

OVERSIGHT OF THE CIVIL RIGHTS DIVISION OF
THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

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CONTENTS

SEPTEMBER 24, 2020

OPENING STATEMENTS

	Page
The Honorable Steve Cohen, Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Tennessee	1
The Honorable Mike Johnson, Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Louisiana	5
The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary from the State of New York	13
The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary from the State of Ohio	14

WITNESSES

Catherine E. Lhamon, Chair, U.S. Commission on Civil Rights	
Oral Testimony	16
Prepared Testimony	19
Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Educational Fund	
Oral Testimony	30
Prepared Testimony	33
Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational Fund	
Oral Testimony	41
Prepared Testimony	44
Hiram Sasser, Executive General Counsel, First Liberty Institute	
Oral Testimony	48
Prepared Testimony	50
Sharon M. McGowan, Chief Strategy Officer and Legal Director, Lambda Legal	
Oral Testimony	57
Prepared Testimony	60
Sam Mabrouk, Small Business Owner, Columbus, Ohio	
Oral Testimony	71
Prepared Testimony	73
Michael Waldman, President, Brennan Center for Justice, New York University School of Law	
Oral Testimony	74
Prepared Testimony	76
Jonathan M. Smith, Executive Director, Washington Lawyers' Committee for Civil Rights and Urban Affairs	
Oral Testimony	89
Prepared Testimony	92

LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

A letter from Stephen Boyd to Chairman Nadler regarding AAG Eric Dreiband's congressional testimony, submitted by the Honorable Mike Johnson, Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Louisiana for the record	10
A memo from Attorney General Sessions to U.S. Attorneys regarding civil consent decrees, submitted by the Honorable Sheila Jackson Lee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Texas for the record	132

IV

Page

APPENDIX

Statement submitted by the Honorable Sheila Jackson Lee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Texas for the record	141
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OVERSIGHT OF THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

THURSDAY, SEPTEMBER 24, 2020

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met, pursuant to call, at 9:33 a.m., 2141 Rayburn Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Escobar, Jackson Lee, Jordan, Johnson of Louisiana, Gohmert, and Cline.

Staff present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Jordan Dashow, Professional Staff Member; Anthony Valdez, Staff Assistant; John Williams, Parliamentarian; James Park, Chief Counsel; Keenan Keller, Senior Counsel; Will Emmons, Professional Staff Member; James Lesinski, Minority Counsel; Kiley Bidelman, Minority Clerk.

Mr. COHEN. The Committee on the Judiciary—this is the Subcommittee on the Constitution, Civil Rights, and Civil Liberties—will come to order.

Without objection, the chair is recognized to declare recesses of this subcommittee at any time. I welcome everyone to today's hearing on the "Oversight of the Civil Rights Division of the Department of Justice," a lonely place.

I thank all of our witnesses for joining us today.

Before we begin, I would like to remind members we have established an email address and distribution list dedicated to circulating the exhibits, motions, and other written materials that members might want to offer as part of our hearing today.

If you would like to submit materials, please submit them to judiciarydocs—that is d-o-c-s as in doctors—*judiciarydocs@mail.house.gov*. We will distribute them to members and staff as quickly as we can.

I will now recognize myself for an opening statement. With the authority to enforce this nation's civil rights laws, the Department of Justice's Civil Rights Division is supposed to be the guardian of our most cherished and fundamental rights: the rights to be treated equally, the right to cast a vote in a free and fair election re-

ardless of race, the right to obtain a job, a home, or an education free from discrimination, and the right to exist in a society where the police respect your constitutional rights and your rights as a human being.

So that is a pretty good group of rights to protect, treated equally regardless of race, free from discrimination, and exist in a society where the police respect your rights.

Over 60 years ago, Congress passed the Civil Rights Act of 1957, when Dwight Eisenhower was president, and as some people we know would say, you know, Dwight Eisenhower was a Republican, just like Abraham Lincoln.

To protect the voting rights of Black Americans and other minorities, it was the first civil rights law Congress had passed since Reconstruction. It would later be overshadowed in importance by the Voting Rights Act of 1965 and, of course, the Civil Rights Act of 1964.

He represented a start of the reinvigorated effort by the federal government to ensure that all Americans could exercise their right to vote. The Civil Rights Act of 1957 established the Civil Rights Division in Justice.

It is important to highlight that the very genesis of the Civil Rights Division was rooted in a renewed federal effort to protect voting rights. The right to vote is the foundation right upon which all other rights I have previously described, ultimately, rest.

Voting rights in the '50s were, of course, most in jeopardy in the South. It is why I am especially concerned about efforts around the country since the Supreme Court's decision in *Shelby County v. Holder* to prevent Americans from exercising the right to vote.

Since *Shelby County*, we have seen the enactment of various voter ID laws with the purpose and effect of preventing people from voting under the pretext of protecting the integrity of elections.

Many of you may remember *Shelby County v. Holder* in a wonderful dissent written by the late Justice Ruth Bader Ginsburg.

These efforts are not without precedent in our country. Literacy tests, grandfather clauses, and poll taxes had been used to silence the voices of Black Americans and other minorities that those in power did not want to hear from. Literacy tests would have failed Albert Einstein. They were impossible to pass for the most brilliant of human beings because they were designed by some of the less brilliant to make them the predominant voice.

Today, we see different methods intended to achieve that same end such as voter roll purges, which include removal of voters we know for a fact are qualified, or the requirement of particular forms of voter identification that we know some segments of the population are less likely to possess.

Yet, where is the Civil Rights Division? Where is the guardian of our civil rights? It pains me to say that despite its righteous history and traditional role, the Civil Rights Division, appears under the Trump administration, to have abandoned its historical mandate to protect voting rights, more interested in protecting other newfound important rights that sometimes trample on other people's rights.

Since the start of this administration, the Civil Rights Division has filed zero new Voting Rights Act cases until this past May, and

none that enforce the rights of Black and Latino voters. It has also abruptly changed positions in several existing voting rights cases including a case against a racially discriminatory voter ID law in Texas and a challenge to a purge of Ohio's voter rolls.

As bad as this is, it is not the only change for the worse we have seen in the Civil Rights Division since the start of the current administration.

Under the former attorney general, Jeff Sessions, the division sought to curtail the use of consent decrees as a tool to reform police departments that engaged in a pattern and practice of unconstitutional conduct, asserting that such decrees reduced the morale among officers and had the effect of increasing violent crime.

Reduce the morale among officers. Despite the new wave of protests against racial injustice and police violence that began after the murder of George Floyd, these policies have continued under Attorney General Bill Barr.

One of the purposes of justice is to bring peace to communities. Yet, Attorney General Barr has only intensified the divisions and refused to allow Civil Rights Division to perform what its function is supposed to be.

Indeed, despite a request from leading civil rights groups and calls from the community, Attorney General Barr as so far refused to allow DOJ to open a pattern or practice investigation into systemic racial discrimination by the Minneapolis Police Department following the killing of George Floyd, perhaps thinking that the institution of law and order on the streets from Washington was a better way to achieve that and to boost the morale of the police.

The Civil Rights Division has become a twisted shadow of its former self in Bill Barr's dystopian Justice Department and under this administration. The division must answer for its inaction or, in some cases, its active opposition to civil rights enforcement.

With the guidance of our witnesses today it must chart a new course, going forward.

Today, we have a special guest, or the absence of a special guest. Normally, at a hearing like this the assistant attorney general for civil rights would appear before us to testify about the work of the Civil Rights Division custom and norms.

The assistant attorney general for civil rights have typically appeared before this subcommittee for these hearings.

In July, when Attorney General Bill Barr acquiesced to appear before this committee after refusing to do so over a year earlier, when he chickened out because he didn't want to have two attorneys, Mr. Eisen and his cohort, question him, I asked at the insistence of my counsel on the committee—I asked Mr. Barr to send Assistant Attorney General Eric Dreiband and ask him to commit to sending him to testify before this hearing.

He replied, in a condescending tone, "I will talk to him about it," and turned his head aside. And I asked him again. I said, "Will you get him to appear before this committee," and once again, in that same condescending tone, he turned away and said, "I will talk to him about it."

Well, I don't know what he said to him but Mr. Dreiband is not here. There is a seat for him, just as there was a seat for Mr. Barr in 2019, an unoccupied seat, showing the disdain they have for this

committee, for the legislative process, for the House of Representatives.

And, apparently, they think the unitary president is not just the president who controls the entire executive but controls the entire government.

On August 28th, the committee sent a formal invitation to Assistant Attorney General Dreiband to testify today, and on Monday, in the latest pattern of a long-standing pattern of complete obstruction, the Justice Department informed us that Mr. Dreiband would not be appearing for this hearing.

Worse yet, the excuse that the department provided was about as immature and unsophisticated as saying the dog ate my homework. Evidently, the department feels we were too rough on Attorney General Barr. We hurt his feelings.

We didn't treat him with the respect that previous attorney generals deserved when he appeared before us and is, therefore, refusing to send other officials to testify before this committee.

That dog won't hunt. Under our system of checks and balances, the Congress has the right and the obligation to conduct vigorous oversight of the executive branch, and the executive branch has the obligation to be responsive to Congress's legitimate oversight inquiries, even those inquiries which may be pointed in tone.

That is why the Congress is Article I. The Founding Fathers intended Congress's Article I to be the top branch, the people's representatives. The department's broad refusal to cooperate with the committee's legitimate request not only undermines our nation's constitutional system, a system in which no branch is above scrutiny, but also does a disservice to the public.

The American people who pay for the Justice Department and who the department is supposed to serve have a right to know what the Civil Rights Division has been doing and to assess the quality of its performance, particularly as we approach an election in which the people have a chance to render their judgment about such a performance.

By keeping this subcommittee in the dark, the department keeps the public in the dark. We know why they keep us in the dark. Because they don't want to tell us what they have not done.

This is totally unacceptable and I call upon the department once again, and I know calling upon the vacant seat, calling upon the department, asking Bill Barr to do anything is fruitless.

But I will call once again, as my able and learned and wise counsel suggested, asking Mr. Barr if he would ask Mr. Dreiband to come before this committee, knowing that he would not do it and I wasted 30 seconds of my time.

But we got him on the record to say he would discuss it. And when I saw his condescending tone after I watched the film of that, I realized it was wise that I didn't ask him questions and I attacked him for destroying the First Amendment at Lafayette Square and sending the troops in, because he wasn't going to answer any questions appropriately.

His not sending his representative here, the people's representative, is unacceptable and I will call upon the department to make Assistant Attorney General Dreiband available promptly to testify about the civil rights work of his committee.

Now, my pleasure to recognize the ranking member of the subcommittee, the gentleman from Louisiana, Mr. Johnson, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman.

Good morning. Thanks, everybody, for being a part of this hearing today. I am really just kind of stunned at the opening statement by the chairman.

I respect you, my friend, but what you have said here is just, clearly, in contradiction to the facts. I mean, you say that the Civil Rights Division and the attorney general are running a dystopian operation.

What is dystopian here is the way this committee has been run for the last two years. Everybody can see this for themselves. The American people have watched what has gone on here—the lack of decorum, the danger it has done to the legitimacy of this institution.

To say that the attorney general chickened out is just outrageous. It is not only counterproductive rhetoric; it is direct defiance to the history that is recorded on video that every American can see for themselves.

It is theatrics. It is what all the Judiciary Committee has become. For two years we have been doing theatrics. It is, of course, in direct contradiction to what everybody can see for themselves.

I just want to read—take a minute to read from this letter that has just been criticized here. It is dated September 21 from the Office of the Assistant Attorney General in response to the request to show up.

I will point out, first of all, there was no subpoena issued for Mr. Dreiband. Of course, this committee uses subpoenas all the time and, certainly, could have done that. But instead, they sent a snarky letter, and this was the very respectful response that they got back.

I will just read you a couple of excerpts. “Dear Mr. Chairman, I write in response to your August 28, 2020, letter to Assistant Attorney General Eric Dreiband.”

It goes on, “The Department of Justice recognizes that the committee has a legitimate interest in oversight of the department including the matters indentified in your letters. That is why the attorney general himself recently appeared in person to testify about these subjects and others at the committee’s oversight hearing on July 28th, 2020.

Prior to the attorney general’s testimony, the committee advised that the members would seek to ask him about the policies of the Civil Rights Division with respect to police conduct, the election, and voting rights that we just heard about. Unfortunately—skipping down—“when given the opportunity to obtain information from the head of the Department of Justice himself about precisely these matters, many committee members chose instead to use their allotted time to air grievances rather than attempt to obtain information from the department that would assist the committee in recommending legislation to the House.

Many members of the majority devoted their time entirely towards scolding and insulting the attorney general of the United States. These members refused to allow the attorney general to re-

spond to their accusations or to answer question as for rhetorical effect.”

It goes down—just reading a couple excerpts. “We very much regret that the committee did not elect to engage in a meaningful good faith effort to obtain information and views from the attorney general while he was present and prepared fully to testify.

Having squandered its opportunity to conduct a meaningful oversight hearing with the AG, it remains unclear how further public spectacles with other department officials would now, a mere 14 legislative days since the attorney general’s hearing, advance the committee’s oversight efforts.

In short, the attorney general recently appeared before the committee, was available to address the topics that are to be covered at today’s hearing, and although the department is not in a position to provide witnesses for these hearings at this time, should the committee nonetheless continue to have particular interest in obtaining information from the department.

And should the committee commit to doing so in an appropriate and productive manner, the department would be happy to work with you regarding the scheduling of additional oversight hearings in the future. Sincerely, signed Stephen Boyd, Assistant Attorney General.”

The point is very clear. Everyone saw the spectacle. It has become a point of comedy in the country. That hearing was just absolutely outrageous.

I think it is going to backfire on our friends that tried to use it for political purposes, and I do not begrudge in any way Mr. Dreiband’s not being here this morning because why would he? It is another spectacle.

I am going to just say this in response to what was said here in the beginning. The Civil Rights Division of the Department of Justice, obviously, plays a very important role in enforcing our nation’s civil rights.

But rather than becoming—I just wrote the quote down. It is rather incredible. A twisted shadow of its former self, as the chairman said. Instead of that, the division has been very active and innovative.

They have done some exceptional work over the last 3½ years. The division prosecutes cases involving hate crimes, discrimination in education and housing, employment, immigration and many other areas.

I spent most of my 20-year legal career prior to Congress as a religious liberty defense attorney and I watch those areas very closely because it is of personal interest to me.

I have been particularly grateful to the Trump administration for the emphasis it has given to the protection of our first freedom under his leadership. A couple of examples just in this subcategory.

Under his leadership the assistant attorney general, Eric Dreiband, the Civil Rights Division has taken affirmative steps to protect the religious liberty of everyone.

In June of 2018, the DOJ launched its place to worship initiative that focuses on ensuring that religious institutions are not discriminated against in land use cases in violation of RLUIPA, the Religious Land Use and Institutionalized Persons Act.

To date, under this initiative the Civil Rights Division has intervened in cases to protect the rights of churches, synagogues, a Buddhist retreat center, a Hindu temple, and an Islamic association.

In July of 2018, a month later, the DOJ created the Religious Liberty Task Force to coordinate the efforts of DOJ components on litigation and policy relating to religious liberty.

And just as COVID-19 has come to define the lives of Americans in recent months, the Civil Rights Division's most recent work has also addressed novel issues relating to the pandemic.

We know that state and local governments implemented restrictions on travel and public gatherings in response to the pandemic, and the ability of many religious institutions to conduct in-person worship services was eliminated or curtailed.

While churches and other houses of worship must comply with generally applicable requirements the same as any other entity, the Supreme Court has held very specifically the government can't use religion as a basis of classification for the imposition of duties or penalties, privileges, or benefits.

Some jurisdictions have, nonetheless, targeted houses of worship for discriminatory treatment during the COVID-19 pandemic and the DOJ has sought to address this conduct.

On April of this year, Attorney General Barr issued a memo directing Assistant Attorney General Dreiband and Matthew Snyder, the U.S. Attorney the Eastern District of Michigan, to lead an effort to monitor and, if necessary, intervene to stop discrimination against religious institutions and religious believers.

Consistent with this directive the Civil Rights Division has taken action to intervene where state or local governments treated religious institutions less favorably than secular institutions and restrictions relating to the pandemic.

The mantle has also been taken up by public interest legal organizations who provided critical pro bono legal services to houses of worship, seeking to be treated the same as comparable secular entities.

In addition to religious institutions, private individuals who have sought to express conservative or religious viewpoints through peaceful protests have been subjected to discriminatory treatment by state and local officials.

This happened in New York, New Jersey, North Carolina, here in the District of Columbia. Local authorities arrested individuals merely for engaging in constitutionally-protected conservative and religious speech.

These same state and local authorities have often encouraged similar activity by individuals who support causes they favor such as police reform.

Of course, those protests, encouraged by state and local authorities have at times devolved into violent riots, and after so many of those riots that resulted in the destruction of public and private property, residents and businesses in those communities have been left to pick up the pieces. We are going to hear a little bit about that today.

Under our constitutional system there is never an excuse, even during a pandemic, to discriminate on the basis of religion or the viewpoints of the people expressed. Respecting the civil liberties of

citizens and protecting public health are not mutually exclusive pursuits.

In America, we have to do both. The attorney general summarized this very well when we said the Constitution is not suspended in times of crisis.

Mr. Chairman, I would just ask unanimous consent to enter into the record of the hearing this letter than I read from that we received from the attorney general. And I—

Mr. COHEN. Without objection, it will be done.

[The information follows:]

MR. JOHNSON FOR THE OFFICIAL RECORD



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 21, 2020

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler:

I write in response to your August 28, 2020 letter to Assistant Attorney General Eric Dreiband and your September 14, 2020 letters to Bureau of Prisons Director Michael Carvajal and U.S. Marshals Service Director Donald Washington.¹

Your letters request that Assistant Attorney General Dreiband testify at a hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on September 24 regarding "a broad range of topics regarding current policies and actions of the Civil Rights Division." You have also requested that Director Carvajal and Director Washington appear before the Subcommittee on Crime, Terrorism, and Homeland Security for an oversight hearing regarding the Bureau of Prisons and the U.S. Marshals Service on October 1, 2020.

The Department of Justice (Department) recognizes that the Committee has a legitimate interest in oversight of the Department, including the matters identified in your letters. That is why the Attorney General recently appeared in person to testify about these subjects and others at the Committee's oversight hearing on July 28, 2020. Prior to the Attorney General's testimony, the Committee advised that the Members would seek to ask him about the policies of the Civil Rights Division with respect to police misconduct, the election, and voting rights. *See, e.g., Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence, Hearing Before the H. Comm. on the Judiciary, 116th Cong. (June 24, 2020)*. In addition, the Committee expressed interest in information related to the Bureau of Prisons and Marshals Service, including the components' response to the COVID-19 pandemic as well as matters of civil unrest. *See, e.g., Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and Rep. Karen Bass, to Michael Carvajal, Dir., U.S. Bureau of Prisons (June 11, 2020); Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and Rep. Karen Bass, to Donald Washington, Dir., U.S. Marshals Service (May 15, 2020)*. The Attorney General

¹ We anticipate responding to your February 28, 2020 and August 10, 2020 letters to the Attorney General in the upcoming weeks.

The Honorable Jerrold Nadler
Page 2

therefore appeared prepared to discuss all of these subjects, and he in fact addressed some of them when asked by the Members.

Unfortunately, when given the opportunity to obtain information from the head of the Department of Justice about precisely these matters, many Committee Members chose instead to use their allotted time to air grievances. Rather than attempt to obtain information from the Department that would assist the Committee in recommending legislation to the House, many Members of the majority devoted their time entirely towards scolding and insulting the Attorney General. These Members refused to allow the Attorney General to respond to their accusations or to answer questions asked for rhetorical effect. As the *New York Times* reported, “Democrat after Democrat posed questions to Mr. Barr only to cut him off when he tried to reply, substituting their own replies for his.” *See Barr Testimony: Highlights of Combative Hearings on Protests, Stone Case and More*, N.Y. Times (July 28, 2020). In what can only be viewed as a coordinated effort to muzzle the Attorney General, the Members repeatedly invoked the phrase, “reclaiming my time,” which they employed more than 30 times when the Attorney General tried to respond. All told, when the Attorney General tried to address the Committee’s questions, he was interrupted and silenced in excess of 70 times. Some Members were quite candid that they had no interest in actually hearing from the Attorney General. One Member interrupted him and admitted, “Well I don’t want you to tell your story.” *Oversight of the Department of Justice, Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (July 28, 2020). Another advised, “You will have a chance to comment after your testimony is done here today.” *Id.* Despite the Attorney General appearing in person and taking questions from all Members who were present, he was denied the most basic opportunities to respond.

As the Supreme Court recently reiterated, the purpose of a hearing by the House is to obtain the information necessary to legislate “wisely and effectively,” and the questioning is required to serve a legitimate legislative purpose. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). Yet the House’s so-called oversight “hearing” of the Attorney General did precious little to advance any legitimate interest since the Attorney General was repeatedly denied the opportunity to provide information to the Committee. We very much regret that the Committee did not elect to engage in a meaningful, good-faith effort to obtain information and views from the Attorney General while he was present and prepared to testify. Having squandered its opportunity to conduct a meaningful oversight hearing with the Attorney General, it remains unclear how further public spectacles with other Department officials would now—a mere 14 legislative days since the Attorney General’s hearing—advance the Committee’s legitimate oversight efforts.

In short, the Attorney General recently appeared before the Committee and was available to address the topics that are to be covered by the September 24 and October 1 hearings. Although the Department is not in a position to provide witnesses for these hearings at this time, should the Committee nonetheless continue to have particular interest in obtaining information from the Department, and should the Committee commit to doing so in an appropriate and productive manner, the Department would be happy to work with you regarding the scheduling of additional oversight hearings in the future.

The Honorable Jerrold Nadler
Page 3

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Boyd', with a long horizontal stroke extending to the right.

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member

Mr. JOHNSON of Louisiana. And I thank you for that and I look forward to hearing from all our witnesses today. I hope we can have a productive conversation, and I yield back.

Mr. COHEN. Thank you. Mr. Nadler, the ranking member, is arriving and he will be recognized in a second for his opening statement.

But I do appreciate the fact that the ranking member brought up what the division has done for the protection of religion, because it is going to be important for us to have religion and a place to pray for the return of democracy if things don't turn around soon.

I yield to Mr. Nadler for his opening statement.

Chairman NADLER. Thank you, Chairman Cohen.

Thank you, Chairman Cohen, and thanks to all our witnesses for joining us today.

When Attorney General William Barr came before the full committee earlier this year, many of our questions focused on the Trump administration's abysmal record on civil rights.

We pressed Mr. Barr to answer questions about federal officials tear gassing protestors at his direction, about voting rights, about police violence, and about other pressing matters where it appears the Civil Rights Division has been either absent or actively counterproductive.

Today, Assistant Attorney General Eric Dreiband—I hope I pronounced that right—the man who is in charge of the Civil Rights Division, simply refuses to appear to defend his record such as it is.

And although I would like to focus on the substance of this hearing, I must take a minute to acknowledge the department's truly astonishing explanation for his absence.

Late Monday night, DOJ sent a letter stating that Mr. Dreiband would not be attending today's hearing and that the heads of the Bureau of Prisons and the U.S. Marshal Service also plan on boycotting an upcoming hearing before the Subcommittee on Crime, Terrorism, and Homeland Security.

Now, this administration has come up with a lot of reasons for ignoring Congress. We have heard them assert absolutely immunity.

We have heard them complain about the terms in which government lawyers are allowed to accompany the witnesses. We have heard them say the hearing date is too soon. But this one takes the cake.

The United States Department of Justice now says, in complete seriousness, that it is not sending any more witnesses to this committee because we were mean to Attorney General Barr when he was here in July, or as the department put it, that we, quote, "used our allotted time to air grievances," closed quote.

Apparently, it is too—excuse me, apparently it is too much for DOJ to stomach the thought that when the attorney general orders the tear gassing of peaceful protestors, repeatedly interferes in criminal investigations to protect the President, and actively foments distrust in an upcoming election, he might get some pressing questions when he comes before the Congress.

But in a way, Mr. Dreiband's absence from today's hearing is fitting because this hearing is really about the complete absence of the Civil Rights Division when it comes to enforcing civil rights.

Mr. Dreiband is not being here—his not being here perfectly encapsulates what we have been seeing from his office over the past four years, an empty chair.

The Civil Rights Division is a large office with a proud tradition of enforcing some of our most sacred laws. From voting rights to housing and disability rights, and from employment and education rights, to the right to be free from police violence, the Civil Rights Division is supposed to stand up for the values that protect all people in our nation.

But during this administration, time and time again the division has fallen short. As far as justice and policing goes, it has abandoned the idea of pursuing structural reform through consent decrees, a critical tool that courts and DOJ have used in the past to reform unconstitutional policing in our cities.

As for voting rights, what we have seen is a near total abdication of responsibility. The division has filed precious few cases protecting Americans' voting rights and it has filed no new cases protecting the rights of Black or Latino voters, among others.

After reviewing a list of activities published by the division, one former official commented, "Frankly, it is hard to see what the Voting Rights Section is doing all day where still, in many instances, the Civil Rights Division has switched its earlier positions to fight actively against the interests of minority voters."

In cases involving LGBTQ rights as well, we have seen the Justice Department actively litigate against gay, lesbian, and transgender Americans, including by arguing in the Supreme Court that federal law permits employers to fire their employees for being gay or transgender. Fortunately, they lost.

And now, the Civil Rights Division is urging the courts to eliminate what remains of affirmative action and diversity in college admissions.

Fortunately, and in the absence of actual participation from Mr. Dreiband, we have excellent witnesses before this committee today who can help inform us about where the division has fallen short and, most importantly, where it can improve. I thank Chairman Cohen for holding this hearing and I look forward to hearing from the panel.

I yield back the balance of my time.

Mr. COHEN. Thank you, Chairman Nadler.

I would now like to recognize the ranking member, my classmate, Mr. Jordan.

Mr. JORDAN. I thank the chairman, and I would just point out the chairman subcommittee said the attorney general is immature. What? This from the guy who brought a bucket of chicken to a hearing?

Mr. COHEN. Did not say he was immature. I said a lot of things about him.

Mr. JORDAN. You did, too.

Mr. COHEN. I did not.

Mr. JORDAN. The chairman said the attorney general was condescending during the hearing two months ago. He was interrupted

70 times by the Democrats. Over 30 times they used the phrase “reclaiming my time.”

Everyone saw the spectacle that the ranking member of the subcommittee talked about, and you want to say he was condescending? You got to be kidding me.

No wonder the guy doesn’t want to come. Jeepers, I have never seen anything—well, I will tell you one thing I do remember from that hearing, too.

I remember when the attorney general of the United States asked the Democrats, “Why won’t you speak out against the mob? Why won’t you speak out against the violence?” And guess what he got in response?

Silence from the Democrats. We got a witness here today, Sam Mabrouk, from Columbus, Ohio, who knows what the mob can do to his store. Looted, his store destroyed, stole his property, and you guys refuse to speak out against it. But you can bring a bucket of chicken to a hearing? This is ridiculous.

I want to thank our witness. I want to thank—I want to thank Mr. Sasser for coming. I want to thank Mr. Mabrouk for testifying.

We feel for what you have had to go through as a business owner, the mob that they won’t speak out against destroying your property, looting your store, and all they want to do is lecture the attorney general, get mad at the Justice Department because they won’t send a witness after the way the attorney general was treated.

The American people saw that hearing. They know how you guys treated him. Five hours of it. Five hours of it. And the guy who brings a bucket of chicken wants to—wants to condemn and critique the attorney general. You have got to be kidding me. You have got to be kidding me.

Mr. COHEN. One more time and [inaudible] Cool it.

Mr. JORDAN. Oh, that is great. That is great.

Mr. COHEN. Cool it.

Mr. JORDAN. The—I look forward to our witnesses. I appreciate what the ranking member of the subcommittee had to say.

I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Jordan, for your prescient remarks.

We welcome our witnesses and thank them for participation in today’s hearing in person or virtually. I will now recognize each of the witnesses, and after each introduction will recognize that witness for his or her testimony. Your written statement will be entered into the record in its entirety.

Accordingly, I ask you to summarize your oral testimony in no more than five minutes. Before proceeding with the testimony, I would like to remind all of our witnesses that you have a legal obligation to provide truthful testimony and answers to this subcommittee, and that any false statement you may make today may subject you to prosecution under Section 1001 of Title 18 of the United States Code.

Our first witness is Catherine Lhamon. Ms. Lhamon is chair of the United States Commission on Civil Rights, a position she has held since 2016.

Ms. Lhamon previously served as the assistant secretary for civil rights at the U.S. Department of Education from June 2013 until

January of 2017. She clerked for the Honorable William A. Norris on the U.S. Court of Appeals for the Ninth Circuit.

Ms. Lhamon received her JD from Yale Law School where she was the Outstanding Woman Law Graduate and she graduated summa cum laude from Amherst.

Ms. Lhamon, you are recognized for five minutes.

STATEMENTS OF THE HONORABLE CATHERINE E. LHAMON, CHAIR, U.S. COMMISSION ON CIVIL RIGHTS; SHERRILYN IFILL, PRESIDENT AND DIRECTOR COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND; THOMAS A. SAENZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; HIRAM SASSER, EXECUTIVE GENERAL COUNSEL, FIRST LIBERTY INSTITUTE; SHARON M. MCGOWAN, CHIEF STRATEGY OFFICER AND LEGAL DIRECTOR, LAMBDA LEGAL; SAM MABROUK, SMALL BUSINESS OWNER, COLUMBUS, OHIO; MICHAEL WALDMAN, PRESIDENT, BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW; JONATHAN M. SMITH, EXECUTIVE DIRECTOR, WASHINGTON LAWYERS COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS

STATEMENT OF CATHERINE E. LHAMON

Ms. LHAMON. Thank you to the chair and thank you to each of the members for inviting me to testify.

I am Catherine Lhamon and I chair the United States Commission on Civil Rights, which Congress has charged to evaluate the effectiveness of civil rights enforcement including at the United States Department of Justice.

The Department of Justice's Civil Rights Division is tasked, as we heard this morning, with enforcement of all federal civil rights laws and, among other duties, files civil rights litigation to fulfill its mission.

As 17 state attorneys general testified to the commission I chair, Congress has reserved exclusively to the federal government and, specifically, to DOJ powerful remedies to address civil rights wrongs. But if DOJ does not enforce these laws, the states are not positioned to pick up the slack.

Notwithstanding these very high stakes to the American people, the Civil Rights Division is not currently fulfilling this mandate, dangerously leaving Americans vulnerable to violation of their civil rights.

The Civil Rights Division's case resolutions dropped nearly 25 percent between fiscal year 2016 and fiscal year 2018.

In addition to the actual drop in case resolutions in recent years, the Trump administration has repeatedly requested funding reductions to DOJ's civil rights work, signaling its dollar commitment to doing less work and has, in fact, reduced the number of staff at the Civil Rights Division.

I am pained to report to you today that in this administration the Department of Justice Civil Rights Division fails to make statutory promises and constitutional convictions real in the lives of all Americans.

Concern over that failure should not be partisan. The commission received powerful testimony from former Republican administration DOJ civil rights officials about what should occur in conservative administrations, including, and this is a quote, “that one thing a Republican administration should be able to do is to enforce mightily the kind of core statutory functions DOJ has.”

To concretize the civil rights harm that can follow from Justice Department inaction, I offer a handful of examples.

In 2018, the commission unanimously found that pernicious race discrimination in voting endures today and that barriers to voter access and discrimination continue today for voters with disabilities and voters requiring language assistance.

Despite this ongoing discrimination in voting, we at the commission found that DOJ enforcement is lacking, with actual enforcement work lagging well behind nonprofit litigation in the area, notwithstanding a statutory charge and associated appropriated taxpayer funding to do the work.

Our 2018 assessment, of course, predated the pandemic that we now live. There are specific additional civil rights risks associated with the rise of COVID-19.

The commission received testimony about the increased health risks associated with people casting in-person ballots, with insufficient measures to guard against the transmission of COVID-19, against the backdrop of what we know about pronounced racial disparities in deaths due to coronavirus.

The commission received bipartisan calls for increased access for mail-in ballots as well as substantial testimony about the need for safe in-person voting options to preserve access for voters with disabilities and voters who require language assistance.

But in the face of these dire concerns about American citizens’ ability to practice that most essential core function of our democracy in casting a ballot, the commission received testimony the DOJ has been still largely absent from enforcement that protects and ensures voter access.

Turning to oversight of law enforcement, several uses of deadly force against Black civilians earlier this year underscore an ongoing need for federal leadership in enforcement against unconstitutional policing practices to protect civil rights.

Congress specifically authorized DOJ to conduct pattern or practice investigations to determine if law enforcement have violated constitutional or federal rights.

But in the Trump administration, the DOJ has abandoned pattern or practice investigations, criticized them as a tool, and refused to initiate new investigations and curtailed the use of consent decrees.

As police leaders generally recognize, fostering community trust, positive community relations, and cooperation are essential for law enforcement to effectively discharge their public safety duty.

Yet, the department now fails to use the full measure of its authority to conduct investigations into these cases and to bring enforcement actions if appropriate to prevent these events and other systemic deprivations of constitutional rights from occurring.

Finally, DOJ has taken affirmative steps to promote an interpretation of sex discrimination laws that the United States Supreme

Court roundly rejected. Yet, DOJ has not altered course to accommodate even that ruling from the highest court in the land.

DOJ persists in ignoring law as it is, in Justice Gorsuch's words. Violating DOJ's own civil rights—

Mr. COHEN. We are going a little bit over. If you can wrap up in about 10 seconds. You are over about 30 already.

Ms. LHAMON. I will. Thank you.

Just to say the DOJ is harming not only the LGBT community most directly impacted but also all people whose rights are limited by incorrect federal understanding of and commitment to protection against sex discrimination. We need the Department of Justice to live up to the justice in its name.

Thank you.

[The statement of Ms. Lhamon follows:]

STATEMENT OF
CATHERINE E. LHAMON
CHAIR, U.S. COMMISSION ON CIVIL RIGHTS
BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES

THURSDAY SEPTEMBER 24, 2020

Chair Nadler, Ranking Member Jordan, Chair Cohen, Ranking Member Johnson, and Members, thank you for inviting me to testify. I chair the United States Commission on Civil Rights, and I come before you today to speak about the Commission's recent and ongoing work to evaluate the effectiveness of civil rights enforcement at the United States Department of Justice.

The U.S. Department of Justice's Civil Rights Division (DOJ or Civil Rights Division) is the nation's oldest federal civil rights enforcement agency, created in 1957 by the same statute that created the Commission I chair to perform the civil rights watchdog function I am pleased to fulfill in part through this testimony today. The Civil Rights Division at DOJ is tasked with "enforcement of all Federal statutes affecting civil rights" and files civil rights litigation to fulfill its mission.¹ Along with its broad mandate to investigate compliance with federal civil rights laws, the Civil Rights Division is also tasked with issuing policy guidance, providing technical assistance, conducting research, providing educational materials to the public as well as impacted entities, and consulting with other agencies (federal, state and local).² As 17 state Attorneys General testified to the Commission two years ago, Congress has reserved to the federal government, and specifically to DOJ, powerful remedies to redress civil rights wrongs; "If the federal government declines to enforce these laws, the states are not positioned to pick up the slack."³ Notwithstanding these very high stakes to the American people, the Commission's findings from careful study demonstrate that the Civil Rights Division is not currently fulfilling this mandate, dangerously leaving Americans vulnerable to violation of their civil rights.

¹ 28 C.F.R. § 0.50(a); U.S. Dep't of Justice, Justice Manual, Title 8-1.100 (March 2018) (providing the full list of civil and criminal civil rights enforced by the Civil Rights Division), <https://www.justice.gov/jm/jm-8-1000-civil-rights-division>; see also U.S. Commission on Civil Rights, Are Rights A Reality? Evaluating Federal Civil Rights Enforcement, Nov. 2019, p. 62 (hereinafter "Are Rights A Reality"), <https://www.uscrr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

² 28 C.F.R. § 0.50(a)-(n); U.S. Dep't of Justice, Title VI Legal Manual (Mar. 18, 2019), at Section III, Department of Justice Role Under Title VI, <https://www.justice.gov/crt/fcs/T6manual> (describing DOJ and other agencies' role in issuing guidance and regulations, review applications for federal funding, monitor compliance, and enforce civil rights laws against recipients); see also Are Rights A Reality at 68, 76.

³ Are Rights A Reality at 10.

DOJ Civil Rights Enforcement

Despite the compelling bipartisan testimony submitted to the Commission about ongoing civil rights harms, DOJ's Civil Rights Division enforcement efforts generally decreased between Fiscal Years 2016 through 2018.⁴ The Civil Rights Division resolved 143 total cases in Fiscal Year 2016, followed by 136.5 cases in Fiscal Year 2017, followed by 109 cases in Fiscal Year 2018. Those resolution numbers represent a nearly 25% drop between FY16 and FY18.⁵ The drop was not consistent across the different subsections of the Civil Rights Division; the most significant drops were in the sections on Educational Opportunities, Housing, and Special Litigation.⁶ In addition to the actual drop in case resolutions in recent years, the Trump Administration has repeatedly requested funding reductions to DOJ's civil rights work, signaling its dollar commitment to doing less work, and in fact reduced the number of staff at DOJ's Civil Rights Division.⁷ This issues should not be partisan: the gap in enforcement runs counter to what former Republican Administration DOJ civil rights officials testified should occur in conservative administrations. A former DOJ civil rights official during the George W. Bush presidency, Robert Driscoll, testified to the Commission that "one thing a Republican administration should be able to do is . . . to enforce mightily the kind of core statutory functions" the Division has.⁸

Mr. Driscoll further testified that "some of the most important work, civil rights work that is done in the country has nothing to do with our political differences but, rather, rule of law that tries to make our intellectual agreement, statutory promises, and constitutional convictions a reality for all of us."⁹ As firmly as I share that view, I am pained to report to you today that in this Administration the Department of Justice Civil Rights Division fails to make these statutory promises and constitutional convictions real in the lives of all Americans.

The Civil Rights Division during the Trump Administration has also failed to issue policy guidance where necessary. Guidance documents are necessary tools for the regulated community to understand their legal obligations under federal civil rights laws, and guidance documents help the general public to know their rights and understand the government's role in enforcing those rights.¹⁰ But in the last three years, the Department of Justice has withdrawn close to 50 guidance documents, including *inter alia* guidance on compliance with the Americans with Disabilities Act (ADA), guidance pertaining to protecting the rights of legal permanent residents, guidance

⁴ Ibid., 502.

⁵ Ibid., 102, 502.

⁶ Ibid., 502.

⁷ Ibid., 34.

⁸ Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Washington, DC, Nov. 2, 2018, transcript, p. 129, <https://www.usccr.gov/calendar/2018/11-02-Evaluating-Federal-Civil-Rights-Enforcement.pdf>.

⁹ Are Rights A Reality at 28.

¹⁰ Are Rights A Reality at 501, 53-60.

on federal protections against national origin discrimination, as well as joint DOJ and Department of Education guidance on the use of race by educational institutions and the civil rights of transgender students.¹¹ Yet, DOJ did not replace the vast majority of these guidance documents with new guidance about how to satisfy the law the rescinded documents described. I emphasize this failure to issue replacement guidance in crucial civil rights areas both because creating a knowledge vacuum where none had otherwise existed is in itself harmful to civil rights compliance but also because DOJ has a mandatory obligation, which it has therefore failed, that it “shall” issue policy guidance regarding civil rights.¹²

The withdrawn documents included two guidance documents related to access to justice for low-income Americans to simply remind state Chief Justices and state court administrators of what the Constitution requires regarding the enforcement of fines and fees and to promote best practices for municipal courts in interaction with individuals who are unable to pay.¹³ The rescinded guidance pointed to potential violations of civil rights laws, including Title VI of the Civil Rights Act of 1964, which guards against race discrimination by recipients of federal funds. The rescinded guidance also discussed the prior Justice Department investigation of the Ferguson Police Department, which concluded that “Ferguson’s municipal court and police practices are due, at least in part, to intentional discrimination, as demonstrated by evidence of racial bias and stereotyping of African American residents by certain Ferguson police and municipal court officials.”¹⁴ The Commission strongly criticized the withdrawal of these guidance documents.¹⁵ In 2017, the Commission majority found that court imposition of fines and fees for criminal and civil justice activities has become a common practice in many jurisdictions across the country—and that even after public condemnation of the excesses of such practices, most states have taken virtually no steps to conform their actions to the law.¹⁶ The Commission majority also found that the best available data reflects that municipal fee targeting tends to aggregate in

¹¹ *Ibid.*, 136, 139-40 (citing U.S. Dept. of Justice, “Press Release: Attorney General Jeff Sessions Rescinds 25 Guidance Documents,” Dec. 21, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; U.S. Dept. of Justice, “Press Release: Attorney General Jeff Sessions Rescinds 24 Guidance Documents,” Jul. 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>).

¹² 28 C.F.R. § 0.50 (stating that under the broad mandate set forth in Executive Order 12,250, the Civil Rights Division “shall” issue policy guidance, among other responsibilities); *see also* Are Rights A Reality at 76.

¹³ U.S. Department of Justice, Dear Colleague Letter, March 14, 2016, <https://www.justice.gov/opa/file/832541/download>; U.S. Department of Justice, Advisory for Recipients of Financial Assistance, January 2017, <https://ojp.gov/archives/documents/AdvisoryJuvFinesFees.pdf>.

¹⁴ U.S. Commission on Civil Rights, Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications, Sept. 2017, p. 13 (hereinafter “Targeted Fines and Fees”), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

¹⁵ *Ibid.* (citing U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions’ Withdrawal of Critical Civil Rights Guidance,” Jan. 19, 2018 (hereinafter “Withdrawal of Critical Civil Rights Guidance Statement”), <https://www.usccr.gov/press/2018/01-19-PR-Sessions.pdf>).

¹⁶ Withdrawal of Critical Civil Rights Guidance Statement at 1 (citing Targeted Fines and Fees at 52).

communities of color and, to a lesser degree, in low-income communities.¹⁷ The Commission heard from judicial officials who candidly admitted that some of their judges did not know the law prohibiting jailing people for their inability to pay fines and fees. Specific to the Department's guidance in this area, the Commission's report recognized that the Dear Colleague letters increased knowledge of and compliance with the relevant law, leading to important reforms among states and municipalities.¹⁸

The withdrawn documents also included Department guidance addressing integration of people with disabilities to state and local government employment service systems, as required under the ADA.¹⁹ DOJ had complemented that guidance by a series of suits DOJ brought against state and local governments that resulted in settlements and consent decrees in which jurisdictions agreed to release persons with disabilities from unduly sheltered and segregated environments.²⁰ The Commission received testimony from Alison Barkoff, Director of the Center for Public Representation, who served as Special Counsel for Olmstead Enforcement in the Civil Rights Division of the Department of Justice from 2010-2014, that after the rescission of federal guidance, the laws are "not fully being enforced at this point" and that the federal government has "backed away" from offering technical assistance and guidance in recent years.²¹ DOJ litigation to enforce the ADA's integration mandate has also decreased.²²

¹⁷ Targeted Fines and Fees at 72.

¹⁸ In addition to the direct concern about legal compliance relative to the imposition of fines and fees, their imposition can have substantial negative collateral consequences including with respect to the right to vote. As our Alabama Advisory Committee reported, on the impediments to voting that result from such a requirement, "[s]uch fines and fees are often set . . . unconnected in any way to the facts of the case or the harms the defendant inflicted with his or her crimes" which "seems to serve little purpose but to ensure that those without economic resources remain ineligible to vote." Alabama Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Alabama*, Feb. 2020, p. 28, <https://www.usccr.gov/files/2020-07-02-Barriers-to-Voting-in-Alabama.pdf>. The Committee's findings led to their recommendation that the payment of all fines and fees be removed as a barrier to eligibility for voting rights restoration in the state of Alabama. *Ibid.*, 30.

¹⁹ Withdrawal of Critical Civil Rights Guidance Statement at 2.

²⁰ See, e.g., Order Approving Consent Decree & Consent Decree, *United States v. Rhode Island*, No. 1:14-cv-00175 (D.R.I. April 9, 2014), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana; United States of America's Motion to Intervene, *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST (D. Ore. Mar. 27, 2013); Settlement Agreement, *Lane v. Brown* (formerly *Lane v. Kitzhaber*), No. 3:12-cv-00138-ST (D. Ore. Sept. 8, 2015), approved by U.S. Magistrate Judge Janice Stewart (Dec. 29, 2018); and see Independent Reviewer, 2016 Report to the Court, *Lane v. Brown* (Jan. 1 – Dec. 31, 2016), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana; U.S. Dep't. of Justice, Civil Rights Division, Presentation: Department of Justice Olmstead Enforcement: Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *passim*. (Jan. 23, 2015), <https://www.dol.gov/odep/topics/date/SheilaForan.pdf>. See also U.S. Commission on Civil Rights, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, Sept. 2020, p. 127 (hereinafter "Subminimum Wages"), <https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>.

²¹ Subminimum Wages at 128.

²² *Ibid.*, 129-30.

Withdrawing these guidance documents – without sharing replacement guidance addressing these civil rights issues – runs directly counter to the Commission’s recommendation that the Department continue to promote core principles identified through its Dear Colleague letters and in so doing harms the public.

DOJ’s Assistant Attorney General for Civil Rights is charged to coordinate the federal enforcement of all statutes that prohibit discrimination against protected classes by federal agencies and funding recipients.²³ Notably, the budget requests DOJ has submitted for its Civil Rights Division during Fiscal Years 2017 through 2019 have changed prior language describing Division priorities, deleting in these more recent submissions prior reference to “ensuring constitutional policing and advancing criminal justice reform,” as well as to protecting the rights of people with disabilities and protecting LGBT individuals from discrimination, harassment, and violence.²⁴

In particular, DOJ has both taken affirmative steps to – wrongly – interpret sex discrimination laws not to protect gender identity and in addition failed to coordinate federal civil rights agency enforcement and regulatory efforts to comply with the law as interpreted by our nation’s courts.²⁵ DOJ’s efforts in this area contrast starkly with the United States Supreme Court’s recent holding in *Bostock v. Clayton County, Georgia* that, as the Court put it, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against the individual based on sex.”²⁶ DOJ persists in this area to, in the Supreme Court’s words, “ignore the law as it is,” directly contrary to the Court’s direction and DOJ’s own civil rights coordination role.²⁷

Voting Rights

In 2018, the Commission reported on the status of voter access and voting discrimination in the United States and of the efficacy of DOJ enforcement of the Voting Rights Act (VRA) since

²³ 28 C.F.R. § 0.50(e) (tasking the Civil Rights Division’s Assistant Attorney General with “consultation with and assistance to other Federal departments and agencies and State and local agencies on matter affective civil rights”); see also U.S. Dep’t of Justice, Title VI Legal Manual (updated Mar. 18, 2019) § III, Department of Justice Role Under Title VI, <https://www.justice.gov/crt/fcs/T6manual> (describing DOJ and other agencies’ role in issuing guidance and regulations, review applications for federal funding, monitor compliance, and enforce civil rights laws against recipients), see also *Are Rights A Reality* at 56.

²⁴ *Are Rights A Reality* at 82.

²⁵ *Are Rights A Reality* at 501; see also U.S. Commission on Civil Rights, Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans, Nov. 2017, p. 72, https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

²⁶ *Bostock v. Clayton County, Georgia*, 590 U.S. ___, ___, slip. op. at 9 (2020); see also U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Calls on Trump Administration to Revise Regulations and Enforcement Practices to Recognize Civil Rights Protections for LGBT Americans and Comply with the *Bostock* Decision,” Jun. 19, 2020, <https://www.usccr.gov/files/2020-06-19-USCCR-Calls-for-Changes-Post-Bostock.pdf>.

²⁷ *Bostock*, 590 U.S. at ___, slip op. at 16.

Congress' 2006 Reauthorization and in particular, since the Supreme Court's June 2013 decision in *Shelby v. Holder*.²⁸ The conclusions the report drew were bleak, leading to unanimous Commission findings, including that:

- Race discrimination in voting has been pernicious and endures today.
- Voter access issues and discrimination continue today for voters with disabilities and limited English proficient voters.
- The right to vote, which is a bedrock of American democracy, has proven fragile and in need of robust statutory protection in addition to Constitutional protection.
- Following the Supreme Court's decision in *Shelby County*, in the absence of the preclearance protections of Section 5 of the Voting Rights Act, voters in jurisdictions with long histories of voting discrimination have faced discriminatory voting measures that could not be stopped prior to elections because of the cost, complexity and time limitations of the remaining statutory tools.²⁹
- The *Shelby County* decision had the practical effect of signaling a loss of federal supervision in voting rights enforcement to states and local jurisdictions.³⁰

Notwithstanding the recurrence of this ongoing discrimination in voting, the report showed that DOJ enforcement lags behind even available tools. Whereas the DOJ has statutory authority to enforce VRA and congressional appropriations annually to staff such enforcement, the DOJ's actual enforcement work in this area lags well behind private enforcement that is much more expensive and onerous to mount.³¹

Our September 2018 report found that since the *Shelby County* decision in 2013, the DOJ had filed only four of the 61 Section 2 cases filed, one language access case, and zero cases about the right to assistance in voting.³² The ACLU alone has brought more Section 2 cases than the DOJ;³³ so has the Lawyers' Committee for Civil Rights Under Law.³⁴ The DOJ has shown a sharp decline in the number of language access cases it has filed, filing only one such case since

²⁸ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, Sept. 2018, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (hereinafter "Voting Rights").

²⁹ *Ibid.*, 12-13.

³⁰ *Ibid.*, 12, 279.

³¹ *Ibid.*, 254-56.

³² *Ibid.*, 10. The Section 2 cases were filed in 2013 and 2017 and the language access case in 2016. *Ibid.*, 253, 259.

³³ *Ibid.*, 80, 265.

³⁴ *Ibid.*, 265.

the *Shelby County* decision, while the need for language access protections has not abated.³⁵ The DOJ has not filed any cases to enforce Section 208 of the VRA, which provides for voters' rights to assistance, including for voters with disabilities and limited-English proficiency, since 2009.³⁶

Our 2018 assessment of course predated the novel coronavirus pandemic that we now live with. As the Commission majority recognized in March, there are specific additional civil rights risks associated with the rise of the pandemic.³⁷ The nation has suffered pronounced racial disparities in deaths due to coronavirus.³⁸ The Commission's Indiana Advisory Committee advised that "History shows that presidential elections always generate the highest levels of voter turnout, which increases the likelihood that there will be large crowds of people gathering in polling places all across the state."³⁹ The Indiana Advisory Committee called on their state to expand absentee voting to be available to all voters in the state. Similarly Loyola University law professor Justin Levitt submitted to the Commission: "whatever the underlying causes, the fact remains that minority communities are more at risk from COVID-19. Congregating in groups can be life-threatening for anyone in a pandemic. For minority citizens, the risks are even greater."⁴⁰

Ilya Shapiro of the Cato Institute and Dan Morenoff of the Equal Voting Rights Institute each submitted testimony to the Commission, agreeing with the need for expanding absentee ballot access this year given the health risks presented by COVID-19. Significantly, while they expressed some concerns about increased risk of voter fraud with regard to third-party ballot collection,⁴¹ they also acknowledged that incidents of voter fraud in absentee voting are exceedingly rare (less than 0.00006% of a Heritage Foundation database of allegations).⁴²

³⁵ *Ibid.*, 259.

³⁶ *Ibid.*, 260-62.

³⁷ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Urges Federal Agencies to Vigilantly Enforce Civil Rights Laws During and in the Wake of the COVID-19 Crisis," Apr. 17, 2020, <https://www.usccr.gov/press/2020/04-17-Statement-on-Coronavirus-Federal-Guidance.pdf>.

³⁸ *Ibid.*, 6.

³⁹ Indiana Advisory Committee to the U.S. Commission on Civil Rights, "Indiana Advisory Committee to the U.S. Commission on Civil Rights Urges Adoption of No-Excuse Absentee Voting in Upcoming Election," Jul. 22, 2020, p. 2, <https://www.usccr.gov/files/2020-07-22-Indiana-SAC-statement-on-voting-rights.pdf>.

⁴⁰ Justin Levitt, Professor, Loyola Law School, Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, Jul. 1, 2020, p. 3, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceQXlrch5zS0011ef58>.

⁴¹ Ilya Shapiro, Director and James T. Knight II, Legal Associate, Robert A. Levy Center for Constitutional Studies, Cato Institute, Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, Jun. 29, 2020, p. 1, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceQXlrch5zS0011ef58> (hereinafter "Shapiro Statement"); Dan Morenoff, Executive Director, The Equal Voting Rights Institute, Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, Jul. 8, 2020, pp. 1-3, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceQXlrch5zS0011ef58> (hereinafter "Morenoff Statement").

⁴² Shapiro Statement at 3; Morenoff Statement at 3.

The Commission also received substantial testimony about the need for safe in-person voting options to preserve access for voters with disabilities and voters who require language assistance. Clark Rachfal of the American Council of the Blind pointed out that changes to voting processes implemented in response to COVID-19 “impose serious barriers to voting privately and independently for people who are blind and visually impaired.”⁴³ Michelle Bishop of the National Disability Rights Network pointed out that “curbside voting may be used as a stop gap measure for voters with disabilities to cast their ballots until an inaccessible polling place can be brought into compliance with the ADA.”⁴⁴ Indeed, this particular measure has, in previous Administrations, been included in “accessibility settlements and memoranda of agreements between the U.S. Department of Justice and individual voting jurisdictions.”⁴⁵ Jerry Vattamala of the Asian American Legal Defense and Education Fund submitted testimony to the Commission that jurisdictions covered under Section 203 of the Voting Rights Act, which requires particular jurisdictions to provide language assistance, have failed to fulfill their obligations to provide translated written materials and access to interpreters.⁴⁶

But in the face of these dire concerns about American citizens’ ability to practice that most essential, core function of our democracy in casting a ballot, the Commission received testimony that the Trump Administration has been largely absent from enforcement that protects and ensures voter access.⁴⁷

As the House Committee on Administration’s Subcommittee on Elections points out, we do not even have a Department of Justice “that argues cases on behalf of the voter.”⁴⁸

⁴³ Clark Rachfal, Director of Advocacy and Governmental Affairs, American Council of the Blind, Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, Jul. 1, 2020, p. 1, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceOXIrch5zS0011ef58>.

⁴⁴ Michelle Bishop, Voting Rights Specialist, National Disability Rights Network, Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, p. 4, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceOXIrch5zS0011ef58>.

⁴⁵ *Ibid.*, 4-5.

⁴⁶ Jerry Vattamala, Director, Democracy Program, Asian American Legal Defense and Education Fund (AALDEF), Written Statement for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, Jul. 1, 2020, pp. 2-3, <https://securisync.intermedia.net/us2/s/2n8deuGPijiceOXIrch5zS0011ef58>.

⁴⁷ U.S. Committee on House Administration, Subcommittee on Elections, Report on Voting Rights and Election Administration in the United States of America, p. 111 (submitted by Chair Marcia L. Fudge, Subcommittee on Elections, Committee on House Administration, for Minority Voting Rights Access Update before the U.S. Commission on Civil Rights, July 1, 2020), <https://securisync.intermedia.net/us2/s/2n8deuGPijiceOXIrch5zS0011ef58>.

⁴⁸ *Ibid.*, 138.

Policing Practices

Several uses of deadly force against Black civilians earlier this year underscore an ongoing need for federal leadership in enforcement against unconstitutional policing practices to protect civil rights. Yet, as the Commission unanimously recognized last June, in the current Administration the U.S. Department of Justice has taken the public position that it would significantly curtail policing investigations,⁴⁹ and has followed through in that reduction.⁵⁰

The Commission acknowledges the Department of Justice's decision to initiate a criminal investigation into the death of George Floyd in Minneapolis, Minnesota,⁵¹ a use of deadly force that has been widely criticized by law enforcement leaders.⁵² Opening a criminal investigation is separate and apart from and does not address the Civil Rights Division's authority to open pattern or practice investigations; as discussed below, this pattern or practice investigative authority is a powerful, effective tool that DOJ has not been using. The Commission remains concerned that DOJ has curtailed its activity in this area, which in turn, has directly undermined public trust in the federal commitment to constitutional policing practices and to ensuring nondiscrimination in police use of force.⁵³ The Commission unanimously urges vigorous federal enforcement of civil rights laws that protect Americans from unconstitutional policing practices.

⁴⁹ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Unanimously Condemns the Killings of Ahmaud Arbery, Breonna Taylor, and George Floyd and Calls on the Department of Justice to Enforce Federal Civil Rights Laws that Protect Americans from Unconstitutional Policing Practices," Jun. 5, 2020 (hereinafter "Enforce Policing Practices Statement"), <https://www.usccr.gov/press/2020/06-05-Pattern-or-Practice-Statement.pdf> (citing Office of the Att'y Gen., "Memorandum for Heads of Department Components and United States Attorneys," March 31, 2017, <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html> (stating that "It is not the responsibility of the federal government to manage non-federal law enforcement agencies")); see also U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, Nov. 2018, pp. 88-90 (hereinafter "Police Use of Force"), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>; see also U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments to Ensure Constitutional Policing," Apr. 24, 2017, https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf.

⁵⁰ Enforce Policing Practices Statement at 1 (citing *Are Rights A Reality* at 119).

⁵¹ Enforce Policing Practices Statement at 1, n. 3 (citing U.S. Department of Justice, "Joint Statement of United States Attorney Erica MacDonald and FBI Special Agent in Charge Rainer Drolshagen," May 28, 2020, <https://www.justice.gov/usao-mn/pr/joint-statement-united-states-attorney-erica-macdonald-and-fbi-special-agent-charge>)).

⁵² Christina Maxouris, *Minneapolis police chief says all four officers involved in George Floyd's death bear responsibility*, CNN (Jun. 1, 2020, 5:25 AM), <https://www.cnn.com/2020/06/01/us/minneapolis-police-chief-floyd-response/index.html>; see also, Phil Helsel, *Police chiefs across U.S. condemn officers in Floyd death*, NBC News (May 29, 2020, 12:14 PM), <https://www.nbcnews.com/news/us-news/several-police-heads-across-nation-condemn-force-used-floyd-death-n1217451>.

⁵³ *Are Rights A Reality* at 93.

The U.S. Attorney General is authorized to “investigate and litigate cases involving a ‘pattern or practice of conduct by law enforcement officer’ that violates Constitutional or federal rights.”⁵⁴ These pattern or practice investigations begin with the Civil Rights Division conducting a formal investigation into a law enforcement agency, most often involving a systemic analysis of the policies and practices of policing in a particular community to determine if there are constitutional violations.⁵⁵ After making its findings and conclusions, the Division can negotiate reforms, sometimes in the form of a consent decree, overseen by a federal court and an independent monitor.⁵⁶ In 2018, the Commission published a report on police use of force, and discussed the positive results of many of these decrees, noting that jurisdictions with some form of federal oversight saw decreases in shootings, at a rate of twenty-seven percent the first year, and up to thirty-five percent in following years.⁵⁷ The report also noted a decrease in reports of non-lethal police use of force,⁵⁸ and police use of force citizen complaints.⁵⁹

Since 1994, DOJ has opened seventy pattern or practice investigations, of which, forty-one resulted in a consent decree or other settlement agreement.⁶⁰ Nineteen of these decrees were still actively being implemented as of April 2017.⁶¹ Under this Administration, the DOJ has abandoned pattern or practice investigations, criticized pattern or practice policing investigations as a tool, and refused to initiate new investigations and curtailed the use of consent decrees.⁶² They have also diminished the use of the DOJ Office of Community Oriented Policing to assist local police departments in developing new methods and policies for training officers and carrying out their duties in a fair, safe, and constitutional manner.⁶³

⁵⁴ 42 U.S.C. § 14141 (recodified as 34 U.S.C. § 12601); *see also* Civil Rights Division, U.S. Department of Justice, The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present, 3 (2017), <https://www.justice.gov/crt/file/922421/download> (hereinafter “Pattern and Practice Police Reform Work”).

⁵⁵ Pattern and Practice Police Reform Work at 1.

⁵⁶ *Ibid.*

⁵⁷ Police Use of Force at 88-89.

⁵⁸ *Ibid.*, 92.

⁵⁹ *Ibid.*, 75.

⁶⁰ Ed Chung, *The Trump Administration Is Putting DOJ Policing Reform Efforts At Risk*, Center for American Progress (Apr. 13, 2017, 9:00 am), <https://www.americanprogress.org/issues/criminal-justice/news/2017/04/13/430461/trump-administration-putting-doj-policing-reform-efforts-risk/>.

⁶¹ *Ibid.*

⁶² Memorandum from the Att’y Gen. to Heads of Civ. Litigating Components and United States Att’ys (Nov. 7, 2018) (on file with the Commission); *see also* Police Use of Force at 88.

⁶³ *See* Alan Neuhauser, *Justice Department Ends COPS Office Review of Police*, U.S. News and World Report (Sept. 15, 2017), <https://www.usnews.com/news/national-news/articles/2017-09-15/justice-department-ends-cops-office-review-of-local-police>. The Trump Administration has also repeatedly called for the elimination of the COPS office, most recently in its FY 2021 President’s Budget. <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2804>.

As police leaders generally recognize, fostering community trust, positive community relations and cooperation are essential for law enforcement to effectively discharge its public safety duty. Yet the Department has failed to use the full measure of its authority to conduct investigations into these cases, and to bring enforcement actions if appropriate to prevent these events and other systemic deprivations of constitutional rights from occurring.⁶⁴

Conclusion

For over six decades the Department of Justice has been statutorily obligated to enforce civil rights laws. Today it fails in that promise. Americans need the Department of Justice to live up to its name. The extraordinary volume of complaints that continue to be filed with federal civil rights agencies coupled with findings of discrimination and resolutions from federal agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Department of Justice must adopt effective practices to fulfill its mission to coordinate and ensure federal civil rights enforcement.

⁶⁴ See Police Use of Force at 139 (recommending that the Department of Justice “return to vigorous enforcement of constitutional policing”); see also U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments to Ensure Constitutional Policing,” Apr. 24, 2017, https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf.

Mr. COHEN. Our next witness is Sherrilyn Ifill. Ms. Ifill is the president and director-counsel of the NAACP Legal Defense and Education Fund, a position she has held since 2013, and I think a position Mr. Ogletree might have held at some time. No, he didn't hold it. Well, he was a star litigator there.

She first joined the staff of the Legal Defense Fund in 1988 as an assistant counsel and litigated voting rights cases at that time.

For 20 years, she taught constitutional law and civil procedure at the University of Maryland School of Law. She has her JD from New York University School of Law, which is in Mr. Nadler's district, and her B.A. from Vassar.

Ms. Ifill, you are recognized for five minutes.

Ms. Ifill.

STATEMENT OF SHERRILYN IFILL

Ms. IFILL. Good morning, Chairman Cohen and Ranking Member Johnson, members of the subcommittee.

My name is Sherrilyn Ifill and I am president and director-counsel of the NAACP Legal Defense Fund and I thank you for the opportunity to testify this morning regarding the ongoing need for oversight of the Civil Rights Division of the Department of Justice.

LDF was founded in 1940 by Thurgood Marshall, the trailblazing civil rights lawyer whose groundbreaking litigation created the field of civil rights law. Marshall later became the first Black justice to sit on the United States Supreme Court.

LDF has been an entirely separate entity from the NAACP since 1957. We were launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality.

The Civil Rights Division of the Department of Justice was created by the Civil Rights Act of 1957, the first civil rights statute enacted since Reconstruction. The division formation in the early days of the civil rights movement proved critical to ensuring protection for civil rights demands for equal citizenship in southern states by Black citizens.

I feel compelled to say that the core purpose of the creation of the division was to protect against racial discrimination.

Because of the presentation I heard earlier from Representative Johnson about the department's role in religious discrimination, I feel compelled to call the names of the civil rights martyrs who were killed in the years leading up to the passage of the Civil Rights Act of 1957 to ensure we remember the context in which the division was created.

Harry Moore, who was assassinated in his bed in Florida in 1951. Reverend George Lee in Mississippi in 1955, and of course, young Emmett Till in 1955 in Money, Mississippi. It was in that context that the Civil Rights Division was created as part of the Civil Rights Act of 1957.

LDF is particularly well suited to speak about the work of the Civil Rights Division because for former LDF staff attorneys served as assistant United States attorney generals for civil rights, the position that Mr. Dreiband holds today, leading the Civil Rights Division in its work during critical times in the division's history. They include Drew Days, 1977 to 1980, Deval Patrick, 1994 to 1997, Bill

Lann Lee, 1997 to 2001 and, most recently, Vanita Gupta, from 2014 to 2017, and she appeared most recently before this committee in 2016.

The work of the division is advanced through 11 sections. But I really want to touch on just a few. We have already heard about the department's traditional role in voting.

In fact, the Civil Rights Act of 1957 empowered the division to issue injunctions to protect voting rights. This is years before the passage of the Voting Rights Act. The division was empowered to engage in voter protection work.

In the 30 years that I have been a civil rights litigator, the department, through Republican and Democratic administrations, has often partnered with civil rights organizations in bringing voting litigation.

Of course, the principal role of the division in protecting voting rights was, largely, advanced through Section 5 of the Voting Rights Act. But after the Supreme Court struck down the core provision of Section 5, the preclearance formula, we were left only with the other provisions of the act, including Section 2, which is a vital tool for advancing voter protection.

And yet, today, the division only has one case on its docket under Section 2 of the Voting Rights Act protecting minority voting rights, and that case was already on the docket before 2017.

Even worse, the division has reversed itself in cases in which it formally was advancing voting rights cases under Section 2, including a case in which the division was co-counsel with the Legal Defense Fund challenging Texas's voter ID law. The division switched its position and later withdrew from the case.

The result has been that civil rights organizations have had to essentially function as private civil rights divisions themselves because we have no longer had the partnership of the Civil Rights Division at the Department of Justice.

The same is true in the area of policing, which we have already heard about. Not only has the department withdrawn from vigorous enforcement of the law enforcement misconduct statute passed in 1994 in the wake of the unrest following the beating of Rodney King in Los Angeles and the acquittal of the officers who assaulted him. Under prior administrations, pattern and practice investigations provided opportunities to transform unconstitutional policing in police departments around the country.

Under first Attorney General Sessions and now Attorney General Barr, the department has abandoned that work.

Mr. COHEN. We are starting to run over. Ms. Ifill, I appreciate we are starting to run over a little bit. If you could close in the next 10 seconds.

Ms. IFILL. There is no private civil rights organization that can replace the resources of the Civil Rights Division of the Department of Justice. The Department of Justice has the investigators, the lawyers, the team, the research, and the history to do the best civil rights work.

But they are absent from this work. We need a Civil Rights Division to return to its core mission protecting against racial discrimination, protecting voting rights, protecting against criminal justice discrimination, and I hope that this hearing will be the opening for

us to begin to talk about how to right the ship at the Civil Rights Division.

Thank you.

[The statement of Ms. Ifill follows:]



**Testimony of Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.**

**Before the United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil
Liberties**

**Hearing on Oversight of the Civil Rights
Division of the Department of Justice**

September 24, 2020

Good morning, Chairman Cohen, Ranking Member Johnson and members of the Subcommittee. My name is Sherrilyn Ifill, and I am the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"). Thank you for the opportunity to testify this morning regarding the ongoing need for oversight of the Civil Rights Division of the Department of Justice.

LDF was founded in 1940 by Thurgood Marshall, the trailblazing lawyer whose groundbreaking litigation created the field of civil rights law. Marshall later became the first Black justice to sit on the United States Supreme Court. LDF has been an entirely separate organization from the NAACP since 1957. LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF has always been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained.

The Civil Rights Division of the Department of Justice was created by the Civil Rights Act of 1957, the first federal civil rights statute enacted since Reconstruction. The division's formation in the early days of the Civil Rights Movement proved critical to ensuring protection for civil rights demands for equal citizenship emerging in southern states. Among its most important provisions, the Act empowered federal prosecutors to seek injunctions for the protection of voting rights. Since its formation, the Division's lawyers have played a powerful leadership role in enforcing the nation's civil rights laws. The leaders of the Division have often been drawn from the top ranks of civil rights law organizations, bringing a wealth of experience and commitment to the robust enforcement of key civil rights statutes that prohibit discrimination on the basis of race, sex, disability, religion, familial status and national origin. LDF is particularly well suited to speak about the work the Civil Rights Division of the Justice Department. Four former LDF staff attorneys have served as the Assistant United States Attorney General for Civil Rights, leading the Civil Rights Division in its work during critical periods in the Division's history. They include Drew S. Days III (1977-1980), Deval Patrick (1994-1997), Bill Lann Lee (1997-2001), and, most recently, Vanita Gupta (2014-2017).

The work of the Civil Rights Division is advanced through 11 sections or issue areas, they are:

Appellate Section	Federal Coordination and Compliance
Criminal Section	Housing and Civil Enforcement Section
Disability Rights Section	Immigration and Employee Rights Section

Educational Opportunities Section Policy and Strategy Section

Employment Litigation Section Special Litigation Section

Voting Section

For most of its history, the Division has been at the forefront of civil rights protection in each of these areas. Since 2017, however, we have seen a drastic change. The current Civil Rights Division is largely absent from leadership in civil rights enforcement. Even worse, the Division has used its resources to take positions that stand in opposition to core civil rights principles, betraying the history and vital role the Division was created to play protecting our most historically vulnerable citizens from practices, laws and policies that violate the constitutional guarantee of “equal protection of laws.”

Voting Rights

Protecting voting rights for racial minorities was perhaps the most important charge given the Civil Rights Division in the Civil Rights Act of 1957. The Civil Rights Division has previously played an active role in the enforcement of voting rights by bringing cases raising claims of violations of Section 2¹ and various other provisions of the Voting Rights Act of 1965. Section 2

¹ See, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019); *United States v. North Carolina*, No. 1:13CV861 (M.D.N.C. Feb. 6, 2014); *United States v. State of Texas*, Case 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Sep. 25, 2013); *United States v. State of Texas*, Case 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013); *United States v. Town of Lake Park*, Civil Action No. 09-80570-MARRA (S.D. Fla. Oct. 26, 2009); *United States v. Euclid City School Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009); *United States v. Salem County and the Borough of Penns Grove*, Civil Action No. 1:08-cv-03276-JHR-AMD (D.N.J. Jul. 24, 2008); *United States v. School Board of Osceola County*, Civil Action No. 6:08-CV-582-ORL-18DAB (M.D. Fla. Apr. 23, 2008); *United States v. Georgetown County School District*, Civil Action No. 2:08-889 DCN (D.S.C. Mar. 21, 2008); *United States v. City of Philadelphia*, Case 2:06-cv-04592-PBT (E.D. Pa. Jun. 1, 2007); *United States of America v. Village of Port Chester*, No. 7:2006cv15173 - Document 124 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008); *United States v. Long County*, Case No. CV 206-040 (S.D. Ga. Feb. 10, 2006); *United States v. City of Boston*, 497 F. Supp. 2d 263 (D. Mass. 2007); *United States v. Osceola County*, Case No. 6:05-cv-1053-Orl-31DAB (M.D. Fla. Jun. 26, 2006); *United States v. Brown*, Civil Action No. 4:05CV33TSL-LRA (S.D. Miss. Aug. 27, 2007); *United States v. Berks County*, 250 F. Supp. 2d 525 (E.D. Pa. 2003); *United States v. Osceola County*, 6:02-cv-00738 (M.D. Fla. Jul. 22, 2002); *United States v. Alamosa County*, 306 F. Supp. 2d 1016 (D. Colo. 2004); *United States v. Crockett County*, No. 1-01-1129 (W.D. Tenn. 2001); *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002); *United States v. City of Hamtramck Michigan*, Civil Action No. 00-73541 (E.D. Mich. Jan. 29, 2004); *United States v. Upper San Gabriel Valley Mun. Water Dist.*, CV 00-7903 AHM (BQRx) (C.D. Cal. Sep. 8, 2000); *United States v. Morgan City*, Civil Action No. 6:2000cv01541 (W.D. La. 2000); *Grieg v. City of St. Martinville*, Case 6:00-cv-00603-RFD-MEM (W.D. La. 2000); *United States v. City of Santa Paula*, CV 00-03691-GHK (SHx) (C.D. Cal. 2000); *United States v. Roosevelt County*, Civil Action No. 00-50-BLG-JDS, (D. Mont. Mar. 24, 2000); *United States v. Town of Cicero*, Civil Action No. 00C-153 (N.D. Ill. Mar. 13, 2000); *United States v. Benson County*, Civil Action No. A2-00-30 (D.N.D. 2000); *United States v. Blaine County, Montana*, 157 F. Supp. 2d 1145 (D. Mont. 2001); *United States v. Passaic City*, No. 99- 2544 (D.N.J. 1999); *United States v. Day County*, No. 99-1024 (D.S.D. June 16, 2000); *United States v. City of Lawrence*, No. 1:98-cv-12256 (D. Mass. Nov.

of the Voting Rights Act is the provision that authorizes private actors and the U.S. Department of Justice to challenge discriminatory voting practices in the federal courts. Section 2 applies nationwide and is one of the main protections available to people of color after the devastating *Shelby County v. Holder* decision in 2013 which gutted a key provision of the VRA that for nearly 50 years, required jurisdictions across the country, though primarily in the American South, to (a) provide notice of every voting change that they proposed implementing² and (b) satisfy their burden to receive approval from the federal government before they implemented any voting change and show that it would not worsen the ability of people of color to participate equally in the political process. The Supreme Court decision in *Shelby County* loosened the reins of protection and allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked. While section 5 was severely weakened, Section 2 of the VRA remains intact and is often used to seek redress for harmful and discriminatory actions related to voting. In August of 2013, civil rights groups, including LDF, and other advocates challenged the Texas photo ID law, SB14 in a case called *Veasey v. Perry*. Texas implemented this strict and prohibitive photo ID law within hours of the *Shelby* decision. While the previous Administration's Department of Justice intervened in that case as a Plaintiff-Intervenor, the current Administration subsequently withdrew from the matter.

Similarly, the Civil Rights Division of the Department of Justice also filed a section 2 case against the State of North Carolina in 2013, alleging that provisions in House Bill 589 illegally resulted in a denial of the right to vote on the basis of race, color or membership in a language minority. That litigation was successful in striking down the North Carolina law with the decision of the Fourth Circuit Court noting that the law was "the most restrictive voting law North Carolina has seen since the era of Jim Crow"³ and that the provisions of the law targeted African Americans with "almost surgical precision."⁴

Of course, until 2013, the Department played a vital role in enforcing the preclearance provisions of section 5 of the Voting Rights Act. As noted above, the Supreme Court in its *Shelby County* decision struck down the formula used to implement section 5.⁵ The 2006 congressional record amassed for the reauthorization of the Voting Rights Act reveals that the department denied preclearance for 700 changes between 1982 and 2006.⁶ The *Shelby County* decision

5, 1998); *United States v. Cibola County*, Civil Action No. 93-1134-LH/LFG (D. N.M. 1993); *United States v. Sandoval County*, No. 88-CV-1457-BRB-DJS (D. N.M. 1988).

² The Department of Justice reports that in just the three years before the *Shelby* decision, between 2010-2013, it considered 44,790 voting changes under Section 5. Section 5 Changes By Type and Year, Total Section 5 Changes Received By The Attorney General 1965 Through 2013, <https://www.justice.gov/crt/section-5-changes-type-and-year-2> (last visited June 24, 2019).

³ N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016)

⁴ *Id.*

⁵ A *Review of the Operations of the Voting Section of the Civil Rights Division*, Office of the Inspector General, Department of Justice, page 81 (March 2013) <https://www.oversight.gov/sites/default/files/oig-reports/s1303.pdf>.

⁶ H. R. REP. NO. 109-478, at 21 (2006) <https://www.congress.gov/109/crpt/hrpt478/CRPT-109hrpt478.pdf>.

ended the preclearance process, but voting changes that result in discrimination continued, and indeed increased, since 2013.⁷

With voter suppression intensifying each, and every year, at the local, state, and federal levels, the right to vote for African American people and other people of color, is facing its greatest threat in decades. Yet, the current Administration has not filed a single Section 2 Voting Rights Act case to challenge clearly discriminatory voting changes which would have been caught and denied preclearance under section 5. This dearth/insufficiency of VRA enforcement was captured in the 2018 Statutory Report of the U.S. Commission on Civil Rights entitled “An Assessment of Minority Voting Rights Access in the United States” which examined the Trump Administration’s record on voting rights⁸. The report sets forth many findings on issues related to voter access, voter discrimination and various barriers to voting. A key conclusion/recommendation in the report is that “[T]he DOJ should pursue more VRA enforcement in order to address the aggressive efforts by state and local officials to limit the vote of minority citizens and the many new efforts to limit access to the ballot in the post-Shelby County landscape.”⁹

Criminal Justice/Policing

The Civil Rights Division has similarly abdicated its responsibility for enforcing civil rights laws in the area of criminal justice. One of the key areas in which the Division has followed an explicit policy against using its power in this area is its failure to aggressively prosecute “patterns and practices” of unconstitutional policing, which the Department is empowered to do under the Law Enforcement Misconduct Act.¹⁰ That statute was passed by Congress in 1994 in response to the shocking video of the beating of Black motorist Rodney King by officers of the Los Angeles Police Department and the acquittal of the officers in a state prosecution. The law empowers the Attorney General to address systemic discrimination by law enforcement and to prosecute individual law enforcement officers engaged in unconstitutional policing practices.¹¹ Since its enactment, various administrations have taken a measured approach to utilizing this authority opening approximately 69 investigations and resolving findings of civil rights violations with 40 agreements between 1994 and 2017.¹²

⁷ See NAACP Legal Defense and Educational Fund, Inc., *Democracy Diminished: State and Local Threats to Voting Post-Shelby County v. Holder* (Aug 2017) https://tminstitutelfdf.org/wp-content/uploads/2017/08/Democracy-Diminished-State-and-Local-Voting-Changes-Post-Shelby-v.-Holder_4.pdf

⁸ https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

⁹ *Id* at page 14

¹⁰ 42 U.S.C. § 14141.

¹¹ 34 U.S.C. § 12601.

¹² Civil Rights Division, U.S. Dep’t of Justice, *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present*, 3, Jan. 2017, <https://www.justice.gov/crt/file/922421/download>.

Yet, the Trump Administration has abdicated its authority to investigate police departments. When U.S. Attorney General Jefferson Sessions initially took office in 2017, he sent a memo to Justice Department officials stating that:

The Federal government alone cannot successfully address rising crimes rates, secure public safety, protect and respect the civil rights of all members of the public, or implement best practices in policing. These are, first and foremost, tasks for state, local, and tribal law enforcement. By strengthening our longstanding and productive relationships with our law enforcement partners, we will improve public safety for all Americans.¹³ (Emphasis added).

However, instead of supporting the Illinois Attorney General and Chicago elected officials who spent a year negotiating the terms of a proposed consent decree— which sought to protect and respect the civil rights of Chicago residents—the DOJ decided to spend taxpayers’ dollars opposing an agreement that was fully consistent with the objectives set forth in its memo noted above because it does not agree with consent decrees¹⁴.

This was not the first time the current DOJ tried to hinder local efforts to advance policing reforms, despite local residents and law enforcement executives supporting those reforms. In 2017, prior to the approval of the consent decree in Baltimore, the DOJ attempted to delay and restart the process. In that instance the DOJ was a party and the Judge denied its 11th hour request.¹⁵

The abandonment of the use of pattern and practice investigations and consent decrees was institutionalized in a memo from Attorney General Jeff Sessions dated November 7, 2018 wherein he severely restricted the use and duration of consent decrees.¹⁶ The current administration has only opened one narrow investigation focusing on a single unit of the Springfield Police Department in Massachusetts. The prior Administration opened 25 investigations of police departments.¹⁷

Education

The Justice Department has similarly abandoned its roll of protecting and enforcing civil rights laws in Education. In 2018, the Justice Department joined the Education Department in

¹³ Office of Attorney General, Memorandum for Heads of Department Components and United States Attorneys, March 31, 2017, available at <https://www.justice.gov/opa/pressrelease/file/954916/download>.

¹⁴ See Merrick J. Bobb, Jeff Sessions thinks consent decrees increase crime. He's just plain wrong, LOS ANGELES TIMES, Apr. 25, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-bobb-consentdecrees-work-20170425-story.html>; see also Andrew Kaczynski, Attorney General Jeff Sessions: Consent decrees 'can reduce morale of the police officers,' Apr. 14, 2017, <https://www.cnn.com/2017/04/14/politics/kfile-sessions-consent-decrees/index.html>.

¹⁵ 4 See U.S. v. Police Department of Baltimore, Case No. 17-cv-0099, Doc. No. 23 (D. Md.) (denying the DOJ's Motion for Continuance of Public Fairness Hearing and noting that the DOJ's efforts were "highly unusual")

¹⁶ <https://www.justice.gov/opa/press-release/file/1109621/download>

¹⁷ <https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice/>

rescinding Title VI of the Civil Rights Act of 1964 guidelines regarding the administration of school discipline in K-12 schools. The guidance was created as a response to evidence which demonstrates that students of color receive harsher punishments and are punished at higher rates— despite the fact that they do not misbehave more than their white peers. Research shows that Black K-12 students are 3.8 times more likely to receive an out of school suspension and 2.2 times more likely to be subjected to a school-based arrest.¹⁸ Students of color are often disciplined for subjective infractions when their white peers are not. Advocates from across the country urged the Administration to maintain this critical protection for students of color, which does not create any new requirements for schools and is intended to help them comply with existing civil rights laws.

Additionally, the Justice Department has attacked the affirmative action efforts of higher education institutions. In every case challenging affirmative action to reach the Supreme Court since 1979, the Court has upheld the constitutionality of the practice with strict protections and safeguards.¹⁹ The most recent was in *Fisher v. University of Texas* in 2016. Nevertheless, in 2018 the Division’s lawyers filed a statement of interest opposing affirmative action in a case challenging affirmative action in admissions at Harvard. After a federal district court found that Harvard’s affirmative action program did not violate the constitution, the Division’s lawyers filed an amicus brief on appeal in that case in 2020. Just months ago the Division threatened to sue Yale University for its use of affirmative action in admissions. And just a week ago, the division made threatening moves towards Princeton University, after the university undertook to proactively address the history and contemporary reality of discrimination on campus.²⁰

Department of Justice focused on tearing down civil rights laws and encouraging harmful behavior

Rather than protecting and advancing civil rights for the citizens of this country, the current Department of Justice often takes positions and promotes actions which violate civil rights laws. Instead of investigating unlawful policing, this Administration has incited unlawful policing by encouraging police to abuse those who are arrested by allowing them to hit their heads as they are seated in police cars,²¹ and, U.S. Attorney General Barr warned that if people of color who protest police violence do not show respect for law enforcement, then they may

¹⁸ https://indrc.indiana.edu/tools-resources/pdf-disciplineseries/disparity_newresearch_full_040414.pdf

¹⁹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas*, 579 U.S. ____ (2016).

²⁰ Anemona Hartocollis, *Princeton Admitted Past Racism. Now It Is Under Investigation*, New York Times (Sep. 17, 2020) <https://www.nytimes.com/2020/09/17/us/princeton-racism-federal-investigation.html>

²¹ Associate Press, *WATCH: Trump to police: Don't worry about people in custody hitting their heads on squad cars*, July 28, 2017, <https://www.pbs.org/newshour/politics/watch-trump-police-dont-worry-people-custody-hitting-heads-squad-cars>:

not receive protection from officers.²² Recently even as demonstrators peacefully protested police violence in Washington, D.C. in the aftermath of George Floyd's death, President Trump and Attorney General Barr, ordered federal law enforcement to disperse crowds by throwing smoke canisters and pepper balls.²³ Furthermore, instead of fighting injustices in voting, the Department has abandoned its use of section 2 litigation to challenge pernicious voting suppression.

Conclusion

The Department of Justice's abdication of its role to protect and ensure compliance with civil rights laws has caused a need for organizations such as LDF to increase their own efforts to litigate cases, investigate violations, collect & disseminate data and provide leadership in the enforcement of the nation's core civil rights laws. This is not a model that can be sustained. The Department of Justice, Civil Rights division was established for a particular purpose. Congress should use its oversight powers to ensure that the Department fulfills its stated purpose "to uphold the civil and constitutional rights of all Americans" and to "enforce federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin."²⁴

²² Owen Daugherty, *Barr warns that communities that don't show respect to law enforcement may not get police protection: report*, Dec. 4, 2019, The Hill, <https://thehill.com/homenews/news/472946-barr-warns-that-communities-that-dont-show-respect-to-law-enforcement-may-not>.

²³ Ben Gittleston and Jordan Phelps, *Police use munitions to forcibly push back peaceful protesters for Trump church visit*, ABC News, <https://abcnews.go.com/Politics/national-guard-troops-deployed-white-house-trump-calls/story?id=71004151>.

²⁴<https://www.justice.gov/crt/about-division>

Mr. COHEN. Thank you. Thank you very much. We appreciate your testimony. Thank you very much.

Our next witness is Mr. Thomas Saenz. Mr. Saenz is the president and general counsel of the Mexican American Legal Defense and Education Fund, or MALDEF, a position he has held since August 2009.

Mr. Saenz previously was a litigator for MALDEF for 12 years, leading numerous civil rights cases in the areas of immigrant rights, education, employment, and voting rights.

He served as law clerk for the Honorable Harry L. Hupp of the U.S. District Court for the Central District of California, and the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth District.

Mr. Saenz received his JD with honors from Yale Law School and his undergraduate degree summa cum laude from Yale.

Mr. Saenz, you are recognized for five minutes. I know you could talk to us like our previous folks, at more length, and it would be good to have it. But we are limited to five minutes.

Thank you, sir.

STATEMENT OF THOMAS A. SAENZ

Mr. SAENZ. Thank you, Mr. Chair.

Good morning, Congress members. My name is Thomas Saenz. I am president and general counsel of MALDEF, the Mexican American Legal Defense and Educational Fund, which has for over 52 years now worked to promote the civil rights of all Latinos living in the United States.

I appear before you remotely today from the city of Los Angeles, California.

MALDEF focuses its work in four subject matter areas: education, employment, immigrant rights, and voting rights. With the possible exception of immigrant rights, our areas of expertise and litigation overlap with areas within the responsibility of the Civil Rights Division.

Unfortunately, at MALDEF we have seen the division alter its formal alignment and legal position in pending cases, decrease its role and interest in cases where it has previously performed an important part, and turn its attention to issues that do not fall within the broad realm of protecting the rights of communities, including Latinos, that have faced ongoing problems of discrimination in equity and exclusion.

I would start with voting rights. As we approach a new decade in the decennial necessity of redrawing electoral districts for Congress, state legislatures, and local governing bodies, the division's activities do not suggest that it will participate actively in ensuring that redistricting in 2021 will protect the voting rights of communities of color.

I give you one experience. MALDEF was a leader in the litigation that began in 2011 and continued until 2019 against the initial and subsequent redistricting plans enacted by the state of Texas state legislature.

The Section 2 litigation in Texas, as I mentioned, continued until 2019 through several trials and included damning evidence of both

vote dilution and of intentional discrimination by the Texas legislature.

The United States, represented by the Civil Rights Division, participated in the case on the side of plaintiffs. The division helped plaintiff's counsel to marshal and present evidence of intent to discriminate.

It was clear to all that one significant purpose of proving intent to discriminate, which is otherwise not required to prove a violation of the Voting Rights Act Section 2, was to build the necessary prerequisite for a request to the three-judge panel to order the state be subject to a judicially ordered preclearance requirement, in particular for its upcoming 2021 redistricting plan.

Unfortunately, in January of 2019, the Civil Rights Division filed a motion indicating that the United States had changed positions and seeking to file a brief opposing the order to require the state of Texas to subject its electoral changes to preclearance.

Even after collecting and presenting evidence of intentional discrimination, the division sought to prevent the consequence of such evidence in the form of a court-ordered bail-in order.

The three-judge court ultimately declined to enter a bail-in order so Texas will, in 2021, be free to adopt new district lines without having to seek preclearance. This is despite several decades of court judgments against the state of Texas for its unlawful decennial redistricting.

In our education work, MALDEF has had a different but also disturbing experience with the Civil Rights Division. We continue to represent a class of Latino students in long-standing litigation regarding desegregation of the Tucson Unified School District.

After the development of a new unitary status plan following an appeal in 2011, the United States, the Civil Rights Division, had been an important participant in ongoing discussions about compliance in several areas of the USP in particular with respect to disparate discipline, a matter of concern to both Latino and African-American plaintiff classes.

Despite continued concerns regarding compliance, in recent years the Civil Rights Division has been decidedly less active and engaged on these issues including the issues including the issues related to discipline.

Moreover, the division has now taken a position in support of granting unitary status to the Tucson Unified School District, even though both plaintiff classes continue to raise significant concern about compliance, and the district court itself has indicated that future obligations are necessary and appropriate for the school district.

We can readily observe a significant shift in the priority of the Civil Rights Division. This shift has been away from addressing traditional civil rights concerns faced by communities of color.

Yet, the current pandemic and associated economic down turn have only accentuated and brought to more prominent public attention the disparities confronted by people of color, including Latinos.

Recent demonstrations nationwide have also brought renewed attention and greater discussion and awareness around issues of police conscious and subconscious bias, and the systematic disparities

in law enforcement violence faced by both Blacks and Latinos in the United States.

In such times, the Civil Rights Division and, in particular, its special litigation section, should be an acknowledged leader in identifying and pursuing legal and litigated solutions to these ongoing disparities.

Instead, we have seen a division that subscribes to a different world view than many of its predecessors. It is time for us to return the Civil Rights Division to a place of creativity and innovation and aggressive attention to the disparities throughout society that we continue to see faced by numerous communities of color, including Latinos.

Thank you.

[The statement of Mr. Saenz follows:]



**Testimony of Thomas A. Saenz
President and General Counsel, MALDEF**

**Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Committee on the Judiciary**

Hearing on Oversight of the Civil Rights Division of the Department of Justice

September 24, 2020

Good morning. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has, for over 52 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, D.C. I appear before you remotely today from the city of Los Angeles.

MALDEF focuses its work in four subject-matter areas: education, employment, immigrant rights, and voting rights. With the possible exception of immigrant rights, where our litigation has tended to place our work within the realm of other divisions of the Department of Justice, our areas of expertise and litigation overlap with areas within the responsibility of the Civil Rights Division. Unfortunately, at MALDEF, we have seen the Division alter its formal alignment and legal position in pending cases, decrease its role and interest in cases where it has previously performed an important part, and turn its attention to issues that do not fall within the broad realm of protecting the rights of communities, including Latinos, that have faced ongoing problems of discrimination, inequity, and exclusion. As a result, the current Civil Rights Division cannot be expected to play an appropriate and significant role in responding to concerns around constitutional policing and law enforcement reform, even as the nation continues to discuss and debate these critical issues.¹

As we approach a new decade and the decennial necessity of redrawing electoral districts for Congress, state legislatures, and local governing bodies, the Division's activities do not suggest that it will participate actively in ensuring that redistricting in 2021 will protect the

¹ I should note that there are many career lawyers who continue to perform admirable work in the Civil Rights Division; however, leadership and focus are extraordinarily important to civil rights enforcement, particularly during challenging times, like those our nation currently faces.

voting rights of communities of color and ensure compliance with the Constitution and the federal Voting Rights Act (VRA). Of course, the United States Senate's ongoing refusal to deliberate on a new coverage formula for the preclearance provisions in section 5 of the VRA precludes the Division from playing the same critical role of reviewing redistricting plans that it has played in every redistricting round since the VRA's original enactment.

Nonetheless, the Division can and should be an active participant in challenging redistricting plans – drawn wherever in the nation and by whatever the assigned body – that violate the prohibition of minority vote dilution in VRA section 2. Instead, what we have seen is withdrawal from a position of supporting such claims and a switch to supporting line-drawing wrongdoers. For example, MALDEF was a leader in the litigation that began in 2011 against the initial and subsequent redistricting plans enacted by the Texas Legislature following the last Census. This litigation began before the 2013 Supreme Court decision in *Shelby County v. Holder* disabled the preclearance provisions in section 5, so the courtroom contest commenced in two different three-judge courts – one in Texas under section 2 and the other in Washington, D.C. where the state sought judicial preclearance under section 5. Eventually, the *Shelby County* decision effectively nullified the D.C. court's jurisdiction and its findings of serious misconduct, effectively restricting the litigation to the three-judge panel in Texas.

The section 2 litigation continued until 2019 through several trials, and included equally damning evidence of both vote dilution and of intentional discrimination by the Texas Legislature. The United States, represented by the Civil Rights Division, participated in the case on the side of plaintiffs. The Division helped plaintiffs' counsel, representing numerous parties, to marshal and present evidence of intent to discriminate; it was clear to all that one significant purpose of proving intent to discriminate, which is otherwise not required to prove a violation of VRA section 2, was to build the necessary prerequisite for a request to the three-judge panel to order the state be subject to a judicially-ordered preclearance requirement, in particular for its 2021 redistricting plan.

Consistent with those well-known intentions and with the robust showing of intentional discrimination recognized by the three-judge court, the plaintiffs sought a so-called "bail-in" order to require Texas once more to preclear its election-related changes, as it had been required to do prior to *Shelby County*. In January 2019, the Civil Rights Division filed a motion indicating that the United States had changed positions and seeking to file a brief opposing the "bail-in" order in support of Texas. Thus, even after collecting and presenting evidence of intentional discrimination, the Division sought to prevent the consequence of such evidence in the form of a court-ordered preclearance requirement. The three-judge court ultimately declined to enter a "bail-in" order, so Texas will in 2021 be free to adopt new district lines without having to seek preclearance; this is despite several decades of court judgments against the state of Texas

for its decennial redistricting. Moreover, the state and its citizens will be unable to avail themselves of the more efficient and cost-effective alternative dispute resolution device presented by preclearance review.

In our education work, MALDEF has had a different, but also disturbing, experience with the Civil Rights Division. MALDEF continues to represent a class of Latino students in longstanding litigation regarding desegregation of the Tucson Unified School District in Arizona. Even though nine years have passed since the Ninth Circuit Court of Appeals reversed a premature grant of unitary status to the district, there remain ongoing and significant issues about the district's compliance with numerous obligations under the unitary status plan (USP). After the development of the new USP following the Ninth Circuit's 2011 decision, the United States, through the Civil Rights Division, had been an important participant in ongoing discussions about compliance in several areas of the USP; in particular, the Division had been a critical partner on issues of disparate discipline, a matter of concern to both Latino and African American plaintiff classes.

Despite the continued concerns regarding compliance with the USP, in recent years, the Civil Rights Division has been decidedly less active and engaged on those issues, including the issues related to discipline. Moreover, the Division has now taken a position in support of granting unitary status to the Tucson Unified School District, even though both plaintiff classes continue to raise significant concerns and the District Court itself has indicated that future obligations are appropriate for the school district.

Aside from MALDEF's own litigation experiences, we can readily observe a significant shift in the priorities of the Civil Rights Division. This shift has been away from addressing traditional civil rights concerns faced by communities of color. Yet, the current pandemic and the associated significant economic downturn have only accentuated and brought to more prominent public attention the disparities confronted by people of color, including Latinos, in the areas of economics, education, health care, housing, and voting rights. In addition, recent demonstrations nationwide have brought renewed attention and even greater discussion and awareness around issues of police conscious and subconscious bias, and the systemic disparities in law enforcement violence faced by both Blacks and Latinos in the United States. In such times, the Civil Rights Division and its Special Litigation Section should be an acknowledged leader in identifying and pursuing legal and litigated solutions to these disparities.

In particular, the Civil Rights Division should be an active and recognized locus for seeking systemic reforms of law enforcement agencies. Many years ago, I served as Counsel to the Mayor of the City of Los Angeles during a time when the Los Angeles Police Department was continuing to implement a negotiated federal consent decree, which was the result of

important work by the Civil Rights Division of the United States Department of Justice. I saw firsthand the critical role that systems-reform litigation and a detailed consent decree can play in helping to change embedded law enforcement cultures that are contrary to constitutional and civil rights guarantees. More is certainly required – ongoing community engagement, leadership and government commitment, resources – but decrees have contributed critically to past law enforcement reforms.

This is plainly a time when we should be considering more significant and broader reforms than are reflected in the police department consent decrees of the last generation. Nonetheless, next-generation decrees and necessary complementary reforms are an area where the Civil Rights Division should be playing a far more significant part in being creative to ensure that the current crisis in law enforcement practices results in lasting and real commitments to respecting constitutional and civil rights of all community members.

The current Civil Rights Division seems to subscribe to a different world view than many of its predecessors. At bottom, the Division seems to accept as normal and expected the significant disparities that harm the lives and livelihoods of people of color, including Latinos. The Division seems to have focused instead on targeting private actors that undertake to address some of these disparities, as epitomized by the Civil Rights Division actions to target admissions practices at Harvard University and more recently at my own alma mater, Yale University.

This world view is contrary to long and successful practice in the area of civil rights enforcement. Since the enactment of the Civil Rights Act of 1964, the identification of significant disparities that work to the detriment of people of color – in many different social milieus – and the attempted elimination of those disparities that cannot be well-justified as serving some social necessity, in education, business, or other government endeavor, has been perhaps the critical component in enforcing civil rights and constitutional guarantees of equal protection. This is an essential component of rooting out irrational discrimination, however disguised.

A Civil Rights Division whose leadership views unsupportable disparate impacts and discriminatory results as the norm, even attacking attempts to change those impacts, is not a Division that is serving well the interests of our Constitution or of our nation.

Mr. COHEN. Thank you, sir.

Our next witness is present here in the chamber, Mr. Hiram Sasser. He is the executive general counsel of First Liberty Institute, a public interest law firm that focuses on religious liberty issues for people of all faiths.

Mr. Sasser also serves as an adjunct professor of law at the University of Texas Austin School of Law, as well as an adjunct professor of law at Oklahoma City University School of Law. He received his JD from Oklahoma City University, the Chieftains, and his B.A. from Oklahoma State University, the Cowboys.

Mr. Sasser, you are recognized for five minutes.

STATEMENT OF HIRAM SASSER

Mr. SASSER. Thank you, Chairman Nadler and Chairman Cohen, and Ranking Member Johnson and members of the committee.

Throughout my almost two decades of litigation experience, the Department of Justice Civil Rights Division has proven itself a consistent and stalwart ally in fighting against religious discrimination by enforcing the strong civil rights protections in the Constitution and federal law.

I will tell you a story to start it off with is Nashala Hearn in Muskogee, Oklahoma. It is a small town. It is just on the border of the Cherokee Nation in Oklahoma. That is actually where my wife was born.

And we were visiting there and saw on the news that there was a small young lady, young child, wearing her hijab to school and she was being discriminated against. Told her that she couldn't wear a hijab. Everyone else was allowed to wear hats for various reasons but she couldn't wear her hijab.

I, and I suppose others, contacted the Department of Justice Civil Rights Division and asked them to do something about this, and they took it on. They sued the school district and they were able to solve that problem for Nashala.

And then another issue came along, and this was just a short time thereafter. I saw a case in which the Falun Gong—you may not be familiar with their religious practice. It is an ancient Eastern religious practice that is practiced mostly in China.

The Falun Gong were trying to protest the visiting president of China and they were—they had obtained hotel rooms at a hotel chain that subsequently kicked them out of their hotel, allegedly because the Chinese government asked them to and paid them substantially more for their rooms. At least that was the allegation.

We thought it was wrong how this took place and, you know, it was a very difficult case for them to try to prove. But the Civil Rights Division opened an investigation, and soon thereafter we were able to reach a resolution with the hotel chain in order to make sure that this kind of discrimination did not happen again.

And then we had a case that—I have it mentioned here in the—in my written testimony but I think it is important to note another case we did. Those cases were during the Bush administration.

During the Obama administration we did a case with the Civil Rights Division together representing an African-American church that was told that it couldn't be on the old town square of Holly Springs, Mississippi.

And so we ended up having to sue Holly Springs, Mississippi, and we were able to win at the Fifth Circuit after losing at the district court, and we were ultimately able to get a preliminary injunction to allow the church to be able to continue on there.

And all this tradition of fighting for religious liberty from minority faiths continued with the Trump administration unabated. When we were contacted by the Islamic Association of Collin County, it was a very disturbing story.

It was a town—I won't name the town—in Texas that was prohibiting the Islamic Association from having a cemetery in their town. You can imagine the kind of cultural and religious affront that this must be that you can't even find a place to bury your loved ones.

And so there was this property that the Islamic Association owned and, for whatever reason, the city wouldn't allow them to be able to use that property for a cemetery.

And I won't go to the reasons that they raised. They were, mostly, illegitimate and somewhat ridiculous. But we represented the Islamic Association of Collin County and we asked the Department of Justice to also get involved in that, and they were very enthusiastic about coming to the aid of the Islamic Association and a matter of fact through their participation were able to resolve that issue and now they have their cemetery today.

I would also like to share a story. This started during the George Herbert Walker Bush administration. Then Attorney General Barr led the fight to stop discrimination against the Orthodox Jewish community in Airmont, New York.

Airmont was founded for the purpose of excluding the Orthodox Jewish community. It was a city and it is just north of New York City. And the Department of Justice had to sue them in order to provide civil rights protections for the Orthodox Jewish community there.

But, then again, the Bush administration also had to sue, and now, almost like General MacArthur returning, as he would have promised to have done, General Barr has once again come to the aid of the Orthodox Jewish community in Airmont who have now suffered for almost three decades of continuous discrimination and continuous needs for lawsuits in order to understand that equal protection also applies to the Orthodox Jewish community.

And it is through Attorney General Barr's leadership that we have been able to achieve lots of advances for people of minority faiths, because I think it is very important that we recognize that when we protect minority faiths we are protecting the religious liberty of everybody because religious liberty rises and falls on the rights that we acknowledge for our neighbors.

Thank you.

[The statement of Mr. Sasser follows:]

Prepared Testimony and Statement for the Record of

Hiram S. Sasser, III
Executive General Counsel
First Liberty Institute

At the
Hearing on "Oversight of the Civil Rights Division of the Department of Justice"

Before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
September 24, 2020

Curriculum Vitae

Hiram Sasser is the Executive General Counsel of First Liberty Institute, a public interest law firm that focuses on religious liberty issues for people of all faiths. Mr. Sasser also serves as an adjunct professor of law at the University of Texas at Austin School of Law as well as an adjunct professor of law at Oklahoma City University School of Law.

Introduction

Throughout my almost two decades of litigation experience, the Department of Justice Civil Rights Division has proven itself a consistent and stalwart ally in the fight to prevent religious discrimination by enforcing the strong civil rights protections in the Constitution and federal law. When governments threaten religious liberty, the Department of Justice is there.

DOJ's History of Protecting Liberty for All Faiths

To enforce federal civil rights protections, DOJ wields a variety of tools, such as conducting investigations, filing statements of interest or intervening in pending litigation, or filing independent lawsuits. The following provide only a few examples of DOJ's long history of protecting essential liberty for people of all faiths.

Nashala Hearn

In 2003, Nashala Hearn began sixth grade at a public school in Muskogee, Oklahoma.¹ Nashala wore a hijab in accordance with her Muslim faith.² However, the school district suspended Nashala twice for wearing her hijab, citing its dress code policy prohibiting head coverings.³ The school argued that prohibiting her hijab was necessary to prevent "unnecessary disruption" and "to maintain a religion-free zone."⁴ Even so, the school made other discriminatory exceptions to the dress code. For instance, students could wear "Cat in the Hat" hats to celebrate Dr. Seuss's birthday, hats in support of anti-drug programs, and headgear as part of Halloween costumes or play costumes.⁵ Both students and teachers made insensitive comments to Nashala, and on one occasion another student even ripped off her hijab.⁶

The Department of Justice sued the Muskogee School District in 2004 for discriminating against Nashala because of her religious beliefs.⁷ As a result of DOJ's efforts, the school district

¹ U.S. DOJ, "Justice Department Reaches Settlement Agreement with Oklahoma School District in Muslim Student Headscarf Case," May 19, 2004, https://www.justice.gov/archive/opa/pr/2004/May/04_crt_343.htm [hereinafter Hearn Press Release].

² Intervenor's Br. in Supp. of Mot. for Summ. J. at 4, *Hearn v. Muskogee Public Sch. Dist.* 020, No. CIV 03-598-S (E.D. Okla. May 6, 2004), available at <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hearmokbrief.pdf> [hereinafter Hearn MSJ].

³ Hearn MSJ, *supra* n. 2, at 5-6.

⁴ Hearn MSJ, *supra* n. 2, at 7.

⁵ Hearn MSJ, *supra* n. 2, at 3.

⁶ Hearn MSJ, *supra* n. 2, at 7.

⁷ Hearn Press Release, *supra* n. 1.

agreed to a consent decree protecting Nashala and other students of faith.⁷ The six-year agreement required the school district to make individual exceptions to its dress code for religious head coverings.⁸ The agreement mandated that the school district provide proper training and information to teachers and students.⁹

Falun Gong

In 2004, First Liberty Institute represented practitioners of a spiritual practice called Falun Gong, which blends aspects of Taoism, Buddhism, and meditation techniques of the traditional martial art quigong.¹⁰ Practitioners of the Falun Gong face severe persecution in China, which banned the Falun Gong in 1999.¹¹ Adherents have suffered arrest, detention, imprisonment, torture, and abuse, as well as “severe societal discrimination in employment, housing, and business opportunities.”¹² Members of the Falun Gong in the United States alleged that the Chinese government took steps to prevent them from protesting at a the President of China’s visit to Houston in 2003.¹³

After First Liberty Institute submitted a complaint to the Department of Justice on behalf of several Falun Gong members, the Department of Justice Civil Rights Division opened an investigation.¹⁴ First Liberty also investigated to determine whether a hotel chain unlawfully evicted members of the Falun Gong who were staying near the President of China as a staging area for peaceful protests. While the Falun Gong did not succeed in their case, First Liberty believes it was the DOJ’s investigation that led to the hotel chain guaranteeing the Falun Gong that such actions would never take place in the future.

Islamic Association of Collin County, Texas

In 2015, the Islamic Association of Collin County (IACC) purchased property in the extra-territorial jurisdiction of Farmersville, Texas to develop a cemetery for its members to bury loved ones according to the requirements of their Muslim faith.¹⁵ Despite initial approval by the City of Farmersville’s Planning and Zoning Commission, the City Council denied IACC’s preliminary

⁷ Hearn Press Release, *supra* n. 1; Consent Order, *Hearn v. Muskogee Public Sch. Dist. 020*, No. CIV 03-598-S (E.D. Okla. May 20, 2004), available at

<https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hearnokor2.pdf> [hereinafter Hearn Consent Order].

⁸ Hearn Consent Order, *supra* n. 8, at 3.

⁹ Hearn Consent Order, *supra* n. 8, at 4.

¹⁰ See *Brief Introduction to Falun Dafa*, <https://en.falundafa.org> (last visited Sept. 22, 2020); J.Y., *What is Falun Gong?*, THE ECONOMIST, Sept. 5, 2018, <https://www.economist.com/the-economist-explains/2018/09/05/what-is-falun-gong>.

¹¹ U.S. State Dep’t, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2019: CHINA (June 10, 2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/china/>.

¹² *Id.*; U.S. State Dep’t, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: CHINA, <https://2009-2017.state.gov/j/drl/rls/irf/2003/23826.htm>.

¹³ See Pls.’ Original Compl. at 1–2, *McCoy, et al. v. Homestead Studio Suites, et al.*, No. CIV-H-03-3648 (S.D. Tex. Sept. 11, 2003), ECF No. 1.

¹⁴ Yvonne Marcotte, *Department of Justice Investigation of U.S. Hotel Touches a Bigger Issue*, THE EPOCH TIMES, Mar. 17, 2005, *republished at* <http://en.minghui.org/html/articles/2005/3/19/58596.html>.

¹⁵ Case Page: Islamic Association of Collin County, First Liberty Institute, <https://firstliberty.org/cases/iacc/#simple1>.

plat application multiple times. Farmersville provided vague and shifting reasons, some of which conflicted with the testimony of the City's own engineers, to justify the denial.¹⁷

The Department of Justice began investigating the City in 2017 and concluded that the City's actions violated the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁸ As a result of DOJ's efforts, in 2018 the City unanimously voted to allow the IACC to develop its cemetery.¹⁹ Unfortunately, the religious land use discrimination IACC faced occurs frequently in cities across the country.²⁰

Airmont, New York

For almost thirty years, DOJ fought tirelessly to protect Orthodox Jewish congregations in Airmont, New York. Over the years, Airmont used various discriminatory zoning practices to prevent local Jewish congregations from meeting together on the Sabbath.²¹ Airmont incorporated in 1991, and that same year DOJ filed suit challenging Airmont's discriminatory zoning laws.²² In 1995, the Second Circuit Court of Appeals upheld the finding that "animosity towards Orthodox Jews as a group" motivated Airmont's zoning restrictions.²³ Airmont later adopted new zoning restrictions, and DOJ sued again in 2005.²⁴ Ultimately, DOJ obtained a consent decree that protected Airmont's Orthodox Jewish residents until it expired in 2015.²⁵

First Liberty Institute represents several Orthodox Jewish congregations in the latest lawsuit challenging Airmont's zoning practices.²⁶ Each congregation fruitlessly labored for years through Airmont's onerous and expensive zoning process seeking the permits necessary to meet in accordance with their faith.²⁷ Faced with no other option and the possibility of criminal punishment, the congregations challenged Airmont's zoning practices in 2018 under the First Amendment, RLUIPA, and the Fair Housing Act.²⁸

¹⁷ *Id.*

¹⁸ U.S. DOJ, "Justice Department Settles Claims Against Farmersville, Texas, Involving Denial of Islamic Cemetery," April 16, 2019, <https://www.justice.gov/opa/pr/justice-department-settles-claims-against-farmersvilletexas-involving-denial-islamic-cemetery>.

¹⁹ *Id.*; Settlement Agreement between the United States and the City of Farmersville, Texas (Apr. 16, 2019), <https://www.justice.gov/opa/press-release/file/1154826/download>.

²⁰ See, e.g., U.S. DOJ, "Place to Worship Initiative," <https://www.justice.gov/crt/place-worship-initiative>.

²¹ See *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 419 (2d Cir. 1995); Consent Decree at 2, *United States v. Village of Airmont, et al.*, No. 05-cv-5520 (S.D.N.Y. Apr. 25, 2011), available at <https://firstliberty.org/wp-content/uploads/2018/06/2011-DOJVA-Consent-Decree.pdf> [hereinafter Airmont Consent Decree].

²² See *id.*

²³ *Leblanc-Sternberg*, 67 F.3d at 431.

²⁴ See Airmont Consent Decree, *supra* n. 21.

²⁵ See *id.*

²⁶ See Pls.' Original Compl., *Congregation of Ridnik, et al. v. Village of Airmont, et al.*, No. 7:18-cv-11533 (S.D.N.Y. Dec. 10, 2018), ECF No. 1, available at https://firstliberty.org/wp-content/uploads/2018/06/Airmont_Complaint_Redacted.pdf.

²⁷ *Id.* at 27–56.

²⁸ *Id.* at 2, 62, 77.

Last September, DOJ filed a statement of interest in the case highlighting Airmont’s “history of non-compliance with antidiscrimination laws.”²⁹ By its continued vigilance over thirty years and five presidential administrations, DOJ has proven itself a staunch defender of religious liberty for the Orthodox Jewish congregations forced underground by Airmont’s discriminatory zoning practices.

DOJ Fought to Protect Religious Liberty During COVID-19

DOJ maintained its vigilance over civil rights during the extraordinary challenges posed by the COVID-19 pandemic. While acknowledging the necessity of appropriate safety measures, DOJ recognized the risk that local and state governments would abuse their emergency authority to engage in religious discrimination.³⁰ As a result, DOJ structured its enforcement to balance reasonable, temporary emergency measures with Constitutional and statutory civil rights protections.³¹

Across the country, DOJ filed statements of interest supporting religious congregations challenging discriminatory restrictions. For example, DOJ filed a statement of interest in a lawsuit challenging Greenville, Mississippi’s restrictions targeting churches with special prohibitions on drive-in worship.³² DOJ emphasized that the City failed to apply its restrictions evenhandedly—the City allowed drive-in restaurants and other similar establishments to operate in parking lots across the city.³³ Churches, instead, faced fines for providing drive-in services, even though they complied with CDC guidelines.³⁴ While emphasizing “that during this period there is a sufficient basis for the social distancing rules that have been put in place,” DOJ committed to “ensur[ing] that religious freedom remains protected if any state or local government, in their response to COVID-19, singles out, targets, or discriminates against any house of worship for special restrictions.”³⁵

Likewise, DOJ filed a statement of interest supporting a small church in Chincoteague, Virginia when it challenged discriminatory meeting restrictions.³⁶ The small church’s specialized ministry serving the socioeconomically disabled lacked the resources to provide drive-in or virtual

²⁹ United States Statement of Interest, *Congregation of Ridnik, et al. v. Village of Airmont, et al.*, No. 7:18-cv-11533 (S.D.N.Y. Sept. 30, 2019), ECF No. 54, available at https://firstliberty.org/wp-content/uploads/2018/06/DOJ-Letter_Redacted.pdf.

³⁰ Attorney General William P. Barr, *Memorandum: Balancing Public Safety with the Preservation of Civil Rights* (April 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>.

³¹ See *id.*

³² U.S. DOJ, “Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case,” Apr. 14, 2020, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0> [hereinafter Mississippi Press Release].

³³ United States Statement of Interest at 8–9, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV (N.D. Miss. Apr. 14, 2020), ECF No. 6, available at <https://www.justice.gov/opa/press-release/file/1268651/download>.

³⁴ Mississippi Press Release, *supra* n. 32.

³⁵ Mississippi Press Release, *supra* n. 32.

³⁶ U.S. DOJ, “The Department of Justice Files Statement of Interest in Support of Church That Ministers to Underserved Communities,” May 3, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-church-ministers-underserved-communities> [hereinafter Chincoteague Press Release].

services.” The church faced criminal penalties for holding a socially distanced, sixteen-person worship service, even though Virginia allowed gatherings of more than ten workers in various secular businesses.” DOJ did not take a position on whether in-person gatherings were advisable but emphasized that state authorities must not discriminate against churches in enforcing necessary restrictions.”

Similarly, DOJ filed a statement of interest supporting a Colorado church challenging discriminatory restrictions.” Although Colorado limited churches to ten worshippers, it exempted restaurants, marijuana dispensaries, and other businesses from the public gathering restrictions.” In filing the statement of interest, DOJ explained, “Unlawful discrimination against people who exercise their right to religion violates the First Amendment, whether we are in a pandemic or not.””

Finally, DOJ filed a statement of interest supporting a congregation in Washington, because Washington’s COVID-19 restrictions treated gatherings at places such as restaurants, taverns, and protests more leniently than churches.” Unless the state can demonstrate some material difference between religious services and other similar gatherings, religious services must be treated equally.” These examples demonstrate that throughout the COVID-19 pandemic’s unusual challenges, DOJ vigilantly stepped in to prevent religious discrimination.

The need for such vigilance remains. On September 22, First Liberty and attorneys at Wilmer Cutler Pickering Hale & Dorr LLP filed suit on behalf of Capitol Hill Baptist Church.” The lawsuit challenges the District of Columbia’s discriminatory restrictions on church gatherings.” While outdoor restaurants may open with appropriate social distancing, D.C.’s four-

¹ United States Statement of Interest at 4, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK (E.D. Va. May 3, 2020), ECF No. 19, available at <https://www.justice.gov/opa/press-release/file/1273211/download> [hereinafter Chincoteague Statement of Interest].

² Chincoteague Press Release, *supra* n. 36; Chincoteague Statement of Interest, *supra* n. 37 at 6–7.

³ Chincoteague Statement of Interest at 2–3.

⁴ U.S. DOJ, “The Department of Justice Files Statement of Interest in Support of Freedom of Religion for Colorado Church,” May 29, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-freedom-religion-colorado-church> [hereinafter Colorado Press Release].

⁵ *Id.*; United States Statement of Interest at 2, *High Plains Harvest Church, et al. v. Polis, et al.*, No. 20-cv-1480-RM-MEH (D. Colo. May 29, 2020), ECF No. 28, available at <https://www.justice.gov/opa/press-release/file/1281611/download>.

⁶ Colorado Press Release, *supra* n. 4040.

⁷ U.S. DOJ, “The Department of Justice Files Statement of Interest in Support of Equal Treatment of Washington State Church Based on Recent Supreme Court Ruling,” June 11, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-equal-treatment-washington-state-church> [hereinafter Harborview Press Release]; United States Statement of Interest at 1–2, 9–10, *Harborview Fellowship v. Inslee*, No. 3:20-cv-05518, (W.D. Wash. June 11, 2020), ECF No. 20, available at <https://www.justice.gov/opa/press-release/file/1284756/download> [hereinafter Harborview Statement of Interest].

⁸ Harborview Press Release, *supra* n. 4343; Harborview Statement of Interest, *supra* n. 4343 at 9–11.

⁹ Michelle Boorstein, *Prominent Evangelical Church is the First to Sue D.C. Over COVID-19 Worship Limits*, THE WASHINGTON POST, Sept. 22, 2020, <https://www.washingtonpost.com/religion/2020/09/22/dc-mayor-bowser-sued-church-coronavirus-covid-restrictions/>.

¹⁰ Pl.’s Original Compl. at 1–3, *Capitol Hill Baptist Church v. Bowser*, No. 1:20-cv-02710 (D.D.C. Sept. 22, 2020), ECF No. 1, available at <https://content-cdn.washingtonpost.com/notes/prod/default/documents/eccc2501-3017-43a4-97fd-c8b7f579497c/notes/2cf9ae61-0a27-41f8-aa3a-d0cc4d520e0d.#page=1>.

stage pandemic plan prohibits churches from gathering in person, even outdoors, until a COVID-19 vaccine or therapeutic is developed.⁴³ This effectively means that religious services are suspended indefinitely.⁴⁴ The persistence of religious discrimination cases like this one demonstrate the critical importance of DOJ's mission to enforce federal law safeguarding religious liberty for people of all faiths.

Conclusion

The Department of Justice Civil Rights Division has a long and distinguished record of protecting religious liberty for people of all faiths. It continues to discharge its duty to enforce federal civil rights laws by stopping acts of discrimination.

⁴³ *Id.* at 2, 9, 12.

⁴⁴ *See id.*

Mr. COHEN. Thank you, sir.

Our next witness is Ms. Sharon McGowan, chief strategy officer and legal director of Lambda Legal. As legal director, she oversees Lambda Legal's efforts to resist any attempt by opponents of LGBTQ equality to thwart or roll back the community's progress towards full equality.

Previously, she served as the principal deputy chief of the appellate section of the Civil Rights Division in the Department of Justice.

Ms. McGowan is a graduate of Harvard Law School, the University of Virginia. She was a law clerk for the Honorable Norman Stahl of the U.S. Court of Appeals of the First Circuit and also for the Honorable Helen Berrigan of the U.S. District Court for the Eastern District of Louisiana.

Ms. McGowan, you are recognized for five minutes.

STATEMENT OF SHARON MCGOWAN

Ms. MCGOWAN. Good morning. Let me begin by thanking Chairman Cohen, Ranking Member Johnson, Chairman Nadler, my congressman, Vice Chairman Raskin, and the distinguished members of the committee.

My name is Sharon McGowan and I currently serve as the chief strategy officer and legal director of Lambda Legal Defense and Education Fund, the oldest and largest national legal organization dedicated to securing full equality for LGBTQ people and everyone living with HIV.

Prior to joining Lambda Legal, I was proud to serve for many years as a career attorney in the Civil Rights Division of the United States Department of Justice, starting first as an appellate line lawyer and eventually becoming the principal deputy chief of the appellate section.

My years with the Civil Rights Division are among the proudest of my career. I felt tremendous responsibility of my role whenever I stood at a lectern and introduced myself with the words, Sharon McGowan, on behalf of the United States.

Unfortunately, upon learning that President Trump intended to nominate Jeff Sessions to lead the Justice Department, I made the difficult decision that in order to continue advancing civil rights, I would need to leave what had been for me a dream job. Perhaps even more unfortunately, the past three-plus years have confirmed that my fears were not overblown.

As an American, I have found it exasperating to see how the Civil Rights Division's scarce resources have been deployed to undermine rather than advance civil rights. But as someone who once proudly served in the division, I have found it heartbreaking.

It has been so painful to witness the damage that has been done to the reputation and the stature of the Civil Rights Division, which I still hold so dear to my heart.

I say this knowing that we are all still grieving over the recent loss of two civil rights champions, Justice Ruth Bader Ginsburg and the Honorable John Lewis.

And yet, I find comfort in the knowledge that we are honoring their legacy and their commitment to equal justice under law

through the work that we are doing here today as well as through the incredible work of some of my fellow witnesses.

I always felt incredibly proud whenever I heard the Civil Rights Division referred to as the conscience of the federal government and I had the privilege of witnessing firsthand the many ways in which this was true.

First and foremost, and perhaps most obviously to the public, the Civil Rights Division enforces the landmark federal statutes enacted to promote equal opportunity in critical spheres of public life, including employment, housing, credit, policing, education, voting, and access to public spaces.

The impact and influence of the Civil Rights Division, however, extends beyond its affirmative litigation docket. During my tenure, the Civil Rights Division would have a seat at the table whenever significant questions were under consideration within DOJ.

We would play an important role in identifying civil rights implications of actions that the federal government might take or not take, whether in the context of litigation, regulatory work, or broader policy discussions, and we would back up our advice with legal analysis proving that our recommended position was not only defensible but, in fact, the best reading of the law.

Perhaps the most recent public example of what I am describing occurred this past June when the U.S. Supreme Court, in a 6–3 decision written by Justice Gorsuch and joined by Chief Justice Roberts, ruled that the federal prohibition on sex discrimination contained within Title 7 of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and gender identity.

This view of the law was one that the Civil Rights Division had championed within the department for many years and which, with respect to gender identity, at least, had become the litigation position of the United States.

That is, until Attorney General Sessions summarily reversed it during the first years of the Trump administration.

These reversals in position by the Justice Department over the past three-plus years have damaged the credibility of the institution as a whole but have been particularly devastating with respect to the Civil Rights Division, and we must never forget that these policy changes affect real people's lives, denying them physical safety, legal security, and a chance to succeed, a chance that we all deserve.

The ways in which the legal and moral authority of the Civil Rights Division has been commandeered to advance positions that are antithetical to civil rights is as mortifying as it is infuriating.

In the realm of employment, I am referring to the fact that Civil Rights Division attorneys participated in the unsuccessful effort to carve LGBT people out of the workplace protections of Title 7.

In education, I am referring to the Civil Rights Division's withdrawal of guidance designed to protect the health, safety, and educational opportunity of transgender students, to their joining forces with organizations committed to denigrating and ostracizing transgender people from public life and filing briefs on behalf of the United States using language negating the identity of transgender girls.

With respect to public accommodations, I am referring to Civil Rights Division lawyers filing briefs in the Supreme Court and in lower courts seeking to gut nondiscrimination laws that prevent businesses from turning people away simply because of their sexual orientation, gender identity, or the fact that they are in a same-sex marriage.

These are just a few of the examples of how the Civil Rights Division has turned its mission on its head and has abandoned its noble legacy of defending the civil rights of those who have been historically shut out, turned away, or treated as less than others in our community and I look forward to the day when the Civil Rights Division can once again be viewed as a credible partner in the important work of advancing civil rights in our country.

Thank you.

[The statement of Ms. McGowan follows:]



**Testimony of Sharon M. McGowan
Chief Strategy Officer and Legal Director, Lambda Legal Defense & Education Fund, Inc.
Former Principal Deputy Chief, Appellate Section,
U.S. Department of Justice Civil Rights Division**

**Testimony before the United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties**

**Hearing on
“Oversight of the Civil Rights Division of the Department of Justice”**

September 24, 2020

Good morning, and let me begin by thanking Chairman Cohen, Ranking Member Johnson, Chairman Nadler, and the other distinguished members of the Committee for the invitation to testify today as part of this incredibly important oversight hearing regarding the Civil Rights Division of the U.S. Department of Justice.

My name is Sharon McGowan, and I currently serve as the Chief Strategy Officer and Legal Director of Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”), the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education and public policy work. Immediately prior to joining Lambda Legal, I was proud to serve as the Principal Deputy Chief of the Appellate Section of the Civil Rights Division of the U.S. Department of Justice. I first joined the Civil Rights Division as a line lawyer in the Appellate Section in February 2010. I served in that role for approximately three years. After a stint at the U.S. Office of Personnel Management, I returned to the Justice Department in September 2014, when I was selected for an open Deputy Chief position in the Appellate Section. When the Section’s Principal Deputy Chief retired, I successfully applied for the position, which I assumed in June 2016.

I appear before you today bringing not only my experience as a former career lawyer in the Civil Rights Division, but also my perspective as the Chief Strategy Officer and Legal Director of a national legal organization that serves a community of people who have been specifically targeted by the current administration. Despite important legal and social progress, LGBTQ people still face pervasive discrimination nationwide in employment, education, housing, credit,

1

public accommodations, and health care.¹ LGBTQ people suffer high rates of violence, including not only hate crimes by private perpetrators, but also discriminatory and abusive treatment by law enforcement and within our criminal justice system more broadly.² I was proud to serve in the Civil Rights Division at a time when it was committed to using its legal and moral authority to address these harmful and destructive forms of discrimination. In particular, I served as the Co-Chair of the Civil Rights Division’s LGBTI Working Group, a collaborative space where lawyers representing the various sections of the Civil Rights Division could identify opportunities for the Department to secure and advance the civil rights of lesbian, gay, bisexual, transgender and intersex individuals. Shortly after the November 2016 election, I made the difficult decision that I would need to leave the Civil Rights Division in order to continue advocating for civil rights in what I felt would be a meaningful way. But many of my former colleagues have chosen to stay. My decision to testify today derives in part from my deep respect for them, and the pain that I have felt as I have seen the Civil Rights Division either sidelined or, in some cases, made to participate in this administration’s relentless campaign to roll back civil rights, not only on LGBTQ issues, but also with respect to police reform, voting rights, and educational opportunity.

I. The Unique Role of the Civil Rights Division

As an attorney in the Civil Rights Division, I took great pride whenever I heard us referred to as “the conscience of the federal government.”³ During my time in the Appellate Section, I witnessed first-hand the many ways in which this was true. First and foremost, and perhaps most obviously to the public, the Civil Rights Division enforces the landmark civil rights statutes enacted to promote equal opportunity in critical spheres of public life, including employment, housing, credit, policing, education, voting and access to public spaces, and to root out discrimination on the basis of race, ethnicity, religion, sex (including sexual orientation and gender identity),⁴ family status, or disability.

The impact and influence of the Civil Rights Division, however, extends far beyond its affirmative litigation docket. With respect to decision-making within the Justice Department itself, the Civil Rights Division – at least during my tenure – would have a seat at the table when significant legal questions were under consideration. For example, in situations when the federal government had been sued for alleged violations of civil rights, or the constitutionality of a federal law or program had been challenged, Civil Rights Division attorneys provided an important counterbalance to the perspective of our colleagues in the Civil Division, whose role

¹ See, e.g., Lambda Legal, *Written Testimony in Support of the Equality Act, H.R. 5*, before the House Committee on Education and Labor (Apr. 22, 2019), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20190422_lambda-legal-testimony-in-support-of-equality-act-for-house-committee-education-labor.pdf.

² See, e.g., Lambda Legal, *Written Testimony for the President’s Commission on Law Enforcement and the Administration of Justice* (June 8, 2020), https://www.lambdalegal.org/in-court/legal-docs/20200608_written-testimony-presidents-commission-law-enforcement-administration-justice; Lambda Legal, *Protected and Served?* <https://www.lambdalegal.org/protected-and-served> (last visited at Sept. 21, 2020).

³ U.S. Dep’t of Justice, *Civil Rights Division* (September 2010), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/division_booklet.pdf.

⁴ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

as the defender of the federal government as employer or administrator of a particular federal policy or program might lead them to discount the negative impact on civil rights that could result from their litigation positions in a particular case. In those moments, the Civil Rights Division attorneys would remind our colleagues that we were the Department of *Justice*, and not just another civil litigation defense firm. We did not rest on these platitudes, however; rather, we would prepare thorough and often exhaustive legal analysis to demonstrate that a position that advanced civil rights was not only a defensible position for the Department to take, but was the best reading of the law at issue. Perhaps the most recent public example of what I am describing occurred this past June, when the U.S. Supreme Court, in a 6-3 decision written by Justice Gorsuch and joined by Chief Justice Roberts, ruled that the federal prohibition on sex discrimination contained in Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and gender identity,⁵ a position that the Civil Rights Division of which I was a part had championed within the Department for many years and which had become the litigation position of the United States until Attorney General Sessions summarily reversed it during the first year of the Trump Administration.

The Civil Rights Division has historically also played an important role in guiding what positions the Department of Justice will take when participating in a case as an amicus, either at its own instigation or in response to a court's invitation, including the Supreme Court. Attorneys from the Civil Rights Division's Appellate Section, in consultation with the relevant litigating section in the Division, advise the Solicitor General, and his or her deputies and assistants, on which cases to pursue, what positions to advance, and how to ensure that the federal government's interest in vindicating civil rights is given adequate consideration during these deliberations.

Less obvious to the public is the role that the Civil Rights Division plays, or at least used to play during my tenure, in advising the rest of the federal government on the civil rights implications of regulatory proposals emanating from other agencies, or legislative proposals coming from, or being sent to, Congress. While the Department of Justice's Office of Legal Policy and Office of Legislative Affairs play a significant role in coordinating the Department's consideration of these proposals, the Civil Rights Division serves as an important watchdog, identifying key issues or collateral consequences for civil rights that might have been overlooked, underappreciated, or undervalued by the entity proposing the change. Civil Rights Division attorneys often have strong relationships with career attorneys at other agencies charged with enforcing our nation's federal civil rights statutes, including attorneys working in the Office of Civil Rights or the General Counsel's offices of executive agencies like the Departments of Education, Housing and Urban Development, or Health and Human Services, as well as independent agencies like the Equal Employment Opportunity Commission ("EEOC"). Furthermore, my experience is that the expertise of the Civil Rights Division has been valued throughout the federal government and therefore sought out more broadly. For example, I was one of the lawyers from the Civil Rights Division invited to consult with the Department of Defense as they undertook the study that led to the implementation of the legislative repeal of Don't Ask, Don't Tell, the law that prohibited open service by gay, lesbian and bisexual servicemembers.⁶

⁵ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

⁶ 10 U.S.C. 654, *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010).

II. Role of Current Civil Rights Division in Supporting and Enabling Trump Administration's Anti-LGBTQ Agenda

In light of the significant role that the Civil Rights Division has historically played in working to ensure that federal authority is used to advance civil rights, the action and inaction of the Division over the past three years has been disheartening to witness. The swift nomination of Jeff Sessions to serve as President Trump's (first) Attorney General sent a clear signal as to what was to come with respect to the Justice Department's approach to civil rights. To be sure, many of the troubling events outlined below during the first months of the Trump Administration must be attributed to Attorney General Sessions' longstanding hostility for civil rights. Nevertheless, these past three-plus years will undoubtedly go down as one of the darkest periods in the 63-year history of the Civil Rights Division. While the damage has been more obvious in some areas than others, it is no overstatement to say that the significant reversals of position that have occurred during this time have significantly tarnished the credibility of the Department of Justice generally, and the Civil Rights Division specifically. My testimony will focus on the ways in which the LGBTQ community has been harmed by these actions, but the diminution of the role of the Civil Rights Division will, I fear, have ramifications for many communities for years to come.

I. Employment

One of the many areas of life in which the Civil Rights Division strives to eliminate discrimination is employment. Among its other areas of jurisdiction, the Employment Litigation Section of the Division enforces the nondiscrimination protections of Title VII of the Civil Rights Act of 1964, including its protections against sex discrimination, against state and local government employers.⁷

In the decades following the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,⁸ courts increasingly recognized that Title VII's prohibition on sex discrimination encompassed discrimination on the basis of an employee's failure to conform to sex stereotypes. Starting in the mid-2000s with a series of Sixth Circuit public sector employment cases,⁹ courts increasingly affirmed the right of transgender employees to pursue claims of sex discrimination under Title VII when they suffered adverse employment action due to their gender transition or perceived failure to conform to stereotypes.¹⁰ By 2012, the case law supporting this position had reached

⁷ U.S. Dep't of Justice, *Employment Litigation Section*, <https://www.justice.gov/crt/employment-litigation-section> (last visited Sept. 22, 2020).

⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁹ *Smith v. City of Salem Ohio*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

¹⁰ See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Mitchell v. Axcan Scandipharm*, 2006 WL 456173, 2006 U.S. Dist. LEXIS 6521 (W.D.Pa. Feb. 21, 2006); *Tronetti v. Healthnet Lakeshore Hosp.*, 2003 WL 22757935, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003); cf. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

the point where the full Commission of the EEOC, in connection with its adjudication of a federal sector employment case, reversed the agency's prior stance, and held that Title VII, correctly interpreted, authorized claims where the alleged sex discrimination stemmed from an individual's gender transition or transgender status.¹¹

Two years later, the Department of Justice joined suit. Specifically, on December 15, 2014, Attorney General Eric Holder announced that the official litigating position of the Department of Justice from that point forward would recognize that protections against discrimination in employment on the basis of sex encompassed discrimination against an individual due to their gender identity or transgender status.¹² In practical terms, this decision meant not only that the Civil Division and other components of the Department of Justice would no longer resist this argument should it arise in the context of litigation against the federal government, but it also meant that the Civil Rights Division was now empowered to advance this position in the context of its affirmative litigation. On October 21, 2015, as part of the 63rd Annual Attorney General's Awards Ceremony, a team of Civil Rights Division lawyers, of which I was proud to be a member, received the John Marshall Award for Providing Legal Advice "for guiding the department to its new position regarding Title VII and gender identity."¹³

In one of the many manifestations of his hostility to the civil rights of LGBTQ people, Attorney General Jeff Sessions reversed this position on October 4, 2017.¹⁴ This move came on the heels of the Department of Justice filing a brief in the Second Circuit Court of Appeals for the specific purpose of refuting the EEOC's position that Title VII's prohibition on sex discrimination in employment also precluded discrimination the basis of sexual orientation. Among the brief's signatories was the then-Acting Assistant Attorney General for the Civil Rights Division, Tom Wheeler.¹⁵

Fortunately for civil rights, the Supreme Court repudiated the position of the Justice Department with respect to both sexual orientation and gender identity in its June 2020 decision in *Bostock v. Clayton County*. Yet it would be inappropriate to assume that no harm means no foul. The Civil Rights Division's participation in the Department of Justice's efforts to deny LGBTQ people the protections of our federal employment discrimination statute, and by extension, the statutes that look to Title VII for guidance, will be one of the many stains on the reputation of the Division for years to come.

¹¹ *Macy v. Holder*, EEOC DOC 0120120821 (E.E.O.C.), 2012 WL 1435995.

¹² Dep't of Justice, Attorney Gen. Mem., *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>.

¹³ Press Release, Attorney Gen. Loretta E. Lynch Hosts the 63rd Annual Attorney General Awards Honoring Department Employees and Others For Their Service (Oct. 21, 2015), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-hosts-63rd-annual-attorney-general-awards-honoring>.

¹⁴ Dep't of Justice, Attorney Gen. Mem., *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (October 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁵ Brief for the United States as *Amicus Curiae*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), 2017 WL 3277292.

One aspect of this story that must not be forgotten is the Department of Justice's actions with respect to Aimee Stephens, the transgender woman whose case was one of the three decided by the Supreme Court under the *Bostock* caption. The EEOC, the agency with enforcement jurisdiction over employment discrimination cases in the private sector, initially took on Aimee Stephens' case. After investigating Aimee's allegations that her funeral home employer fired her after she came out to him as a woman, the EEOC litigated on her behalf, with great success, for a number of years. After Attorney General Sessions' October 2017 announcement reversing the Department of Justice's litigation position regarding Title VII and its coverage of claims involving anti-transgender discrimination, Aimee and her lawyers with the ACLU intervened out of concern that the federal government, which had been litigating on her behalf, might no longer be a zealous advocate for her.

Although the EEOC stood firm in defending Aimee's rights in the Sixth Circuit Court of Appeals, Aimee's fears came to fruition when the funeral home sought review by the Supreme Court. In a brief signed by the then-Acting Assistant Attorney General for Civil Rights, John Gore, and another Civil Rights Division attorney, the Department of Justice stated in no uncertain terms that it thought the Sixth Circuit was wrong in concluding that Title VII's prohibition against sex discrimination protected Aimee from discrimination due to her gender transition and her failure to conform to her employer's gender stereotypes.¹⁶ And when the case was briefed on the merits, Assistant Attorney General Eric Dreiband was included as one of the signatories, again signaling the endorsement of the Civil Rights Division.

I take heart from the fact that the Supreme Court repudiated the position of the Justice Department, and know that there were many good people in the Civil Rights Division who were celebrating quietly on June 15, 2020. Yet it is still painful, even today, to see the names of Civil Rights Division lawyers on briefs seeking to cut off civil rights protections for LGBTQ people. It symbolizes a betrayal not only of Aimee Stephens, whose rights the federal government had previously gone to court to vindicate, but of all of us who had proudly served in the Civil Rights Division out of a desire to expand, and certainly not to restrict, the promise of equal opportunity. It remains to be seen whether the Division will actually enforce the *Bostock* decision in a meaningful way in the public employment settings where it has affirmative jurisdiction. I am troubled by the fact that the website of the Employment Litigation Section still includes no mention of the fact that its mandate to root out sex discrimination now unquestionably includes sexual orientation and gender identity. Only through meaningful oversight by this Committee can the public have any assurance that the Division will (be allowed to) actually translate the ruling of *Bostock* into meaningful action.

2. Education

Unfortunately, employment is not the only area where the Civil Rights Division has been commandeered in support of this administration's campaign to roll back civil rights for LGBTQ people. Starting almost immediately after President Trump's inauguration, the Department of Justice took aim at transgender students. First, the Department abandoned its defense of an

¹⁶ See Brief for the Federal Respondent in Opposition, *R.G. & G.R. Harris Funeral Homes v. EEOC*, affirmed by, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020), 2018 WL 5293597.

important guidance document that had been jointly published by the Civil Rights Division and the Department of Education's Office of Civil Rights ("ED OCR") to ensure transgender students' equal educational opportunity, particularly with respect to their right to use sex-segregated restrooms consistent with their gender identity.¹⁷ Specifically, on February 10, 2017, the day after Jeff Sessions' swearing in as Attorney General, the Justice Department withdrew its motion to stay an injunction entered by a federal district court in Texas preventing the federal government from enforcing its position with respect to the rights of transgender students anywhere in the country, rather than limiting relief to the jurisdictions that were parties to the lawsuit.¹⁸ Notwithstanding the Department of Justice's general practice of resisting nationwide injunctions issued by a district court, in this case, as one reporter explained, "[t]he Trump administration has found a nationwide injunction it can live with."¹⁹ This dramatic departure from typical Justice Department protocol in cases challenging government action was the first clear signal that any norms that stood in the way of this administration's anti-LGBTQ agenda would be tossed aside.

Just days later, on February 22, 2017, the heads of the Civil Rights Division and ED OCR, Tom Wheeler and Sandra Battle respectively, officially rescinded the 2016 transgender guidance document, along with another related position statement that ED OCR had issued in 2015.²⁰ And then, notwithstanding the fact that the Civil Rights Division had previously been authorized to file a brief in support of transgender high school student Gavin Grimm in the U.S. Court of Appeals for the Fourth Circuit in 2016, the Solicitor General urged the Supreme Court to remand the case. This left in place a stay of the favorable lower court ruling, the effect of which being that Gavin would be denied access to gender identity-appropriate facilities during the pendency of his litigation.

Four years later, Gavin Grimm's case is still working its way through the courts. Fortunately, his right to equal educational opportunity, including access to appropriate restrooms, was vindicated yet again by the U.S. Court of Appeals for the Fourth Circuit in an August 2020 decision applying the Supreme Court's Title VII analysis from *Bostock* to the context of Title IX, the federal statute proscribing discrimination because of sex in education.²¹

¹⁷ U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (marked "Rescinded").

¹⁸ Defendants-Appellants' Notice of Withdrawal of Motion for Partial Stay Pending Appeal and Joint Motion to Cancel Oral Argument, *Texas v. U.S.*, No. 16-11534 (5th Cir., filed Feb. 10, 2017). Specifically, Texas and twelve other states sued the U.S. Departments of Education, Justice and Labor, and the EEOC to enjoin prevent them from enforcing various federal government policies seeking to protect transgender people from discrimination.

¹⁹ Josh Gerstein, *Feds Drop Request to Rein in Ban on Obama Transgender Policy*, Politico (Feb. 11, 2017, 11:32 AM) <https://www.politico.com/blogs/under-the-radar/2017/02/feds-obama-transgender-policy-234928>.

²⁰ U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (Feb. 22, 2017) (withdrawing statements of policy and guidance), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

²¹ See *Grimm v. Gloucester Cnty. Sch. Bd.*, --- F.3d. ---, 2020 WL 5034430 (4th Cir. 2020). Notably the Eleventh Circuit Court of Appeal reached the same conclusion in a similar case involving restroom access by a transgender boy, Andrew Adams, also relying on the Supreme Court's analysis in *Bostock*. See *Adams v. Sch. Bd. of St. John's Cnty, Fl.*, 968 F.3d 1286 (11th Cir. 2020).

In the midst of all this, the Civil Rights Division has nevertheless continued to be coopted in the service of this administration's insatiable desire to further marginalize and humiliate transgender young people. In perhaps its most recent shameful example, the Civil Rights Division filed a Statement of Interest arguing that the trans-inclusive policies of the Connecticut Interscholastic Athletic Conference (CIAC) violates federal law, and demanding that Connecticut apply a scientifically and legally unmoored "biological sex" standard to ensure that transgender athletes are precluded from participating in sex-segregated athletic programs consistent with their gender identity. In addition to advancing profoundly damaging and incorrect legal analysis, the brief was perhaps most shocking with respect to its willful and persistent reference to transgender girls as "biological boys who publicly identify with the female gender."²²

While one has come to expect such deeply disrespectful and dehumanizing language from Alliance Defending Freedom, the anti-LGBT organization pushing this case, such language in a filing from the federal government, and from the Civil Rights Division in particular, is shameful. Yet such language appeared again in a Statement of Interest filed by the Civil Rights Division in defense of an Idaho statute that would categorically bar transgender female athletes from participating in women's sports.²³ Fortunately, the federal district court in Idaho entered an order on August 17, 2020, preliminarily enjoining enforcement of this law due to grave concerns about the ways in which it would violate not only the rights of transgender female athletes, but also the rights of any female student who might be required to "verify" her sex under the terms of the statute.²⁴

While the Civil Rights Division has turned its mission to promote equal educational opportunity on its head with respect to LGBTQ students, it is important to note that other groups are suffering as well as a result of the Division's distorted approach to civil rights. Perhaps the most noteworthy examples have been the deployment of Civil Rights Division attorneys to support efforts to strike down admissions programs at Harvard, Yale and other colleges and universities that take race into consideration as one of many factors in their effort to promote racial diversity.²⁵ Reversing this damage will not be easy, but oversight by this Committee brings this harm into the light, which is an essential first step.

3. Public Accommodations

Another area where the Civil Rights Division has become complicit in this administration's assault on the LGBTQ community is in the arena of public accommodations. Remarkably, the Justice Department has inserted itself into multiple cases involving the enforcement of state and

²² United States' Statement of Interest, *Soule v. Connecticut Ass'n of Schools, Inc.*, No.3:20-cv-201 (D. Conn. filed March 24, 2020) ECF No. 75.

²³ United States' Statement of Interest, *Hecox v. Little*, No. 1:20-cv-184 (D. Idaho, filed June 19, 2020) ECF No. 53.

²⁴ Mem. Decision and Order, *Hecox v. Little*, No. 1:20-cv-184 (D. Idaho, filed Aug. 17, 2020) ECF No. 63.

²⁵ See, e.g., United States' Statement of Interest, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corp.)*, 397 F.Supp.3d 126 (D. Mass. 2019), ; Civil Rights Division, *Letter to Counsel for Yale University Re: Notice of Violation of Title VI of the Civil Rights Act of 1964* (August 13, 2020), <https://www.justice.gov/opa/press-release/file/1304591/download>.

local nondiscrimination laws prohibiting anti-LGBTQ discrimination to advance arguments intended to constitutionally immunize from liability the denial of service to LGBTQ people based on an individual's religious or moral objections to, most notably, same-sex marriages.

The most prominent example of the Civil Rights Division's endorsement of these efforts was its co-signing of the brief filed on behalf of the United States in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in September 2017.²⁶ The brief was noteworthy for the ways in which it attempted to contort First Amendment jurisprudence to create an exemption for businesses engaged in anything "sufficiently artistic," which in their view could include a cake designed with custom colors or frosting, and with any proximity to a same-sex marriage.²⁷ But even more disturbing, particularly in a brief co-signed by the Civil Rights Division, were the arguments that "it cannot be said" that a state has a "fundamental, overriding interest" in eliminating sexual orientation discrimination, at least when it comes to anything related to marriage.²⁸ In fact, in its brief, the Department of Justice attempted to argue that a state's prior legal prohibition on marriage by same-sex couples somehow rendered its interest in rooting out sexual orientation discrimination less – rather than more -- compelling.²⁹

Fortunately, the Supreme Court did not endorse this troubling argument. Even though the Court ultimately ruled in favor of the bakery, in doing so, it did not disturb well-settled law. While acknowledging that "religious and philosophical objection are protected," the Court specifically reaffirmed that "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."³⁰

Nevertheless, the Civil Rights Division has continued to pursue this dangerous line of argument in other cases involving business owners who hold themselves out as open to the public, but then claim an artistic or religious entitlement to deny services to same-sex couples. Most recently, the Division filed a Statement of Interest supporting a preemptive challenge to a Louisville civil rights ordinance brought by Chelsey Nelson,³¹ a wedding photographer who claims that the public accommodations ordinance requiring equal service irrespective of sexual orientation violates her First Amendment right to not photograph "anything that conflicts with [her] religious conviction that marriage is a covenantal relationship before God between one man and

²⁶ Brief of the United States as *Amicus Curiae*, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), 2017 WL 4004530.

²⁷ *Id.* at *24.

²⁸ *Id.* at *32.

²⁹ *Id.* at *32-33.

³⁰ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

³¹ United States' Statement of Interest, *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Gov't*, No. 3:10-cv-851 (D. Ky., filed Feb. 27, 2020) ECF No. 38.

one woman.”³² Again, one may not be surprised to hear such arguments advanced by an organization like Alliance Defending Freedom, which proudly seeks out individuals to represent who are willing to assist in ADF’s efforts to gut laws that protect LGBTQ people from discrimination in the marketplace and public square. But it is another thing entirely for the Justice Department to deploy Civil Rights Division attorneys to undermine a local nondiscrimination ordinance. It is not simply disturbing; rather, it is an inappropriate and profoundly misguided allocation of resources, warranting oversight by this Committee and calls for accountability.

III. Conclusion

The dramatic shifts in the priorities and positions of the Civil Rights Division over these past nearly four years have done significant damage not only in the areas of employment, education, and public accommodations, but in other areas as well. Moreover, it is not simply the LGBTQ community that has suffered from these reversals. As the Committee’s other witnesses will likely explain in greater detail, the action and inaction of the Justice Department, including the Civil Rights Division specifically, has diminished voting rights,³³ hamstrung efforts to address police misconduct in meaningful ways,³⁴ and made communities with, or perceived as having, high percentages of new arrivals to this country even more vulnerable.³⁵

The Civil Rights Division has been referred to as the “crown jewel” of the Justice Department.³⁶ The damage done to its luster during this administration should pain anyone who cares about equal opportunity and justice under law. We know that other divisions and components of the Justice Department have been diminished in stature due to political interference and demands for subservience to an agenda that put the interests of favored individuals ahead of the interests of the country. But just as we think about the need to repair, rebuild, and restore agencies like the FBI, our national security divisions, and other important government agencies whose duty to

³² Dylan Lovan, *U.S. Justice Department Backs Louisville Photographer Challenging Fairness Ordinance*, Courier Journal (Feb. 28, 2020), <https://www.courier-journal.com/story/news/local/2020/02/28/u-s-justice-department-backs-kentucky-photographer-gay-rights-case/4901976002/>.

³³ *Compare* Brief of the United States as *Amicus Curiae*, *Ohio A. Phillip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016) 2016 WL 3923034 *with* Brief of the United States as *Amicus Curiae* Supporting Petition, *Husted v. A. Phillip Randolph Institute, et al.*, 138 S. Ct. 1833 (2018) 2017 WL 3485554.

³⁴ Dep’t of Justice, Attorney Gen. Mem., *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (November 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>.

³⁵ For example, the section of the Civil Rights Division formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices is now called the Immigrant and Employee Rights Section, and describes its U.S. Workers Initiative, started in 2017, as “target[ing], investigat[ing], and (where appropriate) bring[ing] enforcement actions against employers that intentionally discriminate against U.S. workers due to a preference for temporary visa workers.” <https://www.justice.gov/crt/immigrant-and-employee-rights-section> (last visited Sept. 21, 2020). While targeted oversight could certainly bring more concrete information to light on this question, one can surmise that the willingness of individuals to cooperate with the Justice Department in rooting out abusive immigration-related employment practices has plummeted in the current environment.

³⁶ *See, e.g.*, Sally Q. Yates, Deputy Attorney Gen., Remarks at the Civil Rights Division Awards Ceremony (Dec. 7, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-civil-rights-division-awards>.

uphold their constitutional oath against threats foreign and domestic has been tested, so too must we turn our attention to the civil rights components of the federal government, starting first and foremost with the Civil Rights Division of the Department of Justice. For in order for this country to achieve its fullest potential, we need to revive and fortify the Civil Rights Division so that it can once again attract and retain bold and brilliant attorneys whose commitment to civil rights surpasses partisan loyalties.

When President Trump named Jeff Sessions as his nominee for Attorney General shortly after his election, I made the personal call that, in order to keep the ball moving down the field toward the goalposts of civil rights, I would need to change team uniforms. It was an incredibly difficult decision, and one that brought me no joy and a few tears. In the days leading up to my departure, I spoke with many of my colleagues whom I knew were planning to stay. I encouraged them to keep fighting, and reminded them to keep their focus on all of the people who would be counting on the Civil Rights Division to still have their backs.

The day I submitted my resignation, January 30, 2017, started off as a sad day for me personally, but within hours, it was clear that this day would go down as one of the darkest days in the history of the Justice Department. For as it turns out, just a few hours after I sent the email to my Section Chief resigning my position, Sally Yates was fired as Acting Attorney General after announcing that the Department of Justice would not defend President Trump's Muslim ban. Until that moment, I had doubts about whether I was acting too hastily, and questioned whether I should try to find a way to continue advancing civil rights from within the Justice Department. From that moment on, I never doubted myself again about whether I had made the right decision.

The Department of Justice that I knew, and for which I have mourned on so many occasions since that day, was the Department of Justice that Sally Yates believed in and sought to defend, and it is a place where many dedicated people continue to work today. Many of them have been tested in unimaginable ways and put in situations that no federal civil servant committed to serving our country and upholding our Constitution should have to endure.

Therefore, it is not only on my own behalf, but on theirs as well, that I appear before you today. I was incredibly proud to serve in the Civil Rights Division of the U.S. Department of Justice, and I am deeply invested in the Division being a place where I could once again encourage people committed to civil rights to consider working. In my view, oversight is not only welcome, but is in fact absolutely necessary to bringing us closer to that day.

I thank you for this opportunity to share my experience and perspective, which I hope will be useful to the Committee.

Mr. COHEN. Thank you, Ms. McGowan, and I know Greg Nevins looks forward to that day as well.

Sam Mabrouk is the owner of 89 & Pine, a small business in Columbus, Ohio. First opening his doors in 2011, he sells upscale, modern, and original men's and women's apparel.

And before you are recognized, I just want to say that many if not all of us, but I know the chair of this subcommittee is against looting and unlawful behavior, and the previous statement made that nobody responded to Mr. Barr, it was not our appropriate time to respond.

But that is a fact, and if you were injured I regret it and it shouldn't have happened.

Mr. Mabrouk, you are recognized.

STATEMENT OF SAM MABROUK

Mr. MABROUK. Good morning, ladies and gentlemen. My name is Sammy Mabrouk and I am here today to testify as the owner of 89 & Pine, Columbus, Ohio.

My store started in January—my story started in January of 2010 when I first moved to the United States as a legal immigrant. That is the same year I started laying the groundwork for my small business, which has been growing ever since.

By the beginning of 2020, I owned two brick and mortar retail stores and had a team of six people working under me, most of whom are minorities. My stores carry three brands that I am proud to say that I designed them here in the United States of America.

When COVID-19 hit, we were forced to close our stores, which resulted in the loss of all of our business. In May 2020, we were, thankfully, able to reopen for business.

I was very excited to reopen for business and was ready to work even harder to make up for what was lost during the closure.

Then May 29th and 30th happened. That is when the protesting started in downtown Columbus, exactly where my stores are located. On the night of May 30th, the protests turned into riots, violence, and a wave of destruction that hit the city that I had been calling home for over a decade.

I never thought that a protest in support of minority rights would flip and do harm to a local minority-owned business. Unfortunately, that is exactly what happened to me as well as many other businesses in the downtown Columbus area.

My store was completely looted and I lost 10 years of hard work and savings in two hours. Yeah, it was two hours of looting that made me lose 10 years of hard work and savings.

If that isn't enough, I was also threatened to be shot twice that same night. I have been living in the American dreams. I have been living in the American dream, along with all the blood, sweat, and tears that it requires.

Then one day I woke up to a nightmare of loss and destruction. But I am not a quitter and I am ready to work harder than before to get my small businesses back to where they were before that horrible night of May 30th, 2020.

The last thing that I wanted to say is I actually had to spend the night here at this store that I am talking to you from to keep an eye on the situation in downtown Columbus again.

Due to the current unrest in Louisville, Kentucky I spent the night monitoring local media and social media to make sure that—to make sure there wouldn't be a repeat of that fateful day this past summer.

It is sad that I had to do that instead of spending time with my two little kids after a long day of work. But I am willing to do it because it is not just material. It is my family's livelihood.

Thank you for giving me the time to speak out my heart and my mind.

[The statement of Mr. Mabrouk follows:]

My name is Sami Mabrouk and I'm here today to testify as the owner of 89 and Pine in Columbus, Ohio. My story started in January of 2010, when I first moved to the United States as a legal immigrant. That is the same year I started laying the groundwork for my small business, which has been growing ever since. By the beginning of 2020 I owned 2 brick & mortar retail stores, and had a team of 6 people working under me, most of whom are minorities. My stores carry 3 brands that I'm proud to say are designed here in America. When COVID-19 hit, we were forced to close our stores, which resulted in the loss of all of our business. In May 2020 we were, thankfully, able to reopen for business. I was very excited to get back to business, and was ready to work even harder to make up for what was lost during the closure.

Then May 29th and 30th happened. That is when the protesting started in downtown Columbus, exactly where my stores are located. On the night of May 29th the protests turned into riots, violence and a wave of destruction that hit the city that I have been calling home for over a decade. I thought being a minority myself would protect me. I never thought that a protest in support of minority rights would flip, and do harm to a local, minority owned business. Unfortunately, that is exactly what happened to me, as well as many other small shops in the downtown Columbus area. My store was completely looted, and I lost 10 years of savings in 2 hours of looting. You heard that right, everything lost in just two hours. If that isn't enough, I was also threatened to be shot twice that same night.

I have been living the American dream; along with all the blood, sweat and tears that it requires. Then one day I woke up to a nightmare of loss and destruction. But I'm not a quitter; and I'm ready to work harder than before to get my small businesses back to where they were before that horrible night of May 29, 2020.

The last thing I will say is this; while writing this statement I also had to keep an eye on the situation in downtown Columbus again. Due to the current unrest in Louisville, KY; I was monitoring local media, social media and my store's security cameras to make sure there wouldn't be a repeat of that fateful day this past summer. It's sad that I had to do that instead of spending time with my kids after a long day of work; but I'm willing to do it because it is not just a job, it is my family's livelihood.

Mr. COHEN. Thank you for your testimony, and contrary to canards that have been passed, we do regret your damages and think they were wrong, and it is unfortunate.

Our final witness is Jonathan Smith. Mr. Smith is—excuse me? Oh, Mr.—sorry. We will go to Mr. Waldman, Michael Waldman.

Michael Waldman is president of the Brennan Center for Justice at the NYU School of Law, a constitutional lawyer, expert in the presidency and American democracy. He has led the Brennan Center since 2005.

He previously was director of speech writing for President Clinton from 1995 to '99 and special assistant to the president for policy coordination from '93 to '95.

Among other works, he is the author of the “Fight to Vote,” a history of the struggle to secure voting rights for all Americans. He is a graduate of NYU and Columbia.

Mr. Waldman, you are recognized for five minutes.

STATEMENT OF MICHAEL WALDMAN

Mr. WALDMAN. Thank you, Mr. Chairman, Ranking Member, members of the subcommittee.

As we have heard, the Civil Rights Division has a storied past and it should play a vital role in the fight for democracy and equality in our country today.

But in this administration in recent years it has retreated from that vital role, strikingly, at a moment of pain and solemnity in this country when we are reckoning with years and, indeed, centuries of systemic racism and its consequences for our country.

In my testimony, I will focus in particular on voting and the duty of this part of the Justice Department to stand up for and play its role in the fight for voting rights. It has retreated from that.

Much of that retreat, of course, comes from the Supreme Court's decision in *Shelby County*, which took away from the division the preclearance tool that had proven so effective and that had made the Voting Rights Act the most effective civil rights law in the country.

But that is not only the blame to be assigned to the Supreme Court. We cannot solely blame the court. This division simply brings no cases. This is the first time since the passage of the Voting Rights Act, the first administration that has brought no cases under its terms.

As you have heard, the division has actually switched sides in two key cases, in Texas and Ohio, and that is pretty remarkable. We should pause on that. Something that was deemed to be discriminatory, deemed to be illegal for years suddenly, overnight, became acceptable and okay.

Was that because the practice changed or was that because the political overseers changed? Unfortunately, the latter interpretation is far more likely.

The most noteworthy thing in many ways that this Civil Rights Division has done is to play its role in the concocting of a pretext on the Census as called out by the Supreme Court when it blocked the citizenship question.

This division can do better. It is striking as well that it acts within the context of a highly politicized Department of Justice, grossly so.

The president has been reported to be saying he wished he had a Roy Cohn. Well, it is, unfortunately, the case that it seems he has one in the current attorney general.

The attorney general has said when it comes to voting that elections have been—that have been held with mail have found substantial fraud and coercion. That is a lie.

Last month, the president threatened to use law enforcement, to send law enforcement in in case there are, quote, “riots on election day.” That is not lawful and the attorney general proclaimed it to be lawful.

This is worrisome as the election approaches. What can be done to renew the division? What can be done so the Civil Rights Division again plays the role that it has played under administrations of both political parties in the past?

Well, first, this Congress can restore the strength of the Voting Rights Act to enact the John Lewis Voting Rights Advancement Act in his name, in his honor, and carrying forward that legacy.

The second thing is this division, even with its current tools, can focus on the actual real threats to the vote that exist right now of abusive voter purges, long lines especially in communities of color, deceptive practices, and others.

The third thing that this division could do is to use the tools that it has that sit unused to protect election security. We all know that in 2016 our election system was attacked by Russia and we have every reason to think that malevolent foreign actors, including Russia, are at it again, according to the intelligence community.

There are things that the Civil Rights Division can do to help in that fight. It can enforce provisions of HAVA, the Help America Vote Act, such as those giving voters the right to a provisional ballot, which is a failsafe in case there is a cyber security problem at a polling place.

The final thing that this Congress can do to help this division do its job is to take steps to restore the independence of the Justice Department, which has been so undermined.

In the last day, legislation has been introduced, the Protect Our Democracy Act, by Chairman Nadler and others that would require, among other things, disclosure of contacts between the White House and the Justice Department on things of the very kind that could undermine impartial enforcement of civil rights laws in this division.

Again, I will restate what my written testimony says, what other witnesses have said. This division can and should play an extraordinarily important role in our country in the great and never-ending quest for equality and democracy. It has before and we hope it does so again in the future.

Thank you.

[The statement of Mr. Waldman follows:]

**BRENNAN
CENTER**

FOR JUSTICE

TESTIMONY OF

MICHAEL WALDMAN
PRESIDENT, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

**HEARING ON OVERSIGHT OF THE CIVIL RIGHTS DIVISION
OF THE DEPARTMENT OF JUSTICE**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

SEPTEMBER 24, 2020

Mr. Chairman, Ranking Member, and members of the subcommittee:

Thank you for the opportunity to testify today on the performance and the future of the Civil Rights Division of the U.S. Department of Justice.¹ The Division has a storied past and should play a vital role in the great fight for American democracy. Its career attorneys and researchers continue to advance its mission. But in this administration, the Civil Rights Division has retreated from civil rights to pursue, instead, divisiveness. Going forward, we should all work to renew the Division so it once again can play its vital role.

This hearing takes place at a solemn moment in a painful year. In July, we lost Rep. John Lewis, whose bravery brought the Voting Rights Act into being in 1965. This past week, we lost Justice Ruth Bader Ginsburg, whose commitment to that very statute was the heart of her most powerful dissent. And it comes at a time of a nationwide reckoning with the reality and consequences of persistent systemic racism against Black Americans and other minorities – the very phenomenon the Civil Rights Division is charged with seeking to combat and eradicate. That embedded discrimination is the worst of America – and at its best, the Justice Department has been the best of America. It should be again.

The Justice Department and the Civil Rights Division work in myriad ways to advance equality and racial justice. On the burning issue of police misconduct, for example, the Department possesses broad authority, particularly through “pattern and practice” investigations of police departments and resulting consent decrees.² The Trump Administration abdicated that power in 2017, and has initiated only one such investigation in three years. As a result, key federal oversight powers have gone unused even as issues of policing and race convulsed the country.³ On education, LGBTQ rights, gender equality, housing, and so many other issues, this Department should play a vital, central role – and must do better.

This testimony will focus on one of the issues the Brennan Center knows best: voting rights and the health of our democracy.

¹ The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize, and defend our country’s system of democracy and justice so they work for all. This year, the Brennan Center has litigated and lobbied in eighteen states for voting rights and strong election administration. I have led the Center since 2005. I have authored books on government, the presidency, and the law, including *The Fight to Vote* (Simon & Schuster, 2016), a history of the struggle for voting rights. I previously served as Director of Speechwriting for President Bill Clinton from 1995-99, and as Special Assistant to the President for Policy Coordination. I would like to thank Alan Beard, Harold Ekeh, Jeanine Chirlin, Sean Morales-Doyle, Max Feldman, Clio Morrison, Spencer LaFata, Izabela Tringali, Emily Eagleton, Myrna Perez, Wendy Weiser, Dan Weiner, Martha Kinsella, Maya Efrati, Kirstin Dunham, Larry Norden, Gowri Ramachandran, Brianna Cea, Taryn Merkl, Lauren-Brooke Eisen, Edgardo Cortes, Hannah Klain, and Liz Howard for research and assistance in drafting this testimony. My testimony does not purport to convey the views, if any, of the NYU School of Law.

² Civil Rights Division, U.S. Department of Justice, *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present*, January 2017, <https://www.justice.gov/ert/file/922421/download>.

³ For a general discussion of how the Justice Department should augment its work on policing, see *Written Testimony from the Brennan Center for Justice to the President’s Commission on Law Enforcement and the Administration of Justice*, (June 8, 2020,) (Statement of Lauren-Brooke Eisen, Director of Brennan Center Justice Program and Spencer Boyer, Director of Brennan Center Washington Office), <https://www.brennancenter.org/our-work/research-reports/testimony-brennan-center-presidents-commission-law-enforcement-and>.

I. ABDICATION OF DUTY

Under this administration, unfortunately, the Justice Department has retreated from its historic role as a protector of voting rights. Indeed, too often, it has ignored or even embraced voter suppression moves. It has also shifted resources to other areas and enforcement topics, draining focus on the Division's core voting rights work.

Some of the change, of course, is due to the U.S. Supreme Court's 2013 ruling in *Shelby County v. Holder*.⁴ This stripped from the Department its most potent tool to prevent voting abuse: Section 5 of the Voting Rights Act (VRA) of 1965. For forty-eight years, the Civil Rights Division was charged with preclearance for changes to voting laws. It did so with minimal bureaucratic burden. From 1998 to 2013, the Division blocked 86 state and local submissions of election changes. These numbers understate the law's effectiveness. Preclearance deterred states and localities from enacting discriminatory voting changes in the first place. Between 1999 and 2005 alone, 153 voting changes were withdrawn and 109 were superseded by altered submissions after DOJ requested more information.⁵

As we all are reminded this week, during oral argument in *Shelby County*, Justice Scalia called the Voting Rights Act little more than a "racial entitlement." Chief Justice Roberts was more decorous. In the majority opinion, he wrote, in effect, that systemic racial discrimination was no longer part of "current conditions," and that states with long histories of discrimination should not be treated differently. In her dissent Justice Ginsburg famously wrote, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." Plainly, Justice Ginsburg's prediction was right.

In the seven years since *Shelby County*, a wave of disenfranchisement and suppression swept across states previously covered by the preclearance requirement.⁶ Soon after the ruling, Texas, Mississippi, and Alabama began to implement and enforce photo ID laws previously barred by preclearance.⁷ In states once covered by Section 5, voter purges soared, typically 40 percent higher than in the rest of the country.⁸ Were preclearance still in effect, these changes would have been screened before they were enacted and before voters were hurt.⁹

Yet the Division's retreat from its core mission cannot solely be blamed on the Supreme Court. Too often, its officials have actively worked to curb voting rights.

⁴ *Shelby County v. Holder*, 570 U.S. 557 (2013).

⁵ Myrna Pérez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, Brennan Center for Justice (June 13, 2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf.

⁶ Myrna Pérez, "7 Years of Gutting Voting Rights," *The Brennan Center for Justice*, June 25, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights>.

⁷ "The Effects of *Shelby County v. Holder*," *The Brennan Center for Justice*, August 6, 2018, <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

⁸ Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," Brennan Center for Justice, August 21, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

⁹ Myrna Pérez, "7 Years of Gutting Voting Rights," Brennan Center for Justice, June 25, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights>.

The Division has flinched in the most basic way: it simply brings no cases. This administration is the first, since the passage of the Voting Rights Act in 1965, to not bring a single enforcement action under the VRA. According to the Justice Department website, during the Obama administration, the Voting Section brought twelve VRA enforcement cases, and during the George W. Bush administration, it brought 46.¹⁰ Even this does not even fully illustrate the abdication of duty. Since Trump was inaugurated on January 20, 2017, the Voting Section has filed claims in only three cases total under any of the statutes it has authority to enforce.¹¹ (In comparison, it filed claims in 32 cases during the Obama administration and in 69 cases under George W. Bush.¹²) True, in this administration the Voting Section has shown the most interest in enforcing the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), filing two enforcement cases. But it filed sixteen UOCAVA cases under President Obama.¹³

The Voting Section has failed to spend its resources protecting voting rights in other ways as well. In the Obama administration, the Section filed amicus briefs or statements of interest in 24 cases. Since Trump took office, it has filed only five.¹⁴ Moreover, even when it weighs in, often it does not defend voting rights. In two of these five cases, the Voting Section filed a Statement of Interest defending state laws requiring voters to have a witness sign their absentee ballots.¹⁵ (During the Covid-19 pandemic, when absentee voting is on the rise and hard for isolated voters, plaintiffs had sued to challenge these laws as an unlawful “voucher” requirement under the VRA.¹⁶) At a time of crisis, instead of advancing voting rights, the storied Civil Rights Division instead has defended states’ rights.

Indeed, in two key cases the Division switched sides. It lurched abruptly to support policies that just days before it had argued were racially discriminatory. Either the policies suddenly ceased to be discriminatory, or the Justice Department’s political overseers suddenly decided such conduct is acceptable. The latter analysis unfortunately is far more likely.

One case concerned the harsh voter ID law in Texas, implemented just hours after the Court announced its ruling in *Shelby County*.¹⁷ (Under this law you could not use a University of Texas ID as a government ID, but could use a concealed carry gun permit.) A federal judge found that

¹⁰ See Voting Section Litigation, <https://www.justice.gov/crt/voting-section-litigation>.

¹¹ These cases include two cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that were immediately settled, and an intervening complaint seeking to force Kentucky to remove inactive voters from the rolls. See https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act#wi_uocava18 (describing *United States v. State of Wisconsin* (W.D. Wisc. 2018) and *United States v. State of Arizona* (D. Ariz. 2018)); <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nynvra2016> (describing *United States v. Commonwealth of Kentucky* (E.D. Ky. 2018)).

¹² See Voting Section Litigation, <https://www.justice.gov/crt/voting-section-litigation>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C. 2020); Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, No. 2:20-cv-619 (N.D. Ala. 2020).

¹⁶ See 52 U.S.C. § 10501(b)(4).

¹⁷ SB 14, 82nd Leg. (2011); Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

more than 600,000 registered voters lacked the required ID.¹⁸ The Justice Department spent six years opposing Texas's law. Together with private litigants—including parties represented by the Brennan Center—it won federal court rulings that the law was discriminatory and unlawful. Then came Inauguration Day, 2017. The Department abruptly abandoned its longstanding position, and asked the Court of Appeals to allow Texas to enforce the law.¹⁹

In Ohio, a similar switch occurred.²⁰ During the Obama administration the Justice Department had successfully opposed the state's effort to purge thousands of voters from the rolls because they had not voted in recent elections. Again, the Justice Department abruptly reversed position, arguing before the Supreme Court that the state's actions were compliant with federal law.

The Civil Rights Division has actively worked, too, to politicize and undermine the Census. The Trump administration tried to add an untested, unprecedented citizenship question; named unqualified political appointees to ill-defined Census Bureau leadership positions late in the census cycle; and refused to comply with congressional subpoenas. The Justice Department actively participated in these moves. For instance, it helped concoct a rationale for adding a citizenship question. Then it defended that pretext in the courts as an authentic reason for the administration's actions. A 5-4 vote of the U.S. Supreme Court stopped the scheme, a ruling which turned in part on the Justice Department's purported rationale being little more than a pretext.²¹

The Division also has sought to obscure its actions. In 2017, the head of the Voting Section sent a letter to most states, requesting detailed information on the policies, practices, and procedures related to voter list maintenance. Voting rights advocates feared it was a prelude to a broader effort to force states to aggressively purge voter rolls, and the Brennan Center filed a FOIA request seeking information.²² Three years later, DOJ refuses to release thousands of pages of documents, asserting that releasing them would interfere with ongoing law enforcement proceedings.

¹⁸ For a history of the litigation, see Court Case Tracker: Texas NAACP v. Steen (consolidated with Veasey v. Abbott), Brennan Center for Justice, <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>.

¹⁹ Sari Horwitz, "Justice Department changes its position in high-profile Texas voter-ID case," *Washington Post*, February 27, 2017, https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html; and Pam Fessler, "Justice Department Reverses Position On Texas Voter ID Law Case," *NPR*, February 27, 2017, <https://www.npr.org/2017/02/27/517558469/justice-department-reverses-position-on-texas-voter-id-law-case>.

²⁰ Sari Horwitz, "Justice Dept. sides with Ohio's purge of inactive voters in case headed to Supreme Court," *Washington Post*, August 8, 2017, https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f191668ed_story.html.

²¹ Department of Commerce v. New York, 588 U.S. ____ (2019).

²² Wendy Weiser to Nelson D. Hermilla, July 20, 2017, Freedom of Information Act Request, Request for Expedited Processing and Fee Waiver, (Brennan Center for Justice, New York, NY), https://www.brennancenter.org/sites/default/files/analysis/Brennan_Center_FOIA_Request.pdf.

II. THE POLITICIZATION OF THE JUSTICE DEPARTMENT

The Civil Rights Division is embedded within a cabinet agency distorted and politicized by its leadership. The Justice Department today is under greater improper political duress than at any point in the past half century. One must return to the days of Richard Nixon and John Mitchell to find anything close.

Attorney General William P. Barr has made clear as a matter of doctrine and brute political will that too often the professional judgments of the prosecutors and attorneys at the Department of Justice mean little. In a recent speech, he stated that non-political staff are not as “equipped [as political appointees] to make the complex judgment calls concerning how we should wield our prosecutorial power.”²³ He decried the “criminalization of politics” (even as he pursued former Obama officials seemingly at the behest of the president’s Twitter feed).²⁴ He appears to have intervened in ongoing prosecutions, over and over, to benefit the president’s personal and political interests.²⁵ President Trump’s operative Roger Stone had his sentence commuted; his former campaign manager Paul Manafort, jailed for tax evasion and bank fraud, was granted home confinement.²⁶ The Justice Department, having won a guilty plea from former National Security Advisor Michael Flynn for lying to the FBI about his conversation about sanctions with the Russian ambassador, now has moved to drop the case. The trial judge was so concerned about improper political motive that he has convened an extraordinary inquiry, over the objections of the Justice Department.²⁷ The president’s personal attorney, Michael Cohen, who credibly accused Trump of participation in a criminal campaign finance scheme, was sent back to prison after he was released during the pandemic because he was writing a book critical of the president.²⁸ Most recently, the Justice Department stepped in to defend Donald Trump in a personal lawsuit alleging sexual assault.²⁹ The president’s personal interest and the actions of the Justice Department appear to have fused. Donald Trump long reportedly has asked, “Where’s my

²³ Martha Kinsella, Gareth Fowler, Julia Boland, Daniel L. Wiener, “Trump Administration Abuses That Thwart Pandemic Response,” Brennan Center for Justice, updated September 22, 2020, <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response#s7a>.

²⁴ Attorney General William P. Barr, “Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event,” (speech, Washington, D.C., September 16, 2020), U.S. States Department of Justice, <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event>.

²⁵ Katie Benner, Sharon LaFraniere, and Nicole Hong, “Fearful of Trump’s Attacks, Justice Dept. Lawyers Worry Barr Will Leave Them Exposed,” *The New York Times*, May 18, 2020, <https://www.nytimes.com/2020/02/15/us/politics/trump-barr-justice-department.html>.

²⁶ Peter Baker, Maggie Haberman, and Sharon LaFraniere, “Trump Commutes Sentence of Roger Stone in Case He Long Denounced,” *The New York Times*, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>; Eileen Sullivan, “Paul Manafort, Trump’s Ex-Campaign Manager, Released to Home Confinement,” *New York Times*, May 13, 2020, <https://www.nytimes.com/2020/05/13/us/politics/paul-manafort-released-coronavirus.html>.

²⁷ Colbert King, “It’s Roger Stone Now. Manafort and Flynn Are Next,” *The Washington Post*, July 11, 2020, <https://www.washingtonpost.com/opinions/2020/07/11/its-roger-stone-now-manafort-flynn-are-next/>.

²⁸ Benjamin Weiser and Alan Feuer, “Judge Orders Cohen Released, Citing ‘Retaliation’ Over Tell-All Book,” *The New York Times*, July 23, 2020, <https://www.nytimes.com/2020/07/23/nyregion/michael-cohen-trump-book.html>.

²⁹ Alan Feuer, “Justice Dept. Intervenes to Help Trump in E. Jean Carroll Defamation Lawsuit,” *The New York Times*, September 8, 2020, <https://www.nytimes.com/2020/09/08/nyregion/donald-trump-jean-carroll-lawsuit-rape.html>.

Roy Cohn,” pining for the legendarily ruthless and corrupt attorney and fixer. Startlingly, he has managed to find “his Roy Cohn” in the Attorney General.

All this is in service of Trump’s yearning for an imperial presidency. Last July, Trump declared: “I have an Article II [of the Constitution], where I have to the right to do whatever I want as president.”³⁰ Attorney General Barr has given a pseudo-scholarly gloss to this misreading of the Constitution. Barr’s words articulating the “unitary executive” assert that the president has untrammelled control over the executive branch, that the attorney general has untrammelled control over the prosecutorial decisions of the Justice Department.³¹ His actions assert with equal force that he sees no problem with wielding that absolute control to advance the personal and political interest of the president.

All this raises profoundly alarming questions about the role the Justice Department will play in the upcoming election. In recent months Attorney General Barr has joined in spreading misinformation and threatening misconduct.

- Barr has said that “elections that have been held with mail have found substantial fraud and coercion.”³² This is false.
- Last month, Trump threatened to use law enforcement personnel on Election Day, claiming they were needed to quell “election night riots.” “We’re going to have sheriffs,” he explained, “and we’re going to have law enforcement, and we’re going to have, hopefully, U.S. attorneys.” He added, “We’ll put them down very quickly if they do that.”³³ Days later during an interview with CNN, Barr defended the president’s comments, saying it would be legal to send law enforcement to polling locations on Election day if it were in response to “a particular criminal threat.”³⁴
- Barr has claimed that mail-in voting leads to substantial voter fraud based on a Texas case in which “we indicted someone in Texas – 1,700 ballots collected from people who could vote, he made them out and voted for the person he wanted to.” Barr’s description of the case does

³⁰ President Donald Trump, “Remarks by President Trump at Turning Point USA’s Teen Student Action Summit 2019,” Washington, D.C., July 23, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/>.

³¹ Attorney General William P. Barr, “Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society’s 2019 National Lawyers Convention,” (speech, Washington, D.C., November 15, 2019) U.S. Department of Justice, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture>.

³² Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³³ Quint Forgy, “‘We’ll Put Them Down Very Quickly’: Trump Threatens to Quash Election Night Riots.” *POLITICO*, September 11, 2020, <https://www.politico.com/news/2020/09/11/trump-election-night-riots-412323>

³⁴ Justin Wise, “Barr Suggests Law Enforcement Could Be Sent to Polling Places Over ‘Criminal Threat,’” *The Hill*, September 3, 2020, <https://thehill.com/homenews/administration/514931-barr-suggests-law-enforcement-could-be-sent-to-polling-places-if>.

not match the facts: only one ballot was fraudulent, the fraud was detected, and the perpetrator was punished accordingly.³⁵

- Barr echoed Trump in claiming that vote by mail somehow opened the way for foreign governments to commit fraud. “I’m saying people are concerned about foreign influence, and if we use a ballot system with a system that some – that states are just now trying to adopt, it does leave open the possibility of counterfeiting, counterfeiting ballots either by someone here or someone overseas.”³⁶
- Barr said the U.S. will go down a “socialist path” if Trump isn’t reelected, a frightening direct step into partisan politics.³⁷

How could such power be misused in and around the election? Recently we have seen the executive branch stir division and challenge First Amendment-protected activity. In June, protestors responding to the killing of George Floyd gathered in Lafayette Square. It was the Attorney General who organized federal officials from DOJ and elsewhere – including Bureau of Prisons riot policemen – to blast through the square, using flash grenades and gas, so the President could hold a photo opportunity. In July, the federal government (in this case, the Department of Homeland Security) sent forces into Portland, Oregon, provoking street battles that stirred fear and dominated the news.

Typically the Justice Department under both parties has carefully avoided actions that could affect an election. In 2000, for example, despite the topsy-turvy Florida recount, the Justice Department under Attorney General Janet Reno did not intervene in the counting – let alone on behalf of her own political party. FBI Director James Comey’s disruptive public statements about Hillary Clinton in 2016 stood out for that very reason.

But Congress has ample reason for concern, given the recent record of this Attorney General – and should make clear it would be a gross abuse of power for the Justice Department to take partisan actions around the election. One hesitates to enumerate them: Could the Department send federal law enforcement into what President Trump calls “Democrat cities” supposedly to protect federal facilities – but in fact, to suppress the vote in a racially discriminatory manner? Could it seize ballots as they are legitimately counted in service of the President’s fevered insistence that ballots cast by mail (other than his) are improper? And so on. We should not risk normalizing such actions by speculating. They would be a breach of our democratic order.

³⁵ Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³⁶ Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³⁷ Katie Benner, “In an Interview, Barr Warned of the U.S. Going Down ‘the Socialist Path’ if Trump is not Re-Elected,” *The New York Times*, September 16, 2020, <https://www.nytimes.com/2020/09/16/us/elections/in-an-interview-barr-warned-of-the-us-going-down-the-socialist-path-if-trump-is-not-re-elected.html>.

III. RENEWING THE CIVIL RIGHTS DIVISION

The task for the Justice Department goes beyond a duty not to abuse power. We should expect more than mere restoration of the Civil Rights Division to its previous work and role. Rather, the deep problems in our electoral system exposed by the pandemic compel us to think anew, and to ask what changes could improve and modernize the Division and its work.

A. Restore the Voting Rights Act

The most important legislative task is to restore the strength of the Voting Rights Act of 1965, the nation's most effective civil rights law.

Congress should promptly pass the John R. Lewis Voting Rights Advancement Act (VRAA), which passed the House of Representatives last year as H.R. 4. When the Supreme Court gutted preclearance, it stated explicitly that Congress could fix the VRA, using current data and taking a wider perspective than the last time it reauthorized the law.³⁸ Congress has engaged in extensive fact-finding and built a strong record.

The John Lewis Act would update the coverage formula that the Supreme Court struck down in *Shelby County*, renewing the Civil Rights Division's authority to block discriminatory voting rules in states with a recent history of voting rights violations.³⁹ The Justice Department would once again review proposed changes, before they are implemented, to ensure that they do not make it more difficult for racial and language group minorities to cast a ballot.

The VRAA would also give the Department stronger tools to combat discrimination. It would require preclearance of certain known, discriminatory voting practices nationwide, increase transparency by requiring reasonable public notice for voting law changes, and reinforce the Attorney General's authority to send observers to polling places.⁴⁰

B. Focus On Today's Threats to the Vote

A renewed Civil Rights Division should be an active force that takes on the myriad urgent threats to the vote nationwide.

Abusive voter purges. Rather than pressing states to ever-more-frenetically purge voters, the Division should refocus its list maintenance enforcement efforts around protecting voters from improper purges. Another example: in 2018, voters of color experienced longer wait times at the polls than their white counterparts and were more likely to wait in the longest lines.⁴¹ The Division should investigate and remedy these inequities.

Pay-to-vote schemes. The Division should also step up enforcement of rights guaranteed by the U.S. Constitution. A prime example: in 2018, 64 percent of Florida voters endorsed ending the state's policy of lifetime felony disenfranchisement, a Jim Crow remnant that affected 1.4

³⁸ *Shelby County v. Holder*, 570 U.S. 557 (2013).

³⁹ John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. § 3 (2019).

⁴⁰ See John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. §§ 5-7 (2019).

⁴¹ Hannah Klain, et al, "Waiting to Vote," Brennan Center for Justice, June 3, 2020, <https://www.brennancenter.org/our-work/research-reports/waiting-vote>.

million people. But last year, Gov. Ron DeSantis signed into law a requirement that denies people the right to vote unless they pay fees and costs whose primary purpose is to raise revenue for the state. Former Civil Rights Division officials filed an amicus brief decrying the law as a blatant violation of the Twenty-Fourth Amendment, which prohibits making voting rights contingent on the payment of taxes.⁴² But the current Department itself sat idly by while a federal appeals court ruled that it was constitutional to deny voting rights to hundreds of thousands of Floridians simply because they were not wealthy enough to pay their fees and fines.

Deceptive practices. American elections are awash in misinformation. These lies and threats, magnified exponentially by social media, are the most effective way to deter Americans from exercising their core right to vote. We may see increasing evidence of this as the November ballot approaches.

The Justice Department should be given stronger authority to police and punish those who deter voting through false information about eligibility or the “time, place and manner” of an election, or who hinder voters through intimidation. The For the People Act (H.R. 1), sweeping democracy reform passed by the House of Representatives last year, includes these and other measures to strengthen the Division’s power to address voter suppression through misinformation. It also charges the Department with publicizing corrective information when misinformation is disseminated.

C. Protect Election Security

Cyberattacks put American democracy at risk. They pose real, not imaginary, challenges to Americans’ right to vote. The Civil Rights Division could do more to help bolster the nation’s defenses.

The Help America Vote Act (HAVA) was passed in 2002 after the Florida recount. It aimed to modernize the nation’s election systems. The Justice Department has authority to enforce many of its provisions, authority it has not used during the Trump administration. HAVA enforcement would particularly help effort improve election infrastructure security. For instance, the law requires that when a voter’s eligibility is questioned, provisional ballots should be available as a failsafe at polling places.⁴³ That is important not only for individuals; it is a key resiliency mechanism should registration or pollbook data be corrupted. Some states always offer these ballots,⁴⁴ but others do not do so consistently.⁴⁵ Indeed, a recent Georgia State Board of

⁴² “Brief of Former Officials of the Civil Rights Division of the United States Department of Justice as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance,” <https://assets.documentcloud.org/documents/7012575/Doj-Lawyers-Florida-2020-08-03.pdf>; Marcia Coyle, “36 Former DOJ Civil Rights Attorneys Urge Court to Scrap Florida’s ‘Pay-to-Vote’ System,” National Law Journal, August 3, 2020, <https://www.law.com/nationallawjournal/2020/08/03/36-former-doj-civil-rights-attorneys-urge-court-to-scrap-floridas-pay-to-vote-system/>.

⁴³ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 302 (2002).

⁴⁴ “Provisional Voting,” North Carolina State Board of Elections, accessed September 21, 2020, <https://www.ncsbe.gov/voting/provisional-voting>.

⁴⁵ *Georgia Pollworker Manual*, Office of Georgia Secretary of State Raffensperger, August 2020, 74-80, <https://georgiapollworkers.sos.ga.gov/Shared%20Documents/Georgia%20Poll%20Worker%20Training%20Manual.pdf>.

Elections hearing revealed that during the June primary, multiple polling locations ran out of envelopes and could not offer voters this option.⁴⁶ Yet the Department of Justice has not issued clarifying guidance on maintaining the supplies needed to effectuate this right.

In another important provision, HAVA requires that voting systems used in federal elections provide an auditable paper trail, and that voters can change their selections before that permanent paper record is produced.⁴⁷ These requirements should prohibit Direct Record Electronic (DRE) devices that lack a paper record in federal elections, as well as any online voting systems in which voters return their ballots through email or over the internet, a method that is not secure. Yet even as some jurisdictions in eight states continue to employ the use of DREs without a paper record,⁴⁸ and as jurisdictions have become tempted to permit online ballot return,⁴⁹ no clarification or enforcement action has been taken to protect the security of those ballots. Justice Department action matters greatly because the existence of a private right of action to enforce some sections of HAVA is sometimes contested.⁵⁰

Particularly important after the foreign attacks on registration databases in 2016: HAVA's mandate that computerized registration lists be protected by "adequate technological security measures."⁵¹ Russian hackers were able to exfiltrate data from at least one registration database in 2016.⁵² We know that Russia is at it again, potentially along with other malevolent foreign governments or groups. Even subtle manipulation of databases can wreak havoc on Election Day and undermine public confidence. It is therefore vital that officials and vendors meet HAVA's requirement for basic cybersecurity standards.

D. Restore the Independence of the Justice Department

A final recommendation goes to a fundamental challenge for American governance: the politicization of law enforcement. Donald Trump is hardly the first president to seek to influence the Justice Department. Nor is William Barr the first Attorney General to oblige. But as discussed above, their misconduct has wrenched the Department, sparking a crisis of confidence within its ranks and with the public.

⁴⁶ *Georgia State Board of Elections Hearing*, (September 10, 2020), recording available at <https://sos.ga.gov/admin/files/September%202020%20State%20Election%20Board%20Meeting.mp4>.

⁴⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 301 (2002).

⁴⁸ For jurisdictions in Ohio, Kansas, Tennessee, Indiana, Mississippi, Louisiana, Texas, and New Jersey that use DREs lacking a paper record for all who vote in person, see, "The Verifier," Verified Voting, accessed September 21, 2020, <https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020>.

⁴⁹ Eric Geller, "Some States Have Embraced Online Voting. It's a Huge Risk," *Politico*, June 9, 2020, <https://www.politico.com/news/2020/06/08/online-voting-304013>.

⁵⁰ *E.g.*, Memorandum by United States as Amicus Curiae, *Bay County Dem. Party v. Land*, 347 F.Supp. 404 (E.D. Mich. 2004) (arguing that HAVA does not create a private right of action); *County of Nassau v. New York*, 724 F.Supp. 295, 305 (E.D. New York 2010). ("[T]here is no indication that HAVA provides any exclusive cause of action or, for that matter, any private right of action with respect to voting machines and procedures.")

⁵¹ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 303(a)(3) (2002).

⁵² U.S. Senate, Select Committee on Intelligence, *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, 2019, vol. 1, 22, https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf.

The Brennan Center has done a substantial amount of work on partisan abuses at the Department of Justice. Our bipartisan National Task Force on the Rule of Law and Democracy, comprised of former senior political officials who have served in both Republican and Democratic administrations, created a legislative agenda to strengthen guardrails against abuse of power in the executive branch.⁵³ The Brennan Center has also published a set of proposals for executive actions that the next president can take to rebuild unwritten rules of governance that safeguard our democracy.⁵⁴ Additionally, we have a tracker of the Trump administration's abuses of power throughout its response to the Covid-19 pandemic, including those occurring at the Department of Justice.⁵⁵

Undue political interference gravely threatens the work of the Civil Rights Division, and the Department of Justice in general, a threat that has recurred during the past several administrations. For instance, under the George W. Bush presidency, the Department's inspector general and Office of Professional Responsibility found that the political official overseeing the Civil Rights Division "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys" there.⁵⁶ Indeed, when political officials pressured prosecutors to bring voter fraud charges against innocent people, some of the prosecutors refused and were fired. The resulting scandal led to the resignation of Attorney General Alberto Gonzales.

Political interference at the Department of Justice has again reached a crisis point during the current administration. As described above, repeatedly the Department has made prosecution and sentencing decisions about the President's political associates. And the president has meddled in politically sensitive prosecutions, including by firing the U.S. attorney for the Southern District of New York, whose office is investigating matters involving the president and his close associates.⁵⁷

⁵³ *National Task Force on Rule of Law & Democracy*, Brennan Center for Justice, 2019, <https://www.brennancenter.org/issues/bolster-checks-balances/ethics-rule-law/national-task-force-rule-law-democracy>.

⁵⁴ Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 5, <https://www.brennancenter.org/our-work/policy-solutions/executive-actions-restore-integrity-and-accountability-government>.

⁵⁵ Martha Kinsella, Gareth Fowler, Julia Boland, and Daniel Weiner, *Trump Administration Abuses Thwart US Pandemic Response*, Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response>.

⁵⁶ U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, https://www.oversight.gov/sites/default/files/oig-reports/final_9.pdf.

⁵⁷ Alan Feuer et al., "Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle," *The New York Times*, June 20, 2020, <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>. Senior political officials also pressured department attorneys to conduct an antitrust investigation of automakers that attempted to lower their emissions and to cut Trump ally Roger Stone "a break" in sentencing. Kyle Cheney and Leah Nylén, "Prosecutor Says He Was Pressured to Cut Roger Stone 'a Break' Because of His Ties to Trump," *Politico*, June 23, 2020, <https://www.politico.com/news/2020/06/23/prosecutor-says-he-was-pressured-to-cut-roger-stone-a-break-because-of-his-ties-to-trump-336075>.

This abuse must stop. The Brennan Center has crafted a series of solutions — building on longstanding practices — that would safeguard against undue political interference at the Department of Justice. Among these solutions is a proposal to strengthen the policy of limiting contacts between the White House and the Department.⁵⁸ Our Task Force has also proposed expanding the jurisdiction of agency inspectors general to include investigations into improper interference in law enforcement matters.⁵⁹ It also makes sense to strengthen safeguards at other agencies that interact with the Justice Department. For example, the Census Bureau and the Commerce Department could be required to maintain publicly accessible logs of the communications that senior officials have with personnel from other federal agencies, such as the Department of Justice.

Congress is already moving to address these issues. Seven committee chairs, including Chairman Nadler, this week introduced groundbreaking legislation that would, among other things, codify new safeguards to prevent improper political interference with the Department of Justice.⁶⁰ This proposal is similar to a separate bill introduced by Rep. Jeffries.⁶¹ Another bill sponsored by Rep. Richmond, which passed the House of Representatives, would expand the jurisdiction of the inspector general for the Department of Justice to include allegations relating to a Department attorney's authority to investigate, litigate, or provide legal advice.⁶²

There is reason to hope that in a new Congress, such legislation could attract bipartisan support.

* * *

The Civil Rights Division has a storied history. It must play a vital role in the defense of our democracy. At a time of extraordinary stress on our political institutions, it can once again step forward to advance the voting rights of millions of Americans. It must be renewed and revitalized. That will require determination, a resistance to inappropriate political interference, and a commitment to following the law.

⁵⁸ Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law & Democracy, 2018, 17-

20, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf; and Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 7, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

⁵⁹ Bharara, Whitman, *Proposals for Reform*, 20–21. Relatedly, the Brennan Center has also proposed that the president issue a memorandum laying out standards ensuring that inspectors general are insulated from political pressure. Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 9, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

⁶⁰ Adam Schiff, Jerrold Nadler, Carolyn Maloney, John Yarmuth, Zoe Lofgren, Eliot Engel, and Richard Neal, “Democratic House Chairs: Here’s How We Can Protect Democracy from a Lawless President,” *Washington Post*, September 23, 2020, <https://www.washingtonpost.com/opinions/2020/09/23/democratic-house-chairs-trump-damage-democracy/>.

⁶¹ Security from Political Interference in Justice Act of 2019, H.R. 3380, 116th Cong. (2019).

⁶² Inspector General Access Act of 2019, H.R. 202, 116th Cong. (2019).

Mr. COHEN. Thank you, Mr. Waldman.

Now, Mr. Jonathan Smith. Mr. Smith is executive director for the Washington Lawyers Committee for Civil Rights and Urban Affairs.

He previously was a chief of the special litigation section of the Civil Rights Division of the Department of Justice from 2000 to 2015.

Under his leadership, the section conducted the civil investigation of the Ferguson, Missouri, Police Department following the death of Michael Brown.

Mr. Smith received his JD from Antioch School of Law and his BA from the University of Maine at Orono.

Mr. Smith, you are recognized for five minutes.

STATEMENT OF JONATHAN SMITH

Mr. SMITH. Thank you, Mr. Chairman. Thank you, committee members. It is an honor to be able to testify about the Civil Rights Division.

I had the honor to serve as the chief of the special litigation section from 2010 through 2015. The section has a responsibility, among others, to undertake police accountability cases.

I have submitted longer testimony for the record. In the few minutes that I have to speak with you, I want to touch on two critical issues.

First, for the last 3½ years the division has, in critical ways [inaudible] laws as they apply to [inaudible] and in some cases asserted positions that have set back the cause of civil rights.

As the nation struggles with its history of racial injustice, the division has been missing and the department has taken actions adverse to the cause of race equity.

Second, the politicization of certain enforcement decisions has undermined the credibility of the division and done serious damage to the reputation of the department and the morale of the career staff.

The work of the division is done, largely, by career lawyers, investigators, and paralegals who joined the department with dedication and idealism. The cynical abuse of the enforcement actions for electoral political gain demeans and diminishes their hard work.

In the wake of the deaths of George Floyd, Breonna Taylor, Ahmaud Aubery, and others, people have flooded the streets demanding change and policing the communities of color, and that the criminalization of Black and brown people cease.

At this historic inflection point, the Civil Rights Division has been conspicuously absent, or worse. The department has retreated from the sections of police reform work.

The attack on the sections of police reform work started at the beginning of the administration. Attorney General Sessions criticized the section's investigations and use of consent decrees.

Admitting that he had not even read the findings issued by the section, he called them anecdotal. He walked away from the Chicago investigation and attempted to withdraw from the Baltimore consent decree.

Attorney General Sessions' last act was to issue a directive that severely limited the use of consent decrees, one of the very few remedies that has proven effective in police reform cases.

At the same time, the president, in a speech to police officials, urged that they bang the heads of arrestees on squad car doors and stated that the, quote, "handcuffs," end quote, on law enforcement had been removed.

Attorney General Barr frequently criticizes those who protest police brutality, acts to suppress protest, and threatened the communities that do not show adequate support for police will not be provided police protection.

During the last administration, 25 police investigations were open, resulting in comprehensive consent decrees in major cities across the country. During this administration, the section has entered into no police reform consent decrees.

A simple contrast between the last administration's response to the death of Michael Brown and this administration's response to the death of George Floyd and others shows why this matters.

Michael Brown's death and the resulting uprisings in the streets of Ferguson and elsewhere caused the department to spring into action.

The attorney general authorized a civil investigation of the Ferguson Police Department, a criminal investigation into Michael Brown's death, and ordered the community-oriented policing office to review the law enforcement response to the demonstrations.

The community relations service was dispatched and the attorney general personally traveled to Ferguson to meet with a broad swath of community members and public officials.

By contrast, the repeated in-custody deaths of Black and brown people under circumstances that suggest widespread systemic deficiencies and racial bias, this administration has opened no investigations and entered into no consent decrees. Not in Minneapolis, not in Louisville, not in Fort Worth, not in Rochester, not in Kenosha, not in any other city.

Finally, to be effective, the section's work must be free of partisan politics. I am proud that the division I work for undertook the investigations regardless of the political party of the mayor, sheriff, or governor. We investigated the police departments in Democratic cities like Newark, New Jersey when Cory Booker was mayor, and Republican strongholds like Maricopa County, Arizona, and Sheriff Joe Arpaio.

The abuse of power for political purposes does not better policing. In August, the department targeted the states of New York, New Jersey, Pennsylvania, and Michigan with threatening enforcement actions for their response to the COVID-19 in nursing homes.

The targeted states and the tactics used belie the seriousness of the department to gauge in an actual inquiry as opposed to an effort to influence the upcoming elections.

Typically, information requests are made by career attorneys, not by the political leadership through a press release. Moreover, while nursing home deaths have declined nationwide and dramatically declined in the northeast, Sunbelt states have seen a dramatic spike. The states targeted did not pose the most serious concerns nor the most potent use of section resources.

The division has a long and proud history, and it is difficult to watch the harm being done to it by this administration.

Thank you.

[The statement of Mr. Smith follows:]

Testimony of Jonathan M. Smith
Before the House Judiciary Committee, Subcommittee on the Constitution and Civil
Justice
Oversight Hearing on the Civil Rights Division of the United States Department of Justice
September 24, 2020

Chairman Nadler and Members of the Judiciary Committee, thank you for the opportunity to testify concerning the Civil Rights Division of the United States Department of Justice. For the last three-and-a-half years, the Division has, in critical ways, abdicated its responsibility to enforce the civil rights laws and in some cases asserted positions that have set back the cause of civil rights. As the nation struggles with its history of racial injustice, the Division has largely been absent. Moreover, the politicization of certain enforcement decisions has undermined the credibility of the Division and done serious damage to the reputation of the Department.

I am currently the Executive Director of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. From 2010 through 2015, I served as the Chief of the Special Litigation Section of the Civil Rights Division. The Special Litigation Section is one of ten Sections. The Section is responsible for the enforcement of the law enforcement provisions of the Omnibus Violent Crime Control and Law Enforcement Act, 42 U.S.C. 14141 (recodified 34 U.S.C. 12601); the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997, et. seq.; the civil provisions of the Freedom of Access to Clinic Entrances Act, 18 U.S.C 248; and the corrections portions of the Religious Land Use and Institutionalized Persons Act 42 U.S.C. §§ 2000cc, et seq. We also shared responsibility with the Disability Rights Section to enforce the integration mandate of the Americans with Disabilities, Act 42 U.S.C. § 12101, et seq. In short, the Special Litigation Section has the authority to address patterns and practices of the violation of the Constitution and federal law with regard to a broad range of criminal justice institutions – police, prisons, jails, and juvenile justice systems.

Created as part of the 1957 Civil Rights Act, for more than 60 years, the Division has enforced the nation's laws prohibiting discrimination on the basis of race, color, gender, sex, disability, religion, familial status, and national origin. Since its founding, the Civil Rights Division has played an essential role in the nation's halting progress towards equal opportunity and equal justice. Division lawyers, along with their counterparts in the civil rights community, have brought some of the most consequential cases to make the promise of our Constitution and our civil rights laws a reality. The Division is often referred to as the "conscience" of the Department of Justice. That legacy has been severely tarnished in the last three and a half years.

This summer's demonstrations demanding that the nation reckon with systemic racism in policing and in the carceral system underscore the important work left to be done by the Division and the Section. Dedicated career staff have been hobbled by the political leadership in their efforts to pursue the Division's mission. The sidelining of the career staff is particularly harmful

Civil Rights Division Oversight Hearing
 Testimony of Jonathan M. Smith
 September 24, 2020

Page 2

at this critical moment in our history. While the Section engages in other important work, because of the urgency of this moment, I will focus on police, prisons, and jails in my testimony.

Policing

In the wake of the death of George Floyd, Breonna Taylor, Ahmaud Arbery and others, the nation has, yet again, embarked on a summer of protest. Communities have flooded the streets demanding changes in the policing of communities of color and that the criminalization of Black and Brown people cease. At this historic inflection point, the Civil Rights Division has been conspicuously absent.

The Division's retreat from its critical role in ensuring that law enforcement agencies operate within the limits of the Constitution started long before this summer's protests. From the very early days of this administration, the leadership of the Department sought to undermine and dismantle the work of the Special Litigation Section. Attorney General Jeff Sessions, upon taking office, criticized the Section's investigations and the use of consent decrees. Admitting that he had not even read the findings letters issued by the Section, he called them "anecdotal."¹ He immediately ordered a review of existing consent decrees and made clear that the Department of Justice would no longer work to ensure that police agencies meet their obligation to comply with the Constitution and civil rights laws.² The very last act of Attorney General Sessions before he left office was to issue a directive limiting the use of consent decrees to achieve reform. His memo required that consent decrees last no longer than two years, could be used in only very limited circumstances, and imposed onerous burdens on government attorneys to secure approval for one of the very few remedies that has proven effective in police reform cases.³

During this same time period, the President of the United States also signaled that the administration would refuse to protect the constitutional rights of its residents in interactions with law enforcement. Speaking to a gathering of police officials, he urged them to bang the heads of arrestees on squad car doors and stated that the "handcuffs" on law enforcement had been removed.⁴ Attorney General Barr continued this theme by frequently criticizing those who

¹ "I have not read those reports, frankly. We've had summaries of them, and some of it was pretty anecdotal, and not so scientifically based." Brandon Patterson, Jeff Sessions Hasn't Even Read the DOJ's Landmark Reports on Police Abuse in Ferguson and Chicago, Mother Jones, February 2017, <https://www.motherjones.com/politics/2017/02/sessions-comments-chicago-ferguson-reports-doj/>

² Memorandum from the Attorney General, Supporting Federal, State, Local and Tribal Law Enforcement, March 31, 2017 ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies.") <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>

³ Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities, November 7, 2018, <https://www.justice.gov/opa/press-release/file/1109621/download>

⁴ Mark Berman, Trump tells police not to worry about injuring suspects during arrests, Washington Post, July 28, 2017, <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/>

Civil Rights Division Oversight Hearing
 Testimony of Jonathan M. Smith
 September 24, 2020

Page 3

exercised their constitutionally protected right to protest police brutality and by threatening that if communities do not show adequate support for police that they will not be provided police protection.⁵

In the 25 years since the statute authorizing pattern and practice investigations of law enforcement was enacted, the Section has conducted more than 70 investigations of police agencies. During the last administration, 25 investigations were opened resulting in comprehensive consent decrees in major cities across the country, including Cleveland, Ohio; Newark New Jersey; Albuquerque, New Mexico; Seattle, Washington; New Orleans, Louisiana; Ferguson, Missouri; and the Commonwealth of Puerto Rico.⁶ During the Trump Administration, the Section has opened one.⁷ It has entered into no police reform consent decrees.⁸

When the new administration took office, it inherited the recently completed investigation of the Chicago Police Department and the recently completed, but not yet entered, consent decree in Baltimore. In January of 2017, the Section issued an extensive and damning report on the Chicago Police Department.⁹ The report found patterns of excessive force and racial profiling, as well as material failures in hiring, training, supervision, and accountability.¹⁰ In any other case with these findings, the Section would have moved immediately to begin to negotiate a comprehensive consent decree. Instead, the Division took no action and opposed comprehensive reform when Illinois Attorney General Lisa Madigan stepped in to fill the void.¹¹ The irony of the Department's action in this case cannot be avoided – on the one hand insisting that oversight of law enforcement is a local matter and on the other opposing reforms sought and agreed to by local officials.

⁵ Katie Benner, *Barr Says Communities That Protest the Police Risk Losing Protection*, New York Times, December 4, 2019, <https://www.nytimes.com/2019/12/04/us/politics/barr-police.html>

⁶The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present, January 2017, <https://www.justice.gov/crt/file/922421/download>

⁷ PolitiFact: Fact-checking Kamala Harris' claim about Donald Trump and investigations of police misconduct; <https://www.tampabay.com/news/nation-world/2020/06/10/politifact-fact-checking-kamala-harris-claim-about-donald-trump-and-investigations-of-police-misconduct/>

⁸ Findings letters and consent decrees are posted on the Section's webpage. No law enforcement consent decrees have been posted during this administration. <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

⁹Report of the Investigation of the Chicago Police Department, <https://www.justice.gov/crt/case-document/file/925771/download>

¹⁰ Id.

¹¹ Statement of Interest Opposing Chicago Consent Decree, <https://www.justice.gov/opa/press-release/file/1100631/download> (Nota Benne, statements of interest are usually signed by members of the career staff. This statement was signed by political appointees and no member of the Section appears on the pleadings, despite that the Section conducted the investigation.)

Civil Rights Division Oversight Hearing
Testimony of Jonathan M. Smith
September 24, 2020

Page 4

Similarly, the Department attempted to withdraw from the consent decree in Baltimore, despite that it had been agreed to by the City and submitted to the Court.¹² The consent decree was, nevertheless, entered and reform in Baltimore is underway. It is important to note that, despite these actions by the Department's political leadership, the career staff in the Section continue to work hard and effectively to implement the reforms in existing consent decrees.

The harm caused by this administration's actions regarding law enforcement are incalculable. While the implications are too many to meaningfully address in this testimony, a simple contrast between the last administration's response to the death of Michael Brown and this administration's response to the death of George Floyd is illustrative.

When Michael Brown died in Ferguson, Missouri in August of 2014, the Special Litigation Section was involved in significant investigations and enforcement actions across the country. Addressing systemic unconstitutional practices by law enforcement had been a long-standing priority. The Section's track record gave it credibility in the law enforcement and the civil rights communities.

Michael Brown's death and the resulting uprisings on the streets in Ferguson and elsewhere caused the Department to spring into action. The Attorney General authorized a civil investigation of the Ferguson Police Department, a criminal investigation in Michael Brown's death, and ordered that the Community Oriented Policing Office of the Department review the law enforcement response to the demonstrations. The Community Relations Services was dispatched and the Attorney General personally travelled to Ferguson to meet with a broad swath of community members and public officials. The President ordered the creation of the Task Force on 21st Century Policing, which made extensive and detailed recommendations for reforming police practices, creating greater community trust, and working towards racial equity.¹³ The Section acted with similar urgency following the death of Freddie Gray in Baltimore and the revelations regarding the death of Laquan McDonald in Chicago. Investigations were opened and pursued with vigor and reports of the investigative findings issued.

The 25 investigations in the last administration followed the same pattern. When serious systemic issues were revealed in a community, a public investigation was opened. The Section performed a thorough review of the police department, but also engaged in extensive outreach to understand the experience of diverse community members with the policies and practices of the police. At the conclusion of the investigation, a findings report was issued that disclosed the facts

¹² Kevin Rector, Federal Judge Approves Baltimore Consent Decree Denying Justice Department's Request for Delay, Baltimore Sun, April 17, 2017, <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-consent-decree-approved-20170407-story.html>

¹³ Final Report, President's Task Force on 21st Century Policing, May 2015, https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

Civil Rights Division Oversight Hearing
Testimony of Jonathan M. Smith
September 24, 2020

Page 5

that we found, applied those facts to the legal standard and introduced broad recommendations for reform. In this way, the entire community had a baseline to address the necessary changes in a department. The transparency of the investigation created credibility and set the stage for the hard project of reform. Community members could see, in some cases for the first time, the official acknowledgement of their experience. The Section then pursued a consent decree, or in some cases, an out-of-court reform agreement.

By contrast, despite repeated in-custody deaths of people of color under circumstances that suggest widespread systemic deficiencies and racial bias, this administration has opened no investigations and entered into no consent decrees. Not in Minneapolis, not in Louisville, not in Fort Worth, not in Rochester, not in Kenosha, nor any other city. To the contrary, the administration has worked to suppress and punish the legitimate First Amendment protected protests by those seeking race equity in policing.

As the Department's commitment to police reform came to a halt in January of 2017, and as leadership in the Department of Justice sent the message that civil rights in interactions with law enforcement no longer mattered, the national movement for police accountability took a blow. The Section and the Division are not and will never be the sole motivators of reform or the sole guarantors of civil rights, but the role of the Division is important. By making police accountability a priority, by issuing findings reports that publicly accounted for police misconduct, and by pursuing enforceable consent decrees, the Department, and the federal government, sent a message that the lives and experiences of everyone who encounter a police officer matter. The conduct of the present Department of Justice is having the opposite effect and the Attorney General and other political leadership have supported and encouraged practices that have increased systemic racism in law enforcement.

Prisons, Jails and Juvenile Detention

Cases under the CRIPA have been a core part of the Section's docket since the law was enacted in 1980. Regardless of administration, CRIPA has been actively applied to address unconstitutional conditions of confinement and address practices including excessive force and the unreasonable risk of violence, denial of medical or mental health care, or the excessive use of solitary confinement. As with policing, the Section's work on prison, jail, and juvenile detention conditions has been muted. There have been fewer investigations, findings letters, or consent decrees than in any other administration since CRIPA became law.

In the last three and a half years, the Section completed a comprehensive investigation of the Alabama State Prisons for Men and issued two findings letters.¹⁴ The Section also issued

¹⁴ Findings letter, April 2019 regarding general conditions, <https://www.justice.gov/crt/case-document/file/1149971/download>; findings letter regarding use of force, July 23, 2020, <https://www.justice.gov/crt/case-document/file/1297031/download>.

Civil Rights Division Oversight Hearing
 Testimony of Jonathan M. Smith
 September 24, 2020

Page 6

findings letters regarding three jails – Boyd County, Kentucky; Union, New Jersey; and Hampden Roads, Virginia – entered into one consent decree in Hampden Roads and continues to enforce existing consent decrees and reform agreements. No findings letters have been issued or consent decrees reached with regard to juvenile detention facilities. In the first four years of the last administration, at least twelve corrections or juvenile justice findings reports were issued and thirteen settlements reached.¹⁵ A disturbing contrast given the national focus on the impact of mass incarceration and the racialization of our prison system.

There are serious constitutional issues in America's prisons and jails that justify a significantly more robust docket, including sexual assault of women prisoners,¹⁶ excessive solitary confinement and the solitary confinement of prisoners with mental illness,¹⁷ cruel treatment of juveniles including physical and sexual abuse,¹⁸ denial of medical and mental health care,¹⁹ and illegally overlong detention.²⁰

The need for CRIPA enforcement actions has never been more apparent than in recent months. COVID-19 hit first and hardest people confined to institutions, including correctional facilities. More than 125,000 prisoners have become infected with COVID-19 and almost 1100 died.²¹ The infection rate in prison is more than five and a half times the rate of the general population and a prisoner is three times more likely to die of COVID-19 than a member of the general public.²²

The conditions in prisons, jails and detention facility have been the subject of scores of lawsuits brought by civil and prisoners' rights advocates.²³ In these cases, courts have been critical of the response by local and state officials to take the steps necessary to stop the spread of

¹⁵ <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

¹⁶ E.g., Alabama, https://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf; Kansas, https://www.justice.gov/crt/about/spl/documents/topeka_findings_9-6-12.pdf

¹⁷ E.g., Pennsylvania, https://www.justice.gov/crt/about/spl/documents/pdoc_finding_2-24-14.pdf

¹⁸ Cases listed, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

¹⁹ E.g., New Orleans, Louisiana, https://www.justice.gov/crt/about/spl/documents/opp_consentjudg_6-6-13.pdf; St. Tammany Parish, Louisiana, https://www.justice.gov/sites/default/files/crt/legacy/2012/07/16/tammany_findings_7-12-12.pdf

²⁰ E.g., Hinds County, Mississippi, https://www.justice.gov/crt/about/spl/documents/hinds_findings_5-21-15.pdf

²¹ A State by State Look at Coronavirus in Prison, Marshall Project, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

²² COVID-19 Cases and Deaths in Federal and State Prisons, Journal of the American Medical Association, July 8, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2768249>

²³ Burton Bentley, The Growing Litigation Battle Over COVID-19 in the Nation's Prisons and Jails, Law.com, August 25, 2020, <https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/>

Civil Rights Division Oversight Hearing
Testimony of Jonathan M. Smith
September 24, 2020

Page 7

the virus.²⁴ Nevertheless, infection rates amongst prisoners is increasing at a rate of approximately 5% per week.²⁵

The Section's absence regarding the crisis of COVID-19 in prisons and jails is palpable. At this moment, the Section should be opening investigation in those places where the virus has placed prisoners at greatest risk. CRIPA gives the Section unique capacity to act rapidly and address emerging issues. Unlike private litigants, the Section does not need to exhaust byzantine and complex administrative remedies, does not need to meet standing requirements, and has access to resources that private litigants lack.

Politicization of the Section's work

A hallmark of the Section's work was that it exercised its enforcement authority without the influence of politics. As a result, the Section undertook investigations and pursued them regardless to the partisan leadership of the jurisdiction under investigation. I am proud that not once during my tenure was the political affiliation of an elected official a consideration in any of the Section's cases, either in the Section or in the front office. As a result, we investigated police departments in Democratic cities like Newark, New Jersey when Cory Booker was Mayor and Republican strongholds like Maricopa County, Arizona and Sheriff Joe Arpaio.

As I discussed above, partisan politics has influenced the Department's response to the crisis in our nation's police departments. However, the abuse of power does not end there. In August, the Department targeted the states of New York, New Jersey, Pennsylvania, and Michigan with threatened CRIPA actions for their response to COVID-19 in nursing homes.²⁶ There is an appropriate use of CRIPA to address nursing home conditions, but this was not such an instance. The targeted states and the tactics used belie the seriousness of the Department to engage in an actual inquiry as opposed to an effort to influence the upcoming elections. Typically, information requests are made by the career attorneys, not by the political leadership through a press release. Moreover, while nursing home deaths have declined nation-wide, and dramatically declined in the northeast, Sunbelt states are seeing a dramatic spike – 78% of nursing home cases and 69% of nursing home deaths are in a Sunbelt state.²⁷ The states targeted

²⁴ COVID Update, Prison Legal News, <https://www.prisonlegalnews.org/covid-19/>

²⁵ State by State Look, *supra*.

²⁶ Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents, August 26, 2020. <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>

²⁷ Ginger Christ, Nursing home COVID-19 cases, deaths spike in Sun Belt states, Modern Health Care, Modern Health Care, August 17, 2020. <https://www.modernhealthcare.com/post-acute-care/nursing-home-covid-19-cases-deaths-spike-sun-belt-states>

Civil Rights Division Oversight Hearing
Testimony of Jonathan M. Smith
September 24, 2020

Page 8

were, in fact, not the places that pose the most serious concerns nor where the resources of the Department would have the biggest impact.

The politicization of enforcement decisions is corrosive to the Department's credibility and damaging to the morale of the career staff. The work of the Division is done largely by career lawyers, investigators, and paralegals who join the Department with dedication and idealism. The cynical abuse of enforcement actions for electoral political gain demeans and diminishes their hard work.

Conclusion

I was proud to serve in the Civil Rights Division and of our accomplishments across the country. I believe that we made a difference in the lives of thousands and, through our work, addressed critical drivers of systemic racial inequity. I am angered and saddened by the damage that is currently being done by the Attorney General and the political leadership of the Department to the integrity and reputation of the Division. This moment in history creates the opportunity to confront racial injustice and achieve change that will create greater equity. The Civil Rights Division is largely sitting on the sidelines.

Mr. COHEN. Thank you, Mr. Smith.

I have been advised that maybe my statement after Mr. Mabrouk's testimony that I think everybody on this committee regrets the damages done to your store and the inconvenience to your life and that it is not something that any of us approve of didn't go out. So I wanted to make that point clear.

We now go to a question period where we each have a chance to ask questions with the five-minute rule imposed upon us, and I will begin by recognize myself for five minutes.

I will start with Ms. Catherin Lhamon. Until May of this year, the Civil Rights Division under the Trump administration did not file, as I understand it, a single case enforcing Section 2 of the Voting Rights Act.

Can you explain this shortcoming, if you believe it is one, and is it—if it is such that do you believe, as some might claim, that there simply isn't much voter discrimination going on?

Ms. LHAMON. I think there is no question that there is substantial voter discrimination still taking place. That was a unanimous finding of the U.S. Commission on Civil Rights. And the failure to file litigation using a tool that Congress funds the department to use is astonishing to me and inexcusable.

I want to really concretize that by recognizing that the ACLU alone has filed more cases than the Department of Justice has to protect voting rights in this country. Likewise, the Lawyers Committee for Civil Rights has filed more cases itself than the United States Department of Justice has.

That nonprofits are bringing more litigation on behalf of American voters than the nation's litigator charged by Congress, funded by Congress, funded by taxpayers to do that job is jaw-dropping and inexcusable, and leaves voters profoundly unprotected.

Separate and apart from the number of cases brought, voting rights cases are among the most challenging cases to litigate, among the most expensive cases to litigate.

They take a long time. They require experts. They are enormously challenging to prosecute to completion, and to see the Department of Justice absent in this area when we know and we have documented all across the country that there are ongoing voting rights challenges for voters with disabilities, voters with language access issues, and for voters of color in this country, that we don't see the department active in litigating in that area is a crisis in the country.

Mr. COHEN. Thank you very much.

Ms. IFILL, communities of color have experienced years of police misconduct and they are distrustful of their police departments. We see it in Louisville and Minneapolis, et cetera. How can an outside investigation by the Civil Rights Division remedy this systemic misconduct and start to alleviate the distrust, and how would you rate the division's performance under the Trump administration in this regard?

Ms. IFILL. Well, the performance has been, frankly, abysmal. In the years [inaudible] Obama administration the department was taking a very active role in addressing police misconduct.

Communities responded to the presence of the attorney general, to the presence of lawyers for the Civil Rights Division in Baltimore, in Ferguson, and in other cities.

Members of the community regarded it as important that the federal government, that the Civil Rights Division at the Department of Justice was being attentive to these long-standing systemic issues that local communities have had with police departments.

The current Civil Rights Division not only has pulled out of pattern and practice investigations, which really is the most important tool to get at systemic discrimination in law enforcement, they have tried to frustrate the efforts to do those kinds of investigations in other fora.

You already heard that they really attempted to reverse themselves in the Baltimore case but were stopped from doing so by the—by the federal judge.

They also filed a statement of interest in Chicago when the state of Illinois filed its own pattern and practice investigation against the Chicago Police Department.

The Department of Justice submitted a statement of interest, essentially, suggesting that they should not enter into a consent decree. This is a case the department was not even part of, but they wanted to frustrate the efforts of the state of Illinois to do what the department has failed to do.

So this is actually quite serious, indeed, not only the absence of the Civil Rights Division in aggressively entering this space but also the effort to frustrate the attempts by others to try and address systemic unconstitutional policing.

The law enforcement misconduct statute was passed after the unrest following Rodney King's beating in Los Angeles, and that statute empowered the attorney general to do these investigations, and it, essentially, sits dormant.

So the attorney general, essentially, has made the decision and the Civil Rights Division has, essentially, abdicated its role under an authorized statute to do this work. It sits—it lies dormant, unused by the department because they have chosen not to do so.

Mr. COHEN. Thank you.

Ms. IFILL. And much of what we have seen today—

Mr. COHEN. Thank you, Ms. Ifill.

Ms. IFILL [continuing]. The frustration around the country is a reflection of that.

Thank you.

Mr. COHEN. Thank you, Ms. Ifill.

Mr. Sessions had said that bringing these type of pattern and practice investigations reduced officer morale and suggested they had the effect of increasing crime.

That seems analogous to their not appearing before our committee because we hurt their feelings once. Do any of you all believe—Mr. Smith, I guess, or Ms. Ifill—that we should not have pattern and practice investigations for concern that we might be reducing the officers' morale?

Ms. IFILL. Representative Cohen, I met with Attorney General Sessions early in his term and I shared with him the existing scholarship that actually demonstrated the contrary, and I shared with him the way in which we increased the morale of the police

department by increasing trust with the community and community trust is increased by ensuring that there is not unconstitutional policing.

I shared this with him directly. His view is unsubstantiated and simply untrue, and as we can see, I think things have deteriorated in this country around policing, largely, because of that decision by this department.

Mr. COHEN. Thank you very much.

I now yield to Mr. Johnson for questions.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman, and thank you for being here, Mr. Sasser. I just want to just make a comment at the outset that you and First Liberty Institute have just done extraordinary work over the years defending what we often refer to is our first freedom, religious liberty.

And I have often heard Kelly Shackelford, our good friend, who is the CEO and president of First Liberty Institute, he says when religious freedom is taken from a people, their political freedom soon follows, explaining the urgency and the importance of protecting that first freedom. And your organization has called religious freedom the foundational right that all others are built upon.

Elaborate on that sentiment for us. Why is it so important for not only public interest law firms but also the Department of Justice Civil Rights Division to be engaged in this battle?

Mr. SASSER. Well, I think Thomas Jefferson said it best, that religious institutions guard against state absolutism, and that whenever—any time a totalitarian regime takes over a people group the first thing it has to do is it has to crush the ability of the people group to have an allegiance that is higher than the state.

Any competition with the state has to be crushed. And so it is very, very important.

A lot of the people who support our work are actually immigrants from Eastern Europe who are not of any particular faith but they support our work because they saw, in their experience, that the very first freedom that is deprived of any people whenever a totalitarian regime takes over is religious liberty and that that is the guardian of all the other liberties, and that is what we really believe and we feel very strongly about.

Mr. JOHNSON of Louisiana. I really appreciate you highlighting today the protection of religious liberty being a point of emphasis for the Civil Rights Division or the Trump administration and, importantly, that the division has devoted its energy and resources to assisting all Americans equally.

I mean, your examples of the recent cases of Nashala Hearn and the Falun Gong and Islamic Association of Collin County, Texas, are helpful, compelling examples of how minority faiths have been protected with the help of the DOJ as well.

I know First Liberty does work in a lot of these areas. One of them I just wanted to highlight in the limited time we have. The work you guys have done recently representing religious institutions in lawsuits against state and local governments that have infringed upon their rights under the cover of the COVID-19 pandemic, one of those cases was a—involved a church in Greenville, Mississippi, the drive-in services. Could you elaborate a little bit more on that one, just as an example?

Mr. SASSER. Sure. In Greenville, Mississippi, the mayor there was concerned that the church was having a drive-in church service where the cars would all come and park six feet apart from each other, and the mayor, I assume, was concerned that the virus could penetrate the steel and the glass of the vehicles.

And so we brought a lawsuit and the Department of Justice also got involved in a sister lawsuit against the same mayor in order to bring an end to that discrimination that was going on, because you were allowed to drive your car to go pick up food or whatever else it may be but you weren't allowed to congregate in your vehicles for purposes of going to church.

Mr. JOHNSON of Louisiana. And the DOJ's involvement involves sometimes statements of interest, other tools. How do they help in a typical case like that?

Mr. SASSER. Well, usually the Department of Justice starts off with a statement of interest. They usually do a very thorough investigation and then sometimes they intervene.

Sometimes they file an amicus brief. When the Obama administration helped us, it was filing an amicus brief. We have seen a lot more intervention under the Trump administration.

Mr. JOHNSON of Louisiana. And you had done previous work under the Obama DOJ and, as you mentioned, you were around during the Bush DOJ. In your estimation, how is this Civil Rights Division doing on these issues and others that you have heard about today?

Mr. SASSER. Well, the—I think the best measure is really what is going on in Airmont, New York, with the Orthodox Jewish community suffering discrimination there. It was the first Bush administration that fought.

It was then the second Bush administration that fought, and now it is the Trump administration fighting again. You know, we appreciate the Department of Justice and their fight for the Jewish people.

Mr. JOHNSON of Louisiana. Very good.

Mr. MABROUK, I had a quick question for you. I just have limited time. But I really appreciate you sharing your story today with us and we are really sorry about what happened to you. I do believe everybody is.

Do you think city officials failed to adequately ensure your safety and prevent the looting of your store?

Mr. MABROUK. Absolutely, and that is why I spent the night at my store. Last night at the store [inaudible]

Mr. JOHNSON of Louisiana. Has the city responded to the looting of your store and the other damage in the downtown Columbus area? I mean, do you know if there have been prosecutions yet?

Mr. MABROUK. Zero.

Mr. JOHNSON of Louisiana. I know that you mentioned—I just have a second left—I know you mentioned that you had been a part of protests in Egypt back in the late 1990s.

But that was a different kind of protest, right? You guys didn't loot and destroy property. Why is that so important? What message do you have about that?

Mr. MABROUK. Well, I hope I don't get in trouble. [Laughter.]

Well, it is—I think we had a message that tried to [inaudible] on that, like, on day one but we had a message we are determined—we actually, you know, carried the chains to protect personal properties because it is—again, I really believe it is not material. It is not.

It is people's livelihood. So and it is—I mean, I am minority myself. I always say I am a minority within the minority. You guys all hear the accent. So if this is happening to protect me, then why is it destructing me? It is really frustrating.

Mr. JOHNSON of Louisiana. Thank you for being here and pursuing your American dream. I yield back. I am out of time.

Mr. COHEN. Thank you, sir.

I now recognize the chairman of the committee, Mr. Nadler, for five minutes.

Chairman NADLER. Thank you, Mr. Chairman.

Mr. Waldman, you note in your testimony that Attorney General Barr is actively fomenting distrust in our upcoming election and spreading false information about voter fraud. What are some of the ways in which the attorney general may actively seek to help President Trump gain improper advantages and what can we do to stop him?

Mr. WALDMAN. Well, so far, Mr. Chairman, that active involvement has in particular been the public statements that he has made, which are documented in some length in our testimony.

We are trying, as a nation, to do something important but hard, which is to vote in a critical election in the middle of a pandemic.

And, as we know, the president has responded to this by loudly spreading falsehoods about vote by mail and about the election system being rigged, and repeatedly the attorney general has, when asked or even when not asked, validated those misrepresentations.

So, first and foremost, his voice, rather than being a voice for the vote is a voice to undermine the vote. It is also the case that there is reason to worry as the election day itself approaches that this administration could try to engage a misconduct to stir the pot to undermine faith in the election or to bring law enforcement or other uniformed personnel into play in a way that is not allowed, is not appropriate.

The attorney general's willingness to step forward in Lafayette Square to organize a sort of motley assortment of law enforcement personnel to clear the square suggests that that is something we ought to worry about.

The most important thing, I would say, is that the Justice Department, rather than undermining confidence in the vote, should be out there helping to bolster confidence in the vote. Even if it were not—even if it were not repeating lies, it should be out there advancing those very core values.

Chairman NADLER. And what can we do to stop them?

Mr. WALDMAN. Well, a hearing like this can play a significant role. It is also worth noting that states have power here and sovereignty, and that if, for example, federal uniformed law enforcement is sent in to a city, the President has threatened to send them to, quote, "Democrat-run cities," under the pretext of protecting federal property, but in fact to deter people from voting or to do so in a discriminatory way, that is illegal.

The courts can be involved, and also states and cities have—and counties have a considerable role. We, certainly, hope that not—that is never the reality we need to deal with and, hopefully, people will understand that for all the scare talk from the White House, the worries that people have, this system can work, has many checks and balances, and we all hope that voters will be able to understand they can vote this year.

Chairman NADLER. Thank you very much.

Ms. Lhamon, according to recent press reports, the Commission on Civil Rights spent months working on a detailed report about threats to minority voting rights through the COVID-19 pandemic.

But Republican appointees to the commission voted the shelve the report and prevent it from ever seeing the light of day. Can you describe some of the enormous challenges facing Black, Latino, and other minority voters right now and the commission's recommendations for how to respond?

Ms. LHAMON. Well, unfortunately, Chair Nadler, I am unable to offer recommendations from the commission because the commission voted them down. So those are not available.

But we took in incredibly compelling bipartisan testimony about the challenges that voters of color, voters with disabilities, voters with language access needs face in this time to exercise their right to vote.

The very long lines, the need—and we received bipartisan interest in increasing access to mail-in votes so that people would be able to vote safely either at home or in person [inaudible] and a need for ensuring that poll workers are trained and available to assist voters who are present and have safety measures in place.

There was incredibly compelling testimony about the specific kinds of protections that should be in place in this time because of—

Chairman NADLER. Thank—thank you. Before my time expires, I want to ask Ms. McGowan, your testimony describes in detail the Trump administration's efforts to undermine the rights of gay, lesbian, bisexual, and transgender Americans.

In your view, what are some of the most indefensible positions the administration has taken and how has the Civil Rights Division played a role?

Ms. LHAMON. Thank you, Mr. Chairman.

Obviously, the fact that the Civil Rights Division played a role in trying to convince courts and, ultimately, the Supreme Court unsuccessfully, I may add, to basically write LGBT people out of the protections of our foundational workplace discrimination law, Title 7, was really one of the low watermarks of the division.

And I would note that even still to this day the employment litigation section of the Civil Rights Division does not have an updated website reflecting the fact that its mandate to root out sex discrimination includes sexual orientation and gender identity.

From the minute of the decision we have worked with allies here in Congress, both in the Senate and the House, urging Attorney General Barr and the entire federal government to demonstrate that it would follow the rule of law, follow the ruling of this decision, and the fact that they have not causes us deep, deep concern.

And, in fact, we have actually seen different agencies within the federal government act as though Bostock never happened. As you may know, the Department of Health and Human Services, just days after the Bostock decision, rolled out a regulation rolling back protections within the Affordable Care Act, specifically sex discrimination protections, advancing the view of sex discrimination advanced by the Department of Justice that had been resoundingly rejected by the Supreme Court.

Lambda Legal has been in court and, fortunately, we have been able to enjoy enforcement of that regulation. But that is an example of the lawlessness of this administration as a whole and the ways in which it has undermined not only the credibility of the Civil Rights Division but civil rights offices throughout the administration.

Chairman NADLER. Thank you very much.

Mr. COHEN. Thank you, Mr. Chairman.

I now recognize Judge Gohmert for five minutes of questioning.

Mr. GOHMERT. Thank you. I appreciate the witnesses being here.

With regard to the attorney general's response to the demand to be here, for those of us who were here, it was a bit shocking to have the attorney general of the United States asked questions and then being refused the opportunity to answer those questions.

It is one thing when an answer is nonresponsive, but we had occasions when the attorney general was providing response or trying to provide responsive answers and he was cut off, treated rudely, abused in completely inappropriate ways.

The attorney general also noticed those who showed a real hatred. Adversary positions to the attorney general were provided extra time as opposed to those who were interested in getting his answers. So it is not surprising to me to see the response, and I don't think in this case it was inappropriate.

We also had the classification of the DOJ not coming because their feelings were hurt. Hurt their feelings. Actually, that is unfair and inaccurate, and I hope we will at some point arrive at being more fair and accurate to witnesses that the current majority wishes to bring in here and make whipping people out of.

With regard to things deteriorating at the Department of Justice, I couldn't agree more. We saw that illustrated when the Department of Justice participated in Fast and Furious, and was complicit in an operation that got guns to some of the worst criminals in this hemisphere, and yet totally denied any opportunity for information that would have gotten to the bottom of how the DOJ helped play such an integral role in killing people—hundreds in Mexico, at least one of our own federal agents here.

So I totally agree. Hopefully, the Department of Justice will continue to come back from the damage that was done through those days.

With regard to Russian interference in the U.S. election, I am glad we agree on that. But to have Russia provide so-called witnesses and those witnesses provide information to people hired by the DNC, by the Hillary Clinton campaign, and have them totally fabricate stories about the candidate for president and then president, and put this country through three years of hell to get down

to the bottom of it that actually it was all fabricated and it likely did come from Russians is just abysmal as well.

With regard to Mr. Mabrouk, did the state and local government protect your property and your liberty?

[No response.]

Mr. GOHMERT. I am not hearing—

Mr. MABROUK. I did not see that.

Mr. GOHMERT. Okay. And when the state and local government does not protect a citizen's property or liberty, then the federal government does need to step in. And we have the Insurrection Act that allows the federal government to do that even without the governor's invitation.

Mr. Sasser, if a commission here in the United States is supposed to be devoted to protecting civil rights actually puts in writing that evangelical Christians, in its opinion, are the biggest hate group threat in America, is that commission really serving civil rights interests?

Mr. SASSER. Well, I sure hope that nobody has written that. Somebody has written that?

Mr. GOHMERT. Yes.

Mr. SASSER. Well—

Mr. GOHMERT. So that is why the question. I take it by your response you don't believe that does.

I yield back.

Mr. COHEN. Thank you, Mr. Gohmert.

I now recognize Mr. Raskin, who is here in his office, but he is virtual in terms of his appearance today.

Mr. Raskin, you are recognized for five minutes.

Mr. RASKIN. Mr. Cohen, thank you very much. Thanks for calling this hearing.

A week ago, FBI Director Wray warned the Homeland Security Committee that Vladimir Putin and Russian agents are, again, interfering in the U.S. presidential election in order to skew and influence the outcome of the election.

Mr. Waldman, what is it that the states should be doing to secure the election against cyber attack and what is it Congress can do, if anything at this point, other than make funds available as the House is trying to do through the HEROES act?

Mr. WALDMAN. Well, Congressman Raskin, you are right that states have a key role, and counties, and election officials, in our experience, of both parties are working hard to try to, in effect, harden their systems against the types of cyber attacks that began in 2016 and that could be well underway now.

One of the most important things they can do is to make sure there is resiliency so that if there is an attack on poll books or something else, or other problems at a polling place, that voters can vote and that votes can be counted. There could be a recount. There could be audits after the fact to see if there has been something inappropriate.

States can only do this with resources, and that is something where the federal government and Congress have a critical irreplaceable role to play in providing resources.

Over the past few years, the federal government has provided resources. They have been used by states. Earlier this year, as you

know, \$400 million was appropriated to help states run safe elections and including for security. But that is only one-tenth of the amount of funds needed to run this election this year.

The House did pass \$3.6 billion, but it hasn't been voted on in the Senate and it is tied up, as you know, in stimulus negotiations.

My one point here, we talk to election officials every day. It is not too late. Funds appropriated now will be used and useable. But it is critically important, I would suggest, that Congress and the president do so.

Mr. RASKIN. Let me follow up on this.

Yesterday, President Trump refused to commit himself to the peaceful transfer of power when he was asked by a reporter, and he said, "We are going to have to see what happens. You know that I have been complaining very strongly about the ballots and the ballots are a disaster. Get rid of the ballots and you will have a very peaceful—there won't be a transfer, frankly. There will be a continuation."

Now, in the face of that blatant violation of his oath of office to swear to uphold and defend the Constitution, what would a real attorney general be doing in terms of consulting with the president who takes this attitude about a democratic election in the United States of America?

Mr. WALDMAN. Well, it would be encouraging to hear law enforcement leaders from the federal government as well as other parts of our federal system make very clear that the peaceful transfer of power is one of the key aspects of having a republic.

I do think that an independent attorney general would also point out to any president who says the kinds of things about voting that this president says, that when you hear widespread—when you hear this president make unsubstantiated claims that voting by mail is rigged and is fraudulent, that is not really a charge.

That is a lie. Already one in four people in the United States vote by mail before this year. It has happened in states with minimal problem and with no, no, no evidence of widespread fraud or misconduct, and we need it this year to help so everybody could vote safely.

Mr. RASKIN. Thank you.

Ms. IFILL, the NAACP tried to get Texas placed under court supervision based on its continuing violations of the voting rights of African-American and Latino American citizens. The Civil Rights Division initially supported that effort but then changed course, did a U-turn under President Trump.

What explains that switch from supporting your lawsuit to opposing it?

Ms. IFILL. Well, it is an excellent question, Representative Raskin. We learned, as we [inaudible] oral argument in the Court of Appeals that they would [inaudible] our shared argument. Our successful argument in the Texas law had deliberately discriminated against African-American and Latino voters.

It is hard to say. It very much relates to the question that you just asked. So LDF is in active litigation on behalf of Black voters seeking to relax onerous absentee voter requirements because of the COVID-19 pandemic.

When the president said what he said yesterday about the ballots, he is talking to the people that I represent. He is talking to the African-American voters who are disproportionately vulnerable to COVID who we have encouraged to vote absentee because they need to be able to vote safely, and we are in that kind of active litigation that we would have thought the Civil Rights Division would have brought.

So what would an attorney general do? First of all, an attorney general would be bringing the litigation that LDF has been compelled to bring, but an attorney general would also be saying every vote should be counted.

The entire voting rights movement of the 1960s that was designed to ensure that Black people could finally, at long last, participate equally in the political process, was premised on the idea that we would be able to cast votes but that our votes would also count.

So it is shocking to hear the silence from the attorney general after the president's comments.

Mr. RASKIN. Thank you. And, Ms. McGowan—

Mr. COHEN. Thank you, Mr. Raskin. Your five minutes are up. I hope you will be around for a second round and I hope you will bring up the fact that African Americans are the most disproportionately hurt by the coronavirus, therefore, the most likely to want to use mail-in voting to protect their health and, therefore, likely to be the most discriminated against, once again. So I hope you will do that.

Mr. Cline, you are recognized for five minutes.

Mr. CLINE. Thank you, Mr. Chairman.

The Constitution is clear that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. And yet, during this pandemic some jurisdictions have discriminated against houses of worship.

In my home state of Virginia, this unequal treatment has been seen, and I brought this issue to the attention of the attorney general when he testified before the full committee back in July.

I am also pleased to see that the Civil Rights Division at DOJ has taken the issue seriously. Attorney General Barr's memorandum directing Assistant Attorney Eric Dreiband and Matthew Schneider, the U.S. Attorney for the Eastern District of Michigan to monitor and, if necessary, intervene in discrimination against religious institutions and believers is a welcome step toward ensuring that our rights are preserved.

Particularly thankful for the department's intervention in the case in Chincoteague, Virginia, and similarly I am glad to see that for now the governor of Virginia has agreed that for churches with fewer than 250 attendees the only remaining restriction is the executive order related to face coverings.

However, we should not have gotten to this point and our rights should have always been protected, and that is why I have co-sponsored legislation to prohibit states and units, local government that issue orders limiting gatherings to a certain number of people pursuant to an emergency declaration from discriminating in the enforcement of such order in the case of persons who are exercising a right protected under the First Amendment, and authorizes the

private right of action in U.S. District Court by a person who is harmed by a violation of this provision.

I want to ask Mr. Sasser—thank you for being here. I thank all our witnesses for participating. The Department of Justice Civil Rights Division has been active in responding to discrimination against houses of worship during COVID-19.

Are you aware of efforts undertaken by the Civil Rights Division to combat discrimination against religious institutions during the pandemic?

Mr. SASSER. Yes. I mean, they have been pretty active. They have sent several letters out. They have filed some statements of interest.

We actually just filed a case this week against the District of Columbia for their ban on church services, and that is going to get litigated, and perhaps we might have a decision on emergency relief coming in a week or so and that would—you know, obviously, we welcome the Department of Justice's participation if they so choose to participate in that.

Mr. CLINE. Has the Department of Justice supported any cases that your organization has taken on through statements of interest or other tools?

Mr. SASSER. Yes. I have highlighted some of them with the Islamic Association of Collin County, the issue in Airmont New York with the Orthodox Jewish community, and then a small rural church in Nebraska that ministers to a very large Native American population.

Mr. CLINE. Your organization—I believe the church in Chincoteague is represented by Liberty Counsel. But the—and that case was decided at the district court level but it is on appeal, to my understanding.

It sounds to me like there are several cases in other states that are—that are moving forward. Would you say that and would you say that is happening?

Mr. SASSER. Well, sure. There is—there is another wave of these types of cases that are challenging the restrictions on religious liberty during the COVID-19 situation that are going to make their way through the court system, and there will be another opportunity for the Supreme Court to provide some robust protection to the first freedom that is mentioned in the Bill of Rights.

Mr. CLINE. Thank you. Well, I appreciate your work and I appreciate you being here today.

Mr. Chairman, I yield back.

Mr. COHEN. Thank you, Mr. Cline.

Ms. Scanlon, you are recognized for four minutes and 60 seconds.

Ms. SCANLON. I appreciate your generosity, Mr. Chairman. Thank you.

Thank you to our witnesses being here. Listening to your testimonies I have certainly been reminded of the Civil Rights Division's critical and honorable role in our country's fight against discrimination, and it is sad and maybe even pathetic how far from that legacy the current division has fallen not because of the dedication and knowledge and commitment of the career civil servants but because of the administration's politicization of the Department of Justice.

You know, the Civil Rights Division is tasked with protecting individuals from discrimination on the basis of race, sex, disability, religion, and national origin.

But this—the department and DOJ, at large, during the Trump administration have, largely, failed to accomplish this task, even going back to undo the progress of previous administrations, and this was decades of bipartisan progress. It is really quite astonishing to see where we are with this.

Mr. Smith, your testimony touched on this politicization and you talk about how important it was during your tenure at the Civil Rights Division that decisions be made without any political consideration.

Why is it important that the Civil Rights Division enforce anti-discrimination laws without political bias and how has this administration changed that equation?

Mr. SMITH. Certainly. Thank you for the question.

You know, I was proud when I was in the Civil Rights Division that we went to where the problems were. We were able to go into communities where there was an identified issue, whether it be in policing with regard to what was happening inside a correction facility, psychiatric hospitals to enforce the Americans With Disabilities Act and the immigration mandate.

We went all across this country, and as I said earlier, we were often in cities where there was Democratic leadership and we were in places where there was Republican leadership, and that never played a role and that added to the credibility of our enforcement decisions.

And it was critical that when we went in and we conducted an investigation, we reached conclusions about the facts. We applied those facts to the law and we recommended a remedy.

In fact, those recommendations and those findings have credibility and that they were independent from the political process. In order—the project of overcoming the history of racial injustice in this country is a difficult one.

It is one that takes—it takes a tremendous amount of effort and it requires an independent Department of Justice that comes with credibility that communities can trust, that the jurisdictions trust, that the members of the very diverse communities that make up any jurisdiction can rely on. And so that independence is critical.

What we have seen with his administration is the targeting of the use of the enforcement to gain political advantage in the upcoming election and that has been just very, very disturbing to see.

And as you have pointed out, you know, the career staff in the Department of Justice does extraordinary work and to have that work undermined by political consideration is just very damaging both to their morale but also to the credibility of the work that they do.

Ms. SCANLON. Yeah, and it has just been so disturbing. As someone who worked in this field as a pro bono ally with the Department of Justice and many of the groups on this call, to see not only has there been no enforcement, no new cases brought, but to see the reversal of positions that were—you know, principled positions has just been so, so destructive, and to have—I think we had Act-

ing Attorney General Whitaker before us here, he had no idea whether any cases had been brought.

So it just, clearly, has not been a priority, which is so antithetical to the whole point of the Office of Civil Rights.

I wanted to take a minute with Mr. Waldman. The Census is a huge issue in our area. We have a lot of undercounted communities, both because of socioeconomic factors and fully 10 percent or more of my district is foreign born.

We saw reports just today indicating that there are probably a million people in the Philadelphia region who have not yet been counted and, surprisingly, that is equal to at least one or maybe more congressional seats.

So it is clear why this administration has interest in suppressing the Census. But how has the Civil Rights Division helped the Trump administration push xenophobic Census policies to exclude people like my constituents?

Mr. WALDMAN. Well, in a number of ways. As you may recall, the administration tried to add a question, unprecedented, to ask everybody, are you a citizen. And the rationale that was concocted by this was from the Civil Rights Division and it was supposedly so that it could enforce the Voting Rights Act.

Except as this hearing has heard, it doesn't enforce the Voting Rights Act. This was a pretext. And when the case went to the Supreme Court, in fact, the question was removed precisely because this purported rationale was—evaporated as soon as it came in contact with sunlight.

There are other things as well where the Justice Department is defending—the Justice Department institutionally is defending conduct and policies that would make it harder to count in the Census.

In particular, the Brennan Center and others are involved in litigating the abrupt early end of the Census that was deemed necessary—that was ordered by the administration, and the courts have said no, you need to take as much time as possible.

Again, there is a pandemic. We haven't lived through this in nearly a century. We have to make sure that everybody is counted so they can have their votes counted and be heard by our government.

Ms. SCANLON. Thank you. I see my time has expired. But I will be out this weekend in a Census caravan trying to do some of the work the administration is unwilling to do.

I yield back.

Mr. COHEN. Thank you.

Ms. Dean is recognized for five minutes.

Ms. DEAN. Did you skip Ms. Garcia?

Mr. COHEN. I don't go in order of who comes at times. I go in order of seniority. So I think you are next.

Ms. DEAN. I thank you, and I thank you, Ms. Garcia.

Mr. Waldman, in your testimony you discuss areas where the Department of Justice has abdicated its responsibility in protecting voting rights from oppressive restrictions in areas in which it acts in opposition to its duty.

I am from Pennsylvania. So I would like you to think about Pennsylvania. We are well in the news in terms of the legal fight surrounding our elections and our ballots. The state supreme court

rules last week that there will be a three-day extension for mail-in ballots to be counted as long as they are postmarked by 8:00 p.m. on November the 3rd, election night.

Previously, ballots were due when the polls close on election day, but the state's Democratic Party filed a lawsuit to push back that deadline.

Republicans have challenged this, arguing that, in effect, expanding mail-in voting would give Democrats an unfair edge in the election. We now have 203,000 Americans dead of COVID.

Of course, mail-in ballots are essential. We have a president saying, quote, "Get rid of these ballots," an extraordinarily transparent attempt to grab political power.

Ordinarily, could we expect the Department of Justice to act in cases like this one in Pennsylvania maybe by submitting an amicus brief or intervening? Could you describe what processes we should expect or should have expected?

Mr. WALDMAN. Well, Congresswoman, of course, if the president were a local official and were saying these things and taking these steps to make it harder for people to vote, that would be precisely the kind of thing a strong Civil Rights Division would take a look at.

You are absolutely right that all across the country, including especially in Pennsylvania there are so many issues relating to how ballots are counted, whether people will have their votes counted if they send them by election day, whether there are drop boxes that people can safely use to drop off ballots, and many other things, all related in new ways to the pandemic.

And there are litigants that are private litigants, that are political campaigns, who are pushing. In the case of the Pennsylvania matters you describe, the Trump campaign actually is pushing to make it harder for these ballots to be counted and in other cases voting rights groups are trying to make sure that states and counties give their citizens full ability to be heard.

The Justice Department and the Civil Rights Division has a long practice of filing amicus briefs, "friend of the court" briefs, to state, in effect, the interest of voting rights and the interest, therefore, of the federal government in protecting those voting rights, even if it is not bringing the case itself.

We note that this Civil Rights Division has pulled back dramatically from filing amicus briefs of that kind at a pace far less than either the Obama administration or the George W. Bush administration.

One would hope that this division would speak out in that way to make clear that the right to vote needs to be protected in new circumstances with new technologies, with new issues. But it is a core right for Americans.

Ms. DEAN. I want to ask you, and this is really just from constituents who text me, call me. They are fearful for their vote. They are in a panic now. Maybe I shouldn't have done with a mail-in ballot. Maybe I will walk in on election day. We know that if they do that they have got to bring their ballot so it can be spoiled or they are going to have to vote provisionally, further muddying and delaying the count.

What can you say to my constituents? My sister-in-law, who texted me at midnight last night, I am in a panic over the security of my vote, even though I try to tell them, with confidence, your mail-in ballot is secure.

What should we say, particularly in light of Pennsylvania being one of the—the keystone state yet again?

Mr. WALDMAN. It is an excellent question, and all who care about this election being free and fair and secure need to be careful in how we speak to the public.

What I would say to your constituents, first and foremost, is we all have a extra responsibility this year. Make sure you are registered. Make sure that if you can you can vote early.

Whatever you do, make it easier for election officials to handle the new wave of ballots coming in or the new wave of voters. I would say also that we who care a great deal about the challenges that are being erected or the challenges that exist need to be careful not to alarm voters unduly and—

Ms. DEAN. And if I—

Mr. WALDMAN. Go ahead.

Ms. DEAN. Exactly right. And just in the remaining seconds, I want to give a shout out to my counties, Montgomery and Berks Counties, who have done just that. They have invested in the security of our elections.

We are trying to get the word out that your ballot is secure, up against a president who says, “Get rid of these ballots.” Incredibly transparently corrupt.

Thank you.

Mr. WALDMAN. And I would say we can all speak out and have the backs of the local election officials of both parties who, all across the country, are doing their best to try to make this situation work well.

Mr. DEAN. Thank you, Mr. Waldman. I yield back.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you.

Representative Garcia is recognized for five minutes.

Ms. GARCIA. Thank you, Mr. Chairman, and thank you so much for this opportunity for this committee to shed light on the work and, yes, the failures of the Department of Justice Civil Rights Division. And thank you to all the witnesses who have come to visit with us today.

This hearing on this topic comes at a critical point in our country’s history as we near the 2020 elections. Following reports that the Civil Rights Division has virtually abdicated its responsibility to protect the rights of minority voters makes it even more critical.

Essentially, the Civil Rights Division has responsibility to uphold civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society.

Specifically, the division carries the responsibility of exercising its enforcement of voting rights and consent decrees with local police departments found to have engaged in a pattern or practice of violation of constitutional rights.

Months ago, I proudly joined my colleagues of this full committee in consideration of the George Floyd Justice in Policing Act.

To this day, this attorney general has so far refused to allow DOJ to open a pattern or practice investigation into systematic racial discrimination by the Minneapolis Police Department following the killing of George Floyd.

We need a real attorney general, someone who can really talk about the reality of what is going on on the streets and someone who can speak truth to law and order, and must rebuild the Civil Rights Division of the Department of Justice and help it reclaim its purpose of enforcing federal statutes prohibiting discrimination.

I want to start with Sherrilyn Ifill and Thomas Saenz representing the NAACP and MALDEF. I think—Ms. Ifill, again, thank you for being here. I know we have visited with you before. You talked a little bit about the Texas case in response to my colleague, Representative Raskin, and there is more cases in Texas where this attorney general has reversed course, reversed position.

Could you, for the record, and, you know, I know you have mentioned some and, Mr. Thomas Saenz, you too, you have mentioned some. But I think it is important for the public to hear what a difference having an attorney general, whether it is, like Mr. Raskin said, we don't have a real attorney general, but this attorney general has done so much damage.

Could you give us just some quick examples not only in Texas but across the country of where reversing course has hurt minority rights, voting rights, civil rights, et cetera?

And I will start with Ms. Ifill.

Ms. IFILL. Thank you. I will leave the Texas cases to my colleague, Mr. Saenz.

One area that we haven't talked about is education and, in particular, affirmative action. Every time affirmative action has gone—cases have gone to the Supreme Court over the last 40 years, the Supreme Court has upheld the constitutionality of the practice in the Bakke case, in the Gratz and Grutter cases, and in the Fisher cases, and in the Fisher cases the Department of Justice actually argued in support of affirmative action.

And yet, this year—this year and beginning last year, the Department of Justice has, essentially, switched side on affirmative action, filing a statement of interest in the case challenging affirmative action against Harvard last year and the brief in the court of appeals just recently, Mr. Dreiband himself sending a letter to Yale University threatening to sue Yale University for its affirmative action program, and now recently sending a threatening missive to Princeton University after Princeton University voluntarily chose to acknowledge its own history of discrimination.

This is yet another area, affirmative action, where the department has essentially switched its position and now actively works against affirmative action, once again, a core civil rights measure.

We combined that with voting. We combined that with the policing cases, and we see a Civil Rights Division that, essentially, has abandoned its core mission.

I am listening today to the conversations about religious discrimination, which is certainly part of the portfolio and docket.

But it is one part of the portfolio and docket. On race discrimination cases, this department has essentially stood on the opposite side of core civil rights positions.

And as I suggested earlier, in some cases, actually not just, you know, withdrawing but actually seeking actively to undermine civil rights protections in the area of race discrimination, a reminder again that the division was created at a moment when this country was fracturing around race discrimination, and here we are again all over this country, racism from the highest levels of government, explicit white supremacy, the DHS telling us that white supremacist violence is the number-one domestic terrorism threat.

And yet, silence from the Civil Rights Division as we see this violence unfold around the country. Really alarming and shocking, and time for a reversal.

Ms. GARCIA. Thank you. Mr. Chairman, could we allow Mr. Saenz to respond to my question?

Mr. COHEN. Yes.

Mr. SAENZ. Thank you, Congress member.

As I mentioned in my testimony, the Department of Justice changed its position on preclearance for the state of Texas following the lengthy redistricting litigation. It changed its position, as Ms. Ifill testified, in the voter ID litigation in Texas.

I want to emphasize with respect to redistricting that that change of position and not subjecting the state of Texas to preclearance it has its greatest cause for the state itself.

The fact is that preclearance is a much more efficient and effective means of quickly addressing flaws in redistricting.

Without preclearance in 2021, I expect we may end up in lengthy litigation lasted eight years plus, in this decade, lengthy litigation against the state of Texas that is, frankly, very costly for the state.

I would simply add, in the state of Texas, as you know, Congress member, a year ago the secretary of state attempted to remove a hundred thousand voters from the rolls based on faulty data, data that the secretary of state knew was faulty, from the Motor Vehicles Department, and this would have resulted in removing up to a hundred thousand naturalized voters from our voter rolls, and that would have had an impact in this election.

That is the kind of case that ordinarily one would expect the Civil Rights Division to step up and arrive at a very quick resolution with the state of Texas.

Ms. GARCIA. Thank you. I yield back.

Mr. COHEN. I would now like to recognize the honorable lady from Houston, Texas. Oh, I am sorry. I am sorry. Off camera. El Paso, Texas.

Representative Escobar for five minutes.

Ms. ESCOBAR. Thank you so much, Mr. Chairman, and many thanks to all of our panelists.

I would like to use my five minutes to focus on two areas of great concern to me. The first is the increase in hate crimes and the second is police brutality.

And as you all know, August 3rd of 2019, El Paso suffered one of the deadliest targeted attacks against Latinos in modern American history where a gunman drove over six hours—I am sorry, over 10 hours and 600 miles in order to kill people that he believed were immigrants, in order to kill Mexicans, but essentially to kill people with brown skin.

And I believe that that hate in his heart has been fueled and was fueled by the racism coming from the White House and racism that has been amplified by other leaders across our country.

And the fact of the matter is we are seeing hate crimes increasing tremendously and they have increased since 2016 since the president was installed in office.

Chair Lhamon, it is so wonderful to see you again and I want to thank you once again for joining me at a town hall where we marked that terrible anniversary about the shooting and where we came together to talk about what needs to—what more needs to be done to fight hate crimes in our country. And we discussed the commission's report entitled "In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes."

And the report, obviously, affirmed what we all know, which is that there has been this increase in hate crimes since the election.

If we had an attorney general interested in keeping our communities safe from hate crimes, what more could and should the Department of Justice be doing?

Ms. LHAMON. Thank you so much for that question, and thank you again for lifting up the critical importance of addressing hate in this time. I just want to recognize that the Department of Justice in fiscal year 2018 prosecuted 27 hate crimes allegations. That is a tiny fraction of the level of hate that we know to exist in the country.

So we, first, need more than rhetoric and more than baby steps, but actual action from the Department of Justice. In addition, the Department of Justice knows and has recognized that the data that it has is not sufficient and it does not require that the local departments around the country actually submit data to the Department of Justice and then make sure that it is accurate and transparent.

And so we need better transparency, we need—we need better data, and we need more fulsome commitment from the department actually to prosecute hate crimes.

Ms. ESCOBAR. Thank you so much, Chair Lhamon.

Ms. IFILL, we, obviously, have been just shocked and I had hoped that we had reached a tipping point in our country on police brutality and confronting what we need to do as a country to finally overcome institutionalized racism.

But we continue to see injustice and we continue to see civil unrest because of the desperation that exists in this country around racism and around injustice and lack of accountability.

We just saw it in the Breonna Taylor case and in what was revealed yesterday, and it feels as though our country is—it is hard for our country to come to grips with what we need to do.

But Congress passed the George Floyd Justice in Policing Act. I continue to urge our Senate colleagues to pass it. But along the same lines of what I asked Chair Lhamon, if we had an attorney general interested in addressing police abuses, what could the DOJ do? What tools do they have to help our country right now?

Ms. IFILL. Well, the attorney general has soft tools and hard tools. The hard tools are the actual statutory provisions that empower the attorney general to take action.

One of the most important is the Law Enforcement Misconduct Statute which authorizes the attorney general to conduct invest patterns and practice investigations of unconstitutional policing.

This is how you get at systemic discrimination in police departments. But we have heard this attorney general say he does not believe that there are systemic issues in police departments. He only believes that there are individual police officers who have engaged in misconduct.

So he has, essentially, set to the side a statute passed by this Congress, by the United States Congress, to authorize the attorney general to probe into this important area.

And then he has soft tools, which is what he says, and this attorney general and this head of the Civil Rights Division have not used those soft tools to address the issue of racism in policing and to be a—to stand with communities around seeking to ensure that those who carry weapons and have the license of the state to take life or doing so in a manner that is consistent with the Constitution.

Ms. ESCOBAR. Thank you very much, both of you.

I yield back, Mr. Chairman.

Mr. COHEN. Thank you, Ms. Escobar.

I now recognize the lady from Houston, Texas, where they not only sing but they dance. [Laughter.]

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and I can't thank you enough and the ranking member for the list of stellar witnesses.

I don't think we have had a gathering of this amount of compassion, talent, and genius on the question of civil rights in this committee for a very long time.

I want to, very quickly, indicate that this committee's responsibility is oversight, and to my friends on the other side of the aisle, I remember distinctly General Holder coming and not being able to even give a comment, a comma, or a period in his answers because there was this intense oversight.

Oversight is the duty of the United States Congress in the equal branches of government. So let me emphasize, pointedly, my concern. Black lives matter. Black women lives matter. And in the last two days, we have seen in particular a narrative given to a grand jury in Kentucky that brought about an altered position.

Questions of facts remain on the table, and the nation—mothers with strollers and grandmothers and young nonviolent protestors—are in the streets asking for justice.

So I am interested in a memo dated November 17th, 2018, issued by the attorney general, a directive which, among other things, limits the limited circumstances in which such a consent decree may be appropriate and the terms for consent decrees and settlement agreements.

So let me ask a first question to Mr. Smith, I think it is. I am going to ask you—Mr. Smith? Yeah, I see you moving.

Mr. SMITH. Yes. Hi, Congresswoman.

Ms. JACKSON LEE. I want to ask you the question. This seemingly skewed presentation to the grand jury—defective warrant, no clarification of whether they had a uniform—but the point is what could be the immediate response that the Justice Department, with

a functioning Civil Rights Division, could give relief to Breonna Taylor's mother about an additional investigation, working with the FBI?

Mr. SMITH. Certainly.

So there are a couple of things that could happen immediately. First, I [inaudible] we, in the last administration, opened up a pattern and practice civil investigation to determine whether there is a pattern or practice of the violation of the Constitution or federal law with regard to the law enforcement in Louisville.

We have seen in the—just in this incident significant indications that there are serious problems in that department that go much deeper than just what happened to Ms. Taylor, and it is a city that is ripe for a pattern and practice investigation.

The United States could also open up an investigation under the—its criminal laws that permit the prosecution for the willful violation of someone's civil rights.

Now, I must note that there are very few tools in the criminal toolkit for the Civil Rights Division—

Ms. JACKSON LEE. And I have two other questions to two other panelists.

Mr. SMITH. Certainly. And the third—I am so sorry.

And the third thing that it can do is to, through its grant making authority, it can make a tremendous difference in terms of forcing the obligation [inaudible] of its grants.

Ms. JACKSON LEE. So she can—there should be relief if we had a functioning Civil Rights Division of the DOJ.

Mr. SMITH. Correct.

Ms. JACKSON LEE. Let me ask you, Mr. Saenz.

Mr. Saenz, as you well know, in Texas we had a voter ID law in the state—on the district court level that was found unconstitutional.

Again, my time is very short. What is the impact of a Civil Rights Division that is not supporting voting rights?

Mr. Saenz.

Mr. SAENZ. It is tremendous cost. It is tremendous cost to the state of Texas. It is tremendous cost to those that have to litigate the cases in the absence of the Civil Rights Division, and it misses an opportunity to send an important message to others around the country about not pursuing similar measures.

Ms. JACKSON LEE. And as we go into a very tumultuous voting period, November 3rd, we need the protectors of the American people in the DOJ.

Ms. Ifill, I want to go back to that document dated 11/7/18 where it looks as if there are directions to not have consent decrees.

Can you provide me with the overall chaotic response or the chaotic actions that come about when you don't have a tool to correct policing misconduct?

And what I have known is that when you give them a roadmap they feel better, the community feels better, and they save lives. But here is a direct directive not to do that. Could you respond to that, please?

Unmute.

Ms. IFILL. That is correct, and that is consistent with then Attorney General Sessions' stated opposition to consent decrees at his confirmation hearing.

Consent decrees in policing actually improve policing not only for the community but for police officers themselves because it provides a framework in which police officers receive training.

They tend to receive greater funding to implement the provisions and the requirements of the consent decree. And as you point out, they receive a roadmap for constitutional policing.

So yes, this undermines actually improving policing itself and undermines the protection of the community.

Ms. JACKSON LEE. Thank you very much.

Mr. Chairman, I yield back my time.

Mr. COHEN. Thank you, Ms. Jackson Lee.

We will now have a second round, and first I would like to ask Ms. McGowan, you noted in your testimony that when you submitted your resignation to the Civil Rights Division it was the same day that Acting Attorney General Yates was fired for refusing to defend President Trump's Muslim ban.

Did you consider that an attack on religion by singling out Muslims for discrimination?

Ms. MCGOWAN. Mr. Chairman, the attacks of this president against the Muslim community are among the most horrifying legacies of this administration.

And I will tell you, it was a very, very difficult day for me to submit my resignation from what I was describing as a dream job, and I will say when I first learned that Attorney General—Acting Attorney General Yates had stood up to the president and said that the Department of Justice has a duty to do justice and enforce the Constitution and would not defend that ban, I had a moment of thinking that maybe I had jumped ship too soon.

I thought maybe the good folks on the inside would be there to serve as that firewall against what we feared might come from this administration. And then, as many of you all know, we all came back from commercial break, watching whatever program we might have been watching, and then we learned that she had been summarily fired.

And so to the extent that is, again, is a sign from day one of the lawlessness of this administration and the fact that anyone who would be standing up for civil rights was inevitably going to have an extraordinarily hard time and, in fact, actually would be forced to choose between whether or not they could continue to serve in their role or actually live up to the Constitution is why I left, why so many amazing people have left.

And I just want to make clear that the ramifications of what have happened, has been happening over these past three years, will have a legacy for many, many years to come. Civil rights lawyers at the Justice Department, even if we turn the corner and have new leadership, will be now handicapped trying to go into communities with any level of credibility, right.

It is not just the FBI that has been damaged. It is Civil Rights Division lawyers going into communities, and why should they be trusted?

The amount of energy that will need to be spent rehabilitating that credibility is effort that will be wasted when, in fact, it can and should be spent on reinforcing and rebuilding civil rights in this country.

Mr. COHEN. Thank you, Ms. McGowan.

Mr. Sasser, did your firm—group, public interest group, get involved with opposing the Muslim ban?

Mr. SASSER. No, we did not. We did not file any briefs have any clients in that matter.

Mr. COHEN. You didn't see that as a religious issue when every Muslim was not permitted to come to this country?

Mr. SASSER. We just didn't analyze it, and so I don't have any comment to share with you.

Mr. COHEN. Thank you, sir.

The—Ms. Ifill, do you see any reason why the Civil Rights Division should be involved with the unfortunate incident that happened to Mr. Mabrouk and others when they had their businesses damaged during riots in this country? Is that a Civil Rights Division claim or is that a—should that be the Criminal Division?

Ms. IFILL. Well, I think it is the Criminal Division except in this way, which is that, you know, the question today in Louisville is what are people supposed to think; what is the action that is going to be taken that is going to make changes in a department that has had problems over many, many years in the situation in which there are officers on the force, including the officer who was indicted yesterday, who, when he left the Lexington Police Department, his supervisor said he should never be hired again.

And yet, he was hired by Louisville. He has been accused of multiple incidents of sexual assault. This department has been having problems for many, many years, and if business leaders want their businesses to be protected and they want to ensure that the community is at peace then they too should want the Department of Justice to bring their resources in to conduct a pattern and practice investigation to find out what has been happening in the Louisville Metro Police Department and to, if necessary, bring suit and enter into a consent decree to create a roadmap so that there can be peace and a path forward for public safety in Louisville. Business leaders should want that, too.

Mr. COHEN. So, Ms. Ifill—Ms. Ifill, what you are saying, I guess, one of my colleagues on the other side said that when the city, like in Columbus, Ohio, can't come in and protect Mr. Mabrouk's property that the federal government should and, of course, the Republican government of the state didn't ask for the federal government.

What you are saying is when the rights of African Americans can't be protected by the locals, then the Civil Rights Division should come in with patterns and practices. Is that correct?

Ms. IFILL. That is correct, and that will help protect businesses as well because it will bring some order, some vision, and some roadmap for public safety to the community.

Mr. COHEN. I appreciate your responding. And I would just like to comment that we saw it at the Republican Convention when Mr. Pence recognized the lady whose brother had been killed in Oakland, California.

He was a Homeland—I think was a Homeland Security officer and he was killed during the riots that occurred afterwards.

They were unable to say as the members of this committee during the hearings when we had Mr. Barr before us and others—they can't say the word "Boogaloo." They could be waterboarded and they would not say the word "Boogaloo." And FBI Director Wray made clear in his testimony that most of the violence that the FBI sees as terrorism comes from the right wing, the right side, from groups like Boogaloo. Boogaloo. Waterboard. Won't talk. Won't talk.

I yield back.

Mr. Johnson.

Mr. JOHNSON of Louisiana. Sometimes I am not sure how to take the baton after this.

It is interesting how we see this from very different lenses. You know, I was just listening to you, Ms. McGowan, and you said the attacks of this administration against the Muslim community have been outrageous or something like that.

But, yet, we just heard this morning in the course of this hearing, Mr. Sasser himself gave us specific example here today just that his organization has been involved with the Department of Justice's Civil Rights Division where they have aggressively intervened to protect Muslims across the country, and many other minority faiths as well.

The facts just don't line up with so much of the rhetoric we are hearing, and the fact that the volume has been turned up on this partisan bickering is—I think it is destructive to our institutions, and the Department of Justice and the Civil Rights Division is one of the most important institutions we have.

I mean, the American people have to believe in the integrity of the system. And all of us have complaints. I mean, we had—our side had complaints during the Obama administration. It is never perfect.

But we are on our way to making a more perfect union. And I just want to say this in the defense of our attorney general because he has been maligned so maliciously here today, as he has been all this—since he took the office, you know.

When he was at his confirmation hearing he said, very clearly—this is his quote, I wrote it down—"The attorney general has a unique obligation. He holds in trust the fair and impartial administration of justice," unquote.

Many of us believe that he has done exactly that. He is a serious law enforcement officer with a sterling reputation. He didn't have to do this job. He had done it before in the past but he came do it because he believes in this country and he believes in the pursuit of justice.

And I think, from many people's perspective, he has done a fair job at that. He has administered justice impartially and I believe they are doing their best. He had to clean up some messes of the previous administration.

I mean, we all know about the Comey FBI and the special counsel investigation, all the flaws. I won't go down that rabbit trail.

But there was a lot to do when he came in, and as we know, since the pandemic we have had some of these mayors and governors who have failed pretty miserably.

The attorney general has had to protect federal property. He has had to restore order to cities by using federal resources to quell left wing extremist violence so that peaceful protestors may safely exercise their First Amendment rights.

That is his job. It is his duty. It is a hard one. It is controversial. But if he had not done it, we would have more of this massive property destruction, personal and private property all across the country, and I think that he ought to be applauded for taking a strong stand on that because if he didn't the safety of every single American is in jeopardy.

Let me ask a question of Mr. Sasser. You have been in this arena, litigation constitutional law cases for a long time, particularly in the realm of civil liberties and defending our first freedoms and all that.

What can Congress actually do to assist the protection of civil liberties instead of just merely pontificating and engaging in, you know, personal attacks on various DOJ officials?

Mr. SASSER. Well, I will tell you what I tell my law school students, which is that if you have a problem with civil rights enforcement, it is Congress's fault.

Congress has abandoned its post. The F 42 USC 1983, all you have to do is amend it to establish respondeat superior liability. Create vicarious liability for the government entities for the actions of the government employees.

You want to reform the police? Then you don't—then all you have to do is amend 1983 in order to make that reformation take place. You won't need custom and practice investigations because you won't need to establish custom and practice as an alternative route to liability because you will have respondeat superior liability, just like private companies have to do.

But for whatever reason, we have decided to take this position as a country that we are going to treat the government officials as if they are so incompetent and buffoons that they can't possibly—that the government entity can't possibly be held responsible for their actions and, thus, accountable to train them properly and to properly make sure that they are doing the right thing.

So what can Congress do? Instead of talking about why won't the executive branch do their job, Congress could do its job and amend 1983 and establish respondeat superior liability, and that will bring an end to a lot of problems.

Mr. JOHNSON of Louisiana. That is a great idea and if we had the political will to do some of that around here, if we could get a majority of members together to make actual change we probably could prevent a lot of the things that everyone is complaining about.

But I appreciate your expertise and what you brought to the table today. Again, I want to say to Mr. Mabrouk, thank you for your compelling testimony, and you bought a lot to the hearing today and we are grateful for that.

I am out of time. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Mr. Raskin, you are recognized.

Mr. RASKIN. Thank you very much, Mr. Chairman.

I am coming to Ms. McGowan, and I want to thank her for her excellent testimony. Let me start with a yes or no question, Ms. McGowan. Is there a general religious-free exercise exemption from public health orders that are handed down by a state or a county?

Ms. MCGOWAN. I am sorry, Congressman. Is there a general exemption for religious—

Mr. RASKIN. Yeah. Does the religious-free exercise clause exempt churches and synagogues and so on from public health orders that are handed down by states or counties?

Ms. MCGOWAN. No, to the extent that they are places where the public health is at issue, these are generally applicable laws.

Mr. RASKIN. Right. And did the Supreme Court on May 29th of this year in a case called South Bay Pentecostal Church v. Newsom reject precisely the argument that my dear colleague, Mr. Johnson, has been spending most of his time on today, which is that somehow churches have a special exemption from public health orders that are handed down because of COVID-19?

In that case, the court said that churches were being treated just like other institutions having public gatherings like lectures, concerts, movie showing, spectator sports, theatrical performances.

There are a lot of people who are participating in First Amendment activity like a political party gathering indoors or a political organization gathering indoors, and if there is a ban on assembling in, say, more than 50 people it applies to everybody whether it is secular or religious. Isn't that right?

Ms. MCGOWAN. That is right.

Mr. RASKIN. Well, why are we getting this continual barrage of complaints that somehow religious groups are being unfairly targeted in COVID-19 when in fact the Supreme Court has already rejected the argument that they are making?

Ms. MCGOWAN. Well, Congressman, it is, I think, unfortunately, part of a larger pattern where we see the use of religious liberty arguments as a sword, as a way to carve out coverage from generally applicable laws, and that has been a clearly established principle in this country for quite some time, that when you have generally applicable laws, even if there is some incidental burden those laws can and should be enforced.

Now, in this context, we see attempts being made to suggest that somehow religious groups are being targeted when I don't think that in most cases there is anything of factually back that up.

But, as we know, this has actually been a pattern that we have seen with respect to other laws as well where the government has been trying to advance compelling government interests whether it is protecting public health or whether it is about rooting out discrimination in places of public business and anytime that law is applied against religious entities, unfortunately, there is a pattern of suggesting that they have been targeted for unfavorable treatment when, in fact, what we are seeing is an attempt to create a different set of rules.

Mr. RASKIN. Yeah. And, in fact, didn't the Supreme Court in the 1960s in cases like Ollie's Barbecue and the Heart of Atlanta Motel precisely reject the argument that there is somehow a First Amendment free association or religious-free exercise right or free speech right to discriminate?

And that seems to be, really, the only civil rights agenda that seems to animate my friends, which is to take the religious-free exercise clause and claim that it provides an exemption from generally applicable universal laws, especially in the civil rights field.

Ms. MCGOWAN. You are absolutely right, and the Civil Rights Division has a long history of using laws like the Religious Land Use Act to ensure that religions are not being discriminated against.

But when I talk about sort of the misdirection of the resources of the Civil Rights Division, I am talking about this in particular, the way in which, and as Ms. Ifill and others have indicated, the overwhelming redirection of resources to this one particular issue, in many cases which often have the effect of gutting civil rights protections.

By suggesting that somehow the application of law is designed to advance this compelling government interest are somehow the most important work of the Civil Rights Division is certainly not consistent with the long history, and to the extent that it actually has very negative effects for civil rights it is a troubling way to see the Civil Rights Division dedicating the majority of its time.

Mr. RASKIN. Thank you.

Mr. Smith, let me turn to you because the—several of the witnesses have—including Ms. McGowan have referred to the Civil Rights Division as the crown jewel of the Department of Justice.

And, one, I wonder what you think of what has happened to the crown jewel under Donald Trump and Bill Barr, and two, will there be any way to recover the muscle memory, the focus, and the effectiveness of the Civil Rights Division in the future?

Mr. SMITH. So thank you. The crown jewel has experienced a tremendous amount of tarnish during this administration because, as I think every one of the witnesses has said, it is heartbreaking to watch this storied organization that plays such an important role not only in our government and our Department of Justice but in the nation's history of promoting equity and equality and equal opportunity. It is heartbreaking.

The answer is yes. It is going to take us—as Ms. McGowan said, it is going to take some real work to rebuild the department. But there have been a number of—there have been a large number of incredibly talented dedicated committed career staff who have stayed.

Under new leadership they can rebuild the docket of the department. But it will take—it will take a lot of work to rebuild that department by getting back into the communities that are most impacted by the policy decisions that create inequity and injustice, rebuild that trust that the department is real about the work that it is doing, and get back with the long complicated project of addressing the racial injustice that has been the hallmark of history of this country.

You know, when you think about policing and, you know, just to be very brief, when you think about policing, when we entered in consent decrees those were roadmaps for change in a police department that was to address a history of unaccountability and problems in the department that had developed over decades.

And these are not—consent decrees are not the kind of thing that are going to turn the corner in a minute. It takes years of hard

work implementing that roadmap to reform to bring about the kind of change that is necessary to address racial bias, excessive use of force, and the broad range of other accountability issues.

And it is going to take that same kind of time to rebuild the department's credibility in communities and to get back to that really important work.

Mr. RASKIN. Thank you. Mr. Chairman, I am out of time.

Mr. COHEN. Thank you, Mr. Raskin. Thank you, sir. I appreciate it.

Ms. Garcia, do you have any questions?

Ms. GARCIA. I do. Thank you.

I want to start with Ms. Lhamon, and I just wanted to clarify a point that Representative Gohmert made earlier in his first round of questions. I am not sure if he is coming back.

He seemed to implicitly criticize the Civil Rights Commission with his question and probably false assertion that the Civil Rights Commission has designated evangelical Christians—evangelical Christians as a hate group.

Could you respond to that and correct the record? Because I don't recall that you all did that but thought I would give you the opportunity to clear that up.

Ms. LHAMON. Thank you very much for the opportunity. It is absolutely not the position of the U.S. Commission on Civil Rights, and I want to be very clear that the commission is made up of eight independent commissioners, each of whom is given an opportunity to make a statement at the end of reports that we issue, and in a report issued before my tenure on the commission the chair I replaced made a comment that was not quite the comment that Mr. Gohmert suggested but that has been inflammatory and has raised many people's hackles.

It was not then the position of the U.S. Commission on Civil Rights and it is not now the position of the U.S. Commission on Civil Rights, which is wildly protective of religious freedom and wildly protective of religion, among all other civil rights.

Ms. GARCIA. So you have not designated them a hate group. Is there any other religious group that you may have done and there may be some confusion?

Ms. LHAMON. The U.S. Commission on Civil Rights is not in a position of designating any group as a hate group. So we have not designated evangelical Christians or anyone else as a hate group, and it is not the position of the U.S. Commission on Civil Rights that any religion or any faith is a hate group.

Ms. GARCIA. All right. Thank you. I just wanted to clarify the record. Now I have a question for Mr. Lhamon.

Mr. Lhamon, you were—your testimony earlier in a response to a question was talking about the enforcement of or potential scenario where law enforcement may be sent to polling places.

And I know that in some of the states where some law enforcement was sent it was because—or in the pretense, if you will, that it was to protect federal property.

So if there is no polling place that is on federal property, does it follow logically that the president cannot send forces to polling places? Not ICE, not any local law enforcement or any of these groups that he is putting together? [Pause.]

Mr. Waldman.

Mr. WALDMAN. Oh, I didn't realize that was for me.

Yes, federal forces can be used in limited circumstances to protect federal property. But when they stray beyond that—in fact, when they go to polling places, that raises federal legal issues. It raises—

Ms. GARCIA. Right. My question was that if the polling places are not on federal property because, frankly, I have been voting since I could and I don't recall ever seeing a polling place at a federal property. So the question is—

Mr. WALDMAN. That is right.

Ms. GARCIA [continuing]. Would they have any right to send any law enforcement or any of these—you know, ICE officers are being put on a plane and come here to D.C. to join in the fight against the protestors. Would they have any authority to do that?

Mr. WALDMAN. No. Their authority is very limited and must be guarded, especially in the context of an election where there is a long history of law enforcement being used to intimidate voters, especially voters of color.

Ms. GARCIA. Right. So what is the best way that we can work with local officials to ensure that the rights of all voters coming to a polling place, because under COVID there will be long lines if they are in person.

There will—at least in our county there is—you know, major voting centers to ensure that local officials get the support that they need to ensure the voting rights of all the people that come on election day?

Mr. WALDMAN. Well, first of all, you are right that the principle responsibility here is a responsibility for local officials.

The Brennan Center for Justice and our website and numerous other voting rights and democracy organizations have ample material making clear that it is currently illegal, flatly illegal, to intimidate voters.

It is flatly illegal to keep other people from exercising their right to vote. Local officials have authority to enforce those laws.

In addition, the courts have a role. We know that there are both private groups and political entities that, in the guise of ballot security, are basically vigilantes. Voters—again, this goes back to an earlier point. There is every reason to expect that voters will be able to vote without this kind of interference.

Ms. GARCIA. Right.

Mr. WALDMAN. The law is quite clear that people cannot—

Ms. GARCIA. If I could interrupt you, because my time is—my time is up.

I think the problem we have locally is that in—before this administration when we had issues like that, we would call the Justice Department. Now we are afraid to call the Justice Department.

So, really, my question was what can we do more locally to ensure that we can take care of things locally because, quite honestly, we fear calling the Justice Department. We are not sure what they will or will not do.

Mr. WALDMAN. Well, and we wouldn't really want to have uniformed federal personnel in any case. But this is under an ideal

world the kind of misconduct that monitors would be able to look at from the Justice Department.

This year, a lot of us are all going to have to step up in different and new ways to make sure the election is run right.

Ms. GARCIA. All right. Thank you. I yield back, Mr. Chairman.

Mr. COHEN. Thank you, Ms. Garcia.

Ms. Jackson Lee is our last questioner, for five minutes. Thank you.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

Mr. Waldman, I hope by your statement that we can make this public knowledge and demand the Justice Department to do its job, which is, as my colleague has said, we have always—from Texas, we are always in the midst of, unfortunately, voter suppression every election.

Intimidation at the polls by poll watchers in Latinx and African-American polling. I remember clearly in the year 2000 the intimidation, using a database from Texas, of turning away people who had done their time but they were ex-felons and they were able to vote or they were—I am sorry, they were claimed to be ex-felons and they were not. They were African-American men.

So I hope that we are making that statement.

Let me go to Mr. Saenz, and I am so sorry, Mr. Saenz. I always say this but I know you will be pointed. What should the Voting Rights Section top priorities be right now as we move into an election where the president of the United States said, “Throw away the ballots?”

Mr. Saenz.

Mr. SAENZ. They should be bolstering our competence in the use of vote by mail and making sure that it is widely available because of the special circumstances we face with the pandemic.

You know in the state of Texas the absence of no excuse remote voting is a barrier, particularly for Black and Latino communities and that is somewhere where the division could be a real leader in bolstering, understanding that that is a legitimate means of voting. It is a nonfraudulent genuine means of voting and should be widely available.

Ms. JACKSON LEE. So what you are saying is contrary to the person holding the presidency, they should boldly adhere to their dicta or their—excuse me, their directions or their mission and tell the American people through outreach that that is a secure way of voting, that it will be protected and that they can vote that way, along with early vote?

Mr. SAENZ. Absolutely. That is the role of the division. It is to make clear that access to the ballot is the right of every eligible citizen.

Ms. JACKSON LEE. Not to be dominated by words spoken from a podium about throwing out the ballots.

Mr. SAENZ. Exactly, particularly when that person has himself remote voted on numerous occasions in the past. That is Exhibit 1 for what the division could be using to create confidence in giving access to remote voting to all voters.

Ms. JACKSON LEE. Thank you.

I don't want to create chaos, but—Mr. Waldman, and I want to ask Ms. Ifill a question. So let me—I don't want to create chaos. I want to create security and safety.

But we have been pummeled by chaotic messages from the White House regarding the transfer of power, the safe transfer of power. I always think of civil rights because I always, during local elections, get empowered by being able to say, I am going to call the DOJ in terms of the Civil Rights Division.

Just give me—I know the Brennan—the Center for Justice has an array of perspectives on this threat not to commit to the democratic constitutional protocols of transfer of power.

Mr. WALDMAN. Well, Congresswoman, as you know, it is extraordinary in American history for a candidate for president, let alone the president of the United States, to say something like that, to so openly and flagrantly scorn our democratic norms. It is vital for leaders of both parties to speak up and make clear that we believe in the rule of law and this election will be run accordingly.

I will note, and I think this is, again, important in us all keeping our eye on the ball, it is really not up to President Trump or any candidate whether he accepts the results or not.

That is up to our system. Lots of candidates lose and they don't like it. But it is really not up to them whether they accept the results.

We need to make sure that the law is followed, that states follow their laws, that Congress, should it need to become involved, follows the rules, and whether President Trump feels right or not is, you know, not as—not a first order [inaudible].

Ms. JACKSON LEE. Thank you.

Let me, quickly, to Ms. Ifill and I do want to get Ms. McGowan, very quickly.

The lack of the respectful comment about nonviolent protests and dealing with bringing down the temperature and not acknowledging that white provocateurs, white nationalists, and others are involved in promoting violence in these peaceful protests, how damaging is that and how much schism does that create in the efforts that all of us are making to reimagine policing and to work on police community relations in your—in the civil rights perspective?

Ms. Ifill.

Ms. IFILL. It is damaging and it is dangerous. We—the LDF has appealed first to Attorney General Sessions and then to Attorney General Barr to really investigate white supremacist violence.

We most recently asked for an investigation of what appeared to be a kind of concerted decision by white supremacists to drive cars through protestors, and we just saw this happen again last night. And yet the rhetoric we hear from the attorney general is always about Antifa and never about what DHS says is the number-one threat.

It makes it very difficult for us to move forward with reimaging public safety and moving forward with the kinds of reforms that many of us have advocated and which the department previously advocated but have abandoned under this administration.

Ms. JACKSON LEE. And the FBI said it.

Ms. McGowan, let me thank you for your courage for stepping down. I know what it is like to have a job—not a job, a profession.

So can you—I think you will be the last voice before the chairman—can you characterize what you have seen, as now what I see, is a total disarray and the skewing of the duties of the various divisions in the Department of Justice? And we are focused on civil rights. We have focused on the LGBTQ community.

But the complete flipping of what comfort Americans are supposed to have by calling their DOJ or getting their local official to call the Civil Rights Division to bring order to their life when they have been deprived of their civil rights.

Ms. MCGOWAN. Thank you so much for that question, and I said to my colleagues as I was leaving the Justice Department that they should stand strong because there were people in the country counting on them.

And when we talk about sort of low watermarks for the Civil Rights Division, sort of these dark moments, you know, I think about the rescission of the guidance from the Department of Justice Civil Rights Division and the Department of Education to protect transgender children and the fear that their parents now experience, because they used to know that the Department of Justice was on their side. And now, not only is it not on their side but it is attacking their children in schools.

And so the fact that we have now found ourselves in a situation where people have to question whether or not the Department of Justice is a place that will vindicate civil rights, that will be a place of justice, is going to be the most important work that we need to do when we finally turn this page in our history.

Ms. JACKSON LEE. I thank you so very much for closing remark.

Mr. Chairman, I yield back. Thank you for your courtesy.

Mr. COHEN. You are very welcome.

We are about to close. I do want to clear up a matter of in correction. We would like to make the record clear, even though the truth is at trial in these last—What I said in my introduction was that we are still—the excuse that the department provided was about as mature and sophisticated as saying the dog ate my homework.

So Mr. Jordan was incorrect and I was correct in saying I did not say Bill Barr was immature. If I would have, it would have been one of the nicer things I would have said about him. And I didn't say that.

Ms. JACKSON LEE. Mr. Chairman, I have a—sorry.

Mr. Chairman, I have a submission before you close the hearing. Thank you.

Mr. COHEN. You are recognized.

Ms. JACKSON LEE. Mr. Chairman, I would like to submit into the record the attorney general memorandum Heads of Civil Litigation Components, United States Attorneys, principles and procedures for civil consent decrees and settlement agreements with state and local governments. That is where he diminished that authority, and it is dated November 7th, 2018.

I ask unanimous consent.

Mr. COHEN. Without objection, so done.

[The information follows:]

MS. JACKSON LEE FOR THE OFFICIAL RECORD



Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL *[Signature]* 11/7/10

SUBJECT: Principles and Procedures for Civil Consent Decrees and Settlement
Agreements with State and Local Governmental Entities

I. INTRODUCTION

In enforcing federal law, the Department of Justice ("Department") sometimes brings lawsuits against state and local governmental entities.¹ State governments are sovereigns with special and protected roles under our constitutional order. Accordingly, the Department must ensure that its practices in such cases are in the interests of justice, transparent, and consistent with the impartial rule of law and fundamental constitutional principles, including federalism and democratic control and accountability.

This memorandum's purpose is to provide direction to all civil litigating components and United States Attorneys' Offices ("USAO") concerning several important issues arising when a civil action against a state or local governmental entity is resolved by consent decree or settlement agreement.² In particular, it requires that the Department provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; requires special caution before using a consent decree to resolve disputes with state or local governmental entities; provides guidance on the limited circumstances in which such a consent decree may be appropriate; limits the terms for consent decrees and settlement agreements with state and local governmental entities, including terms requiring the use of monitors; and amends the process for the approval of these mechanisms in cases in which they are permissible.

¹ As used in this memorandum, the term "state and local governmental entities" also includes territorial and tribal entities, as federal consent decrees and settlements with such entities raise many of the same concerns regarding democratic autonomy and accountability.

² As used in this memorandum, the term "consent decree" means a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt. The term "settlement agreement" means an out-of-court resolution that requires performance by the defendant, including a memorandum of agreement ("MOA") or memorandum of understanding ("MOU"), enforcement of which requires filing a lawsuit for breach of contract.

This memorandum provides a general statement of principles. The Office of the Associate Attorney General is available for consultation on its application in specific cases.³

II. INVESTIGATIONS AND REPORTS OF ALLEGATIONS

Pursuant to federal statutes and regulations, the Department may investigate allegations of legal violations by state and local governmental entities in anticipation of potential litigation. In conducting these investigations, Department personnel must afford the subject governmental entity the respect and comity deserving of a separate sovereign, and shall afford the entity an opportunity to respond to the material allegations against it. To the extent such an investigation results in a notice, letter, report, or similar document, that document must make clear that the Department's conclusions are allegations only and have not been proven in a court of law. For consent decrees and settlement agreements subject to the notice and approval requirements set forth in Part III of this policy, the required justification memorandum must explain how the defendant state or local governmental entity was afforded an opportunity to respond.

III. CONSENT DECREES AND SETTLEMENTS IN CIVIL LITIGATION AGAINST STATE AND LOCAL GOVERNMENTAL ENTITIES

A. Constitutional and Policy Considerations

While consent decrees are sometimes necessary and appropriate to secure compliance with federal law, federal court decrees that impose wide-ranging and long-term obligations on, or require ongoing judicial supervision of, state or local governments are extraordinary remedies that "raise sensitive federalism concerns." *Horne v. Flores*, 557 U.S. 433, 448 (2009). Such concerns are most acute when a federal judge, directly or through a court-appointed monitor, effectively superintends the ongoing operations of the governmental entity subject to the decree. This supervision can deprive the elected representatives of the people of the affected jurisdiction of control of their government. Consent decrees can also have significant ramifications for state or local budget priorities, effectively taking these decisions, and accountability for them, away from the people's elected representatives. *See id.* ("When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."). In addition, consent decrees that are "not limited to reasonable and necessary implementations of federal law" may "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).

³ This memorandum provides only internal Department of Justice policy directed at Department components and employees. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. All prior Department memoranda or policies are superseded to the extent they are inconsistent with this memorandum. To the extent portions of this memorandum require amendments to Department regulations governing settlement authority, those portions do not apply until such time as the Attorney General amends the regulations.

In addition to these constitutional concerns, consent decrees involving state and local governmental entities can raise policy concerns. First, a consent decree can reduce long-term flexibility in how the defendant remedies the legal violation, especially if the passage of time has resulted in changed circumstances. Second, if terms are not carefully and appropriately crafted, a consent decree can subject defendants to ongoing judicial supervision long after it is no longer necessary to ensure compliance with the decree's terms—in some cases even after the Department believes the purposes of the decree have been achieved. Third, in some circumstances, a consent decree can significantly increase litigation costs for all parties, including the taxpayers who fund the Department, the federal courts, and state and local governments.

B. Notice and Approval Requirements for Consent Decrees with State and Local Governmental Entities

In light of the foregoing concerns, the Department should exercise special caution before entering into a consent decree with a state or local governmental entity. While such consent decrees can be appropriate settlement vehicles in limited circumstances as discussed further below, they should be employed carefully and only after review and approval of senior leadership of the Department, as described below.⁴

Absent an applicable exception,⁵ the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified of any decision by a litigating component or USAO to initiate negotiations with a state or local governmental entity for a consent decree that would (1) place a court in a long-term position of monitoring compliance by a state or local governmental entity; (2) create long-term structural or programmatic obligations, or long-term, indeterminate financial obligations, for a state or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. As used herein, "long-term" means that the obligations, on their face or in practice, are reasonably likely to take twenty-four months or longer to satisfy. The

⁴ By way of comparison, the Department's regulations have long required that monetary settlements exceeding certain thresholds be approved at the highest leadership levels of the Department. See 28 C.F.R. §§ 0.160, 0.161. For the constitutional and policy reasons discussed above, a consent decree with a state or local governmental entity can be as significant as, if not more significant than, a high-dollar settlement. Such decrees should likewise receive approval by senior Department leadership.

⁵ The notification and approval requirements set forth herein do not apply where (1) use of a consent decree is required by statute or regulation or (2) the consent decree is limited to the payment of a sum certain of money or performance of a specific environmental removal action (as is often the case, for example, when the defendant is liable as a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, or is liable as a responsible party for reimbursement of government removal costs or natural resource damages under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*). As noted above, Department regulations already address approval requirements for monetary settlements exceeding certain dollar thresholds.

notification should include a description of the alleged violations and an explanation of why the litigating component or USAO believes that resolution of the claims in the case through negotiation of a consent decree is necessary and appropriate based on the factors listed below and any other relevant factors.

Before the final consent decree is agreed to by the Department or submitted to the court for entry, it must be approved by the U.S. Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter of the consent decree and by the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department. In seeking the required approvals, the case team must draft a justification memorandum attaching the draft consent decree and explaining the reasons for the request and why a consent decree is necessary and consistent with the principles set forth herein. The justification memorandum should set forth the factual and legal basis for concluding that the defendant has violated federal law, a summary of the defendant's anticipated defenses, and an explanation of how the defendant was afforded an opportunity to respond to the material allegations against it. It should also evaluate the estimated costs of compliance with the consent decree and explain why the consent decree's benefits justify those costs. Any significant modifications to the material terms of a consent decree covered by this policy must be approved in the same manner.

Entering a consent decree with a state or local governmental entity may be appropriate if one or more of the following factors is present:

1. The defendant has an established history of recalcitrance or is known to be unlikely to perform because, for example, the defendant has violated other related administrative orders, judicial orders, settlement agreements, or consent decrees.
2. The defendant has unlawfully attempted to obstruct the investigation by, for example, engaging in spoliation.
3. The defendant has engaged in a pattern or practice of deprivations of rights or other violations of federal law, and other remedies have proven ineffective, such that ensuring compliance without the ongoing supervision of a court is unrealistic.
4. A consent decree is necessary to secure statutory protection or relief for the defendant, such as statutory protection against challenges and claims by third parties or statutory relief that preempts state law.

Neither the presence nor absence of any one of these factors, nor any particular combination thereof, will guarantee approval of a consent decree. The determination will be made based on analysis of the law and facts applicable in each case.

C. Substantive Requirements for Consent Decrees with State and Local Governmental Entities

For cases in which a consent decree is appropriate, the consent decree must adhere to the following requirements. Any exceptions to these requirements must be approved along with the proposed consent decree as set forth in the preceding section, and an explanation providing the justification for such an exception must be provided in the justification memorandum.

1. The duration of the consent decree must be specified in the decree and must be no longer than necessary to achieve an effective and durable remedy. Absent a compelling justification, such as where state or local governments have sought extended compliance schedules for significant capital investments, the obligations imposed by the decree should, if feasible, generally last for no more than three years.
2. The consent decree must include specific and measurable actions that trigger the decree's termination. In addition, the consent decree must include a "sunset" provision providing that, regardless of the decree's specific requirements, the decree terminates upon a showing by the defendant that it has come into durable compliance with the federal law that gave rise to the decree. The consent decree must also provide for partial termination when the state or local government can demonstrate durable compliance with particular provisions of the consent decree.
3. The consent decree must require the parties to return to court at appropriate intervals to report on compliance or noncompliance.
4. The provisions of the consent decree must be narrowly tailored to remedy the injury caused by the alleged legal violation.
5. The consent decree must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.
6. A consent decree involving federal control of a state or local governmental institution should be limited in scope and must be structured to ensure that responsibility for discharging the duties of the institution is returned to the relevant officials as soon as the injuries caused by the legal violations alleged have been remedied.

C. Requirements for Settlement Agreements with State and Local Governmental Entities

Many of the concerns discussed above apply not only to court-enforceable consent decrees, but also to settlement agreements that create long-term obligations for state and local governmental entities. When entering into such settlements, the Department should be sensitive to these concerns and seek to avoid or minimize interference with democratic control.

The approval of the U.S. Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter is required for any settlement agreement that would (1) place the Department or another federal agency in a long-term position of monitoring compliance by a state or local governmental entity; (2) create long-term structural or programmatic obligations, or long-term, indeterminate financial obligations, for a state or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. The Office of the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified and consulted before any such agreement is finalized. For significant modifications to the material terms of any such agreement, the same process must be followed.

The terms of such settlement agreements must adhere to the same substantive requirements set forth above for consent decrees, except that the required periodic assessment of compliance or noncompliance may be handled by consultation of the parties without involving a court.

IV. USE OF MONITORS FOR STATE AND LOCAL GOVERNMENTAL ENTITIES

A. Constitutional and Policy Considerations

In resolving civil suits against state and local governmental entities—whether through a settlement agreement or by consent decree—the federal government has often required the use of a monitor. Unconstrained use of a monitor may, in some cases, effectively turn over partial control of the state or local governmental entity to the monitor, and therefore may raise or exacerbate many of the same constitutional and policy concerns raised by the use of a consent decree.

Monitors should operate with sufficient accountability and oversight, and should adhere to a code of ethics so that conflicts of interest—including a financial interest in prolonging the duration or expanding the scope of the monitorship—are avoided.

Just as it would be extraordinary for a federal agency to consent to the use of a monitor to oversee its operations or policies, in most cases there is little reason to expect or require a state or local government, equally a democratically accountable entity, to do so.

B. Limits on Use of Monitors for State and Local Governmental Entities

In most cases, the Department should take direct responsibility for ensuring a defendant's compliance with the terms of a settlement agreement rather than delegating that responsibility to a monitor. If, in light of the circumstances of a given case, it is prohibitively difficult for the Department or its client agency to directly oversee compliance, a monitor may be considered.⁶

⁶ Inadequate Department resources, standing alone, will usually not constitute a circumstance that justifies the use of a monitor. If a settlement agreement or consent decree is so complicated or long-term that Department officials cannot effectively monitor compliance, that may be an

In light of the monitor's role in overseeing compliance with a settlement that the Department believes is necessary to remedy a legal violation and is otherwise in the interests of justice, good government principles require that the Department structure agreements to ensure that monitors have appropriate incentives to work efficiently and effectively to bring the defendant into compliance with the terms of the settlement agreement or consent decree and to ensure that monitors act in the interests of justice and not in their own interest.

Before provision is made for a monitor as part of a civil settlement or consent decree with a state or local governmental entity, the relevant component head or U.S. Attorney must secure permission from the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department. For cases in which a monitor is appointed, the following guidelines must be followed, unless an exception is approved by the Deputy Attorney General or the Associate Attorney General:

1. The settlement agreement or consent decree must create incentives for the monitor to encourage early compliance with and conclusion of the settlement agreement or consent decree.
2. In most cases, the monitor must be replaced at an appropriate interval, usually of no more than two to three years.
3. Payment of costs and fees for the monitor's services must be specified in the settlement agreement or consent decree and capped at a reasonable amount (requiring the monitor to complete remaining tasks even if the cap is met).
4. The monitor must be selected in accordance with the guidance set forth in the Memorandum from Acting Associate Attorney General Stuart F. Delery dated April 13, 2016, entitled, *Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions*, to avoid conflicts of interest and ensure that monitors are independent and highly qualified.

Where a monitor is proposed in the context of a consent decree, the decree proposed to the court must include the limits stated above, unless an exception is approved by the Deputy Attorney General or the Associate Attorney General.

indication that the settlement agreement or consent decree is not appropriately cabined or respectful of the state or local governmental entity's interest in local control and accountability.

Ms. JACKSON LEE. Thank you. I yield back.

[Pause.]

Mr. COHEN. Hearing is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee was adjourned.]

APPENDIX

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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEE ON JUDICIARY
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CIVIL RIGHTS, INTELLECTUAL PROPERTY AND THE INTERNET
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HOMELAND SECURITY
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RANKING MEMBER
BORDER AND MARITIME SECURITY
TRANSPORTATION SECURITY
CHIEF CLERK
DEMOCRATIC CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OVERSIGHT HEARING ON:
“U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION”

2141 RAYBURN

9:30 A.M.

THURSDAY, SEPTEMBER 24, 2020



- Thank you, Chairman Cohen and Ranking Member Buck, for convening this important oversight hearing on the Civil Rights Division of the United States Department of Justice.
- Let me thank our witnesses for their helpful testimony and assistance:
 1. **Catherine Lhamon**, Chair, U.S. Commission on Civil Rights
 2. **Sherrilyn Ifill**, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

3. **Thomas Saenz**, President and General Counsel, Mexican American Legal Defense and Education Fund
4. **Sharon McGowan**, Chief Strategy Officer and Legal Director, Lambda Legal
5. **Jonathan M. Smith**, Executive Director, Washington Lawyers' Committee on Civil Rights
6. **Michael Waldman**, President, the Brennan Center for Justice.

(Minority Witnesses)

7. **Hiram Sasser**, First Liberty Institute
 8. **Sam Mabrouk**, Small Business Owner, Columbus, OH.
- This is hearing is particularly timely given the outrage in Louisville, Kentucky yesterday where the Kentucky Attorney General announced that no charges will be brought against any of the police officers who shot and killed Breonna Taylor, a 26 year-old black woman and first responder, after bursting through her home on a no-knock warning and shooting her eight times while she lay sleeping in her bed, and killing her.
 - Mr. Chairman, the Department of Justice is the nation's largest law enforcement agency and it is no exaggeration to state that its Civil Rights Division used to be the nation's largest civil rights legal organization.
 - The Civil Rights Division wields the authority and the resources of the federal government on difficult and complex issues and has helped bring about some of the greatest global advances for civil rights.
 - However, the Department's record under this Administration indicates that it is not living up to its tradition of fighting for equal justice under law and championing the rights of the powerless and vulnerable.
 - The Civil Rights Division has simply neglected to bring challenging cases that could yield significant rulings and advance the cause of civil rights in our country.
 - The Trump administration has abdicated its responsibility to enforce the nation's most critical laws.

- For example, since January 21, 2017, the Trump Administration has filed only 1 pattern or practice investigation against a police department, even though all Americans have witnessed the ever-growing instances of wanton misconduct by law enforcement officers, especially against innocent and unarmed black Americans.
- In contrast, the Clinton Administration filed 13 pattern or practice cases, 8 of which involved racial discrimination; the Obama Administration has a similar record of upholding justice and equal treatment.
- The record is even worse when it comes to the subject of voting rights enforcement.
- After nearly four years, the Trump Administration has not brought a single Section 2 cases.
- The George W. Bush Administration, which had the lowest rate of bringing such cases since 1982, looks like a crusader for justice compared to the current Administration, which is led a President that daily seeks to discourage or impede voting by persons who do not support him.
- The Voting Section filed a total of 33 involving vote dilution and/or other types of Section 2 claims during the 77 months of the Reagan Administration that followed the 1982 amendment of Section 2.
- Eight (8) were filed during the 48 months of the George H.W. Bush Administration and 34 were filed during the 96 months of the Clinton Administration.
- But the record is really bad when it comes to enforcement of the federal criminal civil rights law.
- Civil rights enforcement no longer is a top departmental priority.
- Federal investigations targeting abusive police officers are non-existent and investigations of cross-burners and other purveyors of hate declined are not conducted.

- The Trump Administration in 2018 issued a directive severely limiting the ability of the Justice Department to enter into consent settlements to combat discrimination.
- Mr. Chairman, I am very troubled by this trend because hate-crimes are too dangerous to ignore, and there is social value in effective federal review of police misconduct.
- Additionally, Mr. Chairman, most of the Department's major voting-related actions of the past five years have been beneficial to the Republican Party, including reversing its long-standing position that Texas intended to discriminate against racial minorities when it passed a strict voter-ID law.
- In addition to holding the seat of my hero, role model, and predecessor, the incomparable Barbara Jordan, one of the reasons that I have been so proud to be a member of the Committee on the Judiciary throughout my seven terms in Congress is that this Committee has oversight jurisdiction over the Department of Justice, which I have always regarded as the crown jewel of the Executive Branch.
- In recent years the reputation of that Department, which has done so much to advance the cause of justice and equality for all Americans through the years under the leadership of such great Attorney Generals as Robert Jackson, Robert F. Kennedy, Nicholas Katzenbach, Herbert Brownell, Harlan Fiske Stone, Francis Biddle, Tom C. Clark and his son Ramsey, and Elliot Richardson, has been tarnished under the malfeasance of William P. Barr, easily the worst Attorney General in history.
- And that is putting it charitably.
- This Committee has no greater challenge and obligation to the nation than to help restore the Department of Justice, and the Civil Rights Division, to its former greatness.
- But before we can begin to set it right we have to get to the bottom as to how it went wrong.
- Thank you, Mr. Chairman, I yield back my time.

