barriers to the ballot.¹¹⁸ Election after election, problems with voter registration, inadequate poll worker training and lack of access to absentee ballots and early voting prevented access to the ballot.¹¹⁹

102. The problems with election administration are outlined in a report by the Lawyers' Committee to the Presidential Commission on Election Administration, which is discussed below.¹²⁰

¹¹⁴ Election Protection & Lawyers' Comm. for Civil Rights Under Law, *The 2012 Election Protection Report: Our Broken Voting System and How to Repair it 10-14* (2013), available at http://www.lawyerscommittee.org/projects/voting_rights/publications?id=0033 (hereafter, the "2012 Election Protection Report"); Brennan Center for Justice, *Voting Changes in 2012* (2011), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf

¹¹⁵ For example, the onerous voter ID requirements passed by some states resulted in having a disparate impact upon African American voters, in addition to the elderly, veterans, Latinos, students, people with disabilities, and lower income voters. See Brennan Ctr. for Justice at NYU Sch. of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (Nov. 3, 2006) (noting that 25% of Black voting-age citizens have no current government-issued photo ID, compared with 8% of White voting-age citizens); *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. 2012).

¹¹⁶ Alabama, Kansas and Georgia have also passed such laws. However, Arizona's was the only law in effect before the 2012 election.

¹¹⁷ *Arizona v. Inter Tribal Council of Ariz., Inc.*, No. 12-71, 133 S.Ct. 2247, 2013 WL 2922124 (2013). For further discussion, see http://www.lawyerscommittee.org/admin/voting_rights/documents/files/LCCRUL-ITCA-flyer.pdf.

¹¹⁸ See generally, 2012 Election Protection Report.

¹¹⁹ *Id.* at 2.

103. Additionally, aggressive removal of voters from registration rolls, also known as voter purging, carried out by state election officials, threatens access to the ballot. The NVRA requires voter purging to be done in a uniform and non-discriminatory manner. However, when carried out using improper databases or based on false information, eligible citizens are barred from voting. As demonstrated below, improper purging has significant consequences, and often disproportionately affects minority voters.

104. Before the 2012 Election, the state of Florida initiated a substantial effort to purge suspected non-citizens from the voter rolls. However, it used highly inaccurate procedure to target voters. Initially, the purge list had over 180,000 voters, 87% of whom were people of color.¹²¹ This list was eventually narrowed down to 2,700 people who had 30 days to verify their citizenship or have their names dropped from the voter rolls. The inaccurate targeting of eligible voters prompted election supervisors to revolt against the purge, and in the face of this and three federal lawsuits the State eventually abandoned and repudiated the list. In addition to Florida, Colorado and Texas have also undertaken statewide programs to purge voters from the voter rolls based on faulty data or procedures.¹²² As a direct result of the invalidation of Section 4 of the VRA, states such as Florida no longer have to seek federal review of the impact of its list maintenance procedures. Florida has recently announced that it will continue its purge of voters.¹²³

105. Any practice that results in the disenfranchisement of a disproportionate number of minorities warrants the attention of the U.S. government, including the improper use of voter purging, and only highlights the need to aggressively end such practices. While list maintenance is a legitimate function of the government, it must be carried out in a fair and uniform manner that does not rely on faulty data or procedures. Although included as an item requiring further elaboration in the Committee's

¹²⁰ Available at <https://www.supportthevoter.gov/files/2013/06/Recommendations-to-the-Presidential-Commission-on-Election-Administration.pdf>

¹²¹ Liz Kennedy et al., *Dēmos*, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation 9-10 (Sept. 10, 2012).

¹²² *Id.* at 8-16.

¹²³ See <http://www.bloomberg.com/news/2013-08-09/florida-s-scott-rolls-political-dice-with-new-voter-purge.html>.

list of questions, the U.S. Response failed to address the issue of purging voters from registration rolls, leading to legal or de facto disenfranchisement of voters.

106. The U.S. has long recognized the need to improve the election experience for all voters and most recently, established the Presidential Commission on Election Administration (the "Commission") to identify best practices and make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the ability to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots.¹²⁴ The Commission has been charged with considering a number of issues that continue to plague election administration, including the training and recruitment of poll workers, efficient management of voter rolls and poll books, voting machine capacity and technology and ballot simplicity and voter education. The Lawyers' Committee has submitted its recommendations to the Commission, as well as a number of case studies demonstrating issues faced and innovative programs implemented from noteworthy jurisdictions.¹²⁵ The Lawyers' Committee strongly urges the U.S. and the Presidential Commission to actively work with states to improve election administration such that eligible voters will not improperly be denied access to the ballot.

E. The Need to Combat Deceptive Voter Practices and Voter Intimidation

107. In addition to aforementioned the methods used by some states to suppress voter turnout, private parties engage in activity to depress voter turnout among certain constituencies, such as minorities and college students. The most prevalent methods used by such private parties include voter caging, voter intimidation, and a variety of other deceptive or intimidating practices.

108. Voter caging is the practice of sending non-forwardable mail to registered voters and using any returned mail as the basis for building lists of voters to challenge.¹²⁶ Such practices typically

¹²⁴ See <https://www.supportthevoter.gov/>.

¹²⁵ Available at: http://www.lawyerscommittee.org/admin/site/documents/files/Recommendations-to-the-Presidential-Commission_LCCRUL.pdf

¹²⁶ Voter caging is often used in an effort to deter voter turnout or create an atmosphere of discomfort and the challenges at the polls based on these challenge lists are of particular concern. For example, a group called "True the Vote" tried to dissuade otherwise eligible voters from voting by frivolously challenging voters' eligibility in

focus on areas with heavy minority and college student populations with the objective of depressing voter turnout among those populations.¹²⁷ This practice often is motivated by a partisan interest in suppressing turnout of key constituencies and results in successfully creating an atmosphere of discomfort.¹²⁸ Voter caging and procedures under state laws were used during the 2010 and 2012 elections by private citizens to challenge voter registrations and remove voters from the rolls, in an attempt to deprive such individuals of the right to vote.

109. State law varies regarding how a challenged voter must respond. Often, when a voter's right to vote is challenged, he or she has to vote using a provisional ballot which is not always counted. State laws permit the challenged voter a limited period of time to prove his or her eligibility, often resulting in the voter not following up and effectively being denied the right to vote.¹²⁹

110. Voter intimidation has grown in sophistication, despite the VRA's provision against it.¹³⁰ In recent years an increasing number of private citizens have acted to intimidate voters at the polls. Such intimidating behavior has not been restricted to the use or threat of force, but has also included behavior ranging from hovering over the voter, blocking lines, and engaging in confrontational conversations with election workers. For example, in the 2010 election, there were complaints that "poll watchers" were intimidating voters at multiple polling locations serving communities of color during early voting in Harris County, Texas.¹³¹ In the 2011 special election in Massachusetts, another group was report to have

numerous counties. Liz Kennedy et al., *Dēmos, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation*, 4-6 (Sept. 10, 2012).

¹²⁷ Liz Kennedy et al., *Dēmos, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation* 8-16 (Sept. 10, 2012).

¹²⁸ Voter caging has long been practiced. A consent decree resulting from litigation brought in 1980 by the Democratic National Committee against the Republican National Committee, continues to be used in recent elections to fight back against the practice; the decree in fact was recently extended until 2017 by the federal court because of continued violations by the RNC,. *Court documents available at <http://www.brennancenter.org/legal-work/dnc-v-rnc-consent-decree>*.

¹²⁹ Liz Kennedy et al., *Dēmos, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation*, 8-17 (Sept. 10, 2012).

¹³⁰ Section 11(b) of the Voting Rights Act prohibits intimidation, threats, or coercion with respect to the exercise of the right to vote, whether or not such intimidation or coercion is shown to be racially targeted.

¹³¹ Liz Kennedy et al., *Dēmos, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation*, 4 and 25 (Sept. 10, 2012).

harassed Latino voters at the polls in Southbridge, Massachusetts.¹³² In the June 2012 Wisconsin recall election, many students reported being challenged by poll watchers.¹³³ Before the 2012 general elections, billboards reading "VOTER FRAUD IS A FELONY" and listing criminal penalties appeared in predominately African American neighborhoods in Wisconsin and Ohio.¹³⁴ While it is true that voter fraud is a felony, having large billboards broadcasting this in predominantly minority neighborhoods not only stigmatized the minority communities in which they were placed; they were meant to intimidate the voters in those communities.

111. Intentionally deceptive election practices by private parties also remain a problem in the electoral process and cause distress at the polling place. Examples include misleading calls informing voters that they could vote by phone, and incorrect information about when, where or how to vote distributed either by flyers, online or by social media. These practices tend to occur in areas with substantial minority populations.¹³⁵

112. Such deceptive election practices can have a serious impact on elections, placing additional strain on both voters and election officials. Not only do they hinder the ability of the voter to cast an effective ballot, they also have the potential to create widespread misinformation regarding where and how to vote. Election officials must combat these problems by engaging in public education and outreach efforts such as public service announcements and sending notifications and pre-election mailings to registered voters containing correct information on the date, time, and locations of elections.¹³⁶

113. Given the increase of voter intimidation and deceptive practices, the U.S. must undertake aggressive efforts to eliminate these threats to fair elections and uphold its commitment to Article 25 of

¹³² *Id.* at 4.

¹³³ *Id.* at 4.

¹³⁴ 2012 Election Protection Report at 13.

¹³⁵ Liz Kennedy et al., *Dēmos, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation* 4-6 (Sept. 10, 2012); Lawyers' Comm. for Civil Rights Under Law, *Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection* (July 2012), available at <http://www.lawyerscommittee.org/page?id=0056>.

¹³⁶ 2012 Election Protection Report at 10-14; see also The Lawyers' Comm. for Civil Rights Under Law, *Recommendations & Case Studies Presented to the Presidential Commission on Election Administration* (2013), available at <https://www.supportthevoter.gov/files/2013/06/Recommendations-to-the-Presidential-Commission-on-Election-Administration.pdf>.

the ICCPR, or voters will continue to face organized disenfranchisement efforts.¹³⁷ The Lawyers' Committee recommends that the U.S. support the passage of legislation such as the Deceptive Practices and Voter Intimidation Prevention Act of 2011 that would effectively deter and punish those who engage in intimidation and deceptive practices.¹³⁸

F. Felon Disenfranchisement

114. Many states within the U.S. bar citizens with felony convictions from voting, either for a period of time or permanently.¹³⁹ These suppressive laws disproportionately affect African Americans and prevent a sizable number of citizens from voting.¹⁴⁰ We reference the coalition report regarding the impact of felony disenfranchisement laws entitled *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Law in the United States* for a more detailed discussion and analysis on how Felony Disenfranchisement laws run counter to Article 25 of the ICCPR.¹⁴¹ We incorporate by reference the recommendations made in that report.

G. Lawyers' Committee's Recommendations

115. The U.S. Government must work with Congress to reinstate the full protections of the VRA.

116. The U.S. Government must vigorously enforce all provisions of federal voting rights laws.

¹³⁷ See, e.g., 2012 Election Protection Report at 6.

¹³⁸ S. 453, 110th Congress, available at <http://beta.congress.gov/bill/110th-congress/senate-bill/453/text>.

¹³⁹ Elizabeth A. Wahler, The Sentencing Project, Losing the Right to Vote: Perceptions of Permanent Disenfranchisement and the Civil Rights Restoration Application Process in the State of Kentucky 1, 1-3 (Apr. 2006).

¹⁴⁰ The Sentencing Project & The Int'l Human Rights Law Clinic, Washington Coll. of Law, Am. Univ., Barriers to Democracy: A Petition to the Inter-American Commission on Human Rights for a Thematic Hearing on Felony Disenfranchisement Practices in the United States and the Americas 1-5 (May 2007), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_petition%20to20%IACHR_final_formatted.pdf; Angela Behrens, Chapter 6, *Disenfranchisement and Civic Reintegration: Felons Speak Out*, 151 in J. Manza & C. Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006).

¹⁴¹ *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Law in the United States*, A Shadow Report Submitted to the United Nations Human Rights Committee in Conjunction with its Fourth Periodic Review of the United States under the International Covenant on Civil and Political Rights, September 2013.

118. The U.S. Government must actively speak out against suppressive voting laws, including detailing the impact of suppressive laws on minority and other voters. Further, it should support legislation such as the Voter Empowerment Act.¹⁴²

119. The U.S. and the Presidential Commission must actively work with states to improve election administration such that eligible voters will not improperly be denied access to the ballot.

120. The U.S. Government should support the passage of laws that punish citizens or other people who use, or attempt to use, deceptive practices and intimidation with the intention of preventing another person from exercising the right to vote in an election.

121. The U.S. Government should support efforts to ensure that those disenfranchised because of felony convictions have their rights to vote restored upon completion of sentence.

¹⁴² H.R. 12, 113th Cong. (introduced in January of 2013), *available at* <http://www.brennancenter.org/legislation/voter-empowerment-act-2013>.