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From: Andrew Gall
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This represents a partial response to FOIA Request #2022-1. We will continue to work to identify any remaining responsive documents and provide those to you in a timely manner. Please let me know if you have any further questions or would like to discuss any aspect of your request.

Respectfully,
Andrew Gall

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Presidential Commission
on the
Supreme Court of the United States

FINAL REPORT

December 2021

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Letter to the President

December 8, 2021

Dear Mr. President:

The Presidential Commission on the Supreme Court of the United States established by your Executive Order 14023 respectfully submits its Report. At its public meeting on December 7, 2021, the Commission voted unanimously to approve this submission upon concluding that it had met its charge to provide an account of the current debate over the "role and operation of the Supreme Court in our constitutional system" and an "analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals."

The Commission was immensely assisted in its work by the diversity of perspectives and expertise among the Commissioners, written and oral testimony provided by experts and organizations in connection with the Commission's hearings, the public's engagement in the Commission's work through the submission of comments, and excellent support from the staff at the General Services Administration.

We are honored to have had the opportunity to examine and then present to you an analysis of these complex and often controversial issues.

Respectfully,

Bob Bauer
Co-Chair

Cristina Rodríguez
Co-Chair

Kate Andrias
Rapporteur

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Preface

Executive Order 14023 established this Presidential Commission on the Supreme Court of the United States. The Order directed the Commission to provide an account of the current debate over the "role and operation of the Supreme Court in our constitutional system" and an "analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals."

Consistent with the Executive Order, the Report identifies prominent proposals for reform and provides a critical evaluation of the strengths and weaknesses of the proposals. This appraisal includes consideration of whether specific proposals could reasonably be expected to achieve the objectives that their proponents desire. It also identifies other potential consequences that might result from the reforms, including whether and how they might affect: the critical role of the Court in our system of government, including as a guardian of the rule of law; the protection of constitutional rights, principles, or structures; the processes by which Justices are nominated and confirmed to the Court; and public opinion and perceptions of the Court.

The Report also analyzes the constitutional and other legal requirements that would have to be met or resolved to implement the reforms.

The President made plain in public statements and in his Executive Order that he was seeking a Report reflecting bipartisan, diverse perspectives from Commissioners "having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States." As would be expected, the Commissioners appointed by the President hold various and sometimes opposing views on the legal and policy issues raised in the Court reform debate, and disagreements are noted at various points in the analysis. The Executive Order does not call for the Commission to issue recommendations, but the Report does provide a critical appraisal of arguments in the reform debate.

Given the size and nature of the Commission and the complexity of the issues addressed, individual members of the Commission would have written the Report with different emphases and approaches. But the Commission submits this Report by unanimous vote, in the belief that it represents a fair and constructive treatment of the complex and often highly controversial issues it was charged with examining.

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Executive Summary

On April 9, 2021, President Joseph R. Biden, Jr. issued Executive Order 14023 establishing this Commission, to consist of "individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States." The Order charged the Commission with producing a report for the President that addresses three sets of questions. First, the Report should include "[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court." Second, the Report should consider the "historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform." Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, "including an appraisal of [their] merits and legality," and should be informed by "a broad spectrum of ideas."

The Report begins by explaining the genesis of today's Court reform debate, including by identifying developments that gave rise to President Biden's decision to issue the April 2021 Executive Order, particularly the debates surrounding the most recent nominations. This Introduction emphasizes that the Court's composition and jurisprudence long have been subjects of public controversy and debate in the nation's civic life: The Court serves as a crucial guardian of the rule of law and also plays a central role in major social and political conflicts. Its decisions have profound effects on the life of the nation. Though conflict surrounding the processes by which the President nominates and the Senate confirms Justices is not new, it has become more intensely partisan in recent years.

The Introduction also articulates three common and interrelated ideas frequently invoked in reform debates and throughout the Chapters of the Report: the importance of protecting or enhancing the Court's legitimacy; the role of judicial independence in our system of government; and the value of democracy and its relationship to the Supreme Court's decisionmaking. These important ideas can mean different things to different people. The Introduction discusses the range of meanings ascribed to these terms, with the aim of clarifying how they are deployed in arguments for and against reform.

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Chapter 1

Chapter 1 provides a history of efforts to reform the Supreme Court dating back to the Founding. This history highlights how lawmakers and the public, throughout the Nation's history, have been attentive to and engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to attempt to resolve today's debate according to a particular historical standard, but rather to offer context for today's discussions and to underscore that debates about Court reform are part and parcel of U.S. constitutional history and the development of the American political order.

Chapter 2

Chapter 2 examines proposals to expand or otherwise alter the current structure of the Supreme Court. The Chapter begins by presenting a brief history of past efforts to alter the size of the Court, dating back to the nineteenth century. It then proceeds to consider the legality of Court expansion, concluding based on text, structure, and history that Congress has broad authority to modify the Court's size.

The Chapter then describes arguments made in the public debate both for and against Court expansion. Supporters contend that Court expansion is necessary to address serious violations of norms governing the confirmation process and troubling developments in the Supreme Court's jurisprudence that they see as undermining the democratic system. Opponents contend that expanding—or "packing"—the Court would significantly diminish its independence and legitimacy and establish a dangerous precedent that could be used by any future political force as a means of pressuring or intimidating the Court. The Commission takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on these issues. We present the arguments in order to fulfill our charge to provide a complete account of the contemporary Court reform debate.

The Chapter also considers other structural reforms to the Court, such as proposals to provide for rotation between the Supreme Court and the lower federal courts, divide the Supreme Court into panels, or ensure ideological balance on the Court. The Commission

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concludes that some of these proposals rest on sounder constitutional ground than others. Nonetheless, most such proposals would require significant changes to our federal judicial system and offer uncertain practical benefits.

Chapter 3

Chapter 3 considers proposals for establishing non-renewable term limits for Supreme Court Justices. Proponents of term limits argue that they would help ensure that the Court's membership is broadly responsive to the outcome of elections over time; make appointments to the Court more predictable and less arbitrary; reduce the chances that excess power might be concentrated in any single Justice for extended periods of time; and enhance the Court's decisionmaking by ensuring regular rotation in decisionmakers, while maintaining judicial independence by guaranteeing long terms and lifetime salaries. Opponents of term limits argue that eliminating life tenure would weaken the Constitution's express protection of judicial independence, which could undermine the Court's legitimacy; further politicize the selection and confirmation process by requiring confirmations every two years; heighten the perception that Justices are partisan or political actors; and destabilize Court doctrine. Opponents do not agree that long fixed terms and lifetime salaries would solve these problems.

Without taking a position on the merits of term limits, the Chapter considers design questions that would have to be addressed were term limits to be adopted. It begins by considering how to draft a constitutional amendment to establish term limits and then proceeds to consider whether a similar system could be adopted by statute. In this analysis, the Chapter addresses key implementation questions, including the length of terms; the number of appointments a President should be able to make in a four-year term; how to transition from our current system of life tenure to a term-limited system; whether to impose constraints on Justices' post-tenure employment; and the challenge presented by potential impasses in the Senate's confirmation process. Opponents of term limits cite what they believe to be the intractability of these implementation questions as reason not to pursue term limits. Proponents emphasize that the benefits of term limits warrant grappling with what they believe are difficult but soluble design questions.

Chapter 4

Chapter 4 explores proposals that would reduce the power of the Supreme Court or of the judicial branch as a whole. Many proposals for reforming the Court accept the scope of its power more or less as a given. By contrast, the proposals canvassed in this Chapter would curb

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the Justices' capacity to invalidate legislation. They are designed to shift power to resolve major social, political, and cultural issues from the Court to the political branches.

Without attempting to address all potential means of reducing the Court's power, this Chapter examines jurisdiction stripping; supermajority voting requirements for the invalidation of congressional or other government action, as well as other rules that would require courts to show greater deference to the political branches; and proposals for a constitutional amendment to authorize Congress, through legislation, to override decisions of the Supreme Court and other courts. The Chapter analyzes how such reforms might affect the role of the Supreme Court or other courts in relation to the elected branches of government; the potential benefits and costs of the proposals; and whether they would require constitutional amendment.

The Chapter concludes that the efficacy of proposals targeting the jurisdiction of the Supreme Court or otherwise constraining its decisionmaking depend on the details of the proposals, including whether they also affect lower court and state court decisionmaking. We also conclude that the reforms that would most directly reduce the Supreme Court's (and other courts') power over fundamental social questions are also ones that, absent constitutional amendment, the Court would most likely find to be unconstitutional. However, the Chapter highlights arguments regarding how Congress might engage in more robust constitutional interpretation and enforcement even without constitutional amendment. Without taking a position on the ultimate merits of such proposals, this Chapter aims to help inform further debate about whether reforms would be worth pursuing.

Chapter 5

Chapter 5 addresses how the Supreme Court conducts its work and explains its decisions. Although much of the public discussion about Court reform has been focused on structural issues, the Court's internal procedures and practices also have been a part of contemporary debates about the Court's role and operations. Accordingly, Chapter 5 focuses on three sets of issues.

The first is the Court's use of emergency orders, which are issued without the rounds of briefing and oral argument that its merits cases receive, and often also without a written explanatory opinion—even in cases that can generate intense public debate, involving issues of national importance or great practical impact. The Chapter reviews recent controversies relating to emergency orders and apparent changes in the Court's approach to managing them.

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It notes that the Court may well benefit from continuing to adjust its explanatory practices in important cases, with an eye toward providing insight into its reasoning, reinforcing procedural consistency, and avoiding any possible appearance of arbitrariness or bias. The Chapter also addresses issues presented by emergency orders in capital cases, where the Court often has the final word on whether a state or federal execution will go forward.

The second set of issues concerns judicial ethics. The Chapter reviews potential benefits and drawbacks of reforms that would impose on the Justices a code of conduct, a disciplinary framework, or recusal review. The Chapter explores the potential difficulties presented by a framework containing binding sanctions, but also notes that experience in other contexts suggests that the adoption of an advisory code of conduct would be a positive step on its own.

The third topic is public access to the Court's proceedings through the audio or video streaming of oral arguments and opinion announcements in real time. The Chapter acknowledges that several Justices have expressed opposition to the use of cameras, but suggests that the continuation of near-simultaneous audio would enable the media and interested members of the bar and the public to better follow the work of the Court.

Acknowledgments

The Presidential Commission on the Supreme Court of the United States would like to give special acknowledgment to Designated Federal Officer Dana Fowler for her exceptional leadership and to the team at the General Services Administration: Patrick McConnell, Marten Wallace, Ivana Henry, Helen Heinrich, Marcerto Barr, Cody Dean, and Devon Andrew. The Commission would not have been able to complete its charge without their outstanding support and assistance. The Commission would also like to thank the following individuals for the stellar research assistance they provided to individual Commissioners:

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Introduction: The Genesis of the Reform Debate and the Commission's Mission

On April 9, 2021, President Joseph R. Biden, Jr. issued an executive order establishing this Commission. The Order charged the Commission with producing a Report for the President that addresses three sets of questions. First, the Report should include "[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court."[1] Second, the Report should consider the "historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform."[2] Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, "including an appraisal of [their] merits and legality."[3]

This Commission is the most recent of various committees and commissions established over the last fifty years to explore judicial reform. These have addressed a wide range of issues, such as caseload management and capacity, judicial disciplinary codes and administration, and the organization of the lower federal courts. Consistent with this history, President Biden's Order charged this Commission to enlist experts, as well as the public, to "ensure that its work is informed by a broad spectrum of ideas" on the question of Supreme Court reform.[4]

I. The Genesis of Today's Reform Debate

In October of 2020, then-presidential candidate Biden stated his intention, if elected, to create a bipartisan Commission to examine Supreme Court reform. In response to a question about whether he supported proposals to expand the number of Justices on the Court, Biden responded that "it's not about court packing" and observed that constitutional scholars have debated a range of Court reform proposals.[5]

The President's comments and the Commission's subsequent creation underscore that the nation has been engaged for some time in an intense and ongoing debate about the Court's composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices. Political actors, lawmakers,

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and commentators have articulated sharply divergent accounts of why conflict over the Court has escalated in recent years. And they disagree about whether these political struggles have undermined the Court's legitimacy.[6]

The Commission does not purport to offer a consensus history of the last decades of conflict over the Supreme Court, nor does it come to a conclusion about whether the Court has suffered a loss or crisis of legitimacy. Commissioners hold very different views on these matters. Without purporting to resolve any of those differences, this introductory Chapter offers a set of observations that provide context for President Biden's decision to issue the April 2021 Executive Order and discusses a set of criteria by which the broader debate might be appraised.

A. Conflict Over the Court

The role the Court plays in major political and social conflicts has long made its composition and jurisprudence subjects of debate in the nation's civic life. Throughout American history, including in recent decades, conflict over the Court has played out with varying degrees of intensity in the processes by which the President nominates and the Senate confirms new Justices. In recent decades, both Democrats and Republicans have lamented that nominees, prepared by the White House staff, have systematically sidestepped candid answers to questions about their records and judicial philosophies, although many also agree that nominees should not answer questions in ways that might be seen as pre-committing themselves to particular outcomes in future cases.

Nominations to the Court have been fiercely opposed for a range of reasons. President Woodrow Wilson's nomination of Louis Brandeis generated aggressive opposition fueled by antisemitism.[7] President Herbert Hoover's nomination of John J. Parker was opposed by civil rights groups and labor organizations, and was ultimately defeated at least in part because of Parker's expressed opposition, while a candidate for Governor of North Carolina, to the participation of Black people in politics.[8] When President Lyndon Johnson nominated Judge Thurgood Marshall—a trailblazing civil rights lawyer, former federal appellate judge, and, at the time of his nomination, Solicitor General of the United States—to be the first Black member of the Court, Marshall was confronted with hostile and racist questions from segregationist Senators, and numerous Senators voted against his nomination or abstained from voting.[9] The Senate later rejected two of President Richard Nixon's nominees—G. Harrold Carswell and Clement F. Haynsworth, Jr.—for reasons including their prior support for segregation, and also in each case because of other objections to their candidacies.[10]

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Among the nomination contests still debated today is President Ronald Reagan's failed attempt to place Judge Robert Bork on the Supreme Court in 1987. Judge Bork's supporters contended that he was a highly qualified nominee who was subjected to deceptive and inflammatory partisan criticism; his record and views, supporters claimed, were mischaracterized by his opponents. Defenders of the Senate's treatment of Judge Bork, by contrast, argued that he received an extensive hearing at which he had an opportunity to present and defend his views at length, and that his nomination failed by a bipartisan majority vote after a floor debate because of fundamental and legitimate disagreements with his legal views and judicial philosophy.

Three recent nominations have generated especially bitter partisan conflict. We explore those nomination battles in greater detail in Chapter 2 of this Report but note them here because of their role in the debates leading to the formation of this bipartisan Commission. First, after Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Barack Obama's March 2016 nomination of Chief Judge Merrick Garland to fill that seat. The Republican Senate leadership argued that the nation was poised in a matter of months to elect a new President, who should be able to appoint Justice Scalia's successor. It thus declined to take any formal action, such as a hearing or a vote, on the Garland nomination. President Donald Trump later appointed Judge Neil Gorsuch to fill the vacant seat. Next, in the summer of 2018, Justice Anthony Kennedy—widely viewed as occupying the Court's ideological center—announced his retirement. President Trump then nominated Judge Brett Kavanaugh, whom the Senate confirmed in October 2018 after contentious hearings and floor debate. Finally, Justice Ruth Bader Ginsburg died in September 2020, creating another election-year vacancy. Although the Senate's Republican majority had opposed the election-year confirmation of Judge Garland for nearly eight months before the 2016 election, this time it took up President Trump's nomination of Judge Amy Coney Barrett and confirmed her in one month, on October 26, after voting in the 2020 presidential election had already commenced. Senate Democrats participated in the Judiciary Committee hearings and final vote on Justice Barrett's nomination, but most declined individual meetings with her, and the Democrats on the Judiciary Committee boycotted the final committee vote to express their objection to the timing of the nomination.

These events directly motivate some of the current calls for Supreme Court reform by those who argue that the seats previously occupied by Justices Scalia and Ginsburg were "stolen" by Republicans from Democrats. According to these critics, Republicans achieved the current conservative dominance of the Court by disregarding the norms that should govern

and have governed the appointments process in the past.[11] Critics of the treatment of the Garland nomination in particular emphasize that the Senate majority's refusal to take any formal action at all on that nomination broke important new ground, departing from historical practice dating back to the nineteenth century. In addition, according to critics, the fact that Republicans were willing to act on Justice Barrett's nomination just before the 2020 election undermines their claim that their refusal to consider Judge Garland's nomination was motivated by the principle that Supreme Court vacancies ought not be filled in an election year. In response, defenders of the Senate majority point out that Judge Garland was nominated when the White House and the Senate were controlled by different political parties, while Justice Barrett was nominated when both institutions were controlled by the same party. More broadly, these defenders assert that the Senate majority's actions during these two periods did not violate any well-established norms or disrupt any consistent historical practice. Over the course of American history, they note, Senate majorities periodically have declined to take up nominations in election years or have used the filibuster to deny a sitting President a confirmation, in order to reserve the choice for his successor.

Several witnesses who testified before or provided written submissions to the Commission observed that partisan conflict over nominations has occurred throughout the nation's history, particularly in election years.[12] According to one witness, historically the Senate has confirmed nearly ninety percent of Supreme Court nominees when the President's party is in power but "fewer than 60 percent of nominees under divided government."[13] Similarly, the same witness observed that over eighty percent of nominees are confirmed when nominated "in the first three years of a presidential term," but "barely more than half" when nominated "in the fourth (election) year."[14] Nonetheless, most witnesses agreed that conflict has intensified in recent years. One witness cited the history of confirmations since the Reagan Administration as one of a "continuous cycle of escalation" of partisan conflict over nominations to both lower courts and the Supreme Court.[15] This escalation originates in the belief, held by both parties, that "the other side plays dirty and will manipulate the rules to its own advantage," conferring on the party in power "a significant incentive to violate the current norms when it has the chance."[16] The witness summarized the current state of affairs: "[E]ach side . . . believ[es], probably rightly, that the other side would do the same as soon as it had the chance. It's a classic prisoner's dilemma, and it operates according to its own logic."[17] Another witness characterized this recent history as "decades of political circus."[18]

The Commission also received a survey of a bipartisan group of former Senate staffers, including those who have served the current and former leadership of the Senate Judiciary

Committee, documenting their views on the state of the confirmation process. The results reflected broad bipartisan agreement that the confirmation process has come under severe strain from partisan conflict, though Republican and Democratic staffers disagreed about the causes of the strain. Democrats cited the controversies surrounding the nominations of Judge Garland and Justice Barrett as evidence of Republican bad faith and disregard of longstanding norms. Republicans cited the hearings on the nominations of Judge Bork, Justice Clarence Thomas, and Justice Kavanaugh, and blamed Democrats for personal attacks on nominees designed to derail nominations for partisan or ideological reasons.[19]

The recent history of Senate confirmation votes supports witnesses' accounts of escalating partisanship. For seventy years until 1968, most Justices were confirmed by voice vote. Since then, roll call voting has become the norm, and votes have divided increasingly along party lines.[20] Justice Sonia Sotomayor received 68 votes (all Democrats and nine Republicans voting to confirm); Justice Elena Kagan, 63 (all but one Democrat and only five Republicans voting to confirm); Justice Gorsuch, 54 (all Republicans and only three Democrats voting to confirm); Justice Kavanaugh, 50 (all Republicans and just one Democrat voting to confirm); and Justice Barrett, 52 (all but one Republican and no Democrat voting to confirm).

To be sure, over the last fifty years, some nominees have received significant bipartisan support. Some of those nominations—including Justice Scalia (confirmed in 1986 with 98 votes), Justice Ginsburg (confirmed in 1993 with 96 votes), and Justice Stephen Breyer (confirmed in 1994 with 87 votes)—occurred when the Senate was controlled by the President's party. Others—including Justice Kennedy (confirmed unanimously in 1988, an election year, after Judge Bork's nomination was rejected) and Justice David Souter (confirmed in 1990 with 90 votes)—occurred when the Senate majority was not aligned with the President. Unmistakably, however, the trend over the last three decades has been toward more partisan conflict, which has affected nominations to the lower courts as well as to the Supreme Court.

The confirmation battles of recent years have given rise to multi-million dollar lobbying campaigns seeking to mobilize public pressure for or against particular nominations. Millions of dollars were spent for and against the nominations of Justices Kavanaugh and Barrett.[21] There is little reason to doubt that nominations will continue to trigger expensive campaigns to shape public opinion and pressure undecided Senators to vote in a particular way. Indeed, when vacancies arise, political and interest group allies now expect the President to thoroughly vet nominees for their substantive views in an effort to ensure that the nominee will advance the desired ideological outlook. Presidents are also expected to nominate individuals who, if

confirmed, will be young enough to serve for many decades. In short, political actors now perceive the stakes of each nomination to be exceedingly high, especially if confirmation is seen as likely to lead to an immediate shift in the balance of power between Court "liberals" and "conservatives."

As witness testimony before the Commission suggested, the struggles over the confirmation process appear likely to persist, if not intensify. One witness testified that the partisan escalation of recent years may lead future Senate majorities to decline to take up any nomination from a President of the opposing party at any time at all, not just in the last year of the President's term.[22] At various times and to different degrees, party leaders have expressed a readiness to resort to these kinds of tactics as a matter of course. In 2021, Republican Leader Mitch McConnell stated that if his party won a majority in the Senate in the 2022 midterm elections, he would not commit to acting on any Supreme Court nomination by President Biden in 2023 and indicated that it was "highly unlikely" he would agree to any such consideration in the 2024 presidential election year.[23] In 2007, Senator Chuck Schumer, then a member of the Senate Democratic leadership and now the Senate Majority Leader, observed in a speech that, for the eighteen months remaining in George W. Bush's presidency, "[w]e should reverse the presumption of confirmation."[24] He set the nomination of a "moderate" as a condition of confirmation, asserting that "the Supreme Court is dangerously out of balance" and that a Bush nomination should not be confirmed "except in extraordinary circumstances."[25] Defenders of recent Republican actions point to these statements as evidence that both sides have engaged or have been prepared to engage in similar practices. They therefore contend that Republicans cannot fairly be charged with breaching any established norms. Critics of the Republicans' approach see a distinction between Senator McConnell's and Senator Schumer's respective statements. They view it as improper for the Senate simply to refuse to consider a President's nominees, but claim it is different, and appropriate, for a Senate majority that is not aligned with the President to insist that the President's nominees be relatively moderate. Of course, what it means for a nominee to be "moderate," and whether any given nominee is accurately described as such, are often matters of significant disagreement.

B. The Stakes of the Reform Debate

The Court reform debate is not merely a byproduct of recent partisan conflict. Rather, it is a high-stakes debate because of the unique role and structure of the Supreme Court. The Court's decisions have extraordinary impact on the lives of Americans generally. The Court also exercises enormous power within the U.S. system of government, as do the individual

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Justices themselves, who serve for life. The sharp polarization in contemporary American politics only exacerbates the conflict over the Court.

The Court has long occupied a central and often contested role in shaping American political and civic life. In the modern era, its decisions continue to have both immediate and long-term effects on the welfare of individuals and communities throughout the country, including by affecting the rights of people of the same sex to marry, the right to bear arms, religious liberty, property ownership, women's reproductive rights and freedoms, access to health care, participation in the political process and voting, the structure of government and the separation of powers, the operation of the criminal justice system, diversity in higher education, and the regulation of workplaces and the right to organize.[26] The stakes of the nomination process are so high precisely because they implicate matters of great public concern. Indeed, at various moments throughout history, conservatives and progressives alike have turned to the Court to protect the rights they most value and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution.

The controversies surrounding the Court are heightened by the combination of—as one witness put it—a "very powerful Supreme Court" and "a nearly-impossible-to-amend constitution."[27] Consequently, when the Court generates "a firestorm of controversy, the only practical avenue for overturning decisions of the Court has been through changing the judges who sit on that Court."[28] The fact that Justices have life tenure—and therefore often serve for upwards of thirty years in the modern era—only heightens the stakes of who joins the Court. Up until the late 1960s, the average term of service was fifteen years. It has now risen to roughly twenty-six years, and a number of Justices have served three or more decades, spanning numerous election cycles and presidential administrations. It is hardly a surprise, then, that key segments of the American public are so heavily invested in making sure that the "right" nominee is confirmed.

The highly polarized politics of the current era threaten to transform this already high-stakes process into one that is badly broken.[29] Political scientists generally agree that "the period since the 1980s has largely featured deepening dispute and standoff between the parties, accompanied by intensifying political and social polarization."[30] This polarization is not simply a matter of partisan competition for its own sake, but also reflects a greater and more stable ideological divide between the two major political parties.[31] As the parties become more accurate proxies for deep ideological disagreements, the realistic potential for bipartisan compromise and cooperation decreases.[32] The depth and stakes of partisan polarization

increase accordingly.[33] Indeed, contemporary politics generally have developed the "distinctive character of high-stakes warfare" associated with the "breakdown of norms of cooperation and civility across the aisle."[34] According to Chief Justice John Roberts, this extreme polarization has affected public perceptions of the Court: "When you live in a polarized political environment, people tend to see everything in those terms."[35]

The Commission did not attempt to identify the sources of polarization or come to conclusions about any role the Court may have played in it. These, too, are matters about which individual Commissioners disagree. The Commission did hear testimony, however, that acute polarization is likely to continue to affect the debate over the Court's role in the constitutional system, and to perpetuate partisan conflict over nominees to the Court.[36] On this point, there is consensus among Commissioners. Any account of the origins of the present debate about the role and operations of the Court, therefore, would be incomplete without taking note of how the deeply divided nature of our polity affects debates over the Court.

* * *

Before we turn to discussing proposals for Court reform and how best to evaluate them, two caveats to the above picture of partisan conflict are in order. First, even as the Court is at the center of escalating partisanship, the Court's rulings do not necessarily track the ideological differences between parties. Justices appointed by Republicans do not always vote in a predictably conservative fashion, and Justices appointed by Democrats do not always vote in a consistently liberal one. What is more, a significant portion of the Court's work is not highly ideological. In these cases the Justices are often unanimous or aligned in ways that cannot be predicted by the political party affiliation of the President who appointed them or by the ideologies associated with that party.[37]

Second, the extent to which extreme political polarization affects the public standing of the Court is not clear. Historically, the Court has maintained levels of public confidence higher than those accorded the other branches.[38] Though public opinion may shift in the wake of particularly controversial decisions and nominations, commentators have argued that basic trust in the Court as an institution has exhibited significant resilience.[39] At the same time, there is some evidence that partisan differences shape judgments about the Court's performance. Court "approval" among Democrats dropped to forty percent after President Trump assumed office and made his first appointment to the Court, while among Republicans it rose to nearly sixty-five percent.[40] And whether public trust in the Court will continue to be durable remains to be seen. One recent poll suggests the Court's approval is waning, with forty-nine percent of

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Americans disapproving of its performance and only thirty-seven percent approving—an all-time low.[41]

II. Proposals for Reform

A. The Commission's Process and Scope of Analysis

In considering the current reform debate, the Commission held six public meetings; heard oral testimony from forty-four witnesses; and received written statements from numerous additional experts and organizations, as well as more than 7,000 submissions in the form of public comment. The views expressed regarding the need for Court reform and evaluating proposals for such reform were wide-ranging and diverse.

Informed by that material and the broader public debate, the Commission divided its work into five parts: one devoted to providing a historical background and the other four devoted to analyzing the major categories of reform proposals.

- *The history of Supreme Court reform debates and proposals.* Debates about whether and how to adjust the size, role, and operation of the Supreme Court are as old as the Court itself. To put the present reform debates in context, in Chapter 1 we provide a historical overview of past efforts in favor of and opposed to Supreme Court reform.
- *The size and composition of the Court.* One prominent proposal would increase the number of Justices who sit on the Court. Other proposals suggest reorganizing the membership of the Court—for example, by having cases decided by panels instead of the entire Court, or by periodically rotating other Article III judges onto the Supreme Court. We address these proposals in Chapter 2.
- *The Justices' tenure.* Justices currently serve "during good Behavior," meaning for life, unless they voluntarily leave the Court or are impeached and removed from office. Another prominent proposal would limit the length of time that Justices serve on the Court and, relatedly, would define the intervals at which Justices are appointed. We consider these term-limits proposals in Chapter 3.
- *The powers of the Court and its role in the constitutional system.* Another set of proposals seeks to disempower the Court in relation to the political branches, particularly to limit the Court's power to declare legislative acts unconstitutional. This category includes modifying the Court's jurisdiction, as well as changing the Court's

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voting rules and the standards of review it uses when considering whether to invalidate the actions of elected officials. Finally, it includes proposals to allow Congress to override constitutional decisions of the Supreme Court and other courts. We analyze this category of proposals in Chapter 4.

- *Transparency and the Court's internal processes.* A final category of potential reforms includes proposals that would address internal operations of the Court. These proposals concern: the procedures and principles the Court applies to emergency applications; judicial ethics and transparency with respect to recusals and conflicts; and making the Court's proceedings widely accessible in real time through audio or video transmission. We take up this set of reforms in Chapter 5.

With regard to each of the four categories of Court reform, we consider relevant historical background (in addition to the more general historical background provided in Chapter 1); we evaluate the case for and against the reform as framed by proponents and critics; we explore whether the proposed reforms promote the goals of their proponents and what the potential consequences of the reforms might be; and we consider the legal requirements and obstacles that must be met or overcome to implement the reforms.

We do not analyze at length the confirmation process or proposals for how the Senate might reform it. The Commission recognizes that the processes by which individuals are nominated to the Court by the President and considered by the Senate are central to today's debate. However, the Commission's charge was to address proposals for reforming the Court itself, not for reforming the confirmation process. At the same time, given the extensive and bipartisan testimony we received concerning the intense conflict that now characterizes that process, generating widespread concern that it has become dysfunctional, we have attached an Appendix to this Report that discusses specific reform proposals presented to the Commission—proposals we believe merit close attention and consideration.[42]

B. Evaluating Reform Proposals

Before proceeding to analyze particular reform proposals in subsequent Chapters, we consider the values and principles that might be brought to bear in evaluating whether reform is needed and whether a particular reform might be worth pursuing or could be counterproductive. Three common and interrelated themes are frequently invoked in discussions about reform: the perceived need to protect, or enhance, the Court's legitimacy; concerns about preserving the independence of the federal judiciary and the Supreme Court in particular; and the Court's relationship to democracy. One challenge in defining these concepts

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is that they mean different things to different people. Thus, discussions cast in these terms sometimes create terminological confusion.

We do not try to assign specific meanings to any of these ideas. But we do think it is useful to articulate the values that underlie the ideas of legitimacy, judicial independence, and democracy, as those ideas pertain to the Court, with the hope of clarifying the terms of the debate and providing ways in which reform proposals might be evaluated.

1. Legitimacy

Nearly all of the matters now being debated—the size and composition of the Court, the Justices' tenure, the Court's role in the constitutional system, the propriety and transparency of the Court's internal processes, and the way in which Justices are appointed and confirmed—are said to implicate questions of legitimacy. There are, however, different ways to understand the idea of legitimacy as it is used in reform debates. Legitimacy might refer to the general level of support that the Court has among the people of the United States, perhaps as reflected in public opinion polls. Or, in a related and more specific use of the term, it might refer to whether people who disagree with a decision by the Court are willing to comply with it.

Those who use legitimacy in one of these ways commonly say that the Court's legitimacy is crucial to the institution because the federal judiciary has no military or other way to coerce people to comply;[43] the judiciary must rely on others to adhere to its decisions.[44] Alexander Hamilton formulated the point in *The Federalist* in a way that has become virtually a cliché: "The judiciary . . . has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[45] The Supreme Court's capacity to function in its accustomed way, at least in the long term, arguably depends on the Court retaining its legitimacy in this sense.[46]

Sometimes, though, legitimacy is used in these debates to mean something else—to express an evaluative judgment about the Court or its actions, not a prediction about whether it will be obeyed. In particular, people who believe that the Court is functionally a "political" or even partisan body might say that the Court is (or has become) illegitimate. That claim might be made irrespective of whether the Court has lost popular support or its ability to command obedience to its decisions. More generally, the assertion that the Court is illegitimate might be an evaluative judgment that the Court has made decisions that are seriously wrong. Of course, it would be rhetorical overkill, by any standard, to say that every mistaken decision

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draws into question the Court's legitimacy. But an observer who believes that the Court has made decisions that are wrong in some fundamental way might couch that criticism in terms of legitimacy.

Finally, assertions about illegitimacy might combine these two elements: both a criticism of the Court or its decisions and a commentary on its ability to command obedience. The claim may be that the Court has become so partisan, political, ideological, or that the Court's decisions are so fundamentally wrong, that it is not entitled to obedience.

Because claims about legitimacy play a large role in debates about the Court—and because the term has different possible meanings—there is a risk that participants in these debates will talk past each other and not clarify their areas of agreement or disagreement. For example, a claim that the Court is illegitimate because of the way in which some of its members have been appointed or because it made a decision based on objectionable motivations might be met with an assertion that the Court still commands substantial popular support. However, the assertion about popular support is not truly responsive to the evaluative claim about the Court. Conversely, a weakening of the Court's popularity might be taken as evidence that the Court has embarked on a misguided course of decisions—which need not be true.

In fact, the relationship between popular acceptance of the Court and the correctness of the Court's decisions is a complex question that must be analyzed in its own right. Competing assertions about legitimacy that do not recognize the complexity of that term can obscure, rather than focus, the terms of debate.

2. Judicial Independence

Judicial independence is also invoked in varying ways. In one sense, judicial independence is commonly, and correctly, thought to be a core requirement of the rule of law. Judges must be free to decide cases without fear that they will be punished by the government or will suffer physical or financial harm at the hands of private individuals. They must not be corrupted by bribes. Their rulings must not be influenced by personal favoritism or family relationships.

In those ways, judicial independence is not different from what we expect of other government officials: that they be able to, and do, carry out the responsibilities of their office without fear or favor. But the ideal of judicial independence might be understood to include qualities that are distinctive and indispensable components of the work of judges in particular.

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Judges should not be partisans. Other government officials, depending on their positions, might legitimately set out to promote the interests of the political party with which they are associated; one requirement of judicial independence is that judges not do that. And, importantly—because federal judges are appointed and confirmed by political actors—the belief that the judiciary is independent can be undermined if judges are perceived to be "playing on the team" of one party or another.

Beyond that, it is sometimes said that judicial independence requires that judges decide cases solely according to the law. Of course, it is incontrovertible that judges should decide cases according to law. But there are difficult questions—they have been debated, literally, for centuries—about what making decisions according to law means. In particular, legal decisions, especially those of a court like the Supreme Court that has responsibility to resolve the most challenging issues facing our system, will sometimes require the exercise of judgment on legal issues about which there can be reasonable disagreement and that may implicate—to quote Judge (later Justice) Benjamin Cardozo—"[h]istory or custom or social utility or some compelling sentiment of justice."[47] Difficult decisions of those kinds, especially when they involve controversial social issues, can leave judges and Justices open to the accusation that they have compromised judicial independence by advancing a partisan or otherwise improper agenda. That makes some of the duties associated with the judicial role and judicial independence—candor, consistency, reasoned elaboration, attention to both the appearance and reality of impartiality—all the more important.

There is a different meaning of judicial independence that raises more complex questions about the role of the judiciary as a whole, and the Supreme Court in particular, in our constitutional system. Judges and Justices should undoubtedly be independent in the sense of making decisions that are unaffected by improper influences, whether those influences are imposed from the outside (by threats, for example) or are the result of their own approach to the job (if, for example, their decisions are influenced by an intention to run for office after they leave the judiciary or if they simply act as members of a partisan "team").

But judicial independence might also refer to the separate idea that the judiciary as an institution has an independent role to play—a role that is distinct from that of the other branches. Some of the confusion in debates about Court reform may result from a blurring of these two different meanings of judicial independence—the unquestionable value of judges acting free from fear or favor and according to law, and the more complex issues raised by the relationship between the judiciary and the other institutions of our government. The question of how independent of the other branches the judiciary should be is not easy to answer.

On the one hand, especially because judges and Justices sometimes must decide issues about which reasonable people disagree, there is an argument that the judiciary must not be entirely independent of the elected branches of government. Some aspects of our system—including not only the appointment and confirmation process, but also Congress's role in setting the Court's budget, jurisdiction, and size, and its control of the impeachment process—ensure that the judiciary is not entirely independent but is to some degree responsive to elected officials and therefore to public opinion. On the other hand, the role of the judiciary, in any system, is to decide cases according to law and not according to the desires of political actors. Beyond that, in our constitutional system the judiciary has the responsibility to protect minorities against impermissible exercises of political power. The independence of the judiciary as an institution is crucial to the courts' ability to carry out this responsibility. We consider this clash between ideals more fully in our discussion of the relationship of the Court to democracy.

3. Democracy

One far-reaching critique of the Court, also sometimes cast in terms of legitimacy, asserts that the Court is too willing to intrude into matters that should be left to democratic political processes. According to this line of criticism, many concerns about the Court are derivative of its outsized role in the system of government. When the Court's decisions are so important, the confirmation process becomes more contentious and partisan; the incentives to attempt to use the Court for partisan purposes become greater; and worries that the Court will entrench views that the people have rejected become more acute.

This criticism highlights the tension between the role of an independent judiciary as a check on the political process and the idea that our constitutional democracy must provide a democratic check on the judiciary as well. The democratic check advocated by some critics takes a variety of forms, each of which has different implications for the relationship between the Court and democracy. Because each of these suggested ways of defining the relationship between the Court and democracy also implicates the values associated with legitimacy and judicial independence, we consider them in some detail.

a. Deference to the Political Branches

If the fundamental democratic goal is ensuring that decisions are made by relatively democratic institutions, such as the legislature, a goal of reform might be to ensure that the Supreme Court not interfere (or not interfere too readily) with the outcomes of the democratic process—by, for example, holding unconstitutional federal or state legislation. Some

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advocates for reform thus contend that the Court should be more reluctant to declare legislation unconstitutional, or that Congress should limit the Court's power to do so. This understanding, in various forms, has been advocated by commentators, judges, and Justices at various points in history, and some of the witnesses before the Commission forcefully advanced this view.[48] In fact, it is difficult to think of any issue related to the Court that has been discussed more extensively.

This conception gives rise to various questions. What is the category of decisions to which the Court should be more deferential? Is the concern that the Court exercises too much power just about the invalidation of Acts of Congress, or does it extend to the much more common instances in which the Court declares unconstitutional the actions of states or local governments? Those two forms of judicial review raise significantly different issues, but both implicate the power of the Court to overturn enactments by democratically elected bodies. In addition, the Court exercises power over the other branches of the federal government in ways apart from its constitutional holdings. The Court interprets federal statutes and can declare unlawful the actions of executive branch agencies. Though these decisions, unlike constitutional holdings, can in principle be overturned by legislation, in practice the difficulty of enacting legislation routinely means that what the Court says is the last word.

Perhaps the more fundamental question—the one that has attracted so much discussion for so long—is when deference is justified and when it is not. In prominent cases, the Court has intervened to try to protect racial or religious minorities or political dissidents from the abusive actions of majorities.[49] If the Court were to adopt a posture of across-the-board deference, it would no longer play that role. But some critics of the Court assert that greater deference would be worth it—that the gains from those celebrated decisions are outweighed by the instances in which the Court has prevented democratically-elected branches of government from serving the nation's interests, including by recognizing and protecting individual rights and the rights of minority and disadvantaged groups.[50]

b. A More Representative Court—and Avoiding Partisan Entrenchment

A second democracy-related argument aims for a Court that reflects, in broad terms, the political makeup of the country. The assumption appears to be that such a Court would not issue decisions that diverge too greatly from the preferences of the broader public. The argument is that while the Court need not and should not be responsive to short-term swings in public opinion, it is not good for the Court or the country for the Court to be substantially out of line with public opinion for an extended period.

Some critics of the current system contend that it produces a persistent gap between the composition of the Court and long-term movements in popular opinion. This misalignment might occur by happenstance, because the fortuitous nature of vacancies enables some Presidents to make many more appointments to the Court than others and therefore to have a much greater influence on its direction.[51] It may also happen by design, if a transient governing majority, or one that is about to be superseded, succeeds in appointing to the judiciary a significant number of candidates whose legal philosophy matches that majority's preferences—a phenomenon sometimes referred to as partisan entrenchment. During such periods of misalignment, there may be a heightened risk that the Court's direction on political or social issues will be perceived as significantly or increasingly distant from the strongly held preferences of a large majority of the public.

Some commentators assert that such a misalignment exists today. They point to the fact that Republican Presidents have appointed fifteen of the last nineteen Justices and six of the current nine Justices, "even though Democrats have held the presidency for 16 of the last 28 years and have received more votes in six of the last seven presidential elections."[52] President Trump, for example, appointed three Justices in his single four-year term; his immediate Democratic predecessors, Presidents Barack Obama, Bill Clinton, and Jimmy Carter, made only four appointments total in a combined twenty years in office.[53] This argument dovetails with some of the concerns about Supreme Court legitimacy. Observers worry that, absent a change in membership, the Court will reverse longstanding precedents that may be favored by a large segment of the public, such as those concerning reproductive rights.[54]

The prospect of misalignment arguably deepens in light of certain structural features of the Constitution and their relationship to the country's demographic development. As larger states grow relative to smaller ones, the power imbalance in the Senate increases; Senators from smaller states, who represent increasingly smaller portions of the electorate, nonetheless retain the same power to move or block nominations. In addition, the vagaries of the Electoral College will increasingly magnify the risk that candidates who do not secure the popular vote will nonetheless win the presidency and with it the opportunity to appoint Justices to the Court.

What some critics cite as misalignment, however, others view as serving important values or purposes of the constitutional system. It is by design that members of the Court (and the rest of the federal judiciary) do not stand for reelection. The protection of life tenure may help maintain judicial independence by providing a degree of insulation from the partisan politics of the moment. This insulation also helps the Court to serve as a check on majority opinion in order to protect constitutional rights and other principles that political majorities may not

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favor. Indeed, some would contend that any concerted attempt to align the Court's decisions with the preferences of political majorities tends to overlook that the Court's obligation is to the Constitution and laws. From this point of view, if the Court's decisions are not favored by current political majorities, that may simply be the unavoidable consequence of a system in which the judiciary is expected to interpret and apply the law, not to do politics. Indeed, some of the Court's most consequential decisions on subjects ranging from school prayer to criminal justice were quite unpopular when first issued.[55] Even if misaligned with public opinion at first, the Court's decisions may garner support as the "popular will" changes over time. *Brown v. Board of Education* was met with significant resistance when it was issued, for example, but is now one of the most respected Supreme Court decisions in history.[56]

Further, the severity of any misalignment between the Supreme Court and popular opinion is debatable. Some legal scholars argue that the Court has, for much of its history, issued decisions that generally reflect the wishes of the public.[57] Still, those who criticize the current Court on the basis of misalignment may see the present circumstances as meaningfully new and different from past ones, and thus may not see history as a reliable guide on this point. In any event, however, identifying whether misalignment exists is not straightforward. There is no obvious way of distinguishing between cases where the Justices have simply reflected the policy views of an earlier generation and those where they have provided a valuable and principled counterweight to majoritarian excesses. Moreover, there are historical examples of dominant political coalitions that tried to entrench themselves in the judiciary by systematically appointing Justices with certain views, only to have those very appointees decide cases in ways that diverged from the preferences or platforms of the appointing party.[58] This last point cuts against any assumption that nominees to the Court are nothing more than political instruments of the Presidents who nominate them.

Ultimately, Commissioners hold different views on the extent to which misalignment is a problem and on whether the Court is sufficiently deferential to the political branches. Throughout this Report, however, we address and take seriously these democracy-related concerns as we evaluate the various proposals that seek to advance different conceptions of democracy.

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Endnotes: Introduction

[1] Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 14, 2021) [hereinafter Exec. Order].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Joe Biden 60 Minutes Interview Transcript*, REV (Oct. 25, 2020), https://www.rev.com/blog/transcripts/joe-biden-60-minutes-interview-transcript.

[6] *See, e.g.*, Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html (noting that partisan politics threaten to "destroy the court's legitimacy in the coming decade"); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court's Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018), https://www.sacbee.com/opinion/california-forum/article219317565.html (noting a "cloud over the court's legitimacy"); Press Release, Office of Sen. Mitch McConnell, McConnell on Court-Packing Commission: Disdain for Judicial Independence (Apr. 9, 2021), https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-on-court-packing-commission-disdain-for-judicial-independence- (describing the Commission as "squarely within liberals' years-long campaign to politicize the Court, intimidate its members, and subvert its independence").

[7] *Roll Call Vote on the Confirmation of Louis Brandeis, 1916*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/timeline/image/roll-call-vote-confirmation-louis-brandeis-1916#top.

[8] *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm.

[9] Matt Ford, *Thurgood Marshall's Patient but Relentless War*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/membership/archive/2017/09/thurgood-marshalls-patient-but-relentless-war/538854/ (describing Justice Marshall's confirmation process as a "national embarrassment").

[10] *See* LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT 209-45 (2017); Alfonso A. Narvaez, *Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat*, N.Y. TIMES (Nov. 23, 1989), https://www.nytimes.com/1989/11/23/obituaries/clement-haynsworth-dies-at-77-lost-struggle-for-high court-seat.html (describing "a tense battle between the Nixon Administration and a coalition of labor and civil rights groups" that led to the failed confirmation of Judge Clement Haynsworth to the Supreme Court).

[11] *See, e.g.*, Jackie Calmes, *How Republicans Have Packed the Court for Years*, TIME (June 22, 2021), https://time.com/6074707/republicans-courts-congress-mcconnell (describing "bare-knuckle tactics in the Senate" by Republicans to "stock . . . the federal bench at all levels with conservatives").

[12] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Ilya Shapiro, Vice President & Dir., Robert A. Levy Ctr. for Const. Stud.), https://www.whitehouse.gov/wp-content/uploads/2021/07/Shapiro-Testimony.pdf.

[13] *Id.*

[14] *Id.*

[15] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Benjamin Wittes, Senior Fellow in Governance Studies, Brookings Inst.) [hereinafter Wittes Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf.

[16] *Id.*

[17] *Id.*

[18] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Curt Levey, President, Comm. for Just.), https://www.whitehouse.gov/wp-content/uploads/2021/07/Levey-testimony.pdf.

[19] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jeffrey J. Peck) https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf.

[20] The Democratic vote count includes independents who caucus with the Senate Democrats.

[21] Peter Overby, *Kavanaugh Nomination Battle Is Fought with Millions in Secret Cash*, NPR (Oct. 4, 2018, 5:00 AM), https://www.npr.org/2018/10/04/654187465/kavanaugh-nomination-battle-is-fought-with-millions-in-secret-cash; Jordan Fabian, *Trump-Allied Groups Pour $30 Million into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020, 4:00 AM), https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation.

[22] *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School) https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf.

[23] Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html.

[24] Senator Charles Schumer, Remarks at the American Constitution Society (July 27, 2007), https://www.acslaw.org/expertforum/text-of-senator-schumers-speech/.

[25] *Id.*

[26] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* (Aug. 26, 2021) (written testimony of David D. Cole, National Legal Director, ACLU), https://www.whitehouse.gov/wp-content/uploads/2021/08/ACLU.pdf (describing the federal judiciary as "the primary guarantor of the Bill of Rights"); *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project), https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf (describing the Court's crucial role in death penalty cases).

[27] *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University) , https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf. Some commentators have suggested that, as a practical matter, the infrequency of constitutional amendments may in part be a function of the Court's willingness to interpret the Constitution in ways that, from an originalist perspective, amount to amending the Constitution informally. *See, e.g.*, John O. McGinnis & Mike Rappaport, *Where Have all the Amendments Gone?*, LAW & LIBERTY (Nov. 1, 2021), https://lawliberty.org/forum/where-have-all-the-amendments-gone/.

[28] *Presidential Commission on the Supreme Court of the United States* 2 (July 5, 2021) (appendix to written testimony of Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), https://www.whitehouse.gov/wp-content/uploads/2021/09/Scheppele-Followup-response.pdf.

[29] Neal Devins & Lawrence Baum, The Company They Keep: How Partisan Divisions Came to the Supreme Court 149 (2019).

[30] Donald Alexander Downs, Supreme Court Nominations at the Bar of Political Conflict: The Strange and Uncertain Career of the Liberal Consensus in Law, 46 LAW & SOC. INQUIRY 540, 542 (2021) (discussing KALMAN, *supra* note 10).

[31] *See* Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 545 (2008); MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1 (2009).

[32] *See, e.g.*, Lee Drutman, *Why Bipartisanship in the Senate Is Dying*, FIVETHIRTYEIGHT (Sept. 27, 2021), https://fivethirtyeight.com/features/why-bipartisanship-in-the-senate-is-dying/ ("[A] bipartisan record has become a liability in today's electoral environment.").

[33] *See, e.g.*, FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (arguing that because of our polarized environment, both parties can reasonably believe in their prospects of controlling Congress, and have no incentive to compromise on legislation); Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519 (1999) (finding that less legislation passes under divided legislatures); James N. Druckman, Erik Peterson & Rune Slothuus, *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57 (2013) (showing that the way individuals make decisions fundamentally changes in polarized environments); Anne E. Wilson, Victoria A. Parker & Matthew Feinberg, *Polarization in the Contemporary Political and Media Landscape*, 34 CURRENT OPINION BEHAV. SCIS. 223, 223 (2020) ("[P]eople's misperceptions of division among the electorate . . . can contribute to a self-perpetuating cycle fueling animosity (affective polarization) and actual ideological polarization over time.").

[34] Sam Rosenfeld, The Polarizers: Postwar Architects of Our Partisan Era 3 (2018).

[35] Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019), https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F.

[36] Wittes Testimony, *supra* note 15, at 5.

[37] *Stat Pack for the Supreme Court's 2020-21 Term*, SCOTUSBLOG (July 2, 2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf (showing that forty-three percent of the October Term 2020 cases were decided unanimously, with only fifteen percent of cases neatly polarized along ideological lines).

[38] *See* Ephrat Livni, *Americans Trust the Supreme Court More than Other Government Branches*, QUARTZ (Oct. 26, 2019), https://qz.com/1735709/americans-trust-supreme-court-more-than-other-government-branches; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx.

[39] Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx.

[40] *Id.* (showing a table where the trend lines cross for Democrats and Republicans in early 2017).

[41] Nearly 7 in 10 Say Recent Rise in COVID-19 Deaths Was Preventable, Quinnipiac University National Poll Finds; Job Approval for Supreme Court Drops to All-Time Low, QUINNIPIAC POLL (Sept. 15, 2021), https://poll.qu.edu/poll-release?releaseid=3820.

[42] Peck Testimony, *supra* note 19.

[43] *See* Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008) ("[T]he Supreme Court does not possess the budgetary power of Congress or the enforcement power of the President.").

[44] *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) ("For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy.").

[45] THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[46] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

[47] Benjamin N. Cardozo, The Nature of the Judicial Process 43 (1921).

[48] *See, e.g.*, Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here's How We Can Scale Back Its Influence.*, VOX (Sept. 29, 2020), https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler; *Presidential Commission on the Supreme Court of the United States* 2 (June 30,

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2021) (written testimony of Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History, Yale University), https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf.

[49] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding that the First Amendment protected Jehovah's Witness students from compulsorily saluting the American flag in public schools); Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (finding public school segregation unconstitutional under the Equal Protection Clause); Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969) (finding that the First Amendment prevented a public school from punishing students for peacefully protesting the Vietnam War through the wearing of black armbands); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (striking down a Pennsylvania abortion restriction as creating an undue burden on women seeking abortions); Obergefell v. Hodges, 576 U.S. 664 (2015) (finding that the Fourteenth Amendment requires states to license and recognize same-sex marriages).

[50] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2, 12 (June 30, 2021) (written testimony of Nikolas Bowie, Assistant Professor of Law, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf ("[A]s Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory."); Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L. REV. 109 (2010).

[51] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 3, 16 (July 20, 2021) (written testimony of Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf ("[T]he current system makes vacancies depend on contingent, random events.").

[52] *Presidential Commission on the Supreme Court of the United States* 3, 1 n.2 (July 20, 2021) (written testimony of Jamal Greene, Dwight Professor of Law, Columbia Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf.

[53] *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

[54] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 3, 15 (July 20, 2021) (written testimony of Nan Aron, President, Alliance for Justice), https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf ("If the Court proceeds to wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights, then the only possible conclusion is that reform is imperative.").

[55] *See* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (showing that, in the 1970s, over seventy percent of the public disapproved of the Court's school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, *in* PUBLIC OPINION, *supra*, at 42-43 (noting that "[i]n many ways" the Warren Court's criminal procedure decisions "were out of step with public opinion and may even have shifted public opinion against the Court's pro-rights position").

[56] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal."); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1016 (1998) (describing *Brown* as "[t]he classic example" of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (describing "the constitutional canon" as "the set of decisions whose correctness participants in constitutional argument must always assume" and naming *Brown* as "the classic example"). For discussions of the resistance to school desegregation, see JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 242-314 (2018); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004).

[57] *See* Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 16 (2009) (arguing that the Supreme Court "ratif[ies] the American people's considered views about the . . . Constitution"); Jeffrey Rosen, The Most Democratic Branch: How the Courts Save America 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress). *But see* Devins & Baum, *supra* note 29, at xi (arguing that the Justices are "elites who seek to win favor with other elites," rather than with the general public); Justin Driver, *The Consensus Constitution*, 89 Tex. L. Rev. 755, 757-58 (2011) (doubting that Supreme Court decisions "reflect[] the 'consensus' views of the American public,"

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because the public rarely has a united position on controversial constitutional issues); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 Sup. Ct. Rev. 103 (2010).

[58] *See, e.g.*, Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO MAG. (July 9, 2018), https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953 (noting how Justice Souter, a Republican appointee, "began to drift left" soon after his Court tenure began, ultimately becoming a "more reliable champion of liberal causes than Clinton appointees Ruth Bader Ginsburg and Stephen Breyer"); Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2020 Supreme Court Database, Version 2021 Release 01*, http://supremecourtdatabase.org (tracking the leftward drift of numerous Republican-appointed Justices).

Chapter 1: The History of Reforms and Reform Debates

Any account of what has precipitated today's debate about the role and operation of the Supreme Court would be incomplete without an understanding of the long history of political debate and institutional reform surrounding the Court. This history, which dates back to the Founding and encompasses formative periods of the nation's history, highlights how lawmakers and the public frequently have been keenly attentive to and engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to explain away or attempt to resolve today's debate according to a particular historical standard, but rather to underscore the fact that debates about Court reform are part and parcel of U.S. constitutional history and the development of the American political order.

I. The Origins of Federal Judicial Power

In the spring of 1788, Alexander Hamilton published an essay titled *The Federalist No. 78* under the pseudonym "Publius." The piece was one of a "Collection of Essays, written in favour of the New Constitution" and addressed to "the People of the State of New York." In it, Hamilton offered "an examination of the judiciary department of the proposed government." Describing the role of the Supreme Court in the constitutional structure, he wrote:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be

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> said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[1]

The Constitution's separation-of-powers principle, Hamilton argued, gave courts the power of "judgment" so that they could act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[2]

Federalist 78 was one of many political commentaries that were printed in newspapers and sold as pamphlets while the ratification debates were taking place. Tracts defending and criticizing the Constitution circulated through the markets, coffeehouses, shops, and parlors of American towns. Not everyone who read *Federalist 78* agreed with it. Some readers preferred the writings of "Brutus," who "found the Constitution flawed in its 'fundamental principles' and advocated its rejection," while others agreed with the "Federal Farmer," in whose view the Constitution "included 'many good things' as well as 'many important defects,' and that 'with several alterations' it could create a 'tolerably good' federal system."[3] By the time the Constitution began operating in 1789, Americans were already engaged in a broad and lively public debate about the role that courts should play in the new republic.[4]

The Constitution creates the fundamental law of the nation, understood to embody the will of the people. But as a written document, it depends on actual governmental institutions for its articulation and enforcement. Beginning in the founding era and continuing to the present day, the role of the Court in carrying out this fundamental law has been contested. Over the intervening centuries, the place of the Court in the American system has changed.

Four themes are especially vital to understanding modern debates concerning the current role of, and potential reforms to, the Supreme Court:

- the persistence of debates over restructuring or reforming the Court, even as the nature and content of these debates have varied over time;
- the tension in the Court's role, insofar as it is both one of three co-equal branches of the federal government and also the arbiter that sees itself as responsible for resolving disputes among the branches and otherwise determining the meaning of the Constitution;

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- the connection between the Court's organization and deeper structural concerns (e.g., the connection between the Justices' circuit-riding duties, the size of the Court, and regional representation); and
- the relationship between the Court and politics.

Here, we trace the history of debates over potential reforms to the Supreme Court from the early national period through the twentieth century. The discussion proceeds chronologically in order to explicate the ways in which the themes just mentioned shaped, and were shaped by, changing conceptions of the Court's role in the American constitutional system.

II. The Origins of the Supreme Court: The Constitution and the Judiciary Act of 1789

The Court's origins are inextricably bound up with existential questions concerning the structure of the judicial power of the United States. On March 4, 1789, the new government created by the Constitution began operating. Many elements of the system remained uncertain and disputed despite the preceding twenty-two months of discussion and drafting, first in the Constitutional Convention and then in the state ratifying conventions.[5] The Constitution's beginning raised a host of new questions, the stakes of which were understood to be tremendously high.[6]

Chief among the issues still to be settled were the scope of the federal judicial power and the practical details of how that power would function. Article III of the Constitution established the Supreme Court. But the drafters of the Constitution had been unable to agree on key points—most importantly, whether to create inferior federal courts, what types of cases the federal courts would be able to hear, and what sort of relationship the Supreme Court would have with the state courts.[7] The Constitution was also silent on the number of Justices who would sit on the Court. The drafters therefore left to Congress the task of addressing many of these questions as it saw fit, subject to the boundaries set forth in Article III.[8] The drafters' decision to postpone the question of the inferior federal courts has been termed by modern commentators the "Madisonian Compromise."[9]

When the First Congress convened in New York's Federal Hall in April 1789, its members immediately began debating a bill to establish the federal courts. "The importance of the judiciary bill was obvious to contemporary observers both inside and outside Congress," according to several historians.[10]

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In March 1789, weeks before a Senate committee had even been formed to draft a bill, an anxious James Sullivan—soon to become the attorney general of Massachusetts—wrote to his friend Representative Elbridge Gerry pleading for more news about the formation of the judiciary. "[T]he freedom of the people depends so much upon the proper arrangement of this part of the government," he explained. James Monroe, not yet in Congress, told Representative James Madison that the judiciary bill "will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the gov[ernment] itself, and sh[o]w in the opinion of those who organize it, how far it can discharge its own functions." Senator Richard Bassett, a member of the committee drafting the bill, ventured to say that "our happiness as a people very much depends on this System."[11]

A Senate committee comprising ten members (one from each state that had both ratified the Constitution and sent senators by that point) produced a first version of the Act. The committee then sent its draft to leading lawyers, jurists, and officials around the nation, requesting their comments. What resulted was a compromise bill that attempted to balance competing interests, most notably the Federalists' focus on establishing a strong federal judiciary with the Anti-Federalists' desire to preserve state autonomy.[12] Following several rounds of revisions and amendments, the bill won approval from the Senate and the House. On September 24, the Judiciary Act of 1789 was signed into law by President George Washington.[13]

The Judiciary Act was far more than a restatement of Article III of the Constitution.[14] As the intense debates surrounding the bill suggest, the provisions of the Act were hard fought, and the final version represented a set of choices about how the judicial power of the nation would be shaped.[15] Even its supporters expressed reservations about the bill. James Madison wrote that the act was "pregnant with difficulties."[16] On the floor of Congress a few weeks later, however, he praised the bill as "as good as we can at present make it," while noting that it "may not exactly suit any one member of the House, in all its parts."[17]

The Act provided for a six-justice Supreme Court: one Chief Justice and five associate Justices. It established the Court's jurisdiction, both original and appellate. It also placed the Court at the top of the hierarchy of courts in the nation, state as well as federal. Section 25 of the Act granted the Court the power to review certain decisions of the highest courts of the states. This provision was viewed by some as particularly delicate, insofar as it placed the Supreme Court in the position of overseeing—and potentially overruling—the decisions of state court judges.

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Proponents of the Act, including Senator Oliver Ellsworth of Connecticut, its primary drafter (and a future Chief Justice of the United States), maintained that a robust system of inferior federal courts with jurisdiction to hear cases arising under federal law would be a more effective method of vindicating constitutionally secured rights and guarantees than relying on state courts alone.[18] The Act thus established a system of inferior federal courts, which it broke down into two categories: district courts and circuit courts. The thirteen district courts, each with a single district judge, were apportioned along state lines, including one each for Maine and Kentucky, which had not yet become independent states. The jurisdiction of the district courts extended primarily to admiralty cases and cases involving minor federal crimes. The three circuits—eastern, middle, and southern—were each staffed by the district judge and two Justices of the Supreme Court, whom the Act charged with "riding circuit" to hold sessions in each district of the circuit twice each year.[19] Both the district courts and the circuit courts were primarily trial courts, with jurisdiction depending on the nature of the suit, the citizenship of the parties, and the amount in controversy. The circuit courts also possessed limited appellate jurisdiction.

The Act's assignment of circuit-riding duties to the Justices of the Supreme Court proved one of the most significant and controversial features of the U.S. judicial system for its first century of existence. The circuit-riding system tied the Court to the circuits, in both numerical and geographic terms. The original number of seats on the Court was set at six, allowing an even division among the three circuits. Although it required substantial and difficult travel, drawing complaints from the Justices,[20] the practice of circuit riding compelled the Justices to leave the capital and travel to the nation's periphery, where they mixed with a broad array of lawyers and litigants. When hearing cases on circuit, the Justices acted as trial-court judges, requiring them to deal with issues of fact, instruct juries, and issue rulings on procedure and evidence.

Four months after Congress passed the Judiciary Act, the Supreme Court began operations. On February 2, 1790, Chief Justice John Jay convened the initial session at New York's Royal Exchange, at which only three associate Justices were present.

The Court started its work amid intense arguments about the Judiciary Act. Within a year of the Court's first session, reform of the federal judiciary returned to the center of public debate because of dissatisfaction with the allocations of authority between the district and circuit courts, and between the federal and the state courts.[21] In 1790, President Washington's Attorney General, Edmund Randolph, submitted a report to Congress that recommended restructuring the federal courts. Randolph's report was soon followed by a set of proposed

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amendments to Article III drawn up by New York congressman Egbert Benson. Among the proposed reforms in Randolph's and Benson's plans were ending circuit riding, creating circuit judgeships, and vesting the inferior federal courts with jurisdiction to hear all cases arising under federal law.[22] Neither plan gained sufficient support to bring about change. Yet reform of the federal courts was a constant topic of political debate in the early years of the Republic.

III. The Court and Politics in the Early National Period

Throughout the 1790s, Congress continued to debate reform of the federal judiciary, with much criticism focusing on the Justices' circuit-riding duties. In his annual message to Congress in 1799, President John Adams urged members to begin "a revision and amendment of the judiciary system," which he argued was "indispensably necessary" to "give due effect to the civil administration of Government and to insure a just execution of the laws."[23]

In February 1800, a House committee met with Justices William Paterson and Bushrod Washington to solicit their recommendations for reform. The following month, Congressman Robert Goodloe Harper of South Carolina introduced a draft bill recommending substantial reforms to the federal judiciary. The bill expanded the jurisdiction of the inferior federal courts to include all cases arising under federal law, increased the number of districts and circuits, and created sixteen new circuit judgeships, thereby ending the Justices' circuit-riding duties.[24] The bill reduced the number of Supreme Court Justices from six to five upon the next vacancy, likely to limit the ability of a future President who was not Adams to shape the Court.[25] It also added a new, sixth circuit, comprising Tennessee, Kentucky, and the Indiana and Ohio territories. Following debate and minor modifications, the bill passed the House on January 20 and the Senate on February 7, 1801, and was signed into law by Adams on February 13, 1801. Officially titled "An Act to Provide for the More Convenient Organization of the Courts of the United States," the Act became known as the Judiciary Act of 1801.[26]

The Judiciary Act of 1801 is sometimes assumed to have been entirely motivated by Thomas Jefferson's victory in the presidential election of 1800. Four days after the 1801 Act was passed, on February 17, 1801, the House settled the disputed contest by electing Jefferson on the thirty-sixth ballot. Jefferson's Republican Party swept into power in Congress as well. But reforms to the federal judiciary, including ending circuit riding and expanding the courts' jurisdiction, had been debated since the 1790s, and the movement that led to the 1801 Act predated the election by several months.[27]

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Nevertheless, the election of 1800 clearly heightened political polarization, and with it the politicization of the judiciary. When Jefferson and the Republicans took control of the presidency and Congress in March 1801, they quickly moved to undo the Federalists' judicial reforms. On March 8, 1802, the Judiciary Act of 1801 was repealed. The new Act, known as the Judiciary Act of 1802, revoked the grant of general federal question jurisdiction, abolished the new circuit judgeships, and reinstated the Supreme Court Justices' circuit-riding duties.[28] The 1802 Act also retained the enlarged number of circuits (six) but reversed the planned reduction of the number of seats on the Court, bringing it back to six. For the third time in a dozen years, the Founders adjusted the number of Justices on the Supreme Court. Consequently, after 1802, the number of circuits matched the number of Justices, and the Justices continued to ride circuit.

The 1802 repeal of the 1801 Judiciary Act further inflamed debate surrounding the federal courts. All sides accused the others of using the judiciary for political gain. Jefferson charged the Federalists with having "retired into the Judiciary as a strong hold" in order to entrench themselves in the face of electoral losses.[29] Alexander Hamilton, influential among Federalists even though out of office, warned that "if the bill for the repeal passed, and the independence of the Judiciary was destroyed," the nation would before long "be divided into separate confederacies, turning our arms against each other."[30]

The substance as well as the structure of federal judicial power was deeply contested during the early national period. One of Adams's most lasting achievements as President was his appointment of John Marshall as Chief Justice in January 1801. During Marshall's thirty-four-year tenure as Chief Justice, the Court became stronger as an institution, claimed the power to interpret the Constitution, and asserted with increasing force a particular vision of the United States as a union rather than a confederation. Under Chief Justice Marshall's leadership, the Court positioned itself as an arbiter of the constitutional order.

In the early months of 1803, the Marshall Court issued two important rulings on key constitutional issues. In both cases, *Marbury v. Madison* and *Stuart v. Laird*, the Court demonstrated a notable ability to claim power while also appearing to limit that power. Both cases were also deeply political, having arisen out of the election of 1800, and both had been delayed when the Jeffersonian Congress postponed the Court's 1802 term.

In *Marbury v. Madison*, the Court held that it lacked the authority to order Secretary of State James Madison to issue a commission to William Marbury for a position as justice of the peace, even though Marbury clearly had a right to the commission, and the remedy he

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sought—a writ of mandamus—was the proper remedy.[31] The problem, Chief Justice Marshall held, was that the statutory provision on which Marbury relied to establish the Court's jurisdiction to grant the remedy was invalid because it exceeded Congress's authority. The Court therefore lacked the ability to grant Marbury his remedy, Chief Justice Marshall determined.

The reason for this seeming weakness, however, was that the Court possessed a far stronger weapon: the ability to declare acts of Congress unconstitutional. This was the power of judicial review. The authority that Congress sought to give the Court in Section 13 of the Judiciary Act of 1789 "appears not to be warranted by the constitution," Chief Justice Marshall stated.[32] Then followed what became one of the most quoted passages in American constitutional law:

> It is emphatically the province and duty of the judicial department to say what the law is. . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[33]

As many scholars have noted, judicial review was not new to American law in 1803.[34] Courts—including the Supreme Court, state courts, and, even earlier, colonial courts—had long claimed the authority to invalidate legislation. The Constitution did not refer explicitly to judicial review. But the combined force of Article III, the Supremacy Clause of Article VI, longstanding Anglo-American practice, and the nature of the written Constitution suggested to Chief Justice Marshall and others that judicial review was within the Court's power.[35] In *Marbury*, Chief Justice Marshall established judicial review as a principle of American law, claiming for the Court—in the name of the Constitution and the people—the power "to say what the law is."[36] Yet Chief Justice Marshall's opinion in *Marbury* was ambivalent, insofar as it paired this claim of interpretive power with a disavowal of the power to order Madison to deliver Marbury's commission.

In addition, the power of judicial *review* that Chief Justice Marshall asserted did not necessarily amount to judicial *supremacy*. As one leading constitutional law casebook puts it, judicial review "means that a federal court can review statutes (or executive actions) for constitutionality and refuse to enforce them in court proceedings if it finds them unconstitutional." Judicial supremacy, in contrast, "means that the federal courts'

interpretation of the Constitution is supreme over the other branches."[37] The boundaries between the two concepts, and the Court's claim on each, have been the subject of debate since the founding era.

One week after the Court handed down its ruling in *Marbury*, it decided another case that also carried important consequences for the role of the judiciary in the constitutional system. That case, *Stuart v. Laird*, required the Court to rule on the constitutionality of the Jeffersonian Congress's 1802 repeal of the Judiciary Act of 1801. The questions presented asked, first, whether Congress could validly abolish the circuit courts created under the 1801 Act without violating Article III of the Constitution, which stated that federal judges were to hold their offices "during good Behaviour," and second, whether the Justices could be required to sit as circuit judges.[38] The Court upheld the constitutionality of the 1802 Act, found that the reorganization of the inferior federal courts was within Congress's power, and held that the validity of circuit riding had been settled by "practice and acquiescence."[39]

Some commentators have characterized *Stuart* as a more overtly political—and perhaps more consequential—decision than *Marbury*. *Stuart* forced the Court to confront existential questions about the balance between judicial independence and congressional control of the courts. One scholar has argued that "Marshall and his brethren apparently calculated that to invalidate this statute was to guarantee Jeffersonian political retaliation against the Court,"[40] while another called the *Stuart* decision "an exercise in self-preservation."[41] Chief Justice Marshall himself seems to have remained skeptical about the basis of the decision, referring in an 1823 letter, in ironic tones, to "the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge."[42]

As the *Marbury* and *Stuart* decisions demonstrate, the Court was at the center of negotiations about both law and politics during the early nineteenth century. Through its substantive decisions, the Court established its power even as it showed itself attentive to political context. As the Court gained stature under Chief Justice Marshall's leadership, structural reforms to the judiciary continued to be a perpetual topic of discussion. In 1807, Congress both increased the size of the Court to seven Justices and added a seventh circuit comprising Ohio, Kentucky, and Tennessee.[43] The size of the Court and the number of circuits were still understood as necessarily linked. Other changes to the Court's jurisdiction were periodically proposed. These included stripping the Court of its power under Section 25 of the 1789 Judiciary Act to hear appeals from state courts, an effort that was linked to specific policy issues, including treaty enforcement, land sales, bank regulation, and internal improvements.[44]

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IV. The Jacksonian Era: National Expansion, Court Expansion, and Partisan Strife

The antebellum decades saw continuing disputes over the federal judiciary's structure; the balance between political control of the Court and judicial independence; and the orientation of the Court toward pressing political issues, including commerce, migration, and slavery.

The election of Andrew Jackson as President in 1828, and the related rise of the Democratic Party to national political dominance, was viewed by many contemporaries as "a kind of revolution" akin to that which had swept Jefferson into office in 1800.[45] Jackson's two terms as President, from 1829 to 1837, brought a bold Executive who claimed broad powers, the rise of modern party politics, and the entrenchment of sectionalism. Jacksonian nationalism aimed, in the words of one historian, to "maintain white supremacy and expand the white empire, to evict the Indian tribes, [and] to support and extend slavery."[46]

These imperatives had important consequences for the federal judiciary in three distinct areas: the role of the Supreme Court and its relationship to contemporary politics; the structure of the federal courts, in particular the ongoing debate over the Justices' circuit riding; and the related issue of the size of the Court. Throughout this period, the Court was embroiled in important issues relating to the separation of powers (the Court's relationship to the President and Congress) and federalism (the relationship between the Court and the states, including both state courts and legislatures).

First, the Supreme Court continued to be viewed by contemporaries as an institution that was necessarily involved in politics. Prior to Chief Justice Marshall's death in 1835, the Court took stances in a few high-profile cases that appeared to be carefully calculated acts of resistance to Jeffersonian-Republican policies. In McCulloch v. Maryland (1819) and Osborn v. Bank of the United States (1824), the Court upheld the constitutionality of the Second Bank of the United States against attacks on it by several states and by then-candidate Jackson.47 Chief Justice Marshall published a series of newspaper essays under a pseudonym in which he defended the McCulloch decision against arguments that the Bank represented an overreach by Congress and an invasion of state sovereignty.48 During Jackson's presidency, the Marshall Court heard a pair of cases brought by the Cherokee Nation in which the tribe sought to vindicate its jurisdiction and ownership of lands against the state of Georgia. Jackson had campaigned for the presidency on a promise of "Indian removal," and, in 1830, a closely

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divided Congress had passed the Indian Removal Act.49 In the 1831 case of Cherokee Nation v. Georgia, the Court held that it lacked jurisdiction to hear the tribe's case.50 In 1832, however, the Court ruled in Worcester v. Georgia that Georgia did not have authority to extend its criminal laws over the Cherokee Nation.51 The Court's ability to compel the state to carry out its decision was limited, however, by the procedures set forth in the Judiciary Act of 1789. Contemporaries also speculated that the Court was leery of provoking Georgia at the same moment that South Carolina was claiming the power to nullify federal law.[52]

Following Chief Justice Marshall's death in July 1835, President Jackson nominated as his successor Roger Brooke Taney, who had previously served as Jackson's Attorney General and Treasury Secretary (the latter via a recess appointment which was subsequently rejected by the Whig-dominated Senate). Earlier in 1835, President Jackson had nominated Taney to an associate justiceship on the Court. At that time, the Senate had refused to confirm Taney based on his removal of deposits from the Bank of the United States at President Jackson's direction.[53] Taney had removed the deposits following Jackson's 1832 veto of the Bank's recharter, in which Jackson had rejected the Court's power to decide with finality the issue of the Bank's constitutionality.[54] By 1836, Democrats had regained sufficient control of the Senate to confirm him.[55]

Contemporaries noted the interaction of politics with the structure of the federal courts and the size of the Supreme Court. Territorial expansion and regional affiliations were important factors with respect to these issues. By 1837, the Union comprised twenty-six states, nine of which had been admitted since the addition of the most recent circuit in 1807. Since then, the number of circuits and Justices had remained at seven. But residents of the six most recently added states increasingly demanded that their states be incorporated into circuits, rather than having district courts exercise both district- and circuit-court jurisdiction (and without ever being visited by a circuit-riding Justice).[56] Jackson was the first western president, and the West was an important piece of the Democratic political coalition. An increasingly widespread belief held that the Court should represent the regions of the nation. Relatedly, some observers felt that, for all its problems, circuit riding was valuable because it ensured that the Justices were exposed to the issues and debates on the periphery, and that Americans on the nation's periphery felt connected to the center. Another view, however, held that the Court was already too large, and that the quest for regional balance was either not worth pursuing or doomed to failure.[57]

While these arguments over the structure of the federal judiciary were churning, the Court's membership was shifting, in part due to deaths and retirements among the Justices and

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in part due to politics. During his first term in office, President Jackson appointed two Justices to the Court. During his second term, he nominated five additional Justices, including Taney as Chief Justice, bringing to seven his total number of nominees to the Court, of whom six served as Justices. The last five of President Jackson's appointments came from slaveholding states.[58] President Jackson thus "made more Supreme Court appointments than any other president between Washington and Taft."[59]

President Jackson was able to appoint so many Justices to the Court because on March 3, 1837—his last day in office—Congress, which was controlled by Jackson's Democratic Party, passed a new Judiciary Act.[60] The Act of 1837 created two new circuits and added two new seats to the Court, bringing the total for both to nine for the first time in the nation's history. The Act also took effect immediately, allowing outgoing President Jackson to nominate two Justices: John Catron, whose circuit-riding duties would cover the newly created Eighth Circuit, and William Smith for the new Ninth Circuit. When President Jackson's successor Martin Van Buren (who had previously served as Jackson's Vice President and Secretary of State) took office on March 4, 1837, the Senate confirmed both Catron's and Smith's nominations. Smith, however, declined, and Van Buren nominated John McKinley through a recess appointment.[61]

After decades of wrangling over Court expansion, circuit riding, and western representation, Congress ultimately restructured the federal judiciary in 1837 because it was possible to do so in a way that consolidated the Democratic Party's control. "The two events which finally induced both Houses to agree were the election of Van Buren, bringing with it the prospect of a four-year Democratic rule, and the Supreme Court appointments made by Jackson in 1835 and 1836," which eliminated "the fear that the addition of two new judges would change the complexion of the Court."[62] Describing Jackson's impact on the Court, one contemporary magazine characterized the "late *renovation* of the constitution of this august body, by the creation of seven of the nine members under the auspices of the present democratic ascendancy" as "the closing of an old, and the opening of a new, era in its history."[63] For the first time in the nation's history, the Court comprised nine Justices. The expansion had come about through a combination of factors: pragmatic concerns about the federal courts' efficacy; sectional demands; and political imperatives.

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V. The Upheavals of the Civil War and Reconstruction: Transforming the Constitution

The Civil War and Reconstruction launched a series of constitutional transformations that were accompanied by fundamental changes in the operation of the federal judiciary. At the heart of this "second founding" were the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[64] The Thirteenth Amendment abolished slavery.[65] The Fourteenth Amendment "constitutionalized the principles of birthright citizenship and equality before the law and sought to settle key issues arising from the war, such as the future political role of Confederate leaders and the fate of Confederate debt."[66] The Fifteenth Amendment granted Black men the right to vote.[67] Each of the Reconstruction Amendments also vested Congress with the power to enforce these rights. In the realm of judicial power, the trend was toward stronger federal courts with more robust jurisdiction. Beginning in the 1870s, however, a series of narrow decisions from the Court severely limited Reconstruction's revolutionary potential.

Prior to the war, in 1857, the Supreme Court had drawn attack from growing numbers of Americans for its immediately infamous decision in *Dred Scott v. Sandford*, in which Chief Justice Taney wrote for the Court that "that class of persons" whose "ancestors were negroes of the African race, and imported into this country and sold and held as slaves" were "not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[68] To support his holding, Taney presented his own version of Founding-era history:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[69]

Frederick Douglass, the great abolitionist political leader, excoriated the decision in a series of public addresses. "You may close your Supreme Court against the black man's cry for justice, but you cannot, thank God, close against him the ear of a sympathising world, nor shut up the Court of Heaven. All that is merciful and just, on earth and in Heaven, will execrate

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and despise this edict of Taney," Douglass told a New York audience in May 1857. "Judge Taney can do many things, but he cannot change the essential nature of things—making evil good, and good evil."[70]

As part of his campaign for the U.S. Senate in 1858, Abraham Lincoln decried the *Dred Scott* decision, calling it "erroneous" as a matter of law and warning that it would lead to "the spread of the black man's bondage."[71] In his first inaugural address in March 1861, Lincoln continued his criticism of the Court, suggesting that such judicial overreach as the *Dred Scott* decision—which he did not mention by name—threatened democracy:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[72]

Following the secession of the eleven states that formed the Confederacy between December 1860 and May 1861, the Republican-controlled Congress set about reshaping the federal judiciary as "a partner against the South."[73] Many contemporaries also hoped that these efforts would redeem the Court from the stain of the *Dred Scott* decision.

The start of the Civil War witnessed a series of reforms to the circuit courts. In his first message to Congress in 1861, President Lincoln observed that "the country has outgrown our present judicial system" and called for the circuit system to be overhauled.[74] Eight states that had been admitted over the past two decades had never had circuit courts visited by a Supreme Court Justice. Yet Lincoln did not advocate expanding the size of the Court. Instead, he urged that Congress sever the connection between the Court and the circuits, setting the size of the Court at a "convenient number" and then establishing circuits of "convenient size," with circuit-judging duties to be handled by some combination of Justices and circuit judges.[75]

Congress enacted some of Lincoln's recommended reforms. In 1862 and 1863, enabled by the exodus of southern Democrats from the federal government, Congress reorganized the circuits in order to limit southern influence. Instead of five circuits composed entirely of slaveholding states, there were now only three such circuits. The total number of circuits was now ten, and a tenth seat was added to the Court. As in the eighteenth century, when the Court had comprised six seats, reformers appeared unbothered by the prospect of an even number of

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Justices. The Justices responsible for the Eighth, Ninth, and Tenth Circuits now all hailed from northern states.[76]

In 1866, after the war had ended, Congress once more reorganized the circuits and the Court, again with the objective of limiting the influence of the former Confederate and other slaveholding states. The statute reduced the number of circuits to nine and mandated a gradual reduction of the number of seats on the Court from ten to seven, via attrition.[77] Congressional Republicans sought to reduce the size of the Court in order to prevent President Andrew Johnson, a foe of Reconstruction, from nominating Justices to fill any vacancies.[78]

The judicial power of the United States was even more profoundly transformed in this period by a series of statutes enlarging the federal courts' jurisdiction. As one historian writes, "[i]n no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876."[79] Although Congress did on a few notable occasions strip the Supreme Court of jurisdiction in specific sets of cases,[80] the broader movement was toward expanding the judicial power of the United States.[81] The most important reforms were in three areas: first, removal jurisdiction, which allowed certain cases that began in state court to be taken to federal court;[82] second, the habeas corpus power, permitting federal courts to issue writs on behalf of prisoners held by state authorities in violation of federal law;[83] and third, federal question or "arising under" jurisdiction.[84]

This growth in jurisdiction was accompanied by substantive legislation from Congress that created new federal rights and causes of action, many of which were aimed at protecting the rights of African-Americans.[85] As a result of these reforms, the inferior federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[86]

Despite Congress's expansion of federal jurisdiction during the post-Civil War era, the Court issued a series of decisions that significantly limited the reach of both civil rights legislation and the Reconstruction Amendments. In the *Slaughter-House Cases*, the Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment narrowly, holding that the Clause covered only certain rights of national citizenship that did not include the economic protections claimed by the plaintiffs, a group of white butchers in New Orleans.[87] Three years later, the Court reaffirmed this constrained view of the Fourteenth Amendment in *United States v. Cruikshank*, a case arising out of the infamous Colfax Massacre in Louisiana, in which a mob of white vigilantes killed between 60 and 150 African-

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Americans, as well as three white men.[88] In *Cruikshank*, the Court overturned the federal convictions of the vigilantes, holding that the Bill of Rights protected citizens only against deprivations of rights by the federal government, not by states or private parties.[89]

The next several years saw frequent litigation of the Reconstruction legislation and Amendments. In the words of one historian, "[t]he opening of each term of the Court, beginning in 1876, caused a buildup of anxiety regarding possible decisions in the civil rights cases."[90] The Civil Rights Act of 1875 was regarded by many contemporaries as the most far-reaching piece of Reconstruction legislation.[91] The Act's stated aim was "to protect all citizens in their civil and legal rights," and it guaranteed to all citizens, regardless of color, access to public accommodations, including public schools, churches, theatres, and transportation, as well as jury service.[92] In 1883, in the *Civil Rights Cases*, the Court invalidated key provisions of the Act, ruling that neither the Thirteenth nor the Fourteenth Amendment permitted the federal government to proscribe discriminatory behavior by private actors.[93] Many scholars regard the *Civil Rights Cases* as the culmination of a decade-long shift by the Court toward a narrow interpretation of the Reconstruction statutes and Amendments. As one historian observes, "[t]he rights of the individual took precedence over obvious social inequalities that federal officials sought to address."[94] With the erosion of northern support for robust Reconstruction policies, "[t]hat same narrow, highly individualized interpretation of rights also allowed legal segregation to flourish."[95]

VI. The Progressive Era: Structural Reforms and Democracy-Based Critiques of the Courts

A. Reorganization of the Federal Courts

As a result of the structural reforms of the Reconstruction era, the dockets of the federal courts—and in particular the Supreme Court—became crowded "beyond all control."[96] A small reprieve came from Congress in an 1869 statute that created circuit judgeships, one for each of the nine circuits.[97] The circuit-riding obligations of the Justices were also reduced. But it was not enough to stem the tide of litigation in federal court. The number of cases pending in the federal district and circuit courts rose from 29,013 in 1873 to 54,194 in 1890—an increase of eighty-six percent.[98] Yet over the same period, the number of inferior federal court judges rose only slightly, from sixty-two in 1873 to sixty-nine in 1890.[99]

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Moreover, the booming dockets in the district and circuit courts meant a concomitant surge in the Supreme Court's caseload. "[W]ith no other exclusively appellate court and an automatic right of appeal to the Court in many instances, the losing parties in such cases inevitably brought their claims to the justices."[100] The Court's docket in 1860 numbered 310 cases. In 1890, the number was 1,816 cases—623 of which had been filed in 1890 alone.[101]

Dissatisfaction with the federal courts' organization and functioning spawned numerous reform proposals. These included calls for an intermediate level of appeals courts, an innovation that had been discussed for decades but had never gained sufficient support to be attempted. Other proposals included expanding the Court to eighteen Justices, half of whom would operate as a "National Court of Appeals." Another proposal would have segmented the Court into three "divisional" panels, each responsible for common-law, equity, and admiralty and revenue cases, and with the entire Court hearing constitutional cases.[102]

Finally, in 1891, Congress passed the Circuit Court of Appeals Act, known as the Evarts Act in honor of its chief architect, Senate Judiciary Committee Chairman William Evarts of New York.[103] The Evarts Act "fundamentally reshaped the federal judicial system" and "substantially established the framework of the contemporary system."[104] For the first time since 1802, the Justices were no longer obliged to ride circuit. The Act also created intermediate courts of appeals, which "shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system's primary trial courts."[105] The reforms also drastically decreased the Court's caseload by limiting the right of automatic appeal, and by making the decisions of the courts of appeals final in several categories of cases, including diversity suits and criminal prosecutions. The courts of appeals could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari; for state court cases, the review mechanism remained the writ of error.[106] Whereas the number of new cases filed before the Court in 1890 was 623, that number dropped to 379 in 1891 and then to 275 in 1892.[107] Three decades later, Harvard law professor and future Supreme Court Justice Felix Frankfurter, along with his former student James M. Landis, offered the following characterization of the Evarts Act: "The remedy was decisive. The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off."[108]

B. The Progressive Critique of the Court

The end of federally enforced Reconstruction by 1877 also redirected Republican energies from civil rights for African-Americans toward new forms of nationalism that prioritized economic development, property rights, and the interests of large-scale enterprise.[109] Critics

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of the Court, especially those associated with the progressive movement (and the related Progressive Party), charged the federal courts with favoring business interests, in part due to the expansion of the courts' diversity jurisdiction, the frequency of removal from state to federal court by corporate defendants, and the application of a substantive body of law known as "general federal common law."[110] These critics charged the Court with deploying its power of judicial review more often and in accordance with conservative policy preferences. Chief among these preferences was the curtailing of legislation and regulations, especially those that protected workers and consumers. Between 1864 and 1895, the Court invalidated an average of three state laws each year, a sharp contrast with the pre-Civil War rate of less than one law per year.[111]

By the 1890s, what one scholar has described as a "muted fury" toward the federal courts had developed among some reformers, many of whom mobilized as the Populist and later the Progressive parties.[112] Three decisions that the Court handed down in 1895 drew particular criticism: *United States v. E.C. Knight Co.* (holding that the federal commerce power did not reach manufacturing);[113] *Pollock v. Farmers' Loan & Trust Co.* (invaliding the federal income tax);[114] and *In re Debs* (upholding a labor injunction against striking railroad workers).[115]

Progressive anger at the courts became a defining issue in the 1912 presidential election. After having left office and embarked on a worldwide tour, former president Theodore Roosevelt reentered the political fray with a blistering attack on the courts, focusing his ire on the Supreme Court's recent decision in *Lochner v. New York*.[116] Addressing a joint session of the Colorado legislature, as well as an audience of thousands who had gathered outside, Roosevelt decried the Court's decisions in *Lochner* and *E.C. Knight*.[117] In print, Roosevelt argued that the Justices had "strained to the utmost (and, indeed, in my judgement, violated) the Constitution in order to sustain a do-nothing philosophy which has everywhere completely broken down when applied to the actual conditions of modern life."[118]

Upon launching his presidential campaign in February 1912, Roosevelt proposed that state judicial decisions invalidating a statute as unconstitutional (either under the Federal Constitution or the state constitution) should be "recalled" by a vote of the citizens.[119] "[W]hen a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong," Roosevelt argued.[120] The former President's proposal focused on rulings by state courts, and he disavowed the notion that it would apply to federal courts. But one commentator notes that despite his public statements, Roosevelt "confided to [progressive journalist Herbert] Croly

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that he believed the people would ultimately obtain the power to interpret even the federal Constitution."[121]

Roosevelt's recall initiative became a dominant issue during the 1912 presidential election, a four-way contest that pitted Roosevelt, running as a Progressive, against Republican incumbent William Howard Taft, Democrat Woodrow Wilson, and Socialist Eugene V. Debs.[122] Ultimately, Roosevelt's attacks on the judiciary failed to win him the Republican nomination, repelling party conservatives and energizing Taft's reelection campaign, which focused on protecting judicial independence.[123] President Wilson, who prevailed in the contest, did not support recall of court decisions, and the frontal attack on the judiciary faded after Roosevelt's defeat.

During and after Roosevelt's unsuccessful presidential campaign in 1912, a group of U.S. Senators continued to press the progressive critique of the Court. Led by Robert La Follette of Wisconsin, William Borah of Idaho, George Norris of Nebraska, and Robert Owen of Oklahoma, these western and midwestern lawmakers argued that the federal courts, especially the Supreme Court, stood in the way of reforms that the Senators viewed as necessary remedies for social and economic ills caused by industrialization. Arguing that the courts were unduly solicitous of corporate interests and thus hostile to workplace regulation and the labor movement, progressives sought tools to limit judicial power. In the name of popular accountability, they proposed a number of mechanisms to constrain the judiciary, including recalls, supermajority voting requirements, and legislative overrides.[124]

In 1912, Senator Owen proposed that Congress be empowered to recall and remove federal judges from office by a majority vote of both houses. In 1918, he sought to write into a piece of legislation a provision shielding it from judicial review—as in a renewed federal ban on child labor, after the Court had invalidated a similar ban. Inveighing against "judicial usurpations" a few years later, Senator La Follette argued for a constitutional amendment that would permit Congress to override the Court by passing again laws that the Court had invalidated. Senator Borah, for his part, objected to decisions in which the Court decided by a 5–4 or 6–3 vote to strike down a statute. He therefore sponsored a bill in 1923 that would have required the assent of at least seven Justices to hold a statute unconstitutional.[125] Though none of these proposals ultimately succeeded, their numerosity and the seriousness with which they were debated, both within Congress and among the broader public, demonstrates the force and appeal of the progressive critiques.

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C. Nominations to the Court: Increasing Controversy

During the same period, the process by which Justices were appointed to the Court became increasingly public and controversial. The first significantly contested nomination, and the first time that the Senate held a confirmation hearing for a nominee to the Court, was President Wilson's nomination of Louis D. Brandeis to the Court in 1916.[126] Brandeis, who was one of Wilson's informal legal advisers, was a leading progressive who had become known as "the people's attorney" for his successful and high-profile attacks on corporate interests and his dedication to bringing the social and economic impact of regulation to bear on legal arguments.[127]

Brandeis's nomination was strenuously opposed by many luminaries of the legal and business establishment: former President William Howard Taft; Harvard President A. Lawrence Lowell; former Attorney General George Wickersham; and former Secretary of State and War (and current American Bar Association President) Elihu Root, among others. President Wilson defended his nominee, charging that the opposition stemmed from Brandeis's refusal "to be serviceable to them in the promotion of their own selfish interests."[128] Another factor in the attacks on Brandeis was bigotry: He was the first Jewish person to be nominated to the Court.[129] After four months of debate, including hearings that Brandeis did not attend, the Democratic-controlled Senate voted along party lines to confirm Brandeis in June 1916.

Fourteen years later, another nomination that was controversial for very different reasons failed to win Senate confirmation. In 1930, President Hoover nominated federal appeals court judge John J. Parker to the Court. Given that Parker was a sitting federal judge, the nomination was initially expected by many observers to yield a smooth confirmation process.

Parker's nomination ultimately failed, however, because it was vocally and effectively opposed by civil rights groups, led by the NAACP, as well as labor organizations—groups that also shared the progressive sensibility. As a circuit judge, Parker had issued a strongly worded opinion upholding an injunction against the United Mine Workers, earning him the ire of organized labor. The NAACP and other organizations, meanwhile, condemned racially inflammatory remarks Parker had made a decade earlier while running for governor of North Carolina. "The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina," Parker had stated in 1920.[130] Two months after Hoover named Parker, the nomination was rejected by a vote of 39 to 41. It was the Senate's only rejection of a nominee to the Court in

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the seventy-four years between 1894 and 1968. For perspective, however, it is worth noting that for most of the nineteenth century, the Senate had rejected or otherwise blocked an average of nearly one out of every three nominees to the Court.[131]

VII. 1937, FDR, and the Court: Existential Challenges

Populist and Progressive critiques of the Court continued to circulate through the early decades of the twentieth century. By 1936, when the nation was in the grip of the Great Depression, these criticisms gained new salience. After President Franklin D. Roosevelt won reelection to a second term by an overwhelming margin, he turned his attention to the Court. In a series of decisions in 1935 and 1936, the Court had invalidated key New Deal legislation introduced by the Roosevelt Administration and supported by Democrats in Congress.[132] "A majority of the Court seemed to have turned decisively against the Administration's programs," notes one prominent casebook, adding that "constitutional challenges to a new spate of laws—the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act—loomed in the coming months."[133]

In February 1937, Roosevelt presented a package of reforms to Congress that he described as a remedy for overcrowded federal court dockets. The proposal authorized the President to appoint one additional judge to the federal courts, including the Supreme Court, to supplement any federal judge who reached the age of seventy and did not retire. The size of the Court would be limited to fifteen Justices. "The significant fact was that the plan would permit the president to appoint six new Supreme Court justices, and thus to insure approval of the New Deal programs. It was, as it was called, a 'court-packing plan.'"[134] On March 9, 1937, Roosevelt took to the national airwaves to present the reforms to the American people in a "Fireside Chat."

Roosevelt's plan sparked a robust national discussion about the Court, its decisions, and its and the President's respective roles in the constitutional system. "Day after day for the next half-year, stories about the Supreme Court conflict rated banner headlines."[135]

> The question was debated at town meetings in New England, at crossroads country stores in North Carolina, at a large rally around the Tulsa courthouse, by the Chatterbox Club of Rochester, New York, the Thursday Study Club of La Crosse, Wisconsin, the Veteran Fire Fighters' Association of New Orleans, and the Baptist Young People's Union of Lime Rock, Rhode Island. In Beaumont, Texas, a movie

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> audience broke out in applause for rival arguments on the plan when they were shown on the screen.[136]

While the public as well as members of Congress debated the merits and flaws of the President's plan, the Court itself took action in a manner that surprised many observers. "Within weeks of the bill's introduction . . . the Supreme Court began prudently to change course by upholding New Deal measures that months earlier it seemed prepared to invalidate."[137] On March 29, 1937, the Supreme Court handed down its decision in *West Coast Hotel Co. v. Parrish*, upholding a state minimum-wage statute for women that was nearly identical to one that it had struck down a year earlier.[138] On April 12, the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, in which it held the National Labor Relations Act to be a valid exercise of Congress's power to regulate interstate commerce, appearing to diverge from its position in a similar case from 1936.[139] And on May 24, in *Steward Machine Co. v. Davis*, the Court upheld the unemployment compensation provisions of the Social Security Act of 1935—again seemingly taking a broader view of congressional power than in previous cases.[140] All three were 5–4 decisions. This seeming about-face was dubbed the "switch in time that saved nine" by some observers[141] and "the constitutional revolution of 1937" by others.[142] Also in May 1937, Justice Willis Van Devanter—one of the so-called "Four Horsemen" who had steadfastly opposed most New Deal legislation—announced his retirement from the Court.[143]

By the summer of 1937, however, Roosevelt's proposal was foundering in Congress. It was ultimately defeated in July 1937. The controversy over the Court "helped weld together a bipartisan coalition of anti-New Deal Senators"; it also led to a "deeply divided" Democratic party.[144] Henry Wallace, a member of Roosevelt's cabinet during the Court-packing controversy, opined that "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight."[145] But the battle over the Court was not the only factor in this diminution of support for the President's plan. Other pressures included "dismay at the harsh recession of 1937–1938, anxiety over relief spending, and resentment at sit-down strikes."[146]

Many observers—at the time and since—charged Roosevelt with overreaching.[147] They argue that had the plan succeeded, its passage would have "set a precedent from which the institution of judicial review might never recover."[148] On this view, Roosevelt's effort to expand the Court failed on two fronts: It was voted down in Congress and it hobbled Roosevelt and the Democratic Party in their efforts to consolidate the progressive reforms that formed the core of the New Deal agenda.[149] "[A]lthough the battle was won, the war was lost."[150]

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> Court packing divided Democrats and undermined middle-class and bipartisan support for the New Deal. It shattered FDR's aura of invincibility, helped "blunt the most important drive for social reform in American history," and "squandered" the president's 1936 triumph by welding together a coalition of conservative Southern Democrats and Republicans that blocked reform in Congress until 1964.[151]

Other commentators contend, however, that the plan in fact achieved some of its objectives. The Supreme Court's constitutional doctrine did undergo changes in 1937, and certain of those changes proved enduring. That spring, the Court began upholding major pieces of New Deal legislation, despite challenges that the statutes exceeded Congress's Article I powers—in particular, the commerce power and the taxing and spending power. Roosevelt did not succeed in "packing" the Court, but neither did he have to abandon his New Deal agenda. Nor did he have to launch an effort for a constitutional amendment to limit the Court's power, as some in his administration had urged.[152]

Scholars disagree regarding both the magnitude and the causes of these doctrinal shifts. The Justices might well have viewed the Court-packing plan as a threat and altered their views accordingly, engaging in "self-salvation by self-reversal."[153] On this view, "[w]hile the president lost the skirmish with the Court, he won the battle."[154] Gradual shifts in specific Justices' doctrinal approaches might explain the Court's shift in 1937.[155] The New Deal "did not reconstruct constitutional law out of thin air."[156] But "the doctrinal revolution would not have happened without sustained Presidential leadership."[157] Clearly, the struggle over the Court "exacted an enormous toll" on Roosevelt and impeded the legislative momentum for comprehensive economic and social reform. Yet, as one leading historian of the era notes, these costs "should not obscure the President's one huge success in the Court fight—the legitimation of a vast expansion of the power of government in American life."[158]

The public debate surrounding the President's plan placed undeniable pressure on the Court in the late winter and spring of 1937. More than twenty-five bills regulating the Court were introduced in Congress between January 8 and May 20, 1937.[159] Justice Owen Roberts, the Justice whom many conventional accounts of the crisis identify as switching his views in 1937, recalled years later, in testimony before the Senate, "the tremendous strain and the threat to the existing Court, of which I was fully conscious."[160]

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VIII. The Postwar Period: *Brown v. Board of Education* and the Warren Court

The middle decades of the twentieth century witnessed revived debates about the role of the Court in American public life, its ability to protect individual rights, and the relationship between the federal courts and state officials, particularly in the context of the civil rights movement.

In the wake of *Brown v. Board of Education*,[161] in which the Court unanimously held that racial segregation in public schools was unconstitutional, some southern officials challenged the authority of the Court's decisions on issues concerning African-Americans' civil rights under the Fourteenth Amendment, and school desegregation in particular. Some southern state legislatures passed "interposition" resolutions asserting that a given issue—typically, public education—was within the exclusive control of the state.[162] In 1956, nineteen senators and seventy-seven congressmen, all from former Confederate states, signed onto a document titled "The Declaration of Constitutional Principles," but which became known as the "Southern Manifesto."[163] Such efforts at blocking the implementation of the Court's decisions explicitly borrowed from eighteenth- and nineteenth-century theories of state sovereignty associated with James Madison and John C. Calhoun, among others.[164]

The reaction against the *Brown* decision sparked a number of proposals for constitutional amendments. Among the amendments presented to Congress by various state legislatures were the following:

- An amendment making the Senate the final appellate court with power to review decisions of the Supreme Court in cases "where questions of the powers reserved to the States, or the people, are either directly or indirectly involved and decided, and a State is a party or anywise interested in such question."[165]
- An amendment setting term limits for federal judges and revising the method of selecting them.[166]
- A procedure according to which if one-fourth of the states disapproved of a decision by the Court that weakens states' rights, the decision would be rendered null unless three-fourths of the states approved it.[167]

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- A proposed "Court of the Union" drawn from judges of state supreme courts, with the power to review decisions of the Supreme Court with respect to "the rights reserved to the States or to the people" by the Constitution.[168]
- An amendment reserving to the states "the right to sole, and exclusive jurisdiction of public-school systems in the separate States."[169]

None of these proposed amendments came to pass. But they demonstrate the broad range of Supreme Court reforms that have been proposed from across the political spectrum by critics of its decisions, its procedures, and, in some cases, its authority. In response to continued and frequently violent southern resistance to federal court decisions that sought to dismantle racial segregation, the Court explicitly claimed the mantle of judicial supremacy. "The major act of the Supreme Court, in the ten years after *Brown*, was defending its newly self-appointed role as 'ultimate interpreter of the Constitution' in *Cooper v. Aaron*."[170] *Cooper* was a 1958 case in which the Court held that Arkansas officials were bound by federal court orders mandating desegregation in public schools.[171] The joint opinion, authored by all nine Justices, stated that the Supremacy Clause of the Constitution made the Court's decisions binding on every state, overriding any state laws to the contrary.[172] The Court's decision in *Brown* could "neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation," the Court wrote.[173]

Under Chief Justice Earl Warren's tenure from 1953 to 1969, the Court became a focus of public debate because "it displayed a willingness to confront a host of important issues head-on and become, in important ways, a significant agenda setter for domestic policy."[174] For some observers, the Warren Court stood for the protection of civil rights and civil liberties, including the rights of criminal defendants as well as due process rights within the administrative state. Others took a more skeptical view, warning of the risks that judicial activism might pose when pitted against policies adopted by the people's elected representatives. An "Impeach Earl Warren" movement, led by several newly formed right-wing groups, placed advertisements and planted billboards throughout the U.S.[175]

The Court was met with unusually sustained and pointed criticism in response to a set of six cases that were argued together in November 1963 and decided in June 1964. Known collectively as "the Reapportionment Cases," the most prominent of which were *Reynolds v. Sims*[176] and *Lucas v. Forty-Fourth General Assembly of Colorado*,[177] the decisions effectively invalidated the apportionment of nearly every state legislature. Rather than allocating representatives by political subdivisions such as the county, the Constitution required a

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principle of "one person, one vote"—in other words, that any chamber of a state legislature must be based on equal population districts.

In response to these decisions, the House of Representatives passed a bill stripping the federal courts of jurisdiction over cases involving legislative apportionment. Members of Congress, led by Senator Everett Dirksen of Illinois, spearheaded a movement for a constitutional amendment overriding the Court's decisions. The effort ultimately fell short of the two-thirds of the states required under Article V of the Constitution to compel Congress to call a convention to propose amendments. "The newly reapportioned legislatures, after all, had no desire to return to the status quo ante the *Reapportionment Cases*."[178]

Debates about the role of, and potential reforms to, the Court continued through the decades following the retirement of Chief Justice Warren in 1969. Many of these controversies are, of course, pertinent to the Commission's mission. They are discussed in the following Chapters in the context of the specific structural issues they presented.

IX. Conclusion

As this historical overview demonstrates, debates about the proper role of the Supreme Court are as old as the Constitution. Though the focus of today's discussions is, appropriately, on current events and the immediate recent past, taking a longer view across 234 years of the Republic's existence allows for a deeper and more contextualized analysis of complex imperatives of text, structure, politics, and reform. The combination of these factors was present when the Constitution was drafted in 1787; when it was fundamentally reshaped through the Reconstruction Amendments of 1865, 1868, and 1870; in the controversy between the President, Congress, and the judiciary over Court-packing in 1937; and in the civil rights struggles and victories of the 1950s and 1960s. The current debates require us to draw on the strengths and insights of these previous conflicts while also recognizing the distinctiveness of each moment across the history of the courts, the country, and the Constitution.

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Endnotes: Chapter 1

[1] THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[2] *Id.* at 392, 394.

[3] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 83 (2010).

[4] *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 154 (2018) (noting that although the *Federalist* essays "were not yet cloaked in national mystique, and were far from being deemed the authoritative constitutional commentary they would later become, as early as the spring of 1789 they enjoyed wide purchase"); *see also* MAIER, *supra* note 3, at 84 ("The series' reach and the number of people who testified to its distinction expanded substantially after the spring of 1788, when the essays were collected and printed together in two volumes of some 600 pages (with Hamilton picking up over half the cost) . . . .").

[5] *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); MAIER, *supra* note 3; BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard Beeman, Stephen Botein & Edward C. Carter II, eds., 1987).

[6] *See* GIENAPP, *supra* note 4, at 4 (2018) ("The Constitution was born without many of its defining attributes; these had to be provided through acts of imagination.").

[7] *See also* Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 393 (2007) [hereinafter *The New Wheel in the Federal Machine*] ("The language of Article III, combined with the Madisonian compromise, had deliberately left a lacuna in the constitutional structure."). *See generally* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

[8] U.S. CONST. art. III, § 2, cl. 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

[9] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 (7th ed. 2015).

[10] Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY 13, 14 (Maeva Marcus ed., 1992).

[11] *Id.* (alteration added) (footnotes omitted).

[12] *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 182-85 (2010) [hereinafter IDEOLOGICAL ORIGINS].

[13] An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

[14] *See* Marcus & Wexler, *supra* note 10, at 27 (noting that "politics had a greater influence than the language of the Constitution on the decisions Congress made with regard to a new judicial system").

[15] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 201 (noting that "beginning in 1789, judicial power emerged as the focus of both practical and theoretical disputes about the nature of multilayered authority" in the American federal republic).

[16] Letter from James Madison to Samuel Johnston (July 31, 1789), *in* 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 491 (Maeva Marcus, ed., 1992) [hereinafter DHSC].

[17] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 186.

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[18] Similar arguments for expansive federal jurisdiction continued to be made well into the nineteenth century, even as Congress declined to grant the full scope of decisional authority permitted by the Constitution. *See generally* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205 (2012).

[19] *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 5-8 (3d ed. 2005). In 1793, the Act was amended to require only one Justice, along with the district judge, to hold circuit court.

[20] In 1791, while riding circuit in Virginia, Justice James Iredell wrote to his wife Hannah of "a very rascally house where I had the misfortune to be obliged to put up on Saturday night" at which "a parcel of worthless young Fellows" were "sitting up drinking gaming & cursing & swearing all night." Letter from James Iredell to Hannah Iredell (Sept. 19, 1791), *in* 2 DHSC, *supra* note 16, at 210.

[21] *See* Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965).

[22] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 194-97.

[23] John Adams, Third Annual Message (Dec. 3, 1799), https://millercenter.org/the-presidency/presidential-speeches/december-3-1799-third-annual-message.

[24] Harper Judiciary Bill of 1800, *reprinted in* 4 DHSC, *supra* note 16, at 310, 317.

[25] On March 28, 1800, arguing against congressional Republicans' motion to postpone the bill's consideration, one Federalist congressman contended "that the close of the present Executive's authority was at hand, and from his experience, he was more capable to choose suitable persons to fill the offices than another." Turner, *supra* note 21, at 13.

[26] An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801).

[27] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 202-03 ("[T]he source of the conflict was political gain and power as well as ongoing and fundamental disagreement about just what the 'federal' in 'federal republic' was to mean, and what role the judiciary would play in that federal republic."); LINDA K. KERBER, FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA 136 (1970) ("Contrary to its subsequent reputation, the Judiciary Act of 1801 had been the subject of a full and responsible debate during the preceding session of Congress, and its terms represented an attempt to correct the inadequacies of the first Judiciary Act of twelve years before.").

[28] An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and For Other Purposes, ch. 8, 2 Stat. 132 (1802).

[29] Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 36 THE PAPERS OF THOMAS JEFFERSON 165-66 (Barbara B. Oberg ed., 2009).

[30] Alexander Hamilton, *Remarks on the Repeal of the Judiciary Act*, NEW-YORK GAZETTE & GEN. ADVERTISER (Feb. 13, 1802), *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 523 (Harold C. Syrett ed., 1976).

[31] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[32] *Id.* at 176.

[33] *Id.* at 177-78.

[34] *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 6 (2008); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004).

[35] The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[36] *Marbury*, 5 U.S. (1 Cranch) at 177.

[37] PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 134-35 (Paul Brest et al. eds., 7th ed. 2018).

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[38] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803). Justice William Paterson wrote the opinion for the Court; Chief Justice Marshall had recused himself from hearing the case when it came before the Court, perhaps because he had heard the case when it was before his circuit court. *See* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 76 (2012).

[39] *Stuart*, 5 U.S. (1 Cranch) at 309.

[40] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124-25 (2001).

[41] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 78 n.102 (1985).

[42] Letter from Chief Justice Marshall to Henry Clay (Dec. 22, 1823), *reprinted in* Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT 247, 267-69 (1997).

[43] Act of Feb. 24, 1807, ch. 16, 2 Stat. 420.

[44] *See* William M. Wiecek, Murdock v. Memphis*: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, *in* ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 10, at 225-29.

[45] Carl B. Swisher, *The Taney Period, 1836-1864*, *in* 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 4 (2010).

[46] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 280 (2007).

[47] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824).

[48] *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).

[49] Ch. 148, 4 Stat. 411 (1830).

[50] 30 U.S. (5 Pet.) 1 (1831).

[51] 31 U.S. (6 Pet.) 515 (1832).

[52] *See* RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 116 (1987) (quoting the observations of William Wirt, attorney for the Cherokee Nation, regarding "public considerations connected with the state of the country (particularly the open resistance of South Carolina), and the extremely ticklish predicament of Georgia").

[53] *See* HOWE, *supra* note 46, at 441.

[54] Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (James D. Richardson ed., 1898) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").

[55] *See* HOWE, *supra* note 46, at 441.

[56] *See* Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807-1837*, 12 MISS. VALLEY HIST. REV. 202 (1925).

[57] *Id.* at 210 ("Extension of the circuit courts was delayed until 1837 because it entailed a decision as to the permanent structure of the whole judiciary upon which all parts of the country could not agree.").

[58] *Id.* at 226; HOWE, *supra* note 46 at 441 ("All five of [President Jackson's] last round of appointees came from the slave states . . . .").

[59] HOWE, *supra* note 46, at 441.

[60] Act of Mar. 3, 1837, ch. 34, 5 Stat. 176. The Act is also known as the Eighth and Ninth Circuits Act.

[61] *See* Swisher, *supra* note 45, at 62-65.

[62] Nettels, *supra* note 56, at 225.

[63] *The Supreme Court of the United States*, 1 U.S. MAG. & DEMOCRATIC REV. 143, 143 (1838).

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[64] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[65] U.S. CONST. amend. XIII.

[66] U.S. CONST. amend. XIV; FONER, *supra* note 64, at xix.

[67] U.S. CONST. amend. XV.

[68] 60 U.S. (19 How.) 393, 403, 404 (1856); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 322 (1978) ("Only one thing was absolutely certain. Dred Scott had lost his eleven-year legal battle for freedom in the last court of appeal. Seven of the nine justices agreed that at law he was still a slave.").

[69] *Dred Scott*, 60 U.S. (19 How.) at 407. On Taney's misuse of Founding-era history, see MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 131 (2018) (noting, in a monograph documenting the ways in which free Black Baltimoreans seized rights in the courtroom and in everyday life, that "Chief Justice Taney concluded that only those who had been citizens of the individual states at the time of the Constitution's adoption could be citizens of the United States. To reach this decision, he set forth his own view of history").

[70] Frederick Douglass, The Dred Scott Decision: Speech, Delivered, in Part, at the Anniversary of the American Abolition Society, Held in New York, May 14th, 1857, *in* TWO SPEECHES BY FREDERICK DOUGLASS 25, 31-32 (1857), https://www.loc.gov/resource/mfd.21039/?sp=25.

[71] Speech at Springfield, Ill. (June 26, 1857), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401, 404 (Roy P. Basler ed., 1953).

[72] First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 71, at 262, 268.

[73] CROWE, *supra* note 38, at 133.

[74] *See* WHEELER & HARRISON, *supra* note 19, at 12.

[75] *Id.*

[76] Act of July 15, 1862, ch. 178, 12 Stat. 576 (Eighth and Ninth Circuits); Act of Mar. 3, 1863, ch. 100, 12 Stat. 794 (Tenth Circuit). The Justices were David Davis of Illinois (Eighth Circuit), Samuel Miller of Iowa (Ninth), and Stephen Field of California (Tenth).

[77] Act of July 23, 1866, ch. 210, 14 Stat. 209.

[78] *See* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 27 n.44.

[79] William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969).

[80] *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (upholding jurisdiction-stripping legislation). *But see* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (invalidating jurisdiction-stripping legislation).

[81] *See* CROWE, *supra* note 38, at 132 ("Contrary to the view that the election of Abraham Lincoln and the ascendance of the Radical Republicans effectively resulted in a circumscribed and cowering Supreme Court, the events of the Civil War and Reconstruction empowered rather than dismantled the federal courts." (citations omitted)).

[82] *See* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

[83] *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

[84] *See* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

[85] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

[86] Steffel v. Thompson, 415 U.S. 452, 464 (1974) (emphasis omitted) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928)).

[87] 83 U.S. (16 Wall.) 36 (1873).

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[88] 92 U.S. 542 (1876). *See generally* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

[89] 92 U.S. 542.

[90] John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225, 234 (1974).

[91] *See* WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 273-74 (1982).

[92] Ch. 114, 18 Stat. 335.

[93] 109 U.S. 3 (1883).

[94] LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 164 (2015).

[95] *Id.*

[96] FRANKFURTER & LANDIS, *supra* note 86, at 86.

[97] Act of April 10, 1869, ch. 22, 16 Stat. 44.

[98] FRANKFURTER & LANDIS, *supra* note 86, at 60.

[99] WHEELER & HARRISON, *supra* note 19, at 16.

[100] CROWE, *supra* note 38, at 174.

[101] FRANKFURTER & LANDIS, *supra* note 86 at 60, 102.

[102] *See Id.* at 82-83; WHEELER & HARRISON, *supra* note 19, at 16.

[103] Act of March 3, 1891, ch. 517, 26 Stat. 826.

[104] FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 29.

[105] WHEELER & HARRISON, *supra* note 19, at 18.

[106] *See Id.*; FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 30 & n.67.

[107] FRANKFURTER & LANDIS, *supra* note 86, at 102.

[108] *Id.* at 101.

[109] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 517, 522 (1988); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512 (2002).

[110] *See generally* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992).

[111] Gillman, *supra* note 109, at 512.

[112] *See generally* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994).

[113] 156 U.S. 1 (1895). The case was also known as the "Sugar Trust Case."

[114] 157 U.S. 429 (1895).

[115] 158 U.S. 564 (1895).

[116] 198 U.S. 45 (1905) (invalidating a New York statute regulating bakers' working hours on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment).

[117] *See Roosevelt in 1912 The Cry in Denver*, N.Y. TIMES, Aug. 30, 1910, at 1.

[118] Theodore Roosevelt, *Judges and Progress*, OUTLOOK, JAN. 6, 1912 at 40, 44.

[119] *See* ROSS, *supra* note 112, at 130-54.

[120] Theodore Roosevelt, A Charter of Democracy: Address Before the Ohio Constitutional Convention (Feb. 21, 1912).

[121] ROSS, *supra* note 112, at 144.

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[122] JAMES CHASE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 105 (2004).

[123] SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 56 (2009).

[124] *See also infra* Chapter Four.

[125] Senate Historical Office, *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal courts.htm.

[126] *A History of Supreme Court Confirmation Hearings*, NPR (July 12, 2009), https://www.npr.org/templates/story/story.php?storyId=106528133 (interview with Lucas Powe).

[127] Melvin I. Urofsky, *Brandeis, Louis Dembitz*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 98 (Kermit L. Hall ed., 2d ed. 2005).

[128] Letter from President Woodrow Wilson to U.S. Senate (May 9, 1916), https://www.brandeis.edu/library/archives/exhibits/ldb-100/career/president.shtml.

[129] *See* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 180 (2009) ("Brandeis's take-no-prisoners approach to his public interest practice had something to do with [his opposition], too—as did raw anti-Semitism. He simply was not clubbable.").

[130] *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE (May 7, 1930), https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm.

[131] *Id.*

[132] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (voiding the National Industrial Recovery Act of 1933); United States v. Butler, 297 U.S. 1 (1936) (voiding the Agricultural Adjustment Act of 1933).

[133] PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 37, at 602; *see also* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

[134] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 113 (Sanford Levinson ed., 6th ed. 2005).

[135] WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 134 (1995).

[136] *Id.*

[137] ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 19 (1995).

[138] 300 U.S. 379 (1937).

[139] 301 U.S. 1 (1937).

[140] 301 U.S. 548 (1937).

[141] *See* LEUCHTENBURG, *supra* note 135, at 177.

[142] *See* Kalman, *supra* note 133, at 1055.

[143] *Justice Van Devanter Retires*, LIBR. CONG. (May 19, 1937), https://www.loc.gov/item/2016871705/.

[144] LEUCHTENBURG, *supra* note 135, at 157-58.

[145] William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 239 (1963) (quoting Henry Wallace).

[146] *Id.* at 156.

[147] *See* Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 293 (1988).

[148] MCCLOSKEY, *supra* note 134, at 113.

[149] LEUCHTENBURG, *supra* note 135 at 156 (noting several respects in which "FDR lost the war").

[150] Kalman, *supra* note 133, at 1057.

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[151] *Id.* at 1057 (quoting LEUCHTENBURG, *supra* note 135, at 157).

[152] *See* Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 316 (1937) (discussing, among others, proposals from the National Committee for Clarifying the Constitution by Amendment aimed at ensuring that "the right will be clear for the federal and the state governments to enact labor and social legislation in accordance with the needs of the complicated industrial and economic system today").

[153] JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 147 (1938).

[154] Kalman, *supra* note 133, at 1056.

[155] *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

[156] BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 291 (1998).

[157] *Id.*

[158] LEUCHTENBURG, *supra* note 135, at 161.

[159] *See* Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 58-59 (1992).

[160] Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (quoting *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Const. Amendments of the S. Comm. on the Judiciary*, 83d Cong. 9 (statement of Justice Owen J. Roberts)).

[161] 347 U.S. 483 (1954).

[162] *See, e.g.*, Bush v. Orleans Parish Sch. Bd., 364 U.S. 500, 501 (1960) (rejecting the state of Louisiana's assertion that certain state statutes were valid because the state "has interposed itself in the field of public education over which it has exclusive control" (quotations omitted)).

[163] *See generally* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (noting that although the debates over the Southern Manifesto challenged the Court's authority, they also suggest widespread popular belief in judicial supremacy by 1956, two years before the Court's decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which scholars often identify as establishing judicial supremacy).

[164] *See* James Madison, Virginia Resolutions, Dec. 21, 1798, *in* 17 THE PAPERS OF JAMES MADISON 189 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (describing "the powers of the federal government" as "resulting from the compact, to which the states are parties" and stating that "in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the states who are parties there-to, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them").

[165] 103 CONG. REC. S12787 (daily ed. July 26, 1957) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

[166] 103 CONG. REC. S10863 (daily ed. July 3, 1957) (Res. of the Leg. of Ala. to the S. Comm. on the Judiciary).

[167] 107 CONG. REC. S2154 (daily ed. Feb. 16, 1961) (Res. of the Leg. of Ark. to the S. Comm. on the Judiciary).

[168] 109 CONG. REC. S2071-72 (daily ed. Feb. 11, 1963) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

[169] 111 CONG. REC. S15769-70 (daily ed. July 7, 1965) (Res. of the Leg. of Miss. to the S. Comm. on the Judiciary).

[170] MCCLOSKEY, *supra* note 134, at 255.

[171] 358 U.S. 1 (1958)

[172] *Id.* at 18; *see* U.S. CONST. art. VI.

[173] 358 U.S. at 17.

[174] MCCLOSKEY, *supra* note 134, at 149.

[175] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 141 (2000).

[176] 377 U.S. 533 (1964).

[177] 377 U.S. 713 (1964).

[178] J.W. Peltason, *Reapportionment Cases*, *in* OXFORD COMPANION TO THE SUPREME COURT, *supra* note 127, at 826-27.

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Chapter 2: Membership and Size of the Court

In recent years, calls to expand the size of the Supreme Court have become a significant part of the debate over the Court and its role in American government. Although there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court's size, there is profound disagreement over whether Court expansion at this moment in time would be wise. We do not seek to evaluate or judge the weight of any of these arguments, and the Commission takes no position on the wisdom of expansion. In this Chapter, we begin in Part I by presenting an account of past efforts to expand or contract the size of the Court, which occurred at various points in the nineteenth century and perhaps most famously during the New Deal era. In Part II, we consider whether Congress has the authority to expand the size of the Court. In Part III, we articulate the arguments made by proponents of expansion, as well as the arguments made by those who oppose any such efforts. In Part IV, we consider other proposals that have been made during recent reform debates to restructure the Supreme Court.

I. A Brief History of Efforts to Alter the Size of the Court

Although debates about Court expansion and restructuring have become increasingly salient in recent years, there is a long history of similar disputes earlier in U.S. history. Congress contracted or expanded the size of the Supreme Court several times in the nineteenth century, and President Franklin Roosevelt sought to expand the Court during the New Deal era. But the size of the Court has remained at nine Justices since 1869. This section details the history of efforts to alter the size of the Court.

A. Nineteenth-Century Changes to the Court's Size

Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court."[1] But the constitutional text does not specify how many Justices should be on that Court. Congress on several occasions in the country's first century altered the size of the Court. In 1789, Congress fixed the size of the Court at six members.[2] A decade later, Congress began to make changes. After Thomas Jefferson defeated John Adams for the presidency in 1800, but before the newly elected President Jefferson took office, the outgoing Federalist Congress in 1801 reduced the Court's future size to five members.[3] (The Federalists did not

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terminate the position of any existing Justice; the law provided that, whenever the next Justice left the Court, the vacancy would not be filled.) In 1802, the new Democratic Republican Congress then repealed that 1801 law and restored the Court to six members.[4] In 1807, Congress added one Justice to increase the size to seven members,[5] and in 1837, Congress expanded the size to nine members.[6]

Each reform seems to have been motivated by a mix of institutional and political concerns. During the early years of the Court, each Justice had two duties: both to sit on the Supreme Court and to serve as a judge on a lower federal court (a practice known as "circuit riding").[7] In 1789, Congress created a six-member Supreme Court to serve the existing federal circuits. Over the next several decades, as the country grew in size, it became clear that more judges were needed, particularly in newly admitted states such as Kentucky, Tennessee, and Ohio, and (later) Louisiana, Illinois, Alabama, and Missouri.[8] In 1807, Congress added a seventh circuit, and in 1837, an eighth and a ninth circuit. Each time, Congress expanded the size of the Supreme Court accordingly.[9] These expansions served an institutional purpose: providing sufficient judicial machinery for a growing nation. But each expansion also served the interests of a political party. In 1807, the Democratic Republicans controlled Congress and trusted their party leader—President Jefferson—to appoint the seventh Justice. In 1837, the Democrats who controlled Congress had similar confidence in their party leader President Andrew Jackson.[10] The new courts created also ensured that a majority of circuits would cover slave-holding territory and therefore that a majority of Justices would be friendly to slavery.[11]

The reforms in 1801 and 1802 can also be explained by a mix of institutional and political concerns. In 1801, the Federalist Congress temporarily ended circuit riding,[12] and so its reduction of the Court to five Justices could have been justified by the fact that the Court could now function effectively with only five members. But the reduction in size was also likely attributable to the Federalists' desire to prevent their incoming political rival—President-elect Jefferson—from filling a Supreme Court vacancy.[13] When the Democratic Republicans repealed the 1801 law and returned the Court to six Justices, they also re-established circuit riding and thus the link between the number of Justices and the number of circuits.[14] But their re-expansion of the Court also coincided with their political interest in giving President Jefferson an opportunity to shape the future of the Court.

In the 1860s, Congress made several changes to the size of the Supreme Court in fairly short order. These changes were not tied as closely to the number of lower circuit courts and are often said to have had a primarily political motivation.[15] Many lawmakers were deeply skeptical of the Court after its 1857 decision in *Dred Scott v. Sanford*, which held that African-

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Americans were not "citizens," and that Congress could not prohibit slavery in the territories.[16] Accordingly, there was a strong sense that the Court was in need of reform. During the Civil War, the Republican Congress in 1863 created a new tenth circuit and added a tenth seat to the Supreme Court for its new circuit Justice, enabling President Lincoln to appoint a pro-Union, anti-slavery Justice.[17] Soon thereafter, Congress again modified the Supreme Court's size. In 1866, after the assassination of Lincoln led to the presidency of Democrat Andrew Johnson, Congress reduced the Court's future membership to seven.[18] The conventional view is that the Republicans who controlled Congress in the post-Civil War era—and whose primary goal was to reconstruct the South—did not trust Johnson to nominate Justices sympathetic to those reconstruction efforts.[19] By contrast, in 1869, the Republican Congress was willing to return the Supreme Court to nine members, once fellow Republican (and former Union army general) President Grant was in charge.[20] But other historical experts conclude that these changes "were motivated by practical and mundane performance goals," including returning the Court to a workable (and odd) number of Justices.[21]

B. The Court-Packing Plan of 1937

The size of the Supreme Court has remained at nine members since 1869. But there was a prominent attempt to remake the Court in 1937: President Franklin Roosevelt's so-called "Court-packing plan."[22] As we explain in some detail in Chapter 1, the proposal was a response to a series of decisions by the Supreme Court in 1935 and 1936 invalidating major New Deal legislation enacted by Congress and championed by Roosevelt, as well as myriad state labor and social welfare laws, all directed at bringing the nation out of the economic and social calamity of the Great Depression.[23] With still more constitutional challenges to major New Deal enactments on the horizon, and after his commanding victory in the election of 1936, Roosevelt and his administration turned to protect the progressive New Deal from the courts.[24]

Under Roosevelt's plan, the President would be authorized to appoint one additional Justice to the Supreme Court for each Justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.[25] The legislative proposal grew out of a nearly two-year study in the Department of Justice as to the proper means of reforming the Supreme Court. Justice Department officials considered a variety of proposals, including constitutional amendments, measures to restrict federal jurisdiction, and proposals to expand the Supreme Court.[26] Ultimately, officials advised that "the proposal to enlarge the Supreme Court, while not without flaw, was 'the only one which is certainly constitutional and . . . may be done quickly and with a fair assurance of success.'. . . [I]t was the 'only undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court.'"[27]

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In public, President Roosevelt initially asserted that the Court reform was designed to promote judicial efficiency. The Supreme Court, he argued, needed additional and younger personnel to handle its growing caseload.[28] But Roosevelt soon acknowledged that the real purpose was to alter the future course of the Court's decisions.[29] In his Fireside Chat on March 9, 1937, the President urged that "new blood" was needed, because the Supreme Court was "acting not as a judicial body, but as a policy-making body" in invalidating New Deal programs.[30] "[W]e must take action to save the Constitution from the Court and the Court from itself,"[31] he proclaimed.

In congressional testimony, executive officials defended the plan as a constitutional and desirable method of Court reform. Then-Assistant Attorney General (and later Supreme Court Justice) Robert Jackson argued that "[o]ur forebears" placed certain mechanisms in the Constitution to "enable Congress to check judicial abuses and usurpations."[32] One of those checks was the power of Congress to alter the size of the Supreme Court. Jackson insisted that Congress had throughout the nineteenth century changed the Court's size "to keep the divergence between the Court and the elective branches from becoming so wide as to threaten the stability of the Government."[33] Jackson declared: "When immediate and effective action has been necessary" to prevent the judiciary from "impos[ing] . . . its unsympathetic predilections on the country," "the method which the President now proposes has been used throughout our constitutional history."[34]

Some modern observers assume that Roosevelt's proposal was quickly rejected.[35] But at least in Congress, that appears not to have been the case. To be sure, the plan faced considerable opposition from Roosevelt's fellow Democrats (notably, at a time when the Democrats controlled over 70% of the seats in both the House of Representatives and the Senate)[36] and prompted widespread media condemnation.[37] Some opponents saw the plan as an effort to consolidate presidential control over the judiciary and "compar[ed] Roosevelt to Stuart tyrants and European dictators."[38] Chief Justice Hughes sent a letter to Senator Burton Wheeler which sought to refute President Roosevelt's initial claim that enlarging the Court would improve judicial efficiency. The Chief Justice argued that "[a]n increase in the number of Justices . . . would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of Justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned."[39]

But there was also considerable support in Congress for Roosevelt's plan, and many in Congress expected throughout much of the debate that the legislation would succeed in some

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form.[40] Democratic Senate Majority Leader Joe Robinson pushed hard for Court expansion, with the enthusiastic support of many other Democrats, including then-Senator (and later Supreme Court Justice) Hugo Black.[41] Initially, the measure seemed likely to get through the Senate, and many participants assumed that it would pass the House of Representatives by a wide margin.[42]

The political debate, which took place in the halls of Congress, across the editorial pages, and in numerous local venues throughout the country, was then significantly affected by the Supreme Court itself. Soon after the plan was announced, the Supreme Court issued a series of decisions upholding state and federal regulation of the economy.[43] Although scholars disagree as to why the Supreme Court changed its approach,[44] there is no question that this apparent "switch in time" in the spring of 1937 dampened the congressional support for the President's plan. The Court's decisions signaled that it might be more receptive to New Deal programs, even absent a change in membership.[45]

In June 1937, the Senate Judiciary Committee, voting 10 to 8, issued a strongly worded report recommending against the plan.[46] The majority of the Committee denounced Roosevelt's plan as "a needless, futile, and utterly dangerous abandonment of constitutional principle."[47] The bill was "an attempt to impose upon the courts . . . a line of decision" and thus "would undermine the independence of the courts."[48] The report declared:

> Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact.[49]

Neither the Court's decisions upholding New Deal legislation nor this vociferous criticism in Congress ended debate over the Court-packing plan in Congress. Considerable support for some type of Court expansion remained, and some historians contend that the harsh rebuke by the Judiciary Committee backfired by leading some Democrats, who thought the attack intemperate, to support the administration.[50] And it appeared for a time that Congress in fact would authorize the President to appoint four additional Justices (one for every member over age seventy-five).[51] It was not until after additional debates—and the sudden death of the bill's staunch proponent Senate Majority Leader Robinson—that political support for the measure finally ran out, with the defeat of the plan in July 1937.[52]

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As we note in Chapter 1, scholars and commentators disagree about how to put the long debate over Court packing during the New Deal era into perspective. On some accounts, the plan and the debate surrounding it prompted changes in the Court's doctrine that left in place Roosevelt's existing New Deal and ended an era in which the Court frequently invalidated laws designed to protect workers, consumers, and the public. In that doctrine, the Court established that Congress and state legislatures have broad authority to regulate the economy. But the political controversy over the Court-packing plan clearly divided Democrats and took a major toll on the once broad political support Roosevelt enjoyed. According to some historians, this "undermined bipartisan support for the New Deal," which along with numerous other developments of the time helped bring about the end of major social reform until the 1960s.[53]

C. A Failed Constitutional Amendment to Fix the Court at Nine

In the ensuing decades, a strong constitutional norm against any measure that might be deemed "Court packing" developed, leading some commentators today to describe Court expansion as a "third rail in American politics."[54] Members of Congress sought in the 1950s to amend the Constitution to fix the size of the Supreme Court at nine members.[55] (The proposed amendment would also have prevented Congress from restricting the Supreme Court's appellate jurisdiction over constitutional claims.)[56] Senator John Butler led the charge, declaring that the goal of the amendment was to "forestall future attempts to undermine the integrity and independence of the Supreme Court."[57]

Supporters argued that the amendment would close "loopholes" in the constitutional structure.[58] Senator Butler emphasized that Roosevelt was not the first to propose a change in the Supreme Court's size in order to influence the future course of its decisions: "The Congress . . . in 1866, was guilty of the same wrong . . . except that in 1866, the attempt was successful" at "prevent[ing] President Johnson from having an opportunity to fill the vacancies with persons who were friendly to his policies."[59] Butler asserted: "We cannot know, with these historical illustrations fresh in our minds from what quarter and at what time the next attempt to influence the judgment of the Supreme Court may come."[60]

Senator Butler's amendment easily mustered the two-thirds supermajority needed to make it through the Senate.[61] But the measure failed in the House of Representatives. Some lawmakers worried that freezing the Supreme Court's size would be unwise.[62] Congress might, the legislators argued, need to modify the Court's size for institutional reasons, such as to enable it to tackle a larger workload. Representative Emmanuel Celler stated that, although he

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had protested "President Roosevelt's proposal to pack the Supreme Court . . . with such vehemence that Roosevelt never forgave me for it," Congress should not "force upon ourselves a rigidity which can in the future make much mischief. . . . In the event there is another such move to increase the members of the Court, the then Congress, in the final analysis, can approve or reject, as is deemed best in the national interest."[63]

Significantly, both supporters and opponents of this proposed constitutional amendment shared one assumption: Congress has broad formal power to expand or contract the Supreme Court, such that the only way to freeze the size of the Court in place was through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise. Some observers see these congressional debates as reflecting a view that expanding the Court for partisan or ideological purposes is inappropriate, but that changing the size of the Court for reasons of institutional efficiency is legitimate.

Since these efforts and until recently, no other attempts have been made in Congress to fix or expand the size of the Court. But the longstanding norm against Court expansion is being challenged today, and bills that would expand the size of the Court and those that propose a constitutional amendment to fix the Court at nine have again re-emerged.[64] As we describe in Part III of this Chapter, the reasons for this re-emergence are specific to our time. But understanding the contested history of efforts at Court expansion is valuable in highlighting the myriad institutional and political interests relevant to evaluating this turn of constitutional events. As one witness before the Commission observed: "[S]eeking guidance from the past can mislead policymakers" but it also "provides a way to make sense of the world."[65]

II. The Legality of Court Expansion

Article III of the Constitution, which establishes the judiciary, requires that there be "one supreme Court" but does not specify the number of Justices that shall serve on that Court.[66] Article I authorizes Congress to make all laws that are "necessary and proper" to carry out the powers conferred on various institutions of government, which include the Supreme Court.[67] Determining the size of the Court that might be "necessary and proper" to its functioning seems well within Congress's formal discretion.[68]

The historical practice we recount above also supports the conclusion that Congress has broad authority to establish and change the Court's size: Congress exercised that power on

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numerous occasions in the nation's first century (in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869), expanding or contracting the Supreme Court's size for both institutional and political reasons. On several occasions, Congress adjusted the Court's size in large part to influence the future course of its decisions: The Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 had this objective. President Roosevelt explained a few years after the failure of his 1937 plan that he turned to Court expansion to influence the Court in part because of its "undoubted constitutionality."[69] Two decades later, in the early 1950s, members of Congress continued to assume that the only way to permanently fix the size of the Supreme Court at nine members was through a constitutional amendment.

During the Commission's public hearings, one witness argued that, although Congress has broad power to modify the size of the Supreme Court for many purposes, it cannot do so for "partisan" reasons.[70] This argument faces a few challenges.[71] First, it is doubtful that "partisan" reasons can be disentangled from "good-government" reasons. For example, the changes to the Supreme Court in 1807 and 1837 by the Democratic Republicans and Jacksonian Democrats, respectively, had both institutional and political motives;[72] lawmakers not only sought to give the Court more personnel to serve a growing nation but also enabled their party leaders—Presidents Jefferson and Jackson—to shape the Supreme Court.[73] Second, and relatedly, the argument has little historical support; as discussed in Part I, *every* change to the Supreme Court's size has tended, at least in part, to serve the interests of one political party.

III. Arguments in Support of and Opposition to Court Expansion

In order to fulfill our charge to provide a complete account of the contemporary Court reform debate, this Part sets out arguments made by proponents and opponents of expansion. The Commission as a whole takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on this issue. Accordingly, we present arguments for and against expansion independently of each other.

A. The Case for Expanding the Court

The current calls to expand the size of the Court stem most immediately from the Senate's refusal to act on President Obama's nomination of Judge Garland to the Supreme Court, as

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well as its confirmation of the three Justices nominated by President Trump—and the effect those norm violations may have on both the health of the democratic process and the scope of bedrock constitutional rights. Proponents motivated by these developments contend that the Senate's actions violated norms governing the confirmation process and that expansion of the Court would serve to counteract these violations and bring the Court's jurisprudence into better alignment with prevailing values and views of the American public. Other proponents of expansion regard it as critical to prevent the continued undermining of our democratic system of government, which they regard as exacerbated by the Court's jurisprudence. They view recent changes in the composition of the Court as accelerating these jurisprudential developments that began even before these most recent confirmations. On their view, expanding the size of the Court represents a constitutional and immediately achievable response to this threat to democracy that should not go unaddressed, even in the short term. Still others who believe expansion of the Court may be warranted cite the reform as a possible means of enhancing the diversity of the Court's membership and assisting it to hear more cases each year.

1. Responding to Norm Violations

In recent times, arguments to expand the Supreme Court have been relatively rare, but not nonexistent.[74] In 2017, an academic's call for congressional Republicans to expand the lower federal courts spurred an historian of President Roosevelt's Court-packing plan to worry that President Trump would adopt such a proposal.[75] Supreme Court reform also became a pivotal topic in the 2020 Democratic primary, as several Democratic candidates endorsed significant reforms.[76] The Democratic Party Platform for the election of 2020 ultimately called for "structural court reforms to increase transparency and accountability,"[77] and candidates Trump and Biden debated the merits of Court expansion.[78] Events surrounding the last three nominations to the Supreme Court have helped spark the now-prominent calls for expansion of the Court.

Some proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms in order to secure a conservative supermajority on the Court.[79] They see expansion of the Court as particularly justified in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett. When Justice Scalia died unexpectedly on February 13, 2016, 269 days—more than 38 weeks—before the 2016 presidential election, the Senate held neither a hearing nor a vote on President Obama's nomination of Judge Garland.[80] Yet when Justice Ginsburg died only 46

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days before the election of 2020, Republicans quickly confirmed President Trump's nomination of Justice Barrett to fill the seat.[81]

Calls for expansion in response to these developments did not begin immediately. Even after Republican Senators refused to act on the Garland nomination and eventually confirmed Justice Gorsuch instead, Democratic critics who accused Republicans of "stealing" a Supreme Court seat largely refrained from calling for Democrats to respond with a Court-expansion plan. Indeed, references to "Court packing" consisted primarily of arguments that Republicans themselves had in fact "packed the courts" by refusing to act on the Garland nomination and by moving swiftly to confirm President Trump's nominations to the lower federal courts.[82]

Calls for and by Democrats to expand the size of the Court first appeared in substantial numbers upon the announcement of his retirement by Justice Kennedy, who had long been seen as the median Justice on a closely divided Court, and during the subsequent controversial nomination process of Justice Kavanaugh.[83] These calls increased in late 2020 when Senate Republicans confirmed Justice Barrett, with Democrats arguing that Republicans had contradicted their own prior arguments that Justices should not be confirmed in close proximity to a presidential election.[84] According to news accounts, "[a]s soon as it became clear that the Republican-controlled Senate would almost certainly confirm Judge Amy Coney Barrett, creating a 6-3 conservative majority on the court," a number of Democrats "argued that if Democrats won in November, they should seriously consider increasing the number of justices."[85] Public discussion of Court expansion surged noticeably between 2019 and 2020. In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, and *USA Today* invoking the term "Court packing" in the context of the Supreme Court, in contrast to approximately 100 articles in 2019.[86]

Proponents of expansion who point to this series of events argue that the addition of new seats to the Supreme Court, at the next opportunity, by a Democratic President and Congress, could help restore the balance on the Court that was disrupted by significant norm violations in the confirmation process, thus protecting the legitimacy of the Court.[87] Some of those who argue for expansion in light of recent events emphasize that they are not motivated by partisan politics but rather by a commitment to the protection of longstanding norms and important constitutional rights. They worry that the current conservative supermajority established by the recent norm violations threatens to take the law, and particularly federal constitutional law, in a still more troubling direction than where it was already moving—perhaps by reversing or continuing to revise longstanding precedents in the areas of reproductive rights, racial justice, workers' rights, the regulation of guns, religion, administrative law, voting rights, and

campaign finance law.[88] But for the improper confirmation tactics of Republican lawmakers, the argument goes, the Court's doctrinal trajectory might have been considerably different.[89]

Others emphasize that a failure to respond to what they regard as confirmation "hardball" by Republicans since 2016—as well as a failure to advance expansion as a viable option in the political process—might encourage future aggressive measures in the confirmation process, such as a refusal to hold hearings on any judicial nominee put forward by a President of the opposite party.[90] The judicial selection process has already become, in the view of many, a partisan spectacle.[91] Further escalation of the battles surrounding the Supreme Court could put additional pressure on the long-term legitimacy of the institution. On this account, a significant reform such as Court expansion may be needed to calm the controversy surrounding the Court, by attaching consequences to the Senate's actions during the Trump years in order to deter future conduct of this kind.[92]

2. Preventing the Erosion of Democracy

Some proponents of expansion believe it to be essential to address the urgent circumstances brought on by developments in the Court's jurisprudence that predate recent confirmation controversies but that have been accelerated by those appointments. They believe that these developments threaten to seriously and perhaps irreversibly damage the democratic process. These critics maintain that the Supreme Court has been complicit in and partially responsible for the "degradation of American democracy" writ large.[93] On this view, the Court has whittled away the Voting Rights Act and other cornerstones of democracy, and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young.[94] This has contributed to circumstances that threaten to give outsized power over the future of the presidency and therefore the Court to one political party and to entrench that power.[95] As one witness before the Commission put it, the current Court "could easily invalidate federal legislation containing . . . democracy-entrenching measures . . . Those same Justices could easily invalidate measures designed to reduce the influence of money in politics, increase the transparency of political spending, restore the preclearance provision of the Voting Rights Act, and ameliorate economic inequality."[96] Those holding this view regard expansion as required to ensure a Court more likely to uphold future voting rights and democracy-enhancing legislation constitutionally enacted by Congress and to prevent state legislatures from undermining or destroying the democratic process.[97] In arguing the case for expansion, proponents contend this moment is unlike any of the others in which this reform has been debated: Antidemocratic developments risk

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entrenching the judicial philosophy of the current Court majority for generations, while advantaging one political party.

Those who advance arguments for expansion along these lines emphasize that maintaining the status quo would amount to a failure to pursue available reforms with the potential to restore the Court's role as ensuring the representativeness of government and the operation of democracy. On this view, any risks associated with expanding the Court at this time would not compare in severity to the failure to take action.

For some proponents of expansion, even the calls for such reform could help prevent further democratic backsliding. As some of the testimony before the Commission suggested, an *attempted* expansion—or even just the prospect of expansion—could lead the Supreme Court to be restrained in its jurisprudence and more respectful of the role of the political branches, at least in the short term.[98] Soon after President Roosevelt unveiled his Court-reform plan in 1937, the Supreme Court began to uphold New Deal programs. Although scholars continue to debate the reason for this "switch," a few years after the failure of his plan, Roosevelt described it as "among the most important domestic achievements of [his] first two terms in office," because it led to changes in the Court's jurisprudence.[99]

3. Strengthening the Court

Some participants in the debate over Court reform also regard expansion as worth considering because of its potential to strengthen the Court as an institution.[100] An expanded Court might better incorporate diverse personal and professional perspectives. That diversity could come from the inclusion of Justices with experience in different sectors of the legal community or even the public sphere more generally. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds. Expanded diversity could enrich the Court's decisionmaking, and a Court that was drawn from a broader cross-section of society would be well received by the public.[101] A larger Supreme Court might also be able to decide more cases and to spend more time on emergency applications—an element of the Court's work that has attracted considerable attention as is discussed in Chapter 5 of this Report.[102] The Supreme Court's rulings in merits cases have decreased considerably in recent decades. In the 1980s, the Court decided around 150 cases per year.[103] In recent years, that number has fallen to seventy or eighty cases.[104] To the extent the public or lawmakers would like the Court to resolve more cases, expanding the size of the Court might prompt the Justices to do so,[105] though other means to this end also could include expanding the Court's mandatory appellate jurisdiction.

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Most proponents of Court expansion have focused on the possibility of an immediate increase in the number of Justices sitting on the Supreme Court. But as noted in public testimony before the Commission, proposals for Court expansion need not involve congressional action to expand the Court all at once.[106] Congress could enact a law providing for the expansion of the Supreme Court over time. For example, the Court could be increased by one Justice during each four-year presidential term until the Court reached some maximum size (say, thirteen members). Alternatively, the Court could be expanded by two Justices immediately, followed by two more Justices after an intervening presidential election. Proponents of expansion note that, though the longstanding convention has been for the Court to have nine members, it is possible for a high court to be productive and functional with significantly more than nine Justices. They note that other jurisdictions have larger courts that function efficiently and collegially, and that countries other than the United States have tended to settle on more than nine seats and have not necessarily maintained an odd number of seats on their high bench.[107]

The table below puts the U.S. Supreme Court in context with other constitutional courts.

7 Judges	Australia
9 Judges	Canada, United States
10 Judges	Chile
11 Judges	France, South Africa
12 Judges	Belgium, Ireland, Spain, United Kingdom
14 Judges	Austria, South Korea
15 Judges	Italy, Japan
16 Judges	Germany, Sweden
18 Judges	Denmark

B. The Case Against Packing the Supreme Court

Opponents of efforts to expand—or "pack"—the Court at this time hold a range of views. Some critics of the calls for expansion regard the recent nominations to the Court as appropriate reflections of electoral outcomes and as fully consistent with constitutional processes and historical Senate practice.[108] They view the Court's changing doctrine as

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reflecting a principled approach to constitutional interpretation. Meanwhile, other critics of expansion, including some who take issue with the current Court and its jurisprudence and conclude that other reforms of the Court would be beneficial,[109] believe efforts to expand the Court or otherwise alter its structure at this moment would threaten the independence of the Court. Critics of Court expansion worry that such efforts would pose considerable risk to our constitutional system, including by spurring parties able to take control of the White House and Congress at the same time to routinely add Justices to bring the Court more into line with their ideological stances or partisan political aims. Court packing, in the critics' view, would compromise the Court's long-term capacity to perform its essential role of policing the excesses of the other branches and protecting individual rights. Opponents also conclude that packing the Court would not serve democratic values because such reforms would not address the Court's power to resolve questions better left to the political process. Still other opponents argue that the reform would be contrary to rule of law principles and that what they see as an enduring bipartisan norm against Court packing should be reaffirmed and protected.

1. Protecting Judicial Independence

Opponents of Court packing contend that it would significantly undermine the Supreme Court's independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. In a system that permitted Court packing, any time the Supreme Court issued a decision that was at odds with the preferences of those in power—whether the matter related to the U.S. census,[110] immigration policy,[111] or the validity of a presidential election[112]—the party in power could respond by stacking the Court with loyalists. One witness before the Commission further explained: "Court-packing risks undermining the *willingness* of the Justices to maintain their independence" from "the very political forces they are supposed to police in the name of the Constitution."[113]

Given these concerns, opponents underscore, it is crucial that for much of the past century, there has been a strong—and bipartisan—constitutional norm or convention treating Court packing as "something that just isn't done."[114] As one scholar wrote a few years ago, one could say confidently that "court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade* or *Citizens United*."[115] Scholars could say, until very recently, that even as compared to other Court reform efforts, "'Court packing' is especially out of bounds. This is part of the convention of judicial independence."[116]

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For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government. For example, in 2004, Democratic lawmakers celebrated how "President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary."[117] Republican lawmakers have also repeatedly denounced Roosevelt's Court-packing plan.[118] On this view, the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.[119] Opponents of Court packing also emphasize that those who resisted Court packing in 1937—particularly those who stood up to the President and leader of their own party—are seen as having shown tremendous political courage.

Opponents of Court packing argue that the strong bipartisan rejection of it has helped to preserve the Supreme Court's constitutional role for much of the past century. There has been considerable pressure on this norm in recent years—as evidenced by the fact that the issue has come before this Commission. But one witness during the Commission's public hearings noted opposition to expansion on the ground that there continues to be "[a] strong norm . . . that the political branches do not threaten or change the Court's membership because of unhappiness with its decisions."[120]

For opponents, the United States' fidelity to this norm has particular significance in light of developments in other parts of the world where manipulation of the composition of the judiciary has been a worrying sign of democratic backsliding.[121] After his election in 1989, for example, Argentinian president Carlos Menem worked to draw greater power into the executive branch, and in 1990 he successfully added four new members to a formerly five-member supreme court.[122] In 2004, Hugo Chavez in Venezuela reined in judicial independence by expanding the size of the constitutional court from twenty to thirty-two.[123] In 2010, Turkish leader Recep Tayyip Erdogan's populist party consolidated control over the Turkish constitutional court by expanding its membership from ten to seventeen and altering the process by which judges were selected.[124] In 2010, the populist Fidesz Party won a narrow majority in the Hungarian Parliament and quickly went about consolidating power, including through the addition of several new seats to the constitutional court.[125] In 2018, a package of judicial reforms in Poland forced sitting judges off the bench and dramatically expanded the size of the supreme court.[126] By contrast, these critics argue, stable democracies since the mid-twentieth century have retained a strong commitment to judicial independence and have not

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tended to make such moves.[127] For these opponents of expansion, it is important that the United States remain firmly in the ranks of democracies standing behind this commitment.

2. Safeguarding the Court's Legitimacy

Opponents also cite a concern related to the threat to judicial independence, underscored by witnesses before the Commission: that Court packing would almost certainly undermine or destroy the Supreme Court's legitimacy.[128] Some witnesses testified that the reform would be perceived by many as a partisan maneuver,[129] or a dangerous power grab by one political party—a move that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to much of the public.[130] Critics argue that the public is less likely to treat the decisions of a packed Court as authoritative, diminishing the Court's capacity to protect individual rights, equality, or constrain abuses of executive power.

Opponents of Court packing in this moment warn that it would also almost certainly generate a continuous cycle of future expansions. Expanding the Court would be on the agenda of every administration under unified government.[131] One (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices concludes that the Supreme Court could expand to twenty-three or twenty-nine Justices in the next fifty years, and thirty-nine or possibly sixty-three Justices over the next century.[132] Critics worry that these repeated fights over the Court could lead the public to see the Court as a "political football"—a pawn in a continuing partisan game.[133]

Relatedly, critics of Court packing argue that it would further degrade the confirmation process—a process that has already become a partisan spectacle.[134] There would be significant battles over any Justice added by a Court-expansion measure. And past examples of Court packing would easily become an excuse for blocking the confirmation of any nominee.

Critics of Court packing emphasize that it is hard to predict which forces will find themselves at odds with the Court in the future. At some points in our history, the Court has faced resistance from progressive groups—as illustrated by President Roosevelt's effort to pack the Court in 1937. By contrast, in the mid-to-late twentieth and early twenty-first centuries, the Court was repeatedly attacked by conservatives who objected to the Court's jurisprudence on abortion, school prayer, desegregation, protections for criminal defendants, and other civil rights issues.[135] This uncertainty leads even some who fundamentally disagree with aspects of the current Supreme Court's jurisprudence to believe it is better to preserve

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the Court's long-term legitimacy and independence than to open up the Court to be packed by potentially dangerous and even authoritarian political movements going forward.

3. Defending Democracy

Opponents of Court packing emphasize that polls show that large majorities of the public oppose expanding the Supreme Court.[136] For that reason alone, they argue, it is difficult to justify Court packing on grounds that it might serve democratic interests. Moreover, to the extent that one goal of Supreme Court reform is to enhance the power of democratic bodies, Court packing would not serve that end. Expansion would leave the Supreme Court's existing jurisdiction in place, as well as its existing approach to judicial review. An expanded Court could just as easily hold unconstitutional federal and state government conduct as the current Court. In addition, as noted above, given that Court packing could lead to cycles of Court expansion, critics of the measure believe it to be questionable that it would "balance" the Court to more closely align it with popular opinion over time. [137]

Other critics of Court expansion contend that, to the extent it aims to align the outcomes of Court decisions with the policy preferences and values of the country, the reform is misguided and misconceives the role of the Court.[138] They emphasize that no single American public exists and that popular views and opinions are divided across a range of issues the Court addresses. Moreover, opponents contend, some of the Court's most prominent decisions on subjects ranging from school prayer to criminal justice were quite unpopular,[139] and that decisions that meet with considerable political backlash sometimes become "canonical," as with *Brown v. Board of Education.*[140] These critics emphasize that, as *Brown* underscores, the Supreme Court may play its best role in our democracy when it polices the political process by working to ensure that the process is more open and responsive to *all* members of society—whether by helping to dismantle racial segregation; invalidating laws that discriminate upon the basis of gender or sexual orientation;[141] or requiring that each person's vote be given equal weight.[142] Opponents conclude that Court packing would so deeply compromise the Court's legitimacy and independence as to impede its capacity to serve this vital role.[143] In the long run, they argue, putting judges under the thumb of sitting politicians is unlikely to serve the broader interests of a democratic constitutional order. [144]

* * *

As we noted at the outset of this Part, there is profound disagreement among Commissioners over whether adding Justices to the Supreme Court at this moment in time

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would be wise. As a Commission we have endeavored to articulate the contours of that debate as best as we understand them, without purporting to judge the weight of any of the arguments offered in favor or against calls to increase the size of the Court.

IV. Other Structural Reforms

At points in history, and in today's debate over Supreme Court reform, lawmakers and commentators have proposed different schemes for altering the composition of the Court beyond its basic expansion. In this Chapter, we focus on three categories of such reforms: proposals that would rotate the Court's membership; proposals that would introduce panels into the Court's decisionmaking; and proposals designed to ensure partisan or ideological balance on the Court.

The first set of reforms would structure the Supreme Court as a shifting or rotating set of nine (or more) Justices from among a larger set of Article III judges. The details of rotation schemes vary, but generally speaking, they would provide that judges rotate between service on the Supreme Court and the lower federal courts. Some subset of these judges would constitute "the Supreme Court" in a given case or controversy, or for designated periods of time.[145]

The second type of reform would have the Justices sit on panels to hear cases. A panel system could take a variety of forms: For instance, one subset of Justices might be entrusted to decide questions falling within the Court's "original Jurisdiction" and another subset of Justices might be empowered to hear appeals (that is, cases reviewing decisions of the lower courts).[146] Or, one subset of Justices might be entrusted to resolve statutory questions and another subset could be entrusted to decide constitutional issues.[147] Or, the Justices might sit in randomly assigned panels on any given case, much like the judges of the courts of appeals today. Such a panel system could be instituted with the Court as currently constituted with nine Justices, or it could be employed as a way to manage the decisionmaking of an expanded Court. In either case, the system could be designed to enable all of the Justices to sit en banc, or all together, to review the decisions of a single panel when necessary.

The final set of reforms would distribute partisan or ideological influence over the Court's composition in an attempt to achieve evenhandedness. One such proposal would authorize each President to appoint two Justices to the Court during a four-year term. Another proposal would design the appointments process to ensure that a roughly even number of Justices would

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be affiliated with each of the two major political parties. One version of this idea would expand the Court to fifteen seats, with five Justices "affiliated with the Democratic Party" and "five with the Republican Party."[148] These initial ten Justices would then choose five additional judges from the courts of appeals to serve for a short-term period.[149]

In assessing these reforms, we begin by assessing the constitutional questions they raise. This analysis entails consideration of past efforts in U.S. history to implement similar reforms. We then proceed to consider the potential benefits of these different calls to alter the Court's structure. We ultimately find that these reforms may present more serious constitutional questions than basic Court expansion, but that they are not all clearly foreclosed by the Constitution. They may, however, offer uncertain practical benefits.

A. Legality

1. Rotation and Panel Systems and the Requirement of "one supreme Court"

The first two reforms—rotation and panel systems—raise similar legal questions. Both proposals, if enacted through statute, face a potential constitutional obstacle in the Constitution's command in Article III, Section 1, that "[t]he judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish."[150] The rotation proposals, because they would alter the duties currently performed by the Justices of the Supreme Court, also could give rise to distinct constitutional concerns, both under the "good Behaviour" Clause of Article III, Section 1, and the Appointments Clause of Article II, Section 2.[151] Because some of the proposals for term limits raise similar concerns, we address these particular constitutional issues in Chapter 3. We focus here on the meaning of "one supreme Court."

As a textual and structural matter, the "one supreme Court" provision requires an apex juridical body that operates in some meaningful sense as a single court and not merely as a scattering of individual jurists occasionally called upon to resolve questions of federal law. The Constitution thus would almost certainly not permit treating all Article III judges sitting at any given time as "*the*" Supreme Court of the United States and either polling that entire mass or randomly sampling individual judges' votes in order to emerge with a single result, without mutual consultation or collaboration (and with no true opinion of the whole Court) in each case.

The Commission is not prepared, however, to conclude that rotation and panel systems are clearly unconstitutional simply on the ground that each would entail having less than the

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full set of sitting Justices making initial decisions in individual cases for the Court as a whole.[152] One could reasonably read the text of Article III to suggest that the Supreme Court must be a unitary apex court whose members sit together in every case the Court takes up on the merits. But the text is also arguably consistent with having a large apex body that is nonetheless organized into panels, at least as long as a mechanism exists to enable en banc hearings, or some other form of review that would ensure that the Court produces a single, authoritative answer to whatever questions of fact or law the "Judges of the supreme Court" are charged with resolving. Such a structure could plausibly be considered "one supreme Court." The operation of the thirteen United States Courts of Appeals supports this understanding. They are understood to constitute thirteen unitary courts even though each of them typically sits in panels of three, treating each panel's decision as binding on all future panels of the same circuit unless and until the full circuit court, sitting en banc, reverses that opinion.[153] In contrast, a system under which groups of Justices were drawn, on a bi-weekly or other constantly rotating basis, from among all federal judges would raise more serious constitutional concerns, because it would be difficult to identify any single complement of Justices, sitting en banc or otherwise, to provide review as "one supreme Court."

The history of the "one supreme Court" language at the Founding and its interpretation over subsequent centuries supports the view that the Court must operate in some meaningful sense as a single court. But nothing in the history the Commission has reviewed surrounding the drafting or adoption of this "one supreme Court" provision reveals the thinking that underlay the creation of one Supreme Court or resolves the question whether the Court could sit in smaller panels or rotating groups, subject to a potential en banc review process.

During the Constitutional Convention of 1787, James Madison initially proposed "that a National Judiciary be established to consist of *one or more supreme tribunals*, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services. . . ."[154] But a few days later, the Convention opted for a "national judiciary . . . to consist of *One supreme tribunal*, and of one or more inferior tribunals."[155] Subsequent versions of the constitutional text then consistently referred to "*one* supreme Court."[156] Historians debate the significance of this textual change.[157] There is evidence that at least some Framers anticipated that the Supreme Court could divide into panels to complete its work more efficiently, while others anticipated that the Court would only hear cases as a single unit. For example, later in the Convention, when the participants debated how Congress could address workload concerns in the judiciary, Madison argued that Congress could simply add more judges.[158] Gouverneur

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Morris responded that such an approach might work for the inferior federal courts but not for the Supreme Court, because "[a]ll the business of a certain description whether more or less must be done in that single tribunal."[159]

In the nineteenth century, Congress on a few occasions considered a rotation or a panel system for the Supreme Court. Each time, some lawmakers supported the scheme in question and others cast doubt on its constitutionality. In 1869, for example, when Congress increased the size of the Supreme Court from seven to nine members, it also considered expanding the size of the lower federal judiciary.[160] But one lawmaker suggested an alternative: Congress could add sufficient personnel to the federal judiciary by greatly expanding the Supreme Court (whose members were still at the time expected to serve in part as lower circuit court judges). Under the proposed system, the Court would consist of eighteen members; nine members would serve on the Supreme Court at any given time, while the other nine would serve as circuit court judges ("riding circuit").[161] That is, the judges would rotate between the Supreme Court and the circuit courts.

Several lawmakers objected that this rotation system would be inconsistent with the constitutional requirement for "one supreme Court."[162] "The Constitution establishes the Supreme Court. . . . [Y]ou have no right to say that half of those judges shall take no part in the adjudications of that court."[163] Opponents also worried that this system might lead to instability in the law: "[A] court that was varying every year could never have stable decisions upon which the people of the country could rely. . . ."[164] Supporters of the measure countered that Congress had the power to say how many Justices could speak for the Court as a whole; after all, Congress had long established a quorum for the Supreme Court.[165] Moreover, supporters argued, past precedents had not proven unstable simply because they were decided by less than the full Court (but still a quorum).[166] Opponents countered that establishing a quorum—*permitting* fewer than the full number to issue a decision—was very different from *prohibiting* some number of Justices from serving on the Supreme Court at any given time, if they so chose.[167] Ultimately, the proposal for an eighteen-member Court died in Congress.[168]

A few decades later, Congress considered a proposal for a panel system. The issue arose as lawmakers sought to address a caseload crisis at the Supreme Court. The Court's appellate jurisdiction was still largely defined by the Judiciary Act of 1789, which required it to review every case properly before it on appeal.[169] By 1890, the Court's mandatory appellate docket had swelled to over 1,800 cases, only four or five hundred of which it could dispose of in a given year.[170] To address this caseload crisis, Congress considered a number of options. Senator William Evarts proposed a plan to create a scheme of federal appellate courts and to

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give the Supreme Court the discretion to review certain classes of cases via writs of certiorari. A version of this proposal was ultimately enacted as the Judiciary Act of 1891.[171]

During the debates over this 1891 measure, several members of the Senate Judiciary Committee proposed that the Court hear cases in panels. Under the proposal, the Court would hear most appeals in three-Justice panels, but the full Court would resolve federal constitutional questions and (at its discretion) other cases of "unusual difficulty or importance."[172] Observing that such panel systems existed in some states and other countries, the Senators asserted that the Supreme Court could likewise "dispose speedily of all causes that may be upon its calendar . . . by acting in separate divisions of three or more [J]ustices," all hearing cases "at the same time."[173]

The Senators argued that Congress could enact the proposal as part of its power to make exceptions and regulations to the Supreme Court's appellate jurisdiction.[174] Much like their predecessors in 1869, they pointed out that Congress had long exercised the power to declare how many Justices constituted a quorum and, thus, how many Justices were required to speak for the Court as a whole. Congress could, by extension, direct the Court to decide cases in panels.[175] Nor, according to the proponents, was such an arrangement at odds with the constitutional requirement for "one supreme Court." The Justices would "proceed at the same time to hear arguments and pronounce decisions, not as three separate Supreme Courts, but as one Supreme Court, exercising its appellate jurisdiction in a twofold or threefold manner at the same time."[176] The Senators added that, if a panel was presented with "a question of extraordinary difficulty or high consideration, . . . provision should be, and can be, made for the matter being heard before all."[177]

Other lawmakers were skeptical of the reform. Some insisted that a panel system would violate the constitutional requirement for one Supreme Court. "The power of Congress [to regulate the Court's appellate jurisdiction] can not be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution."[178] Some lawmakers also worried that a decision rendered by less than the full Court would lack legitimacy with the public.[179] Ultimately, the proposal was rejected by the Senate.[180]

Congress does not appear to have debated the validity or legality of rotation or panel systems after these various efforts at reform. But on several occasions, when Congress has considered reforms to deal with the Supreme Court's capacity constraints, individual Justices have noted—and expressed concerns about—the possibility of splitting the Court into subsets.

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For example, in the 1920s, Chief Justice Taft insisted that Congress "could not adopt" the panel approach that existed in some states, "because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts."[181] Likewise, in responding to President Roosevelt's 1937 Court-packing plan, Chief Justice Hughes expressed doubts about the wisdom and the constitutionality of a panel system. He argued that the proposed expansion would "impair [the Court's] efficiency so long as the Court acts as a unit" but noted that a decision by less than the full Supreme Court may not be seen as legitimate or consistent with Article III.[182] In the 1970s and 1980s, Congress debated reforms that eventually led to the Judiciary Act of 1988, which granted the Supreme Court the discretion to decide whether to review virtually every appeal.[183] During the debates, Chief Justice Burger asserted that a panel system was not a viable alternative: "Such a change would appear to alter the basic concept of 'one supreme Court' under Article III."[184]

It is arguably of some significance that individual lawmakers and Justices in the past have questioned the legality of structural reforms such as rotation and panel systems; these views underscore that the claims should be taken seriously. But lawmakers have reached different conclusions, and the statements of the Justices made outside of the context of judicial opinions, and in favor of preserving the existing structure, are not authoritative in establishing the meaning of Article III. Ultimately, we cannot conclude that the Constitution precludes rotation and panel reforms, at least as long as processes exist to ensure that a juridical body operates in some meaningful sense as a single "Court."

2. Proposals to Distribute Partisan or Ideological Influence

Reforms designed to secure partisan or ideological balance on the Court present at least two potential constitutional difficulties. First, such reforms may be in some tension with core First Amendment freedoms of political speech, association, and thought, as they may be seen as locking the major parties as they exist today into control over Court appointments. Second, proposals that would have the Justices select part of the Court's membership would seem to be on a collision course with the Constitution's clear specification in Article II, Section 2, of how "Judges of the supreme Court" are to be selected—namely, by presidential nomination and Senate confirmation.[185] Article II does not permit "Judges of the supreme Court" to be selected by other members of that Court.

B. The Value of Rotation, Panel, and Balance Systems

The rotation and panel proposals might enhance the Court's operations by injecting vitality and diversity of various kinds into the Court or better enabling the Court to hear greater

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numbers of cases. These reforms also would reduce the power of any single individual on the Court, though by themselves they would not meaningfully reduce the power of the Court as a whole within the U.S. system of constitutional government. The proposals aimed more directly at distributing the partisan or ideological affiliations and identities of the Justices could help reduce the stakes of the nomination and confirmation processes and in turn make the Court less of a source of political acrimony, particularly proposals that would give each President a specific number of appointments each term. These types of reforms also squarely acknowledge the political implications of the Court's decisionmaking, but they do not directly address the scope of the Court's power. Ultimately, however, though these proposals may have real benefits, those benefits may not be sufficiently significant or assured to justify the dramatic reconceptualization of the Article III judiciary they would require.

1. Policy Analysis of Rotation and Panel Proposals

a. Rotation Proposals. Proposals that would call for the rotation of Justices on and off the Supreme Court involve changing the membership of the Court on some sort of semi-regular basis; judges would alternate between actively hearing the cases of the Supreme Court and serving on the courts of appeals. Justices would be drawn according to a sorting process from a considerably larger collection of Article III judges—a set that could include all Article III judges or a prescribed subset of those judges. That larger set of Justices would be formally designated Supreme Court Justices serving during good behavior from the time of their appointment, but only a smaller subset of these judges would function as the Supreme Court of the United States in any given "case" or "controversy."[186]

By expanding the number of Justices who would sit on the Court, rotation proposals reduce the power of any single individual over the outcomes of the Court's cases. Rotation would thus address the need for litigants to gear their strategies toward the predilections of a single Justice perceived as the swing vote and would reduce the power of a single swing voter on the Court (though not necessarily a moderate swing "bloc") from shaping the trajectory of the Court's doctrine.[187] In addition, by incorporating a greater number of judges, these proposals could help regularly rejuvenate the Court by consistently introducing greater diversity of perspective, interpretive approach, and professional and geographic background, among other things, into its decisionmaking. Taken together, these features of rotation systems might enhance the quality of the Court's decisionmaking or the Court's legitimacy in the eyes of the public by extending decisionmaking power over matters of great consequence beyond the same nine individuals, though the Court would still be composed of Article III judges with

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life tenure. And rotation might lower the stakes of any single confirmation and thus help to ameliorate the partisan warfare that characterizes the nomination and appointment process.[188]

Each of these potential benefits, however, may well be offset by significant costs. A rotation system could introduce inefficiencies into the Court's work or otherwise undermine the supervisory and unifying functions it performs within the U.S. legal system.[189] The utility of these proposals would depend in part on the size of the pool from which the Justices would be drawn; a pool that is too small or chosen by partisan actors would produce little advantage over the status quo. But the larger that pool, the more unwieldy and unstable the Supreme Court's decisionmaking processes would become. A regularly fluctuating Court might also undermine the collegiality and familiarity that enables the Justices to manage contentious cases, including the resolution of hard cases through compromise. A lack of consistency in the Court's personnel could compromise its ability to provide guidance to lower courts and state courts as the result of more rapid doctrinal change on the Court. Most importantly, a rotation system that does not otherwise address the power of the Court could well heighten the stakes of confirmation processes for appellate judges.

Proponents of rotation contend, however, that Justices under this model would prioritize restraint and narrow decisionmaking for fear that a subsequent collection of Justices might overrule extreme or outlying precedent,[190] which in turn would lower the stakes of Supreme Court judgments and therefore judicial confirmations. But it is not clear that having a larger Court whose personnel churns will lead the Court to accept fewer cases of great import or otherwise exercise the power of judicial review more modestly.

b. Panel Proposals. The need for the Justices to sit on panels could well arise as a consequence of other reform proposals that would lead to significant expansion of the Court's numbers. If an initial attempt at Court expansion were to prompt future expansions as the result of partisan competition in the political branches, or if the transition to a system of term limits were to temporarily expand the size of the Court, there could be too many Justices to efficiently hear cases in all instances. Size would thus necessitate panels, with a potential en banc procedure for resolving significant disputes or conflicts between panels in order to provide adequate guidance to the lower courts, as discussed in Chapter 3 of this Report.

The question then becomes whether there would be virtues in the first instance in establishing a panel system. It is possible that this model would introduce some inefficiencies into the Court's decisionmaking. But constitutional and high courts in other jurisdictions function effectively on this model, whether by assigning particular types of cases to different

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panels or to different courts (constitutional vs. statutory cases, or criminal vs. civil cases, for example).[191] The Commission heard persuasive testimony suggesting that some apex courts in other nations manage to function with panels or layers, suggesting that complaints about the inherent infeasibility or inoperability of such systems are overdrawn. [192]

A Court structured in this way would have to be sensitive to the need for the clear development of doctrine so as to provide adequate supervision of the lower courts. The often fractured decisionmaking of the U.S. Supreme Court underscores that even the current composition can produce inefficiencies, however; such challenges might simply be an unavoidable aspect of any system in which a set of individuals who hold different theories of interpretation and of the Constitution's meaning is tasked with deciding complex and novel cases. A panel system that accompanied an increase in the number of Justices on the Court would certainly expand perspectives and representation on the Court, as discussed in Part III.A, though the extent of these benefits would be limited by the need to keep the overall size of the Court reasonable and manageable. Structuring panels along substantive lines might also produce specialization benefits, which might be especially useful when the Court deals with technical matters whose resolution would benefit from particularized expertise. And yet, the current Court's non-specialized character is itself a virtue; at least in theory, it facilitates fresh and open judgment about cases. More importantly, substantive areas of the law intersect and are deeply interrelated; it would be difficult, for example, to bifurcate constitutional and statutory analysis, since constitutional presumptions frequently inform how courts evaluate statutes.

2. Proposals to Distribute Partisan or Ideological Influence

As the Commission heard from numerous witnesses, and as we discuss throughout this Report, calls for reform have been motivated in significant part by the perceived mismatch between the ideological composition of the Court and the views of the public as reflected in election outcomes at particular points in time.[193] The fact that the Court's membership is often determined by the contingencies of the Justices' retirement or death exacerbates this concern and raises the stakes of the nomination and confirmation processes. It is not surprising, then, that some reform proposals would attempt to ameliorate this problem by distributing appointments more predictably and by trying to ensure rough alignment between the Court and electoral majorities.

One such proposal, closely related to the term limits proposal and discussed in Chapter 3, would give each President two nominations per term.[194] This proposal could reduce the

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partisan rancor of the confirmation process and lower the stakes of appointments by ensuring that a party controlling the White House need not wait for happenstance to be able to influence the Court. This proposal also would address the anomaly of some Presidents appointing as many as three Justices in one term and others having no opportunities to make appointments in the same amount of time. As noted in Chapter 3, this particular benefit would depend on a functional confirmation process to ensure that each President could in fact make two nominations. And ultimately this sort of proposal is most productively considered alongside term limits; unlike a system of term limits, which could eventually stabilize at a particular number of Justices, this proposal could lead to an irregularly expanding and contracting Court.

The other type of proposal that would introduce partisan or ideological balance onto the Court as a matter of design would require an even or roughly even number of Justices with affiliations from the two major political parties, on the model of independent commissions, with additional judges to be chosen from the circuit or district courts by the party-affiliated Justices.[195] This approach—sometimes called the balanced bench—might ensure some form of ideological even-handedness, and therefore moderation, which could help to keep the outcomes of Court decisions in line with public opinion. This form of balance could help induce compromise among the Justices, especially under those proposals that would set the size of the Court at an even number.[196] These virtues might in turn temper the confirmation wars by ensuring that both parties have roughly equal influence over the Court.

But it is far from clear that ideological balance is in and of itself a desirable goal. If there is no such balance in the political branches, requiring such balance on the Court could make the Court insufficiently reflective of or connected to electoral outcomes. In other words, if the goal were to ensure that the Court roughly reflects the public will and exhibits a degree of responsiveness to the political composition of the people at a given time, artificial balance between the two political parties would not achieve that objective. A balanced bench could be preferable to the status quo for those observers of the Court who perceive a significant mismatch between its composition today and the body politic.[197] But institutionalizing such a requirement would block farther-reaching change.

What is more, an explicit requirement that Justices be affiliated with particular parties would constrain the pool of potential nominees and reinforce the notion that Justices are partisan actors. Even if we accept the fact that the Justices' judgments have political implications and ideological motivations, this close identification of Justices with political party could undermine the perception of judicial independence, which is important to the acceptance of and compliance with the Court's decisions. It also seems likely that a "balanced

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bench" would continue to produce a significant number of divided results in contested cases, even on an evenly divided Court, keeping the Court at the center of charged political debates, for better or worse. Unless the types of cases the Court hears were to change markedly, its decisions would continue to have major political significance. Even the sort of more moderated outcomes that could result from these balancing proposals would still keep the Court central to political life.

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Endnotes: Chapter 2

[1] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[2] *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

[3] *See* Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

[4] *See* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

[5] *See* Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421.

[6] *See* Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176.

[7] At the time, the federal judiciary consisted of district court judges and Supreme Court Justices. A federal district judge would sit alongside a Supreme Court Justice (riding circuit) to constitute a circuit court. For a description of this system, see Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390-91 (2006) ("Beginning in 1789, each circuit court was staffed with two Supreme Court Justices and one local district judge. In 1793, the system was reformed so that only one Justice . . . was required."); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714-26 (2007). Congress abolished the circuit riding practice in 1911. *See* Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

[8] *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 33-37, 47-49 (Transaction Publishers 2007) (1928).

[9] *See* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2759-63 (2020).

[10] *See Id.* at 2761-63.

[11] *See* Mark Graber, *"No Better Than They Deserve:"* Dred Scott *and Constitutional Democracy*, 34 N. KY. L. REV. 589, 604 (2007) ("Federal law . . . structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states."); *Id.* at 609-10 ("The Court that decided *Dred Scott* had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court."); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 514 (2002) ("[T]o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.").

[12] The 1801 law established a system of lower federal circuit courts to handle appeals (in lieu of the circuits staffed by a Supreme Court Justice and a federal district judge). *See* Judiciary Act of 1801, §§ 7, 27, 2 Stat. 89, 90, 98.

[13] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 189 (Beard Books ed. 1999) (1922) (noting Jefferson viewed this provision "as aimed directly at himself and as an intentional diminution of his powers").

[14] *See* Act of Apr. 29, 1802, ch. 31, §§ 4, 5, 2 Stat. 156, 157-58.

[15] The tight connection between the number of circuits and the number of Justices had begun to break down. In 1855, Congress created a circuit court for California, without creating a new position on the Supreme Court. JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 133-34 (2012). But when Congress added a Justice in 1863, it transformed the California circuit into the Tenth Circuit and gave the new Justice the job of serving on that court. *Id.* at 138*; see also* Braver, *supra* note 9, at

2768-73 (arguing that the 1863 example can be seen as "the last example of the circuit-riding system at work" but asserting that subsequent changes were not tied to the circuit system).

[16] 60 U.S. (19 How.) 393 (1857); *see* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415-17 (1998).

[17] *See* Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794, 794; CROWE, *supra* note 15, at 138-39, 143-46.

[18] *See* Judiciary Act of 1866, ch. 210, 14 Stat. 209, 209. As in 1802, Congress did not terminate the position of any Justice but instead provided that the next three vacancies would not be filled. *Id.*

[19] *See* 3 WARREN, *supra* note 13, at 143-45. The reduction to seven Justices was not tied to the then-existing circuit court system; *see* Braver, *supra* note 9, at 2785 ("Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed.").

[20] *See* Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44; 3 WARREN, *supra* note 13, at 223.

[21] *See* CROWE, *supra* note 15, at 153-59 (noting the 1866 and 1869 changes are often seen as partisan attempts to manipulate the Court's size but urging that the laws had more neutral purposes).

[22] There has been a great deal of scholarship on President Roosevelt's Court-packing plan. For a few of the accounts, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE 217-29 (2009); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 82-162 (1996); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).

[23] *See*, *e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 317 (1936) (invalidating the Bituminous Coal Conservation Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542-51 (1935) (holding unconstitutional provisions of the National Industrial Recovery Act). These decisions by the Court also followed decades in which the Court struck down numerous laws enacted to protect workers, consumers, and the public. *See*, *e.g.*, Lochner v. New York, 198 U.S. 45, 64-65 (1905) (invalidating a New York state maximum-hour and minimum-wage law regulating the baking industry on grounds that it violated the freedom to contract); Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 561-63 (1923) (holding that a federal minimum-wage law for women was unconstitutional because it violated the freedom of contract and did not advance a compelling state interest).

[24] In 1936, Roosevelt won every state in the electoral college other than Maine and Vermont, with 61% of the popular vote, and Democrats won an overwhelming majority in Congress. *E.g.*, *Presidential Commission on the Supreme Court of the United States* 6 (June 25, 2021) (written testimony of Laura Kalman, University of California, Santa Barbara) [hereinafter Kalman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf ("Roosevelt had won every state except Maine and Vermont and nearly 61% of the popular vote. If Americans had voted against Herbert Hoover in 1932, they had given FDR a mandate in 1936, as in the 1934 midterm elections.").

[25] *See* Message from the President of the United States: A Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. DOC. NO. 75-142, at 9-10 (1937).

[26] *See* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 269-73 (2012).

[27] *Id.* at 273 (quoting Memorandum from Warner W. Gardner, Att'y, Dep't of Just., to Stanley Forman Reed, U.S. Solic. Gen. 56-57, 65 (Dec. 10, 1936)).

[28] *See* H.R. DOC. NO. 75-142, at 1-3 ("The Judiciary has often found itself handicapped by insufficient personnel[.]").

[29] *See Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937)*, AM. PRESIDENCY PROJ., https://www.presidency.ucsb.edu/documents/fireside-chat-17 (last visited Nov. 14, 2021).

[30] *Id.*

[31] *Id.*

[32] *Reorganization of the Federal Judiciary, Part 1: Hearing Before the S. Comm. on the Judiciary*, 75th Cong. 38 (1937) (statement of Robert H. Jackson, Assistant Att'y Gen. of the United States).

[33] *Id.* at 40.

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[34] *Id.* at 41.

[35] Kalman Testimony, *supra* note 24, at 1-3 (noting that, although Roosevelt's Court fight has often "been portrayed as the idiotic brainchild of a hubristic FDR destined from its inception for defeat, . . . the *history* of the Court fight tells a different story" and Roosevelt could reasonably have anticipated some success); *see also* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1148-49 (1987) (finding that public opinion did not turn decisively against Roosevelt's proposal until the Court showed greater support for the New Deal); William D. Blake, *"Justice Under the Constitution, Not Over It": Public Perceptions of FDR's Court-Packing Plan*, 49 PRESIDENTIAL STUD. Q. 204, 205 (2019) (finding broad support among the general public for more liberal constitutional rules in 1937 but less support for Court-expansion as a means for getting that outcome).

[36] *See* LEUCHTENBURG, *supra* note 22, at 137-39; SHESOL, *supra* note 22, at 467; 5 Historical Statistics of the United States 201, tbl. Eb296-308 (Susan B. Carter et al. eds., 2006) (showing that the Democrats controlled the House 331–89 and the Senate 76–16 over Republicans in 1937–38).

[37] Kalman Testimony, *supra* note 24, at 17.

[38] LEUCHTENBURG, *supra* note 22, at 138; SHESOL, *supra* note 22, at 315 ("The idea of giving any president, particularly Roosevelt, the authority to remake the Supreme Court virtually overnight was abhorrent to Senate progressives.").

[39] Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), *reprinted in* S. REP. NO. 75–711, app. c at 40 (1937) [hereinafter Hughes Letter].

[40] *See also* Kalman Testimony, *supra* note 24, at 21; Laura Kalman, Court Packing and Its Legacy 498 (2021) (unpublished manuscript) (on file with author) (observing that for much of the spring and summer of 1937, it appeared that Roosevelt might succeed to some degree in enlarging the Court).

[41] *See* LEUCHTENBURG, *supra* note 22, at 135 ("In the first week, numbers of Democratic Senators announced themselves for the bill."); SHESOL, *supra* note 22, at 514.

[42] *See* LEUCHTENBURG, *supra* note 22 at 135, 137-54 ("Despite all the antagonism, though, it still seemed highly likely in the last week of March [1937] that FDR's proposal would be adopted.").

[43] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act); Steward Mach. Co. v. Davis, 301 U.S. 548, 578-98 (1937) (upholding provisions of the Social Security Act); Helvering v. Davis, 301 U.S. 619, 639-46 (1937) (same); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390-400 (1937) (upholding a state minimum wage law for women).

[44] *Compare* JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 141-43 (1938) ("It seems probable . . . that all the justices realized that their only chance to save the Court lay in more self-reversals."), *and* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 19 (1996) (arguing that the Court "blinked" in response to the Court-packing plan), *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3-7 (1998) (challenging the view that the Court's decisions were a "political response to political pressure"), *and* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Ch. 8, § 8-6, 449 n.18 (1978) (casting doubt on the myth that a Justice changed his vote in response to the 1937 Court-packing plan).

[45] *See* FRIEDMAN, *supra* note 22, at 226 ("The Court's apparent change of direction [in *West Coast Hotel v. Parrish* and two weeks later in *NLRB v. Jones & Laughlin Steel Corp.*] was a major turning point for the plan, and everyone knew it."); LEUCHTENBURG, *supra* note 22, at 143 (arguing that Justice "Roberts' 'somersault' [in *West Coast Hotel*] gravely damaged the chances of the Court plan.").

[46] *See* S. REP. NO. 75-711, at 9 (1937); SHESOL, *supra* note 22, at 467.

[47] S. REP. NO. 75-711, at 23.

[48] *Id.* at 3, 8.

[49] *Id.* at 14.

[50] Kalman, *supra* note 40, at 417-19.

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[51] *See* LEUCHTENBURG, *supra* note 22, at 147-48 ("The prospects for enacting this new bill appeared very promising.").

[52] *See* SHESOL, *supra* note 22, at 481-89, 497-500.

[53] LEUCHTENBERG, *supra* note 22, at 160; Chapter 1, *supra*; *see also* Shesol, *supra* note 22, at 525 (observing of the Court-packing plan that it was "not the cause, but the catalyst that helped fracture the New Deal coalition; reawaken the GOP; unite conservatives across party lines; and shatter the myth of FDR's omnipotence.").

[54] Daniel Epps & Ganesh Sitaraman, Essay, *Supreme Court Reform and American Democracy*, Yale L.J.F. 821, 822 (2021); *see also* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-17, 538-44 (2018).

[55] *See* 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD).

[56] *Id.*

[57] 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

[58] 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD) (emphasizing that the amendment would "plug[] the loopholes in the Constitution's protection for the Supreme Court"); *Id.* at 1108 (statement of Sen. Russell Long, D-LA) ("Undoubtedly, one of the weak links is the possibility that the Supreme Court could be packed. . . . [T]hat is one loophole which we should close in order to protect ourselves in the future.").

[59] *See* 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

[60] *Id.*

[61] *See id.* at 6347 (showing that the Senate voted 58 to 19 in favor of the amendment). A constitutional amendment requires a two-thirds supermajority vote in the House of Representatives and the Senate, and then ratification by three-fourths of the states. U.S. CONST. art. V.

[62] *See* C.P. Trussell, *Court Amendment Tabled in House*, N.Y. TIMES, Aug. 4, 1954, at 11.

[63] 100 CONG. REC. 10,454 (1954) (statement of Rep. Emmanuel Celler, D-NY). A similar objection was raised in the Senate. *Id.* at 6342 (statement of Sen. Thomas Hennings, D-MO) (arguing that Congress might in the future decide that the Supreme Court should be either larger or smaller, depending on its workload, and for that reason a constitutional amendment was "undesirable").

[64] Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021); H.R.J. Res. 95, 116th Cong. (2020).

[65] Kalman Testimony, *supra* note 24, at 28.

[66] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[67] *See* U.S. CONST. art. I, § 8, cl. 18 ("[The Congress shall have power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[68] *See id.*

[69] Franklin Delano Roosevelt, *The Fight Goes On*, COLLIER'S WKLY., Sept. 20, 1941, at 16, 37 (also arguing that the approach "seemed . . . to have the best chance of passing both Houses of the Congress most quickly").

[70] *Presidential Commission on the Supreme Court of the United States* 2, 4 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center), [hereinafter Barnett Testimony] https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf (arguing that "partisan court packing" is unconstitutional, because "seeking a partisan advantage on the Supreme Court is not a legitimate end" under the Necessary and Proper Clause). Most scholars who have considered the issue, by contrast, have concluded that Congress has broad power to modify the Court's size. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 354-55 (2012) ("[I]f Congress has a sincere good-government reason for altering the Court's size, it is hard to see why Congress's views should not prevail, even if the Court sincerely disagrees about what size would be best for achieving good government . . . Even if . . . Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings

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and judicial overreaches—the legislature should still prevail."); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1062-63 (2014); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002); *Presidential Commission on the Supreme Court of the United States* 19 (Aug. 9, 2021) (written testimony of Michael J. Gerhardt, University of North Carolina at Chapel Hill) ("There is little doubt about the constitutionality of the Congress's authority to expand or contract the size of the Court."); *Presidential Commission on the Supreme Court of the United States* 3 (Aug. 9, 2021) (written testimony of G. Edward White, University of Virginia School of Law) ("There is no question that Congress can constitutionally change the size of the Court . . . .").

[71] *But see* Mike Rappaport, *Is Court Packing Constitutional?*, ORIGINALISM BLOG (Nov. 9, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/11/is-court-packing-constitutionalmike-rappaport-.html.

[72] The witness recognized this point but asserted that the political motives were "suppressed" in 1807 and 1837, such that these Court reforms were valId. Barnett Testimony, *supra* note 70, at 4 (asserting that though "political motives may have existed with each change to the number of justices" in 1807 and 1837, "these motives were suppressed and there was a demonstrable justification for altering the number of judges as the number of states expanded").

[73] *See* HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, 1 AMERICAN CONSTITUTIONALISM 191-92, 248-51 (2d ed. 2017); *supra* notes 2-10 and accompanying text.

[74] *See*, *e.g.*, Jean Edward Smith, *Stacking the Court*, N.Y. TIMES (July 26, 2007), https://www.nytimes.com/2007/07/26/opinion/26smith.html ("If the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president and Congress could provide a corrective."); Jonathan Turley, *A Bigger, Better Supreme Court: The Case for Reform*, GUARDIAN (June 27, 2012), https://www.theguardian.com/commentisfree/2012/jun/27/bigger-better-supreme-court-reform; Mark Tushnet, *"For a Generation"?*, BALKINIZATION (July 5, 2017), https://balkin.blogspot.com/2017/07/for-generation.html ("Suppose Democrats regain control of the Presidency and Congress after the 2020 elections. . . . One item on their legislative agenda might be expanding the Supreme Court to eleven (or more).").

[75] Jeff Shesol, *Would Trump Consider a Court-Packing Scheme?*, NEW YORKER (Dec. 5, 2017), https://www.newyorker.com/news/news-desk/would-trump-consider-a-court-packing-scheme; *see also* Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal.

[76] Benjy Sarlin & Lauren Egan, *The Hot New Dem Plan to Score Policy Wins: Change the Rules of the Game*, NBC NEWS (Mar. 16 2019, 7:31 AM EDT), https://www.nbcnews.com/politics/2020-election/hot-new-dem-plan-score-policy-wins-change-rules-game-n983456.

[77] *2020 Democratic Party Platform*, DEMOCRATIC PARTY 58 (2020), https://democrats.org/where-we-stand/party-platform.

[78] Barbara Sprung, *Biden Says He's 'Not A Fan' of Expanding the Supreme Court*, NPR (Oct. 13, 2020), https://www.npr.org/2020/10/13/923213582/biden-says-hes-not-a-fan-of-expanding-the-supreme-court (quoting then-candidate Biden as saying: "I've already spoken: I'm not a fan of court packing, but I don't want to get off on that whole issue. I want to keep focused."). Later, though he called the court system "out of whack," he noted that "the last thing we need to do is turn the Supreme Court into just a political football, whoever has the most votes gets whatever they want." Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020), https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms. In a tweet, then-President Trump said that court-packing would "permanently destroy the Court." *Donald J. Trump, Tweets of October 11, 2020*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/tweets-october-11-2020 (last visited Sept. 19, 2021).

[79] *See Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Christopher Kang, Demand Justice) [hereinafter Kang Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf ("In the past five years, Republicans have used their political

power to: [c]hange the size of the Supreme Court for more than a year by stealing a Supreme Court seat from President Obama in 2016[;] . . . [u]nilaterally change the Senate Rules to confirm Neil Gorsuch[;] . . . [d]iscard multiple credible allegations of sexual assault and perjury against Brett Kavanaugh and confirm him without legitimate investigation, and[;] [d]eny the will of the voters and confirm Amy Coney Barrett . . . ."); *Presidential Commission on the Supreme Court of the United States* 12-13 (July 20, 2021) (written testimony of Michael J. Klarman) [hereinafter Klarman Testimony] (discussing the confirmation tactics of the Republican-controlled Senate).

[80] Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html.

[81] *See* Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, ASSOCIATED PRESS (Oct. 26, 2020), https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07; David Cohen & Josh Gerstein, *Justice Ruth Bader Ginsburg Dies at 87*, POLITICO (Sept. 18, 2020), https://www.politico.com/news/2020/09/18/justice-ruth-bader-ginsburg-034990.

[82] *See*, *e.g.*, 163 CONG. REC. S6914 (daily ed. Oct. 31, 2017) (statement of Sen. Jeff Merkley, D-OR) ("We are seeing the President engaged in a zeal to pack the court with extreme rightwing ideologues and to ram them through this confirmation process without due review."). Such efforts to apply the "court packing" label to actions other than the outright addition of seats to courts were contrarian, but they were not altogether unprecedented. The term "court packing" had been invoked to criticize President Obama's swift appointment of three judges to the D.C. Circuit upon the Senate's elimination of filibusters for lower court nominations. *See* Louis Jacobson, *Is Barack Obama Trying to 'Pack' the D.C. Circuit Court of Appeals?*, POLITIFACT (June 5, 2013), https://www.politifact.com/factchecks/2013/jun/05/chuck-grassley/barack-obama-trying-pack-dc-circuit-court-appeals. The term was also used to criticize President Ronald Reagan's and President George H.W. Bush's nominations to the Supreme Court. *See* Grove, *supra* note 54, at 514; *see also Id.* at 512-17 (tracing the use of "court packing" as a political epithet from the 1950s through 2017). *See generally* HERMAN SCHWARTZ, PACKING THE COURTS (1988).

[83] *See* Charlie Savage, *On the Left, Eyeing More Radical Ways to Fight Kavanaugh*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/us/politics/democrats-kavanaugh-supreme-court.html.

[84] *See* E.J. Dionne, Opinion, *Enlarging the Supreme Court Is the Only Answer to the Right's Judicial Radicalism*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html; Press Release, Sen. Ed Markey, Expand the Supreme Court: Sen. Markey and Reps. Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), https://www.markey.senate.gov/news/press-releases/expand-the-supreme-court-senator-markey-and-reps-nadler-johnson-and-jones-introduce-legislation-to-restore-justice-and-democracy-to-judicial-system; Michael Hiltzik, *How a New Court-Packing Scheme Could Save the Supreme Court from Right-Wing Domination*, L.A. TIMES (July 2, 2018, 6:30 AM PT), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-scotus-20180629-story.html.

[85] Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html.

[86] In addition to greater media coverage, the topic of Court reform also captured the public's attention during that period. Google Trends, which captures patterns in Google search queries, recorded dramatic spikes in searches for "Court packing" and related terms between Justice Ginsburg's death and Justice Barrett's confirmation. *See Google Trends: "Court Packing," "Pack the Court," "Pack the Supreme Court,"* GOOGLE, https://trends.google.com/trends/explore?date=today%205y&geo=US&q=court%20packing,pack%20the%20court,pack%20the%20supreme%20court (last visited Nov. 14, 2021).

[87] *Presidential Commission on the Supreme Court of the United States* 1-2 (July 20, 2021) (written testimony of Nan Aron, Alliance for Justice) [hereinafter Aron Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf ("[T]he Court's legitimacy has already been tarnished [] after decades of partisan takeover. . . . Given this reality, it is clear that reform is in fact necessary to *restore."*); *Id.* at 1-5, 11-12 (further arguing that "the most effective way to restore balance to our Court is through expansion").

[88] *See id.* at 3-4, 7, 15 (asserting that the Court could, among other things, "wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights," "continually block[] the people's

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efforts to protect themselves and their loved ones from the scourge of gun violence," and undermine other important precedents related to campaign finance reform, administrative law, and religion); Kang Testimony, *supra* note 79, at 3 ("The problem is not that Democrats are unable to understand the impact of the courts on reproductive rights, LGBTQ+ equality, voting rights, gun violence prevention, labor, the environment, racial justice, immigration, and more. We hold our collective breath every June to see what rights the Republican justices will allow to survive another year."); Sahil Kapur, *Some Republicans Feel Protected by 6-3 Supreme Court, Even if Biden Wins*, NBC NEWS (Nov. 3, 2020, 12:15 PM), https://www.nbcnews.com/politics/2020-election/some-republicans-feel-protected-6-3-supreme-court-even-if-n1245838; Moira Donegan, *Enough Playing Nice. It's Time to Pack the Courts*, GUARDIAN (Apr. 19, 2019, 6:00 AM), https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020l; Elie Mystal, *The Democrats Need to Prepare for the Supreme Court to Overturn 'Roe v. Wade,'* NATION (Oct. 7, 2020), https://www.thenation.com/article/politics/biden-abortion-supreme-court; Jeff Taylor, *How Safe is Gay Marriage? Advocates Fear Increasingly Conservative Court*, NBC NEWS (Oct. 6, 2020, 1:48 PM), https://www.nbcnews.com/feature/nbc-out/fight-against-gay-marriage-still-alive-well-u-s-advocates-n1242272; Adam Serwer, *The Supreme Court Is Helping Republicans Rig Elections*, ATLANTIC (Oct. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808; Adam Gopnik, *The New, Conservative Supreme Court Is Returning to the Second Amendment*, NEW YORKER (May 7, 2021), https://www.newyorker.com/news/daily-comment/the-new-conservative-supreme-court-is-returning-to-the-second-amendment.

[89] *Cf.* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 43-44 (2009) ("[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups. . . . From this perspective, Court support can change fairly quickly over time. . . ."); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206-07 (2014) (noting this risk to "diffuse [public] support").

[90] *Cf.* Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html (noting that then-Senate Majority Leader McConnell "threatened on Monday to block any Supreme Court nominee put forward by President Biden in 2024 if Republicans regain control of the Senate" and that McConnell declined to say whether a Republican-controlled Senate would confirm a nominee in 2023).

[91] *See Presidential Commission on the Supreme Court of the United States* 5 (July 20, 2021) (written testimony of Jeffrey J. Peck) [hereinafter Peck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf (noting, and proposing reforms to address, "the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations"); *Presidential Commission on the Supreme Court of the United States* 1 (July 20, 2021) (written testimony of Benjamin Wittes, the Brookings Institution) [hereinafter Wittes Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf (emphasizing "the decay of the confirmation process"); *see also Presidential Commission on the Supreme Court of the United States* 8:31:32-8:34:27 (July 20, 2021) (oral testimony of Randy E. Barnett, Georgetown University Law Center), https://www.whitehouse.gov/pcscotus/public-meetings/ (suggesting that the Senate's repeated refusal to confirm a nominee could violate the spirit of the Constitution, given that "all discretionary power can be abused").

[92] *See Presidential Commission on the Supreme Court of the United States* 9-10 (July 20, 2021) (written testimony of Larry Kramer, William & Flora Hewlett Foundation) [hereinafter Kramer Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Kramer-Testimony.pdf ("Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. . . . [F]aced with a credible threat that 'tit' really will be matched by 'tat,' opposing parties learn to cooperate.").

[93] Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 1 (2020).

[94] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 200-01 (2008) (upholding an Indiana voter identification law); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (upholding Arizona laws that excluded ballots for being deposited at the wrong precinct and criminalizing ballot harvesting, respectively); Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (striking down the Voting Rights Act's preclearance regime);

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Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that extreme partisan gerrymanders implicate non-justiciable political questions that courts cannot hear); Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28 (2020) (reversing a federal district court's decision to permit counting of ballots post-stamped after Election Day despite unclear instructions from state officials).

[95] *See infra* Section III.B.1-3; s*ee also* Klarman Testimony, *supra* note 79, at 10-12; *cf.* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1996).

[96] *See* Klarman Testimony, *supra* note 79, at 16-17.

[97] *See* Kang Testimony, *supra* note 79, at 6-7.

[98] *See Presidential Commission on the Supreme Court of the United States* 11 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf (noting "the implicit threat of court-packing" and stating "if their interpretations over time go so far away from mainstream constitutional opinion that they cause the court to lose legitimacy, the justices know that it could lead to substantial loss of independence in the form of court-packing"); Kramer Testimony, *supra* note 92, at 6-7 ("Roosevelt's effort was also *entirely* successful in getting him exactly what he sought: the Court reversed course and upheld the second New Deal. . . . As with any tool of deterrence, making clear that the other branches can and will push back against an overreaching Court makes it less necessary to do so. . . . [T]he Court adjusts its behavior to greater sensitivity in the other branches.").

[99] *See supra* note 98 and accompanying text; Kramer Testimony, *supra* note 92, at 6.

[100] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 23 (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) [hereinafter Resnik Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf ("[I]ncreasing the number of sitting Justices and shifting to a system of panels would mitigate the undue impact of any one appointment. . . . These proposals are but a few of the many ideas that aim to constrain a small group of people from entrenching their views of the law's obligations."); *Presidential Commission on the Supreme Court of the United States* 9 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School) [hereinafter Greene Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf ("Increasing the Court's size could significantly reduce the influence of particular justices, thereby lowering the stakes that attach to their appointment and increasing the Court's diversity along multiple dimensions.").

[101] *See Presidential Commission on the Supreme Court of the United States* 4 (July 20, 2021) (written testimony of Wade Henderson, Leadership Conference on Civil Rights), https://www.whitehouse.gov/wp-content/uploads/2021/07/Henderson-Testimony.pdf; *Id.* at 10 ("Courts rely on public trust for legitimacy, and diversity among judges and justices helps improve both public trust and balanced judicial decisionmaking."); Aron Testimony, *supra* note 87, at 12 ("By expanding the Court, we can ensure that it actually looks like America, and includes Justices with diverse backgrounds and experiences who will bring important perspectives to major decisions.").

[102] Emergency petitions are discussed at length in Chapter 5 of this Report.

[103] *See* LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 74 tbls.2-6 (6th ed. 2015) (showing that the Court granted review in 184 cases in 1980; 149 cases in 1983; 186 cases in 1985; and 122 cases in 1989).

[104] We include statistics from the pre-pandemic era, given that more recent statistics may reflect the complexities of the past eighteen months. *See* JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5-6 (2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf (reporting that the Supreme Court decided sixty-nine cases in the 2018 term, and sixty-three in the 2017 term); JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf (reporting that the Supreme Court decided sixty-eight cases in the 2016 term, and seventy in the 2015 term); JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (reporting that the Supreme Court decided seventy-five cases in the 2014 term and seventy-seven in the 2013 term).

[105] *See* Greene Testimony, *supra* note 100, at 9 ("Workload alone provides good and sufficient reason for the U.S. Supreme Court to have more than nine members."); *Id.* at 10 (listing the various ways in which a larger Court could increase the pace and enhance the quality of its work, including through more attention to testing legislative facts and answering certified questions from lower courts).

[106] *See Presidential Commission on the Supreme Court of the United States* 2, 16-17 (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf ("I urge the Commission to consider proposals to provide for fluctuating Court membership, or a 'decoupling' of appointments from vacancies, by guaranteeing one, or two, presidential appointments each term, while letting the overall numbers on the Court fluctuate. . . . Such a mechanism could be capped (e.g. at 11) to keep the Court to a workable number."); *see also* Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 136-38 (2021) (making a similar proposal, albeit without fixing an upper boundary on the number of Justices).

[107] *See* Resnik Testimony, *supra* note 100, at 23; Greene Testimony, *supra* note 100, at 9.

[108] See Thomas E. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 122, 136 (2021).

[109] For example, during the Commission's public hearings, some witnesses who opposed Court packing asserted that term limits could be a beneficial reform. *See* Jackson Testimony, *supra* note 106, at 2; *Presidential Commission on the Supreme Court of the United States* 17-20 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School) [hereinafter Siegel testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf.

[110] *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575-76 (2019) (holding that the federal executive branch failed to adequately explain its decision to add a citizenship question to the U.S. Census, and concluding that the matter must be sent back to the agency for further explanation).

[111] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (holding that the rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act because DHS did not "provide a reasoned explanation for its action").

[112] *See, e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (rejecting, on standing grounds, an original action brought by a state to prevent several other states—Georgia, Michigan, Pennsylvania, and Wisconsin—from certifying presidential electors); *see also* Siegel Testimony, *supra* note 109, at 6 ("[B]y most accounts, the federal courts—including the Justices—performed well during the controversies surrounding the 2020 presidential elections, regardless of the political affiliations of the judges.").

[113] Siegel Testimony, *supra* note 109, at 5-6. This position has considerable historical support. *See* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 15-16, 193 (2011) (arguing, based on a statistical analysis of judicial reactions to legislative proposals to curb the Supreme Court from 1877-2008, that "when Court-curbing bills are introduced in Congress, the justices will exercise self-restraint by attenuating their use of judicial review to invalidate federal legislation"); *see also* WALTER F. MURPHY, CONGRESS AND THE COURT 62 (1962) (arguing that, historically, the Justices have been "acutely aware of the attacks against their decisions, and . . . willing to make concessions when they felt that danger had become too threatening").

[114] Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 79-81 (Matthew D. Adler & Kenneth Einer Himma eds., 2009) ("[W]hat Roosevelt had proposed to do was *something that just isn't done*. It violated the customary norm obligatory on Congress even though not formally part of the Constitution."); *see* Bradley & Siegel, *supra* note 54, at 269-87; Grove, *supra* note 54, at 505-17, 538-44; *see also* Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 424 (2012) (noting that "the rejection of Roosevelt's court-packing plan in 1937 . . . is said by many to have created an unwritten constitutional norm against court-packing"); Tom Donnelly, Note, *Popular Constitutionalism, Civic Education and the Stories We Tell Our Children*, 118 YALE L.J. 948, 994 (2008) ("No contemporary textbook presents an account that even subtly suggests the potential legitimacy of an argument in favor of 'packing' the Court under similar circumstances."); *infra* notes 108-144 and accompanying text.

[115] Krotoszynski, Jr., *supra* note 70, at 1063-64.

[116] David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014).

[117] H.R. REP. NO. 108-691, at 110 (2004) (Minority Report) (invoking Roosevelt's plan to criticize bills that would have restricted federal jurisdiction over challenges to the Defense of Marriage Act and to the use of "under God" in the Pledge of Allegiance, and arguing that, just as Roosevelt's plan failed, "so too must this modern day effort to show the courts 'who is boss' fail as well").

[118] *See* Grove, *supra* note 54, at 512-17 (recounting how, beginning in the 1950s, both Republican and Democratic lawmakers treated "Court packing" as a political epithet and repeatedly denounced Roosevelt's plan).

[119] *Id.* at 532-33.

[120] Jackson Testimony, *supra* note 106, at 20-21.

[121] David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONST. STUD. 133 (2020).

[122] Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LAT. AM. RSCH. REV. 56, 63-64 (2004).

[123] Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in Latin America*, *in* ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018).

[124] Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMPAR. L. 187, 197-99 (2017).

[125] David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 209 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 551-52 (2018).

[126] Michał Ziółkowski, *Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments*, 5 EUR. PAPERS 347, 350 (2020).

[127] Skeptics of expansion also argue that the American example in the world matters and that politicians at home and abroad who might wish to control their courts might find themselves emboldened to take such actions if the United States engages in Court packing, regardless of the reasons for the U.S. reform. *See Presidential Commission on the Supreme Court of the United States* 8:15:20-8:17:15 (July 20, 2021) (oral testimony of Marin K. Levy, Duke University School of Law), https://www.whitehouse.gov/pcscotus/public-meetings (stating that "[c]ertainly if we were to see expansion of the Supreme Court, that could be seen as some sort of green light" at the state level, although also noting that any such impact would be uncertain); *Presidential Commission on the Supreme Court of the United States* 10-11 (June 30, 2021) (written testimony of Rosalind Dixon, University of New South Wales, Sydney) [hereinafter Dixon Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf (noting that "[c]omparative scholars . . . highlight the potential for renewed use of court-packing in the US to be seen as legitimating new and expanded attempts at court-packing in a range of democracies under threat" while suggesting that the risk of such borrowing with respect to "court-packing" may be less severe because authoritarians are already able to rely on Roosevelt's 1937 plan).

[128] Feldman Testimony, *supra* note 98, at 8 ("Under almost all ordinary circumstances, court-packing would seriously undermine the legitimacy of the Supreme Court."); *Presidential Commission on the Supreme Court of the United States* 1 (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School) [hereinafter McConnell Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf ("Any attempt to increase the size of the Court . . . would be a severe blow to the reputation of the Court as a legal institution . . . ."); Siegel Testimony, *supra* note 109, at 2 ("Court-packing would significantly undermine the Court's independence and, in almost all circumstances, risk its legal and public legitimacy."); *Presidential Commission on the Supreme Court of the United States* 90 (July 20, 2021) (written testimony of Supreme Court Practitioners' Committee, co-chaired by Kenneth Geller and Maureen Mahoney) [hereinafter Supreme Court Practitioners' Committee Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf ("[T]he independence of the Court and its standing with the public would be gravely compromised if Congresses were to add seats for the purpose of affecting the Court's jurisprudence . . . .").

[129] *See Presidential Commission on the Supreme Court of the United States* 2:58:15-2:58:44 (June 30, 2021) (oral testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 ("How would the public perceive court expansion? . . . [I]t's going to be filtered through partisan concerns at the public opinion level.").

[130] McConnell Testimony, *supra* note 128, at 1 ("Any attempt to increase the size of the Court would be widely, and correctly, regarded as a partisan interference with the independence of the Court. This would be a severe blow to the reputation of the Court as a legal institution . . . ."); *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf ("[R]eforms that are not perceived by both sides as enhancing the courts' legitimacy will never succeed in doing so.").

[131] *See* Feldman Testimony, *supra* note 98, at 9 ("Court-packing would likely become a tit-for-tat practice" and would "drastically reduc[e] the court's institutional legitimacy.").

[132] *See* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, The Endgame of Court-Packing 2-3 (May 3, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502 ("We find that the median result of repeated partisan court-packing would be to increase the size of the Court to 23 justices within 50 years and to 39 justices within 100 years. . . . [I]f court-packing happens every time the president's party has appointed a minority of justices on the Supreme Court and there is unified government—the worst-case tit-for-tat scenario cited by opponents of court-packing—we find that the median size of the Court across the simulations is 29 justices after 50 years and 63 justices after 100 years.").

[133] Jackson Testimony, *supra* note 106, at 20-21 ("[E]xpanding the Court simply to give one specific President the power to fill seats . . . risks turning the Court into even more of a perceived political football."); *see also* Supreme Court Practitioners' Committee Testimony, *supra* note 128, at 90 ("If Democrats were to [add seats for the purpose of affecting the Court's jurisprudence] now, Republicans would surely adopt the same tactic when they next have the opportunity. This would exacerbate the public perception that the Court is a mere political body.").

[134] *See* Peck Testimony, *supra* note 91, at 5 (noting, and proposing reforms to address, "the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations"); Wittes Testimony, *supra* note 91, at 1 (emphasizing "the decay of the confirmation process"); *see also Presidential Commission on the Supreme Court of the United States* 8:31:32-8:34:27 (July 20, 2021) (oral testimony of Randy E. Barnett, Georgetown University Law Center), https://www.whitehouse.gov/pcscotus/public-meetings/ (suggesting that the Senate's repeated refusal to confirm a nominee could violate the spirit of the Constitution, given that "all discretionary power can be abused").

[135] *See* FRIEDMAN, *supra* note 22, at 237-79 (2009); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16 (2011).

[136] See *Presidential Commission on the Supreme Court of the United States* 7-8 (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf (noting that "simply expanding the size of the Supreme Court is unpopular among the public" and citing polls showing that only 26% or 32% of Americans favor increasing the number of Justices).

[137] Critics who reject democracy-based arguments for Court expansion also note that Supreme Court Justices are selected by the President, with the advice and consent of the Senate, and the constitutional methods of selecting the President and the Senate do not guarantee that those bodies will reflect the popular will. The President is selected through the Electoral College, and on five occasions, a President has been elected without winning the popular vote. And the Senate is designed to provide equal representation to the states, not to reflect a broad national mandate. *See* U.S. CONST. art. II, § 1, cl. 2-4, *amended by* U.S. CONST. amend. XII. *Electoral College Fast Facts*, HIST., ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ (last visited Sept. 17, 2021) ("Five times a candidate has won the popular vote and lost the election. Andrew Jackson in 1824 (to John Quincy Adams); Samuel Tilden in 1876 (to Rutherford B. Hayes); Grover Cleveland in 1888 (to Benjamin Harrison); Al Gore in 2000 (to George W. Bush); Hillary Clinton in 2016 (to Donald J. Trump).").

[138] *Cf.* THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("This independence of the judges is equally requisite to guard the [C]onstitution and the rights of individuals from the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the

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meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

[139] *See* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) [hereinafter PUBLIC OPINION] (showing that, in the 1970s, over seventy percent of the public disapproved of the Court's school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, *in* PUBLIC OPINION, *supra*, at 42-43 ("In many ways," the Warren Court's criminal procedure decisions "were out of step with public opinion and may even have shifted public opinion against the Court's pro-rights position.").

[140] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal."); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (describing *Brown* as "[t]he classic example" of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) ("[T]he constitutional canon" is "the set of decisions whose correctness participants in constitutional argument must always assume. Brown . . . is the classic example."). For discussions of the resistance to school desegregation, see JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 242-314 (2019); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004).

[141] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675-76 (2015) (holding that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of" the right to marry); United States v. Windsor, 570 U.S. 744, 774-75 (2013) (holding invalid the Defense of Marriage Act, which allowed states to refuse to recognize same-sex marriages that were lawful under another state's law); United States v. Virginia, 518 U.S. 515, 556-58 (1996) (holding that a state university could not lawfully exclude women).

[142] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (establishing the one-person, one-vote rule for legislative apportionment).

[143] Siegel Testimony, *supra* note 109, at 20 ("Repeated Court-packing, or repeated threats of it, would make it increasingly difficult for the Supreme Court to perform functions that no other governmental institution is likely to perform better.").

[144] *See* Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 55, 60 (1994) (asserting that elections, when elections exist at all, in political systems where courts are treated as "nuisances" and "impediments" to be overcome, "are [] very emotional and high-stakes events: candidates compete for a chance to rule virtually free of all constraints save those imposed by naked, noninstitutionalized power relations"); *see also* Whittington, *supra* note 70, at 2134 (asserting that Roosevelt's 1937 "Court-packing plan might have indicated that the President no longer took constitutional constraints seriously, that the Constitution was suffering a crisis of fidelity.").

[145] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019); *see also* John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999) (making a similar proposal with six- to twelve-month stints on the Court); Greene Testimony, *supra* note 100, at 17 ("[T]he suggestion is for a 16-member Court whose members serve 16-year terms and are drawn from what are now designated as the courts of appeals. . . . [T]he first step in the proposal would be to expand the formal size of the Supreme Court to equal the size of the Article III appellate bench—currently 179 authorized positions. . . . The second step would be to enact, via statute, an appointment procedure that would designate which judges of the formally expanded Supreme Court exercise the powers of the functional Supreme Court. The remaining judges of the formal Supreme Court would exercise roughly the same powers, including appeals of right from federal district courts, that the courts of appeals enjoy today.").

[146] *E.g.*, Jack Balkin, *Don't Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html.

[147] *E.g.*, Bruce Ackerman, *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html.

[148] *See* Epps & Sitaraman, *supra* note 145, at 193.

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[149] *Id.*

[150] U.S. CONST. art. III, § 1 (emphasis added).

[151] Article III, Section 1 of the U.S. Constitution provides that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." The Appointments Clause of Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." *Id.* § 2. The concern under the "good Behaviour" Clause is that a statute that would have judges sit on the Supreme Court for only brief periods, interspersed with service on the lower federal courts, would significantly change the nature of the office. The concern under the Appointments Clause is that the Clause creates an office of Supreme Court Justice separate and apart from the office of lower federal court judge. These constitutional issues are complex, and scholars disagree over their appropriate resolution. If these rotation reforms were to be pursued via a constitutional amendment, these concerns would not arise.

[152] *See* Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 110 (2011) ("The Court sitting en banc would be the 'real' indivisible Supreme Court, while the panels could be understood as lower federal courts."); *see also* Tracey E. George & Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1847 n.85 (2008) (providing several justifications for the constitutionality of panel proposals).

[153] Some circuits are more numerous than others, and the size of the court might affect how often it might sit en banc to resolve disagreements on the Court: The number currently ranges from six judges on the First Circuit to twenty-nine on the Ninth.

[154] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22 (Max Farrand ed., 1911) (emphasis added) [hereinafter RECORDS]; *see* Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 684 (2006) (noting that this proposal was "[t]he ninth 'Resolve' in the 'Virginia Plan' presented at the opening of the Philadelphia convention in late May 1787").

[155] 1 RECORDS, *supra* note 154, at 95 (emphasis added).

[156] The only change was the capitalization. *See* 2 RECORDS, *supra* note 154, at 186 (showing that the draft from the Committee of Detail on August 6 provided that "[t]he Judicial Power of the United States shall be vested *in one Supreme Court*, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States." (emphasis added)); *Id.* at 600 (showing that the draft from the Committee of Style in mid-September provided that "[t]he judicial power of the United States, both in law and equity, shall be vested in *one supreme court*, and in such inferior courts as the Congress may from time to time ordain and establish. . . ." (emphasis added)); *Id.* at 660 (showing the final text adopted on September 17, 1787, which provided for "one supreme Court").

[157] *See, e.g.*, James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452-53 (2000) ("In providing for one supreme court and ruling out the possibility of multiple supreme courts, the Framers appear to have contemplated that the Supreme Court was to play a distinctive role as the hierarchical leader of the judicial department."). *But see* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 465 (1991) (disputing this understanding of the "wording change").

[158] *See* 2 RECORDS, *supra* note 154, at 44-45; *Id.* at 45 (statement of James Madison) ("The increase of business will be provided for by an increase of the number who are to do it.").

[159] *Id.* (statement of Gouverneur Morris); *see* Davies, *supra* note 154, at 685-86 ("In other words, [Morris was asserting that,] because the work of the Supreme Court could not be divided up among the members of the Court, adding Justices would only add to the number of people involved in each decision and every other piece of Court business.").

[160] *See* FRANKFURTER & LANDIS, *supra* note 8, at 73-76 (discussing the efforts of Senator Lyman Trumbull, R-IL, to establish a nine circuit-judge panel that would "ride circuit," thus easing the circuit-riding burdens placed on Supreme Court Justices).

[161] CONG. GLOBE, 41st Cong., 1st Sess. 208-09 (1869) (statement of Sen. George Williams, R-OR); *see* FRANKFURTER & LANDIS, *supra* note 8, at 74-75.

[162] *See* CONG. GLOBE, 41st Cong., 1st Sess. 213-14 (1869) (statement of Sen. William Stewart, R-NV) ("The Constitution says there shall be one Supreme Court. You make a man a justice of that court and can you say that he shall not sit there after you have made him a justice of the Supreme Court? That raises a grave doubt."); *see also Id.* at 210 (statement of Sen. Allen Thurman, D-OH) ("[W]hile I am inclined to think that the very best model of a court in the world is the French court of cassation, consisting of twenty-four judges divided into three sections, yet with my understanding of the Constitution of the United States it is not competent for us to provide such a system.").

[163] *Id.* at 214-15 (statement of Sen. Lyman Trumbull, R-IL) (predicting that "such a law would be held unconstitutional by that court, and then you would have eighteen judges of your Supreme Court of the United States").

[164] *Id.* at 215.

[165] *See id.* at 212 (statement of Sen. George Williams, R-OR) (stating that "this bill, reported from the Judiciary Committee, provides that six of the judges shall constitute a quorum. . . . [And t]here is nothing in the Constitution that restricts the power of Congress [to set a quorum for the Supreme Court]"); *Id.* at 217 (statement of Sen. George Edmunds, R-VT) ("[M]y friend says that the Constitution of the United States declares that there shall be one Supreme Court. I agree to that; but it does not declare how it shall be composed . . . . It leaves . . . that to general principles of legislation, where it ought to be left.").

[166] *See id.* at 216 (statement of Sen. George Edmunds, R-VT) (noting that, under current law, "only a majority of th[e Court's] quorum are necessary to make a decision. . . . Do you find that when the whole number get together at the next meeting of the court they reverse that [decision]? Not by any means.").

[167] *See id.* at 213 (statement of Sen. William Stewart, R-NV) ("[W]e can fix the quorum. But that does not meet the point. After you have fixed the quorum, the question arises, have not all the justices of the Supreme Court the right to sit there all the time?"); *Id.* at 215 (statement of Sen. Lyman Trumbull, R-IL) (agreeing with this point and noting that "a law that should declare that the rest of the Senate besides the quorum had no right to vote and participate in [its] decisions would be utterly void").

[168] *See* FRANKFURTER & LANDIS, *supra* note 8, at 75-76 (noting Congress instead passed a proposal by Senator Lyman Trumbull, R-IL, for additional circuit judges).

[169] *See* Eugene Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979).

[170] FRANKFURTER & LANDIS, *supra* note 8, at 60-61 (noting that, from 1850 to 1890, the Court's docket grew from 253 to 1,816 cases); *see* H.R. REP. NO. 51-1295, at 3 (1890) (noting that, according to Justice Harlan, the Court disposed of 451 out of 1,396 cases on its docket in 1886).

[171] *See* Evarts Act, ch. 517, §§ 1, 2, 5-6, 26 Stat. 826, 826-28 (1891) (authorizing discretionary review over cases from new appellate courts involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty law). For discussions of the history behind this law, see Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948-50, 952-59 (2013); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649-57 (2000).

[172] S. REP. NO. 51-1571, at 3-5 (1890) (describing the views of a minority of senators).

[173] *Id.* at 3.

[174] *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."); S. REP. NO. 51-1571, at 3 ("It is true that

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the Constitution provides that there shall be 'one Supreme Court;' but it also provides that the appellate jurisdiction of that court shall be exerted 'both as to law and as to fact with such exceptions, and *under such regulations as Congress may make*.'").

[175] *See* S. REP. NO. 51-1571, at 3 ("Congress has from the beginning, from time to time, declared what number out of and less than the whole number of justices shall be such a quorum.").

[176] *Id.*

[177] *Id.* at 4.

[178] 21 CONG. REC. 10,227 (1890) (statement of Sen. Joseph Dolph, R-OR).

[179] *See, e.g.*, *Id.* (stating that he "sympathize[d]" with the notion held by some senators that such a division "would detract from [the Court's] dignity and importance and from the weight, if not from the authority, of its decisions").

[180] *See* 21 CONG. REC. 10,316 (1890) (showing that the proposal was rejected by a vote of 36-10).

[181] *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the House Comm. on the Judiciary*, 67th Cong. 3 (1922) (statement of Chief Justice Taft). To address the Court's growing caseload, Congress instead expanded the scope of discretionary certiorari review. *See* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

[182] Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen., *supra* note 39.

[183] *See* Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662; Grove, *supra* note 171, at 968-78 (discussing the legislative debates leading up to this measure).

[184] Letter from Warren E. Burger, C.J., to Roman L. Hruska, U.S. Sen. (May 29, 1975), *reprinted in* COMM'N ON REVISION OF FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) app. d at 173 ("It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but any such proposals would meet with almost universal opposition, even assuming their constitutionality. Such a change would appear to alter the basic concept of 'one supreme Court' under Article III.").

[185] U.S. CONST. art. II, § 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.").

[186] One prominent proposal of this type would establish a system by which every judge on the courts of appeals also would be appointed as an Associate Justice of the Supreme Court. The Court would hear cases as a panel of nine Justices, and the Court's membership would be replenished every two weeks through random assignment. *See* Epps & Sitaraman, *supra* note 145, at 181-82 (2019). Proponents of this reform combine it with other significant changes, including a prohibition on having more than five Justices nominated by a single political party at one time; a rule that only a 6-3 majority of Justices could invalidate federal legislation; and a provision that would have the Justices select cases for review for future, unknown panels, but not their own.

[187] *See* Epps & Sitaraman, *supra* note 145, at 182-83; Resnik Testimony, *supra* note 100, at 23; Greene Testimony, *supra* note 100, at 9.

[188] *See id.* at 182-83; *see also* John G. Grove, *Reforming the Court*, NAT'L AFFS. (2020), https://www.nationalaffairs.com/publications/detail/reforming-the-court.

[189] *See Presidential Commission on the Supreme Court of the United States* 1-5 (Aug. 2021) (written testimony of Erin F. Delaney, Northwestern University Pritzker School of Law), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Erin-Delaney.pdf (arguing that federalism and the two-party political system are responsible for the Supreme Court's status as a "federal apex court," but that apex courts need not be "overly politicized").

[190] *See* Epps & Sitaraman, *supra* note 145, at 183; Grove, *supra* note 188.

[191] *See Presidential Commission on the Supreme Court of the United States* 10 (June 30, 2021) (written testimony of Kim Lane Scheppele, Princeton University) [hereinafter Scheppele Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf; Dixon Testimony, *supra* note 127, at 12. Texas and Oklahoma "maintain[] a bifurcated structure of civil and criminal courts of last

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resort." Brent M. Hanson, *Judicial Hot Potato: An Analysis of Bifurcated Courts of Last Resort in Texas and Oklahoma*, 12 TENN. J.L. & POL'Y 161, 164-65 (2018).

[192] *See* Scheppele Testimony, *supra* note 191, at 9-14 (providing examples of high courts that sit in panels, and arguing that such a structure may be preferable).

[193] Jackson Testimony, *supra* note 106, at 2, 19, 21-23; Greene Testimony, *supra* note 100, at 3-5.

[194] *See* Hemel, *supra* note 106.

[195] For different versions of this proposal, see Epps & Sitaraman, *supra* note 145, at 193 (proposing a Supreme Court of 15 Justices, with five Democrats, five Republicans, and five Justices to be chosen, with a unanimity requirement, from the lower courts by the sitting Justices); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 550 (2018) (proposing that Congress set the number of Justices at eight, with four Democrats and four Republicans).

[196] *See* Segall, *supra* note 195, at 561-62. Some proponents of this approach note the likelihood of greater plurality opinions, which carry less weight as precedent. *See* Grove, *supra* note 188. This prospect could lower the stakes of any one decision by the Court. *See* Grove, *supra.*

[197] *See* Epps & Sitaraman, *supra* note 145, at 199-200.

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Chapter 3: Term Limits

Among the proposals for reforming the Supreme Court, non-renewable limited terms—or "term limits"—for Supreme Court Justices have enjoyed considerable, bipartisan support. Advocacy groups, nonprofits, and membership organizations have expressed their support for term limits. In testimony before the Commission, a bipartisan group of experienced Supreme Court practitioners concluded that an eighteen-year non-renewable term "warrants serious consideration."[1] Major think tanks and their leaders have also endorsed the concept,[2] as have both liberal and conservative constitutional scholars.[3] When the National Constitution Center organized separate groups of "conservative" scholars and "progressive" scholars to draft their own proposals for improving the Constitution, both groups concluded that Supreme Court Justices should be limited to eighteen-year terms.[4] Yet other scholars and commentators have questioned the idea of altering the system of life tenure,[5] which has been in place since the Constitution established the Supreme Court and the judicial power.

This Chapter considers the full range of debate over term limits and addresses numerous design questions that policymakers would need to take into account if they were to develop such a system, including the question of whether implementation would require constitutional amendment or could be achieved by statute. Consistent with its charge, the Commission does not take a position on whether or how term limits ought to be implemented but rather seeks to define and inform the debate over these questions.

Part I presents a series of arguments for term limits, explaining how, in the view of proponents, term limits would enable a regularized system of appointments to the Court that would preserve the value of judicial independence, make it more likely all Justices would serve for roughly equal numbers of years, and ensure that the Court's membership would be broadly responsive to the outcome of democratic elections over time. Part II then sets out a series of objections to term limits and articulates the harms opponents of the proposal believe it might have on judicial independence and legitimacy. In Part III, we consider the design questions presented by a constitutional amendment that would institute a system of term limits. In Part IV, we consider whether and how such a system would be achievable by statute. Throughout Parts III and IV, we consider questions about the design of a system of limits, such as the length of Supreme Court Justices' terms, the number of appointments each President should be able to make in four years' time, and how transitioning to a term-limited system would be accomplished. We conclude in Parts V and VI by addressing some additional concerns: first, the potential impasse in the Senate's confirmation process that would stymie a new system of

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term limits; second, the possibility that the adoption of term limits through statute would invite further intervention in the judiciary by Congress.

I. The Justifications for Term Limits

U.S. Supreme Court Justices have always had life tenure. But as proponents of term limits point out, life tenure is virtually unique to the U.S. federal judiciary. Defined terms for high court justices are commonplace at the state level. Since the Founding, states have decidedly moved away from life tenure for justices of their highest courts. Thirty-one states and the District of Columbia have some form of mandatory retirement,[6] with the majority of states setting the retirement age at 70.[7] Almost all states also establish terms for high court justices, ranging from six to fifteen years. Though these terms are renewable through elections in many states and reappointment in others, mandatory retirement applies in the majority of such systems. Rhode Island is the only state that currently has neither term limits nor a mandatory retirement age for its supreme court justices.[8]

The United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term limit for its high court Justices.[9] Among the world's democracies, at least 27 have term limits for their constitutional courts. And those that do not have term limits, such as the Supreme Court of the United Kingdom, typically impose age limits.[10] In light of this contrast, one scholar who testified before the Commission opined that, "were we writing the United States Constitution anew, there is no way we would adopt the particular institutional structure that we have for judicial tenure. No other country has true lifetime tenure for its justices, and for good reason."[11]

In the view of proponents of term limits, the existing system lacks adequate justification beyond the fact that it has always been in place. Currently, the number of appointments available to a President can vary greatly because of random chance; when a vacancy arises depends on when Justices leave the bench due to illness or death, or when they themselves choose to retire. As elaborated in more detail below, some Presidents are able to make three (or more) appointments in a term while others make none. These differences in opportunities, term limits proponents argue, serve no obvious structural purpose.

Proponents of term limits argue that regularizing the appointments process would address these arbitrary consequences of life tenure by making judicial appointments more predictable and the composition of the U.S. Supreme Court more rationally related to the outcome of

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democratic elections over time. Proposals for staggered eighteen-year terms, for example, discussed in detail in Parts III and IV, would ensure that all Presidents have the opportunity to appoint two Justices to the Supreme Court in each term they serve. This predictability, proponents argue, would strike a more appropriate balance than the current system between two important features of our constitutional system of checks and balances: judicial independence on the one hand and long-term responsiveness of the judiciary to our democratic system of representation on the other.

By providing for tenure during "good Behaviour," Article III of the Constitution provides judges with independence from direct and inappropriate external pressures and political influence when they interpret laws, review executive actions and administrative regulations, and consider the constitutionality of state and federal legislation.[12] Article II of the Constitution authorizes the elected branches to affect the composition of the judiciary through appointments over time; the Constitution gives the President and Senate power over appointments to the federal judiciary, and it gives Congress power over the structure and jurisdiction of the federal courts. Proponents of term limits emphasize that the influence of elections on the composition of the Court and its work is thus indirect, but that it is nevertheless an important element of the constitutional system. From the perspective of those who urge term limits, these various provisions of the Constitution aim to make the individual members of the judiciary *independent* at any given point in time, but the composition of the judiciary as a whole *responsive* over time to the people's will, as expressed through its electoral decisions about who occupies the presidency and the Senate.

Proponents of term limits contend that the reform would better strike this balance than the current system in two respects. Long fixed terms, such as terms of eighteen years, coupled with post-service guarantees of financial security, would insulate individual Justices from political pressure and financial temptation and function as effectively as life tenure to safeguard judicial independence. At the same time, such fixed terms enable democratic majorities, as reflected in who is elected to the presidency and the Senate, to have the same or a roughly equal opportunity to influence who sits on the Supreme Court through new nominations—an objective that is poorly served by the current system of life tenure. Relatedly, proponents stress, lifetime tenure does not comport with the ideal of limited government authority. The nine individuals who sit on the Supreme Court wield extraordinary power over critical social and political questions, often for several decades. Though judicial independence requires them to be insulated from the same forms of accountability imposed on the political branches, life tenure arguably arrogates too much power to single individuals.

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Proponents of term limits caution that one should not confuse the argument that the Court's composition should reflect electoral outcomes over time with a claim that Presidents have a right to make the Supreme Court generate a particular set of results. In our constitutional system, judges and Justices are not and should not be considered the mere representatives of political parties or the creatures of a particular President, and the argument for term limits does not rest on such assumptions. Moreover, Presidents may appoint Justices for many reasons other than the hope or expectation that the Justice will support the President's particular policy agenda or constitutional philosophy. Presidents may wish to achieve geographic or demographic diversity on the Court, attract new voters through the selection of a nominee, or choose a Justice with a particular set of professional experiences. And history shows that Presidents cannot necessarily predict the path a Justice will pursue; Justices often confront new issues in contexts quite different from the circumstances in which they were appointed. Thus, the argument for regularized appointments is not an argument for making Justices the representatives of Presidents or a particular ideology. Rather, according to proponents, the ability of Presidents to nominate Justices at regular intervals that would be afforded by term limits, coupled with the Senate's authority to advise and consent, would help ensure, at least in the long run, that "[t]he political balance of the Court would reflect the opinions of the people over time as expressed in their choice of presidents and senators, rather than the happenstance of health or accident or the strategic timing of the justices."[13]

Proponents underscore that the value of term limits in advancing these constitutional principles is heightened by various ways in which the consequences of life tenure have changed over time. In particular, the average length of Justices' terms has expanded.[14] Life spans have lengthened and modern Justices may increasingly delay retirement.[15] Up until the late 1960s, the average term of service was around fifteen years. By contrast, the average tenure of the Justices who have left the Court since 1970 has been roughly twenty-six years.[16] In the future, it's quite possible that tenure will continue to lengthen, as several recent Justices have been younger than their predecessors and life spans generally continue to grow. The increasing length of the Justices' terms, in turn, raises the stakes of each nomination. Political partisans may press for nominating younger candidates in the hope that they will serve longer and thus allow for the entrenchment of particular views on the Court for three or more decades into the future.[17]

Proponents also note that the variation in the number of each President's opportunities to nominate a Justice has become more pronounced. Throughout history, the median, modal, and mean number of chances for a Supreme Court appointment has been approximately two per

four-year term.[18] Most Presidents have had either one or two opportunities, and a small number have been very lucky and received four or more. But sometimes Presidents get none at all. This situation has occurred more frequently since the mid-1970s. In the 188 years from the presidency of George Washington to the presidency of Gerald Ford, there were only five presidential terms out of forty-seven (just eleven percent) in which Presidents did not get an opportunity to make a Supreme Court appointment.[19] But in the forty-four years from Jimmy Carter to Donald Trump, Presidents did not make a single appointment in three out of eleven terms (twenty-seven percent)—and four out of eleven terms if we include Senate Republicans' refusal to consider the nomination of Judge Merrick Garland during President Barack Obama's second term.

Again, proponents of term limits do not seek partisan balance. According to proponents, if a party wins the White House more often, its Presidents should have the opportunity to nominate more Justices, though this opportunity may be checked, as with all judicial appointments, by the Senate's advice and consent. But, proponents emphasize, our current system allows parties to shape the composition and influence the direction of the Court to a degree that does not necessarily reflect their record of electoral success over time.[20] They argue that the existing system—buffeted by chance illness or deaths, possible strategic behavior, and aggressive political tactics—makes it easier than it should be for parties that lose elections to nevertheless have outsized impact on who sits on the Court and on its general direction.

Another justification offered for term limits is that they would largely eliminate the possibility of "strategic retirements" and, just as importantly, the *perception* that Justices retire for strategic reasons. Through strategic retirements, Justices attempt to control the future direction of the Court by creating openings when there is a particular President or Senate majority. Conversely, Justices may remain on the Court, even if they are no longer up to the job, because they are waiting for a different President to select their replacement on the Court. This kind of strategic calculation, or the perception of it, can fuel public beliefs that the Court is a partisan institution. It can contribute to the perception that the system is unfair or rigged, in part because strategic retirements prevent Presidents from receiving a roughly equal number of appointments for each term in office. Moreover, the possibility that Justices might retire strategically can lead to public relations campaigns to push a Justice to retire precisely so that a particular President can appoint a successor. Though it may be impossible to know why any particular Justice chooses to retire at a particular moment, term limits could put a stop to both the possibility and perception of strategic retirements. Under one possible design of term limits

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that we discuss further below, Presidents (with Senate advice and consent) would only be able to fill out the remaining years of the term for a retiring Justice, eliminating much of the advantage of, and hence the motivation for, retiring strategically. Proponents do not claim that term limits are a panacea for polarization, nor that they would stop political parties from fighting over judicial appointments. But by regularizing Supreme Court appointments, term limits would make the system of Supreme Court appointments fairer, less arbitrary, and more predictable, and therefore enhance the Court's legitimacy in the eyes of the public.

Finally, in addition to these arguments based in constitutional structure and principle, proponents of term limits also believe that they would enhance the Court's decisionmaking, on the ground that a regular rotation in personnel tends to improve the quality of decisionmaking over time.[21] Judges, like others, are inevitably a product of their time. After distinguished professional careers and eighteen-year terms on the Court, judges may tend to grow more distant from the experiences and contexts to which their legal decisions apply. Judges, like others, can also become set in their ways, making fresh perspectives on issues more difficult to achieve. Rotation in office introduces new voices and new interpersonal dynamics into the deliberations of multimember bodies, as well as more generational diversity, which may bring valuable perspectives.[22] Ensuring that there are regular changes in composition can be especially important for bodies where a small number of people hold considerable power. Indeed, given how powerful the Court has become as an institution—certainly more powerful than the Framers of our Constitution expected—relying on Justices to voluntarily make way for other figures who can help revitalize the Court is asking a great deal. These are some of the reasons that rules and norms governing the leadership of other organizations often require a change of leadership after many years.[23] These are also some of the reasons that other systems that appoint judges through non-political mechanisms, such as through committees of judges and lawyers, nonetheless impose either term limits or mandatory retirement ages on their judges.[24]

The possibility of imposing a mandatory retirement age on Justices is sometimes offered as an alternative to term limits, and the Commission heard testimony on this possibility.[25] Mandatory retirements would arguably improve the quality of decisionmaking for the reasons stated above and provide some degree of responsiveness to elections over time, while preserving judicial independence by allowing for long terms. As with term limits, a mandatory retirement age would make it possible to know when a given Justice will retire (assuming that the Justice does not die or leave the bench early). But, according to term limit proponents, a mandatory retirement age is inferior to term limits in important respects. It would not

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guarantee regular appointments. It would still encourage parties to nominate ever younger candidates in order to squeeze the maximum number of years out of each appointment. Thus, if the goal is to regularize appointments and to ensure that political parties that win elections get a predictable number of opportunities to appoint new Justices, term limits offer a better option.

II. Objections to Term Limits

The Commission also heard and considered arguments against term limits. In the main, the opponents argue that the current system of appointing and protecting the independence and neutrality of federal judges and Justices, through life tenure, has worked well for over 230 years. The independent federal judiciary, protected by lifetime tenure, is one of the most signal accomplishments of our constitutional system. Opponents of term limits for Supreme Court Justices argue that proponents therefore have a heavy burden of persuasion when they seek to remove what opponents regard as an important pillar of judicial independence. Opponents point to the Constitution's provision that judges serve for "good Behaviour," which they regard as providing for life tenure, as one of only two express protections of judicial independence.[26] Opponents contend that far from meeting the burden of persuasion, term limits are likely to worsen existing problems, such as the partisanship of the confirmation process, while at the same time introducing new problems. In addition, opponents argue that term limits would be extraordinarily difficult to implement.

Most fundamentally, term limit opponents deny that it would be good for each President to receive two appointments to the Court. They are concerned that the proposal would further politicize appointments and heighten the belief that Justices are allies of the President and the President's party—developments they think could do great damage to the Court. Because they believe that term limits could be perceived as founded on the view that judges are partisan, political actors, opponents of term limits believe that inestimable damage could be done to the federal courts by adoption of this reform proposal.

Opponents also raise a number of more specific objections to term limit proposals and their justifications.

First, opponents see term limits as setting up a dynamic in which the presidential election focuses not just on Court appointments in general but on the two guaranteed vacancies and appointments specifically. If two seats on the Supreme Court are guaranteed to open every

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four years, the Court might become even more of an issue in electoral politics than it currently is. Presidential candidates might have even greater incentives to make promises about whom they will appoint, and presidential elections might increasingly appear to the public to also be elections of specific identified persons—now candidates—to the Supreme Court. In a highly polarized environment, it might be especially harmful to reinforce connections between the Court and presidential politics. Such an electoral process might change not just the public's perception of the Court, but also how the Justices view themselves and behave, making the institution more partisan. Moreover, introducing term limits might reinforce the erroneous message that appointments to the Supreme Court are the spoils of politics or the property of a particular President or party. Relatedly, one critic of term limits worries that the Justices "will be Republican appointees or Democratic appointees in a more explicit sense than they are now," and that some Justices "may . . . view their own roles in a manner a little more political and a little less law-like."[27]

Second, opponents of term limits point out that if one of the failings of the current system is a bitterly partisan confirmation process, then prescribing yet more regular confirmation hearings, as term limits would, simply worsens an already bad situation. While there is sometimes the suggestion that eighteen-year terms might engender less partisanship than lifetime appointments, opponents of term limits think a reduction of such partisanship in the United States is unlikely given the underlying dynamics of the current confirmation process and the incentives of interest groups.[28]

Third, some commentators and scholars have also expressed concern that term limits (whether through constitutional amendment or by statute) would threaten the basic structural principle of judicial independence.[29] They argue that life tenure is essential to that independence, as evidenced in our longstanding historical practice. Opponents are not comforted by citations to foreign courts, or to the state supreme courts where judicial terms are renewable through different systems of election or reappointment. Opponents note that it is perilous to draw conclusions from systems that are so fundamentally different. They also argue that the federal system of life tenure is the gold standard for judicial independence.

Opponents of term limits further believe that even long, non-renewable terms could undermine judicial independence by virtue of the fact that at least some Justices would have to consider what they would do after their terms expire. Their plans for the future might affect either their performance as Justices or public perceptions of that performance. One might worry that a Justice who is eyeing future positions in government might try to curry favor with political constituencies, or that a Justice who is eyeing future positions in industry or at a law

firm might decide cases in light of those plans or might appear to do so. While it might be thought that term limits reduce the pressure for Presidents to appoint younger people, such that most Justices who serve eighteen-year terms may still view their positions on the Court as their last major position, other Justices who have served some portion of the eighteen-year term might decide that they would prefer to take a different unlimited position in government or the private sector rather than filling out the rest of the term. In order to address this problem, term limits proposals would have to be coupled with what opponents see as troubling restrictions on post-Court employment.[30]

Fourth, by design, term limits would produce more turnover on the Supreme Court than has been typical in recent decades. Opponents argue that this turnover could have costs as well as benefits. At the outset, one might object that term limits would deprive the Court of certain benefits that can result from Justices serving for several decades. Some might believe life tenure tends to improve the judgment of the Justices because wisdom and, perhaps, open-mindedness come with age and experience. Moreover, several of the greatest Justices in American history—Chief Justice Marshall comes quickly to mind—served on the Court for a very long time. Opponents argue that a system of term limits would make such distinguished careers less possible—or at least shorter—in the future and might reduce the stature of the Court as a whole, including its stature with the public, the bar, and the lower courts. Moreover, the concern for the advanced age of long-serving Justices ignores, in the view of critics, that the most pronounced divisions on the Court are not by age, but by judicial philosophy.

Another concern about increased turnover is that it might destabilize the Court's doctrine. To the extent that new Justices have different views of the law than their predecessors, and to the extent that they are willing to overrule or narrow precedents with which they disagree, more turnover on the Supreme Court could lead to more frequent doctrinal shifts, or even cycles in which major precedents are discarded only to be reinstated later, perhaps in very short order. To opponents of term limits, the current system provides sufficient turnover and there is little reason to adopt a new and untried system simply to generate more turnover.[31]

Fifth, those who object to term limits fear that such limits would give the President too much power, an especially worrying concern given how powerful the modern presidency has become. If Presidents make new appointments to the Supreme Court every two years, two-term Presidents will have appointed four of the nine active Justices by the final year of their administrations. The power to appoint four-ninths of the Supreme Court is a substantial power; term limits would lock in that power and make it less subject to the vagaries of chance.[32] Critics might therefore argue that the randomness of presidential opportunities to make

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Supreme Court appointments throughout history has actually been an advantage, because it limits presidential power and ambitions, and thereby helps preserve the Court's independence. And over time, opponents argue, we might expect a "balancing out," such that the randomness of appointments over more limited periods is not a sufficient source of concern to justify the institution of a system of term limits. Opponents also argue that a focus on the presidency and presidential politics in structuring regularized appointments mistakenly minimizes the role of the Senate. These concerns would be heightened were the term limit reduced to twelve years; in the course of two terms, a single President would have appointed a majority of the Court.

Sixth, a different type of objection involves the incentives for gamesmanship in particular cases. If it is known that a swing Justice will lose the power to participate in cases on a specific date, either litigants or lower court judges might try to time a case accordingly.[33] Conversely, Justices who want to weigh in on a question while they still have the power to do so might be inclined to grant certiorari before the question has fully "percolate[d]" through the lower courts, and they might also face temptations to accept cases that are not ideal "vehicle[s]" for presenting and deciding the question.[34] Similarly, other Justices might vote to defer hearing a case or an issue until their colleague had been forced to leave the Court.

A final objection returns to the premises of the proposal. Proponents ground their support for term limits on the principles and values that underlie the original constitutional structure. Opponents emphasize, however, that the Constitution expressly provides for judicial service during "good Behaviour." Opponents of term limits point to Hamilton's observation in Federalist 78 that "nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office," a quality he regarded as "an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."[35] In the view of those who oppose term limits, life tenure as guaranteed by the Constitution helps protect both the decisional and institutional independence of the third branch from being "overpowered, awed, or influenced" by the other branches.[36]

* * *

Opponents of term limits caution that any such proposal should not appear as a settling of scores, as an attack on particular Justices, or an effort to change the substantive opinions and direction of the current Court. And term limits by themselves cannot ensure that the President will nominate high-quality individuals. Those who object to term limits believe that the Supreme Court has functioned with life tenure ever since the Founding, and switching to a system of term limits poses major design challenges and could well further politicize the

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confirmation and selection process while also affecting the culture and standing of the Court. A broader concern they hold is less about term limits than about any reform that weakens one of the Constitution's two express protections of judicial independence. In our current polarized environment, opponents argue, *any* change to the structure of the Supreme Court might be regarded with suspicion, and the risks of unintended consequences are significant. Opponents further contend that, if pursued by statute rather than constitutional amendment, such reform might open the door to further structural changes, such as an overreaching President's attempt in collaboration with Congress to remove life tenure from all Article III judges, with considerable risk to the stability of the judiciary. In short, say opponents of term limits, the current system of life tenure is not broken, and term limit proponents have not met their heavy burden of persuasion.

Term limit proponents acknowledge that the risk of unintended consequences is an important point to consider, but they argue that it is not a conclusive argument for inertia, particularly because the status quo has significant problems. Indeed, they argue, inertia too can have unintended consequences, as illustrated by the gradually lengthening tenure of Justices over time and the increased perception that Justices retire strategically. Responding to the costs and risks asserted by opponents, they note that the average tenure of the Justices who left the Supreme Court from the Founding until 1970 was less than eighteen years.[37] So, proponents argue, the Court has historically experienced greater turnover than a system of eighteen-year terms would be likely to produce now. They argue that concerns over judicial independence or increased executive power are not supported by actual experience in courts that have term limits or mandatory retirement ages, nor are they supported more generally by the empirical literature.[38] Moreover, these concerns can and should be addressed through the careful design of the system, such as through long and non-renewable term limits, a guaranteed lifetime of judicial office and compensation while performing other judicial duties, and the coupling of term limits with some restrictions on the types of post-Court employment. Even some critics of term limits, they note, think it fair to expect that "long fixed terms followed by assignment to a court of appeals" would give individual Justices a degree of independence comparable to the status quo.[39] And they respond to opponents' concerns about politicization of the appointments process by pointing out that the process is already highly politicized and that an eighteen-year term is long enough to avoid any increase in the heat of confirmation battles.

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III. Analyzing a Constitutional Amendment for Term Limits

This section identifies the major issues to consider in designing a system of term limits. These issues include the size of the Court, the length of the Justices' terms, how to fill vacancies that arise before a set term ends, and how to transition from the current system.

Many of these issues arise under either a proposed constitutional amendment creating term limits or a statutory term limit proposal. But the options for addressing them differ depending on which path is being considered. In this Part, we discuss these issues in the context of a constitutional amendment to adopt term limits. In Part IV, we do so in the context of a statutory term limits proposal, and we also discuss whether these reforms would require constitutional amendment or whether they could be enacted by Congress. While our aim is not to recommend a specific proposal, we believe it is necessary to discuss plausible reform options in order to ground our analysis.

A. Setting the Court's Size and the Appropriate Term Length

A system of term limits ought to specify the appropriate size of the Court. One major justification for a staggered, term-limited system of appointment is that such a system would bring about less randomness and greater equality across presidential terms in the number of Justices a President would have the opportunity to appoint. That aim would be drastically undermined, however, were Congress free to vary the size of the Court. We separately evaluate proposals to expand the size of the Court in Chapter 2 of this Report. For purposes of our analysis here, we assume that an amendment would fix the Court's size at nine Justices.

With a nine-member Court, the two likeliest options for term limits would be a twelve-year term or an eighteen-year term, as both would create a roughly equal number of appointment opportunities in each presidential term. In recent decades, the overwhelming majority of term limit proposals have endorsed the eighteen-year version. In that version, each President would have two regular appointments in a single presidential term. In the twelve-year version, each President would have three such appointments.

Important tradeoffs are involved in this choice. As we noted at the outset of this Chapter, from the perspective of the state courts and international peers, an eighteen-year term is quite long. Of the forty-seven states that impose term limits for their highest court judges, only one state has a term longer than twelve years.[40] Similarly, of the twenty-seven countries that impose a term limit, those limits range between five and fifteen years.[41] The German

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constitutional court, considered one of the strongest constitutional courts in Europe, is composed of judges who serve twelve-year non-renewable terms and who must retire at age sixty-eight.[42]

As this experience in the states and other countries suggests, there is a case to be made for twelve-year, non-renewable terms if the structure of the Court is considered in isolation from the larger political circumstances of the appointments process. With twelve-year terms, each presidential term would involve three regularly scheduled appointments. In addition, a President elected for two terms would have the power to appoint six regularly appointed Justices. Even if a constitutional amendment for term limits would to some extent reduce the intensity of political conflict over Court appointments, however, three appointments every four years would put the Court at the center of the political process on an almost yearly basis. There are also reasons to be concerned that enabling a single two-term President to make six appointments gives one person too much power to reshape the Court. This tradeoff has led most proponents of term limits in the United States to endorse an eighteen-year term. For simplicity's sake, and in the light of these considerations, we will use an eighteen-year term limit to ground our analysis.

That said, circumstances could change, making potential turbulence less of a risk. If so, the costs and benefits of a twelve-year term as opposed to an eighteen-year term might be weighted differently than at present. For this reason, the designers of a constitutional amendment might consider whether the amendment should give Congress the power to adopt prospectively a twelve-year term (that is, to adopt a statute that would take effect for Justices appointed after the date of enactment). Drafters should take care to hew to the core purpose of such an amendment by ensuring that each President receives the same number of regularly scheduled appointments.

B. Effective Date and Timing of Appointments

The designers of a constitutional amendment to implement a term limit system must make several choices related to the timing of the reform.

First, drafters must decide when the amendment would take effect. The amendment could, of course, take effect upon adoption. If there is concern that knowledge of who the sitting President is at the time the amendment takes effect would make it more difficult for the amendment to be adopted, the amendment could be structured to take effect starting at some

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later date. For instance, it could begin in the first presidential administration elected after the amendment is approved.

Second, drafters must also determine the timing of appointments. The amendment could specify when during a presidential term the President's two appointments would arise. If the drafters wished to avoid appointments arising during an election year, they could specify that appointments would arise in years one and three of a presidential term. To avoid disrupting an ongoing Supreme Court term, the amendment could specify that the outgoing Justice's term ends on a specific date that typically falls after the Court has issued all its opinions in argued cases. The incoming Justice's term can be made to run from that date, in which case Justices might serve slightly fewer than eighteen years, given the time it would take for confirmation.

Third, drafters must also address how to fill seats that become vacant due to retirement, death, or impeachment before the end of a Justice's eighteen-year term. Once every Justice has been appointed to an eighteen-year seat, this situation is not likely to occur often. Only one Justice appointed in the last fifty years has served fewer than eighteen years.[43]

We identify three options for how to fill seats that become vacant:

The first is to leave those seats unfilled for the remainder of any retiring Justice's term, thereby preventing any President from having more than two appointments in a presidential term. That option would leave the Court to function without a full complement of Justices for what might be extended periods; it would also mean the Court would likely have to function for periods with an even number of Justices. The Court has functioned occasionally with an even number of Justices, as it did for fourteen months after Justice Scalia's death. Some argue that an even-numbered Court encourages the Justices to deliberate more to find common ground, in an effort to avoid leaving the Court unable to decide a case. In addition, the Court would not be able to find state or national action unconstitutional absent greater consensus than a five-to-four decision entails. But a significant cost of having an evenly divided Court is that it could prevent the Court from ensuring that federal law is uniform throughout the country. If the courts of appeals are divided on an issue, for example, there would be no higher judicial authority to resolve that difference if the Court itself is evenly divided on the issue. The same law could be held constitutional in one part of the country and unconstitutional in another.

A second option is that the sitting President, with Senate confirmation, would have the power to appoint a candidate to fill out only the remainder of the original eighteen-year term.

Some witnesses testified that confirmation in this context should require a supermajority Senate vote.[44] The justification for that higher hurdle is that seats that become vacant before the end of an eighteen-year term reintroduce a random element into the timing of appointments by allowing certain Presidents to make more than two appointments. On this view, those appointments should succeed only if they are backed by a significant consensus in the Senate. Although a supermajority requirement might lead some seats to remain vacant (as in the first option), no President would be deprived of the right to make two regularly scheduled appointments in a presidential term. If the amendment does permit the President to fill out the term of a seat that becomes vacant prematurely, the drafters might consider prohibiting the person appointed from being reappointed to a full eighteen-year term.

A third option depends on how the amendment treats Justices who have reached the end of their eighteen-year terms. The amendment might define these individuals as "Senior Justices," who continue to hold offices as Article III judges but no longer participate in the day-to-day operation of the Court. Given that these Justices have all been confirmed by the Senate, the amendment could give the President the option to designate a Senior Justice, if one is available, to fill out an eighteen-year term that has become vacant prematurely. If unilateral presidential designation is undesirable, the amendment could instead require the Senate to confirm the President's choice (if no Senior Justices are available, one of the first two options would have to apply).

C. Designing the Transition to Fixed-Term Appointments

How to structure the Court's transition to fixed-term appointments presents significant practical challenges. The most significant options that have been proposed are discussed below. For purposes of this analysis, our discussion will assume an eighteen-year term with regular presidential nominations in years one and three of a President's term.

1. Sitting Justices Retire on a Fixed Schedule That the Amendment Establishes

Under this approach, once the amendment takes effect, the longest-serving Justice would retire in year one of the first presidential term in which the amendment takes effect. The next most senior Justice would retire in year three, and so on. This strategy is the conceptually cleanest structure for the transition. Were this approach adopted, sixteen years after the first Justice is appointed to a term-limited seat, the full Court would consist entirely of Justices serving eighteen-year terms. For instance, if the amendment took effect in 2025, the most junior Justice on the current Court would retire in 2041, after twenty-one years of service. If

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this were done through a constitutional amendment, the Commission does not perceive there to be any significant constitutional issues in applying the amendment to sitting Justices.

2. Sitting Justices Remain on the Court as New Term-Limited Justices Are Appointed

The Commission is aware that while the simplest approach would be to apply a term limits amendment to the sitting Justices, this strategy might generate political conflict that would make passage of an amendment difficult.

If the amendment is designed not to apply to currently sitting Justices, the Court could expand temporarily. New Justices would start being appointed every two years for eighteen-year terms after the amendment's effective date. As legacy Justices leave, their seats would not be filled as long as at least nine Justices would remain on the Court. It is likely that the Court would never drop below nine Justices. One study concludes that, under this approach, it would take around thirty-five years until the full Court consisted entirely of Justices serving for fixed terms.[45]

This approach does come with potential costs, however. It would likely produce a considerably expanded Court for a period of years. In Chapter 2, we consider some of the consequences of a larger bench, including that it could hamper the Court's decisionmaking (depending on how large the expansion is). That said, many of the highest courts in other democracies have eleven or more members, and in many cases they function effectively by sitting in panels, a prospect we also explore in Chapter 2.[46] On the other hand, no state supreme court has more than nine judges and only seven are even that large; most have seven judges and seventeen have five.[47] As one former federal judge testified to the Commission, above a certain size, effective collective deliberation becomes more difficult.[48] In addition, in some years, the Court might also have an even number of Justices, which would raise the issues discussed above about the pros and cons of an even-numbered Court.[49] It is also uncertain how the public would perceive the Court if its size fluctuated from year to year for many years. Closely divided decisions on a Court that sometimes has nine members, sometimes eleven, sometimes thirteen, might make the Court appear less stable and generate perceptions that outcomes turn on the fortuity of how many Justices happen to be on the Court at any particular moment.

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3. New Term-Limited Justices Are Appointed Only When Currently Sitting Justices Vacate Their Seats

Another alternative proposed in academic work on this issue is that current Justices continue to serve for life and new appointments are made only when the seat of a currently sitting Justice becomes vacant.[50] The amendment would still establish a schedule of regular eighteen-year appointments, into which retirements of currently sitting Justices would then have to be integrated. For example, if a currently sitting Justice retires before the date for vacating that seat occurs, the President nominates a Justice who would serve the next eighteen-year slot that is scheduled to become available. Suppose under the amendment the first three eighteen-year terms would arise in 2025, 2027, and 2029. If a currently sitting Justice leaves the bench in 2024, the President would nominate a Justice whose term would be nineteen years (2024-2025 plus the eighteen-year term that begins in 2025). If the next sitting Justice leaves in 2025, the President would nominate a Justice whose term would be twenty years (2025-2027 plus the eighteen-year term that begins in 2027). If another seat does not open up until 2031, the President would nominate a Justice who would serve for only sixteen years (filling the term that was scheduled to begin in 2029 and end in 2047).

This proposal would avoid temporary expansion of the Court, but it would also generate the longest time interval before the full Court was composed of Justices serving eighteen-year terms. One study estimates that, under this proposal, it might take around fifty-two years before the Court reached the point that all Justices were serving eighteen-year terms.[51] The additional complexities just noted about timing of appointments might also be considered a cost of this proposal.

4. Addressing Seats Held by Currently Sitting Justices That Become Vacated Prematurely

If the amendment applies to currently sitting Justices, as in the first option above, a distinct issue arises concerning the seats of those Justices that might become vacant prematurely. For example, a currently sitting Justice whose term would be scheduled to end in 2033 might vacate the seat in 2025. This may be a more likely scenario than that a new Justice appointed to an eighteen-year term would vacate that seat prematurely. Simply for reasons of age, it seems more likely that a Justice on the current Court would leave office eight years before a scheduled end-of-term date than would a newly appointed eighteen-year term Justice.

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One option is the same as discussed earlier: the seat could remain vacant. But in this context, that could leave the Court with fewer than nine Justices, and possibly an even number of Justices, for an extended time—eight years, in the example above.

If the seat that becomes vacant is the next one the sitting President would be entitled to fill in any event during the four-year term, the President could be given the power to nominate the Justice to fill that seat. That Justice would then serve eighteen years plus the small amount of additional time involved; if a currently sitting Justice's term is scheduled to end in 2027, but ends in 2026, the new Justice would serve one year plus the new eighteen-year term. Given that a new Justice under this scenario would never serve more than twenty years, the normal presidential nomination and Senate confirmation process might be appropriate (that is, without a supermajority requirement).

If the President has not yet filled any of the two allocated seats, and the Justice who leaves is the one whose term would expire in year three of the administration, there are two options for addressing that scenario. In the first, the amendment would treat this situation as if the President is filling the first of two seats. The Justice who would otherwise be scheduled to retire first during that term would instead stay on until the term ends of the Justice scheduled to retire in year three—the Justice who has left prematurely. At that point, that Justice retires and the President fills the second seat. The second option is that the President appoints a Justice to fill out the remainder of the term for the Justice who left early plus eighteen years. When the term of the Justice scheduled to retire in year one of the administration ends, the President fills that term as well. The first option reduces possibilities of strategic retirements, but might be considered overly complex.

In any other context, the current President should at most have the authority to appoint a replacement only for the rest of the term that the departing Justice was scheduled to serve. Under the theory behind the term limits amendment, no President should get to make more than two eighteen-year appointments in any single presidential term. With respect to the replacement Justice, moreover, the options discussed earlier might be appropriate. First, a supermajority vote requirement in the Senate might be appropriate. Second, if there are "senior" Supreme Court Justices, one could be designated to serve out the remainder of the scheduled term.

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D. Constraints on Justices Who Have Fully Retired After Finishing Their Term of Service

Many countries that impose term limits or retirement ages on judges of their highest courts also impose constraints on the post-service activities of those judges. There are two main reasons for imposing such constraints. The most important is to avoid undermining the fact and appearance of judicial independence by eliminating the likelihood of Justices' altering their behavior in their last years of their service on the Court to enhance certain post-service employment opportunities. In addition, certain post-service positions might be detrimental to the public's sense of the integrity and professionalism of the Court. At the same time, it is important that former Justices who choose to retire from judicial service altogether after their term ends have appropriate opportunities to pursue other professional interests.

In order to address these concerns, the amendment could specify that at the end of their service, Justices have the option of retaining the office of an Article III judge and remaining available to serve by designation on any of the lower federal courts; to serve by designation on the Supreme Court if a Justice in an eighteen-year seat vacates that seat prematurely; or to perform other federal judicial functions. The amendment could also specify that upon completion of their terms, Justices would continue to receive a pension for life commensurate with their salaries on the bench.[52] But these two provisions would not solve the problem fully. With term limits, some Justices would complete service at younger ages than the current average age at which Justices leave the Court. Some might prefer to relinquish their Article III commission and work in other capacities.

Former Justices who have chosen to retire fully from the bench could be barred from certain kinds of employment for a certain period of time. The prospect of high-level government employment is a particular concern, given the risk of public perceptions that a Justice will have ruled in certain ways late in their term to curry favor with the sitting government. Retired Justices could be prohibited from involvement in legal matters that had been the subject of proceedings before the Court and, perhaps, closely related matters.[53] Former Justices could also be barred from working on any matters before the Court. Service in roles such as mediator, arbitrator, or law school lecturer, on the other hand, are most compatible with the role of a retired Justice. While some of these concerns should be addressed in any constitutional amendment—such as whether term-limited Justices retain the option of remaining Article III judges—others might be appropriately handled through legislation.

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IV. Enacting Term Limits through Statute

Members of the Commission are divided about whether Congress has the power under the Constitution to create the equivalent of term limits by statute. Some believe that a statutory solution is within Congress's powers. Others believe that no statutory solution is constitutional, or that any statute would raise so many difficult constitutional and implementation questions that it would be unwise to proceed through statute. Opponents of term limits cite these complexities as reasons to eschew term limits altogether.

In this Part, we consider the primary statutory approach and two alternative approaches. In all three proposals, Presidents appoint new Justices in the first and third years of their terms in office. As noted in the introduction to this Chapter, we focus on these proposals to ground our analysis rather than to endorse these proposals over all others. In addition, because the Commissioners are divided as to whether it would be constitutional to implement term limits via statute, we offer what we take to be the best argument for each position but do not seek to resolve the matter. We also examine some of the prudential concerns arising from these proposals. If Congress were contemplating imposing term limits by statute, a constitutional amendment that simply specified the size of the Court might still be advisable, for the reasons discussed above.

The main focus of our analysis is the so-called Junior/Senior Justice proposal. It creates the functional equivalent of term limits by providing that, after eighteen years of service, Justices become Senior Justices and stop participating in the ordinary work of the Court. This proposal features elements common to other proposals that scholars and advocates have offered,[54] and the constitutional issues we discuss here are also common to those proposals. The two alternative solutions—the Original/Appellate Jurisdiction proposal and the Designated Justices proposal—attempt to address potential constitutional problems with the Junior/Senior Justice proposal, but they raise their own sets of constitutional issues.

In all three proposals, Justices would spend an eighteen-year nonrenewable term participating in the ordinary work of the Supreme Court. After that period, they would perform a different or a subsidiary set of duties.

A. The Junior and Senior Justices Proposal

In the Junior/Senior Justice proposal, Congress passes a statute that provides that, after eighteen years of service as a "Junior Justice" deciding cases, each Justice would assume

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senior status. Thereafter, these "Senior Justices" would no longer participate regularly in the ordinary work of the Court. But they would perform other duties, including sitting by designation in the lower federal courts and assisting the Chief Justice with administrative duties. Congress could specify these duties by statute, or it could leave it to the Justices themselves to decide on them through an internal rule.[55]

If the duties of Senior Justices were not sufficiently germane to the office of a Supreme Court Justice, the change in duties might amount to appointment to a new office. This would require a new nomination by the President and confirmation by the Senate. However, it is not clear that the germaneness requirement applies to the prospective redefinition of an office. In any case, the Supreme Court's understanding of germaneness appears to be very broad. In *Weiss v. United States*,[56] for example, the Court held that the duties of a military judge were sufficiently germane to the duties of a commissioned officer that the officer could be designated to serve as a judge without going through the appointments process.

The Justices already perform the duties listed above and that would pertain to Senior Justices under the proposal. Current federal law authorizes Justices to sit on circuit courts.[57] And as a historical matter, federal law long *required* the Justices to sit on other federal courts in addition to hearing cases on the Supreme Court. For almost all of the first hundred years of the Republic, Supreme Court Justices "rode circuit": they heard and decided cases in the lower federal courts. With the Judiciary Act of 1801, Congress abolished circuit riding, only to reinstate it in the Repeal Act of 1802 after control of Congress changed hands. The Supreme Court rejected a constitutional challenge to the 1802 Act in *Stuart v. Laird*,[58] in which the challenger sought to reverse a circuit court's judgment partly on the ground that "the judges of the supreme court have no right to sit as circuit judges, not being appointed as such."[59] The Supreme Court responded that circuit riding was so well established that its validity was no longer open to question: "[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."[60] Justices continued to have circuit-riding duties until the late nineteenth century.[61]

Existing practice and precedent offer a model for the types of duties Senior Justices might perform. A federal statute, 28 U.S.C. § 371, provides two options for federal judges, including Supreme Court Justices, who meet certain service and age requirements. They may "retire from the office" under § 371(a), at which point they no longer hold the office of federal judge or Justice but continue to receive an annuity equivalent to their salary at the time of retirement. Or they may "retain the office but retire from regular active service" under § 371(b) and

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"continue to receive the salary of the office" if they perform a different set of duties, which they may select from a list set out in later sections. Listed duties include "a caseload involving courtroom participation," "substantial judicial duties not involving courtroom participation," "substantial administrative duties directly related to the operation of the courts," or "substantial duties for a Federal or State governmental entity." For lower court judges, the status created in § 371(b) is usually called senior status.

Under the current rules, judges who take senior status need not sit on any cases at all. They may, however, sit by designation within their own circuit at the discretion of the chief judge or judicial council of their circuit. They may also sit by designation in other circuits at the discretion of the Chief Justice upon presentation of a certificate of necessity by the chief judge or circuit justice of the other circuit. Supreme Court Justices who retire from regular active service (and take the analogue of senior status for lower court judges) are not allowed to participate in any decisions or actions of the Supreme Court, but they may sit by designation in the lower federal courts.[62]

As with a constitutional amendment, drafters of a Junior/Senior Justice statute would have to make decisions about whether it would apply to sitting Justices, when the appointments of term-limited Justices would begin, how to handle vacancies that arose outside of the scheduled process, and whether there should be restrictions on the future employment of former Justices. The discussion of these issues in the constitutional amendment section applies equally to such a statute, with the caveat that applying the statute to sitting Justices might raise additional constitutional questions, as noted below.

1. Constitutional Issues Raised by the Junior/Senior Justice Proposal: The Good Behavior and Appointments Clauses

Article III, Section 1 provides that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[63] The Appointments Clause of Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."[64] The issues raised under these constitutional provisions by any term limits statute are complex, and what follows is a brief review of the relevant considerations. Commissioners disagree about the proper resolution of the questions raised.

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Those who believe that the Junior/Senior Justice proposal is unconstitutional start with the Good Behavior Clause, which is conventionally interpreted to give federal judges "life tenure": Federal judges hold their offices for an indefinite period that ends only when they die, voluntarily resign, or are involuntarily removed through the process of impeachment and conviction. Although the Good Behavior Clause does not specify the details of the "Offices" that federal judges hold, the Appointments Clause arguably recognizes a separate office of "Judge[] of the supreme Court" that is different from other federal judicial offices. If so, people who have been appointed to the Supreme Court must remain "Judges of the supreme Court." Those who believe that the Junior/Senior Justice proposal is unconstitutional argue that Senior Justices (who would be barred from participating in the ordinary work of the Court after eighteen years) do not remain "Judges of the supreme Court" in the sense that the Constitution requires. Indeed, given the enormously consequential constitutional decisions of the Court that this Chapter emphasizes, these critics argue it is implausible to claim that individual Justices can be involuntarily removed from most of the Court's constitutional work without being deemed to have lost their "office." In addition, some believe that these specific textual provisions should be understood in the context of more general separation of powers principles, including the principle of judicial independence. Part of the reason the Good Behavior and Appointments Clauses are best understood to deny Congress the power to modify life tenure by statute, in this view, is to protect the structural principle of judicial independence that underwrites Article III of the Constitution.

Proponents of the Junior/Senior Justice proposal believe that Congress may redefine the office prospectively. Thus, for all new appointments made after the statute takes effect, the office of Justice of the Supreme Court would mean serving as a Junior Justice for the first eighteen years and serving as a Senior Justice thereafter. All Justices would have the same duties and powers, but the nature of these duties would change over time. Under this approach, every Justice, unless they retire, would eventually become a Senior Justice if they stay on the Court for more than eighteen years. Note that under the terms of this argument, the statutory changes would not apply to sitting Justices.

The debate hinges on the nature of the "office" of Justice of the Supreme Court that the Constitution creates and whether a statute that contemplates that the Justices' duties will change after eighteen years removes them from that office in violation of the Good Behavior Clause. Proponents, relying on the senior status statute, 28 U.S.C. § 371(b) and (e), conclude that a change in duties does not necessarily involve a change in office because senior status judges still hold their office. For the same reason, they believe that deciding cases is not

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essential to continuing to hold office as a federal judge, and that deciding Supreme Court cases is not essential to continuing to hold the office of a Supreme Court Justice.

In support of this conclusion, proponents argue that the Supreme Court approved this system for senior judges in *Booth v. United States*.[65] In *Booth*, a unanimous Supreme Court held that a lower court federal judge who retired under the predecessor of § 371(b) "remains in office" within the meaning of Article III, Section 1.[66] The Court pointed out that senior judges exercise the judicial power of the United States in deciding cases when designated to do so. "It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge."[67] On one reading of *Booth,* a statutory change of duties does not remove a judge from office as long as "[t]he purpose is . . . that he shall continue . . . to perform judicial service."[68] The Supreme Court reaffirmed this reasoning in 2003 in *Nguyen v. United States*.[69]

Booth thus distinguishes between a *change in duties*, which is within the power of Congress, and *removal from office* or *reduction in compensation*, which are not: "Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it."[70] Moreover, those who believe statutory term limits are constitutional argue that the reasoning of *Booth* and *Nguyen* also extends to retired Justices. Retired Justices such as David Souter and Sandra Day O'Connor have often participated in courts of appeals decisions pursuant to 28 U.S.C. § 294. When they do, proponents of the Junior/Senior Justice proposal believe they are best understood as having retained their office as Supreme Court Justices because they are exercising federal power and they have not been appointed to any new office. Hence, proponents conclude, Senior Justices retain the office of Justice of the Supreme Court even if their duties have changed and no longer include participation in the ordinary work of the Court. Critics, however, believe that retired Justices still hold federal judicial office, which is required under *Booth* if they are to exercise federal judicial power, but that they do not necessarily continue to occupy the constitutional office of Supreme Court Justice.[71]

Setting *Booth* aside, critics believe that the best understanding of the Constitution forbids the change in duties that the Junior/Senior Justice proposal entails. One constitutional scholar puts the argument this way: "To say there is a particular office of Supreme Court Justice, as opposed to federal judge in general, is to say that the Constitution contemplates some connection between the justices and the work of the Court."[72] On one view, because the Court

is a decisionmaking body in which members participate and deliberate together, the ability to "participat[e] in substantially all the body's final decisions" is a necessary constitutional feature of holding the office of "Judge[] of the supreme Court."[73] Because the Junior/Senior Justice proposal eliminates the right to participate in the Court's decisions after eighteen years, some think it marks a change in office that violates the Good Behavior Clause.

Commentators have also discussed an alternative understanding of what it means to be a "Judge[] of the supreme Court": Instead of participating in substantially all of the Court's final decisions, perhaps each Justice must be able to participate in *an equal share* of the Court's work. There is a sense in which the Junior/Senior Justice proposal establishes equality among the Justices, because each Justice has the same powers for the same period of time. But even so, critics argue that "the proposal is not consistent with the Constitution's idea of a term" (and with the prevailing view that the Good Behavior Clause prevents Congress from imposing straightforward term limits).[74] In the critics' view, Congress cannot establish a time limit after which Justices lose the ability to participate equally in the Court's decisions, even if all Justices are subject to the same time limit.

To the extent that the proponents' argument rests on the precedential authority of *Booth*, critics believe that the precedent is limited. *Booth* involved the Compensation Clause of Article III and the issue was whether Congress could cut the pay of lower federal court judges who had *voluntarily* taken what we now call senior status. As permitted by a 1919 amendment to the Judicial Code, they had chosen to "retire . . . from regular active service on the bench" but had not "resign[ed] [their] office,"[75] and they continued to hear cases or perform other judicial duties. The Court held that Congress could not constitutionally reduce their compensation because they still remained in office and exercised federal judicial power. Thus, critics of statutory term limits argue, *Booth* only holds that when judges *voluntarily* take senior status, but continue to hear cases, Congress may not reduce their compensation under the Compensation Clause. According to critics, it does not follow that Congress can *require* life-tenured Supreme Court Justices to stop participating in the Supreme Court's exercises of judicial power after eighteen years.[76]

Proponents argue that if judges who have elected senior status "[c]ontinu[e] in Office" within the meaning of the Compensation Clause, then a statute requiring judges to take senior status after eighteen years would not deprive them of their "Offices" within the meaning of the Good Behavior Clause. In the proponents' view, moreover, *Booth* and subsequent established practice with respect to retired Justices foreclose the critics' arguments about the essential nature of the offices of "Judges of the supreme Court." According to proponents,

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there is no meaningful legal distinction between Supreme Court Justices and other federal judges as to whether they retain their judicial office after senior status, and whether or not that status is voluntarily chosen or imposed by statute. On this view, substantial participation or equal participation in all merits decisions is therefore not "inherent" in the nature of the office of Supreme Court Justice. The critics' assertion to the contrary, proponents argue, is belied by practice.

Critics respond that practice does not support allowing Congress to *mandate* a reduction in duties after a certain number of years. And the fact that our current practices make a reasonable accommodation for voluntary decisions does not mean that those practices establish a general principle that extends to a new set of arrangements in which Justices have no say in the matter.

Indeed, critics believe that the argument from history favors their position. Throughout most of American history, members of Congress have assumed that the only constitutional way to achieve term limits for Supreme Court Justices is through constitutional amendment. Starting as early as 1807,[77] and continuing to the present, more than two hundred proposals have been introduced in Congress to amend the Constitution to establish term limits for Supreme Court Justices or for federal judges more generally—sometimes in conjunction with other changes, sometimes as a stand-alone measure. But the first bill to establish the functional equivalent of term limits by statute was not introduced until 2020.[78] The very idea of mandating term limits by statute is a recent innovation.

B. An Alternative Proposal: Original/Appellate Jurisdiction

An alternative to the Junior/Senior Justice proposal is the Original/Appellate Jurisdiction proposal, under which all Justices continue to hear original jurisdiction cases throughout their tenure in office, but only the nine most junior Justices in service hear cases brought to the Court under its appellate jurisdiction.[79] The Court hears only a small number of cases through original jurisdiction every year. Most cases, and almost all of the controversial cases, come before the Court through its discretionary appellate jurisdiction. In addition to participating in cases involving original jurisdiction, Senior Justices may also perform other duties, as in the Junior/Senior Justice proposal above or under the current retirement statute. This proposal does not separate appellate jurisdiction cases for reasons of efficiency. Rather, the proposal offers another way of creating the effective equivalent of term limits that might avoid some of the constitutional problems of the main proposal.

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The central argument for the Original/Appellate proposal is that it can be linked to a specific textual provision in the Constitution. Article III, Section 2 of the Constitution gives Congress the power to regulate the Court's appellate jurisdiction: "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[80] In *Marbury v. Madison*,[81] the Court held that the Exceptions and Regulations Clause applied only to the Court's appellate jurisdiction and that Congress could not alter the Court's original jurisdiction.[82] The proposal argues, accordingly, that although Congress must allow all Justices to hear all cases arising out of original jurisdiction, it may provide, as a regulation of appellate jurisdiction, that only Junior Justices hear appeals.

Although this proposal invokes a different congressional power, it raises some of the same constitutional issues discussed above. No matter which enumerated power Congress is exercising, Congress's statutes must comport with the Good Behavior Clause and the Appointments Clause. If critics are correct that everyone who holds the office of "Judge[] of the supreme Court" must be able to participate in substantially all of the Court's final decisions, or must remain eligible to participate in an equal share of the Court's work, then the Original/Appellate proposal would be vulnerable to the same objections as the Junior/Senior Justice proposal.

Critics may raise several additional objections. First, critics will argue that the Exceptions and Regulations Clause gives Congress the power to change the *scope* of the Supreme Court's appellate jurisdiction, but not the *personnel* who decide appeals. Put another way, the Clause allows Congress to decide *what* appeals the Court can hear, but not *who* hears the appeals.

Proponents, in turn, will argue this does not attend to the distinction between "exceptions" to and "regulations" of appellate jurisdiction that appears in the text of Article III. "Exceptions" to appellate jurisdiction involve limiting *what* cases the Court may hear. But "regulations" of appellate jurisdiction may also include deciding *how* the Court hears appeals and *who* hears them. The Supreme Court has never addressed this precise issue.

A second objection is that the Original/Appellate proposal creates two panels. One panel, consisting of all of the Justices, hears original jurisdiction cases. The other, consisting only of the nine Justices most junior in service, hears appellate cases. As we discuss in Chapter 2 at greater length, there is an argument that this aspect of the proposal would violate the provision in Article III, Section 1 that "[t]he judicial Power of the United States, shall be vested in one supreme Court."[83] From a textual point of view, if there is "one" Supreme Court, then perhaps

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the Justices must participate together in deciding merits cases and may not decide cases in separate panels.

A third objection to the Original/Appellate proposal is that, like all other proposals for Supreme Court panels, it gives Congress too much power to gerrymander the Justices by subject matter to attempt to manipulate the outcome of particular cases. If Congress may divide cases in this way, why not in other ways that would undermine the Court's integrity and independence? For example, Congress might create a special panel that heard only cases involving abortion or the environment.

Proponents might respond that whether or not a general power to divide the Court into panels poses dangers, the Constitution itself creates a distinction between the Supreme Court's original and appellate jurisdiction. This provision offers a bright-line rule, which, according to *Marbury v. Madison*, Congress may not vary. When Congress follows this bright-line rule, there is no danger to judicial independence. Congress cannot expand or contract the Court's original jurisdiction. Therefore, the proposal does not assume that Congress has a general power to create panels of the Court. It simply argues that this one, which matches distinctions already present in the text of Article III, is constitutionally valid.

C. An Alternative Proposal: Designated Supreme Court Justices

The third proposal attempts to respond to the concern that the Junior/Senior Justice proposal effectively removes Justices from their offices. Instead, it proposes that Presidents henceforth only appoint judges from the lower federal courts to sit by designation on the Supreme Court for a non-renewable term of eighteen years. The relevant statute will specify that one of the duties of lower federal court judges (or some statutorily demarcated subset of these judges) is that they may be called upon to serve by designation on the Supreme Court for eighteen years, after which they would return to their original court.[84]

Under this proposal, Presidents would no longer appoint anyone to the office of "Judge[] of the supreme Court." Instead, Presidents would simply designate lower court judges to serve on the Court temporarily. The statute could provide that the designation is subject to the ordinary advice-and-consent process. If the designation does not amount to appointment to a different office (see the discussion below), advice and consent would not be required by the Constitution, but Congress might nevertheless provide for it.

One main objection to the Designated Justices proposal is a textual argument. As noted previously, the Appointments Clause of Article II contemplates a separate office of "Judge[]

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of the supreme Court." Therefore, critics will assert that the judges who sit and decide cases on the Supreme Court must hold the office of "Judges of the supreme Court."

Proponents will respond that the existence of a separate office of "Judge[] of the supreme Court" does not mean that someone not appointed to that office is forbidden to serve on the Supreme Court by designation. Federal judges often serve on different courts by designation without receiving new commissions. Retired Supreme Court Justices serve on appellate and district courts; appellate judges serve as district judges, and district judges serve as appellate judges by designation. In addition, Supreme Court seats have been filled on a temporary basis through recess appointments without a lifetime appointment, and even without Senate confirmation. The Vacancies Clause of Article II, Section 2, Clause 3, which applies to federal offices generally, provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[85] Over three hundred federal judges, including fifteen Supreme Court Justices, have been appointed through this process.[86] Lower federal courts have approved of its constitutionality.[87] If Presidents may temporarily fill Supreme Court vacancies without the Senate's advice and consent, the argument goes, *a fortiori* they should be permitted to do so with the Senate's advice and consent.[88]

Critics will say that the Constitution distinguishes the Supreme Court from other federal courts and that everyone who sits on the Supreme Court must hold the office of "Judge[] of the supreme Court" (whether pursuant to a regular appointment under the Appointments Clause, which lasts during good behavior, or a recess appointment under the Vacancies Clause, which lasts for at most two years). Critics may also note that in the vast majority of cases, when a President has made recess appointments to either the lower courts or the Supreme Court, Congress has subsequently confirmed these judges and Justices to lifetime appointments.[89] And when judges sit by designation on other courts, they usually remain only for a short time, and sometimes only for a single case. This practice, critics of this proposal will argue, is very different than a statutory designation lasting eighteen years, which would cover a sizeable proportion—and often a majority—of any federal judge's career. There is nothing temporary about such appointments, and hence they cannot be justified by existing practice.

A second main objection to the Designated Justices proposal is rooted in past practice: No person who does not hold the office of Justice of the Supreme Court has ever sat on or decided a case before the Supreme Court.[90] Justices have indeed sat on lower federal courts from the beginning of the Republic, and Justices who take senior status sit by designation

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today. Nevertheless, the opposite has never occurred—lower federal court judges have never sat by designation on the Supreme Court. The novelty of the practice suggests that it is unconstitutional.

Proponents will respond that if Justices may "move down" and sit on lower courts by designation, there is no reason why lower court judges may not "move up" by designation. In fact, district court judges often sit by designation on circuit courts of appeals. Proponents would assert, therefore, that district and circuit court judges should also be able to sit by designation on the Supreme Court. The novelty of a practice does not by itself prove that it is unconstitutional; otherwise, a host of federal laws that exercised constitutional powers in new ways would be unconstitutional.[91]

V. Addressing the Risk of Repeated Confirmation Impasse

It is essential that any term limits proposal provide an acceptable mechanism for resolving the problem of repeated confirmation impasses. Absent such a mechanism, the repeated failure of the Senate to confirm any nominee would undermine a major justification for staggered term limits: that each President be entitled to the same number of regular nominations. Designing a structure to address the risk of impasse, however, is not an easy matter. That structure must not give too much effective power to the President but also address the risk of repeated confirmation impasses. And the difficulty of reforming the confirmation process is among the reasons opponents of term limits reject the reform.

Reform of the general structure of presidential nomination and Senate confirmation is not squarely within the Commission's remit. In this Part we consider some means by which to address potential confirmation impasses under a system of term limits. In addition, in an Appendix to this Report we summarize some helpful testimony regarding potential reforms to the confirmation process more generally.

A. Term Limits by Constitutional Amendment and the Confirmation Process

The options for designing a mechanism to avoid a confirmation impasse are different and broader in the context of designing an amendment as opposed to a statute. Some have suggested that a constitutional amendment should provide that a nominee will be deemed confirmed if the Senate does not vote to disapprove within a specified time, such as four

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months after nomination.[92] (This proposal is somewhat similar to Madison's initial proposal at the Constitutional Convention that judges be deemed confirmed if they were not rejected by a two-thirds vote of the Senate by a date certain, a proposal that the Convention rejected.[93]) This might be a good idea as a starting point, but more is required to address the risk of the Senate repeatedly voting down successive nominees for a particular eighteen-year seat.

To begin to address this potential concern, the amendment would first have to define the circumstances that trigger any fallback mechanism. For instance, the trigger might be the Senate voting down two consecutive nominees. This trigger may be particularly apt if the amendment also adopts the provision deeming a nominee automatically confirmed if the Senate fails to vote at all after a set time. If that time is set at four months, then this fallback mechanism would come into play after roughly eight months of a confirmation impasse. Another option would be to trigger the fallback mechanism at a set amount of time after the date the President nominates a person for the particular eighteen-year position.

The Commission is not aware of any scholarship that explores in-depth the issue of an appropriate design for a fallback mechanism. Witnesses offered a few brief suggestions. One is that the President present three nominees to the Senate; if the Senate rejects all three, the President is then empowered to choose one of those to sit on the Court.[94] But Presidents could easily game this system, choosing two figures the Senate would never approve and thereby effectively gaining unilateral power to fill the seat. Another possibility would be for the amendment to specify that the Senate cannot conduct other business while a nomination is pending.[95] But this approach would preclude the Senate from acting on any number of urgent issues that might arise, including those involving our national security.

From an institutional-design perspective, the challenge is that any backup mechanism that stays within the traditional President-Senate framework risks giving either too much unilateral power to the President or too much blocking power to the Senate. The solution might need to rest with an institution that sits outside this framework. One possibility is that, in case of a prolonged impasse, the chief judges of the twelve non-specialized federal courts of appeals (or a subset of them) could be assigned one of two roles.[96] On one approach, once this fallback mechanism is triggered, this body of chief judges would become the confirmation body for the President's choice. Two institutions of the government would thus still be required to confirm a Justice. A subsidiary issue to consider is whether the President should be precluded from nominating any individual whose appointment to the Court the Senate has affirmatively rejected.

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A second option would be to give the chief judges (or a subset of them) the power to directly designate a Justice after a prolonged impasse. The amendment could also limit the chief judges to selecting a sitting federal court of appeals judge. These are the individuals with appropriate experience whose fitness for the Court the chief judges would be in the best position to evaluate. Good reasons might exist to appoint to the Court persons other than federal court of appeals judges. But empowering the chief judges to directly appoint anyone in the country to the Court would put enormous discretion in the hands of this body. Limiting the set of potential appointees to existing court of appeals judges would substantially constrain this power. Because this fallback mechanism would come into play only when the Senate repeatedly rejects a President's nominees, it is not likely to affect the majority of seats on the Court.

If one worries that the knowledge of the sitting chief judges' identities would shape the actions of the President or the Senate, this power could be given to a random selection of seven or five of the chief judges. An advantage of using the chief judges (or a subset of them) is that the amendment would not have to design from scratch a new, independent institution to serve as the fallback mechanism. Given the complexities of designing such a new institution, as well as questions about how well the public would accept that institution, the easier course may be to use a set of actors who have been Senate confirmed already and for whom a selection mechanism also already exists.[97]

An amendment could instead provide that if the Senate rejected one nominee, the threshold for confirmation of the next nominee for that seat would decrease. Alternatively, the amendment could provide that if the Senate fails to confirm a nominee by a certain point, the President would have the power to designate any sitting federal judge (or any circuit judge) to fill that eighteen-year seat. But both of these options might be thought to give too much power to the President.

B. Term Limits by Statute and the Confirmation Process

If term limits are implemented by a statute rather than a constitutional amendment, modifications to the confirmation process must be consistent with the current constitutional framework, which gives the President the power to select a nominee and the Senate the power to approve or disapprove. It might still be possible to create a backup mechanism of the sort discussed above, but such a mechanism would have to be understood as a delegation of authority by the Senate and/or the President. The constitutionality of such a delegation is not

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clear, and the relevant actor might also be able to revoke it unilaterally, undoing most of its benefits.

Another means of dealing with the possibility of a prolonged impasse might include a statute that prescribes that the threshold number of votes for confirmation decreases each time the Senate refuses to confirm a nominee. The constitutionality of such a statute is unclear, however, given that the Constitution gives each chamber the power over its own rules and procedures.[98] The Senate could instead incorporate such a policy into its own Senate rules; a later Senate, however, could change that rule. Alternatively, consistent with the Designated Justices proposal set out above, a statute might provide that in the event of an impasse, the President could designate a lower court judge to fill the Supreme Court vacancy for an eighteen-year term without Senate confirmation. This statute would be subject to many of the same constitutional concerns as the Designated Justices proposal, although it would operate with respect to only some seats rather than all of them.

Last, a statute might provide that if the Senate fails to confirm one or both of a President's scheduled appointments, the next President of a different party would lose a corresponding number of appointments. While this approach might occasion substantial constitutional debate, its justification might be grounded in the view that Congress has authority to determine the timing of judicial appointments, as well as the size of the Court. But even if constitutionally defensible and reasonably effective, making party affiliation relevant to the operation of the statute is arguably problematic. Such a statute also poses the risk that an extended impasse would shrink the Court. And because what is effected by statute can also be undone by statute, this alternative could also become another front in the polarized and destabilizing partisan contestation of the times.

VI. Concluding Considerations

A final set of concerns about enacting term limits via statute rather than constitutional amendment can be viewed as prudential or grounded in the separation of powers. If Congress has the power to change the composition of the Court by statute, it could mean that Congress has considerable flexibility in altering the duties of the Justices in other ways. Once Congress has exercised the power to change the Court's composition by statute in order to regularize appointments, Congress might seek to do so for other purposes. If federal statutes can validly restrict members of the Supreme Court to a very limited set of duties after a certain number of years, Congress might try to establish other criteria for imposing similar limits on a subset of

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Justices. Even if one focuses entirely on term limits, moreover, the group of Supreme Court practitioners cited in the introduction to this Chapter warns that "a statutory solution would be inherently unstable"; over the years, Congress might amend the system depending on whether Congress and the White House are in the same hands at the moment.[99] Opponents of term limits are especially critical of a statutory approach, arguing that if term limits may be changed by statute, then an angry Congress could punish the Court by reducing the term of office anytime it chose to do so. Critics of the statutory approach argue that it is precisely to avoid such risks that the Constitution does not permit Congress to impose term limits by statute. On this view, the degree of consensus required for a constitutional amendment provides important security against the composition of the Court being manipulated for partisan or ideological reasons.

For some members of the Commission, the existence of constitutional doubt, as well as the significance and complexity of adopting a system of term limits, are themselves reasons to pursue the reform through constitutional amendment. They worry that a statute altering the Court's composition will generate greater uncertainty and mistrust than other constitutional questions. When litigants eventually challenge a term limits statute, the Court would have to decide on the constitutionality of a law that restructures the Court itself. There might also be strong disagreements about which Justices should participate in the decision. No matter which way the Court came out on the question, these Commissioners worry that the Court's legitimacy, or perceptions of its legitimacy, would be undermined.

Members of the Commission who support a statutory solution believe these concerns are overblown. They do not believe that a term limits statute would be any more destabilizing than a host of other issues that the Court has confronted over the years. They also think that inaction carries its own risks, and that the appointments process now displays a degree of dysfunction that makes remedial action urgent. Given the powers that Congress and the President already have to regulate the Court, proponents believe that recognizing the power of Congress to regularize appointments would not add more risk than it is worth—and as a practical matter, if the reform were adopted with strong bipartisan support, the precedent established by the statute might not carry over to other situations.

At a minimum, the contestability of statutory approaches counsels in favor of serious deliberation by Congress if it chooses to consider this route. In these deliberations, we hope that Congress would keep in mind the central structural values of our Constitution, particularly the principle of judicial independence, and consider what future Congresses, armed with the same constitutional powers, might someday attempt. Indeed, in recent years, we have seen

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democratic governments "regress" or "backslide" with respect to judicial independence. This has come about through electoral majorities using their power to restructure previously independent institutions, including courts, to favor the political agendas of those governments. Comparative political scientists have concluded that the democratic systems most resistant to this prospect are those in which an electoral majority is not sufficient to change the fundamental structure of institutions such as the courts.

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Endnotes: Chapter 3

[1] *Presidential Commission on the Supreme Court of the United States* 5 (July 16, 2021) (written testimony of the Supreme Court Practitioners' Committee), https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf.

[2] *See, e.g.*, Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits; Lee Drutman, *It's Time for Term Limits for Supreme Court justices*, VOX (June 27, 2018), https://www.vox.com/platform/amp/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement.

[3] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2 (July 20, 2021) (written testimony of Akhil Amar, Yale Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf; *Presidential Commission on the Supreme Court of the United States* 6 (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School), https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf. One scholar who testified to the Commission, and had been against term limits for the Court in the mid-2000s, now favored term limits and explained why her view had changed since then. *See Presidential Commission on the Supreme Court of the United States* 1-2 (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf (citing Vicki C. Jackson, *Packages of Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007-08 (2007)).

[4] *Compare* Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, NAT'L CONST. CTR. (2020), https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf, *with* Caroline Fredrickson, Jamal Greene & Melissa Murray, *The Progressive Constitution*, NAT'L CONST. CTR. (2020), https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf.

[5] *See, e.g.*, J. Harvie Wilkinson III, *Supreme Court Term Limits Wouldn't Solve Anything*, WASH. POST (Oct. 17, 2021), https://www.washingtonpost.com/opinions/2021/10/18/supreme-court-term-limits-wouldnt-solve-anything; Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006) (offering criticisms of the main reform proposals and the critiques of life tenure); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (2005) (defending the system of life tenure); William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063 (1990); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1397 (2005).

[6] *See State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts (detailing the election or appointment procedure for each state); D.C. Code § 11-1502 (2021) (exemplifying a law with a mandatory retirement age and renewable terms); Francis X. Shen, *Aging Judges*, 81 OHIO STATE L.J. 235 app. (2020) (providing mandatory retirement age data); COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 189 tbl.5.1 (2019) (furnishing term length data); Sandra Schultz Newman & Daniel Mark Isaacs, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1 app. (2004) (providing state-by-state data on selection processes, term lengths, and retirement requirements).

[7] *See State Supreme Courts*, *supra* note 6; D.C. CODE § 11-1502 (2021).

[8] *See State Supreme Courts*, *supra* note 6.

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[9] *See* Jackson Testimony, *supra* note 3, at 1; *Presidential Commission on the Supreme Court of the United States* 3 (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf ("[T]he Justices continue to enjoy lifetime appointment, without being subject to any form of term limit or mandatory retirement age, in ways that are increasingly unusual in global terms.").

[10] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Tom Ginsburg, University of Chicago Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf.

[11] *Id.* at 2.

[12] U.S. CONST. art. III, § 1. This formula does not mean that judges, once in office, are entirely immune from consequences or professional incentives. Judges may, of course, be impeached for high crimes and misdemeanors, lower court judges may be elevated to higher courts, and Associate Justices may be appointed Chief Justice.

[13] McConnell Testimony, *supra* note 3, at 7.

[14] *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 778-79 (2006). Nevertheless, Supreme Court vacancies have always occurred irregularly. *See* Allison Rabkin Golden, David Herman, Alexander Nocks, Ayoub Ouederni & Kaveri Sharma, *Vacancies and Tenures on the Supreme Court: A Response to Calabresi and Lindgren* (2021) (on file with the Presidential Commission on the Supreme Court of the United States).

[15] Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1316-20 (2007).

[16] Supreme Court Practitioners' Committee Testimony, *supra* note 1, at 78-82; *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx.

[17] David Ingold, *Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer*, BLOOMBERG (Apr. 7, 2017), https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure ("In 1900, justices tended to be in their late 50s when they joined the court. Today, the average age is about five years younger, and President Donald Trump's nomination of Gorsuch, currently 49 years old, only furthers that trend."); *see also Presidential Commission on the Supreme Court of the United States* 5 (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf.

[18] Both the median and modal number of appointments are 2, and the mean is 1.83. *See Justices 1789 to Present*, *supra* note 16.

[19] There have been only six if we include the Reconstruction period, in which Republicans, following Abraham Lincoln's assassination, refused to allow any appointments by his successor, Andrew Johnson.

[20] *See generally* Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435 (Roger C. Cramton & Paul D. Carrington eds., 2006).

[21] *Cf.* Jason P. Davis & Kathleen M. Eisenhardt, *Rotating Leadership and Collaborative Innovation: Recombination Processes in Symbiotic Relationships*, 56 ADMIN. SCI. Q. 159, 194 (2011) (linking rotating personnel and innovation in decisionmaking); Amir Erez, Jeffrey A. Lepine & Heather Elms, *Effects of Rotated Leadership and Peer Evaluation on the Functioning and Effectiveness of Self-Managed Teams: A Quasi-Experiment*, 55 PERSONNEL PSYCH. 929, 929 (2002) ("[T]eams that rotated leadership among members had higher levels of voice, cooperation, and performance.").

[22] David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter; Steven A. Ramirez, *Diversity, Compliance, Ethics & In-House Counsel*, 48 U. TOL. L. REV. 465, 483 (2017).

[23] Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 242-44 (2019) (describing various businesses that have implemented term limits for members of their boards of directors, and the accompanying decline in the median age of members serving on these boards).

[24] In Japan, for instance, judges are appointed by the Cabinet from lists of candidates nominated by the Supreme Court and serve for a term of ten years. *Courts in Japan*, SUP. CT. JAPAN (2020), https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf.

[25] *See Presidential Commission on the Supreme Court of the United States* (July 16, 2021) (written testimony of Margaret H. Marshall, Choate Hall & Stewart LLP), https://www.whitehouse.gov/wp-content/uploads/2021/07/Marshall-Testimony.pdf.

[26] In addition to providing that the Justices shall hold their office for "good Behaviour," Article III, Section 1 of the Constitution provides that they shall, "at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. *Cf. infra* notes 63-83 and accompanying text.

[27] Farnsworth, *supra* note 5, at 437-38.

[28] *See* Burbank, *supra* note 5, at 1548; Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 291, 298-303 (Roger C. Cramton & Paul D. Carrington eds., 2006).

[29] *See Presidential Commission on the Supreme Court of the United States* 12 (Oct. 2021) (written testimony of Philip Bobbitt, Columbia Law School), https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf; *Presidential Commission on the Supreme Court of the United States* 5 (Aug. 2, 2021) (written testimony of Michael Stokes Paulsen, University of St. Thomas School of Law), https://www.regulations.gov/comment/PCSCOTUS-2021-0001-2159; *Presidential Commission on the Supreme Court of the United States* 18 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center), https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf.

[30] Farnsworth, *supra* note 5, at 411.

[31] Empirical studies modeling the effects of term limits on doctrinal change suggest different possibilities. *See* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming 2021) (manuscript at 40-42) (on file with the Presidential Commission on the Supreme Court of the United States) (finding that all but one of the most prominent proposals for term limits would likely have produced *fewer* flips than actually occurred in the real world); Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil:* Roe v. Wade*'s Whiplash*, 98 TEX. L. REV. 121, 160 (2019) (concluding that "the danger of increased instability due to term limits is very real" and needs to be weighed against the potential benefits of term limits); *cf.* Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61, 102 fig. 6 (2017) (indicating that the state supreme courts with either life tenure or tenure until age 70 overrule fewer precedents than state supreme courts with most other judicial retention methods).

[32] *Cf.* Farnsworth, *supra* note 5, at 416 ("A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust.").

[33] According to a committee of distinguished Supreme Court practitioners, however, "orchestrating timing within two-year windows would still often prove difficult," and "[t]he fact that more Justices would have shorter track records" could also impede predictions. Supreme Court Practitioners' Committee Testimony, *supra* note 1, at 86.

[34] *See* Hellman, *supra* note 28, at 303-08.

[35] THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[36] *Id.* at 392-93.

[37] Supreme Court Practitioners' Committee Testimony, *supra* note 1, at 78-82; *Justices 1789 to Present*, *supra* note 16.

[38] *See* Lee Epstein, Jack C. Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 36 (2001) ("Our analysis of non-renewable terms—an institution used quite frequently in the European context—suggests . . . it may be more effective [than life tenure] at encouraging sincere behavior on the part of justices."); MICHAEL S. KANG & JOANNA M. SHEPHERD, FREE TO JUDGE? HOW CAMPAIGN FINANCE MONEY BIASES JUDGES (Stanford Univ. Press, forthcoming 2023) (discussing the experience of state courts with respect to term limits and mandatory retirement ages).

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[39] Farnsworth, *supra* note 5, at 411.

[40] *See* Jackson Testimony, *supra* note 3, at 5; *State Supreme Courts*, *supra* note 6.

[41] *See* Ginsburg Testimony, *supra* note 10, at 3; Zachary Elkins & Tom Ginsburg, *Characteristics of National Constitutions, Version 3.0*, COMPAR. CONSTS. PROJECT (May 20, 2021), https://comparativeconstitutionsproject.org/download-data/#.

[42] Jackson Testimony, *supra* note 3, at 5.

[43] *See Justices 1789 to Present*, *supra* note 16.

[44] McConnell Testimony, *supra* note 3, at 7.

[45] *See* Chilton, Epps, Rozema & Sen, *supra* note 31.

[46] Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1461 (2009).

[47] McConnell Testimony, *supra* note 3, at 5.

[48] *Id.*

[49] *See* Chapter 2, at 93.

[50] Calabresi & Lindgren, *supra* note 14, at 826-31.

[51] Chilton, Epps, Rozema & Sen, *supra* note 31, at 3.

[52] Designers would have to consider how a term limits system would operate in relation to the existing set of retirement statutes and whether those would need to be changed.

[53] *See* Jackson Testimony, *supra* note 3, at 18.

[54] *See, e.g.*, Amar Testimony, *supra* note 3, at 3-4; Cramton, *supra* note 15, at 1323-25; H.R. 8424, 116th Cong. (2020); H.R. 5140, 117th Cong. (2021); *Term Limits*, FIX CT. (Sep. 29, 2020), https://fixthecourt.com/fix/term-limits.

[55] Amar Testimony, *supra* note 3.

[56] 510 U.S. 163 (1994).

[57] 28 U.S.C. § 43(b).

[58] 5 U.S. (1 Cranch) 299 (1803).

[59] *Id.* at 309.

[60] *Id.*

[61] *See generally* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

[62] *See* 28 U.S.C. § 294.

[63] U.S. CONST. art. III, § 1.

[64] U.S. CONST. art. II, § 2.

[65] 291 U.S. 339 (1934).

[66] *Id.* at 351.

[67] *Id.* at 350.

[68] *Id.*

[69] 539 U.S. 69, 72 (2003) (noting that while judges of the District Court for the Northern Mariana Islands cannot be designated to sit on a federal court of appeals because they are not Article III judges, senior circuit judges "are, of course, life-tenured Article III judges who serve during 'good Behaviour' for compensation that may not be diminished while in office").

[70] *Booth*, 291 U.S. at 351.

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[71] In the alternative, one might argue that they retain judicial office, but not office as Supreme Court Justices, or that they hold multiple judicial offices, and give up one when they take senior status. *See* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 475-78 (2007) (suggesting that both *Booth* and 28 U.S.C. § 371 could be read to mean that senior status judges retain judicial office without still holding the same offices that they served in before they retired); *cf.* William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 338-42 (2019) (focusing specifically on the retirement of Supreme Court Justices, and discussing the possibilities that they retain their old office, that they move into a new office, or that they started off with two offices and surrender one upon retirement).

[72] John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 361, 366 (Roger C. Cramton & Paul D. Carrington eds., 2006).

[73] *Id.*

[74] *Id.* at 367; *cf.* Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 697 (1969) ("I am quite convinced that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for judges of the federal constitutional courts.").

[75] Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157 (codified as amended at 28 U.S.C. § 375 (1934)).

[76] Because *Booth* involved the 1919 federal statute under which lower federal court judges had been deciding cases as senior judges, *Booth* also concluded that it was "too late to contend that services so performed were extra-legal and unconstitutional." *Booth*, 291 U.S. at 351. It is unclear what weight that factor—or the practice of retired Justices sitting by designation on lower federal courts—would carry in a statute that imposes for the first time on Supreme Court Justices the new status of Senior Justices.

[77] *See* 17 ANNALS OF CONG. 22 (1807).

[78] *See First-Ever Measure to End Life Tenure on the Supreme Court Via Statute, Not Amendment, To Be Introduced*, FIX CT. (Sept. 29, 2020), https://fixthecourt.com/2020/09/first-ever-measure-end-life-tenure-supreme-court-via-statute-not-amendment-introduced (referring to H.R. 8424, 116th Cong. (2020)).

[79] *See* Jack M. Balkin, *Don't Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020), https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html.

[80] U.S. CONST. art. III, § 2.

[81] 5 U.S. 137 (1803).

[82] *Id.* at 175.

[83] U.S. CONST. art. III, § 1.

[84] *See* Calabresi & Lindgren, *supra* note 14, at 855-58, 860 (2006) (considering the proposal but rejecting it because the work of a Supreme Court Justice is not germane to the duties of a lower court judge).

[85] U.S. CONST. art. II, § 2, cl. 3.

[86] Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1670 (2011).

[87] *See, e.g.*, United States v. Woodley, 751 F.2d 1008, 1014 (9th Cir. 1985) (stating that "a recess appointment to the federal bench [] could exercise the judicial power of the United States").

[88] Following President Eisenhower's recess appointments of three Justices, the Senate passed a resolution discouraging the practice of Supreme Court recess appointments, but the primary concern there was that recess appointments bypass the advice and consent process, not that they are temporary.

[89] Motz, *supra* note 86, at 1670 ("By 2000, Presidents had made more than 300 recess appointments of Article III judges, and of those, only thirty-four had not been confirmed.").

[90] Harrison, *supra* note 72, at 365.

[91] A final objection to the Designated Justices proposal is that it adds new duties to the office of lower federal court judge, perhaps triggering the germaneness analysis set out in *Weiss v. United States*, 510 U.S. 163 (1994), discussed above. *See* Calabresi & Lindgren, *supra* 14, at 860 (2006) (raising this concern). This analysis might or

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might not apply to judges appointed after the proposal's enactment—*Weiss* assumes without deciding that germaneness also governs the prospective addition of duties for unknown future officeholders.

[92] McConnell Testimony, *supra* note 3, at 6.

[93] Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103 (2005).

[94] Ginsburg Testimony, *supra* note 10, at 10.

[95] *See* Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html (arguing that "the Senate [should] be forbidden from taking action whatsoever on any of its calendars" in the event of "[f]ailure to confirm a justice by July 1 of a president's first or third year").

[96] Jackson Testimony, *supra* note 3, at 11 n.30.

[97] The current federal statute that determines who serves as chief judge of a court of appeals, 28 U.S.C. § 45, is well-designed and has served the country well. To the extent there is any concern Congress might modify the statute for partisan reasons to game this fallback mechanism for Supreme Court appointments, the amendment could include the provisions of the current statute.

[98] U.S. CONST. art. I, § 5.

[99] Supreme Court Practitioners' Testimony, *supra* note 1, at 82; *see also* Harrison, *supra* note 72, at 372 (providing examples of "gamesmanship" that could be attempted).

Chapter 4: The Court's Role in the Constitutional System

Many observers view the judiciary and especially the Supreme Court as vital to the preservation of individual rights, democracy, federalism, and other constitutional values.[1] On this account, the Court serves as an important counterweight to majoritarian impulses, safeguards the Constitution, and helps ensure the rule of law. But others argue that the Supreme Court has exerted too much power in our system of constitutional governance by interfering with or taking control of matters that should be resolved by the elected branches and the political process. Under this view, the Court has emerged as an obstacle to the realization of important social goals and undermined the ability of Congress and other political actors to protect rights.[2]

Proposals to disempower the Court generally rest on two interrelated assumptions. First, Court rulings that statutes violate the Constitution typically require exercising judgment about the meaning of the Constitution, over which reasonable people might disagree, as is often illustrated by divisions among the Justices themselves in constitutional cases. Second, in cases of reasonable disagreement over whether a law comports with the Constitution, principles of democracy necessitate that Congress and the executive branch have opportunities to check the judgments of an unelected judiciary and to advance their own views about what the Constitution requires. In the view of some proponents of judicial disempowerment, the modern Supreme Court has injected itself into spheres appropriately left to democratic argument and resolution—for example, by invalidating laws that prohibit or restrict abortion or legislation designed to protect voting rights. For these critics, the Court's fundamentally "countermajoritarian" character is in tension with the basic commitments of a democracy; an unelected judiciary, in this view, acts undemocratically when it invalidates the acts of democratically elected representative bodies.[3] For some, the problem is also that Supreme Court Justices are nearly always drawn from the elite and are therefore insufficiently representative of the population as a whole.[4]

Those who critique the Supreme Court's power emphasize that when the Court acts to invalidate statutes, its decisions "have an unusually high degree of finality or 'strength'[] by global standards."[5] This high degree of finality derives in part from the Court's approach to judicial review, known as "judicial supremacy."[6] That is, the Court has held that it has the last word on constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states.[7] The Court has

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embraced judicial supremacy since at least the 1950s, when it asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution."[8] Yet, as discussed below in Part III of this Chapter, this approach to judicial review is not explicitly required by the text of the Constitution or by the Court's early precedents establishing the power of judicial review. Indeed, judicial supremacy has long been contested, sometimes by Congress and the President and sometimes even within the Court. Critics argue that the Court was not intended to be the *exclusive* interpreter of the Constitution; rather, as long as legislative and executive branch actors obey specific Court orders in specific cases, they can act in their spheres on a contrary interpretation of the Constitution.[9]

Two other features of our constitutional system combine with judicial supremacy to insulate the Court's constitutional judgments from the will of the people as it evolves over time. First, the U.S. Constitution is very difficult to amend—much more so than most state and foreign constitutions.[10] Second, as discussed in Chapter 3 of this Report, because Justices serve for life, the timing of nominations is unpredictable. Some Justices serve for many decades and some Presidents have few or no opportunities to make appointments. According to some observers, the result is that the Court may not be reflective of, or responsive to, the people, as expressed through electoral preferences over time.

Proposals to curb judicial power are diverse. Without purporting to be comprehensive, this Chapter examines proposals (1) to strip the Supreme Court and other federal courts of jurisdiction to hear certain kinds of cases, (2) to impose supermajority voting requirements or require courts to give deference to legislative judgments about constitutionality, and (3) to authorize congressional overrides of judicial decisions striking down legislation. As we emphasize, some disempowering proposals specifically target the Supreme Court, while others would apply to lower courts as well. Some would insulate broad categories of legislation from judicial review; others would limit judicial power only with respect to specifically identified issues.

We consider the extent to which such proposals would affect the Supreme Court's role, or that of the judiciary as a whole, in relation to the other branches of government in the resolution of major social, political, and cultural issues. We also highlight the counterarguments advanced by those who defend the existing role of the Court in our constitutional system. Among other concerns, critics of proposals to disempower the courts worry that such reforms might undermine protections for individual rights, particularly minority rights, or that as more constitutional interpretation is performed by the political branches, the law could become less settled or well-reasoned. Critics also emphasize that

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disempowerment reforms could undermine the rule of law by eliminating the courts' role in ensuring officials' accountability. Some also question whether courts necessarily operate in ways that are antidemocratic.[11]

Our discussion is predominantly analytical. We do not purport to resolve the fundamental questions of democratic and political theory that any substantial disempowering of the courts would raise. Instead, we analyze the extent to which the various proposals to disempower the courts would in fact realize their stated goals. We also identify some of the potential costs of various proposals, including from the perspective of those who emphasize the importance of the courts in protecting individual rights, federalism, or other constitutional values and structures. Finally, we discuss the constitutional issues to which leading proposals would give rise and evaluate whether the proposals could be achieved without constitutional amendment. Given the importance of concerns about the Court's power in relation to the elected branches—and given the relative lack of attention disempowering proposals have received compared to some of the other reforms discussed in this Report—a key aim of this Chapter is to inform future debate on these topics.[12]

I. Proposals to Restrict the Supreme Court's Jurisdiction

One set of proposals to reduce the power of the Supreme Court involves limiting the Court's jurisdiction to hear and decide certain types of cases. Over the last fifty years, various members of Congress have proposed bills that would strip the jurisdiction or authority of the Supreme Court—sometimes in conjunction with the jurisdiction of other courts—to rule on the constitutionality of anti-abortion legislation,[13] school prayer,[14] the Affordable Care Act,[15] prohibitions against pornography,[16] local mandates to recite the Pledge of Allegiance,[17] and the now-invalidated Defense of Marriage Act.[18] Proponents of such jurisdiction-stripping measures may hope that limiting the Court's power in this way would shift control over affected public policies to the political and democratic processes. However, we note that jurisdiction stripping has no inherent partisan valence and could be utilized to serve the ideological goals of nearly any constituency with the political capacity to enact it.

Jurisdiction stripping has long been a topic of debate among legal academics as well, and it has drawn new attention in the last few years. For example, one commentator recently suggested that Congress might use jurisdiction stripping to protect specific legislation, such as a hypothetical federal wealth tax, from judicial invalidation.[19] Others have proposed jurisdiction stripping as a general means of disempowering the Court and shifting authority to

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more democratically accountable institutions.[20] Jurisdiction stripping is also a mechanism that has been used in other countries to make apex courts more politically accountable.[21]

Though the academic debate has been robust, no recent commentator has offered a programmatic blueprint for jurisdiction stripping. In the analysis that follows, we provide a brief historical background concerning congressional efforts to strip courts of their jurisdiction, an evaluation of various types of jurisdiction-stripping proposals, and an assessment of the constitutionality of jurisdiction stripping in its various forms.

At bottom, one cannot assess the constitutionality of jurisdiction stripping in the abstract. Congress certainly has some power to impose limits on the appellate jurisdiction of the Supreme Court. However, the extent of that power is unclear, and the constitutionality of specific proposals would depend upon the particular details of those proposals. The Commission does not have a firm view on the overall merits of jurisdiction stripping, but we are skeptical that the aim of promoting more democratically accountable control of public policy can be achieved solely by limiting the jurisdiction of the Supreme Court.

A. Constitutional and Historical Background

The Constitution undisputedly gives Congress power to grant and withhold the jurisdiction of the federal courts, though the precise scope of that power is much debated. Article III of the Constitution vests the Supreme Court with "original" jurisdiction in a small category of cases. Article III then specifies that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*."[22] Although the scope of Congress's power under the Exceptions Clause has never been settled definitively, Congress always has made some exceptions to the Court's appellate jurisdiction. The 1789 Judiciary Act, for example, made no provision for Supreme Court review of criminal cases tried in the lower federal courts.[23]

The Constitution also contemplates broad congressional power to determine and adjust the jurisdiction of the lower federal courts. As the result of a deliberate compromise at the Constitutional Convention, Article III authorizes Congress to create lower federal courts but does not require it to do so. It provides instead that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[24] This language has always been understood to authorize Congress to create or not create lower courts, and to vest the lower courts with less jurisdiction than the maximum amount that Article III would permit.

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In the 1789 Judiciary Act, Congress accepted the Constitution's invitation to create lower federal courts and gave them broad jurisdiction, but Congress also imposed significant limitations. For example, the Act included jurisdictional dollar-amount requirements not only for cases brought by parties from different states (what is known as diversity jurisdiction), but also for civil actions brought by the United States.[25] The 1789 Judiciary Act also omitted any general grant of jurisdiction to the lower federal courts to address suits arising under the Constitution, laws, and treaties of the United States. Such cases could be filed only if they happened to fall within other more specific grants of jurisdiction, which many did not.

From the beginning, moreover, the federal courts' exercise of their jurisdiction conferred by Congress provoked occasional controversy and calls for statutory revision. In the early decades of constitutional history, contention surrounded the Supreme Court's appellate jurisdiction under Section 25 of the 1789 Judiciary Act to review the decisions of state supreme courts. Throughout the antebellum era, a number of states and state courts objected that Supreme Court review of state court decisions was incompatible with the partial sovereignty of states and their institutions as guaranteed by the Constitution. In 1831, the House Judiciary Committee reported out a bill that would have stripped the Supreme Court's jurisdiction to review state court judgments, but that measure failed on the floor amid concerns about asserted state authority to nullify acts of Congress.[26]

Following the Civil War, fearing that the Supreme Court might invalidate the Military Reconstruction Act,[27] Congress enacted a statute depriving the Court of appellate jurisdiction over a pending habeas corpus case that presented important constitutional questions concerning Reconstruction. The Court upheld this deprivation of its appellate jurisdiction in *Ex parte McCardle*.[28] However, in upholding this jurisdiction-stripping statute, the Court's view of Congress's power remained ambiguous. The Court noted that although Congress had eliminated one avenue for parties to bring their challenges to the Military Reconstruction Act to the Court, it had potentially left open another avenue that could be used in future cases.

In another case from the Reconstruction Era, *United States v. Klein*, the Supreme Court invalidated a statute that made it harder for pardoned rebels to receive compensation from the United States.[29] Formally, the statute directed both the Court of Claims and the Supreme Court to dismiss "for want of jurisdiction" certain claims against the United States in which a party relied on a presidential pardon to establish proof of loyalty during the Civil War. The Court issued an opinion whose rationale, to this day, has inspired uncertainty and debate. It held that a statute that confers Supreme Court jurisdiction up to "a given point" in a case, but then requires the Court to dismiss that case "when it ascertains that a certain state of things exists,"

is "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[30] In other words, limits exist on Congress's power to make exceptions, though there is debate about what these limits are.

Congress enacted a small spate of legislation restricting the jurisdiction of the federal courts during the 1930s, primarily to limit the remedies lower federal courts could issue for violations of the law. The Norris-LaGuardia Act of 1932 sharply limited the capacity of "the courts of the United States" to issue injunctions "in a case involving or growing out of a labor dispute."[31] The Supreme Court upheld that restriction against a constitutional challenge in *Lauf v. E.G. Shinner & Co*.[32] The Johnson Act of 1934 stripped the federal courts of jurisdiction to enjoin state orders fixing rates for public utilities whenever certain conditions were satisfied, including where "[a] plain, speedy and efficient remedy" for illegality was available in state court.[33] The Tax Injunction Act of 1937 similarly provided that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[34]

Since at least the 1950s, members of Congress regularly have introduced legislation that would strip the Supreme Court, the lower federal courts, or both, of jurisdiction to resolve particular hotly contested and politically salient constitutional issues.[35] Only one of these proposals, the Military Commissions Act of 2006, has ever been enacted into law (and that statute was subsequently invalidated, as noted below). In the 1950s, Congress gave serious consideration to bills that would have restricted the Supreme Court's jurisdiction to review challenges to national-security legislation.[36] In the 1970s, a number of proposals sought to limit federal jurisdiction to order busing as a remedy for school segregation.[37] The 1980s witnessed repeated failed proposals to limit federal jurisdiction over challenges to abortion restrictions and school prayer.[38] In 2004, the House of Representatives enacted bills that would have deprived both the lower federal courts and the Supreme Court of jurisdiction over suits challenging the Defense of Marriage Act,[39] as well as over suits against laws requiring students to recite the Pledge of Allegiance in school.[40] But those measures died in the Senate. In more recent years, members of Congress have introduced jurisdiction-stripping legislation involving abortion, religious liberty, and other matters.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court's certiorari jurisdiction to review decisions by the federal courts of appeals denying prisoners convicted by state courts the permission to file second or "successive" petitions for federal writs of habeas corpus.[41] The Court upheld that limitation in *Felker v. Turpin*.[42] In doing so, however, it emphasized that the AEDPA provision curbing the Court's

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certiorari jurisdiction did not deprive it of jurisdiction to consider original petitions for habeas. AEDPA would "inform" its consideration of such petitions, the Court said, but not exert a preclusive effect.

The Detainee Treatment Act of 2005, as amended by the Military Commissions Act of 2006, purported to strip all courts of the United States, including the Supreme Court, of habeas corpus jurisdiction in all cases brought by noncitizens being detained as enemy combatants. (Congress instead tried to provide a substitute for habeas corpus: providing the D.C. Circuit with limited review of detention decisions made by non-Article III military tribunals.) But the Supreme Court held in *Boumediene v. Bush*[43] that the withdrawal of habeas jurisdiction violated the Suspension Clause of Article I, Section 9 of the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[44] The Court did not opine on jurisdiction stripping outside of the habeas context.

Overall, the Constitution gives Congress power to limit the Supreme Court's appellate jurisdiction. This was the conclusion of the various experts who testified before this Commission on the issue.[45] However, Congress's jurisdiction-stripping power is not unlimited, and neither the Court's jurisprudence nor past practice fully defines its reach or scope. Thus, the constitutionality and policy merits or demerits of jurisdiction-stripping proposals are contingent on the proposals' details. We evaluate those details below.

B. Evaluation of Current Jurisdiction-Stripping Proposals

In this Section, we consider proposals to strip courts of their jurisdiction to review the constitutionality of federal and state legislation. Jurisdiction-stripping legislation might also seek to shield executive action from judicial review, though we are aware of fewer proposals to do so. Our analysis necessarily takes a selective approach, given the many possible kinds of jurisdiction-stripping measures. We focus mostly on issue-specific jurisdiction-stripping legislation that would seek to disempower courts from ruling on a specific law or type of law. Examples include proposals that would bar jurisdiction over challenges to a wealth tax or to a law regulating abortion. We omit discussion of most general jurisdiction-stripping bills, such as those that exclude relatively unimportant cases (as measured by dollar amount, for example) from the federal courts. We do consider general jurisdiction-stripping efforts insofar as they would seek to temper or eliminate the federal courts' authority to declare legislation unconstitutional, and thereby to decrease the courts' power relative to other institutions of government.

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In evaluating jurisdiction stripping, we also differentiate among proposals based on the courts they would affect: Some proposals would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Others would withdraw jurisdiction from all federal courts, including the district courts and courts of appeals, while leaving state court jurisdiction intact. Still others would withdraw jurisdiction not only from the Supreme Court, but also from all other federal and state courts. The merits and consequences of each type of proposal would differ, as we explain.

To organize our analysis, we begin by considering the goals of jurisdiction-stripping proposals and the proposals' likely efficacy in achieving those goals. We then consider the consequences that successfully implementing the proposals might have for the functioning of the constitutional system.[46] We defer consideration of the constitutional issues that their enactment would present until Section I.C. We do not evaluate the specific policy goals that any jurisdiction-stripping proposal might serve.

1. Goals and Efficacy

Most prominent jurisdiction-stripping proposals today would shield specific, substantively defined issues, legislation, or policies from judicial review by the Supreme Court, by all federal courts, or by all federal and state courts. The goals of such proposals are overwhelmingly substantive in nature—to protect the particular laws in question from judicial invalidation. Nevertheless, proposals to curb judicial jurisdiction can also have more abstract goals, involving the redistribution of decisionmaking authority within our scheme of government. More specifically, some proponents of jurisdiction stripping regard it as a means of promoting greater democratic accountability by transferring power from the Supreme Court to more democratically responsive institutions.[47]

The Commission does not take a position on the desirability of any particular substantive proposal. These issues are ones over which Commissioners disagree. However, in analyzing the issue of jurisdiction stripping, we are skeptical that jurisdiction stripping could promote meaningful democratic accountability if Congress were to restrict the appellate jurisdiction of the Supreme Court alone.

The reallocation of authority would be most dramatic if Congress were to strip jurisdiction from all courts, including state as well as federal courts, to entertain constitutional challenges to particular substantive legislation. In foreclosing all judicial review of legislation, Congress might be viewed as effectively claiming authority to determine that any covered statutes—such as one imposing a wealth tax or those banning abortions—were constitutionally valid.

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Proponents of such legislation, moreover, would likely defend it as enhancing political democracy and accountability by enabling Congress, as a democratically accountable institution, to authoritatively resolve a constitutional issue about which reasonable minds could be expected to differ.[48]

However, the ability of issue-specific jurisdiction-stripping legislation to promote political democracy seems by definition limited, since legislation of this kind would still leave responsibility for the overwhelming bulk of constitutional interpretation in the courts, despite stripping it from discrete contexts. Similarly, general jurisdiction-stripping bills that affect a smaller subset of courts rather than the full set of federal and state courts would have limited effect in enhancing democratic accountability in the domain of constitutional interpretation.

Measures that would restrict the appellate jurisdiction of the Supreme Court alone, for example, would not straightforwardly transfer interpretive authority from the judiciary to Congress or to any other democratically accountable institution. They would instead reallocate power from the Supreme Court to the lower courts. There seems to be little reason to preclude Supreme Court jurisdiction over specific constitutional questions that remain subject to decision by the lower courts. Precluding Supreme Court review alone would do little or nothing to enhance political democracy. Nor would it advance interests in justice or accuracy to permit different courts to issue incompatible rulings on the same substantive constitutional issue with no possibility of Supreme Court review.

Proposals that would withdraw jurisdiction from all federal courts but allow continued adjudication of a constitutional issue in the state courts might more plausibly aspire to promote a democracy-enhancing goal. They would leave responsibility for constitutional decisions in the hands of state judges who are, in many instances, democratically elected or otherwise amenable to the influence of public opinion. By contrast, Article III of the federal Constitution seeks to insulate federal judges from political influence through guarantees of life tenure and protection against salary reduction.

We are uncertain, however, about the precise extent to which a transfer of adjudicative power from federal to state courts would enhance the influence of political majorities over the resolution of constitutional issues. To reach such a conclusion would require resolution of myriad empirical and normative issues. State court judges would remain bound by the Supremacy Clause, which provides that the Constitution is the "supreme Law of the Land" and that "the Judges in every State shall be bound thereby,"[49] but it is not clear whether state court judges would be bound by preexisting Supreme Court precedents speaking to the

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constitutional question over which Congress had precluded formal Supreme Court review. If state courts found that prior Supreme Court precedents tied their hands, then this sort of jurisdiction stripping would be limited as a means of promoting democratization of authority over constitutional interpretation. An unintended effect might even be to freeze in place the Supreme Court doctrine on the books at the time of the jurisdiction stripping.

Proposals that would strip the jurisdiction of all courts to rule on the constitutionality of federal (and possibly also state) legislation would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review. Whether congressional preclusion of all judicial review of specific legislation or policies could fairly be described as injecting political accountability into the process of constitutional interpretation would depend on (a) whether Congress actually purported to conclude that the legislation or policies that it shielded from judicial review were constitutionally valid and (b), if so, whether it took its responsibilities to apply and interpret the Constitution seriously. Some commentators believe that legislatures in countries that do not have judicial review discharge their responsibilities to protect individual rights with impressive conscientiousness.[50] It is also imaginable, however, that legislation precluding all judicial challenges to particular statutes or programs could have the purpose and effect of undermining constitutional rights, because Congress and state legislatures might not feel bound to protect them.

2. Consequences for the Functioning of the Federal System

The systemic consequences of jurisdiction-stripping legislation would similarly depend on the details of any particular measure that Congress might adopt. Legislation that withdrew appellate jurisdiction from the Supreme Court but retained jurisdiction in the lower federal courts and in state courts would obviously diminish the capacity of the Supreme Court to ensure uniformity in constitutional interpretation (and consistency in constitutional outcomes) across federal courts of appeals and state supreme courts. The courts of appeals and state supreme courts could become the courts of last resort with respect to the constitutional status of federal legislation. Thus, a federal statute could be held constitutional by one circuit and unconstitutional by another, with no apex court to resolve the circuit split. We would regard this resulting lack of uniformity on matters of great political or constitutional salience as a significant cost.

In some cases, moreover, the absence of opportunity for appeal to the Supreme Court could result in a single lower court having the capacity to utter the last, controlling word on

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an important constitutional issue. This result would occur if, for example, a court of appeals upheld a nationwide injunction against the enforcement of a federal statute or policy based on a constitutional ruling. Partial jurisdiction stripping would thus empower the lower courts.

A statute that simultaneously withdrew jurisdiction from both the Supreme Court and the lower federal courts could have similar effects in producing unreconciled disagreements among state courts about important constitutional issues, leading to variation in the U.S. Constitution's reach and effects. Furthermore, many courts have concluded that state courts lack the power to issue injunctions against federal officials, which would contribute to further disagreement and tension.[51]

A jurisdiction-stripping statute that bars state as well as federal courts from exercising jurisdiction over constitutional challenges to legislation would have even farther-reaching systemic consequences. Whether by accident or design, it would impliedly reject longstanding assumptions about what it means to possess a constitutional right in the United States. More specifically, it would make rights more dependent on legislative exposition, a task that legislatures may not currently be well-positioned to undertake. Legislatures are not currently adept at anticipating all possible future applications of a statute and crafting exceptions for cases that would present constitutional difficulties. It is possible that legislatures might enhance their relevant skills and resources if courts no longer played such a dominant role, for example by expanding legal staff dedicated to constitutional analysis. To the extent that jurisdiction stripping reflects majoritarian impulses while depriving individuals of any right to seek redress in court, it might also make it harder for minorities to vindicate individual rights that, in some instances, are essential to constitutional democracy itself.

A final systemic consequence that merits consideration is the extent to which a particular jurisdiction-stripping measure would tend to contribute to partisan polarization and institutional instability.[52] There is little empirical data on this point.[53] One might worry that the turn by transient majorities in Congress to jurisdiction stripping to insulate their preferred policy objectives from judicial scrutiny could give rise to escalating jurisdiction stripping as control of Congress changes hands, ultimately resulting in serious abuses of power. Against this worry, it might be argued that the fact that Congress has long had this tool at its disposal and has used it infrequently suggests this concern is more hypothetical than real. However, we cannot rule out the possibility that in the current era, lawmakers might resort to jurisdiction stripping with increasing frequency in partisan political struggles.

C. The Constitutional Permissibility of Jurisdiction Stripping

Debates about the constitutional limits on Congress's power to restrict the jurisdiction of the Supreme Court, the lower federal courts, and the state courts have generated an enormous literature that was described decades ago as already "choking on redundancy."[54] Here we can do no more than highlight some areas of virtual consensus among scholars and identify some of the issues that different types of jurisdiction-stripping legislation would pose.

1. Sources of Congress's Regulatory Power

In order to enact jurisdiction-stripping legislation, Congress must be able to point to a specific source of authority within the Constitution. Insofar as legislation restricting the appellate jurisdiction of the Supreme Court is concerned, power would come from the Exceptions Clause, as discussed in Section I.A, possibly in conjunction with the Necessary and Proper Clause.[55]

Where jurisdiction-stripping legislation also extends to the lower federal courts, a prima facie source of authority lies in Article III's Judicial Vesting Clause, which provides that Congress "may from time to time ordain and establish" tribunals "inferior" to the Supreme Court.[56] Traditional understandings hold that the power to create lower courts includes a power to prescribe and limit their jurisdiction. If a further source of authority were needed, the Necessary and Proper Clause may provide it.

Insofar as Congress might seek to restrict state court jurisdiction in conjunction with a restriction on the appellate jurisdiction of the Supreme Court, its authority would rest solely on the Necessary and Proper Clause. Congress could deprive the state courts of jurisdiction to entertain a constitutional challenge to state or federal legislation only if doing so was "necessary and proper for carrying into Execution" one of the powers of the federal government,[57] which presumably would include making effective or viable Congress's restraints on the Court's appellate jurisdiction.

Finally, we note that jurisdiction-stripping legislation might have a spillover impact on the Supreme Court's original jurisdiction. Because the Supreme Court's Article III original jurisdiction extends to cases "in which a State shall be [a] Party," any case brought by a state could potentially be filed under the Court's original jurisdiction.[58] For instance, the landmark voting rights case of *South Carolina v. Katzenbach*,[59] which upheld the Voting Rights Act against a broad constitutional challenge, was brought within the Court's original jurisdiction. We note that states have filed several high-profile challenges to federal policies in recent

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years.[60] While few of these challenges have been brought as original jurisdiction suits, the practice could take on more importance if politically salient jurisdiction-stripping legislation were enacted. The prospect of states filing original actions is significant partly because it is questionable whether Congress can restrict the *original* jurisdiction of the Supreme Court; the Article III exceptions power does not extend to Supreme Court original jurisdiction. Although the current original jurisdiction statute does not authorize the full extent of jurisdiction that the Article III appears to contemplate, some Justices and commenters have expressed doubts about Congress's capacity to confine the Court's original jurisdiction short of its constitutionally specified bounds.[61] In other words, original jurisdiction could potentially be an important loophole in many jurisdiction-stripping proposals.

2. Sources of Limitations on Congress's Jurisdiction-Stripping Power

For analytical purposes, it is helpful to distinguish two kinds of limitations on Congress's powers to restrict the jurisdiction of the Supreme Court, the lower federal courts, and state courts. One category includes limitations that are inherent in, or "internal" to, Article III's grant of jurisdiction-limiting powers to Congress. Another category of limitations arises from constitutional provisions that circumscribe congressional power by creating individual rights. In scholarly literature, such limits are often referred to as "external" limits on congressional power.

a. *Limits from Within Article III*

It is difficult to identify specific examples of clear and noncontroversial internal limits, because each possible limit is much debated among scholars. That said, it is easy to give general examples that illustrate the idea. In perhaps the best-known example, Professor Henry M. Hart, Jr., argued in a much-celebrated contribution to the federal courts literature that the Constitution's provision that "the judicial Power of the United States shall be vested in one supreme Court" establishes an implicit limit, internal to Article III, on Congress's power to make exceptions to the Court's appellate jurisdiction.[62] Constitutionally authorized restrictions, Hart maintained, cannot go so far as to "destroy the essential role of the Supreme Court in the constitutional plan." To offer an illustration of this concern, a statute that limited the Court's appellate jurisdiction to cases presenting issues of statutory interpretation only—and thus excluded all constitutional issues—might be thought to destroy the Court's essential role and thus overreach Congress's power under the Exceptions Clause. We note, however, that some scholars and commentators appear unpersuaded by Hart's argument on this point.[63]

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In another controversial example, some have argued that a jurisdiction-limiting statute would exceed Congress's powers if it were enacted for constitutionally forbidden purposes, whatever those might be.[64] Whether such an inquiry into purpose is appropriate is a subject of debate. *Ex parte McCardle* contains a dictum clearly precluding the inquiry. In response to the argument that Congress had withdrawn the Court's appellate jurisdiction for the forbidden purpose of preventing the enforcement of a constitutional right, the Court answered that "[w]e are not at liberty to inquire into the motives of the legislature."[65] But there is arguably language in *United States v. Klein* that supports the inquiry into forbidden purposes; there, the Court stated that jurisdiction-stripping legislation that is enacted "as a means to an end" that is not constitutionally valid "is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power."[66] In addition, Supreme Court decisions in the twentieth and twenty-first centuries have made legislative motives relevant to the assessment of statutes' constitutional validity under a broad range of other constitutional provisions, such as the First Amendment.[67] In light of those decisions, it is arguable that motive-based analysis could now be invoked.

b. *Limits from Elsewhere in the Constitution*

No one doubts that rights under some provisions of the Constitution define limits on Congress's power to restrict the jurisdiction of the Supreme Court and other courts. In *Boumediene v. Bush*, the Supreme Court affirmed that the Suspension Clause constitutes a rights-based limit on congressional power to curb jurisdiction over petitions for the writ of habeas corpus.[68] Although *Boumediene* was decided by a narrowly divided Court, it should be uncontroversial to say that a statute stripping jurisdiction over suits brought by racial minorities or adherents of a particular religion or political party would violate constitutional guarantees against discrimination.

Henry Hart famously argued that jurisdiction-limiting legislation would violate the Due Process Clause if it removed all grants of jurisdiction and all judicial remedies through which those rights might be vindicated, because a law of that kind would effectively destroy constitutional rights. According to Hart, it would be "monstrous illogic" to construe Congress's power to limit jurisdiction and withhold judicial remedies as a de facto power to destroy constitutional rights.[69] But there is little case law or other authority identifying where exactly the lines between the permissible and the impermissible are drawn.

Hart did not believe—and the Supreme Court has denied—that the Constitution guarantees an effective remedy in court to every person whose constitutional rights have been

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violated. Hart's concern about the nullification of rights appears to have involved systemic effects, such as those of imagined legislation that would make it impossible for anyone ever to judicially vindicate a particular constitutional right at all. But Hart again did not attempt line drawing of his own and ultimately equivocated even with regard to the question of whether and when a total deprivation of jurisdiction and remedies to enforce a right might violate the Constitution. "The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented," he wrote.[70]

3. The Constitutionality of Particular Jurisdiction-Curbing Proposals

It would be infeasible to attempt to apply the principles delineated above—many of which, as we acknowledged, are disputed anyway—to all of the specific types of jurisdiction-curbing legislation that Congress might enact. Instead, we analyze some of the general issues that would arise from jurisdiction-curbing legislation within each of the three categories that we distinguished at the outset of Section I.B. First, we consider proposals that would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Second, we consider proposals that would withdraw jurisdiction from all federal courts, while leaving state court jurisdiction intact. Finally, we consider proposals that would withdraw jurisdiction from all federal and state courts, including the Supreme Court, to rule on the constitutionality of federal (and possibly also state) legislation.

a. *Restricting the Jurisdiction of Only the Supreme Court*

If Congress were to withdraw the appellate jurisdiction of the Supreme Court over a class of cases—such as those challenging the constitutionality of a wealth tax or of prohibitions against abortion—while allowing such challenges to be litigated in other courts, including federal district courts and courts of appeals, challengers would likely argue that the restriction overstepped congressional power under the Exceptions Clause by precluding the Court from performing a function essential to its status as the nation's "one supreme Court." The argument would be that the Court is deprived of an aspect of its "supreme" status when it is denied the opportunity to pronounce authoritatively on a justiciable issue with respect to which the decisions of lower courts may diverge and might even (from the Court's perspective) err egregiously.[71] Proponents of this argument could acknowledge Congress's authority to withdraw rights to de novo appellate review by the Supreme Court, but insist that the Court must retain some minimal capacity to correct clear lower court errors—capacity that traditionally existed through "discretionary writs, such as mandamus, habeas corpus, and prohibition."[72]

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When the Supreme Court confronted a statute that deprived it of appellate jurisdiction over a narrow class of court of appeals decisions in the habeas corpus case of *Felker v. Turpin*, the Court upheld the statute, but it emphasized—as it had more than a century earlier in *Ex parte McCardle*[73]—that it retained jurisdiction to oversee the courts of appeals by entertaining original applications for the writ.[74] As a result, there appears to be no squarely on-point precedent deciding whether Congress could more categorically strip the Supreme Court of all jurisdiction over a particular issue or set of issues that the lower courts could continue to decide. Perhaps the only clear conclusion is this: A total preclusion of all opportunity for Supreme Court oversight of lower court decisions involving specific issues, statutes, or policies would run a greater risk of judicial invalidation than a less-than-total preclusion.

b. *Restricting the Jurisdiction of All Federal Courts, but Not State Courts*

There also appears to be no authoritative ruling and no consensus among scholars on the permissibility of Congress's stripping all federal courts of jurisdiction over a class of cases—which again might be cases challenging the constitutionality of a wealth tax or prohibitions against abortion—while permitting those specified issues to be litigated in the state courts. Reviving an argument that Justice Joseph Story advanced in the iconic case of *Martin v. Hunter's Lessee*,[75] one prominent modern commentator has argued energetically that legislation of this kind would violate the provision of Article III, Section 2, Clause 1 that "[t]he judicial Power [of the United States] shall extend *to all Cases, in Law and Equity, arising under this Constitution*, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[76] Under this principally text-based argument, the Exceptions Clause permits elimination of the Supreme Court's appellate jurisdiction in cases "arising under" federal law if and only if they are subject to the jurisdiction of the lower federal courts. Similarly, Congress can divest the lower federal courts of jurisdiction over cases presenting federal questions that remain within the Supreme Court's appellate jurisdiction to review state court judgments. But, the argument maintains, Congress cannot simultaneously preclude the exercise of jurisdiction by both the Supreme Court and the lower federal courts in cases arising under the Constitution, laws, and treaties of the United States.

Other distinguished modern scholars have disagreed with this argument on both originalist and precedent-based grounds.[77] Among other arguments, they maintain that Article III's provision that the judicial power shall extend to "all cases" under the Constitution serves mainly to clarify that Congress can provide for federal jurisdiction over both civil and criminal actions if it chooses to do so.[78]

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c. *Restricting the Jurisdiction of All Courts, Including State Courts*

Simultaneous preclusion of jurisdiction by all courts to consider challenges to the constitutional validity of legislation would present a plethora of serious constitutional issues. Among other things, because a statute precluding all judicial jurisdiction would necessarily be invalid if a preclusion of all federal jurisdiction would be invalid, the grounds for constitutional objection cumulate as the scope of an attempted issue-specific preclusion of judicial review expands. Here we identify a few of the distinctive issues that a preclusion of all judicial jurisdiction would present, though without pretense of exhaustive treatment.

If Congress sought to deprive state courts of jurisdiction to rule on challenges to the constitutional validity of state legislation under the U.S. Constitution, there would be a serious question about the source of Congress's authority to do so. It is not obvious that a federal statute divesting state courts of jurisdiction to rule on the constitutionality of state legislation, for purposes other than granting exclusive jurisdiction to the federal courts, would be "necessary and proper" for carrying any federal power into execution.

If Congress sought to deprive all courts of jurisdiction to rule on the constitutional validity of federal legislation, a similar question would arise about the source of Congress's power. It might be argued that legislation of this kind would be "necessary and proper" to implement whatever substantive power supported the enactment of the federal legislation that Congress sought to shield from judicial scrutiny—for example, a statute imposing a wealth tax or barring abortions. But that conclusion would be disputable. The Necessary and Proper Clause, and the doctrine interpreting it, leave room for an argument that a categorical bar on judicial challenges to arguably unconstitutional legislation is not necessary and proper because of its adverse impact on constitutional rights.

Depending on the details of any particular measure that Congress might enact, rights-based restrictions on congressional authority would likely come into play, as well. The restrictions would perhaps be plainest if Congress sought to provide for coercive enforcement of a statute by the courts while purporting to withdraw judicial jurisdiction to entertain constitutional objections to the statute that courts were charged with enforcing. Consider, for example, if a doctor were prosecuted for violating a statute that forbade performing abortions, or a taxpayer were prosecuted for refusing to pay a wealth tax. If Congress purported to bar a court from entertaining defenses that the abortion prohibition or the wealth tax were unconstitutional, the doctor or the taxpayer would have a more than colorable argument that

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the "jurisdictional" statute violated the Due Process Clause or otherwise intruded on the courts' exercise of an irreducibly judicial function.

d. *Conclusion on Constitutionality*

Given the Exceptions Clause, Congress undoubtedly has some capacity to disempower the Supreme Court by restricting its jurisdiction if Congress should choose to do so. But the precise scope of congressional power is uncertain. Moreover, even if we were prepared to make conclusions about the proper resolution of disputed issues, the requisite judgments would depend on the fine-grained details of particular proposals.

That said, we offer three general conclusions: First, congressional legislation aimed at disempowering the Supreme Court by limiting its jurisdiction to resolve particular constitutional issues would likely trigger constitutional challenges. Second, depending on the precise form that jurisdiction-limiting legislation might take, the Supreme Court could plausibly find some of the possible challenges to be meritorious. Third, the more that jurisdiction-limiting legislation leaves open alternative avenues for judicial enforcement—such as through state courts and lower federal courts—the more likely it is to survive constitutional challenges. However, leaving open alternative avenues for judicial enforcement might also hinder jurisdiction-stripping legislation from achieving the ends that its proponents would wish to realize.

II. Proposals for Supermajority Rules or Deference Rules at the Supreme Court

A second way to reduce the Supreme Court's power would be to impose a supermajority voting requirement for decisions finding actions of the political branches unconstitutional, or alternatively, to require the Court to apply a deferential standard of review in constitutional cases. These proposals would make it more difficult than it is today for the Supreme Court to invalidate legislation and other acts of the elected branches on constitutional grounds. Like other proposals discussed in this Chapter, they therefore would shift some power away from the Court, although they would still leave the Court as the ultimate authority over constitutional matters.

This Part provides an overview of supermajority voting requirements and deferential standards of review as potential reforms. It begins with a historical and comparative look at proposals for supermajority voting requirements advanced at earlier times in U.S. history and

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approaches adopted in foreign and state courts. It next considers the advantages and potential drawbacks of a supermajority voting rule and assesses the feasibility of particular approaches to implementation, particularly by considering the implications for the lower courts of a supermajority rule at the Supreme Court. It then considers the advantages and drawbacks of reducing the Court's power by requiring a deferential standard of review. Finally, this Part concludes by examining Congress's power under the Constitution to impose either type of reform.

A. Supermajority Voting Requirements—Historical and Comparative Context

Proposals for supermajority voting requirements generally focus on the U.S. Supreme Court. Federal district judges preside alone, or on three-judge panels, such that decisions by the district courts are either unanimous or by 2-1 panel vote. Similarly, federal courts of appeals typically preside in three-judge panels, deciding cases either unanimously or by 2-1 panel vote, though when they sit en banc, a supermajority requirement could be applied to change their current simple majority voting practice. Congress might prescribe supermajority voting rules for state courts, but this is an uncommon suggestion and, as discussed below, it may be subject to substantial constitutional objections.

By longstanding practice, the U.S. Supreme Court decides cases by simple majority vote. Neither Article III of the Constitution nor Congress in the 1789 Judiciary Act directly specified how the Supreme Court's cases should be decided. From the beginning, however, the Court appears to have assumed that a simple majority vote was sufficient to determine its rulings—a conclusion generally consistent with the practices of Anglo-American multimember courts of the time.

The first proposal in Congress for a supermajority voting requirement at the Supreme Court seems to have been made in 1823, and over sixty such proposals have been offered at various times since then.[79] During the Reconstruction Era, the Republican-controlled House of Representatives passed a bill imposing a supermajority vote requirement for invalidating federal legislation, but the Senate did not act on it.[80] In the 1920s, Idaho Senator William Borah made an influential proposal to require that:

> in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls and those in which a State shall be a party, where is drawn in question an Act

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> of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court concur before pronouncing said law unconstitutional.[81]

A more recent proposal, from 1967, encompassed rulings against both state and federal law:

> The Supreme Court may not in any case hold that any provision of an Act of Congress, an Act of the legislature of any State, or a constitution of a State is invalid because it violates a provision of the Constitution of the United States unless at least six Justices of the Supreme Court concur in that holding.[82]

Many (perhaps all) of these proposals appear to have been reactions to particular rulings or lines of rulings of the Court, or concerns about particular rulings the Court might issue. For example, in the 1820s, members of Congress were principally concerned about Supreme Court decisions invalidating state laws.[83] After the Civil War, Congress worried that the Court might invalidate Reconstruction legislation or even question the validity of the Fourteenth Amendment itself; in the early twentieth century, Senator Borah and his supporters were reacting to pro-business decisions issued by narrow majorities of the Court.[84]

Although Congress never enacted a supermajority rule for Supreme Court voting, North Dakota, Nebraska, and Ohio each adopted supermajority voting for their supreme courts in the early twentieth century. The North Dakota Constitution provides that the state supreme court "shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide."[85] Similarly, the Nebraska Constitution provides: "No legislative act shall be held unconstitutional except by the concurrence of five [of seven] judges."[86] A scholarly examination of experience under these provisions suggests that they have not posed significant operational difficulties.[87] Ohio adopted a similar constitutional amendment in 1912, which it repealed in 1968 after experiencing difficulties in practice.[88]

Although majority voting is the most common practice among multimember courts worldwide, a number of high courts outside the United States (including in Mexico and South Korea) operate under a supermajority voting requirement for constitutional adjudication. According to a recent study, at least ten countries have such a requirement, typically imposed in their constitutions.[89] Some of these countries have substantial experience with constitutional litigation under supermajority voting rules. For example, South Korea adopted the current version of its supermajority rule for its constitutional court in 1987, requiring the votes of six

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out of nine justices to find a statute unconstitutional. A study of the South Korean constitutional court counted sixty-two cases from 1987 to 2016 decided by a 4-5 vote (that is, in which five, but not more than five, justices thought the statute was unconstitutional), along with a substantial docket of constitutional cases in which the votes were not so closely divided.[90] The study does not suggest significant tensions arising in Korean law or in the conduct of the court as a result of the supermajority voting rule, although it identifies a few issues of implementation.[91] Comparative experience also indicates that a supermajority voting rule does not necessarily prevent a constitutional court from issuing important rulings finding statutes to be unconstitutional. For example, Mexico's Supreme Court—despite operating under a rule generally requiring the vote of 8 of 11 justices to invalidate legislation—has issued a number of important constitutional rulings against the government.[92]

B. Evaluating Supermajority Voting Requirements

In this section, we begin by articulating the arguments made by proponents of supermajority voting requirements as well as those made by skeptics. We then evaluate the extent to which supermajority voting rules would achieve the goals of their proponents and identify some implementation concerns that must be taken into account when considering these proposals.

1. Goals and Risks

The principal goal of proposals for supermajority voting requirements is to make it more difficult for the Court to invalidate laws or other government actions on constitutional grounds. A supermajority voting requirement would require broader agreement among the Justices with the judgment of unconstitutionality than under a simple majority voting rule. In the view of advocates of these proposals, the Court today is not sufficiently deferential to lawmakers by historical standards; it is too prone to overturning laws and thwarting the outcomes of the democratic process.[93] Relatedly, proponents emphasize that the Court has resolved too many disputed constitutional issues by narrow 5-4 majorities, particularly in the modern era.[94] This observation sometimes centers specifically on the Court's perceived willingness to overturn acts of Congress, while other times it is raised more generally about the Court's resolution of disputed matters of social policy. Some proponents of these proposals view supermajority voting requirements as a bright-line, readily enforceable means of approximating the kind of deference to legislative judgment that James Bradley Thayer sought to achieve through a "rule of [judicial] administration" under which courts would invalidate congressional legislation only in cases of "clear" unconstitutionality.[95]

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Some scholars also ground their support for supermajority voting on the greater likelihood that the Court will reach correct constitutional decisions if a supermajority must agree that a law is unconstitutional.[96] Supermajority requirements would, in their view, also enhance deliberation and consensus-building among the Justices, leading on balance to superior outcomes.[97]

For skeptics of supermajority voting rules, a central concern is that such measures would undercut judicial capacity to protect constitutional rights against majoritarian overreach. One longstanding, conventional view of the courts and constitutional review is that they serve as a valuable countermajoritarian check on the political branches by vindicating individual and structural rights in constitutional cases, limiting the abuse of power by overweening legislatures and executive officers.[98] A supermajority voting requirement would make it more difficult for courts to protect constitutional rights as they interpret them. A related concern is that a supermajority voting rule would weaken courts' ability to protect the constitutional structures of federalism and separation of powers against encroachment by Congress. Supermajority voting rules thus might not only enhance congressional power as compared to the courts; they might also enhance congressional power as compared to the states and the executive branch.

Supporters of disempowering proposals counter that supermajority voting requirements actually may bolster constitutional rights precisely by restricting the Supreme Court, on the ground that "rights protection may well be available in superior form through political branches."[99] Instead of looking exclusively to courts as protectors of individual rights and legislatures as threats to those rights, such commentators admire legislative efforts like the Voting Rights Act as protective of constitutional rights and criticize the Court's decision to invalidate Section 4 of the Voting Rights Act in *Shelby County v. Holder*.[100] They see an important role for the political branches in promoting constitutional freedom that courts recently, in their view, have undercut.[101] Moreover, if one thinks the courts are too protective of the states and the executive branch, or that structural disputes are better worked out politically rather than through the judiciary, enhancing congressional power in the area would be an advantage.

2. Efficacy and Implementation

Any ultimate assessment of the systemic consequences of supermajority voting requirements will depend on one's perspective on the role the Supreme Court and the federal judiciary ought to play within our system of government and on how well the democratic

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lawmaking process and its various institutions currently operate. Evaluating these proposals will hinge in large part on one's view of the relative abilities of courts and legislatures to protect constitutional rights. Whatever one's perspective on this question, which we do not purport to answer, we think it useful to offer observations concerning the likely effects of a supermajority voting requirement for the Supreme Court.

We believe that supermajority voting requirements are likely to achieve at least some of the effects intended by proponents. Supermajority voting may shift authority over constitutional questions marginally away from the Supreme Court and toward other government actors by reducing the likelihood that the Court would find actions of the political branches unconstitutional. But supermajority requirements also would bring with them their own potential costs, and it is uncertain that greater "correctness" would result from supermajority voting in the absence of agreed-upon criteria for differentiating correct from incorrect decisions.[102] The extent of success would depend on how the supermajority voting requirements were imposed, and the general idea of supermajority voting gives rise to some specific implementation challenges, particularly given the wide range of cases that come before the Court in varied procedural posture. Below, we highlight a few of the many complications that might arise.

First, a supermajority requirement would complicate the Supreme Court's supervision of the courts of appeals. Though a full accounting of these technical issues would be too extensive to analyze in detail here, it is important to consider what the weight of a 5-4 decision of the Supreme Court would be in a world where a 6-3 decision is required to find a statute unconstitutional. Imagine that the Supreme Court votes 5-4 to affirm a lower court decision that invalidated a federal law on constitutional grounds. What happens to the constitutional challenge? The 5-4 vote falls short of the requisite supermajority needed to find unconstitutionality, so does the Court's decision amount to a decision to reverse the lower court judgment invalidating the statute? We would assume so, given that the principal motivation for the supermajority rule is greater judicial deference to the political branches. The alternative, in which the lower court decision is undisturbed, would not actually promote judicial deference; it would only shift power from the Supreme Court to the lower courts.

But this disjunction between the majority of judges who have heard a case and concluded that a law is unconstitutional and the legal outcome of the case dictated by the supermajority voting requirement could cause confusion for subsequent courts that must interpret the doctrinal meaning of those cases. Should courts follow the reasoning of the majority of Justices in the 5-4 case, or disregard the majority opinion and instead follow the reasoning of the four-

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Justice minority that controls the outcome of the case under the supermajority requirement? The greater precedential weight given to the minority's opinion, the greater the level of deference produced by the new supermajority requirement. These issues are novel, as far as we can tell, for U.S. law. Past practice with supermajority voting at the state level is too sparse to establish a clear model for judicial decisionmaking. As noted, other countries with supermajority voting requirements for their highest court apply their rules without substantial difficulty, but these systems are often procedurally distinct from the U.S. system, particularly in terms of appellate structure.[103]

Second, Congress might consider extending a supermajority voting requirement to lower federal courts or state courts in addition to the Supreme Court. As noted, this extension would not change current practice for lower federal courts apart from en banc hearings. Most state supreme courts use majority voting, but their cases generally involve state law rather than federal law, so the effect (assuming it applied only to decisions under the U.S. Constitution) would not be wide-reaching.

A supermajority voting requirement applied only to the U.S. Supreme Court (or to all federal courts) might have the incidental effect of empowering state courts. Even if Congress extended a supermajority voting requirement to state supreme courts when they decide federal constitutional questions, state courts would still remain free to decide the constitutionality of state laws under their state constitutions, which often contain guarantees that parallel the federal Constitution.[104] These state-law guarantees would likely increase in importance if courts were constrained in their authority to decide under the federal Constitution (assuming the supermajority vote requirement applies only to federal constitutional questions). As discussed in connection with jurisdiction stripping, it is not necessarily preferable to have state courts substitute for federal courts in constitutional review of state lawmaking.

Third, in designing a supermajority voting rule, Congress also would need to consider to which laws or actions it would apply. Supermajority voting requirements could be imposed for review of (a) only federal legislation; (b) federal legislation and federal executive actions; or (c) all federal and state lawmaking. The reduction in judicial influence vis-à-vis the other branches of government would vary in step with the reach of the supermajority voting requirement. Simply put, the more actions to which the supermajority voting requirement applied, the greater the shift in influence to other institutions such as Congress, the Presidency, and state legislatures.

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The proper specification of scope depends on the particular motivation for imposing a supermajority voting requirement. If the motivation is limited to addressing the courts' insufficient constitutional deference to Congress, then extension of the requirement to cases involving executive action or state laws seems unnecessary. However, if the motivation is a broader concern about judicial countermajoritarianism and insufficient judicial deference generally to the full political process, extension of the supermajority voting requirement to cases involving a wider spectrum of democratic actors makes more sense. Again, extension of the requirement beyond federal actors and federal law complicates the constitutional analysis, as we discuss in the next section.

Another important question of scope is whether the requirements would apply to all laws or just to those that Congress singled out on an issue-specific or even a law-specific basis. For example, instead of specifying a supermajority voting rule for all constitutional decisions of the Supreme Court, Congress might do so only for constitutional review of a wealth tax or only for constitutional review of abortion restrictions. As we discuss further in our constitutional analysis, whether a supermajority voting rule applies generally or on an issue-specific basis might influence its constitutionality as well.

No matter how the requirement is designed, a supermajority voting requirement is likely to affect only a limited number of cases as a practical matter. By its terms, the requirement would not affect cases where a majority of the Court votes to uphold the action in question. In addition, the requirement would not change the outcome where the Court finds a constitutional violation by a supermajority vote. Unlike other disempowering reforms such as jurisdiction stripping, a supermajority voting rule would leave the Court (and lower courts) with clear authority to invalidate laws for unconstitutionality. The supermajority requirement changes outcomes only where the Court would invalidate a law by a bare majority rather than a supermajority.[105]

Of course, the relatively few close cases where a supermajority voting requirement would affect the outcome may be quite important. *Shelby County v. Holder*, in which a 5-4 majority of the Supreme Court invalidated Section 4 of the Voting Rights Act, was such a case.[106] Similarly, *United States v. Windsor*, where a 5-4 Court majority declared unconstitutional part of the Defense of Marriage Act,[107] also would have been decided otherwise under a supermajority voting rule. Much of the support for disempowering reforms galvanizes around similarly controversial closely decided cases, in which the Court has divided narrowly along ideological or partisan lines. For those critical cases, supermajority voting requirements could marginally redistribute resolution of close constitutional calls to Congress, where these

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advocates contend they belong.[108] In addition, even if a supermajority voting rule changes the outcomes of only a few Supreme Court cases, the jurisprudential consequences of these decisions may be far reaching, as they may set legal precedent for a large number of lower court cases as well. For instance, a decision in which only a bare majority, but not a supermajority, of Justices thought the application of a statute to a criminal defendant violated the defendant's constitutional rights would apply potentially to many other cases involving the same statute; similarly situated defendants thus might be precluded from raising the same constitutional claim against the federal criminal statute.

An additional challenge involving the application of supermajority voting rules is that court majorities may be able to achieve their preferred outcomes despite a supermajority requirement by narrowly interpreting laws rather than finding them unconstitutional. A supermajority voting requirement would apply only when courts find a constitutional violation but (we assume) not when a court simply reads a law to have a narrow application that stunts its impact. In those cases, a court would avoid the supermajority requirement by understanding it not to be triggered in the first place. One witness testified before us that courts in Japan and the United Kingdom are widely known for their judicial restraint regarding outright invalidation of legislation, but they nonetheless engage in "wide-ranging sub-constitutional review in the guise of statutory (re)interpretation" that effectively limits the purpose and reach of challenged laws.[109]

C. Deferential Standards of Review

Another means of reducing the power of the judiciary by changing its decisionmaking practices would be for Congress to impose a deferential standard of review in constitutional cases. (We assume this reform would apply to the judiciary generally, as it appears to make little sense to impose deference only on the Supreme Court.) Like a supermajority voting requirement, this reform would have the purpose of reducing the courts' propensity to invalidate acts of Congress (or acts of the political branches and the states more generally, depending on how the standard is designed).[110] Congress could provide by statute that the federal courts shall not invalidate legislation (or other government action) unless the court concludes that it is clearly unconstitutional (or some similar standard). As mentioned earlier, James Bradley Thayer famously proposed a standard of clear unconstitutionality before courts should invalidate congressional statutes, though his proposal was principally directed to courts themselves rather than as a legislative reform.[111] Notably, the Court on its own initiative has adopted highly deferential standards of review in particular subject areas of constitutional

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adjudication, such as review of ordinary economic regulation for consistency with the Due Process and Equal Protection Clauses.[112]

Though Congress has sometimes imposed deferential standards of review on the federal courts with respect to statutory and other sub-constitutional questions of law,[113] requiring a more deferential standard of review for constitutional questions has been quite uncommon. In AEDPA, Congress imposed a highly deferential standard of review on federal courts (in a different context) that might offer a potential example; the statute prohibited federal courts from granting federal habeas corpus relief to state criminal defendants unless the previous state court adjudication of the claim was an "unreasonable application of clearly established federal law" or based on an "unreasonable determination" of the facts.[114] Congress could consider imposing a similarly deferential standard on constitutional review of legislation.

A deferential standard of judicial review would be functionally similar to, but distinct from, a supermajority voting requirement. It would achieve greater deference than current practice by requiring greater subjective certainty as to a law's unconstitutionality from each judge before voting to invalidate a law. But at the Supreme Court only a simple majority of Justices would need to vote in favor of unconstitutionality for a statute to be invalidated. By comparison, a supermajority voting requirement is what some scholars call a "hard solution."[115] It would not require the Justices to adjust their subjective evaluations, but it would seek to protect the decisions of the elected branches by requiring a greater number of Justices to find unconstitutionality. A supermajority voting requirement would not directly impose the clear unconstitutionality standard advocated by Thayer, because it would not restrict judges to voting to invalidate statutes only in cases of clear error. For example, it is possible that a supermajority of Justices could agree that it was a close (not clear) question whether a statute was constitutional but decide that the statute was ultimately unconstitutional. In such a situation, a supermajority of Justices might still decide in favor of unconstitutionality and therefore satisfy the supermajority voting requirement, in spite of the fact that they also agree that the constitutional question is a close or debatable one. Supermajority voting requirements and heightened deference standards thus can produce different outcomes.

A required deferential standard of review seems easier to adopt than a supermajority voting requirement, avoiding some of the complexities mentioned above. It might be less effective in shifting power away from the courts, depending on the extent to which judges were willing to internalize an externally imposed deference standard. Like a supermajority voting requirement, it might lead courts to reach their preferred outcomes by sub-constitutional means, such as by interpreting statutes narrowly. Also like a supermajority voting requirement,

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the principal objection would seem to be that it would lessen courts' ability to protect constitutional rights and structure from transgressions by Congress and the Executive.

D. The Constitutional Permissibility of Supermajority Voting and Deference Rules

1. Supermajority Rules

Whether Congress could impose some form of supermajority voting requirement on the Supreme Court without a constitutional amendment is a difficult question.[116] As with jurisdiction-stripping legislation discussed earlier, a central issue would be the constitutional source of Congress's power. Again, like jurisdiction stripping, one possibility is the Exceptions and Regulations Clause of Article III, which grants the Supreme Court "appellate Jurisdiction, as to both Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[117] Reliance on this provision would be subject to many of the difficulties discussed earlier with respect to jurisdiction stripping. Further, it is less clear that this clause allows Congress to regulate decisionmaking procedures of the Court, as opposed to matters affecting its jurisdiction—the term used in the text. However, one could argue that a supermajority voting rule is a "regulation" of the manner in which the Court exercises its appellate jurisdiction.[118]

To the extent the power to create supermajority voting rules is located in the Exceptions and Regulations Clause, that power would likely not extend to matters under the Court's original jurisdiction, which is described in a separate sentence of Article III and so appears not to be covered by the Exceptions and Regulations Clause.[119] That could create an odd situation: The majority required to overturn a statute on constitutional grounds would depend on the route the case took to reach the Court. Although the vast majority of cases currently reach the Court through its appellate jurisdiction, that might change if the supermajority rule applied to one type of jurisdiction but not the other.[120]

Another possible source of congressional authority to impose a supermajority voting rule might be the Necessary and Proper Clause of Article I, Section 8.[121] That clause grants Congress authority to "Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is commonly understood that this clause is the source of Congress's power to legislate with respect to the structure and procedures of the Court. For example, Congress has by statute designated the size of the Court as nine Justices,[122] with a quorum of six required for issuing decisions,[123] and

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set the start of the Court's annual Term (the first Monday in October),[124] to be held at the "seat of government."[125] These statutory provisions "carry[] into Execution" the judicial power vested in the Supreme Court by the Constitution.

However, one might conclude that Congress's power to carry into execution the powers of the Supreme Court only empowers Congress to facilitate the operation of the Court. Legislation designed to limit the power of the Court (as a supermajority voting requirement might plausibly be described) would arguably not be enacted to carry into execution the Court's power, but rather to frustrate (to some extent) the Court's power. It thus might not be regarded as "necessary and proper" to a constitutionally permissible purpose.

Alternatively, one might locate Congress's power to prescribe judicial supermajority voting rules in Congress's power to make laws necessary and proper to carry into execution Congress's own powers. For example, in legislating to regulate commerce among the states, Congress might think that limiting the Court's review of such legislation is necessary and proper to giving that legislation full effect. But one might also conclude that Congress's power to effectuate its own legislation does not extend to limiting the Court's power of constitutional review (or, in textual terms, that limiting the Court's review is not "necessary and proper" to Congress's exercising its own power).

Regardless of the potential sources of congressional power, the Court might also take the position that judicial action by majority vote is implied by the grant of "the judicial Power" to the Court in Article III,[126] since action by majority is the usual and historical practice of multimember courts and was the presumed way that courts operated at the time of the Founding. At minimum, it might be thought that the power to determine voting rules lies with the courts through the Constitution's vesting of the judicial power. On this view, Congress would not have power to interfere with a power constitutionally granted to another branch. However, judicial action by majority vote could also be viewed merely as a default rule that could be altered by Congress, assuming Congress had an applicable power granted to it by the Constitution.

There is little precedent or practice to inform any of these matters. Congress has rarely acted in ways that materially restrict the Court's decisionmaking procedures. As discussed in Part I of this Chapter, scholars have debated how the Supreme Court's decision in *United States v. Klein*[127] affects Congress's powers to control the Court's decisionmaking. *Klein*'s implications for Congress's power to impose a supermajority voting rule on the Court are uncertain.[128] One reading of *Klein* is that Congress infringes the judicial power when it directs

courts to reach an unconstitutional result, which arguably would be the effect of a supermajority voting rule. Thus, the Court might conclude that *Klein* bars Congress from influencing judicial outcomes through devices such as a supermajority voting rule.

A supermajority voting requirement could be restricted by Congress to particular pieces of legislation, or alternately to a specified area of law, where congressional action arguably warrants greater judicial deference. For instance, Congress might understand the Fourteenth Amendment's textual direction that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article" as granting Congress broader prerogatives vis-à-vis the courts. The argument would be that a higher bar should apply before courts can invalidate legislation enacted under the specified congressional enforcement powers. To be sure, this position likely would not withstand review by the Supreme Court, absent a change in doctrine. In a different context, the Supreme Court, in *City of Boerne v. Flores*,[129] largely rejected the view that Congress possesses enhanced authority to interpret the Constitution when acting pursuant to its Fourteenth Amendment enforcement power. Still, four dissenting Justices and many scholars from across the political spectrum have argued that historical and textual considerations support broader congressional interpretative authority with respect to the Fourteenth Amendment than the Court majority recognized.[130]

Attempts by Congress to impose broad versions of the supermajority voting rule—for example, extending it to state courts or to judicial review of state legislation—seem even more likely to raise constitutional doubts as to the source of Congress's power. Any claim of congressional power to regulate voting requirements in state courts would need to rely on its power under the Necessary and Proper Clause. To the extent that the Necessary and Proper Clause allows Congress to impose a supermajority rule on the Supreme Court's review of federal legislation (an untested proposition), that power might also be thought to extend equally to state court review of federal legislation. Requiring state court supermajorities to invalidate federal legislation might similarly be necessary and proper to implementation of federal policies. Requiring state court supermajorities to invalidate state legislation on federal constitutional grounds seems less capable of justification under the Necessary and Proper Clause, as it would not involve the implementation of federal legislation.

In sum, while definite conclusions are elusive in this area and the analysis will vary depending on the particular contours of any proposed reform, it seems quite plausible that the Court would find a congressional attempt to impose a supermajority rule on the Court's decisionmaking, or courts generally, to be beyond Congress's power. It should be noted that Congress might be able to impose a version of a supermajority rule on the Court by prescribing

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an even number of Justices. As discussed in Chapter 2, Congress has broad power to establish the number of Justices on the Court.[131] Even using a rule of majority vote, a six-Justice Court in effect requires a 2/3 supermajority vote (four of six) to act, while an eight-Justice Court in effect requires a 62.5% supermajority (five of eight).

2. Deferential Standards of Review

The related proposal discussed above—for Congress to limit the Court's authority to situations of clear constitutional error (or a similar standard of review)—would raise generally parallel constitutional issues. There would first be the question of the constitutional source of Congress's power. Congress might claim power from the Exceptions and Regulations Clause or from the Necessary and Proper Clause, each of which would be subject to the potential objections noted above in relation to supermajority voting proposals. There might also be the objection that establishing a standard of constitutional review for the Court, like establishing a voting procedure in constitutional cases, is committed to the Court, not Congress, by the vesting of "the judicial Power" in the courts in Article III, Section 1.

Congress commonly prescribes standards of review for courts in statutory and administrative matters, and this is generally not thought to raise constitutional problems. For example, the Administrative Procedure Act provides for judicial review of certain agency actions under an "arbitrary or capricious" standard, and some statutes wholly preclude judicial review of administrative or executive determinations. As described previously, in AEDPA Congress imposed a deferential standard of review on federal courts' habeas corpus review of state criminal convictions, and the Supreme Court has routinely applied AEDPA without finding constitutional problems.[132] However, a congressionally prescribed standard of review for constitutional claims more generally is arguably distinguishable. AEDPA applies only to cases on collateral review after state court convictions have been upheld pursuant to nondeferential standards on direct review or otherwise have ripened into final judgments. The Court might well find a congressionally mandated standard of review in constitutional cases to be an infringement of the judicial power.

Of course, a supermajority voting rule or a deferential standard of review could be imposed by constitutional amendment, regardless of any limitations under the current Constitution. Several of the historical proposals for supermajority voting requirements took the form of constitutional amendments.[133] As discussed above, there would be substantial technical issues of implementation, particularly for supermajority rules, but these could conceivably be addressed by careful drafting.

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III. Proposals to Enable Legislative Overrides of Supreme Court Decisions

Another way to reduce the Supreme Court's power would be to allow Congress to override Court decisions that strike down federal or state legislation on constitutional grounds.[134] A constitutional amendment adopting a system of legislative overrides was urged in the Progressive Era and during the New Deal period. More recently, the idea of an override has been floated by advocates on both the right and left of the political spectrum as a way to minimize judicial supremacy—i.e., the system under which the Court is the final and authoritative arbiter of the constitutionality of statutes or executive action. Legislative overrides exist in several countries, including in Canada and Israel, and other countries reject judicial supremacy even without a formal system of legislative overrides.

Legislative override systems can take different forms. For example, section 33 of the Canadian Charter of Rights and Freedoms, known as the "notwithstanding clause," allows both the federal Parliament and the provincial legislatures to "expressly declare" by a simple majority that a law "shall operate notwithstanding" a provision in the Charter, whether or not a court has already ruled the law unconstitutional. Only some Charter provisions may be overridden, and an override ceases to have effect five years after it comes into force, though it may be reenacted by the legislature upon its expiration.[135] Israel's legislative override system is similar but allows an override only by the national parliament, applies only to the right to "freedom of occupation," and has a four-year sunset provision.[136]

A constitutional amendment establishing a legislative override system would allow Congress and the President to override Supreme Court decisions that strike down legislation on constitutional grounds. The system could follow the ordinary legislative process of bicameralism and presentment; alternatively, an override could require a supermajority vote by both houses of Congress, as well as presidential signature. A system could allow override of any court decision striking down a statute on constitutional grounds, or it could be limited to decisions involving certain constitutional provisions. It could allow permanent override of decisions or it could specify that the override will sunset after a particular period of time, at which point the courts' prior interpretation would prevail. In addition, the system could allow Congress to act prospectively in anticipation of a negative court decision or only after a court has struck down legislation.[137]

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Supporters argue that legislative overrides would cabin excessive judicial power in favor of democratic decisionmaking, while also encouraging greater constitutional discourse and deliberation within the legislative and executive branches and among the public as part of the political process. They contend that the system can be designed in ways to minimize risk to individual rights, structural design, and the stability of law. Perhaps because an explicit override system would very likely require a constitutional amendment, the academic debate on legislative overrides is relatively limited. No recent commentator has offered a programmatic blueprint for overrides, though arguments have long existed to support the assertion of constitutional interpretive authority by Congress (and the Executive) in ways short of an override. In the analysis that follows, we briefly provide a historical background, an evaluation of various forms of legislative overrides, and a constitutional assessment.

A. Constitutional and Historical Background

As discussed in the Introduction to this Chapter, it is widely believed that the Supreme Court has the last word when it comes to constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states. This approach to judicial review—known as "judicial supremacy"—has been embraced by the Supreme Court for many decades.[138] Yet the extent of the Court's authority to serve as the final interpreter of the Constitution—or to foreclose contrary interpretation by other branches of government acting in their own spheres—has also long been contested.

In the early years of the Republic, many argued that each of the three branches of government was endowed with the power of constitutional interpretation. As long as legislative and executive branch actors obeyed specific Court orders in specific cases, they could act on a contrary interpretation of the Constitution.[139]

Those who embrace judicial supremacy often point to Chief Justice John Marshall's famous pronouncement in *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[140] Indeed, that line has been cited by the Supreme Court in recent decades to support a strong approach to judicial supremacy. However, according to many scholars, Chief Justice Marshall was asserting only the authority of judicial review—i.e., the power of a court to refuse to give effect to an act or mandate of a coordinate branch of government—not the power of judicial supremacy. Moreover, over the course of the country's history, numerous Presidents have claimed the right to engage in independent and co-equal constitutional interpretation. Although nearly all Presidents have conceded that they are bound by direct orders from the Supreme Court, they have also offered their own

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constitutional interpretations through signing statements, litigation, and enforcement practices that have been in tension with, or even contrary to, Supreme Court precedent.[141] Likewise, Congress has sometimes resisted—or refused to acquiesce to—the Court's constitutional interpretations, for example by attempting to overrule Court decisions through legislation, or by enacting statutes in considerable tension with prior Supreme Court decisions.[142]

On several occasions over the course of U.S. history, advocates have sought to amend the Constitution in order to grant Congress power to overrule the Supreme Court's rulings striking down federal statutes through a formal system of legislative overrides. The Progressive Party, which ran a ticket with Senator Robert La Follette (Wisconsin) and Senator Burton Wheeler (Montana) in the 1924 presidential election, included a provision in its platform calling for "a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto."[143] La Follette was a vocal advocate for the amendment, which would have allowed Congress to override the Supreme Court by repassing any legislation previously declared unconstitutional.[144]

In 1937, Senator Wheeler, who remained a Democratic Senator from Montana following his unsuccessful bid for the Vice Presidency, along with Senator Homer Bone, a Republican from Washington State, introduced a variation on the Progressive Era proposal. Their constitutional amendment would have allowed Congress, by a two-thirds vote of each Chamber, to overturn a Supreme Court decision holding an act unconstitutional—but not until after the election following the Supreme Court decision.[145] Notably, Senator Wheeler was a strong supporter of the New Deal but adamantly opposed President Franklin D. Roosevelt's proposal to increase the size of the Supreme Court.[146] Reportedly, two of President Roosevelt's closest advisors, Benjamin Cohen and Thomas Corcoran, also privately opposed the proposal for Court expansion in favor of a constitutional amendment similar to the one proposed by Senator Wheeler. Their version would have allowed Congress to overturn immediately a Supreme Court constitutional decision striking down a federal statute by a two-thirds vote from each chamber, or to overturn such a decision by a simple majority following the next election.[147]

More recently, proposals for overrides by Congress have appeared only in academic writing and public commentary. For example, in 1996, Robert H. Bork—who served as a judge on the D.C. Circuit and as Solicitor General of the United States—wrote an essay in which he argued that the "most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control." He suggested that the Constitution be amended to enable modification or reversal of Supreme Court decisions by a simple majority

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vote of the Senate and House of Representatives.[148] A few scholars from the opposite side of the political spectrum from Bork have recently expressed support for legislative overrides, albeit without offering any detailed proposal.[149] Meanwhile, at the state level, numerous state legislators have introduced legislation to allow overrides of state court decisions, though none of these efforts has been successful.[150]

B. Evaluation of Override Proposals

In this Section, we consider (a) the goals of a system of overrides and whether such goals are likely to be achieved by the reform; and (b) the overall consequences for the functioning of the constitutional system if overrides are successfully implemented. We also distinguish among different forms of override systems. For the purposes of this analysis, we assume that an override system would be adopted through constitutional amendment, though we discuss the arguments regarding how Congress might engage in independent constitutional interpretation or attempt to limit the reach of Supreme Court decisions in Part III.C.

As with the other reforms discussed in this Chapter, we note that a system of legislative overrides has no inherent or fixed partisan or ideological valence—an override system could be used to advance the goals of any legislative majority or supermajority. However, some commentators have argued that elite interests are more likely to find a favorable audience with the Supreme Court, and therefore to benefit from a system of judicial supremacy; on this account, shifting power away from the courts and toward the legislature would benefit non-elites.[151] Others, however, have argued that Congress is also more responsive to elites than it is to non-elites or the poor.[152]

1. Goals and Efficacy

Congress on occasion has enacted one-off efforts to override a Supreme Court decision. But its efforts, such as its attempt to override the Court's decision in *Miranda v. Arizona*[153] with the Omnibus Crime Bill of 1968, have tended to have subject-specific goals (to change a particular constitutional doctrine) and have generally been rebuffed by the Court.[154] The goals of a constitutional amendment enabling legislative overrides would be more fundamental. Their chief aim would be to allocate power away from the Supreme Court and toward the elected branches. Proponents of legislative overrides, as with other disempowerment reforms, worry that the Supreme Court exercises excessive power over the resolution of major social, political, and cultural decisions—decisions that would be better resolved through the democratic process. As we discuss in the Introduction to this Chapter, for these critics, the

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Supreme Court's fundamentally "countermajoritarian" character is in tension with the basic commitments of a democracy.

The concern about excessive Court power is not limited to one political camp. Conservatives objected to the Warren Court's assertion of judicial supremacy in desegregation and criminal law cases,[155] as well as to more recent rulings striking down prohibitions on gay marriage and restrictions on abortion. On the left, concerns about judicial supremacy, dominant during the early twentieth century when the Court routinely struck down legislation protective of workers and consumers, have returned in recent years as the Court has exercised less deference to congressional judgments about the scope of the Reconstruction Amendments and civil rights (e.g., in voting rights cases such as *Shelby County v. Holder*),[156] and as it has used the First Amendment to invalidate campaign finance regulation and union security agreements.[157]

Proponents of legislative overrides also emphasize two other, related goals: Overrides would strengthen the system of checks and balances by allowing Congress the power to override the Court much like it can override presidential vetoes, and they would strengthen public deliberation and discourse on constitutional matters by empowering the people's representatives to decide constitutional questions and thus returning such questions directly to the political process.[158]

As a theoretical matter, a system of legislative overrides should accomplish all three of the goals their proponents advance. By expressly allowing Congress to overrule the Court's constitutional decisions, the power of Congress over fundamental social, political, and cultural decisions would be augmented, the power of the Court would be checked, and more actors would be engaged in constitutional interpretation.

In practice, however, the evidence from countries with both judicial review and legislative override systems—chiefly Canada and Israel—is mixed.[159] In both Canada and Israel, despite language in the constitutions enabling legislative overrides, the federal legislatures have used the power rarely.[160] One might predict a similar outcome in the United States, particularly if a legislative override system were to require a two-thirds or other supermajority vote by Congress. Scholars note, however, that even if the use of legislative overrides is infrequent, the mere possibility of legislative overrides may influence the Court, for example by making it more deferential to the elected branches.[161]

Another way in which legislative overrides might not achieve their goals is if they enable Congress to overrule constitutional decisions made only by the Supreme Court. This approach

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would still leave extensive power in the lower federal courts and the state courts. Because the U.S. Supreme Court is under no obligation to grant certiorari after a lower court or state court rules a federal statute unconstitutional, a legislative override system that did not empower review of lower court decisions striking down federal statutes would leave such decisions more insulated from democratic review than similar decisions of the Supreme Court. This problem is soluble, however, by enabling overrides of lower court or state court decisions, as well as Supreme Court decisions, on federal constitutional grounds.

Finally, some observers question whether legislative overrides are the best way to achieve the ends that their proponents desire. A better approach, they argue, would be to change Article V of the Constitution, making the Constitution easier to amend. Changing the Constitution through amendment, these critics contend, produces more reasoned democratic deliberation; in contrast, overrides are too tied to particular controversies. The Commission notes that there may well be sound arguments for making the Constitution easier to amend. However, because such substantial reform to the Constitution is outside the scope of this Commission's mandate, we do not consider this proposal. In addition, it is worth noting that a system of legislative overrides might have advantages over making the entire Constitution significantly easier to amend. A legislative override process could enable Congress to advance its own constitutional vision, re-enacting statutes that the Court has struck down subject to a temporal sunset or to other limitations, without enabling too-frequent wholesale reforms to the structure of government or the text of the Constitution.

2. Consequences for the Political Process and Legal System

Given that legislative overrides would at least partially achieve the goal of reducing the Supreme Court's power vis-à-vis the democratic branches, one important concern is whether they might result in insufficient protection of individual rights and, in particular, minority rights. Another concern is that allowing actors other than the Court to determine the constitutionality of statutes might result in less settled law and less well-reasoned constitutional decisionmaking. In addition, some worry that allowing congressional overrides might have implications for federalism, with Congress potentially more likely to use legislative overrides to favor its own power over states' rights (though some might find that to be an advantage rather than a disadvantage).

Proponents of legislative overrides (and critics of judicial supremacy more generally) respond that, in practice, the Court has not consistently protected rights of underprivileged, politically powerless minorities who lack support from popular majorities; indeed, some argue it has rarely done so.[162] Notably, many scholars observe that parliamentary democracies

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without American-style judicial supremacy—including Australia, New Zealand, and numerous European countries—are just as effective when it comes to protecting rights (although it is important to note that the comparative analysis is challenging, in part because those jurisdictions have very different structures of governments and broader commitments to universal social benefits).[163] Proponents of overrides would also argue that federalism concerns are overstated, given that the design of Congress already adequately represents the interests of states.

Meanwhile, concerns about minority rights, rule of law, and deliberation could potentially be addressed in the design of the system. The systemic consequences of congressional overrides would depend significantly on the details of the system adopted. The varying approaches have tradeoffs. For example, requiring a two-thirds majority of both houses of Congress to override the Court would reduce the risk of threat to minority rights and would require significant congressional deliberation about the underlying constitutional issue. But this approach would also make overrides much less likely to occur. Limiting overrides to cases that do not involve certain fundamental rights—as is done in Canada[164]—would limit the risk to those rights, but unless very clearly elaborated, would leave great discretion with the Supreme Court. Adopting a "sunset" element, where Congress's override would last only for a certain number of years and then would need to be reenacted,[165] might also serve as a safeguard against long-term incursions on individual rights and would encourage continued constitutional debate but could introduce greater uncertainty and instability in the law. Finally, a system that only permitted a legislature to issue an override after the Court has rendered its constitutional judgment, rather than insulating its laws preemptively, could help raise the political costs of an override and prompt the legislature to directly engage the constitutional principles at stake.

C. Constitutional Analysis

As noted in the preceding analysis, the most straightforward way to adopt a system of legislative overrides would be through constitutional amendment, as was urged during the Progressive and New Deal eras. Absent constitutional amendment, it is highly likely that the Supreme Court would strike down a statute (or congressional rule of procedure) setting forth a system for legislative overrides. The Court would likely conclude that it—not Congress—has ultimate authority under Article III to determine the constitutionality of federal statutes (as well as state statutes and executive action).[166] On this view, any effort at legislative override absent a constitutional amendment would constitute an impermissible end run around the amendment process established by Article V of the Constitution. Indeed, the Article V

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amendment process has been used on numerous occasions to overrule Supreme Court opinions.[167]

Nonetheless, Congress may be able to assert greater authority to engage in independent constitutional interpretation or to limit the reach of judicial opinions, short of enacting a system of legislative overrides.[168] As previously noted, numerous scholars have long contended that Article III never expressly states that the Supreme Court is the final or sole arbiter of statutes' constitutionality.[169] Under this view, although specific Court orders must be obeyed, Congress and the President can continue to enforce the Constitution as they see fit, as long as they are not in defiance of a particular order. By way of example, Congress might make it a crime to burn the flag; the Court might hold that such a law is unconstitutional; Congress does nothing wrong by enacting the statute again and saying it does not agree with the Court's interpretation, particularly if it includes new legislative findings. But if someone is prosecuted under the new law, and the Court maintains the view that the law is unconstitutional and enjoins the prosecution, the Court's orders in that case must be followed.

According to this understanding of judicial review, Congress could enact a statute that affirms congressional authority to reenact a statute after a negative Court ruling; Congress could also establish procedures for such reenactment, consistent with bicameralism and presentment requirements. In addition, Congress could attempt to establish a general rule regarding what weight stare decisis ought to carry. The argument would be that determining the prospective precedential effect of opinions is within Congress's "necessary and proper" power to regulate the operations of the federal courts, similar to its power to provide rules of evidence and procedure.[170] Others, however, have argued that determining the significance of stare decisis in constitutional cases is an inherent aspect of the judicial power to interpret the Constitution.[171] In any case, there is widespread agreement that Congress could not prospectively or retroactively deny the reach of a court order to the parties in a particular case.[172]

Apart from possible constitutional difficulties, Congress's assertion of authority to limit the precedential effects of prior Court decisions might raise arbitrariness and unfairness concerns about giving the parties to a particular case the benefit (or burden) of a rule announced by the Court, while denying the same benefit (or burden) to others similarly situated.[173] In other words, the government would remain free to bring prosecutions against individuals who have violated a statute that the Court has declared unconstitutional in another case, leaving it to each individual defendant to raise the constitutional objection anew. Such concerns would be less pressing with a legislative override system achieved by constitutional

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amendment; such a system would clearly enable Congress to declare that, for all parties, "notwithstanding" a court's interpretation of particular constitutional provisions, a particular statute is permissible, for a defined period of time. However, as discussed above, the broader system may raise other concerns about protection of rights.

D. Conclusion: Legislative Overrides

In short, a constitutional amendment adopting a system of legislative overrides would reduce the power of the Supreme Court over fundamental social questions and would increase the power of Congress. Design of the system might mitigate concerns about rule of law, constitutional structure, and minority rights. However, those design questions are difficult and would require further debate and elaboration, particularly because this reform has attracted less attention than some of the other reforms discussed in this Report. Short of constitutional amendment, some argue that Congress could still do more to resist judicial supremacy, though that, too, would likely face a critical audience from the current Supreme Court. Some proponents of reducing the power of the Court argue that the Court's commitment to judicial supremacy should not be a concern and that statutory reform to facilitate Congress's ability to assert its own constitutional authority would be worth trying.[174] Others disagree—not only because they question the legality of congressional non-acquiescence to the Court, but also because resistance to judicial supremacy would mark a substantial shift in contemporary practice, the legitimacy of which would be questionable without constitutional amendment.[175] In any event, further public debate could help flesh out the merits of the various approaches.

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Endnotes: Chapter 4

[1] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf; *Presidential Commission on the Supreme Court of the United States* 8, 12-13 (Oct. 2021) (written testimony of Philip Bobbitt, Columbia Law School) [hereinafter Bobbitt Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf; Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Reexamining Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2001) (manuscript at 28-39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869128.

[2] *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Samuel Moyn, Yale Law School) [hereinafter Moyn Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf; *Presidential Commission on the Supreme Court of the United States* 3-5 (June 30, 2021) (written testimony of Nikolas Bowie, Harvard Law School) [hereinafter Bowie Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf; *see also* Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy.

[3] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (introducing the term "the counter-majoritarian difficulty"). For academic critiques of judicial supremacy, see, for example, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 249-53 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177 (1999); and Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 789 (2002). For a defense, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

[4] *See* Bowie Testimony, *supra* note 2, at 15-16, 19, 23 (describing how Justices share the same elite educational backgrounds).

[5] *Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales) [hereinafter Dixon Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf; *see also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21 (2009).

[6] *See generally* Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 888 (2008) (reviewing KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007)).

[7] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); United States v. Nixon, 418 U.S. 683, 705 (1974); City of Boerne v. Flores, 521 U.S. 507, 516 (1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

[8] *Cooper*, 358 U.S. at 18.

[9] *See infra* notes 139-141.

[10] Dixon Testimony, *supra* note 5, at 7; *Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (written testimony of Kim Lane Scheppele, Princeton University) [hereinafter Scheppele Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf.

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[11] *See* Bobbitt Testimony, *supra* note 1, at 6, 12; Feldman Testimony, *supra* note 1, at 8; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1069 (2001); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 39 (2006); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007); NeJaime & Siegel, *supra* note 1.

[12] We note that any future elaboration of these proposals would require addressing a number of technical concerns that we have chosen not to analyze here because of their specificity. These include how the proposals might be drafted to encompass cases brought as both facial and as-applied challenges and how to take into account the range of remedies available to courts. Relatedly, we note that most of the proposals discussed below do not address another suite of concerns critics raise: that courts sometimes exercise power to rewrite statutes or to arrogate power to themselves by giving statutes meaning, including through the practice of constitutional avoidance.

[13] *See, e.g.*, S. 158, 97th Cong. (1981); H.R. 867, 97th Cong. (1981); H.R. 900, 97th Cong. (1981).

[14] *See, e.g.*, S. 1742, 97th Cong. (1981); H.R. 4364, 109th Cong. (2005).

[15] *See, e.g.*, Patient Protection and Affordable Care Act § 3403(e)(5), 42 U.S.C. § 1395ww(r)(3).

[16] *See, e.g.*, S. 4058, 90th Cong. (1968).

[17] *See, e.g.*, H.R. 2389, 109th Cong. (2005).

[18] *See, e.g.*, H.R. 3313, 108th Cong. (2004); H.R. 4379, 109th Cong. (2005).

[19] *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1785 (2020).

[20] *See generally* Doerfler & Moyn, *supra* note 2.

[21] *See, e.g.*, Dixon Testimony, *supra* note 5, at 8-9.

[22] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[23] Forsyth v. United States, 50 U.S. (9 How.) 571, 572 (1850).

[24] U.S. CONST. art. III, § 1, cl. 1.

[25] An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789) [hereinafter Judiciary Act of 1789].

[26] Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 163-64 (1913).

[27] William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 238 (1973). During the Reconstruction Era, Congress enacted the Military Reconstruction Act of 1867 in part to enforce new federal protections for civil rights and civil liberties. The Act sought "to 'regularize' federal military jurisdiction in the South by dividing the region into districts subject to military command." *Id.* at 236.

[28] 74 U.S. (7 Wall.) 506 (1868).

[29] 80 U.S. (13 Wall.) 128, 128 (1871).

[30] *Id.* at 146.

[31] 29 U.S.C. §§ 101-102.

[32] 303 U.S. 323 (1938).

[33] 28 U.S.C. § 1342.

[34] *Id.* § 1341.

[35] Such proposed legislation has frequently triggered debates about constitutional permissibility in both Congress and the executive branch. *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16, 920-27 (2011); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 268-86 (2012).

[36] *See, e.g.*, S. 3930, 109th Cong. (2006).

[37] *See, e.g.*, H.R. 13915, 92d Cong. (1972).

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[38] *See supra* notes 13-14 and accompanying text.

[39] The Defense of Marriage Act defined marriage as "only a legal union between one man and one woman as husband and wife" for federal purposes. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013). For related jurisdiction-stripping proposals, see *supra* note 18 and accompanying text.

[40] *See supra* note 17 and accompanying text.

[41] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106(b), 110 Stat. 1214, 1220-21 (codified at 28 U.S.C. § 2244(b)(3)(E)).

[42] 518 U.S. 651 (1996).

[43] 553 U.S. 723 (2008).

[44] U.S. CONST. art. I, § 9, cl. 2.

[45] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf (stating that "Congress unquestionably has the constitutional power, via the Exceptions Clause, to require the Court to hear certain appellate cases and not to hear others"); *Presidential Commission on the Supreme Court of the United States* 12 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf (noting that Congress exercising its power under the Exceptions Clause to make "Exceptions" to the Supreme Court's appellate jurisdiction is "wholly constitutional"). Even critics of proposals to limit the Court's jurisdiction, on policy and constitutional grounds, could not conclude that such proposals are categorically or definitively unconstitutional. The most that they conclude is that such proposals would raise constitutional questions. *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 57 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, and Maureen Mahoney, Latham & Watkins, LLP), https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf (expressing significant reservations on proposals to limit the Court's jurisdiction and concluding that such proposals "would raise serious constitutional issues").

[46] *See, e.g.*, Feldman Testimony, *supra* note 1, at 2 (noting that Supreme Court reform proposals ought to be evaluated against (a) the function of the Court in the American constitutional context and (b) whether reform proposals would advance or impede that function).

[47] *See, e.g.*, Moyn Testimony, *supra* note 2, at 3; Sprigman, *supra* note 19, at 1858-59.

[48] *See generally* Bowie Testimony, *supra* note 2, at 24, 25; Moyn Testimony, *supra* note 2, at 1.

[49] U.S. CONST. art. VI cl. 2.

[50] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1384 (2006); *see also* Scheppele Testimony, *supra* note 10, at 6.

[51] However, the power remains a subject of debate. *See, e.g.*, Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 81 (1975); Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1190 (2018).

[52] Several of the experts who testified before the Commission counseled that any reforms of our current system should be developed and implemented in a manner that reduces partisan polarization and minimizes institutional instability. *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2 (July 16, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf; *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf.

[53] *See* Feldman Testimony, *supra* note 1, at 9 (noting that jurisdiction stripping "could potentially devastate the Court's ability to fulfill its functions").

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[54] Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting Letter from William Van Alstyne to Gerald Gunther (Feb. 28, 1983)).

[55] *See* U.S. CONST. art. I, § 8, cl. 18 (conferring congressional power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[56] *Id.* art. III, § 1.

[57] *Id.* art. I, § 8, cl. 18.

[58] *Id.* art. III, § 2, cl. 2.

[59] 383 U.S. 301 (1966).

[60] *See, e.g.*, California v. Texas, 141 S. Ct. 2104 (2021) (challenge to the Affordable Care Act); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (challenge to the Trump Administration's travel ban); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (challenge to the Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans and Lawful Permanent Residents programs), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); Massachusetts v. E.P.A., 549 U.S. 497 (2007) (challenge to the Environmental Protection Agency's refusal to regulate greenhouse gas emissions from motor vehicles); *see also* Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.) (rejecting Texas's challenge, brought under the Court's original jurisdiction, to other states' election administration procedures).

[61] *See, e.g.*, California v. Arizona, 440 U.S. 59, 66 (1979) (noting it is "extremely doubtful" that Congress could exclude the Supreme Court's original jurisdiction by granting exclusive jurisdiction to federal district courts over actions for which the United States has waived its sovereign immunity); Kansas v. Colorado, 556 U.S. 98, 109-10 (2009) (Roberts, C.J., concurring) (arguing that Congress cannot infringe on the Court's authority over procedural matters related to its original jurisdiction).

[62] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

[63] *See, e.g.*, Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990).

[64] *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* the Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 30 (2019); Laurence Henry Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV, C.R.-C.L. L. REV. 129, 149-52 (1981).

[65] 74 U.S. (7 Wall.) 506, 514 (1868).

[66] 80 U.S. (13 Wall.) 128, 145-46 (1871).

[67] *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 583 (1988); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 759 (1961); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 525-26 (2016); Laurence Henry Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 17-26.

[68] 553 U.S. 723, 798 (2008).

[69] Hart, *supra* note 62, at 1371.

[70] *Id.* at 1369.

[71] Support for this argument would come from James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000).

[72] *Id.* at 1441.

[73] 74 U.S. (7 Wall.) 506, 514 (1868).

[74] 518 U.S. 651, 658 (1996).

[75] 14 U.S. (1 Wheat.) 304 (1816).

[76] The relevant articles include Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271-72 (1985); Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 487 (1989); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1673 (1990); and Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 445 (1991).

[77] *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); William A. Fletcher, Lecture, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word "All" in Article III*, 59 DUKE L.J. 929 (2010).

[78] *See, e.g.*, Meltzer, *supra* note 77, at 1575.

[79] Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 88 (2003); *Id.* at 117 (appendix listing proposals).

[80] H.R. 379, 40th Cong. (1868).

[81] S. 4483, 67th Cong. (1923).

[82] H.R. 11007, 90th Cong. (1967).

[83] Caminker, *supra* note 79, at 83.

[84] *See* Moyn Testimony, *supra* note 2, at 6 (discussing the post-Civil War era); Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 420 (1980) (discussing Senator Borah's Court reform efforts).

[85] N.D. CONST. art VI, § 4; *see* Caminker, *supra* note 79, at 91 (noting that this supermajority voting rule was originally adopted in a 1919 amendment).

[86] NEB. CONST. art. V, § 2; *see* Caminker, *supra* note 79, at 92-93 (noting that this supermajority voting rule was originally adopted in a 1920 amendment).

[87] Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 955-56 (2003).

[88] OHIO CONST. art. IV, § 2 (amended 1968); *see* Caminker, *supra* note 79, at 91-92 (discussing difficulties motivating the elimination of the requirement, including inconsistent caselaw between circuits and confusion surrounding the precedential status of certain decisions); Shugerman, *supra* note 87, at 956-62 (same).

[89] *Presidential Commission on the Supreme Court of the United States* 2 (Sept. 21, 2021) (written testimony of David Law, University of Virginia Law School) [hereinafter Law Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law.pdf (citing Eric Yik Him Chan, Judicial Review and Supermajority Voting Rules (May 2019) (L.L.M. thesis, University of Hong Kong, Faculty of Law), https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law-appendix.pdf)). The cited thesis lists eleven countries with supermajority voting requirements in their highest constitutional court as of 2019; this includes Taiwan, which has switched to majority voting effective in 2022. Chan, *supra*, at 13. In addition, a number of countries require an absolute majority of the entire court, as opposed to a majority or plurality of voting justices, and a few countries have supermajority requirements for decisions in particular subject matters. *See* Chan, *supra*, at 51-60; Law Testimony, *supra*, at 3.

[90] Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 AM. J. COMP. L. 177, 194 (2019).

[91] *Id.* However, many of these courts—including in South Korea—hear principally or exclusively constitutional claims and do not generally hear cases on appeal from lower courts. Therefore, it is not clear whether their experiences readily translate to the U.S. Supreme Court, which hears statutory as well as constitutional cases and typically reviews decisions of lower courts.

[92] *See, e.g.*, Anthony Harrup, *Mexico's Top Court Sets Back President's Plans for State Power Company*, WALL ST. J. (Feb. 3, 2021, 3:42 PM), https://www.wsj.com/articles/top-mexico-court-rules-electricity-rules-favoring-state-utility-are-unconstitutional-11612381067.

[93] Shugerman, *supra* note 87, at 893-94.

[94] *Id.* at 899-931; *see id.* at 906 (referring to an "explosion of five-to-four decisions invalidating acts of Congress").

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[95] Thayer, *supra* note 2, at 144.

[96] Shugerman, *supra* note 87, at 932; *see also* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 437-38 (1999) (generally advocating for supermajority rules as a tool for achieving better results).

[97] Shugerman, *supra* note 87, at 932-35.

[98] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1978) ("A judge who is insulated from the demands of the political majority whose interest the right would trump is, therefore, in a better position to evaluate the argument [about the right].").

[99] Doerfler & Moyn, *supra* note 2, at 1742.

[100] Shelby County v. Holder, 570 U.S. 529 (2013); *see* Bowie Testimony, *supra* note 2, at 8-9.

[101] Doerfler & Moyn, *supra* note 2.

[102] *See* Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1240-43 (2020).

[103] *See* Law Testimony, *supra* note 89.

[104] *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[105] *See* Caminker, *supra* note 79, at 73-75; Shugerman, *supra* note 87, at 1012-19 (listing Court decisions invalidating congressional acts and noting cases decided by a bare majority).

[106] *See* 570 U.S. 529, 532 (2013) (noting 5-4 majority).

[107] Defense of Marriage Act, 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

[108] *Cf. Presidential Commission on the Supreme Court of the United States* 1 (Aug. 2021) (written testimony of Center for American Progress), https://www.whitehouse.gov/wp-content/uploads/2021/08/CAP-Testimony.pdf (advocating supermajority voting requirements as a mechanism to steer the Court away from "blockbuster political issues"); Bowie Testimony, *supra* note 2, at 3-5 (arguing that rights are more reliably protected through Congress than through the Court).

[109] Dixon Testimony, *supra* note 5, at 10.

[110] *See* Caminker, *supra* note 79, at 88 (comparing deferential review with supermajority rules as ways of limiting the Court's role in constitutional adjudication).

[111] Thayer, *supra* note 2, at 144.

[112] *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

[113] *See, e.g.*, Administrative Procedure Act (APA) § 10(e), 5 U.S.C. § 706(2)(A) (directing courts to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) (describing the APA's arbitrary or capricious standard as "deferential").

[114] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)).

[115] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 685-86 (2007) (arguing that a "hard solution" like a supermajority voting rule is more effective in producing deference than a soft solution like a more deferential standard; judges might not comply, consciously or not, with a statutorily imposed deferential standard and may instead fall back on a traditional, less deferential standard).

[116] For an overview of scholarly views and responses, see Shugerman, *supra* note 87, at 971-88.

[117] U.S. CONST. art. III, § 2, cl. 2.

[118] Congress has a strong claim to broad power to regulate lower federal courts due to its plenary power to decide whether to establish such courts in the first place. *See* U.S. CONST. art. I, § 8, cl. 9. Thus, Congress's powers to impose a supermajority rule on lower federal courts or to prescribe the effect on lower federal courts of the Supreme Court failing to reach the necessary supermajority seem to have fairly firm constitutional foundations.

[119] U.S. CONST. art. III, § 2, cl. 2.

[120] *See supra* text accompanying notes 58-61.

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[121] U.S. CONST. art. I, § 8, cl. 18.

[122] Circuit Judges Act of 1869, § 1, 16. Stat. 44 (codified as amended at 28 U.S.C. § 1).

[123] 28 U.S.C. § 1.

[124] *Id.* § 2.

[125] *Id.*

[126] U.S. CONST. art. III, § 1.

[127] 80 U.S. (13 Wall.) 128 (1871).

[128] *See* Shugerman, *supra* note 87, at 972.

[129] 521 U.S. 507 (1997).

[130] *See, e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV L. REV. 1 (2011); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

[131] *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (creating a Supreme Court composed of one Chief Justice and five Associate Justices).

[132] It is important to note that not everyone has been convinced that AEDPA's deferential review scheme is constitutional. *See, e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 703-04 (1998) (criticizing AEDPA's review scheme as applied by the Fifth, Seventh, and Eleventh Circuits); Williams v. Taylor, 529 U.S. 362, 378-79 (2000) (Stevens, J., concurring) ("A construction of AEDPA that would require the federal courts to cede this authority [to say what the law is] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.").

[132] Caminker, *supra* note 79, at 117.

[133] *Id.*

[134] We focus on a system of legislative overrides that would allow Congress to overrule decisions by the Supreme Court or other courts striking down federal or state legislation. However, a broader approach would allow Congress to overrule any constitutional opinion that upholds or rejects claims of constitutional rights, whether or not a statute is involved. Congress would, for example, have power to override such decisions as the Court's rejection of a Free Exercise claim in *Employment Division v. Smith*, 494 U.S. 872 (1990), or of a Takings claim in *Kelo v. City of New London*, 545 U.S. 469 (2005). Because past proposals have not urged such expansive reform, we do not discuss it in any depth, however many of the legal and policy arguments discussed in this Chapter would apply equally or in stronger version to the broader reform.

[135] Constitution Act, 1982, § 33, *being* Schedule B to the Canada Act 1982, c 11 (U.K.); *see* Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250, 255 (2005).

[136] Stephanopoulos, *supra* note 135, at 260.

[137] Theoretically, a legislative override system achieved through constitutional amendment could also empower state legislatures but this might raise serious federalism concerns given the overall structure of U.S. government. Because this idea has not been proposed, we do not consider it.

[138] Cooper v. Aaron, 358 U.S. 1, 18 (1958); *see also* United States v. Nixon, 418 U.S. 683, 704-05 (1974); City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

[139] Kramer, *supra* note 3, at 105-10, 125, 135-36; *see also* Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History, at xi (2007) (discussing the theory of departmentalism); *Presidential Commission on the Supreme Court of the United States* 5-7 (June 30, 2021) (written testimony of Ilan Wurman, Arizona State University) [hereinafter Wurman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf (noting that the modern Supreme Court's view of judicial supremacy departs from antebellum understandings of the three branches' coextensive powers over constitutional interpretation). Notably, the

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departmentalist view—that legislative and executive branch actors could act on their own interpretations of the Constitution in their respective spheres—seems to have been Hamilton's view, in contrast to the views of the antifederalist writer Brutus, who suggested that the federal courts would have greater interpretative authority under the Constitution and opposed it on that ground. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 245-52 (1994); The Federalist No. 78 (Alexander Hamilton); *Essays of Brutus*, No. XI, *reprinted in* 2 Herbert J. Storing, The Complete Anti-Federalist § 2.9.138-139 (1st ed. 1981).

[140] 5 U.S. (1 Cranch) 137, 177 (1803).

[141] See Richard H. Fallon, Jr., Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 TEX. L. REV. 487, 503-05 (2018).

[142] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 141-43 (2007) (discussing how, in enacting the Partial-Birth Abortion Ban Act of 2003, Congress "responded" to the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated a similar state law, and sought to tailor the federal law to avoid the errors the Court identified in the state analog); Dickerson v. United States, 530 U.S. 428, 431-38 (2000) (describing how Congress sought to override the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but holding Congress was powerless to do so because the Court's decision in *Miranda* announced a constitutional rule that Congress could not legislatively override); City of Boerne v. Flores, 521 U.S. 507, 511-12, 515 (1997) (invalidating the Religious Freedom Restoration Act of 1993, which "Congress enacted . . . in direct response to the Court's decision" in *Employment Division v. Smith*, 494 U.S. 872 (1990)); *see also* Barry Cushman, NFIB v. Sebelius *and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 142-43 (2013) (recounting how in an effort to combat child labor Congress passed the Keating-Owen Act, which the Supreme Court ruled unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and that when Congress subsequently "responded" to that decision "by adding a provision to the Revenue Act of 1918" that taxed businesses employing children "in violation of any of the standards established by the Keating-Owen Act," the Supreme Court in turn invalidated that tax in *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922)).

[143] *Progressive Party Platform of 1924*, AM. PRESIDENCY PROJECT (Nov. 4, 1924), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924.

[144] *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal courts.htm#6.

[145] Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 476-77 n.87 (2001) (citing S.J. Res. 80, 75th Cong. (1937)). *See generally* 81 CONG. REC. 1273 (1937), https://www.govinfo.gov/content/pkg/GPO-CRECB-1937-pt2-v81/pdf/GPO-CRECB-1937-pt2-v81-3.pdf (noting Senators Wheeler and Bone's introduction of the proposed amendment).

[146] Marian C. McKenna, *Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight*, 62 PAC. HIST. REV. 405, 405 (1993).

[147] *See* William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was there a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1372 (2000) (citing Memorandum from Benjamin V. Cohen & Thomas G. Corcoran on Constitutional Problems, Cohen Papers, Library of Congress, https://www.loc.gov/item/mm83061590) (reviewing BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998)).

[148] Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996).

[149] *E.g.*, Doerfler & Moyn, *supra* note 2; Stephanopoulos, *supra* note 135, at 264-69, 290-92.

[150] Alicia Bannon & Nathan Sobel, *Assaults on the Courts: A Legislative Round-Up*, BRENNAN CTR. (May 8, 2017), https://www.brennancenter.org/our-work/research-reports/assaults-courts-legislative-round.

[151] *See* Bowie Testimony, *supra* note 2, at 23; *see also* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1129-30 (1989) (noting that courts played a proactive role in fashioning an economic system that was hostile to workers during the Gilded Age).

[152] LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (1st ed. 2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN

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AMERICA (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

[153] 384 U.S. 436 (1966) (holding that the Fifth Amendment bars the prosecution from "us[ing] statements, whether exculpatory or inculpatory," made by a person in police custody "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination," and that those safeguards require that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney").

[154] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that Congress could not overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), by legislation, since "*Miranda* announced a constitutional rule").

[155] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 1-3 (Aug. 2021) (written testimony of William G. Ross, Samford University), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-William-G.-Ross.pdf.

[156] 570 U.S. 529 (2013).

[157] *See, e.g.*, Doerfler & Moyn, *supra* note 2, at 1713; *Presidential Commission on the Supreme Court of the United States* 10-11 (Aug. 17, 2021) (written testimony of Mark Tushnet, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf.

[158] *See* Stephanopoulos, *supra* note 135, at 264-69, 290-92; Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 265, 275 (1995).

[159] *See* Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 222 (2002); Peter H. Russell, *Standing up for Notwithstanding*, 29 ALTA. L. REV. 293, 297 (1991); Stephanopoulos, *supra* note 135, at 254-59; Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 457-59 (2012).

[160] *See* Kahana, *supra* note 159, at 223 (Canada); Weill, *supra* note 159, at 461 (Israel). In Canada, the provincial legislatures, particularly Quebec, have been the primary proponents of legislative overrides, known as "notwithstanding clauses," in legislation. Early on, the province of Quebec attempted to craft an omnibus notwithstanding clause to immunize its laws against all court attacks. This approach was invalidated by the Canadian Supreme Court but narrower approaches have had some limited success. *See* Stephanopoulos, *supra* note 135, at 255-56; *see also* Law Testimony, *supra* note 89, at 4-5 (discussing Canada's experience and noting that "[a]t one extreme, the province of Quebec has overused the override power to the point of preemptively immunizing all laws against constitutional challenge, and dragging the override power itself into disrepute in the process," while "[a]t the other extreme, the federal government has effectively abandoned the override power").

[161] Weill, *supra* note 159, at 461.

[162] Bowie Testimony, *supra* note 2, at 4-5; Moyn Testimony, *supra* note 2, at 6.

[163] For example, in Australia and New Zealand, judicial review is "constrained," with courts exercising a "privileged, but not a supreme, role," without any evidence of resulting harm to minority rights. Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950, 951-52 (2012). Moreover, in most European countries, constitutional questions typically are reviewed by specialized courts and through referral by parliamentary or executive officials, rather than in individualized cases. In this model, the court serves as an aide to the legislature in determining the conformity of legislation to the constitution. Albert H. Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives* 3 (Univ. of H.K. Faculty of Law Research Paper No. 1, 2013). Such inquiries take place on a theoretical level and not in terms of a case or controversy involving the rights of an individual allegedly harmed by such a law. This approach, it has been argued, is equally if not more protective of rights than the U.S. model. *See, e.g.*, VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE, at xiii-xvi (2009). Of course, it bears remembering that Europeans' rights are also protected by the European Court of Human Rights and the European Court of Justice, among other institutions. *See* Waldron, *supra* note 50, at 1353 n.20.

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[164] Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.) (excluding from the "notwithstanding clause" democratic rights, mobility rights, language rights, and education rights); *see* Dixon Testimony, *supra* note 5, at 7.

[165] *See* Canadian Charter of Rights and Freedoms § 33.

[166] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); Shelby County v. Holder, 570 U.S. 529, 556 (2013) (citing Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

[167] The Eleventh Amendment, immunizing states from certain lawsuits, overruled the Supreme Court's ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Thirteenth, Fourteenth, and Fifteenth Amendments—the Reconstruction Amendments—effectively overruled the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment gave Congress the authority to enact income taxes, overturning the Supreme Court's ruling in *Pollack v. Farmers' Loan and Trust Co*., 157 U.S. 429 (1895); the Nineteenth Amendment enfranchised women, overruling *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); the Twenty-Fourth Amendment abolished poll taxes, overruling the Supreme Court's decisions in cases like *Breedlove v. Suttles*, 302 U.S. 277 (1937); and the Twenty-Sixth Amendment made clear that all U.S. citizens eighteen years of age and older have the right to vote in 1971, overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970).

[168] *See* Moyn Testimony, *supra* note 2, at 19; *see also Presidential Commission on the Supreme Court of the United States* 8-9 (Aug. 15, 2021) (written testimony of Christopher Jon Sprigman, New York University School of Law) [hereinafter Sprigman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf.

[169] *See* KRAMER, *supra* note 3, at 105-10, 125, 135-36; WHITTINGTON, *supra* note 139, at xi; Wurman Testimony, *supra* note 139, at 5-7.

[170] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1543 (2000). It is important to note, however, that such an argument likely would not extend to limiting the stare decisis of state court decisions.

[171] *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001)

[172] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[173] *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) ("[S]elective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."). Some Justices have also expressed concern that applying decisions only to subsequent litigants violates the judicial power established by Article III. *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring); *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring).

[174] *See* Sprigman, *supra* note 19, at 9 ("There is nothing standing in the way of Congress asserting its power to override judicial decisions save the will to do so and the political judgment to do so successfully. As a matter of practical politics, Congress can draw the outlines of its own authority by using its Article III power effectively and in ways that voters approve.").

[175] *Cf.* Dixon Testimony, *supra* note 5, at 7-8 (emphasizing importance of formal amendment to change longstanding norms); Jackson Testimony, *supra* note 52, at 14 (suggesting, while evaluating term limit proposals, that constitutional amendment would be needed to "significant[ly]" depart from longstanding norms surrounding Justices' tenure on the Court); *see also* Fallon, *supra* note 171, at 582 (arguing that "deeply entrenched practices" greatly inform the American constitutional order).

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Chapter 5: The Supreme Court's Procedures and Practices

In recent years, Supreme Court observers have engaged in vigorous debates about how the Court conducts its work and explains its decisions. The Commission recognizes that the discourse about reform, in addition to focusing on the structural proposals discussed in prior Chapters, has also addressed the Court's operations and its procedures for reviewing cases. As observers, including members of Congress, have emphasized, internal procedures and practices at the Court can have a significant external impact: They affect perceptions of the Court's impartiality, the credibility of its rulings, and the clarity of its guidance for lawyers and for other courts. And they have real consequences for the parties in each case, as well as for the many people and institutions affected by the federal laws or constitutional rights at issue.

The Commission received testimony on a broad range of the Court's internal procedures and practices. The testimony included criticisms and counterarguments, as well as proposals aimed at increasing transparency, improving procedure, and generating more visible adherence to standards of judicial ethics.[1] A number of Justices have also expressed their views on some of these issues in written opinions and public discussions. Although it is not the Commission's charge to present suggestions to the Court, we are tasked with examining prominent debates about the work of the Court; and this task entails addressing a range of proposals from witnesses and commentators, including policies the Court would be able to implement on its own.

This Chapter focuses on three sets of issues. While some of these issues have become more salient under the pressure of recent events, others have been the subject of longstanding public discussion, debate, and analysis. The first issue is the Court's use of emergency orders, issued without the usual rounds of briefing or oral argument and often without a written explanatory opinion. The second is judicial ethics. The third is public access to the Court's proceedings. In addition, Appendix D to this Report details analyses offered by witnesses before the Commission about the sources of advocacy and information provided to the Court.

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I. Emergency Orders

Many people associate the work of the Supreme Court with its "merits cases." These are cases in which the Court grants review and the parties then conduct established rounds of briefing and participate in oral argument. The Court may also receive briefs from interested non-parties called amici curiae. In these cases, the Court eventually issues a decision with a reasoned, written opinion and discloses the votes of all Justices. These robust procedures are intended to ensure that the Court's decisions are well informed, fair to the parties, and attentive to implications for the broader legal system. The opinions in these merits cases generally carry the full weight of precedent and thus are written in a manner that not only binds lower courts but also aspires to guide them, all while limiting the likelihood that the Court will dramatically change its own positions in the near future.

Yet the Court's business goes beyond its merits cases. As the Court explains on its website, the "vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders."[2] The most common orders—there are thousands of these each year—are those in which the Court declines to review cases by denying the parties' petitions for certiorari.[3]

In another category of unsigned orders, the Court responds to parties' emergency requests by issuing an injunction, vacating a lower court's injunction, granting or lifting a stay of a lower court ruling, or denying such emergency relief. Because these emergency orders often concern legal challenges to governmental decisions and practices, they can have substantial effects on the rights and obligations of governments, private institutions, and broad segments of the American public.

In contrast to its merits cases, however, the Court issues emergency orders without the same regularized rounds of full briefing, amicus participation, and oral argument; without much time for deliberation; often without a written opinion speaking for the Court and explaining its reasoning; and often without disclosing how each of the Justices voted. Many of these orders respond to requests from parties in the early stages of litigation and thus are issued before the lower courts have completed their adjudication and appellate review of the case.

The Court's use of various truncated procedures has at times attracted public scrutiny. Beginning in the 1950s, some commentators criticized its use of summary decisions on grounds of procedural inadequacy and lack of guidance for the lower courts.[4] Others argued

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that these practices were useful for managing a large caseload and supervising the lower courts.[5] Subsequent scholarship has continued to address certain forms of summary or unsigned decisions,[6] and recently the phrase "shadow docket" has come into use as a catch-all term for the Court's "orders and summary decisions that defy its normal procedural regularity."[7]

In the past few years, many commentators have focused their attention on the Court's increasing use of emergency orders,[8] especially in cases of public importance or controversy.[9] Several Justices have addressed the issue in recent statements, offering both critiques and defenses of this practice.[10] The Commission also received testimony and comments about the Court's use of emergency orders. It should be emphasized that the concerns raised are not about the existence of emergency procedures—no one disputes that they are needed for true emergencies—but about specific aspects of their current use by the Court.

This section first examines three sets of concerns about emergency orders: limited process in high-impact cases; limited information about the Justices' votes and the Court's reasoning; and uncertain signals about a ruling's precedential effect. This section then examines proposals from witnesses and commentators for changing current practices, including proposals addressed to concerns about emergency orders generally, as well as those specifically addressed to cases involving the death penalty.[11]

A. Limited Procedure for Important Cases

The Court's recent emergency orders have involved issues of national importance and public debate, including abortion,[12] immigration policy,[13] environmental regulations,[14] and evictions during a surge in COVID-19.[15] Yet the Court's practice in issuing such orders has involved relatively limited briefing, no oral argument, no norm that the Court's reasoning must be publicly explained in a written opinion, and no expectation that the Justices' votes will be revealed. Thus, a prominent line of critique has focused on the dissonance between the significance of many of the Court's orders and the limited procedures that apply to them. Commentators initially focused criticism on orders that granted emergency applications seeking results contrary to those reached by the lower courts. More recently, following the Court's first ruling in *Whole Woman's Health v. Jackson*, which denied an emergency application that would have prevented a Texas abortion law known as S.B. 8 from going into effect,[16] critical attention has also turned to orders that deny such relief.

Although emergency orders technically are temporary and used in service of further adjudication, they often have the practical effect of being the final word on the issue. Since

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2016, for example, the Court has issued orders that have effectively determined the end of the period for responding to the 2020 Census;[17] limitations on absentee and curbside voting, including for voters with disabilities and other vulnerable populations, at the height of the pandemic;[18] the degree of exposure to COVID-19 infection for inmates in prisons and jails;[19] and the extent of the right to congregate for religious services during the pandemic.[20] Even where such orders eventually expire, moreover, and even where they directly involve only one person as a party, they can have profound implications for affected individuals and influence larger societal debates.[21]

As these examples suggest, the issues resolved through emergency rulings often are controversial as well as consequential. Emergency orders breaking down 6-3 or 5-4 along ideological lines have multiplied in recent years, indicating that the Court increasingly is deciding contested legal questions through cursory and relatively non-transparent emergency procedures.[22] During the 2017 Term, there were five orders from which at least three Justices publicly dissented; during the 2020 Term, there were 29 such orders.[23] This increase has occurred even while the merits docket has remained at historically low levels,[24] and during the 2019 Term there were nearly as many 5-4 decisions among emergency rulings as on the merits docket.[25]

Various explanations have been offered for the Court's increasing use of expedited procedures in important and controversial cases: the lower courts' issuance of so-called "nationwide" or "universal" injunctions that "control the behavior of the federal government toward everyone, not just the plaintiffs," and which often prompt the government to seek relief;[26] federal executions during the Trump Administration; emergency requests during the COVID-19 pandemic;[27] a growing divide between the views of the Supreme Court and the lower federal courts; and possible changes in how the Justices apply the traditional legal standard for emergency relief pending appeal.[28] Critics and defenders of the Court's practices draw competing conclusions from such explanations, some of which point to passing rather than persistent causes.

Those who defend the Court's recent use of emergency rulings argue that the problem—if there is one—is not of the Court's own making. As in the lower courts, emergency applications come to the Court from parties seeking urgent relief.[29] The consequential nature of the interests at stake is precisely why the Court must act quickly, lest significant rights be left unprotected or harm imposed on the parties and the public while the full judicial process unfolds.[30] Deciding important issues using a truncated process, on this view, is not illegitimate; it is the nature of emergency adjudication. And the de facto final resolution of important

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matters through temporary relief is an unavoidable part of the tradeoff that can happen at any judicial level.

Indeed, virtually everyone agrees that nothing is inherently suspect about emergency orders. Every court must have procedures for accelerated determination of urgent matters, even at the expense of a more deliberative process or more fully reasoned decisions. Disagreement, then, tends to center not on the fact of emergency procedures, but on which matters warrant the Court's immediate intervention. Critics have argued that the Court is too often using relatively impoverished procedures and deliberation to intervene on important issues, including by overturning reasoned decisions of the lower courts.[31] Relatedly, some commentators contend that the Court too often acts to disrupt the appropriate "status quo" rather than to preserve it—in some cases, at least, without clear explanation of when or why intervention is warranted.[32]

In some respects, these debates may reflect disagreement about the underlying merits of the disputes or about how to weigh the threatened interests or risk of harm.[33] An additional source of disagreement is the question of how to characterize the baseline condition or "status quo" that emergency relief is meant to preserve and the "disruptive force" that is to be held at bay pending full judicial consideration.[34] Witnesses before the Commission differed on the proper conception of the status quo for purposes of evaluating the Court's emergency orders,[35] and as one witness acknowledged, the choice will often be contested and "normatively tinge[d]."[36] One possible understanding of the status quo is the state of affairs that exists based on the last ruling in the courts below.[37] That is the baseline some critics claim the Court too often disrupts, as it did in a number of pandemic-related voting, prison safety, and religious gathering cases, among others.[38] A different conception of the status quo is the state of affairs created by the law, policy, or practice being challenged.[39] A third understanding was captured by Chief Justice Roberts's dissent in *Whole Woman's Health*, in which he explained: "I would grant preliminary relief to preserve the status quo ante—*before* the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."[40] This question becomes more complicated still when policymakers are responding (or not) to a sudden change in the state of the world, such as during a pandemic.

B. Transparency

The Court often issues emergency orders without accompanying explanation, or with very little of it. A standard defense of such a norm is that emergency decisionmaking may not allow time for a thorough expression of the Court's reasoning in every case, and that anything less

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(such as a rote citation to a legal standard without elaboration on its application to a given case) would rarely provide much useful information.

Yet the question is not whether all emergency orders require detailed explanation; there has been no serious suggestion that routine denials of obviously unwarranted relief need to be accompanied by a written opinion.[41] Rather, the question is whether some emergency orders are important enough (as all merits cases are presumed to be) that the public—and the public record—should receive an express statement of the Court's reasoning and of how the Justices voted.

Critics and defenders alike recognize that the Court sometimes does issue opinions explaining its emergency orders, and individual Justices even more frequently write opinions concurring in or dissenting from the Court's orders. For critics of the Court's orders practices, such opinions demonstrate that reasoned explanation is possible; the problem, in their view, is that it is not provided more regularly in cases of national importance.

Critics argue that the lack of a stated rationale on behalf of the Court—and the lack of full disclosure of the Justices' votes on emergency orders—deprive the public of valuable information about how the Court and each of its members understands and applies the substantive legal principles at issue in important cases.[42] Similar arguments extend to the procedural rules that govern emergency orders: Critics contend that it is sometimes unclear whether or how the Court is applying the traditional multipart standard used to determine issuance of emergency relief.[43]

Another line of critique focuses on the disciplining function of reasoned opinions. For example, some critics argue that the Court has not followed a straight line on the question of when to grant emergency relief, and that it has been willing to break new legal ground in certain cases while disclaiming that power in others, without explaining the difference.[44] In the critics' view, the lack of explanation enables such variation by removing the rigor and consistency that the writing of carefully reasoned opinions is said to impose on judicial decisions.

Critics more broadly charge that the issuance of high-profile orders without adequate explanation damages the perceived impartiality and legitimacy of those rulings, or even of the Court, in the public eye: When the Court does not routinely explain its reasoning in cases of great public concern, people may speculate that the Justices are making decisions based on politics.

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Defenders of the Court's rulings respond that detailed opinion writing is infeasible in many emergency settings.[45] On this view, the relative lack of explanation in emergency orders is simply part of the process of faster decisionmaking. Moreover, in certain cases, the chances of the Justices reaching rapid agreement on the outcome might be improved by dispensing with an expectation that a majority of Justices will agree on legal reasoning set out in an opinion speaking for the Court.[46]

Relatedly, it may be practically useful for the Justices to reveal less rather than more in their emergency orders, to avoid locking themselves into positions or reasoning that is based on limited process, reflection, and information.[47] A similar argument supports the view that Justices ought not be required to reveal their votes in emergency orders.

C. Uncertain Precedential Effect

A third set of concerns centers on the uncertain precedential effect of the Court's emergency rulings. Even to expert legal observers, including judges, it remains unclear which orders and related opinions operate as precedents binding on lower courts.[48] In the context of emergency orders, one might think that, at most, only opinions designated as "Opinions of the Court" should function as binding precedents; indeed, Justice Alito recently noted in a public address that a ruling on an emergency application is not a precedent with respect to the underlying issue in the case.[49] Yet at times the Court has appeared to expect its emergency orders to be treated as precedential, at least if statements of individual Justices or concurring opinions accompany the order, even though none of them is designated as the opinion of the Court.

An example from the Court's pandemic cases about religious gatherings illustrates this issue.[50] In *Gateway City Church v. Newsom,* the Court ruled that the Ninth Circuit's "failure to grant relief was erroneous," and explained that "[t]his outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom.*"[51] But the *South Bay* case was an emergency ruling that presented no majority rationale. As one Commission witness noted, the Court seemed to require lower courts to discern binding legal principles from an order with a concurring opinion by Justice Barrett (joined by Justice Kavanaugh), a statement of Justice Gorsuch (joined by Justices Thomas and Alito), and a concurrence by Chief Justice Roberts.[52]

Critics as well as many defenders of the Court's emergency orders appear to agree that orders like the one in *South Bay* should not carry precedential weight for lower courts. More broadly, even when emergency orders do include an opinion for "the Court," the nature of

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such orders and the quality of the processes that precede them generally counsel against giving dispositive weight to decisions reached on an emergency footing.[53] Without clarification, uncertainty about the precedential effect of emergency orders can breed confusion about the content of the law for the lower courts, for relevant parties, and for the public.

D. General Proposals

Commentators have made various proposals aimed at addressing the concerns described above while acknowledging the reality that emergency orders are, and will remain, a necessary component of the Court's work.

1. Giving Reasons

Specific reforms proposed in response to concerns about inadequate transparency—and the accompanying risk of an appearance of inconsistency, arbitrariness, or bias—urge the Court to explain the majority's reasoning in emergency orders involving matters of great public debate. A different approach would place a premium on providing an explanation whenever the Court is undoing reasoned rulings in the lower courts.[54] Another proposal would urge the Justices to disclose their votes in emergency orders.[55]

The aim of such explanations and disclosures would be to provide guidance to parties, lawyers, and lower court judges; to allow the public to know the role of each Justice in granting or denying an emergency order; and to ensure that especially consequential decisions benefit from the rigor and discipline associated with reasoned opinions.[56] The explanations need not be lengthy, nor does anyone suggest that opinions need to be written in every case. Instead, the goal is to enable observers to understand the bases for the Court's most significant rulings—to follow the legal trail through each decision and from one decision to the next. Proponents of reform argue that, at a minimum, the Court should clearly articulate the test it is using to assess the application for emergency relief and indicate how (or whether) it applied each prong of the test.[57]

The category of "important" cases in which explanation may be most valuable is not self-defining; reasonable minds will differ about that threshold. Even short opinions take time to write, moreover, and the suggestion that the Court indicate how it applied each prong of a four-part test may be in tension with the suggestion that the writing need not be lengthy. Indeed, there may be an unavoidable tradeoff between the explanatory benefits of any given opinion and the costs of producing it—including not only the time and effort spent preparing the opinion, but also the possibility of committing the Justices to positions they have not yet

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had time to consider fully. On the one hand, an opinion in which the Court merely articulates the relevant legal test and states its conclusions on the application of each prong may not pose undue risks of delay or lock-in. On the other hand, such an opinion—lacking the detailed explanation of the underlying reasoning typically found in merits opinions—may not provide much illumination.[58]

The Court has demonstrated, however, that it can issue informative opinions in an expedited way. In a high-profile case concerning the second federal eviction moratorium, the Court released an eight-page per curiam opinion providing a concise analysis of the majority's view of the likelihood of success on the merits, weighing of the equities, and consideration of the public interest.[59] Given that public perceptions of the legitimacy of its rulings may be at stake, the Court may well benefit from continuing to adjust its explanatory practices in important cases, with an eye toward providing insight into the Court's reasoning, reinforcing procedural consistency, and avoiding the possible appearance of arbitrariness or bias.

Relatedly, the Court might also avoid most of the procedural and transparency concerns about emergency rulings by more frequently exercising its discretion to transfer emergency applications to the merits docket on an expedited basis, as it recently did in the ongoing litigation concerning the Texas abortion law,[60] as well as in *Ramirez v. Collier*, a capital case.[61]

2. Clarity on Precedential Value

Many observers seem to agree that emergency orders should not, as a general matter, carry precedential weight. In some of its orders, the Court is careful to say that the grant or denial of emergency relief should not be construed as resolving the merits of the case. The opinions accompanying the first emergency order denying relief in *Whole Woman's Health* present an illustration: The Court stated that "we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit."[62] And, as the dissent by Chief Justice Roberts elaborates, "[a]lthough the Court denies the applicants' request for emergency relief today, the Court's order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue."[63]

By contrast, when the Court earlier implied that lower courts are bound even by an emergency order issued with no opinion on behalf of the Court, in *Gateway City Church v. Newsom,* it risked confusing lower courts, relevant parties, and the public. Such an implied expectation would also be hard to square with a central justification for using truncated and relatively non-transparent procedures for emergency orders.[64] To the extent the Court has been taking steps since that case to clarify whether emergency rulings should have any precedential

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effect on lower courts,[65] or to specify which aspects of individual rulings should or should not be construed as precedent, these are welcome developments.

3. Existing Norms of Deference

A committee of regular advocates before the Court, including several former Solicitors General and Deputy Solicitors General, provided testimony highlighting established principles that the Court has endorsed and yet may not be regularly applying.[66] These principles, if applied more consistently, might relieve pressure on the Court to intervene early in at least some lower court proceedings. For example, their testimony pointed to "the Supreme Court's traditional 'two-court rule,'" which places an especially heavy thumb on the scale against reversing findings of fact that have been made by the trial court and affirmed by a court of appeals.[67] Also, "when the Court of Appeals sets an expedited schedule to address an important constitutional issue, the interest in ordinary process weighs against Supreme Court intervention."[68] One potential cost of more regular adherence to such principles might arise from privileging lower court rulings that turn out to be erroneous. An additional limitation is that these principles are relevant only to a subset of cases. The reach of both principles may be expanded, however, by the greater use of expedited scheduling in the federal appeals courts for cases likely qualifying as emergencies.[69]

4. Nationwide Injunctions

Another approach would aim to eliminate or reduce the number of "nationwide" or other defendant-oriented injunctions in the lower courts, some of which give rise to emergency applications to the Court.[70] Recommendations along these lines, including proposed legislation, have been primarily motivated not by concerns about the Court's emergency orders but by considerations about the power of the lower courts; such proposals have inspired extensive debate among commentators and policymakers, which we do not rehearse or evaluate here.[71] A witness before the Commission proposed the alternative of legislation allowing the government to "transfer all civil suits seeking 'nationwide' injunctive relief to the D.C. district court—to avoid the concern of overlapping (or diverging) 'nationwide' injunctions."[72] Funneling litigation involving the federal government into a single court, however, would only affect the subset of cases in which federal law or policy is at issue—and perhaps only the still-smaller subset in which there is a realistic risk of conflicting injunctions.

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E. Proposals for Capital Cases

The Supreme Court's emergency orders draw the most attention in high-profile cases where controversies directly impacting large numbers of people are at stake. Another component of the Court's emergency rulings, however, arises in the context of capital punishment, where the Court often has the final word on whether a state or federal execution will go forward. These cases come to the Court in an emergency posture as the date of execution approaches, when there are unresolved legal challenges to the execution pending in the lower courts.[73] If the lower courts do not stay the execution, the condemned person will ask the Court to do so. If the lower courts do halt the execution, the state will typically ask the Court to vacate that stay so the execution can proceed.[74] These decisions form a substantial and well-known component of the Court's emergency orders.[75]

In recent years, the Court's handling of emergency applications in capital cases has drawn criticism from commentators as well as from members of the Court itself. Several Commission witnesses presented arguments and proposals specific to the death penalty context, based on the premise that "death is different" because there is no opportunity to correct a legal error if an execution goes through, and because ending human life is a uniquely serious form of state action.[76] At the extreme, the risk of legal error may compound a risk of factual error, thus raising the worry that the state may kill an innocent person;[77] one Commission witness testified that to date "185 people have been exonerated after being wrongfully convicted of a capital offense and condemned to death."[78] In other cases, the concern is not that the state might execute someone who is innocent, but rather that it will violate constitutional or other legal rights and protections in the course of administering a death sentence.[79] These cases include challenges concerning the risk of severe and needless pain and suffering due to the method of execution,[80] the individual's competency to be executed,[81] or the presence of a religious advisor at the time of death.[82] Commentators have argued that the Court should err on the side of pausing an execution if such legal challenges remain unresolved.[83]

Yet there are those who argue, to quote Justice Thomas, that injustice can also come "in the form of justice delayed."[84] Executions typically are authorized pursuant to warrants that expire on a given date; if a judicial stay prevents the execution from going forward, the state often needs to obtain a fresh warrant, a process that can delay an execution by a month or more, while frustrating the state's interest in carrying out the sentence.[85] And a stay that remains in effect during the pendency of lower court or Supreme Court review can remain in place for considerably longer.[86]

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Until very recently, such debates centered on death penalty cases in the states, with little attention paid to federal executions, for the simple reason that federal executions are far less common. Between 1963 and 2001, the federal government did not execute anyone, and it executed only three people between 2001 and 2019.[87] By contrast, the states have executed more than 1,500 people since 1973.[88] In the months before the Commission's formation, however, a spike in federal executions gave rise to multiple emergency applications to the Court. Commission witnesses and commentators cited these rulings, in addition to state cases, as salient examples of problems with the Court's handling of its emergency orders.[89]

The federal executions at issue occurred during the last six months of the Trump administration, when the Department of Justice sought the execution of thirteen individuals.[90] Legal challenges were filed in all thirteen cases, including claims that the Department's proposed execution plan violated federal statutes and constituted cruel and unusual punishment under the Eighth Amendment.[91] In multiple instances, the lower federal courts noted that the challenges raised significant and complex issues, and in some cases they concluded that the challengers were likely enough to succeed on the merits to warrant a stay of execution to permit time for the courts to resolve the issues.[92] At the Supreme Court, one or more requests for emergency relief were filed in each case, sometimes from the government seeking to vacate a lower court stay and sometimes from the person seeking the stay. The combined effect of the Court's orders in these cases was to permit all thirteen executions to go forward.[93] In most cases, it did so in brief orders that gave no rationale for its decision,[94] though multiple dissents were filed.[95] A Commission witness defended these rulings on the ground that the challengers did not convince the Court that they were likely to succeed on the underlying merits.[96] Other Commission witnesses criticized the Court's handling of the cases.[97] So did Justices Breyer and Sotomayor.[98] In Justice Sotomayor's view, the way the Court made these decisions, "with little opportunity for proper briefing and consideration, often in just a few short days or even hours," and often without a public explanation of their rationale, "is not justice."[99]

In their testimony before the Commission, several witnesses argued that because in capital cases the stakes of error are asymmetrical, the Court's approach to stays of execution should be asymmetrical as well. "[T]here is no symmetry between an erroneous execution and an erroneous non-execution," one witness reasoned. "If proper attention is given to irreparability [of harm] and the need to preserve the judiciary's ability to decide a case, then the Justices should be much more willing to give shadow-docket orders that *delay* an execution than shadow-docket orders that *accelerate* an execution."[100] Below, we address two sets of reforms proposed by witnesses taking this view of asymmetrical stakes.

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1. Asymmetric or Automatic Stays of Execution

Several witnesses endorsed the view that the Court should apply an explicitly asymmetrical approach to staying executions,[101] for example, with a presumption in favor of staying an execution when there is genuine doubt as to its legality, or with a heightened standard of review for vacating stays when lower courts have issued them.[102] One witness testified that such an asymmetric approach could be imposed by congressional legislation, either in the form of a statute prescribing asymmetric standards of review or one removing the Court's jurisdiction to review stays of execution entered by lower courts.[103] We address jurisdiction stripping generally in Chapter 4 of this Report. But absent any action from Congress, the Court can alter its own threshold for staying an execution.

Commission witnesses also proposed variations of an automatic stay of execution during certain stages of litigation. Under one proposal, previously endorsed by Justice Stevens and by a commission led by Justice Powell, "the Supreme Court should be required to automatically grant a stay of execution to any defendant who has not yet completed a first federal habeas review."[104] In another proposal, every person with a pending execution date would have at least one full opportunity to litigate any challenges to the state's proposed method or administration of execution.[105] Arguing against these proposals, a Commission witness contended that the availability of automatic stays might induce litigation based on weak claims; that the existing legal standard could account for the irreversibility of an execution; and that any additional delay could undermine the government's interests in cases where the legal challenge has little chance of success, even if lower court judges view the underlying question as unsettled or unresolved.[106]

2. Four Votes to Stay an Execution

Another approach would be for the Court itself to reduce the number of votes required to grant a stay of execution, from five votes to four—a reform embraced by a number of Commission witnesses,[107] as well as certain Justices in the past.[108] Such a reduction would address a related but distinct set of concerns called to the Commission's attention regarding what one commentator has termed "a lethal gap" in the Court's internal processes: "It takes four votes to put a case on the court's docket" via a writ of certiorari, "but it takes five to stop an execution."[109] Thus, it is possible that the Court could grant a petition for certiorari and set a case for full briefing and argument to resolve a significant legal question, and yet also allow the petitioner to be put to death while the case is pending. Given this concern, some Justices have at times employed a practice known as the "courtesy fifth," whereby a Justice who does not believe that either certiorari or a stay is warranted will nonetheless vote to issue a stay if

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four other Justices have voted to grant certiorari, thus preserving the Court's jurisdiction.[110] The contours and the continuing viability of this norm are unclear, however.[111]

In recent years, the Court has declined to halt executions when four Justices requested more time for consideration—before a vote on certiorari. In one instance, four Justices voted to call for the views of the Solicitor General, a step typically taken only in cases in which the Court is seriously considering granting certiorari. But as Justice Breyer noted in dissent: "[N]o Member of the majority . . . proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution."[112] More recently, in *Dunn v. Price*,[113] after the state sought to vacate a lower court stay on the evening of the execution, four Justices requested that the application be held until the following morning when all the Justices could discuss the issue at their regularly scheduled conference; the Court refused and entered a brief order vacating the stay.[114]

In such situations, a case that four Justices are seriously considering placing on the merits docket for full consideration can be denied a path forward by a decision disposing of the case through an emergency order. The proposal of a rule that four votes are sufficient to grant a stay of execution would resolve this concern. So would an extension of the "courtesy fifth" norm to include circumstances in which four Justices need more time to determine whether to vote to grant certiorari, an approach taken by Chief Justice Roberts in a capital case several years ago.[115]

Arguing against such a proposal, a Commission witness urged that if the Court is to prevent the government from carrying out a death sentence as scheduled, it should only do so if a majority of the Justices endorse that action.[116] A related concern is the one raised by then-Justice Rehnquist, who argued to his colleagues that "four Justices out of a total number of nine could frustrate the effectuation of the will of the majority" by banding together to issue a stay "in every death penalty case."[117] Other commentators are skeptical of this concern, however, asserting for instance that "there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and congressional comment—why the minority would be unlikely to behave in this fashion."[118] A Commission witness observed, moreover, that the Court for many years had four Justices who were generally sympathetic to legal issues raised by capital defendants, but who did not use "their existing authority to disrupt the operation of the court" by granting certiorari in every capital case and pressing for a courtesy fifth.[119]

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II. Judicial Ethics

The Justices of the U.S. Supreme Court are the only members of the federal judiciary who are not covered by a code of conduct. Since 1973, the United States Judicial Conference has composed and updated an advisory Code of Conduct directed to all other federal judges. That Code, by its own terms, is not addressed to the Justices.

In a 2011 year-end report, Chief Justice Roberts addressed concerns over the Justices' exclusion from the Code. He emphasized that "All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges.'"[120] In 2019, during an appropriations hearing in Congress, Justice Kagan similarly stated that the Justices follow the Code to the very best of their ability.[121]

There is some debate over whether the Justices always follow the Code even if they do consult it.[122] The Commission has not undertaken a study of the Justices' adherence to the standards in the existing Code and makes no finding in this respect. Regardless of whether the Justices do consult and follow the existing Code, not having a formally adopted code might not be best practice for the Court. On this view, even if there were no apparent issue with ethical practices on the Court, the explicit adoption of a code could promote important institutional values. Most significant public and private entities have adopted codes of conduct for their organizations and employees.[123] It is not obvious why the Court is best served by an exemption from what so many consider best practice. To bring the Court into alignment with other courts and entities, some observers argue that the Supreme Court should adopt a code of conduct—either the existing Code applicable to other judges or its own version of a code—or that Congress should impose one.

The discussion of whether the Court should adopt a code of conduct has included a further discussion about whether the Justices should be subject to a disciplinary framework as well. The Justices are not subject to the complaint and discipline framework that applies to other federal judges. The Judicial Conduct and Disability Act of 1980 allows for any person to file a complaint against a federal judge alleging that the judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability."[124] The Code of Conduct can be relevant to determining whether a judge has engaged in prejudicial conduct. However, the Judicial Conduct and Disability Act excludes the Justices from its reach.[125]

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Relatedly, though the Justices are subject to statutory standards that require recusal in specified situations, unlike recusal decisions by lower court judges, the Justices' recusal decisions are not subject to further review.

This section discusses potential benefits and drawbacks of reforms that would impose a code of conduct, a disciplinary framework, or recusal review.

A. Code of Conduct

A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code. In other contexts, such a demonstration of commitment has affected conduct over time, in part by encouraging periodic training and other similar techniques that enhance attention to ethical concerns.[126]

There are two paths to a code of conduct for the Supreme Court: The Court could *internally* adopt a code, or Congress could *externally* impose a code upon the Court. In either case, the code could mirror the one that applies to other federal judges or could be specific to the Supreme Court.

1. Internal Adoption of a Code

The Court could formally adopt the Code of Conduct that already applies to other Article III federal judges. It has adopted similar non-binding regulations in the past: In 1991, the Court formally adopted ethical regulations enacted by the Judicial Conference under the Ethics Reform Act of 1989.[127] Those regulations now govern the Justices' ability to receive gifts, honoraria, and outside income, and they require the Justices to make periodic financial disclosures. Adopting the current Code could be done quickly. Furthermore, the Justices' ethical obligations would then parallel those of the rest of the federal judiciary. The Code comprises, for the most part, broadly stated aspirational principles. Were the current Code to apply to the Justices, it might not be necessary to amend the actual language of the Code,[128] although the opinion letters interpreting the Code in the context of particular situations involving lower court judges might not be directly applicable to the Justices.

As an alternative to adopting the current Code, the Court could create its own code. In a 2019 appropriations hearing, Justice Kagan stated that the Chief Justice was "studying" the question of whether to adopt a code applicable only to the Supreme Court.[129] In that same hearing, Justice Alito was asked why the current Code of Conduct does not apply to the

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Supreme Court; among other things, he commented that the working life of the Court is a "little different" from that of the rest of the federal judiciary.[130]

An advantage of creating a new code drafted by the Justices is that the language of the code could be geared to the unique institutional setting of the Court. For example, the considerations involved in the recusal context might be different for the Justices, even though the statutory standards are the same as for other judges.[131] This is because a Justice, unlike a lower court judge, cannot simply be replaced by another judge. As another example, a new code for the Justices might also provide guidance on public and private appearances, as the considerations could be different for a Justice than for other judges who are not the object of so much public attention. The Justices themselves might be well positioned to consider the tensions and issues that can arise from their public and private activities, and to set standards for themselves. While the Justices' participation in a broad range of educational and professional activities undoubtedly benefits the profession and the country, the Justices must be mindful of appearances if they choose to attend meetings of organizations that have a political or other valence that could cause the Justices' attendance to become controversial or cast doubt on their neutrality.[132] A code drafted by the Justices, amplified over time through its application, might help the Justices navigate these waters.

In either case, the Supreme Court clearly has sufficient authority to adopt a code—doing so raises no constitutional problems. The Court has the power to affect its own internal governance, so long as it continues to meet its constitutional responsibilities.

2. External Imposition of a Code

In the absence of Court action, Congress could enact a code for the Supreme Court. Several bills have been proposed to this effect, although none has been enacted.[133] Typically, the proposed bills direct the Judicial Conference to craft a code for the Court (or simply make the existing Code applicable to the Justices). In his 2011 year-end report, Chief Justice Roberts pointed out that the Judicial Conference currently lacks the statutory authority to do so. The Chief Justice put it bluntly: "Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body."[134] The proposed bills would address this precise issue of Judicial Conference authority.

Alternatively, Congress could write a code itself. One observer points out that Congress already imposes requirements on the Court that are analogous to a code of conduct.[135] For example, Congress requires that Justices take an oath of office, requiring them to swear to

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"administer justice without respect to persons, and do equal right to the poor and to the rich . . . ."[136] The oath resembles provisions that might be included in a code of conduct.

External proposals would give Congress more control over the composition of a code of conduct. If Congress were to write a code, it would need to be careful to ensure that the code's demands did not encroach on the Court's constitutionally exclusive judicial decisionmaking function.[137] Further, Congress has largely delegated procedural matters to the courts.[138]

B. Judicial Discipline

In addition to the adoption of a code, there is a similar question of whether the Court should adopt a complaint and discipline framework. Under the Judicial Conduct and Disability Act, other federal judges can be subject to sanctions for conduct that is prejudicial to the "effective and expeditious" business of the courts; the Code is highly relevant to an appraisal of judicial conduct under this misconduct formulation.

This section will discuss first the benefits and costs of applying the Judicial Conduct and Disability Act to the Justices. It will then discuss the benefits and consequences of an internal disciplinary framework.

1. Judicial Conduct and Disability Act

The Judicial Conduct and Disability Act is a framework for disciplining misconduct that does not rise to the level of impeachment. The Judicial Conference provides nationally uniform guidelines governing the substantive and procedural aspects of misconduct proceedings. The following is a simplified description of the procedures currently in place for the lower federal courts:

(1) "Any person" may file a complaint alleging misconduct or disability.
(2) The chief judge of the relevant circuit (or the most senior active circuit judge in the event that the chief judge is disqualified) reviews the complaint and decides whether to dismiss the complaint for lack of conformity with the statute or because voluntary corrective action has been taken.
(3) If the complaint is not dismissed, a special committee appointed by and including the chief judge investigates the complaint and reports to the circuit judicial council.[139]
(4) Upon receiving the special committee's report, the judicial council may conduct additional investigation, dismiss the complaint, impose sanctions, or refer the complaint to the United States Judicial Conference.

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(5) If a complainant is dissatisfied with the disposition of the circuit council, the complainant may petition for review by the judicial conduct and disability committee of the Judicial Conference (review is discretionary).

Applying the Act to the Justices without modification would place inferior court judges in the position of evaluating members of a body that is hierarchically superior. This could possibly lead to undue deference. Applying the Act to the Court might be constitutionally infirm as well if the disciplinary process encroached on the judicial decisionmaking function of the Court.[140]

Additionally, the Act's lack of a standing or jurisdictional requirement for filing a complaint may be open to abuse. The Act allows "any person" to file a complaint against a federal judge. In 2013, chief circuit judges resolved 1,167 filed complaints, dismissing all but 20 as "merits-related, lacking sufficient evidence, frivolous, or otherwise improper."[141] These numbers would likely be even higher if the statute applied to the Supreme Court due to the visibility of the Court and the individual Justices.[142]

Furthermore, the stakes of the procedure would be much higher if applied to the Court. Sanctions under the Act "may include . . . ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."[143] Although Justices do not have their own dockets, temporarily restricting a Justice from the work of the Court would be a highly consequential event that would deprive litigants and the American people of whatever number constitutes a full complement of Justices.[144] Unlike in the lower courts, there is currently no mechanism for replacing an absent Justice. The availability of such a sanction could cause groups to file more complaints in the hope of removing those Justices with whom they tend to disagree. Further, and more broadly, it is possible that interest groups seeking to mobilize support, raise money, and pursue their own agendas would see in this process an avenue for seeking their own ends to the detriment of the Court, individual Justices, and the public.

2. Internal Disciplinary Procedures

An internal disciplinary procedure for the Court would avoid the issue of having inferior court judges sit in judgment of the Justices or the more serious risks that could arise if the disciplinary process were run by persons outside the judiciary.[145] Some of the mechanisms of the Judicial Conduct and Disability Act, detailed above, could serve as a model for procedures tailored to the Justices. If these procedures called for internal enforcement, the Chief Justice (or next most senior Justice, in the event of conflict) could review complaints against

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individual Justices. The complaint could be referred to the entire Court or a subset of Justices. How such a procedure might affect the overall role of the Chief Justice and the working relationships of the Justices is not clear, although the development of deep personal rifts seems at least possible as a result. And again, the sanction of removal from a case could have broad repercussions for the Court, litigants, and the public.

Some might conclude that the adoption of a code of conduct would not be beneficial without an additional mechanism for receiving and reviewing complaints. However, experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions.[146]

C. Recusal

All federal judges, including the Justices, are subject to statutory standards that require recusal in specified situations. The statute, 28 U.S.C. § 455, requires a judge or Justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[147] The statute also requires recusal in more specific circumstances, such as when the judge has a financial interest in the proceedings or personal knowledge of disputed facts.[148] Recusal decisions by lower court judges are orders in a case and, like other rulings, are subject to review on appeal. By contrast, a recusal decision by a Justice is not subject to further review. Perhaps in part for this reason, the Justices rarely offer any explanation either for refusing to recuse or for recusing. Justices Rehnquist and Scalia famously wrote memoranda explaining their decisions not to recuse in two high-profile cases.[149] But those memoranda were quite unusual.

Moreover, when a lower court judge recuses, another judge is selected to hear the case. While it can be disruptive to a case when a judge recuses after participating in the proceedings for a substantial period of time, most recusals come at the first assignment of a case and do not affect the handling of the case. In contrast, when a Justice recuses there is no current possibility of adding another Justice. For this reason, the mere fact of the recusal may be case dispositive. The Justices may therefore be justified in being more hesitant than lower court judges to recuse, and correspondingly should be more careful to avoid circumstances that might trigger recusal.

The Justices' recusal decisions are subject to significant public attention, and Justices are often criticized for failing to recuse.[150] Even so, the Justices recuse somewhat frequently, at least at the certiorari stage. There was an average of 193 recusals at the certiorari stage over the last six Terms, and an average of four recusals at the merits stage.[151]

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U.S. Supreme Court Term	Recusals at the Certiorari Stage	Recusals at the Merits Stage
2020	247	1
2019	145	4
2018	198	3
2017	228	6
2016	206	4
2015	181	4

The Justices do not offer reasons for their recusals, but reasons sometimes can be inferred based on context. For example, a Justice's financial disclosure forms may reveal whether a recusal was due to an interest such as owning shares of stock in a publicly traded company. Based on context, it appears that the most common reason for recusal in the past six Terms is that the Justice was involved with a case during previous employment as a circuit judge or as Solicitor General. Following that, recusals due to stock ownership were the next most common.

After stock ownership, there is a significant dip. A few recusals were likely because a Justice (or Justices) were named in the suit, or because of a family relationship (Justice Breyer, for example, will routinely recuse in cases that were handled by his brother, a U.S. district judge). A negligible number of recusals involve other reasons. In 2020, for example, Chief Justice Roberts recused from a case involving the Smithsonian Institute apparently because the Chief Justice serves as the chancellor of that institution.

Proposals for recusal reform largely focus on making the process more transparent and accountable. There are three common proposals for reform: (1) require the Justices to state their reasons for recusal or for refusing to recuse; (2) establish a formal procedure by which recusal decisions may be reviewed by another Justice or by the entire Court; and (3) reform recusal laws to make it easier for Justices to avoid financial conflicts.

1. Stating Reasons for Recusal

Statements from the Justices explaining their reasons for recusal could enhance the transparency of the recusal process and help build a "common law" of recusal on the Court.

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Recusal decisions could serve as guidance to Justices and might also clarify whether the Justices use the same standards for recusal on recurring issues, particularly a Justice's prior contact with a case when a circuit judge. While the Justices may provide such statements on their own, Congress or the Court itself might also require such statements from the Justices.[152] However, requiring full discussion on every decision to recuse could be time consuming and burdensome. A reasoning requirement could also force Justices in some situations to divulge private matters—for example the medical condition of a family member—and this could discourage recusal where otherwise appropriate. A recusal opinion might also have the appearance or effect of lobbying the other Justices.[153] One answer to these concerns might be to require only a short statement without specific details; for example, the Justice might state that the recusal is based on the Justice's involvement with the case when a circuit judge and identify the nature of the involvement (e.g., served on the panel, reviewed a motion to hear the case en banc).

In tandem with requiring explanations for recusal, there may be benefits to requiring Justices to state reasons for *not* recusing when a motion for recusal has been filed. Requiring reasoned explanations could ensure that the Justices have thoroughly considered whether to recuse. And, like explanations for recusal, explanations for not recusing could help build a body of guidance to future Justices that is also accessible to the public. Even more so than with explanations for recusal, however, requiring explanations for not recusing could become burdensome and time-consuming if motions to recuse became more common and interested groups see such motions as an opportunity to harry or embarrass Justices with whom they disagree.

2. Establish a Review Procedure

A Justice's decision whether to recuse is totally independent, and recusal decisions are not subject to any kind of review. The Justices may well consult with one another over difficult recusal decisions, but the decision is still that of the individual Justice and not subject to further review. This places the Justice in the position of being the final arbiter of a recusal motion that challenges the Justice's own impartiality.[154]

Other individual decisions made by the Justices are subject to a form of review by another Justice or the full Court. Parties regularly make applications to individual Justices. These applications include, for example, requests for filing deadline extensions and requests for a temporary stay of an injunction. If a Justice denies one of these requests, Supreme Court Rule

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22 provides that a party may renew its request to another Justice on the Court.[155] Sometimes Justices refer emergency motions to the entire court.

It is not clear how the Court's operations or relations among the Justices would be affected by an internal process for review of recusal decisions. There has been at least one occasion in the Court's history where disagreement over recusal has led to a significant feud.[156] Because recusal can be case dispositive, were the ultimate decision on recusal to rest with the entire Court, a decision by the Court to force a Justice to recuse may lead to accusations of improper purpose. These issues may not be insuperable; some state supreme courts have a referral process for recusal decisions and the process appears to work without undue friction or burden in that setting.[157] The practice of comparable high courts in other countries, such as those in Canada and the UK, also may be instructive. It appears that neither Canada nor the UK has a referral practice for recusal on its highest court and that high court justices decide recusal on their own without further review, as in the U.S. Supreme Court. The views of the Justices would be particularly helpful in any further analysis.

3. Reform Financial Recusal Laws

Context suggests that a significant number of Supreme Court recusals are due to a Justice's financial conflict. Indeed, a study of recusals at the certiorari stage in Terms 2003-2013 revealed that there was at least one recusal in 10% of certiorari petitions involving a Forbes 100 company.[158] What makes these numbers surprising is that the Justices (along with their spouses and dependent children) are legally enabled to divest themselves of any stock that is causing a conflict without incurring capital gains tax.[159] It may be that there is something about the wording or operation of the relevant statute, 26 U.S.C. § 1043, that limits its reach or effectiveness.[160] If so, the Court might speak to this issue so that the statute might be improved.

Given the significant number of financial recusals, some have suggested reforms that may reduce the number of recusals due to financial conflicts. For example, Congress could act to prohibit Justices, their spouses, and any dependent children from owning individual shares in publicly traded companies, or Congress could require divestment when a conflict arises.[161] Both reforms would reduce financial conflicts significantly (and eliminate conflicts arising from stock ownership).

The Commission notes a building consensus among observers that no Justices or their spouses and dependent children should own or continue to own individual publicly traded securities.[162]

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III. Courtroom Transparency

Due to the COVID-19 pandemic, the Supreme Court conducted oral arguments over teleconference beginning in the 2020 Term. For the first time, oral arguments were routinely livestreamed, so the public could listen in from anywhere an internet connection was available. The Court has decided to continue livestreaming oral arguments for the first few months of the current Term (through December 2021), although it has not yet announced whether this practice would continue beyond that period. The present experiment in simultaneous audio has added additional fuel to a longstanding debate over whether there ought to be cameras in the Supreme Court's courtroom, which is usually capable of seating only around 50 members of the general public at a time.

In many respects, the work of the Court has become more accessible over the past few decades. The Court's opinions are available online for anyone to read or download, as are its orders, including decisions on petitions for certiorari. Even before arguments were livestreamed, recordings could be accessed after the fact in most modern cases. Still, the Court has never made the leap to allowing video streaming or video recording of its proceedings.

Proponents of cameras in the courtroom emphasize the potential educational, historical, and civic benefits of being able to see the Justices at work. Congress has introduced bills calling for cameras. Numerous members of the media and interested members of the public also urge video coverage. Moreover, lower federal courts and state courts have experimented with cameras, and scholars and judges have documented the results of those experiments.[163]

However, several Justices have made clear that they disfavor video recording and streaming of the Court's proceedings.[164] They and other opponents of cameras raise concerns that being on camera may lead to grandstanding by attorneys or even by the Justices, that the nature of the discussion may become more scripted and less useful, and that video clips of the Court may be taken out of context and used to mislead the public.

As an alternative to cameras in the courtroom, the Court could continue its current practice of livestreaming audio of oral arguments. Prior to the pandemic, attendance at the courtroom was determined on a first-come, first-served basis, and important cases often attracted long lines and large crowds.[165] Critics have documented the unfortunate practice of paid line-standers, a problem the Court itself partially addressed in advance of one especially high-profile case.[166] Livestreamed audio is far more accessible; one does not need to be in Washington, D.C., to listen to arguments, and attendance is not limited by seats available.

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Livestreamed audio also gives the American public real-time access to important events in the Supreme Court's courtroom. This may be practically important in those few cases where the oral argument itself may have significant immediate effects, for example on public markets. In addition to hearing arguments, it could also be meaningful for members of the public to hear opinion announcements from the Justices themselves in real time.

Although livestreaming of the arguments prevents the Court from fixing minor mistakes that may occur during oral argument, the past two Terms indicate that this problem is minor. Livestreamed audio has led to few, if any, hiccups; any such technical problems were related to the telephonic format of the arguments during the pandemic. There is also some concern that observers in the courtroom might attempt to use the fact of livestreaming to disrupt the proceedings. A short delay in transmission to allow livestreaming to be halted during any outburst could prevent any such disruption.

Given the Court's longstanding opposition to cameras, a continuation of near-simultaneous audio would be a step toward enabling the media and interested members of the bar and the public to better follow the work of the Court. Perhaps further experience with simultaneous audio will encourage the Court to try cameras as well.

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[1] By transparency, we do not mean opening the Court's internal deliberations to the public but rather increasing the consistency of reason-giving in important cases and easing public access to the Court's already public activity.

[2] *Orders of the Court - Term Year 2020*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/ordersofthecourt/20 (last accessed Sept. 18, 2021). The Court releases a list of orders each Monday that it sits and issues "miscellaneous" orders in individual cases "at any time." *Id.* These orders are catalogued by date of issuance on the Court's website and later consolidated into a set of Orders Lists published in the bound volumes of the *United States Reports*, in a section following the Opinions of the Court. The *United States Reports* are generally printed multiple years after a case is resolved. *See* Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions,* 128 HARV. L. REV. 540, 543 (2014) (noting a five-year delay). In the interim, the Court's orders and its opinions related to orders can be found in various places on the Court's website, including: on a page entitled "Opinions Relating to Orders;" at the end of the regular or miscellaneous "Orders List" catalogued online; and in the preliminary (and eventually final) version of the *United States Reports*, digital images of which the Court makes available for free online. Finally, the Court's orders (but not the opinions relating to those orders) are separately printed in the Journal of the Supreme Court, a bound volume printed at the conclusion of each Term that contains "the official minutes of the Court," digital images of which are also made available online. *Journal*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/journal.aspx (last accessed Sept. 18, 2021).

[3] The Court also sometimes issues per curiam decisions finally resolving a given case. These per curiam opinions appear on the Court's web page and in the *United States Reports* alongside other "Opinions of the Court" issued via the merits docket, even though they are often decided summarily without the robust procedures normally associated with merits cases. In addition, the Court sometimes resolves a pending case by granting a petition for certiorari, vacating the opinion below, and remanding for further proceedings (typically with brief instructions, such as to consider a recently issued opinion of the Court). These summary dispositions, known colloquially as "GVRs," for grant, vacate, and remand, appear on the Orders List. Individual Justices also occasionally issue "in chambers" opinions in their capacities as Circuit Justice; these opinions are posted on the Court's web page and eventually published in the *United States Reports*.

[4] *See, e.g.*, Albert M. Sacks, *The Supreme Court, 1953 Term - Foreword*, 68 HARV. L. REV. 96, 103 (1954); Ernest J. Brown, *The Supreme Court, 1957 Term - Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957); Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 & n.13 (1959); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 3-4 (1957). Many of these criticisms focused on summary dispositions occurring at a time when the Court's docket was more crowded with mandatory appeals (which have largely been eliminated from its present, almost entirely discretionary merits docket). *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 20 (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) [hereinafter Resnik Testimony] (noting that between 2018 and 2021, while certiorari was granted in 217 cases, only 4 cases arose from the Court's mandatory appellate jurisdiction), https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf.

[5] *See, e.g.*, William O. Douglas, *The Supreme Court and its Caseload*, 45 CORNELL L.Q. 40 (1960); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964).

[6] See, e.g., Aaron-Andrew P. Bruhl, The Supreme Court's Controversial GVRs—and an Alternative, 107 MICH. L. REV. 711 (2009); Ira P. Robbins, Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions, 86 TUL. L. REV. 1197 (2012).

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[7] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); *see also Presidential Commission on the Supreme Court of the United States* 1 n.1 (June 30, 2021) (written testimony of Samuel L. Bray, Notre Dame Law School) [hereinafter Bray Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf (defining the shadow docket as "the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari").

[8] *See Presidential Commission on the Supreme Court of the United States* 4-5 (June 30, 2021) (testimony of Stephen I. Vladeck, University of Texas School of Law) [hereinafter Vladeck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf (presenting evidence of an increase in emergency orders in important cases, while also acknowledging that "[t]here's no perfect way to measure the rise of the shadow docket" and that "it's hard to separate out the significant rulings (which are always a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones"). Professor Vladeck documents a general upward trend, from 2005 through 2020, in the number of orders that either grant or vacate a stay or injunction—"orders that, through whatever mechanism, change the status quo" set by the lower courts. *Id.* Although this measure omits rulings in which the Court *denied* an application to grant or vacate a stay or injunction, such orders can also be of great consequence. Professor Vladeck also presents indicators of shifts in the qualitative importance of the Court's emergency orders in recent years. *Id.* at 6-10.

[9] The leading critic on these issues is Professor Stephen Vladeck. See, e.g., The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary, 117th Cong. (2021) (statement of Stephen I. Vladeck, University of Texas School of Law), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf; Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, The Solicitor General and the Shadow Docket]; Vladeck Testimony, supra note 8. For other critics of the Court's use of emergency rulings, see, for example, The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary, 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor General, District of Columbia) [hereinafter AliKhan House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliKhanL-20210218-U1.pdf; Mark Walsh, The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny, A.B.A. J. (Aug. 20, 2020, 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny. Although emergency orders—the focus of this section—have received the most attention in recent debates, commentators also continue to point to concerns about the Court's use of summary reversals. *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 11-12 (June 25, 2021) (testimony of Michael R. Dreeben, O'Melveny & Myers LLP), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dreeben-Statement-for-the-Presidential-Commission-on-the-Supreme-Court-6.25.2021.pdf; Richard C. Chen, Summary Dispositions as Precedent, 61 WM. & MARY L. REV. 691 (2020); Edward A. Hartnett, Summary Reversals in the Roberts Court, 38 CARDOZO L. REV. 591 (2016); see also Barry Friedman & Maria Ponomarenko, To Rein in Abuse by the Police, Lawmakers Must Do What the Supreme Court Will Not, N.Y. Times (Oct. 27, 2021) (critiquing recent summary reversals and arguing that the decisions escaped media attention "because the court handled them on its shadow docket").

[10] On September 30, 2021, Justice Alito gave a public address on "The Emergency Docket" at Notre Dame Law School in which he responded to many of the critiques of the Court's recent orders. The address was livestreamed, but a recording is not publicly available. *See* https://events.nd.edu/events/2021/09/30/justice-samuel-alito-the-emergency-docket/. *See also, e.g.,* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (contending that the ruling "illustrates just how far the Court's 'shadow docket' decisions may depart from the usual principles of appellate process," and "is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend"); Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html (quoting Justice Breyer in an interview: "I can't say never decide a shadow-docket thing," he saId. "Not never. But be careful. And I've said that in print. I'll probably say it more.").

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[11] This section is not meant to exhaustively engage every criticism or defense advanced about the Court's procedures in its issuance of emergency orders. We have focused on especially salient critiques—and responses to those critiques—that have been developed by scholars and practitioners, and more recently the Justices themselves, over the past few years.

[12] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

[13] *E.g.*, Biden v. Texas, No. 21A21, slip op. at 1 (U.S. Aug. 24, 2021) (mem.); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).

[14] *E.g.*, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).

[15] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1 (U.S. Aug. 26, 2021) (per curiam); Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 20A169, slip op. at 1 (U.S. June 29, 2021) (mem.); Chrysafis v. Marks, No. 21A8, slip op. at 1 (U.S. Aug. 12, 2021) (mem.).

[16] 141 S. Ct. 2494 (2021).

[17] *See* Ross v. Nat'l Urban League, 141 S. Ct. 18 (2020) (mem.).

[18] *See* Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (mem.); Andino v. Middleton, 141 S. Ct. 9 (2020) (mem.); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (mem.).

[19] *See* Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.).

[20] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[21] *Presidential Commission on the Supreme Court of the United States* 13 (July 20, 2021) (written testimony of Sharon McGowan, Lambda Legal), https://www.whitehouse.gov/wp-content/uploads/2021/07/McGowan-Testimony.pdf (describing how although the Court later denied cert in a Virginia school board's effort to reverse a lower court injunction allowing a transgender student to use the boys' bathroom, the Supreme Court's initial stay in the case, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (mem.), had the effect of barring Gavin Grimm from "using the boys' restroom along with all the other boys throughout his last year of high school").

[22] Vladeck Testimony*, supra* note 8, at 7.

[23] Steve Vladeck (@steve_vladeck), TWITTER (Sept. 5, 2021 1:27 PM), https://mobile.twitter.com/steve_vladeck/status/1434568812045742086.

[24] In the 2020 Term, the Court decided fewer than 70 merits cases, below its average over the past 15 years. *See* Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020-21 TERM 18 (2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf. The merits docket for the 2019 Term contained the lowest number of cases since the Civil War. Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war; *see* SCOTUSBLOG*,* FINAL STAT PACK FOR OCTOBER TERM 2019, at 1 (2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf.

[25] Vladeck Testimony*, supra* note 8, at 7-8.

[26] Bray Testimony, *supra* note 7, at 5-7 (discussing such injunctions and their relationship to the shadow docket).

[27] *See* Alito, "The Emergency Docket," *supra* note 10.

[28] As an example of the latter point, Professor Vladeck argues that a majority of the Justices believe that state and federal governments are irreparably harmed when their actions are enjoined by a lower court and suggests that this is a relatively new development. Vladeck Testimony, *supra* note 8, at 14.

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[29] In *Whole Woman's Health*, for example, abortion providers and other groups challenging the Texas law applied to the Court for emergency relief after a federal appeals court issued an administrative stay halting proceedings in the district court. Challengers asked the Court to issue injunctive relief or, in the alternative, to lift the appellate court's stay. Given that the law was set to go into effect the following day, the Court faced great pressure to act quickly—and its decision could hardly have failed to be important and controversial.

[30] *See* Alito, "The Emergency Docket," *supra* note 10. *See also* Mark Rienzi, *The Supreme Court's "Shadow" Docket—A Response to Professor Vladeck*, NAT'L REV. (Mar. 16, 2021, 1:30 PM), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck.

[31] *See, e.g.*, Vladeck Testimony, *supra* note 8, at 4-6 (focusing on evidence of an increase in "cases in which the Justices are using the shadow docket to change the status quo—where the Court's summary action disrupts what was previously true under rulings by lower courts"); *Id.* at 14-15 (critiquing the Court's apparent readiness to intervene on the ground that "when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect," as well as the Court's apparent willingness to grant emergency relief to protect "newly minted rights").

[32] *Id.* at 6 (describing the rise of "cases in which the Justices are using the shadow docket to change the status quo" and arguing that "part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs until a case reaches the Court on the merits (which, increasingly, may be never)").

[33] *See, e.g.*, Rienzi, *The Supreme Court's "Shadow" Docket, supra* note 30. For a response, see *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket, Hearing Before the Senate Committee on the Judiciary* 20-21 (Sept. 29, 2021) (written testimony of Stephen I. Vladeck, University of Texas School of Law), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [hereinafter Vladeck Senate Testimony]. *See also* Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's 'Shadow Docket,'* N.Y. Times (Sept. 2, 2021) ("'I think the real concern [of critics] is that the court has been reaching out aggressively in some of the immigration and Covid cases, and [in *Whole Woman's Health*] it is not. . . . And why is it when it's a Covid restriction in church service, the court rushes in, in the middle of the night, to stop the government, but when it's an anti-abortion law, the court lets it go?'" (quoting Professor Will Baude)).

[34] Bray Testimony, *supra* note 7, at 9.

[35] *Compare Presidential Commission on the Supreme Court of the United States* 5:19:47 (June 30, 2021) (oral testimony of Samuel L. Bray) [hereinafter Bray Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (defining "status quo" as used in the testimony of Samuel L. Bray) *with Id.* at 50:20:12 (defining "status quo" as used in the testimony of Stephen I. Vladeck).

[36] Bray Testimony, *supra* note 7, at 9 ("I recognize that these judgments inevitably have a normative tinge. I know that it is a choice to see the national injunction as the disruptive force, not the executive policy or rule that prompted the national injunction. I know it is a choice to see the state public health measures as the disruptive force, not the worship services that ran up against the public health measures.").

[37] *See, e.g.*, Vladeck Testimony, *supra* note 8, at 4 (describing "orders that . . . change the status quo" as those that "stay[] a lower court decision and/or mandate pending appeal," "vacat[e] a stay . . . imposed by a lower court," "grant[] an emergency writ of injunction pending appeal," or "vacat[e] a lower court's grant of an emergency injunction").

[38] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (issuing a writ of injunction against enforcement of California's pandemic-based limits on in-home gatherings); Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (staying a lower court order lifting a ban on Alabama counties from offering curbside voting in light of the COVID-19 pandemic); Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.) (staying a lower court preliminary injunction requiring implementation of safety measures to protect inmates during the COVID–19 pandemic).

[39] *See, e.g.*, Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 8 (U.S. Aug. 26, 2021) (Breyer, J., dissenting) ("We should not set aside the CDC's eviction moratorium in this summary

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proceeding."); Bray Oral Testimony, *supra* note 35 (defining status quo as "the last peaceable moment" that existed prior to a disruption, and explaining that in a case in which a lower court enters an injunction blocking a new executive policy, "the disruption is coming from the lower courts usually").

[40] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (Roberts, C.J., dissenting) (emphasis added).

[41] For example, Justice Barrett recently denied a request for emergency relief concerning Indiana University's vaccine requirement. The denial is noted on the Court's docket without any accompanying explanation. *See* Klaassen v. Trustees of Indiana University, No. 21A15, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a15.html; Amy Howe, *Barrett leaves Indiana University's vaccine mandate in place*, SCOTUSblog (Aug. 12, 2021, 9:40 PM), https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/.

[42] As an example, commentators cite the Court's decisions in a series of cases concerning the rights of people facing execution to have a religious advisor of their chosen spiritual denomination present in the execution chamber at the time of their death. *See* Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); Gutierrez v. Saenz*,* 141 S. Ct. 127 (2020) (mem.); Murphy v. Collier*,* 139 S. Ct. 1475 (2019) (mem.); Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.). To some observers, the Court's rulings suggest that some of the Justices' understanding of the governing legal principles may have shifted across the four cases, but in the absence of majority opinions speaking for "the Court" and information about how each Justice voted in each case, the answer is not clear. *See* Vladeck Testimony, *supra* note 8, at 8-9 & 18 (discussing the lack of written explanation for the Court, as well as the lack of disclosure of certain Justices' votes, in the emergency orders in the religious-adviser capital cases).

[43] *See* Vladeck, *The Solicitor General and the Shadow Docket*, *supra* note 9, at 131; Vladeck Testimony, *supra* note 8, at 14 (citing the Court's decision in *South Bay United Pentecostal Church v. Newsom (South Bay II)*, 141 S. Ct. 716 (2021) (mem), and emphasizing that none of the four separate opinions issued by Justices who supported the order "purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction"). For some of the recent articulations of the standard, which may vary by context, including procedural posture, see, e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a strong showing that it is likely to succeed on the merits, that it will be irreparably injured absent a stay, that the balance of equities favors it, and that a stay is consistent with the public interest." (internal quotation marks omitted)); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) ("To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing the factors as "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies"). *Cf.* John Does 1-3 v. Mills, No. 21A90, slip op. at 1 (U.S. Oct. 29, 2021) (Barrett, J., concurring) ("When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant is 'likely to succeed on the merits'. . . I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case . . . Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without the benefit of full briefing and argument.").

[44] *See, e.g.*, Steve Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently.,* WASH. POST (Sept. 3, 2021, 10:43 AM), available at https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion (contrasting the Court's refusal to issue relief in *Whole Woman's Health,* the Texas abortion case, on grounds of legal uncertainty, with cases in which the Court "showed no compunction about [making new law] where alleged infringements on religion were at issue"); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket,* SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket (contrasting *Whole Woman's Health* with cases involving federal executions); *see also* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1-2 (U.S. Aug. 26, 2021) (Breyer, J.,

dissenting) (criticizing the majority for vacating a stay entered by a lower court when the agency order was not "demonstrably wrong" (citation omitted)); Wheaton College v. Burwell, 573 U.S. 958, 965-68 (2014) (Sotomayor, J., dissenting) (objecting to the majority's decision to issue an emergency injunction where the legal rights at issue were not "indisputably clear," as required by precedent interpreting the All Writs Act, 28 U.S.C. § 1651 (citing Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1303 (1993))).

[45] As one Commission witness put it, "[i]t is common in our legal system for preliminary orders, rather than merits decisions, to have different norms of justification and attribution." Bray Testimony, *supra* note 7, at 13. *See also* Alito, "The Emergency Docket," *supra* note 10.

[46] As Professor Michael Morley argued in congressional testimony, "it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning . . . ." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 3 (2021) (statement of Michael T. Morley, Florida State University College of Law) [hereinafter Morley House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf.

[47] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 18 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, & Maureen Mahoney, Latham & Watkins, LLP) [hereinafter Geller & Mahoney Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf (arguing that "requiring the Court to announce legal conclusions may appear to commit the Justices to particular views before merits briefing—which itself is a criticism of some emergency orders"); Bray Testimony, *supra* note 7, at 14 (discussing potential psychological precommitment effect).

[48] *See, e.g.*, Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 830 (2021); AliKhan House Testimony, *supra* note 9, at 12-13.

[49] *See* Alito, "The Emergency Docket," *supra* note 10.

[50] There are other examples. One witness testified that the U.S. Court of Appeals for the Fourth Circuit grappled with the same problem in *CASA de Md., Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020). *See* Vladeck Testimony, *supra* note 8, at 10 n.30; *see also* Baude, *Foreword: The Supreme Court's Shadow Docket, supra* note 7, at 13 (describing the Seventh Circuit's effort in *Frank v. Walker,* 769 F.3d 494 (7th Cir. 2014), to discern the meaning of the Supreme Court's stays in the earlier marriage equality cases). *Cf.* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 4 (U.S. Aug. 26, 2021) (per curiam) (explaining, in the second of two eviction moratorium cases, that the district court concluded that "the Government was unlikely to succeed on the merits, given the four votes to vacate the stay in this Court and Justice Kavanaugh's concurring opinion" in the first case); *Id.* at 5 (Breyer, J., dissenting) ("Certainly this Court did not resolve the question by denying applicants' last emergency motion, whatever one Justice might have said in a concurrence.").

[51] 141 S. Ct. 1460, 1460 (2021).

[52] Vladeck Testimony, *supra* note 8, at 14.

[53] *See, e.g.*, Bray Testimony, *supra* note 7, at 7-9, 18 (analogizing emergency rulings to preliminary injunctions and arguing that "[i]f the shadow docket works (and fails to work) in the same way as the preliminary injunction, then we want to tamp down the precedential effects, not ramp them up").

[54] *See, e.g.*, Vladeck Testimony, *supra* note 8, at 22-26.

[55] *Id.*

[56] One defender of the Court's use of emergency orders explained that "there does not appear to be a need for either vote tallies, or the identities of the Justices who voted to grant or deny a petition, to be withheld from the public." Morley House Testimony, *supra* note 46, at 3.

[57] *See* Vladeck Senate Testimony, *supra* note 33, at 27 (critiquing the Court's order in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), which articulated the standard four-part test for relief and concluded that the applicants failed to "me[e]t their burden," but did not explain how the Court weighed the four factors (or whether it deemed some factors irrelevant in the absence of a sufficient showing on the merits)). For a response, see

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Jurisdiction and the Supreme Court's Orders Docket, U.S. Senate Committee on the Judiciary (Sept. 29, 2021) (written testimony of Jennifer L. Mascott).

[58] *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (faulting the majority for "barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail").

[59] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. (U.S. Aug. 26, 2021) (per curiam).

[60] United States v. Texas, No. 21A85, slip op. (U.S. Oct. 22, 2021), https://www.supremecourt.gov/opinions/21pdf/21a85_5h25.pdf (treating application for emergency relief as a petition for a writ of certiorari before judgment and granting the petition with an expedited schedule for briefing and oral argument); Whole Woman's Health v. Jackson, No. 21-463, 2021 U.S. LEXIS 5326 (Oct. 22, 2021), https://www.supremecourt.gov/orders/courtorders/102221zr_986b.pdf (granting petition for certiorari before judgment with an expedited schedule for briefing and oral argument).

[61] Ramirez v. Collier, No. 21-5592 (21A33), 2021 U.S. LEXIS 3681 (Sept. 8, 2021), https://www.supremecourt.gov/orders/courtorders/090821zr_n7ip.pdf.

[62] *Whole Woman's Health,* 141 S. Ct., at 2495. Disavowing a decision on the merits, while potentially deflecting mistaken treatment of an emergency ruling as precedent, might not dull its practical effects. *See United States v. Texas*, slip op. at 2 (Sotomayor, J., concurring in part and dissenting in part) ("The promise of future adjudication offers cold comfort, however, for Texas women seeking abortion care, who are entitled to relief now. These women will suffer personal harm from delaying their medical care, and as their pregnancies progress, they may even be unable to obtain abortion care altogether.").

[63] *Whole Woman's Health*, 141 S. Ct., at 2496 (Roberts, C.J., dissenting).

[64] Bray Testimony, *supra* note 7, at 18.

[65] The Commission has focused primarily on the issue of emergency orders as "vertical precedents" that are binding on lower courts. Significant complications are raised by the questions of whether, when, and how emergency orders should operate as "horizontal precedents" that bind the Court itself in later cases. The Court might, for example, treat its statements about the standards for review in emergency rulings as carrying some precedential weight in later cases even if it does not treat the more substantive elements of its emergency rulings, such as predictions about likelihood of success on the merits, as precedential. One's views on these matters might inform the questions of whether and on what issues the Court should be "consistent" across the run of its emergency rulings, and vice versa.

[66] Geller & Mahoney Testimony, *supra* note 47, at 18-19 (detailing such existing principles but noting that "the Court may not always garner universal acclaim—even among the Justices themselves—for its adherence to these settled standards").

[67] *Id.* at 19 (citing *Glossip v. Gross*, 576 U.S. 863, 882 (2015) as stating that Supreme Court does not review "concurrent findings of fact by two courts below in the absence of a very obvious sand exceptional showing of error").

[68] *Id.* at 19. The testimony points to *Doe v. Gonzales*, 546 U.S. 1301, 1303 (2005) (Ginsburg, J., in chambers), as an endorsement of the expedited-schedule norm. *Id.*

[69] Professor Vladeck, for example, has proposed that "[i]n any cases in which *any* (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower court rulings receive plenary appellate review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority." Vladeck Testimony, *supra* note 8, at 24. Although Professor Vladeck is suggesting this as a reform for Congress to enact, similar acceleration may be accomplished to some degree by the courts themselves.

[70] Bray Testimony, *supra* note 7, at 18 (endorsing the Injunctive Authority Clarification Act of 2021, H.R. 43, 117th Cong. (2021)); *see also* Morley House Testimony, *supra* note 46, at 7 (arguing that if nationwide injunctions were

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"curtailed—whether through a clear Supreme Court precedent directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure—at least one of the contributing factors to the recent growth of the shadow docket w[ould] be removed").

[71] In the specific context of "nationwide" injunctions, as relevant to emergency orders, one limitation is that such restrictions would address only a subset of the orders that have been of concern. *See* Vladeck Testimony, *supra* note 8, at 11-12 (reporting that cases involving the federal government—and, thus, the potential for a nationwide injunction—account for "only one modest slice of the shadow docket," and that "even within the DOJ slice, less than half of the Trump administration's applications for emergency relief involved nationwide injunctions" (emphasis omitted)).

[72] *Id.* at 24.

[73] There is a debate over the extent to which litigation commenced as execution dates approach is an example of strategic gamesmanship, versus a more benign outgrowth of the nature of death penalty law and litigation itself. Several Justices clearly view it as the former. *See, e.g.*, Murphy v. Collier, 139 S. Ct. 1475, 1482 (2019) (mem.) (Alito, J., dissenting) ("This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent."); Price v. Dunn, 139 S. Ct. 1533, 1538 (2019) (mem.) (Thomas, J., concurring) ("A stay [when] the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place — only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage."). On the other hand, Professor Lee Kovarsky observes that litigation in the lead up to an execution is a natural consequence of two other factors. First, the Court's own doctrine creates a set of "intrinsically delayed claims," such as challenges to a person's competency to be executed or to the method of execution, for which "the nature of the constitutional challenge itself thwarts early-phase litigation" because the claims are unripe for adjudication until an execution date is imminent. Lee Kovarsky, *Delay in the Shadow of Death,* 95 N.Y.U. L. REV. 1319, 1322-23 (2020) (citing, *inter alia,* Panetti v. Quarterman, 551 U.S. 930, 946 (2007)); *cf. Glossip v. Gross,* 576 U.S. 863, 923-24 (2015) (Breyer, J., dissenting) ("[D]elay is in part a problem that the Constitution's own demands create."). Second, Kovarsky observes that a lack of resources available to capital defendants forces a small number of lawyers to triage their representation, such that litigation is often "undertaken after the state sets an execution date—because that is the first time that many capital prisoners have the legal representation necessary to enforce certain rights." Kovarsky, *supra*, at 1321. *See generally Id.* at 1356-85.

[74] *See* Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 4, 2012, at A19.

[75] The clerk who handles all emergency applications at the Court is sometimes referred to as the "death clerk" due to the salience of this category of cases. *Id.* This category is also procedurally distinctive in that many cases involve habeas corpus, "a thorny and evolving area of the law governed by intricate rules, multi-faceted statutes, and a complex (and still developing) jurisprudence." *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project) [hereinafter Federal Capital Habeas Project Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf.

[76] *See, e.g.*, Geller & Mahoney testimony, *supra* note 47, at 28 ("On balance, based on the Supreme Court's recognition that capital cases are different and on the potential beneficial effects of a heightened standard of review on the process for consideration of applications to vacate a stay of execution, a majority of the Committee [of experienced Supreme Court practitioners] believes that proposals for heightened standards of review for such applications warrant serious consideration."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); Reid v. Covert, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring) ("The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.").

[77] *Cf. Glossip,* 576 U.S. at 937 (Breyer, J., dissenting) ("[R]eview by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court he may well have been executed rather than exonerated." (citing *Hinton v. Alabama,* 571 U.S. 263 (2014))).

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[78] *See Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Christina Swarns, Innocence Project) [hereinafter Swarns Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Swarns-Presidential-Commission-on-SCOTUS-Testimony.pdf. Given these statistics, "the risk of convicting and executing an innocent person is real and," the witness argued, "constitutionally unacceptable." *Id. See also Glossip v. Gross,* 567 U.S. 863, 927 (2015) (Breyer, J., dissenting) ("Several inmates have come within hours or days of execution before later being exonerated.") (citing multiple examples); Dahlia Lithwick, *Cruel but not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), https://slate.com/news-and-politics/2011/04/connick-v-thompson-clarence-thomas-writes-one-of-the-cruelest-supreme-court-decisions-ever.html (noting that John Thompson had seven death warrants signed, each setting an imminent date for his execution, before he was exonerated).

[79] One Commission witness drew a sharp distinction between challenges to a condemned person's conviction and arguments that the execution itself would violate the condemned person's constitutional or statutory rights. *Presidential Commission on the Supreme Court of the United States* 2 (Sept. 15, 2021) (written testimony of Hashim M. Mooppan) [hereinafter Mooppan Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf.

[80] *See, e.g.*, *Glossip*, 576 U.S. at 876-77 (2015) (describing the standard for an Eighth Amendment method-of-execution claim).

[81] *See* Ford v. Wainwright, 477 U.S. 399 (1986).

[82] *See supra* note 42 (discussing religious advisor cases).

[83] *See, e.g.*, Swarns Testimony, *supra* note 78, at 1 (arguing that there "is no area of the law in which reliability, accuracy, and fairness are more critical than capital punishment").

[84] Price v. Dunn, 139 S. Ct. 1533, 1540 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) (quoting Ivana Hrynkiw, *Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late*, ALABAMA.COM (Apr. 12, 2019, 7:03 AM), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html). Most death sentences are never carried out. *See Glossip,* 576 U.S. at 931 (Breyer, J., dissenting) ("Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row."). Those that are take a very long time: for those put to death in 2014, an average of 18 years had elapsed between the imposition and the execution of sentence. *See id.* at 924-25. Most of that delay is attributable to the ordinary course of judicial review (as opposed to emergency stay applications) or to factors independent of the judicial process. *See, e.g.*, *Jones v. Chappell,* 31 F. Supp. 3d 1050, 1055-60 (C.D. Cal. 2014) (concluding after reviewing multiple reports on death penalty delay in California "that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued").

[85] Mooppan Testimony, *supra* note 79, at 3 ("Especially given the lengthy delay before an execution is scheduled at all, further delaying an execution even for a limited time in these circumstances essentially undermines for that period the judgment of Congress, the Executive Branch, and the sentencing judge and jury that continued imprisonment is inadequate and only death is sufficient punishment for the most heinous of murders.").

[86] A further consequence, also noted by Justice Thomas, is that surviving relatives of the victims sometimes travel to witness the execution and may be "forced to leave without closure" after years of waiting if the execution is postponed at the last minute. *Dunn v. Price,* 139 S. Ct. 1533, 1540 (2019) (mem.).

[87] *See* Federal Bureau of Prisons, *Historical Information: Capital Punishment*, at https://www.bop.gov/about/history/federal_executions.jsp (last accessed Oct. 3, 2021); *see also* Lee Kovarsky, *The Trump Executions* 10 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784.

[88] *See* Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last accessed Oct. 3, 2021). Against this backdrop, several witnesses who shared assessments and recommendations with the Commission regarding the Court's emergency capital orders grounded their analyses at least in part on cases from the states, including a series of recent cases from Alabama and Texas about the

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presence of a religious adviser at the execution. *See* Swarns Testimony, *supra* note 78; Bray Testimony, *supra* note 7; *cf.* Mooppan Testimony, *supra* note 79, at 22 n.10.

[89] Federal Capital Habeas Project Testimony, *supra* note 75; Vladeck Testimony, *supra* note 8; *see also* Kovarsky, *The Trump Executions, supra* note 87. The Commission also solicited and received testimony from one witness who defended the Court's approach to the federal execution cases. *See* Mooppan Testimony, *supra* note 79.

[90] For detailed (and divergent) accounts of the cases and litigation described in this section, see Kovarsky, *The Trump Executions, supra* note 87; Federal Capital Habeas Project Testimony, *supra* note 75; Mooppan Testimony, *supra* note 79.

[91] Federal Capital Habeas Project Testimony, *supra* note 75, at 5-6 (listing legal challenges raised by federal prisoners that were unanswered by the Supreme Court); Kovarsky, *The Trump Executions*, *supra* note 87, at 27-28 (noting Eighth Amendment claims). Notably, these executions were conducted pursuant to a recently adopted execution protocol that was being implemented for the first time in the midst of a pandemic, and they implicated a set of statutes that had not previously been examined closely by the courts.

[92] Federal Capital Habeas Project Testimony, *supra* note 75, at 3 & n.14.

[93] Professor Kovarsky summarized these requests as follows: the Court "entertained some twenty-four requests for emergency relief, touching on all of the executions"; and while it "granted no emergency relief to prisoners," it issued "shadow-docket orders granting emergency relief to the U.S. Solicitor General" multiple times. Kovarsky, *The Trump Executions*, *supra* note 87, at 43 & n.322 (citing United States v. Higgs, 141 S. Ct. 645 (2021); Rosen v. Montgomery, 141 S. Ct. 1232 (2021); United States v. Montgomery, 141 S. Ct. 1233 (2021); Barr v. Hall, 141 S. Ct. 869 (2020); Barr v. Purkey, 141 S. Ct. 196 (2020); Barr v. Lee, 140 S. Ct. 2590 (2020)). *See also* Federal Capital Habeas Project Testimony, *supra* note 75, n.14 ("In eight of these cases, the government filed emergency applications to vacate the stays, which the Court uniformly granted—and in seven of those eight, the Court provided no explanation at all for its orders.").

[94] *See, e.g.*, United States v. Higgs, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating two lower court decisions preventing execution); Barr v. Purkey, 141 S. Ct. 196 (2020) (vacating the lower court's preliminary injunction without reasoning). As one commentator observes, in the rare instance where the Court did issue a brief per curiam opinion, it appeared to change the underlying Eighth Amendment doctrine. Prior precedent issued in 2019 (via the merits docket) had held that a person challenging a method of execution under the Eighth Amendment must demonstrate that the challenged method would "superadd" pain above and beyond a "feasible and readily implemented alternative method of execution." Buckley v. Precythe, 139 S. Ct. 1112, 1125 (2019). In contrast to that comparative analysis, the Court's per curiam opinion in the federal execution case of *Barr v. Lee*, 140 S. Ct. 2590 (2020), "appeared to ground its vacatur [of the lower court's stay] in the idea that pentobarbital-only executions [a]re *unconditionally* consistent with the Eighth Amendment," even when compared to a proposed less painful alternative that had not previously been analyzed by the Court. Kovarsky, *The Trump Executions*, *supra* note 87, at 24 (emphasis added).

[95] Ten of the orders, out of 25, were issued over dissents. Mooppan Testimony, *supra* note 79, at 11. Also, in several cases, the Court vacated lower court stays even though the courts of appeals had set expedited briefing schedules to resolve the cases promptly. *See*, *e.g.*, Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (vacating D.C. Circuit's stay of execution pending highly expedited en banc consideration of FDPA statutory question); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating similarly expedited D.C. Circuit consideration of Eighth Amendment challenge to federal execution protocol).

[96] *See generally* Mooppan Testimony, *supra* note 79, at 1-16; *see also Id.* at 12 (defending "the orders where the criticism of the Court would seem to be most relevant, because a divided Court used emergency rulings to" summarily vacate lower court says, on the ground that "the dissenting Justices did not assert that the inmate's claim was likely to succeed").

[97] *See* Vladeck Testimony, *supra* note 8; Federal Capital Habeas Project Testimony, *supra* note 75; *Presidential Commission on the Supreme Court of the United States* 16 (Sept. 1, 2021) (written testimony of Janai S. Nelson, NAACP Legal Defense Fund), https://www.whitehouse.gov/wp-content/uploads/2021/09/NAACP-LDF.pdf ("In

eight orders supported by little to no reasoning, the Court lifted lower court stays of federal executions, denying the inmates a fair opportunity to present evidence for their claims.").

[98] In *United States v. Higgs*, the final case to reach the Court during the Trump administration, Justice Sotomayor argued in dissent that:

> This unprecedented rush of federal executions has predictably given rise to many difficult legal disputes. . . . Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

Higgs, 141 S. Ct. at 647 (Sotomayor, J., dissenting). Justice Breyer was similarly critical: "None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up'? That is no solution." *Id.* at 646 (Breyer, J., dissenting).

[99] *Id.* at 647 (Sotomayor, J., dissenting).

[100] *See, e.g.*, Bray Testimony, *supra* note 7, at 16. Professor Bray's point echoed others, most notably Mr. Amir Ali, who told Congress earlier this year that "When it comes to ending someone's life, there is no do-over. And when the matter before the Court is one of life or death, the public's interest in transparency and the need to ensure public confidence in our legal system are at their apex." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 1 (2021) (statement of Amir H. Ali, Roderick & Solange MacArthur Justice Center) [hereinafter Ali House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf; *see also* Swarns Testimony, *supra* note 78; *cf.* Eric M. Freedman, *No Execution If Four Justices Object,* 43 HOFSTRA L. REV. 639, 652-54 (2015) (arguing that executions should be stayed whenever necessary to afford the Justices "time to think" about whether to grant certiorari in a case).

[101] *See* Bray Testimony, *supra* note 7, at 16-17; Swarns Testimony, *supra* note 78, at 5-6; *see also* Ali House Testimony, *supra* note 100, at 5-6.

[102] *See* Swarns Testimony, *supra* note 78, at 5-6. *See also* Geller & Mahoney testimony, supra note 47, at 28 (noting that among a committee of experienced Supreme Court practitioners, "a majority of the Committee believes that proposals for heightened standards of review for such applications warrant serious consideration," although a "significant number of members of the Committee oppose the proposal").

[103] See *Presidential Commission on the Supreme Court of the United States* 5:42:00 (June 30, 2021) (oral testimony of Stephen Vladeck, University of Texas Law School) [hereinafter Vladeck Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (describing an asymmetrical, statutorily imposed standard of review as "clearly constitutional"); *see also* Ali House Testimony, *supra* note 100 , at 5-6 (proposing a statutory approach).

[104] Swarns Testimony *supra* note 78, at 6. *See also Id.* at 7 ("While it may be unlikely for an execution to proceed while a first-time habeas petition pends, the assurance of an automatic stay is nevertheless called for given the gravity of what is at stake."). Ms. Swarns agreed with Justice Stevens that "granting an automatic stay of execution pending the completion of a full round of federal habeas review is consistent with the goals of the Antiterrorism and Effective Death Penalty Act and would improve the balance between finality and justice in the Court's review of capital cases." *Id. See also* AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 CRIM. L. REP. 3239 (1989); Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J. respecting denial of certiorari).

[105] See Vladeck Oral Testimony, *supra* note 103, at 5:44:22 (proposing a statutory bar on carrying out an execution during the course of such a legal challenge to the method of execution, as well as arguing for mandatory review at the Supreme Court of such a challenge). *But see* Mooppan Testimony, *supra* note 79, at 23 (noting practical

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problems with automatically allowing a full round of litigation on administration-of-execution challenges, including potential incentives for capital inmates to raise weak claims).

[106] *See, e.g.*, Mooppan Testimony, *supra* note 79, at 3 ("[W]hen a claim is not likely to succeed—especially when it does not even challenge the lawfulness of the sentence or the risk of material harm in how the sentence will be carried out—the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges. Postponement for that reason alone would fail to give sufficient weight to the compelling interest of the government and the public in timely executions.").

[107] See *Presidential Commission on the Supreme Court of the United States* 5:46:40 (June 30, 2021) (oral testimony of Michael Dreeben, O'Melveny & Myers LLP), https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 ("I think a much better approach would be that if four Justices vote to hear a case, that there either be a courtesy fifth or just a policy that four in that instance trumps five and that the Court hear the case on the merits. I think that would be more consistent with the traditional rule of four and the underlying purposes that it serves.").

[108] *See* Freedman, *supra* note 100, at 650 n.45 (describing proposals separately advanced over the years, most explicitly by Justices Brennan and Marshall).

[109] Adam Liptak, *A Fitful Commitment to Halting Executions*, N.Y. TIMES, Dec. 13, 2016, at A13.

[110] *See, e.g.*, Darden v. Wainwright, 473 U.S. 928, 928–29 (1985) (mem.) (Powell, J., concurring in the granting of the application for a stay) ("I find no merit whatever in any of the claims advanced in the petition for certiorari . . . . But in view of the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner's life at stake . . . I feel obligated to join in granting the application for a stay."). In practice, however, this norm has been difficult to discern and has not always been applied consistently. *See* Freedman, *supra* note 100; Liptak, *supra* note 109 (describing the courtesy-fifth practice as operating "in fits and starts" and as being "inconsistent"). The Court also often denies stays of execution or vacates lower court stays over four dissents. *See, e.g.*, Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting); *see also* Freedman, *supra* note 100, at 651 n.50 (recounting "dozens of cases . . . denying stays over four dissents"). Some observers contend that these votes might be consistent with the courtesy-fifth norm if the norm requires the four dissenting Justices to actually vote to grant certiorari, and not merely to vote for a stay to permit more time to consider granting certiorari. *See* Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM), http://www.scotusblog.com/wp/2007/10/death-penalty-stays.

[111] As one commentator notes, "the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be," while any potential pattern one might attempt to glean from the Court's public actions are consistent with "ad hoc negotiations by the Justices on a case-by-case basis." Freedman, *supra* note 100, at 651.

[112] Medellin v. Texas, 554 U.S. 759, 765-66 (2008) (Breyer, J., dissenting).

[113] 139 S. Ct. 1312 (2019) (mem.). In *Dunn,* Justice Breyer's request to consider the state's application the following morning would have carried the execution past its warrant date. As it turns out, the Court's majority did not vacate the lower court's stay until after the warrant expired, which resulted in the execution being postponed. *See* Adam Liptak, *Dissent As Court Splits Over Execution*¸ N.Y. TIMES, Apr. 13, 2019, at A1.

[114] *Id.* at 1313-14 (Breyer, J., dissenting). *But cf.* Price v. Dunn, 139 S. Ct. 1533, 1539 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) ("Insofar as Justice Breyer was serious in suggesting that the Court simply 'take no action' on the State's emergency motion to vacate until the following day, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.").

[115] As Chief Justice Roberts noted in voting for a stay as a "courtesy" when four other Justices had voted for a stay (before deciding on certiorari): "I do not believe that this application meets our ordinary criteria for a stay. This case does not merit the Court's review: the claims set out in the application are purely fact-specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three. Four Justices have, however, voted to grant a stay. To afford them the opportunity to

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more fully consider the suitability of this case for review, including these circumstances, I vote to grant the stay as a courtesy." Arthur v. Dunn, 137 S. Ct. 14 (2016) (mem.) (statement of Roberts, C.J., respecting the grant of the application for stay).

[116] Mooppan Testimony, *supra* note 79, at 5 ("If the Supreme Court is to take such consequential action, it should be done only if a majority of the Justices vested with the judicial power of the Court actually agrees with that action.").

[117] Freedman, *supra* note 100, at 652 n.55 (quoting Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2 (Sept. 9, 1985)). At various points over the past few decades, more than four Justices (albeit not all serving at the same time) have expressed their opposition to the death penalty. Some but not all made a regular practice of voting in favor of every capital defendant seeking relief at the Court. *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); *see also* Green v. Zant, 469 U.S. 1143, 1143 (1985) (mem.) (Brennan, J., joined by Marshall, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for a stay of execution.") (citation omitted); Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.") (quotation omitted); Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) ("[M]y own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment."); *see generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT ch. 2 (2016).

[118] Freedman, *supra* note 100, at 652 n.55.

[119] Swarns Testimony, *supra* note 78, at 5.

[120] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011) [hereinafter 2011 YEAR-END REPORT], https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[121] *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 116th Cong. (2019) (statements of Hons. Samuel Alito & Elena Kagan, Associate Justices, U.S. Supreme Court), https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm.

[122] In the past decade, observers have argued that Justices transgressed provisions of the Code by participating in fundraising dinners for outside organizations or by overtly criticizing political candidates, to take two prominent examples. *See e.g.*, Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice; Editorial Board, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html. Justice Ginsburg later apologized for her comments and acknowledged that "[j]udges should avoid commenting on a candidate for public office." Meg Anderson, *LISTEN: Justice Ginsburg Expands on Decision to Apologize for Trump Remarks*, NPR (July 14, 2016), https://www.npr.org/2016/07/14/486080234/listen-justice-ginsburg-expands-on-decision-to-apologize-for-trump-remarks.

[123] *See, e.g.*, *Ethics Handbook for On and Off-Duty Conduct,* DEP'T OF JUSTICE (Jan. 2017), https://www.justice.gov/jmd/ethics-handbook; *Code of Business Conduct and Ethics*, AMAZON, https://ir.aboutamazon.com/corporate-governance/documents-and-charters/code-of-business-conduct-and-ethics/default.aspx (last accessed Oct. 25, 2021); *Code of Ethics*, EXXONMOBIL, https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/Code-of-ethics#Overview (last accessed Oct. 25, 2021).

[124] 28 U.S.C. § 351(a).

[125] *Id.* § 351(d).

[126] *See, e.g.*, Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535 (2011) (finding that quality codes of conduct can positively affect culture in

the corporate context); Alan Doig & John Wilson, *The Effectiveness Of Codes Of Conduct*, 7 BUS. ETHICS, ENV'T & RESPONSIBILITY 140 (1998) (finding that codes of conduct can positively affect ethical practices when paired with practices that inculcate and reinforce values).

[127] 1991 SUPREME COURT INTERNAL ETHICS RESOLUTION 1 (1991), https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution.html.

[128] Although, as noted below, there might be reason to be cautious when considering the current Code's provisions on recusal because recused Justices cannot be replaced. Although the current statutory standards of recusal apply equally to the Justices. 28 U.S.C. §455(a).

[129] Alito & Kagan House Testimony, *supra* note 121.

[130] *Id.*

[131] Although the statutory standards for recusal are fixed, courts have developed doctrines that assist in their application. For example, many circuits require timely filing of recusal motions so that waste of judicial resources may be avoided. *See, e.g.*, Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991) ("We require recusal motions to be lodged in a timely fashion because the absence of such a requirement would result in increased instances of wasted judicial time and resources."); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994) ("[I]t is well-settled that—for obvious reasons—one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification."). The Supreme Court might similarly tailor the application of the statute to fit its institutional concerns.

[132] There has been an internal debate in the federal judiciary over to what extent judges should be limited in their attendance at events and memberships in organizations. In 2020, the Code of Conduct Committee of the Judicial Conference released a draft opinion concluding that the Code prohibits membership in the Federalist Society and American Constitution Society. COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117 (EXPOSURE DRAFT): JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020). But the opinion was rescinded after widespread opposition from many members of the judiciary.

[133] *See, e.g.*, Supreme Court Ethics Act of 2015, S. 1072, 114th Cong. (2015); Supreme Court Ethics Act, H.R. 1057, 116th Cong. (2019). As noted above, Congress has enacted such legislation with respect to other federal courts. *See* Resnik Testimony, *supra* note 4, at 13 ("During the twentieth century, Congress built on constitutional and common law understandings of judicial impartiality and due process to articulate norms for most of the federal judiciary. . . . Congress elaborated methods for rulemaking, imposed standards for recusal, mandated term limits on individuals serving as the chief judge of a district and or a circuit court, and instituted a process for complaints to be filed against judges.").

[134] 2011 YEAR-END REPORT, *supra* note 120, at 4.

[135] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460-61 (2013).

[136] 28 U.S.C. § 453.

[137] Several observers have argued that Congress is limited in its capacity to regulate the ethical practices of the Supreme Court when such regulation might intrude on the Court's inherent constitutional powers. *See* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1562-75 (2012); Suzanne Levy, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1181-84 (2014); *but see* Frost, *supra note* 135, at 463–75 (arguing against various constitutional objections to proposed ethics legislation governing the Supreme Court, in part because ethics legislation might encroach on the Court's decisionmaking function).

[138] *See* 28 U.S.C. § 2072 (Rules Enabling Act).

[139] Circuit judicial councils are composed of a circuit's chief judge sitting as chair and an equal number of other circuit and district court judges. Circuit judicial councils perform various administrative roles within their

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circuits. *See Governance & the Judicial Conference*, U.S. COURTS, https://www.uscourts.gov/about-federal courts/governance-judicial-conference (last accessed Sept. 18, 2021).

[140] The constitutionality of the Judicial Conduct and Disability Act has been challenged at least once in the past, in a case brought by a United States District Judge; there, the Act's constitutionality was upheld. *See* McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S., 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the constitutionality of the Judicial Conduct and Disability Act against arguments based on Article III and the impeachment clause).

[141] Anthony J. Scirica, Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, *Judicial Governance and Judicial Independence*, Madison Lecture, *in* 90 N.Y.U. L. REV. 779, 788 (2015).

[142] *Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Russell Wheeler), https://www.whitehouse.gov/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS_.pdf (noting that a "small bureaucracy" would be required to sift through the high number of potential complaints against Supreme Court justices).

[143] *See* 28 U.S.C. § 354(a)(2).

[144] Such a sanction might also be unconstitutional as a de facto impeachment or impairment of the Court's ability to discharge its constitutionally mandated duties. *See* Lynn A. Baker, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1133 (1985) ("By authorizing the judicial councils and the Judicial Conference to order that no new cases be assigned [to] a judge, the Act contravenes th[e] explicit decision of the Framers not to permit so much as the temporary removal of an official, even if already impeached, until convicted by the Senate."); *but see* McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S., 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the facial constitutionality of the Judicial Conduct and Disability Act on the theory that principles of judicial independence established by the Constitution were designed to protect judges from interference by the *other branches*, and not to prevent intrabranch organization and discipline).

[145] A conduct oversight option frequently proposed by some members of Congress is the creation of an Inspector General for the Federal Courts. Some variations of the proposal give the Inspector General the power to investigate misconduct on the Supreme Court. This proposal has been around for decades and has been heavily discussed. *See, e.g.*, Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243 (1999); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010). Members of the federal judiciary have criticized the proposal and noted the dangers such an office could pose to judicial independence. *See* Scirica, *supra* note 141, at 789-97 (2015). Since 2018, the Judicial Conference has provided for a "Judicial Integrity Officer" who oversees workplace conduct in the federal judiciary. The responsibilities of the Judicial Integrity Office include "answering individuals' questions, providing guidance on conflict resolution, mediation, and formal complaint options." *Judicial Integrity Officer Named for Federal Judiciary*, U.S. COURTS (Dec. 3, 2018), https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary.

[146] *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001) (arguing that where lawyers are given clear rules to follow, informal social pressures from other members of the profession can serve the role of formal sanctions).

[147] 28 U.S.C. § 455(a).

[148] *Id.* § 455(1)-(4).

[149] *See* Tuan Samahon, *Rehnquist's Recusals*, 10 GREEN BAG 2D 205, 207 (2007); Memorandum of Justice Scalia, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004), available at https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf.

[150] *See Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (June 13, 2021), https://fixthecourt.com/2021/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest.

[151] This data was compiled with the help of Fix the Court's regular reports on Supreme Court recusal. *See, e.g.*, *The Supreme Court's Unexplained OT17 Cert.-Stage Recusals Explained*, FIX THE COURT, https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf (last accessed Sept. 18, 2021).

[152] Even some who are skeptical of congressional regulation of the Court's recusal practices have argued that requiring statements explaining recusal decisions would be a permissible procedural reform. *See* Virelli, *supra* note 137, at 1591-92.

[153] In a 2015 appropriations hearing, Justice Kennedy voiced a concern that presenting reasons for recusal might resemble lobbying. Justice Kennedy said: "In the rare cases when I recuse, I never tell my colleagues, oh, I'm recusing because my son works for this company and it's a very important case for my son. Why should I say that? That's almost like lobbying. So, in my view, the reason for recusal should never be discussed." Rich Gardella, *Why Don't Supreme Court Justices Have an Ethics Code*, NBC NEWS (Apr. 11, 2017, 2:26 PM) (quoting Justice Kennedy), https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236.

[154] Under 28 U.S.C. § 455, all federal judges decide certain recusal motions in the first instance. However, for lower court judges, the decision not to recuse may be appealed. Under 28 U.S.C. § 144, an affidavit alleging personal bias or prejudice by a United States District Judge must be heard by another judge if the affidavit is timely and sufficient.

[155] SUP. CT. R. 22(4).

[156] Justice Black and Justice Jackson feuded over Black's refusal to recuse himself in a case where the plaintiff's counsel was Black's former law partner and personal lawyer. Jackson wrote a concurrence to an order denying rehearing of the case that has been interpreted as critical of Black. *See* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 897 (1945) (Jackson, J., concurring); *see also* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (covering the Black-Jackson feud in detail).

[157] *See* RUSSELL WHEELER & MALIA REDDICK, JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING 19-21 (2017) (listing state statutes and codes that allow or require a judge's recusal decision to be referred to another judge or the entire court, including some statutes and codes that create such a referral process for the state's highest court).

[158] James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1178 (2015).

[159] *See* 26 U.S.C. § 1043.

[160] For example, the divestment statute only allows for divestiture when doing so is "reasonably necessary" to avoid a conflict. 26 U.S.C. § 1043(b)(2). Perhaps the Justices interpret this language as not permitting preemptive divestments to avoid conflicts.

[161] *See* Anderson, Helland & McAlister, *supra* note 158, at 1207-08 (proposing divestment requirements for judges or Justices).

[162] *See, e.g.*, Anderson, Helland & McAlister, *supra* note 158 at 1207-08 (suggesting that Congress should require divestment of stock ownership as a condition for confirmation, or require divestment when conflicts arise); Adam Liptak, *The Hazards Justices Face by Owning Individual Stocks*, N.Y. TIMES (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/us/politics/the-hazards-justices-face-by-owning-individual-stocks.html; Richard W. Painter, *Stocks owned by Supreme Court justices tilt the scales of justice*, MSNBC (Oct. 6, 2021, 1:39 PM), https://www.msnbc.com/opinion/stocks-owned-supreme-court-justices-tilt-scales-justice-n1280712.

[163] From our review, the Second, Third, Seventh, and Ninth Circuits have all allowed video recording of at least some oral arguments in the past few years. The Ninth Circuit has been especially prolific in this regard; it posts video recordings of most, if not all, of its oral arguments. *See Audio and Video*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/media/ (last accessed Oct. 31, 2021). According to a 2019 report by the Congressional Research Service, all 50 state supreme courts allow video recording of proceedings "under certain conditions." CONGRESSIONAL RESEARCH SERVICE, VIDEO BROADCASTING FROM THE FEDERAL

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COURTS: ISSUES FOR CONGRESS (2019). Judges on lower federal courts and state courts have written articles reflecting on the positive and negative effects of cameras in their courtrooms. *See* Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323 (2007); Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1 (2007). *See also* Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489 (2012) (collecting many of the competing arguments for and against cameras).

[164] *See, e.g.*, Alito & Kagan House Testimony, *supra* note 121 (Justice Alito observing that "I recognize that most people think that our arguments should be televised. Most of the members of my family think that arguments should be televised. I used to think they should be televised. . . . But I came to see and I do believe that allowing the arguments to be televised would undermine their value to us as a step in the decisionmaking process. I think that lawyers would find it irresistible to try to put in a little sound bite in the hope of being that evening on CNN or FOX or MSNBC or one of the broadcast networks, and that would detract from the value of the arguments in the decisionmaking process"); *Id.* (Justice Kagan observing that "it is a principle of physics, I think, . . . [that] when the observer comes in, the observed thing changes. And you commented on Congress, and if you all were given truth serum, I think some of you might agree that hearings change when cameras are there"); Sonia Sotomayor, "*Just Ask" & Life as a Supreme Court Justice – Extended Interview*, THE DAILY SHOW WITH TREVOR NOAH (Sept. 16, 2019) (Justice Sotomayor arguing that "if our arguments were televised, it might change the dynamic," for instance, "you would have more studied questions rather than those questions which are less studied and more inquisitive" and "the draw to play to TV affects every human being," with the overall result that "I think you would change our institution so dramatically that it would be for its worse, not for the country's better"), https://www.cc.com/video/hdash0/the-daily-show-with-trevor-noah-sonia-sotomayor-just-ask-life-as-a-supreme-court-justice-extended-interview.

[165] *Visitor's Guide to Oral Argument*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last accessed Sept. 18, 2021).

[166] At the start of the 2015 Term, the Court announced: "Only Bar members who actually intend to attend argument will be allowed in the line for the bar section; 'line standers' will not be permitted." Robert Barnes, *Supreme Court Tells Lawyers: Stand in Line Yourselves. You Can't Pay Others to Hold a Spot*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-bar-bans-line-standing-for-hearings/2015/10/06/a309e0e6-6c15-11e5-aa5b-f78a98956699_story.html; *see Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (testimony of Amy Howe), https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-Amy-Howe.pdf; Katie Bart, *Courtroom Access: Line-Standing Businesses Save Spots in the Public Line*, SCOTUSBLOG (Apr. 15, 2020, 4:48 PM), https://www.scotusblog.com/2020/04/courtroom-access-line-standing-businesses-save-spots-in-the-public-line. For data on the number of people waiting in the public line for seats at each argument session during the 2019 Term (until the courtroom closed due to the pandemic), the share of people in line who were eventually seated, and when one would have needed to arrive in order to secure a seat, see Amy Howe, *Courtroom Access: Let's Talk Data—The Public Line*, SCOTUSBLOG (May 4, 2020, 6:47 PM), https://www.scotusblog.com/category/special-features/courtroom-access-2020/.

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Appendices

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Appendix A: Executive Order 14023

Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Establishment.

There is established the Presidential Commission on the Supreme Court of the United States (Commission).

Sec. 2. Membership.

(a) The Commission shall be composed of not more than 36 members appointed by the President.

(b) Members of the Commission shall be distinguished constitutional scholars, retired members of the Federal judiciary, or other individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States (Supreme Court).

(c) The President shall designate two members of the Commission to serve as Co-Chairs.

Sec. 3. Functions.

(a) The Commission shall produce a report for the President that includes the following:

(i) An account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court;

(ii) The historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform; and

(iii) An analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.

(b) The Commission shall solicit public comment, including other expert views, to ensure that its work is informed by a broad spectrum of ideas.

(c) The Commission shall submit its report to the President within 180 days of the date of the Commission's first public meeting.

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Sec. 4. Administration.

(a) The Office of Administration within the Executive Office of the President shall provide funding and administrative support for the Commission to the extent permitted by law and within existing appropriations. To the extent permitted by law, including the Economy Act (31 U.S.C. 1535), and subject to the availability of appropriations, the General Services Administration shall provide administrative services, including facilities, staff, equipment, and other support services as may be necessary to carry out the objectives of the Commission.

(b) Members of the Commission shall serve without compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701-5707).

(c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (Act), may apply to the Commission, any functions of the President under the Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.

Sec. 5. Termination.

The Commission shall terminate 30 days after it submits its report to the President.

Sec. 6. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
April 9, 2021

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Appendix B: Commission Meetings, Expert Testimony, and Public Comment

President Biden established this Commission on April 9, 2021, by Executive Order 14023. Consistent with the Federal Advisory Committee Act of 1972, Public Law 92-463, 5 U.S.C. App., the Commission held public meetings on May 19, June 30, July 20, October 15, November 19, and December 7, 2021. Recordings and transcripts of those meetings, which include deliberations and statements by Commissioners, are available here (https://www.whitehouse.gov/pcscotus/public-meetings/).

Following its introductory meeting on May 19, the Commission scheduled public hearings on June 30, 2021, and July 20, 2021. Over the course of these two days, the Commission heard oral testimony from 44 experts. The materials circulated for each meeting, the recordings and transcripts of the hearings, and witnesses' written statements are available for review at www.whitehouse.gov/pcscotus/public-meetings/. The Commission also solicited and received additional written testimony from numerous academic experts and advocacy organizations, available at www.whitehouse.gov/pcscotus/public-comments/.

In addition, the Commission received submissions from several members of Congress, current and retired federal and state judges, and members of state government.

Fifteen days prior to each public meeting, the Commission called for public comments through notices released in the Federal Register. The Commission also established a portal through which members of the general public were able to provide commentary, at regulations.gov, and maintained an email inbox for public commentary.

As discussed at the first public meeting, the Commission divided itself into subcommittees, denominated as "Working Groups," to consider testimony and comments from outside experts, organizations, and the public, and to further research and analyze the following topics:

- The Genesis of the Reform Debate; the Commission's Mission; and the History of Reforms
- Membership and Size of the Court
- Length of Service and Turnover of Justices on the Court
- The Court's Role in the Constitutional System
- The Supreme Court's Procedures and Practices

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The following individuals or organizations provided oral or written submissions to the Commission:

Witnesses of June 30, 2021

Nikolas Bowie, Harvard Law School
Samuel Bray, Notre Dame Law School
Rosalind Dixon, University of New South Wales, Sydney
Michael Dreeben, O'Melveny and Myers, LLP
Noah Feldman, Harvard Law School
Charles Fried, Harvard Law School
Deepak Gupta, Gupta Wessler
Amy Howe, SCOTUSblog
Laura Kalman, University of California - Santa Barbara
Allison Orr Larsen, William & Mary Law School
Michael McConnell, Stanford Law School
Samuel Moyn, Yale Law School
Judith Resnik, Yale Law School
Kim Scheppele, Princeton University
Maya Sen, Harvard University
Christina Swarns, Innocence Project
Stephen Vladeck, University of Texas Austin School of Law
Russell Wheeler, Brookings Institution
Ilan Wurman, Arizona State University

Witnesses of July 20, 2021

Justice Rosalie Abella, Supreme Court of Canada
Akhil Amar, Yale Law School
Nan Aron, Alliance for Justice
Randy Barnett, Georgetown University Law Center
Craig Becker, AFL-CIO
Daniel Epps, Washington University in St. Louis
Kenneth Geller, Mayer Brown, LLP

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Tom Ginsburg, University of Chicago
Jamal Greene, Columbia Law School
Wade Henderson, The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund
Vicki Jackson, Harvard Law School
Christopher Kang, Demand Justice
Michael Klarman, Harvard Law School
Larry Kramer, Harvard Law School
Curt Levey, Committee for Justice
Marin Levy, Duke University School of Law
Maureen Mahoney, Latham & Watkins
John Malcolm, Heritage Foundation
Justice Margaret Marshall, Choate, Hall & Stewart
Sharon McGowan, Lambda Legal
Dennis Parker, National Center for Law and Economic Justice
Jeff Peck, Tiber Creek Group
Gabe Roth, Fix the Court
Stephen Sachs, Harvard Law School
Ilya Shapiro, Cato Institute
Neil Siegel, Duke Law School
Benjamin Wittes, The Brookings Institution

Public Officials[1]

Senator Richard Blumenthal
Senator Ted Cruz
Senator Mazie K. Hirono
Representative Henry C. "Hank" Johnson, Jr.
Senator Charles Schumer
Senator Sheldon Whitehouse
Jim Jones, former Attorney General and state Supreme Court Justice of Idaho
Champ Lyons, Supreme Court of Alabama
Ashley Moody, Attorney General of Florida
Paul Summers, Attorney General (retired), Tennessee
Samuel Thumma, Court of Appeals of Arizona
Galen Vaa, 7th Judicial District, Minnesota

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Academic and Legal Experts

Aaron Belkin, Take Back the Court
Philip Bobbitt, Columbia Law School
Barry Cushman, Notre Dame Law School
Erin Delaney, Northwestern Pritzker School of Law
Michael J. Gerhardt, University of North Carolina School of Law
Edward A. Hartnett, Seton Hall Law School
Amanda Hollis-Brusky, Pomona College
David Law, University of Virginia School of Law
Richard Lazarus, Professor, Harvard Law School
Hashim M. Mooppan, Jones Day (formerly U.S. Department of Justice)
Michael Stokes Paulsen, University of St. Thomas School of Law
William G. Ross, Samford University
Jeff Shesol, Author
Christopher Jon Sprigman, New York University School of Law
Julie Suk, Fordham University School of Law
Mark Tushnet, Harvard Law School
G. Edward White, University of Virginia School of Law

Advocacy and Professional Organizations[2]

American Academy of Arts & Sciences
American Bar Association
American Civil Liberties Union (ACLU)
American Constitution Society
Appellate Courts Working Group
Brazil Comparative Law Institute
Business Roundtable
Center for American Progress
Chamber of Commerce of the United States of America
Coalition Against Judicial Fraud
Constitutional Accountability Center
Demos

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Federal Bar Association
Federal Capital Habeas Project
First Liberty Institute
FreedomWorks Foundation
Independent Women's Forum
Judicial Discipline Reform
Keep Nine Coalition
Lawyers' Committee for Civil Rights Under Law
Madison Coalition
National Asian Pacific American Women's Forum
National Association for the Advancement of Colored People (NAACP) Legal Defense Fund
National Center for Law and Economic Justice
National Council of Jewish Women
National Federation of Independent Business (NFIB)
New York County Lawyers Association
Our Children's Trust
People For the American Way
Project on Government Oversight
Public Citizen Inc. and Public Citizen Foundation
Service Employees International Union (SEIU)
Stand Up America
Take Back the Court
The Constitution Project at POGO (Project on Government Oversight)
The Innocence Project
Unrig the Courts Coalition

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Public Comments Received by the Commission

The Commission established a public comment policy that set parameters for the publication of comments received on regulations.gov. Public comments that met this policy were published on regulations.gov (Docket: PCSCOTUS) and can be reviewed there. The published comments expressed a broad array of opinions on the Commission's work, its draft discussion materials, reform proposals in the public debate, and other related topics.

Comments received by the Commission that did not meet the posted public comment policy were not published. The bulk of unpublished comments fell into two categories: duplicate submissions included in several mass mailing campaigns targeted at the Commission and submissions on topics not within the Commission charge/not relevant.

The table below provides an overview of the public comments received in association with a given public meeting. Deadlines were set out in each public meeting notice as a cut-off for comments prior to each public meeting. The table below is complete up to and including comments received for the 12/7 public meeting (cut-off 12/3). Comments received after this date could not be included in the report due to printing timelines.

Number of comments received by status of publication and public meeting date:[3]

	COMMISSION PUBLIC MEETING DATE[4]						
	5/19/21	6/30/21	7/20/21	10/15/21	11/19/21	12/7/21	Total
Comments published on Regulations.gov	46	221	163	3,556	186	1,118	5,290
Comments not published due to violations of policy	58	2,054	429	367	502	50	3,460
Total comments received	104	2,275	592	3,923	688	1,168	8,750

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Endnotes: Appendix B

[1] Individuals listed provided their title in their public comment or signed, with their name and title, a submission filed by another individual. Additional comments from current or retired government officials may have been received but are not listed here if submissions did not specify their title or office.

[2] Published comments from these organizations can be found on https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003/comment

[3] All published comments received by the Commission can be found on https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003/comment

[4] Source: PCSCOTUS public comment tracker. This tracker contains a record of all received comments through both Regulations.gov and the Commission's general email inbox.

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Appendix C: The Confirmation Process

Executive Order 14023 directed the Commission on the Supreme Court of the United States to produce a report that includes an "account of the contemporary commentary and debate about . . . the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court." Several witnesses who testified before the Commission noted that recent debates over Supreme Court reform have taken place amidst controversies surrounding the processes by which Justices are nominated and confirmed. The evaluation of proposals for Court reform may thus require both attention to existing problems with the confirmation process and consideration of how a proposal, if implemented, might affect that process.

One witness, Jeffrey J. Peck, who previously served as General Counsel and the Majority Staff Director of the Senate Judiciary Committee, proposed changes to Senate rules and norms designed to improve the confirmation process. These proposals grew out of his examination of the history of the Senate's treatment of Supreme Court nominees over the last several decades and numerous interviews he conducted with former Senators and senior staff—thirteen Democrats and twelve Republicans. That group included individuals who had been involved in seventeen Supreme Court nominations, from 1981 to the present.

In the Introduction to this Report, we have provided a brief account of contemporary debates surrounding the confirmation process, consistent with our charge. But consideration of proposed reforms to the confirmation process are beyond that charge, and we accordingly do not analyze or endorse any of the recommendations offered to us. Nonetheless, we do wish to highlight some of the analysis and recommendations in the Peck testimony.

In this Appendix, we have included excerpts from Mr. Peck's testimony. The full testimony is available at the Commission website at https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf

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Excerpts of Testimony of Jeffrey J. Peck
The Presidential Commission on the Supreme Court of the United States
July 20, 2021

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In calendar years, it was not too long ago – 1994, in fact – when Stephen Breyer was confirmed, 87-9. When Ruth Bader Ginsburg was confirmed, 96-3, in 1993. When David Souter was confirmed, 90-9, in 1990. When Anthony Kennedy was confirmed, 97-0, in 1988. When Antonin Scalia was confirmed, 98-0, in 1986. And when Sandra Day O'Connor was confirmed, 99-0, in 1981. Strong bipartisan majorities often prevailed.

In political years, these consensus confirmations reflect a bygone era akin to the locomotive, the Model T and wired telephones. Will any nominee to the highest court in the land ever get 90 votes again? Doubtful, since at present there are likely to be at least 25 negative votes before hearings begin, regardless of which party controls the White House and the Senate; indeed, there may be that many automatic negative votes before a nomination is even announced!

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During the past few months, I conducted 25 interviews[1] -- 13 Republicans and 12 Democrats, thereby ensuring that both sides of the political spectrum were fairly represented.[2] All respondents served in the Senate as Senators or senior staff, typically as committee chief counsels, staff directors, senior nomination counsels or senior leadership staff. Time constraints and respondent availability limited the overall number…My objective was to speak with individuals spanning as broad a range of nominations as possible to secure bipartisan perspectives from multiple political eras. Accordingly, the responses discussed herein cover 17 nominations between Sandra Day O'Connor (1981) and Amy Coney Barrett (2020)…

As detailed therein, I covered eight areas with all interviewees.

1. Biographical Information
2. General Observations
3. The Senate's Advice Function
4. Role of the Senate Judiciary Committee
5. Scope of Questioning

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6. The FBI Report
7. Third Party Witnesses
8. The Senate's Consent Function: Filibuster, Margins and Presidential Election Year Nominations

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Most interviewees believe that the value of SCOTUS nomination hearings has increasingly diminished over time. Common descriptions included "kabuki theater," "farce," "charade," "circus," "a model of escape and evasion" and "insufferable." Anyone who has watched recent hearings would be hard pressed to disagree. Given the extreme reluctance of nominees, questioning by Senators has become tedious and uninformative. One interviewee noted that Senate questioning has become "air cover for some to justify a negative vote they have already decided to make."

There was consensus among all interviewees that it is not feasible to develop hard-and-fast formal rules regarding the questioning of SCOTUS nominees. Among other problems, such rules would turn the Judiciary Committee chair into a faux judge obligated to decide on the relevance, materiality and scope of his or her colleagues' questions – inevitably a "lose-lose" proposition for the Chair, as one interviewee put it. It would also, as another interviewee noted, invade the "holy province of senatorial desire" to ask any questions he or she wants to pose.

A small number of Democrat interviewees and one Republican interviewee supported the view that nominees should answer questions about how they would have ruled in specific past Supreme Court decisions. These interviewees dismissed the notion that outside groups would use these answers to politicize the process even further, noting that the groups already assume that nominees embrace particular views and act on those assumptions accordingly. The Republican interviewee in this group supported this level of specificity based on his view that future cases involved different facts and thereby do not compromise a nominee's judicial independence. Moreover, this interviewee believes that the public is entitled to know a nominee's views and that Senators, with such information, can then vote based on the totality of the nominee's record.

Two Democrat interviewees and one Republican interviewee support specific questioning but stop short of asking about how a nominee would have voted in past cases. The Republican interviewee noted the appropriateness of asking a nominee, "Had you been on the Court in

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1973 and had the Roe factual record before you, how would you have approached the case," distinguishing that question from a precise question about how the nominee would have voted.

Approximately 15 interviewees – both Democrats and Republicans – support questions about the "general philosophy of judging." They believe it is appropriate to ask questions about what nominees have written but oppose questions regarding how nominees would have ruled in specific past cases decided by the Court. For nominees who are or have previously been judges, these interviewees also support asking them about their reasoning in cases they have decided.

Several Republican interviewees referred approvingly to the so-called "Ginsburg Rule," noting that should be the model for all future nominees.

One issue that arose during my research was whether to allow each Member of the Judiciary Committee to submit a defined number of written questions to the nominee before the hearings commence, with answers due before the nominee appears in person. The argument in favor of such an approach is that the nominee's testimony would then follow an enhanced record. The problem with such an approach is that if history is any guide, the answers are likely to be written by White House Counsel lawyers, Department of Justice lawyers, outside lawyers (such as former law clerks) supporting the nominee or some combination thereof. While rules could require the nominee to attest to the accuracy of the answers and the fact that they reflect the nominee's actual views, it would be difficult, if not impossible, to police their actual preparation.

One GOP interviewee proposed limiting the questioning of nominees in open session to one round, no longer than 30 minutes, with the remainder of the questioning occurred in closed session to "produce less grandstanding."

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I offer the following recommendations to the Commission.[3]

I. Time Frames: By Standing Rule of the Senate or Rule of Procedure of the Senate Judiciary Committee, the following time frames and procedures should be adopted and implemented:

   a) Hearings shall commence no sooner than 30 days and no later than 50 days after the Senate receives the nomination. If the nomination is made during a Senate recess that

is longer than three days, the minimum and maximum periods shall be extended by the length of the recess.

b) The nominee's complete written record shall be delivered to the Committee no later than 10 days before hearings begin. Delays in the production of materials shall extend the minimum and maximum periods by the length of the delay, thereby penalizing the nominating Administration for dragging its feet. The White House Counsel shall certify when production of materials has been completed.

c) The Committee shall vote on the nomination no sooner than 10 days and no later than 21 days after hearings conclude. The "official" conclusion of the hearings shall be determined by the Chair and Ranking Member; any "gaming" of the hearings for the sole purpose of extending the time frames should be avoided. The current ability of one Senator to "hold over" a nomination shall be eliminated.

d) The Committee shall be required to report the nomination to the floor in all circumstances – even with a negative recommendation or without recommendation. The Constitution places the advice and consent obligation on the Senate, not a committee of the Senate. The Judiciary Committee processes the nomination by holding hearings, preparing a report and reporting the nomination to the Senate. It should not determine the fate of the nominee.

e) The full Senate shall begin consideration of the nomination no sooner than 10 days and no later than 21 days after the Committee formally files its report on the nomination. The Senate can delay consideration only by unanimous consent.

f) The time frames in this new Rule could be shortened or lengthened "for cause" by joint agreement of the Judiciary Committee's Chair and Ranking Member. "Cause" includes, but is not limited to, a voluminous record of the nominee due to extensive writings, speeches or opinions, the need for investigation of new matters and/or if additional relevant materials are uncovered.

g) These timeframes shall apply under all circumstances, including nominations in a presidential election year up to August 1 of that year, as explained below.

h) These new Rules could be altered only by unanimous consent of the Senate in order to eliminate the ability of the majority party to jettison the new policies for political expediency by simple majority vote.

i) These new Rules are needed now and, ideally, should be adopted and implemented immediately. Unfortunately, there is little or no chance of that occurring. Accordingly, the new Rules proposed here shall not take effect until after the next presidential election and not until the swearing in of the new Congress in January 2025. Postponing the effective date of new rules should reduce the partisanship over their deliberation and increase the likelihood of adoption because neither party would know who the rules theoretically help, and who they theoretically hurt, by the time they go into effect.

II. Scope of Questioning: While it is not feasible to establish a Senate or Committee Rule defining the allowable scope of questioning, the appropriate norm for questioning SCOTUS nominees – a "standard of responsiveness" – should be "philosophical particularity," as opposed to "pinpoint specificity seeking pledges or commitments" or the "extreme reluctance" taken by more recent nominees. Procedurally, no Member of the Committee, including the Chair or Ranking Member, should be allowed to instruct a nominee not to answer a question. A Member or Members may dislike the questions posed by a colleague, but it is up to the nominee to decide whether to answer.

a) To make an informed decision and fulfill their constitutional obligation and duty to exercise "advice and consent" on judicial nominations, Senators must understand the nominee's judicial philosophy and views on core constitutional principles.

b) The so-called "Ginsburg Rule" cited by recent nominees is neither a rule nor an appropriate tactic to utilize to deflect substantively appropriate questions. Indeed, then Judge Ginsburg did not always follow it during her hearings.

c) When presidents campaign on promises regarding the justices they will appoint to the Supreme Court, criticizing past rulings and individual Justices – as they increasingly do – the Senate can hardly sit idly by during the hearings and not probe the judicial philosophy of nominees selected to fulfill those promises and answer those critiques. Indeed, the imperative to question nominees on judicial philosophy is even greater under such circumstances.

III. The Role of the FBI: Processes pertaining to the FBI's investigation of SCOTUS nominees should be further clarified and memorialized in a Memorandum of Understanding that updates and replaces the 2009 MOU executed by President Obama's White House Counsel and the then Senate Judiciary Committee Chair and Ranking Member. This MOU should be adopted at the beginning of a new Congress so that it is done outside the context of any particular nomination, and should:

a) Underscore and memorialize the independence of the FBI, stating specifically that the FBI's client is the American people. It is important to make clear, formally, that when the FBI conducts its investigations neither the White House Counsel nor the Senate Judiciary Committee majority or minority are the clients.

b) Create communication protocols governing the FBI's dialogue with the White House and the Chair/Ranking Member of the Judiciary Committee so that each of those three parties receives information simultaneously when the FBI has determined that a matter warrants investigation. It is necessary to take steps ensuring neither receives preferential treatment over the other.

c) Spell out the parameters of the FBI's role in conducting the background investigation before the hearings begin and any subsequent investigations that arise once the hearings have started. Specifically, and working with FBI leadership, the MOU should require

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a more fulsome investigative process at the outset so matters that have historically come to light later in the process are more likely to be uncovered on the front end.

d) Set an expected time frame for the delivery of the FBI report for the original investigation and any subsequent investigations, with room for potential adjustments depending on the precise nature of allegations that arise.

IV. Third Party Witnesses: Qualitative or quantitative limits on the live testimony of third-party witnesses should not be established by rule.

a) The Supreme Court plays a vital role in our nation and third-party witnesses should have the opportunity not only to submit written statements for the record but also testify in person.

b) A norm should be established whereby the majority of outside witnesses should provide well-informed assessments of the record of the nominee.

c) The Chair and Ranking Member should utilize their joint discretion, as they do in all hearings, to manage the number of witnesses.

d) The American Bar Association should no longer play the dominant role it has in reviewing nominees. The Committee should place equal weight on multiple bar associations without affording a lead role to any single one.

V. Senate Consideration and Vote on Confirmation: If we had the good fortune to write on a blank slate, Senate Rules should require 60 votes to confirm a Supreme Court Justice in order to force, at least in most circumstances, a bipartisan consensus not only on the back end, for the final vote, but also on the front end, by necessitating more consultation by the president with the minority party leadership in the Senate. But the slate is not blank; far from it. It is inconceivable that Democrats will restore a 60-vote margin for SCOTUS nominees after a Republican president and Republican Senate confirmed one-third of the Justices sitting today by majority vote. Bipartisan consensus on this issue is simply not attainable. Accordingly, I recommend:

a) The Senate should retain the current simple majority requirement for confirming Supreme Court nominees.

b) The Senate should add a new Rule explicitly requiring that all nominees receive a Senate Judiciary Committee hearing, a Committee vote and an up-or-down vote on the merits in the Senate. No nominee should be refused consideration unless the nomination has been withdrawn.

c) The Senate should consider all nominations in a presidential election year except for those made after August 1. Nominations before August 1 are likely to be completed prior to Election Day in a balanced and orderly manner. Given the time frames proposed for new Rules guiding the Judiciary Committee's consideration, nominations after August 1 are not likely to be considered thoroughly and fairly before the American people select the next president. Key steps by the Administration and the Senate – including document production, requests for more investigative work by the FBI,

number of third-party witnesses and the like – are more likely to be colored by politics and game-playing when taking place within 90 days of a presidential election. Fairness and responsible decision-making will ensue when presidential politics is not the main driver.

d) Using August 1 as a cut-off date in a presidential election year also takes into account the early voting – either by mail or in-person – that many states now allow. There are few more consequential decisions made in in our nation than placing one of nine Justices with life tenure on the Supreme Court. Doing so while tens of millions of Americans are voicing their preference about the next president is anti-democratic.

e) Despite the August 1 cut-off date, any Senator who believes nominations made before that date in a presidential election year are still too close to Election Day can vote against the nomination solely for that reason.

f) While not likely feasible to implement by Senate rule, the two parties should share an understanding that nominations made by a lame duck president after his or her defeat on Election Day will not be considered.

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Endnotes: Appendix C

[1] I am not presenting my findings as empirical research or necessarily consistent with scientifically accepted statistical methodology. The goal was to solicit opinions through a standardized set of questions, with answers informed by personal experience, which, in all cases, was extensive.

[2] Since my views as a Democrat are also included in this report, the total number of interviewees was, in effect, equally split.

[3] Each potential reform area is discussed later in detail, and organized and presented in three sections: Relevant Historical Background and Context; Results of Research; and Policy Recommendations. The relevant historical background sections are not intended to be exhaustive.

Appendix D: Advocacy Before the Court

The Commission received testimony from several witnesses about the sources of advocacy and information provided to the Supreme Court as it selects and decides cases. Their testimony addressed patterns in advocacy before the Court, including the fact that a small group of specialized lawyers appears in a large proportion of cases. It also addressed the role of interested non-parties, called amici curiae, in providing information to the Court beyond the parties' briefs and the record in a given case. These analyses focused on the conduct and characteristics of advocates and amici rather than of the Court itself. We do not endorse this testimony or the proposals contained within it. But we believe it would be informative for the public discourse for this Report to highlight portions of the testimony.

The witnesses whose statements are excerpted here are Deepak Gupta; the Supreme Court Practitioners' Committee, chaired by Kenneth Geller and Maureen Mahoney; Richard Lazarus; and Allison Orr Larsen. Their full testimony, respectively, is available on the Commission website at the links noted below.[1]

Excerpts from Testimony of Deepak Gupta, Gupta Wessler PLLC

https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf

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The Diversity of the Supreme Court Bar

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Today, roughly 70 lawyers are considered part of the elite Supreme Court bar, filing less than 1% of the petitions for certiorari before the Court but participating in nearly half the cases the Court selects.

The demographics of these elite few are telling. From 2012 to 2018, women appearing before the Court constituted only 12 to 21% of advocates. In the 2019 term, 155 oral argument appearances were made before the Court, only twenty of which were made by women and only twenty-seven of which were made by advocates of color. In the entire 2019 term, only one woman of color appeared before the Court.

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In other words, the entire ecosystem surrounding the Court looks a lot less like the American public than we might hope. For the development of the law, this limited diversity can make the Court "woefully inattentive to its impact on underrepresented groups." And on the most basic level, as this small and elite institution makes laws for a large and diverse country, many Americans do not see people like them regularly participate in the process.

Docket Capture

Homogeneity among Supreme Court advocates is by no means limited to race and gender. The small handful of elite appellate lawyers who argue most cases before the Supreme Court are not only overwhelmingly white and male—they also tend to represent the largest corporations in the world. Attorneys at corporate-defense firms are often conflicted out of representing plaintiffs, even if they would be inclined to do so otherwise.

This imbalance in the small group of advocates who have the ear of the Court has serious consequences for the Court's agenda and the public's perception that the Court gives each party before it an equal hearing. In turn, the stakes for the country are high: not just the rights of workers, consumers, and other plaintiffs, but also the credibility and legitimacy of the Court in the eyes of a public that already believes their government is overly aligned with the interests of large corporations.

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. . . The influence of corporate America in the Supreme Court is borne out by the dominance of specialized "repeat players." As Professor Richard Lazarus has written, the 1980 term saw 5.8% of cases argued by attorneys who have presented at least five cases before the Supreme Court, or who were affiliated with law firms whose members had argued at least ten. By 2007, the percentage of Supreme Court cases argued by such "expert advocates" had passed 50%. For the past several years, it has hovered around 70%. Hiring one of these advocates is especially useful at the cert stage, and, since the 1980's, the success of cert petitions filed by specialized private appellate practices has skyrocketed. In 1980, 5% of successful petitions (excluding the Solicitor General's) were filed by repeat player advocates. By 2007, that rate had increased to more than 50%. Unsurprisingly, these advocates' corporate clients benefit from their success. The past few decades are replete with examples of the Court granting

review to corporate-friendly petitions that it would have likely passed over if not for an expert advocate's name on the industry-side brief.

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These elite lawyers' "capture" of the Supreme Court docket, as Professor Lazarus has put it, has real consequences for workers, consumers, and other plaintiffs who have been hurt by corporations, as well as for criminal defendants. For one, judges and attorneys widely agree that hiring specialized appellate counsel—especially one particularly familiar with the Court—matters for a favorable outcome. In a 2004 survey of former Supreme Court clerks, 88% said they "len[t] additional consideration" to amicus briefs signed by an eminent repeat player. Empirical studies have linked attorney experience with case outcomes as well. A study by Professor Jeffrey Fisher, for example, found that a party represented in the Supreme Court is almost 20% more likely to win on the merits than one represented by a nonspecialist—and that the advantage at the certiorari stage is likely even larger. A 2014 investigation found that over a decade, just 66 of the 17,000 attorneys who filed petitions at the Supreme Court accounted for 43% of the cases the Court took up, and 51 of those lawyers represented corporate interests. An increase in cert petitions, combined with a shrinking merits docket, has made the involvement of repeat players in petitioning the Court especially valuable. . .

The access that plaintiffs, criminal defendants, and other public-interest clients have to this specialized group of repeat players is severely limited. For one, corporate-defense firms routinely charge more than $1,000 per hour for their services, and a single cert petition can cost a client hundreds of thousands of dollars. Even if attorneys at high-powered appellate practices have some inclination to take on plaintiff-side work, they often will not due to the fact that their firms represent the corporations, or at least the antiplaintiff positions, on the other side of the case. The Chamber of Commerce and other influential industry groups—not to mention many of the largest corporations in the country themselves—have hired most of the firms with elite appellate practices, making it difficult or impossible for attorneys at those firms to represent contrary interests and positions. Some might reasonably suggest that the rise of excellent law school supreme court clinics mitigates this problem, but, unfortunately, that is not the case. Virtually all of those clinics are affiliated with the very same corporate-defense law firms that employ the expert Supreme Court advocates, making it difficult for the clinics to take a position against, for example, a major bank in a case concerning financial services regulation.

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Mitigating Corporate Skew in the Supreme Court Bar

Given this landscape, the government, starting with this Commission and this White House, can and should encourage the development of specialized public-interest and plaintiffs' lawyers—first and foremost by advocating for increased funding to organizations that do this appellate work. To start, Legal Aid organizations around the country provide invaluable services to low-income people in the areas of housing, employment, immigration, criminal justice, public benefits, and more. A few Legal Aid offices—but only a few—have developed small appellate practices. Similarly, some public defender offices have small appellate divisions. More funding for these offices would strengthen the legal representation of low-income and other marginalized people in general—a worthy goal in its own right—but it could also facilitate the development of a larger, more experienced public-interest appellate bar. Just as corporate law firms and the Solicitor General's office do for most prominent appellate lawyers now, better-funded Legal Aid and Public Defender offices could create the kinds of opportunities for training, specialization, and, eventually, repeat advocacy for career public-interest lawyers.

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Excerpts from Testimony of Supreme Court Practitioners' Committee (Co-Chairs Kenneth Geller, Mayer Brown LLP; Maureen Mahoney, Latham & Watkins LLP)

https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf

Diversifying the Group of Appointed Amicus Counsel

Since 1926, the Supreme Court has appointed counsel as amicus curiae approximately 70 times, with an average of one or two per year. Unlike traditional amici, appointed amici are instructed by the Court to take a particular position and to present oral argument. Of the approximately 70 amicus counsel appointments to date, it appears that only seven advocates have been women and only four have been people of color. Appointments have been heavily skewed toward former law clerks.

Commentators have suggested various means of broadening the group of attorneys considered for appointment by creating an application process, promulgating qualification

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criteria, or issuing general invitations for amicus briefing on issues and selecting one responding amicus to argue.

The Committee does not endorse prescribing a public standard for appointments, but we support continued expansion of the group to which the Court looks for appointments. In particular, greater diversity likely would result if consideration were given to more attorneys who are not former law clerks, especially advocates in the specialized appellate bars of state courts and other federal courts and law professors.

Criminal Defense Cases

Some of the best advocates before the Supreme Court are criminal defense attorneys, especially in the specialized capital defense bar. But the attorneys in the criminal defense bar generally have fewer resources to support specialized Supreme Court litigation than do their prosecutor counterparts. Government prosecutors also have more strategic flexibility about which issues to litigate in a case, whereas criminal defense attorneys have an ethical duty to zealously represent the interests of their individual client whose personal liberty is at stake. And prosecutors collaborate extensively with each other through organizations like the National Association of Attorneys General, and often support each other as amicus curiae, but such resources are much more limited on the criminal defense side.

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The imbalance would be better addressed through federal and state legislative appropriation of increased resources to develop more Supreme Court specialization within the criminal defense bar in state and federal public defender offices and through greater collaboration with Supreme Court specialists in clinics and pro bono partnerships.

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Excerpts from Written Statement of Richard Lazarus, Harvard Law School

https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Richard-Lazarus.pdf

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The Distinct Importance of the Court's Jurisdictional Determination

. . . The Court's decision at the jurisdictional stage that a particular case warrants plenary review is . . . one of the most consequential rulings that the Court makes. Yet, as the number of petitions has significantly increased over time, the Court's resources to identify which cases warrant full briefing and argument have necessarily been stretched increasingly thin and, as a result, increasingly susceptible to be unduly influenced by expert members of the Supreme Court Bar.

I have no comparable concern relating to the Court's decision-making process for those cases granted plenary review. Especially now that the Court decides only sixty to eighty cases a year, the Justices and their chambers have ample time to immerse themselves fully into those cases and potentially make up for any possible deficits in the advocacy in any specific case. Advocacy deficits are also effectively addressed in most cases that the Court has decided to review with full briefing and oral argument by the sheer number of amicus briefs filed these days in those merits cases, many of which are crafted by outstanding lawyers on all sides of a case. My concern is instead limited to the jurisdictional stage, where mismatches in the advocacy skills of the competing parties favoring and opposing review are likely to be present and the Court lacks the time and resources to make up for the difference. It is at the jurisdictional stage, not the merits stage, that the Court is most vulnerable.

The Deficiencies in the Court's Current Internal Processes at the Jurisdictional Stage

The Court currently considers between five and six thousand petitions each year and, as described above, grants review in about sixty to eighty cases. Although the Justices themselves plainly commit significant time to deciding—based on full briefing and the merits, oral argument, and circulation of draft opinions—those cases in which review is granted, it is an open secret that the individual Justices spend relatively little time reviewing individual petitions at the jurisdictional stage. To be sure, the Justices are the ones who formally vote on the question whether review is warranted but given the thousands of petitions to be considered and all of their other responsibilities, especially deciding the cases granted review, the Justices themselves spend no time at all on the vast majority of cert petitions and only minutes even

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on those relatively few petitions in which review is seriously considered. The Justices instead must, as they do, depend heavily on their law clerks to identify which cases warrant the Court's attention.

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As a result, the law clerks and, accordingly, the Justices, are highly dependent at the jurisdictional stage on the quality of the advocacy reflected in the petition for a writ of certiorari seeking review, amicus briefs filed in support of the petition, and those in any briefs opposed to review. And, most simply put, as good as those law clerks are, they are no match at the jurisdictional stage when time is so limited for the nation's most skilled Supreme Court advocates. The latter, many of whom were once themselves Supreme Court law clerks but are now seasoned Supreme Court lawyers with years and decades of experience, know precisely how to pitch cases both to persuade a law clerk that a case is worthy of the Court's review when it is not, and to persuade the clerks that a case is not worthy of review, when it is.

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Were the assistance of the most skilled Supreme Court advocates equally available to all persons, especially our society's most vulnerable, their potential for outsized influence would neither be realized nor a problem. The Justices and their chambers would always have the advantage of exceedingly able lawyers on all sides of a case. In many cases, with the modern rise of the expert Supreme Court Bar during the past four decades, that is now true for the cases the Court decides after full briefing and oral argument. That development is very much a good thing. But it is not true at the jurisdictional stage which is both why the Court remains particularly vulnerable to undue influence by certain advocates and reform of the Court's procedures is warranted.

Until relatively recently, the problem of skewed advocacy expertise was less concerning because so few attorneys possessed it outside of the Office of the Solicitor General of the U.S. Department of Justice. . .

Until the late 1980s, the Office of the Solicitor General enjoyed the equivalent of a monopoly on such expertise, but the emergence of a modern Supreme Court Bar has since dramatically changed that dynamic, and a handful of national law firms now fairly boast of highly skilled and successful Supreme Court practices frequently staffed by veterans of the

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Solicitor General's Office and former Supreme Court law clerks. They match, and sometimes even best the Solicitor General's Office in the depth and breadth of their advocacy expertise. Year after year, they now dominate the cases the Court decides to hear at the jurisdictional stage and disproportionately employ the attorneys who file the briefs and present oral argument on the merits.

Nor does the significant pro bono work many of those same law firms commendably engage in effectively close the advocacy gap. Such work is necessarily both secondary to their need to earn profits and limited by the professional requirement that they avoid any formal conflicts of interests with their paying clients as well as by the practical need to avoid taking on pro bono causes that might upset their business clients that pay full freight for legal representation. Consequently, it is the business interests that can afford to pay their high billable rates that have greatest access to their expertise.

To be sure, a few public interest organizations, such as the NAACP Legal Defense Fund, Public Citizen, and the American Civil Liberties Union, can fairly boast of impressive Supreme Court expertise. Their representation, however, is as a practical matter still very limited in its reach at the Court's jurisdictional stage and many parties, such as non-white-collar defendants in federal and state criminal defendants, lack the distinct advantage of their assistance. As a result, potentially successful cert petitions representing those parties are either not filed at all or, if filed, poorly executed. And petitions filed by government prosecutors drafted by expert Supreme Court counsel in the U.S. Solicitor General's Office, or their counterparts in many States, are granted, even though an effective opposition to the petition might well have resulted in a denial of review instead.

The Proposed Addition of a Career Staff Attorney Office at the Court

My reform proposal for the Commission's consideration is a modest one that does not purport to address the more serious and pervasive underlying problem of the profound lack of effective legal representation of the nation's most vulnerable populations. Consistent with the Commission's charge, my proposal is instead narrowly aimed at improving the internal decisionmaking process that the Supreme Court uses to identify the cases it determines warrant its plenary review. Although a significant problem, it is also one that I believe can be effectively addressed in a relatively simple way and at relatively little cost.

The Court should hire a staff of career attorneys whose exclusive responsibility would be to provide the Court with assistance in deciding which cases warrant the Court's review. The

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office would be staffed by seasoned, highly accomplished attorneys with significant experience in appellate and Supreme Court advocacy. Following general guidance provided by the Justices, these staff attorneys would review the petitions in the first instance, identify those petitions warranting closer attention by the Justices and their law clerks, and write up memoranda for their consideration in deciding whether review should be granted. The staff attorneys would possess both the time and the years of professional experience that the law clerks currently lack in evaluating the cert petitions. That would include, when needed, reading closely the briefs, the cited authorities, the lower court opinions, identifying how expert counsel may be overreaching in their framing of the case, and otherwise making up for gaps in advocacy. But also important, the staff attorneys would, as now, leave the final decisions to the Justices, assisted by their clerks as each Justice sees fit.

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Testimony of Allison Orr Larsen, William & Mary Law School

https://www.whitehouse.gov/wp-content/uploads/2021/06/Larsen-Testimony-Presidential-Commission-on-the-Supreme-Court.pdf.

An Amicus Boom

Amicus briefs are on the rise. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995. To put things in perspective historically, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. By contrast, in the 2015 *Obergefell* case the number of amicus briefs reached 147 (a record-breaker) and the health care case two years earlier (*NFIB v. Sebelius*) had 136 amicus briefs on the docket. For the sake of comparison, consider that *Roe v. Wade* had twenty-three amicus briefs. In *Brown v. Board of Education*, there were only six. In *Lochner v. New York* that number was zero.

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Perhaps it is not surprising, therefore, that the Justices cite these briefs to support their factual claims . . . increasingly regularly. In my 2014 study on the subject I found that one in every five citations to amicus briefs by the Justices were used to support a factual assertion. The Justices seem to have only picked up the pace since then. A 2020 study of amicus citations found citations to amici in 65 percent of the Court's cases (a record), and "most of all" the

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justices relied on briefs that "provided real world information." Of the citations I studied, several surprising patterns emerge. Less than a third of the factual claims presented by amici and credited by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. The implication from this omission is telling: the Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.

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The Trouble with Amicus Facts

Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us significant pause. Unlike other legal decision makers (i.e., administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea of factual claims coming from a variety of actors who all claim to be experts. Mistakes are almost inevitable.

The studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a "dog in the fight." The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. Rather they are chosen as part of a coordinated plan to win the day. And with the vast amount of information and studies available online now, it is not hard to assemble evidence – whether of dubious or strong reliability – to support a pre-existing point of view. Because the secret is out that the Justices value briefs that supplement their technical knowledge, many amicus briefs stretch to make factual claims – even if it is beyond their institutional capacity to do so.

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To date, the standard response to questions about "junk science" ending up in Supreme Court opinions is to resort to the adversary process. While that may have been enough in a pre-Internet universe, it is insufficient today. My research shows that the check from the adversary system at the Court is very feeble to the point of being almost non-existent. In both my 2014 published study and my 2018 update I went through each of the factual claims

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supported by an amicus and cross-referenced the party briefs to see if they were contested by the parties. Such a check existed in less than a third of the citations for the 2014 study and less than 10% of the citations for the more modern time period. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

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One possible reform involves increased disclosure rules on amici so that the Justices are fully aware of the source of the information they are digesting. . . If the Justices are blind to the actual funders of the amici then they have no way to evaluate critically the factual submissions coming from them. Current Supreme Court rules on amicus briefs require a statement of interest of the amicus and disclosure only as to whether the party contributed financially or otherwise to the brief. The rules do not bar anonymously-funded amicus briefs and they do little to shed light on briefs filed by neutral-sounding organizations that are in reality funded by those with an interest in the case (even if not the party).

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Disclosure rules on amicus briefs can take many forms and still be effective. One possibility (borrowed from Daubert and the rules of evidence) is for the Court to require any amicus brief filed with factual claims to include an explanation of the methods used to discover them. . . The Court could easily impose even minor variations of this reform. It could, for example, require that any statement of fact in an amicus brief be supported by data that is publicly available (not "on file with" the author). Or, the Court could require disclosure when an amicus (or a related group) funds or authors a study purporting to establish a factual claim. . . Alternatively, the Supreme Court Rules could create a limited way for the parties to respond to unreliability in factual claims. The Court could permit a limited letter at the end of the amicus submissions in which the parties can respond—not to legal arguments—but only to instances where they think the amicus has relied on a shaky authority for a claim of fact.

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Endnotes: Appendix D

[1] All citations are omitted from the excerpts but are included in the full testimony available on the website.

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Appendix E: Commission Members

Michelle Adams

Michelle Adams is a Professor of Law at Benjamin N. Cardozo School of Law, where she teaches Constitutional Law, Federal Courts, and Federal Civil Rights. At Cardozo, she is a Director of the Floersheimer Center for Constitutional Democracy and was a Board Member of the Innocence Project. Adams has published in the Yale Law Journal, the California Law Review, and the Texas Law Review. She recently appeared in "Amend: The Fight for America," a 2021 Netflix documentary about the 14th Amendment. She is the author of The Containment: Detroit, The Supreme Court, and the Battle for Racial Justice in the North, forthcoming from Farrar, Straus and Giroux. Previously, she was a Law Professor at Seton Hall Law School, practiced law at the Legal Aid Society, and served as a Law Clerk for Magistrate Judge James C. Francis IV in the Southern District of New York. Adams holds a B.A. from Brown University, a J.D. from City University of New York Law School, and an LL.M. from Harvard Law School, where she was the first Charles Hamilton Houston Scholar. She is a two-time recipient of Cardozo's Faculty Inspire Award.

Kate Andrias (Rapporteur)

Kate Andrias is a Professor of Law at Columbia Law School. She teaches and writes about constitutional law, labor and employment law, and administrative law, with a focus on problems of economic and political inequality. Her work has been published in numerous books and journals, including the Harvard Law Review, the NYU Law Review, the Supreme Court Review, and the Yale Law Journal. In 2016, Andrias was the recipient of Michigan Law School's L. Hart Wright Award for Excellence in Teaching. Andrias previously served as special assistant and associate counsel to President Obama, and as chief of staff of the White House Counsel's Office. A graduate of Yale Law School, she clerked for Justice Ruth Bader Ginsburg of the U.S. Supreme Court and the Hon. Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.

Jack M. Balkin

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School. He is the founder and director of Yale's Information Society Project, an interdisciplinary center that studies law and new information technologies. He also directs the Abrams Institute for Freedom of Expression, and the Knight Law and Media Program at Yale. Balkin is a member of the American Law Institute and the American Academy of Arts and Sciences, and founded and edits the group blog Balkinization. His most recent books include

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The Cycles of Constitutional Time, Democracy and Dysfunction (with Sanford Levinson), Processes of Constitutional Decisionmaking (7th ed. with Brest, Levinson, Amar, and Siegel), Living Originalism, and Constitutional Redemption: Political Faith in an Unjust World.

Bob Bauer (Co-Chair)

Bob Bauer is Professor of Practice and Distinguished Scholar in Residence at the New York University School of Law and Co-Director of NYU Law's Legislative and Regulatory Process Clinic. Bauer served as White House Counsel to President Obama from 2009 to 2011. In 2013, the President named him to be Co-Chair of the Presidential Commission on Election Administration. He is co-author with Jack Goldsmith of After Trump: Reconstructing the Presidency (2020), books on federal campaign finance and numerous articles on law and politics for legal periodicals. He has co-authored numerous bipartisan reports on policy and legal reform, including "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration" (Presidential Commission on Election Administration, 2014); "The State of Campaign Finance in the United States" (Bipartisan Policy Center, 2018); and "Democratizing the Debates" (Annenberg Working Group on Presidential Campaign Debate Reform, 2015); ; He is a Contributing Editor of Lawfare and has published opinion pieces on constitutional and political law issues in The New York Times, The Washington Post, and The Atlantic, among other publications.

William Baude

William Baude is a Professor of Law and Faculty Director of the Constitutional Law Institute at the University of Chicago Law School, where he teaches federal courts, constitutional law, conflicts of law, and elements of the law. His most recent articles include Adjudication Outside Article III, and Is Quasi-Judicial Immunity Qualified Immunity? He is also the co-editor of the textbook, The Constitution of the United States, and an Affiliated Scholar at the Center for the Study of Constitutional Originalism. He is a graduate of the University of Chicago and the Yale Law School, and a former clerk for then-Judge Michael McConnell and Chief Justice John Roberts.

Elise Boddie

Elise Boddie is a Professor of Law, Henry Rutgers Professor, and Judge Robert L. Carter Scholar at Rutgers University. An award-winning scholar, Boddie teaches and writes about constitutional law and civil rights and has published in leading law reviews. Her commentary has appeared multiple times in The New York Times, as well as in The Washington Post, among other national news outlets. Boddie has served on the national board of the American Constitution Society and the board of the New Jersey Institute for Social Justice and is the

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founder and director of The Inclusion Project at Rutgers. Before joining the Rutgers faculty, Boddie was Director of Litigation for the NAACP Legal Defense & Educational Fund, Inc. and supervised its nationwide litigation program, including its advocacy in several major U.S. Supreme Court cases. An honors graduate of Harvard Law School and Yale, she also holds a master's degree in public policy from the Harvard Kennedy School of Government. Boddie clerked for Judge Robert L. Carter in the Southern District of New York. She is a member of the American Law Institute and an American Bar Foundation Fellow. In 2016, Rutgers University President Barchi appointed Boddie a Henry Rutgers Professor in recognition of her scholarship, teaching, and service. In 2021, Boddie was named the founding Newark Director of Rutgers University's Institute for the Study of Global Racial Justice.

Guy-Uriel E. Charles

Guy-Uriel E. Charles is the inaugural Charles J. Ogletree Jr. Professor of Law at Harvard Law School. He writes about the relationship between law and political power and law's role in addressing racial subordination. He teaches courses on civil procedure; election law; constitutional law; race and law; legislation and statutory interpretation; law, economics, and politics; and law, identity, and politics. He is currently working on a book, with Luis Fuentes-Rohwer, on the past and future of voting rights, under contract with Cambridge University Press. He is also co-editing, with Aziza Ahmed, a handbook entitled Race, Racism, and the Law, under contract with Edward Elgar Publishing. This book will survey the current state of research on race and the law in the United States and aims to influence the intellectual agenda of the field. He clerked on the Sixth Circuit for the late Judge Damon J. Keith. He has published numerous articles in top law journals. He is the co-author of two leading casebooks and two edited volumes. He is also a member of the American Law Institute.

Andrew Manuel Crespo

Andrew Manuel Crespo is the Morris Wasserstein Public Interest Professor of Law at Harvard University where he directs the Institute to End Mass Incarceration. Professor Crespo's scholarship has been published in multiple leading academic journals including the Harvard Law Review, the Yale Law Journal, and the Columbia Law Review. Prior to beginning his academic career, Professor Crespo served as a Staff Attorney with the Public Defender Service for the District of Columbia, where he represented over one hundred people accused of crimes who could not afford a lawyer. Professor Crespo graduated magna cum laude from Harvard Law School, where he served as president of the Harvard Law Review and was the first Latino to hold that position. Following law school, he served as a law clerk to Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit before going on to serve for two years as a law clerk at the United States Supreme Court, first to Associate Justice Stephen Breyer and then to Associate Justice Elena Kagan during her inaugural term on the Court.

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Walter Dellinger

Walter Dellinger is the Douglas Maggs Emeritus Professor of Law at Duke University and a Partner in the firm of O'Melveny & Myers. He was named one of the 100 Most Influential Lawyers in America by the National Law Journal and is the recipient of Lifetime Achievement Awards from the American Lawyer, the American Constitution Society and the Mississippi Center for Justice. Dellinger served in the White House and as Assistant Attorney General and head of the Office of Legal Counsel (OLC) from 1993 to 1996. He was acting Solicitor General for the 1996-97 Term of the US Supreme Court, He has argued 25 cases before the United States Supreme Court and has testified more than 30 times before committees of Congress. He has published in academic journals including the Harvard Law Review, the Yale Law Journal and the Duke Law Journal, and has written extensively for the Washington Post, The New York Times, the Wall Street Journal, Slate, and other publications. In 1987-88 he was a scholar at the National Humanities Center and has lectured at universities throughout the United States and other countries including China, Belgium, Netherlands, Germany, Mexico, Italy, Brazil, and Denmark. He graduated from University of North Carolina and Yale Law School and served as law clerk to Supreme Court Justice Hugo Black.

Justin Driver

Justin Driver is the Robert R. Slaughter Professor of Law at Yale Law School. He teaches and writes in the areas of constitutional law, education law, and prison law. His prize-winning book, The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind, was selected as a Washington Post Notable Book of the Year, an Editors' Choice of the New York Times Book Review, and received several other accolades. A recipient of the American Society for Legal History's William Nelson Cromwell Article Prize, he has published widely in the nation's leading law reviews and has also written extensively for general audiences. He is an editor of the Supreme Court Review and an elected member of the American Law Institute. He holds degrees from Brown, Oxford (where he was a Marshall Scholar), Duke (where he received certification to teach public school), and Harvard Law School (where he was an editor of the Harvard Law Review). After graduating from Harvard, he clerked for Judge Merrick Garland, Justice Sandra Day O'Connor (Ret.), and Justice Stephen Breyer.

Richard H. Fallon, Jr.

Richard H. Fallon, Jr., joined the Harvard Law School faculty as an assistant professor in 1982 and is currently Story Professor of Law. He is also an Affiliate Professor in the Harvard University Government Department. Fallon is a graduate of Yale University and Yale Law School. He also earned a B.A. degree in Philosophy, Politics, and Economics from Oxford University, which he attended as a Rhodes Scholar. Before entering teaching, Fallon served as

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a law clerk to Judge J. Skelly Wright and to Justice Lewis F. Powell of the United States Supreme Court. Fallon has written extensively about Constitutional Law and Federal Courts Law. He is the author of The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny (Cambridge University Press, 2019); Law and Legitimacy in the Supreme Court (Harvard University Press, 2018), The Dynamic Constitution (Cambridge University Press, 2d ed. 2013), and Implementing the Constitution (Harvard University Press, 2001) and a co-editor of Hart & Wechsler's The Federal Courts and the Federal System (7th ed. 2015). Fallon is a fellow of the American Academy of Arts and Sciences and a member of the American Law Institute. He is a two-time winner of Harvard Law School's Sacks-Freund Award, which is voted annually by the School's graduating class to honor excellence in teaching. In 2021, the Federal Courts Section of the American Association of Law Schools honored Fallon with its lifetime achievement award.

Caroline Fredrickson

Caroline Fredrickson is a Distinguished Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. Caroline Fredrickson served as the President of the American Constitution Society from 2009-2019. Fredrickson has published works on many legal and constitutional issues and is a frequent guest on television and radio, including serving as a regular on-air commentator on impeachment. Before joining ACS, Fredrickson served as the Director of the ACLU's Washington Legislative Office and as General Counsel and Legal Director of NARAL Pro-Choice America. In addition, she served as the Chief of Staff to Senator Maria Cantwell, of Washington, and Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle, of South Dakota. During the Clinton Administration, she served as Special Assistant to the President for Legislative Affairs. Fredrickson is currently an elected member of the American Law Institute, co-chair of the National Constitution Center's Coalition of Freedom Advisory Board, a member of If/When/How's Advisory Board, and on the boards of American Oversight and the National Institute of Money and Politics. In 2015 Fredrickson was appointed a member of the Yale Les Aspin Fellowship Committee. Fredrickson received her J.D. from Columbia Law School with honors and her B.A. from Yale University in Russian and East European Studies summa cum laude, phi beta kappa. She clerked for the Hon. James L. Oakes of the United States Court of Appeals for the Second Circuit.

Heather Gerken

Heather Gerken is the Dean and Sol & Lillian Goldman Professor of Law at Yale Law School and one of the country's leading experts on constitutional law and election law. A founder of the "nationalist school" of federalism, her work focuses on federalism, diversity, and dissent. Gerken's work has been featured in the Harvard Law Review, the Yale Law Journal, and the

Stanford Law Review as well as The Atlantic, TheBoston Globe, NPR, and TheNew York Times. In 2017, Politico Magazine named Gerken one of The Politico 50, a list of idea makers in American politics. At Yale, she founded and runs the country's most innovative clinic in local government law, the San Francisco Affirmative Litigation Project (SFALP). Gerken is also a renowned teacher who has won awards at both Yale and Harvard. She was named one of the nation's "twenty-six best law teachers" in a book published by the Harvard University Press. She became dean of Yale Law School on July 1, 2017.

Nancy Gertner

Nancy Gertner was United States District Court Judge (D. Mass.) from 1994-2011. She retired to join the faculty at Harvard Law School and has been a Visiting Lecturer at Yale Law School. Prior to 1994, Gertner was a civil rights and criminal defense lawyer. Named one of "The Most Influential Lawyers of the Past 25 Years" by Massachusetts Lawyers Weekly, she has published widely on sentencing, discrimination, forensic evidence, women's rights, and the jury system. Her autobiography, "In Defense of Women: Memoirs of an Unrepentant Advocate," (Beacon Press) was published in 2011. She is coauthor of "The Law of Juries" (Thomson Reuters, 2021). She is the author of an edited volume of the dissenting and majority opinions of Justice Ruth Bader Ginsburg (Talbot, forthcoming). She is writing a memoir, "Incomplete Sentences" (Beacon, forthcoming) about the men she has sentenced. A graduate of Barnard College, with a M.A in Political Science and J.D. from Yale, she clerked for Justice Luther Swygert, Chief Judge, 7th Circuit. She has received numerous awards, including the ABA's Margaret Brent Award, the National Association of Women Lawyers' Arabella Babb Mansfield Award, and the Thurgood Marshall Award from the American Bar Association. In October 2014, she was a resident scholar at the Rockefeller Foundation in Bellagio, Italy.

Thomas B. Griffith

Thomas B. Griffith served on the U. S. Court of Appeals for the D. C. Circuit from 2005 – 2020. He is now Special Counsel at Hunton Andrews Kurth, a Senior Advisor to the National Institute for Civil Discourse, and a Lecturer on Law at Harvard Law School. During his tenure on the D.C. Circuit, Judge Griffith served on the Judicial Conference's Committee on the Judicial Branch, which is concerned with the federal judiciary's relationship to the Executive Branch and Congress, and the Code of Conduct Committee, which sets the ethical standards that govern the federal judiciary. Prior to his appointment to the D.C. Circuit, Judge Griffith was the General Counsel of Brigham Young University. Previously he served as Senate Legal Counsel, the nonpartisan chief legal officer of the U.S. Senate, and before that was a partner at Wiley, Rein & Fielding. Judge Griffith has long been active in the American Bar Association's rule of law projects in Eastern Europe and Eurasia and is currently a member of the International

Advisory Board of the CEELI Institute in Prague. He is a graduate of Brigham Young University and the University of Virginia School of Law.

Tara Leigh Grove

Tara Leigh Grove is the Charles E. Tweedy, Jr., Endowed Chairholder of Law and Director of the Program in Constitutional Studies at the University of Alabama School of Law. After graduating summa cum laude from Duke University and magna cum laude from Harvard Law School, Grove clerked for Judge Emilio Garza of the U.S. Court of Appeals for the Fifth Circuit. She then spent four years as an appellate attorney for the U.S. Department of Justice, arguing fifteen cases in the courts of appeals. Grove has written extensively about the federal judiciary, exploring issues related to judicial legitimacy and judicial independence. Grove's work has been published in prestigious law journals, such as the Harvard Law Review, the Columbia Law Review, the University of Pennsylvania Law Review, the New York University Law Review, the Cornell Law Review, and the Vanderbilt Law Review. Grove has served as a visiting professor at Harvard Law School and Northwestern Pritzker School of Law.

Bert I. Huang

Bert I. Huang is the Michael I. Sovern Professor of Law at Columbia University, where he received the Reese Prize for Excellence in Teaching from the law school's graduating class. The university has also recognized him with its Presidential Award for Outstanding Teaching. At Columbia, he created the Courts & Legal Process colloquium to bring judges, students, and faculty together to discuss new academic research about the judiciary; and he previously served as a vice dean. He has also taught at Harvard. He served as the president of the Harvard Law Review and as a law clerk for Justice David H. Souter of the U.S. Supreme Court. He also clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit. He completed his J.D. and Ph.D. at Harvard University, where he was a Paul & Daisy Soros Fellow. After receiving his A.B. from Harvard, he was a Marshall Scholar at the University of Oxford and worked for the White House Council of Economic Advisers.

Sherrilyn Ifill

Sherrilyn Ifill is the President & Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (LDF), the nation's oldest and premier civil rights law organization fighting for racial justice and equality. Ifill began her career as a Fellow at the American Civil Liberties Union, and then as an Assistant Counsel at LDF where she litigated voting rights cases in the South. In 1993 Ifill joined the faculty at University of Maryland School of Law, where she taught civil procedure, constitutional law, and a broad range of civil rights and clinical offerings. Her scholarship focused on the critical importance of a racially diverse judiciary to the integrity of

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judicial decision-making. Ifill also studies and writes about racial violence. Her critically acclaimed book, On The Courthouse Lawn: Confronting The Legacy Of Lynching In The 21st Century, is credited with inspiring contemporary conversations about lynching and reconciliation. Since returning to LDF as its 7th President & Director-Counsel in 2013, Ifill has led the organization's bold advocacy in the federal courts, including the U.S. Supreme Court, on behalf of clients fighting voter suppression, racial discrimination in the criminal justice system, and a broad array of other urgent civil rights issues. Ifill is a member of the American Law Institute and the American Academy of Arts & Sciences. She holds an undergraduate degree from Vassar College, a J.D. from New York University School of Law, and numerous honorary doctorates.

Olatunde Johnson

Olatunde Johnson is the Jerome B. Sherman Professor of Law at Columbia Law School where she teaches and writes about legislation, administrative law, antidiscrimination law, litigation, and inequality in the United States. In February 2020, she was appointed by the United States Department of Justice to the Resolutions Committee honoring Justice John Paul Stevens. In 2016, she was awarded Columbia University's Presidential Award for Outstanding Teaching, and Columbia Law School's Willis L.M. Reese Prize for Excellence in Teaching. Previously, Professor Johnson served as constitutional and civil rights counsel to Senator Edward M. Kennedy on the Senate Judiciary Committee and as an attorney at the NAACP Legal Defense Fund. Professor Johnson graduated from Yale University and from Stanford Law School. After law school, she clerked for Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and for Justice John Paul Stevens on the United States Supreme Court.

Michael S. Kang

Michael S. Kang is the William G. and Virginia K. Karnes Research Professor at Northwestern Pritzker School of Law and nationally recognized expert on campaign finance, voting rights, redistricting, judicial elections, and corporate governance. His research has been published widely in leading law journals and featured in TheNew York Times, The Washington Post, and Forbes, among others. His recent work focuses on partisan gerrymandering; the influence of party and campaign finance on elected judges; the de-regulation of campaign finance after Citizens United; and so-called "sore loser laws" that restrict losing primary candidates from running in the general election. Kang previously served as the Thomas Simmons Professor of Law at Emory University School of Law. He received his BA and JD from the University of Chicago, where he served as technical editor of the Law Review and graduated Order of the Coif. He also received a PhD in government from Harvard University and an MA from the University of Illinois. After law school, he clerked for Judge Kanne on the U.S. Court of Appeals for the Seventh Circuit and worked in private practice at Ropes & Gray in Boston.

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Alison L. LaCroix

Alison L. LaCroix is the Robert Newton Reid Professor of Law at the University of Chicago Law School. She is also an Associate Member of the University of Chicago Department of History. Professor LaCroix is the author of The Ideological Origins of American Federalism (Harvard University Press, 2010), and in 2018 she was awarded a National Endowment for the Humanities Fellowship for her current book project, titled The Interbellum Constitution: Union, Commerce, and Slavery From the Long Founding Moment to the Civil War (Yale University Press, forthcoming). Before joining the University of Chicago faculty in 2006, she practiced in the litigation department at Debevoise & Plimpton in New York. Professor LaCroix received her B.A. and J.D. from Yale University, and her A.M. and Ph.D. from Harvard University.

Margaret H. Lemos

Maggie Lemos is the Robert G. Seaks LL.B. ’34 Professor of Law, Senior Associate Dean for Faculty and Research, and faculty co-advisor for the Bolch Judicial Institute at Duke Law School. She is a scholar of constitutional law, legal institutions, and procedure. Her current research focuses on the institutions of law interpretation and enforcement, including both public and private lawyers, and their effects on substantive rights. Lemos is also a co-author of a new multidisciplinary coursebook on judicial decision making. She teaches courses on civil procedure, legislation, and judicial process, and was awarded Duke’s Distinguished Teaching Award in 2013. Prior to joining the Duke Law faculty, Lemos was an associate professor at the Benjamin N. Cardozo School of Law; a Bristow Fellow at the Office of the Solicitor General; and a law clerk for Judge Kermit V. Lipez of the U.S. Court of Appeals for the First Circuit, and for U.S. Supreme Court Justice John Paul Stevens. She received her J.D. from New York University School of Law and her B.A. from Brown University.

David F. Levi

David F. Levi is the Levi Family Professor of Law and Judicial Studies and Director of the Bolch Judicial Institute at Duke Law School. Levi was previously the James B. Duke and Benjamin N. Duke Dean of the Duke Law School. He served as dean for 11 years from 2007-2018. Prior to his appointment at Duke, Levi was the Chief United States District Judge for the Eastern District of California with chambers in Sacramento. He was appointed to the district court in 1990. From 1986-1990 he was the United States Attorney for the Eastern District of California. Following graduation from Stanford Law School in 1980, Levi served as a law clerk to Judge Ben C. Duniway of the U.S. Court of Appeals for the Ninth Circuit, and then to Justice Lewis F. Powell, Jr., of the U.S. Supreme Court. Levi has served as member and chair of two U.S. Judicial Conference committees — the Advisory Committee on the Civil Rules and the Standing Committee on the Rules of Practice and Procedure. He was chair of the American Bar

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Association's Standing Committee on the American Judicial System (2014-2016). He is an elected fellow of the American Academy of Arts and Sciences. He is the author or co-author of several books, articles, and published speeches mostly on the judiciary, judicial independence, and judicial decision-making. He is President of the American Law Institute.

Trevor W. Morrison

Trevor Morrison serves as Dean of New York University School of Law, where he is also the Eric M. & Laurie B. Roth Professor of Law. He previously held faculty appointments at Cornell Law School and Columbia Law School. Morrison's research and teaching interests are in constitutional law (especially separation of powers), federal courts, and the law of the executive branch. After graduating from Columbia Law School, he served as a law clerk to Judge Betty Fletcher of the U.S. Court of Appeals for the Ninth Circuit and to Justice Ruth Bader Ginsburg of the U.S. Supreme Court. Between those clerkships, he was a Bristow Fellow in the U.S. Justice Department's Office of the Solicitor General, an attorney-adviser in the Justice Department's Office of Legal Counsel, and an associate at Wilmer, Cutler & Pickering (now WilmerHale). Morrison also served as associate counsel to President Barack Obama. He is a fellow of the American Academy of Arts & Sciences and a member of the American Law Institute and the Council on Foreign Relations.

Richard H. Pildes

Professor Richard H. Pildes is Sudler Family Professor of Constitutional Law at New York University School of Law and one of the country's leading experts on the legal aspects of American democracy and government. His academic work focuses on all aspects of the political process, as well as legal issues concerning the structure of American government, including the powers of the President, Congress, and the Supreme Court. His two casebooks, The Law of Democracy and When Elections Go Bad, created the law of democracy as a field of study in the law schools. In addition to editing the book, The Future of the Voting Rights Act, he has published more than seventy academic articles. Pildes has represented numerous clients before the Supreme Court. He served as a law clerk at the Court to Justice Thurgood Marshall and to Judge Abner J. Mikva of the United States Court of Appeals for the D.C. Circuit. He has testified several times before the United States Senate and House of Representatives. Born in Chicago, he began his teaching career at the University of Michigan Law School, before moving to NYU. He is an elected member of the American Academy of Arts and Sciences and the American Law Institute, as well as a Guggenheim Fellow.

AMERICAN OVERSIGHT

Michael D. Ramsey

Michael D. Ramsey is Hugh and Hazel Darling Foundation Professor of Law at the University of San Diego School of Law, where he teaches and writes in the areas of constitutional law, foreign relations law, and international law. He is the author of The Constitution's Text in Foreign Affairs (Harvard University Press 2007), co-editor of International Law in the U.S. Supreme Court: Continuity and Change (Cambridge University Press 2011), and co-author of two casebooks, Transnational Law and Practice (Aspen 2015) and International Business Transactions: A Problem-Oriented Coursebook (12th ed., West 2015). His scholarly articles have appeared in publications such as the Yale Law Journal, the University of Chicago Law Review, the Georgetown Law Journal and the American Journal of International Law. He received his B.A. magna cum laude from Dartmouth College and his J.D. summa cum laude from Stanford Law School. Prior to teaching, he served as a judicial clerk for Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit and Justice Antonin Scalia of the United States Supreme Court, and practiced law with the law firm of Latham & Watkins. He has taught as a visiting professor at the University of California, San Diego, in the Department of Political Science and at the University of Paris – Sorbonne, in the Department of Comparative Law.

Cristina M. Rodríguez (Co-Chair)

Cristina M. Rodríguez is the Leighton Homer Surbeck Professor of Law at Yale Law School. Her fields of research and teaching include constitutional law and theory, immigration law and policy, and administrative law and process. Her new book, The President and Immigration Law (with Adam B. Cox) was published by Oxford University Press in September 2020, and explores the long history of presidential control over immigration policy and its implications for the future of immigration law and the presidency itself. Rodríguez joined Yale Law School in 2013 after serving for two years as Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice. She was on the faculty at the New York University School of Law from 2004–2012 and has been Visiting Professor of Law at Stanford, Harvard, and Columbia Law Schools. She is a member of the American Academy of Arts and Sciences and the American Law Institute, a non-resident fellow at the Migration Policy Institute in Washington, D.C., and a past member of the Council on Foreign Relations. She is also a past recipient of the Yale Law Women Award for Excellence in Teaching. She earned her B.A. and J.D. degrees from Yale and attended Oxford University as a Rhodes Scholar, where she received a Master of Letters in Modern History. Following law school, Rodríguez clerked for Judge David S. Tatel of the U.S. Court of Appeals for the D.C. Circuit and Justice Sandra Day O'Connor of the U.S. Supreme Court.

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USCCR-21-1814-B-000292

Kermit Roosevelt

Kermit Roosevelt is a professor of law at the University of Pennsylvania Carey Law School, where he teaches constitutional law and conflict of laws. He is a graduate of Harvard College and Yale Law School. Before joining the Penn faculty, he practiced appellate litigation with Mayer Brown in Chicago and clerked for D.C. Circuit Judge Stephen F. Williams and Supreme Court Justice David H. Souter. He is the Reporter for the American Law Institute's Third Restatement of Conflict of Laws. His most recent book, The Nation that Never Was: Reconstructing America's Story (University of Chicago Press, 2022), explores the source of American values of liberty and equality.

Bertrall Ross

Bertrall Ross is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia, School of Law. He teaches and writes in the areas of constitutional law, election law, administrative law, and statutory interpretation. Ross's research is driven by a concern about democratic responsiveness and accountability, as well as the inclusion of marginalized communities in administrative and political processes. His past scholarship has been published in several books and journals, including the Columbia Law Review, the NYU Law Review, and the University of Chicago Law Review. Ross is currently working on book projects related to separation of powers, gerrymandering, and voter data as a tool for disfranchisement. Ross has been the recipient of the Berkeley Law Rutter Award for Teaching Distinction, the Berlin Prize from the American Academy in Berlin, the Princeton University Law and Public Affairs Fellowship, the Columbia Law School Kellis Parker Academic Fellowship, and the Marshall Scholarship. He is currently a public member of the Administrative Conference of the United States. Ross earned his law degree from Yale Law School and Masters degrees from the London School of Economics and Princeton University's School of Public and International Affairs. Prior to joining Berkeley Law, he clerked for Judge Dorothy Nelson of the U.S. Court of Appeals for the Ninth Circuit and Judge Myron Thompson of the U.S. District Court for the Middle District of Alabama.

David A. Strauss

David Strauss is the Gerald Ratner Distinguished Service Professor of Law and the Faculty Director of the Supreme Court and Appellate Clinic at the University of Chicago. He is the author of The Living Constitution (Oxford University Press, 2010) and the co-author of Democracy and Equality: The Enduring Constitutional Vision of the Warren Court (Oxford University Press, 2019), and he has written many academic and popular articles on constitutional law and related subjects. He is a Fellow of the American Academy of Arts and Sciences and a co-editor of the Supreme Court Review. He has been a visiting professor at

AMERICAN OVERSIGHT

Harvard and Georgetown. He has served as an Assistant to the Solicitor General of the United States, in the Office of Legal Counsel of the U.S. Department of Justice, and as Special Counsel to the Senate Judiciary Committee. He has argued nineteen cases before the U.S. Supreme Court.

Laurence H. Tribe

Laurence Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University. Tribe has taught at Harvard since 1968 and was voted the best professor by the class of 2000. The title "University Professor" is Harvard's highest academic honor, awarded to a handful of professors at any given time and to fewer than 75 professors in Harvard University's history. Tribe clerked for the California and U.S. Supreme Courts; was elected to the American Academy of Arts and Sciences in 1980 and the American Philosophical Society in 2010; helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands; and has received eleven honorary degrees, most recently a degree honoris causa from the Government of Mexico in March 2011 (never before awarded to an American) and an LL.D from Columbia University. Tribe has argued 35 cases in the U.S. Supreme Court. He was appointed in 2010 by President Obama and Attorney General Holder to serve as the first Senior Counselor for Access to Justice. He has written 115 books and articles, most recently, "To End A Presidency: The Power of Impeachment." His treatise, "American Constitutional Law," has been cited more than any other legal text since 1950.

Michael Waldman

Michael Waldman is the president of the Brennan Center for Justice at NYU School of Law. The Brennan Center is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice so they work for all Americans. The Center is a leading national voice on voting rights, money in politics, criminal justice reform, and constitutional law. Waldman has led the Center since 2005. He is the author of The Fight to Vote (2016), a history of the struggle to win voting rights for all citizens, The Second Amendment: A Biography (2014), and five other books. Waldman served as director of speechwriting for President Bill Clinton from 1995-1999, and special assistant to the president for policy coordination from 1993-1995. He was responsible for writing or editing nearly two thousand speeches, including four State of the Union and two inaugural addresses. He is a graduate of NYU School of Law and Columbia College.

Adam White

Adam White is a senior fellow at the American Enterprise Institute and co-director of George Mason University's C. Boyden Gray Center for the Study of the Administrative State. He writes

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on the courts, the Constitution, administrative law, and regulatory policy. He is a public member of the Administrative Conference of the United States. Previously he practiced constitutional and administrative law in Washington, D.C., and he clerked for the U.S. Court of Appeals for the D.C. Circuit, after graduating from the Harvard Law School and the University of Iowa. In 2005, the Harvard Journal of Law & Public Policy published his study of the Senate's constitutional power to grant or withhold its "advice and consent" for judicial nominations.

Keith E. Whittington

Keith E. Whittington is the William Nelson Cromwell Professor of Politics at Princeton University and is currently the chair of Academic Freedom Alliance. He works on American constitutional history, politics and law, and on American political thought. He is the author of Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present and Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History, among other works. He has been a visiting professor at Harvard Law School, Georgetown University Law Center, and the University of Texas School of Law, and he is a member of the American Academy of Arts and Sciences. He did his undergraduate work at the University of Texas at Austin and completed his Ph.D. in political science at Yale University.

Date : 11/15/2021 12:28:26 PM
From : "Bert Benavides" bbenavides@eac.gov
To : "mcott@nga.org" mcott@nga.org, "mwoods@nga.org" mwoods@nga.org, "Kevin.Bratcher@LRC.KY.GOV" Kevin.Bratcher@LRC.KY.GOV, "daniel.ivey-soto@nmlegis.gov" daniel.ivey-soto@nmlegis.gov, "Iveysoto@usa.net" Iveysoto@usa.net, "Kyle Ardoin" kyle.ardoin@sos.la.gov, "Joel Watson" joel.watson@sos.la.gov, "Clayton Smith" clayton.smith@sos.la.gov, "Nancy Landry" Nancy.landry@sos.la.gov, "Maggie Toliver" maggie.toliver@state.nm.us, "Theresa Romero" theresa.romero@state.nm.us, "reynolds@sso.org" reynolds@sso.org, "kingram@sos.texas.gov" kingram@sos.texas.gov, "linda.lamone@maryland.gov" linda.lamone@maryland.gov, "Amy Cohen" acohen@nased.org, "nikki.charlson@maryland.gov" nikki.charlson@maryland.gov, "rhatch@co.weber.ut.us" rhatch@co.weber.ut.us, "Alysoun" Alysoun.Mclaughlin@montgomerycountymd.gov, "howardl@brennan.law.nyu.edu" howardl@brennan.law.nyu.edu, "tmattice@electioncenter.org" tmattice@electioncenter.org, "dlogan@rrcc.lacounty.gov" dlogan@rrcc.lacounty.gov, "mwinn@cco.hctx.net" mwinn@cco.hctx.net, "Neal.kelley@rov.ocgov.com" Neal.kelley@rov.ocgov.com, "dkladney@usccr.gov" dkladney@usccr.gov, "cleta@cletamitchell.com" cleta@cletamitchell.com, "mguthrie52@gmail.com" mguthrie52@gmail.com, "guthrie@access-board.gov" guthrie@access-board.gov, "Patrick Cannon (secondary)" pat.cannon@comcast.net, "Patrick Cannon" cannon@access-board.gov, "Bruce Bailey" bailey@access-board.gov, "Richard Pilger" richard.pilger@usdoj.gov, "Chris Herren" chris.herren@usdoj.gov, "David Beirne" david.e.beirne.civ@mail.mil, "stark@stat.berkeley.edu" stark@stat.berkeley.edu, "pbstark@gmail.com" pbstark@gmail.com, "eberke@berkefarah.com" eberke@berkefarah.com, "Sarah Johnson" Sarah.Johnson@coloradosprings.gov, "simons@acm.org" simons@acm.org, "gregmoore151@gmail.com" gregmoore151@gmail.com, "nordenl@brennan.law.nyu.edu" nordenl@brennan.law.nyu.edu, "jfogarty@clarkhill.com" jfogarty@clarkhill.com, "Don Gray" don.gray@co.sangamon.il.us, "james.charles.dickson@gmail.com" james.charles.dickson@gmail.com, "donaldmarkritchie@gmail.com" donaldmarkritchie@gmail.com, "Rick Stream" rstream@stlouisco.com, "sschoeller@greenecountymo.gov" sschoeller@greenecountymo.gov, "Christy McCormick" cmccormick@eac.gov, "Tina Barton" TBarton@eac.gov, "Tyler Herrmann" THerrmann@eac.gov, "Bert Benavides" bbenavides@eac.gov
Cc : "Kevin Rayburn" KRayburn@eac.gov, "Amanda Joiner" AJoiner@eac.gov, "Robin Sargent" rsargent@eac.gov
Subject : [EXTERNAL] EAC Bd. of Advisors - New USCCR appointment
Attachment : BOA - 2021 Roster Contact Info with Emails, Rev. 11-15-21.doc;BOA - 2021 Roster, Emails Only, Rev. 11-15-21.doc;

CAUTION: This email is from outside USCCR.

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Good afternoon, all. On behalf of Commissioner/Designated Federal Officer (DFO) Christy McCormick and Alternate DFO Tina Barton, attached are two lists revised on 11-15-21 for the Board of Advisors. The first attachment is the **Roster with Affiliation and Contact information**, and the second attachment is a **Group Email List**. The 11-15-21 Revision reflects the appointment of Cleta Mitchell, Senior Legal Fellow, Conservative Partnership Institute, effective 11-03-21, to the United States Commission on Civil Rights.

Let me know if you have any questions. Thank you.

Ms. Bert Benavides
bbenavides@eac.gov
202.294-9580

AMERICAN OVERSIGHT

NATIONAL GOVERNORS ASSOCIATION (2 appointments)	
Mary Catherine Ott Legislative Director 444 North Capitol St. NW Suite 267 Washington DC 20001 mcott@nga.org **Appointed: 4-26-21** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	Michelle Woods Program Director, Homeland Security National Governor's Association 444 N. Capitol St., NW, Suite 267 Washington DC 20001 **mwoods@nga.org** **Appointed: 4-26-21** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***
NATIONAL CONFERENCE OF STATE LEGISLATURES (2 appointments)	
Representative Kevin O. Bratcher KY House of Representatives State Capitol, Rm. 357-E Frankfort KY 40801 Kevin.Bratcher@LRC.KY.GOV **Appointed: 04-01-21** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	Senator Daniel Ivey-Soto New Mexico State Legislature 1420 Carlisle Blvd., NE, Suite 208 Albuquerque NM 87110 daniel.ivey-soto@nmlegis.gov Iveysoto@usa.net **Appointed: 05-03-17** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***
NATIONAL ASSOCIATION OF SECRETARIES OF STATE (2 appointments)	
The Honorable Kyle Ardoin LA Secretary of State, and NASS President P. O. Box 94125 Baton Rouge, LA 70804-9125 kyle.ardoin@sos.la.gov joel.watson@sos.la.gov clayton.smith@sos.la.gov Nancy.landry@sos.la.gov Leslie Reynolds, NASS Executive Director reynolds@sso.org **Appointed: 9-10-21** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	The Honorable Maggie Toulouse-Oliver NM Secretary of State, and NASS Immediate Past President New Mexico Capitol Annex North 325 Don Gaspar, Suite 300 Santa Fe, NM 87501 maggie.toliver@state.nm.us theresa.romero@state.nm.us Leslie Reynolds, NASS Executive Director reynolds@sso.org **Appointed: 09-10-21** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***

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NATIONAL ASSOCIATION OF STATE ELECTION DIRECTORS (2 appointments)	
Keith Ingram Director, Elections Division Texas Secretary of State P.O. Box 12060 Austin, TX 78711 kingram@sos.texas.gov Amy Cohen, NASED Executive Director acohen@nased.org **Appointed: 03-04-20** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	Linda H. Lamone Administrator of Elections Maryland State Board of Elections 151 West Street, Suite 200 P.O. Box 6486 Annapolis, MD 21401-0486 linda.lamone@maryland.gov Amy Cohen, NASED Executive Director acohen@nased.org **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***
NATIONAL ASSOCIATION OF COUNTIES (2 appointments)	
Ricky Hatch Weber County Clerk/Auditor 2380 Washington Blvd., Suite 320 Ogden UT 84401 rhatch@co.weber.ut.us **Appointed: 12-15-17** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	Alysoun McLaughlin Deputy Election Director Montgomery County 18753 N. Frederick Ave. Ste. 210 Gaithersburg MD 20879 Alysoun.mclaughlin@montgomerycountymd.gov **Appointed: 04-11-17** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***
UNITED STATES CONFERENCE OF MAYORS (2 appointments)	
VACANT **Appointed:** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***	Elizabeth (Liz) Howard Counsel, Brennan Center for Justice 920 I St NW #507 Washington DC 20001 howardl@brennan.law.nyu.edu **Appointed: 06-30-20** ***Expires: 04-13-23*** ***Charter renews every two years;*** ***Appointment renews until replaced***

AMERICAN OVERSIGHT

THE ELECTION CENTER (2 appointments)	
Tim Mattice Executive Director The Election Center 21946 Royal Montreal Katy, TX 77450 tmattice@electioncenter.org **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Dean Logan Registrar-Recorder/County Clerk, Los Angeles County 12400 Imperial Highway Norwalk CA 90650 Dlogan@rrcc.lacounty.gov **Appointed: 07-09-19** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
INTERNATIONAL ASSOCIATION OF GOVERNMENT OFFICIALS (2 appointments)	
Michael B. Winn Harris County Director of Elections 1001 Preston, 4th floor. Houston, TX 77002 mwinn@cco.hctx.net **Appointed: 04-11-17** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Neal Kelley Registrar of Voters, Orange County P.O. Box 11298 Santa Ana, CA 92711 neal.kelley@rov.ocgov.com **Appointed: 04-11-17** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
UNITED STATES COMMISSION ON CIVIL RIGHTS (2 appointments)	
Cleta Mitchell Senior Legal Fellow Conservative Partnership Institute 300 Independence Ave., SE Washington DC 20003 cleta@cletamitchell.com **Appointed: 11-03-21** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	David Kladney U.S. Commission on Civil Rights Commissioner 905 Joy Lake Road Reno, NV 89511 dkladney@usccr.gov **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***

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<table>
<tr><th colspan="2">ARCHITECTURAL AND TRANSPORTATION BARRIER COMPLIANCE BOARD
(2 appointments)</th></tr>
<tr><td>Marc Guthrie
Public Member, U.S. Access Board
4455 Hunts Landing Rd, Mallory Square 16-B
Hebron OH 43025

mguthrie52@gmail.com
guthrie@access-board.gov

IT Asst: bailey@access-board.gov

Appointed: 04-28-15
Expires: 04-13-23
Charter renews every two years;
Appointment renews until replaced</td><td>Patrick D. Cannon
Public Board Member
2700 Marfitt Road, #307
East Lansing, MI 48823

pat.cannon@comcast.net
cannon@access-board.gov

IT Asst: bailey@access-board.gov

Appointed: 12-20-20
Expires: 04-13-23
Charter renews every two years;
Appointment renews until replaced</td></tr>
<tr><th>CHIEF, OFFICE OF PUBLIC INTEGRITY,
UNITED STATES DEPARTMENT OF JUSTICE
(1 appointment)</th><th>CHIEF, VOTING SECTION
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE
(1 appointment)</th></tr>
<tr><td>Richard C. Pilger
Senior Trial Attorney, Criminal Division
U. S. Department of Justice
1400 New York Avenue NW
Room 12100
Washington, DC 20530

richard.pilger@usdoj.gov

Appointed: 04-28-15
Expires: 04-13-23
Charter renews every two years;
Appointment renews until replaced</td><td>Chris Herren, Chief, Voting Section
Civil Rights Division
U. S. Department of Justice
1800 G Street, NW
Room 7264-NWB
Washington, DC 20006

chris.herren@usdoj.gov

Appointed: 04-28-15
Expires: 04-13-23
Charter renews every two years;
Appointment renews until replaced</td></tr>
<tr><th colspan="2">DIRECTOR, FEDERAL VOTING ASSISTANCE PROGRAM
U.S. DEPARTMENT OF DEFENSE
(1 appointment)</th></tr>
<tr><td colspan="2">David Beirne, Director
Federal Voting Assistance Program, U.S. Dept. of Defense
4800 Mark Center Dr., Ste. 03J25-02
Alexandria, VA 22350-5000

david.e.beirne.civ@mail.mil

Appointed: 01-01-17
Expires: 04-13-23
Charter renews every two years;
Appointment renews until replaced</td></tr>
</table>

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SPEAKER OF THE HOUSE (1 appointment)	**HOUSE MINORITY LEADER (1 appointment)**
Philip B. Stark Associate Dean, Mathematical & Physical Sciences and Professor of Statistics University of California - Berkeley 1157 Cragmont Avenue Berkeley CA 94708 stark@stat.berkeley.edu **Appointed: 09-20-16** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Elliot Berke Managing Partner Berke Farah LLP 701 8th St, NW Suite 601 Washington DC 20001 eberke@berkefarah.com **Appointed: 12-10-17** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
SENATE MAJORITY LEADER (1 appointment)	**SENATE MINORITY LEADER (1 appointment)**
Sarah Ball Johnson City Clerk, Colorado Springs CO 30 S. Nevada Ave., Ste. 101 Colorado Springs CO 80903 Sarah.Johnson@coloradosprings.gov **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Barbara Simons, PhD Association for Computing Machinery 301 Mission Street, Unit 45D San Francisco, CA 94105 simons@acm.org **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
HOUSE ADMINISTRATION – CHAIR (2 appointments)	
Gregory T. Moore President, GTM Consulting Services, LLC 14319 Gov. Lee Pl Upper Marlboro MD 20771 gregorytmoore@aol.com **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Lawrence Norden Deputy Director, Brennan Center for Justice Democracy Program 120 Broadway, Suite 1750 New York, NY 10271 nordenl@brennan.law.nyu.edu **Appointed: 04-22-19** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***

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HOUSE ADMINISTRATION – RANKING MEMBER (2 appointments)	
John G. Fogarty Senior Counsel 130 E. Randolph St., Ste 3900 Chicago IL 60601 jfogarty@clarkhill.com **Appointed: 04-04-19** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Don Gray County Clerk 200 South Ninth St. Springfield IL 62701 don.gray@co.sangamon.il.us **Appointed: 04-04-19** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
SENATE RULES & ADMINISTRATION COMMITTEE – RANKING MEMBER (2 appointments)	
James C. Dickson Co-Chair, Voting Rights Task Force National Council on Independent Living 4429 Colorado Avenue NW Washington, DC 20011 james.charles.dickson@gmail.com **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Mark Ritchie President MN World's Fair Bid Committee 1813 Girard Avenue South Minneapolis MN donaldmarkritchie@gmail.com **Appointed: 05-08-17** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***
SENATE RULES & ADMINISTRATION COMMITTEE – CHAIR (2 appointments)	
Rick Stream Republican Director of Elections St. Louis County, MO 725 Northwest Plaza Drive St. Ann, MO 63074 rstream@stlouisco.com **Appointed: 03-17-21** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***	Shane Schoeller Greene County Clerk 940 N. Boonville Avenue – Room 113 Springfield MO 65802 sschoeller@greenecountymo.gov **Appointed: 04-28-15** ***Expires: 04-13-23*** ***Charter renews every two years; Appointment renews until replaced***

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Designated Federal Officer (DFO) Alternate Designated Federal Officer (ADFO) EAC Staff Point of Contact	
Commissioner Christy McCormick Designated Federal Officer 633 3rd Street NW, Suite 200 Washington DC 20001 cmccormick@eac.gov	Tina Barton Alternate Designated Federal Officer 633 3rd Street NW, Suite 200 Washington DC 20001 tbarton@eac.gov

NOTE: The appointment expiration date is tied to the BOA charter renewal date. Currently there are 34 Board of Advisor Members, and 1 vacancy

EAC Staff Point of Contact:

Ms. Bert A. Benavides
633 3rd Street NW, Suite 200
Washington DC 20001

202-294-9580 cell
bbenavides@eac.gov

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Date : 11/3/2021 11:07:27 AM
From : "Norma Cantu" ncantu@usccr.gov
To : "juanadelpilar@gmail.com" juanadelpilar@gmail.com
Attachment : Notice-of-Representation-Form-Board-Advisors-2021_USCCR Mitchell.pdf;

AMERICAN OVERSIGHT

Notice of Representation
United States Election Assistance Commission
Board of Advisors

In accordance with 52 U.S.C. § 20944 of the Help America Vote Act of 2002, your office submits the following individual(s) as a member of the Election Assistance Commission Board of Advisors:

Designated Representative

Name: Cleta Mitchell

Title: Senior Legal Fellow, Conservative Partnership Institute

Address: 300 Independence Ave, SE
Washington, DC 20003

Phone: 202.431.1950

Email: cleta@cletamitchell.com

Party Affiliation: Republican (personal; CPI is nonpartisan)

Designated Representative

Name: _____

Title: _____

Address: _____

_____

Phone: _____

Email: _____

Party Affiliation: _____

Name and Title of Appointing Official

Print Name: Norma Cantu

Print Title: Chairwoman- USCCR

Signature: _____ Date: 11/3/2021

Please return the completed form via email to EAC General Counsel Kevin Rayburn (krayburn@eac.gov).

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Date : 11/16/2021 6:38:38 PM
From : "Joshua Dansby" jdansby@usccr.gov
To : "Irena Vidulovic" ividulovic@usccr.gov, "David Kladney" dkladney@usccr.gov, "Debo P. Adegbile" dadegbile@usccr.gov
Subject : 2018 990 Form for PILF
Attachment : PILF 2018 990.pdf;

Joshua W. Dansby (he/him)
Special Assistant to Commissioner David Kladney
U.S. Commission on Civil Rights
E: jdansby@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suit 1150
Washington, DC 20425

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29493270221 8 9

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

A For the 2018 calendar year, or tax year beginning , 2018, and ending , 20 18

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization: Public Interest Legal Foundation
Doing business as:
Number and street (or P O box if mail is not delivered to street address): 32 E. Washington St
Room/suite: STE 1675
City or town, state or province, country, and ZIP or foreign postal code: Indianapolis, IN 46204

D Employer identification number: [redacted]641

E Telephone number: [redacted]

G Gross receipts $ 1469765

F Name and address of principal officer: John Christian Adams, President
same as box C

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website ▶ publicinterestlegal org

H(c) Group exemption number ▶

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 2012

M State of legal domicile: IN

Part I Summary

1 Briefly describe the organization's mission or most significant activities: The Org exists to provide services / representation to states and election officials, non-profit organizations, and individuals, to assist with the exercise of their civil/constitutional rights, with particular focus on voting rights. Provide education to citizens and election officials regarding election integrity.

2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets

3	Number of voting members of the governing body (Part VI, line 1a)	3	8
4	Number of independent voting members of the governing body (Part VI, line 1b)	4	6
5	Total number of individuals employed in calendar year 2018 (Part V, line 2a)	5	5
6	Total number of volunteers (estimate if necessary)	6	5
7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
b	Net unrelated business taxable income from Form 990-T, line 38	7b	0

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		Prior Year	Current Year
8	Contributions and grants (Part VIII, line 1h)	1025453	1381709
9	Program service revenue (Part VIII, line 2g)	11444	76090
10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	25000	
11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	9055	11966
12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	1170952	1469765
13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	695178	717019
16a	Professional fundraising fees (Part IX, column (A), line 11e)	3000	67933
b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 138779	[redacted]	[redacted]
17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	341097	353655
18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	1039275	1138607
19	Revenue less expenses. Subtract line 18 from line 12	131677	331158

		Beginning of Current Year	End of Year
20	Total assets (Part X, line 16)	698018	1032621
21	Total liabilities (Part X, line 26)	35008	38453
22	Net assets or fund balances. Subtract line 21 from line 20	663010	994168

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

Signature of officer: J. Christian Adams, President — Date 10/20/19

Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶			Firm's EIN ▶	
Firm's address ▶			Phone no	

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☑ No

For Paperwork Reduction Act Notice, see the separate instructions. Cat No 11282Y Form **990** (2018)

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission

The Foundation exists to provide services and representation to states and election officials, non-profit organizations, and individuals, to assist them with the exercise of their civil and constitutional rights, with particular focus on voting rights. PILF provides education to citizens and election officials regarding election integrity and the role of election process laws and how they affect policy and constitutional architecture.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code) (Expenses $ 587341 including grants of $ 0) (Revenue $ 76090)

Provided litigation for the purpose of defending the constitutional and statutory rights of individuals and non-profit organizations from intrusion by state, federal, and local governments. Specializes in civil litigation in high-profile matters affecting the processes of the nation, with particular emphasis given to aiding the cause of election integrity and litigating against lawlessness in American elections. Additionally, volunteer attorneys contributed in-kind legal services for these cases valued at $7,500. The foundation litigated 8 fundamental cases and filed 5 Brief of Amicus in 2018.

* See Attachment 1 of this 990 for detailed case descriptions.

4b (Code:) (Expenses $ 316690 including grants of $ 0) (Revenue $ 0)

Education and Advocacy- PILF has a focused effort to raise awareness of vital issues such as non-citizens voting, lack of citizen verification and other shortfalls in the current election process. PILF has marshalled expert resources to help educate citizens, officials and decision makers about the role of election process laws and how they affect policy and Constitutional architecture. PILF assists election officials in devising election integrity policies. PILF has responded to requests for assistance from election officials and legislatures to discuss best practices for voter roll maintenance. PILF has completed research projects and published reports regarding best practices for voter roll maintenance and regarding the consequences of lack of citizenship verification in the election process. PILF attorneys have testified before legislative bodies presenting and discussing PILF's research and reports.

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 904031

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Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	✓	
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2	✓	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		✓
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		✓
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		✓
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		✓
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		✓
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		✓
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		✓
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		✓
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		✓
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		✓
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		✓
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		✓
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		✓
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		✓
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	✓	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	✓	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		✓
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		✓
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		✓
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		✓
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		✓
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I* (see instructions)	17	✓	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		✓
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		✓
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		✓
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		✓

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Part IV Checklist of Required Schedules *(continued)*

			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		✓
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		✓
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K If "No," go to line 25a*	24a		✓
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		✓
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		✓
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		✓
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		✓
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		✓
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		✓
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		✓
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		✓
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		✓
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		✓
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		✓
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		✓
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	✓	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	✓	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	✓	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		✓
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		✓
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	✓	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	14		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		✓	

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Part V Statements Regarding Other IRS Filings and Tax Compliance *(continued)*

			Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return 2a 5			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b	✓	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)			
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a		✓
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*	3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a		✓
b	If "Yes," enter the name of the foreign country: ▶ ---------- See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).			
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a		✓
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b		✓
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?	5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a		✓
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b		
7	**Organizations that may receive deductible contributions under section 170(c).**			
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		✓
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c		✓
d	If "Yes," indicate the number of Forms 8282 filed during the year 7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e		✓
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f		✓
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h		
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8		
9	**Sponsoring organizations maintaining donor advised funds.**			
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b		
10	**Section 501(c)(7) organizations.** Enter			
a	Initiation fees and capital contributions included on Part VIII, line 12 10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities 10b			
11	**Section 501(c)(12) organizations.** Enter:			
a	Gross income from members or shareholders 11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.) 11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year 12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**			
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O.	13a		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans 13b			
c	Enter the amount of reserves on hand 13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a		✓
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see instructions and file Form 4720, Schedule N.	15		✓
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.	16		✓

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Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O See instructions*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☑

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a 8		
b	Enter the number of voting members included in line 1a, above, who are independent	1b 6		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		✓
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3		✓
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		✓
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		✓
6	Did the organization have members or stockholders?	6		✓
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a		✓
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b		✓
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	✓	
b	Each committee with authority to act on behalf of the governing body?	8b	✓	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O* . . .	9		✓

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		✓
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	✓	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	✓	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	✓	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	✓	
13	Did the organization have a written whistleblower policy?	13		✓
14	Did the organization have a written document retention and destruction policy?	14	✓	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	✓	
b	Other officers or key employees of the organization	15b	✓	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		✓
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (1024 or 1024-A if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply

☐ Own website ☐ Another's website ☑ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records ▶

Shawna Powell, Public Interest Legal Foundation, 32 E. Washington St., Indianapolis, IN 46204 (317) 203-5599

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Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order. individual trustees or directors, institutional trustees, officers; key employees; highest compensated employees, and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Brian Brown Director	2 -	✓						0	0	0
(2) William Davis Director	2 -	✓						0	0	0
(3) Hans von Spakovsky Director	2 -	✓						0	0	0
(4) Dr. John Eastman Director	2 -	✓						0	0	0
(5) Cleta Mitchell Chariman, Director	2 -	✓		✓				0	0	0
(6) Neil Corkery Treasurer, Director	5 -	✓		✓				30000	0	0
(7) John Christian Adams President, General Counsel, Director	40 -	✓		✓				120000	0	0
(8) Shawna L Powell Secretary	40 -			✓				88564	0	0
(9) David Norcross Director	2 -	✓						0	0	0
(10)										
(11)										
(12)										
(13)										
(14)										

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Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)										
(16)										
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
1b **Sub-total** ▶								238564	0	0
c **Total from continuation sheets to Part VII, Section A** ▶								0	0	0
d **Total (add lines 1b and 1c)** ▶								238564	0	0

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 1

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*		✓
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*		✓
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*		✓

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
John Christian Adams, 32 E. Washington St., STE 1675, Indianapolis, IN 46204	General Counsel	120000

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 1

AMERICAN OVERSIGHT

Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512–514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f	1381709			
	g	Noncash contributions included in lines 1a–1f $					
	h	**Total.** Add lines 1a–1f ▶		1381709			
Program Service Revenue			Business Code				
	2a	Litigation	541100	76090	76090	0	0
	b						
	c						
	d						
	e						
	f	All other program service revenue					
	g	**Total.** Add lines 2a–2f ▶		76090			
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties ▶					
			(i) Real / (ii) Personal				
	6a	Gross rents					
	b	Less rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) ▶					
			(i) Securities / (ii) Other				
	7a	Gross amount from sales of assets other than inventory					
	b	Less cost or other basis and sales expenses					
	c	Gain or (loss)					
	d	Net gain or (loss) ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b	Less direct expenses b					
	c	Net income or (loss) from fundraising events ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 a					
	b	Less direct expenses b					
	c	Net income or (loss) from gaming activities ▶					
	10a	Gross sales of inventory, less returns and allowances a					
	b	Less cost of goods sold b					
	c	Net income or (loss) from sales of inventory ▶		0	0	0	0
		Miscellaneous Revenue	Business Code				
	11a	Cost reimbursement fm related entity	900099	11966	11966	0	0
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d ▶		11966			
	12	**Total revenue.** See instructions ▶		1469765	88056	0	0

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns All other organizations must complete column (A)

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☑

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2	Grants and other assistance to domestic individuals. See Part IV, line 22				
3	Grants and other assistance to foreign organizations, foreign governments, and foreign individuals See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	238564	149138	68569	20856
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	347509	346989	260	260
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits	97879	89992	5887	2000
10	Payroll taxes	33067	30388	2000	680
11	Fees for services (non-employees):				
a	Management				
b	Legal	50074	50074	0	0
c	Accounting	4500	0	4500	0
d	Lobbying				
e	Professional fundraising services See Part IV, line 17	67933			67933
f	Investment management fees				
g	Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)				
12	Advertising and promotion				
13	Office expenses	20017	9859	1883	8275
14	Information technology	515	474	0	41
15	Royalties				
16	Occupancy	23594	20055	2359	1180
17	Travel	22150	17705	4445	0
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings	7273	4537	1368	1368
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance	24217	19692	4526	0
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	**Direct Mail Expense**	180931	144745	0	36186
b	**Litigation Direct Expense**	14571	14571	0	0
c	**Education Direct Expense**	5812	5812	0	0
d					
e	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24e	1138607	904031	95797	138779
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☑ if following SOP 98-2 (ASC 958-720)	202364	144745	0	57619

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Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing	692226	1	1031105
	2	Savings and temporary cash investments	0	2	0
	3	Pledges and grants receivable, net	0	3	0
	4	Accounts receivable, net	0	4	0
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	0	5	0
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L	0	6	0
	7	Notes and loans receivable, net	0	7	0
	8	Inventories for sale or use	0	8	0
	9	Prepaid expenses and deferred charges	0	9	0
	10a	Land, buildings, and equipment cost or other basis. Complete Part VI of Schedule D — 10a: 0			
	b	Less: accumulated depreciation — 10b: 0	0	10c	0
	11	Investments—publicly traded securities	0	11	0
	12	Investments—other securities. See Part IV, line 11	0	12	0
	13	Investments—program-related. See Part IV, line 11	0	13	0
	14	Intangible assets	0	14	0
	15	Other assets. See Part IV, line 11	5792	15	1516
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	698018	16	1032621
Liabilities	17	Accounts payable and accrued expenses	35008	17	38453
	18	Grants payable	0	18	0
	19	Deferred revenue	0	19	0
	20	Tax-exempt bond liabilities	0	20	0
	21	Escrow or custodial account liability. Complete Part IV of Schedule D	0	21	0
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L	0	22	0
	23	Secured mortgages and notes payable to unrelated third parties	0	23	0
	24	Unsecured notes and loans payable to unrelated third parties	0	24	0
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17–24). Complete Part X of Schedule D	0	25	0
	26	**Total liabilities.** Add lines 17 through 25	35008	26	38453
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	663010	27	994168
	28	Temporarily restricted net assets	0	28	0
	29	Permanently restricted net assets	0	29	0
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds	0	30	0
	31	Paid-in or capital surplus, or land, building, or equipment fund	0	31	0
	32	Retained earnings, endowment, accumulated income, or other funds	0	32	0
	33	Total net assets or fund balances	663010	33	994168
	34	Total liabilities and net assets/fund balances	698018	34	1032621

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Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	1469765
2	Total expenses (must equal Part IX, column (A), line 25)	2	1138607
3	Revenue less expenses. Subtract line 2 from line 1	3	331158
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	663010
5	Net unrealized gains (losses) on investments	5	0
6	Donated services and use of facilities	6	0
7	Investment expenses	7	0
8	Prior period adjustments	8	0
9	Other changes in net assets or fund balances (explain in Schedule O)	9	0
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	994168

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		✓
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	✓	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both. ☐ Separate basis ☐ Consolidated basis ☑ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c		✓
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		✓
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

AMERICAN OVERSIGHT

SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

► Attach to Form 990 or Form 990-EZ.

► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization	Employer identification number
Public Interest Legal Foundation	45-4355641

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

09

The organization is not a private foundation because it is (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives (1) more than 33⅓% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33⅓% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1–10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
(A)						
(B)						
(C)						
(D)						
(E)						
Total						

AMERICAN OVERSIGHT

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") . .						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
3 The value of services or facilities furnished by a governmental unit to the organization without charge . . .						
4 **Total.** Add lines 1 through 3 . . .						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
11 **Total support.** Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14	Public support percentage for 2018 (line 6, column (f) divided by line 11, column (f))	14	%
15	Public support percentage from 2017 Schedule A, Part II, line 14	15	%

16a **33⅓% support test—2018.** If the organization did not check the box on line 13, and line 14 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **33⅓% support test—2017.** If the organization did not check a box on line 13 or 16a, and line 15 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2018.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **10%-facts-and-circumstances test—2017.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . . ▶ ☐

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Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	1,455,665	287,407	969,841	1,025453	1,381,709	$5,120,075
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	458,923	246,797	49,242	111,444	76,090	$942,496
3 Gross receipts from activities that are not an unrelated trade or business under section 513		27,664	23,061	9,055	11,966	$71,746
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
7a Amounts included on lines 1, 2, and 3 received from disqualified persons	364,971	303,800	525,000	575,000	600,000	$2,368,771
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year	199,109	161,242	38,046	97,162	61,392	$556,952
c Add lines 7a and 7b	564,081	465,042	563,046	672,162	661,392	$2,925,723
8 **Public support.** (Subtract line 7c from line 6.)						$3,208,594

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
9 Amounts from line 6	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources				25,000		25,000
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975				0		
c Add lines 10a and 10b				25,000		25,000
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12)	1,914,588	561,868	1,042,144	1,170,952	1,469,765	$6,159,317

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2018 (line 8, column (f), divided by line 13, column (f))	15	52 %
16	Public support percentage from 2017 Schedule A, Part III, line 15	16	55 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2018** (line 10c, column (f), divided by line 13, column (f))	17	1 %
18	Investment income percentage from **2017** Schedule A, Part III, line 17	18	1 %

19a **33 1/3% support tests—2018.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☑

b **33 1/3% support tests—2017.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

AMERICAN OVERSIGHT

Part IV **Supporting Organizations**

(Complete only if you checked a box in line 12 on Part I. If you checked 12a of Part I, complete Sections A and B. If you checked 12b of Part I, complete Sections A and C. If you checked 12c of Part I, complete Sections A, D, and E. If you checked 12d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 12a or 12b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action, (iii) the authority under the organization's organizing document authorizing such action, and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (as defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

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Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in* ***Part VI.***	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s)*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard*	3		

Section E. Type III Functionally Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the year* ***(see instructions).***

a ☐ The organization satisfied the Activities Test. *Complete* ***line 2*** *below*

b ☐ The organization is the parent of each of its supported organizations. *Complete* ***line 3*** *below*

c ☐ The organization supported a governmental entity. *Describe in* ***Part VI*** *how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? *Provide details in* ***Part VI.***	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI*** *the role played by the organization in this regard*	3b		

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (explain in Part VI). **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E.

Section A—Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6, and 7 from line 4)	8		

Section B—Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**)			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions)	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035.	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C—Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1.	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3.	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions).	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally integrated Type III supporting organization (see instructions)

AMERICAN OVERSIGHT

Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D—Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in **Part VI**). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in **Part VI**). See instructions.	
9	Distributable amount for 2018 from Section C, line 6	
10	Line 8 amount divided by line 9 amount	

Section E—Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2018	(iii) Distributable Amount for 2018
1	Distributable amount for 2018 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2018 (reasonable cause required—explain in **Part VI**). See instructions.			
3	Excess distributions carryover, if any, to 2018			
a	From 2013 .			
b	From 2014 . . .			
c	From 2015			
d	From 2016			
e	From 2017			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2018 distributable amount			
i	Carryover from 2013 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2018 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2018 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4			
5	Remaining underdistributions for years prior to 2018, if any. Subtract lines 3g and 4a from line 2. For result greater than zero, explain in **Part VI.** See instructions.			
6	Remaining underdistributions for 2018 Subtract lines 3h and 4b from line 1. For result greater than zero, explain in **Part VI.** See instructions.			
7	**Excess distributions carryover to 2019.** Add lines 3j and 4c.			
8	Breakdown of line 7.			
a	Excess from 2014 .			
b	Excess from 2015 .			
c	Excess from 2016 . . .			
d	Excess from 2017 . . .			
e	Excess from 2018 . . .			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c, Part IV, Section B, lines 1 and 2, Part IV, Section C, line 1, Part IV, Section D, lines 2 and 3, Part IV, Section E, lines 1c, 2a, 2b, 3a, and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6 Also complete this part for any additional information. (See instructions.)

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.

Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)

☐ Preservation of land for public use (for example, recreation or education)
☐ Preservation of a historically important land area
☐ Protection of natural habitat
☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Tax Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	*Number of conservation easements on a certified historic structure included in (a)*	2c	
d	Number of conservation easements included in (c) acquired after 7/25/06, and not on a historic structure listed in the National Register	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ---

4 Number of states where property subject to conservation easement is located ▶ ---

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ---

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ---

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide in Part XIII the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ ---

(ii) Assets included in Form 990, Part X ▶ $ ---

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ ---

b Assets included in Form 990, Part X ▶ $

AMERICAN OVERSIGHT

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that make significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ *Scholarly research*
c ☐ Preservation for future generations
d ☐ Loan or exchange program
e ☐ *Other* _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? . . ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? . . . . . ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table

		Amount
c Beginning balance	1c	
d Additions during the year	1d	
e Distributions during the year	1e	
f Ending balance	1f	

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII . . . ☐

Part V Endowment Funds.

Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

	(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a Beginning of year balance					
b Contributions					
c Net investment earnings, gains, and losses					
d Grants or scholarships					
e Other expenditures for facilities and programs					
f Administrative expenses					
g End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as.

a Board designated or quasi-endowment ▶ _____ %
b Permanent endowment ▶ _____ %
c Term endowment ▶ _____ %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i) Unrelated organizations	3a(i)		
(ii) Related organizations	3a(ii)		
b If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R?	3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a Land				
b Buildings				
c Leasehold improvements				
d Equipment				
e Other				
Total. Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				

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Part VII Investments—Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 12)* ▶		

Part VIII Investments—Program Related.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 13)* ▶		

Part IX Other Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 15)* ▶	

Part X Other Liabilities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 25)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FASB ASC 740. Check here if the text of the footnote has been provided in Part XIII . ☐

AMERICAN OVERSIGHT

Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	1477265
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains (losses) on investments	2a			
b	Donated services and use of facilities	2b	7,500		
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1469765
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total revenue. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 12.)*			5	1469765

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	1146107
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a	7,500		
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1138607
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total expenses. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 18.)*			5	1138607

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b; Part V, line 4, Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

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Part XIII Supplemental Information *(continued)*

AMERICAN OVERSIGHT

SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a ☑ Mail solicitations
b ☑ Internet and email solicitations
c ☐ Phone solicitations
d ☑ In-person solicitations
e ☑ Solicitation of non-government grants
f ☐ Solicitation of government grants
g ☐ Special fundraising events

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☑ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col (i)	(vi) Amount paid to (or retained by) organization
1 A.C. Fitzgerald & Associates, LLC PO Box 321012, Alexandria VA 22320	Consults		✓	0	46500	0
2 ForthRight Strategy Inc. 15th St, NW STE 410 D.C. 20005	Direct Mail consl		✓	212849	21433	191416
3						
4						
5						
6						
7						
8						
9						
10						
Total ▶				212849	67933	191416

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

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USCCR-21-1814-B-000333

Part II **Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 (event type)	(b) Event #2 (event type)	(c) Other events (total number)	(d) Total events (add col. (a) through col (c))
Revenue	1 Gross receipts				
	2 Less. Contributions				
	3 Gross income (line 1 minus line 2)				
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs				
	7 Food and beverages				
	8 Entertainment				
	9 Other direct expenses				
	10 Direct expense summary Add lines 4 through 9 in column (d) ▶				
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				

Part III **Gaming.** Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/Instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col (a) through col (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	
	7 Direct expense summary Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended, or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

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11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust, or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information

Name ▶

Gaming manager compensation ▶ $

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information. See instructions.

Part I Line 2b- Fundraising counsultant, AC Fitzgerald, does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time. Direct mail counsultant, ForthRight Strategy Inc., does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time.

AC Fitzgerald is paid a flat monthly fee for fundraising counsulting, the fee is not based on the amount raised. No other fundraising expenses are paid for or to AC Fitzgerald

ForthRight Strategy Inc. is compensated $90 per one thousand pieces processed and mailed and paid for creative services.

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.

▶ Attach to Form 990 or 990-EZ.

▶ Go to *www.irs.gov/Form990* for the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

990 Part VI Section B. 11b. The 990 is prepared by the Secretary and Treasurer, after which it is reviewed by a CPA then presented to the Board of Directors for review. Upon approval by the Board the 990 is executed by an officer.

Part VI Section B. 12c, All officers and directors are required to read the Conflict of Interest Policy and comply with the same

990 Part VI Section B, 15: The process for determining compensation involves a review of comparable data from like enterprises in the same region for functionally comparable services. The review is done by the independent members of the Board who then approve the compensation amount.

990 Part VI Section C. 19: Documents which are required by IRS to be available to the public are available upon request.

990 Part VI Section C 17, AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

990 Part IX, Line 24a: Other expense- Direct Mail Expense $180,931 itemization:

$99,003 Printing & Mailshop, $60,645 Postage, $8,509 Data Processing, $2,819 List Rental, $9,955 Indirect Expenses

990 Part IX, Line 24b, Other expense- Litigation Direct Expense $14,571 itemization.

$6,203 Public Relations, $1,905 Court filing fees and transcripts, $1,232 Printing Amicus Brief, $5,231 Research & Investigation

990 Part IX, Line 24c, Other expense- Education Direct Expense $5,812 itemization

$3,371 Printing & Design, $2,441 Research & Document Retrieval

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SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

► Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.
► Attach to Form 990.
► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Identification of Disregarded Entities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

Part II **Identification of Related Tax-Exempt Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity?	
						Yes	No
(1)							
(2)							
(3)							
(4)							
(5)							
(6)							
(7)							

USCCR-21-1814-B-000337

Part III **Identification of Related Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)												
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No
(1)Omni Compliance Services, Inc. 45-3794958 32 E Washington St STE 1675, Indianapolis, IN 46204	Specialize Report Filing	Indiana	Public Int Lgl Fd	C corp	$0	$0	100%	✓	
(2)									
(3)									
(4)									
(5)									
(6)									
(7)									

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USCCR-21-1814-B-000338

Part V **Transactions With Related Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note: Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II–IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		✓
b	Gift, grant, or capital contribution to related organization(s)	1b		✓
c	Gift, grant, or capital contribution from related organization(s)	1c		✓
d	Loans or loan guarantees to or for related organization(s)	1d		✓
e	Loans or loan guarantees by related organization(s)	1e		✓
f	Dividends from related organization(s)	1f		✓
g	Sale of assets to related organization(s)	1g		✓
h	Purchase of assets from related organization(s)	1h		✓
i	Exchange of assets with related organization(s)	1i		✓
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		✓
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		✓
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		✓
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		✓
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n		✓
o	Sharing of paid employees with related organization(s)	1o		✓
p	Reimbursement paid to related organization(s) for expenses	1p		✓
q	Reimbursement paid by related organization(s) for expenses	1q	✓	
r	Other transfer of cash or property to related organization(s)	1r		✓
s	Other transfer of cash or property from related organization(s)	1s		✓

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

(a) Name of related organization	(b) Transaction type (a–s)	(c) Amount involved	(d) Method of determining amount involved
(1) Omni Compliance Services Inc. 45-3794958, 32 E Washington St STE 1675, Indianapolis, IN 46204	Q	11966	actual cost reimbursed by related org
(2)			
(3)			
(4)			
(5)			
(6)			

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USCCR-21-1814-B-000339

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Part VI **Unrelated Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(e) Are all partners section 501(c)(3) organizations? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)													
(2)													
(3)													
(4)													
(5)													
(6)													
(7)													
(8)													
(9)													
(10)													
(11)													
(12)													
(13)													
(14)													
(15)													
(16)													

USCCR-21-1814-B-000340

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Part VII **Supplemental Information.**
Provide additional information for responses to questions on Schedule R. See instructions.

USCCR-21-1814-B-000341

U.S. Election Assistance Commission
Board of Advisors
Revised 11-15-21

BOA member group E-mail list (incl assts) – listed in order of roster organizations:

mcott@nga.org

mwoods@nga.org

Kevin.Bratcher@LRC.KY.GOV

daniel.ivey-soto@nmlegis.gov

Iveysoto@usa.net

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rstream@stlouisco.com

sschoeller@greenecountymo.gov

cmccormick@eac.gov

tbarton@eac.gov

therrmann@eac.gov

bbenavides@eac.gov

AMERICAN OVERSIGHT

Date : 11/23/2021 3:15:04 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Mauro Morales" mmorales@usccr.gov, "David Ganz" dganz@usccr.gov
Cc : "Debo P. Adegbile" dadegbile@usccr.gov
Subject : Conflict of Interest
Attachment : PILF 2018 990.pdf;

Staff Director Morales and General Counsel Ganz,

I write to follow up on a potential conflict issue I raised during the Friday business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, appears to employ Commissioner Adams as General Counsel, it also appears he serves as a Director for the organization and as an officer through his status as President.

At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams appears to have financial and business relationships with Ms. Mitchell, through PILF, which as far as I am aware he failed to disclose to the General Counsel's office prior to the nomination and vote on Ms. Mitchell's appointment. I asked for a written opinion from the General Counsel as to whether any ethical rules, policies or laws were violated as a result of this apparent non-disclosure, and, if so, what the impact of any breach is not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors. In other words, if Commissioner Adams should have disclosed and recused but did neither are the nomination and the vote itself tainted. Other Commissioners may have thought differently about the nomination and their vote had they been aware of ethical issues.

Specifically, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it

AMERICAN OVERSIGHT

indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts if true raise serious questions as to the propriety and validity of Commissioner Adams participation in matters regarding Ms. Mitchell.

Please undertake a review of the relevant ethical and conflict of interests policies, and laws, including but not limited to those I have identified and report your findings to the Commissioners. If it is determined that a violation occurred or that this matter is more appropriately investigated by a separate independent third-party, a referral to Office of Inspector General of the Department of Justice may be appropriate, consistent with 5 CFR 2638.502)

As indicated above, please include in your analysis a determination as to whether any rule, policy or law was violated , if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Thank you,
Debo P. Adegbile

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

A For the 2018 calendar year, or tax year beginning , 2018, and ending , 20 18

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization: Public Interest Legal Foundation
Doing business as:
Number and street (or P O box if mail is not delivered to street address): 32 E. Washington St
Room/suite: STE 1675
City or town, state or province, country, and ZIP or foreign postal code: Indianapolis, IN 46204

D Employer identification number: 45-4355641

E Telephone number: 317-203-5599

G Gross receipts $: 1469765

F Name and address of principal officer: John Christian Adams, President
same as box C

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website ▶ publicinterestlegal org

H(c) Group exemption number ▶

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 2012

M State of legal domicile: IN

Part I Summary

1 Briefly describe the organization's mission or most significant activities: The Org exists to provide services / representation to states and election officials, non-profit organizations, and individuals, to assist with the exercise of their civil/constitutional rights, with particular focus on voting rights. Provide education to citizens and election officials regarding election integrity.

2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets

3	Number of voting members of the governing body (Part VI, line 1a)	3	8
4	Number of independent voting members of the governing body (Part VI, line 1b)	4	6
5	Total number of individuals employed in calendar year 2018 (Part V, line 2a)	5	5
6	Total number of volunteers (estimate if necessary)	6	5
7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
b	Net unrelated business taxable income from Form 990-T, line 38	7b	0

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OGDEN, UT

		Prior Year	Current Year
8	Contributions and grants (Part VIII, line 1h)	1025453	1381709
9	Program service revenue (Part VIII, line 2g)	11444	76090
10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	25000	
11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	9055	11966
12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	1170952	1469765
13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	695178	717019
16a	Professional fundraising fees (Part IX, column (A), line 11e)	3000	67933
b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 138779		
17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	341097	353655
18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	1039275	1138607
19	Revenue less expenses. Subtract line 18 from line 12	131677	331158

		Beginning of Current Year	End of Year
20	Total assets (Part X, line 16)	698018	1032621
21	Total liabilities (Part X, line 26)	35008	38453
22	Net assets or fund balances. Subtract line 21 from line 20	663010	994168

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

Signature of officer: J. Christian Adams
Date: 10/20/19

Type or print name and title: J. Christian Adams, President

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ▶ | Firm's EIN ▶
Firm's address ▶ | Phone no

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☑ No

For Paperwork Reduction Act Notice, see the separate instructions. Cat No 11282Y Form **990** (2018)

935-45 19

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission

The Foundation exists to provide services and representation to states and election officials, non-profit organizations, and individuals, to assist them with the exercise of their civil and constitutional rights, with particular focus on voting rights. PILF provides education to citizens and election officials regarding election integrity and the role of election process laws and how they affect policy and constitutional architecture.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code) (Expenses $ 587341 including grants of $ 0) (Revenue $ 76090)

Provided litigation for the purpose of defending the constitutional and statutory rights of individuals and non-profit organizations from intrusion by state, federal, and local governments. Specializes in civil litigation in high-profile matters affecting the processes of the nation, with particular emphasis given to aiding the cause of election integrity and litigating against lawlessness in American elections. Additionally, volunteer attorneys contributed in-kind legal services for these cases valued at $7,500. The foundation litigated 8 fundamental cases and filed 5 Brief of Amicus in 2018.

* See Attachment 1 of this 990 for detailed case descriptions.

4b (Code:) (Expenses $ 316690 including grants of $ 0) (Revenue $ 0)

Education and Advocacy- PILF has a focused effort to raise awareness of vital issues such as non-citizens voting, lack of citizen verification and other shortfalls in the current election process. PILF has marshalled expert resources to help educate citizens, officials and decision makers about the role of election process laws and how they affect policy and Constitutional architecture. PILF assists election officials in devising election integrity policies. PILF has responded to requests for assistance from election officials and legislatures to discuss best practices for voter roll maintenance. PILF has completed research projects and published reports regarding best practices for voter roll maintenance and regarding the consequences of lack of citizenship verification in the election process. PILF attorneys have testified before legislative bodies presenting and discussing PILF's research and reports.

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 904031

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ORABDG

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	✓	
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2	✓	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		✓
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		✓
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		✓
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		✓
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		✓
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		✓
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		✓
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		✓
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		✓
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		✓
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		✓
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		✓
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		✓
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		✓
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	✓	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	✓	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		✓
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		✓
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		✓
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		✓
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		✓
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I* (see instructions)	17	✓	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		✓
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		✓
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		✓
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		✓

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Part IV Checklist of Required Schedules *(continued)*

			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		✓
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		✓
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K If "No," go to line 25a*	24a		✓
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		✓
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		✓
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		✓
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		✓
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		✓
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		✓
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		✓
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		✓
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		✓
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		✓
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		✓
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		✓
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	✓	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	✓	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	✓	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		✓
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		✓
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	✓	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	14		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		✓	

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Part V Statements Regarding Other IRS Filings and Tax Compliance *(continued)*

			Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return 2a 5			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b	✓	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)			
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a		✓
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*	3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a		✓
b	If "Yes," enter the name of the foreign country: ► ---------- See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).			
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a		✓
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b		✓
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?	5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a		✓
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b		
7	**Organizations that may receive deductible contributions under section 170(c).**			
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		✓
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c		✓
d	If "Yes," indicate the number of Forms 8282 filed during the year 7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e		✓
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f		✓
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h		
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8		
9	**Sponsoring organizations maintaining donor advised funds.**			
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b		
10	**Section 501(c)(7) organizations.** Enter			
a	Initiation fees and capital contributions included on Part VIII, line 12 10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities 10b			
11	**Section 501(c)(12) organizations.** Enter:			
a	Gross income from members or shareholders 11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.) 11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year 12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**			
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O.	13a		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans 13b			
c	Enter the amount of reserves on hand 13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a		✓
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see instructions and file Form 4720, Schedule N.	15		✓
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.	16		✓

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Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O See instructions*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☑

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a 8		
b	Enter the number of voting members included in line 1a, above, who are independent	1b 6		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		✓
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3		✓
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		✓
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		✓
6	Did the organization have members or stockholders?	6		✓
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a		✓
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b		✓
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	✓	
b	Each committee with authority to act on behalf of the governing body?	8b	✓	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O* . . .	9		✓

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		✓
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	✓	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	✓	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	✓	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	✓	
13	Did the organization have a written whistleblower policy?	13		✓
14	Did the organization have a written document retention and destruction policy?	14	✓	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	✓	
b	Other officers or key employees of the organization	15b	✓	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		✓
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (1024 or 1024-A if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply

☐ Own website ☐ Another's website ☑ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records ▶

Shawna Powell, Public Interest Legal Foundation, 32 E. Washington St., Indianapolis, IN 46204 (317) 203-5599

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Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order. individual trustees or directors, institutional trustees, officers; key employees; highest compensated employees, and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Brian Brown Director	2 -	✓						0	0	0
(2) William Davis Director	2 -	✓						0	0	0
(3) Hans von Spakovsky Director	2 -	✓						0	0	0
(4) Dr. John Eastman Director	2 -	✓						0	0	0
(5) Cleta Mitchell Chariman, Director	2 -	✓		✓				0	0	0
(6) Neil Corkery Treasurer, Director	5 -	✓		✓				30000	0	0
(7) John Christian Adams President, General Counsel, Director	40 -	✓		✓				120000	0	0
(8) Shawna L Powell Secretary	40 -			✓				88564	0	0
(9) David Norcross Director	2 -	✓						0	0	0
(10)										
(11)										
(12)										
(13)										
(14)										

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Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)										
(16)										
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
1b **Sub-total** ▶								238564	0	0
c **Total from continuation sheets to Part VII, Section A** ▶								0	0	0
d **Total (add lines 1b and 1c)** ▶								238564	0	0

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 1

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*		✓
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*		✓
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*		✓

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
John Christian Adams, 32 E. Washington St., STE 1675, Indianapolis, IN 46204	General Counsel	120000

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 1

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Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512–514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f	1381709			
	g	Noncash contributions included in lines 1a–1f $					
	h	**Total.** Add lines 1a–1f ▶		1381709			
Program Service Revenue			Business Code				
	2a	Litigation	541100	76090	76090	0	0
	b						
	c						
	d						
	e						
	f	All other program service revenue					
	g	**Total.** Add lines 2a–2f ▶		76090			
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties ▶					
			(i) Real / (ii) Personal				
	6a	Gross rents					
	b	Less rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) ▶					
			(i) Securities / (ii) Other				
	7a	Gross amount from sales of assets other than inventory					
	b	Less cost or other basis and sales expenses					
	c	Gain or (loss)					
	d	Net gain or (loss) ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b	Less direct expenses b					
	c	Net income or (loss) from fundraising events ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 a					
	b	Less direct expenses b					
	c	Net income or (loss) from gaming activities ▶					
	10a	Gross sales of inventory, less returns and allowances a					
	b	Less cost of goods sold b					
	c	Net income or (loss) from sales of inventory ▶		0	0	0	0
		Miscellaneous Revenue	Business Code				
	11a	Cost reimbursement fm related entity	900099	11966	11966	0	0
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d ▶		11966			
	12	**Total revenue.** See instructions ▶		1469765	88056	0	0

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns All other organizations must complete column (A)

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☑

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2	Grants and other assistance to domestic individuals. See Part IV, line 22				
3	Grants and other assistance to foreign organizations, foreign governments, and foreign individuals See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	238564	149138	68569	20856
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	347509	346989	260	260
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits	97879	89992	5887	2000
10	Payroll taxes	33067	30388	2000	680
11	Fees for services (non-employees):				
a	Management				
b	Legal	50074	50074	0	0
c	Accounting	4500	0	4500	0
d	Lobbying				
e	Professional fundraising services See Part IV, line 17	67933			67933
f	Investment management fees				
g	Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)				
12	Advertising and promotion				
13	Office expenses	20017	9859	1883	8275
14	Information technology	515	474	0	41
15	Royalties				
16	Occupancy	23594	20055	2359	1180
17	Travel	22150	17705	4445	0
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings	7273	4537	1368	1368
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance	24217	19692	4526	0
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	**Direct Mail Expense**	180931	144745	0	36186
b	**Litigation Direct Expense**	14571	14571	0	0
c	**Education Direct Expense**	5812	5812	0	0
d					
e	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24e	1138607	904031	95797	138779
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☑ if following SOP 98-2 (ASC 958-720)	202364	144745	0	57619

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Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing	692226	1	1031105
	2	Savings and temporary cash investments	0	2	0
	3	Pledges and grants receivable, net	0	3	0
	4	Accounts receivable, net	0	4	0
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	0	5	0
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L	0	6	0
	7	Notes and loans receivable, net	0	7	0
	8	Inventories for sale or use	0	8	0
	9	Prepaid expenses and deferred charges	0	9	0
	10a	Land, buildings, and equipment cost or other basis. Complete Part VI of Schedule D — 10a: 0			
	b	Less: accumulated depreciation — 10b: 0	0	10c	0
	11	Investments—publicly traded securities	0	11	0
	12	Investments—other securities. See Part IV, line 11	0	12	0
	13	Investments—program-related. See Part IV, line 11	0	13	0
	14	Intangible assets	0	14	0
	15	Other assets. See Part IV, line 11	5792	15	1516
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	698018	16	1032621
Liabilities	17	Accounts payable and accrued expenses	35008	17	38453
	18	Grants payable	0	18	0
	19	Deferred revenue	0	19	0
	20	Tax-exempt bond liabilities	0	20	0
	21	Escrow or custodial account liability. Complete Part IV of Schedule D	0	21	0
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L	0	22	0
	23	Secured mortgages and notes payable to unrelated third parties	0	23	0
	24	Unsecured notes and loans payable to unrelated third parties	0	24	0
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17–24). Complete Part X of Schedule D	0	25	0
	26	**Total liabilities.** Add lines 17 through 25	35008	26	38453
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	663010	27	994168
	28	Temporarily restricted net assets	0	28	0
	29	Permanently restricted net assets	0	29	0
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds	0	30	0
	31	Paid-in or capital surplus, or land, building, or equipment fund	0	31	0
	32	Retained earnings, endowment, accumulated income, or other funds	0	32	0
	33	Total net assets or fund balances	663010	33	994168
	34	Total liabilities and net assets/fund balances	698018	34	1032621

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Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	1469765
2	Total expenses (must equal Part IX, column (A), line 25)	2	1138607
3	Revenue less expenses. Subtract line 2 from line 1	3	331158
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	663010
5	Net unrealized gains (losses) on investments	5	0
6	Donated services and use of facilities	6	0
7	Investment expenses	7	0
8	Prior period adjustments	8	0
9	Other changes in net assets or fund balances (explain in Schedule O)	9	0
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	994168

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		✓
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	✓	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both. ☐ Separate basis ☐ Consolidated basis ☑ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c		✓
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		✓
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

AMERICAN OVERSIGHT

SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

► Attach to Form 990 or Form 990-EZ.

► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization	Employer identification number
Public Interest Legal Foundation	45-4355641

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

09

The organization is not a private foundation because it is (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives (1) more than 33⅓% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33⅓% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1–10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
(A)						
(B)						
(C)						
(D)						
(E)						
Total						

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Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") . .						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
3 The value of services or facilities furnished by a governmental unit to the organization without charge . . .						
4 **Total.** Add lines 1 through 3 . . .						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
11 **Total support.** Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14	Public support percentage for 2018 (line 6, column (f) divided by line 11, column (f))	14	%
15	Public support percentage from 2017 Schedule A, Part II, line 14	15	%

16a **33⅓% support test—2018.** If the organization did not check the box on line 13, and line 14 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **33⅓% support test—2017.** If the organization did not check a box on line 13 or 16a, and line 15 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2018.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **10%-facts-and-circumstances test—2017.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . . ▶ ☐

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Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	1,455,665	287,407	969,841	1,025453	1,381,709	$5,120,075
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	458,923	246,797	49,242	111,444	76,090	$942,496
3 Gross receipts from activities that are not an unrelated trade or business under section 513		27,664	23,061	9,055	11,966	$71,746
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
7a Amounts included on lines 1, 2, and 3 received from disqualified persons	364,971	303,800	525,000	575,000	600,000	$2,368,771
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year	199,109	161,242	38,046	97,162	61,392	$556,952
c Add lines 7a and 7b	564,081	465,042	563,046	672,162	661,392	$2,925,723
8 **Public support.** (Subtract line 7c from line 6.)						$3,208,594

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
9 Amounts from line 6	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources				25,000		25,000
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975				0		
c Add lines 10a and 10b				25,000		25,000
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12)	1,914,588	561,868	1,042,144	1,170,952	1,469,765	$6,159,317

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2018 (line 8, column (f), divided by line 13, column (f))	15	52 %
16	Public support percentage from 2017 Schedule A, Part III, line 15	16	55 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2018** (line 10c, column (f), divided by line 13, column (f))	17	1 %
18	Investment income percentage from **2017** Schedule A, Part III, line 17	18	1 %

19a **33 1/3% support tests—2018.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☑

b **33 1/3% support tests—2017.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

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Part IV **Supporting Organizations**

(Complete only if you checked a box in line 12 on Part I. If you checked 12a of Part I, complete Sections A and B. If you checked 12b of Part I, complete Sections A and C. If you checked 12c of Part I, complete Sections A, D, and E. If you checked 12d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 12a or 12b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action, (iii) the authority under the organization's organizing document authorizing such action, and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (as defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

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Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in* ***Part VI.***	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s)*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard*	3		

Section E. Type III Functionally Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the year* ***(see instructions).***

a ☐ The organization satisfied the Activities Test. *Complete* ***line 2*** *below*

b ☐ The organization is the parent of each of its supported organizations. *Complete* ***line 3*** *below*

c ☐ The organization supported a governmental entity. *Describe in* ***Part VI*** *how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? *Provide details in* ***Part VI.***	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI*** *the role played by the organization in this regard*	3b		

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (explain in Part VI) **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E

Section A—Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6, and 7 from line 4)	8		

Section B—Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**)			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions)	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035.	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C—Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1.	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3.	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions).	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally integrated Type III supporting organization (see instructions)

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D—Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in **Part VI**). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in **Part VI**). See instructions.	
9	Distributable amount for 2018 from Section C, line 6	
10	Line 8 amount divided by line 9 amount	

Section E—Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2018	(iii) Distributable Amount for 2018
1	Distributable amount for 2018 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2018 (reasonable cause required—explain in **Part VI**). See instructions.			
3	Excess distributions carryover, if any, to 2018			
a	From 2013 .			
b	From 2014 . . .			
c	From 2015			
d	From 2016			
e	From 2017			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2018 distributable amount			
i	Carryover from 2013 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2018 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2018 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4			
5	Remaining underdistributions for years prior to 2018, if any. Subtract lines 3g and 4a from line 2. For result greater than zero, explain in **Part VI.** See instructions.			
6	Remaining underdistributions for 2018 Subtract lines 3h and 4b from line 1. For result greater than zero, explain in **Part VI.** See instructions.			
7	**Excess distributions carryover to 2019.** Add lines 3j and 4c.			
8	Breakdown of line 7.			
a	Excess from 2014 .			
b	Excess from 2015 .			
c	Excess from 2016 . . .			
d	Excess from 2017 . . .			
e	Excess from 2018 . . .			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c, Part IV, Section B, lines 1 and 2, Part IV, Section C, line 1, Part IV, Section D, lines 2 and 3, Part IV, Section E, lines 1c, 2a, 2b, 3a, and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6 Also complete this part for any additional information. (See instructions.)

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.

Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)

☐ Preservation of land for public use (for example, recreation or education)
☐ Preservation of a historically important land area
☐ Protection of natural habitat
☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Tax Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	*Number of conservation easements on a certified historic structure included in (a)*	2c	
d	Number of conservation easements included in (c) acquired after 7/25/06, and not on a historic structure listed in the National Register	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ----------

4 Number of states where property subject to conservation easement is located ▶ ----------

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ----------

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ----------

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide in Part XIII the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
(ii) Assets included in Form 990, Part X ▶ $ ----------

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
b Assets included in Form 990, Part X ▶ $

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Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that make significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ *Scholarly research*
c ☐ Preservation for future generations
d ☐ Loan or exchange program
e ☐ *Other* _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table

		Amount
c	Beginning balance	1c
d	Additions during the year	1d
e	Distributions during the year	1e
f	Ending balance	1f

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds.

Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

		(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a	Beginning of year balance					
b	Contributions					
c	Net investment earnings, gains, and losses					
d	Grants or scholarships					
e	Other expenditures for facilities and programs					
f	Administrative expenses					
g	End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as.

a Board designated or quasi-endowment ▶ _____ %
b Permanent endowment ▶ _____ %
c Term endowment ▶ _____ %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i)	Unrelated organizations 3a(i)		
(ii)	Related organizations 3a(ii)		
b	If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R? 3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

	Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a	Land				
b	Buildings				
c	Leasehold improvements				
d	Equipment				
e	Other				
Total.	Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				

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Part VII Investments—Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 12)* ▶		

Part VIII Investments—Program Related.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 13)* ▶		

Part IX Other Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 15)* ▶	

Part X Other Liabilities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 25)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FASB ASC 740. Check here if the text of the footnote has been provided in Part XIII . ☐

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Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	1477265
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains (losses) on investments	2a			
b	Donated services and use of facilities	2b	7,500		
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1469765
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total revenue. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 12.)*			5	1469765

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	1146107
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a	7,500		
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1138607
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total expenses. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 18.)*			5	1138607

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b; Part V, line 4, Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

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Part XIII Supplemental Information *(continued)*

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SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a ☑ Mail solicitations
b ☑ Internet and email solicitations
c ☐ Phone solicitations
d ☑ In-person solicitations
e ☑ Solicitation of non-government grants
f ☐ Solicitation of government grants
g ☐ Special fundraising events

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☑ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col (i)	(vi) Amount paid to (or retained by) organization
1 A.C. Fitzgerald & Associates, LLC PO Box 321012, Alexandria VA 22320	Consults		✓	0	46500	0
2 ForthRight Strategy Inc. 15th St, NW STE 410 D.C. 20005	Direct Mail consl		✓	212849	21433	191416
3						
4						
5						
6						
7						
8						
9						
10						
Total ▶				212849	67933	191416

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

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USCCR-21-1814-B-000372

Part II **Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 (event type)	(b) Event #2 (event type)	(c) Other events (total number)	(d) Total events (add col. (a) through col (c))
Revenue	1 Gross receipts				
	2 Less. Contributions				
	3 Gross income (line 1 minus line 2)				
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs				
	7 Food and beverages				
	8 Entertainment				
	9 Other direct expenses				
	10 Direct expense summary Add lines 4 through 9 in column (d) ▶				
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				

Part III **Gaming.** Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/Instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col (a) through col (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	
	7 Direct expense summary Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended, or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

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11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust, or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information

Name ▶

Gaming manager compensation ▶ $

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information. See instructions.

Part I Line 2b- Fundraising counsultant, AC Fitzgerald, does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time. Direct mail counsultant, ForthRight Strategy Inc., does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time.

AC Fitzgerald is paid a flat monthly fee for fundraising counsulting, the fee is not based on the amount raised. No other fundraising expenses are paid for or to AC Fitzgerald

ForthRight Strategy Inc. is compensated $90 per one thousand pieces processed and mailed and paid for creative services.

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.

▶ Attach to Form 990 or 990-EZ.

▶ Go to *www.irs.gov/Form990* for the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

990 Part VI Section B. 11b. The 990 is prepared by the Secretary and Treasurer, after which it is reviewed by a CPA then presented to the Board of Directors for review. Upon approval by the Board the 990 is executed by an officer.

Part VI Section B. 12c, All officers and directors are required to read the Conflict of Interest Policy and comply with the same

990 Part VI Section B, 15: The process for determining compensation involves a review of comparable data from like enterprises in the same region for functionally comparable services. The review is done by the independent members of the Board who then approve the compensation amount.

990 Part VI Section C. 19: Documents which are required by IRS to be available to the public are available upon request.

990 Part VI Section C 17, AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

990 Part IX, Line 24a: Other expense- Direct Mail Expense $180,931 itemization:

$99,003 Printing & Mailshop, $60,645 Postage, $8,509 Data Processing, $2,819 List Rental, $9,955 Indirect Expenses

990 Part IX, Line 24b, Other expense- Litigation Direct Expense $14,571 itemization.

$6,203 Public Relations, $1,905 Court filing fees and transcripts, $1,232 Printing Amicus Brief, $5,231 Research & Investigation

990 Part IX, Line 24c, Other expense- Education Direct Expense $5,812 itemization

$3,371 Printing & Design, $2,441 Research & Document Retrieval

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SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

► Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.
► Attach to Form 990.
► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Identification of Disregarded Entities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

Part II **Identification of Related Tax-Exempt Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity?	
						Yes	No
(1)							
(2)							
(3)							
(4)							
(5)							
(6)							
(7)							

USCCR-21-1814-B-000376

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Part III **Identification of Related Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)												
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No
(1)Omni Compliance Services, Inc. 45-3794958 32 E Washington St STE 1675, Indianapolis, IN 46204	Specialize Report Filing	Indiana	Public Int Lgl Fd	C corp	$0	$0	100%	✓	
(2)									
(3)									
(4)									
(5)									
(6)									
(7)									

USCCR-21-1814-B-000377

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Part V **Transactions With Related Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note: Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II–IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		✓
b	Gift, grant, or capital contribution to related organization(s)	1b		✓
c	Gift, grant, or capital contribution from related organization(s)	1c		✓
d	Loans or loan guarantees to or for related organization(s)	1d		✓
e	Loans or loan guarantees by related organization(s)	1e		✓
f	Dividends from related organization(s)	1f		✓
g	Sale of assets to related organization(s)	1g		✓
h	Purchase of assets from related organization(s)	1h		✓
i	Exchange of assets with related organization(s)	1i		✓
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		✓
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		✓
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		✓
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		✓
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n		✓
o	Sharing of paid employees with related organization(s)	1o		✓
p	Reimbursement paid to related organization(s) for expenses	1p		✓
q	Reimbursement paid by related organization(s) for expenses	1q	✓	
r	Other transfer of cash or property to related organization(s)	1r		✓
s	Other transfer of cash or property from related organization(s)	1s		✓

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

(a) Name of related organization	(b) Transaction type (a–s)	(c) Amount involved	(d) Method of determining amount involved
(1) Omni Compliance Services Inc. 45-3794958, 32 E Washington St STE 1675, Indianapolis, IN 46204	Q	11966	actual cost reimbursed by related org
(2)			
(3)			
(4)			
(5)			
(6)			

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Part VI **Unrelated Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(e) Are all partners section 501(c)(3) organizations? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)													
(2)													
(3)													
(4)													
(5)													
(6)													
(7)													
(8)													
(9)													
(10)													
(11)													
(12)													
(13)													
(14)													
(15)													
(16)													

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Part VII **Supplemental Information.**
Provide additional information for responses to questions on Schedule R. See instructions.

USCCR-21-1814-B-000380

Date : 11/22/2021 2:55:17 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Conflict of Interest email
Attachment : PILF 2018 990.pdf;

Adegbile,

Joshua and I worked on the email to send to Mauro and General Counsel today. Joshua reviewed the legal citations and we included PILF's 990 form.

Staff Director Mauro Morales and General Counsel David Gantz,

Regarding the conflict of issue I raised during Friday, business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, employs Commissioner Adams as General Counsel; he also serves as a Director for the organization and as an officer through his status as President.
At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams has financial and business relationships with Ms. Mitchell, through PILF, which he failed to disclose to the other Commissioners prior to the vote on Ms. Mitchell's appointment. I asked for a written statement from the General Counsel as to whether any ethical laws and/or policies were violated as a result of this non-disclosure, and, if so, what the impact was not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors.

Specifically, though not limited to, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts to the other Commissioners raise serious doubts as to the propriety and validity of Commissioner Adams participation in matters regarding Ms. Mitchell.

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Please undertake a review of the relevant ethical and conflict of interests rules and policies and report your findings to the Commissioners. Also, when reviewing 5 CFR 2638.502, please address its mandatory notice and disclosure provisions.

As indicated above, please include in your analysis a determination as to whether a rule or policy was breached, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

A For the 2018 calendar year, or tax year beginning , 2018, and ending , 20 18

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization: Public Interest Legal Foundation
Doing business as:
Number and street (or P O box if mail is not delivered to street address): 32 E. Washington St
Room/suite: STE 1675
City or town, state or province, country, and ZIP or foreign postal code: Indianapolis, IN 46204

D Employer identification number: 45-4355641

E Telephone number: 317-203-5599

G Gross receipts $: 1469765

F Name and address of principal officer: John Christian Adams, President
same as box C

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website ▶ publicinterestlegal org

H(c) Group exemption number ▶

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 2012

M State of legal domicile: IN

Part I Summary

1 Briefly describe the organization's mission or most significant activities: The Org exists to provide services / representation to states and election officials, non-profit organizations, and individuals, to assist with the exercise of their civil/constitutional rights, with particular focus on voting rights. Provide education to citizens and election officials regarding election integrity.

2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets

3	Number of voting members of the governing body (Part VI, line 1a)	3	8
4	Number of independent voting members of the governing body (Part VI, line 1b)	4	6
5	Total number of individuals employed in calendar year 2018 (Part V, line 2a)	5	5
6	Total number of volunteers (estimate if necessary)	6	5
7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
b	Net unrelated business taxable income from Form 990-T, line 38	7b	0

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		Prior Year	Current Year
8	Contributions and grants (Part VIII, line 1h)	1025453	1381709
9	Program service revenue (Part VIII, line 2g)	11444	76090
10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	25000	
11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	9055	11966
12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	1170952	1469765
13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	695178	717019
16a	Professional fundraising fees (Part IX, column (A), line 11e)	3000	67933
b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 138779		
17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	341097	353655
18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	1039275	1138607
19	Revenue less expenses. Subtract line 18 from line 12	131677	331158

		Beginning of Current Year	End of Year
20	Total assets (Part X, line 16)	698018	1032621
21	Total liabilities (Part X, line 26)	35008	38453
22	Net assets or fund balances. Subtract line 21 from line 20	663010	994168

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

Signature of officer: J. Christian Adams
Date: 10/20/19

Type or print name and title: J. Christian Adams, President

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ▶ | Firm's EIN ▶
Firm's address ▶ | Phone no

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☑ No

For Paperwork Reduction Act Notice, see the separate instructions. Cat No 11282Y Form **990** (2018)

935-45 19

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission

The Foundation exists to provide services and representation to states and election officials, non-profit organizations, and individuals, to assist them with the exercise of their civil and constitutional rights, with particular focus on voting rights. PILF provides education to citizens and election officials regarding election integrity and the role of election process laws and how they affect policy and constitutional architecture.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code) (Expenses $ 587341 including grants of $ 0) (Revenue $ 76090)

Provided litigation for the purpose of defending the constitutional and statutory rights of individuals and non-profit organizations from intrusion by state, federal, and local governments. Specializes in civil litigation in high-profile matters affecting the processes of the nation, with particular emphasis given to aiding the cause of election integrity and litigating against lawlessness in American elections. Additionally, volunteer attorneys contributed in-kind legal services for these cases valued at $7,500. The foundation litigated 8 fundamental cases and filed 5 Brief of Amicus in 2018.

* See Attachment 1 of this 990 for detailed case descriptions.

4b (Code:) (Expenses $ 316690 including grants of $ 0) (Revenue $ 0)

Education and Advocacy- PILF has a focused effort to raise awareness of vital issues such as non-citizens voting, lack of citizen verification and other shortfalls in the current election process. PILF has marshalled expert resources to help educate citizens, officials and decision makers about the role of election process laws and how they affect policy and Constitutional architecture. PILF assists election officials in devising election integrity policies. PILF has responded to requests for assistance from election officials and legislatures to discuss best practices for voter roll maintenance. PILF has completed research projects and published reports regarding best practices for voter roll maintenance and regarding the consequences of lack of citizenship verification in the election process. PILF attorneys have testified before legislative bodies presenting and discussing PILF's research and reports.

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 904031

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Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	✓	
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2	✓	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		✓
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		✓
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		✓
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		✓
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		✓
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		✓
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		✓
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		✓
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		✓
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		✓
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		✓
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		✓
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		✓
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		✓
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	✓	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	✓	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		✓
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		✓
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		✓
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		✓
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		✓
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I* (see instructions)	17	✓	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		✓
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		✓
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		✓
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		✓

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Part IV Checklist of Required Schedules *(continued)*

			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		✓
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		✓
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K If "No," go to line 25a*	24a		✓
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		✓
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		✓
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		✓
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		✓
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		✓
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		✓
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		✓
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		✓
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		✓
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		✓
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		✓
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		✓
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	✓	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	✓	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	✓	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		✓
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		✓
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	✓	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	14		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		✓	

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Part V Statements Regarding Other IRS Filings and Tax Compliance *(continued)*

			Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return 2a 5			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b	✓	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)			
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a		✓
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*	3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a		✓
b	If "Yes," enter the name of the foreign country: ▶ ---------- See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).			
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a		✓
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b		✓
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?	5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a		✓
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b		
7	**Organizations that may receive deductible contributions under section 170(c).**			
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		✓
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c		✓
d	If "Yes," indicate the number of Forms 8282 filed during the year 7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e		✓
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f		✓
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h		
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8		
9	**Sponsoring organizations maintaining donor advised funds.**			
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b		
10	**Section 501(c)(7) organizations.** Enter			
a	Initiation fees and capital contributions included on Part VIII, line 12 10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities 10b			
11	**Section 501(c)(12) organizations.** Enter:			
a	Gross income from members or shareholders 11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.) 11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year 12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**			
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O.	13a		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans 13b			
c	Enter the amount of reserves on hand 13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a		✓
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see instructions and file Form 4720, Schedule N.	15		✓
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.	16		✓

AMERICAN OVERSIGHT

Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O See instructions*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☑

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a 8		
b	Enter the number of voting members included in line 1a, above, who are independent	1b 6		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		✓
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3		✓
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		✓
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		✓
6	Did the organization have members or stockholders?	6		✓
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a		✓
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b		✓
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	✓	
b	Each committee with authority to act on behalf of the governing body?	8b	✓	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O* . . .	9		✓

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		✓
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	✓	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	✓	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	✓	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	✓	
13	Did the organization have a written whistleblower policy?	13		✓
14	Did the organization have a written document retention and destruction policy?	14	✓	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	✓	
b	Other officers or key employees of the organization	15b	✓	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		✓
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (1024 or 1024-A if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply

☐ Own website ☐ Another's website ☑ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records ▶

Shawna Powell, Public Interest Legal Foundation, 32 E. Washington St., Indianapolis, IN 46204 (317) 203-5599

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Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order. individual trustees or directors, institutional trustees, officers; key employees; highest compensated employees, and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Brian Brown Director	2 -	✓						0	0	0
(2) William Davis Director	2 -	✓						0	0	0
(3) Hans von Spakovsky Director	2 -	✓						0	0	0
(4) Dr. John Eastman Director	2 -	✓						0	0	0
(5) Cleta Mitchell Chariman, Director	2 -	✓		✓				0	0	0
(6) Neil Corkery Treasurer, Director	5 -	✓		✓				30000	0	0
(7) John Christian Adams President, General Counsel, Director	40 -	✓		✓				120000	0	0
(8) Shawna L Powell Secretary	40 -			✓				88564	0	0
(9) David Norcross Director	2 -	✓						0	0	0
(10)										
(11)										
(12)										
(13)										
(14)										

AMERICAN OVERSIGHT

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)										
(16)										
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
1b **Sub-total** ▶								238564	0	0
c **Total from continuation sheets to Part VII, Section A** ▶								0	0	0
d **Total (add lines 1b and 1c)** ▶								238564	0	0

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 1

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*		✓
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*		✓
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*		✓

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
John Christian Adams, 32 E. Washington St., STE 1675, Indianapolis, IN 46204	General Counsel	120000

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 1

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Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512–514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f	1381709			
	g	Noncash contributions included in lines 1a–1f $					
	h	**Total.** Add lines 1a–1f ▶		1381709			
Program Service Revenue			Business Code				
	2a	Litigation	541100	76090	76090	0	0
	b						
	c						
	d						
	e						
	f	All other program service revenue					
	g	**Total.** Add lines 2a–2f ▶		76090			
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties ▶					
			(i) Real / (ii) Personal				
	6a	Gross rents					
	b	Less rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) ▶					
			(i) Securities / (ii) Other				
	7a	Gross amount from sales of assets other than inventory					
	b	Less cost or other basis and sales expenses					
	c	Gain or (loss)					
	d	Net gain or (loss) ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b	Less direct expenses b					
	c	Net income or (loss) from fundraising events ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 a					
	b	Less direct expenses b					
	c	Net income or (loss) from gaming activities ▶					
	10a	Gross sales of inventory, less returns and allowances a					
	b	Less cost of goods sold b					
	c	Net income or (loss) from sales of inventory ▶		0	0	0	0
		Miscellaneous Revenue	Business Code				
	11a	Cost reimbursement fm related entity	900099	11966	11966	0	0
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d ▶		11966			
	12	**Total revenue.** See instructions ▶		1469765	88056	0	0

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns All other organizations must complete column (A)

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☑

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2	Grants and other assistance to domestic individuals. See Part IV, line 22				
3	Grants and other assistance to foreign organizations, foreign governments, and foreign individuals See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	238564	149138	68569	20856
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	347509	346989	260	260
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits	97879	89992	5887	2000
10	Payroll taxes	33067	30388	2000	680
11	Fees for services (non-employees):				
a	Management				
b	Legal	50074	50074	0	0
c	Accounting	4500	0	4500	0
d	Lobbying				
e	Professional fundraising services See Part IV, line 17	67933			67933
f	Investment management fees				
g	Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)				
12	Advertising and promotion				
13	Office expenses	20017	9859	1883	8275
14	Information technology	515	474	0	41
15	Royalties				
16	Occupancy	23594	20055	2359	1180
17	Travel	22150	17705	4445	0
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings	7273	4537	1368	1368
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance	24217	19692	4526	0
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	**Direct Mail Expense**	180931	144745	0	36186
b	**Litigation Direct Expense**	14571	14571	0	0
c	**Education Direct Expense**	5812	5812	0	0
d					
e	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24e	1138607	904031	95797	138779
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☑ if following SOP 98-2 (ASC 958-720)	202364	144745	0	57619

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Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing	692226	1	1031105
	2	Savings and temporary cash investments	0	2	0
	3	Pledges and grants receivable, net	0	3	0
	4	Accounts receivable, net	0	4	0
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	0	5	0
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L	0	6	0
	7	Notes and loans receivable, net	0	7	0
	8	Inventories for sale or use	0	8	0
	9	Prepaid expenses and deferred charges	0	9	0
	10a	Land, buildings, and equipment cost or other basis. Complete Part VI of Schedule D — 10a: 0			
	b	Less: accumulated depreciation — 10b: 0	0	10c	0
	11	Investments—publicly traded securities	0	11	0
	12	Investments—other securities. See Part IV, line 11	0	12	0
	13	Investments—program-related. See Part IV, line 11	0	13	0
	14	Intangible assets	0	14	0
	15	Other assets. See Part IV, line 11	5792	15	1516
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	698018	16	1032621
Liabilities	17	Accounts payable and accrued expenses	35008	17	38453
	18	Grants payable	0	18	0
	19	Deferred revenue	0	19	0
	20	Tax-exempt bond liabilities	0	20	0
	21	Escrow or custodial account liability. Complete Part IV of Schedule D	0	21	0
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L	0	22	0
	23	Secured mortgages and notes payable to unrelated third parties	0	23	0
	24	Unsecured notes and loans payable to unrelated third parties	0	24	0
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17–24). Complete Part X of Schedule D	0	25	0
	26	**Total liabilities.** Add lines 17 through 25	35008	26	38453
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	663010	27	994168
	28	Temporarily restricted net assets	0	28	0
	29	Permanently restricted net assets	0	29	0
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds	0	30	0
	31	Paid-in or capital surplus, or land, building, or equipment fund	0	31	0
	32	Retained earnings, endowment, accumulated income, or other funds	0	32	0
	33	Total net assets or fund balances	663010	33	994168
	34	Total liabilities and net assets/fund balances	698018	34	1032621

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Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	1469765
2	Total expenses (must equal Part IX, column (A), line 25)	2	1138607
3	Revenue less expenses. Subtract line 2 from line 1	3	331158
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	663010
5	Net unrealized gains (losses) on investments	5	0
6	Donated services and use of facilities	6	0
7	Investment expenses	7	0
8	Prior period adjustments	8	0
9	Other changes in net assets or fund balances (explain in Schedule O)	9	0
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	994168

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		✓
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	✓	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both. ☐ Separate basis ☐ Consolidated basis ☑ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c		✓
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		✓
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

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SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

► Attach to Form 990 or Form 990-EZ.

► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization	Employer identification number
Public Interest Legal Foundation	45-4355641

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

09

The organization is not a private foundation because it is (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives (1) more than 33⅓% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33⅓% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1–10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
(A)						
(B)						
(C)						
(D)						
(E)						
Total						

AMERICAN OVERSIGHT

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") . .						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
3 The value of services or facilities furnished by a governmental unit to the organization without charge . . .						
4 **Total.** Add lines 1 through 3 . . .						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
11 **Total support.** Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14	Public support percentage for 2018 (line 6, column (f) divided by line 11, column (f))	14	%
15	Public support percentage from 2017 Schedule A, Part II, line 14	15	%

16a **33 1/3% support test—2018.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **33 1/3% support test—2017.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2018.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **10%-facts-and-circumstances test—2017.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . . ▶ ☐

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Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	1,455,665	287,407	969,841	1,025453	1,381,709	$5,120,075
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	458,923	246,797	49,242	111,444	76,090	$942,496
3 Gross receipts from activities that are not an unrelated trade or business under section 513		27,664	23,061	9,055	11,966	$71,746
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
7a Amounts included on lines 1, 2, and 3 received from disqualified persons	364,971	303,800	525,000	575,000	600,000	$2,368,771
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year	199,109	161,242	38,046	97,162	61,392	$556,952
c Add lines 7a and 7b	564,081	465,042	563,046	672,162	661,392	$2,925,723
8 **Public support.** (Subtract line 7c from line 6.)						$3,208,594

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
9 Amounts from line 6	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources				25,000		25,000
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975				0		
c Add lines 10a and 10b				25,000		25,000
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12)	1,914,588	561,868	1,042,144	1,170,952	1,469,765	$6,159,317

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2018 (line 8, column (f), divided by line 13, column (f))	15	52 %
16	Public support percentage from 2017 Schedule A, Part III, line 15	16	55 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2018** (line 10c, column (f), divided by line 13, column (f))	17	1 %
18	Investment income percentage from **2017** Schedule A, Part III, line 17	18	1 %

19a **33 1/3% support tests—2018.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☑

b **33 1/3% support tests—2017.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

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Part IV **Supporting Organizations**

(Complete only if you checked a box in line 12 on Part I. If you checked 12a of Part I, complete Sections A and B. If you checked 12b of Part I, complete Sections A and C. If you checked 12c of Part I, complete Sections A, D, and E. If you checked 12d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 12a or 12b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action, (iii) the authority under the organization's organizing document authorizing such action, and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (as defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

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Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in* ***Part VI.***	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s)*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard*	3		

Section E. Type III Functionally Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the year* ***(see instructions).***

a ☐ The organization satisfied the Activities Test. *Complete* ***line 2*** *below*

b ☐ The organization is the parent of each of its supported organizations. *Complete* ***line 3*** *below*

c ☐ The organization supported a governmental entity. *Describe in* ***Part VI*** *how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? *Provide details in* ***Part VI.***	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI*** *the role played by the organization in this regard*	3b		

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (explain in Part VI) **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E

Section A—Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6, and 7 from line 4)	8		

Section B—Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**)			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions)	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035.	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C—Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1.	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3.	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions).	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally integrated Type III supporting organization (see instructions)

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D—Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in **Part VI**). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in **Part VI**). See instructions.	
9	Distributable amount for 2018 from Section C, line 6	
10	Line 8 amount divided by line 9 amount	

Section E—Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2018	(iii) Distributable Amount for 2018
1	Distributable amount for 2018 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2018 (reasonable cause required—explain in **Part VI**). See instructions.			
3	Excess distributions carryover, if any, to 2018			
a	From 2013 .			
b	From 2014 . . .			
c	From 2015			
d	From 2016			
e	From 2017			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2018 distributable amount			
i	Carryover from 2013 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2018 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2018 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4			
5	Remaining underdistributions for years prior to 2018, if any. Subtract lines 3g and 4a from line 2. For result greater than zero, explain in **Part VI.** See instructions.			
6	Remaining underdistributions for 2018 Subtract lines 3h and 4b from line 1. For result greater than zero, explain in **Part VI.** See instructions.			
7	**Excess distributions carryover to 2019.** Add lines 3j and 4c.			
8	Breakdown of line 7.			
a	Excess from 2014 .			
b	Excess from 2015 .			
c	Excess from 2016 . . .			
d	Excess from 2017 . . .			
e	Excess from 2018 . . .			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c, Part IV, Section B, lines 1 and 2, Part IV, Section C, line 1, Part IV, Section D, lines 2 and 3, Part IV, Section E, lines 1c, 2a, 2b, 3a, and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6 Also complete this part for any additional information. (See instructions.)

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.

Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)

☐ Preservation of land for public use (for example, recreation or education)
☐ Preservation of a historically important land area
☐ Protection of natural habitat
☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Tax Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	*Number of conservation easements on a certified historic structure included in (a)*	2c	
d	Number of conservation easements included in (c) acquired after 7/25/06, and not on a historic structure listed in the National Register	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ----------

4 Number of states where property subject to conservation easement is located ▶ ----------

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ----------

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ----------

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide in Part XIII the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
(ii) Assets included in Form 990, Part X ▶ $ ----------

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
b Assets included in Form 990, Part X ▶ $

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Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that make significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ *Scholarly research*
c ☐ Preservation for future generations
d ☐ Loan or exchange program
e ☐ *Other* _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table

		Amount
c	Beginning balance	1c
d	Additions during the year	1d
e	Distributions during the year	1e
f	Ending balance	1f

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds.

Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

		(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a	Beginning of year balance					
b	Contributions					
c	Net investment earnings, gains, and losses					
d	Grants or scholarships					
e	Other expenditures for facilities and programs					
f	Administrative expenses					
g	End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as.

a Board designated or quasi-endowment ▶ _____ %
b Permanent endowment ▶ _____ %
c Term endowment ▶ _____ %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i)	Unrelated organizations 3a(i)		
(ii)	Related organizations 3a(ii)		
b	If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R? 3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

	Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a	Land				
b	Buildings				
c	Leasehold improvements				
d	Equipment				
e	Other				
Total.	Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				

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Part VII Investments—Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 12)* ▶		

Part VIII Investments—Program Related.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 13)* ▶		

Part IX Other Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 15)* ▶	

Part X Other Liabilities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 25)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FASB ASC 740. Check here if the text of the footnote has been provided in Part XIII . ☐

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Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	1477265
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains (losses) on investments	2a			
b	Donated services and use of facilities	2b	7,500		
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1469765
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total revenue. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 12.)*			5	1469765

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	1146107
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a	7,500		
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1138607
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total expenses. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 18.)*			5	1138607

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b; Part V, line 4, Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

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Part XIII Supplemental Information *(continued)*

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SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a ☑ Mail solicitations
b ☑ Internet and email solicitations
c ☐ Phone solicitations
d ☑ In-person solicitations
e ☑ Solicitation of non-government grants
f ☐ Solicitation of government grants
g ☐ Special fundraising events

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☑ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col (i)	(vi) Amount paid to (or retained by) organization
1 A.C. Fitzgerald & Associates, LLC PO Box 321012, Alexandria VA 22320	Consults		✓	0	46500	0
2 ForthRight Strategy Inc. 15th St, NW STE 410 D.C. 20005	Direct Mail consl		✓	212849	21433	191416
3						
4						
5						
6						
7						
8						
9						
10						
Total ▶				212849	67933	191416

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

AMERICAN OVERSIGHT

USCCR-21-1814-B-000408

Part II **Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 (event type)	(b) Event #2 (event type)	(c) Other events (total number)	(d) Total events (add col. (a) through col (c))
Revenue	1 Gross receipts				
	2 Less. Contributions				
	3 Gross income (line 1 minus line 2)				
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs				
	7 Food and beverages				
	8 Entertainment				
	9 Other direct expenses				
	10 Direct expense summary Add lines 4 through 9 in column (d) ▶				
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				

Part III **Gaming.** Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/Instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col (a) through col (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ☐ No %	☐ Yes ☐ No %	☐ Yes ☐ No %	
	7 Direct expense summary Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended, or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

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11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust, or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information

Name ▶

Gaming manager compensation ▶ $

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information. See instructions.

Part I Line 2b- Fundraising counsultant, AC Fitzgerald, does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time. Direct mail counsultant, ForthRight Strategy Inc., does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time.

AC Fitzgerald is paid a flat monthly fee for fundraising counsulting, the fee is not based on the amount raised. No other fundraising expenses are paid for or to AC Fitzgerald

ForthRight Strategy Inc. is compensated $90 per one thousand pieces processed and mailed and paid for creative services.

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.

▶ Attach to Form 990 or 990-EZ.

▶ Go to *www.irs.gov/Form990* for the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

990 Part VI Section B. 11b. The 990 is prepared by the Secretary and Treasurer, after which it is reviewed by a CPA then presented to the Board of Directors for review. Upon approval by the Board the 990 is executed by an officer.

Part VI Section B. 12c, All officers and directors are required to read the Conflict of Interest Policy and comply with the same

990 Part VI Section B, 15: The process for determining compensation involves a review of comparable data from like enterprises in the same region for functionally comparable services. The review is done by the independent members of the Board who then approve the compensation amount.

990 Part VI Section C. 19: Documents which are required by IRS to be available to the public are available upon request.

990 Part VI Section C 17, AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

990 Part IX, Line 24a: Other expense- Direct Mail Expense $180,931 itemization:

$99,003 Printing & Mailshop, $60,645 Postage, $8,509 Data Processing, $2,819 List Rental, $9,955 Indirect Expenses

990 Part IX, Line 24b, Other expense- Litigation Direct Expense $14,571 itemization.

$6,203 Public Relations, $1,905 Court filing fees and transcripts, $1,232 Printing Amicus Brief, $5,231 Research & Investigation

990 Part IX, Line 24c, Other expense- Education Direct Expense $5,812 itemization

$3,371 Printing & Design, $2,441 Research & Document Retrieval

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SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

► Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.
► Attach to Form 990.
► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Identification of Disregarded Entities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

	(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity
(1)						
(2)						
(3)						
(4)						
(5)						
(6)						

Part II **Identification of Related Tax-Exempt Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related tax-exempt organizations during the tax year.

	(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity?	
							Yes	No
(1)								
(2)								
(3)								
(4)								
(5)								
(6)								
(7)								

USCCR-21-1814-B-000412

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Part III **Identification of Related Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)												
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No
(1)Omni Compliance Services, Inc. 45-3794958 32 E Washington St STE 1675, Indianapolis, IN 46204	Specialize Report Filing	Indiana	Public Int Lgl Fd	C corp	$0	$0	100%	✓	
(2)									
(3)									
(4)									
(5)									
(6)									
(7)									

USCCR-21-1814-B-000413

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Part V **Transactions With Related Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note: Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II–IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		✓
b	Gift, grant, or capital contribution to related organization(s)	1b		✓
c	Gift, grant, or capital contribution from related organization(s)	1c		✓
d	Loans or loan guarantees to or for related organization(s)	1d		✓
e	Loans or loan guarantees by related organization(s)	1e		✓
f	Dividends from related organization(s)	1f		✓
g	Sale of assets to related organization(s)	1g		✓
h	Purchase of assets from related organization(s)	1h		✓
i	Exchange of assets with related organization(s)	1i		✓
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		✓
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		✓
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		✓
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		✓
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n		✓
o	Sharing of paid employees with related organization(s)	1o		✓
p	Reimbursement paid to related organization(s) for expenses	1p		✓
q	Reimbursement paid by related organization(s) for expenses	1q	✓	
r	Other transfer of cash or property to related organization(s)	1r		✓
s	Other transfer of cash or property from related organization(s)	1s		✓

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

(a) Name of related organization	(b) Transaction type (a–s)	(c) Amount involved	(d) Method of determining amount involved
(1) Omni Compliance Services Inc. 45-3794958, 32 E Washington St STE 1675, Indianapolis, IN 46204	Q	11966	actual cost reimbursed by related org
(2)			
(3)			
(4)			
(5)			
(6)			

USCCR-21-1814-B-000414

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Part VI **Unrelated Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(e) Are all partners section 501(c)(3) organizations? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)													
(2)													
(3)													
(4)													
(5)													
(6)													
(7)													
(8)													
(9)													
(10)													
(11)													
(12)													
(13)													
(14)													
(15)													
(16)													

USCCR-21-1814-B-000415

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Part VII **Supplemental Information.**
Provide additional information for responses to questions on Schedule R. See instructions.

USCCR-21-1814-B-000416

Date : 11/23/2021 9:34:22 AM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Conflict of interest email
Attachment : PILF 2018 990.pdf;

Adegbile,

Putting this on top for your review so that we can send it out!

Staff Director Mauro Morales and General Counsel David Gantz,

Regarding the conflict of issue I raised during Friday, business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, employs Commissioner Adams as General Counsel; he also serves as a Director for the organization and as an officer through his status as President.

At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams has financial and business relationships with Ms. Mitchell, through PILF, which he failed to disclose to the other Commissioners prior to the vote on Ms. Mitchell's appointment. I asked for a written statement from the General Counsel as to whether any ethical laws and/or policies were violated as a result of this non-disclosure, and, if so, what the impact was not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors.

Specifically, though not limited to, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts to the other Commissioners raise serious doubts as to the propriety and validity of Commissioner Adams participation in matters regarding Ms.

AMERICAN OVERSIGHT

Mitchell.

Please undertake a review of the relevant ethical and conflict of interests rules and policies and report your findings to the Commissioners. (or we could use this language If it is determined a violation did occur, or it is decided that this matter is more appropriately investigated by a separate independent third-party, a referral to Office of Inspector General of the Department of Justice may be appropriate, consistent with 5 CFR 2638.502)

As indicated above, please include in your analysis a determination as to whether a rule or policy was breached, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

A For the 2018 calendar year, or tax year beginning , 2018, and ending , 20 18

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization: Public Interest Legal Foundation
Doing business as:
Number and street (or P O box if mail is not delivered to street address): 32 E. Washington St
Room/suite: STE 1675
City or town, state or province, country, and ZIP or foreign postal code: Indianapolis, IN 46204

D Employer identification number: 45-4355641

E Telephone number: 317-203-5599

G Gross receipts $: 1469765

F Name and address of principal officer: John Christian Adams, President
same as box C

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website ▶ publicinterestlegal org

H(c) Group exemption number ▶

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 2012

M State of legal domicile: IN

Part I Summary

Activities & Governance	1	Briefly describe the organization's mission or most significant activities: The Org exists to provide services / representation to states and election officials, non-profit organizations, and individuals, to assist with the exercise of their civil/constitutional rights, with particular focus on voting rights. Provide education to citizens and election officials regarding election integrity.		
	2	Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets		
	3	Number of voting members of the governing body (Part VI, line 1a)	3	8
	4	Number of independent voting members of the governing body (Part VI, line 1b)	4	6
	5	Total number of individuals employed in calendar year 2018 (Part V, line 2a)	5	5
	6	Total number of volunteers (estimate if necessary)	6	5
	7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
	b	Net unrelated business taxable income from Form 990-T, line 38	7b	0

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			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)	1025453	1381709
	9	Program service revenue (Part VIII, line 2g)	11444	76090
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	25000	
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	9055	11966
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	1170952	1469765
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
	14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	695178	717019
	16a	Professional fundraising fees (Part IX, column (A), line 11e)	3000	67933
	b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 138779		
	17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	341097	353655
	18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	1039275	1138607
	19	Revenue less expenses. Subtract line 18 from line 12	131677	331158

			Beginning of Current Year	End of Year
Net Assets or Fund Balances	20	Total assets (Part X, line 16)	698018	1032621
	21	Total liabilities (Part X, line 26)	35008	38453
	22	Net assets or fund balances. Subtract line 21 from line 20	663010	994168

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

Signature of officer: J. Christian Adams
Date: 10/20/19

Type or print name and title: J. Christian Adams, President

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ▶ | Firm's EIN ▶
Firm's address ▶ | Phone no

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☑ No

For Paperwork Reduction Act Notice, see the separate instructions. Cat No 11282Y Form **990** (2018)

935-45 19

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission

The Foundation exists to provide services and representation to states and election officials, non-profit organizations, and individuals, to assist them with the exercise of their civil and constitutional rights, with particular focus on voting rights. PILF provides education to citizens and election officials regarding election integrity and the role of election process laws and how they affect policy and constitutional architecture.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code) (Expenses $ 587341 including grants of $ 0) (Revenue $ 76090)

Provided litigation for the purpose of defending the constitutional and statutory rights of individuals and non-profit organizations from intrusion by state, federal, and local governments. Specializes in civil litigation in high-profile matters affecting the processes of the nation, with particular emphasis given to aiding the cause of election integrity and litigating against lawlessness in American elections. Additionally, volunteer attorneys contributed in-kind legal services for these cases valued at $7,500. The foundation litigated 8 fundamental cases and filed 5 Brief of Amicus in 2018.

* See Attachment 1 of this 990 for detailed case descriptions.

4b (Code:) (Expenses $ 316690 including grants of $ 0) (Revenue $ 0)

Education and Advocacy- PILF has a focused effort to raise awareness of vital issues such as non-citizens voting, lack of citizen verification and other shortfalls in the current election process. PILF has marshalled expert resources to help educate citizens, officials and decision makers about the role of election process laws and how they affect policy and Constitutional architecture. PILF assists election officials in devising election integrity policies. PILF has responded to requests for assistance from election officials and legislatures to discuss best practices for voter roll maintenance. PILF has completed research projects and published reports regarding best practices for voter roll maintenance and regarding the consequences of lack of citizenship verification in the election process. PILF attorneys have testified before legislative bodies presenting and discussing PILF's research and reports.

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 904031

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ORABDG

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	✓	
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2	✓	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		✓
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		✓
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		✓
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		✓
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		✓
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		✓
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		✓
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		✓
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		✓
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		✓
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		✓
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		✓
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		✓
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		✓
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	✓	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	✓	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		✓
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		✓
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		✓
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		✓
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		✓
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I* (see instructions)	17	✓	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		✓
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		✓
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		✓
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		✓

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Part IV Checklist of Required Schedules *(continued)*

			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		✓
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		✓
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K If "No," go to line 25a*	24a		✓
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		✓
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		✓
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		✓
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		✓
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		✓
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		✓
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		✓
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		✓
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		✓
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		✓
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		✓
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		✓
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	✓	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	✓	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	✓	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		✓
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		✓
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	✓	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	14		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		✓	

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Part V Statements Regarding Other IRS Filings and Tax Compliance *(continued)*

			Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return 2a 5			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b	✓	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)			
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a		✓
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*	3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a		✓
b	If "Yes," enter the name of the foreign country: ► ---------- See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).			
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a		✓
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b		✓
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?	5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a		✓
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b		
7	**Organizations that may receive deductible contributions under section 170(c).**			
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		✓
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c		✓
d	If "Yes," indicate the number of Forms 8282 filed during the year 7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e		✓
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f		✓
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h		
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8		
9	**Sponsoring organizations maintaining donor advised funds.**			
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b		
10	**Section 501(c)(7) organizations.** Enter			
a	Initiation fees and capital contributions included on Part VIII, line 12 10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities 10b			
11	**Section 501(c)(12) organizations.** Enter:			
a	Gross income from members or shareholders 11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.) 11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year 12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**			
a	Is the organization licensed to issue qualified health plans in more than one state?	13a		
	Note. See the instructions for additional information the organization must report on Schedule O.			
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans 13b			
c	Enter the amount of reserves on hand 13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a		✓
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see instructions and file Form 4720, Schedule N.	15		✓
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.	16		✓

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Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O See instructions*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☑

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a 8		
b	Enter the number of voting members included in line 1a, above, who are independent	1b 6		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		✓
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3		✓
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		✓
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		✓
6	Did the organization have members or stockholders?	6		✓
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a		✓
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b		✓
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	✓	
b	Each committee with authority to act on behalf of the governing body?	8b	✓	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O* . . .	9		✓

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		✓
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	✓	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	✓	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	✓	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	✓	
13	Did the organization have a written whistleblower policy?	13		✓
14	Did the organization have a written document retention and destruction policy?	14	✓	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	✓	
b	Other officers or key employees of the organization	15b	✓	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		✓
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (1024 or 1024-A if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply

☐ Own website ☐ Another's website ☑ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records ▶

Shawna Powell, Public Interest Legal Foundation, 32 E. Washington St., Indianapolis, IN 46204 (317) 203-5599

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Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order. Individual trustees or directors, institutional trustees, officers; key employees; highest compensated employees, and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Brian Brown Director	2 -	✓						0	0	0
(2) William Davis Director	2 -	✓						0	0	0
(3) Hans von Spakovsky Director	2 -	✓						0	0	0
(4) Dr. John Eastman Director	2 -	✓						0	0	0
(5) Cleta Mitchell Chariman, Director	2 -	✓		✓				0	0	0
(6) Neil Corkery Treasurer, Director	5 -	✓		✓				30000	0	0
(7) John Christian Adams President, General Counsel, Director	40 -	✓		✓				120000	0	0
(8) Shawna L Powell Secretary	40 -			✓				88564	0	0
(9) David Norcross Director	2 -	✓						0	0	0
(10)										
(11)										
(12)										
(13)										
(14)										

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Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)										
(16)										
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
1b **Sub-total** ▶								238564	0	0
c **Total from continuation sheets to Part VII, Section A** ▶								0	0	0
d **Total (add lines 1b and 1c)** ▶								238564	0	0

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 1

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*		✓
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*		✓
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*		✓

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
John Christian Adams, 32 E. Washington St., STE 1675, Indianapolis, IN 46204	General Counsel	120000

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 1

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Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512–514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f	1381709			
	g	Noncash contributions included in lines 1a–1f $					
	h	**Total.** Add lines 1a–1f ▶		1381709			
Program Service Revenue			Business Code				
	2a	Litigation	541100	76090	76090	0	0
	b						
	c						
	d						
	e						
	f	All other program service revenue					
	g	**Total.** Add lines 2a–2f ▶		76090			
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties ▶					
			(i) Real	(ii) Personal			
	6a	Gross rents					
	b	Less rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) ▶					
			(i) Securities	(ii) Other			
	7a	Gross amount from sales of assets other than inventory					
	b	Less cost or other basis and sales expenses					
	c	Gain or (loss)					
	d	Net gain or (loss) ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b	Less direct expenses b					
	c	Net income or (loss) from fundraising events ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 a					
	b	Less direct expenses b					
	c	Net income or (loss) from gaming activities ▶					
	10a	Gross sales of inventory, less returns and allowances a					
	b	Less cost of goods sold b					
	c	Net income or (loss) from sales of inventory ▶		0	0	0	0
		Miscellaneous Revenue	Business Code				
	11a	Cost reimbursement fm related entity	900099	11966	11966	0	0
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d ▶		11966			
	12	**Total revenue.** See instructions ▶		1469765	88056	0	0

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns All other organizations must complete column (A)

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☑

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2	Grants and other assistance to domestic individuals. See Part IV, line 22				
3	Grants and other assistance to foreign organizations, foreign governments, and foreign individuals See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	238564	149138	68569	20856
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	347509	346989	260	260
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits	97879	89992	5887	2000
10	Payroll taxes	33067	30388	2000	680
11	Fees for services (non-employees):				
a	Management				
b	Legal	50074	50074	0	0
c	Accounting	4500	0	4500	0
d	Lobbying				
e	Professional fundraising services See Part IV, line 17	67933			67933
f	Investment management fees				
g	Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)				
12	Advertising and promotion				
13	Office expenses	20017	9859	1883	8275
14	Information technology	515	474	0	41
15	Royalties				
16	Occupancy	23594	20055	2359	1180
17	Travel	22150	17705	4445	0
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings	7273	4537	1368	1368
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance	24217	19692	4526	0
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	**Direct Mail Expense**	180931	144745	0	36186
b	**Litigation Direct Expense**	14571	14571	0	0
c	**Education Direct Expense**	5812	5812	0	0
d					
e	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24e	1138607	904031	95797	138779
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☑ if following SOP 98-2 (ASC 958-720)	202364	144745	0	57619

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Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing	692226	1	1031105
	2	Savings and temporary cash investments	0	2	0
	3	Pledges and grants receivable, net	0	3	0
	4	Accounts receivable, net	0	4	0
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	0	5	0
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L	0	6	0
	7	Notes and loans receivable, net	0	7	0
	8	Inventories for sale or use	0	8	0
	9	Prepaid expenses and deferred charges	0	9	0
	10a	Land, buildings, and equipment cost or other basis. Complete Part VI of Schedule D — 10a: 0			
	b	Less: accumulated depreciation — 10b: 0	0	10c	0
	11	Investments—publicly traded securities	0	11	0
	12	Investments—other securities. See Part IV, line 11	0	12	0
	13	Investments—program-related. See Part IV, line 11	0	13	0
	14	Intangible assets	0	14	0
	15	Other assets. See Part IV, line 11	5792	15	1516
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	698018	16	1032621
Liabilities	17	Accounts payable and accrued expenses	35008	17	38453
	18	Grants payable	0	18	0
	19	Deferred revenue	0	19	0
	20	Tax-exempt bond liabilities	0	20	0
	21	Escrow or custodial account liability. Complete Part IV of Schedule D	0	21	0
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L	0	22	0
	23	Secured mortgages and notes payable to unrelated third parties	0	23	0
	24	Unsecured notes and loans payable to unrelated third parties	0	24	0
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17–24). Complete Part X of Schedule D	0	25	0
	26	**Total liabilities.** Add lines 17 through 25	35008	26	38453
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	663010	27	994168
	28	Temporarily restricted net assets	0	28	0
	29	Permanently restricted net assets	0	29	0
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds	0	30	0
	31	Paid-in or capital surplus, or land, building, or equipment fund	0	31	0
	32	Retained earnings, endowment, accumulated income, or other funds	0	32	0
	33	Total net assets or fund balances	663010	33	994168
	34	Total liabilities and net assets/fund balances	698018	34	1032621

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Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	1469765
2	Total expenses (must equal Part IX, column (A), line 25)	2	1138607
3	Revenue less expenses. Subtract line 2 from line 1	3	331158
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	663010
5	Net unrealized gains (losses) on investments	5	0
6	Donated services and use of facilities	6	0
7	Investment expenses	7	0
8	Prior period adjustments	8	0
9	Other changes in net assets or fund balances (explain in Schedule O)	9	0
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	994168

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		✓
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	✓	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both. ☐ Separate basis ☐ Consolidated basis ☑ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c		✓
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		✓
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

AMERICAN OVERSIGHT

SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

► Attach to Form 990 or Form 990-EZ.

► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization	Employer identification number
Public Interest Legal Foundation	45-4355641

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

09

The organization is not a private foundation because it is (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives (1) more than 33⅓% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33⅓% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1–10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
(A)						
(B)						
(C)						
(D)						
(E)						
Total						

AMERICAN OVERSIGHT

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") . .						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
3 The value of services or facilities furnished by a governmental unit to the organization without charge . . .						
4 **Total.** Add lines 1 through 3 . . .						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
11 **Total support.** Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14	Public support percentage for 2018 (line 6, column (f) divided by line 11, column (f))	14	%
15	Public support percentage from 2017 Schedule A, Part II, line 14	15	%

16a **33⅓% support test—2018.** If the organization did not check the box on line 13, and line 14 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **33⅓% support test—2017.** If the organization did not check a box on line 13 or 16a, and line 15 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2018.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **10%-facts-and-circumstances test—2017.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . . ▶ ☐

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Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	1,455,665	287,407	969,841	1,025453	1,381,709	$5,120,075
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	458,923	246,797	49,242	111,444	76,090	$942,496
3 Gross receipts from activities that are not an unrelated trade or business under section 513		27,664	23,061	9,055	11,966	$71,746
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
7a Amounts included on lines 1, 2, and 3 received from disqualified persons	364,971	303,800	525,000	575,000	600,000	$2,368,771
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year	199,109	161,242	38,046	97,162	61,392	$556,952
c Add lines 7a and 7b	564,081	465,042	563,046	672,162	661,392	$2,925,723
8 **Public support.** (Subtract line 7c from line 6.)						$3,208,594

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
9 Amounts from line 6	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources				25,000		25,000
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975				0		
c Add lines 10a and 10b				25,000		25,000
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12)	1,914,588	561,868	1,042,144	1,170,952	1,469,765	$6,159,317

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2018 (line 8, column (f), divided by line 13, column (f))	15	52 %
16	Public support percentage from 2017 Schedule A, Part III, line 15	16	55 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2018** (line 10c, column (f), divided by line 13, column (f))	17	1 %
18	Investment income percentage from **2017** Schedule A, Part III, line 17	18	1 %

19a **33 1/3% support tests—2018.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☑

b **33 1/3% support tests—2017.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

AMERICAN OVERSIGHT

Part IV **Supporting Organizations**

(Complete only if you checked a box in line 12 on Part I. If you checked 12a of Part I, complete Sections A and B. If you checked 12b of Part I, complete Sections A and C. If you checked 12c of Part I, complete Sections A, D, and E. If you checked 12d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 12a or 12b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action, (iii) the authority under the organization's organizing document authorizing such action, and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (as defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

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Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in* ***Part VI.***	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s)*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard*	3		

Section E. Type III Functionally Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the year* ***(see instructions).***

a ☐ The organization satisfied the Activities Test. *Complete* ***line 2*** *below*

b ☐ The organization is the parent of each of its supported organizations. *Complete* ***line 3*** *below*

c ☐ The organization supported a governmental entity. *Describe in* ***Part VI*** *how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? *Provide details in* ***Part VI.***	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI*** *the role played by the organization in this regard*	3b		

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (explain in Part VI) **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E

Section A—Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6, and 7 from line 4)	8		

Section B—Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**)			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions)	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035.	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C—Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1.	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3.	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions).	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally integrated Type III supporting organization (see instructions)

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D—Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in **Part VI**). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in **Part VI**). See instructions.	
9	Distributable amount for 2018 from Section C, line 6	
10	Line 8 amount divided by line 9 amount	

Section E—Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2018	(iii) Distributable Amount for 2018
1	Distributable amount for 2018 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2018 (reasonable cause required—explain in **Part VI**). See instructions.			
3	Excess distributions carryover, if any, to 2018			
a	From 2013 .			
b	From 2014 . . .			
c	From 2015			
d	From 2016			
e	From 2017			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2018 distributable amount			
i	Carryover from 2013 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2018 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2018 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4			
5	Remaining underdistributions for years prior to 2018, if any. Subtract lines 3g and 4a from line 2. For result greater than zero, explain in **Part VI.** See instructions.			
6	Remaining underdistributions for 2018 Subtract lines 3h and 4b from line 1. For result greater than zero, explain in **Part VI.** See instructions.			
7	**Excess distributions carryover to 2019.** Add lines 3j and 4c.			
8	Breakdown of line 7.			
a	Excess from 2014 .			
b	Excess from 2015 .			
c	Excess from 2016 . . .			
d	Excess from 2017 . . .			
e	Excess from 2018 . . .			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c, Part IV, Section B, lines 1 and 2, Part IV, Section C, line 1, Part IV, Section D, lines 2 and 3, Part IV, Section E, lines 1c, 2a, 2b, 3a, and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6 Also complete this part for any additional information. (See instructions.)

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.

Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)

☐ Preservation of land for public use (for example, recreation or education)
☐ Preservation of a historically important land area
☐ Protection of natural habitat
☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Tax Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	*Number of conservation easements on a certified historic structure included in (a)*	2c	
d	Number of conservation easements included in (c) acquired after 7/25/06, and not on a historic structure listed in the National Register	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ----------

4 Number of states where property subject to conservation easement is located ▶ ----------

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ----------

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ----------

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide in Part XIII the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
(ii) Assets included in Form 990, Part X ▶ $ ----------

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
b Assets included in Form 990, Part X ▶ $

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Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that make significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ *Scholarly research*
c ☐ Preservation for future generations
d ☐ Loan or exchange program
e ☐ *Other* _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table

		Amount
c	Beginning balance	1c
d	Additions during the year	1d
e	Distributions during the year	1e
f	Ending balance	1f

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds.

Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

		(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a	Beginning of year balance					
b	Contributions					
c	Net investment earnings, gains, and losses					
d	Grants or scholarships					
e	Other expenditures for facilities and programs					
f	Administrative expenses					
g	End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as.

a Board designated or quasi-endowment ▶ _____ %
b Permanent endowment ▶ _____ %
c Term endowment ▶ _____ %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i)	Unrelated organizations 3a(i)		
(ii)	Related organizations 3a(ii)		
b	If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R? 3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

	Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a	Land				
b	Buildings				
c	Leasehold improvements				
d	Equipment				
e	Other				
Total.	Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				

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Part VII Investments—Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 12)* ▶		

Part VIII Investments—Program Related.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 13)* ▶		

Part IX Other Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 15)* ▶	

Part X Other Liabilities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 25)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FASB ASC 740. Check here if the text of the footnote has been provided in Part XIII . ☐

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Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	1477265
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains (losses) on investments	2a			
b	Donated services and use of facilities	2b	7,500		
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1469765
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total revenue. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 12.)*			5	1469765

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	1146107
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a	7,500		
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1138607
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total expenses. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 18.)*			5	1138607

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b; Part V, line 4, Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

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Part XIII Supplemental Information *(continued)*

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SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a ☑ Mail solicitations
b ☑ Internet and email solicitations
c ☐ Phone solicitations
d ☑ In-person solicitations
e ☑ Solicitation of non-government grants
f ☐ Solicitation of government grants
g ☐ Special fundraising events

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☑ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col (i)	(vi) Amount paid to (or retained by) organization
1 A.C. Fitzgerald & Associates, LLC PO Box 321012, Alexandria VA 22320	Consults		✓	0	46500	0
2 ForthRight Strategy Inc. 15th St, NW STE 410 D.C. 20005	Direct Mail consl		✓	212849	21433	191416
3						
4						
5						
6						
7						
8						
9						
10						
Total ▶				212849	67933	191416

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

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Part II **Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 (event type)	(b) Event #2 (event type)	(c) Other events (total number)	(d) Total events (add col. (a) through col (c))
Revenue	1 Gross receipts				
	2 Less. Contributions				
	3 Gross income (line 1 minus line 2)				
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs				
	7 Food and beverages				
	8 Entertainment				
	9 Other direct expenses				
	10 Direct expense summary Add lines 4 through 9 in column (d) ▶				
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				

Part III **Gaming.** Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/Instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col (a) through col (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	
	7 Direct expense summary Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended, or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

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11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust, or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information

Name ▶

Gaming manager compensation ▶ $

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information. See instructions.

Part I Line 2b- Fundraising counsultant, AC Fitzgerald, does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time. Direct mail counsultant, ForthRight Strategy Inc., does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time.

AC Fitzgerald is paid a flat monthly fee for fundraising counsulting, the fee is not based on the amount raised. No other fundraising expenses are paid for or to AC Fitzgerald

ForthRight Strategy Inc. is compensated $90 per one thousand pieces processed and mailed and paid for creative services.

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.

▶ Attach to Form 990 or 990-EZ.

▶ Go to *www.irs.gov/Form990* for the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

990 Part VI Section B. 11b, The 990 is prepared by the Secretary and Treasurer, after which it is reviewed by a CPA then presented to the Board of Directors for review. Upon approval by the Board the 990 is executed by an officer.

Part VI Section B. 12c, All officers and directors are required to read the Conflict of Interest Policy and comply with the same

990 Part VI Section B, 15: The process for determining compensation involves a review of comparable data from like enterprises in the same region for functionally comparable services. The review is done by the independent members of the Board who then approve the compensation amount.

990 Part VI Section C. 19: Documents which are required by IRS to be available to the public are available upon request.

990 Part VI Section C 17, AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

990 Part IX, Line 24a: Other expense- Direct Mail Expense $180,931 itemization:

$99,003 Printing & Mailshop, $60,645 Postage, $8,509 Data Processing, $2,819 List Rental, $9,955 Indirect Expenses

990 Part IX, Line 24b, Other expense- Litigation Direct Expense $14,571 itemization.

$6,203 Public Relations, $1,905 Court filing fees and transcripts, $1,232 Printing Amicus Brief, $5,231 Research & Investigation

990 Part IX, Line 24c, Other expense- Education Direct Expense $5,812 itemization

$3,371 Printing & Design, $2,441 Research & Document Retrieval

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SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

► Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.
► Attach to Form 990.
► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Identification of Disregarded Entities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

Part II **Identification of Related Tax-Exempt Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity?	
						Yes	No
(1)							
(2)							
(3)							
(4)							
(5)							
(6)							
(7)							

USCCR-21-1814-B-000448

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Part III **Identification of Related Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)												
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No
(1)Omni Compliance Services, Inc. 45-3794958 32 E Washington St STE 1675, Indianapolis, IN 46204	Specialize Report Filing	Indiana	Public Int Lgl Fd	C corp	$0	$0	100%	✓	
(2)									
(3)									
(4)									
(5)									
(6)									
(7)									

USCCR-21-1814-B-000449

Part V **Transactions With Related Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note: Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II–IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		✓
b	Gift, grant, or capital contribution to related organization(s)	1b		✓
c	Gift, grant, or capital contribution from related organization(s)	1c		✓
d	Loans or loan guarantees to or for related organization(s)	1d		✓
e	Loans or loan guarantees by related organization(s)	1e		✓
f	Dividends from related organization(s)	1f		✓
g	Sale of assets to related organization(s)	1g		✓
h	Purchase of assets from related organization(s)	1h		✓
i	Exchange of assets with related organization(s)	1i		✓
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		✓
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		✓
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		✓
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		✓
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n		✓
o	Sharing of paid employees with related organization(s)	1o		✓
p	Reimbursement paid to related organization(s) for expenses	1p		✓
q	Reimbursement paid by related organization(s) for expenses	1q	✓	
r	Other transfer of cash or property to related organization(s)	1r		✓
s	Other transfer of cash or property from related organization(s)	1s		✓

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

(a) Name of related organization	(b) Transaction type (a–s)	(c) Amount involved	(d) Method of determining amount involved
(1) Omni Compliance Services Inc. 45-3794958, 32 E Washington St STE 1675, Indianapolis, IN 46204	Q	11966	actual cost reimbursed by related org
(2)			
(3)			
(4)			
(5)			
(6)			

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USCCR-21-1814-B-000450

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Part VI **Unrelated Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(e) Are all partners section 501(c)(3) organizations? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)													
(2)													
(3)													
(4)													
(5)													
(6)													
(7)													
(8)													
(9)													
(10)													
(11)													
(12)													
(13)													
(14)													
(15)													
(16)													

USCCR-21-1814-B-000451

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Part VII **Supplemental Information.**
Provide additional information for responses to questions on Schedule R. See instructions.

USCCR-21-1814-B-000452

Date : 1/13/2022 2:43:45 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Couple of things

Hey Adegbile,

Let me know when you have time to discuss a couple of items including USCCR hours, EAC request for Black History Month (info below), as well as a spring legal intern possibility.

USCCR Hours:

12/20-1/1

12/20 1 hour weekly priority meeting
12/21 2 hour PR debrief + 2 hours PR receipts submission
12/22 3 hours attend to USCCR business
12/23
12/24
12/28
12/29
12/30

**Adegbile please add any work done on the missing dates

EAC Invitation Info:

Participants:

- Commissioner Thomas Hicks , U.S. Election Assistance Commission
- Commissioner Shana Broussard , Federal Election Commission (confirmed)
- Assistant Attorney General Kristen Clarke , U.S. Department of Justice (confirmed)
- Commissioner Debo Adegbile , U.S. Commission on Civil Rights (invitation to be extended)
- Moderator: Professor Spencer Overton , GW Law (confirmed)

Purpose: As part of the EAC's Black History Month celebrations, we will convene the top federal government officials who oversee various aspects of our election system to discuss the current state of voting rights, election administration, and campaign finance law and what that means for the African American community and other BIPOC.

Format: After brief introductions by the moderator, the Assistant AG's pre-recorded remarks will run. Following her remarks, Commissioners Hicks and Broussard will

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provide agency briefings between 7 and 10 minutes each. A panel discussion about those priorities and other related topics will follow for the next half hour.

Logistics: We hope to pre-record this virtual panel in time for public release on Wednesday, February 23, which coincides with Commissioner Hicks's first day as Chair of the EAC.

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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Date : 12/20/2021 2:52:37 PM
From : "Dave" dkladney@usccr.gov
To : "Joshua Dansby" jdansby@usccr.gov
Subject : DK Research 8
Attachment : New Citi GPS Report Estimates $16 Trillion in Lost GDP Due to Racial Inequality in the United States.pdf;Untitled attachment 00088.htm;CLOSING THE RACIAL INEQUALITY GAPS_ The...c Cost of Black Inequality in the U.S..pdf;Untitled attachment 00091.htm;

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New Citi GPS Report Estimates $16 Trillion in Lost GDP Due to Racial Inequality in the United States

Outlines Actionable Steps for Governments, Corporations and Individuals to Help Eliminate the Economic Gaps

September 22, 2020 04:41 PM Eastern Daylight Time

NEW YORK--(BUSINESS WIRE)--Citi today released a new report that estimates the economic losses attributed to racial inequality in the United States over the last two decades. The Citi Global Perspectives & Solutions (GPS) report *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.* posits the lost GDP of systemic and societal racism and discrimination faced by Blacks over the last 20 years to be $16 trillion. This loss includes gaps in wages, access to housing and higher education and investment in Black-owned businesses. The report also provides recommendations the public and private sectors can take to help close the gap.

"Racial inequality has always had an outsized cost, one that was thought to be paid only by underrepresented groups"

Tweet this

"Racial inequality has always had an outsized cost, one that was thought to be paid only by underrepresented groups," **said Raymond J. McGuire, Vice Chairman of Citigroup and Chairman of Banking, Capital Markets and Advisory at Citi**. "What this report underscores is that this tariff is levied on us all, and particularly in the U.S., that cost has a real and tangible impact on our country's economic output. Now, more than ever, we have a responsibility and an opportunity to confront this longstanding societal ill that has plagued Black and brown people in this country for centuries, tally up the economic loss and as a society, commit to bring greater equity and prosperity to all."

The report identifies the underlying causes of the racial and economic gaps exacerbated by the COVID-19 pandemic and discusses the value of closing gaps. Report authors prognosticate that if racial inequity gaps were closed today, the equivalent added to the U.S. economy over the next five years could be $5 trillion of additional GDP, or an average add of 0.35 percentage points to U.S. GDP growth per year and 0.09 percentage points to global GDP growth per year.

"The important thing that we can do is to show the costs of racial inequality through objective analysis which is what the authors of this report have sought to demonstrate," **said Dr. Catherine L. Mann, Global Chief Economist at Citi** and one of the principal authors of the report. "Our overarching goal for the Citi GPS series is not only to tackle the key opportunities and challenges of the 21st century, but also to address complex societal questions and not to shy away from difficult subjects. As such, we believe that we have a responsibility to address current events and to frame them with an economic lens in order to highlight the real costs of longstanding discrimination against minority groups, especially against Black people and particularly in the U.S."

Additional notable findings include:

- **Closing the Black racial wage gap** 20 years ago might have provided an additional **$2.7 trillion** in income available for consumption and investment.
- **Improving access to housing credit** might have added an **additional 770,000 Black homeowners** over the last 20 years, with **combined sales and expenditures adding another $218 billion to GDP** over that time.
- **Facilitating increased access to higher education** (college, graduate and vocational schools) for Black students might have **bolstered lifetime incomes that in aggregate sums to $90 to $113 billion.**
- **Providing fair and equitable lending to Black entrepreneurs** might have resulted in the **creation of an additional US$13 trillion in business revenue** over the last 20 years that could have been used for investments in labor, technology, capital equipment, and structures. **6.1 million jobs might have been created per year.**

The report also outlines several steps that governments, corporations and individuals can take to improve outcomes, including:

Governments

- **Monetary Policy**: The Fed has recently signaled a willingness to enhance its focus on inequality, indicated its policies will focus on 'broad-based and inclusive' job gains and focusing on both maximum employment and a target inflation rate.
- **Encourage Work:** Reforming tax benefits and application of specialized tax reforms to encourage work among lower income families (e.g., Earned Income Tax Credit or Child Tax Credit) and help reduce racial gaps.
- **Provide Guaranteed Wages, Income Support & Jobs:** Policy suggestions include raising minimum wage, creating a 'living wage', introducing income supplements or supports, and stabilizing jobs.

Corporates

- **Support Initiatives from the Top:** Initiate a focus on diversity and inclusion at the top of the house with senior management and percolating that view down the ranks.
- **Address Racial Gaps in Hiring, Retention, and Firing:** Implement policies that are more conscious of addressing racial gaps in hiring, retention, and firing.
- **Engage in Corporate Social Responsibility:** Take direct action by bolstering external communities and supporting minority-owned firms.
- **Dismantle Structural Barriers to Hiring Black Talent:** Engage fully with Fair Chance Hiring to encourage the hiring of qualified job applicants with criminal histories.

Individuals

- **Use Education as a Pathway for Advancement:** Parents can advocate for greater accountability from and funding for local schools while students can focus on job-relevant skills including STEM, problem-solving, teamwork, and communications .
- **Don't Ask, Don't Get – Advocate for One's Career:** Seek mentors, advocates, and sponsors while considering relocating to increase job prospects or starting one's own business.
- **Embrace Delayed Gratification and Risk:** Increase financial literacy as an avenue for financial independence, including investing in the stock market.

Citi

Citi, the leading global bank, has approximately 200 million customer accounts and does business in more than 160 countries and jurisdictions. Citi provides consumers, corporations, governments and institutions with a broad range of financial products and services, including consumer banking and credit, corporate and investment banking, securities brokerage, transaction services, and wealth management.

Additional information may be found at www.citigroup.com | Twitter: @Citi | YouTube: www.youtube.com/citi | Blog: http://blog.citigroup.com | Facebook: www.facebook.com/citi | LinkedIn: www.linkedin.com/company/citi

About Citi Global Perspectives & Solutions (Citi GPS)

As our premier thought-leadership product, Citi Global Perspectives & Solutions (Citi GPS) is designed to help our clients navigate the global economy's most demanding challenges, identify future themes and trends, and help our clients profit in a fast-changing and interconnected world. Citi GPS accesses the best elements of our global conversation and harvests the thought leadership of our research analysts and a wide range of senior professionals across our firm.

Contacts

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Tweets by @Citi

Citi @Citi
"This is a moment to stand up and be counted, and Citi is committed to leading the way and investing in communities of color to build wealth and strong financial futures." Read more: on.citi/304nsSF

Citi is spending $1.15 billion to h...
Citi plans to spend more than $1 bil...
edition.cnn.com

1h

Citi @Citi
Treasury digitization is key to supporting growth and financial resilience. #Citi's diagnostic survey shows how companies can digitally enable their treasury risk management strategies: on.citi/3mGqNkx

2h

Citi @Citi
At #Citi, we believe you can't improve what you don't measure. We're proud to support the new #GDKA KPI Alliance with the commitment to measure & increase the diversity of our workforce, and make real progress. More here: on.citi/2EsPZcS

3h

More News

Contacts

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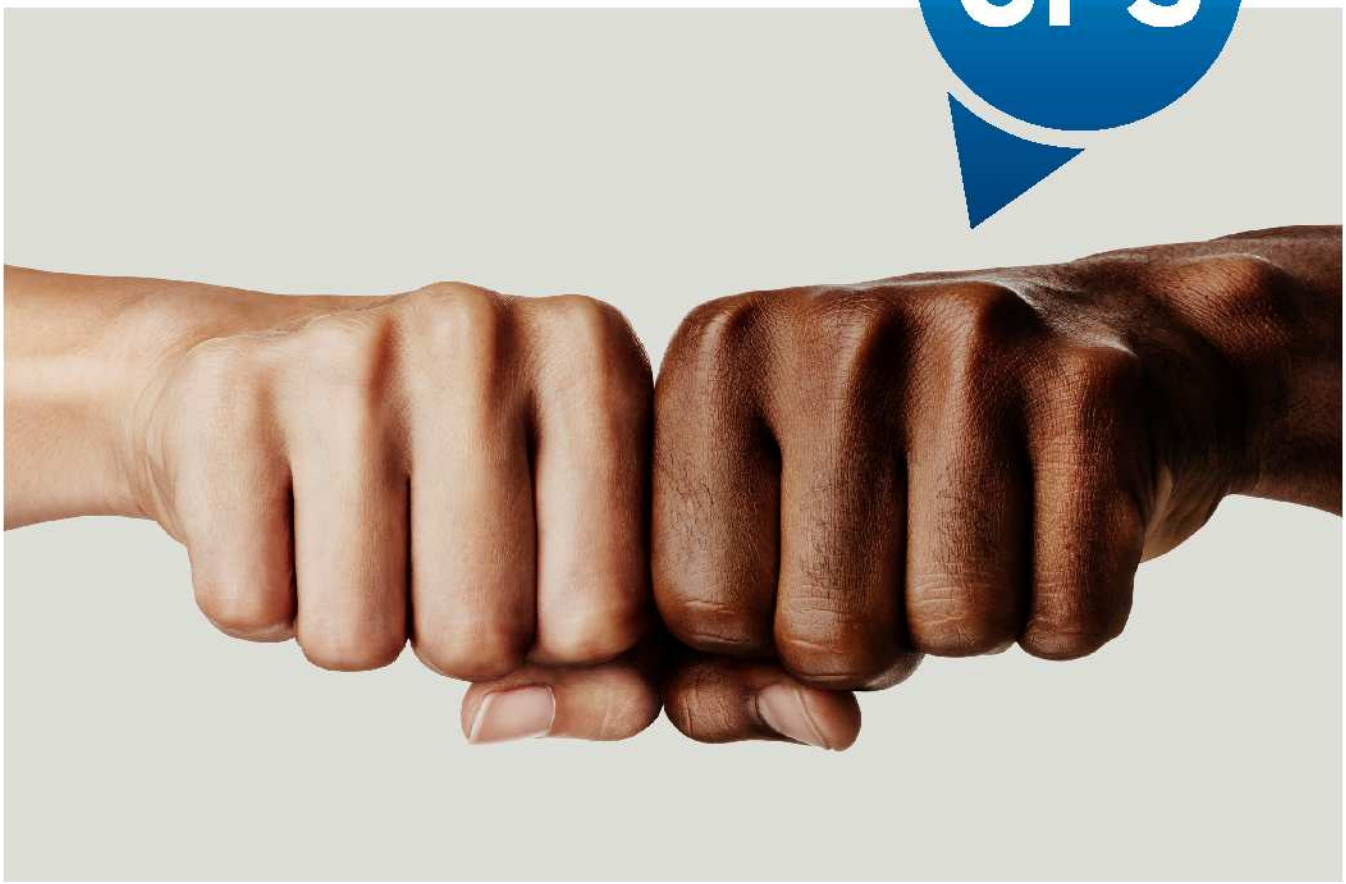
ACCOUNT ID: A-B-000456

Citi GPS



CLOSING THE RACIAL INEQUALITY GAPS

The Economic Cost of Black Inequality in the U.S.

Citi GPS: Global Perspectives & Solutions

September 2020

citi

Citi is one of the world's largest financial institutions, operating in all major established and emerging markets. Across these world markets, our employees conduct an ongoing multi-disciplinary conversation – accessing information, analyzing data, developing insights, and formulating advice. As our premier thought leadership product, Citi GPS is designed to help our readers navigate the global economy's most demanding challenges and to anticipate future themes and trends in a fast-changing and interconnected world. Citi GPS accesses the best elements of our global conversation and harvests the thought leadership of a wide range of senior professionals across our firm. This is not a research report and does not constitute advice on investments or a solicitations to buy or sell any financial instruments.
For more information on Citi GPS, please visit our website at www.citi.com/citigps.

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Dana M Peterson Director, is a Global Economist with Citi Research. Her goal is to provide high value, accurate and timely analysis that informs Citi's top tier clients in their investment, risk, and business planning decisions. Dana has specific responsibility for identifying, analyzing, and publishing research papers on important global economic themes having direct financial market implications. Such global economic themes include, monetary policy, fiscal and trade policy, debt, taxation; ESG; and demographics. Dana also examines U.S. themes using granular data. Dana and her research have been featured by U.S. and international news outlets in print and on television, including the CNBC, Bloomberg, Thomson-Reuters, WSJ, the Financial Times (FT), Fox Business News Network, BNN-Bloomberg, Globe and Mail, CBC, and National Post.

Please note: This is the last report written by Dana Peterson in her role as Global Economist at Citi. We thank Dana for her insights and dedication to global thematics and in particular her work on this important Citi GPS report. We wish her all the best in her new role as Chief Economist at The Conference Board.

Catherine L Mann is the Global Chief Economist at Citigroup where she is responsible for thought leadership, research guidance of a global team of economists, and cross-fertilization of research across macroeconomics, fixed-income, and equities. Prior to this position, she was Chief Economist at the OECD, where she also was Director of the Economics Department and was Finance Deputy to the G20 (2014-2017). Prior to the OECD, she held the Barbara '54 and Richard M. Rosenberg Professor of Global Finance at the International Business School, Brandeis University, where she also directed the Rosenberg Institute of Global Finance (2006-2014). She spent 20-plus years in Washington, DC (1984-2006) where her positions included Senior Fellow at the Peter G. Peterson Institute for International Economics; Economist, Senior Economist, and Assistant Director in the International Finance Division at the Federal Reserve Board of Governors; Senior International Economist on the President's Council of Economic Advisers; and Adviser to the Chief Economist at the World Bank. Dr. Mann received her PhD in Economics from the Massachusetts Institute of Technology and her undergraduate degree is from Harvard University.

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CLOSING THE RACIAL INEQUALITY GAPS

The Economic Cost of Black Inequality in the U.S.

Raymond J McGuire
Vice Chairman, Citi
Chairman, Banking, Capital Markets, Advisory

In his Letter from a Birmingham Jail, Dr. Martin Luther King Jr. wrote, "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."

Today, more than at any time since Dr. King's assassination, we are bearing witness to the grave injustices affecting our fellow citizens. Black, Latinx, and Native Americans have been hospitalized for COVID-19 at a disproportionately high rate, a direct result of what the Centers for Disease Control and Prevention has identified as "long-standing systemic health and social inequities." Blacks and People of Color are also bearing a disproportionate share of the pandemic's economic devastation. And the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd have finally shaken the U.S. and the world awake to the egregious racial inequities in our criminal justice system.

As Dr. King noted, these injustices affect all of us. Higher rates of infection among some affect the health of all, and the loss of health, life, and livelihood among communities of color diminish everyone's economic security. No one should want to live in a society that incarcerates or kills so many of its citizens just because they are black or brown.

The privileges we enjoy by working for Citi come with responsibilities. While elected officials and community activists must do their part, so must we. One important thing we can do is to show the costs of racial inequality through objective analysis which is what the authors of this report have sought so effectively to demonstrate. Our overarching goal for the Citi GPS series is not only to tackle the key opportunities and challenges of the 21st century, but also to address complex societal questions and to not shy away from difficult subjects. As such, we believe we have a responsibility to address current events and to frame them with an economic lens in order to highlight the real costs of longstanding discrimination against minority groups, especially against Black people and particularly in the U.S.

The analysis in the report that follows shows that if four key racial gaps for Blacks — wages, education, housing, and investment — were closed 20 years ago, $16 trillion could have been added to the U.S. economy. And if the gaps are closed today, $5 trillion can be added to U.S. GDP over the next five years.

I write this forward as Citi's Vice Chairman and Chairman of our Global Banking, Capital Markets and Advisory business, but my journey began at the bottom. My two brothers and I were raised in Dayton, Ohio by our single mom and her parents, who had migrated from Georgia to escape the injustice and terror of Jim Crow. They worked tirelessly as janitors, social workers, and leaders at our local church to give us every opportunity. At any given time, we shared our home with five to eight foster siblings.

Yet even today, with all those credentials and as one of the leading executives on Wall Street, I am still seen first as a six-foot-four, two-hundred-pound Black man wherever I go — even in my own neighborhood. I could have been George Floyd. And my wife and I are constantly aware that our children could have their innocence snatched away from them at any given moment, simply for the perceived threat of their skin color. I hope that the analysis in this report brings sober perspective as well as hope to our readers as we collectively find substantive and sustainable opportunities to address the gaps we identify.

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A Path Towards Equality

NOT ADDRESSING RACIAL GAPS BETWEEN BLACKS AND WHITES HAS COST THE U.S. ECONOMY UP TO $16 TRILLION OVER THE PAST 20 YEARS

Closing the Black Wage Gap could have added **$2.7 trillion in income** or **+0.2% to GDP** per year.

Facilitating easy access to higher education for Black students could have increased lifetime incomes **$90-$113 billion**.

Improving access to housing credit might have added an additional **770,000 Black homeowners**, adding **$218 billion in sales** and expenditures.

Providing fair and equitable lending to Black entrepreneurs might have resulted in the creation of an additional **$13 trillion** in business revenue and potentially created **6.1 million jobs** per year.

If these racial gaps were closed today, we could see **$5 trillion** of additional GDP over the next 5 years, or an average add of **0.35 percentage point** to U.S. GDP growth per year and **0.09 percentage point** to global growth per year.

WHAT CAN THE GOVERNMENT DO TO CLOSE THE GAPS BETWEEN BLACKS AND WHITES?

PROVIDE GUARANTEED WAGES, INCOMES AND JOBS
IMPLEMENT TAX REFORM
PROMOTE FINANCIAL INCLUSION
DECOUPLE HEALTHCARE
ENCOURAGE WORK
IMPLEMENT HOUSING INCENTIVES
INVEST IN WEALTH BUILDING
INVEST IN PROTECTIONS AGAINST DISCRIMINATION
IMPLEMENT SALARY HISTORY BANS

WHAT CAN INDIVIDUALS DO?

ADVOCATE FOR ONE'S CAREER

UTILIZE POLITICAL POWER

USE EDUCATION AS A PATHWAY FOR SUCCESS

EMBRACE DELAYED GRATIFICATION AND RISK TO GENERATE WEALTH

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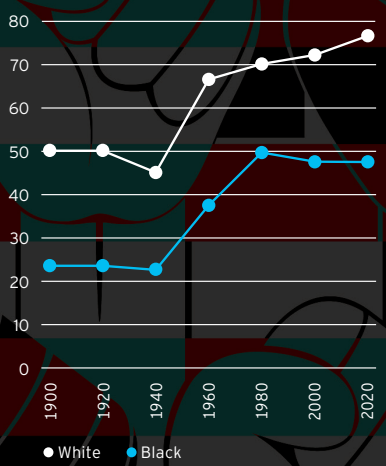
ATTITUDES AND POLICIES THAT UNDERMINE EQUAL ACCESS ARE AT THE ROOT OF THE RACIAL GAPS PLAGUING U.S. SOCIETY

Housing

The gap between white and Black home ownership remains wide with discriminatory practices still an issue.

U.S. Home Ownership Rate by Race (%)



Source: Census Bureau, FRED

Policing

Blacks are 5x as likely to be incarcerated vs. whites and make up an oversized percent of the U.S. prison population – 33% vs. 12% of total U.S. population.

Source: NAACP

Voting

Over past 10 years, 25 of 50 States have implemented voting restrictions which disproportionately affect Black voters.

Of the 3.1 million American adults estimated as banned from voting, 2.2 million are Black Americans.

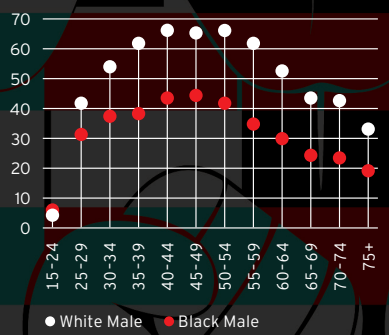
Source: The Sentencing Project

Income

Peak income occurs sooner and is lower for Black males (age 45-49, $43,859) vs. white males (age 50-54, $66,250).

White families have 8x as much wealth as Black families and lower debt-to-asset ratios (~10% vs. ~30%).

Median Income by Race and Age 2018 (US$ 000's)



Source: Census Bureau, Federal Reserve

WHAT CAN CORPORATES DO?

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The Economic Costs of U.S. Racial Inequality

Racial equity has real economic benefits, while discrimination has real economic costs

A useful definition of racial equity hails from the San Francisco Fed: "racial equity means just and fair inclusion in an economy in which all can participate, prosper, and reach their full potential. We will know we have achieved racial equity when race no longer predicts life outcomes."[1]

A plethora of data, studies, and societal ills indicate the U.S. has yet to achieve the point of racial equity, given the prevalence of major gaps in economic opportunity, education, income, housing, and wealth that run along racial fault lines.

The COVID-19 pandemic and the deaths of several Black people while in police custody in rapid succession have laid bare the United States' longstanding problem of discrimination against minority groups, especially against Black people. Moreover, it has laid bare how inequality has produced real economic costs and social losses.

These costs are most evident in racial gaps: wide numerical differences in key social and economic indicators between Black and white Americans. These gaps are apparent in unemployment, net worth, debt levels, wages, peak income, financing for businesses, spending on education, and rates of imprisonment and sentencing levels. The gaps in many cases remain wide 60 years after the Civil Rights Movement. In some cases, including in homeownership rates and college degree attainment, the gaps are wider now than in the 1950s and 1960s.

This report (1) identifies the underlying causes of the racial and economic gaps exacerbated by the COVID-19 pandemic; (2) discusses the value of closing gaps; and (3) outlines how governments, corporations, and individuals can work together to eliminate gaps for good.

We discover that closing racial gaps is a pareto improvement to both the U.S. economy and society. If racial gaps for Blacks had been closed 20 years ago, U.S. GDP could have benefitted by an estimated $16 trillion. If we close gaps today, the equivalent add to the U.S. economy over the next five years could be $5 trillion of additional GDP, or an average add of 0.35 percentage points to U.S. GDP growth per year and 0.09 percentage points to global GDP growth per year.

- Closing the Black racial wage gap 20 years ago might have provided an additional $2.7 trillion in income available for consumption and investment.
- Improving access to housing credit might have added an additional 770,000 Black homeowners over the last 20 years, with combined sales and expenditures adding another $218 billion to GDP over that time.
- Facilitating increased access to higher education (college, graduate, and vocational schools) for Black students might have bolstered lifetime incomes that in aggregate sums to $90 to $113 billion.
- Providing fair and equitable lending to Black entrepreneurs might have resulted in the creation of an additional $13 trillion in business revenue over the last 20 years. This could have been used for investments in labor, technology, capital equipment, and structures and 6.1 million jobs might have been created per year.

[1] "Racial Equity Primer," Federal Reserve Bank of San Francisco, June 12, 2020.

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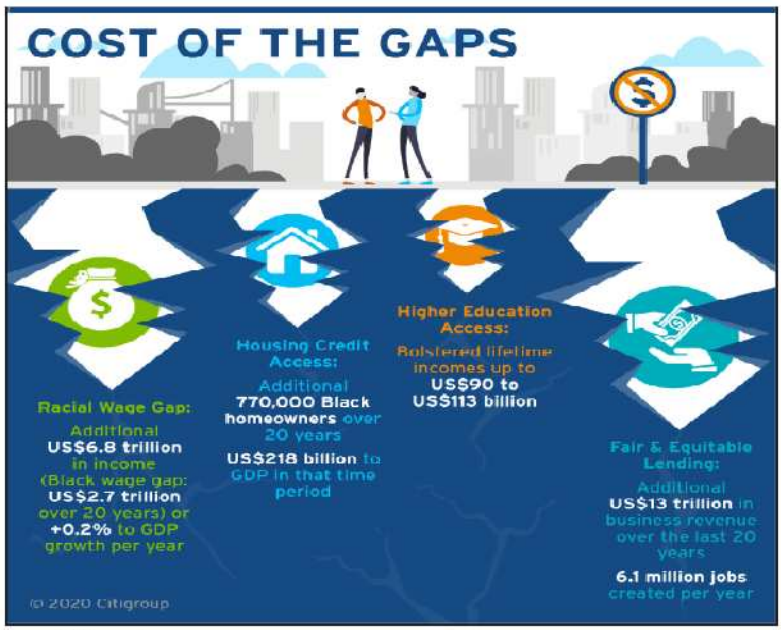
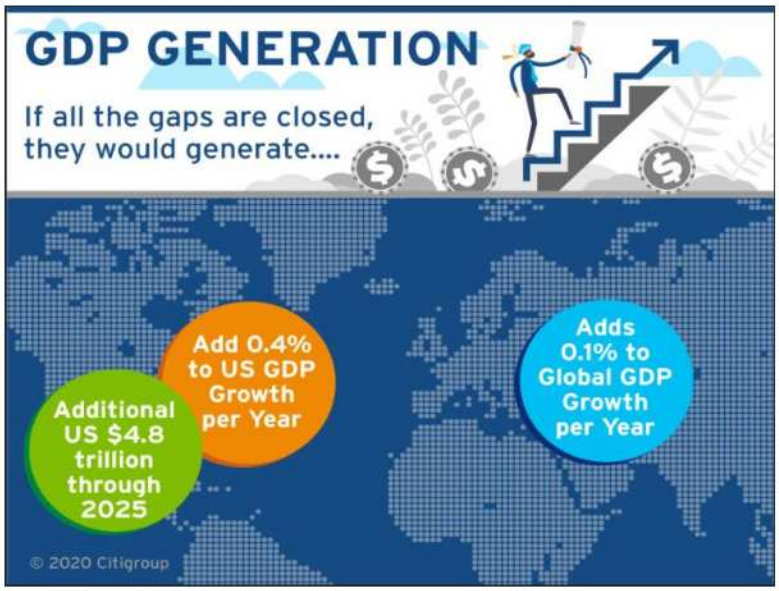
- Closing the wage, housing, education, and business investment racial gaps can help narrow the wealth gap, which is significant for facilitating homeownership, business, and job creation, plus establishing a pipeline for intergenerational wealth accumulation.

Figure 1. Racial Gaps Cause Economic Harm



Source: Citi Research

Figure 2. The Economic Case for Closing Racial Gaps Is Highly Compelling



Source: Citi Research

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COVID-19 Shines Light on Racial Disparities

Figure 3. COVID-19 Uncovers Long-Standing Biases and Inequities in the U.S.

Source: Shutterstock

Dual health and economic crises resulting from the coronavirus lays bare long simmering racial tensions and inequities in the U.S.

The dual health and economic crises resulting from the coronavirus lays bare long simmering racial tensions and inequities that have plagued the U.S for centuries. The overlay of deep job cuts, threat of eviction, hunger, business closures among minority groups, and uneven fiscal supports, with high rates of infections and deaths, plus repeated incidences of police brutality involving Black Americans has proven too great to ignore. The result not only has precipitated protests in the streets, but also a general reassessment of the very soul of the nation. Specifically, how past and current biases have embedded themselves into the economy and society, and what should be done to rectify them.

Data reveal the burden from the pandemic has fallen disproportionately on Black Americans and tangible and emotional hardships from the virus spilled into national outrage after several high profile deaths of Blacks during altercations with police

While all racial and ethnic groups are suffering from the fall-out of the pandemic, data reveal the burden is falling more heavily on certain demographics. Black persons, in particular, appear to have suffered greater job losses amid government-ordered shutdowns; found themselves in industries that are essential but low paying; possessed more pre-existing factors leading to COVID-19 mortality; owned businesses that closed permanently or were unable to access Paycheck Protection Program (PPP) loans; and reported elevated rates of food, income, and housing insecurity amid the crisis. The tangible and emotional hardships of the virus impact spilled over into national outrage about the deaths of several Black people during altercations with the police. Most notably, the video-taped death of George Floyd.

The combination of the pandemic and deadly community policing tactics leads us to revisit the problem of racial gaps in the U.S., and the case for closing them. First we review the disproportionate impact of the virus on minority groups, and Black persons in particular, plus the linkages to preexisting racial gaps.

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Health Divide

In NYC, ethnic minorities were more likely to both contract COVID-19 and die from COVID-19

Ethnic minorities were more likely to contract and perish from COVID-19. Death rates tallied by the U.S. Center for Disease Control (CDC) for New York City — a particularly hard hit region — showed mortality figures for Black/African American persons (92.3 deaths per 100,000 population) and Hispanic/Latino persons (74.3) were substantially higher than that of white (45.2) or Asian (34.5) persons. A Federal Reserve Bank of New York study reveals there is a high significance of death from COVID-19 and the existence of various conditions, including belonging to a low income group, living in a densely populated urban area, and/or being a member of a major minority group (Figure 4).[2] Indeed, an overlay of COVID-19 deaths and U.S. counties having large minority populations indicates a higher prevalence of perishing from COVID-19 if one belongs to a racial minority: Black, Hispanic, and Native American plus select Asian and Pacific Islander population groups (Figure 5).

Figure 4. Being a Minority with Low Income, and/or Residing in Densely Populated Urban Areas Raised the Likelihood of Death from COVID-19

Regressions of Cases and Deaths on Demographics

	Cases/ 1,000 population (1)	Cases/ 1,000 population (2)	Cases/ 1,000 population (3)	Cases/ 1,000 population (4)
Low Income	.5843**	1.183***	.8616***	.1192***
	(2.46)	(5.18)	(3.37)	(9.09)
Majority Minority	3.838***	2.887***	2.453***	.0951***
	(14.91)	(11.58)	(8.34)	(6.64)
In Metropolitan Statistical Area	1.837***	-1.381***	-1.465***	-.1096***
	(6.68)	(-4.51)	(-4.77)	(-6.23)
Log Population Density		1.41***	1.404***	.1177***
		(20.35)	(20.26)	(29.57)
Low Income x Majority			1.335***	
			(2.77)	
Observations	3216	3136	3135	3136

Note: t statistics in parenthesis; Significance: * 10% level, ** 5% level, *** 1% level
Source: Federal Reserve Bank of NY

Federal data corroborate the racial disparity of COVID-19 death

Federal data corroborate the racial disparity of COVID-19 deaths. The Centers for Disease Control (CDC) stated that contributing factors included living conditions (densely populated, residential segregation, multi-generational households, incarceration), work circumstances (critical workers, lack of paid sick leave), and underlying health conditions (lack of access to health insurance, serious underlying medical conditions, stigma, and systemic inequalities). Regarding health conditions, the SHADAC analysis of the American Community Survey (ACS) Public Use Microdata Sample (PUMS) files reveals that although the number of uninsured persons has fallen since passage of the Affordable Care Act in 2012, ethnic minorities are still less likely to have health insurance (Figure 7).

[2] Chakrabarti, R. and William Nober. "Distribution of COVID-19 Incidence by Geography, Race, and Income." Liberty Street Economics, Federal Reserve Bank of New York, June 15, 2020.

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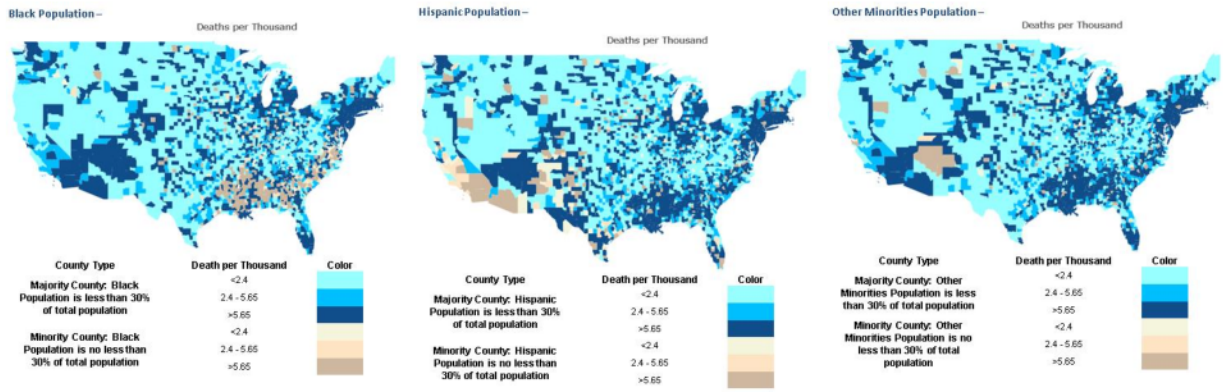
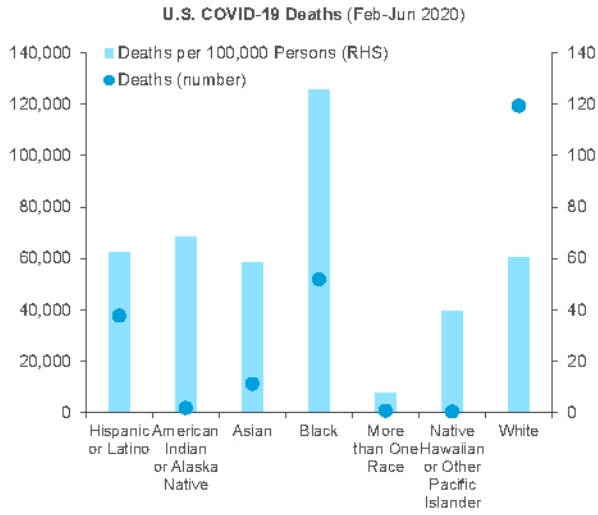
Figure 5. U.S. Counties with Large Number of COVID-19 Deaths Tend to Overlap with Counties Having Large Minority Populations



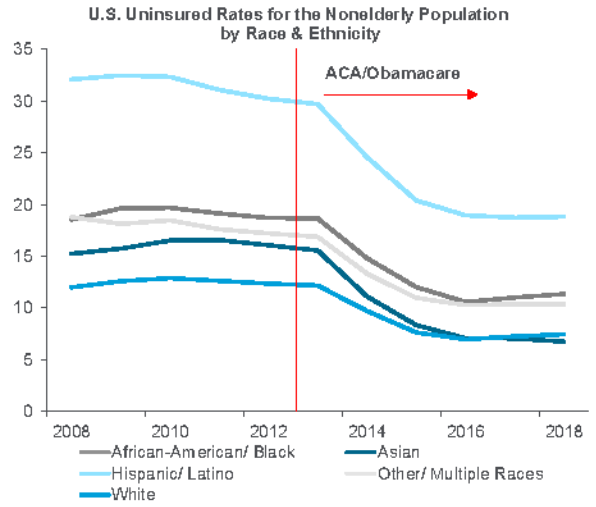
Source: CDC, Census Bureau, Citi Research

Figure 6. Persons Belonging to Minority Groups, Especially Black Persons, Suffered More Deaths Per Capita than White Persons



Source: CDC, Census Bureau and Citi Research

Figure 7. Insurance Coverage has Improved Since Obamacare Passage, But Minorities Are Still More Likely to be Uninsured



Source: SHADAC analysis of the American Community Survey, Citi Research

Wealth and income gaps between Black families and Hispanic, Asian, and white families have remained wide for last 40 years

The eroded sentiment among minorities amid the pandemic, and Black Americans in particular, reflects not only policing and health care inequities, but also long simmering economic disparities. Both the wealth and income gaps between Black and Hispanic families and white and Asian families have remained wide over the last 40 years for which the U.S. Census Bureau has collected data. The real median income (Figure 8) and wealth (Figure 9) disparities continue to be stark for Black Americans. These gaps have been exacerbated by business shutdowns amid the coronavirus pandemic. In the latest Bureau of Labor Statistics (BLS) employment report, the civilian unemployment rate in the U.S. continues to edge lower. Nonetheless, jobless rates are falling for white persons faster than for other minorities, and the unemployment rate for Black workers at 13.0 percent is the highest (Figure 10). Moreover, the NBER reported there was greater business destruction over the February-April 2020 span for Black-owned firms, in terms of percentage decline, than for businesses owned by other ethnicities (Figure 11).

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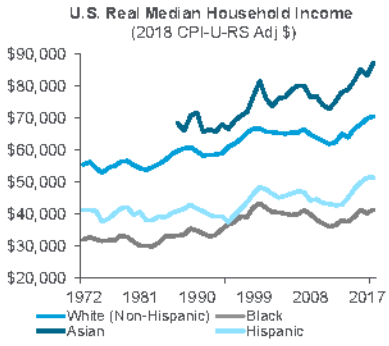
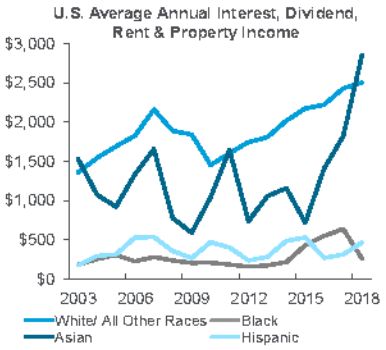
Figure 8. Income Gaps for Black and Hispanic People Remain Wide



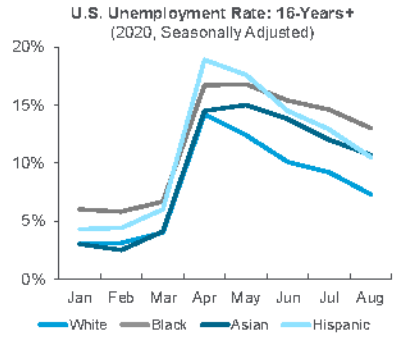
Source: Census Bureau, Citi Research

Figure 9. Wealth Gaps for Black And Hispanic People Have Not Improved



Source: Census Bureau, Citi Research

Figure 10. Jobless Rate Remains Most Elevated for Black People In August 2020



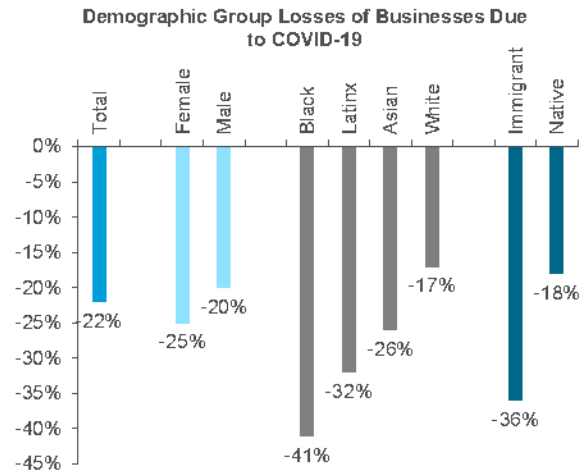
Source: Census Bureau, Citi Research

Insecurity

Black households have had more difficulty managing the basics of daily living amid the COVID-19 pandemic

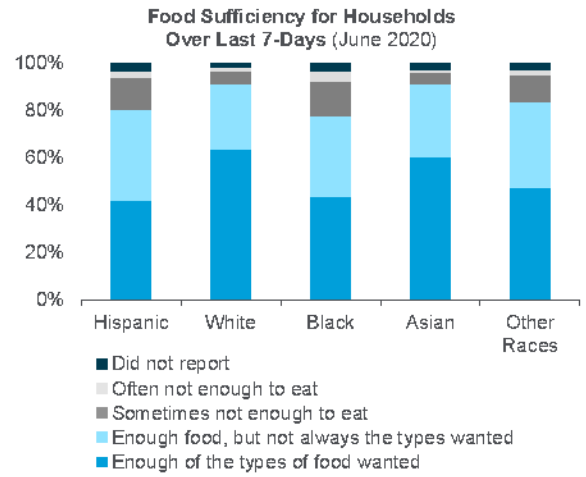
Managing the basics of daily living have been more difficult for Black households amid the COVID-19 pandemic. Food sufficiency has been a greater challenge for select households of color, and Black households in particular, during the COVID-19 pandemic. The Census Bureau's *Household Pulse Survey* revealed that in June 2020, it was more likely the case for Black, Hispanic, and Other Racial category households to have inadequate access to food during the pandemic than was the case for white and Asian households. Black households were more likely to say that they sometimes or often did not have enough to eat (Figure 12). Meanwhile, it was more likely the case that Black, households fell behind on rent or mortgage payments amid the coronavirus pandemic than white households (Figure 13). Black households were also less confident they could make future housing payments than were white households.

Figure 11. Black-Owned Businesses Suffered Brunt of COVID-19 Disruptions



Source: NBER, Citi Research

Figure 12. Black Households Had Significant Challenges Related to Lack of Adequate Access to Food During the Coronavirus Pandemic



Source: Census Bureau *Household Pulse Survey*, Citi Research

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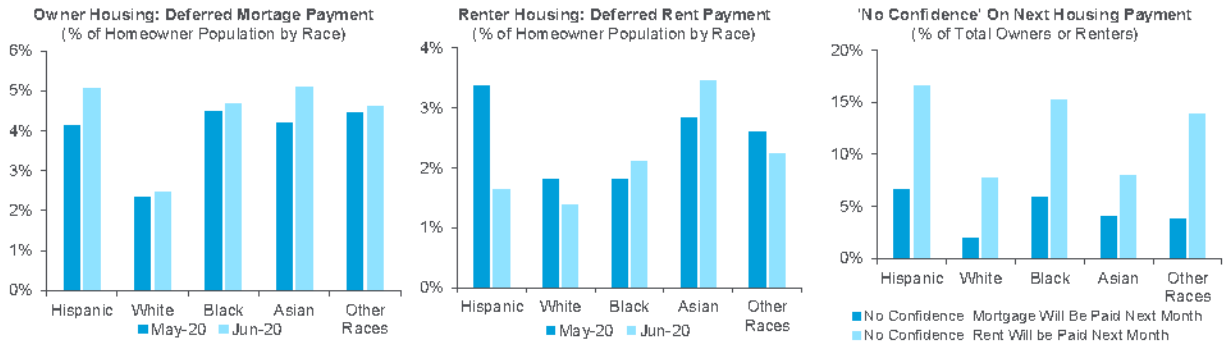
Figure 13. Black Households Are More Likely to Have Deferred Housing Payments and Have "No Confidence" that Future Payments Will be Met



Source: Census Bureau *Household Pulse Survey* and Citi Research

Essential vs. Nonessential

The unequal nature of job losses, which heavily affected low-skilled and discretionary sectors that largely employ minorities, was directly linked to food and housing insecurity levels

Food and housing insecurity during the pandemic were directly linked to the unequal nature of job losses that heavily affected low-skilled and discretionary sectors employing large shares of minorities. The U.S. Private Sector Job Quality Index ® (JQI) listed jobs in the food and beverage services, retail, travel and attractions, and the auto sector among the most vulnerable amid COVID-19 disruptions (Figure 14). Many of these jobs rank low in the quality index. The JQI interprets "job quality" as meaning the weekly dollar income a job generates for an employee. Hence, it is also likely many of these jobs have low skills requirements given the relatively low quality of pay. U.S. job cuts among these sectors were disproportionately skewed toward women and minorities due to labor market segmentation into areas that were discretionary in nature and/or impossible to execute in a work-from-home scheme. Indeed, a staggering 14 million white workers were laid off, but this is compared to 8 million minorities, which comprise 23 percent of the working age population. In the second quarter of 2020, Black persons working in coronavirus disruption-sensitive sectors experienced an employment loss of 2.7 million. However, as a share of the number of employed Black persons one year prior, the loss was 14 percent compared to 12 percent for white persons (Figure 15). For Hispanic and Asian people the loss was 15 percent, each.

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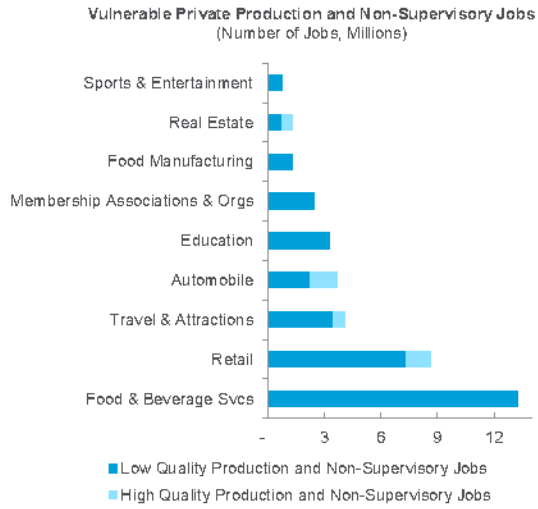
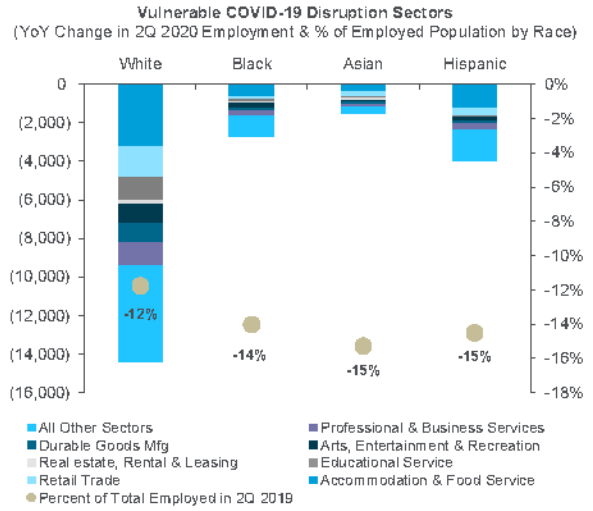
Figure 14. Low-Pay Jobs Also Most Vulnerable to COVID-19 Disruption



Source: U.S. Private Sector Job Quality Index® (JQI), and Citi Research

Figure 15. Minority Groups Slightly Harder Hit by Pandemic Layoffs



Source: Bureau of Labor Statistics and Citi Research estimates

Only 20% of Black workers were able to work from home during the pandemic and Blacks tended to cluster in essential jobs with high exposure to infection

For Black persons who maintained their jobs, the split between essential and non-essential work highlighted that the most hazardous jobs were also among those with the lowest pay. According to the U.S. Bureau of Labor Statistics (BLS), only 30 percent of U.S. workers are able to telework (work-from-home or WFH). Hispanic and Black workers were the least able to WFH (16 percent and 20 percent, respectively). (Figure 16). The BLS also reported laborers who are below the 50th percentile in terms of wage level were the least likely to WFH: <25th percentile (9 percent) and 25th to 50th percentile (20 percent) (Figure 17). Moreover, many of the jobs deemed essential by governments were the least amenable to WFH (Figure 18). Of essential jobs with high exposure to infection, many of them are low wage jobs in which Black workers are clustered (Figure 19). Healthcare, food service, and child care stand out as low-wage, essential occupations employing large numbers of Black employees.

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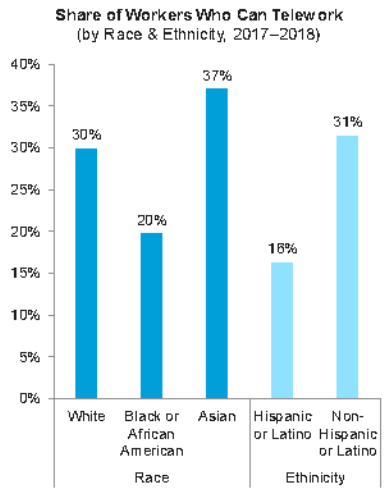
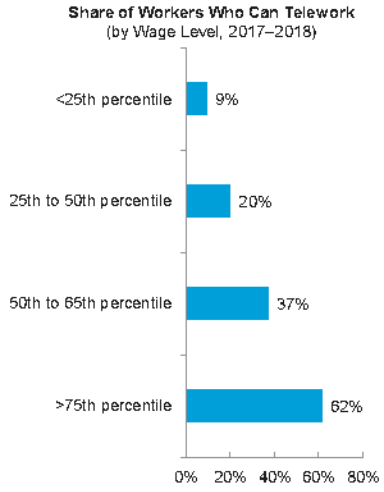
Figure 16. Only 20% of Black Workers Can Work from Home



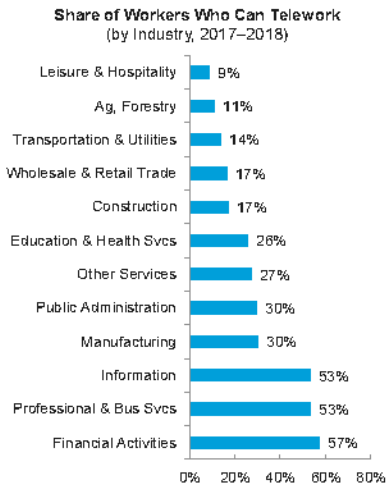
Source: Bureau of Labor Statistics, Citi Research

Figure 17. Low Income Workers Less Likely to Work from Home



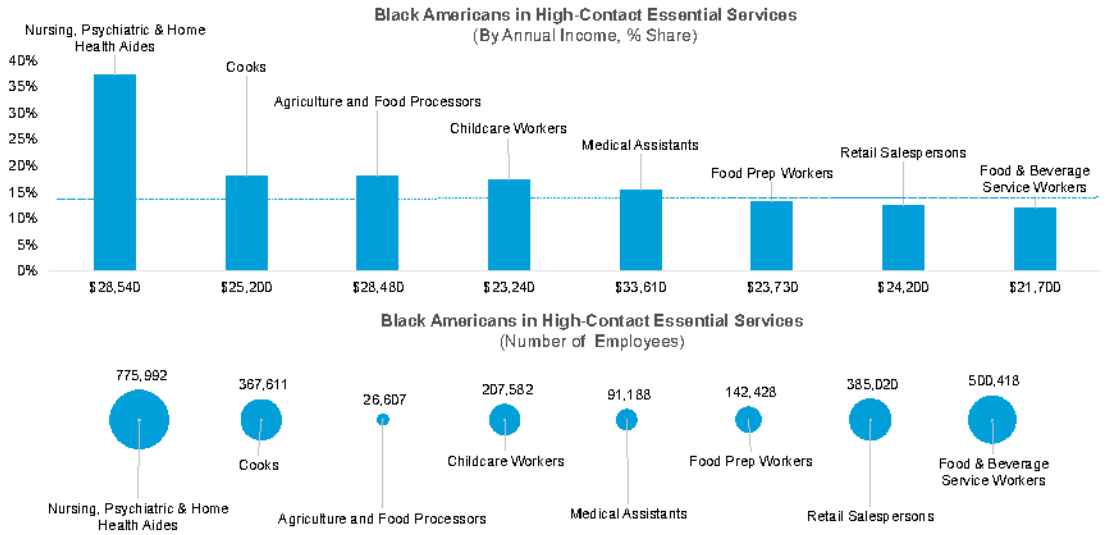
Source: Bureau of Labor Statistics, Citi Research

Figure 18. Low Wage Industries Less Amenable to Work from Home



Source: Bureau of Labor Statistics, Citi Research

Figure 19. Black Workers Are Overrepresented In Many of the Lowest Wage Jobs Considered High-Contact, Essential Services



Note: Dotted line denotes Black workers as a percent of the civilian non-institutional population 20 and over or 12.6 percent.
Source: McKinsey Global Institute analysis, U.S. Bureau of Labor Statistics, Citi Research estimates

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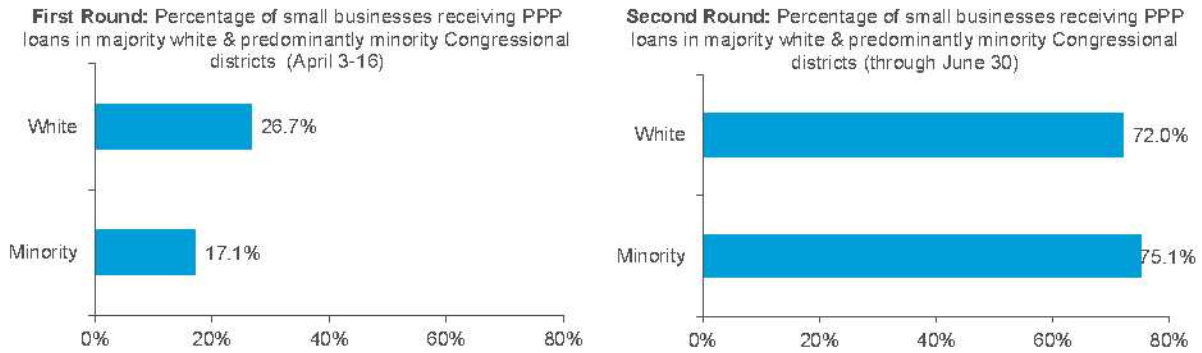
Uneven Relief

From the perspective of recovery, minority-owned firms received Federal government supports later

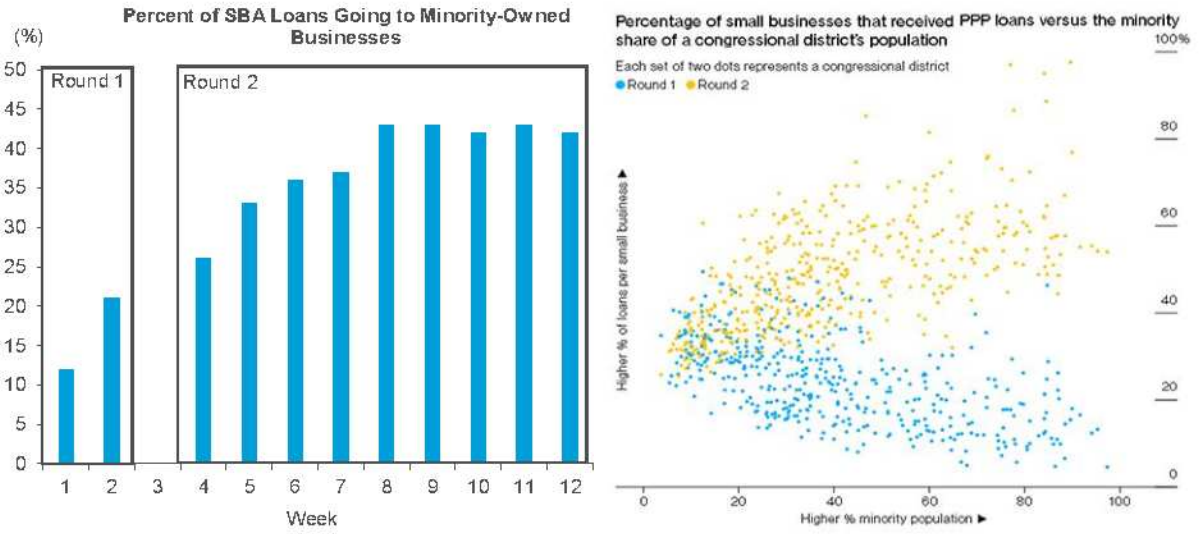
The CARES Act of 2020 legislated the Paycheck Protection Program (PPP), which provided loans to businesses suffering coronavirus disruptions. The potentially forgivable loans were designed to encourage firms to invest and retain workers until domestic demand improved. A Bloomberg News analysis of Small Businesses Association (SBA) data revealed that in the initial wave of the program, minority-owned firms received fewer loans as a share of the total number of minority-owned businesses (17 percent) than did white-owned firms (27 percent). The percentages improved and largely evened out in the second tranche of PPP loans at 75 and 72 percent, respectively (Figure 20). Nonetheless, minority firms found themselves shut-out of the initial rounds of relief and struggled to receive funding from large financial institutions at the outset of the pandemic disruptions, as the availability of community banks expedited lending (Figure 21).

Figure 20. Minority-Owned Firms Received COVID-19 Relief Later than White-Owned Firms



Source: *Bloomberg News*

Figure 21. Minority-Owned Firms Received COVID-19 Relief Later



Source: *Bloomberg News*

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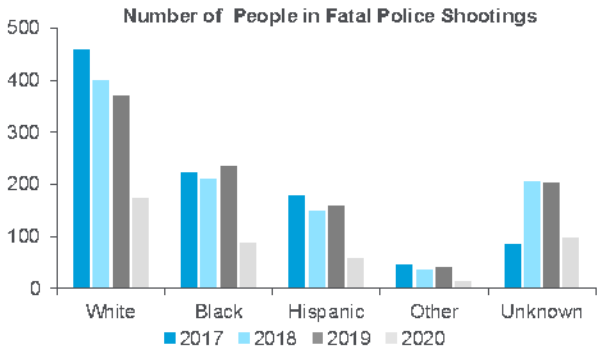
Simmering Tensions

The U.S. has been gripped by protests fueled by a conflagration of inequality, racism, and police brutality

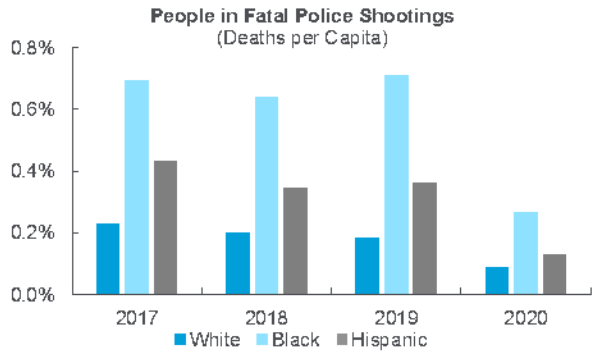
In addition to the disruption from COVID-19, the U.S. has also been gripped by protests fueled by a conflagration of inequality, racism, and police brutality. The civil unrest comes against a backdrop of disproportionately higher numbers of deaths for minorities, especially Black persons from COVID-19, and elevated unemployment figures for Black Americans amid the pandemic-induced U.S. recession. Roughly 1,000 people per year die during altercations with the police (Figure 22). Nearly half of them are racial minorities, and Black persons have a higher share of fatalities per capita (Figure 23). A number of these deaths have come on account of mishandling by police forces, which have been linked at times to long-standing social and racial issues. In general, the U.S. has lost ground relative to other advanced economies, and even the world, in terms of discrimination and violence against minority groups (Figure 24).

Figure 22. Roughly 1,000 People/Yr Die In Altercations with the Police



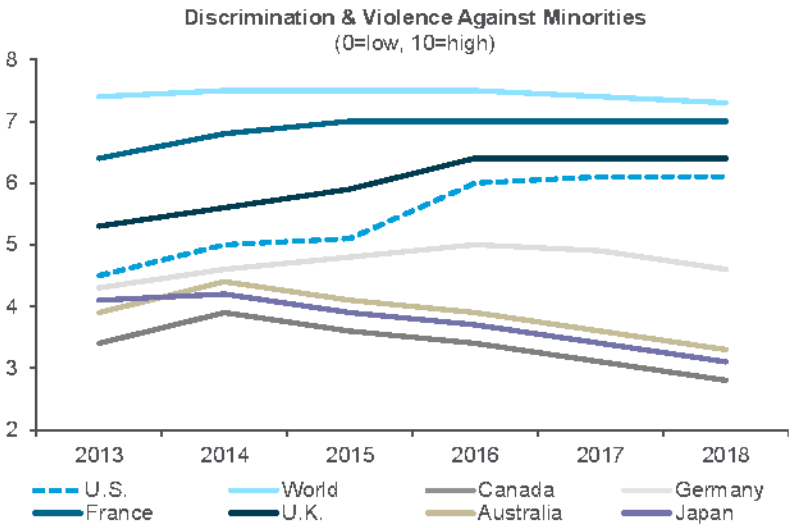
Source: Statista.com, Citi Research

Figure 23. Police-Related Deaths Per Capita Is Highest for Black People



Source: Statista.com, Citi Research

Figure 24. The U.S. Has Lost Ground Relative to Other Advanced Economies and the World Regarding Discrimination and Violence Against Minority Groups



Source: The Social Progress Imperative, Citi Research

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Why Gaps Exist: Racism and Inequality Are Little Improved

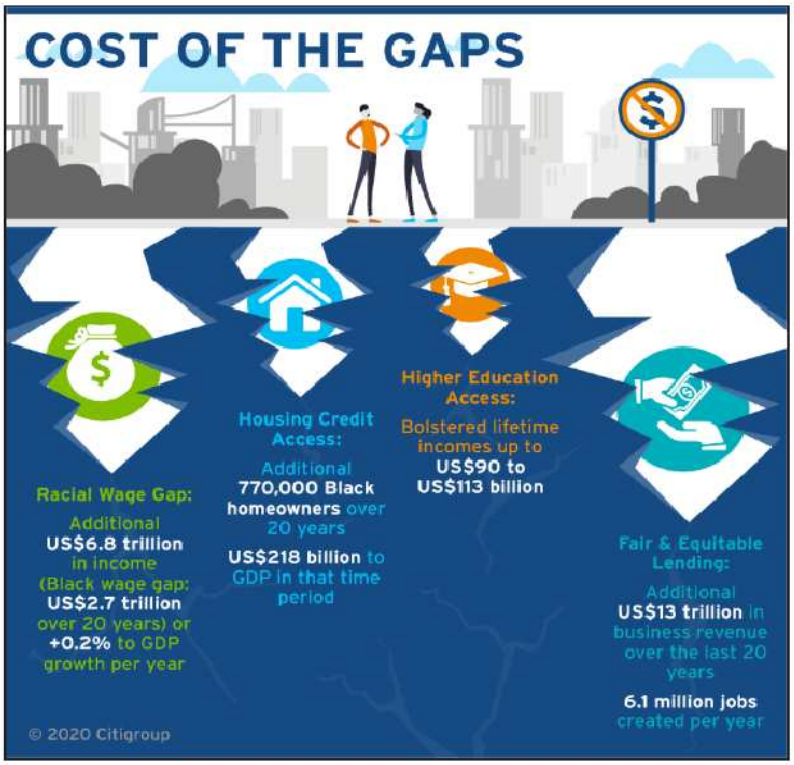
Defining systemic and persistent racism and providing evidence that has led to or exacerbated racial gaps is the first step towards eliminating inequality

Closing racial gaps in the U.S. 20 years ago could have generated $16 trillion in GDP

The 400 years of enslavement of Black populations in the Americas has residual effects that persist to this day despite tomes of legislation providing equal access to various aspects of American life under the law. Attitudes and policies undermining equal access are at the root of the racial gaps plaguing U.S. society.

Moreover, societal inequities have manifested themselves into economic costs, which have harmed individuals, families, communities, and ultimately the growth and well-being of the U.S. economy. If the racial gaps in wages in the U.S. had been closed two decades ago, there might have been an additional 0.2 percentage point to real GDP growth per year. Adequate access to housing credit might have produced 770,000 new Black homeowners. More Black students with university and advanced degrees might have generated an additional $90 to $113 billion in income that could have contributed to consumption. More than 6 million jobs per year might have been added and $13 trillion in cumulative revenue gained if Black-owned firms had equitable access to credit. The global implications are also apparent given the U.S. contributes a one-third share of growth to the world economy.

Figure 25. What the United States Could Have Gained by Closing Racial Gaps 20 Years Ago



Source: Citi Research

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Bias

The results of policies creating and perpetuating bias produce inequality

The persistence of racially-biased attitudes, coupled with the implementation and maintenance of policies enshrining these attitudes, constitute what is often termed as systemic racism. Biases may be conscious or unconscious. Nonetheless, the result of policies creating and perpetuating bias produce inequality. Even when the biases fade, the policies may linger, rendering the inequality multi-generational as it becomes interwoven with the way things are done: in broader society, government, corporations, and/or institutions.

The continuation of racial bias and systemically-entrenched inequality born from past and present biases are evident across multiple facets of U.S. society. The Civil Rights Movement of the 1950s launched 20 years of major legislative achievements for Black persons in America that also spurred other movements for equality. However, 70 years later, improvements appear to be few and far between for many Black Americans. The U.S. is light-years more equal than it was in the 1950s, but systems perpetuating inequalities among different racial groups either still remain or are being reinvented, either consciously or unconsciously.

Bias plays a central role in economic and social outcomes for Black Americans

Bias, whether conscious or unconscious, plays a central role in economic and social outcomes for Black Americans. Building upon the bias seen in businesses financing, there are numerous cases of bias within the hiring spectrum and moreover from a consumption prospective. As discussed by Greenwald and Krieger, 78 percent of those who took the Harvard Implicit Association Test (IAT) displayed implicit bias, with 85 percent of whites showing bias against Blacks. The overarching message in the study was that most people possess bias, and due to its infinitely engrained status, people are generally unware of their own bias despite its profound impact upon behavior and attitude.[3] One study, which sent out resumes with traditionally white-sounding names like Emily and Greg and also resumes with Black-sounding names like Lakisha and Jamal, found a white applicant was 49 percent more likely than their Black counterpart to receive a call back in Chicago and 50 percent more likely in Boston.[4] This kind of systematic discrimination is inherently exclusionary of Black people from the workforce, demonstrating the significant impact of bias, be it unconscious or not. A 2015 experiment involving baseball card auctions on eBay again highlighted the significant difference racial bias can have on economic outcomes. Baseball cards held by dark-skinned/African American hands sold for approximately 20 percent less than cards held by light-skinned/Caucasian hands, despite the cards held by the African American hand being more valuable on average.[5] Without addressing bias directly, the challenge of equality will remain profound.

[3] Greenwald, A. and Linda Krieger. 2006. "Implicit Bias: Scientific Foundations". California Law Review. 94. 945. 10.2307/20439056.
[4] Bertrand, M. and Sendhil Mullainathan. 2004. "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." American Economic Review, Vol 94 (4): 991-1013, https://pubs.aeaweb.org/doi/pdfplus/10.1257/0002828042002561.
[5] Ayres, et. al. 2015. "Race Effects on EBay." The RAND Journal of Economics, Vol. 46 (4), pp. 891–917., www.jstor.org/stable/43895621.

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The U.S. Civil Rights Movement: A Synopsis

The Civil Rights Movement that began in the late 1950s won African Americans basic rights long denied to them, inspired other discriminated groups to fight for their own rights, and had a deep effect on American society.

After the Civil War, the 13th, 14th, and 15th amendments to the Constitution were supposed to guarantee equal rights for African Americans. But in the South, segregation of the races, the denial of opportunities to African Americans, and their disenfranchisement continued in a system known as "Jim Crow laws." In 1896, in a controversial decision, the United States Supreme Court, in the case *Plessy v. Ferguson*, upheld the "separate, but equal" facilities for the races.

During World War II, some progress on equality was made as President Roosevelt outlawed discrimination in the defense industry. Moreover, as the country fought for freedom around the world, many African-Americans began to wonder why they did not enjoy those freedoms at home. In 1954, a series of landmark cases testing segregation pressed by the National Association for the Advancement of Colored People (NAACP) culminated in the Supreme Court's ruling in the *Brown v. Board of Education* case, which unanimously outlawed segregation of public schools.

On December 1, 1955, the modern civil rights movement began when Rosa Parks, an African-American woman, was arrested in Montgomery, Alabama for refusing to move to the back of the bus. A new minister in town, Martin Luther King, Jr., organized a community bus boycott, which eventually led to the desegregation of the bus line and launched protests across the South. In 1960, spontaneous sit-ins by students began at lunch counters throughout the South, and in 1961, "Freedom Riders" boarded inter-state buses to test and break down segregated accommodations. These protests were peaceful, but they were met with violent, and often, brutal force —televised images helped win support from sympathetic whites in the North. In 1963, TV viewers saw hundreds of thousands of African Americans and whites march on Washington, DC to end racial discrimination. It was there that Martin Luther King, Jr. delivered his famous "I Have a Dream" speech.

After the assassination of President Kennedy and the landslide election of Lyndon Johnson, Congress passed the landmark Civil Rights Act of 1964 and the Voting Rights Act of 1965, which outlawed racial discrimination in public accommodations and schools and removed obstacles to voting. As part of the Civil Rights Act, the Federal government would withhold funds from any state that did not desegregate, and as Health, Education & Welfare Secretary, John Gardner was the man holding the purse strings. In 1967, he threatened to cut off $95.8 million in Federal welfare funds to the state of Alabama unless it complied with desegregation guidelines. As Gardner remembers, "Civil rights was real hardball."

The passage of the Voting Rights Act, in particular, prompted a massive effort to register African Americans throughout the South to vote. Again, this was often met with violent resistance. After 1966, the Civil Rights Movement began to fracture between those who favored non-violent means to achieve integration and younger, more radical leaders who wanted to fight for "Black power." This split alienated some white allies, a process that was accelerated by a wave of rioting in Black neighborhoods in Northern cities throughout 1965 and 1967.

After Dr. King was assassinated 1968 and more rioting ensued, the Civil Rights Movement as a cohesive effort disintegrated. Yet the push for civil rights continued, with African Americans making gains economically, politically, and socially. Moreover, other discriminated groups were inspired by the Civil Rights Movement and borrowed its tactics. Over the 1960s and 1970s, gays and lesbians, women, Native Americans, and people with disabilities pushed for their own inclusion in American society. Source: PBS.org.

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Housing & Education

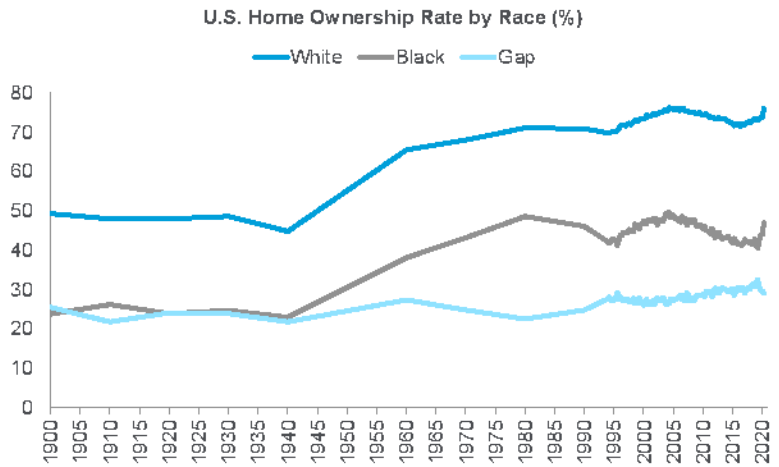
Intricate linkages between racial bias in housing and education dating back over a century are major factors in economic gaps that persist today.

Housing Segregation

Housing discrimination from 1940 through the 1960s prevented Black Americans from owning homes and subsequently building intergenerational wealth

Past discriminatory housing practices have contributed to economic inequality for Black Americans in the present. According to the Economic Policy Institute (EPI), systemic and legalized housing discrimination over the 1940 to 1960 period prevented Black families from achieving homeownership, a critical staple for building intergenerational wealth.[6] Moreover, the disparity in homeownership was perpetuated by continued discrimination in housing, through government, private sector, individual, and even technological choices and actions, keeping the racial gap wide (Figure 26). As recently as 2019, a popular Internet platform was cited for discriminatory practices by its search engines according to the Fair Housing Act.[7]

Figure 26. The Gap Between Black and White Homeownership Rates Remains Wide



Source: Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas and Matthew Sobek. IPUMS USA: Version 10.0 [dataset]. Minneapolis, MN: IPUMS, 2020. https://doi.org/10.18128/D010.V10.0, Census Bureau, FRED, Citi Research.

New Deal policies predating WWII enshrined modern housing segregation and discrimination in the U.S.

In an effort to combat a housing shortage in the mid 1930s the Federal Housing Administration (FHA) refused to insure mortgages in and near Black neighborhoods, a practice known as redlining. The most desirable neighborhoods for mortgages were designated green, and the least, typically predominantly Black neighborhoods, were designated red.

[6] da Costa, P., "Housing discrimination underpins the staggering wealth gap between blacks and Whites," Economic Policy Institute, April 8, 2019.
[7] Aranda, C., "Fighting Housing Discrimination in 2019," Urban Institute, April 1, 2019.

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Prior to the Fair Housing Act in 1968, policies by the government as well as individual and private sector choices perpetuated housing segregation

One study revealed that between 1934 and 1968, 98 percent of home loans approved by the Federal government were given to white applicants.[8] The FHA also subsidized builders creating large tracts of housing in suburban areas as long as those projects excluded Black homebuyers. Meanwhile, minorities were directed to urban housing projects. These urban neighborhoods, where Black family housing was permitted, were often cut off from resources and subject to underinvestment.[9]

Individual and private sector choices also perpetuated housing segregation. Prior to the Fair Housing Act of 1968, residents of neighborhoods were allowed to create contracts called restrictive covenants to establish and maintain a particular racial makeup. Minorities, particularly Black persons, were prevented from moving into the suburbs or predominantly white sections of metropolitan areas either legally or through intimidation. Maps of Black neighborhoods were redlined and/or persons wishing to leave these neighborhoods for majority-white neighborhoods were threatened with violence.[10] Realtors were threatened with the loss of their licenses if they showed homes to Black families outside of prescribed areas. These activities not only upheld segregation, but also concentrated poverty and underdevelopment in geographic locations.

Housing discrimination became less overt after the Fair Housing Act including practices like gentrification, which decreased the affordability of homeownership for Blacks

Housing discrimination did not end with the Fair Housing Act. Tactics used to reinforce segregated neighborhood boundaries and majority-white suburbs became less overt. Real estate agents would show potential Black home purchasers houses in predominantly Black neighborhoods and decline to show many, if any, in other neighborhoods. Banks would continue to decline to provide financing for mortgages to Black homeowners, and insurance companies would refuse to insure mortgages assumed by Black owners. "Gentrification" in urban areas contributed to the decrease in affordability of housing for Black households. Realtors, renovators, and builders played a role as neighborhoods formerly populated by a certain racial or ethnic group were renamed, homes were upgraded to "luxury" status raising the price point, or upscale homes were built in low-income neighborhoods, inviting other such projects. These developments can lead to the displacement of current residents resulting in a change in demographics.[11] Governments can frustrate affordable housing availability via zoning laws limiting construction of multi-family units or expansion of neighborhood boundaries. Even positive community revitalization activities by governments, such as investment in transit infrastructure, can have the negative externality of inviting gentrification that affects Black communities.

Barriers to homeownership have resulted in Black families holding the least amount of housing wealth

Fifty years of barriers to Black home ownership means that Black families have missed out on the benefits of home price appreciation — a key ingredient to wealth accumulation. The Federal Reserve's Survey of Consumer Finances reported that as of 2016, Black homeowners continued to hold the least amount of housing wealth compared to other racial groups (Figure 27). The median amount of housing wealth for a Black family was $124,000, while the median amount for white families was $200,000, Hispanic households $158,000, and other households $240,000.

[8] Fulwood III, S., "The United States' History of Segregated Housing Continues to Limit Affordable Housing," Center for American Progress, December 15, 2016.
[9] Gross, T., "A 'Forgotten History' Of How The U.S. Government Segregated America," NPR, May 3, 2017.
[10] da Costa, P., "Housing discrimination underpins the staggering wealth gap between blacks and Whites," Economic Policy Institute, April 8, 2019.
[11] National Low Income Housing Coalition. "Gentrification and Neighborhood Revitalization: WHAT'S THE DIFFERENCE?".

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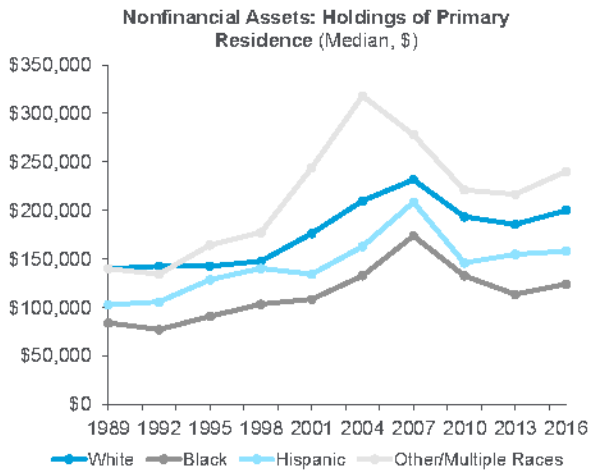
Black homeowners also don't see the same price appreciation in their homes as other homeowners

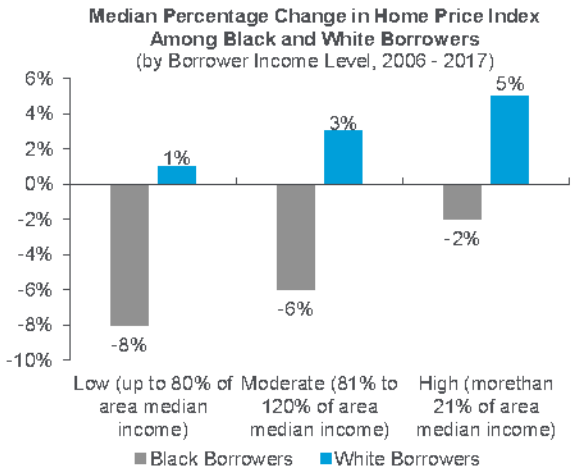
A Princeton University study notes that even among Black families owning homes, properties do not appreciate at the same rate as properties held by other ethnic groups.[12] This is a reflection of the location of Black-owned homes in areas with generally lower home values and/or bias in the way others view Black homeowners. Even though the Great Recession's housing crisis featured a wave of foreclosures, in the subsequent ten years, white homeowners were more likely to see some home price appreciation (+3 percent on average) versus Black families who didn't see a recovery (-6 percent on average) (Figure 28).[13] Indeed, past housing policies have concentrated Black families into higher-poverty neighborhoods with fewer of the amenities that help raise home values. Moreover, even higher-income Black families are still more likely to own homes in impoverished, predominately Black neighborhoods (Figure 29). Black families have also not benefited from tax incentives related to homeownership, including mortgage interest deductions (Figure 30).

Figure 27. Black Families Hold the Least Amount of Housing Wealth



Source: Federal Reserve Survey of Consumer Finances, Citi Research

Figure 28. Black Homeowners Experienced Home Price Depreciation



Source: Center for American Progress, Citi Research

[12] "The sordid history of housing discrimination in America," *Vox*, December 5, 2019.
[13] Zonta, M., "Racial Disparities in Home Appreciation," Center for American Progress, July 15, 2019.

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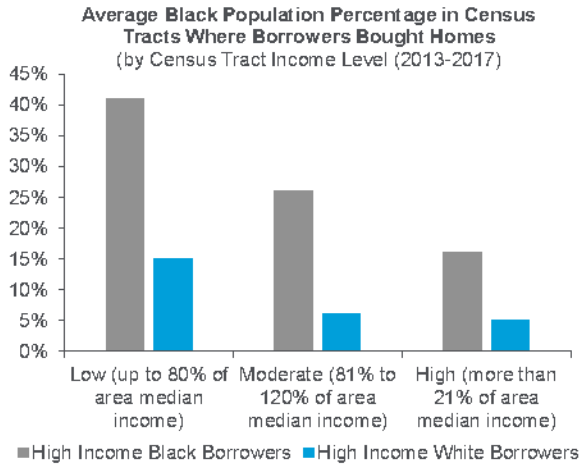
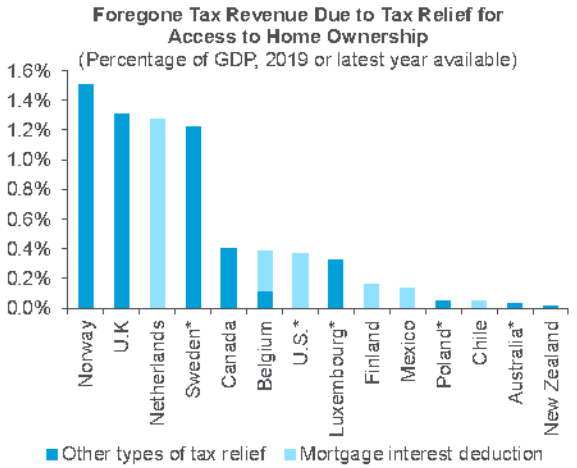
Figure 29. Wealthier Black Families Live In Black Neighborhoods



Source: Center for American Progress, Citi Research

Figure 30. Homeowners Benefit From Special Tax Treatment In the U.S.



Note: * indicates that spending is missing for one of the policy instruments and the reported amount is therefore a lower-bound estimate. Source, OECD, Citi Research

Separate & Unequal Education

Segregated housing has led to segregated schooling by virtue of how schools are generally funded in the U.S.

Segregated housing has facilitated and perpetuated unequal access to quality education for Black Americans, which is pivotal to erasing income and wealth gaps. *Brown vs. the Board of Education* was designed to end separate and categorically unequal public schooling. However, housing segregation and the method used to fund schools have helped to perpetuate separate and unequal access to education for many Black students (Figure 31). A significant degree of evidence suggests a strong correlation between high-value housing and the quality of schooling. Seventy-five percent of children attend public schools in the U.S., which means they are assigned to a school nearest to where they live. If neighborhoods are segregated, then so are the schools. Moreover, if schools are largely funded via property taxes, then schools in wealthy neighborhoods will invariably receive greater resources, while schools in poorer areas will receive fewer resources (Figure 32). State governments attempt to make up the differences, but often fall short.[14] Resources affect both the quality of the school and the education students are given. Hence, racially segregated schools in areas of concentrated poverty have fewer resources, higher teacher turnover, and a lower quality of education.[15] School choice in the form of vouchers and charter schools have in various instances improved the quality of education, but have been unable to address the underlying problem of segregation.

[14] Chingos, M. M. and Kristin Blagg. 2017. "Do Poor Kids Get Their Fair Share of School Funding?", Urban Institute.

[15] Bhargava, S., 2018. "The Interdependence of Housing and School Segregation," Open Society Foundations, Harvard University.

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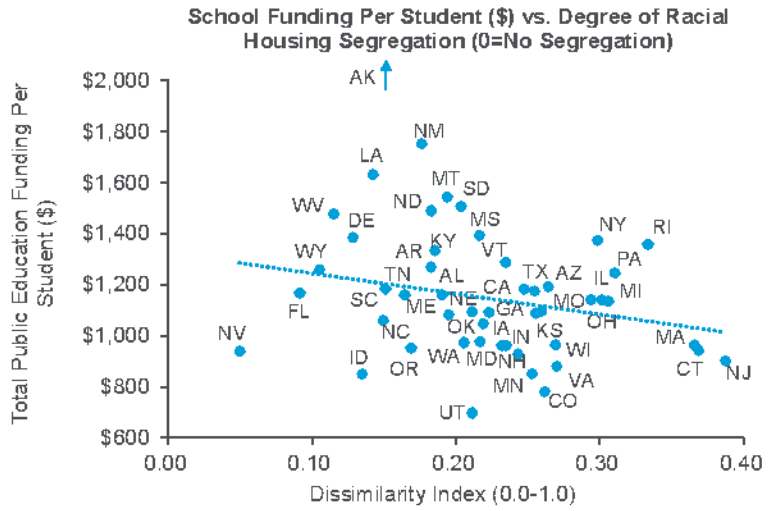
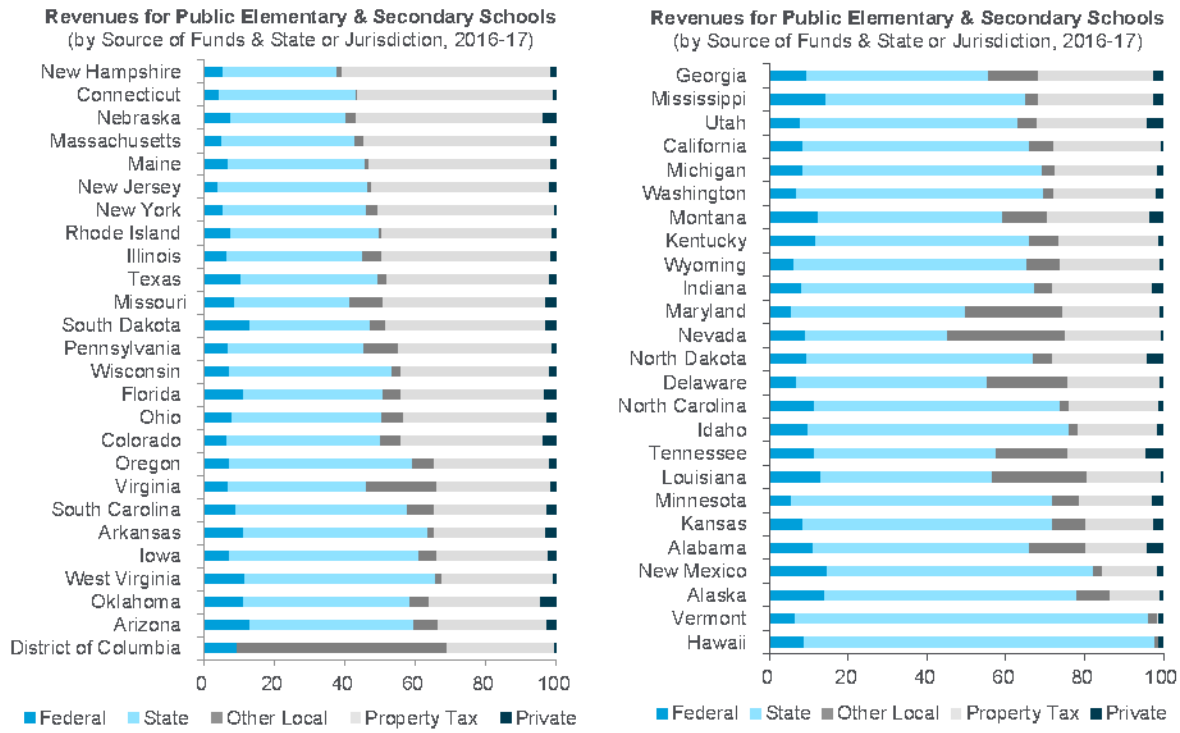
Figure 31. Greater Racial Housing Segregation Often Means Less Public School Funding



Source: Urban Institute, U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), "National Public Education Financial Survey," 2016-17

Figure 32. More Than One-Third of States Rely on Property Taxes as a Major Source of Public School Funding



Source: U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), "National Public Education Financial Survey," 2016-17

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Policing & Voting

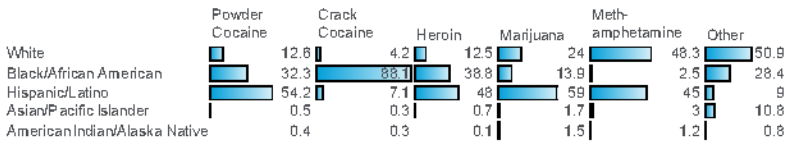
Policies relating to community policing and mass-incarceration have contributed to a deleterious cycle that has led to underrepresentation in government and the labor market.

Community Policing

The War on Drugs enhanced prosecution of Blacks through disparate application of punishment

Extraordinary levels of incarceration as a consequence of bias within the criminal justice system are evident from movements such as the War on Drugs. Following the Rockefeller drug laws of the 1970s and born from the Reagan era, the War on Drugs has become interchangeable with the enhanced prosecution of Blacks. The perceived injustice is only amplified when considering the disparate application of punishment when associated with crimes committed predominantly by Blacks, such as the abuse of crack-cocaine, with 88 percent of Federal crack defendants Black by 2012, in comparison to crimes committed predominantly by whites crime (powdered cocaine) (Figure 33).[16] Though the original 1986 100-1 ratio (500 grams of powdered cocaine and just 5 grams of crack cocaine incurred the same five-year sentence) has been reduced by the 2010 Fair Sentencing Act, a significant disparity remains with the current ratio standing at 18-1.[17] According to recent Bureau of Justice Statistics, there has been material improvement in incarceration rates in the U.S., with the rate for Black Americans declining the most; down 34 percent since 2006.[18] Nonetheless, the share relative to the entire Black population remains stubbornly high (Figure 34).

Figure 33. Drug Offences for Black Prisoners Are Overwhelmingly for Crack Cocaine



Source: Bureau of Justice Statistics, Citi Research

Unequal application of drug-related sentencing has led to mass-incarceration leading to a much higher likelihood of Black incarceration

Reductions in incarceration rates notwithstanding, Black Americans remain far more likely to be imprisoned than their other racial counterparts — almost twice as likely as Hispanic Americans and five times more likely than white Americans. As a result, the United States prison population is disproportionally Black dominated (33 percent) relative to their presence in the U.S. total population (12 percent). A similar trend can be seen with the Hispanic population (23 percent of prison population vs 16 percent of U.S. population), in contrast to white Americans who make up just 30 percent of the prison population despite being 63 percent of total U.S. population. Startlingly, one in every three Black boys born can expect to be sentenced within

[16] Banks, R. R., 2003. "Beyond Profiling: Race, Policing, and the Drug War." Stanford Law Review, Vol. 56, (3), pp. 571–603. "Cruel and Unusual: Disproportionate Sentences for New York Drug Offenders, 1997 " Human Rights Watch Vol. 9 (2) (B). Internet. Available: http://www.hrw.org/summaries/s.us973.html.

[17] U.S. Department of Justice. "Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data," Office of Justice Programs, Bureau of Justice Statistics, October 2012. ACLU Fair Sentencing Act https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act.

[18] Carson, E.A., "Prisoners in 2018," BJS Statistician, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

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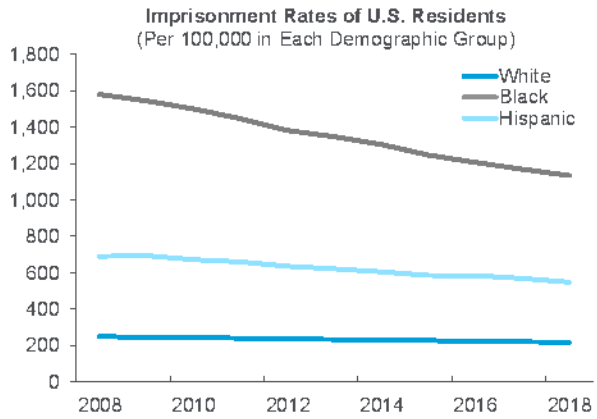
their lifetime, versus one in every six Latino boys and one in every seventeen white boys.

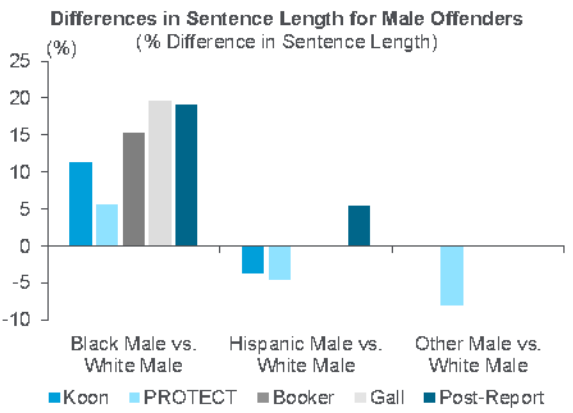
This disparity is even more apparent when reviewing individual age ranges, with 1 in 20 Black Americans between the ages of 35 and 39 in either State or Federal Prison. Moreover, several studies have shown the percentage difference in sentence length for Black versus white prisoners can be from 5 to 20 percentage points (Figure 35). Though only accounting for 5 percent of the global population, the U.S. is home to 25 percent of the world's prison population, recording the highest incarceration rate globally. Aside from the racial inequality, the cost of maintaining this system is outsized, costing $81 billion in 2012 alone (with the rate of spending three times that on Pre K-12 education over the last 30 years).[19]

Figure 34. Imprisonment Rates Have Fallen, But Still Remain Elevated for Black U.S. Residents



Source: Bureau of Justice Statistics, Citi Research

Figure 35. Sentences for Black Prisoners Can Exceed Those of White Offenders by 5 to 20 Percentage Points



Source: US Sentencing Commission,1999-2016 data files, Citi Research

Incarceration limits an ex-offenders ability to obtain employment, earn income, and build wealth

Incarceration also limits the ability of Black ex-offenders to obtain employment, earn income, and build wealth. The Brookings Institute highlights several key facts linking low job prospects to incarceration and vice-versa. Former prisoners fare poorly in the labor market, with only 55 percent earning any income in the first year of release and median earnings of only $10,090. Prisoners generally had poor labor market prospects before becoming incarcerated. An estimated 51 percent of prime-age men were employed two full years prior to imprisonment, with median earnings of only $6,250. Growing up in poverty dramatically increased the likelihood of incarceration. Boys raised in families in the bottom decile of the income distribution were 20 times more likely to be in prison in their early 30s than those born in the top decile. Notably, boys from the poorest families were 40 times more likely to be imprisoned than boys from the wealthiest families. Brookings finds that an astounding one-third of men age 30 without any annual earnings are either incarcerated or ex-prisoners. Moreover, where one grows up is highly correlated with the likelihood of incarceration. Imprisonment rates can vary by a factor of 30 between zip codes in the same city.[20]

[19] NAACP. "Criminal Justice Fact Sheet,".

[20] Looney, A., "5 facts about prisoners and work, before and after incarceration," Brookings, March 14, 2018.

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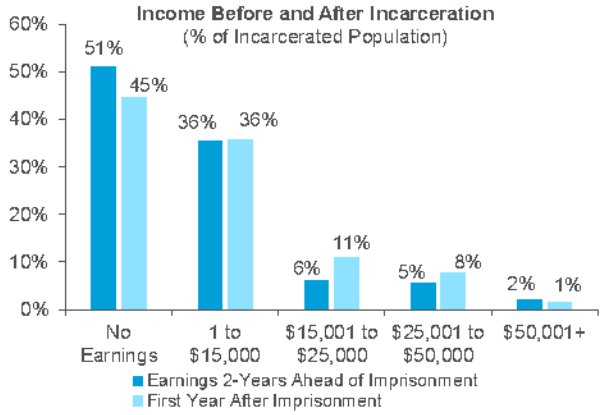
Bias against ex-prisoners leads to a poor earnings trajectory post-imprisonment

A poor earnings trajectory post-imprisonment is linked to bias. Unemployment following incarceration is often a consequence of the "prison penalty," where employers discriminate against persons with criminal records. Evidence of a criminal record reduces employer call-back rates by 50 percent.

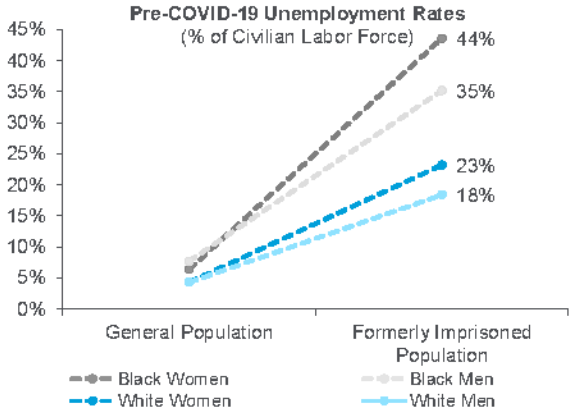
Studies suggest that formerly incarcerated persons do desire to work: among 25-44 year olds, 93.3 percent were active in the labor market compared to 83.8 percent of the general population of the same age. However, unemployment rates for formerly incarcerated persons can be five times that of persons who were never imprisoned. Unemployment rates for Black female former inmates were 44 percent before COVID-19, and the rate for Black males was 35 percent. Black women are also more likely to work part-time jobs after imprisonment than other racial groups.

Figure 36. Incarceration and Poor Earnings Prospects Are Interrelated



Source: Brookings, Citi Research

Figure 37. Ex-Prisoners Are 5x More Likely to be Unemployed



Source: Prison Policy Initiative, Citi Research

Voting Power

Felony disenfranchisement has a disproportionate impact on Black Americans due to the cycle of mass incarceration

This cycle of mass incarceration becomes increasingly problematic when considering the impact of felony disenfranchisement and its disproportionate impact on people of color. As of 2016, one in every thirteen Black American adults could not vote due to felony convictions, with more than 20 percent of Black adults in four states (Florida, Kentucky, Tennessee and Virginia) disenfranchised.[21] There is a sense of cyclicality within disenfranchisement as 27 percent of non-voters were rearrested versus only 12 percent of voters. It has been argued that political elections would have seen differing outcomes should disenfranchisement not have been established, including seven Senate races between 1970 and 1998, as well as the infamously tight Gore-Bush Presidential election of 2000.[22] Though there has been significant progress, with 25 States modifying their felony disenfranchisement provisions since 1997 (10 repealing or amending lifetime disenfranchisement laws), it still stands that of the total 3.1 million American adults estimated as banned from voting, 2.2 million are Black Americans.[23]

[21] Chung, J., 2017. "Felony Disenfranchisement: A Primer," The Sentencing Project.
[22] Uggen, C. & Manza, J. 2002. "Democratic contraction? Political consequences of felon disenfranchisement in the United States". American Sociological Review, 67 (6), 777-803. Uggen, C. & Manza, J. 2004. "Voting and subsequent crime and arrest: Evidence from a community sample". Columbia Human Rights Law Review, 36 (1), 193-215.
[23] Porter, N. 2010. "Expanding the vote: State felony disenfranchisement reform, 1997-2010.", DC: The Sentencing Project., Uggen, C., Larson, L., & Shannon, S. 2016. "6

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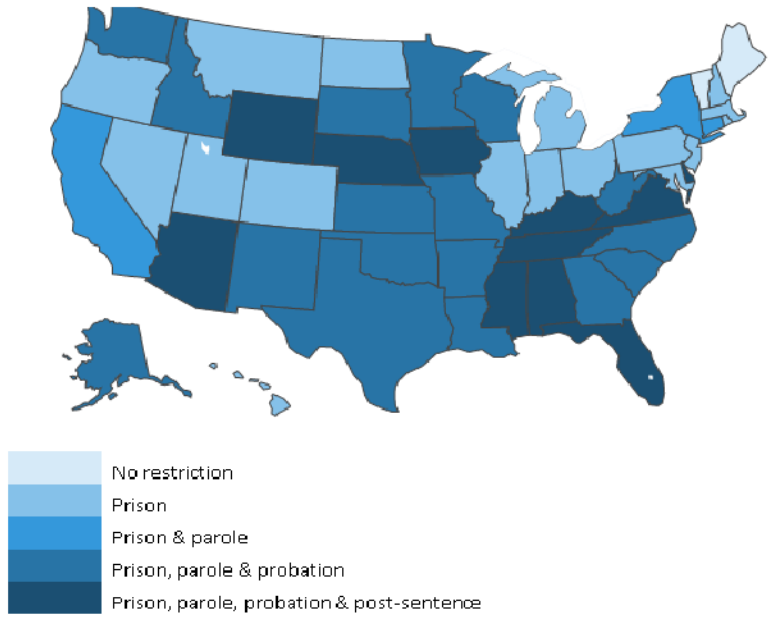
The forced reduction in political clout is only compounded by already lower voter turnout rates for Black and minority voters versus their white counterparts. Excluding record turnout in 2008 (69.1 percent) during the Obama election cycle, Black voters have underperformed white voters with regards to turnout; 51.4 percent vs. 54.2 percent on average from 2000-2018.[24]

Figure 38. Felony Disenfranchisement Restrictions by State, 2019



Source: The Sentencing Project

With the U.S. set to become minority white by 2045 based on demographic trends, the Black and minority vote will become increasingly significant

The Black and minority vote is set to become increasingly significant as the U.S. is forecast to become minority white by 2045.[25] With white voters at less than 50 percent for the first time, the influence of minority voters will be enhanced with the Black vote making up 13.1 percent of the vote, Hispanic 24 percent and Asian 7.9 percent. This trend is compounded by the emergence of Gen Z as part of the electorate. As a group, 'minority majority' is set to potentially be reached in Gen Z as early as this year (2020), with the 18-29 age range achieving this by 2027.[26] Perhaps unsurprisingly Gen Z voters are set to be some of the most 'liberal' yet, essentially reflecting Millennial positioning on key issues.

Younger voters (Gen Z) are more ethnically diverse and are more consolidated around core social issues than older voters

What is apparent is that Gen Z voters from both sides of the aisle are more consolidated around core social issues than their older counterparts. Significantly, over 60 percent of both Gen Z and Millennial voters view increasing racial and ethnic diversity as a good thing for society, versus only 48 percent of Boomers.

million lost voters: State-level estimates of felony disenfranchisement", Washington, DC: The Sentencing Project.

[24] United States Elections Project. "Voter Turnout Demographics".

[25] Frey, W.H., "The US will become 'minority White' in 2045, Census projects," Brookings Institute, May 14, 2018.

[26] Ibid.

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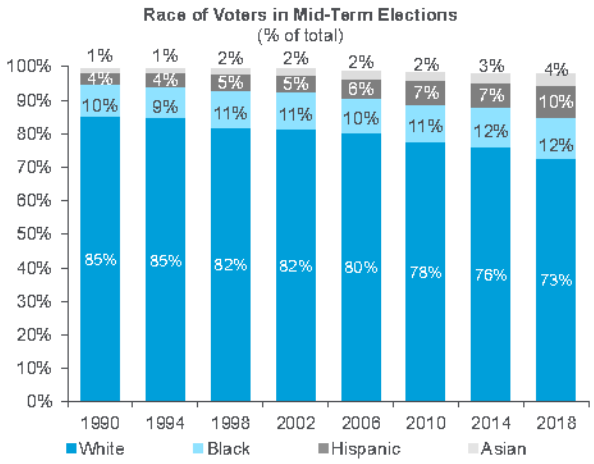
More importantly, even amongst Republican Gen Z voters, a majority still agree with that statement, versus only 30 percent of Republican Boomers.[27]

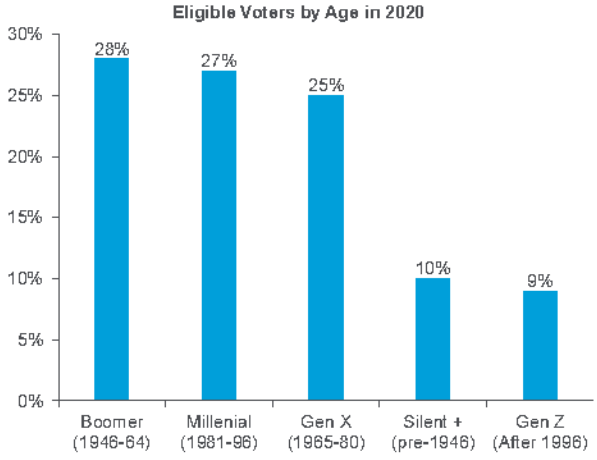
This disparity between younger and older Republicans can be found elsewhere, with a majority of Republican Gen Z also in favor of the government having a larger role in society. Sixty-six percent of American Gen Z and Millennials also hold the opinion that the Black population in the U.S. is treated less fairly than the white population vs. only 50 percent of Gen X. As the younger generations gain prominence amongst the voting population, first as a support to the already established Millennial voting trends and then in their own right, they will demand more political attention. With Gen Z voters composing 9 percent of the 2020 electorate (up from 4 percent in 2016), versus the declining share of Baby Boomers (from 68 percent in 2016 to only 4/10 in 2020), policymakers may need to be more conscientious of this new group of voters.[28]

Figure 39. Minority Voters Are Gaining Ground



Source: The Pew Research Center, Citi Research

Figure 40. Potential Voters Are Skewing Younger (i.e.,<40 Years of Age)



Source: The Pew Research Center, Citi Research

Recent events have rallied and inspired the political activism of many young and Black voters — traditionally two groups with lower-than-average voter turnout. Given the demographic makeup of Gen Z is increasingly diverse (minority majority by 2020 with Blacks (14 percent) and Hispanics (25 percent) the largest minority groups), its unsurprising that movements such as '#BlackLivesMatter' had the support of over 60 percent of Millennials and Gen Z, versus only 37 percent of Boomers.[29] Should young minority voters translate this intensified interest in addressing the issues most prominent to themselves into presence at the polls, then there is a real argument to stress the significance and impact this group can have.

[27] Parker, K., Graf, N., and Ruth Igielnik "Generation Z Looks a Lot Like Millennials on Key Social and Political Issues", Pew Research Center, January 17, 2019.
[28] Parker, K. and Ruth Igielnik."On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far", Pew Research Center, May 14, 2020. Cilluffo, A. and Richard Fry "An early look at the 2020 electorate," Pew Research Center, January 30, 2019.
[29] Parker, K., Graf, N., and Ruth Igielnik "Generation Z Looks a Lot Like Millennials on Key Social and Political Issues", Pew Research Center, January 17, 2019.

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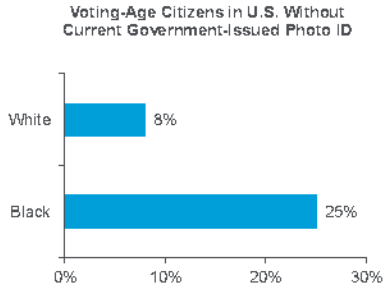
Voter suppression, although less blatant than during the Jim Crow era, still exists today

Voter suppression remains a persistent threat to full participation of Black voters in the U.S. democratic process. The connection between voter suppression and race did not end in the 1960s. Tactics that disenfranchise voters of color, and particularly Black voters, are still in existence today, although they are less blatant than those deployed during the Jim Crow Era. The Voting Rights Act of 1965 significantly curtailed voter suppression. In 1966, the Supreme Court invalidated poll taxes. However, a 2013 Supreme Court decision *Shelby County v. Holder* vacated key provisions of the Voting Rights Act opening the door for state and local governments to erect barriers to voting for racial minorities. The main element in the 2013 decision ended the requirement of state and local governments to obtain preclearance from the Federal government before changing voting rules. Over the last 10 years, 25 of 50 states have implemented new voting restrictions. Ten of those states have sizable Black populations: Mississippi, Alabama, Florida, Georgia, North Carolina, South Carolina, Virginia, Illinois, Michigan, and Tennessee according to the Brennan Center.

States have enhanced barriers to voting since 2013

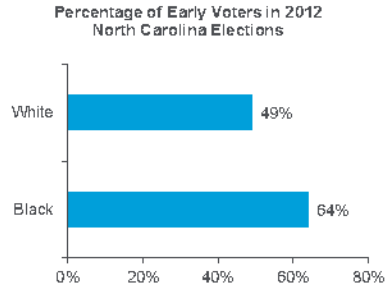
New restrictive voting rules include requiring voters to present government-issued photo IDs, which disproportionately affects the youngest and oldest voters, as they are less likely to have a driver's license or permit (Figure 41). There is even disparity among types of IDs. In Texas for example, handgun licenses, which are predominantly held by white persons (82 percent), are permissible (Figure 44). But student IDs are disallowed, despite more than half of the students of the University of Texas system being racial or ethnic minorities (51 percent). While the stated aim of voter rules is to combat voter impersonation fraud research by the Brennan Center for Justice has found scant evidence of such types of behavior. Other barriers to voting include restrictions on early voting, which is largely used by minority voters; third party voter registration drives that often target Black voters; voter list purges, which have eliminated 33 million voters from the rolls over the 2014-2018 period (Figure 43); and exact matches of voter registration form data and IDs. Other tactics include not upgrading technology; moving or closing polling stations without notifying voters; shortening voting hours; restricting early voting on weekends when Black voters are likely to vote; shutting Departments of Motor Vehicles (DMVs) in minority communities where heavy voter registration takes place; and/or not properly training poll workers. Federal courts have ruled that many voting restrictions have been implemented with the aim to racially discriminate.

Figure 41. Black Voters Are More Likely to Not Have Government Issued Photo IDs



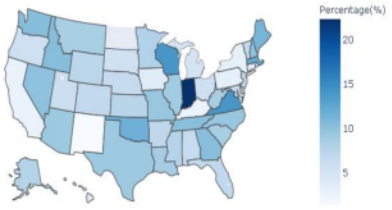
Source: Brennan Center. Citi Research

Figure 42. In Some States, Like North Carolina, Black Voters Are More Likely to Vote Early



Source: Brakebill vs Jaeger, Citi Research

Figure 43. Several States with Notable Minority Populations Are Engaged In Heavy Voter Registration Purges: Percent of Lists Purged



Source: Brennan Center. Citi Research

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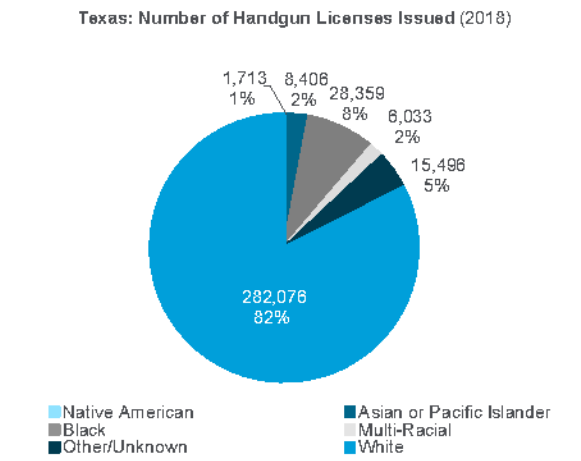
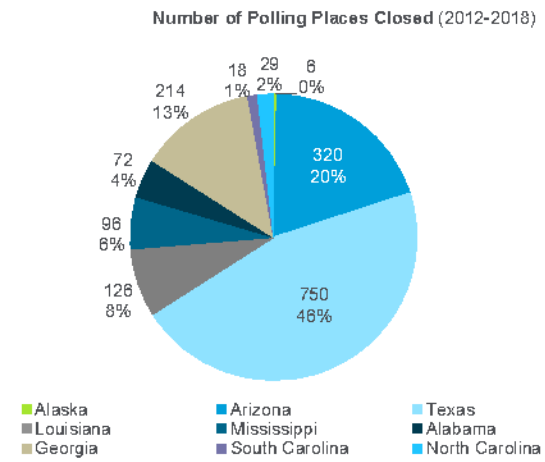
Figure 44. Handgun Licenses Are Acceptable Forms of ID for Voting In Texas, but Student IDs Are Not



Source: Texas Department of Public Safety, Citi Research

Figure 45. Many States with Large Minority Populations In the South and West have Closed Polling Stations



Source: The Leadership Conference Education Fund, Citi Research

Income and Wealth

Disparities in housing, education, policing, and voting rights plus conscious and unconscious bias have limited access to employment for many Black Americans, and consequently social mobility and wealth accumulation.

Peak Income

Peak earnings are lower for Black and Hispanic males than white males and occur at a younger age

An extended history of job discrimination, plus unequal access to quality education in the U.S., have capped lifetime income prospects for many Black Americans. Census Bureau data reveal that as of 2018, it was still the case that male Black and Hispanic workers would see peak income earlier in their careers (age 40s), and at a far lower level (~$40,000) than their white male peers (early 50s and ~$65,000) (Figure 46). The gap between peak income between Black and Hispanic workers is even greater relative to Asian male workers (~$80,000), even though Asian males experience peak income around the same age. For women the peak age is about the same as males, and the gaps in income between races is smaller. Moreover, peak earnings for Black women are about $5,000 higher than for Black men. Nonetheless, women in general earn notably less over a lifetime than do men (Figure 47), having significant negative implications for retirement income which must typically be stretched over a longer period for women than for men.

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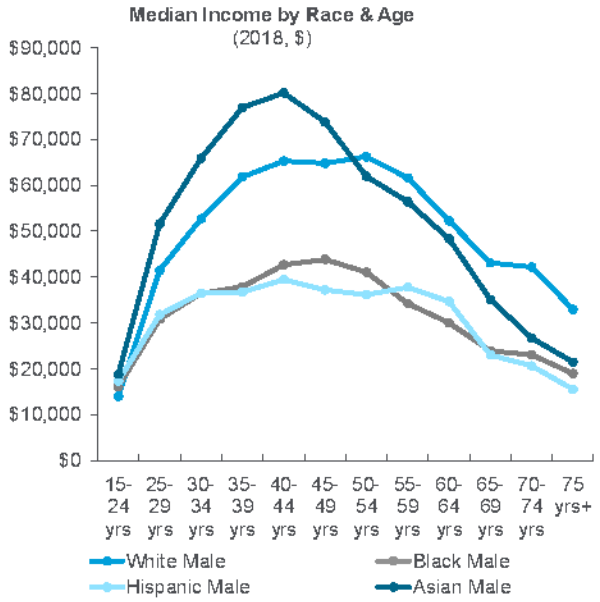
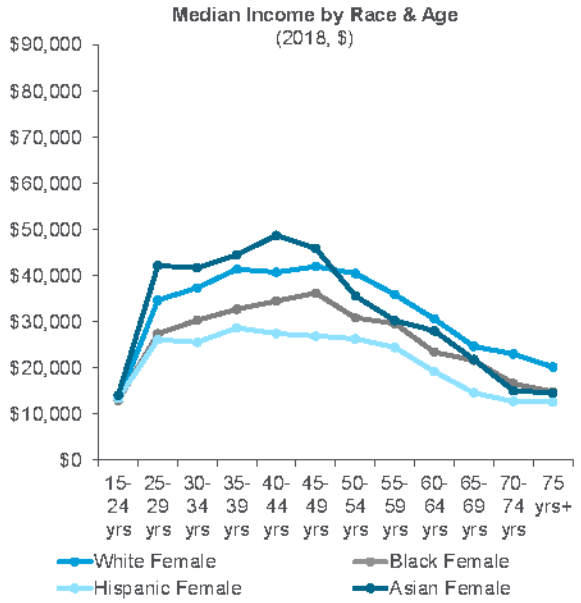
Figure 46. Peak Income Occurs Sooner and Lower for Black Males



Source: Census Bureau, Citi Research

Figure 47. Income Prospects Over a Lifetime are Worse for Women



Source: Census Bureau, Citi Research

Lower lifetime income for Black families caps retirement funds, limits spending options, and reduces cushions needed during recessions and shocks

Income is key to accumulating liquid assets, which are important for smoothing consumption. Lower lifetime income prospects not only cap retirement funds, but also limit spending options over the course of a lifetime, and especially during economic downturns. The Bureau of Labor Statistics' Consumer Expenditure Survey shows that Black families spend slightly more of their incomes than other ethnic and racial groups on budgetary staples, including on housing (20 percent) and utilities (8 percent) (Figure 48). Black families (69 percent) are highly likely to be faced with unaffordable child care options, as are Hispanic families (72 percent), which can often consume as much as 11 percent of a family's monthly income (Figure 49).[30] Importantly, the level of family income is important for creating liquid assets (i.e., savings in the form of cash or easily convertible instruments like certificates of deposit (CDs)).

Savings are paramount for helping families to smooth their consumption over a lifetime, particularly during recessions, and shocks including job loss and illness. According to the Federal Reserve Board's Survey of Consumer Finances, the median amount of liquid assets held by Black families in 2016 (the most recent reading), was $11,400 (Figure 50). This is roughly one-third of what white families held ($29,200), suggesting that Black families are potentially more vulnerable to hardship during tough economic times. Hispanic families were worse off, with just $6,500 in liquid assets.

[30] Baldiga, M., Joshi, P., Hardy, E., and Dolores Acevedo-Garcia. 2018. "Data-for-Equity Research Brief, Child Care Affordability for Working Parents," Institute for Child, Youth and Family Policy, Heller School for Social Policy and Management Brandeis University; Malik, R. 2019. "Working Families Are Spending Big Money on Child Care," Center for American Progress, June 20, 2019.

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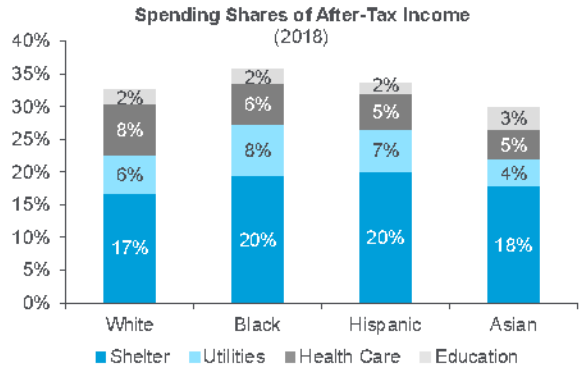
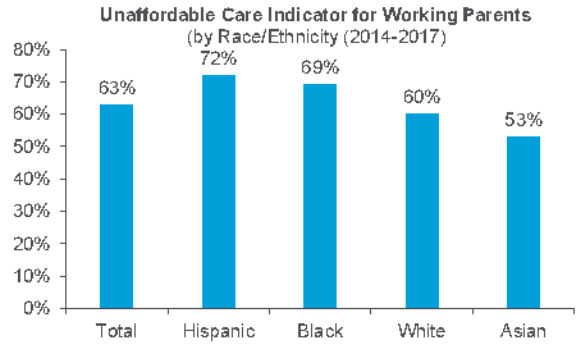
Figure 48. Black and Hispanic Families Spend Slightly More on Housing than White and Asian Families



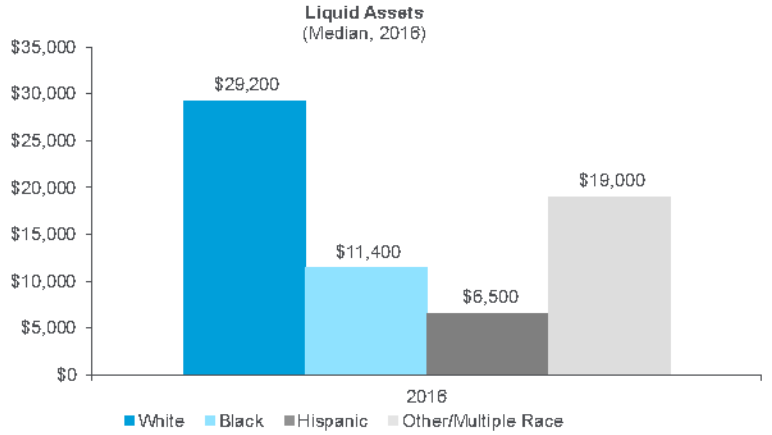
Source: Bureau of Labor Statistics *Consumer Expenditure Survey*, Citi Research estimates

Figure 49. Black and Hispanic Families Are More Likely to Experience Challenging Child Care Options



Note: The sample is parents working full time and year round with four or fewer children and at least one child under age 14 (N=71,981).
Source: Current Population Survey, 2014-2017 March Annual Social and Economic Supplement, Public Use Microdata Files, IPUMS-CPS, University of Minnesota, www.ipums.org.

Figure 50. Black Families Hold Roughly One-Third of the Liquid Assets that Are Key to Smoothing Consumption than White Families Hold



Note: Liquid Assets include transaction accounts, certificates of deposits
Source: Federal Reserve *Survey of Consumer Finances*, Citi Research

Wealth and Debt Gaps

Historical gaps in intergenerational wealth accumulation have led to challenges in social mobility for Black Americans

The Federal Reserve Board's Survey of Consumer Finances reveals that the wealth gap between Black families and white families has remained persistently wide. Among Black families, household net worth, which is defined as total assets less all liabilities, has hovered in the $15,000 to $25,000 range over the last thirty years (Figure 51). Net worth for white families has been in the range of $115,000 and $200,000. The gap between white and Black familial income is a multiple of eight. Meanwhile, the leverage ratio — debt divided by assets — for Black families has remained stubbornly elevated above 25 percent over much of the last 30 years, while the leverage ratio for white families has held between 10 and 15 percent (Figure 52). These metrics matter as the body of literature suggests that wealth and debt play meaningful roles in social mobility, especially from one generation to the next.

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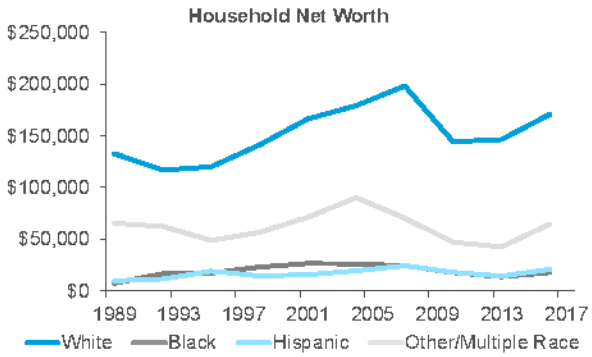
A myriad of factors contribute to the racial wealth gaps in the U.S.

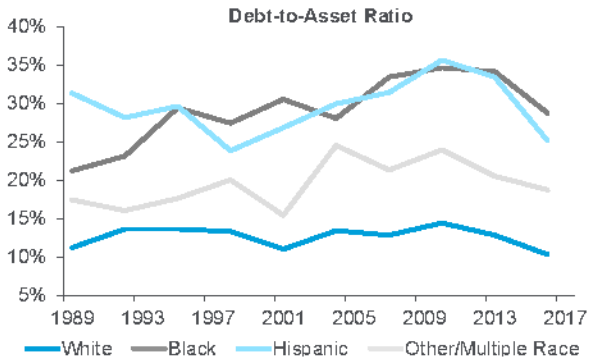
Building wealth is not just a function of higher income, but the ability to save out of income once basic needs are met. The outsized debt-to-asset ratio for Black families indicates that a number of families have insufficient income to meet needs and are financing expenditures with credit. This indicates a lack of disposable income available for saving and investing. Other factors contributing to wealth accumulation include (1) intergenerational transfers of wealth within families; (2) conditions where one lives, such as poverty rates, home values and housing segregation;(3) geographic and financial barriers to human capital formation (e.g., elevated costs for education; limited job prospects in region); (4) discrimination in labor markets and/or racially motivated segmentation; and (5) racial biases in policies and practices of government, institutions, and the private sector.[31] Without amelioration, each of these factors discussed above will perpetuate racial wealth gaps.

Figure 51. White Families Have 8x More Wealth than Black Families



Source: Federal Reserve *Survey of Consumer Finances*, Citi Research

Figure 52. Leverage Ratios for Black Families Have Remained Elevated



Source: Federal Reserve *Survey of Consumer Finances*, Citi Research

[31] (i) (e.g., Meschede et al. 2017; Chiteji and Hamilton 2002; McKernan et al. 2014b); (ii) (e.g., Chetty et al. 2019; Perry et al. 2018); (iii) (e.g., Dobbie and Fryer 2011; Jackson and Reynolds 2013; Addo et al. 2016) ; (iv) (e.g., Grodsky and Pager 2001; Bertrand & Mullainathan 2004); (v)(e.g., Oliver and Shapiro 2013; Katznelson 2005; Robles et al. 2006; Bayer et al. 2014; Asante-Muhamm).

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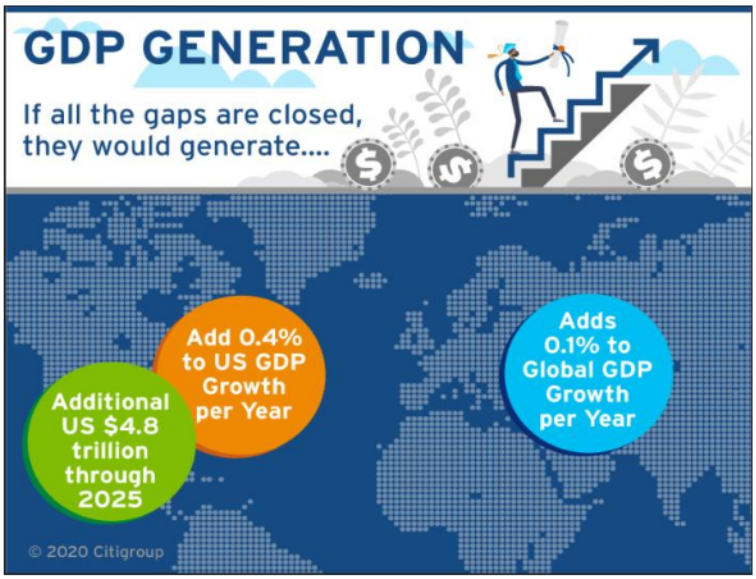
Closing Gaps Generates Growth

Figure 53. The Economic Case for Closing Racial Gaps in the United States



Source: Citi Research

Amid a once-in-a-century global pandemic that has resulted in staggering economic and job losses, investors should welcome ideas and actions that can add value. Closing racial gaps is one.

The business case for eliminating racial gaps is well established

The business case for eliminating racial gaps is well established. Some firms believe continuing to focus on Diversity & Inclusion (D&I) as part of their COVID-19 recovery strategy is a luxury. However evidence shows firms who do not abandon D&I protocols may fare better. Companies in the top quartile for both gender and ethnic diversity are 12 percent more likely to outperform companies in lower quartiles. Top quartile companies outperformed those in the fourth by 36 percent in terms of profitability (up from 33 percent in 2017, 35 percent in 2014).[32]

The economic case for closing racial gaps is equally compelling

The economic case for closing racial gaps is equally compelling. Present racial gaps in income, housing, education, business ownership and financing, and wealth are derived from centuries of bias and institutionalized segregation, producing not only societal, but also real economic losses. However, future gains from eliminating these gaps are enormous: benefiting not only individuals, but also the broader U.S. economy with positive spillover effects into the global economy. If four key racial gaps had been closed 20 years ago, then the additional GDP that could have been added to the U.S. economy might have summed to as much as $16 trillion. Casting this amount forward into the future, a global economic model suggests roughly $5 trillion could be added to U.S. GDP through 2025 from closing the gaps. The consequent additions to U.S. and global GDP growth averages roughly 0.4 percentage point and 0.1 percentage point per year, respectively. These gains do not reflect the potential narrowing of the wealth gap experienced by Black persons in the U.S., which would inevitably also lead to additional economic gains.

[32] Hunt, V., Layton, D., and Sara Prince "Why diversity matters," McKinsey, January 1, 2015.

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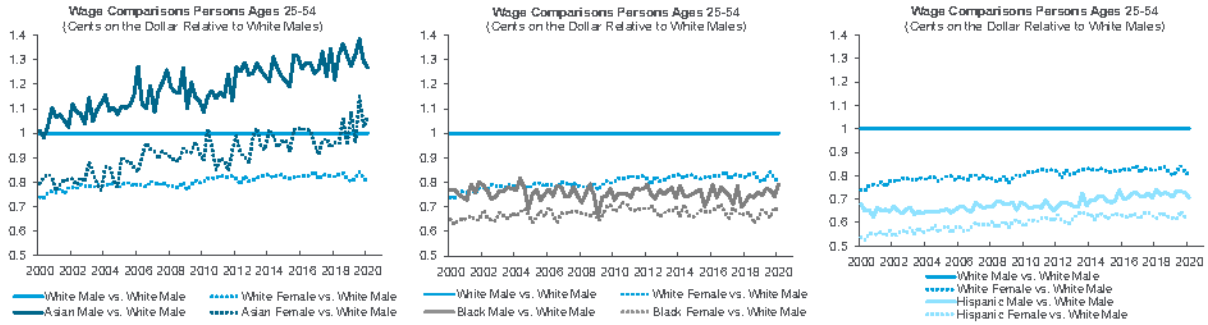
Racial Wage Gap

Opportunity Loss

Racial and gender wage gaps remain wide in the U.S., signaling lost opportunity for income, consumption, investment, and real GDP growth

Racial and gender wage gaps remain wide in the U.S., signaling lost opportunity for income, consumption, investment, and real GDP growth. Typically, wage gaps are measured by comparing the median wage of female and/or non-white workers to that of white males. Over the last 20 years, wages for Asian males have broken significantly above those of white males, and in the most recent two years, wages for Asian women exceed those of white males. However, for white women in general and Black and Hispanic workers in particular, the gaps between white male wages persist. The gap for Black male wages compared to white male wages was 80 cents on the dollar, as of 2020. The gap for Black female wages to white male wages was just below 70 cents on the dollar in 2020. The gaps for male and female Hispanic workers relative to white male wages is even starker at about 70 cents and 60 cents, respectively (Figure 54).

Figure 54. Black and Hispanic Men and Women Make Fewer Cents on the Dollar than White Men and Women



Source: Bureau of Labor Statistics, Citi Research

Individual wage losses over the past 20 years have been substantial — between $175,000 and $360,000 — due to racial and gender gaps

Individual wage losses due to gaps over the last 20 years have been substantial. The gap in terms of aggregate income for white female wages (i.e., all white women nationwide) compared to white male wages has been narrowing as a share of U.S. GDP over the last 20 years (Figure 55). Some of this reflects slower GDP growth in general, but also a slight increase in white female wages. However, for Black and Hispanic male and female workers, their gaps as shares of GDP have not improved. The presence of gaps denote significant opportunity loss in terms of wages that could have been used for personal consumption, home buying, or investment in small businesses. As the wage gap with white males was not collapsed for white females 20 years ago, the typical individual white female worker missed out on roughly $175,000 in additional income. For Black males, the loss was approximately $225,000, for Black females and Hispanic males about $300,000, and for Hispanic females roughly $360,000 (Figure 56).

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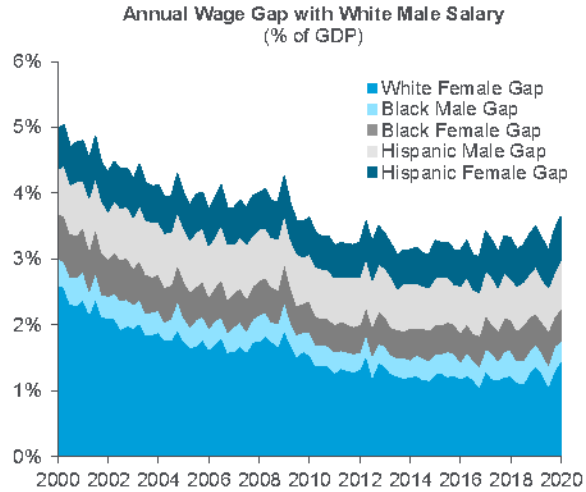
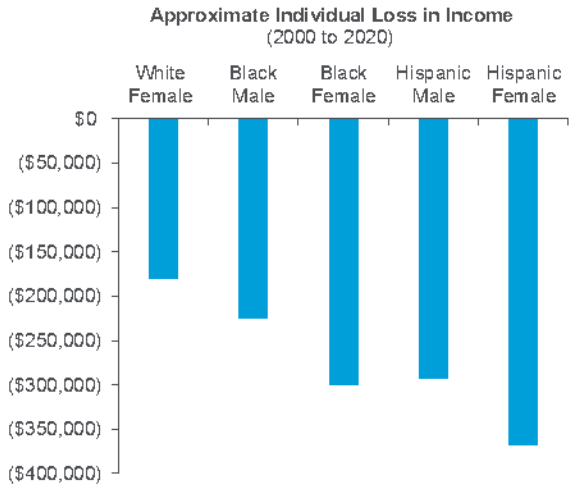
Figure 55. Wage Gap has Narrowed Somewhat for White Women but Not for Black, Hispanic and Other (Non-Asian) Minority Groups



Source: Bureau of Labor Statistics, BEA, Citi Research estimates

Figure 56. Accrual of 20 Years of Lost Income Due to Wage Gap Is Acute for the Representative Black and Hispanic Worker



Source: Bureau of Labor Statistics, Citi Research estimates

Closing the Gap

Closing the minority wage gap 20 years ago could have generated $12 trillion in income; $2.7 trillion for Blacks

The wage gaps between minorities and white males, if closed 20 years ago might have generated $12 trillion in additional income, and indeed for Black workers an additional $2.7 trillion. Since the Great Financial Crisis, income inequality expressed in one fashion by wage gaps has worsened in most years. The aggregate amount of income lost due to wage gaps each year is equivalent to a roughly 0.15 percentage point contribution to U.S. GDP growth per year (Figure 57). While that appears to be a nominal amount in comparison to the losses experienced amid the COVID-19 global recession, in "normal" years a nearly 0.2 percentage point add to annual U.S. GDP growth is actually quite substantial. This is especially true as the pre-pandemic economy was on course to slow to a new equilibrium rate of 1.7 to 1.9 percent a year. The total amount of income that could have been generated since 2000 if all income gaps were closed sums to an astounding $12 trillion, with $5 trillion from closing the white male-white female gap, and another $7 trillion from closing the gaps between white males and Black and Hispanic workers. The contribution of closing the Black worker gaps with white male wages is an outsized $2.7 trillion (Figure 58 and Figure 59).

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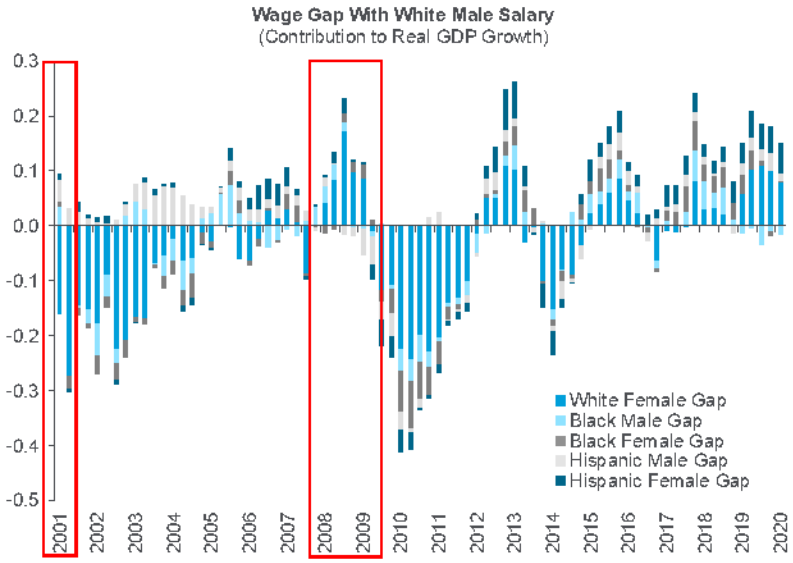
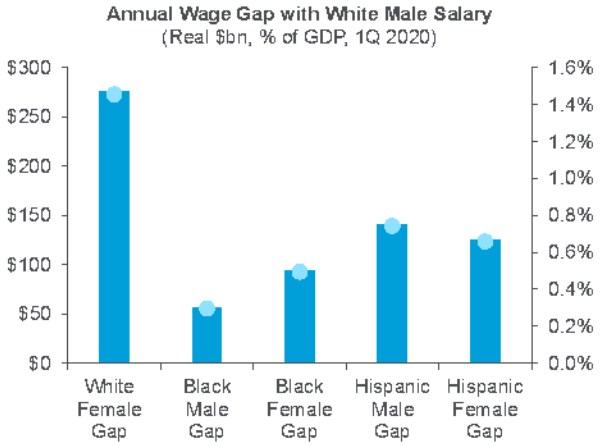
Figure 57. Closing Wage Gaps for White Women and Minorities Could Have Contributed to GDP Growth in Most Years Post-Great Financial Crisis (GFC)



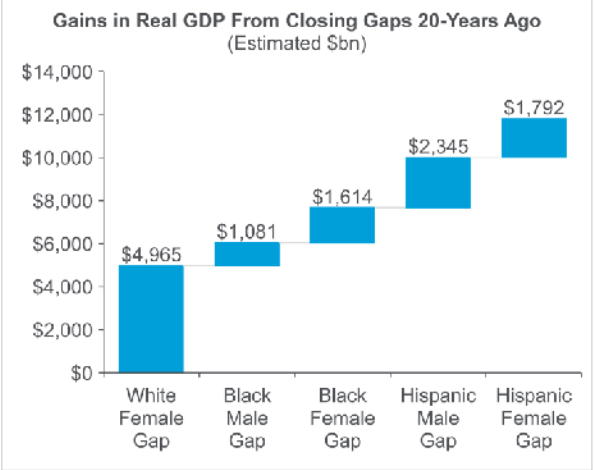
Note: Red rectangles denote U.S. recessions
Source: Bureau of Labor Statistics, Bureau of Economic Analysis (BEA), Citi Research estimates

Figure 58. Gaps with White Male Salaries Remain Wide in 2020



Source: Bureau of Labor Statistics, BEA, Citi Research

Figure 59. Lost Wages Add Up to Trillions of Dollars in Foregone GDP



Source: Bureau of Labor Statistics, BEA, Citi Research

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Racial Labor Segmentation Gap

Location, Location, Location

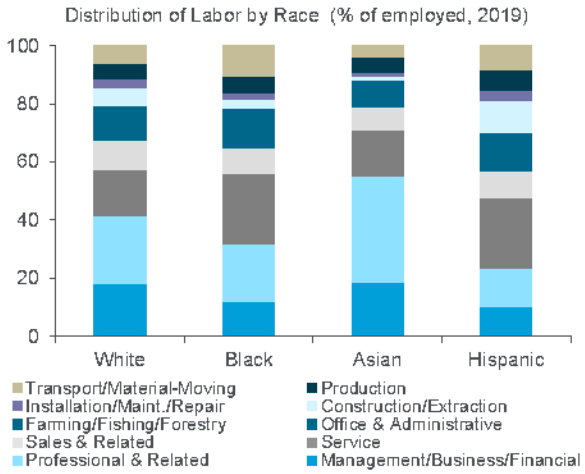
Black workers represent 10 percent or less of many of the occupations paying the top wages

Where a person works determines their wage potential. In general, Black workers are underrepresented in management, business, financial, professional and related occupations that pay the highest salaries. The share of Black managers is roughly 10 percent compared to almost 20 percent among white workers (Figure 60). The share of Black professionals is about 20 percent compared to nearly 35 percent among Asian. On balance, Black workers represent 10 percent or less of many of the occupations that pay the top wages, including STEM, finance, legal, medicine, and management jobs (Figure 61). Black workers are, however, overrepresented in sales and services occupations, office and administrative, as well as in transport and material moving occupations (Figure 62).

Almost half of Black workers are employed in jobs potentially subject to automation

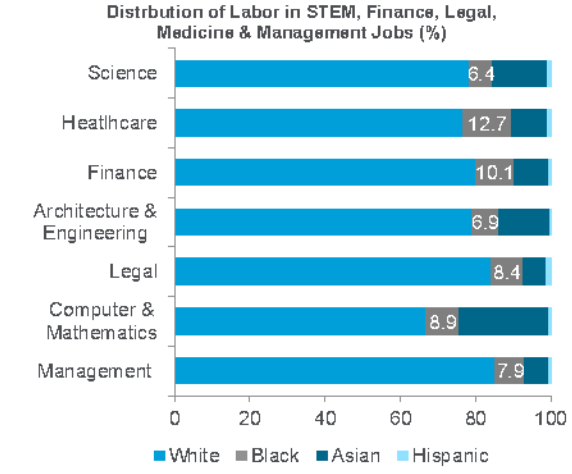
Black workers are more likely to be situated in jobs requiring lower skills and/or are more susceptible to automation. Skill requirements and the risk of automation appear to be drivers of wage differences between more technical and less technical occupations. A study by Carl Benedikt Frey and Michael Osborne highlighted in the Citi GPS report Technology at Work noted that 47% of U.S. jobs were at risk due to automation. Among Black workers, close to half (46 percent) work in jobs that are subject to potential automation compared to those that are not (54 percent), and only 3 percent of Black workers are in technical jobs, leaving the other 97 percent in non-technical jobs that could be automated to some degree (Figure 63).

Figure 60. Black Workers Are Underrepresented In Management, Business, financial, Professional and Related Occupations



Source: Bureau of Labor Statistics, Citi Research

Figure 61. Black Workers Comprise Small Shares of Occupations that Typically Pay Higher Wages Compared to White and Asian Workers



Source: Bureau of Labor Statistics, Citi Research

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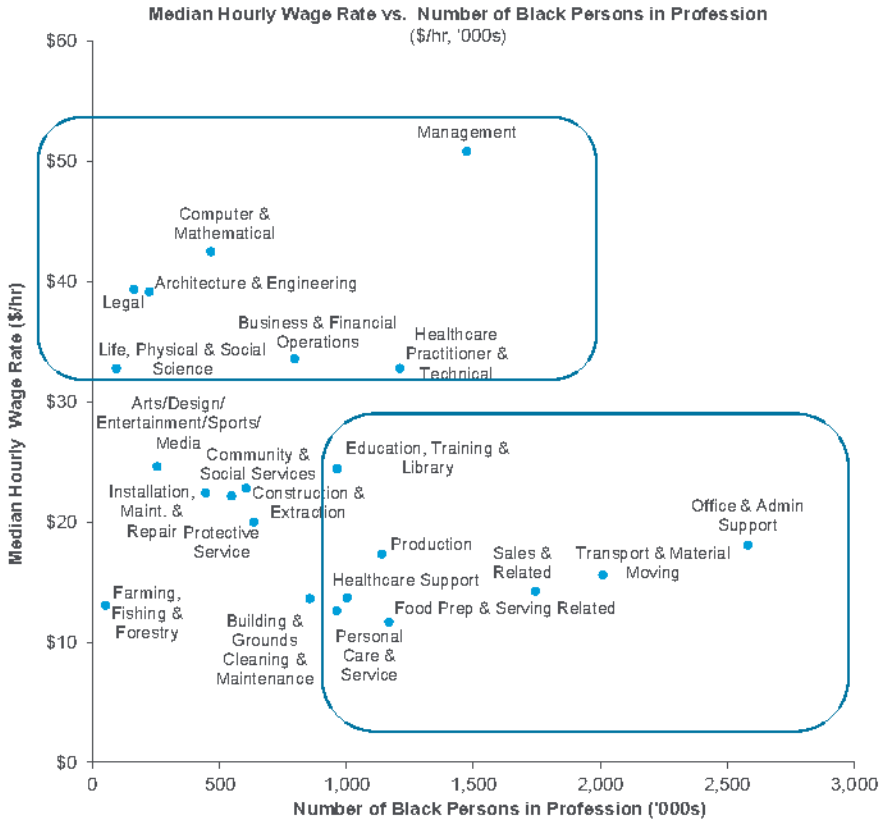
Figure 62. Black Workers Are More Concentrated In Jobs that Pay Less than $25/hour and May Also Require Fewer Skills



Source: Bureau of Labor Statistics, Citi Research

Figure 63. Black People are More Likely to Work In Jobs That Are Susceptible to Automation

	Workers In Jobs Susceptible to Automation	Workers In Jobs Not Susceptible to Automation	Workers In Tech Jobs	Workers In Non-Tech Jobs
Worker Population	58.7 Million	77.7 Million	7.2 Million	129.2 Million
Number of Workers	39 years	41 years	41 years	40 years
Median Age	$17.37	$26.94	$39.68	$21.88
Mean Hourly Wage	$14.26	$22.06	$36.76	$17.16
Percent of workers in the below groups who hold jobs of the specified type:				
Total Workers	43.0%	57.0%	5.3%	94.7%
Male	44.1%	55.9%	8.1%	91.9%
Female	41.9%	58.1%	2.4%	97.6%
Asian, non-Hispanic	35.9%	64.1%	15.9%	84.1%
Black, non-Hispanic	46.4%	53.6%	3.0%	97.0%
Hispanic	54.1%	45.9%	2.3%	97.7%
White, non-Hispanic	40.0%	60.0%	5.6%	94.4%
Other, non-Hispanic	45.2%	54.8%	4.9%	95.1%
Graduate Degree	11.3%	88.7%	10.6%	89.4%
Bachelor's Degree (BA)	26.9%	73.1%	11.3%	88.7%
Some College, but less than a BA	46.7%	53.3%	3.9%	96.1%
High School Degree or Less	60.7%	39.3%	1.0%	99.0%

Source: U.S. Government Accountability Office, BLS and Citi Research

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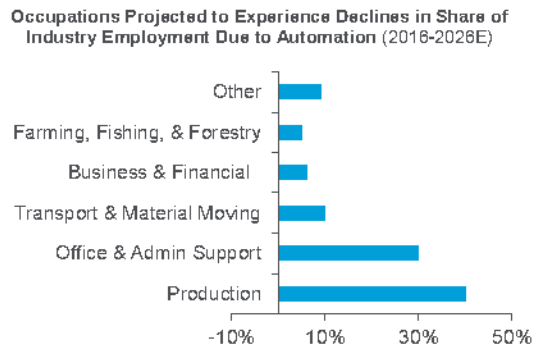
Closing the Gap

Pursuing education and training for more technical and skills-based careers can help close the racial labor segmentation gap

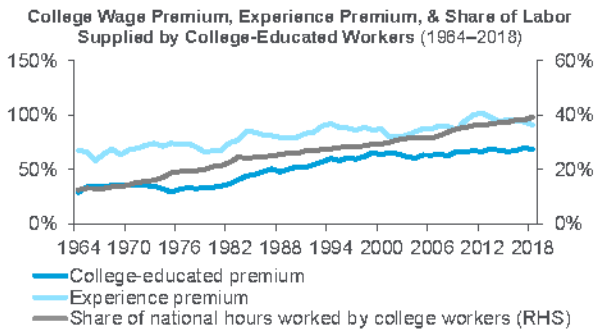
Encouraging Black students and workers to pursue education and training suitable to more technological and skills-based careers can help close the racial labor segmentation gap. The BLS cites literature in labor economics positing that technology has increased the productivity of workers with college educations more than workers with less education. The increase in productivity helps explain the rise of earnings for college-educated workers relative to the earnings of non-college-educated workers, despite the increase in the labor supply of college-educated workers. The BLS notes that since 1980, the relative incomes of college-educated workers have risen compared to high school-educated workers, after adjusting for other observable factors. The phenomenon is called the college earnings premium, which has increased from 34 percent in 1980 to 68 percent by 2018 (Figure 65). One aspect of the widening premium is the share of hours worked by college-educated workers has nearly doubled from 20 percent in 1979 to 39 percent by 2018. In a simple supply-demand framework, this suggests demand for college-educated workers has outpaced the steady increase in supply. Hence, there is plenty of room for more Black college graduates to be absorbed into the U.S. labor market.

Figure 64. Select Occupations Are More Susceptible to Automation



Source: US Government Accountability Office, BLS, Citi Research

Figure 65. College Degrees Produce Notable Wage Benefits



Source: BLS, Citi Research

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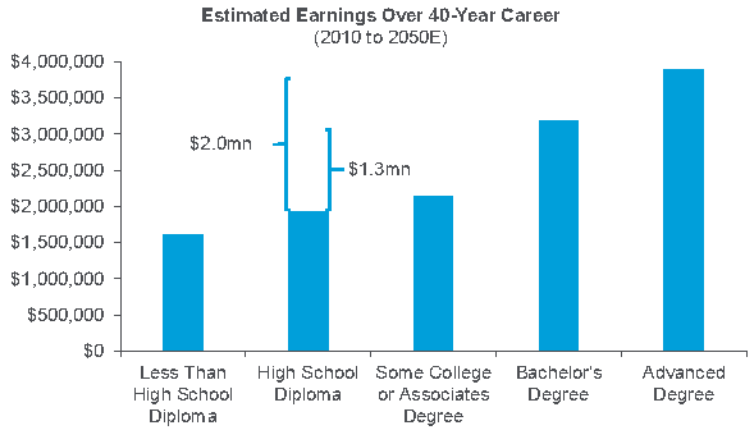
Racial Education Gap

Higher Education

Attainment of higher education can be challenged by lack of access to quality pre-school education and underfunded public schooling in K-12

Encouraging Black students to pursue higher education is a manner in which racial wage and income gaps can be closed, but there are challenges. Plenty of literature and simple calculations affirm that persons with a degree beyond a high school diploma earn more over a lifetime than persons with a high school degree or less. The difference over a 40-year career is upwards of $1.3 million for a person with a bachelor's (or equivalent) degree and $2.0 million for a person with an advance degree (Figure 66). However, the path towards college and advanced degrees for Black students is challenged by lack of access to a quality pre-school education and underfunding of public schools from grades K-12. For Black students who do attend college, which since 1980 has consistently been 10 percentage points below the national average, the occupation chosen after graduating from college or with an advanced degree also determines lifetime income.

Figure 66. Students Earning Bachelor or Advanced Degrees Earn More Lifetime Income



Source: Bureau of Labor Statistics, Citi Research

Access to Pre-School

Black children are more likely to attend full-time pre-school than other children

Education literature suggests that children who receive a pre-school education perform better once in grades K-12. Pre-school programs also serve as an important form of childcare for working parents. A Brookings Institute report summarizing early education studies found that high-quality programs produced short-term gains in cognitive functioning and longer-term gains in school achievement and social adjustment. Moreover, pre-school education yields higher school achievement, fewer children being 'left-back' in a grade, reduced need for special education, and a reduction in neighborhood crime. Early childhood education can also save governments between $13,000 and $19,000 per child over and above the cost of the pre-school program. The National Center for Education Statistics reported that in 2018, 26 percent of Black children aged 3-5 years old attended full-time pre-school, exceeding every other racial group (Figure 67). Slightly more white children overall (43 percent) attended either full- or part-time pre-school, compared to 38 percent of Black children. Nonetheless, a sizable number of Black children overall attend pre-school.

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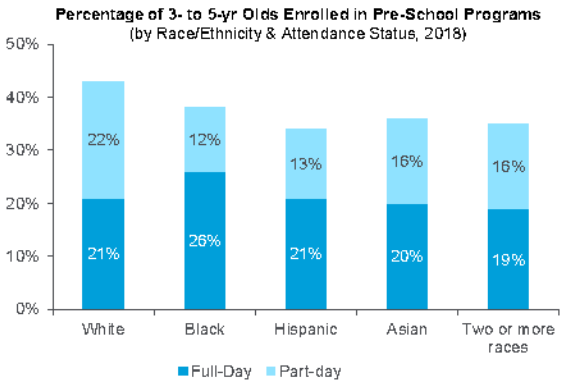
But access to high-quality, adequately-funded pre-school varies by state…and poor funding is directly linked to quality of education

However, access to high quality, adequately-funded pre-school remains challenged in terms of availability, quality, funding, and training of teachers. State-funded (as opposed to private) pre-school programs serve just 22 percent of 4-year-olds and 3 percent of 5-year-olds. Only three states — Florida, Georgia, and Oklahoma — make pre-school available to all 4-year-olds. Twelve states with state-funded pre-school do not offer programs to 3-year-olds, and 12 states have no state-funded pre-school at all (Figure 68). Overall state spending on pre-school is disparate, ranging from $1,600 per child to $10,000, and the average amount of spending ($3,600 per child) is roughly one-third of the average spend on public school students in K-12. Quality of education also varies. The National Institute for Early Education Research (NIEER) reports only 17 states meet eight or more of their ten quality-checklist criteria. Poor funding is directly linked to quality according to NIEER, and programs serving primarily poor students tend to receive less funding than those who serve more middle-class students. Relatedly, while 76 percent of pre-school teachers have a Bachelor's degree, only roughly 56 percent have a teaching certificate to teach young children. Moreover, pre-school teachers earn less than half of that earned by elementary school teachers, and 70 percent report earnings below 200 percent of the Federal poverty guidelines.

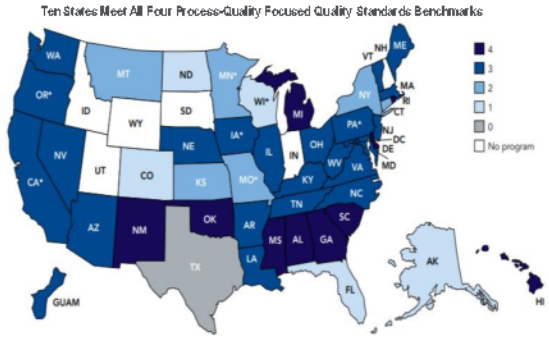
These figures are important, as state programs comprise 70 percent of all early childhood education centers, and the states with the least funding and poorest quality tend to host large Black populations.

Figure 67. Black Children More Likely to Attend Full-Day Pre-School



Source: Census Bureau, Citi Research

Figure 68. Few States Have High Quality Pre-School Programs



Note: Idaho, Montana, New Hampshire, North Dakota, South Dakota, Utah and Wyoming have no state pre-school program.*These multi-program states have programs with different quality standards. Data in map is for largest state program.
Source: National Institute for Early Education, NPR, Citi Research

Funding K-12 Schools

The funding gap between white and minority school districts in the U.S. sums to $23 billion, despite serving the same number of children

The racial education gap begins with widespread underfunding of schools with high concentrations of children of color. The average difference in funding of predominately white school districts and predominately minority school districts sums to $23 billion, despite serving roughly the same number of children, according to a study by nonprofit think tank EdBuild. In the U.S., 27 percent of students live in non-white districts, while 26 percent live in white districts. In white districts, 5 percent of students live in high-poverty areas, while in non-white districts 20 percent of student live in high-poverty areas (Figure 69). Even relative to high-poverty white districts, well-off non-white districts receive less money.

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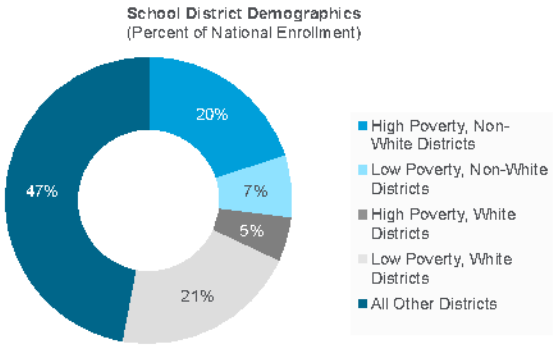
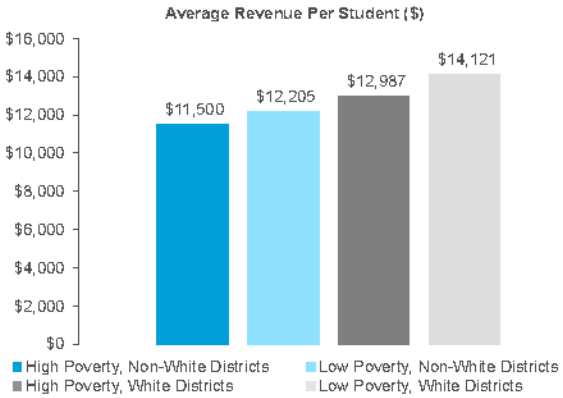
The difference between the revenue received for funding low-poverty white districts ($14,121 per student) and all non-white districts ($11,853) is more than $2,200 per student (Figure 70). EdBuild estimates the national average difference in revenue per student between non-white and white districts is $2,226. This difference this difference sums to $22.5 billion ($2,226 times 10,126,150 affected students). States that stand out in terms of the severity of the funding gap between non-white and white school districts include California, Texas, New Jersey, and Arizona (Figure 71).

Figure 69. White and Non-White Districts Serve Same Number of Kids



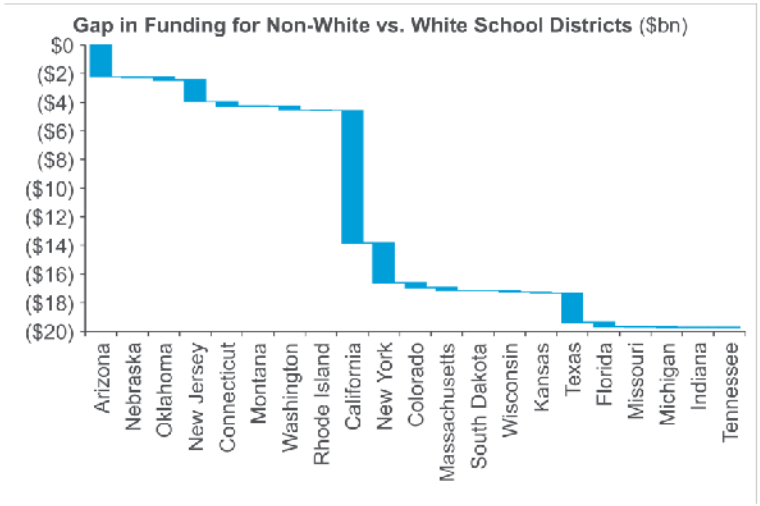
Source: EdBuild, Citi Research

Figure 70. Non-White Districts are Chronically Underfunded



Source: EdBuild, Citi Research

Figure 71. Funding Gaps Between White and Non-White School Districts Remain Wide



Source: EdBuild, Citi Research

Reliance on property taxes for school funding means wealthier municipalities will have potentially greater resources to finance their school districts

Where a student resides can determine whether they will face a funding disadvantage. The Federal government spends roughly $23 billion a year on K-12 education. While a sizable figure, it only constitutes 10 percent of total funding for public schools. The remaining $660 billion is raised at the state and local government level. The gap in school funding reflects a combination of past housing segregation policies and a patchwork of current district financing schemes that value local control.

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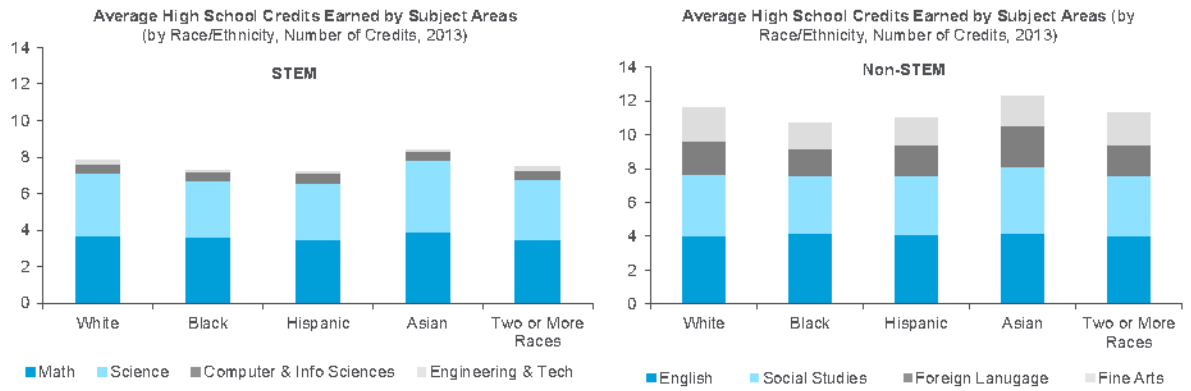
According to EdBuild, nearly all states rely upon property taxes to fund schools. Hence wealthier municipalities will have potentially greater resources to finance their school districts. Fifteen states also generate funds through locally-raised sales taxes, six permit locally-governed income taxes and many states use revenues from lottery gaming programs. Just over half of all states employ a student-based formula, while the remainder fund schools based upon a variety of formulas.

STEM and High-Demand Careers

Only about 20% of students earning university degrees earn degrees in STEM-related fields but Black students only make up 12% of STEM graduates

In addition to funding, school curricula and whether students are directed towards high-wage and/or in-demand occupations matters for closing the education gap that can help solve the income gap. Department of Education data from 2013 indicated that U.S. high school students were on average taking fewer course credits in STEM (Science, Technology, Engineering, and Mathematics) disciplines than in humanities and arts. Even among those taking STEM coursework, Black students took slightly fewer credits than their white and Asian counterparts (Figure 72). More recent data from 2015-16 show that among students receiving university degrees few — 20 percent or less — earn degrees in STEM-related fields, which typically have elevated wages and lifetime earnings potential. Asian students were the exception, with 30 percent of all degrees from STEM programs. Among all other students, Black students produced the least STEM graduates at 12 percent (Figure 73).

Figure 72. U.S. Students In General Are Taking Fewer Credits In STEM Courses than Non-STEM Courses



Source: National Center for Educational Statistics, Citi Research

STEM jobs generally pay more than many 'middle-class' non-STEM jobs. Even within the STEM fields, jobs requiring greater skills pay notably more than the U.S. national median annual salary of $38,640 (Figure 74). It's logical for young students, to not only pursue more difficult jobs in the STEM, finance, and legal fields, but to also aim for those requiring greater mental and/or technical acuity within these fields given the enhanced potential for increased lifetime earnings. Access to high quality education and opportunities throughout one's academic career, as well as guidance by mentors and exposure to higher paying occupations early in one's working career are key to closing the gap.

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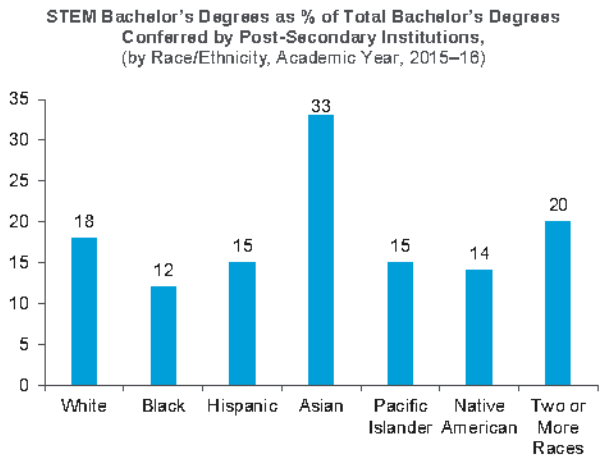
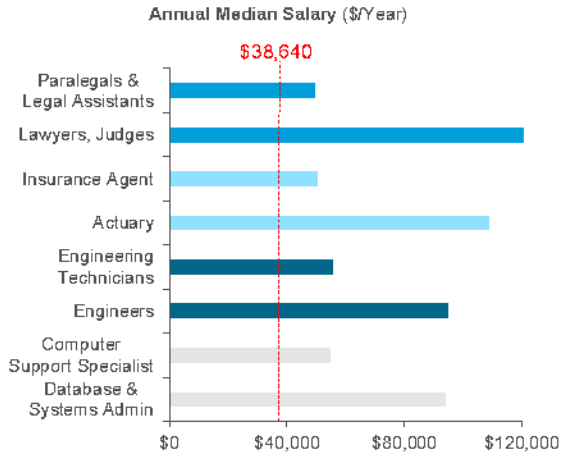
Figure 73. Black People Have the Smallest Share of STEM Graduates



Source: National Center for Education al Statistics, Citi Research

Figure 74. STEM Jobs Pay More than Many Middle-Class Jobs



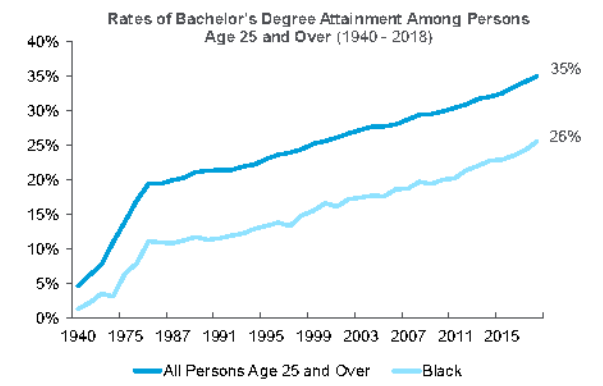
Source: National Center for Educational Statistics, Citi Research

Closing the Gap

Closing the gap in advanced degrees between Blacks and the national average 20 years ago would have produced an additional 1.7 million Black university graduates

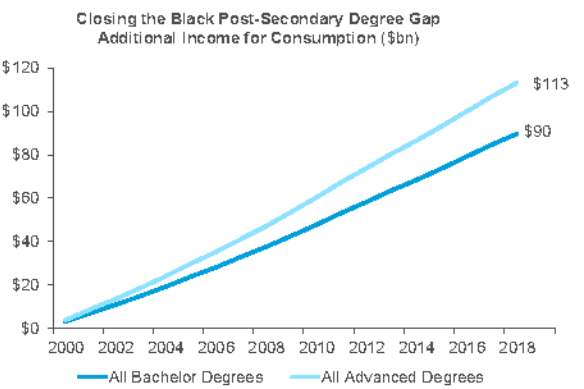
Closing the college/advanced degree racial gap 20 years ago might have generated up to $113 billion in additional income for saving, investing and consumption. Since the early 1980s, the proportion of Black people aged 25+ who obtain a bachelor's degree has persistently been about 10 percentage points below the U.S. national rate (Figure 75). If this gap was closed back in 2000, then over the last 20 years there might have been an additional 1.7 million Black university graduates. If these graduates earned the median income that bachelor degree holders made, as described above, the equivalent additional income generated might be roughly $90 billion. If all of those graduates obtained advanced degrees, the figure might increase to $113 billion (Figure 76). This is not a recommendation for students to only pursue college or graduate school. It is saying that any degree — college, graduate, associate, technical — in excess of a high school degree typically signals greater lifetime income.

Figure 75. The Gap Between Black and National Degree Attainment Has Been Fairly Steady at Around 10 Percentage Points



Source: National Center for Educational Statistics, Citi Research

Figure 76. Closing the 10 Percentage Point Gap 20 Years Ago Might Have Generated an Additional $90 to $113 Billion in Black Income



Source: National Center for Educational Statistics, Citi Research

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Racial Wealth Gap

Black and Hispanic families continue to trail white and Asian families in accumulating wealth

Black and Hispanic families continue to trail white and Asian families in accumulating wealth. Issues like lack of inheritances and barriers to entry, including to income and access to credit, appear to be working against the ability of Black and Hispanic families to amass wealth required for acquiring assets for personal financial security and community investment. Data from the Federal Reserve's 2010 and 2013 Surveys of Consumer Finances, while dated, reveal that inherited wealth significantly bolsters familial wealth, particularly for white families (Figure 77). Black families are less likely to receive (10.6 percent) or expect an inheritance (5.9 percent) relative to white families (22.9 percent and 18.8 percent). Meanwhile, easier avenues toward the accumulation of generational wealth, like home ownership and retirement benefits, are littered with obstacles for minorities, especially Black and Hispanic families.

Figure 77. Inheritance Can Meaningfully Bolster Familial Wealth

	Including Households With Inheritances		Only Households Without Inheritance	
	Mean Wealth	Median Wealth	Mean Wealth	Median Wealth
White	$ 1,152,818.00	$ 287,457.00	$ 742,627.00	$ 183,050.00
Black	$ 168,238.00	$ 38,174.00	$ 85,702.00	$ 33,969.00
Hispanic	$ 399,498.00	$ 65,960.00	$ 196,541.00	$ 38,125.00

Source: Federal Reserve Board, Citi Research

Financial Assets

Black families have one-third, and Hispanic families one-fourth the financial assets of white families

Black families have one-third, and Hispanic families one-fourth the financial assets of white families. Financial assets are dependent on income, job benefits, the ability to accumulate savings, and generational (inherited) wealth. The ability to invest depends on initial conditions including inherited wealth, the ability to work in a high wage job that facilitates savings needed for investment, a higher tolerance for risk, and financial savvy. The sections above explain the challenges for Black and Hispanic families regarding inheritances and high wage employment. Linked to high wage employment are benefits including retirement benefits and pooled investment funds like 401K plans, which are an easy way to accumulate financial wealth. Black and Hispanic workers are almost equally likely to participate in traditional pension plans, but less likely to participate in 401K plans relative to their white counterparts (Figure 78). Jobs that have unions which bargain for pensions may explain some of the similarity in rates of participation among racial groups. Greater labor force participation in jobs that are non-unionized, part-time and/or lacking in benefits among Black and Hispanic workers may explain the disparity for 401K plans (Figure 79).

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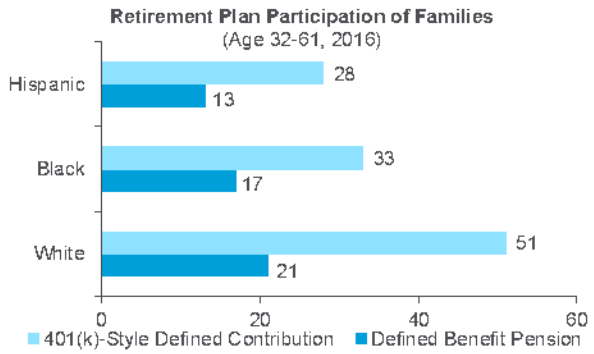
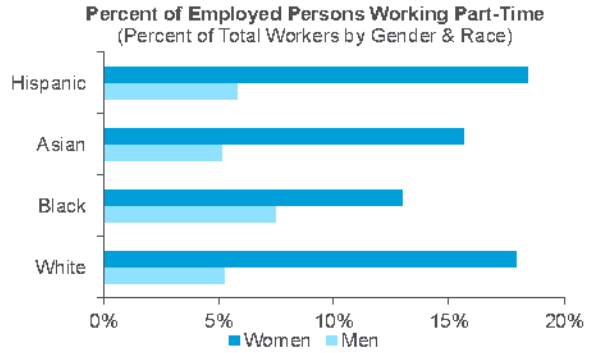
Figure 78. Black and Hispanic Workers Are Less Likely to Participate in 401(k) Plans



Source: Federal Reserve *Survey of Consumer Finances*, Citi Research

Figure 79. Black Men are Slightly More Likely to Work Part-Time than White Men; Black Women More Likely to Work Part-Time than Men



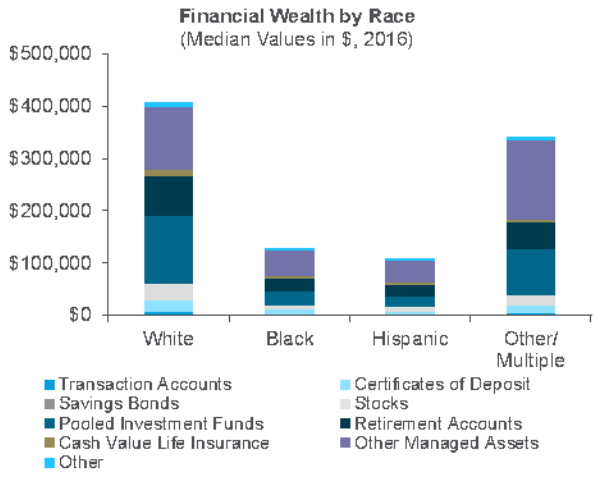
Source: Bureau of Labor Statistics, Citi Research

Nonfinancial Assets

Black families have fewer assets in every category of nonfinancial wealth compared to other races

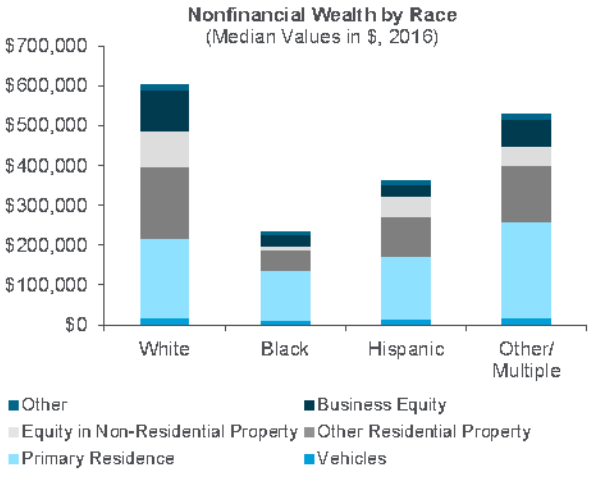
Black families have fewer assets in every category of nonfinancial wealth compared to other races, with elevated barriers to attaining such wealth via property holdings. Nonfinancial assets depend upon income and wealth (Figure 80), but also equal access to credit. The largest contributors of nonfinancial wealth are related to real estate (primary residence, other residential property and nonresidential property). Property is typically acquired through inheritance, or a combination of savings (from earned income and financial assets) and access to credit, which is often dependent upon one's savings, proof of a perpetual source of income (wages), and credit history. Black families are trailing other races on nearly all of these fronts, rendering the path towards building wealth through nonfinancial assets difficult to attain (Figure 81).

Figure 80. Black Families Have One-Third of the Financial Assets of White Families



Source: Federal Reserve Board, Citi Research

Figure 81. Black Families Have Fewer Assets in Every Category of Nonfinancial Wealth Relative to Other Races



Source: Federal Research Board, Citi Research

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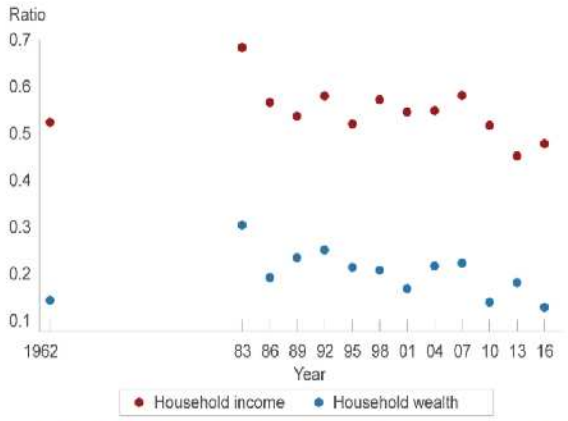
Hard and Soft Barriers

The primary driver behind the wealth gap is the income gap, therefore policies designed to speed the closing of the racial wealth gap should focus on closing the racial income gap

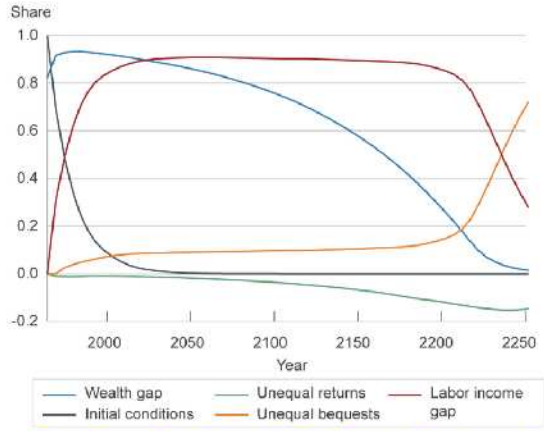
The Federal Reserve found the primary driver behind the wealth gap is the income gap. Moreover the income gap is large enough to explain the persistent difference in wealth accumulation between different racial groups in the United States. The key policy implication of this finding is that policies designed to speed the closing of the racial wealth gap should focus upon closing the racial income gap. Looking at the Federal Reserve's Survey of Consumer Finances dating back nearly 40 years reveals that while wealth and incomes have fallen, the ratio of both wealth and income of Black and white families remained persistently wide (Figure 82). Looking ahead, the Federal Reserve estimates the wealth gap can be eliminated if the racial income gap is closed (Figure 83). This effect would eventually negate the influences of unequal bequests, initial conditions, and unequal returns. The downside is that this might take roughly 200 years to achieve.

Figure 82. Wealth and Income Ratios of Black and White Means in the Survey of Consumer Finances Reveal Persistently Wide Gaps



Source: Federal Reserve Bank of Cleveland: What Is Behind the Persistence of the Racial Wealth Gap?

Figure 83. Contribution to Factors of Wealth Gap Over Time



Source: Federal Reserve Bank of Cleveland: What Is Behind the Persistence of the Racial Wealth Gap?

Intangibles also matter significantly for wealth accumulation

Black and Hispanic families are less likely to have exposure to financial markets and peer groups of successful investors, which help provide the financial literacy required to make informed decisions. Black and Hispanic people are few and far between in finance jobs, which would facilitate education and access to peer groups (Figure 84). Moreover, financial literacy coursework is still far from fully included in academic curriculums, which is problematic for all students, not just for students of color. According to the Council for Economic Education, only 21 states require high school students to take a course in personal finances, and only a handful of states require standardized testing around financial literacy (Figure 85). Compounding these barriers are the lower levels of tolerance for risk among Black and Hispanic families which is strongly associated with the level of net worth (i.e., higher net worth allows for a higher risk tolerance) (Figure 86 and Figure 87).

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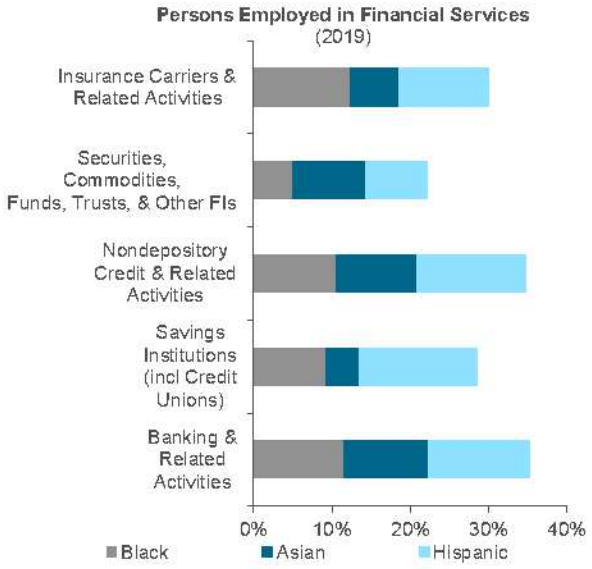
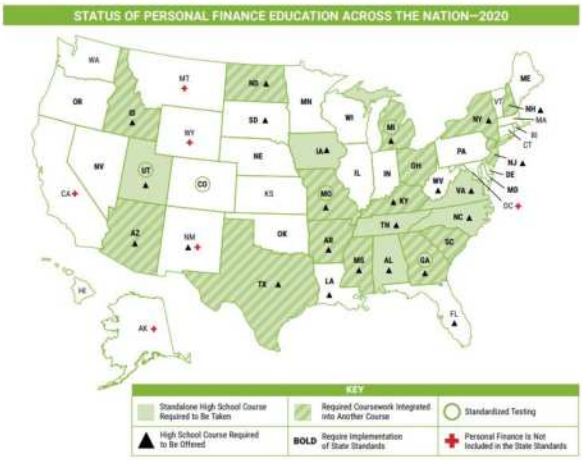
Figure 84. Black People Represent Small Share of Financial Workers



Source: Bureau of Labor Statistics, Citi Research

Figure 85. Few States Mandate Financial Literacy Coursework



Source: Council for Economic Education

Figure 86. Average 2013 Family Wealth by Attitudes Toward Saving and Investing (Family Head Ages 35 to 59)

	Net Worth
Tolerant of risk	$ 1,079,478.00
Not tolerant	$ 375,608.00
Long time horizon for saving and investing	$ 748,093.00
Short or medium time horizon	$ 183,354.00
Approve of borrowing for vacations or luxuries	$ 435,134.00
Do not approve	$ 532,150.00

Source: Federal Reserve Board: Exploring the Racial Wealth Gap Using the Survey of Consumer Finances

Figure 87. Wealth, Race, and Attitudes Toward Saving and Investing: Distribution of Attitudes by Race

	Risk Tolerant	Long Horizon	Luxury Borrower
White	23%	71%	18%
Black	15%	53%	21%
Hispanic	15%	52%	17%
Total	21%	67%	18%

Source: Federal Reserve Board: Exploring the Racial Wealth Gap Using the Survey of Consumer Finances

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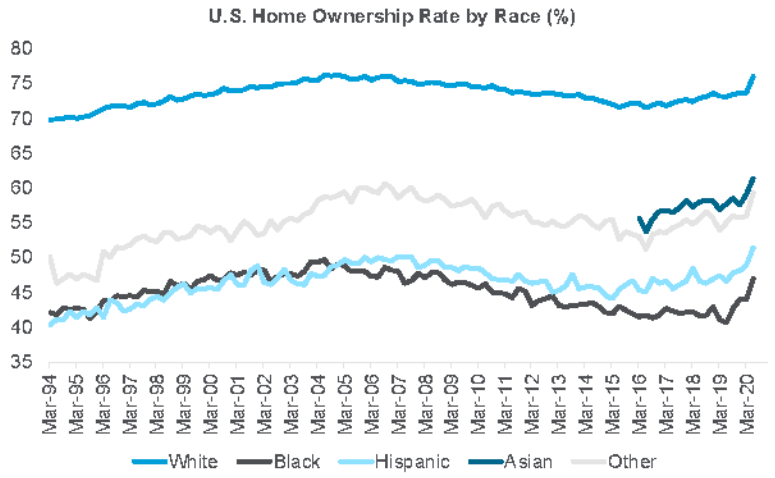
Racial Housing Gap

Black families have the lowest rate of home ownership among different racial groups

Housing is the largest stock of wealth most families hold, with Black families facing the greatest obstacles to home ownership. At 47 percent as of the first quarter of 2020, Black families have the lowest rate of home ownership among different racial groups (Figure 88). Income and wealth gaps contribute to lower levels of homeownership, but so do other factors, including access to credit, outstanding debt, and a short supply of affordable housing options.

Figure 88. Black Homeownership Rates Are Below That of All Other Racial Groups



Source: Census Bureau, Citi Research

Access to Credit

Black families continued to be the most likely racial group to be denied a conventional or nonconventional mortgage

The path towards Black family home ownership is limited by reduced access to credit. The Consumer Financial Protection Bureau (CFPB) reported in 2019, Black families continued to be the most likely racial group to be denied a conventional or nonconventional mortgage for home purchase or refinance (Figure 89). The denial rate for Black families remained above 15 percent for home purchase and was roughly 35 percent for refinance, compared to just above 5 percent and 15 percent, respectively, for white families. The higher denial rate for Black families largely reflected elevated debt-to-income ratios, poor credit histories, and incomplete applications (Figure 90).

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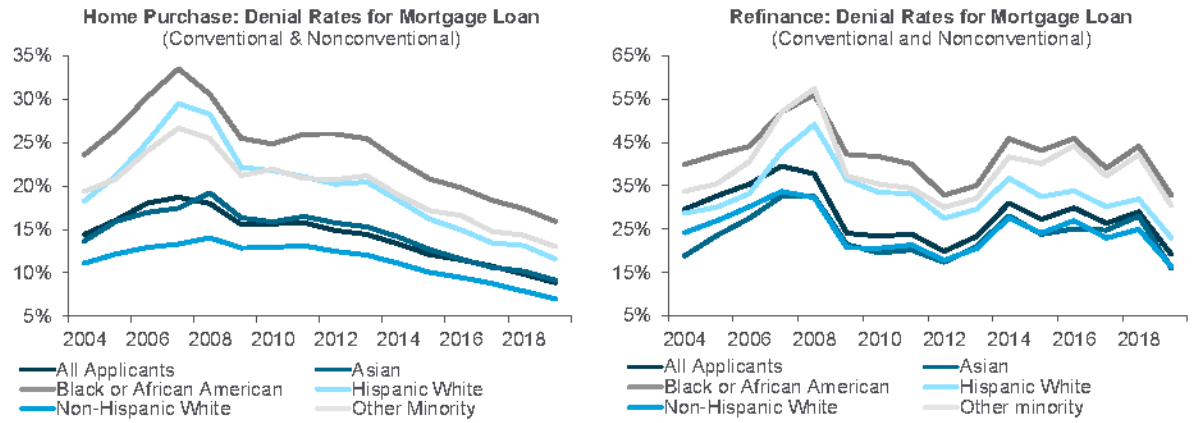
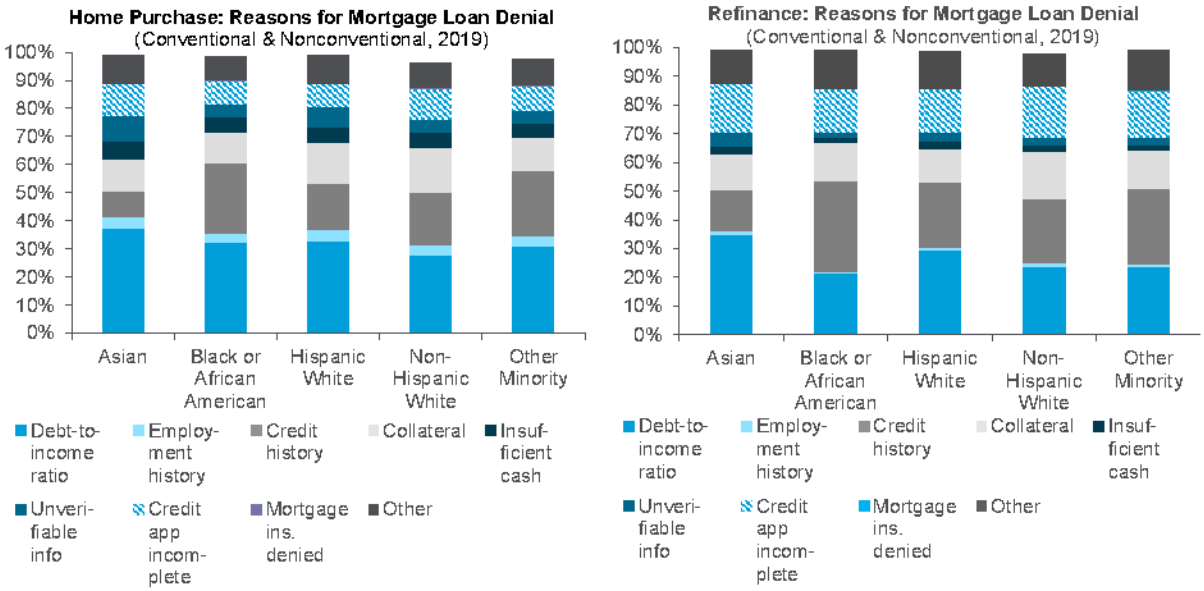
Figure 89. Black People Continue to Experience the Highest Level of Mortgage Loan Denials



* Consists of applications by American Indians or Alaska Natives, Native Hawaiians or other Pacific Islanders, and borrowers reporting two or more minority races.
Source: Consumer Financial Protection Bureau, Citi Research

Figure 90. Elevated Debt-to-Income Ratios, Poor Credit Histories, and Incomplete Applications Are the Main Drivers of Loan Application Denials for Black Homebuyers and Mortgage Loan Refinancers



* Consists of applications by American Indians or Alaska Natives, Native Hawaiians or other Pacific Islanders, and borrowers reporting two or more minority races.
Source: Consumer Financial Protection Bureau, Citi Research

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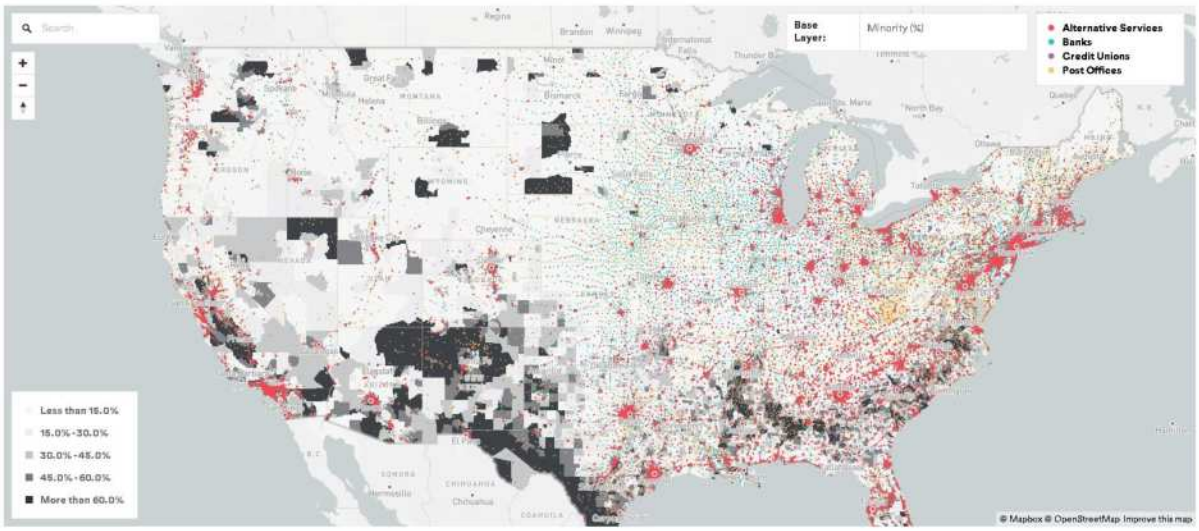
Access to Financial Services

Lack of access to traditional financial services in Black neighborhoods, plus higher account requirements drive Black families to alternative financial institutions which are costly

Lower credit scores among Black families can be partially explained by the forces of structural racism in the financial system. Research shows the legacies of redlining, community segregation, and few traditional financial institutions in predominately Black neighborhoods have limited access to traditional credit for Black borrowers' and exposed them disproportionately to predatory lending sources. A study by think-tank New America reveals that alternative financial institutions predominate in states where more Black people tend to reside. An overlay of the 16 states (IL, MI, AR, LA, MS, AL, TN,GA, FL, SC,NC, VA, MD, DE, NJ, NY) where Black people represent a greater percent of the population than the national average, maps nearly one-to-one with the elevated number of alternative banking institutions (Figure 91). Moreover, traditional banks in predominately Black neighborhoods, tend to require higher initial opening deposits, higher minimum balances. This translates into Black accountholders needing to deposit a higher percentage of their paychecks into accounts to avoid fees or closure (Figure 92). Higher costs contribute to the elevated number of unbanked individuals who are forced to turn to alternative financial institutions like check cashing outfits and payday lenders, which carry higher interest rates and fees (Figure 93). McKinsey estimates the average person could save as much as $40,000 over a career by switching from check cashing places to a traditional bank account. Fines, fees, and subprime borrowing erode credit scores and consequently reduce access to credit for home ownership (Figure 94).

Figure 91. Traditional and Nontraditional Banking Services by Concentration of Minority Populations



Source: New America

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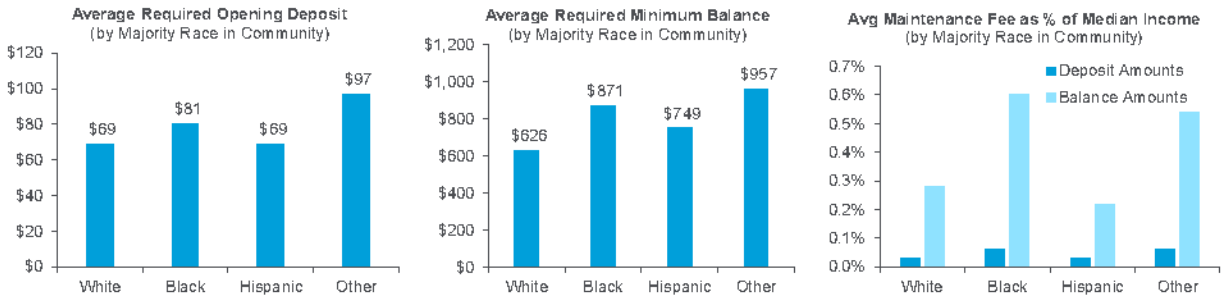
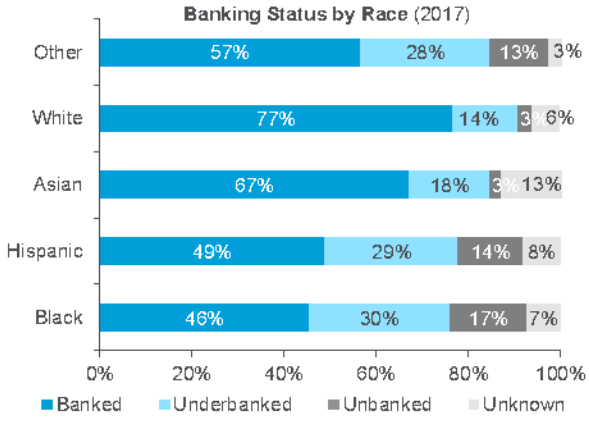
Figure 92. Even Traditional Banking Can Cost More for Minority Communities



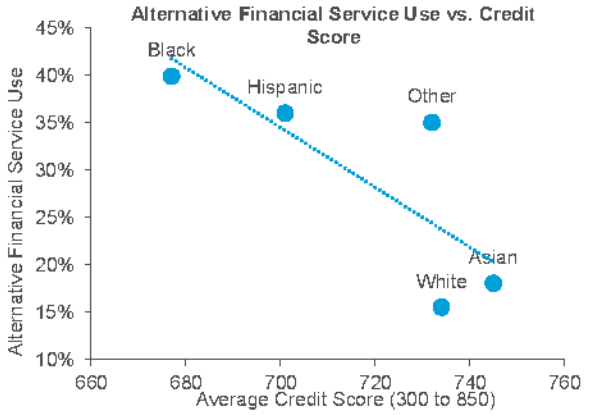
Source: New America (David H Montgomery/Bloomberg CityLab)

Figure 93. Black Consumers Are More Likely to be Unbanked or Underbanked



Source: FDIC National Survey of Unbanked and Underbanked Households

Figure 94. There Is a Notable Relationship Between Alternative Financial Services Use and Low Credit Scores



Source: FDIC National Survey of Unbanked and Underbanked Households, Shiftprocessing.com, Citi Research

Student Loan Debt

Elevated student loan debt and high debt-to-income levels inhibit Black homeownership

Elevated debt-to-income levels and poor credit histories linked to student loan debt are also likely inhibiting Black homeownership. The Urban Institute found that African Americans with four-year college degrees have a lower homeownership rate than white Americans without a high school diploma — 56.4 percent vs. 60.5 percent (Figure 95). Of all racial groups, the Federal Reserve Board's Survey of Household Economics and Decisionmaking reveals Black persons (43 percent) are more likely to have student loan debt than white persons (24 percent), and have more student loan debt on average regardless of housing situation (Figure 96). The income and wealth gaps contribute to the sizable amount of student loans Black persons borrow and ultimately carry as debt. Also according to the Center for Responsible Lending, Black persons with a college degree are five times more likely to default on their student debt than white Americans, which is also associated with the wealth gap. The presence of elevated student loan debt and/or defaults render a person less likely to meet mortgage lending standards.

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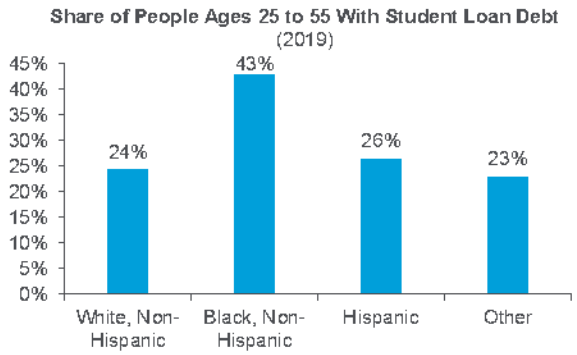
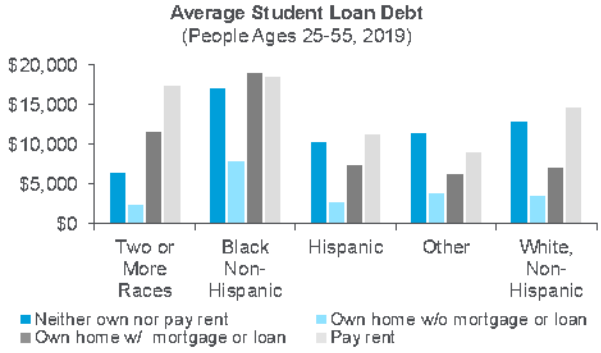
Figure 95. Black Persons Are More Likely to Have Student Loan Debt Than Other Racial and Ethnic Groups



Source: Federal Reserve Board *Survey of Household Economics and Decisionmaking*, Citi Research

Figure 96. Black Persons Tend to Have Higher Average Student Loan Debt Regardless of Housing Situation



Source: Federal Reserve Board *Survey of Household Economics and Decisionmaking*, Citi Research

Affordable Housing

In many metropolitan areas with large Black populations, geographic segregation is compounded by lack of available affordable housing

Even when income and credit conditions are met, lack of affordable housing remains a major constraint to homeownership for many Black families. Data from the Census Bureau and real estate agency Zillow reveal that in many metropolitan areas with large Black populations, geographic segregation is compounded by lack of available affordable housing. The dissimilarity score is a metric that measures the extent to which racial groups are clustered in geographic areas. Again, many of these clusters are a result of past policies including housing discrimination and redlining. Cities with sizable Black populations including New York, Los Angeles, Washington DC, Boston, Miami, Philadelphia, Atlanta, Houston, and Detroit are not only quite segregated (dissimilarity scores closer to 1 than 0.5) but also have wide gaps between the least and most expensive homes (Figure 97). A Trulia real estate agency study also revealed the widening gap between the median home valuation and most homes in large metro areas appeared to be occurring at the lower end of the market. In other words in most markets affordable housing is disappearing.

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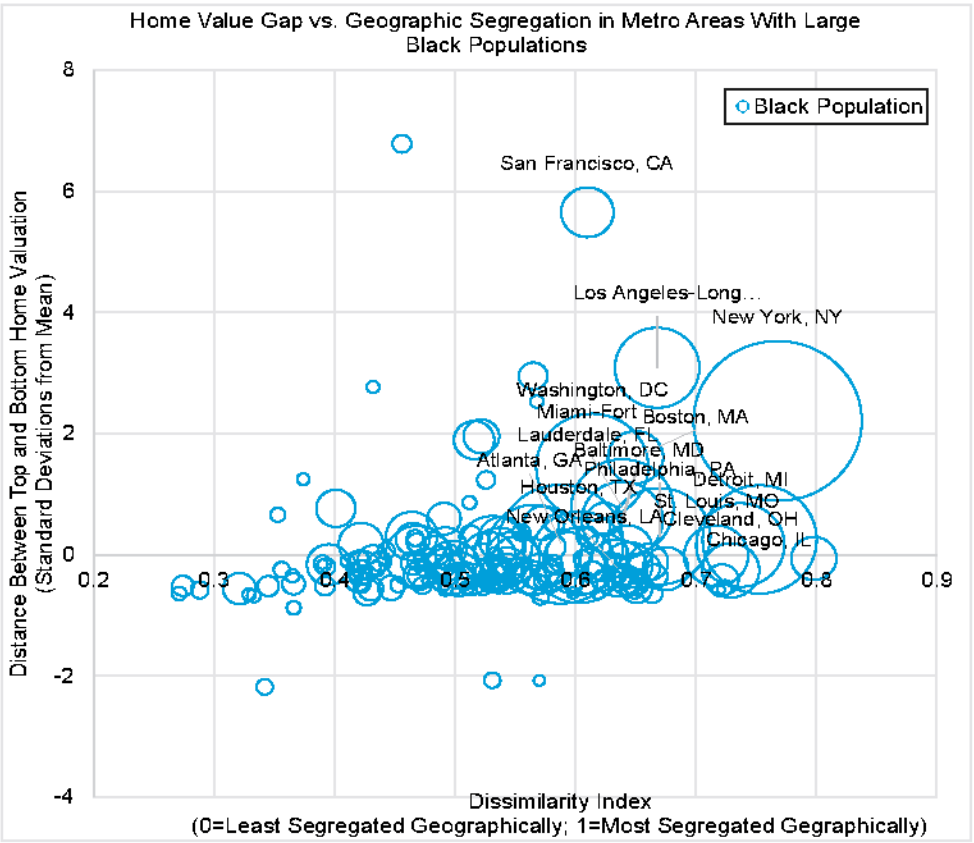
Figure 97. Affordable Housing Gap Is Highly Pronounced In Metro Areas with Large Black Populations



Source: Census Bureau, Zillow, Blackdemographics.com, Citi Research

Closing the Gap

If the Black home ownership rate were returned to the 2000 level, there would be an estimated 770,000 additional Black homeowners

Closing the Black family housing gap 20 years ago might have generated $218 billion in additional U.S. consumption. According to the Urban Institute, the current 30 basis point gap between Black and white family home ownership is greater now than before 1968 when housing discrimination was legal. The ownership spread is directly related to the racial wealth gap and the increase in inequality in general post the Great Financial Crisis. If the Black home ownership rate were returned to the 2000 level, there would be an estimated 770,000 additional Black homeowners. Multiplying the National Association of Realtor's median existing home price by this figure equates to $154 billion in additional home sales over the 2000 to 2019 period (Figure 98). A simple calculation of spending on maintenance, cars, and furniture, which often accompany home buying using the Bureau of Labor Statistics' Consumer Expenditure Survey suggests that there might have been another $65 billion in consumption over the last two decades (Figure 99).

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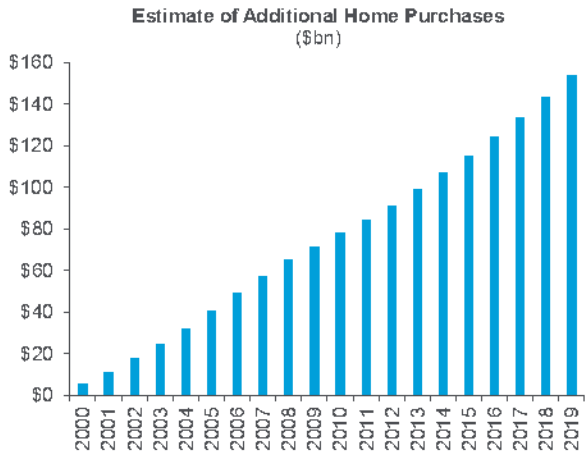
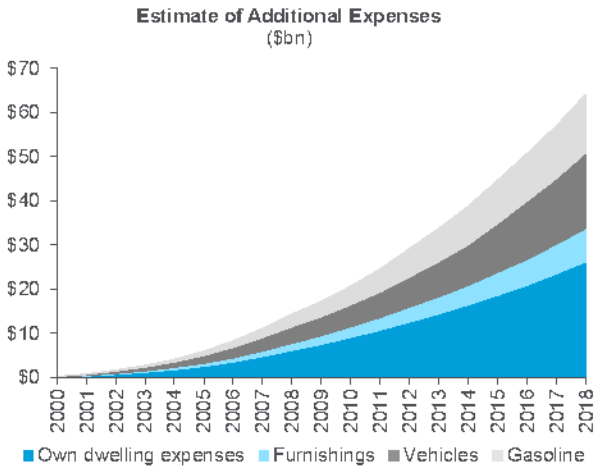
Figure 98. 770,000 Additional Black Homeowners Might Have Added Another $154 Billion in Spending on Housing Since 2000



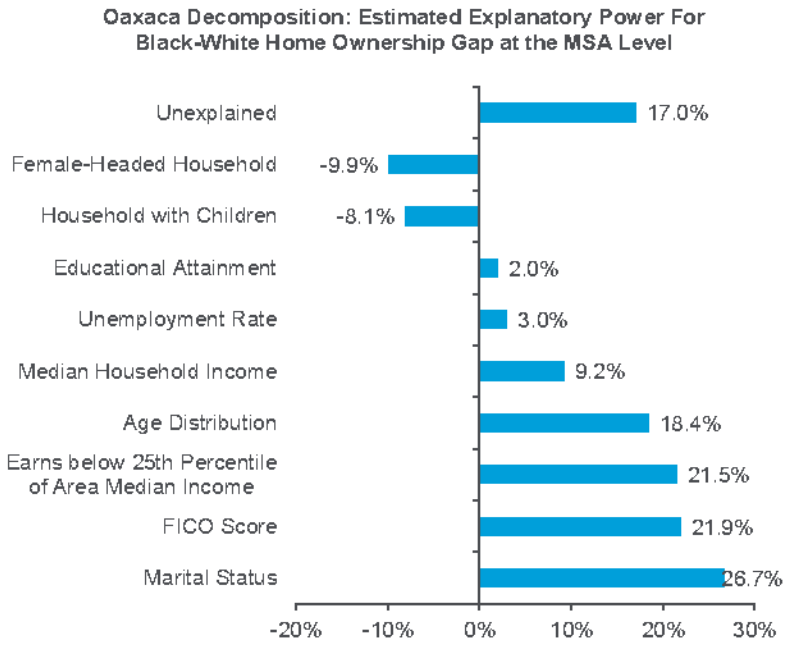
Source: National Association of Realtors, Citi Research

Figure 99. Black Homeowners Might Have Generated an Additional $65 billion in Consumption on Housing-Related Expenditures



Source: Bureau of Labor Statistics, Citi Research

Figure 100. Seventeen Percent of the Black-White Homeownership Gap Remains Unexplained



Source: Urban Institute, Citi Research

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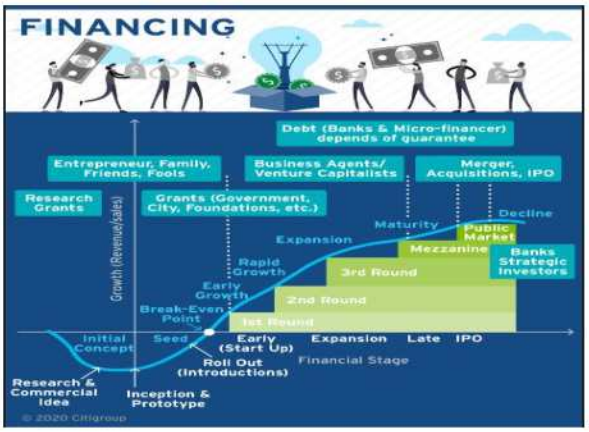
Racial Investment Gap

Capital Deficit

A lack of funding along the investment cycle is an issue for Black entrepreneurs and business owners

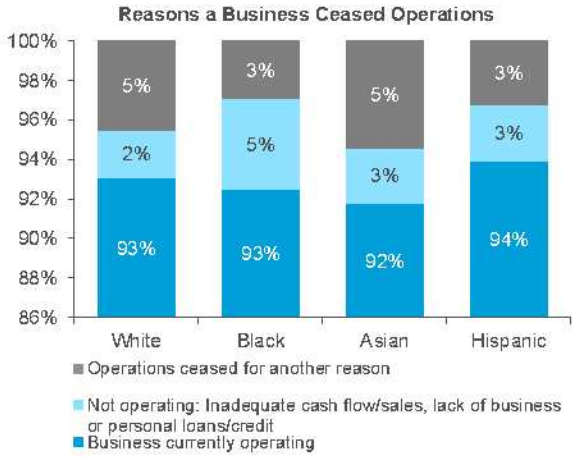
Black entrepreneurs suffer not from a lack of vision, but a lack of funding along every point in the investment cycle. Funding is a challenge over the phases of start-up and as the business matures (Figure 101). Indeed, Black business owners are more likely to cease the operations of their business due to insufficient sales and/or lack of financing than other racial group (Figure 102). During the early stages of funding for a new business, Black founders are more likely to source funds from family, friends, and employees than are white founders. However, funding from friends and family tends to yield $25,000 or less in capital for Black-owned firms, and even less for white-owned firms (Figure 103). Black founders are more likely to bring their own resources to the table than are white founders, with Black founders more apt to use personal and business credit cards that may have higher interest rates and fees (Figure 104). Black founders are also less likely to receive other forms of financing, including business loans from banks, financial institutions, and friends, grants, and professional investors (e.g., angel and venture capital investors). For Black founders who do gain access to these other types of investment, the percentage receiving loans of $100,000 or more is somewhat smaller than the size of loans for white founders (Figure 106).

Figure 101. Phases of Private Business Financing



Source: Citi Research

Figure 102. Black Businesses More Likely to Die Due to Inadequate Sales and/or Access to Financing



Source: SBA, Census Bureau, Citi Research

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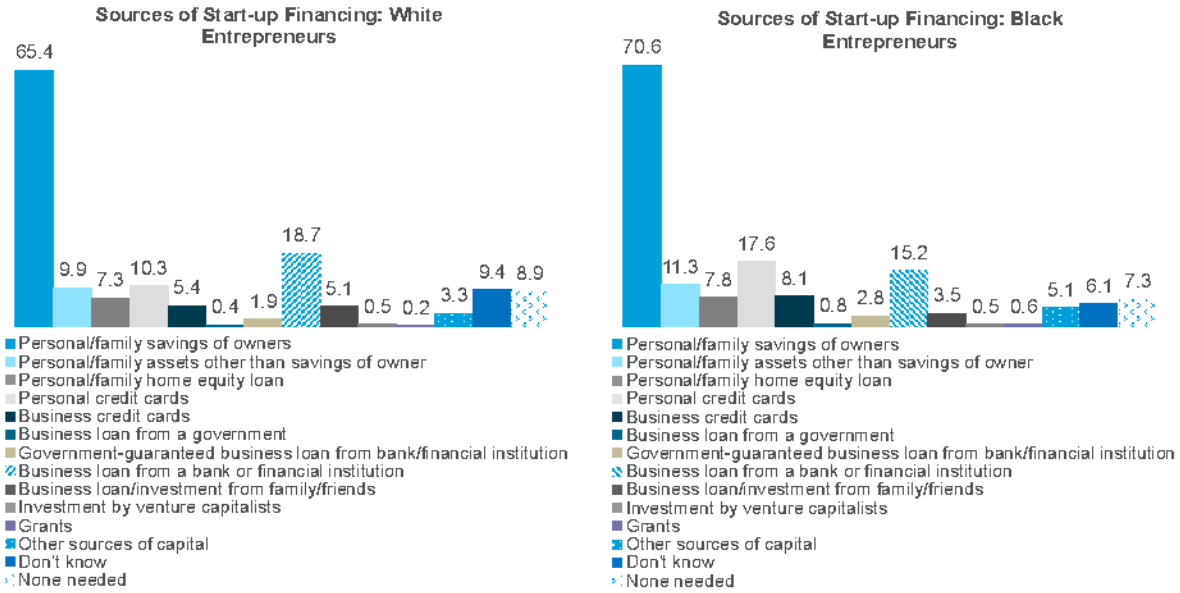
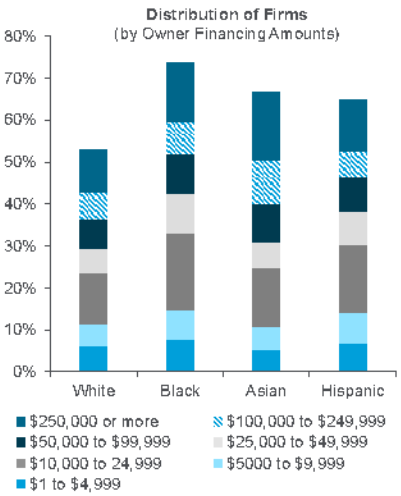
Figure 103. Black Entrepreneurs Are More Dependent Upon Sources of Capital from Friends, Family, and Own Resources for Capital



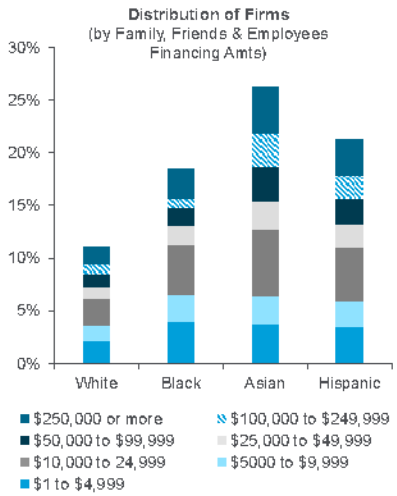
Source: SBA, Census Bureau Annual Survey of Entrepreneurs, Citi Research

Figure 104. Black Founders Are More Likely to Produce their Own Resources for Start-ups



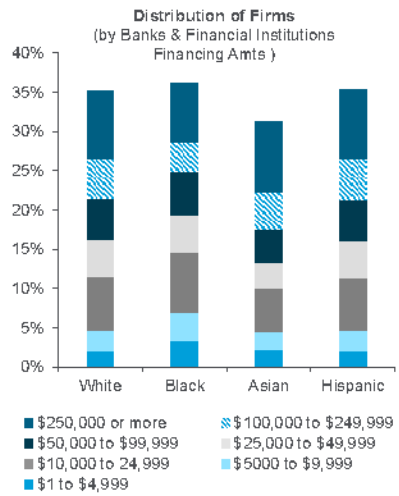
Source: SBA, Census Bureau Annual Survey of Entrepreneurs, Citi Research

Figure 105. Friends and Family Yield Limited Resources for Both Black and White Founders



Source: SBA, Census Bureau Annual Survey of Entrepreneurs, Citi Research

Figure 106. Black Founders Receive Less Funding for Projects Above $100,000



Source: SBA, Census Bureau Annual Survey of Entrepreneurs, Citi Research

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Bank Loans and Denials

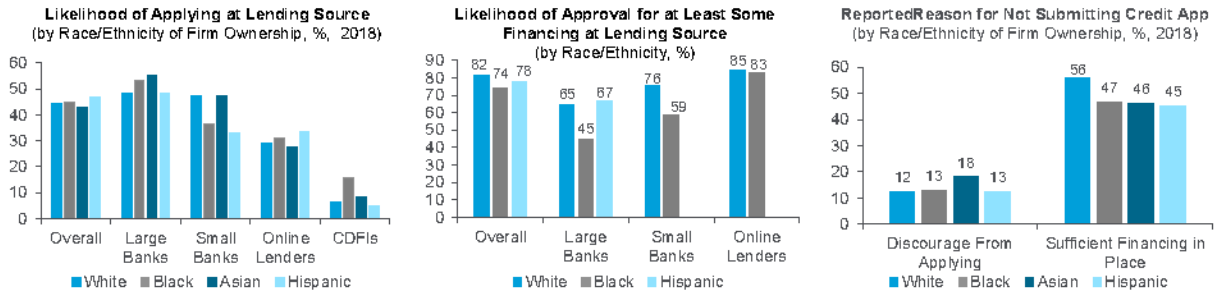
Creditworthy Black-owned firms experience greater challenges raising capital than creditworthy white-owned firms including lower application rate, lower approval rates,

Black entrepreneurs appear shut-out of traditional forms of financing. The reliance of Black founders on less lucrative forms of financing may reflect the difficulty in financing along the investment channel. According to the Fed, creditworthy Black-owned firms experience greater challenges raising capital than creditworthy white-owned firms. Even after controlling for firm characteristics and performance, the Fed finds that approval rates for Black-owned firms still remain lower. Fed data indicate all entrepreneurs are more likely to apply to large banks versus other institutions for financing. However, Black-owned businesses are the least likely to receive approval for loans from large banks (Figure 107). Despite Black-owned firms being less likely to apply for financing at small banks, they are similarly less likely to be approved for loans than white-owned firms at these small banks. Black founders are the least likely to apply to online lending sources, like most other racial groups, but are about equally likely to be approved as white founders at these alternative financial institutions. This suggests there may be critical factors differentiating Black founders in traditional bank lending standards than among alternative financial institutions. If Black-owned firms are passing the gauntlet along myriad metrics, but still not receiving funding, then the epsilon may be bias.

Black-owned forms also tend to receive less in funding than white-owned firms

The Fed also found that underfunding is affecting financing. While Black-owned firms are roughly equivalent with white-owned firms in the percentage who decline to apply for loans due to discouragement, Black founders are still less likely to say that they had sufficient funding in place (Figure 108). The Fed reports that even for those Black-owned firms who are approved for financing, they typically receive less than half of what was requested. According to the Fed, minority-owned businesses in recent times are still facing potentially large unmet financing needs. Census Bureau data confirm this. When complaints of underfunding are tabulated across different types of financing, Black founders routinely state that they received fewer dollars than requested.

Figure 107. Black Entrepreneurs Are Less Likely to Receive Loans from Traditional Banks Despite High Likelihood of Applying to Traditional Banks



Note: CDFI stands for Community Development Financial Institutions
Source: Federal Reserve Board, Citi Research

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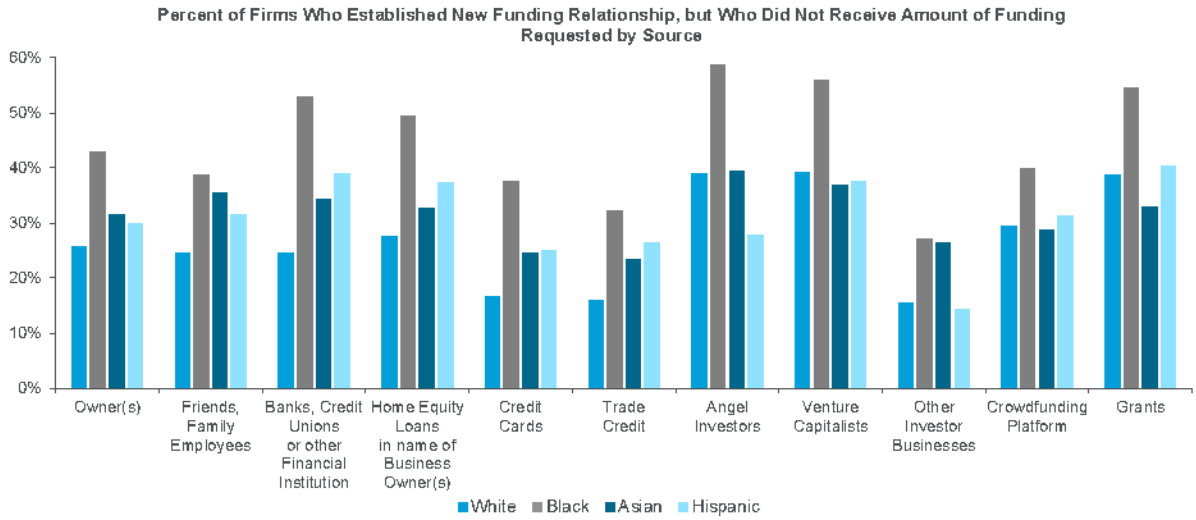
Figure 108. Black Business-Owners Routinely Receive Less Funding than Requested from Financing Sources



Source: SBA, Census Bureau Annual Survey of Entrepreneurs, Citi Research

Asymmetric Information and Narrow Pipelines

Black investors represent small shares of angel and venture capital investment

Black investors are missing out on an important stage in capital raising. Angel and venture capital (VC) investment are important phases in the private business capitalization pathway, but Black investors represent small shares of these types of investors. Just over 1 percent of all angel investors are Black (Figure 109), while 4 percent of the VC workforce is Black, with just 3 percent in the senior ranks of leadership (Figure 110). The number of Black persons in finance provision positions is important because they can play a pivotal role in directing capital to Black-owned businesses. In the VC space, this is extremely important as the majority of products purchased by consumers received VC funding at some point and these financiers decide which businesses receive funding and ultimately what products go to market.

Asymmetric information and a narrow pipeline limit investment in Black-owned businesses

Studies suggest that the sparse amount of investments by Black angel and VC investors reflect a combination of asymmetric information — in that Black entrepreneurs are not aware of these sources of funding — and/or a narrow pipeline of incoming investors. With respect to information, SEC regulation prohibits business founders from publicly advertising fundraising. Communication of these opportunities are limited to a network of accredited investors. Accredited investors must have $1 million in net worth, not including a home, or income exceeding $300,000, which can be prohibitive for many would be angel investors. Hence, a lack of information and wealth-limits create barriers for entrepreneurs and potential investors. Regarding the pipeline, many VCs have backgrounds in investment banking, which have struggled with diversity given in part to recruiting from elite schools that are also lacking in diversity. Indeed, 40 percent of venture capitalists attended either Harvard or Stanford University. Over the last 30 years Harvard Business School had a Black population averaging about 5 percent. The high cost of a business school education is one prohibition for Black students.

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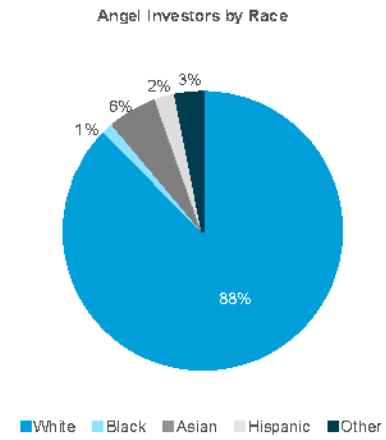
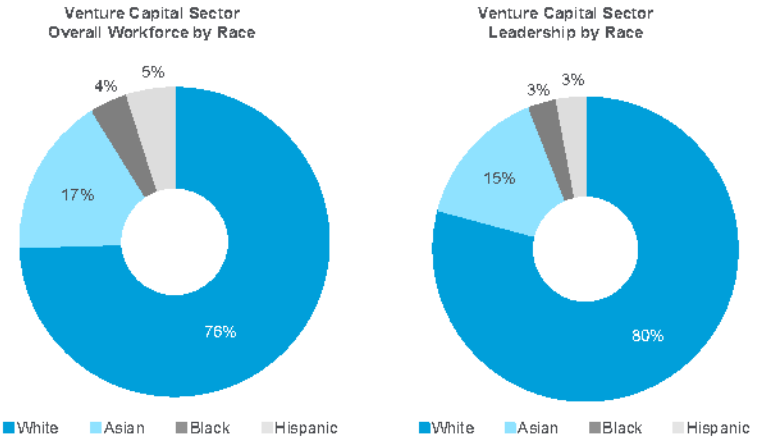
Figure 109. Black Investors Represent a Nominal Share of Angel Investors



Source: Wharton Entrepreneurship and Angel Capital Association, Citi Research

Figure 110. Black Investors Are Underrepresented in the Venture Capital Space, Both In Leadership and the Overall Workforce



Source: NVCA, Deloitte, Citi Research

Investor Bias

Unconscious bias may also be at the root of the dearth of investment in Black-owned businesses

Venture capital is a relationship-based business, so the leaders decide which other investors are invited into the fold, and which firms receive capital. This proves problematic if the perception of Black founders and their business ventures are tinged by unconscious bias. Anecdotal assertions of bias include investors not trusting that Black entrepreneurs have viable and sustainable businesses, and/or lack an understanding of the product or customer Black founders are serving. Even for professional investors choosing to invest in VC funds, data-based evidence of bias is revealed in a Stanford University study which determined when venture capital funds are managed by a person of color with strong credentials, professional investors judge them more harshly than their white counterparts with identical credentials (Figure 111). The study found investors were able to easily distinguish between stronger and weaker white-led teams, where the stronger team received the higher ratings and the weaker team lower ratings. However, investors were unable to distinguish between stronger and weaker Black-led teams. Strong white-led teams were expected to raise more funds than strong Black-led teams, suggesting lower funding prospects for Black-led fund teams, and consequently financing for Black-owned businesses (Figure 112).

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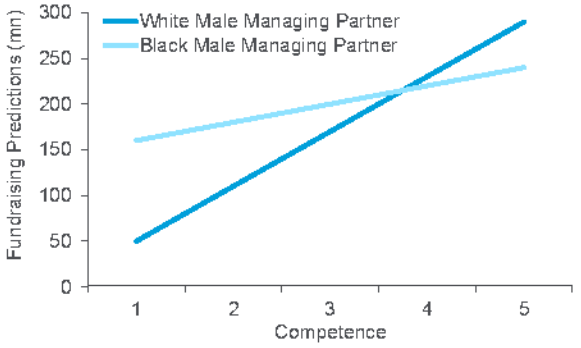
Figure 111. Higher Performing Black-Led VC Funds Rated Lower than White-Led VC Funds by Professional Investors

Source: Stanford University, PNAS

Figure 112. Professional Investors Less Able to Distinguish Between Weak and Strong VC Funds, Projecting Lower Funding Prospects



Source: Stanford University, PNAS

Closing the Gap

Increased access to funding and information, alternative measures of credit, and financial education can all help close the financing gap

Increased access to financing and information are tactics that may help close the financing gap for Black-owned businesses. As Black-owned firms appear to invest greater sums of owner-generated financing for start-up projects, this greater level of personal sacrifice should factor more favorably into lending decisions from financial institutions. Experts have also advocated for alternative measures of credit to factor more materially in underwriting decisions, not just FICO scores. Black entrepreneurs are on balance more highly educated than the average small business owner, and are more likely to be Gen X'ers (45 percent) and Baby Boomers (31 percent) than Millennials (22 percent). However, there still appear to be gaps in experience running a firm and/or knowledge about financing options, including angel and venture capital investment. Governments (including the SBA) can make it easier for firms to learn about funding options and/or lowering the barrier for interested investors to become engaged, particularly for angel investors. There is also a market for private firms to educate and counsel Black business owners regarding applying for and obtaining financing via traditional and non-traditional financing channels.

Eliminating bias will be more difficult. However, if lenders and professional investors changed their views towards minority-owned firms, there might be greater access to capital. More capital helps ensure the survival of Black-owned firms, and greater revenue, which currently trails that of white-owned firms in every industry except manufacturing (Figure 113). More revenue leads to greater job creation, and more income which facilitates consumption and real GDP growth. A Fed survey found that 60 percent of Black-owned firms declined to apply for financing, even when needed, due to concern that they would be denied. Increasing applications as well as improving approval rates would be highly favorable for Black-owned firms.

Closing the share of Black-owned firms-gap 20 years ago might have generated $13 trillion of revenues for investment, 6.1 million jobs per year, and a cumulative $182 billion in income for consumption

Closing the share of Black-owned firms-gap 20 years ago might have generated $13 trillion of revenues for investment, 6.1 million jobs per year, and a cumulative $182 billion in income for consumption. In 2017, there were more than 114,400 small Black-owned firms, employing 1.2 million persons, generating $121 billion in revenue and $35 billion in annual payroll. However, the number of Black-owned small businesses represents just 0.6 percent of the Black civilian population age 20 and over (20 million people). This is compared to a 3.6 percent share of white-owned small firms to the white civilian population (122 million).

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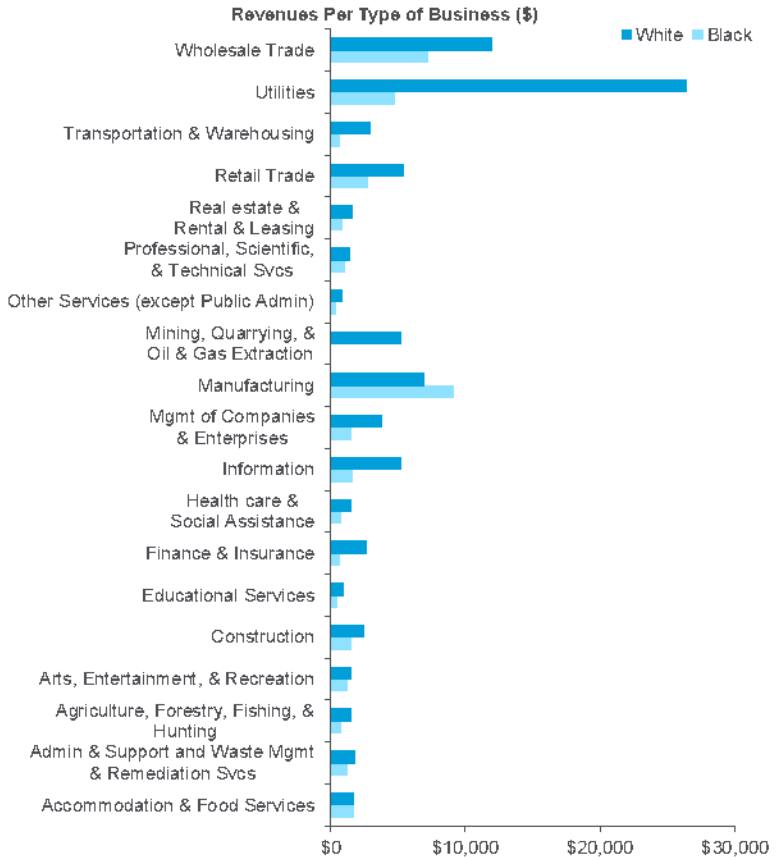
If the share of Black-owned firms was raised to 3.6 percent of the U.S. Black population, the number of businesses would rise to more than 720,000, or a 6-fold increase. Per year, revenue might increase to $761 billion, the number of employees to 7.3 million, and payrolls to $10.8 billion. If this gap were closed two decades ago, then the additional amount of consumption from workers' incomes might have summed to near $182 billion. Some share of the extra $13 trillion in revenues over the last 20 years might have also contributed to GDP-enhancing capital expenditure on equipment, intellectual property, and structures (Figure 114).

Figure 113. With the Exception of Manufacturing, White-Owned Firms Generate More Revenues per Business than Black-Owned Firms



Source: Census Bureau *Survey of Business Owners*, Citi Research

Figure 114. Small Firms, Revenues, Employment and Payrolls: 2017 Actual and Gap Closure Estimates

	Per Year		20 Years	
Black Small Businesses	**2017 Share of Black population (0.6 percent)**	**3.6 Percent Share of Black Population**	**2017 Share of Black population (0.6 percent)**	**3.6 Percent Share of Black Population**
Firms (Number)	114,400	720,069	2,288,000	14,401,386
Revenues (Billions of US$)	$121	$761	$2,417	$15,212
Employees (Number)	1,155,344	7,272,095		
Payrolls/Year (Billions of US$)	$1.7	$10.8	$34.4	$216.7

Source: Citi Research

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How Do We Close the Gaps: Future Policy

Figure 115. Governments, Corporations, and Individuals Can All Work Together to Close Gaps

Source: Shutterstock

Significant and permanent behavioral and attitudinal changes are required to mitigate the number of gaps faced by Black Americans

To emerge from a history of entrenched segregation and active discriminatory policy into an era of genuine equity will require conscientious reform at individualistic, corporate, and governmental levels. Although there is much to celebrate regarding renewed interest in closing gaps, there is still considerable work that must be done.

Moreover, given the exacerbation of inequality amid the COVID-19 pandemic, now is an important time to focus on eliminating racial gaps. In the U.S., the sum total of wealth held by U.S. billionaires is equal to three-quarters of all Black wealth ($3.5 trillion vs $4.6 trillion). Hence, it is crucial to address severe income inequality as part of the overall economic resolution and to avoid the perpetuation of disparity as seen after the Global Financial Crisis (GFC) of 2008. As of 2016, only 20 percent of Americans are said to have recovered to pre-GFC wealth levels, with Black Americans having suffered a 33 percent decline in wealth between 2007 and 2010. The GFC wealth loss further compounded how the median Black family witnessed their wealth almost halve, once adjusted for inflation, from 1983 to 2016; in comparison to an increase of almost one-third for white households.[33]

[33] Dettling, L.J., Hsu, J.W. and Elizabeth Llanes. 2018. "A Wealthless Recovery? Asset Ownership and the Uneven Recovery from the Great Recession," FEDS Notes. Washington: Board of Governors of the Federal Reserve System; Wolff, E. 2017. "Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?", NBER Working Paper No. 24085.

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What Can Governments Do?

Figure 116. Public Policies are Required to Advance Racial Gap Closures

Source: Shutterstock

Governments can help reduce racial gaps by eliminating discriminatory barriers and implementing policies that support work, homeownership, entrepreneurship, and well-being

Governments can help reduce racial gaps by eliminating discriminatory barriers and implementing policies that support work, homeownership, entrepreneurship, and well-being. Basic actions, borrowed in part from the literature on gender equity, include (1) adequate race-specific data collection, necessary for identifying, tracking, and ameliorating race-based gaps; (2) prohibiting discrimination in wages, housing, labor, financial services, lending etc. based upon race; (3) facilitating work, including affordable childcare options, quality K-12 education, access to higher education, and paid family leave; and (4) supporting innovation, including enabling access to financing for Black-owned firms and start-ups. Additionally, governments can act to promote access to affordable healthcare and housing, which are paramount for supporting work and innovation. In this paper, we also highlight more unconventional ideas for how governments can contribute to closing racial gaps, from the Fed and Congress, to the state and local level.

Monetary Policy Focus

Voices are calling for the U.S. central bank to include reducing racial inequality as part of its mission

More voices are calling for the U.S. central bank to enhance its focus upon racial economic gaps. Economic gaps produced as a consequence of decades of racial discrimination have been highlighted by Democratic politicians in the U.S. in their proposal for the Fed to integrate racial considerations in its policymaking. Under 'The Federal Reserve Racial and Economic Equity Act', the reduction of racial inequality in the U.S. economy would become an official part of the Fed's mission. Former Vice President, Joe Biden called on the Fed to 'aggressively enhance' its highlighting of 'persistent racial gaps in jobs, wages and wealth.'[34] It is worth highlighting that before the pandemic, the Black unemployment rate, concurrent will all other jobless rates, was falling and reached an all-time low of 5.4 percent in August 2019. However, it remained higher than overall unemployment, which troughed at 3.5 percent in February 2020 and the white unemployment rate, which fell to 3.1percent in January 2020 (Figure 117).

[34] Long, H., "Democrats introduce bill to give the Federal Reserve a new mission: Ending racial inequality," *Washington Post*, August 5, 2020.

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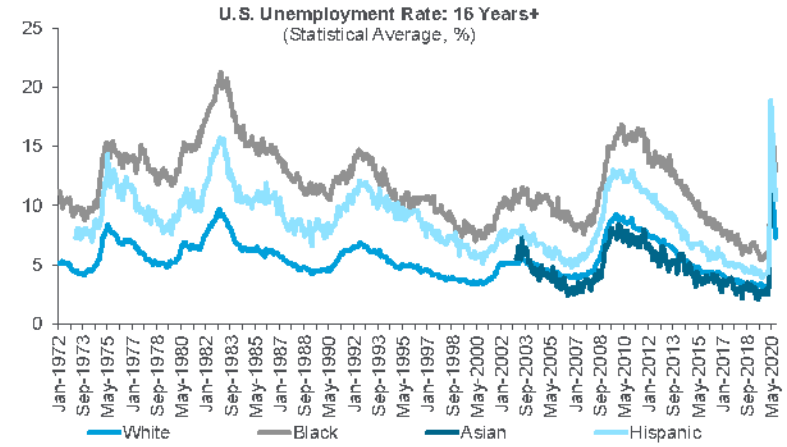
Amid the pandemic, jobless rates across every racial group swelled to nearly four times their pre-COVID levels, but the racial gaps persisted.[35]

The Fed will now focus on broad-based and inclusive job gains and will allow inflation to exceed their 2 percent target for a period

Even in the absence of new legislation, the Fed has signaled a willingness to enhance its focus upon inequality. At the 2020 Jackson Hole Economic Summit, the Fed indicated its policies will focus on "broad-based and inclusive" job gains, language suggesting the central bank's policies may help disadvantaged Americans in particular, rather than as a consequence of focusing upon maximum employment in general. Practically, the Fed will now allow inflation to exceed the 2-percent target for a period of time before raising interest rates, allowing unemployment rates to fall further. Still Chairman Powell stated that ending racial inequality "is more of an all-government, society project that we need to take on forcefully…It can't just be the way the Fed manages interest rates."[36] In other words, there is a role for fiscal policies at every level of government. Moreover, a counter argument to the Fed allowing rates to remain lower for longer, is that low rates inflate the prices of asset that do not benefit low income persons on the upswing, but do negatively affect them on the downswing when the owners of capital (employers) respond to financial market crises by cutting labor.

Figure 117. Black Unemployment Rate Is Consistently Higher than Other Races



Source: Bureau of Labor Statistics, Citi Research

[35] Zeitli, M., "Federal Reserve policy has failed Black Americans for decades. Now is the time to fix that," *Business Insider*, July 18, 2020.
[36] Guida, V., "An activist central bank? Dems push the Fed to fight racial inequality," *Politico*, August 29, 2020.

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Encourage Work

Tax policy, such as EITC and CTC, have proven to reduce poverty as workers keep more of their earnings

Reforming tax benefits and the application of specialized tax reforms can encourage work among lower income families and help reduce racial gaps. One recent study highlighted that of the nearly $275 billion within the 2018 Tax Cuts and Jobs Act, 80 percent benefited white households; receiving $2,020 on average in cuts, versus $970 received by Latino household and just $840 by Black Households.[37] Moreover, households in the highest 1 percentile received 23.7 percent of the law's total tax cuts, in comparison to just 13.8 percent received by the bottom 60 percent. Given that white households are three times as likely as Black or Latino households to be in the top 1%, these racial gaps are further exacerbated.[38] Some effective and racially-inclusive tax provisions linked to work such as the Earned Income Tax Credit (EITC), and Child Tax Credit (CTC), have proven to reduce poverty while serving a larger proportion of minority groups, especially Black and Latina Women. Some policymakers would make CTC fully refundable so the benefits reach the poorest children. Indeed, an estimated 17 million Black households would benefit from a fully-refundable CTC.[39] Under current law, the Congressional Budget Office (CBO) estimates the share of Federal government spending on these credits is set to tumble over the next decade without Congressional intervention (Figure 118).

How do the EITC and the Child Tax Credit Encourage Work?

- **EITC:** The Earned Income Tax Credit, EITC or EIC, is a benefit for working people with low to moderate income. To qualify for EITC, tax filers must have earned income from either working for someone or from running or owning a business or farm, in addition to meeting some basic rules. Filers must also either meet additional rules for workers without a qualifying child or have a child that meets all the qualifying child rules. (Source: IRS.gov).
- **CTC:** The Child Tax Credit (CTC) is designed to give an income boost to the parents or guardians of children and other dependents. It only applies to dependents who are younger than 17 as of the last day of the tax year. The credit is worth up to $2,000 per dependent, but income level determines the exactly amount of the credit. Tax filers need to have earned at least $2,500 to qualify for the CTC. Then it phases out for income above $200,000 for single filers and $400,000 for joint filers. If earned income is above the applicable threshold, filers will receive a partial credit. (Source: Smartasset)

Provide Guaranteed Wages, Income, and Jobs

Progressive policies to help close gaps include raising minimum wages, introducing income supplements, and guaranteeing jobs

A policy with dramatic implication would be a "living wage." Currently, the Federal minimum wage for tip earning employees at just $2.13 an hour and $7.25 for others. Although Black workers make up only 11 percent of the workforce, 38 percent of Black workers currently work for minimum wage and would receive a pay increase under such legislation, helping to address the wage gap (Figure 119).[40] Another policy gaining traction in U.S. policy circles, which has also been implemented in other nations (e.g., Canada), is that of guaranteed income supports.

[37] Institute on Taxation and Economic Policy and Prosperity Now "Race, Wealth and Taxes: How the Tax Cuts and Jobs Act Supercharges the Racial Wealth Divide," October 11, 2018.
[38] Ibid.; Huang, Chye-Ching and Roderick Taylor. "Advancing Racial Equity Through the Tax Code," Spotlight on Poverty and Opportunity, 24 September 2019; Chye-Ching Huang and Roderick Taylor. "How the Federal Tax Code Can Better Advance Racial Equity,", Center on Budget and Policy Priorities, July 25, 2019.
[39] Marr et al., "Working Families Tax Relief Act Would Raise Incomes of 46 Million Households, Reduce Child Poverty," Center on Budget and Policy Priorities, April 16, 2019.
[40] Walker, D., "If Corporations Really Want to Address Racial Inequality, Here are 9 Things That Actually Make a Difference." *Time*, August 4, 2020.

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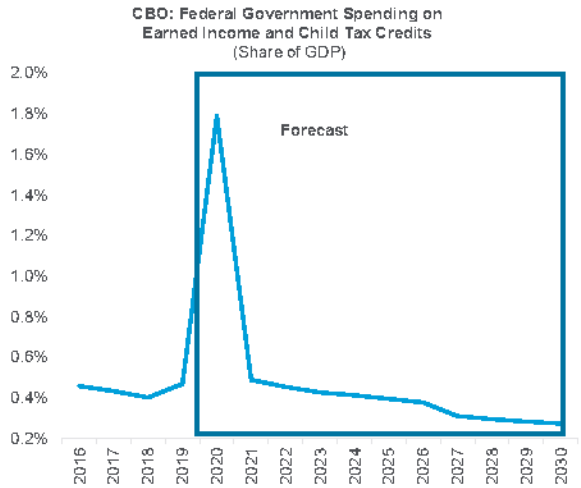
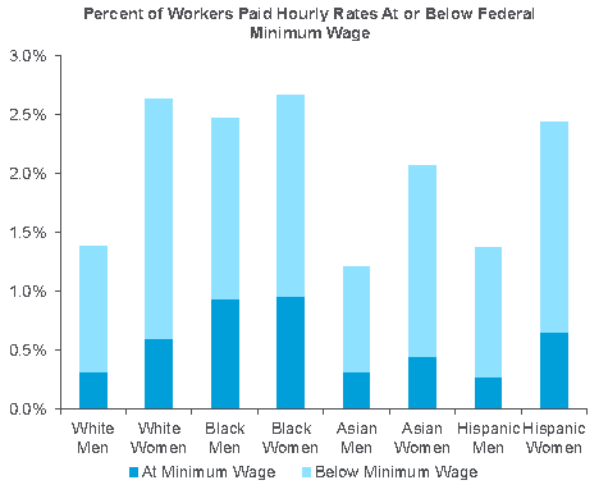
Means-tested, direct government transfers to families, with the potential to expand guaranteed income above the poverty line might help assist families with expenses such as childcare, which is a key enabler of work. A successful basic income program in practice is the Alaska Permanent Fund. The Fund has paid residents a dividend of $1,600 on average in recent years, with one study showing the program reduced poverty by 20 percent in the state.[41] In a similar fashion, a Federal Job Guarantee has also been advocated as an effective way to decrease the racial income gap. While potentially an expensive proposition, with estimated ranging from $378 billion to $543 billion per year, there is some potential to mitigate poverty through work.[42]

Figure 118. EITC and Child Tax Credit Spending Share Set to Tumble



Source: Congressional Budget Office, Citi Research

Figure 119. Black People More Likely to Make Minimum Wage or Less



Source: Bureau of Labor Statistics, Citi Research

Implement Tax Reform

Raising revenue in a more progressive way and moving away from flat income taxes could help close wealth gaps

Changes to current tax provisions, including a more progressive tax code, might also have a material impact on efforts to close gaps. Some policymakers and experts suggest taxing wealth rather than income, and increasing taxes on inherited wealth — both of which are traditionally areas where Black Americans fall behind their white counterparts. Much of the Federal tax code is designed to offset less progressive state tax codes, which rely heavily on sales and excise taxes; meaning that on average, the lowest-income households pay a higher share of their income than the highest-income households.[43] Indeed, 25 of the 50 states in the U.S. plus Washington DC, have combined state and local sales taxes in excess of the national median of 6.98 percent (Figure 120).

Ten of the 50 states (Illinois, Indiana, Kentucky, Massachusetts, Michigan, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Utah) have one income

[41] Berman, Matthew and Random Reamey. "Permanent Fund Dividends and Poverty in Alaska." Institute of Social and Economic Research: University of Alaska Anchorage.
[42] Paddison, Laura. "What is a federal jobs guarantee?" The Huffington Post; Paul, Mark, William Darity, Jr. and Darrick Hamilton. "The Federal Job Guarantee – A Policy to Achieve Permanent Full Employment." Center on Budget and Policy Priorities.
[43] Huang, Chye-Ching and Roderick Taylor "How the Federal Tax Code Can Better Advance Racial Equity," Center on Budget and Policy Priorities, 25 July 2019

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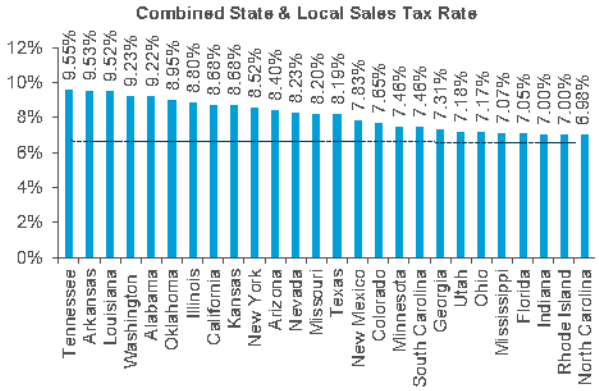
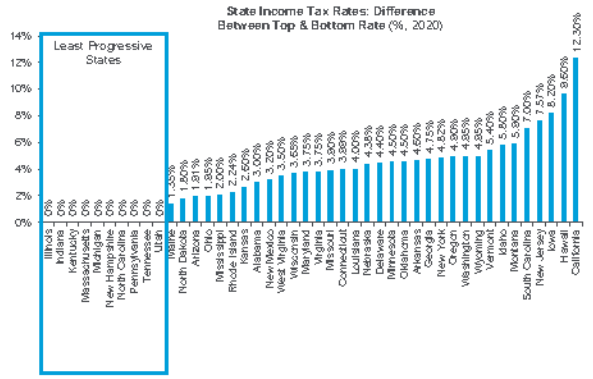
tax rate for all individual tax payers, making them the least progressive (Figure 121). A clear approach the U.S. could take in order to reduce racial inequality would be to raise more revenue overall in a progressive manner, with the revenues then directed to investments which advance racial equity. Indeed, the U.S. system of taxes currently underperforms 27 other high-income countries in regards to reducing post-tax inequality.[44]

Figure 120. 25 States have Combined State and Local Tax Rates Exceeding the National Median of 6.98%



Source: The Tax Foundation, Citi Research

Figure 121. Progressiveness of State Taxes-



Note: States not listed do not have state income taxes.
Source: The Tax Foundation, Citi Research

Promote Financial Inclusion

Increasing access to financial services is key to increasing the amount of Blacks in the financial system

To address racial wealth inequality, the exceptionally high number of unbanked or underbanked Black households (estimated to be 47 percent) also needs to be combatted with Federal banking services. In order to avoid the usual obstacles of traditional for-profit banking of minimum account balances and transaction costs, one study advocates the Congressional strengthening of the U.S. Postal Service (USPS) as an avenue for financial services. At its peak in 1947, the Postal Savings systems held $3.4 billion in reserves. Enabling the USPS to provide financial services would provide an alternative means of banking for many families, and in tandem allow for more money to circulate within the economies of low-income communities. The immediate need for cash availability, which a Postal Service/FedAccounts proposal would mobilize, has been incredibly apparent during the COVID-19 pandemic. These FedAccounts would enable free and digitized payments, withdrawals, and provide the ability to receive payments such as jobless benefits or stimulus checks without minimum balance requirements or fees.

[44] Based on reductions in the Gini measure of inequality among 33 countries for which OECD data for 2016 or the latest available year are available (see OECD Income Distribution Database, 2019). The United States ranks above only New Zealand, Israel, Switzerland, Korea, and Chile on this measure. (Data for Mexico, Hungary, and Turkey are unavailable.)

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Fintech can also play a critical role in reducing the number of unbanked persons. Ex-JP Morgan Managing Director and founder of Mobility Capital Finance, Wole Coaxum, estimates that "Black and Hispanic people spend 50 to 100 percent more per month for basic banking services, which, over a lifetime, can cost $40,000 in fees."[45][46] His company, along with a number of others, seeks to tackle this in providing financial services to those on low to moderate incomes. Similarly FS Card provides credit cards with $500 spending limits as an alternative to payday loan services. In providing these alternative services without the high fees, these fintech firms have the ability to drastically improve access to basic financial services. Moreover, in August 2020, leaders of the fintech industry, including Credit Karma, Monzo, and Stash, announced the creation of the Fintech Equality Coalition. The Coalition will focus on enhancing access to financial services and committing to providing opportunities in recruitment outreach within the Black community.[47]

Decouple Health Care

Providing minimum government-supported healthcare would increase the level of health security for workers in economically-challenged industries

Access to affordable healthcare is a key component of enabling work and wealth creation. Indeed, a Gallup poll found that 9 percent of American adults and 14 percent of non-white American adults would avoid treatment for the coronavirus over concerns over medical expense.[48] An idea gained greater traction in the U.S. is to decouple healthcare from employment. Most people who have health insurance in the U.S. receive it via their employers (Figure 122). Expansion of Medicaid — public healthcare for persons under 65 years of age — has increased since being implemented under Obamacare (ACA) in 2012, but the private-direct purchase option under the ACA has fallen during the Trump Administration. Given the three groups who saw their unemployment markers spike to elevated peaks in April 2020 were women (15.5 percent), Black Americans (16.7 percent), and Latinos (18.9 percent), there is a clear connection between race/gender and those most at risk from losing their healthcare coverage.[49] In providing minimum government-supported healthcare, as an additional option to private job-linked health care, those in more economically-challenged industries would have an increased level of health security, with potentially significant benefits to minority groups.

[45] Rosen, E., "Trying to Correct Banking's Racial Imbalance", *The New York Times*, June 30, 2020.
[46] FDIC National Survey of Unbanked and Underbanked Households, 2017.
[47] "Fintech Equality Coalition Created to Help Fight Racial Inequality in the Industry," PR Newswire, August 13, 2020.
[48] Witters, D., "In U.S., 14% with Likely Covid-19 to Avoid Care Due to Cost," Gallup, April 28, 2020.
[49] Tolbert, J., Orgera, K., Singer, N. and Anthony Damico, "Key Facts About The Uninsured Population," Kaiser Family Foundation, December 13, 2019; Kaiser Family Foundation, "State Data and Policy Actions to Address Coronavirus," Kaiser Family Foundation, May 13, 2020.

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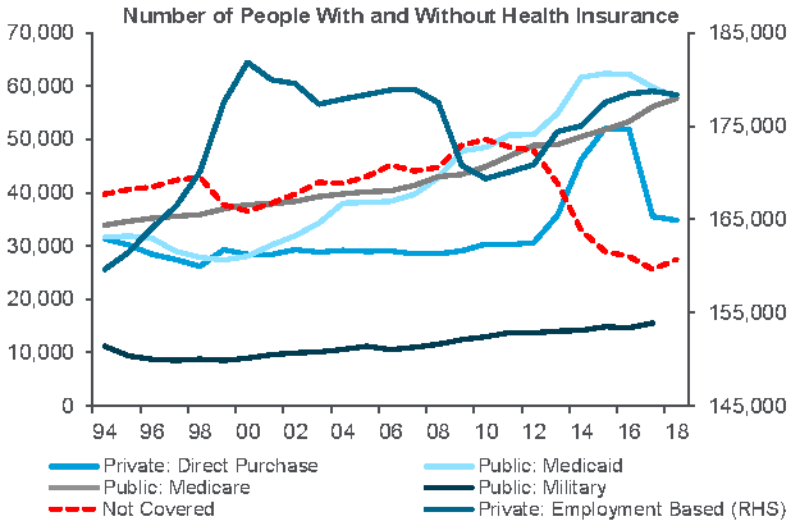
Figure 122. The Majority of U.S. Persons Are Covered by Private-Employed Based Insurance; The Number of Persons In the Private-Direct Purchase Option Has Declined In Recent Years



Note: Some persons may have more than one type of insurance.
Source: Census Bureau, Citi Research

Implement Housing Incentives

Public policy should focus upon housing as a pathway to wealth

Two suggestions proposed for providing affordable housing include: (1) expansion of tax incentives encouraging low-income housing in affluent areas; and (2) low-income community revitalization policies encouraging residential and commercial development in poor and primarily communities of color.[50] A third avenue for facilitating the path to homeownership for Black families is to close gaps enabling higher earnings and wealth accumulation necessary for home ownership.

Encouraging homeownership is a potential path to intergenerational wealth

Policy reform of established programs to benefit minority groups, might be instrumental in closing equity gaps. One candidate for reform is the Mortgage Interest Deduction program which currently only benefits 6% of Black families. Enhancing the benefit to Black households requires increased homeownership, but the gap in homeownership rates between white and Black families is significant: the Black homeownership rate is at 44 percent vs. white at 70 percent. Affordable also housing remains a challenge in many local regions with large Black populations (Figure 123). Increasing incentives and access to affordable housing is an avenue towards greater homeownership. With a stark deficiency in affordable housing — in no state can a full time employee on $7.25 afford a two bedroom apartment — progress in this area is of desperate necessity.[51] The American Housing and Economic Mobility Act provides an initial framework with provisions for down payment assistance for first time buyers living in formerly redlined or officially segregated areas.[52]

[50] Fulwok III, S., "The United States' History of Segregated Housing Continues to Limit Affordable Housing," Center for American Progress, December 15, 2016.
[51] National Low-Income Housing Coalition. "Out of Reach 2018: The High Cost of Housing." 2018.
[52] "Warren Unveils Historic Legislation to Confront America's Housing Crisis." Press release. September 26, 2018.

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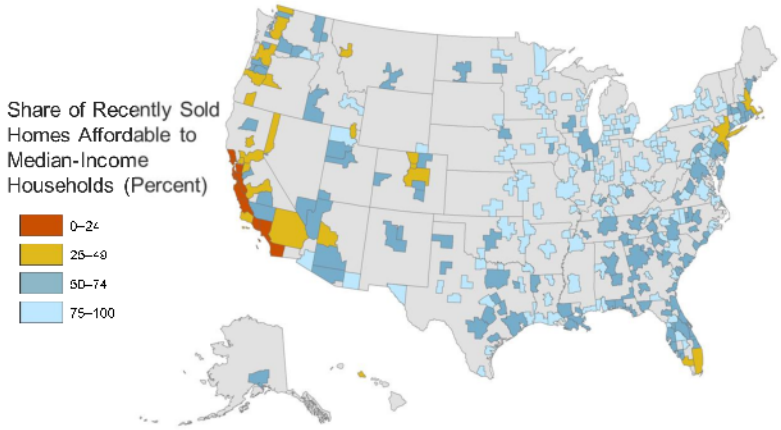
Figure 123. Many Highly Populated Regions of the U.S. Are Unaffordable Even For Median-Income Households



Notes: Median incomes are estimated at the core-based statistical area (CBSA) level. Recently sold homes are defined as homes with owners that moved within the 12 months prior to the survey date. Monthly payments assume a 3.5% down payment and property taxes of 1.15%, property insurance of 0.35%, and mortgage insurance of 0.85% Affordable payments are defined as requiring less than 31% of monthly household income. Only CBSAs with at least 30 home sales in the past year are shown.
Source: JCHS tabulations of US Census Bureau, 2017 American Community Survey 1-Year Estimates, and Freddie Mac, PMMS

17 percent of the gap between Black and white homeownership is unexplained

The Urban Institute found intangible factors are contributing to the widening racial housing gap, highlighting the need for targeted policy solutions. According to the Urban Institute, even after accounting for individual factors including marital status, income distribution, FICO scores, age, median household income, and city segregation, approximately 17 percent of the Black-white family home ownership gap remains unexplained (Figure 100). These intangible factors suggest a combination of policies are necessary to narrow the gap, built on a foundation of fair housing and lending, plus new technologies.

- **Advance policy solutions at the local level:** Expand small-dollar mortgages; remove discriminatory terms in home- and condo-association deeds on single family units; property tax relief for low- and moderate-income taxpayers; strengthen lender networks.
- **Tackle housing supply constraints and affordability:** Reform local land-use, building codes and zoning laws; Federal investments in affordable housing; Government-sponsored enterprise (GSE) and Housing & Urban Development (HUD) collaboration with organizations working to make housing affordable.
- **Promote an equitable and accessible housing finance system:** Increase visibility, access, and types of down payment assistance programs; alternative data for credit histories and diverse sources of income for down payments.
- **Further outreach and counseling for renters and mortgage-ready millennials:** Improve and expand financial education and homeownership preparation; expand programs that automate saving for down payments.
- **Focus on sustainable homeownership and preservation:** Strengthen post-purchase counseling; early-warning displacement metrics; mitigation strategies and interventions for homeowners at high risk for flood and disaster events.

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Invest in Training

Government investment in training programs can help narrow income and wealth gaps

Government focus on specific skills training with respect to identified occupational availability through either community college courses or named industry training has proven instrumental in combating economic inequality. With over 12 million students enrolling in community colleges each year, and a majority of those enrolled as undergraduates in 2-year public colleges identifying as non-white, funding for these programs is vital in delivering a more equitable workforce. However, without a permanent funding stream, sustainability can be a challenge.[53][54] Though community colleges have been the benefactors of a number of grants, including the Community Based Job Training Grant (CBJTG), which provided $600 million in three years from 2005-2010, and two Federal grant programs under President Obama — Health Profession Opportunity Grant and Trade Adjustment Assistance Community College and Career Training (TAACCT) — there have been calls to reform the workforce system to move away from presumptions based upon skills narratives.[55][56] Skills narratives place an emphasis on skills, which for many workers "fail[s] to recognize the historical and inter-generational way in which multiple systems, including not only workforce, but also education, housing, criminal justice and others, have created an inherent set of disadvantages for people of color."[57] Without proper recognition of individual circumstance, and an understanding that a multidimensional, rather than a 'one-size-fits-all' approach is far more likely to deliver meaningful results, there is a natural restriction to equity progress.

Public-private partnerships can help narrow training gaps

Public-private partnerships can help narrow training gaps. Notably, white high school dropouts have the same chance of obtaining a job as Black workers who have completed some college or earned an associate degree. In order to address such discrepancies, The Center for American Progress has highlighted four policy features that are essential for developing an equitable design and process for training and job access: (1) expand the share of economic risk by requiring employers of a certain size to pay into the WETF (Workforce Equity Trust Fund); (2) make a suite of wrap-around services (e.g., childcare) and employment benefits standard; (3) improve workforce analytics by creating an accountability dashboard for multiple measures of job quality; and (4) govern the WETF by a multi-stakeholder partnership comprising of business, labor and the public.[58][59] There are a number of programs along such guidelines emerging with community-based organizations designing programs to directly train and connect workers to local opportunities.

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[53] Eyster, L., Durham, C., and Theresa Anderson. "Federal Investments in Job Training at Community Colleges," Urban Institute, December 2016

[54] Kilpatrick, S., "A Quick Rundown of Community College Diversity Statistics,", EVERFI

[55] Anderson, T., Loprest, P., Derrick-Mills, T. Eyster, L., Morley, E., and Alan Werner. 2014. Health Profession Opportunity Grants: Year Two Annual Report 2011–2012. Report 2014-03. Washington, DC: Office of Planning, Research, and Evaluation, Administration for Children and Families, US Department of Health and Human Services.

[56] Lam, L. "A Design for Workforce Equity," Center for American Progress, October 16, 2019.

[57] Race Forward, "Race-Explicit Strategies for Workforce Equity in Healthcare and IT" (New York: 2017).

[58] Adams, S. "White High School Drop-Outs Are As Likely To Land Jobs As Black College Students," *Forbes*, June 27, 2014.

[59] Lam, L. "A Design for Workforce Equity," Center for American Progress, October 16, 2019.

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For example, in Detroit, HOPE has incorporated robotics training into its technical training; and in San Diego, the International Rescue Committee has included solar panel installation into training options; connecting a high-growth local industry currently facing a skilled labor shortage with job-seekers.[60]

Invest in Wealth Building

Government investment in programs that encourage wealth building can reduce the racial wealth gap

Government investment in building wealth is a radical approach to closing the racial wealth gap. One approach is 'Baby Bonds'.[61] Championed by New Jersey Senator Cory Booker, the bonds would provide every child born with $1,000 in an interest-bearing savings account that would be added to annually (maximum of $2,000 based upon family income) up to the age of 18. Upon reaching adulthood, the funds accrued can be accessed for wealth building activities such as down payments on homes, college tuition, or start-up funding.[62] A study by Columbia University on the effect of instruments such as 'Baby Bonds' estimated that though the racial disparity would persist, it would be substantially narrowed: from a factor of 15.9 to 1.4 at the median, with the median Caucasian adult holding approximately $79,000 versus $58,890 for the median Black adult.[63] The program is expected to cost $60 billion per year, and to be funded by modifying the estate tax and closing the tax break for inherited capital gains.[64] There have also been some successes at the state and local level. In Oklahoma, the Ford Foundation provided over a thousand babies with $1,000 in state-owned 529 college savings account in 2007. There is evidence to suggest these kinds of programs could have significant impact with young people who, with a college fund, are three times as likely to go to college, and four times as likely to graduate, helping to address future racial earnings gaps.[65]

Invest in Protections

Funding and broadening the scope of anti-discrimination agencies can help lessen inequality in the United States

Established in 1965, the U.S. Equal Employment Opportunity Commission (EEOC) is tasked with enforcing Federal laws preventing discrimination against job applicants and employees based upon race, color, religion, sex, national origin, age, disability, or genetic information. However, as the U.S. population has grown by 44 percent in 40 years to roughly 330 million persons, and become even more diverse, Federal funding for the EEOC has not kept pace. Indeed, funding for the EEOC has shrunk by 8 percent over the same period, and the number of employees at the EEOC fielding discrimination complaints has decreased by 42 percent since 1980. Meanwhile, at the state level, funds for employment anti-discrimination programs are modest and in some cases non-existent. A 2015 census of ten states with the largest Black populations revealed that none of them spent more than 70 cents per resident on employment anti-discrimination programs. Indeed, three states — Mississippi, Alabama, and North Carolina — spent zero dollars on such programs.

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[60] Jones, M., and Ed Skyler. "Here's a solution to economic inequity: Invest more in job training," *USA Today*, March 10, 2020.
[61] Zwede, N., "Universal Baby Bonds Reduce Black-White Wealth Inequality, Progressively Raise Net Worth of All Young Adults."
[62] "Interview With Corey Booker: Making real the ideals of our country," The Economist, July 14, 2020.
[63] Zwede, N. "Universal Baby Bonds Reduce Black-White Wealth Inequality, Progressively Raise Net Worth of All Young Adults."
[64] Viebeck, E., "Booker wants a 'baby bond' for every U.S. child. Would it work?," *The Washington Post*, August 19, 2019.
[65] "'Baby bonds' proven to boost aspirations and college savings," *Bangor News*, December 11, 2018.

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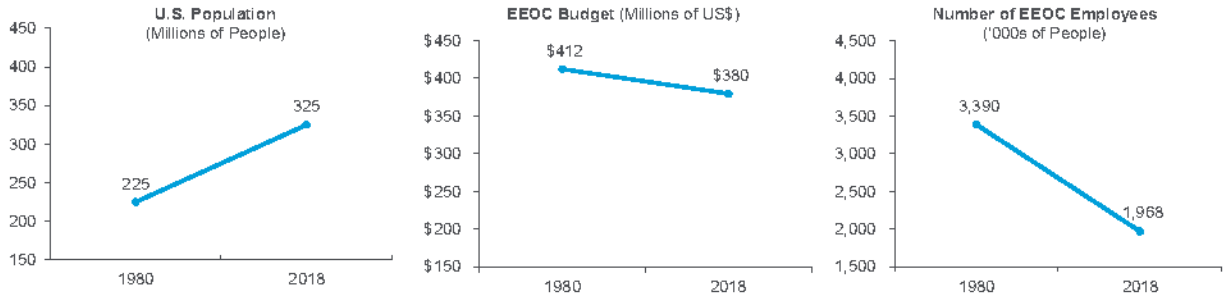
Figure 124. Congress Has Decreased Resources for the Equal Employment Opportunity Commission (EEOC) Over the Last 40 Years



Source: Census Bureau, EEOC, Citi Research

Implement Salary History Bans

Banning employers from asking about salary history helps to stop prior wage discrimination from being perpetuated

Salary history bans are a method to stop the perpetuation of racial wage gaps. With the wage gap between white and Black workers having grown at the median between 2000 and 2019, increasing the discrepancy from 20.8 percent to 24.4 percent, addressing this disparity is particularly important.[66] One approach that has proven particularly effective is banning employers from inquiring about historical salaries. A study by Boston University found that, following bans, pay for job switchers increased by 13 percent for Black workers and 8 percent for women workers, respectively.[67] By removing the knowledge of prior salaries, employers are no longer influenced by potential discrimination of previous employers, and hence are less likely to perpetuate the wage gap between white and Black employees by continuing to maintain the difference. Massachusetts, as the first state to impose a ban preventing employers asking candidates their previous salaries in 2016, has been followed by 18 other states, with individual cities nationwide, including Washington DC, also following suit (Figure 126).[68][69]

[66] Gould, E., "State of Working America Wages 2019," Economic Policy Institute, February 20, 2020.
[67] Bessen, J. E., Meng, C., and Erich Denk. "Perpetuating Inequality: What Salary History Bans Reveal About Wages," SSRN, June 24, 2020.
[68] "Salary history bans," HRDrive, August 7, 2020.
[69] Ziv, S., "Salary History Bans Reduce Racial and Gender Wage Gaps; Every CEO Should Use Them," *Forbes*, June 23, 2020.

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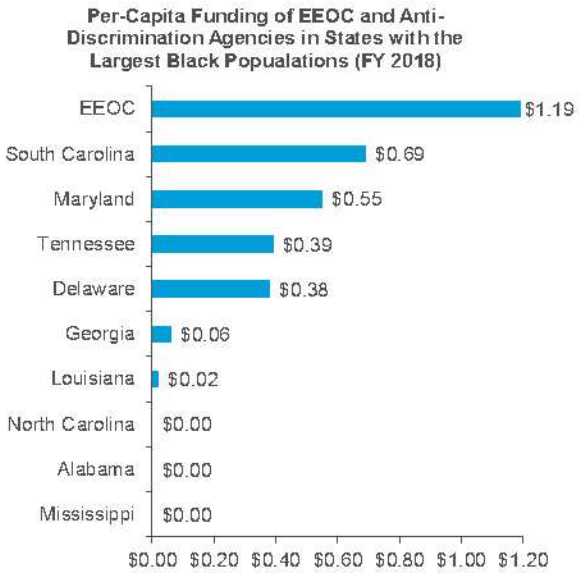
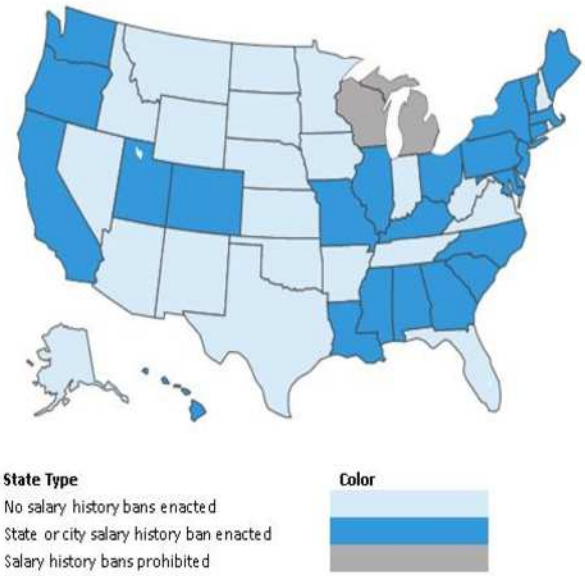
Figure 125. Anti-Discrimination Agency Spending at the State Level Is Significantly Underfunded In States with Large Black Populations



Source: EEOC, Henry J. Kaiser Family Foundation, Citi Research

Figure 126. Only 19 of 50 States Plus Washington, DC, and 20 of Thousands of Municipalities, Have Salary History Bans



Source: AccuSource, HRDrive, Citi Research

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What Can Companies Do?

Figure 127. Corporations Play a Tremendous Role In Eliminating Racial Gaps

Source: Shutterstock

The Business Case

The business case for diversity is multifaceted

While imperfect, there is a business case for diversity that should help motivate firms to act upon closing racial gaps. The body of literature suggests that when executed well, diversity and inclusion in the workplace may lead to increased revenue, reduced costs, greater innovation, and increased employee engagement, productivity, and commitment.[70] The business case is multifaceted:

- **Changing demographics:** Businesses may desire their workforces to reflect current and future population trends. According to the U.S. Census Bureau, by 2060, the percentage of non-Hispanic white persons will decline to 44 percent from roughly 60 percent currently and there will be a major increase in the number of persons of color.[71] If this is the case, firms should adjust their employee composition to match their future customer base. Even today, when persons of color are still in the minority, many firms still do not reflect the demographics of the nation at every rung on the jobs ladder.

[70] "The Business Case for D&I: Ask Catalyst Express," Catalyst, October 4, 2019.
[71] Colby, S.L., and Jennifer M. Ortman. "Projections of the Size and Composition of the U.S. Population: 2014 to 2060," US Census Bureau, March 2015.

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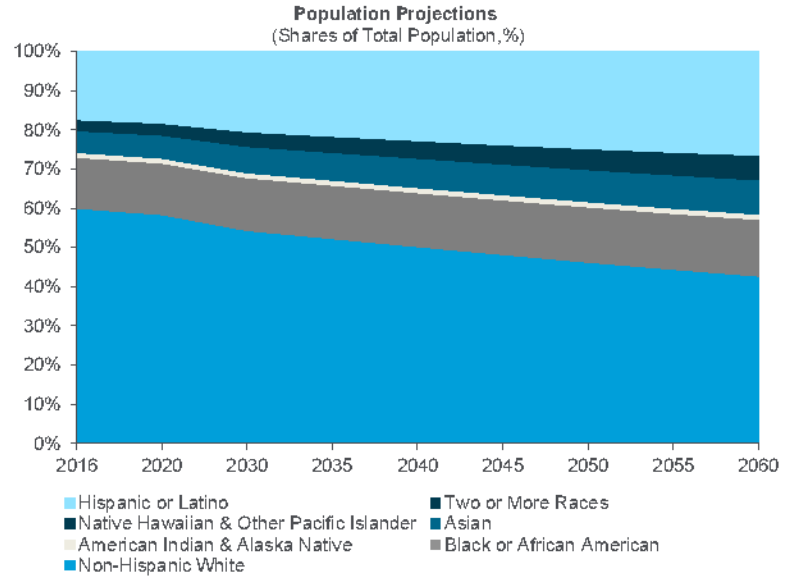
Figure 128. The Share of Non-White Hispanic Persons Is Poised to Shrink to 44% by 2060



Source: Census Bureau, Citi Research

- **Diversity of Perspectives:** Persons from diverse backgrounds and experiences will have a multiplicity of ideas and perspectives. Diversity of perspectives may produce better outcomes as diversity can help avoid "group-think."[72] A diversity of opinions can create friction. However, if diverse employees are made to feel included, then outcomes can potentially be positive.[73] A Boston Consulting Group (BCG) international survey, including the U.S., revealed a strong and statistically significant correlation between the diversity of management teams and overall innovation. "Firms reporting above-average diversity on their management teams also reported innovation revenue that was 19 percentage points higher than that of companies with below-average leadership diversity — 45% of total revenue versus just 26%."[74][75]

- **Bolstering the Bottom Line:** Studies suggest that diverse firms may have stronger financial results more generally. A separate McKinsey & Company international survey found that "companies in the top quartile for racial and ethnic diversity were 35 percent more likely to have financial returns above their respective national industry medians." In the United States, McKinsey found "there is a linear relationship between racial and ethnic diversity and better financial performance: for every 10 percent increase in racial and ethnic diversity on the senior-executive team, earnings before interest and taxes (EBIT) rise 0.8 percent."

[72] Sidorenko, V., "The Business Case For Diversity and Inclusion," TLNT, April 24, 2019.
[73] Kaplan, S., "Why the 'business case' for diversity isn't working," Fast Company, February 12, 2020.
[74] Lorenzo, R., Voigt, N., Tsusaka, M., Krentz, K., and Katie Abouzahr. "How Diverse Leadership Teams Boost Innovation," Boston Consulting Group, January 23, 2018.
[75] Esweraj, V., "The business case for diversity in the workplace is now overwhelming," World Economic Forum (WEF), April 29, 2019.

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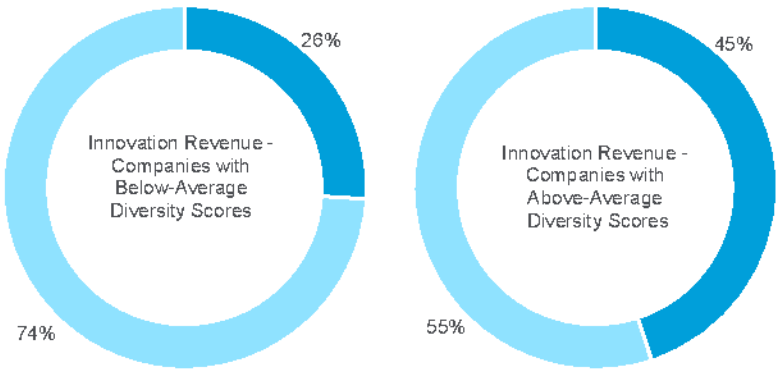
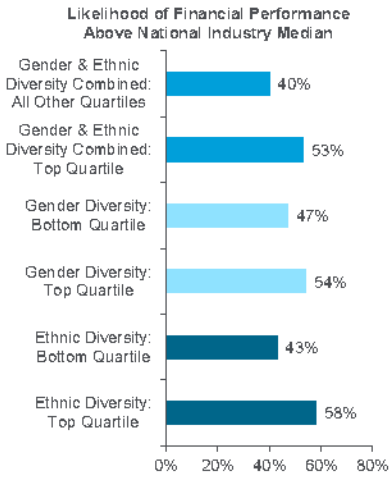
Moreover, that "racial and ethnic diversity has a stronger impact on financial performance in the United States than gender diversity, perhaps because earlier efforts to increase women's representation in the top levels of business have already yielded positive results."[76]

Figure 129. Businesses with Diverse Leadership Teams May Generate More Revenue



Source: The Boston Consulting Group, Citi Research

Figure 130. Diverse Firms May Perform Better



Source: McKinsey & Co, Citi Research

- **A Matter of Talent - Recruiting and Retaining the Best Talent Is Paramount:** By hiring a limited group of people based upon a specific mold (i.e. white and/or male), companies are foregoing significant segments of talent. Hence, firms should consider directing resources and energy towards recruiting and retaining diverse employees, and creating inclusive workplace cultures where everyone has an equal opportunity to contribute and succeed.[77] McKinsey & Company posits that more diverse companies, "are better able to win top talent and improve their customer orientation, employee satisfaction, and decision making, and all that leads to a virtuous cycle of increasing returns."[78]

- **Moral Imperative - It's the Right Thing to Do:** The Society for Human Resource Management defines inclusion as, "the achievement of a work environment in which all individuals are treated fairly and respectfully, have equal access to opportunities and resources, and can contribute fully to the organization's success." Employees who are made to feel like they belong are potentially better performers and happier people.[79]

[76] Hunt, V., Layton, D., and Sara Prince. "Why diversity matters," McKinsey & Company, January 1, 2015.
[77] "The Business Case for D&I: Ask Catalyst Express," Catalyst, October 4, 2019.
[78] Hunt, V., Layton, D., and Sara Prince. "Why diversity matters," McKinsey & Company, January 1, 2015.
[79] Sidorenko, V., "The Business Case For Diversity and Inclusion," TLNT, April 24, 2019.

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Support Initiatives from the Top

Consumers expect corporations that make statements on racial equality to follow up with concrete action – support must come from the top

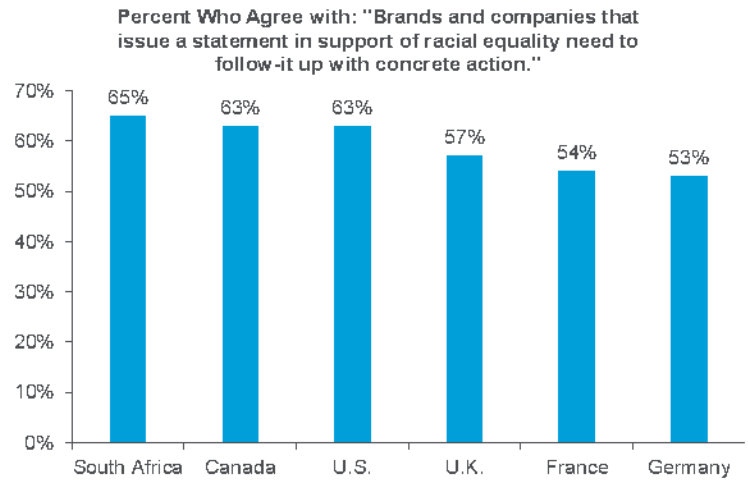
Support of Diversity and Inclusion (D&I) initiatives must come from the top. As of 2020, only four CEOs at Fortune 500 companies are Black. This statistic highlights concerns about equity, as management diversity is often reflected at all levels of a company.[80] Literature suggests that corporations must actively engage in D&I initiatives in order to change the composition and complexion of their firms, but focus must start at the top of the corporate ladder. Indeed, the Edelman Trust Barometer indicates that in the U.S., 63 percent of consumer respondents to their poll believed corporations that make statements in support of racial equality must follow it up with concrete actions in order not to be seen as exploitative or opportunistic (Figure 130).

A number of high profile CEOs support D&I initiatives, including former Xerox CEO Ursula Burns (the first Black female CEO of a Fortune 500 company) who stated that "Business leaders have to start to lead, what has happened in the past, they've trailed." Similarly a number of CEOs have pledged hard dollars to address racial gaps. For example, Comcast pledged $100 million over three years to accelerate efforts on diversity and inclusion, and Walmart also pledged $100 million over five years to create a new center on racial equity that would concentrate in four areas: financial, health care, criminal justice and education.[81]

Citi's Response

In direct response to the messages from the #BLM Protests, Citi itself has committed to $10.7 million in donations: $1 million each to two organizations working to close the Black achievement gap in education in the United States: UNCF and Management Leadership of Tomorrow (MLT). This is in addition to the $8 million Citi committed to four leading Black-led organizations addressing voting rights, income and wealth gaps, and housing discrimination (the NAACP Legal Defense Fund, the Lawyers' Committee for Civil Rights, the National Urban League and the National Fair Housing Alliance), for a total of $10,684,000 in charitable contributions, inclusive of employee contributions.

Figure 131. Consumers Expect Firms to Follow up Talk with Action



Source: Edelman Brand Trust Barometer 2020, Citi Research

[80] Siripurapu, A., "The US Inequality Debate". Council on Foreign Relations. July 15, 2020.

[81] Stankiewicz, K., "CEOs are offering plans and investments to address racial inequality after George Floyd death". CNBC. June 11, 2020.

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Address Racial Gaps in Hiring, Retention, and Firing

Corporations can implement policies that are more conscious of addressing racial gaps in matters of hiring, retention, and firing

Corporations can implement policies that are more conscious of addressing racial gaps in matters of hiring, retention, and firing. There are several recommendations for the corporate setting:

- **Recruitment and Hiring:** Establishing diverse slates and limiting selection bias is paramount at the recruitment and hiring stage. Analysis by NatCen suggests that there is discrimination and 'ethnic filtering' in the recruitment process. Indeed, National Academy of Sciences data reveal the rate of callbacks for Black candidates is generally lower than that of white candidates, and this rate has been little changed over since the 1970s.[82] Moreover, businesses may be inadvertently perpetuating wage inequality by asking for salary histories. To enhance motivation for greater minority employment, companies could be subject to mandatory, randomized public diversity monitoring with the intention that in facing potential obligation to publish minority employment statistics this would translate into material change and diversification of the recruitment process. Additionally, a government supported and fiscally incentivized enhancement of online recruitment as a method to further anonymize the hiring process likely would prove instrumental in improving racial equality in hiring practices.[83]

- **Retention:** With research showing that a professional leaving an organization can cost as much as twice the average associate's salary there is clear economic incentive to improve retention rates, especially among minority employees who are more likely to leave a firm due to mistreatment.[84] Active consideration of minority interests and implementation of specific programs to address minority representation within a firm are proven avenues to greater retention levels. These include mentoring schemes, with defined commitment from employers to provide clear evaluation tools to deliver tangible advancement of their minority employees; active inclusion in high visibility assignments; and proactive endeavors to provide influential sponsors to minority employees within the firm to support the navigation of corporate ascent.[85] Firms should ensure that pay and promotion of Black employees is commensurate with other workers.[86]

[82] Quillian, L., Pager, D., Midtbøen, A., and Ole Hexel. Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years," Harvard Business Review, October 11, 2017.
[83] Lloyd, J., "Ending Ethnic Discrimination in Recruitment". The Strategic Society Centre. November, 2010.
[84] Kapor Center. 2017 Tech Leavers Study.
[85] Diversity Primer, Diversity Best Practices, September 2009 - https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity_primer_chapter_08.pdf.
[86] Vieux, S., "What Companies Can Do to Combat Systemic Racism Against Black Colleagues in the Workplace," Just Capital, June 4, 2020.

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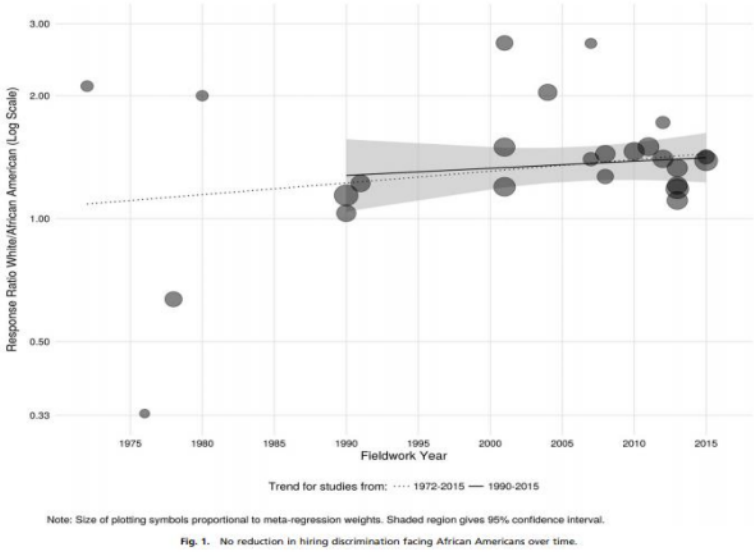
Figure 132. Callbacks of White Applicants Relative to Black Applicants



Source: Meta-analysis of field experiments shows no change in racial discrimination in hiring over time. Lincoln Quilliana, Devah Pager, Ole Hexela, and Arnfinn H. Midtbøen,Proceedings of the National Academy of Sciences (PNAS), 2017

- **Layoffs:** Black and Hispanic workers are more likely to be subject to reductions in force (RIF) actions amid economic downturns due to higher labor market segmentation in lower-level or more discretionary jobs. The Harvard Business Review (HBR) suggests employers can consider performance more than position, and cross-training and upskilling workers to help narrow the numbers of minorities reduced. Companies factoring performance into their decision-making, often are able to retain their best performers, regardless of gender and race. Businesses can redeploy workers with transferable skills to other parts of the firm, and/or cross-train employees for other tasks to avoid major labor cuts. Employers can also cut pay and hours, but continue to retain workers.[87]

- **Lists:** HBR recommends that firms, when releasing employees, maintain lists of persons being let go to note major disparities and to share those lists with other firms that may have job openings. Businesses can draw from these lists of recently unemployed persons to find a diverse set of talent.[88]

Engage in Corporate Social Responsibility

Businesses can engage in corporate social responsibility (CSR)

Bolstering external communities and supporting minority-owned firms can help close gaps at the societal level. Businesses can engage in corporate social responsibility (CSR). CSR is considered a strategic differentiator for firms, which can aid in brand reputation externally and support employee morale and sense of purpose internally. Moreover, corporations can provide direct investments in minority-owned small businesses.

[87] Kalev, A., "Research: U.S. Unemployment Rising Faster for Women and People of Color," Harvard Business Review, April 20, 2020.
[88] Morgan Roberts, L., McCluney, C.L., Thomas, E.L., and Michelle Kim. "How U.S. Companies Can Support Employees of Color Through the Pandemic," Harvard Business Review, May 22, 2020.

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Firms can also consider public actions to accelerate policies and legal measures to protect and support vulnerable populations. This can include public condemnation of events or legislation that target groups of people based upon race.[89]

Studies have shown CSR is not only for attracting and retaining customers, but also for retaining talent. For example, Millennials are willing to forego an average of 14.4 percent of their expected compensation to work at socially responsible companies. Also 88 percent of Millennials believe a business should be proactivity participating in the community. A reported 92 percent of employees involved in CSR programs cite higher rates of emotional and physical health. Moreover, 66 percent of employees report a greater sense of loyalty to their employers as a consequence of participating in CSR programs.[90]

Dismantle Structural Barriers to Hiring Black Talent

Structural barriers to hiring, such as criminal histories, should be addressed to eliminate discrimination

Other structural barriers inhibiting corporations from hiring Black talent must also be dismantled. In a Time Magazine article written by Darren Walker, the President of the Ford Foundation, Walker advocated enforcement of racially diverse candidate pools while also stressing the material impact of engaging fully with Fair Chance Hiring (FCH). FCH is where companies are encouraged to employ qualified job applicants with criminal histories — a group in which Black Americans are overrepresented, as African American men are 11.8 times more likely to be incarcerated than white men of the same age.[91][92] Policies that might help reduce joblessness among ex-inmates include: (1) temporary basic income; (2) occupational licensing reform; (3) bond insurance and tax incentives for employers who hire ex-offenders; (4) automatic record expungement; and (5) banning employment discrimination subject to Title VII of the Civil Rights Act of1964.[93] Moreover, removing blanket bans on occupational licensing, and following a more bespoke approach. For example, in New Jersey and Oklahoma, a conviction must have a 'direct, rational, or reasonable relationship' to the duties of the occupation to be defined for licensing.

Develop Metrics to Analyze, Report, and React

Change can't happen until metrics are developed to analyze current situations, report and react

In order for firms to begin and/or continue the process of facilitating racial gap closures in the workplace, metrics must be used to analyze, report, and react. The steps towards eliminating wage gaps include: (1) collecting data; (2) analyzing and publicizing the data; and then (3) acting on the results of the data if they reveal that inequity in pay exists for jobs requiring the same qualifications. First, firms can assess current workforce demographics: do the present number of Black employees match national and local population ratios? Second, firms may set recruitment targets to address discrepancies for Black employees. In areas where Black employees are underrepresented, firms can establish recruitment targets with accountability mechanisms like tying executive compensation to meeting targets or holding leaders accountable in performance reviews.

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[89] IBID.
[90] Civic, B., "CSR – IS IT GOOD FOR BUSINESS?," February 28, 2018.
[91] Walker, D., "If Corporations Really Want to Address Racial Inequality, Here are 9 Things That Actually Make a Difference." Time, August 4, 2020.
[92] Keaveny, P., "Ensuring Racial Equality- from classrooms to Workplaces". The Conversation. March 6, 2019.
[93] Couloute, L., and Daniel Kopf. "Out of Prison & Out of Work: Unemployment among formerly incarcerated people," Prison Policy Institute, July 2018.

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Targets are useful for opening up opportunity for highly qualified underrepresented persons while potentially limiting space for less qualified persons among overrepresented groups.[94] Third, investigate whether Black employees are compensated for equal work and promoted as regularly as other employees. Following the pay equity study (analyze), firms should be transparent about the results (report), and then create a plan to rectify discrepancies (react).[95] Business can also hire specialized recruitment and employment firms (e.g., Jopwell) to assist with diversification initiatives.

Recruit More Black Board Members

More Black executives need to be added to corporate boards

To assist with accountability, companies can add more Black executives to their boards. According to Deloitte LLP "a critical need for inclusive leadership, the shifting U.S. demographics, and investor pressure in the United States have increased the focus on diversity in the C-suite and on public company boards."[96] A 2018 Deloitte study found that 34 percent of Fortune 500 seats were held by women and minorities, and 38.6 percent of Fortune 100 board seats were held by women and minorities. This share might increase to 40 percent by 2024 if the rate of increase identified over the 2016 to 2018 period of the study were kept. Notably, Black women gained 32 Fortune 500 seats in 2018, and Black men acquired 26 seats, rates of increase of 26.2 percent and 8.5 percent respectively.[97] Nonetheless, the study confirmed that many of the Black board members were "recycled," meaning they had already been board members elsewhere or are currently serving on another board. Hence, while board diversity is increasing, the absolute number and share of Black men and women on boards (9 percent) is lagging relative to the U.S. population (13 percent).

[94] Kaplan, S., "Why the 'business case' for diversity isn't working," *Fast Company*, February 12, 2020.
[95] Vieux, S., "What Companies Can Do to Combat Systemic Racism Against Black Colleagues in the Workplace," Just Capital, June 4, 2020.
[96] DeHaas. D., Akutagawa, L., and Skip Spriggs. Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards, Deloitte LLP, February 5, 2019.
[97] Ibid.

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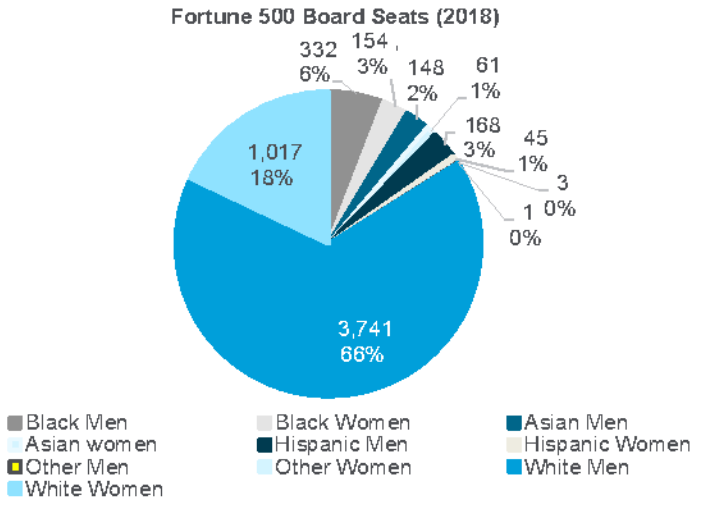
Figure 133. Black People Still Underrepresented on Boards (9%) Relative to Population (13%)



Source: Deloitte LLP, Citi Research

Challenges to adding more Black board directors must be overcome. According to the Harvard Business Review, challenges to adding Black board members include: (1) few existing minority directors to recruit and attract Black board members; (2) a lack of Black persons in the executive pipeline, who are often persons tapped for board seats; (3) an insufficient number of minorities on recruitment slates; (4) homogenous social networks that may have few or no Black persons who might be tapped for board directorships; (5) inadequate director onboarding required for directors to get to know each other and work more effectively; (6) lack of leadership roles on boards for Black directors, making them less effective; and (7) bias, where Black directors, especially women, feel that their ideas are devalued or ignored.[98] Many of these challenges can be overcome by (1) broadening the search criteria for board members; (2) better leveraging search firms for finding board members; (3) improving on-boarding training; (4) ensuring more leadership roles for Black directors; (5) building up the pipeline of potential directors by addressing problems with retention of Black employees; and (6) valuing the expertise, contributions, and opinions of Black board directors. Diverse boards provide a diversity of perspectives, create a virtuous cycle of greater diversity, and help with recruitment and retention of diverse talent throughout the company.

[98] Cheng, J.Y-J., Groysberg, B., and Paul M. Healy. "Why Do Boards Have So Few Black Directors?," Harvard Business Review, August 13, 2020.

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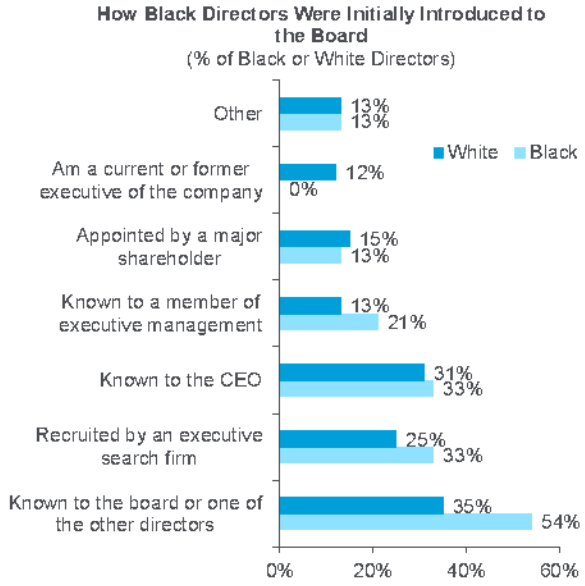
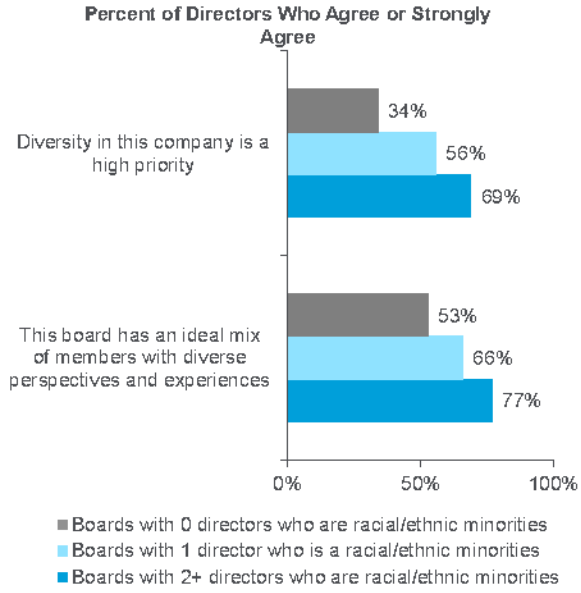
Figure 134. Social Networking Is a Major Factor In Selecting Black Board Members



Source: Harvard Business Review, Citi Research

Figure 135. Racially Diverse Boards Tend to Prioritize Racial Diversity Within the Company



Source: Harvard Business Review, Citi Research

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What Can Individuals Do?

Figure 136. Individuals Can Work Towards Eliminating Racial Gaps

Source: Shutterstock

While we argue that structural factors have and continue to play significant roles in perpetuating racial gaps, individuals are far from powerless. Black persons in the U.S. can continue to advocate for themselves in the realms of finances, education, business, and politics. Meanwhile, persons of other races can continue to educate themselves about historical disparities and work towards fixing them.

Use Education as a Pathway for Advancement

Education is a pathway for advancements and parents can advocate for greater accountability and funding for schools

Parents can advocate for greater accountability from and funding for schools. Although Black parents are less likely to volunteer at school events, often due to work commitments, it does not mean that they are not involved in their children's education. Parents show their activism in their choices for education for their children including charter schools, private schools, and magnet public schools. (Figure 137). On a small scale, one study revealed that 83 percent of Black students had their homework checked by a parent, compared to 57 percent of white students and 59 percent of Asian students.[99] In terms of more dramatic action, parents have reported willingness to move in order to provide their students with access to a better school district. Parents can continue to take action against unequal disciplinary measures against their children that can disrupt learning and future prospects. Black youth comprise roughly 16 percent of public school students and about 9 percent of private school students. Yet, they account for 35 percent of in- and out-of-school suspensions, and 39 percent of expulsions.[100] Parents can ensure that their children are considered for gifted and talented education (GATE) programs and apply to magnate schools, which have become more racially segregated.[101] Finally, parents can use their political power (Decennial Census, voting) to ensure that adequate funding is directed towards their school districts.

[99] Morris, M.W., Black Stats: African Americans by the Numbers in the 21st Century, 2014.
[100] Ibid.
[101] Pirtle, W., "The Other Segregation," *The Atlantic*, April 23, 2019.

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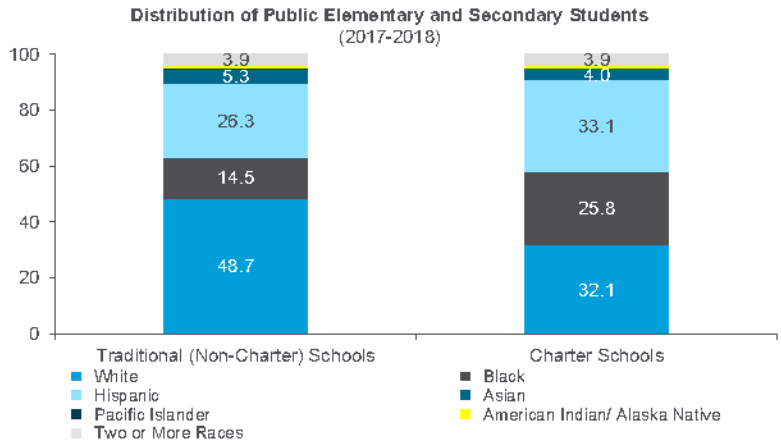
Figure 137. Minority Students Are More Likely to Attend Charter Schools than Traditional Ones



Source: U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), Citi Research

Students can aim high and utilize resources that promote success

As mentioned above, students can take more courses relevant to STEM fields, and take Advanced Placement courses in high school. Students should seek education beyond a high school degree: college, trade school. Students should also consider advanced and professional degrees even after earning a college degree. Throughout the school career, students can take advantage of organizations that promote academic achievement and stepping stones into business. Notable organization include Girls Who Code, My Brother's Keeper Alliance, Jack and Jill of America Incorporated, United Negro College Fund (UNCF), Management Leadership for Tomorrow (MLT), INROADS, Toigo, Sponsors for Educational Opportunity (SEO), A Better Chance, the Jackie Robinson Foundation, and the Urban League. Funding for education can be tackled in part via familial investments in college savings plans and student applications to scholarships. As discussed above, training and higher education are highly correlated with higher incomes over a lifetime.

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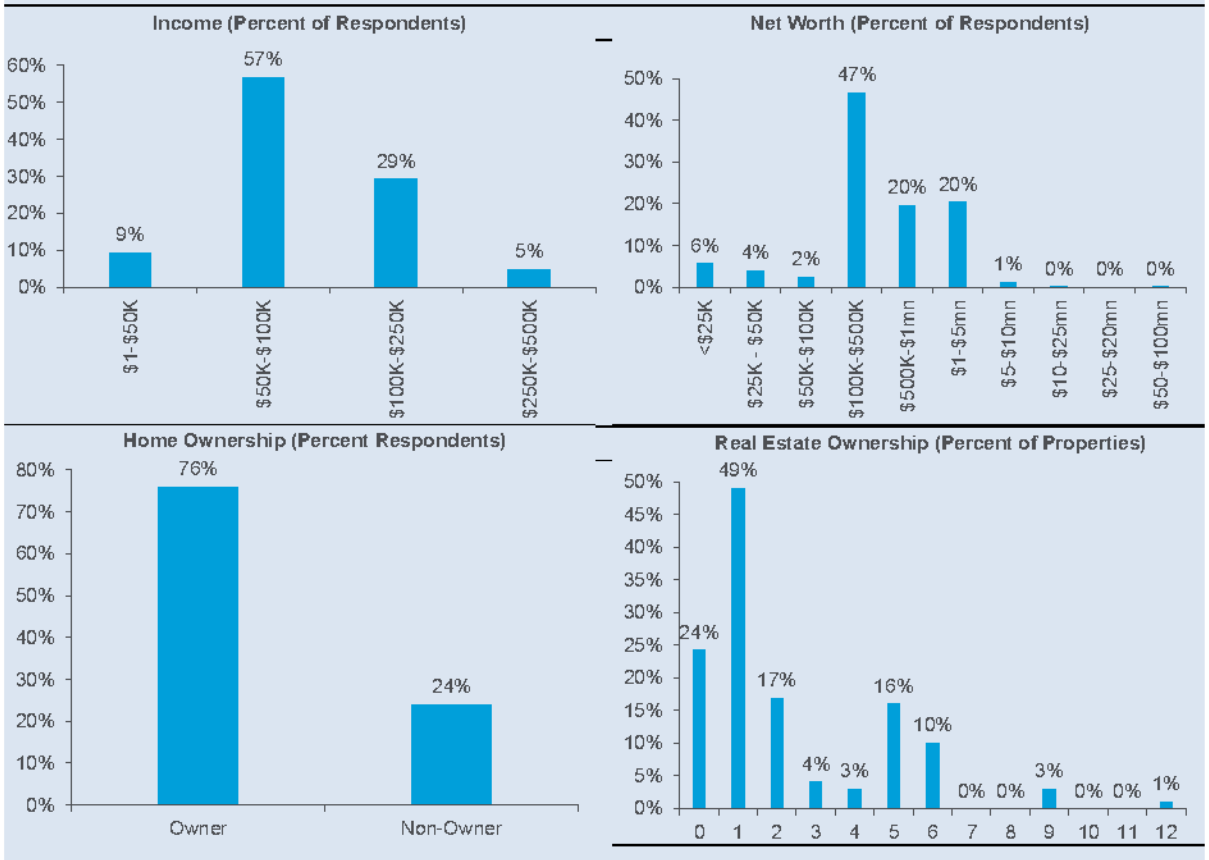
Have Non-Profit Organizations Built the Middle Class? Spotlight on MLT and INROADS

Non-profit organizations have existed for more 100 years to help advance the financial and social wellbeing of Black Americans. Two organizations have quantified how their efforts have bolstered the expansion of the Black middle-class.

- MLT – Statistics from the MLT website indicate the average starting salary for their Career Prep Fellows is $75,000, with half of these students coming from homes with annual household incomes of less than $50,000. Moreover, of their 1,600 scholars per year, 90 percent of their undergraduates receive an offer for a high trajectory job, 90 percent of its MBA Prep students matriculate at top10 business schools, and 90 percent of its first-generation college students are on track to graduate within 4-6 years, compared to the national average of 11 percent.
- INROADS – INROADS in partnership with Australian-based non-profit Career Trackers surveyed 1000 INROADS alumni to determine how the organization has helped to narrow racial gaps. Among respondents, 57 percent have incomes in the range of $50,000 to $100,000 and 34 percent with incomes exceeding $100,000. Forty seven percent have net worth in the range of $100,000 to $500,000, and 40 percent in the $500,000 to $5 million range. Plus, 76 percent own a home. Regarding real estate 49 percent own at least one property and 56 percent own more than one property (Figure 138).

Figure 138. INROADS Scholar Alumni Have Helped to Expand the Black and Minority US Middle-Class



Source: Adam Davids, Fulbright Scholar hosted by INROADS and Director of Learning and Innovation CareerTrackers Australia, Citi Research

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What Is Citi Doing to Help Minority Women Advance in Technology?

Citi Foundation Supports NPower and their report Breaking Through, Rising Up; Strategies for Propelling Women of Color in Technology

In May 2018, the Citi Foundation awarded a $1.64 million grant to NPower to increase the enrollment of young women in its program from 25% to 40% by 2022 — now two years into this mission, enrollment rates are at 31%. In September 2020, Citi Foundation announced it was expanding its partnership with NPower, including an additional $4 million investment, to help advance the careers of young Black and Latinx women in the technology field across six U.S. cities.

To date, the intersection of gender, race, and class in technology has received little attention. NPower seeks to address this discrepancy and highlight the core elements crucial to establishing a more equitable industry; with a particular focus on women of color. Undeniably, achieving this goal will require intention, investment and innovation as well as cross-sector awareness and action by practitioners and executives. With women making up just 26% of the technology workforce and with Black and Latinx women making up just 3% and 1% of the computing workforce, respectively, there is significant progress to be made.

NPower seeks to address inequality in providing free training in technology. Its aim is to correct diminished access to early computing as a result of inequitable funding streams in high-poverty areas disproportionally affecting minority groups. There are four key aspects to the program: (1) focusing on recruitment; (2) support services; (3) instruction; and (4) job placement services. In combining the practical with the personable, the program is able to best approach training for women of color. In using community-based organizations to expand applicant pools whilst providing wraparound support services, the impact of the training and economic mobility provided to alumni can be material. Moreover, in endeavoring to target classroom bias by providing female instructors, the program is also able to provide applicable role models; challenging what is often seen as a barrier to motivation to join an industry. With Citi's support, the instructional staff at NPower has gone from one female instructor in 2018 to recruiting and onboarding six additional female instructors two years later. This trend of inclusion is further emphasized within the job placement aspect of the program, primarily in their drive to create strong partnerships with employers that demonstrate successful and integrated diversity practices.

NPower supports utilization of a number of strategies that practitioners, employers, and funders can apply in order to deliver a successful and minority favorable outcome. Particularly impactful is the suggestion for the provision of flexible training provisions, such as online or at the weekend, whilst considering skill based hiring and embracing non-traditional educational backgrounds. Moreover from a funding prospective, investing in wraparound services such as childcare — with 19% of female and 10% of male students citing managing childcare responsibilities as a significant challenge during the program — and transportation, deliver meaningful differences for participants.

NPower believes a number of policy levers for increasing opportunities for Women of Color in Technology can also be widely applied to the minority population as a whole. Fundamentally, an expansion of funding for apprenticeship programs as well as the expansion of Pell Grants to shorter term training programs would have a positive impact, alongside the increased funding for childcare subsides, especially during non-traditional hours. To provide sustainability, expanding family leave laws and strengthening pay parity laws would prove instrumental in progressing towards a more equitable workplace, not just in technology, but in every industry.

Don't Ask, Don't Get: Advocate for One's Career

Black workers can enhance their wage and income prospects by advocating for their careers.

Black workers should seek greater opportunities, including stretch assignments and leadership roles. Ask for and accept constructive feedback during reviews in order to identify areas of strength and weakness. Request clear goals that constitute success and review them with managers on a frequent basis. When it comes to compensation ask for the raise, but also arm oneself with a list of accomplishments warranting an increase. Ask employers where your salary lies within the range for your duties. If outside of that range, ask for it to be rectified. Unfortunately, a study by PayScale indicates that "People of color were significantly less likely than white men to have received a raise when they asked for one.

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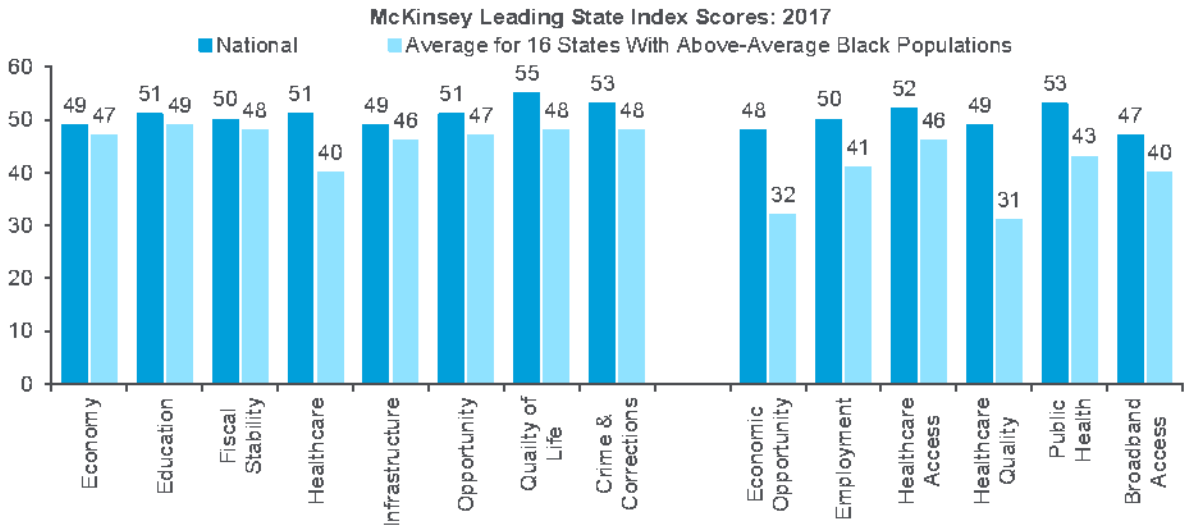
Women of color were 19 percent less likely to have received a raise than a white man and men of color were 25 percent less likely."[102] Nonetheless, if workers do not ask for a raise, then they lower the likelihood of receiving one. Network and remain visible, highlighting your successes with key stakeholders. Workers should seek mentors, advocates, and sponsors to help navigate their careers within a corporate setting. Join trade unions or professional clubs within your industry. Join or create support groups with colleagues outside of your business to glean knowledge and to build morale. Remain curious and retool one's skillset in order to be prepared for larger roles, greater responsibilities, and new opportunities.

- **Consider starting a business:** The U.S. Chamber of Congress and the SBA are resources for Black-owned businesses to find sources for grants, financing, and advice on how to run effective firms.
- **Move:** While a difficult decision, relocation may be the answer to improved jobs prospects. Sixty five percent of the Black population resides in 16 states in the U.S. However, according to a survey by McKinsey and Company, on average these states rank below national averages in metrics that can lead to an improved quality of life and wealth generation. Black workers, especially younger workers can opt to move to states that are generating the most jobs in high paying industries.

Figure 139. Black Workers Are Concentrated In States with Poor Economic Prospects Relative to National Average



Source: McKinsey & Company, Citi Research

[102] "PayScale Research Shows People of Color Up to 25% Less Likely toRreceive a Requested Pay Raise than White Men," PayScale Inc., May 28, 2018.

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Figure 140. Black Workers Are Less Likely to Be Located In States With Rapid Growth In High Wage Sectors

Source: BEA, World Population Review, Citi Research

Embrace Delayed Gratification and Risk

Investment is an important tool for generating wealth

Financial literacy and engaging with more traditional forms of financial services are ways that Black families can learn to budget and adjust spending in order to generate savings. Savings are critical for generating wealth via investments in homes, retirement and college savings vehicles, businesses, and financial assets. Indeed, a 2017 Gallup poll revealed that only 36 percent of Black respondents compared to 60 percent of white respondents cited investments in the stock market (Figure 141).[103] This is despite one fifth to one quarter of people in the US believing that stocks are a good long-term investment in recent years (Figure 142).[104] Actions that generate wealth require delayed gratification and a measure of risk, but can often lead to positive returns over the longer run.

[103] Jones, J.M., "U.S. Stock Ownership Down Among All but Older, Higher-Income," Gallup, May 24, 2017.
[104] McCarthy, J., "Stock Investments Lose Some Luster After COVID-19 Sell-Off," Gallup, April 24, 2020.

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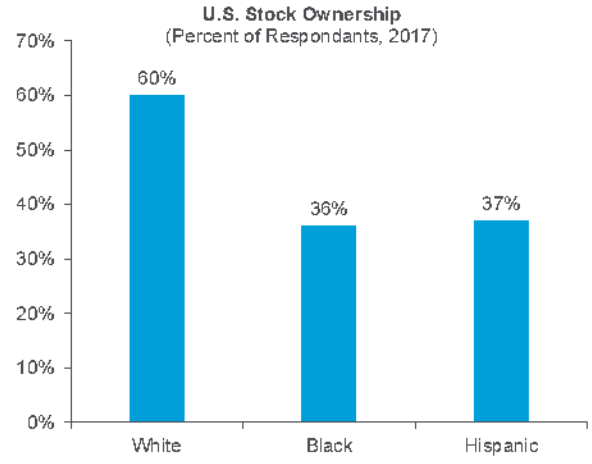
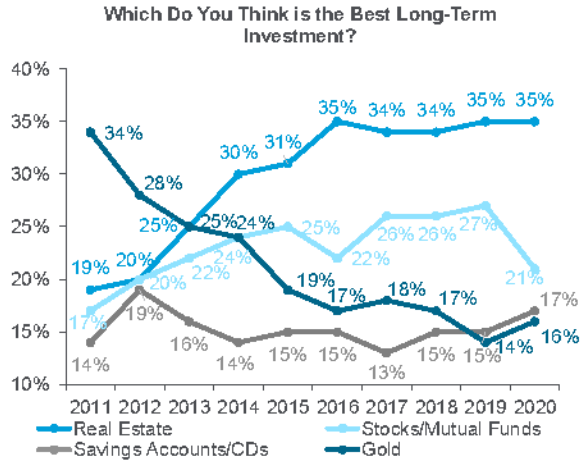
Operation Hope and Dfree are notable organizations that advocate financial literacy as an avenue for achieving financial independence, often known as "silver rights." Online brokerage firms that require smaller initial investments and reduced fees, as well as investment clubs are ways that families with modest incomes can begin to invest in their futures. Families with greater means can seek professional advice from brokers and financial advisors. All persons working at jobs with pension funds and/or retirement savings vehicles (IRAs, 401Ks) should take advantage of them, especially early in one's career.

Figure 141. Black People Less Likely to Own Stocks than White People



Source: Gallup, Citi Research

Figure 142. A Significant Share of Americans Favor Stock Holdings



Source: Gallup, Citi Research

Utilize Political Power

Black persons can use the power of the purse and political activism to advance closure of racial gaps

Many people are utilizing the #BlackLivesMatter movement as an opportunity to speak out against and address racial disparities of all stripes in the United States. Even ordinary persons can use their wallets to challenge firms to change practices that perpetuate inequality. Meanwhile, shareholders can use their influence over corporate executives to advance change. Every citizen having the right to vote should exercise it. Those willing to have a more direct hand in effecting change at the institutional level can engage in political activism by running for office or supporting elected officials with finances and time. While the number of Black politicians, particularly at the Federal level, remains few, the numbers have been on the rise, and likely will continue to do so (Figure 144).

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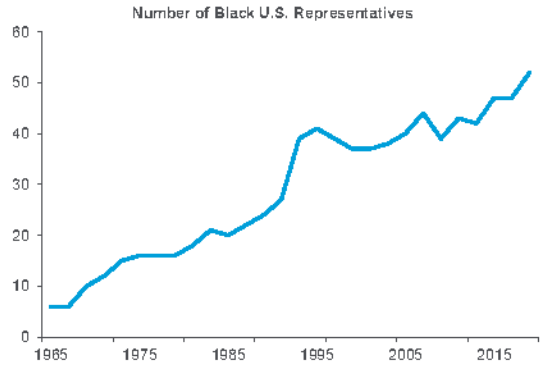
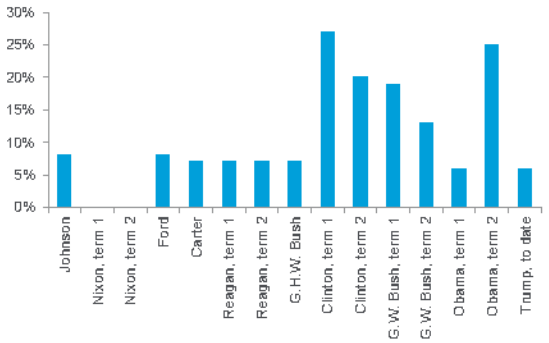
Figure 143. Number of Blacks In Congress Is Small but Steadily Climbing



Source: Pew Research Center, Citi Research

Figure 144. Blacks In Federal Positions Have Increased



Source: Pew Research Center, Citi Research

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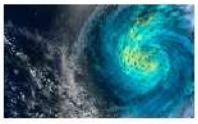

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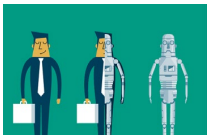

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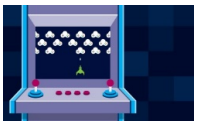

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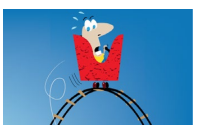

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NOW / NEXT

Key Insights regarding the future of Racial Equality

EDUCATION

Closing the college/advanced degree racial gap 20 years ago might have generated up to $113 billion in additional income for saving, investing and consumption. / Removing funding gaps from K-12 education funding, focusing on school curricula (including STEM) and directing Black students toward higher wage and in-demand occupations can help close the education gap and solve the income gap.

LABOR MARKET

In general Black workers are underrepresented in management, business, financial, professional and related occupations that pay the highest salaries. They are also are more likely to be situated in jobs that require lower skills and/or are more susceptible to automation / Encouraging Black students and workers to pursue education and training suitable to more technological and skills-based careers can help close the racial labor segmentation gap.

POLICY

The current 30 basis point gap between Black and white family home ownership is greater now than before 1968 when housing discrimination was legal. / Public policy should focus upon housing as a pathway to wealth and encourage home ownership as a path to intergenerational wealth.

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Date : 11/3/2021 11:26:49 AM
From : "Norma Cantu" ncantu@usccr.gov
To : "krayburn@eac.gov" krayburn@eac.gov
Cc : "Juana Silverio" jsilverio@usccr.gov
Subject : EAC Representative for USCCR
Attachment : Notice-of-Representation-Form-Board-Advisors-2021_USCCR_Mitchell.pdf;

Good morning-

Please find one of the 2 representatives for the EAC on behalf of the USCCR. We will forward the second representative shortly.

Thank you.
Norma V. Cantú
Chairwoman, USCCR

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Notice of Representation
United States Election Assistance Commission
Board of Advisors

In accordance with 52 U.S.C. § 20944 of the Help America Vote Act of 2002, your office submits the following individual(s) as a member of the Election Assistance Commission Board of Advisors:

Designated Representative

Name: Cleta Mitchell

Title: Senior Legal Fellow, Conservative Partnership Institute

Address: 300 Independence Ave, SE

Washington, DC 20003

Phone: 202.431.1950

Email: cleta@cletamitchell.com

Party Affiliation: Republican (personal; CPI is nonpartisan)

Designated Representative

Name: _____

Title: _____

Address: _____

_____

Phone: _____

Email: _____

Party Affiliation: _____

Name and Title of Appointing Official

Print Name: Norma Cantu

Print Title: Chairwoman- USCCR

Signature: Norma V. Cantú Date: 11/3/2021

Please return the completed form via email to EAC General Counsel Kevin Rayburn (krayburn@eac.gov).

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Date : 11/16/2021 9:58:17 AM
From : "Mauro Morales" mmorales@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov
Subject : FW: [EXTERNAL] Election Assistance Commission

FYI

From: Angelia Rorison <arorison@usccr.gov>
Sent: Tuesday, November 16, 2021 9:20 AM
To: Mauro Morales <mmorales@usccr.gov>
Cc: David Ganz <dganz@usccr.gov>
Subject: Fw: [EXTERNAL] Election Assistance Commission

FYI - We have gotten several emails now, and hundreds of social media hits on this - and one media inquiry. I will also note that the majority of social media hits is coming from twitter are media. Also - there are several tweets calling for new leadership at the Commission which all have dozens of retweets.

All messages are demanding to know how this happen. Also the meeting notice for Friday's business meeting has been shared WIDELY. So attendance will be high.

Angelia Rorison (She/Her)
Director of Media and Communications
FOIA Public Liaison
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425
M: 202-499-0263
arorison@usccr.gov
www.usccr.gov
Follow us on Twitter and Facebook

From: John RAGOSTA <ragostas@comcast.net>
Sent: Tuesday, November 16, 2021 9:13 AM
To: Public Affairs
Subject: [EXTERNAL] Election Assistance Commission

CAUTION: This email is from outside USCCR.

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Who at CCR is responsible for the abomination of appointing an advocate of the Big Lie to an election commission? Who pushed this nomination? Who permitted it? The public has a right to know.

Cleta Mitchell, Who Alleged 2020 Voter Fraud, Appointed to Election Assistance Commission (msn.com)

John Ragosta, PhD/JD

Fellow, Virginia Humanities

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Date : 11/16/2021 9:57:13 AM
From : "Mauro Morales" mmorales@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov
Subject : FW: [EXTERNAL] Election Assistance Commission

FYI

From: Angelia Rorison <arorison@usccr.gov>
Sent: Tuesday, November 16, 2021 9:47 AM
To: David Ganz <dganz@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: Re: [EXTERNAL] Election Assistance Commission

FYI - Here are the first news articles of the day from newsweek and daily beast:

https://www.thedailybeast.com/cleta-mitchell-lands-federal-election-agency-adviser-role

https://www.newsweek.com/cleta-mitchell-trump-voter-fraud-election-assistance-commission-1649620

Cleta Mitchell, Who Alleged 2020 Voter Fraud, Appointed to Election Assistance Commission

www.newsweek.com

Cleta Mitchell has been a key figure in pushing claims of voter fraud in the 2020 presidential election.

Cleta Mitchell Lands Federal Election

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Agency Adviser Role

www.thedailybeast.com

Cleta Mitchell, known for her role in Trump's infamous Georgia phone call, has reportedly been given a seat on federal Election Assistance Commission's board of advisers.

I will continue to monitor. - Ang

Angelia Rorison (She/Her)
Director of Media and Communications
FOIA Public Liaison
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425
M: 202-499-0263
arorison@usccr.gov
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From: David Ganz
Sent: Tuesday, November 16, 2021 9:29:40 AM
To: Angelia Rorison; Mauro Morales
Subject: RE: [EXTERNAL] Election Assistance Commission

Thanks for the update.

From: Angelia Rorison <arorison@usccr.gov>
Sent: Tuesday, November 16, 2021 9:20 AM
To: Mauro Morales <mmorales@usccr.gov>
Cc: David Ganz <dganz@usccr.gov>
Subject: Fw: [EXTERNAL] Election Assistance Commission

FYI - We have gotten several emails now, and hundreds of social media hits on this - and one media inquiry. I will also note that the majority of social media hits is coming from twitter are media. Also - there are several tweets calling for new leadership at the Commission which all have dozens of retweets.

AMERICAN OVERSIGHT

All messages are demanding to know how this happen. Also the meeting notice for Friday's business meeting has been shared WIDELY. So attendance will be high.

Angelia Rorison (She/Her)
Director of Media and Communications
FOIA Public Liaison
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425
M: 202-499-0263
arorison@usccr.gov
www.usccr.gov
Follow us on Twitter and Facebook

From: John RAGOSTA <ragostas@comcast.net>
Sent: Tuesday, November 16, 2021 9:13 AM
To: Public Affairs
Subject: [EXTERNAL] Election Assistance Commission

CAUTION: This email is from outside USCCR.

Who at CCR is responsible for the abomination of appointing an advocate of the Big Lie to an election commission? Who pushed this nomination? Who permitted it? The public has a right to know.

Cleta Mitchell, Who Alleged 2020 Voter Fraud, Appointed to Election Assistance Commission (msn.com)

John Ragosta, PhD/JD

Fellow, Virginia Humanities

AMERICAN OVERSIGHT

Date : 11/2/2021 8:37:48 AM
From : "John Mashburn" jmashburn@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov, "Juana Silverio" jsilverio@usccr.gov
Subject : FW: [EXTERNAL] RE: Notice-of-Representation-Form-Board-Advisors-2021.pdf
Attachment : Notice-of-Representation-Form-Board-Advisors-2021.pdf;

Attached is Cleta Mitchell's completed form with the information that was requested regarding her designation as one of USCCR'S two representatives on the Bd of Advisors to the Election Assistance Commission.

On 11/2/21, 8:26 AM, "Cleta Mitchell" <cleta@cletamitchell.com> wrote:

*** CAUTION: This email is from outside USCCR. ***

Here is my form

Cleta Mitchell, Esq.
Senior Legal Fellow, Election Integrity Network
Conservative Partnership Institute
cleta@cletamitchell.com
(202) 431-1950
https://url.emailprotection.link/?bpSZ5RqBm4QWq71VH06kxNiZUcwRlgNO43fbaiEmXRq8X7Bmw6epWLRZY07_AZcJLkw042PKMzh-GzB5u3mB_fw~~

On 10/29/21, 4:30 PM, "Norma Cantu" <ncantu@usccr.gov> wrote:

John,
This is the form I will be sending to the Elections Commission. Do you have the information for Ms. Cleta Mitchell so I can send this form out?
Many thanks.
Norma

You can view "Notice-of-Representation-Form-Board-Advisors-2021.pdf" at:
https://url.emailprotection.link/?bhGlJCICzBUucC3zhBPAFSDL-h5NRO9sxEO-UrSw_FBsGKreHtqHTlGNYMUi13dVPxGDwm28c9RZtFC89MjrlbxvqW59c5Q5VVIkrr9iOvrxCVovhPtBvxI-nIaJXeNyZQbE3aSFxff9i_60YFIaAvZS-glwYR_vPnNyaRBPIj8~

_____
Sent with Adobe Document Cloud. Click on the link above to access the file online. No sign up or installation of Acrobat is required to access.

AMERICAN OVERSIGHT

Notice of Representation
United States Election Assistance Commission
Board of Advisors

In accordance with 52 U.S.C. § 20944 of the Help America Vote Act of 2002, your office submits the following individual(s) as a member of the Election Assistance Commission Board of Advisors:

Designated Representative

Name: Cleta Mitchell

Title: Senior Legal Fellow, Conservative Partnership Institute

Address: 300 Independence Ave, SE
Washington, DC 20003

Phone: 202.431.1950

Email: cleta@cletamitchell.com

Party Affiliation: Republican (personal; CPI is nonpartisan)

Designated Representative

Name: _____

Title: _____

Address: _____

_____

Phone: _____

Email: _____

Party Affiliation: _____

Name and Title of Appointing Official

Print Name: Norma Cantu

Print Title: Chairwoman- USCCR

Signature: _____ Date: 11/3/2021

Please return the completed form via email to EAC General Counsel Kevin Rayburn (krayburn@eac.gov).

AMERICAN OVERSIGHT

Date : 11/18/2021 5:04:04 PM
From : "Angelia Rorison" arorison@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : FW: [EXTERNAL] RE: Reuters query

Good afternoon Chair Cantu,

A reporter from Reuters sent over the following fact check and a couple of interview questions that can be answered by looking at transcripts. I based or repurposed items on the approved interview responses for yesterday's interview.

Here are draft answers to get the ball rolling, let me know if you have any edits:

Dear Madam Chair, is it accurate that:

- Immediately after your designation by President Biden, the Republican caucus demanded that each of the two caucuses be allowed to nominate one person to EAC or other entities, and said they would not ratify you unless their demands were granted. The republican side wanted Mr. Christian Adams as their nominee.
    - The conservative caucus had blocked ratifying my appointment as Chair by President Joseph R. Biden for several months and to get a majority of votes, conservatives presented three procedural changes… one being appointments to other entities like the EAC. At this point the Commission had been without a Chair for three months.

        The conservative commissioners on the USCCR chose Ms. Mitchell and Commissioner J. Christian Adams as their nominees. The Progressive caucus ranked Ms. Mitchell slightly more suitable for a bipartisanship appointment.

- The democratic side declined, and initial meetings therefore didn't occur because the Republicans said they wouldn't ratify you as Chair and began to delay the commission's work, including on discovery, for instance.
    - My previous answer covers this question as well.

- The two sides began negotiating. One of the issues was around witness appointments; as part of the negotiations you pushed back and removed a proposal that would have commissioners, not staffers, designate witnesses. If this is accurate, would you be able to shed more light on these negotiations? What did the Republican side ask for, what did you respond, and what was the tenor of those conversations?
    - Yes, this was also an administrative policy that was put forth by conservative members at the Commission's April 30th business meeting. A transcript of everything discussed can be found on our website at usccr.gov.

- As part of negotiations, you agreed to the current nominations process.
    - Yes, this discussion can be found in transcripts for our business meeting as well.

AMERICAN OVERSIGHT

- One commissioner has characterized what the Republicans side did as “hostage” taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?

    - Personally, I am not pleased with the appointment and would have welcomed another choice. However, it is my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth by USCCR.

        As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC.

Deadline is tomorrow by 9 am

From: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Sent: Thursday, November 18, 2021 4:38 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

> CAUTION: This email is from outside USCCR.

Thanks Angelia! Here goes:

Dear Madam Chair, is it accurate that:

- Immediately after your designation by President Biden, the Republican caucus demanded that each of the two caucuses be allowed to nominate one person to EAC or other entities, and said they would not ratify you unless their demands were granted. The republican side wanted Mr. Christian Adams as their nominee.
- The democratic side declined, and initial meetings therefore didn’t occur because the Republicans said they wouldn’t ratify you as Chair and began to delay the commission’s work, including on discovery, for instance.
- The two sides began negotiating. One of the issues was around witness appointments; as part of the negotiations you pushed back and removed a proposal that would have commissioners, not staffers, designate witnesses. If this is accurate, would you be able to shed more light on these negotiations? What did the Republican side ask for, what did you respond, and what was the tenor of those conversations?
- As part of negotiations, you agreed to the current nominations process.
- One commissioner has characterized what the Republicans side did as “hostage” taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?

Many thanks.
Bests,
Alexandra

AMERICAN OVERSIGHT

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 1:30 PM
To: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Subject: [EXT] RE: [EXTERNAL] RE: Reuters query

External Email: Use caution with links and attachments.

I can send her questions to answer, but I can't guarantee she will grant interview.

From: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Sent: Thursday, November 18, 2021 4:15 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

CAUTION: This email is from outside USCCR.

Hi Angelia,

Is Chair Cantu available for an interview? Or will she answer written questions?

Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/1/2021 12:20:30 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Fw: Commissioner Appointments to the Election Assistance Commission

Adegbile,

I think that this email is the one to forward to the caucus now that Commissioner Yaki is recused, nominating Allison Riggs and Jenny Carroll the Alabama SAC Chair. Both are willing and able to serve.

The email should go to Cantu, Kladney, Yaki, Juana, Alec and Joshua (email jdansby@usccr.gov).
The Chair can then send our nominees to the R's.

Thanks,
Irena

From: Juana Silverio
Sent: Tuesday, August 3, 2021 4:30 PM
To: Irena Vidulovic; Mauro Morales; Norma Cantu
Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Alec Deull
Subject: RE: Commissioner Appointments to the Election Assistance Commission

Mauro- due to new information received, please replace Leah with Ms. Allison Riggs.

Juana

From: Irena Vidulovic <ividulovic@usccr.gov>
Sent: Tuesday, August 3, 2021 4:12 PM
To: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Debo P. Adegbile <dadegbile@usccr.gov>; Michael Yaki <MYaki@usccr.gov>; David Kladney <dkladney@usccr.gov>; Alec Deull <adeull@usccr.gov>
Subject: Re: Commissioner Appointments to the Election Assistance Commission

Unfortunately Leah Aden is unable to serve. Commissioner Adebile reached out to all the candidates that we proposed including Leah to make sure that they would be willing and able to serve and we have been notified that Leah is unavailable to serve.

AMERICAN OVERSIGHT

From: Juana Silverio
Sent: Tuesday, August 3, 2021 3:38:23 PM
To: Mauro Morales; Norma Cantu
Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Irena Vidulovic; Alec Deull
Subject: RE: Commissioner Appointments to the Election Assistance Commission

Good afternoon Mauro.

The Dem caucus had a tie:

Commissioner Michael Yaki
Leah Aden (Cantu and Yaki)
Allison Riggs (Adegbile and Kladney)

The Chairwoman, in the interest of observing the deadline, is submitting the following names for EAC consideration:

Commissioner Michael Yaki
Leah Aden - https://www.naacpldf.org/about-us/staff/leah-c-aden/

Leah C. Aden
www.naacpldf.org

Leah C. Aden has served as a Deputy Director of Litigation at the NAACP Legal Defense & Educational Fund, Inc. (LDF) since October 2018, assisting in the

Thank you.
Juana

From: Mauro Morales <mmorales@usccr.gov>
Sent: Monday, August 2, 2021 11:47 AM
To: Norma V. Cantú <normavcantu@gmail.com>; Juana Silverio <jsilverio@usccr.gov>
Subject: Fwd: Commissioner Appointments to the Election Assistance Commission

FYI
Sent from my iPhone

Begin forwarded message:

> **From:** Mauro Morales <mmorales@usccr.gov>
> **Date:** August 2, 2021 at 8:45:25 AM MST
> **To:** John Mashburn <jmashburn@usccr.gov>

AMERICAN OVERSIGHT

Cc: Carissa Mulder <CMulder@usccr.gov>, Thomas Simuel <tsimuel@usccr.gov>, Alexander Heideman <aheideman@usccr.gov>
Subject: Re: Commissioner Appointments to the Election Assistance Commission

My flight was canceled and returning today. Your selections were forwarded to Chair Cantu. Thank you.
Sent from my iPhone

> On Jul 30, 2021, at 9:34 AM, John Mashburn <jmashburn@usccr.gov> wrote:
>
> Mauro – after canvassing the Republican Commissioners, the two nominees they wish to put forward for one of the two USCCR designees for the EAC's Board of Advisors (per your email below) are:
>
> Cleta Mitchell – Chair, Conservative Partnership Institute Election Integrity Network, and
>
> Christian Adams – USCCR Commissioner.
>
> ---
>
> **From:** Mauro Morales <mmorales@usccr.gov>
> **Date:** Wednesday, July 28, 2021 at 11:30 AM
> **To:** Commissioners <Commissioners@usccr.gov>
> **Cc:**
> " <CommissionerAssistants@usccr.gov>
> **Subject:** Commissioner Appointments to the Election Assistance Commission
>
> Dear Commissioners-
>
> At the request and in consultation with the Chair, I am sending this email to start the EAC nomination process for Commissioners.
>
> Per the AI voted on during the April 30th meeting (language included below), each caucus is requested to submit two candidates for consideration by COB Friday, July 30, 2021. Once the names are submitted, OGC will conduct an ethics check to be completed by Wednesday, August 4, 2021. Each caucus will then have 24 hours to submit caucus strikes (Thursday, August 5, 2021 COB). The Chair will communicate the two names to EAC no later than Friday, August 6, 2021.
>
> Please let the Chair or I know if you have any questions or concerns.

AMERICAN OVERSIGHT

--
AI language:

Section 1.
.01 Any authority specifically granted the Commission on Civil Rights by statute or regulation or executive order to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Commission as a whole by majority vote.

.02 Any authority specifically granted the Staff Director of the Commission on Civil Rights by statute or regulation or executive order to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Staff Director.

.03 Any authority specifically granted the Chair of the Commission on Civil Rights by statute or regulation or executive order to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Chair.

Section 2
.02

(1) For the two (2) appointments to the U.S. Election Assistance Commission, the members appointed by Democratic authorities shall nominate two individuals who are ready, willing, and able to serve, and the members appointed by the Republican authorities shall nominate two individuals who are ready, willing, and able to serve.

(2) The members appointed by the Democratic authorities shall select one (1) of the two (2) individuals nominated by the members appointed by the Republican authorities, and the members appointed by the Republican authorities shall select one (1) of the two (2) individuals nominated by the members appointed by the Democratic authorities

(3) The members selected shall be placed in nomination and ratified in conformance with Section 1.

AMERICAN OVERSIGHT

Mauro Morales
Staff Director
U.S. Commission on Civil Rights
P: 202-376-7796| F: 202-376-7672
Mmorales@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

Follow Us on Twitter & Facebook:
<image001.gif>
<image002.gif>

#USCCR

AMERICAN OVERSIGHT

Date : 11/4/2021 4:29:31 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Debo P. Adegbile" dadegbile@usccr.gov
Subject : Fw: Commissioner Appointments to the Election Assistance Commission

Dear Norma,

Commissioner Adegbile would like to thank you for thinking of him for the EAC nomination. While he appreciates it, he believes that Allison Riggs and Alabama SAC Chair Jenny Carroll should be nominated instead. They both have voting bona fides and have already expressed a willingness to serve.

Thank you again,
Irena

From: Juana Silverio
Sent: Tuesday, August 3, 2021 4:30 PM
To: Irena Vidulovic; Mauro Morales; Norma Cantu
Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Alec Deull
Subject: RE: Commissioner Appointments to the Election Assistance Commission

Mauro- due to new information received, please replace Leah with Ms. Allison Riggs.

Juana

From: Irena Vidulovic <ividulovic@usccr.gov>
Sent: Tuesday, August 3, 2021 4:12 PM
To: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Debo P. Adegbile <dadegbile@usccr.gov>; Michael Yaki <MYaki@usccr.gov>; David Kladney <dkladney@usccr.gov>; Alec Deull <adeull@usccr.gov>
Subject: Re: Commissioner Appointments to the Election Assistance Commission

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From: Juana Silverio
Sent: Tuesday, August 3, 2021 3:38:23 PM
To: Mauro Morales; Norma Cantu
Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Irena Vidulovic; Alec Deull

AMERICAN OVERSIGHT

Subject: RE: Commissioner Appointments to the Election Assistance Commission

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The Dem caucus had a tie:

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Leah C. Aden

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Sent: Monday, August 2, 2021 11:47 AM
To: Norma V. Cantú <normavcantu@gmail.com>; Juana Silverio <jsilverio@usccr.gov>
Subject: Fwd: Commissioner Appointments to the Election Assistance Commission

FYI
Sent from my iPhone

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> --
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AMERICAN OVERSIGHT

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(3) The members selected shall be placed in nomination and ratified in conformance with Section 1.

Mauro Morales
Staff Director
U.S. Commission on Civil Rights

AMERICAN OVERSIGHT

P: 202-376-7796| F: 202-376-7672
Mmorales@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

Follow Us on Twitter & Facebook:

<image002.gif>

#USCCR

AMERICAN OVERSIGHT

Date : 11/9/2021 2:10:38 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Michael Yaki" MYaki@usccr.gov, "David Kladney" dkladney@usccr.gov
Cc : "Joshua Dansby" jdansby@usccr.gov, "Alec Deull" adeull@usccr.gov
Subject : FW: Commissioner Appointments to the Election Assistance Commission

Good afternoon,

Norma wanted me to make sure you both were ok with the below names before sending them over to the Rep Caucus for consideration re: our second rep on the EAC

Allison Riggs- https://southerncoalition.org/staff/allison-riggs/
Alabama SAC Chair Jenny Carroll-
https://www.congress.gov/116/meeting/house/109456/witnesses/HHRG-116-HA08-Wstate-CarrollJ-20190513.pdf

---

From: Norma Cantu <ncantu@usccr.gov>
Sent: Thursday, November 4, 2021 5:15 PM
To: Irena Vidulovic <ividulovic@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Debo P. Adegbile <dadegbile@usccr.gov>
Subject: RE: Commissioner Appointments to the Election Assistance Commission

Thank you, Irena.
I am relieved the Commission delivered two peerless choices.
Norma

From: Irena Vidulovic <ividulovic@usccr.gov>
Sent: Thursday, November 4, 2021 3:30 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Debo P. Adegbile <dadegbile@usccr.gov>
Subject: Fw: Commissioner Appointments to the Election Assistance Commission

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Thank you again,

Irena

AMERICAN OVERSIGHT

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Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Alec Deull
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AMERICAN OVERSIGHT

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Leah Aden (Cantu and Yaki)

Allison Riggs (Adegbile and Kladney)

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Commissioner Michael Yaki

Leah Aden - https://www.naacpldf.org/about-us/staff/leah-c-aden/

Leah C. Aden

www.naacpldf.org

Leah C. Aden has served as a Deputy Director of Litigation at the NAACP Legal Defense & Educational Fund, Inc. (LDF) since October 2018, assisting in the planning, strategy, and supervision of LDF's voting rights work. In light of the upcoming post-Census redistricting cycle, Leah is leading the planning, strategy, and supervision of LDF's redistricting [...]

Thank you.

Juana

AMERICAN OVERSIGHT

From: Mauro Morales <mmorales@usccr.gov>
Sent: Monday, August 2, 2021 11:47 AM
To: Norma V. Cantú <normavcantu@gmail.com>; Juana Silverio <jsilverio@usccr.gov>
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FYI

Sent from my iPhone

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> > On Jul 30, 2021, at 9:34 AM, John Mashburn <jmashburn@usccr.gov> wrote:
> >
> > Mauro – after canvassing the Republican Commissioners, the two nominees they wish to put forward for one of the two USCCR designees for the EAC's Board of Advisors (per your email below) are:
> >
> > Cleta Mitchell – Chair, Conservative Partnership Institute Election Integrity Network, and
> >
> > Christian Adams – USCCR Commissioner.

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From: Mauro Morales <mmorales@usccr.gov>
Date: Wednesday, July 28, 2021 at 11:30 AM
To: Commissioners <Commissioners@usccr.gov>
Cc:
" <CommissionerAssistants@usccr.gov>
Subject: Commissioner Appointments to the Election Assistance Commission

Dear Commissioners-

At the request and in consultation with the Chair, I am sending this email to start the EAC nomination process for Commissioners.

Per the AI voted on during the April 30th meeting (language included below), each caucus is requested to submit two candidates for consideration by COB Friday, July 30, 2021. Once the names are submitted, OGC will conduct an ethics check to be completed by Wednesday, August 4, 2021. Each caucus will then have 24 hours to submit caucus strikes (Thursday, August 5, 2021 COB). The Chair will communicate the two names to EAC no later than Friday, August 6, 2021.

Please let the Chair or I know if you have any questions or concerns.

--

AI language:

Section 1.

.01 Any authority specifically granted the Commission on Civil Rights by statute or regulation or executive order

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to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Commission as a whole by majority vote.

.02 Any authority specifically granted the Staff Director of the Commission on Civil Rights by statute or regulation or executive order to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Staff Director.

.03 Any authority specifically granted the Chair of the Commission on Civil Rights by statute or regulation or executive order to appoint members to serve on other federal entities such as advisory boards, task forces, other commissions, etc., shall be exercised by the Chair.

Section 2

.02

(1) For the two (2) appointments to the U.S. Election Assistance Commission, the members appointed by Democratic authorities shall nominate two individuals who are ready, willing, and able to serve, and the members appointed by the Republican authorities shall nominate two individuals who are ready, willing, and able to serve.

(2) The members appointed by the Democratic authorities shall select one (1) of the two (2) individuals nominated by the members appointed by the Republican authorities, and the members appointed by the Republican authorities shall select one (1) of the two (2) individuals nominated by the members appointed by the Democratic authorities

(3) The members selected shall be placed in nomination and ratified in conformance with Section 1.

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Mauro Morales

Staff Director

U.S. Commission on Civil Rights

P: 202-376-7796| F: 202-376-7672

Mmorales@usccr.gov

http://usccr.gov/

1331 Pennsylvania Avenue, NW Suite 1150

Washington D.C. 20425

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<image001.gif>

<image002.gif>

#USCCR

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Date : 11/30/2021 9:19:15 AM
From : "Joshua Dansby" jdansby@usccr.gov
To : "David Kladney" dkladney@usccr.gov
Subject : Fw: Conflict of Interest
Attachment : PILF 2018 990.pdf;

Dave,

Irena just sent this over this morn. Scroll down to see the message Commissioner Adegible sent to Mauro & David.

-Joshua

From: Irena Vidulovic
Sent: Tuesday, November 30, 2021 9:08 AM
To: Joshua Dansby
Subject: Fwd: Conflict of Interest

FYI

Sent from my iPhone

Begin forwarded message:

> **From:** Irena Vidulovic <ividulovic@usccr.gov>
> **Date:** November 23, 2021 at 9:15:04 PM GMT+1
> **To:** Mauro Morales <mmorales@usccr.gov>, David Ganz <dganz@usccr.gov>
> **Cc:** "Debo P. Adegbile" <dadegbile@usccr.gov>
> **Subject: Conflict of Interest**
>
> Staff Director Morales and General Counsel Ganz,
>
> I write to follow up on a potential conflict issue I raised during the Friday business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, appears to employ Commissioner Adams as General Counsel, it also appears he serves as a Director for the organization and as an officer through his status as President.

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At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams appears to have financial and business relationships with Ms. Mitchell, through PILF, which as far as I am aware he failed to disclose to the General Counsel's office prior to the nomination and vote on Ms. Mitchell's appointment. I asked for a written opinion from the General Counsel as to whether any ethical rules, policies or laws were violated as a result of this apparent non-disclosure, and, if so, what the impact of any breach is not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors. In other words, if Commissioner Adams should have disclosed and recused but did neither are the nomination and the vote itself tainted. Other Commissioners may have thought differently about the nomination and their vote had they been aware of ethical issues.

Specifically, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts if true raise serious questions as to the propriety and validity of Commissioner Adams participation in matters

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regarding Ms. Mitchell.

Please undertake a review of the relevant ethical and conflict of interests policies, and laws, including but not limited to those I have identified and report your findings to the Commissioners. If it is determined that a violation occurred or that this matter is more appropriately investigated by a separate independent third-party, a referral to Office of Inspector General of the Department of Justice may be appropriate, consistent with 5 CFR 2638.502)

As indicated above, please include in your analysis a determination as to whether any rule, policy or law was violated , if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Thank you,
Debo P. Adegbile

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

A For the 2018 calendar year, or tax year beginning , 2018, and ending , 20 18

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization: Public Interest Legal Foundation
Doing business as:
Number and street (or P O box if mail is not delivered to street address): 32 E. Washington St
Room/suite: STE 1675
City or town, state or province, country, and ZIP or foreign postal code: Indianapolis, IN 46204

D Employer identification number: 45-4355641

E Telephone number: 317-203-5599

G Gross receipts $: 1469765

F Name and address of principal officer: John Christian Adams, President
same as box C

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website ▶ publicinterestlegal org

H(c) Group exemption number ▶

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 2012

M State of legal domicile: IN

Part I Summary

Activities & Governance	1	Briefly describe the organization's mission or most significant activities: The Org exists to provide services / representation to states and election officials, non-profit organizations, and individuals, to assist with the exercise of their civil/constitutional rights, with particular focus on voting rights. Provide education to citizens and election officials regarding election integrity.		
	2	Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets		
	3	Number of voting members of the governing body (Part VI, line 1a)	3	8
	4	Number of independent voting members of the governing body (Part VI, line 1b)	4	6
	5	Total number of individuals employed in calendar year 2018 (Part V, line 2a)	5	5
	6	Total number of volunteers (estimate if necessary)	6	5
	7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
	b	Net unrelated business taxable income from Form 990-T, line 38	7b	0

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			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)	1025453	1381709
	9	Program service revenue (Part VIII, line 2g)	11444	76090
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	25000	
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	9055	11966
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	1170952	1469765
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
	14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	695178	717019
	16a	Professional fundraising fees (Part IX, column (A), line 11e)	3000	67933
	b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 138779		
	17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	341097	353655
	18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	1039275	1138607
	19	Revenue less expenses. Subtract line 18 from line 12	131677	331158

			Beginning of Current Year	End of Year
Net Assets or Fund Balances	20	Total assets (Part X, line 16)	698018	1032621
	21	Total liabilities (Part X, line 26)	35008	38453
	22	Net assets or fund balances. Subtract line 21 from line 20	663010	994168

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

Signature of officer: J. Christian Adams
Date: 10/20/19

Type or print name and title: J. Christian Adams, President

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ▶ | Firm's EIN ▶
Firm's address ▶ | Phone no

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☑ No

For Paperwork Reduction Act Notice, see the separate instructions. Cat No 11282Y Form **990** (2018)

935-45 19

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission

The Foundation exists to provide services and representation to states and election officials, non-profit organizations, and individuals, to assist them with the exercise of their civil and constitutional rights, with particular focus on voting rights. PILF provides education to citizens and election officials regarding election integrity and the role of election process laws and how they affect policy and constitutional architecture.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code) (Expenses $ 587341 including grants of $ 0) (Revenue $ 76090)

Provided litigation for the purpose of defending the constitutional and statutory rights of individuals and non-profit organizations from intrusion by state, federal, and local governments. Specializes in civil litigation in high-profile matters affecting the processes of the nation, with particular emphasis given to aiding the cause of election integrity and litigating against lawlessness in American elections. Additionally, volunteer attorneys contributed in-kind legal services for these cases valued at $7,500. The foundation litigated 8 fundamental cases and filed 5 Brief of Amicus in 2018.

* See Attachment 1 of this 990 for detailed case descriptions.

4b (Code:) (Expenses $ 316690 including grants of $ 0) (Revenue $ 0)

Education and Advocacy- PILF has a focused effort to raise awareness of vital issues such as non-citizens voting, lack of citizen verification and other shortfalls in the current election process. PILF has marshalled expert resources to help educate citizens, officials and decision makers about the role of election process laws and how they affect policy and Constitutional architecture. PILF assists election officials in devising election integrity policies. PILF has responded to requests for assistance from election officials and legislatures to discuss best practices for voter roll maintenance. PILF has completed research projects and published reports regarding best practices for voter roll maintenance and regarding the consequences of lack of citizenship verification in the election process. PILF attorneys have testified before legislative bodies presenting and discussing PILF's research and reports.

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 904031

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ORABDG

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	✓	
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2	✓	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		✓
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		✓
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		✓
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		✓
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		✓
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		✓
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		✓
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		✓
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		✓
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		✓
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		✓
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		✓
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		✓
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		✓
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	✓	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	✓	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		✓
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		✓
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		✓
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		✓
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		✓
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I* (see instructions)	17	✓	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		✓
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		✓
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		✓
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		✓

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Part IV Checklist of Required Schedules *(continued)*

			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		✓
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		✓
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K If "No," go to line 25a*	24a		✓
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		✓
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		✓
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		✓
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		✓
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		✓
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		✓
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		✓
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		✓
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		✓
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		✓
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		✓
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		✓
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	✓	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	✓	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	✓	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		✓
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		✓
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	✓	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	14		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		✓	

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Part V Statements Regarding Other IRS Filings and Tax Compliance *(continued)*

			Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return 2a 5			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b	✓	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)			
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a		✓
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*	3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a		✓
b	If "Yes," enter the name of the foreign country: ▶ ---------- See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).			
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a		✓
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b		✓
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?	5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a		✓
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b		
7	**Organizations that may receive deductible contributions under section 170(c).**			
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		✓
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c		✓
d	If "Yes," indicate the number of Forms 8282 filed during the year 7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e		✓
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f		✓
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h		
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8		
9	**Sponsoring organizations maintaining donor advised funds.**			
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b		
10	**Section 501(c)(7) organizations.** Enter			
a	Initiation fees and capital contributions included on Part VIII, line 12 10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities 10b			
11	**Section 501(c)(12) organizations.** Enter:			
a	Gross income from members or shareholders 11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.) 11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year 12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**			
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O.	13a		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans 13b			
c	Enter the amount of reserves on hand 13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a		✓
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see instructions and file Form 4720, Schedule N.	15		✓
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.	16		✓

AMERICAN OVERSIGHT

Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O See instructions*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☑

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a 8		
b	Enter the number of voting members included in line 1a, above, who are independent	1b 6		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		✓
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3		✓
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		✓
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		✓
6	Did the organization have members or stockholders?	6		✓
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a		✓
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b		✓
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	✓	
b	Each committee with authority to act on behalf of the governing body?	8b	✓	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O* . . .	9		✓

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		✓
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	✓	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	✓	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	✓	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	✓	
13	Did the organization have a written whistleblower policy?	13		✓
14	Did the organization have a written document retention and destruction policy?	14	✓	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	✓	
b	Other officers or key employees of the organization	15b	✓	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		✓
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (1024 or 1024-A if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply

☐ Own website ☐ Another's website ☑ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records ▶

Shawna Powell, Public Interest Legal Foundation, 32 E. Washington St., Indianapolis, IN 46204 (317) 203-5599

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Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order. individual trustees or directors, institutional trustees, officers; key employees; highest compensated employees, and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Brian Brown Director	2 -	✓						0	0	0
(2) William Davis Director	2 -	✓						0	0	0
(3) Hans von Spakovsky Director	2 -	✓						0	0	0
(4) Dr. John Eastman Director	2 -	✓						0	0	0
(5) Cleta Mitchell Chariman, Director	2 -	✓		✓				0	0	0
(6) Neil Corkery Treasurer, Director	5 -	✓		✓				30000	0	0
(7) John Christian Adams President, General Counsel, Director	40 -	✓		✓				120000	0	0
(8) Shawna L Powell Secretary	40 -			✓				88564	0	0
(9) David Norcross Director	2 -	✓						0	0	0
(10)										
(11)										
(12)										
(13)										
(14)										

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Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)										
(16)										
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
1b **Sub-total** ▶								238564	0	0
c **Total from continuation sheets to Part VII, Section A** ▶								0	0	0
d **Total (add lines 1b and 1c)** ▶								238564	0	0

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 1

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*		✓
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*		✓
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*		✓

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
John Christian Adams, 32 E. Washington St., STE 1675, Indianapolis, IN 46204	General Counsel	120000

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 1

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Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512–514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f	1381709			
	g	Noncash contributions included in lines 1a–1f $					
	h	**Total.** Add lines 1a–1f ▶		1381709			
Program Service Revenue			Business Code				
	2a	Litigation	541100	76090	76090	0	0
	b						
	c						
	d						
	e						
	f	All other program service revenue					
	g	**Total.** Add lines 2a–2f ▶		76090			
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties ▶					
			(i) Real	(ii) Personal			
	6a	Gross rents					
	b	Less rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) ▶					
			(i) Securities	(ii) Other			
	7a	Gross amount from sales of assets other than inventory					
	b	Less cost or other basis and sales expenses					
	c	Gain or (loss)					
	d	Net gain or (loss) ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b	Less direct expenses b					
	c	Net income or (loss) from fundraising events ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 a					
	b	Less direct expenses b					
	c	Net income or (loss) from gaming activities ▶					
	10a	Gross sales of inventory, less returns and allowances a					
	b	Less cost of goods sold b					
	c	Net income or (loss) from sales of inventory ▶		0	0	0	0
		Miscellaneous Revenue	Business Code				
	11a	Cost reimbursement fm related entity	900099	11966	11966	0	0
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d ▶		11966			
	12	**Total revenue.** See instructions ▶		1469765	88056	0	0

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns All other organizations must complete column (A)

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☑

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2	Grants and other assistance to domestic individuals. See Part IV, line 22				
3	Grants and other assistance to foreign organizations, foreign governments, and foreign individuals See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	238564	149138	68569	20856
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	347509	346989	260	260
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits	97879	89992	5887	2000
10	Payroll taxes	33067	30388	2000	680
11	Fees for services (non-employees):				
a	Management				
b	Legal	50074	50074	0	0
c	Accounting	4500	0	4500	0
d	Lobbying				
e	Professional fundraising services See Part IV, line 17	67933			67933
f	Investment management fees				
g	Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)				
12	Advertising and promotion				
13	Office expenses	20017	9859	1883	8275
14	Information technology	515	474	0	41
15	Royalties				
16	Occupancy	23594	20055	2359	1180
17	Travel	22150	17705	4445	0
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings	7273	4537	1368	1368
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance	24217	19692	4526	0
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	**Direct Mail Expense**	180931	144745	0	36186
b	**Litigation Direct Expense**	14571	14571	0	0
c	**Education Direct Expense**	5812	5812	0	0
d					
e	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24e	1138607	904031	95797	138779
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☑ if following SOP 98-2 (ASC 958-720)	202364	144745	0	57619

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Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing	692226	1	1031105
	2	Savings and temporary cash investments	0	2	0
	3	Pledges and grants receivable, net	0	3	0
	4	Accounts receivable, net	0	4	0
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	0	5	0
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L	0	6	0
	7	Notes and loans receivable, net	0	7	0
	8	Inventories for sale or use	0	8	0
	9	Prepaid expenses and deferred charges	0	9	0
	10a	Land, buildings, and equipment cost or other basis. Complete Part VI of Schedule D — 10a: 0			
	b	Less: accumulated depreciation — 10b: 0	0	10c	0
	11	Investments—publicly traded securities	0	11	0
	12	Investments—other securities. See Part IV, line 11	0	12	0
	13	Investments—program-related. See Part IV, line 11	0	13	0
	14	Intangible assets	0	14	0
	15	Other assets. See Part IV, line 11	5792	15	1516
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	698018	16	1032621
Liabilities	17	Accounts payable and accrued expenses	35008	17	38453
	18	Grants payable	0	18	0
	19	Deferred revenue	0	19	0
	20	Tax-exempt bond liabilities	0	20	0
	21	Escrow or custodial account liability. Complete Part IV of Schedule D	0	21	0
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L	0	22	0
	23	Secured mortgages and notes payable to unrelated third parties	0	23	0
	24	Unsecured notes and loans payable to unrelated third parties	0	24	0
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17–24). Complete Part X of Schedule D	0	25	0
	26	**Total liabilities.** Add lines 17 through 25	35008	26	38453
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	663010	27	994168
	28	Temporarily restricted net assets	0	28	0
	29	Permanently restricted net assets	0	29	0
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds	0	30	0
	31	Paid-in or capital surplus, or land, building, or equipment fund	0	31	0
	32	Retained earnings, endowment, accumulated income, or other funds	0	32	0
	33	Total net assets or fund balances	663010	33	994168
	34	Total liabilities and net assets/fund balances	698018	34	1032621

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Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	1469765
2	Total expenses (must equal Part IX, column (A), line 25)	2	1138607
3	Revenue less expenses. Subtract line 2 from line 1	3	331158
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	663010
5	Net unrealized gains (losses) on investments	5	0
6	Donated services and use of facilities	6	0
7	Investment expenses	7	0
8	Prior period adjustments	8	0
9	Other changes in net assets or fund balances (explain in Schedule O)	9	0
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	994168

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		✓
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	✓	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both. ☐ Separate basis ☐ Consolidated basis ☑ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c		✓
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		✓
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

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SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

► Attach to Form 990 or Form 990-EZ.

► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization	Employer identification number
Public Interest Legal Foundation	45-4355641

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

09

The organization is not a private foundation because it is (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives (1) more than 33⅓% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33⅓% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1–10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
(A)						
(B)						
(C)						
(D)						
(E)						
Total						

AMERICAN OVERSIGHT

USCCR-21-1814-B-000606

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") . .						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
3 The value of services or facilities furnished by a governmental unit to the organization without charge . . .						
4 **Total.** Add lines 1 through 3 . . .						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
11 **Total support.** Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14	Public support percentage for 2018 (line 6, column (f) divided by line 11, column (f))	14	%
15	Public support percentage from 2017 Schedule A, Part II, line 14	15	%

16a **33⅓% support test—2018.** If the organization did not check the box on line 13, and line 14 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **33⅓% support test—2017.** If the organization did not check a box on line 13 or 16a, and line 15 is 33⅓% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2018.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

b **10%-facts-and-circumstances test—2017.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . . ▶ ☐

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Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	1,455,665	287,407	969,841	1,025453	1,381,709	$5,120,075
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	458,923	246,797	49,242	111,444	76,090	$942,496
3 Gross receipts from activities that are not an unrelated trade or business under section 513		27,664	23,061	9,055	11,966	$71,746
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
7a Amounts included on lines 1, 2, and 3 received from disqualified persons	364,971	303,800	525,000	575,000	600,000	$2,368,771
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year	199,109	161,242	38,046	97,162	61,392	$556,952
c Add lines 7a and 7b	564,081	465,042	563,046	672,162	661,392	$2,925,723
8 **Public support.** (Subtract line 7c from line 6.)						$3,208,594

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2014	(b) 2015	(c) 2016	(d) 2017	(e) 2018	(f) Total
9 Amounts from line 6	1,914,588	561,868	1,042,144	1,145,952	1,469,765	$6,134,317
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources				25,000		25,000
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975				0		
c Add lines 10a and 10b				25,000		25,000
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12)	1,914,588	561,868	1,042,144	1,170,952	1,469,765	$6,159,317

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2018 (line 8, column (f), divided by line 13, column (f))	15	52 %
16	Public support percentage from 2017 Schedule A, Part III, line 15	16	55 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2018** (line 10c, column (f), divided by line 13, column (f))	17	1 %
18	Investment income percentage from **2017** Schedule A, Part III, line 17	18	1 %

19a **33 1/3% support tests—2018.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☑

b **33 1/3% support tests—2017.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

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Part IV **Supporting Organizations**

(Complete only if you checked a box in line 12 on Part I. If you checked 12a of Part I, complete Sections A and B. If you checked 12b of Part I, complete Sections A and C. If you checked 12c of Part I, complete Sections A, D, and E. If you checked 12d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 12a or 12b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action, (iii) the authority under the organization's organizing document authorizing such action, and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (as defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

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Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in* ***Part VI.***	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s)*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard*	3		

Section E. Type III Functionally Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the year* ***(see instructions).***

a ☐ The organization satisfied the Activities Test. *Complete* ***line 2*** *below*

b ☐ The organization is the parent of each of its supported organizations. *Complete* ***line 3*** *below*

c ☐ The organization supported a governmental entity. *Describe in* ***Part VI*** *how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? *Provide details in* ***Part VI.***	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI*** *the role played by the organization in this regard*	3b		

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (explain in Part VI) **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E

Section A—Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6, and 7 from line 4)	8		

Section B—Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**)			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions)	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035.	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C—Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1.	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3.	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions).	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally integrated Type III supporting organization (see instructions)

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Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D—Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in **Part VI**). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in **Part VI**). See instructions.	
9	Distributable amount for 2018 from Section C, line 6	
10	Line 8 amount divided by line 9 amount	

Section E—Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2018	(iii) Distributable Amount for 2018
1	Distributable amount for 2018 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2018 (reasonable cause required—explain in **Part VI**). See instructions.			
3	Excess distributions carryover, if any, to 2018			
a	From 2013 .			
b	From 2014 . . .			
c	From 2015			
d	From 2016			
e	From 2017			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2018 distributable amount			
i	Carryover from 2013 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2018 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2018 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4			
5	Remaining underdistributions for years prior to 2018, if any. Subtract lines 3g and 4a from line 2. For result greater than zero, explain in **Part VI.** See instructions.			
6	Remaining underdistributions for 2018 Subtract lines 3h and 4b from line 1. For result greater than zero, explain in **Part VI.** See instructions.			
7	**Excess distributions carryover to 2019.** Add lines 3j and 4c.			
8	Breakdown of line 7.			
a	Excess from 2014 .			
b	Excess from 2015 .			
c	Excess from 2016 . . .			
d	Excess from 2017 . . .			
e	Excess from 2018 . . .			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c, Part IV, Section B, lines 1 and 2, Part IV, Section C, line 1, Part IV, Section D, lines 2 and 3, Part IV, Section E, lines 1c, 2a, 2b, 3a, and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6 Also complete this part for any additional information. (See instructions.)

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.

Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)

☐ Preservation of land for public use (for example, recreation or education)
☐ Preservation of a historically important land area
☐ Protection of natural habitat
☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Tax Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	*Number of conservation easements on a certified historic structure included in (a)*	2c	
d	Number of conservation easements included in (c) acquired after 7/25/06, and not on a historic structure listed in the National Register	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ----------

4 Number of states where property subject to conservation easement is located ▶ ----------

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ----------

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ----------

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide in Part XIII the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
(ii) Assets included in Form 990, Part X ▶ $ ----------

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ ----------
b Assets included in Form 990, Part X ▶ $

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Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that make significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ *Scholarly research*
c ☐ Preservation for future generations
d ☐ Loan or exchange program
e ☐ *Other* _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements.

Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table

		Amount
c	Beginning balance	1c
d	Additions during the year	1d
e	Distributions during the year	1e
f	Ending balance	1f

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds.

Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

		(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a	Beginning of year balance					
b	Contributions					
c	Net investment earnings, gains, and losses					
d	Grants or scholarships					
e	Other expenditures for facilities and programs					
f	Administrative expenses					
g	End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as.

a Board designated or quasi-endowment ▶ _____ %
b Permanent endowment ▶ _____ %
c Term endowment ▶ _____ %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i)	Unrelated organizations 3a(i)		
(ii)	Related organizations 3a(ii)		
b	If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R? 3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

	Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a	Land				
b	Buildings				
c	Leasehold improvements				
d	Equipment				
e	Other				
Total.	Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				

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Part VII Investments—Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 12)* ▶		

Part VIII Investments—Program Related.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col (B) line 13)* ▶		

Part IX Other Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 15)* ▶	

Part X Other Liabilities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col (B) line 25)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FASB ASC 740. Check here if the text of the footnote has been provided in Part XIII . ☐

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Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	1477265
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains (losses) on investments	2a			
b	Donated services and use of facilities	2b	7,500		
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1469765
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total revenue. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 12.)*			5	1469765

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	1146107
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a	7,500		
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	7500
3	Subtract line **2e** from line **1**			3	1138607
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	0
5	Total expenses. Add lines **3** and **4c.** *(This must equal Form 990, Part I, line 18.)*			5	1138607

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b; Part V, line 4, Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

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Part XIII Supplemental Information *(continued)*

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SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2019

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a ☑ Mail solicitations
b ☑ Internet and email solicitations
c ☐ Phone solicitations
d ☑ In-person solicitations
e ☑ Solicitation of non-government grants
f ☐ Solicitation of government grants
g ☐ Special fundraising events

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☑ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col (i)	(vi) Amount paid to (or retained by) organization
1 A.C. Fitzgerald & Associates, LLC PO Box 321012, Alexandria VA 22320	Consults		✓	0	46500	0
2 ForthRight Strategy Inc. 15th St, NW STE 410 D.C. 20005	Direct Mail consl		✓	212849	21433	191416
3						
4						
5						
6						
7						
8						
9						
10						
Total ▶				212849	67933	191416

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

AMERICAN OVERSIGHT

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Part II **Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 (event type)	(b) Event #2 (event type)	(c) Other events (total number)	(d) Total events (add col. (a) through col (c))
Revenue	1 Gross receipts				
	2 Less. Contributions				
	3 Gross income (line 1 minus line 2)				
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs				
	7 Food and beverages				
	8 Entertainment				
	9 Other direct expenses				
	10 Direct expense summary Add lines 4 through 9 in column (d) ▶				
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				

Part III **Gaming.** Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/Instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col (a) through col (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ☐ No %	☐ Yes ☐ No %	☐ Yes ☐ No %	
	7 Direct expense summary Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended, or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

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11 Does the organization conduct gaming activities with nonmembers? . . . . . ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust, or a member of a partnership or other entity formed to administer charitable gaming? . . . . . ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility . . . . . 13a %

b An outside facility . . . . . 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶ _____

Address ▶ _____

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? . . . . . ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____

c If "Yes," enter name and address of the third party:

Name ▶ _____

Address ▶ _____

16 Gaming manager information

Name ▶ _____

Gaming manager compensation ▶ $ _____

Description of services provided ▶ _____

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? . . . . . ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information. See instructions.

Part I Line 2b- Fundraising counsultant, AC Fitzgerald, does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time. Direct mail counsultant, ForthRight Strategy Inc., does not have control or custody of the funds or the authority to deposit, direct the use of, or use the funds at any time.

AC Fitzgerald is paid a flat monthly fee for fundraising counsulting, the fee is not based on the amount raised. No other fundraising expenses are paid for or to AC Fitzgerald

ForthRight Strategy Inc. is compensated $90 per one thousand pieces processed and mailed and paid for creative services.

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.

▶ Attach to Form 990 or 990-EZ.

▶ Go to *www.irs.gov/Form990* for the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

990 Part VI Section B. 11b. The 990 is prepared by the Secretary and Treasurer, after which it is reviewed by a CPA then presented to the Board of Directors for review. Upon approval by the Board the 990 is executed by an officer.

Part VI Section B. 12c. All officers and directors are required to read the Conflict of Interest Policy and comply with the same

990 Part VI Section B, 15: The process for determining compensation involves a review of comparable data from like enterprises in the same region for functionally comparable services. The review is done by the independent members of the Board who then approve the compensation amount.

990 Part VI Section C. 19: Documents which are required by IRS to be available to the public are available upon request.

990 Part VI Section C 17. AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IL, KS, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WA, WI, WV

990 Part IX, Line 24a: Other expense- Direct Mail Expense $180,931 itemization:

$99,003 Printing & Mailshop, $60,645 Postage, $8,509 Data Processing, $2,819 List Rental, $9,955 Indirect Expenses

990 Part IX, Line 24b, Other expense- Litigation Direct Expense $14,571 itemization.

$6,203 Public Relations, $1,905 Court filing fees and transcripts, $1,232 Printing Amicus Brief, $5,231 Research & Investigation

990 Part IX, Line 24c, Other expense- Education Direct Expense $5,812 itemization

$3,371 Printing & Design, $2,441 Research & Document Retrieval

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SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

► Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.
► Attach to Form 990.
► Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No 1545-0047

2018

Open to Public Inspection

Name of the organization

Public Interest Legal Foundation

Employer identification number

45-4355641

Part I **Identification of Disregarded Entities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

Part II **Identification of Related Tax-Exempt Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity?	
						Yes	No
(1)							
(2)							
(3)							
(4)							
(5)							
(6)							
(7)							

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Part III **Identification of Related Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)												
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No
(1)Omni Compliance Services, Inc. 45-3794958 32 E Washington St STE 1675, Indianapolis, IN 46204	Specialize Report Filing	Indiana	Public Int Lgl Fd	C corp	$0	$0	100%	✓	
(2)									
(3)									
(4)									
(5)									
(6)									
(7)									

USCCR-21-1814-B-000624

Part V **Transactions With Related Organizations.** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note: Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II–IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		✓
b	Gift, grant, or capital contribution to related organization(s)	1b		✓
c	Gift, grant, or capital contribution from related organization(s)	1c		✓
d	Loans or loan guarantees to or for related organization(s)	1d		✓
e	Loans or loan guarantees by related organization(s)	1e		✓
f	Dividends from related organization(s)	1f		✓
g	Sale of assets to related organization(s)	1g		✓
h	Purchase of assets from related organization(s)	1h		✓
i	Exchange of assets with related organization(s)	1i		✓
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		✓
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		✓
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		✓
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		✓
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n		✓
o	Sharing of paid employees with related organization(s)	1o		✓
p	Reimbursement paid to related organization(s) for expenses	1p		✓
q	Reimbursement paid by related organization(s) for expenses	1q	✓	
r	Other transfer of cash or property to related organization(s)	1r		✓
s	Other transfer of cash or property from related organization(s)	1s		✓

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

(a) Name of related organization	(b) Transaction type (a–s)	(c) Amount involved	(d) Method of determining amount involved
(1) Omni Compliance Services Inc. 45-3794958, 32 E Washington St STE 1675, Indianapolis, IN 46204	Q	11966	actual cost reimbursed by related org
(2)			
(3)			
(4)			
(5)			
(6)			

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USCCR-21-1814-B-000625

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Part VI **Unrelated Organizations Taxable as a Partnership.** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512–514)	(e) Are all partners section 501(c)(3) organizations? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership
(1)													
(2)													
(3)													
(4)													
(5)													
(6)													
(7)													
(8)													
(9)													
(10)													
(11)													
(12)													
(13)													
(14)													
(15)													
(16)													

USCCR-21-1814-B-000626

AMERICAN OVERSIGHT

Part VII **Supplemental Information.**
Provide additional information for responses to questions on Schedule R. See instructions.

USCCR-21-1814-B-000627

Date : 11/17/2021 12:13:03 PM
From : "Mauro Morales" mmorales@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov
Subject : FW: Media Regarding EAC Appointment

FYI

From: Angelia Rorison <arorison@usccr.gov>
Sent: Wednesday, November 17, 2021 11:26 AM
To: Mauro Morales <mmorales@usccr.gov>
Subject: Media Regarding EAC Appointment

Hi Mauro,

Here is current coverage:

- Original AP Story
  - Notable publications that ran:
    - Washington Post
    - NBC
    - SF Chronicle
    - Yahoo
    - Over 260 outlets have run the AP story across the US & a few in India
- Fox News
  - The Fox piece also cites the Commission's statement; the subhead notes that the EAC advisory board doesn't have power to make policy. It includes Cleta's quote a bit higher up and doesn't as directly cite the cause of her resignation from her law firm.
  - It cites the AP story and includes an image of and link to the Twitter post from Jessica Huseman, which was also mentioned in the AP piece
  - Also republished on Yahoo
- HillReporter.com
  - Goes a little deeper into Cleta's background and doesn't mention the nominations of the two board members but also calls the EAC and the USCCR "bodies with little authority."
  - It also includes an image of and link to Jessica Huseman's post on Twitter as well as a Nov. 1 post from Cleta

These are the major highlights – these stories all cite your statement and mention the nomination of 2 board members and the nomination process.

- J. Christian Adams guest hosted a radio show this morning where he interviewed Cleta. I haven't had a chance to listen since it just went online.
- Newsweek released an updated story, but didn't name J. Christian Adams as the other nominee. It cites the statement from yesterday.

AMERICAN OVERSIGHT

Angelia Rorison (she/her/hers)
Director of Media and Communications
FOIA Public Liaison
U.S. Commission on Civil Rights
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Washington, DC 20425
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Established in 1957 by the Civil Rights Act, the Commission is the only independent, bipartisan federal agency charged with advising the President and Congress on civil rights matters. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels.

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Date : 11/17/2021 3:55:19 PM
From : "Angelia Rorison" arorison@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : Interview Answers for your Review and Edits
Attachment : Huseman Interview Questions.docx;

Hi Chair Cantu – please see the interview questions and corresponding answers attached. You will see two responses to the first questions – please choose which ne you think is best.

If possible, please return document asap.

Thanks so much!
Ang

Angelia Rorison (she/her/hers)
Director of Media and Communications
FOIA Public Liaison
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425
M: 202-499-0263
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AMERICAN OVERSIGHT

1. **Who made the decision to hold Mitchell's nominating vote as a notional vote, and why was that decision made?**

There are two instances when the Commissioners will take a procedural vote or notational (written) vote. The first is if the item/s that are not controversial because it has been clear in deliberation – and a public final vote will be taken. The second is "press of time" which is used to get a vote done expeditiously with out having to wait a month or more for the next public business meeting. The decision was made by all Commissioners to take this vote in the interest of time.

Recommended Response:

In the interest of time, all Commissioners agreed to the procedural/notational vote to avoid waiting a month or more till the next public business meeting to make a decision. The conservative caucus had blocked ratifying my appointment as Chair by President Joseph R. Biden for several months and to get a majority of votes to be ratified, conservatives presented three procedural changes. One being appointments to other entities like the EAC. At this point the Commission had been without a Chair for three months. You can see this in transcripts from Commission public business meetings on April 16 & April 30, which can be found at usccr.gov.

Commented [AR1]: I took these notes from our meeting as a response but I would recommend the alternative bc the reporters will jump on this one bc they would consider Cleta as controversial and that since her nomination was sent over in November that there was plenty of time to have a public vote. I want o keep us from having to answer too many follow ups or give the media something to run with.

2. **Does the commission believe Ms. Mitchell is qualified to serve in this role, and will professionally and appropriately carry out her duties**?

The EAC does not have criteria for individuals appointed to the Board of Advisors. Ms. Mitchell was one of two choices put forth by conservative Commissioners of the Commission, one being Ms. Mitchell and the other USCCR Commissioner, J. Christian Adams. Personally, I am not pleased with the appointment and would have welcomed any other choice by my conservative colleagues. However, it is also my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth by the Commission, as a federal agency.

3. **Please confirm that J. Christian Adams initially proposed Mitchell, and also that he was the second Republican nominee.**

Yes, I can confirm J. Christian Adams and Mitchell were the two conservative choices presented to Commissioners. I was not a part of the conservative caucus' deliberation on their choices, so I am not sure he proposed her. However, as she is a board member of his organization, he would be the closest contact at the Commission to Ms. Mitchell.

4. **Can you please outline the commission's decision making around selecting Mitchell over Adams?**

"As a member of the same Commission, we were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC. Unfortunately for the Commission either choice would have been controversial.

AMERICAN OVERSIGHT

The Commission has been impacted greatly by Ms. Mitchell's appointment, we want to assure the American public we have heard you. I would like to end by clarifying, the Commission's conservative caucus were the ones who appointed Ms. Mitchell. Our democratic appointee with be voted on at our November 19, 2021 business meeting."

AMERICAN OVERSIGHT

Date : 11/19/2021 8:25:09 AM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Cc : "Zervoudis, Flor" Flor.Zervoudis@wilmerhale.com
Subject : November Business Meeting Documents
Attachment : 06-16-VA-Hate-Crimes-Statement-2021.pdf;2020-11-13-LSR-Missouri-Voting-Memorandum.pdf;2021-01-25-CA-SAC-Immigration-Enforcement-Report.pdf;Letellier CV.pdf;Concept Paper - COVID-19 The Homework Gap and the E-rate Program (sin citations) - AG edits.docx;Kirsanow crime increase concept paper revised 10.19.21.pdf;Minority Entrepreneur Concept paper.docx;Section 230 and Hate Speech -AG Edits.docx;Staff Director Report for Commission Meeting on 11.19.2021.docx;2021-11-19-usccr-business-meeting-notice.pdf;Mississippi SAC Memo.docx;Indiana SAC Vetting Memo.docx;Nebraska SAC Vetting Memo.docx;Arizona SAC Vetting Memo.docx;

Adegbile and Flower,

Please find attached all the business meeting documents for today including the agenda.

Let me know if you have any questions,
IV

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Statement of the Virginia Advisory Committee to the U.S. Commission on Civil Rights Condemning the Rise in Hate Crimes and Violence Targeted at Asian-Americans and Pacific Islanders and in Anti-Semitic Incidents in the U.S.

May 25, 2021

We, the members of the Virginia Advisory Committee to the U.S. Commission on Civil Rights, are shocked and saddened by the recent spike in hate crimes targeting the Asian-American and Pacific Islander (AAPI) and Jewish communities, and we stand in solidarity with all those affected by these crimes—both the victims themselves and the communities they represent. The targeting of AAPI and Jewish communities for violent assaults, racial slurs, and property damage is reprehensible and must be unequivocally condemned. The targeting of any individual or community on the basis of race, religion, creed, ethnicity, or sexual orientation is antithetical to the core principles of the Commission, and thus the civil rights implications of these hate crimes must be clearly articulated. Our Advisory Committee recently conducted an examination of trends in hate crimes and identified certain expert recommendations that can be useful to the Commission to contextualize the wave of anti-Asian and anti-Semitic hate crimes and the subsequent congressional response. [1]

In light of our recent focused study of hate crimes, we appreciate the pernicious effect these types of crimes have not just on the immediate victim but on the entire targeted community. As one of our expert witnesses noted in his testimony, "[Hate crimes] are intended to intimidate, not only the individual victim of the crime, but also members of the victim's community…Failure to properly address hate incidents often causes a single event to explode into widespread community tension. The damage is done by bigotry, therefore it cannot be measured solely in terms of physical injury or dollars and cents harm to institutions."[2] In the present instance, the fact that these crimes against the AAPI and Jewish communities are not geographically contained but rather appear from coast to coast creates an even more pervasive fear as individual members of these communities everywhere may believe themselves to be a potential target simply due to their race, ethnicity, or religion. Therefore, we must draw attention to these crimes, prosecute them appropriately, and devote adequate resources to help the targeted communities.

Hate crimes are generally underreported for the same reasons that cause the community to be initially targeted: differences in language, religion, race, or ethnicity that lead the targeted victims and their community to be fearful, intimidated, or sometimes unable to solicit help from authorities. While it is important to devote additional resources to the gathering and analysis of

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[1] Virginia State Advisory Commission to the U.S. Commission on Civil Rights, *An Advisory Memorandum of the Virginia Advisory Committee to the U.S. Commission on Civil Rights*, Nov. 2020, https://www.usccr.gov/files/2020-11-23-Hate-Crime-Statistics-and-Incidence-in-Virginia.pdf.

[2] Ibid, Appendix B: Doron Ezickson Testimony, 2019 Transcript, p. 36 lines 13-16.

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data on hate crimes, more must be done to ensure that communities are empowered to report such crimes accurately and openly, and that law enforcement and community organizations are positioned and trained to recognize, document, and report these crimes as well.

While shocked and saddened by these crimes, as a Committee we are also heartened by the recent signing of the Covid-19 Hate Crimes Act.[3] Among other things, this legislation requires the U.S. Department of Justice to prioritize and expedite the review of reported hate crimes, and to issue guidance to state, local, and tribal law enforcement agencies on establishing online hate crime reporting processes.[4] The Act also calls for improved collection of hate crime data disaggregated by protected characteristic, and funding the expansion of education campaigns to highlight the threat of hate crimes and offer guidance on reporting such incidents.[5]

Just as hate crimes are intended to send a message beyond the harm of the immediate crime, the political messaging around the approval of such legislation also transcends its immediate impact. After last-minute bipartisan negotiations led by Sen. Mazie Hirono (D-HI) and Sen. Susan Collins (R-ME), the revised legislation was passed in the Senate by an overwhelming vote of 99-1. The legislation passed the House by a similarly overwhelming margin of 364-62, and was promptly signed by President Biden. This type of bipartisan, bicameral consensus sends a powerful message repudiating the hate, bias, and discrimination embodied in all of the recent hate incidents against the AAPI and Jewish communities.

While we are encouraged by the strong support for this legislation, our study of hate crimes also shows us that this is but a first step. There is no doubt that this legislation will bring material improvements to the federal oversight of hate crimes and the collection of hate crimes data, both of which were identified as important factors by the experts who testified before our Committee. Our survey of experts drawn from law enforcement, academia, and community service providers showed broad consensus around certain core components needed to effectively address hate crimes. These included targeted training for first responders and law enforcement to equip them with the knowledge and skills necessary to handle delicate situations that often involve cultural or linguistic barriers.[6] Similarly, the experts articulated a need for focused education and information for targeted communities to equip them to understand and trust available resources, and the integration of community service organizations in the effort to build relationships with law enforcement.[7] Taken together, these recommendations bridge the gap between law enforcement and the targeted communities by addressing cultural and linguistic issues, and positioning first responders to understand the sensitivities related to hate crimes.[8]

This law omits several of our study's central recommendations, including specifically the inclusion of focused training for law enforcement and first responders and the comprehensive

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[3] COVID 19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265, (codified at 34 U.S.C. § 30501 statutory notes), https://www.congress.gov/bill/117th-congress/senate-bill/937/text

[4] Id. at Sec. 3 (a).

[5] Id. at Sec. 4 (a).

[6] Ezickson Testimony, 2019 Transcript, Pg. 37, lines 3-5. See also Coston Testimony, 2019 Transcript, Pg.34, lines 31-33. (Appendix B), https://www.usccr.gov/files/2020-11-23-Hate-Crime-Statistics-and-Incidence-in-Virginia.pdf

[7] McDevitt Testimony, 2018 Transcript, pp. 9-10. (Appendix A), https://www.usccr.gov/files/2020-11-23-Hate-Crime-Statistics-and-Incidence-in-Virginia.pdf

[8] Ibid.

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engagement of community service providers. Instead, the law emphasizes improving data collection and directs additional resources to law enforcement. These are important and worthy elements, but in and of themselves are insufficient. The AAPI and Jewish communities need and deserve more support and resources targeted at the most effective means of identifying, measuring, reporting, preventing, and ultimately prosecuting, hate crimes. As a civil rights advisory committee, we stand vigilant against all forms of prejudice, hate, and bigotry, and reiterate our condemnation of the crimes committed against members of the AAPI and Jewish communities. As an Advisory Committee to the U.S. Commission on Civil rights, we would like to invite the Commission to revisit our recently published report on Hate Crimes in Virginia in light of this current context. We further request that the Commission forward the report and its recommendations, along with this statement, to the White House, members of the U.S. Congress, and the U.S. Department of Justice, Civil Rights Division.

Virginia Advisory Committee to the
U.S. Commission on Civil Rights

K. Shiek Pal, Chair, *Virginia Advisory Committee*, Arlington

Angela Ciccolo, *Vice Chair*, Ashburn

Arthur Rizer, *Vice Chair*, Alexandria

Raul Danny Vargas, Secretary, Herndon

Brenda Abdelall, Oakton

Maria Almond, Farmville

Jason Brennan, Fairfax

Edgardo Cortes, Midlothian

Ann Haney, Charlottesville

William Hyde, Springfield

Lisalyn Jacobs, Arlington

Binh Nguyen, McLean

Ilya Shapiro, Falls Church

Andrew Wright, Arlington

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*The U.S. Commission on Civil Rights, established by the Civil Rights Act of 1957, is the only independent, bipartisan agency charged with advising the President and Congress on civil rights and reporting annually on federal civil rights enforcement. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels. The Commission: in our 7th decade, a continuing legacy of influence in civil rights. For more information about the Commission and our Committees, please visit *www.usccr.gov and follow us on Twitter and Facebook.*

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Voting Rights in Missouri – The Impact of COVID-19

A Modified Summary of Testimony from
Missouri Advisory Committee to the
U.S. Commission on Civil Rights

October 2020

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Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

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Missouri Advisory Committee to the U.S. Commission on Civil Rights **Letter of Transmittal**

To: The United States Commission on Civil Rights

Catherine E. Lhamon (Chair)	Gail Heriot
Debo P. Adegbile	David Kladney
Stephen Gilchrist	Peter N. Kirsanow
J. Christian Adams	Michael Yaki

From: The Missouri Advisory Committee to the U.S. Commission on Civil Rights

The Missouri State Advisory Committee to the U.S. Commission on Civil Rights (hereafter "the Committee") submits this memorandum "Voting Rights in Missouri - The Impact of COVID-19" as part of its responsibility to examine and report on civil rights issues in Missouri under the jurisdiction of the Commission. This memorandum is a modified summary of testimony resulting from numerous committee meeting discussions and a unanimous vote on June 25, 2020, to take up a proposal to study the extent to which the 2019 Novel Coronavirus Pandemic impacts the right to vote in Missouri.

The state of Missouri has some of the strictest absentee voting laws in the country. During the course of the Committee's research and inquiry leading up to and during meeting discussions in April 2020, it became apparent that there were concerns regarding the impact of and potential additional barriers to absentee voting during the 2019 Novel Coronavirus Pandemic, and the need to investigate potential discriminatory practices and burdens on Missouri citizens' fundamental right to vote. In particular, the Committee expressed concern regarding barriers to voting for already marginalized populations including, but not limited to, people with disabilities[1], the

[1] In the 2018 US Commission on Civil Rights Statutory Report, *An Assessment of Minority Voting Rights Access in the United States*, "Persons with disabilities are disproportionately lower income and have less access, compared to voters without disability, to voter ID, transportation, and funds." Further, the report stated that, "Closure of polling places has a significant impact on voter access for people with disabilities. Current Population Survey data from the

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working poor, rural and other citizens with limited access to transportation and information.

The Committee chose to study the extent to which the 2019 Novel Coronavirus pandemic impacts the right to vote in Missouri in recognition of both the significance of this right to our democracy and the role that Missouri law and election policy and practices have played in shaping this right, particularly in relation to the Voting Rights Act of 1965. In an effort to focus the project on current barriers, the Committee began by identifying voting regulations instituted since the United States Supreme Court's decision in *Shelby County, Missouri v. Holder*, 570 U.S. 529 (2013) (henceforth "Shelby County"). The Committee then considered the effects of such regulations on the citizens of our state.

The Committee convened a series of public meetings to discuss the potential impacts of COVID-19 on voter access to elections within the state, hearing from twelve (12) panelists during Missouri SAC Briefings held via web-conference on June 25, 2020; July 15, 2020, August 13, 2020; and August 27, 2020. The Committee considered state and local responses to the 2019 Novel Coronavirus Pandemic in an examination of potential disruptions in the election process which could lead to deprivations of the right to vote. Testimony included state and local election officials, advocates, academics, and other election experts.

This memorandum provides a modified summary of that testimony, and was approved by the Committee for submission to the U.S. Commission on Civil Rights, upon final review by Committee Chair, on October 28, 2020, by a vote of 5 yea, 0 nay, with no members abstaining. It does not make specific findings nor offer any specific recommendations.

It is anticipated that the Committee will hear from additional experts, persons representing state and local election officials, civil rights groups, community organizations, and additional Missouri citizens following the November 3, 2020 Presidential General Election, and will thereafter follow-up this memorandum with a report of the Committee findings in effort to assist policymakers with ensuring the voting rights of all of the residents of Missouri are appropriately protected.

Respectfully,
Elizabeth A. Moran, Chair
Missouri Advisory Committee to the U.S. Commission on Civil Rights

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2016 election showed a sizable percentage of survey respondents stating that disability access prevented their voting." https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

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Missouri Advisory Committee to the
U.S. Commission on Civil Rights

Elizabeth Moran, *Chair, Missouri Advisory Committee*, Kansas City

Mark Bremer, St. Louis

Chad Flanders, St. Louis

Edward Greim, Kansas City

Amany Hacking, St. Louis

Domingo Martinez-Castilla, Columbia

David Mitchell (*past Chair*), Columbia

David Rose, St. Louis

Eliza Straim, St. Louis

David Smith, Columbia

Alisa Warren, St. Louis

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Panelists Who Testified During the Missouri Advisory Committee Briefings on Voting Rights in Missouri – The Impact of COVID- 19

Jay Ashcroft

John R. (Jay) Ashcroft is Missouri's 40th Secretary of State, elected in November 2016. Secretary Ashcroft's background in education, engineering, data protection and the law has provided him with a perspective on election security and has helped shape the efforts of his office. Ashcroft has worked to modernize the Office of the Secretary of State's operating systems, statutes, and administrative rules.

Paul DeGregorio

Paul DeGregorio served as commissioner and as chairman of the United States Election Assistance Commission (EAC) from 2003-2007. At the EAC, Mr. DeGregorio oversaw federal election reform, such as the implementation of the Help America Vote Act and the establishment of the First federal certification of voting systems. Prior to the EAC, Mr. DeGregorio was Executive Vice President of the International Foundation for Election Systems (IFES). He was Director of Elections for St. Louis County, Missouri, USA.

Eric Fey

Eric Fey was appointed Director of Elections in January of 2015 with responsibilities for administering all federal, state, and local elections within St. Louis County, Missouri. Eric is also a member of the National Association of Election Officials, International Association of Government Officials, Missouri Association of County Clerks and Election Authorities, and is a member of the advisory board for the Citizenship Education Clearinghouse at the University of Missouri-St. Louis.

Angela Gabel

Angela Gabel is a Missouri attorney who counsels' clients interested in implementing alternatives to the traditional voting systems. These include proportional systems like ranked choice voting (sometimes known as single transferable voting), limited voting, and cumulative voting.

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Brianna Lennon

Brianna L. Lennon was elected as Boone County Clerk in November 2018. Prior to her election Brianna served as an Assistant Attorney General in the Consumer Protection Division of the Missouri Attorney General's Office before joining the Missouri Secretary of State's Office. As the Deputy Director of Elections and first coordinator of the Election Integrity Unit in the Secretary of State's Office, she worked closely with local election authorities across the state to ensure that elections were simple, secure, and accessible for voters.

Denise Lieberman

Denise Lieberman is a civil rights attorney and nationally recognized expert on voting rights. Most recently serving as Director of Power & Democracy at Advancement Project National Office in Washington DC, a racial justice organization, Denise is also Faculty Director of the Voter Access and Engagement Initiative at Washington University in St. Louis and head of the Missouri Voter Protection Coalition. Denise is also Faculty Director of the Voter Access and Engagement Initiative at Washington University in St. Louis, where she is also an adjunct professor of law and political science teaching courses on constitutional law and voting rights.

Amber McReynolds

Amber McReynolds is a leading experts on election administration and election policy, and co-author of the book “When Women Vote”. Amber is the CEO for the National Vote at Home Institute and Coalition and is the former Director of Elections for Denver, Colorado. Amber serves on the National Election Task Force on Election Crises, as an advisory board member for the Massachusetts Institute of Technology (MIT) Election and Data Science Lab.

Dave Roland

Dave Roland is the Director of Litigation and co-founder of the Freedom Center of Missouri; he also serves as the Secretary for the Freedom Center’s Board of Directors. Dave has also established himself as one of the preeminent attorneys in Missouri. Prior to founding the Freedom Center, he spent three years working as an attorney and policy analyst for the Show-Me Institute.

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Shane Schoeller

Shane Schoeller is the Greene County Clerk. He is the former Speaker Pro Tem of the Missouri House of Representatives and represented parts of Greene County during his three terms in the Missouri House. He was the House's second ranking official in 2011 and eventually served as Speaker upon the resignation of then Speaker Steven Tilley. He served on committees that reviewed budget appropriations, utilities, taxation, and revenue, and chaired the disaster recovery committee after the Joplin tornado of 2011.

Charles Stewart III

Charles Stewart is a Distinguished Professor of Political Science at Massachusetts Institute of Technology. His areas of expertise include elections; Congress; American politics. Since 2001, Professor Stewart has been a member of the Caltech/MIT Voting Technology Project, a leading research effort that applies scientific analysis to questions about election technology, election administration, and election reform. He is currently the MIT director of the project.

Rick Stream

Rick is currently the Director of Elections for the St. Louis County Election Board. He served as a Missouri State Representative from Kirkwood and rose to the position of Chairman of the House Budget Committee, responsible for a $26 billion budget.

Hans von Spakovsky

Hans Von Spakovsky is a senior legal fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Before joining Heritage in 2008, von Spakovsky served two years as a member of the Federal Election Commission, the authority charged with enforcing campaign finance laws for congressional and presidential elections. President Donald Trump appointed von Spakovsky to the Presidential Advisory Commission on Election Integrity in 2017.

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I. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On June 25, 2020, the Missouri Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to take up a proposal to study the extent to which COVID-19 is affecting the right to vote in Missouri.

II. BACKGROUND

Despite the numerous laws and constitutional amendments established to protect voting rights in the United States, many continue to raise concerns regarding disparities in access to and participation in the country's electoral system. The United States Commission on Civil Rights issued a report in 2018 entitled *An Assessment of Minority Voting Rights Access*.[2] Key findings in that report observed "Racial discrimination in voting has proven to be a particularly pernicious and enduring American problem. Voter access issues, discrimination, and barriers to equal access for voters with disabilities, and for voters with limited-English proficiency continue today."[3]

In addition to the barriers and inequalities outlined in the Commission's 2018 report, voters in the United States face a new barrier in 2020: the novel Corona virus known as COVID-19.[4] The virus has caused a worldwide pandemic and has resulted in the death of over 226,000 Americans.[5] Because of social distancing recommendations, Americans may be concerned about the choice between protecting their health and exercising the right to vote.

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[2] U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access (2018). https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

[3] Ibid., 12.

[4] U.S. Commission on Civil Rights, *USCCR Urges Federal Agencies to Vigilantly Enforce Civil Rights Laws During and in the Wake of the COVID-19 Crisis,* (2020). https://www.usccr.gov/press/2020/04-17-Statement-on-Coronavirus-Federal-Guidance.pdf.

[5] Centers for Disease Control and Prevention. *Coronavirus Disease Cases in the US.* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html

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Jurisdictions around the country are having different debates about what to do in the face of the pandemic. In some states, due to stay-at-home orders and social distancing requirements, the political and legal fight right now is focused on lifting the requirement that voters have an excuse to request an absentee ballot. Virginia, South Carolina, New Hampshire, and Kentucky for example, have lifted this requirement in differing degrees.[6]

Missouri is one few states that only allows absentee voting for limited reasons,[7] and is also one of only three states that requires the voter's signature on an absentee ballot to be notarized before returning the absentee ballot to the local election office.[8] Missouri's strict absentee voting laws have been modified during the pandemic.[9] For the November 3, 2020 election, eligible absentee voters can submit their ballot *without a notary signature*. Those eligible include:

- Incapacitated or confined due to illness
- In 2020, has contracted coronavirus or is at risk due to any of the following[10]
  - Is age 65 or older
  - Lives in a long-term care facility
  - Has chronic lung disease/asthma
  - Has a serious heart condition
  - Is immunocompromised
  - Has diabetes
  - Has chronic kidney disease and is undergoing dialysis
  - Has liver disease

Voters are eligible to absentee vote *with a notary* if they meet the following conditions[11]

- Religious beliefs or practice
- Working as an election worker

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[6] National Association of Secretaries of State. *Issue Briefing: Election Emergencies & COVID-19*. https://www.nass.org/resources/issue-briefing-election-emergencies-covid-19.

[7] Missouri Secretary of State, Absentee Voting, https://www.sos.mo.gov/elections/goVoteMissouri/howtovote#absentee, last visited Nov. 9, 2020 (listing seven reasons for voting absentee in Missouri); National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*. https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[8] National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*. https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[9] Missouri Secretary of State, Absentee and Mail-in Ballot Informational Flyer, 2020, https://www.sos.mo.gov/elections/goVoteMissouri/howtovote#absentee. h

[10] Ibid.

[11] Supra, note 9.

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- Incarceration, if still eligible to vote
- Certified participation in an address confidentiality program
- Absence on election day from your election jurisdiction

Absentee ballots may be requested in person up until the day before Election Day. Ballots may be turned in by mail or in-person and must be received by 7:00 p.m. on Election Day.

Missouri also allows registered voters the opportunity to vote by mail. This "Mail-In" option requires the registered voter to fill out a mail-in ballot application and deliver that application (in-person or by mail) to an election authority. The registered voter receives and fills out the mail-in ballot and must have the return envelope notarized. Unlike absentee ballots, mail-in ballots must be returned through the U.S. mail and must be received by the election authority by Election Day at 7:00 p.m.

The Missouri Advisory Committee met with election officials and policy experts in a series of briefings. Panelists and several committee members questioned whether the notarization requirements, during a pandemic, are necessary or if they represent overly burdensome barriers to absentee voting.

Summary of Panel Testimony

Questions were raised during the Missouri Advisory Committee meetings about the steps being taken by the state in response to the pandemic, such as: What steps has the Governor or Secretary of State taken to coordinate with state and local officials to identify the potential impacts of COVID-19 on elections? Is the state proactively planning for and coordinating with local authorities to manage all potential disruptions? Following these and other questions the held several web-based briefings[12] that included testimony from nationally renowned experts on elections, Missouri election officials, and representatives from advocacy groups.

A. In-Person Voting

1. The Polls

Traditionally the greatest percentage of voters vote in person. Missouri Secretary of State John Ashcroft testified to the committee regarding Missouri's normal election operations and changes that have been made during the COVID- 19 pandemic. Secretary Ashcroft said, "We

[12] Missouri SAC Briefings were held via web-conference on June 25, 2020; July 16, 2020; August 13, 2020; and August 27, 2020.

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did not have any evidence of COVID transmission or sicknesses because [of in person voting during the April 2020 primary elections]. And you probably didn't see any newspaper articles about it because we didn't have problems."[13]

Although Missouri expanded access to absentee and mail in ballots in response to the COVID-19 pandemic, the Secretary of State's office has concentrated on making sure people know that in-person voting is secure.[14] Secretary Ashcroft commented on in-person voting by saying:

> It [in-person voting] is not only secure, but it is the best way to make sure your vote counts. You do not have a second chance to change your ballot. If you accidentally marked two offices or leave a slot blank, if you come in and in person and run it through the scanner, it will beep and give you that chance. If you mail in your ballot, you have to worry about the postal service. And we had one lady that mailed her ballot in six days before, and it took 14 days to get back. And of course, if you do it in person, you don't have to worry about notary. You don't have to worry about signature match. And if you are like me, you really like putting your ballot through the scanner and seeing the green light to know that you've done your duty.[15]

Secretary Ashcroft also testified that "…we actually had stories out of Kansas City from public radio remarking on the fact that there were not long lines and that people were able to vote easily and well."[16].

Hans von Spakovsky, senior legal fellow at the Heritage Foundation, shared Secretary Ashcroft's view that "In- person voting can be conducted safely and is the best way of ensuring those voters are not disenfranchised."[17] He emphasized that if precautions are followed, in person voting can be held successfully and fulfills both concerns of access and of avoiding fraud.[18]

Mr. von Spakovsky also pointed to other nations that have successfully held in-person voting, such as South Korea, stating, "[South Korea] held a national election April 15, 2020 in which 29 million votes were cast in- person, using the same types of safety protocols…and there were no reported increases in infections."[19] Mr. von Spakovsky also told the committee that "A report released by analysts from the World Health Organization and Stanford University after the Wisconsin election found no detectable surge [in COVID- 19] transmissions due to the April 7 election, and in fact

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[13] Ashcroft Testimony, MO August 13 Briefing, p.22.

[14] John Ashcroft, Missouri Secretary of State, Briefing Before the Missouri Advisory Committee to the U.S. Commission on Civil Rights, Web-Briefing, MO, August 13, 2020, transcript, p.24 (hereafter cited as MO August 13 Briefing.)

[15] Ashcroft Testimony, MO August 13 Briefing, p.24.

[16] Ashcroft Testimony, MO August 13 Briefing, p.13.

[17] Hans von Spakovsky, Briefing Before the Missouri Advisory Committee to the U.S. Commission on Civil Rights, Web-Briefing, MO, August 27, 2020, transcript, p.3 (hereafter cited as MO August 27 Briefing.)

[18] Ibid.

[19] Ibid.

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there were fewer cases reported during the incubation period after the election (April 9-21) than in the 13 days preceding the election"[20]

Not all the panelists shared this optimism. Denise Lieberman, a civil rights attorney and nationally recognized expert on voting rights, said the COVID-19 pandemic presents an existential threat to the right to vote in Missouri, as well as across the country.[21] She opined that "no one should have to choose between exercising their fundamental right to vote and their health."[22]

Ms. Lieberman agreed that election officials have taken steps to "ensure safe and accessible access to the ballot for Missouri voters this year amid the pandemic,"[23] "But unfortunately", she continued, "I would submit that while Missouri has taken some steps to provide accommodations to voting in acknowledgement of the risks posed by the COVID-19 pandemic, I would submit to you that these measures are insufficient, are needlessly complicated, are needlessly confusing, and overall leadership and guidance from our state's leaders, including our state's chief elections official has been lacking."[24]

When asked about his chief concern about the November elections, Paul DeGregorio, former Chairman of the United States Election Assistance Commission, stated "In my view, it's in-person voting, and that's based on what I have seen in elections conducted so far in the US in the past few months, and also in other countries, that because of the consolidation of polling places, because some places don't want to be used as a polling place, they won't allow it. They are not a government facility. They could say no."[25]

Mr. DeGregorio testified that South Korea was a success story during the pandemic, as it actually had higher voter turn-out than usual but noted the population of South Korea is over 50 million, substantially more than any individual US state. He noted: "South Korea's success was because of widespread access to early voting sites and very strict measures at polling places where everyone had to socially distance, everyone had to wear a mask and use hand sanitizers at various points in the voting process"[26]

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[20] Ibid.

[21] Lieberman Testimony, MO August 27 Briefing, p.4.

[22] Ibid

[23] Ibid

[24] Ibid

[25] Paul DeGregorio, Briefing Before the Missouri Advisory Committee to the U.S. Commission on Civil Rights, Web-Briefing, MO, July 16, 2020, transcript, p.29 (hereafter cited as MO July 16 Briefing.)

[26] DeGregorio Testimony, MO July 16 Briefing, p.23.

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Mr. DeGregorio told the committee it is "unlikely that the Missouri legislature will make any new election laws before November"[27]. He suggested the committee focus on "what Missouri election officials are doing to implement the new law allowing balloting by mail and how they're going to provide safety for voters at polling places." He noted that Missouri's 116 election jurisdictions may follow the same laws, but they can provide different access opportunities. According to Mr. DeGregorio, "St. Louis County has perhaps taken the greatest leadership in Missouri providing as much access as possible for its voters during this COVID crisis. Most counties in Missouri have not followed their lead, although it should be said that most county clerks in Missouri do not have the same challenges faced in urban areas, and they also tend to be responsive to voters because they stand for election every four years and are held accountable."[28]

Rick Stream, Director of Elections for St. Louis County (Rep.), informed the committee of the changes made to the in-person voting process and safety measures that have been put in place to mitigate the spread of Covid-19.[29] Throughout his testimony, Mr. Stream detailed the logistics of the new safety measures and their effectiveness, for example he told the committee: "At the polling places, and this is important, all the workers are wearing masks and gloves. They are wiping down surfaces with alcohol. Disinfecting and cleaning the styluses and pens after each use. There is hand sanitizer at each polling place for the voters to use. And there are also always social distancing strips placed on the floors. This is what we did in June."[30]

Mr. Stream made clear that the polling stations within St. Louis County are following CDC Guidelines just as other businesses that have been allowed to resume operation. Although St. Louis County reduced the number of polling stations for the June 2nd general municipal election, Mr. Stream indicated that, "We were able to staff those sites completely with no problems. Our plan is to increase the number up to 200 sites in August, and then a larger number for the November presidential election. All of our polling place selections are done with the proximity to the public transit lines in mind. In other words, we know that some of our voters have trouble with transportation issues"[31]

Mr. Stream also said "We also have curbside voting here at the office that goes on the entire six weeks prior to the election when absentee ballot is in effect. Curbside voting gives constituents additional in- person voting options if they do not feel completely comfortable voting at a polling

[27] Ibid.

[28] Ibid.

[29] Stream Testimony, MO July 16 Briefing, p.15.

[30] Ibid.

[31] Ibid.

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station but want to ensure that their ballot is as secure as possible."[32] He also noted that this option has been in place for over 3 ½ years, indicating that it is something the election workers are comfortable with and see as an effective option.

Eric Fey, Director of Elections in St. Louis County (Dem.), confirmed the precautionary measures that have been put in place for St. Louis County. He testified that "Under Missouri law, a public tax supported building cannot refuse to be a polling place."[33] This ensures that there will be spaces available to serve as polling stations for future elections during the pandemic.

Charles Stewart III, MIT Director of the Caltech/MIT Voting Technology Project, identified a trend that his team is discovering around the country, "consolidation of polling places and places like Wisconsin, are coming at the expense of the convenience and proximity of voting to communities of color. We need to be very seriously attuned to any policy that does not give voters as much flexibility as possible in this coming election. Whether a state adopts these policies of encouraging vote by mail permanently, to me, is off the table. It is really irrelevant for these discussions. The question is, what do we do with this continuing emergency that will no doubt be with us in November, as well as it is in the summer."[34]

In Missouri, the County Clerk is an elected official who is responsible for keeping accurate records of the orders, rules, and proceedings of the County Commission. In addition, the County Clerk is responsible for inspecting and reviewing all voter precinct boundaries within the County and conducting elections. The Missouri Advisory Committee invited a bi-partisan set of County Clerks to provide testimony on local elections at the county level.

Brianna Lennon, Boone County Clerk, explained to the committee that her concern is "not more people in the lines, but it is more distance. So, it requires more space. So moving into November, I am concerned when I look at the polling places that we have, whether they can accommodate the lines that I expect to have, because, while we did have a healthy turnout in August of about 30%, we in Boone County get closer to 80% during the November election. So, we're doing the best we can to almost double our poll working stations or pulling places. We're also looking at incorporating some satellite locations for absentee voting in order to get people to cast their ballot earlier, if possible, to try to lessen the number of people that are actually going to be showing up on Election Day."[35]

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[32] Ibid, at p.18.

[33] Fey Testimony, MO July 16 Briefing, p.16.

[34] Charles Stewart III, Briefing Before the Missouri Advisory Committee to the U.S. Commission on Civil Rights, Web-Briefing, MO, June 25, 2020, transcript, p.12 (hereafter cited as MO June 25 Briefing.)

[35] Lennon Testimony, MO August 13 Briefing, p.4.

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Ms. Lennon added, "in-person voting went very smoothly in Boone County for the August election, and that the county plans on almost doubling polling places for November to accommodate for the increase in voter turn-out of about 50%, Boone County has a population of 180,463, significantly higher than the Missouri average of 52,078, Boone County has still managed to make in- person voting work thus far."[36] Ms. Lennon said, "there are challenges when you start pushing voting by mail for all of those individuals."[37]

Shane Schoeller, Green County Clerk, discussed with the committee the average processing time for a voter. He noted, "We went back to August of 2018, 56 seconds on average check to check in the voter. But then when you get to November that year… it appears they probably cut some of the conversation because it then went down to 39 seconds per voter to check in once you get to November. Now both in March and August of [2020], the average time to process of voter was 53 and 59 seconds per voter."[38]

Mr. Schoeller pointed out that the analysis indicates, at least for Green County, that "the wait times for in-person voting are not substantially longer during Covid- 19 and that polling stations can accommodate safety measures."[39] There was a lower voter turnout in April 2020 than from 2016, but Mr. Schoeller stated "the county will take steps to let voters know that voting in- person will be safe and clean."[40] He further elaborated on this point, testifying, "We let them [voters] know that we had two additional election judges at every voting location that we're going to be cleaning and sanitizing the voting services, the pens that they're using to vote on the ballot, as well as the touch screen equipment. That were going to be cleaning the entrances into the phone and location in terms of the door handles and everything."[41]

2. Poll Workers

Some of the panelists testified about their concerns about poll workers. Mr. DeGregorio said "in some jurisdictions, the lack of poll workers, people canceling, is going to result in funneling people to fewer polling places and people deciding for whatever reason that they don't want to vote by mail, either they don't trust it, or they want to go to the polling place, that there could be long lines and people getting discouraged from voting."[42] He gave the committee an example by stating "We saw this in Milwaukee when they decided to go through with their primary election this spring,

[36] Ibid.

[37] Ibid.

[38] Schoeller Testimony, MO August 13 Briefing, p.5.

[39] Ibid, at p.5.

[40] Ibid.

[41] Ibid.

[42] DeGregorio Testimony, MO July 16 Briefing, p.29.

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and people waiting four to five, six hours to vote. I mean, that's unconscionable. I think that's my biggest fear of what might happen in the US and that people might get discouraged and leave."[43]

Charles Stewart also had concerns about poll worker. He observed, "we're losing poll workers. In Missouri in 2016, 66% of your poll workers were over the age of 60, and 31% were over the age of 70. We're seeing nationwide that poll workers are refusing to work, being concerned about health. In Anchorage, Alaska, their election director recently testified that they have lost 95% of their poll workers."[44]

Despite the observations made by Dr. Stewart, Rick Stream did not testify to any forecasted shortages, instead he said "we do not foresee any problems with getting enough poll workers, but it's a continuous daily battle because we have people canceling, and then we have to recruit more folks. So, but we think we will be able to do it."[45]

Eric Fey, Mr. Stream's counterpart in St. Louis County added:

> When I mentioned those things [poll worker shortages] to groups or to folks in the general public, they say, 'Well, I could work, or we could get some college students to work. They're maybe not in school right now.' And normally, that would be great. But right now, training the poll workers is a major obstacle as well. For the June election, as Rick mentioned, we conducted significant online training and we had about half the poll workers train in person, but they were all folks who had worked before. So, it was just a refresher training. In order to bring on a new poll worker, they really need hands-on in-person training. They need to learn how to set up the equipment, how to take it down, all those types of things.[46]

Mr. Fey also told the committee about a COVID outbreak in the county offices that led to a shut down of in-person training. "Right now, it's gone all online and it is really not advisable to train a new poll worker completely online because they won't really have any hands-on experience on what to do on election day. So that's why, as Rick said, we're confident we're going to be able to staff our polling places for August because of the consolidations we've had. And again, we hope that the significant increase in absentee voting will ameliorate any possible overcrowding at polling places."[47]

Ms. Lennon also described how Boone County is dealing with polling stations and workers, testifying, "We were very fortunate to have the same number of polling places as we had for August of 2016. So, we had 45 locations around Boone County, and we had a lot of interests from high schoolers and former poll workers, experienced poll workers that wanted to continue serving.

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[43] Ibid.

[44] Stewart Testimony, MO June 25 Briefing, p.11.

[45] Stream Testimony, MO July 16 Briefing, p.15.

[46] Fey Testimony, MO July 16 Briefing, p.19.

[47] Ibid., 20.

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So, we did push very hard and did a pretty extensive educational recruitment campaign to get more poll workers. And it worked very well. We had a couple locations that had lines, but they moved pretty quickly"[48]

B. Mail-in and Absentee Voting

1. Mail-in vs Absentee Voting

In Missouri, any registered voter can request a *mail-in* ballot, while *absentee* ballots are only for eligible voters that meet strict criteria. The issue of in-person vs absentee/mail-in voting was discussed by several panelists.

Dave Roland, co-founder of the Freedom Center in Missouri, testified about the potential impact of COVID-19 on vote by mail in the November election. He said "I'm quite concerned that the risk of infection is very likely to discourage large numbers of people from going to vote in-person. And if these people are not afforded this alternative means of casting their ballot [vote by mail], I think a lot of people will feel disenfranchised and it may cause some people to feel that the results of an election are not truly representative of the will of the people. And that starts to chip away at the idea of the legitimacy of the election's outcome."[49]

Secretary Ashcroft also noted in his testimony that concerns about absentee/ mail-in ballots are not just an issue during the pandemic: "we always have at least 2% of absentee ballots that are not counted for some reason. We should not be pushing people to use absentee and mail in ballots that are inherently more likely not to be counted."[50]

Secretary Ashcroft also noted that in 2016 "about 3.5% of absentee ballots went uncounted. Not accounting for the increase in process related issues and time constraints, that would be around 73,500 ballots if mail-in ballots were to reach a 50/50 ratio with in-person. This assumes the state has 4.2 million registered voters and this would be even higher in states with larger populations."[51]

Continuing on this theme, Mr. von Spakovsky expressed concerns with mail-in voting, testifying that, "According to those EAC (U.S. Election Assistance Commission) reports, in the last four federal elections (2012, 2014, 2016, and 2018), almost 1.3 million mail ballots that were received

[48] Lennon Testimony, MO August 13 Briefing, p.4.

[49] Roland Testimony, MO June 25 Briefing, p.28.

[50] Ashcroft Testimony, MO August 13 Briefing, p.25.

[51] Ibid.

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from voters were rejected by election officials. Over 2 million ballots sent to voters were undeliverable and the fate of over 28 million ballots sent to voters was unknown. The EAC defines unknown ballots as those that were not returned by voter, spoiled, returned as undeliverable, or otherwise unable to be tracked."[52]

Despite the concerns about security of mail-in and absentee voting, some panelists saw a dual concern of protecting one's health and voting. Dr. Stewart of MIT said "I don't need to tell anybody on the committee that the challenge facing the nation, Missouri, and every other state is how to create a safe environment for voting in November. That safe environment involves applying social distancing principles to this election. In turn, the strategies behind doing that involve, first of all, reducing dramatically the density of polling places by increasing mail balloting."[53]

Dr. Stewart continued, "…secondly, ensuring the health of those who either choose to, or must, vote in person. I think that both of these imperatives, decreasing density in polling places through increasing mail balloting and ensuring the health of those who vote in person, are a consensus within the election community, both practitioners, and those of us who endeavor to assist practitioners and people of all political parties and of all intellectual backgrounds and persuasions."[54]

Denise Lieberman, civil rights attorney, and nationally recognized expert on voting rights, indicated a shortage of options for voters. She opined "We also argue that voters should have multiple options for requesting, receiving, and returning mail ballots. That is another insufficiency of both the existing and the new law in particular, with respect to mail in ballots. It provides that in order to request a mail in ballot, the only way that request can be made is through the mail or in person."[55]

In contrast, she said, "absentee ballots may be requested over email or by fax. In addition, mail ballots, once they are completed, may only be submitted back to the election authority by mail. And again, those have to be notarized. Whereas absentee ballots can be submitted by mail or in person."[56]

The combination of these things in tandem with very strict deadlines, both for receiving and returning the ballot request and returning a completed ballot, will serve to make this process a very difficult, confusing, and ultimately elusive for many voters.

During the June committee briefing, Ms. Gable confirmed for the committee the "unwieldly" mail-in ballot process. When asked by committee member Chad Flanders "So, my understanding is they

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[52] Von Spakovsky Testimony, MO August 27 Briefing, p.5.

[53] Stewart Testimony, MO June 25 Briefing, p.9.

[54] Ibid.

[55] Lieberman Testimony, MO July 16 Briefing, p.

[56] Ibid.

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would first have to either go in person or mail a request for a mail in ballot. Then they would have to get it notarized. And if they wanted to do that remotely, would they then have to mail the ballot to the notary so that the notary could sign the envelope. Then the notary would have to mail it back to the voter who would then have to mail it, I think I'm now at a third time, to actually have his vote be counted. Is that correct? Am I getting the number of steps, right?" To which Ms. Gable responded, "You got it all correct."[57]

Ms. Lennon discussed the impacts of COVID-19 on the voting process and the absentee/ mail- in voting increases she has seen within her county. She stated that handling the influx of mail- in ballots is a "very manual process" and "it is extremely time consuming when you are already pressed for time and have limitation in how many staff you have."[58]

Shane Shoeller added, "Because one of the things I think Brianna and I talked about is that we're not prepared yet to be able to make that complete transition, to voting by mail as opposed to voting in person. And so really as we head towards November, ideally if we could have about 30% of all of our voters vote ahead of election day, whether that's 30 going person absentee or it's choosing to go mail, if we have what I would anticipate this would be a good turnout for Green County, 70% turn up November."[59]

Mr. DeGregorio told the committee, "because of these mail ballots being counted, and in some states they don't begin the counting until election night… it could take days to finally figure out who might win the election and it could cause some consternation in this country. I don't know whether to use the term chaos, but it can shake us to our foundation on trusting the results where one group doesn't trust the result."[60] Mr. DeGregorio also affirmed Ms. Lieberman's concern of the troubles mail- in voting might cause for rural Missourians or those without internet access by stating "36.6% percent of the state resides in rural counties and almost 400,000 residents do not have broadband internet access."[61]

Ms. Lieberman told the committee mail-in voting would disenfranchise voters that would otherwise be counted if had they voted in- person.[62] She also voiced concerns about the inability of the postal service to handle the increase in ballots, claiming she not only thought this will be a future issue, but she also noted that it has already been an issue in previous elections.[63] Additionally, Ms. Lieberman said, "studies show… that people who are voting by mail for the first

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[57] Gabel Testimony, MO June 25 Briefing, p.36.

[58] Lennon Testimony, MO August 13 Briefing, p.4.

[59] Schoeller Testimony, MO August 13 Briefing, p.8.

[60] DeGregorio Testimony, MO July 16 Briefing, p.29.

[61] Ibid.

[62] Lieberman Testimony, MO July 16 Briefing, p.9.

[63] Ibid.

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time and disproportionately voters of color, African American and Latinx voters, are more likely to have those ballots rejected due to errors in the numerous forms and paperwork."[64]

Shane Schoeller, speaking of the confusion over mail-in ballots, said, "To be frank, the biggest challenge we've had, and I assume it's been the same as Boone County, is the mail-in ballot. People really didn't understand that they had to mail that ballot and that they could not drop it off.[65]

Mr. Shoeller added, "Now, the solution when that happened as we got towards Election Day, was we would score that ballot, assuming that they could qualify underneath one of the absentee reasons. And if that one of the seven reasons worked for them, we could score it and vote them in-person. That has probably been the biggest challenge, is confusion of the mail-in ballot option of not only the issue of notarization, which has to my knowledge not been an issue as Brianna said anecdotally. But it has been an issue in terms of interim to drop that off."[66]

Dr. Stewart told the committee that expanding mail-in voting is costly, "There are transitional costs that need to be considered. Certainly, in equilibrium, there are savings to be had by going to vote by mail there are organizational personnel, financial costs of making a transition, any sorts of big transition, which needs to be considered."[67]

In Missouri, the deadline to request an absentee ballot, the second Wednesday before election day, is the date by which that request must be received by the election authority. Similarly, the deadline to return a completed ballot, which again, for many voters must be notarized, is the close of polls on election day. Ms. Lieberman thought, "Missouri should join the many States that, instead, reflect the date that the ballot is postmarked as the valid date. Voters should be held harmless for delays in the mail."[68]

Mr. Fey told the committee, "During the June election we had almost 76,000 absentee ballot applications for June. We have already surpassed that number for the August election. I think we'll have over 80,000 absentee ballot applications just for the August election. And just to put that in perspective, the last August election in 2018, we had just over 20,000 absentee ballot applications. In the August election in 2016, before the 2016 presidential election, we had just over 15,000 absentee ballot applications. So, we are in, like so many other things with the coronavirus, we're really in uncharted territory here"[69]

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[64] Ibid.

[65] Schoeller Testimony, MO August 13 Briefing, p.19.

[66] Ibid.

[67] Stewart Testimony, MO June 25 Briefing, p.17.

[68] Lieberman Testimony, MO July 16 Briefing, p.8.

[69] Fey Testimony, MO July 16 Briefing, p.16.

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2. Notarization

Angela Gable told the committee she had a narrow topic that she wanted to discuss, "Missouri's notarization requirement for absentee and mailing voting."[70] Ms. Gable shared a recent experience she had with a client, "and as you know, Missouri does allow an electronic notary. So, I've worked with that a little bit and realized how difficult it is. I ended up not doing an electronic notary and ended up having to do an in-person notarization with my client just to get it done. So that kind of got me interested in Missouri's notarization requirement broadly as it relates to this November's election and whether it's legally sound, practical, and healthy."[71]

Ms. Lieberman said the state's exemption for notarization,

> …does not include all of the categories for whom CDC deems at risk. It only allows people to vote absentee without a notary if they meet some of the risk categories, including all voters over the age of 65, people who are immunocompromised, liver disease, kidney disease, heart disease, severe lung disease, but for example, it doesn't include people with hypertension estimated to be about half of the population who are at elevated risk or smokers who are at elevated risk, people who are pregnant, people with sickle cell disease and other at risk categories, and it also doesn't cover people who may not meet one of those risk factors themselves, but perhaps live with a family member who is vulnerable. And those voters actually make up the plaintiff pool in a lawsuit that the Missouri Voter Protection Coalition filed in collaboration with the ACLU, arguing that all voters should be exempt from the notary requirement.[72]

Denise Lieberman added that some have argued that the notary requirement to vote, both with respect to some of the other absentee provisions, as well as for mail in ballots is unconstitutional amid this Pandemic. She said, "the very same reasons that we should be staying home socially distant that make it unsafe to congregate in crowds at the polls also suggests that voters should not have to go out in person of people outside of their immediate sphere of individuals to get an absentee ballot notarized or a mail in ballot notarized."[73]

Ms. Lieberman also said, "I will also note that while Missouri law makes it illegal for notaries to charge to notarize absentee ballots, there is no such prohibition for the new mail ballot scheme, allowing notaries to thus charge voters to notarize those ballots. We've received reports of voters experiencing great difficulties finding available notaries in the midst of all the business and government shutdowns, and some have been charged significant amounts."[74]

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[70] Gabel Testimony, MO June 25 Briefing, p.23.

[71] Ibid.

[72] Lieberman Testimony, MO July 16 Briefing, p.7.

[73] Ibid.

[74] Ibid, p.8.

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3. Mail Service

Brianna Lennon shared her concerns about mail service, "Regarding the mail…it's something that is in the forefront of my mind as we're making all of the plans for November. We're really fortunate that our local post office, the downtown location is just two blocks away and I have a good relationship with the postmaster. And I literally, for the past two days have been communicating with several of their managers about what we can do to make sure that ballots [will get there on time]."[75]

Denise Lieberman said, "We know because of the significant anticipated increases in absentee ballots, the business class mailings that the postage prepaid requires means that even voters who are very diligent about casting, completing, finding a notary to get their ballot notarized well ahead of time may still find that their ballot returns too late to be counted. Missouri law is explicit. Any ballot received after the close of polls election day may not be counted."[76]

Denise Lieberman also speaking about mail-in concerns said, "we're seeing controversy around the postal service all over the country. And we now know that postal workers are not working overtime anymore. And we are seeing significant delays in the mail. I mean, particularly with respect to absentee ballots. And again, this is no denigration of the incredible work that our local election officials are doing. They are literally inundated with an enormous increase in requests for mail-in ballots and absentee ballots. And need the financial and institutional support from the state, and actually from the federal government as well, to be able to just even start to process that stuff in a timely manner."[77]

Ms. Lieberman indicated, "We know because of the significant anticipated increases in absentee ballots, the business class mailings that the postage prepaid requires means that even voters who are very diligent about casting, completing, finding a notary to get their ballot notarized well ahead of time may still find that their ballot returns too late to be counted."[78]

Mr. Schoeller emphasized that precautions are being taken and it is important to not scare voters into thinking otherwise.[79] He also discussed the issues of votes not being counted due to mail delays, "we don't want too many people to vote by mail because we don't want to overwhelm the mail system in terms of the US Postal Service and or office, or suddenly ballots are not returned"[80]

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[75] Lennon Testimony, MO August 13 Briefing, p.17.

[76] Lieberman Testimony, MO July 16 Briefing, p.8.

[77] Lieberman Testimony, MO July 16 Briefing, p.12.

[78] Ibid, p.8.

[79] Schoeller Testimony, MO August 13 Briefing, p.8.

[80] Ibid, p.10.

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Although Mr. Schoeller advocated for at least the option of mail-in voting, he said, "we're not prepared yet to be able to make that complete transition, to voting by mail as opposed to voting in person"[81]

Mr. DeGregorio echoed the common concern of a majority of the panelists saying, "I want to mention my concerns about the US postal service"[82] He identified "major funding issues" and the "difficulties of mailing a first-class letter across town"[83] and stated, "One study estimates that in past elections, even before this one, many election jurisdictions had 1% or over of ballots not delivered to them on time to be counted. 1% can make a difference in a lot of election contests. The 1% non-delivery rate may even be exceeded if more people vote by mail."[84]

C. Voter Fraud

Mr. Roland spoke about voter fraud and said,

> I talked to dozens of people who had been improperly approached with people trying to, shall we say, 'assist' them in casting absentee ballots. I also talked to several former employees of the election board there in St. Louis, who said that someone associated with the campaign would routinely bring in stacks, dozens of ballots at a time, absentee ballot envelopes at a time and drop them off at the election authority. And then those would be counted even though that was contrary to Missouri law. The judicial opinion in *Franks v. Hubbard* did actually point out that one of the central problems was that the Board of Election Commissioners itself was improperly applying our absentee ballot laws. We identified 246 ballots that the election authority counted unlawfully in that election, and only 4,316 votes were cast. And the margin of victory was only 90 votes.[85]

Mr. DeGregorio also testified that voter fraud is not merely hypothetical, but a current concern, "Just last week, a US postal worker in West Virginia pled guilty to voter fraud by intentionally changing ballots because of political affiliation."[86] He further commented this has also been an issue in the past; in the 1980s and 1990s, there were "certainly cases of voter fraud"[87]

Mr. DeGregorio also told the committee how notaries can be involved in voter fraud, "St. Louis is an example in the 2018 election and other elections, but in recent elections where there's been voter fraud by notaries, where the parties and the candidates and the organizations get a notary that

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[81] Ibid., 8.

[82] DeGregorio Testimony, MO July 16 Briefing, p.24.

[83] Ibid., 25.

[84] Ibid.

[85] Roland Testimony, MO June 25 Briefing, p.31.

[86] DeGregorio Testimony, MO July 16 Briefing, p.25.

[87] Ibid., 28.

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they can control to harvest ballots and to get ballots, and then to mark these ballots, or they send in fraudulent request."[88]

Mr. Roland testified that in a special election in St. Louis, 46% of the votes were unlawfully counted.[89] He discussed other issues such as missing signatures, incorrect personal information, lack of notarizations, etc.[90] He also noted that although some people argue about still counting these votes, these requirements "exist for a reason," which is to protect against fraud.[91]

Mr. Roland also told the committee that he "presented the [St. Louis] election board with statistical evidence showing really, I mean really unusual patterns of absentee ballot activity relating with certain campaigns, going back for years, and the election board turned a blind eye to it."[92] Mr. Roland called into question the claim that there is "not widespread electoral fraud," when in fact the issue might be that it simply goes undetected, and is "definitely an issue that's out there and it can change the outcome of elections." [93]

Mr. von Spakovsky spoke on the issue of voter fraud, "There are numerous cases involving absentee ballot fraud and voters being targeted with coercion or having their ballots stolen or filled out by others."[94] He pointed to a recent example in New Jersey, "Such problems were encountered in Paterson, New Jersey, after it made the mistake of switching to an all-mail process for its recent municipal election, which also had a very high, unacceptable rejection rate. Four locals have already been criminally charged in an absentee ballot fraud scheme and a new election has been ordered."[95] Mr. von Spakovsky's testimony claimed it is naive to think that just because mail-in voting fraud is not already "widespread," that an expansion in mail in voting will not lead to an increase in voter fraud.[96]

Mr. von Spakovsky also directly addressed two other cases in Chicago and New York.[97] He said those impacted by mail-in voting, "were first-time voters or otherwise less informed or lacking in

[88] Ibid., 28.

[89] Roland Testimony, MO June 25 Briefing, p.35.

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Ibid

[94] Von Spakovsky Testimony, MO August 27 Briefing, p.8.

[95] Ibid., 6.

[96] Ibid.

[97] Ibid.

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knowledge of the voting process, the infirm, the poor, and those with limited skills in the English language"[98]

Mr. Roland stated that "even a very well-designed absentee ballot system requires clear-eyed principled oversight of that system or else it will still be susceptible to abuse and it may call into question the legitimacy of the election results."[99]

D. Voters with Disabilities

Amber McReynolds, an expert on election administration and policy, said, "the issue that a lot of voters with accessible challenges have is transportation to get from A to B, right? So COVID has exasperated that, but we knew that before COVID, right?"[100]

She said of her organization's work, "When we meet people where they are and empower them with the option at home to vote in a safe and secure way and return their ballot with prepaid postage. We have essentially created a process that they don't have to worry about the transportation gap. They don't have to worry about somebody else because they can access that ballot and vote independently of others."[101]

McReynolds claimed the same thing is true of some of the other systems, like for instance, "California and Utah have created a remote accessible vote by mail program for voters that need accessible technology to actually vote their ballot. They can now do that at home. They have to print the ballot at the end, so it's not an electronic delivery back, but they print the ballot at the end, insert into an envelope, and then they can return it that way. That's on the books in a few different states."[102]

Speaking about accommodations for voters with disabilities, Eric Fey said, "I would just add curbside voting under Missouri law is available for disabled voters at every polling place. That has been the case for quite a long time. I will say, though, that curbside voting is labor intensive and at a polling place, when a voter does vote curbside, it takes two election judges away from the

[98] Ibid.

[99] Roland Testimony, MO June 25 Briefing, p.31.

[100] McReynolds Testimony, MO June 25 Briefing, p.20.

[101] Ibid.

[102] Ibid.

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polling place. And that usually leads to the line backing up. That's why we do encourage voters who want to vote in their car curbside to come to our main office."[103]

III. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.[104]

The Missouri Advisory Committee presents this summary of testimony with limited comment from the committee. The selected testimony was identified by committee members and is presented in a bi-partisan effort to summarize key points. The committee acknowledges not all the testimony was captured. The committee will hold at least one post-election briefing to collect testimony from experts and stakeholders. Following the closing of the record, the Committee will evaluate all the testimony received over the five briefings and issue a report to the United States Commission on Civil Rights with findings and recommendations.

[103] Fey Testimony, MO July 16 Briefing, p.18.

[104] 45 C.F.R. § 703.2.

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Missouri Advisory Committee to the
United States Commission on Civil Rights

U. S. Commission on Civil Rights

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This report is the work of the Missouri Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government. For more information please contact the Regional Programs Coordination Unit.

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Understanding the Impact of Immigration Enforcement on California Children in K-12 Schools

A Report of the
California Advisory Committee to the
U.S. Commission on Civil Rights

January 2021

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USCCR-21-1814-B-000676

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

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California Advisory Committee to the
U.S. Commission on Civil Rights

The California Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding civil rights concerns in federal immigration enforcement and its impact on California K-12 students. The Committee submits this report as part of its responsibility to study and report on civil rights issues in the state of California. The contents of this report are primarily based on testimony the Committee heard during two public meetings; one held in Los Angeles on October 16, 2019 at the Los Angeles Central Library; the other held in Chula Vista on March 4, 2020 at Southwestern College.

This report details civil rights concerns with federal immigration enforcement in California. The Committee sought to understand the following: the impact of ICE enforcement practices on access to public education for California K-12 students; access to equal protection under the law for individuals based on their perceived national origin; and the extent to which due process is afforded to K-12 students and their families. The executive summary offers findings and recommendations for your consideration.

California Advisory Committee to the
U.S. Commission on Civil Rights
Betty R. Wilson, *Chair*, Los Angeles
Brian Moriguchi, *Vice Chair,* Stevenson Ranch

James Bolton, Altadena
Percy Duran, Los Angeles
Nancy Eisenhart, Woodland Hills
Javier Gonzalez, San Jose
Susan Jester, San Diego
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Maimon Schwarzschild, San Diego
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EXECUTIVE SUMMARY

Immigration has long been at the center of U.S. political debate for decades, as policy makers have weighed economic, national security, and humanitarian concerns. Congress has debated several immigration reforms over the last two decades, some considered comprehensive, while other proposed laws focused on incremental changes. The discussion surrounding comprehensive immigration, or omnibus legislation, attempts to address demand for high- and low-skilled labor, the legal status of millions of undocumented immigrants living in the United States, border security and interior enforcement.

Over the years, presidential administrations have implemented varying immigration enforcement actions affecting and targeting specific groups of the undocumented population, legal immigration system, border security, and interior enforcement. For instance, the Obama Administration set priorities on which populations to target for deportations and announced an executive order creating a 3-year deferred action (protection from deportation) program created for undocumented parents of U.S. citizen or permanent resident sons or daughters. Subsequently, the Trump Administration implemented a "zero-tolerance" approach that allows authorities to arrest and prosecute undocumented immigrants caught crossing the southern border and called for the construction of a physical wall between the U.S. and Mexico border to curb undocumented immigration into the U.S. These varying approaches have garnered support and opposition and even sparked legal challenges that are being litigated in court today.

Interior enforcement in the form of arrests throughout the major cities across the nation, including major California cities,[1] has drawn both criticism and praise from a range of stakeholders. In particular, these arrests have raised concern among educators; immigrant rights advocates, and state and local elected officials because some of these actions occurred near or at sensitive locations such as schools and courthouses.[2] Others support the removal of undocumented immigrants with criminal records from staying in the U.S.

California, like other states, has implemented so-called sanctuary laws. For example, in 2017, the California Legislature passed Senate Bill 54, also known as the California Values Act.[3] The law prohibits state and local law enforcement agencies from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes.[4]

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[1] Hamed Aleaziz, "ICE confirms 150-plus arrests in California sweep, slams Schaaf's early warning." *SFGATE,* Feb. 28, 2018. Accessed on March 18, 2020, https://www.sfgate.com/bayarea/article/Reports-of-California-immigration-sweep-are-true-12714833.php; Elizabeth Chou. "ICE arrests more than 200 in weeklong immigration sweeps across Southern California." *The Sun, Feb. 16, 2018.* https://www.sbsun.com/2018/02/16/ice-arrests-more-than-200-in-weeklong-immigration-sweeps-across-southern-california/.

[2] Andrea Castillo, "Immigrant arrested by ICE after dropping daughter off at school, sending shockwaves through neighborhood." *Los Angeles Times*, Mar. 3, 2017 https://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html; Mackenzie Mays. "After arrests near schools, Valley groups skeptical of ICE policies." Fresno Bee, Apr. 8, 2017. https://www.fresnobee.com/news/local/education-lab/article143462829.html.

[3] Cal. Gov't. Code § 7284 (West 2018).

[4] Cal. Gov't. Code § 7284.6 (West 2018).

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The California Advisory Committee was concerned about media coverage and reports pertaining to perceived increased federal immigration enforcement actions occurring in public spaces such as courtrooms and schools. The Committee also recognized a letter drafted by Supreme Court Justice Tani G. Cantil-Sakauye who delivered a letter[5] to then-Attorney General Jeff Sessions and then-Secretary of Homeland Security John Kelly expressing her concern regarding the effects of ICE's activities on public trust and confidence in the state court system, including the potential chilling effect on crime victims, victims of sexual abuse and domestic violence, witnesses to crime who desire to cooperate with law enforcement, especially limited-English proficient speakers, unrepresented litigants, and children and families. In a joint response, then-Attorney General Jeff Sessions and then-Secretary Kelly stated that "[s]uch policies threaten public safety, rather than enhance it,"[6] and as a result, ICE requires to arrest these individuals in public places, rather than in jails.

The California Advisory Committee (Committee) in 2018 voted to examine the impact of federal immigration enforcement and more narrowly focused on the impact on California K-12 students. Many students live in mixed immigration status households.[7] The Committee also sought to understand the following: the impact of ICE enforcement practices on access to public education for California K-12 students; access to equal protection under the law for individuals based on their perceived national origin; and the extent to which due process is afforded to K-12 students and their families.

The Committee held two public meetings: one held in Los Angeles on October 16, 2019 at the Los Angeles Central Library; the other held in Chula Vista on March 4, 2020 at Southwestern College. Various opinions were presented in testimony offering a wide array of perspectives in the areas of the possible impact of immigration enforcement on California children and otherwise; the role of immigration enforcement; federal immigration enforcement policy and its potential effects; the possible impact of California's sanctuary policies; due process and domestic violence reporting. Stakeholders, including the Customs and Border Protection, the California Department of Justice, academics, national and state advocacy organizations, legal experts, and individuals speaking on their own behalf or on behalf of interested organizations testified in person or provided written statements. In addition, the Committee convened a meeting with representatives from U.S. Immigration and Customs Enforcement on June 24, 2020 to obtain responses to specific questions posed by the Committee after receiving initial testimony at their meetings in Los Angeles and Chula Vista.

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[5] Letter from Chief Justice Cantil-Sakauye to Attorney General Sessions and Secretary Kelly, Mar. 16, 2017 https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

[6] "Response from Sessions and Kelly to California's Chief Judge on Immigration," Mar. 29, 2017, https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

[7] These are households with at least one undocumented immigrant parent.

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This report begins with introduction and background on legal authority surrounding immigration enforcement and relevant laws and policies that apply to the Committee's inquiry such as federal and state laws and a court case. A summary of themes based on testimony received follows. The report concludes with findings and recommendations issued to the U.S. Commission on Civil Rights to forward to appropriate federal and state entities.

The findings and recommendations are also below:

Findings

1. Immigration enforcement impacts children in many ways. Of the 5.1 million children who have at least one undocumented parent, 4.5 million are U.S. citizens. The removal of undocumented parents of children who are U.S. citizens splits families and may negatively impact the growth and stability of millions of children.

2. In California alone, at least 750,000 children live with a parent who is undocumented, including 250,000 children who are undocumented themselves. The arrest and/or deportation of parents adversely affects their children as does the continual fear of arrest and deportation. Media reports and testimony regarding enforcement activity in and around schools also affects undocumented children and children of undocumented parents. Such effects may include an increase in absenteeism among students, a decline in parent participation in school events, an increase in bullying of students because of their perceived national origin and/or citizenship status, and a decline in school participation and willingness to seek higher education.

3. In 2011, ICE promulgated its Sensitive Locations policy that limits ICE enforcement actions at schools, hospitals, places of worship, public religious ceremonies and during public demonstrations. ICE also noted that:

    a. ICE has discretion in how it conducts enforcement actions pursuant to federal law; and if and when enforcement actions occur *near or around* schools, agents are required to ask for supervisory approval.

    b. The ICE Sensitive Locations policy does not prohibit ICE from conducting enforcement actions *near or around* schools or hospitals or places of worship; however, ICE attempts to avoid sensitive locations if possible.

    c. A lack of data collection and reporting by ICE limits a full review, examination and understanding of the efficacy and impact of the Department of Homeland Security's Sensitive Locations policy and limits a full understanding of the impact of ICE's practices and procedures on U.S. children.

4. The Sensitive Locations policy does not limit or restrict ICE from conducting enforcement actions in or around courthouses. On March 16, 2017, Tani Cantil-Sakauye, the Chief Justice of the California Supreme Court, notified the U.S. Attorney General and the U.S. Secretary of Homeland Security about her concern about reports from some California trial courts that immigration agents appeared to be stalking undocumented

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immigrants in state courthouses to make arrests, that those tactics undermine the judiciary's ability to provide equal access to justice, and she requested that that ICE refrain from that sort of enforcement in California's courthouses. In a joint response, then-Attorney General Jeff Sessions and then-Secretary Kelly stated that Justice Cantil-Sakauye should direct her concerns to Governor Jerry Brown and to law enforcement officials who refuse to honor detainers as several California municipalities are "sanctuary cities" that limit police cooperation with ICE. They stated that "[s]uch policies threaten public safety, rather than enhance it,"[8] and as a result, ICE requires to arrest these individuals in public places, rather than in jails.

5. Many local law enforcement agencies allow limited access to ICE to undocumented persons in local custody. This limited access may reduce the ability for ICE to deport undocumented individuals who committed crimes and who may pose the highest risk to public safety. As a result, many undocumented individuals convicted of crimes are released into communities resulting in ICE agents seeking the arrest and deportation of these same individuals in communities rather than in a controlled custodial environment. The transfer of ICE enforcement activity from the local jails/prisons to the communities increases the risk to agents, the undocumented individuals being sought as well as to community members at large. The enforcement in communities also increases the negative perception of ICE in those communities and creates greater fear for undocumented individuals and their children living in those communities. Although the sanctuary laws were intended to protect undocumented immigrants, they may be doing more harm than good and primarily protecting undocumented immigrants who commit crimes.

6. California schools are required to uphold federal laws that: protect students' personal information; prohibit discrimination in public education on the basis of race, color, or national origin; and prohibit discrimination based on immigration status in access to basic public education. While these laws remain in place, and efforts were put forth by California school districts to address concerns about immigration enforcement potentially occurring in and around schools, and ICE's Sensitive Locations policy explicitly indicating that schools are off-limits to conduct enforcement actions, families still express anxiety and fear of deportation. The effect is that students in mixed-status households choose to stay home because of that fear. Such fear, whether real or not, has a chilling effect on education for undocumented children and children of undocumented parents. It also affects school funding that is intended to support all students because funding is largely tied to attendance and impacts student achievement.

7. Testimony indicated that executive orders impact immigrant communities' perception of safety and feel targeted because of their presumed national origin and immigration status.

[8] "Response from Sessions and Kelly to California's Chief Judge on Immigration," Mar. 29, 2017, https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

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8. California's sanctuary laws continue to be a point of tension between federal, state, and local authorities. In particular, the California Values Act made a dent in decreasing immigrant arrests in the state reinforcing the notion supported by previous research and testimony that implementation of deportation procedures would not be as extensive if local officials declined to participate. ICE asserts that a consequence of the California Values Act is that federal immigration enforcement actions are more likely to be conducted in public rather than in local law enforcement custody. In addition, the law fosters a precarious relationship between immigrant communities and local law enforcement.

9. Testimony indicated concerns with immigration courts fulfilling procedural due process requirements. At this time, immigration courts have limited resources, are experiencing a large and growing caseload that sometimes goes beyond the 180-day adjudication period for asylum cases, and are subject to fluctuations in enforcement policy changes. Testimony indicated that these examples may impede due process because they can cause long wait times before cases can be heard, and over-detention of undocumented immigrants.

10. According to U.S. law, undocumented immigrants have a right to due process; however, they do not have a right to counsel provided by the government in civil proceedings. ICE provides undocumented immigrants resources such as contact information for consulates and the American Immigration Lawyers Association to obtain legal representation; however, some individuals are unable to access representation due to understaffed and underfunded nonprofit law firms, who often provide this service. This is notable because children are more likely to receive the relief they are seeking if counsel represents them.

11. Testimony before this Committee indicates a concern with due process and consistency with immigration courts and judges. Undocumented immigrants appearing in immigration court face obstacles to due process and fair adjudication of claims for relief. Testimony indicated inconsistency among immigration judges and highly disparate grant rates as well as hostility and contempt toward immigrants and their attorneys. In contrast, additional testimony indicated favoritism and leniency towards immigrants by some immigration judges. Based on testimony, it appears that outcomes may depend on which court or judge is deciding the case rather than established principles and rules of law.

12. Immigration enforcement may impact the reporting of crimes in immigrant communities. There are several possible reasons that affect a victim's inclination to report crimes. For instance, immigrants, who may be undocumented, and are victims may not report crimes because of shame, fear of deportation, and a lack of faith in law enforcement in taking their report seriously. Fear of reporting crime may result in continual victimization of undocumented immigrants. Such crimes may include domestic violence and child abuse and many other crimes. Failing to report a crime also means that the nation's crime statistics may be grossly inaccurate and potentially misleading. This has significant consequences for policymaking and budgeting because, without proper reporting, resources could be allocated to the wrong place. On the other hand, Department of Justice statistics estimate that approximately 50 percent of all crimes nationwide go unreported.

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Under reporting of crime is an issue that goes well beyond immigrant communities, and hence is broader than immigration enforcement.

13. Testimony indicated concerns with the treatment by federal immigration authorities and/or federal detention conditions that are in violation of the Customs and Border Patrol's National Standards on Transport, Escort, Detention, and Search. Asylum seekers reported mistreatment by immigration officers through verbal abuse and threats; denied adequate food; clean drinking water and bedding. In addition, testimony indicated medical personnel did not screen children while detained and some did not receive medical attention. Lastly, families continue to be separated while in federal custody.

14. ICE no longer exempt groups of removable undocumented immigrants from enforcement. As a result, all undocumented immigrants are likely targets even if they have lived in the United States for many years and have U.S. born children. As seen in the Administration's January 25, 2017 Executive Order, the shift in enforcement philosophy has translated to more arrests and deportations of undocumented immigrants.

Recommendations

The U.S. Commission on Civil Rights should study the impact of sanctuary laws and their effectiveness.

The U.S. Commission on Civil Rights should send this report and issue recommendations to the Department of Homeland Security, Immigrations and Customs Enforcement Agency to:

- Track and release detailed information on enforcement operations including information on who is targeted, arrested, and deported especially those operations conducted near or around sensitive locations, and at courthouses. In addition, track and release information on the detention of U.S. children and those who are legal residents.

- Examine the availability of legal representation for detainees provided by legal aid organizations and develop solutions to ensure detainees have sufficient and proper access to legal representation.

- Comply with the Sensitive Location policy and communicate its importance to the public

- Comply with the Federal Educational Rights and Privacy Act.

- Conduct outreach to immigrant communities to educate them on the core functions of its agencies.

- Expedite the removal of deportable gang members.

- Amend its October 24, 2011, Sensitive Locations policy memorandum to add courthouses to the list of sensitive locations that are subject to certain limitations on immigration enforcement actions.

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The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Department of Homeland Security to investigate and/or review ICE and CBP policing activities and actions at and in proximity to schools and courthouses and other sensitive locations.

The U.S. Commission on Civil Rights should send this report and issue recommendations to the Department of Homeland Security, Customs and Border Protection Agency to:

- Comply with the National Standards on Transport, Escort, Detention, and Search.
- Do not separate undocumented immigrant families who have been apprehended at the border and during detainment, especially those with young children.
- Provide detainees with the contact information of immigration lawyers and create better access to detention facilities by either moving detention facilities to higher populated areas, implementing transportation systems, or expanding video conferencing.
- Provide adequate translation services in detention facilities for indigenous languages so that migrants who do not speak English or Spanish have the ability to communicate with detention staff and have equal access to legal information and representation.

The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Department of Justice, Executive Office for Immigration Review to abide by the 180-day period to adjudicate asylum cases.

The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Congress to:

- Pass legislation that streamlines the legal immigration process to ensure civil rights protections for children.
- Provide appropriate funding to support anti-gang operations.
- Consider legislation to make the immigration court system independent, separate from the Department of Justice, to ensure impartiality and to insulate the system from policy changes. Congress should also consider creating trial and appellate divisions to create judicial independence.
- Provide adequate funding to support the Department of Justice, Executive Office for Immigration Review to adjudicate cases.
- Authorize and fund additional studies examining the impact of sanctuary laws and its relationship to crime rates, reporting crime, removals, and recidivism rates.
- Hold federal agencies accountable for treatment of asylum seekers by reexamining policies and practices for how asylum petitions are received, reviewed, and decided.
- Hold the Department of Homeland Security accountable for compliance with its policies such as the National Standards on Transport, Escort, Detention, and Search.

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- Consider legislation codifying the Department of Homeland Security's Sensitive Locations policy to ensure that the Constitutional rights of U.S. children are protected, including access to education, criminal justice, and social services without fear of family separation or detention.

The U.S. Commission on Civil Rights should send this report and issue a recommendation to the California Legislature to conduct an in-depth study on the impact of sanctuary laws and their effectiveness in obtaining their stated goal. In addition, consider examining their relationship to crime rates, reporting crime, removals, and recidivism rates.

The U.S. Commission on Civil Rights should send this report and issue a recommendation to the California Attorney General's Office to continue enforcing the Educational Equity: Immigration and Citizenship Status Act so that schools educate families on students' right to a safe and free education and the impacts of bullying, and develop anti-bullying policies and information concerning bullying based on immigration status.

The U.S. Commission on Civil Rights should send this report and issue recommendations to the California Department of Education to:

- Ensure all school districts are in compliance with the Family Educational Rights Privacy Act.

- Track and monitor the implementation of the Educational Equity: Immigration and Citizenship Status Act in public schools, including but not limited to the tracking of complaints of discrimination by students and school employees on the basis of immigration status.

- Implement measures to ensure that public schools are not collecting information or documents regarding citizenship or immigration status of pupils or their family members.

- Implement measures to ensure that all school districts are in compliance with the Family Educational Rights Privacy Act and state laws protecting the privacy of student records.

- Require all school districts to annually notify students and parents about the Federal Educational Rights Privacy Act, Educational Equity: Immigration and Citizenship Status Act, and any policies and procedures regarding immigration enforcement on school property.

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INTRODUCTION

Immigration has long been at the center of U.S. political debate for decades, as policy makers have weighed economic, national security, and humanitarian concerns. Congress has debated several immigration reforms over the last two decades, some considered comprehensive, while other proposed laws focused on incremental changes.[9] The executive and judicial branches, in the meantime, have weighed in on administrative changes to immigration enforcement.[10] The discussion surrounding comprehensive immigration legislation, or omnibus legislation, attempts to address demand for labor, the legal status of millions of undocumented immigrants[11] living in the United States, border security and interior enforcement.[12]

Immigration actions varied throughout the history of presidential administrations, focusing on different priority areas. For instance, the Obama Administration, issued memos to the Department of Homeland Security, U.S. Citizenship and Immigration Services, and the Department of Labor, announcing broad changes that affect the undocumented population, legal immigration system, border security and interior enforcement.[13] Some of the changes included:

- A 3-year deferred action (protection from deportation) program created for undocumented parents of U.S. citizen or permanent resident sons or daughters (of any age, not just children). Deferred Action for Childhood Arrivals extended to DREAMers of any age (eliminates previous max age of 30).[14]
- Parole-in-place for undocumented family of persons seeking to serve in the military.[15]
- The expansion of the provisional waiver program to undocumented spouses and children of lawful permanent residents already in line for a green card.[16]

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[9] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); A Bill to Provide for Comprehensive Immigration Reform and for Other Purposes, S. 1639, 110th Cong. (2007).

[10] *See Arizona v. U.S.*, 567 U.S. 387 (2012).

[11] In the immigration debate, there are several terms, some explicitly noted in U.S. statutes, used to describe noncitizens such as unauthorized individuals, illegal aliens, undocumented immigrants, etc. For the purpose of uniformity, this report will use the term undocumented immigrants.

[12] Ruth Essen Wasem, Cong. Research Serv., R42980, Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress (Feb. 27, 2013), https://fas.org/sgp/crs/homesec/R42980.pdf.

[13] Lazaro Zamora, "Obama's Executive Action on Immigration Explained." *Bipartisan Policy Center*, Nov. 25. 2014, https://bipartisanpolicy.org/blog/obamas-executive-action-on-immigration-explained/.

[14] U.S. Department of Homeland Security, Citizenship and Immigration Services, *What Is DACA*, https://www.uscis.gov/archive/consideration-of-deferred-action-for-childhood-arrivals-daca (accessed Dec. 10, 2020).

[15] U.S. Department of Homeland Security, Citizenship and Immigration Services, *Discretionary Options for Military Members, Enlistees and Their Families*, https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families (accessed Dec. 10, 2020).

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- Allowance of H-1B spouses to work if the principal has an approved green card petition.[17]
- Extended optional practical training for foreign students studying science, technology, engineering, and math; and a new parole status for entrepreneurs to remain in the country.[18]
- Expanded avenues for inventors and entrepreneurs to apply for green cards without employer petition.[19]
- Calls for significant modernization of immigrant visa processing, including making sure all authorized visas are issued.[20]
- New strategic border security planning, revamped deportation priorities and clarification of exercising prosecutorial discretion.[21]
- Replacement of the Secure Communities program[22] of information sharing on arrestees with a more targeting program aligned with the new enforcement priorities.

In addition, they outlined three civil immigration enforcement priority areas targeting specific populations: those who are threats to national security, border security and public safety;

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[16] Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 535 (Jan. 3, 2013) https://www.federalregister.gov/documents/2013/01/03/2012-31268/provisional-unlawful-presence-waivers-of-inadmissibility-for-certain-immediate-relatives.

[17] U.S. Department of Homeland Security, Citizenship and Immigration Services, *DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence*, https://www.uscis.gov/archive/dhs-extends-eligibility-for-employment-authorization-to-certain-h-4-dependent-spouses-of-h-1b (accessed Dec. 10, 2020).

[18] Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13039, (March 11, 2016) https://www.federalregister.gov/documents/2016/03/11/2016-04828/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and.

[19] U.S. Department of Homeland Security, Immigration and Citizenship Services, *2014 Executive Actions on Immigration: Modernize, Improve And Clarify Immigrant And Nonimmigrant Visa Programs To Grow Our Economy And Create Jobs*, https://www.uscis.gov/archive/2014-executive-actions-on-immigration#4 (accessed Dec. 10, 2020).

[20] The White House Archives, *Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century*, https://obamawhitehouse.archives.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s (accessed Nov. 21, 2014),

[21] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, Jun. 17, 2011, https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[22] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Secure Communities*, https://www.ice.gov/secure-communities (last updated Mar. 20, 2018) (noting the Secure Communities program uses federal-information sharing between DHS and FBI that helps to identify in-custody undocumented immigrants without imposing new or additional requirements on state and local law enforcement) (hereinafter *Secure Communities*).

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misdemeanants and new immigration violators; and those who have been issued a final order of removal.[23]

More recently, the Trump Administration issued several executive orders affecting immigration policy. One such executive order[24] and the subsequent Department of Homeland Security memo[25] called to rescind all previous policy related to the Obama Administration's target priorities for removal. The new priorities call on the Department of Homeland Security to prioritize individuals for removal based on criminal, security, and fraud grounds that make foreign nationals inadmissible or deportable under the Immigration Nationality Act. Unauthorized immigrants noted in Executive Order 13768 who are targeted have: (i) been convicted of any criminal offense, (ii) been charged with any criminal offense, (iii) committed acts that constitute a chargeable criminal offense, (iv) willfully committed fraud in any official matter before a government agency, (v) abused public benefits, (vi) final orders of removal, and (vii) are otherwise considered a public safety or national security risk by an immigration officer.[26]

Other Executive Orders and policy changes focus on the following areas:

- Increasing border security and instruction for federal agencies to construct a physical wall between the U.S. and Mexico. Additionally, it called for an end to "catch and release" practices, in which certain undocumented immigrants who were captured at the border would be allowed into the United States while they await court hearings.[27]
- Banning nationals from Iran, Iraq, Libya, Somalia, Sudan, and Yemen from entering the United States for at least ninety days; blocked nationals from Syria indefinitely; and suspended the U.S. refugee program for 120 days.[28]
- Decreasing the annual cap of refugees admitted to the U.S. and more stringent measures to allow for individuals to seek asylum.[29]

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[23] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, Mar. 02, 2011, https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf

[24] Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states (herein cited as Exec. Order No. 13768).

[25] U.S. Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest*, Feb. 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

[26] Exec. Order No. 13768.

[27] Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

[28] Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); These actions drew widespread protests and legal challenges from jurisdictions across the country. The Trump Administration revised the travel band twice, and it eventually made its way to the Supreme Court, where justices ruled it to stand based on its third iteration. In 2020, the ban included additional countries.

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- Ending Temporary Protected Status for Haitians, Nicaraguans, and Sudanese. Hondurans, Nepalis, and Salvadorans were later added to this list in 2018.[30]
- Phasing out Deferred Action on Childhood Arrival (DACA) program.[31]
- Implementing a "zero-tolerance" policy, which allows authorities to arrest and prosecute undocumented immigrants caught crossing the southern border.[32]
- Accepting a limited number of asylum applicants each day and instructing others to remain in Mexico.[33]
- Mitigating the influx of Central American migrants through "safe third country" agreements with El Salvador, Guatemala, and Honduras. The deal require asylum seekers traveling through these countries to apply for protection there first and allow U.S. officials to deport migrants to the Northern Triangle without considering them for asylum.[34]
- Implementing "public charge" rule that establishes a test to determine whether an immigrant applying to enter the U.S., extend their visa, or convert their temporary immigration status into a green card is likely to rely on public benefits in the future.[35]

In 2015, the Commission issued a seminal report that addressed civil rights and constitutional concerns in connection with the immigration detention of families and children, including conditions of detention centers, "With Liberty and Justice for All: The State of Civil Rights at Detention Facilities"[36] as part of its annual statutory enforcement reporting. Four years later, the

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[29] Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

[30] *See*, *e.g.*, Jill H. Wilson, Cong. Research Serv., RS20844, Temporary Protected Status: Overview and Current Issues (Oct. 26, 2020) https://fas.org/sgp/crs/homesec/RS20844.pdf; Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59403 (November 4, 2019) https://www.federalregister.gov/documents/2019/03/01/2019-03783/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-sudan.

[31] U.S. Department of Homeland Security, *Memorandum from Kirstjen M. Nielsen*, Jun. 22, 2018, https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

[32] Cong. Research Serv., R45266, The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy (Feb. 26, 2019) https://fas.org/sgp/crs/homesec/R45266.pdf.

[33] U.S. Department of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols*, Jan. 25, 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. The Trump Administration expanded these practices in 2019 under its Migrant Protection Protocols, which require asylum seekers to stay in Mexico while their cases are pending.

[34] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019) https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.

[35] Inadmissibility on Public Charge Grounds; Correction, 84 Fed. Reg. 52357 (October 2, 2019) https://www.uscis.gov/greencard/public-charge.

[36] U.S. Commission on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Detention Facilities*, September 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

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Commission issued a related report, "Trauma at the Border: The Human Cost of Inhumane Immigration Policies"[37] primarily focused on increased enforcement activity at the U.S./Mexican border and the separation of migrant children from their parents.

In 2017, Supreme Court Justice Tani G. Cantil-Sakauye delivered a letter[38] to then-Attorney General Jeff Sessions and then-Secretary of Homeland Security John Kelly expressing her concern regarding the effects of ICE's activities on public trust and confidence in the state court system, including the potential chilling effect on crime victims, victims of sexual abuse and domestic violence, witnesses to crime who desire to cooperate with law enforcement, especially limited-English proficient speakers, unrepresented litigants, and children and families. In a joint response, then-Attorney General Jeff Sessions and then-Secretary Kelly stated that "[s]uch policies threaten public safety, rather than enhance it,"[39] and as a result, ICE requires to arrest these individuals in public places, rather than in jails.

In acknowledgement of these events, the California Advisory Committee also recognized media coverage and reports pertaining to accounts of immigration officers conducting arrests throughout major California cities[40] and enforcement activity around schools. This influenced the Committee to examine the impact of federal immigration enforcement on California K-12 students. Among potential related concerns, the Committee sought to examine: (a) the impact of ICE enforcement practices on access to public education for California K-12 students; (b) access to equal protection under the law for individuals based on their perceived national origin; and (c) the extent to which due process is afforded to K-12 students and their families.

The Committee held two public meetings: one held in Los Angeles on October 16, 2019, at the Los Angeles Central Library; the other held in Chula Vista on March 4, 2020 at Southwestern College. Various opinions were presented in testimony offering a wide array of perspectives in the areas of the possible impact of immigration enforcement on California children and otherwise; the role of immigration enforcement; federal immigration enforcement policy and its potential effects; the possible impact of California's sanctuary policies; due process and domestic violence reporting. Stakeholders, including the Customs and Border Protection, the California Department of Justice, academics, national and state advocacy organizations, legal experts, and

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[37] U.S. Commission on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, October 2019, https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf.

[38] Letter from Chief Justice Cantil-Sakauye to Attorney General Sessions and Secretary Kelly, Mar. 16, 2017 https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

[39] "Response from Sessions and Kelly to California's Chief Judge on Immigration," Mar. 29, 2017, https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

[40] Hamed Aleaziz. "ICE confirms 150-plus arrests in California sweep, slams Schaaf's early warning." *SFGATE,* Feb. 28, 2018. Accessed on March 18, 2020, https://www.sfgate.com/bayarea/article/Reports-of-California-immigration-sweep-are-true-12714833.php; Elizabeth Chou. "ICE arrests more than 200 in weeklong immigration sweeps across Southern California." *The Sun, Feb. 16, 2018.* https://www.sbsun.com/2018/02/16/ice-arrests-more-than-200-in-weeklong-immigration-sweeps-across-southern-california/.

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individuals speaking on their own behalf or on behalf of interested organizations testified in person or provided written statements. In addition, the Committee convened a meeting with representatives from U.S. Immigration and Customs Enforcement on June 24, 2020, to obtain responses to specific questions posed by the Committee after receiving initial testimony at their meetings in Los Angeles and Chula Vista.

BACKGROUND

The following section provides a summary of relevant authority governing immigration enforcement in and around public schools, and other sensitive locations. While there are several laws that can be linked to this topic, the Committee felt the laws, policies, and court case below are particularly related to the scope of their inquiry.

Plyler v. Doe

In California, education is considered a fundamental right.[41] The California Constitution requires the State to provide for a system of free public education.[42] "California has assumed specific responsibility for a statewide public education system open on equal terms to all."[43] Under California law, children between the ages of 6–18 are subject to compulsory full-time education.[44] Therefore, all children in California, including undocumented children, not only have the right to attend school, but are mandated to do so under the Education Code.

School Administration and Security Provisions

The United States Supreme Court has held that schools cannot deny students access to a basic public education due to immigration status.[45] In other words, public schools must provide all children with equal access to schooling, regardless of immigration status, and offer the same benefits for undocumented student as they do for United States citizens or permanent residents. In *Plyler v. Doe*, Texas enacted legislation that denied public school enrollment and withheld state funds from school districts that included children who were "illegally admitted" to the United States.[46] The Supreme Court struck down this law and declared it an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.[47]

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[41] *Serrano v. Priest*, 5 Cal.3d 584 (1971) ("Serrano I"); *Serrano v. Priest*, 18 Cal.3d 728 (1976) ("Serrano II").

[42] Cal. Const. art. IX, § 5.

[43] *Butt v. California*, 4 Cal.4th 668, 680 (1992).

[44] Cal. Educ. Code § 48200.

[45] *Plyler v. Doe*, 457 U.S. 202 (1982).

[46] *Id.*

[47] *Id.*

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The impact of *Plyler v. Doe* is significant: students and their parents cannot be questioned or be required to disclose or document the status of their citizenship. Additionally, students cannot be denied enrollment in schools due to either their immigration status or their parent's immigration status. School districts cannot engage in any practices that "chill" the right of access to school, including making inquiries of students or parents that may expose their undocumented status.

Both federal and state laws explicitly prohibit discrimination on the basis of nationality, race or ethnicity, and immigration status.[48] All local educational agencies are tasked with providing a learning environment free of discrimination, harassment, and violence.[49] Schools are required to implement antidiscrimination and antiharassment policies.[50] School administrators may be liable in their official and personal capacity if they are deliberately indifferent, such as by failing to investigate or failing to take adequate prevention measures, to harassment or discrimination based on race, ethnicity, national origin, and other protected categories.[51]

Because the California Legislature has found that the interruption of class time seriously impairs the educational process, schools can limit disruptions on school grounds to ensure the safety of their students and staff.[52] Schools may deny an individual from accessing a campus during school hours.[53] Any person who willfully disturbs any public school or any public school meeting and does not depart upon request is guilty of a misdemeanor and will be fined.[54] A school district may not bar a student from enrolling because she does not have a birth certificate or has records that indicate a foreign place of birth. In assessing proof of residency, school districts may collect certain information, such as property tax receipts, utility bills, or rental property documents.[55] This list does not include documents that demonstrate proof of legal immigration status.[56]

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[48] 42 U.S.C. § 2000c et seq.; 42 U.S.C. § 2000(d) et seq.; 20 U.S.C. §1681 et seq.; 42 U.S.C. § 12132 et seq.; 20 U.S.C. § 1400 et seq.; 29 U.S.C. § 794; 20 U.S.C. § 1703(f); Cal. Educ. Code. §§ 200, 201, 220, 234.1; Cal. Civ. Code § 51; Cal. Gov't Code § 11135.

[49] Cal. Educ. Code § 201.

[50] Cal. Educ. Code § 234.1.

[51] See Justice Department Factsheet on Rights of All Children to Enroll in School: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerfact.pdf.

[52] Cal. Educ. Code §§ 32211–12.

[53] Cal. Educ. Code § 32211.

[54] *Id.*

[55] Cal Educ. Code § 48204.1.

[56] *Id.*

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Immigration Enforcement

Immigration and Nationality Act of 1965

In 1965, President Lyndon B. Johnson signed into law the Immigration and Nationality Act.[57] The law, known as the Hart-Celler Act for its congressional sponsors, ushered in far-reaching changes that continue to undergird the current immigration system and influenced significant demographic changes that are still shaping the U.S. today and will in future decades.[58] President Lyndon B. Johnson stated that the act "is not a revolutionary bill. It does not affect the lives of millions…. It will not reshape the structure of our daily lives or add importantly to either our wealth or our power."[59]

The law abolished an earlier quota system based on national origin and replaced it with a system that prioritizes relatives of U.S. citizens or permanent residents, those with skills deemed useful to the U.S., and refugees of violence or unrest.[60] It placed caps on per-county total immigration,[61] as well as caps on each category.[62] In addition, it established a new immigration policy focused on family reunification and would increasingly allow entire immigrant families to reestablish their lives in the U.S.

By the end of the 20th century, the policies put into effect by the Immigration and Nationality Act had greatly changed the face of the American population.[63] Compared with the 1950s where more than half of all immigrants were Europeans and just six percent were Asians, in the 1990s only 16 percent were Europeans and 31 percent were of Asian descent and the percentages of Latino and African immigrants had increased significantly.[64]

Pertinent to this report, the Immigration and Nationality Act also established enforcement power to federal agencies and specific leadership. For instance, the law charged the Secretary of

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[57] 8 U.S.C. § 1101.

[58] Saul Gonzalez and Matthew Bell, "50 years on, how one law changed America seeded today's immigration debate," Oct. 2, 2015, *PRI The World*, https://www.pri.org/stories/2015-10-02/50-years-how-one-law-changed-america-and-seeded-todays-immigration-debate.

[59] Lyndon B. Johnson Presidential Library, *President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill,* 1965. http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration (accessed on March 31, 2020).

[60] 8 U.S.C. § 1151.

[61] 8 U.S.C. § 1152.

[62] 8 U.S.C. § 1153.

[63] U.S. Immigration Since 1965, *History.com*, https://www.history.com/topics/immigration/us-immigration-since-1965 (website last updated June 7, 2019 and accessed on March 31, 2020)

[64] Ibid.

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Homeland Security to perform duties such as establishing regulations[65] and controlling and guarding the border of U.S. from illegal entry of unauthorized immigrants.[66]

U.S. Immigration and Customs Enforcement's Sensitive Locations Policy

Under the Sensitive Locations policy, ICE is restricted from conducting enforcement actions at sensitive locations, including schools.[67] The Sensitive Locations policy does not include courthouses. It states that, under exigent circumstances, ICE officers can perform enforcement actions at a sensitive location, or if prior approval is obtained from a designated supervisory official.[68] Officers and agents must conduct themselves as discreetly as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location. ICE's definition of sensitive locations includes

> [s]chools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop."[69]

Enforcement actions covered by this policy are apprehensions, arrests, interviews, or searches, and for purposes of immigration enforcement only, surveillance. However, the Sensitive Locations Policy does not include obtaining records, documents, and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program compliance and certification visits, guarding or securing detainees, or participating in official functions or community meetings.

U.S. Immigration and Customs Enforcement's Secure Communities Policy

During the past three presidential administrations, there has been a shift between competing deportation policies. In 2008, the George W. Bush administration piloted ICE's Secure Communities policy; this policy continued during the Obama Administration until late 2014 when it was replaced by the Priority Enforcement Program.[70] Through executive order,[71] the

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[65] 8 U.S.C. § 1103 (a)(3).

[66] 8 U.S.C. § 1103 (a)(5).

[67] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Enforcement Actions at or Focused on Sensitive Locations*, October 24, 2011, https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf.

[68] *Id.*

[69] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Sensitive Locations FAQ*, https://www.ice.gov/ero/enforcement/sensitive-loc (hereinafter *Sensitive Locations FAQ*).

[70] "Obama Ends Secure Communities Program That Helped Hike Deportations," *NBC News*, Nov. 21, 2014, https://www.nbcnews.com/storyline/immigration-reform/obama-ends-secure-communities-program-helped-hike-deportations-n253541. The Priorities Enforcement Program focused on removing "the most dangerous and law-breaking immigrants."

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Trump administration reinstated Secure Communities to replace the Priority Enforcement Program in January 2017.

The purpose of Secure Communities is to identify immigrants in U.S. jails who are deportable under immigration law. Under this program, participating jails submit arrestee's fingerprints to the FBI. The FBI then run the arrestee's fingerprints through its database of criminal records and sends information regarding the person's criminal history to state and local authorities. The Department of Homeland Security then receives those fingerprints from the FBI so that ICE can determine if that person is also subject to deportation.[72] Since its reactivation more than 43,300 convicted criminal aliens have been removed from the United States.[73]

Disclosure of Students' Personal Information

Federal Educational Rights and Privacy Act, restricts schools from releasing student education records, including immigration status information, except for in exceptional circumstances.[74] Under Federal Educational Rights and Privacy Act, ICE officials may only obtain information with the consent of a parent (or student, if 18 years old or older), or if presented with a judge-signed judicial order or subpoena. If presented with an administrative subpoena, school officials are permitted to seek review by legal counsel and challenge the reasonableness of the subpoena, if applicable.

The California Education Code has a similar provision which states that school districts are prohibited from permitting access to student records without written parental consent or under court order, with limited exceptions.[75] Immigration enforcement is not included in the limited exceptions.[76]

California Laws

California Values Act

The California Values Act[77] prevents the use of state and local resources on behalf of federal immigration officials in carrying out mass deportations, and ensures that public properties, such as schools, hospitals, and courthouses remain safe spaces from immigration enforcement. The

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[71] Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[72] 8 U.S.C. § 1722(a)(2).

[73] *Secure Communities.*

[74] 20 U.S.C. § 1232g; 34 C.F.R. § 99.31.

[75] Cal. Educ. Code § 49076.

[76] Overstaying a visa is not a violation of federal criminal law; it is a civil violation is handled in immigration court proceedings.

[77] Cal. Gov't. Code § 7284 et seq.

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Act prohibits state and local resources from being used to inquire into a person's immigration status, or being used to share sensitive non-public information, such as a person's home or work address.[78] Thus, the authority to enforce federal immigration laws is placed solely in the hands of federal officials. Central to the Act is the California Legislature's finding that the valuable relationship of trust between California's immigrant community and state and local government.[79] Integral to public safety and threatened when state and local government are "entangled with federal immigration enforcement" affecting immigrant community members ability to report crimes, obtain health services or attend school.[80] The Legislature also expressed similar concerns regarding potential Fourth Amendment and Equal Protection violations, should state and local resources be beholden to federal immigration enforcement.[81] The California Values Act was challenged in federal court by the Trump administration in *United States v. California*. The federal district court denied the administration's request for an injunction to block the law, and held that California's directive was permissible and did not conflict with federal law.[82] On April 18, 2019, the Ninth Circuit Court of Appeal affirmed this decision.[83] Therefore, the California Values Act is currently binding law in California.

California TRUTH Act

The TRUTH Act (Transparent Review of Unjust Transfers and Holds) requires that, if ICE places a detainer, a request by ICE to local law enforcement to transfer someone for deportation, on someone in a California jail, the custodial law enforcement agency must serve a copy of that detainer upon the person.[84] It upholds due process for immigrants held in local jails by giving them both the "right to know" when ICE requests to interview with them to gauge eligibility for deportation and the right to respond via consent form to those interview requests.[85] It also requires that a local legislative body host an annual community forum if law enforcement allows ICE access to any individual.[86] The TRUTH Act ensures that if a local jail chooses to notify ICE when an immigrant will be released, they must also provide that notice to the immigrant and their attorney or permitted designee.[87] Records related to ICE access are subject to the California Public Records Act.[88]

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[78] *Id*. at 7284.6 (a)(1).

[79] *Id*. at 7284.2 (b).

[80] *Id*. at 7284.2(c).

[81] *Id*. at 7284.2(e).

[82] *United States v. California*, 314 F. Supp. 3d 1077 (2018).

[83] *United States v. California,* 921 F.3d 865 (2019).

[84] Cal. Gov't. Code § 7283 et seq.

[85] *Id*. at 7283.1(a).

[86] *Id.* at 7283.1(d).

[87] *Id*. at 7283.1(b).

[88] Id. at 7283.1(c).

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The TRUTH Act is, in part, a response to the Secure Communities[89] policy ICE has utilized to arrest immigrants in local jails.

Educational Equity: Immigration and Citizenship Status Act

In 2018, California enacted Assembly Bill 699,[90] Educational Equity: Immigration and Citizenship Status Act, which amended California's Education Code by prohibiting school officials and school district employees, county education offices and charter schools from collecting information or documents regarding citizenship or immigration status from students and their family members. The law limits the ability to request personal information or access to a school site requested by law enforcement and requires requests to be reported to the superintendent of the education agency.[91] It requires the California Department of Education to publish model policies on how to limit assistance with immigration enforcement in public schools and ensures that public schools remain safe and accessible to California students regardless of immigration status.[92]

SUMMARY OF PANEL TESTIMONY

The Committee convened two events to gather testimony: one on October 16, 2019 at the Los Angeles Central Library in Los Angeles and the other on March 4, 2020 at Southwestern College in Chula Vista. Stakeholders, including the Customs and Border Protection, the California Department of Justice, academics, national and state advocacy organizations, legal experts, and individuals speaking on their own behalf or on behalf of interested organizations testified in person or provided written statements. In addition, the Committee convened a meeting with representatives from U.S. Immigration and Customs Enforcement on June 24, 2020 to obtain responses to specific questions[93] posed by the Committee after receiving initial testimony at their meetings in Los Angeles and Chula Vista. Various opinions were presented in testimony offering a wide array of perspectives in the areas of the possible impact of immigration enforcement on California children and otherwise; the role of immigration enforcement; federal immigration enforcement policy and its potential effects; the possible impact of California's sanctuary policies; due process and domestic violence reporting.

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[89] *See* ICE's website for its Secure Communities program: https://www.ice.gov/secure-communities.

[90] Cal. Educ. Code §§ 200, 220, 234.1, 234.7.

[91] *Id*. at 234.7(b).

[92] *Id*. at 234.7(f)(1).

[93] See California Advisory Committee Letter to ICE in Appendix.

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Impact of Immigration Enforcement and K-12 Students

Central to the Committee's inquiry is to consider the impact of immigration enforcement on all K-12 students. According to the Pew Research Center, in 2014, 3.2 million K-12 students in the U.S. were children of undocumented immigrants.[94] Additionally, California is one of six states that has the highest share of K-12 students with undocumented immigrant parents representing 12.3 percent.[95]

Panelists discussed three areas that immigration enforcement may have on students' wellbeing, academic performance, and safety.

Patricia Gándara, professor of education at the University of California, Los Angeles testified to the potential scope of students affected by immigration enforcement. She stated that in California, at least 750,000 children live with an undocumented parent, including 250,000 children who are undocumented themselves, constituting an estimate of 12 percent of all children in the state.[96]

Health and Wellbeing

The Committee received testimony from some speakers that students experience a range of health concerns as a result of the worry of being subject to immigration enforcement. For instance, several panelists stated that students and their parents may live in the midst of fear and anxiety because of the perception of heightened immigration enforcement.[97]

In an attempt to measure the impact of immigration enforcement on students, Professor Gándara testified to findings in a national study[98] of students as observed by educators from 24 districts with more than 760 schools in 13 states, many of which represent Title I schools.[99] The survey

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[94] Pew Research Center, https://www.pewresearch.org/fact-tank/2016/11/17/children-of-unauthorized-immigrants-represent-rising-share-of-k-12-students/, accessed May 3, 2019.

[95] Ibid. Also, according to Pew Research, there are an estimated 2.2 million unauthorized immigrants living in California and U.S.-born children made up 81% of all children of unauthorized immigrants enrolled in grades K-12 in the entire United States in 2014.

[96] "Undocumented Students In California: What You Should Know," *Education Trust-West,* 2017, https://west.edtrust.org/wp-content/uploads/sites/3/2015/11/ETW_CA-Undocumented-Students-What-You-Need-to-Know-FINAL-April-2017.pdf (accessed on April 10, 2020); Patricia Gándara, testimony, *Briefing Before the California Advisory Committee to the U.S. Commission on Civil Rights*, *Los Angeles, CA*, Oct. 16, 2019, transcript, p. 30 (hereafter cited as *Los Angeles Briefing*).

[97] Vaughan Testimony, *Los Angeles Briefing*, p. 27; Vazquez Testimony, *Los Angeles Briefing*, p. 102; Peralez-Dieckmann Testimony, *Los Angeles Briefing*, pp. 183-84; Gándara Testimony, *Los Angeles Briefing*, p. 32.

[98] Jongyeon Ee and Patricia Gándara, *The Impact of Immigration Enforcement on the Nation's Schools*, 57(2) AM. EDUC. RESEARCH JOURNAL 840–71(April 2020). doi:10.3102/0002831219862998. (hereafter cited as Immigration Enforcement on the Nation's Schools).

[99] Title I schools are schools that receive federal funding for children from low-income families to help ensure that all children meet challenging state academic standards.

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captured the perceived impact of immigration enforcement on several topic areas: absenteeism, behavioral/emotional problems, academic performance, students' overt expression of concerns and fears at school, indirect effects on classroom climate, indirect effects on peers, parents' expression of concerns, parental involvement, and bullying.

According to her study, immigration enforcement affects all students because students have overtly expressed fear and especially among those who attend Title I schools.[100] Specific findings related to the perception of California children's well-being include 85 percent of the 1,480 California educators who completed the survey reported observing students' overt expressions of fear of an ICE intervention in their lives, with nearly 44 percent saying this was "extensive."[101] The study also found that pervasive fear and concern in the schools was consistent across regions surveyed; nearly 80 percent of educators surveyed reported observing emotional and behavioral problems among their immigrant students that many described as interfering with students' ability to attend to lessons.[102] This fear, according to Jessica Vaughan, director of policy studies at the Center for Immigration Studies could be addressed by having advocacy groups and schools engage with ICE to understand their roles and the types of situations, such as arrest or incarceration, that could lead to deportation.[103]

Professor Gándara and Mayra Alvarez, president of the Children's Partnership, also noted concerns with frequent bullying among students. According to Professor Gándara, roughly 37.6 percent of educators surveyed saw an increase in bullying among students.[104] The increased bullying in surveyed schools especially impact students who are perceived to be undocumented but are usually not.[105] Concurring with Professor Gándara's study findings, representatives from the Children's Partnership testified that many students are bullied because they or their parents were not born in the United States[106] and California passed AB 699 to address the issue of bullying based on immigration status:

> [California Assembly Bill 699, 2017-2018] [which] codified…the responsibility of schools to educate [] families o[f] …the impacts of bullying and pass anti-bullying policies and information around bullying based on immigration status.[107]

Ms. Alvarez also testified that students' mental health is negatively impacted. She stated that children who witness the detention or deportation of a parent experience depression, anxiety, and psychological distress. In addition, she testified that even the threat of a parent being detained or deported negatively impacts their social and emotional development.[108] Due to symptoms of

[100] Immigration Enforcement on the Nation's Schools, at 4.

[101] Ibid., 3.

[102] Ibid.

[103] Vaughan Testimony, *Los Angeles Briefing*, p. 27.

[104] Ibid., 3.

[105] Gándara Testimony, *Los Angeles Briefing,* p. 61.

[106] Alvarez Testimony, *Los Angeles Briefing*, p. 189.

[107] Cal. Educ. Code § 234.1(a), § 234.1(b); Thornton Testimony, *Los Angeles Briefing*, p. 106.

[108] Alvarez Testimony, *Los Angeles Briefing*, p. 189.

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mental distress, some children refuse to eat, pull out their hair, or have persistent stomachaches or headaches.[109] In addition, children of undocumented parents showed significantly higher risk of internalizing behavioral problems like anxiety, depression, withdrawal, as well as externalizing behavioral problems such as rule breaking and displays of irritability and aggression.[110]

In situations when a parent or parents are taken away, Ms. Alvarez stated that children left behind may face dramatically reduced incomes, housing and food security, and an increased risk of entering the child welfare system, all of which are predictors of poor social and educational outcomes for children later in life.[111] She said that a solution to address the impacts of immigration enforcement on students is to seek a human approach to immigration policy.

Professor Gándara stated that the perception of heightened immigration enforcement also prompted the American Psychological Association to draft a letter to the Trump Administration about the impact it may have on children.[112] According to the American Psychological Association, immigrants who fear deportation are much more vulnerable to heart disease, asthma, diabetes, depression, anxiety, and post-traumatic stress disorder, and their children are more likely to experience psychological distress, academic difficulties, and disruptions in their development.[113]

On the other hand, Stella May, Director for Concerned Citizens of California raised concern about the health of students as more undocumented immigrants have entered the U.S. and may be carriers of new and re-emerging rare diseases, including but not limited to: the Polio-like virus, EVD-68; Drug-resistant Tuberculosis; Chagas disease; Leprosy; Chicken pox; Mumps; Measles; Whooping Cough and other respiratory diseases. She claimed that the Centers for Disease Control admits "re-emerging dangerous diseases" have been "imported" such as Malaria, Dengue fever, Scabies, and other historically uncommon illnesses.[114] She called for enforcement of medical examinations of individuals applying to enter into the U.S.[115]

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[109] H. Koball, et al., "Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents," *Urban Institute and Migration Policy Institute*, September 2015.

[110] "The Effect of Hostile Immigration Policies on Children's Mental Health*," The Children's Partnership and California Immigrant Policy Center,* March 2017. p. 2. https://www.childrenspartnership.org/wp-content/uploads/2017/03/The-Effect-of-Hostile-Immigration-Policies-on-Childrens-Mental-Health.pdf (accessed on April 7, 2020); Alvarez Testimony, *Los Angeles Briefing*, p. 189.

[111] Alvarez Testimony, *Los Angeles Briefing*, p. 190

[112] American Psychological Association letter to the Trump Administration on June 14, 2018 https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation (accessed on April 2, 2020).

[113] American Psychological Association, "The Psychology of Immigration," https://www.apa.org/advocacy/immigration/ (accessed on April 2, 2020).

[114] Stella May, testimony, *Community Forum Before the California Advisory Committee to the U.S. Commission on Civil Rights, Chula Vista, CA,* transcript, p. 12 (hereafter cited at *Chula Vista Community Forum*). The press release, available at https://www.cdc.gov/media/releases/2014/p0529-measles.html, attributes these diseases to "international travel by unvaccinated people" and not to immigrants specifically.

[115] Ibid, (Ms. May is referring to 42 C.F.R. § 34, 70, 71).

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While there may be potential impacts of immigration enforcement on children, ICE implemented policies aimed at reducing the harm that children experience from the detention or deportation of their parents. For instance, immigration law gives discretion to ICE officers to suspend deportation for some immigrants.[116] ICE also implemented a directive known as the "Detention and Removal of Alien Parents of Legal Guardians" that provides guidelines for protecting children whose parents are apprehended, detained, and deported.[117] This directive includes designating a specific point of contact within each field office for matters involving detained parents; promoting complete entry of relevant case information into ICE's data and tracking systems; determining initial detention placement and transfer decisions; facilitating court participation in family court of child welfare proceedings; and other elements.[118]

Academic Performance

Professor Gándara also stated that some surveyed teachers indicated that some children experienced a decline in academic performance that they believe had to do with immigration enforcement. *Plyler v. Doe* provides children, regardless of their immigration status, the fundamental right to an education.[119] Professor Gándara's study suggests that students' education is largely disrupted and experience a host of academic outcomes due to current immigration enforcement policies.[120] Even with ICE policies that set safe zones where no enforcement activity is to take place,[121] Professor Gándara testified that students and parents reportedly still expressed hesitation about sending their children to schools in fear that they would be targeted.[122] She added that in cases when the head of a household is deported, it causes financial hardships that reportedly lead to children experiencing stress, concentration difficulties, disruptive behaviors, school absences, and parental disengagement.[123]

Drawing from the same study authored by Professor Gándara, 54 percent of educators surveyed reported that absenteeism had increased due to immigration enforcement. She testified that this is of concern because for some students, this may mean they are missing the only meal they may get that day.[124] Absenteeism, Professor Gándara stated, harms everyone and reduces funding in schools.[125] Students are absent, reportedly, because they are afraid of being bullied, because they

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[116] Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 CONN. PUB. INT. L.J. 243, 263 (2010) (quoting a 2009 DHS press release on relief for widows of U.S. citizens).

[117] U.S. Immigration and Customs Enforcement, ICE Detained Parents Directive, https://www.ice.gov/parental-interest.

[118] Ibid

[119] *Plyler v. Doe,* 457 U.S. 202 (1982); Gándara Testimony, *Los Angeles Briefing*, p. 34.

[120] Gándara Testimony, *Los Angeles Briefing*, p. 34.

[121] Sensitive Locations FAQ, https://www.ice.gov/ero/enforcement/sensitive-loc.

[122] Gándara Testimony, *Los Angeles Briefing*, p. 32.

[123] Amuedo-Dorantes Testimony, *Los Angeles Briefing*, pp. 16-17.

[124] Gándara Testimony, *Los Angeles Briefing*, p. 34.

[125] Ibid.

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hear rumors about ICE raids, and/or they are scared their parent may be taken by ICE while they are in school.[126] She said, "absenteeism, in turn, creates havoc in schools, because classrooms are disrupted."[127]

According to Professor Gándara, a fourth of educators who completed the same survey also said that the behavioral issues that impede their students' learning were extensive. These issues include crying in school, acting out, putting their heads down on their desk, and tuning out of lessons.[128]

Catalina Amuedo-Dorantes, professor of economics at the University of California, Merced presented her research, a national study, using Current Population Survey data on the educational cost of intensified enforcement for children ages 6 through 17. Her study found that immigration enforcement adversely impacted children of undocumented immigrants, the vast majority of whom are U.S. born citizens.[129] According to Professor Amuedo-Dorantes, increased immigration enforcement increases the probability of youth 6-13 repeating a grade by 14 percent.[130] For older youth ages 14 to 17, dropping out of school rose by 18 percent.[131]

A study conducted by Professor Gándara found similar conclusions noting that 59 percent of respondents reported a decline in academic performance of students that they said was a result of immigration enforcement.[132] She added an anecdote from a school counselor who said:

> I've met with various students, who feel there's no hope for them, and letting[sic] their grades slip because they're under so much stress and unsure about the future. I struggle with encouraging them to have faith when I am unsure myself. It just breaks my heart.[133]

Professor Gándara emphasized that nearly 90 percent of children of undocumented immigrants are believed to be U.S. citizens. With this statistic in mind, she noted that many high school educators said their best students are giving up aspirations to go to college, and reducing their commitment to school.[134] Some students have even considered quitting school to get a job to help their family because their futures are so uncertain.[135] In another case, a high school teacher, who responded to Professor Gándara's survey, said that students who were college bound now

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[126] Ibid.

[127] Gándara Testimony, *Los Angeles Briefing*, pp. 34-35.

[128] Ibid., 33.

[129] Catalina Amuedo-Dorantes and Mary J. Lopez, *The Hidden Educational Costs of Intensified Immigration Enforcement*, SOUTHERN ECONOMIC JOURNAL, 84: 120-154. https://doi.org/10.1002/soej.12207; Amuedo-Dorantes Testimony, *Los Angeles Briefing*, pp. 12-20.

[130] Amuedo-Dorantes Testimony, *Los Angeles Briefing*, p. 16.

[131] Ibid.

[132] Gándara Testimony, *Los Angeles Briefing,* p. 35

[133] Ibid.

[134] Ibid., 32.

[135] Ibid.

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question if it is worth pursuing because they are worried they would not be able to qualify for financial aid.[136]

The Committee also received testimony regarding concerns for U.S. citizen students, who have been deported to Mexico, and their transition into Mexican schools. Angelina Corona, Executive Director for Hermandad Mexicana Nacional noted that she received concerns about the increasing number of U.S. citizen children who left for Mexico with no transition process to allow for students to continue their education in Mexico.[137] Professor Gándara noted that roughly 53,000 U.S. born American citizen children are attempting to be integrated into Mexican schools.[138] These children are at enormous risk for "very poor long-term [educational] outcome[s]"[139] because they are unable to read and write Spanish despite being able to speak the language.

Public Safety

Several panelists also testified to the impact that immigration enforcement has on public safety for children. Ms. Vaughan stated that ICE makes a "very noteworthy contribution to school safety"[140] through its enforcement program that targets transnational gangs like MS-13 and 18th Street. She stated that these gangs are known to recruit in schools; and have many young members who are in the U.S. illegally.[141] Based on a study conducted by the Center for Immigration Studies examining MS-13 arrest cases nationwide between 2012-2018, there were 52 murder victims under the age of 18 from M-13 gang crimes and 87 of the 500 cases occurred in California.[142]

Don Rosenberg, President for Advocates for Victims of Illegal Alien Crime; Ms. Vaughan; and members of the Remembrance Project also testified that without federal immigration enforcement undocumented immigrants who have committed egregious crimes against U.S. citizens will continue to endanger U.S. citizens, including children, as long as sanctuary laws are in place.[143] Mr. Rosenberg testified that his son was killed by an undocumented immigrant driving without a driver's license.[144] Ms. Vaughan testified to criminal cases, which she stated

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[136] Ibid.

[137] Corona Testimony, *Los Angeles Briefing,* p. 82.

[138] Gándara Testimony, *Los Angeles Briefing,* p. 39.

[139] Ibid.

[140] Vaughan Testimony, *Los Angeles Briefing*, p. 25.

[141] Ibid., 25-26.

[142] Jessica M. Vaughan, "MS-13 Resurgence: Immigration Enforcement Needed to Take Back Our Streets," *Center for Immigration Studies*, February 2018, https://cis.org/Report/MS13-Resurgence-Immigration-Enforcement-Needed-Take-Back-Our-Streets.

[143] Rodriguez Testimony, *Chula Vista Community Forum*, pp. 3-4; Hvidston Testimony, *Chula Vista Community Forum*, pp. 13-5, Vaughan Testimony, *Los Angeles Briefing*, p. 25.

[144] Rosenberg Testimony, *Los Angeles Briefing*, p. 169.

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involves undocumented immigrants. Ms. Vaughan testified regarding several criminal cases to a case where an alleged MS-13 gang leader was arrested for the slaying of a Novato High School student in the Spring of 2016[145] and in a separate case, there was a 17-year-old alleged MS-13 gang member who was arrested for the rape of a 15-year-old schoolmate.[146] Also, a member of the Remembrance Project, Raúl Rodriguez, shared a story about a 14-year-old woman who was abducted and killed by an undocumented immigrant who had committed other abductions in Central California and fled to Mexico to avoid arrest.[147] Robin Hvidston shared that similar crimes committed by undocumented immigrants occurred in cities across the country.[148] These crimes include the killing of a 19-year-old Oakland woman in a fatal road rage shooting where the perpetrator left the country,[149] sexual assault of a toddler at a Chicago fast food restaurant by a man who has a felony record and had previously been deported to Mexico[150] and the rape of a minor by an Ecuadorian national living in New York City who had multiple criminal convictions.[151]

Due Process

The Committee also heard testimony regarding due process for undocumented immigrants and sought to understand if there are civil rights concerns associated to the administration of justice. Lucero Chavez, Senior Staff Attorney at Public Counsel, the largest pro bono public interest law firm in the U.S., testified to the due process rights of undocumented individuals and ICE officials

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[145] Vaughan Testimony, *Los Angeles Briefing*, p. 26; Gary Klein, "Alleged MS-13 gang leader arrested in connection with Marin teen's slaying," *Mercury News*, Nov. 22, 2016, https://www.mercurynews.com/2016/11/22/alleged-ms-13-gang-leader-arrested-in-connection-with-marin-teens-slaying/.

[146] Vaughan Testimony, *Los Angeles Briefing*, p. 26; "Report: Novato High Murder Suspect Has Been Arrested in Rape Case," *CBS San Francisco Bay Area,* Jun. 17, 2019, https://sanfrancisco.cbslocal.com/2016/06/17/report-novato-high-murder-suspect-had-been-arrested-in-rape-case/.

[147] Rodriguez Testimony, *Chula Vista Community Forum,* p. 3. Joe Szydlowski, "Man pleads guilty to killing of 14-year-old Christy Piña in 1990 Castroville cold case," *The Californian,* Oct. 9, 2019, https://www.thecalifornian.com/story/news/2019/10/09/man-pleads-guilty-rape-murder-cold-case-castroville-california/3919964002/.

[148] Hvidston Testimony, *Chula Vista Community Forum*, p. 15.

[149] Harry Harris, "Suspect in fatal road rage shooting of 19-year-old Oakland woman identified," *East Bay Times,* Dec. 27, 2019, https://www.eastbaytimes.com/2019/12/27/suspect-in-fatal-road-rage-shooting-of-19-year-old-oakland-woman-identified/.

[150] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Man Arrested for Sexually Assaulting Toddler at Fast Food Restaurant Should Have Been Turned Over to ICE in 2019*, Feb. 27, 2020, https://www.ice.gov/news/releases/man-arrested-sexually-assaulting-toddler-fast-food-restaurant-should-have-been-turned.

[151] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *ICE Arrests Ecuadorian Man Accused of Raping a Minor During Enforcement Efforts in New York*, Jan. 31, 2020, https://www.ice.gov/news/releases/ice-arrests-ecuadorian-man-accused-raping-minor-during-enforcement-efforts-new-york#wcm-survey-target-id.

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provided additional context as to how they provide them with access to legal representation despite the fact that they are not required to do so.[152]

Primarily working on behalf of clients who are English language learners and are recent arrivals of unaccompanied minors, Ms. Chavez explained that undocumented immigrants have a right to due process,[153] to counsel, to find an attorney, pay an attorney, and have an attorney represent them in "very complicated" Immigration Court proceedings.[154] In addition, they have the right to notice of proceedings against them and the opportunity to be heard in that proceeding.[155] Undocumented immigrants have a right to due process because courts have consistently held that anyone in the U.S. is protected by the Constitution's right to due process, even if they illegally entered the country, though people generally have greater legal protections inside the country than at the border.[156] She also added that they do not have the right to government-recognized counsel.[157] The amount of due process is decided based on the situation. In one ruling, undocumented immigrants who entered the U.S. illegally and ordered to be deported have a right to appeal those decisions.[158] However, the courts have also decided that Congress can decide that more limited procedures are sufficient for noncitizens detained at the border.[159] David Marin, Director of Enforcement and Removal Operations for ICE's Los Angeles regional office explained that despite undocumented individuals not being granted an attorney, ICE provides them with access to obtaining legal representation.[160] This includes an updated list of lawyers who offer pro bono legal representation and access to their home country's Consulate General.[161]

Ms. Chavez testified to her experience with helping children going through immigration court proceedings. In many cases, she said that those apprehended at or near the border are very young children.[162] These children are told immigration officials that they will not be deported.[163] When

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[152] Chavez Testimony, *Los Angeles Briefing*, p. 72.

[153] *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (noting that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent").

[154] Chavez Testimony, *Los Angeles Briefing*, p. 72; *Tawadras v. Ashcroft*, 364 F.3d 1099, 1106 (9th Cir. 2004) (explaining that the failure to properly obtain a knowing and voluntary waiver of counsel creates "a level of prejudice tantamount to a violation of ...due process rights.").

[155] *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. 2006).

[156] U.S. CONST. amend. V.

[157] Chavez Testimony, *Los Angeles Briefing*, p. 73.

[158] *Zadvydas v. Davis* (99-7791)185 F.3d 279 and 208 F.3d 815, vacated and remanded.

[159] *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), *superseded by statute*, The Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1252, as recognized in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

[160] David Marin, testimony, *Meeting Before the California Advisory Committee to the U.S. Commission on Civil Rights*, Jun. 24, 2020, transcript, pp. 19-20 (hereafter cited as *6/24/20 Meeting*).

[161] Ibid.

[162] Chavez Testimony, *Los Angeles Briefing*, p. 73.

[163] Ibid., 75-76.

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apprehended, she said, they are presented text-heavy documents advising them of their rights that include the right to call an attorney and call the parent. While this is her experience, ICE disagreed that the forms are text-heavy. Mr. Marin stated that children are read their rights and required to sign and date a form in the children's language.[164] They have a 24/7-language access line, which offers over 240 languages and dialects that agents use if the individual needs assistance with understanding those forms.[165]

She added that children are processed like criminal defendants: they are photographed, fingerprinted, and interrogated alone – however, in some cases they may have an interpreter present who speaks their language.[166] Statements made during their interview, she testified, are used against them at their own proceedings.[167] Children are given multiple forms to sign in English even if they do not know how to read, let alone read English.[168] Finally, they are placed in what she called "iceboxes"[169] known to children as "hierleras"[170] and then transferred to large shelters.

According to Ms. Chavez, there are concerns with the administration of justice for undocumented children's right to due process. First, because the U.S. does not provide attorneys for undocumented children in immigration court proceedings, these children are sometimes left to defend themselves in court. Ms. Chavez expressed grave concern that a senior Department of Justice official argued that 3- and 4-year-olds can represent themselves in immigration court.[171] In addition, considering the time it takes to go through immigration court proceedings and the quotas placed on judges to fast track immigration court cases, she testified that she does not believe judges will take the time to explain to the children forms of relief that are available to them such as asylum or special immigrant juvenile status.[172]

Secondly, she testified that immigration courts are not abiding by the required time period of 180 days to adjudicate an asylum petition for a child.[173] Ms. Chavez said this regulation is routinely violated and petitions are not adjudicated causing backlogs and preventing many undocumented

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[164] Marin Testimony, *6/24/20 Meeting*, p. 18.

[165] Ibid., 19-20.

[166] Chavez Testimony, *Los Angeles Briefing*, p. 73.

[167] Ibid.

[168] Ibid., 74.

[169] Ibid.

[170] Ibid.

[171] Jerry Markon, "Can a 3-year old represent herself in immigration court? This Judge thinks so," *Washington Post*, Mar. 5, 2016. https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html (accessed on April 1, 2020).

[172] Chavez Testimony, *Los Angeles Briefing*, p. 77.

[173] Ibid., 78.

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immigrants from receiving, if qualified, legal status.[174] Also of concern are the court rulings that change the law while petitions are pending and while people are waiting for their cases to be heard.[175] She stated that this is one of the most egregious examples of a due process violation because immigration lawyers must rely on existing law and are beholden to changes to the rules in the middle of the process.[176]

Other concerns, she stated, with the administration of justice include: unchecked authority of administrative agencies that decide immigration cases and decide petitions, the lack of an established right to government-appointed counsel, additional state court and immigration court proceedings, heightened standard of evidence for attorneys to produce on behalf of their clients when the same standard does not apply to other non-undocumented litigants or the government itself.[177]

The behavior of judges at immigration court proceedings was also noted in Ms. Chavez's testimony. During immigration court, attorneys, even when present, are "bullied, [and] strong-armed by immigration judges or government attorneys when [defense attorneys] try to assert [their] clients' rights," and "threaten[ed] to re-detain or take retaliatory action against the clients' families."[178] Also, she said that immigration judges continue to excuse violations committed by immigration officers at the border and even after apprehension.[179]

Also related to the administration of justice during immigration court proceedings, Ms. Chavez said that undocumented children face challenges with getting legal representation because nonprofit law firms are largely underfunded and understaffed.[180] This deficit is of concern because children are more likely to receive the relief they are seeking if counsel represents them.[181]

Considering her experience, she noted several recommendations to address the abovementioned challenges litigating on behalf of immigrant children. She testified that families should be kept together at the border and children should not be kept in cages or boxes.[182] In addition, all stakeholders who deal with immigrant children receiving due process should follow existing

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[174] Ibid.

[175] Ibid., 78-79.

[176] Ibid., 79.

[177] Ibid.

[178] Ibid., 76.

[179] Ibid., 78.

[180] Ibid., 76.

[181] "Representation for Unaccompanied Children in Immigration Court." Syracuse University. https://trac.syr.edu/immigration/reports/371/; see also "Access to Counsel." *National Immigrant Justice Center.* https://www.immigrantjustice.org/issues/access-counsel (accessed on April 1, 2020).

[182] Chavez Testimony, *Los Angeles Briefing*, p. 79

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laws that are meant and created to protect the rights of children.[183] She also suggested recognizing the right to government-appointed counsel for children, which is currently in litigation.[184] Lastly, she recommended for government agencies to follow their own deadlines as there is a 180-day requirement for cases to be adjudicated.[185]

Crime Victims and Victims of Domestic Violence

In 2017, California Supreme Court Chief Justice Tani Cantil-Sakauye delivered a letter[186] to then-Attorney General Jeff Sessions and then-Secretary Kelly expressing her "deep"[187] concern over reports from trial courts that federal immigration agents are "stalking undocumented immigrants" and arresting them at trial courts in the state. Persons affected by ICE tactics, the Chief Justice wrote, include "crime victims, victims of sexual abuse and domestic violence, witnesses to crimes who are aiding law enforcement, limited-English speakers, unrepresented litigants, and children and families seeking justice and due process of the law."[188] Chief Justice Cantil-Sakauye noted that while enforcement of the nation's immigration laws is necessary, "enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair."[189] She asked federal officials to refrain from enforcing in California's courthouses after hearing of incidents at local courthouses and courtrooms from judicial officers throughout the state.[190] In a joint response, then-Attorney General Jeff Sessions and then-Secretary Kelly stated that Justice Cantil-Sakauye should direct her concerns to Governor Jerry Brown and to law enforcement officials who refuse to honor detainers as several California municipalities are "sanctuary cities" that limit police cooperation with ICE.[191] They stated that "[s]uch policies threaten public safety, rather than enhance it," and as a result, ICE requires to arrest these individuals in public places, rather than in jails.[192]

Related to Chief Justice Cantil-Sakauye's concern, the Committee heard and received testimony from persons and witnesses regarding the effect of immigration enforcement actions on the

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[183] Ibid.

[184] Ibid.

[185] Ibid.

[186] Letter from Chief Justice Cantil-Sakauye to Attorney General Sessions and Secretary Kelly, Mar. 16, 2017 https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] Ibid.

[192] "Response from Sessions and Kelly to California's Chief Judge on Immigration," Mar. 29, 2017, https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

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administration of justice and the impact on participation in the justice system individuals who may be undocumented. One of the specific issues addressed by panelists related to the impact of immigration enforcement on reporting of domestic violence incidents. One of the panelists was Esther Peralez-Dieckmann, executive director for Next Door Solutions, an advocacy organization supporting survivors of domestic violence. Ms. Peralez-Dieckmann stated that in her experience domestic violence survivors are becoming more hesitant to report abuse to law enforcement because of fear of deportation for themselves or family members.[193] Ms. Peralez-Dieckmann, like other panelists, noted that with approximately 90 percent of all children in those households being U.S. citizens, the issue of immigration enforcement is placing an added stress on those children with the possibility of long-term emotional and psychological impacts.[194] Fear of deportation is layered with and exacerbated by existing cultural and linguistic barriers that keep many of these communities isolated and afraid of coming forward to report.[195] Also, abusers threaten their victims and keep them from seeking help and as a result, it keeps children in abusive and unstable homes, continuing to witness violence and experience trauma themselves.[196]

Professor Catalina Amuedo-Dorantes and Ms. Peralez-Dieckmann testified that restraining orders were not being filed at the level they were previously;[197] and that many survivors are afraid to go to court because they fear they will get picked up by ICE.[198] Ms. Peralez-Dieckmann, using the filing of restraining orders as an indicator to measure frequency of domestic violence reporting, cautioned to be wary of a decrease in reporting data related to domestic violence incidents because it means that "people do not trust they're going to be served with justice."[199]

On the other hand, Mr. Rosenberg argued that reporting is impacted by the implementation of state laws like Prop 47,[200] Prop 57,[201] and sanctuary laws.[202] He provided an example of how

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[193] Peralez-Dieckmann Testimony, *Los Angeles Briefing*, p. 180

[194] Ibid; Lee and Suh Statement, at 3.

[195] Lee and Suh Statement, at 3.

[196] Ibid.

[197] Ibid., 204; Amuedo-Dorantes Testimony, *Los Angeles Briefing*, p. 44; Police Trust and Domestic Violence: Evidence from Immigration Policies, Catalina Amuedo-Dorantes Esther Arenas-Arroyo, I Z A Institute of Labor Economics, Discussion Paper Series (Oct. 2019).

[198] Lee and Suh Statement, at 3.

[199] Peralez-Dieckmann Testimony, *Los Angeles Briefing*, p. 204.

[200] Prop 47 is a California law that changed certain low-level crimes from potential felonies to misdemeanors. Prop 47 also directs financial savings realized from reduced state costs into a new state fund to treat mental illness and drug addiction, reduce truancy, expand diversion and support crime victims.

[201] Prop 57 is a California law that incentivizes inmates to take responsibility for their own rehabilitation with credit-earning opportunities for sustained good behavior, as well as in-prison program and activities participation. Proposition 57 also moves up parole consideration of nonviolent offenders who have served the full-term of the sentence for their primary offense and who demonstrate that their release to the community would not pose an unreasonable risk of violence to the community.

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sanctuary policy impedes the work of immigration enforcement and jeopardizes public safety and in this example, especially for domestic violence victims. Mr. Rosenberg detailed an account of an undocumented immigrant who was arrested for a domestic violence incident involving his girlfriend and was sent to the Sonoma County Jail.[203] According to Mr. Rosenberg, ICE asked local officials to keep him in custody so that they can detain him, however the Sonoma County Sheriff's office released him and waited an hour and a half before calling ICE to pick the individual up.[204] Sixteen days later, the individual returned home and murdered his girlfriend.[205] Such an example, Mr. Rosenberg says, impacts how immigrant communities view law enforcement in ensuring the detainment of individuals who commit domestic violence offenses and public safety.[206]

Other factors, Ms. Vaughan argued, influence a decrease in crime reporting. She asserted that studies have shown that an increase in immigration enforcement has not resulted in a decrease in crime reporting by immigrants.[207] Crime reporting and crime rates are affected by factors such as police budgets, policing strategies, and the weather.[208] Police departments, she said, "have to make sure that people have access to policing services that they feel [] they can report crimes without fear like anonymous tip lines, [][] community policing officers, officers on the force who speak the language of the community."[209] Additionally, the Department of Justice data indicates that Hispanic women report crimes more frequently than any other racial/ethnic group,[210] a statistic she stated contradicts the belief that immigrants as a group are less likely to report crimes. Immigrants surveyed by academic researchers have said that sometimes they have not reported crimes because of the following reasons: they do not know how to report a crime, they do not speak English, they do not know that what happened to them is a crime, they do not think their complaint will be taken seriously, and/or they come from countries where they do not trust authority.[211]

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[202] Rosenberg Testimony, *Los Angeles Briefing*, p. 111.

[203] Ibid., 112.

[204] Ibid.

[205] Ibid.

[206] Ibid.

[207] Thomas M. Guterbock et al, *Evaluation Study of Prince William County's Illegal Immigration Enforcement Policy: FINAL REPORT 2010*, prepared for the Prince William County (Va.) Board of Supervisors, November 2010, p. 96, Figure 8-7, https://www.pwcgov.org/government/dept/police/Documents/13185.pdf.

[208] Vaughan Testimony, *Los Angeles Briefing*, p. 47.

[209] Ibid.

[210] U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization,* by Jennifer L. Truman, *2010*, NCJ235508, September 2011, Table 8 on p. 11, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2224; U.S. Department of Justice, Bureau of Justice Statistics, *Race and Hispanic Origin of Victims and Offenders, 2012-15,* by Rachel E. Morgan, October 2017, Table 6 on p. 7, https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf.

[211] Robert C. Davis et al, "Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and Prosecutors," *Criminal Justice Policy Review*, Volume 12, Number 3, September 2001, p. 190, https://www.researchgate.net/profile/Edna_Erez/publication/245158456_Access_to_Justice_for_Immigrants_Victimized_by_Crime_The_Perspectives_of_Police_and_Prosecutors/links/587404ea08ae6eb871c67b68/Access-to-

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Other panelists asserted that implementing various best practices will help build community trust among immigrant communities and will allow them to feel comfortable reporting domestic violence incidents. These best practices include ensuring that local law enforcement have a female officer respond to incidents,[212] and conduct outreach and education to the immigrant community about relief available to the survivor through the U-Visa and the Violence Against Women Act.[213] Similarly, there should be more education to assist the immigrant community with distinguishing between immigration enforcement officers and local law enforcement, as it would help them feel comfortable reporting crime.[214]

Immigration Enforcement

Panelists described the purpose of immigration policy, the role of federal agencies mandated to enforce immigration laws, and their observations about how immigration officials enforce laws passed by Congress.

Explanation of Immigration Enforcement

The Committee received testimony from several panelists, including current and former ICE officials to understand immigration enforcement efforts. The Committee heard from David Marin, director of Enforcement and Removal Operations for ICE's Los Angeles regional office; Richard Rocha, acting assistant director for ICE's Office of Partnership and Engagement; Barbara M. Gonzalez, assistant director for ICE's Office of Partnership and Engagement; and Claude Arnold, a retired special agent who led ICE's Homeland Security Investigations Los Angeles regional office.

What is not widely known to the public about ICE, according to former and current ICE representatives, is that there are two major enforcement components: Homeland Security Investigations and Enforcement and Removal Operations.[215] Homeland Security Investigations is the principal investigative component responsible for investigating cross-border crime. It is also responsible for conducting child pornography investigations, money laundering, illegal export of technology and firearms, drug smuggling, and investigating immigration violations.[216] As it

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Justice-for-Immigrants-Victimized-by-Crime-The-Perspectives-of-Police-and-Prosecutors.pdf; Robert C. Davis and Nicole J. Henderson, "Willingness to Report Crimes: The Role of Ethnic Group Membership and Community Efficacy," in *Crime and Delinquency*, October 2003, https://journals.sagepub.com/doi/10.1177/0011128703254418; Cecilia Menjívar and Cynthia L. Bejarano, "Latino immigrants' perceptions of crime and police authorities in the United States: A case study from the Phoenix Metropolitan area," in *Ethnic and Racial Studies*, January 2004, https://asu.pure.elsevier.com/en/publications/latino-immigrants-perceptions-of-crime-and-police-authorities-in- ; Vaughan Testimony, *Los Angeles Briefing*, p. 48.

[212] Amuedo-Dorantes Testimony, *Los Angeles Briefing*, p. 60.

[213] Corona Testimony, *Los Angeles Briefing*, p. 99.

[214] Chavez Testimony, *Los Angeles Briefing*, p. 101.

[215] Rocha Testimony, *6/24/20 Meeting*, p. 16; Arnold Testimony, *Los Angeles Briefing*, p. 118.

[216] Arnold Testimony, *Los Angeles Briefing*, p. 118.

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relates to investigating immigration violations, Mr. Arnold explained that Homeland Security Investigations is mainly focused on large-scale criminal organizations that facilitate the illicit cross-border traffic of people.[217] Homeland Security Investigations has the authority to arrest people who are in violation of immigration laws and will only conduct arrests if it is in support of one of their investigations of a criminal organization.[218] In addition to Homeland Security Investigations, Enforcement and Removals Operations plays an important role in enforcing civil immigration laws such as interior removal proceedings.[219]

Like Mr. Arnold, Mr. Marin stated that while there are many critics of immigration enforcement, it benefits everyone because it ensures public safety.[220] Mr. Marin stated that ICE focuses on individuals who are in the U.S. illegally and who have committed a crime and/or have been previously removed.[221] According to ICE, 90 percent of apprehended individuals have a criminal record.[222] He stated that if 10 are arrested, only one of them fall into the category of not having a criminal record, but has either been ordered to be removed from the country and has not left yet or has been deported and returned without authorization.[223] ICE also places cases on a hierarchy based on the individual's criminal history and prioritize their enforcement efforts.[224] High on their list includes terrorists, murderers, and rapists.[225] Also included are individuals without felony convictions such as individuals with DUIs because they are believed to be a threat to the community.[226]

Although ICE, for the most part, targets individuals who have criminal records, Mr. Marin testified that individuals who do not have records could also be targeted for removal. For instance, an individual whose case is reviewed by the Department of Justice's Executive Office of Immigration Review can be ordered for removal by an immigration judge and ICE's authority permits them to enforce the judge's order.[227]

ICE provided explanations for several scenarios highlighted in media reports and those concerning to Committee members. For instance, news reports[228] allege that ICE conduct

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[217] Ibid.

[218] Ibid.

[219] Marin Testimony, *6/24/20 Meeting*, p. 3.

[220] Arnold Testimony, *Los Angeles Briefing*, p. 122; Marin Testimony, *6/24/20 Meeting*, p. 3.

[221] Marin Testimony, *6/24/20 Meeting*, p. 14.

[222] Ibid., 15.

[223] Ibid.

[224] Ibid.

[225] Ibid., 14.

[226] Ibid., 14-15.

[227] Ibid., 15.

[228] Caitlin Dickerson, Nick Corasaniti, and Edgar Sandoval, "ICE Launches Raids Targeting Migrant Families," *New York Times,* Jul. 14, 2019, https://www.nytimes.com/2019/07/14/us/ice-immigration-raids.html;

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random immigration sweeps and raids.[229] Mr. Marin clarified that every action performed by ICE is a targeted enforcement operation based on a biometric match.[230] When an individual is apprehended by local law enforcement, fingerprinted, and entered into a database, ICE is notified to enforce a removal if that individual's fingerprints match.[231] The individual is usually flagged for the following reasons: because he or she has been ordered for removal and has not left the country; has a criminal record that makes them removable; has been removed from the country before; and/or are on a terrorist watch list.[232] According to Ms. Vaughan, the portrayal of mass immigration enforcement is inaccurate and this "inaccurate narrative…stokes fear and panic in immigrant communities."[233]

In another scenario, the Committee asked about immigration enforcement actions performed in sensitive locations such as schools. Mr. Marin explained that ICE does not routinely go into schools to enforce immigration laws and that such a situation would be rare.[234] He said most media reports claiming ICE enforcement at schools are false and misreported. He stated there are no statutory prohibitions to conduct enforcement actions even next to schools, but as an agency, they recognize the sensitivity and negative impact of immigration enforcement at schools.[235] As such, ICE created the 2011 Sensitive Locations policy.[236] The policy directs agency personnel to avoid conducting targeted enforcement activities in specific locations deemed sensitive including near schools.[237] Ms. Gonzalez and Mr. Marin explained that enforcement actions that occur near schools only occur if they have prior approval from an appropriate supervisory official[238] or "in the event of exigent circumstances."[239] In those cases, Mr. Marin said, ICE conducts thorough surveillance of the individual so that arrests are done safely.[240]

In addition, Mr. Marin said that ICE does not ask about the immigration status of students and their parents and that ICE would never arrest a parent at a school that their child attends unless they receive approval from their Washington D.C. headquarters.[241] Mr. Rocha also shared that

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[229] Marin Testimony, *6/24/20 Meeting*, p. 4.

[230] Ibid.

[231] Ibid.

[232] Ibid.

[233] Vaughan Testimony, *Los Angeles Briefing*, p. 22.

[234] Marin Testimony, *6/24/20 Meeting*, p. 13.

[235] Ibid., 21

[236] Ibid.

[237] Sensitive Locations FAQ.

[238] Ibid., 13.

[239] Barbara M. Gonzalez, Assistant Director U.S. Immigration and Customs Enforcement (ICE), letter to Ana Fortes, September 17, 2019. (hereafter cited as ICE Email to USCCR).

[240] Marin Testimony, *6/24/20 Meeting*, pp. 17-18.

[241] Ibid., 13.

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ICE's Community Relations Office serves as a point of contact to local entities that need clarification about rumors regarding ICE's planned enforcement actions.[242]

Mr. Marin also explained enforcement actions that involve parents. He said, "being a parent[] doesn't absolve a person for their crimes"[243] and that when a parent is detained they "do everything [they] can to ensure the safety of that child."[244] He added that they do not arrest children, but have arrested families in the past if a judge orders for their removal. Subsequently, families are taken into custody together at one of the two family residential centers in Pennsylvania and Texas. [245]

ICE also clarified that they do not target day laborers who are suspected of being in the U.S. illegally. In the mid-1990s, immigration officials used to park in front of a Home Depot waiting to round up people to establish probable cause.[246] These individuals were then driven to and dropped off at the border.[247] Assessing its impact, Mr. Marin stated that it discontinued this strategy because it was not an effective use of their resources.[248] Mr. Rocha added that "an arrest is made because of that individual, not because of where they work"[249] and that any time an enforcement action is performed, officers have information on that individual, including where they may frequent and at what time.[250] Furthermore, enforcement actions performed at work sites are always a part of criminal investigations and involve obtaining federal warrants to seize property and other evidence to further those cases.[251]

Mr. Arnold testified to the Committee that immigration enforcement is a federal statute codified under Title 8 of the U.S. Code and is not a policy act. He noted that how the laws are enforced should take into account the constitutional interests and rights of citizens and that enforcement of the laws involves policy decisions.[252] Congress is responsible for passing immigration laws and the President has the ability to influence the enforcement of these laws as well as set priority areas.[253] Mr. Arnold also shared that the most recent change to the Immigration and Nationality Act was in 2000[254] and that the law has not changed significantly in the Trump

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[242] Rocha Testimony, *6/24/20 Meeting*, pp. 11-12.

[243] Marin Testimony, *6/24/20 Meeting*, p. 22.

[244] Ibid.

[245] Marin Testimony, *6/24/20 Meeting*, p. 22.

[246] Ibid., 16.

[247] Ibid.

[248] Ibid., 17.

[249] Rocha Testimony, *6/24/20 Meeting*, p. 16.

[250] Ibid.

[251] Ibid.

[252] Arnold Testimony, *Los Angeles Briefing*, pp. 145-46.

[253] Ibid., 116.

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Administration.[255] He noted that the highest number of removals in a fiscal year during the Obama Administration was 432,448 in 2013[256] compared with 337,287 in 2018 during the Trump Administration.[257]

Peter Nuñez, a former federal prosecutor with extensive experience in federal law enforcement policy, added that these laws were passed by Congress and that any country that passes laws then refuses to enforce or implement those laws, "is violating the most basic concepts of democracy and the concept of a rule of law which we try to convey around the world."[258] The consequence of the lack of enforcement is that it will encourage people to commit crimes. He stated:

> Whenever any person breaks the law, the violator is not the only person to suffer the consequences. Innocent family members, relatives, friends, neighbors, coworkers, all may suffer collateral consequences as a result of the arrest and punishment of the violator.[259]

Individuals who violate immigration laws of the U.S., he said, are likely to face criminal sanctions or administrative sanctions such as deportation or removal and that, "the blame for these collateral consequences should fall on the immigration violator, not the government agency charged by Congress with enforcing our immigration laws."[260] Mr. Nuñez testified that ICE is seen as the face of immigration enforcement and believed to be the cause of the consequences when individuals break U.S. federal immigration law. He said that efforts should instead be dedicated to "discouraging [] law breakers from initiating this chain of events that can only end in serious problems for their families."[261]

Ms. Vaughan, who agreed that immigration enforcement helps ensure public safety, also testified that immigration enforcement supports several public policy goals. She said that it helps protect job opportunities for Americans and for legal immigrants and prevents wage erosion, especially for Americans who have not had access to a higher education; and preserves the integrity of legal immigration system by making sure that the rules are enforced.[262]

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[254] Legal Immigration and Family Equity Act of 2000. https://www.aila.org/infonet/full-text-of-life-act-and-life-act-amendments.

[255] Arnold Testimony, *Los Angeles Briefing*, p. 116.

[256] U.S. Department of Homeland Security, 2017 Yearbook of Immigration Statistics, *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2017*, https://www.dhs.gov/immigration-statistics/yearbook/2017/table39; Arnold Testimony, *Los Angeles Briefing*, p. 137.

[257] U.S. Department of Homeland Security, 2018 Yearbook of Immigration Statistics, *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2018*, https://www.dhs.gov/immigration-statistics/yearbook/2018/table39. Data for 2019 and 2020 have not been released.

[258] Nuñez Testimony, *Chula Vista Community Forum*, p. 6.

[259] Ibid., 7.

[260] Ibid.

[261] Ibid.

[262] Ibid.

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Mr. Rosenberg argued that while immigration enforcement provides a public safety benefit, he testified that immigration is not enforced to the extent that it should be. Mr. Rosenberg, who founded an organization that "help[s] those who have been victims of crimes committed against them or their family by illegal noncitizens"[263] shared a story about the murder of his son by an undocumented immigrant driving without a license, who he learned entered the country illegally in 1999 and was given temporary protective status in 2000. He contributed to the immigration debate when he learned that "illegal noncitizens were a significant part of [the immigration] problem and responsible for more than half of the annual vehicle fatalities."[264] Reflecting upon these trends and understanding that many who enter the U.S. illegally do not mean harm, he questioned the lack of acknowledgement of the crimes committed by undocumented immigrants in political debates around immigration and challenged efforts to protect these individuals from deportation.[265] He testified that, his son and thousands of others have been impacted by the lack of enforcement and their civil rights were violated "to the maximum as their lives were taken from them because we didn't enforce our laws."[266] Similar to other speakers, he cautioned that if laws are not enforced for undocumented immigrants especially those who commit crimes, there will be more deaths, rapes, and crimes committed against law-abiding citizens, legal residents, and other illegal noncitizens.[267]

Border Security

While not a central theme to the Committee's inquiry, some panelists referenced border security actions.

Hector Andujo, a Border Patrol Agent who represents the National Border Patrol Council, testified to the process of apprehending individuals at the U.S./Mexico border. Mr. Andujo explained that he was trained to "be respectful and be professional at all times"[268] and ask a series of questions concerning the individual's wellbeing; if the individual has all of their belongings; if anyone was left behind, in distress, or has died along the way. He said that his role also requires being a first responder because he has provided these individuals with water, food, and even diapers.[269] In all his years of working as an agent, Mr. Andujo stated that he has never witnessed any misconduct and that his experience has been "nothing but positive from Border Patrol agents."[270]

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[263] Rosenberg Testimony, *Los Angeles Briefing*, p. 169.

[264] Ibid., 171.

[265] Rosenberg Testimony, *Los Angeles Briefing*, pp. 172-73.

[266] Ibid., 173.

[267] Ibid.

[268] Andujo Testimony, *Chula Vista Community Forum*, p. 9.

[269] Ibid., 11

[270] Ibid.

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Although Mr. Andujo's testimony indicates no concern regarding protocol and observation of possible misconduct at the apprehension stage, testimony from Jill Esbenshade, principal researcher and author of a 2019 ACLU study[271] indicated concerns with the treatment of asylum seekers in detention by immigration officers and general protocol. The report documents aspects of the current U.S. asylum process from the perspective of asylum seekers transitioning through the San Diego Migrant Family Shelter and noted that half of asylum seekers reported mistreatment by immigration officers, most commonly verbal abuse and threats. Others in the study reported being denied adequate food, clean drinking water and bedding. In addition, more than three quarters of people surveyed reported being unable to shower, even if detained longer than the 72-hour standard. As it relates to the health of asylum seekers, two-thirds of adults and more than 40 percent of children were not screened by medical personnel while detained. Of those who reported medical problems to immigration officers, more than a third did not receive medical attention while detained. Asylum seekers also reported that immigration officers did not communicate legal documentation instructions in a manner they understood and nearly half of people surveyed reported they were not informed of their rights.[272]

Solutions to Immigration Enforcement Challenges

Panelists offered varying solutions related to federal enforcement actions.

Mr. Nuñez argued that until "Congress rises to its responsibilities to address our ongoing immigration crisis, this country will continue to struggle with illegal immigration and the consequences it visits on the minority communities and the country at large."[273] He suggested several recommendations, some of which are already stated in immigration law; these include: reform laws that allow for individuals to seek asylum; improve border enforcement where needed and effective entry-exit system to deal with those who overstay their visas; increase attention by ICE to monitor those who overstay their visas; enforce labor laws that do not allow undocumented immigrants from obtaining a job in the U.S., and increase workplace enforcement by ICE.[274]

Along with Ms. Vaughan and Ms. May, Mr. Nuñez stated that local and state jurisdictions should cooperate fully with federal officials to jointly discourage future illegal immigration through effective enforcement of joint laws.[275]

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[271] Jill Esbenshade, "The Right to Seek Asylum: Migrants' Stories of the Struggle for Human Rights, Dignity, Peace and Justice in the United States," *ACLU*, Dec. 10, 2019, https://www.aclusandiego.org/wp-content/uploads/2019/12/The_Right_to_Seek_Asylum-Migrant-Stories_with_Links-1.pdf (hereafter cited as *The Right to Seek Asylum*).

[272] *The Right to Seek Asylum,* p. 7.

[273] Nuñez Testimony, *Chula Vista Community Forum*, p. 8.

[274] Ibid.

[275] Nuñez Testimony, *Chula Vista Community Forum*, p. 8; May Testimony, *Chula Vista Community Forum*, p. 12; Vaughan Testimony, *Los Angeles Briefing,* p. 20.

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To dispel misinformation about immigration enforcement actions impacting certain immigrant communities, Ms. Vaughan advocated for transparency from ICE to release more information on its operation regarding who is being targeted and why (e.g. due to prior offenses or deportations, failure to comply with court orders, warrants from other law enforcement agencies, etc.[276] In addition, she called for other solutions such as encouraging Congress and the President to appropriate more federal funding to support anti-gang operations, expedite the removal of deportable gang members, and examine how the lack of immigration enforcement impacts American citizens.[277]

Other panelists explained the need for a pathway to citizenship to address issues with federal enforcement actions.[278]

Current Immigration Enforcement Efforts by the Numbers

Enforcement actions conducted by Department of Homeland Security agencies are varied and collectively work to prevent unlawful entry into the U.S. and to apprehend and repatriate noncitizens who have violated or failed to comply with U.S. immigration laws. Accordingly, the primary responsibility for the enforcement of immigration law within DHS rests with U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement (ICE). Customs and Border Protection enforces immigration laws at and between the ports of entry and ICE is responsible for interior enforcement and for detention and removal operations.

Enforcement and Removals Operations is the ICE directorate that carries out most of the high-profile immigration enforcement activities that have been the subject of political controversy, including large-scale enforcement actions and the management of detention centers. Its mission is

> [t]o identify, arrest, and remove noncitizens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts.[279]

As such, Enforcement and Removals Operations' main areas of focus are interior enforcement operations, management of agency's detained population nationwide, and removal of noncitizens who have received a final order. Discussion concerning the prevalence of immigration enforcement can be illustrated in the annual statistics released by the Enforcement and Removals Operations report.[280] In 2019, ICE decreased the number of administrative arrests – arrests that

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[276] Vaughan Testimony, *Los Angeles Briefing,* p. 28.

[277] Ibid., 29.

[278] Alvarez Testimony, *Los Angeles Briefing,* p. 212; Peralez-Dieckmann Testimony, *Los Angeles Briefing,* p. 213.

[279] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Who We Are*, https://www.ice.gov/about-ice (updated May 13, 2020).

[280] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report,* 2019, https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. (hereafter cited as *2019 ERO Report*).

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involve a civil violation of immigration law – by 10 percent from 2018 and reportedly focused largely on criminals (Figure 1). ICE noted they are "committed to directing [their] enforcement resources to those aliens posing the greatest risk to the safety and security of the United States."[281]

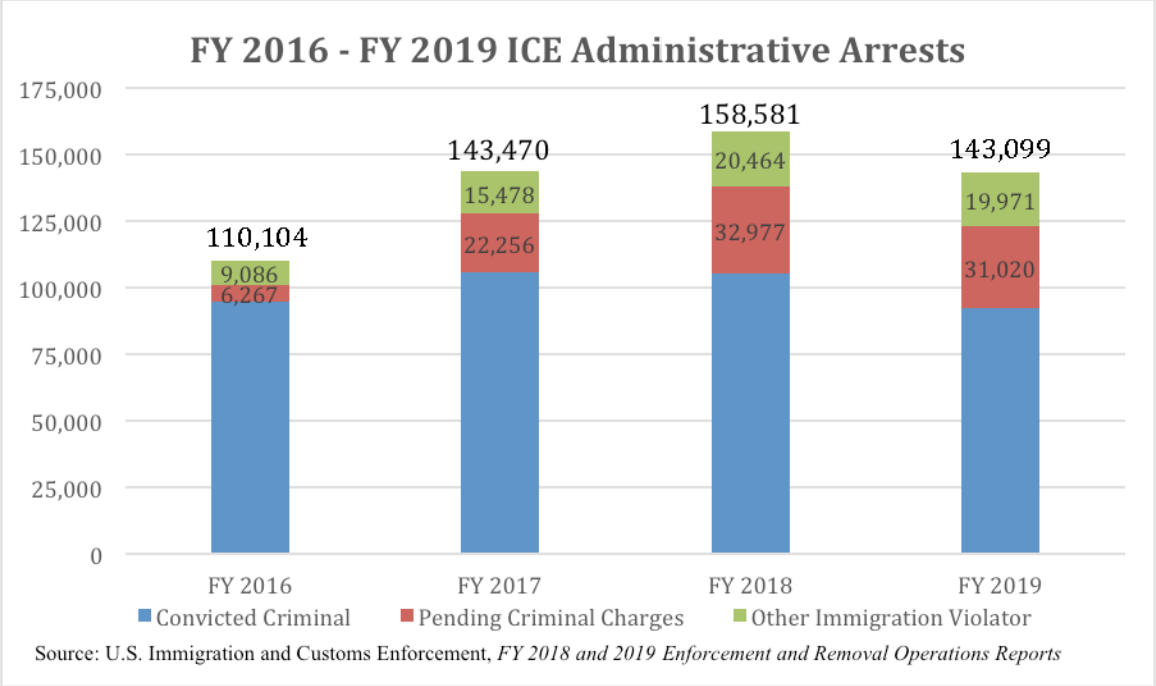

Figure 1

Data on administrative arrests were the highest within a four-year span in 2018 when Enforcement and Removals Operations made 158,581 arrests. The lowest number of arrests occurred in 2016 when Enforcement and Removals Operations made 110,104 arrests. Such arrests are subsequently adjudicated by an immigration judge or through other administrative processes. While arrests provide one indicator of the prevalence of enforcement activity, Mr. Arnold argued it does not illustrate the full extent of immigration enforcement. Arrests, according to Mr. Arnold, is not a significant indicator of the federal government's overall enforcement actions as the number of arrests do not guarantee removals. In his experience, most individuals who are arrested end up being released, awaiting the outcome of their removal proceedings, and are likely to abscond.[282]

ICE also reports on the number of detainers—a request from ICE to local law enforcement agencies to notify Department of Homeland Security as early as practicable before a removeable noncitizen is released from local custody. Detainers are issued to reduce potential risks to Enforcement and Removals Operations officers and the general public by allowing arrests to be made in secure custodial settings as opposed to at-large in communities, conserve scarce

[281] *2019 ERO Report*, at 21.

[282] Arnold Testimony, *Los Angeles Briefing*, p. 152.

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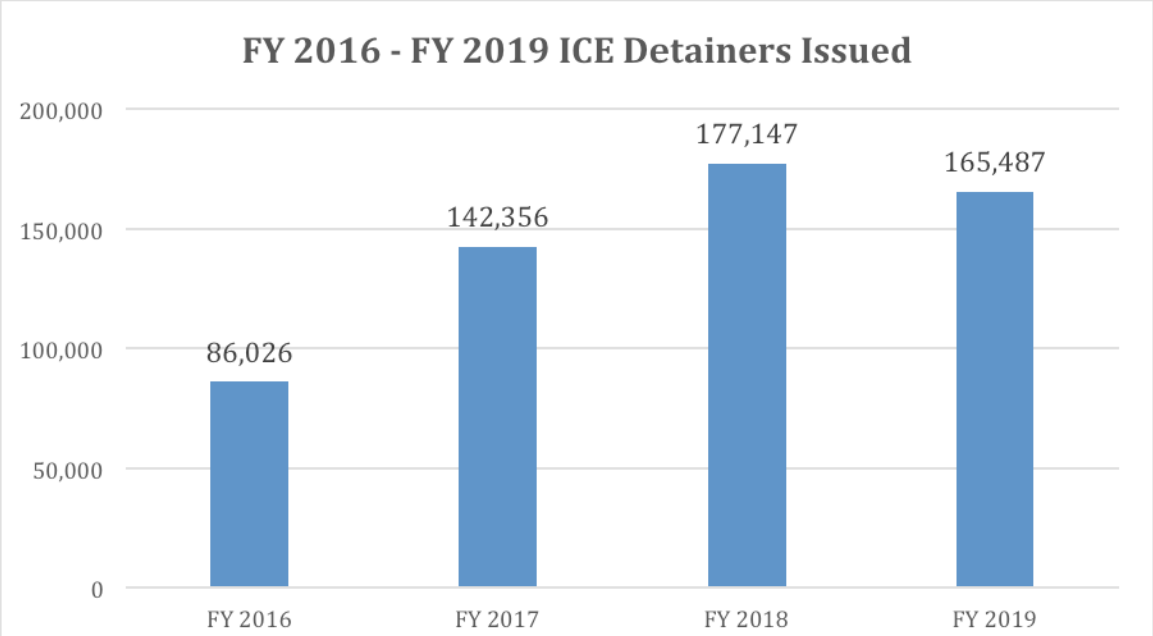
government resources, and allow Enforcement and Removals Operations to assume custody of criminal noncitizens before they have an opportunity to reoffend.[283]

Lee Sherman, Deputy Attorney General for the California Department of Justice testified that he measures the frequency of immigration enforcement based on the number of ICE detainers issued to California law enforcement agencies.[284] In 2017, there were 142,356 detainers issued to local law enforcement nationwide and 35,000 detainers specifically issued to California law enforcement agencies.[285] In 2019, the Enforcement and Removals Operations issued 165,487 detainers across all law enforcement agencies for noncitizens who committed crimes such as assault, sex crimes, robberies, and homicides (Figure 2). The seven percent decrease from 2018 year was reportedly impacted by the diversion of resources to the Southwest Border as well as limited detention space to hold these individuals.[286] Additionally, ICE experienced an increase in the number of jurisdictions that do not cooperate with its enforcement efforts and stated that it is the biggest impediment to Enforcement and Removals Operations' public safety efforts.[287]



Source: U.S. Immigration and Customs Enforcement, *FY 2018 and 2019 Enforcement and Removal Operations Reports*

Figure 2

[283] *2019 ERO Report*, p. 16.

[284] Sherman Testimony, *Los Angeles Briefing*, p. 141.

[285] Ibid

[286] *2019 ERO Report*, p. 17.

[287] Ibid

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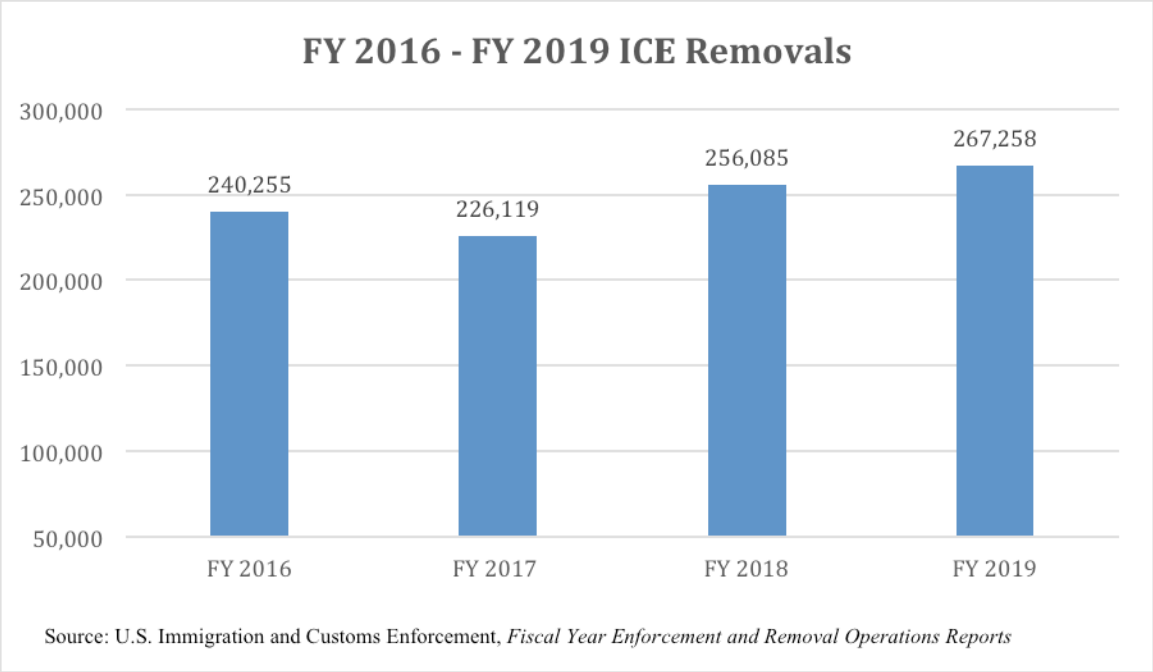
An ICE removal is the compulsory and confirmed movement of an inadmissible or deportable noncitizen out of the U.S.[288] ICE removals include both noncitizens arrested by ERO in the interior of the county and noncitizens who were apprehended by Customs and Border Protection and turned over to Enforcement and Removals Operations for removal efforts.[289] In FY 2019, ICE removed 267,258 noncitizens, an increase from the 256,085 removals in FY 2018 (Figure 3).[290] ICE reported that while their overall removals increased slightly from the previous year, the portion of removals resulting from Customs and Border Protection apprehensions increased significantly during the period as a direct result of the changes in migration flows at the Southwest Border.[291]



Source: U.S. Immigration and Customs Enforcement, *Fiscal Year Enforcement and Removal Operations Reports*

Figure 3

[288] 8 U.S.C. § 1231.

[289] *2019 ERO Report,* p.18.

[290] Ibid., 19.

[291] Ibid., 10, 12.

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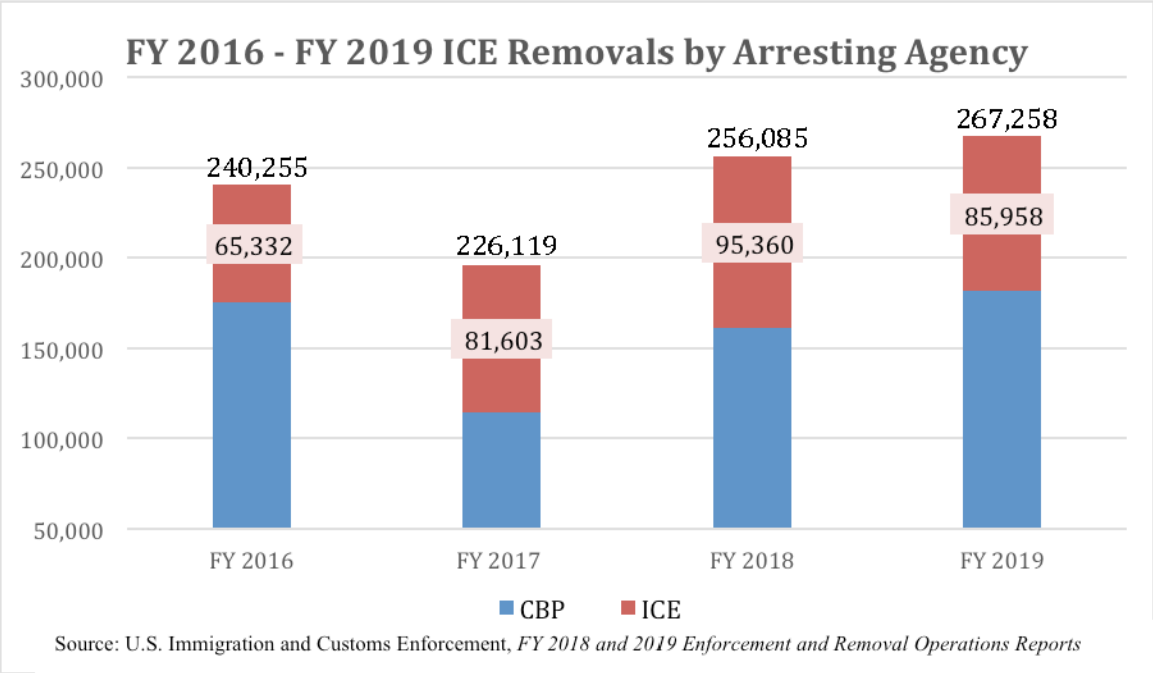
Based on fiscal year 2016 to fiscal year 2018 figures, there was a 31.6 percent increase in removals (from 65,332 to 85,958) tied to ICE arrests with fiscal year 2018 as the highest increase at 46 percent (65,332 to 95,360) (Figure 4).[292]



Source: U.S. Immigration and Customs Enforcement, *FY 2018 and 2019 Enforcement and Removal Operations Reports*

Figure 4

Changes to Federal Immigration Enforcement Policy

In the decades after the ratification of the Constitution, the Supreme Court took a leading role in determining how the immigration power would be allocated among the three branches of Government. Ultimately, the Court gave "plenary power," in other words, absolute power over immigration to Congress and the Executive.[293]

In recent years, U.S. presidents have attempted to manage immigration by issuing executive orders. Executive orders instruct administrative agencies what to do and are followed like a law. Similarly, each president made administrative changes that shift the way U.S. immigration policies are carried out going forward. Testimonies below note a few of these changes to immigration enforcement policies that aimed to curb immigration for certain populations.

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[292] *2019 ERO Report*; U.S. Immigration and Customs Enforcement, *Fiscal Year 2018 Enforcement and Removal Operations Report,* p. 11, https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.

[293] *Fong v. United States,* 149 U.S. 698 (1893).

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Panelists, Joann Lee, special counsel for Legal Aid Foundation of Los Angeles and Debra Suh, executive director for Center for the Pacific Asian Family, were concerned about the 2018 Department of Homeland Security change to its longstanding policy of allowing certain types of humanitarian relief to be filed without risk of removal. Now, even battered spouse petitions under the Violence Against Women Act and relief as human trafficking victims are subject to removal, if denied.[294] According to Ms. Lee and Ms. Suh, a high volume of Asian and Pacific Islander survivors with children seek these benefits and stated that this policy change sent "a great chilling effect" to survivors who are undocumented from coming forward to apply for relief because they risk potential deportation if their applications are not considered strong enough.[295] Several of their Asian and Pacific Islander clients face challenges as many have limited evidence of their victimization due to linguistic and cultural barriers, as well as their fears of reporting to law enforcement and seeking relief in court.[296] Heightened scrutiny, mistrust, and misapplication of the law, they say, have been the causes for a delay in getting applications approved.[297]

USCIS also enhanced requirements to obtain fee waivers for certain applications.[298] Ms. Lee and Ms. Suh stated that this change could impact undocumented survivors from applying because of their inability to pay and "adversely affects the[ir] ability [] to achieve safety, stability and self-sufficiency for themselves and their children, as they must overcome more barriers in order to flee abusive situations and obtain lawful immigration status."[299]

The Administration's announcement in August of 2018 about proposed changes to the definition of "public charge" also raised concern among some speakers. The new rule[300] established that a "public charge" refers to someone who receives public benefits for more than 12 months out of 36. While the public charge rule does not apply to U.S. citizens,[301] some panelists asserted the

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[294] U.S. Department of Homeland Security, Citizenship and Immigration Services, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, Jun. 28, 2018, https://www.uscis.gov/news/alerts/uscis-continue-implementing-new-policy-memorandum-notices-appear.

[295] Joann Lee, Special Counsel, Legal Aid Foundation of Los Angeles; Debra Suh, Executive Director, Center for the Pacific Asian Family, Joint Written Statement for the Los Angeles Briefing before the California Advisory Committee to the U.S. Commission on Civil Rights, October 16, 2019 at p. 4 (hereinafter Lee and Suh Statement).

[296] Ibid.

[297] Ibid.

[298] USCIS Updates Fee Waver Requirements, https://www.uscis.gov/news/news-releases/uscis-updates-fee-waiver-requirements (updated 10/25/2019).

[299] Lee and Suh Statement at 4.

[300] Inadmissibility of Public Charge Grounds, A Rule by the Homeland Security Department, 84 Fed. Reg. 41292 (August 14, 2019) https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds. Since its announcement, plaintiffs in New York, Connecticut, and Vermont have pursued legal action. On July 31, 2020, the U.S. District Court of the Southern District of New York blocked the implementation of the public charge rule (see David Welna, "Twin Rulings by Federal Judge Block 'Public Charge' Rules for Immigrants," *NPR*, Jul. 31, 2020, https://www.npr.org/2020/07/31/897429845/twin-rulings-by-federal-judge-block-public-charge-rules-for-immigrants).

[301] U.S. Department of Homeland Security, Citizenship and Immigration Services, *Public Charge Fact Sheet*, https://www.uscis.gov/news/public-charge-fact-sheet (updated July 31, 2020).

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announcement of the potential change caused fear among many immigrant communities who may live in mixed-status households.[302] Mayra Alvarez, president of the Children's Partnership testified that, if implemented, up to 628,000 children, many of whom are U.S. citizens, will lose Medicaid coverage and up to 311,000 will lose access to food stamps or CalFresh[303] based on an analysis conducted by The Children's Partnership and Kidsdata.org which mirrors Henry J. Kaiser Family Foundation's analysis predicting levels of disenrollment.[304] Another panelist, Ms. Corona, testified that even permanent residents are afraid to leave the country because they do not believe they will be able to return.[305] She said that individuals are fearful that proposed changes to public charge law could notify immigration officials of their use of public benefits causing them to be a target for deportation.[306] Also, Lorena Vazquez, a representative from the Los Angeles Unified School District said that parents expressed concern about applying for the lunch meal program and feared discussing with a Los Angeles Unified School District's staff specialist about their medical insurance options.[307] She testified that parents are also refraining from submitting Medi-Cal[308] forms that would enable children to access mental health and health services offered in their wellness clinics despite Los Angeles Unified School District staff informing parents that the resources will not affect them.[309]

Lastly, Ms. Lee and Ms. Suh indicated that potential changes[310] to the Deferred Action for Childhood Arrivals (DACA) program, an Obama-era program that shields young undocumented immigrants from deportation, has also affected Asian and Pacific Islander children and young adults in California.[311] Although the large majority of those eligible for DACA are from Latin American countries, Ms. Lee and Ms. Suh noted there are 120,000 immigrants from Asian countries eligible, many of whom reside in California.[312] They stated that these individuals are

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[302] Corona Testimony, *Los Angeles Briefing*, p. 81; Vazquez Testimony, *Los Angeles Briefing,* p. 104.

[303] CalFresh is the California implementation of the federal Supplemental Nutrition Assistance Program which provides financial assistance for purchasing food to low-income California residents.

[304] Samantha Artiga Rachel Garfield, and Anthony Damico, "Issue Brief: Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage," *Henry J. Kaiser Family Foundation*, Sept. 2009, https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-final-public-charge-inadmissibility-rule-on-immigrants-and-medicaid-coverage/.

[305] Corona Testimony, *Los Angeles Briefing*, p. 81

[306] Ibid.

[307] Vazquez Testimony, *Los Angeles Briefing,* p. 104.

[308] Medi-Cal is a California health program that offers free or low-cost health coverage for children and adults with limited income and resources.

[309] Vazquez Testimony, *Los Angeles Briefing,* p. 103.

[310] In September of 2017, the Trump Administration ordered to rescind DACA and at the center of three lawsuits combined into one that will be heard by the Supreme Court: Department of Homeland Security, et al., v. Regents of the University of California, et al. As of June 18, 2020, the Supreme Court rejected the Trump Administration's to dismantle the DACA program in a 5-4 decision.

[311] Lee and Suh Statement, at 4.

[312] Ibid.

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from all parts of Asia, with significant numbers from Korea, China, and India; and[313] historically, participation in DACA of those from Asian countries has been low, due to fear, lack of knowledge about the program, and language barriers.[314] The proposed curtailing of the DACA program, according to Ms. Lee and Ms. Suh, will negatively impact Asian and Pacific Islander youth from "obtaining and maintaining the life-changing opportunities that DACA can provide."[315]

California Approach

In the past few years, jurisdictions have adopted so-called sanctuary policies, a term applied to jurisdictions that limit cooperation with federal immigration authorities, such as declining to provide information about an individual's personal information for immigration enforcement purposes and refusing to extend the length of a person's detention pursuant to an ICE detainer hold.[316] These policies have emerged as a point of tension between federal, state, and local authorities. California legislators passed three "sanctuary" policies that went into effect during over the last six years. These laws include the Trust Act (AB 4), the Truth Act (AB 2792), and the Values Act (SB 54).[317]

California Trust Act (AB 4),[318] California Truth Act (AB 2792)[319] and California Values Act (SB 54)[320]

California is involved in several court cases still pending against the Trump Administration challenging recent immigration enforcement actions. At the time of the Committee's meetings in October 2019 and March 2020, the implementation of the California Values Act was at the

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[313] Gregg Orton and John Yang, "DACA Has a Significant Impact on the Asian American Community," *Insight into Diversity*, Apr. 17, 2018. Accessed March 25, 2020 https://www.insightintodiversity.com/daca-has-a-significant-impact-on-the-asian-american-community/;

[314] Douglas Soule, "Why Are DACA Participation Rates so Low for Asian Immigrants?" *Globe Post*, Jul. 10, 2019. https://theglobepost.com/2019/07/10/daca-asian-immigrants/ (accessed March 25, 2020).

[315] Ibid.

[316] States and localities cooperate with federal law enforcement, particularly in criminal investigations, for example, under voluntary agreements such as the 287(g) program. Some state and local governments have policies that limit cooperation in civil investigations to support public safety and community policing goals, such as encouraging witnesses and victims of crime to come forward.

[317] The Trust Act (AB 4) went into effect in 2014, the Truth Act (AB 2792) in 2016, and the Values Act (SB 54) in 2017.

[318] Gov. Code §§ 7282, 7282.5.

[319] Cal. Gov't. Code § 7283 et seq.

[320] Cal. Gov't. Code § 7284 et seq.

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center of one of these court cases between the California Attorney General Xavier Becerra's office and the Trump Administration.[321]

Testifying to the enforcement of the state's sanctuary policies carried out by the California Attorney General's Office, Deputy Attorney General, Lee Sherman said that the Bureau of Children's Justice within the Civil Rights Enforcement section is responsible for protecting the rights of children through systemic enforcement and advocacy efforts, juvenile justice, child welfare, and access to education.[322] He explained that in response to the increase in immigration enforcement from 2016 to 2017,[323] California lawmakers passed the California Values Act with the aim to:

> foster community trust and ensure that the state's law-abiding immigrant population can interact with the state and local governments without the fear that those interactions will result in deportation."[324]

Discussed in the California Values Act are changes in the way in which California law enforcement agencies respond to immigration enforcement requests about the people they serve. Deputy Attorney General Sherman said:

> [it is] guided by the State's values and those are that every Californian, irrespective of their nationality, their race, their ethnicity, their citizenship status, or their immigration status, should feel safe and secure in participating in their communities. They should feel free to access public facilities, seek medical treatment, pursue justice in court, and [] attend school."[325]

The California Values Act, he stated, is significant because it defines the circumstances in which California law enforcement agencies may participate in immigration enforcement. The California legislature argued that enacting the California Value Act

> is in the best interest of public safety and was critical to effective policing, protecting the safety and constitutional rights of Californians, and directing the state's limited resources toward issues of local concern.[326]

The law prohibits law enforcement agencies from asking a person about his or her immigration status for immigration purposes, holding an individual past his or her ordinary release on the basis of an ICE detainer, and providing personal information about an individual for immigration enforcement purposes unless that information is publicly available.[327] The Values Act also

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[321] Noting that the Supreme Court declined the Department of Justice's request to review a federal appeals court decision that upheld three California sanctuary laws: https://www.scotusblog.com/2020/06/court-turns-down-governments-sanctuary-state-petition/.

[322] Sherman Testimony, *Los Angeles Briefing*, p. 126.

[323] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Fiscal Year 2018 Enforcement and Removal Operations Report,* p. 6, https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.

[324] Sherman Testimony, *Los Angeles Briefing*, p. 127.

[325] Ibid., 127-28.

[326] Ibid., 131.

[327] Cal. Gov't. Code § 7284 et seq.

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directed the Attorney General's office to issue model policies for responding to immigration issues for colleges and universities, courthouses, health care facilities, libraries, shelters, and labor agencies, to ensure safety and accessibility for all Californians; and in October of 2018, these model policies were published.[328]

On the other hand, ICE officials critical of California's sanctuary laws argued that "these sanctuary policies and[*sic*] these non-cooperative jurisdictions… are only protecting criminal aliens."[329]

Ms. Gonzalez testified that:

> Communities are safer when law enforcement work [] together, yet sanctuary policies and laws like those in California, continue to hinder the coordination [between ICE and law enforcement agencies] needed to keep dangerous criminals off the streets."[330]

Mr. Rocha added that measures that limit the cooperation between law enforcement and ICE have not been helpful and pointed to states like Texas, Florida and Iowa that have passed laws mandating cooperation with immigration enforcement and sharing of information with ICE.[331]

Drawing on tracked data, the number of detainers honored by law enforcement agencies may serve as a measurement for public safety risk. In September 2019, ICE officials issued over 11,000 detainers to the Los Angeles County Sheriff's Department and less than 500 of those have been honored.[332] Because few detainers are honored, panelists argued, criminal undocumented immigrants are released to the community, providing the opportunity for these individuals to disappear and/or reoffend.[333] Since 2014 there have been more than 10,000 individuals who were sought by ICE after a criminal arrest, but who were released because of sanctuary policies, and subsequently reoffended.[334] ICE noted that they do not track how many individuals have been arrested, released and have subsequently committed crimes, but some sheriff's offices may track more specific information about an individual.[335]

Some of those re-offenses, according to Ms. Vaughan, are against children. She gave an example of a deportable individual who was released and kept getting arrested for continued sexual abuse

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[328] Cal. Gov't. Code § 7284.8 (a) et seq.

[329] Marin Testimony, *6/24/20 Meeting*, p. 24.

[330] ICE Email to USCCR.

[331] Rocha Testimony, *6/24/20 Meeting*, p. 25.

[332] U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Local ICE Director Discusses Sanctuary Policy Impact on Public Safety*, Sept. 26, 2019 https://www.ice.gov/news/releases/local-ice-director-discusses-sanctuary-policy-impact-public-safety#wcm-survey-target-id.

[333] Vaughan Testimony, *Los Angeles Briefing,* p. 25; Rosenberg Testimony, *Los Angeles Briefing,* p. 112.

[334] Vaughan Testimony, *Los Angeles Briefing,* p. 25.

[335] Marin Testimony, *6/24/20 Meeting*, pp. 5-6.

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of a child under 10.[336] She concluded that the federal government and states should pursue injunctions and other legal challenges to the sanctuary policies that are driving ICE to make at-large arrests, contributing to fear, and potentially harming members of the public.[337]

Ms. Vaughan also testified that sanctuary laws are one important the cause for at-large arrests, as seen in media reports, in California and throughout the country. She also argued that California experiences more at-large and is not a coincidence or a result of a change in presidential administration, but instead, it is the direct result of sanctuary policies that limit ICE's ability to work with local law enforcement.[338] In effect, it requires ICE to resort to arresting its targets in homes, workplaces, and public places such as courthouses and sometimes on the street, rather than in the jails, where the individuals can be handed over to ICE.[339]

Claude Arnold testified that ICE has broad discretion in enforcing the laws.[340] He said enforcement activity is based primarily on availability of resources.

> If you have the resources to arrest 10 people, you are going to prioritize arresting 10 of the worst people. So in this case, people with criminal history. You are not going to arrest people who are not criminals.[341]

Mr. Arnold added that if ICE is unable to deal with criminals while incarcerated, ICE agents will need to go into communities to make these arrests. They do not go into the communities to arrest all undocumented immigrants, only those with criminal records.[342] As mentioned earlier in this report, Mr. Marin stated that ICE focuses on undocumented immigrants with criminal records who pose a threat to society.[343] If ICE is unable to deal with them while they are in custody, ICE agents have to deal with them in the communities which is far more dangerous to agents as well as the community.[344]

In defense of the California Values Act, Deputy Attorney General Sherman argued that the law does not impose a blanket prohibition on California law enforcement agencies in assisting in immigration enforcement.[345] The law, he said, allows California law enforcement agencies to provide immigration authorities access to detention facilities, provide release date information and transfers individuals in custody to immigration authorities if those individuals had been

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[336] Vaughan Testimony, *Los Angeles Briefing,* p. 25.

[337] Ibid., 28.

[338] Ibid., 24.

[339] Ibid; Marin Testimony, *6/24/20 Meeting*, pp. 3, 9.

[340] Arnold Testimony, *Los Angeles Briefing,* p. 146.

[341] Ibid.

[342] Ibid., 125.

[343] Marin Testimony, *6/24/20 Meeting*, p. 14.

[344] Vaughan Testimony, *Los Angeles Briefing,* p. 25.

[345] Sherman Testimony, *Los Angeles Briefing*, p. 132.

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previously convicted of criminal offenses identified in the statute.[346] More pointedly, he said, the law does not interfere with federal immigration authorities from conducting enforcement using their own resources but rather, the law directs state and local law enforcement resources in an area within the state's control.[347]

The Attorney General's office has been defending the California Values Act, the California Trust Act, and several other state laws in court against a preemption lawsuit filed by the Trump Administration and in connection with the Administration's efforts to impose immigration enforcement funding conditions on various federal grants that he argues are unrelated to immigration enforcement. Citing testimony from a wide range of stakeholders in support of these laws, Mr. Sherman said those testimonies demonstrate that jurisdictions that limit entanglement with immigration enforcement are safer and that immigrants are more likely to seek government services if their local governments are not entangled with immigration enforcement.[348] In response, two federal courts and the Ninth Circuit Court of Appeals determined that the California Values Act does not conflict with federal law and does not interfere with federal immigration authorities.[349]

Mr. Sherman also testified to other examples of court cases that demonstrate the Trump Administration's attempt to attach immigration enforcement requirements on various grants that threatened to withhold funding from California on the basis of confidentiality statutes that had been enacted prior to 2016.[350] Mr. Sherman asserted that it is the State's responsibility to provide for the health, safety, and welfare of its residents through its laws.[351] He added, "our federalism system of government grants the State the power and responsibility to provide these services for the state's residents, and these principles directed by the federal government cannot force the state to assist in enforcing federal immigration laws against its own residents"[352]

Response to Fear Regarding Immigration Enforcement Impacting Students

Mike Ambrose, associate general counsel for the California School Boards Association testified to how the California School Boards Association responded to its membership of nearly 1,000 educational agencies statewide regarding immigration enforcement concerns. Members were worried over the increase in absentee rates of students, lack of engagement from parents in parent-teacher conferences and other school events, and their ability to provide a good education to students who do not feel safe at school.[353]

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[346] Ibid.

[347] Ibid.

[348] Ibid., 4.

[349] *United States v. California*, 921 F.3d 865 (2019).

[350] Sherman Testimony, *Los Angeles Briefing,* pp. 159-160.

[351] Ibid., 135.

[352] Ibid.

[353] Ambrose Testimony, *Los Angeles Briefing,* p. 64.

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Outlining federal protections for students and families as it relates to immigration status and educational institutions' responsibility to uphold them, Mr. Ambrose discussed that *Plyler v. Doe*, a Supreme Court decision that all students, regardless of immigration status, have equal access to education.[354] The ruling ensures that school districts cannot discourage undocumented students or their parents from enrolling in school, which includes requiring documents or information.[355] This means that schools cannot inquire about a student's immigration status for establishing residency in the district or require a social security number and passport.[356] He also explained that the Family Educational Rights and Privacy Act ensures that schools do not share student information, including citizen status, with ICE or the federal government without parental consent.[357] According to the California School Boards Association, these measures provide some measure of security for students while they are at school.[358] The reality, he said, is that despite these protections, students and families still report fear of immigration enforcement at schools, and reports have indicated that immigration authorities have stopped parents after they dropped off their children at school and in one case, ICE visited an elementary schools asking for school records.[359]

According to Mr. Ambrose, members of the California School Boards Association have gone to "great lengths to ensure that families do[sic] feel safe at school and to make [*sic*] them know that that's their goal and their job there, is to educate students."[360] As part of that effort, school districts asked the California School Boards Association to provide legal guidance and create sample policies and sanctuary resolutions to communicate the message that schools are safe havens from federal immigration enforcement activities, through laws already in place.[361] At the same time, many school districts have approved board resolutions, which do not have additional legal protections, to communicate the message that:

> all students have a right to attend school, that, regardless of immigration status, students need to come to school and have both an obligation under California law to come to school and a constitutional right to an education here.[362]

He also testified that this move communicates to families that school districts will not: ask students or their families about immigration status, share student information, and participate in voluntary enforcement by sharing information with ICE and informs parents of ICE's policy

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[354] *Plyler v. Doe*, 457 U.S. 202 (1982).

[355] *Id.*

[356] *Id.*

[357] The Family Educational Rights and Privacy Act of 1974, Pub. L. 93-380, 88 Stat. 572 (codified as 20 U.S.C. § 1232g).

[358] Ambrose Testimony, *Los Angeles Briefing,* p. 66.

[359] Ibid.

[360] Ibid.

[361] Ibid.

[362] Ibid., 67.

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about sensitive locations are largely off limits.[363] Even with this response, members have reported that immigration enforcement still creates a difficult situation for students and schools to fulfill their constitutional duty.[364]

In addition to Family and Educational Rights and Privacy Act and *Plyler v. Doe*, AB 699, Educational Equity: Immigration and Citizenship Status Act,[365] is also intended to address the impact of immigration enforcement on school children. The law, enacted by California voters in 2017, directed the Attorney General's office to push model policies for K-12 schools to provide guidance as to how to respond to immigration issues.[366] The Act codified the responsibility of schools to educate their families on their students' right to a safe education, responsibilities to educate about the impacts of bullying, and pass anti-bullying policies and information concerning bulling based on immigration status. [367] Since its passage in July of 2018, 140 school districts have implemented this law impacting over 2.5 million students in California.[368]

FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.[369]

Below, the Committee offers to the Commission a summary of findings identified throughout the Committee's inquiry. Following these findings, the Committee proposes for the Commission to consider several recommendations for federal and state actors.

Findings

1. Immigration enforcement impacts children in many ways. Of the 5.1 million children who have at least one undocumented parent, 4.5 million are U.S. citizens. The removal of undocumented parents of children who are U.S. citizens splits families and may negatively impact the growth and stability of millions of children.

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[363] Ambrose Testimony, *Los Angeles Briefing,* p. 67.

[364] Ibid., 69.

[365] Cal. Educ. Code §§ 200, 220, 234.1, 234.7.

[366] *Id.*

[367] Cal. Educ. Code § 234.1(a), § 234.1(b); Thornton Testimony, *Los Angeles Briefing,* p. 106.

[368] Ibid., 107.

[369] 45 C.F.R. § 703.2.

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2. In California alone, at least 750,000 children live with a parent who is undocumented, including 250,000 children who are undocumented themselves. The arrest and/or deportation of parents adversely affects their children as does the continual fear of arrest and deportation. Media reports and testimony regarding enforcement activity in and around schools also affects undocumented children and children of undocumented parents. Such effects may include an increase in absenteeism among students, a decline in parent participation in school events, an increase in bullying of students because of their perceived national origin and/or citizenship status, and a decline in school participation and willingness to seek higher education.

3. In 2011, ICE promulgated its Sensitive Locations policy that limits ICE enforcement actions at schools, hospitals, places of worship, public religious ceremonies and during public demonstrations. ICE also noted that:

    a. ICE has discretion in how it conducts enforcement actions pursuant to federal law; and if and when enforcement actions occur *near or around* schools, agents are required to ask for supervisory approval.

    b. The ICE Sensitive Locations policy does not prohibit ICE from conducting enforcement actions *near or around* schools or hospitals or places of worship; however, ICE attempts to avoid sensitive locations if possible.

    c. A lack of data collection and reporting by ICE limits a full review, examination and understanding of the efficacy and impact of the Department of Homeland Security's Sensitive Locations policy and limits a full understanding of the impact of ICE's practices and procedures on U.S. children.

4. The Sensitive Locations policy does not limit or restrict ICE from conducting enforcement actions in or around courthouses. On March 16, 2017, Tani Cantil-Sakauye, the Chief Justice of the California Supreme Court, notified the U.S. Attorney General and the U.S. Secretary of Homeland Security about her concern about reports from some California trial courts that immigration agents appeared to be stalking undocumented immigrants in state courthouses to make arrests, that those tactics undermine the judiciary's ability to provide equal access to justice, and she requested that that ICE refrain from that sort of enforcement in California's courthouses. In a joint response, then-Attorney General Jeff Sessions and then-Secretary Kelly stated that Justice Cantil-Sakauye should direct her concerns to Governor Jerry Brown and to law enforcement officials who refuse to honor detainers as several California municipalities are "sanctuary cities" that limit police cooperation with ICE. They stated that "[s]uch policies threaten public safety, rather than enhance it,"[370] and as a result, ICE requires to arrest these individuals in public places, rather than in jails.

[370] "Response from Sessions and Kelly to California's Chief Judge on Immigration," Mar. 29, 2017, https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

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5. Many local law enforcement agencies allow limited access to ICE to undocumented persons in local custody. This limited access may reduce the ability for ICE to deport undocumented individuals who committed crimes and who may pose the highest risk to public safety. As a result, many undocumented individuals convicted of crimes are released into communities resulting in ICE agents seeking the arrest and deportation of these same individuals in communities rather than in a controlled custodial environment. The transfer of ICE enforcement activity from the local jails/prisons to the communities increases the risk to agents, the undocumented individuals being sought as well as to community members at large. The enforcement in communities also increases the negative perception of ICE in those communities and creates greater fear for undocumented individuals and their children living in those communities. Although the sanctuary laws were intended to protect undocumented immigrants, they may be doing more harm than good and primarily protecting undocumented immigrants who commit crimes.

6. California schools are required to uphold federal laws that: protect students' personal information; prohibit discrimination in public education on the basis of race, color, or national origin; and prohibit discrimination based on immigration status in access to basic public education. While these laws remain in place, and efforts were put forth by California school districts to address concerns about immigration enforcement potentially occurring in and around schools, and ICE's Sensitive Locations policy explicitly indicating that schools are off-limits to conduct enforcement actions, families still express anxiety and fear of deportation. The effect is that students in mixed-status households choose to stay home because of that fear. Such fear, whether real or not, has a chilling effect on education for undocumented children and children of undocumented parents. It also affects school funding that is intended to support all students because funding is largely tied to attendance and impacts student achievement.

7. Testimony indicated that executive orders impact immigrant communities' perception of safety and feel targeted because of their presumed national origin and immigration status.

8. California's sanctuary laws continue to be a point of tension between federal, state, and local authorities. In particular, the California Values Act made a dent in decreasing immigrant arrests in the state reinforcing the notion supported by previous research and testimony that implementation of deportation procedures would not be as extensive if local officials declined to participate. ICE asserts that a consequence of the California Values Act is that federal immigration enforcement actions are more likely to be conducted in public rather than in local law enforcement custody. In addition, the law fosters a precarious relationship between immigrant communities and local law enforcement.

9. Testimony indicated concerns with immigration courts fulfilling procedural due process requirements. At this time, immigration courts have limited resources, are experiencing a large and growing caseload that sometimes goes beyond the 180-day adjudication period for asylum cases, and are subject to fluctuations in enforcement policy changes. Testimony indicated that these examples may impede due process because they can cause

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long wait times before cases can be heard, and over-detention of undocumented immigrants.

10. According to U.S. law, undocumented immigrants have a right to due process; however, they do not have a right to counsel provided by the government in civil proceedings. ICE provides undocumented immigrants resources such as contact information for consulates and the American Immigration Lawyers Association to obtain legal representation; however, some individuals are unable to access representation due to understaffed and underfunded nonprofit law firms, who often provide this service. This is notable because children are more likely to receive the relief they are seeking if counsel represents them.

11. Testimony before this Committee indicates a concern with due process and consistency with immigration courts and judges. Undocumented immigrants appearing in immigration court face obstacles to due process and fair adjudication of claims for relief. Testimony indicated inconsistency among immigration judges and highly disparate grant rates as well as hostility and contempt toward immigrants and their attorneys. In contrast, additional testimony indicated favoritism and leniency towards immigrants by some immigration judges. Based on testimony, it appears that outcomes may depend on which court or judge is deciding the case rather than established principles and rules of law.

12. Immigration enforcement may impact the reporting of crimes in immigrant communities. There are several possible reasons that affect a victim's inclination to report crimes. For instance, immigrants, who may be undocumented, and are victims may not report crimes because of shame, fear of deportation, and a lack of faith in law enforcement in taking their report seriously. Fear of reporting crime may result in continual victimization of undocumented immigrants. Such crimes may include domestic violence and child abuse and many other crimes. Failing to report a crime also means that the nation's crime statistics may be grossly inaccurate and potentially misleading. This has significant consequences for policymaking and budgeting because, without proper reporting, resources could be allocated to the wrong place. On the other hand, Department of Justice statistics estimate that approximately 50 percent of all crimes nationwide go unreported. Under reporting of crime is an issue that goes well beyond immigrant communities, and hence is broader than immigration enforcement.

13. Testimony indicated concerns with the treatment by federal immigration authorities and/or federal detention conditions that are in violation of the Customs and Border Patrol's National Standards on Transport, Escort, Detention, and Search. Asylum seekers reported mistreatment by immigration officers through verbal abuse and threats; denied adequate food; clean drinking water and bedding. In addition, testimony indicated medical personnel did not screen children while detained and some did not receive medical attention. Lastly, families continue to be separated while in federal custody.

14. ICE no longer exempt groups of removable undocumented immigrants from enforcement. As a result, all undocumented immigrants are likely targets even if they

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have lived in the United States for many years and have U.S. born children. As seen in the Administration's January 25, 2017 Executive Order,[371] the shift in enforcement philosophy has translated to more arrests and deportations of undocumented immigrants.

Recommendations

1. The U.S. Commission on Civil Rights should study the impact of sanctuary laws and their effectiveness.

2. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Department of Homeland Security, Immigrations and Customs Enforcement Agency to:
    a. Track and release detailed information on enforcement operations including information on who is targeted, arrested, and deported especially those operations conducted near or around sensitive locations, and at courthouses. In addition, track and release information on the detention of U.S. children and those who are legal residents.

    b. Examine the availability of legal representation for detainees provided by legal aid organizations and develop solutions to ensure detainees have sufficient and proper access to legal representation.

    c. Comply with the Sensitive Location policy and communicate its importance to the public

    d. Comply with the Federal Educational Rights and Privacy Act.

    e. Conduct outreach to immigrant communities to educate them on the core functions of its agencies.

    f. Expedite the removal of deportable gang members.

    g. Amend its October 24, 2011, Sensitive Locations policy memorandum to add courthouses to the list of sensitive locations that are subject to certain limitations on immigration enforcement actions.

3. The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Department of Homeland Security to investigate and/or

[371] The Executive Order defines as a priority any undocumented immigrant who: has been convicted of any criminal offense; has been charged with any criminal offense, where the charge has not been resolved; has committed acts that constitute a chargeable criminal offense; has engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency; has abused any program related to the receipt of public benefits; is subject to a final order of removal, but has not departed; or otherwise poses, in the judgment of an immigration officer, a risk to public safety or national security.

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review ICE and CBP policing activities and actions at and in proximity to schools and courthouses and other sensitive locations.

4. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Department of Homeland Security, Customs and Border Protection Agency to:
    a. Comply with the National Standards on Transport, Escort, Detention, and Search.

    b. Do not separate undocumented immigrant families who have been apprehended at the border and during detainment, especially those with young children.

    c. Provide detainees with the contact information of immigration lawyers and create better access to detention facilities by either moving detention facilities to higher populated areas, implementing transportation systems, or expanding video conferencing.

    d. Provide adequate translation services in detention facilities for indigenous languages so that migrants who do not speak English or Spanish have the ability to communicate with detention staff and have equal access to legal information and representation.

5. The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Department of Justice, Executive Office for Immigration Review to abide by the 180-day period to adjudicate asylum cases.

6. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Congress to:
    a. Pass legislation that streamlines the legal immigration process to ensure civil rights protections for children.

    b. Provide appropriate funding to support anti-gang operations.

    c. Consider legislation to make the immigration court system independent, separate from the Department of Justice, to ensure impartiality and to insulate the system from policy changes. Congress should also consider creating trial and appellate divisions to create judicial independence.

    d. Provide adequate funding to support the Department of Justice, Executive Office for Immigration Review to adjudicate cases.

    e. Authorize and fund additional studies examining the impact of sanctuary laws and its relationship to crime rates, reporting crime, removals, and recidivism rates.

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f. Hold federal agencies accountable for treatment of asylum seekers by reexamining policies and practices for how asylum petitions are received, reviewed, and decided.

g. Hold the Department of Homeland Security accountable for compliance with its policies such as the National Standards on Transport, Escort, Detention, and Search.

h. Consider legislation codifying the Department of Homeland Security's Sensitive Locations policy to ensure that the Constitutional rights of U.S. children are protected, including access to education, criminal justice, and social services without fear of family separation or detention.

7. The U.S. Commission on Civil Rights should send this report and issue a recommendation to the California Legislature to conduct an in-depth study on the impact of sanctuary laws and their effectiveness in obtaining their stated goal. In addition, consider examining their relationship to crime rates, reporting crime, removals, and recidivism rates.

8. The U.S. Commission on Civil Rights should send this report and issue a recommendation to the California Attorney General's Office to continue enforcing the Educational Equity: Immigration and Citizenship Status Act so that schools educate families on students' right to a safe and free education and the impacts of bullying, and develop anti-bullying policies and information concerning bullying based on immigration status.

9. The U.S. Commission on Civil Rights should send this report and issue recommendations to the California Department of Education to:
    a. Ensure all school districts are in compliance with the Family Educational Rights Privacy Act.

    b. Track and monitor the implementation of the Educational Equity: Immigration and Citizenship Status Act in public schools, including but not limited to the tracking of complaints of discrimination by students and school employees on the basis of immigration status.

    c. Implement measures to ensure that public schools are not collecting information or documents regarding citizenship or immigration status of pupils or their family members.

    d. Implement measures to ensure that all school districts are in compliance with the Family Educational Rights Privacy Act and state laws protecting the privacy of student records.

10. Require all school districts to annually notify students and parents about the Federal Educational Rights Privacy Act, Educational Equity: Immigration and Citizenship

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Status Act, and any policies and procedures regarding immigration enforcement on school property.

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APPENDIX

Dissent Statement by Members Maimon Schwarzschild, Nancy Eisenhart, and Velma Montoya

Concurrence Statements and Partial Dissent by Members Rachel Sigman, Robin Toma, and Rogelio Ruiz

October 16, 2019 Briefing Agenda & Minutes

October 16, 2019 Briefing Transcript

October 16, 2019 Presentation Slides

March 4, 2020 Community Forum Agenda & Minutes

March 4, 2020 Community Forum Transcript

March 19, 2020 Jill Esbenshade Testimony Transcript

June 24, 2020 ICE Testimony Transcript

April 3, 2020 California Advisory Committee Letter to ICE

California School Board Association Board Sample Resolution

California School Board Association Board Sample Resolution (DACA)

March 16, 2017 Letter from Chief Justice Cantil-Sakauye to Attorney General Sessions and Secretary Kelly

March 29, 2019 Response Letter from Attorney General Sessions and Secretary Kelly to Chief Justice Cantil-Sakauye

Written Testimony

Ted Hilton

Joint Letter from Joann H. Lee from Legal Aid Foundation of Los Angeles and Debra Suh from the Center for the Pacific Asian Family

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Stella May, Concerned Citizens of California

Jessica Vaughan, Center for Immigration Studies

Supporting documents can be found here:
https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L0NBL0ltbWlncmF0aW9uIEVuZm9yY2VtZW50

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California State Advisory Committee to the United States Commission on Civil Rights

Supplementary and Dissenting Statement

Maimon Schwarzschild

Nancy Eisenhart

Velma Montoya

Summary and Introduction

The California Advisory Committee (SAC) to the US Commission on Civil Rights has issued a Report on immigration law enforcement, after holding a one-day public hearing in Los Angeles and one afternoon hearing in metropolitan San Diego, and deliberating over the course of more than a year. The majority of the Committee's members were determined from the outset to impugn federal immigration law enforcement and to advance a case for minimal enforcement -- or complete non-enforcement – of the law, and in effect for open, or virtually open, borders. Accordingly, the Committee's "findings and recommendations" press for a significant reduction in immigration enforcement, alleging harmful effects on children in particular; the Committee also calls for the creation of a new immigration court to provide aliens with additional opportunities to argue against deportation, misleadingly suggesting that aliens are routinely mistreated or denied due process in the current system.

We do not support the Committee's recommendations, nor do we believe that the information, testimony and public comments gathered by the committee support them. Instead, we find that the testimony provided to the Committee by representatives of US Immigration and Customs Enforcement (ICE), invited experts, and members of the public strongly indicates that effective and consistent immigration law enforcement enhances the quality of life for families with children, including immigrant families. Immigration law enforcement contributes to public safety and protects job opportunities, wages, affordable housing, and resources for social services by reducing illegal settlement in the country. These protections are perhaps most important for those American citizens and legal immigrants who live on the economic margins of our society – who lack a higher education, who labor at low wage jobs, and who often struggle to support their families. The United States Commission on Civil Rights should not endorse the adoption of policies that undermine these protections and the families who benefit from them.

The Committee document dwells largely, if not primarily, on an emotionally inflammatory claim that children are victimised by immigration law enforcement. That document sets out to establish that

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pervasive and abusive immigration enforcement is suppressing academic achievement, emotional well-being, and socio-economic progress for children in California, hence a civil rights violation. In addition, if somewhat as an afterthought, the Committee suggests that there is a lack or failure of due process for illegal immigrants who wish to stay in the United States, and that this too is a civil rights violation.

Regrettably, many of the Committee's "findings and recommendations" are based on dubious and controversial academic research and exaggerated testimony from politically-motivated advocacy groups – testimony that was challenged by other official and expert testimony as well as by thoughtful and cogent statements at the SAC Community Forum and at each opportunity for public comment: statements which overwhelmingly supported effective enforcement of the immigration laws, only to be virtually ignored by the Committee.

As this Supplementary and Dissenting Statement will demonstrate, the Committee report puts forth a false narrative about immigration enforcement, claiming misleadingly that enforcement is ubiquitous, overzealous, and abusive. Its assertions about the effects on children, in particular, rely on dubious and unsubstantiated claims.

Fishing for civil rights violations, the Committee report also alleges problems in courts, in detention, and at the border, misconceiving due process in the immigration context, and relying on testimony from advocates who allege abuses, while downplaying rebutting testimony.

The Committee uncovered no convincing link between actual law enforcement operations and the well-being of California children, and no systemic civil rights violations or abuse of authority. The SAC's entire exercise of hearings, deliberations and written report – far from being an objective or consensus-building fact-finding exercise -- was transparently designed to lead to a set of misguided policy recommendations for reduced immigration law enforcement, rather than to address any actual civil rights violations.

I. The Importance of Effective Immigration Law Enforcement

Considerable evidence was presented to the SAC that supports effective enforcement of immigration law and demonstrates how state "sanctuary" policies undermine that law, and indeed undermine the principle of the rule of law itself. Yet this evidence is downplayed in the Committee Report and is virtually ignored in the Committee's "findings and recommendations".

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As the late Barbara Jordan expressed it while she was serving as Chair of the U.S. Immigration Reform Commission in 1995, "Credibility in immigration policy can be summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave."[1]

Immigration enforcement supports a number of important public policy goals and generally is viewed positively by the public. According to one recent poll by the non-partisan research institute Public Agenda:

> "Americans across the political spectrum agree on several aspects of immigration policy, including creating a path to citizenship for people brought to the U.S. illegally as children; quickly and fairly processing people who enter the U.S. illegally; enforcing border security; and welcoming immigrants who are skilled, financially secure or escaping war. While Americans differ on whether to create a path to citizenship for people who came illegally as adults, they share a discomfort with allowing undocumented immigrants who fail to pay taxes or commit crimes to stay in the U.S."[2]

The thoughtful and considered views expressed by members of the public, both at the SAC Community Forum in the San Diego area – in Chula Vista, California, in March 2020 – and at the opportunities for public comment at the conclusion of many of the SAC telephone meetings, overwhelmingly reflected this view. Nearly 90% of the public comments to the SAC supported consistent and effective enforcement of the immigration laws, and expressed deep concern about the erosion of public order, and of the rule of law itself, from failure to enforce the law, and in particular from "sanctuary" policies which obstruct enforcement of the law.[3] These concerned members of the public took great trouble to make their voices heard: both by coming to Chula Vista to speak in person, and by waiting patiently – often for considerably more than an hour – until the end of SAC meetings when they were given an opportunity to speak briefly. Yet the Committee Report barely acknowledges the public comments, and essentially ignores their substance.

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[1] Barbara Jordan, quoted in *Becoming an American: Immigration and Immigrant Policy,* U.S. Commission on Immigration Reform Report to Congress, 1997, https://www.numbersusa.com/sites/default/files/public/from_drupal5/JordanCommissionfull-report.pdf.

[2] *Where Americans Stand on Immigration: A Hidden Common Ground Report*, Public Agenda, August 12, 2020, https://www.publicagenda.org/reports/where-americans-stand-on-immigration-a-hidden-common-ground-report/.

[3] More precisely, by our tally, 87 percent of the public comments – 33 out of 38 -- supported vigorous and effective enforcement and opposed toleration of illegal immigration.

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There is – or ought to be -- widespread agreement that the proper purpose of immigration laws is to regulate the inflow of foreign visitors and immigrants, to determine in a transparent and orderly way who will be admitted, and to ensure the correct consequences under law for those who cannot be admitted.

A. Public Safety

In evidence presented to the SAC, experts and government officials provided information on the undeniable public safety benefits to US communities from effective enforcement of the immigration laws. David Marin, director of the ICE Enforcement and Removal Operations division in Los Angeles, told the Committee that ICE had removed approximately 37,000 aliens from California in 2019: this figure includes both those apprehended at the border and cases arising in the "interior" i.e. beyond the border. The vast majority of the aliens removed or deported from the "interior" had criminal convictions, and many also had prior removals or deportations, or were fugitives from the criminal justice system. Jessica Vaughan, a policy researcher with the Center for Immigration Studies, testified to the Committee that according to her analysis of ICE deportation records, 98 percent of the 13,600 deported from the interior by the ICE California field offices in 2018 were arrested in one of ICE's many criminal targeting programs. Their offenses include crimes ranging from drunk driving to drug trafficking to domestic violence to homicide.

ICE's work against criminal gangs is particularly important for ensuring that children are safe in schools and in their neighborhoods. Jessica Vaughan described the recent surge in violent street-gang activity in parts of the country, including in California, attributable to the years-long influx of unaccompanied young people arriving illegally, from Central America in particular, and the ability of gangs to take advantage of lenient legal policies and procedures that apply to minors. In particular, Vaughan noted that according to her research, a significant share of recent MS-13 gang incidents in the US occurred in California, and that a significant share both of the victims and offenders were minors. The presence of these gangs in schools is a serious threat to safety in the schools, and cannot effectively be addressed without active communication and cooperation between schools, local authorities and ICE.

Also providing information to the Committee, numerous members of the pubic shared stories of personal loss at the public meetings and teleconferences, and implored the committee to consider the consequences for Americans and legal residents alike when immigration laws are not enforced.

B. Sanctuary Policies which Undermine Immigration Law and Public Safety

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The Committee heard extensive testimony from law enforcement experts, ICE officials, a California deputy attorney general, and members of the public regarding the effects of state and local sanctuary laws and ordinances in California. The Committee majority merely notes that California's sanctuary laws "may negatively impact immigrant communities as well as public safety in general."

This greatly understates the matter. In fact, the testimony established very clearly that California's sanctuary laws and ordinances are definitely causing harm in California communities – including immigrant communities – and undermining public safety. The Committee report actually spells out why this is so:

> "…Specifically, many local law enforcement agencies allow limited access to ICE to undocumented persons in local custody [ie arrested for crimes]. This limited access may reduce the ability for ICE to deport undocumented individuals who committed crimes and who may pose the highest risk to public safety. As a result, many undocumented individuals convicted of crimes are released into communities resulting in ICE agents seeking the arrest and deportation of these same individuals in communities, rather than in a controlled custodial environment. The transfer of ICE enforcement activity from the local jails/prisons to the communities increases the risk to agents, the undocumented individuals being sought, as well as to community members at large…."

For example, Don Rosenberg of Westlake Village, California, who is the president of Advocates for Victims of Illegal Alien Crime, testified to the Committee about the loss of his son in a traffic crash in San Francisco in 2010. The illegal alien who killed his son had been arrested numerous times for unlicensed, uninsured, and negligent driving prior to the fatal crash, but had been protected repeatedly by the non-enforcement of California laws. Rosenberg also provided details of a case in Sonoma County, in which a man was arrested for domestic violence and then released by the sheriff, despite a detainer issued by ICE. Within two weeks the man was arrested again, this time for killing the girlfriend he had previously been arrested for abusing.[4]

These were preventable crimes – two lives lost needlessly, because local law enforcement agencies refused to enforce laws against illegal aliens, and willfully hindered ICE from enforcing the laws.

These are not isolated incidents. A number of other members of the public spoke of different cases in California. Jessica Vaughan, of the Center for Immigration Studies, presented her research on the public safety problems created by sanctuary policies, based on her analysis of ICE records obtained through the

[4]Hamed Aleaziz, "Man Wanted for Deportation Allegedly Kills Girlfriend," *San Francisco Chronicle*, August 31, 2017, https://www.sfchronicle.com/crime/article/Man-wanted-for-deportation-allegedly-kills-12162718.php.

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Freedom of Information Act. She said that during an eight-month period in 2014, nationwide, there were 1,867 non-citizen offenders who were arrested by local authorities and released despite receiving an ICE notice to hold them, and who subsequently re-offended during the eight-month period studied. These offenders were arrested an additional 4,298 times during those eight months. Together they accumulated 7,491 new charges after release. Ten percent of the new charges involved dangerous drugs and seven percent were for driving under the influence of alcohol (DUI).

These included the following cases in California[5]:

- **Los Angeles:** On April 6, 2014, an alien was arrested for "felony continuous sexual abuse of a child". After release, the alien was arrested for "felony sodomy of a victim under 10 years old".

- **San Francisco:** On March 19, 2014, an illegal alien with two prior deportations was arrested for "felony second degree robbery, felony conspiracy to commit a crime, and felony possession of a narcotic controlled substance", After release, the alien was again arrested for "felony rape with force or fear", "felony sexual penetration with force", "felony false imprisonment", witness intimidation, and other charges.

- **San Mateo County:** On February 16, 2014, an individual was arrested for "felony lewd or lascivious acts with a child under 14". In addition, the alien had a prior DUI conviction. Following release by the local agency, the individual was arrested for three counts of "felony oral copulation with a victim under 10" and two counts of "felony lewd or lascivious acts with a child under 14".

More recently, ICE has revealed details of similar cases on its public website, involving the subsequent commission of multiple and serious crimes by illegal immigrants who had been under arrest in California, and who had been released by the California authorities in defiance of specific "detainer" requests by ICE.[6]

Testimony from David Marin, ICE Director in Los Angeles who took questions from members of the Committee in a conference call, confirmed that local and state sanctuary policies are hampering ICE efforts to arrest and remove criminal aliens. He said that the number of arrests that ICE officers are making in the communities – rather than in custody of local law enforcement: hence with increased peril

[5] Each of the following three cases appear in the Department of Homeland Security "Declined Detainer Outcome Report", dated October 8, 2014, obtained through a FOIA request by the Center for Immigration Studies and posted on the Center's website: https://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf

[6] See e.g. *ICE Declined Detainer Report, Fiscal Year 2018, Second Quarter*, giving details of numerous cases in California where the state authorities declined to honour ICE detainer requests for suspects already under arrest, and upon release the suspects were subsequently arrested for serious crimes, including murder, rape, threatening crime with intent to terrorize, burglary, and inflicting corporal injury on a spouse: https://www.ice.gov/declined-detainer-report.

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to all concerned -- is increasing due to restrictions on cooperation with federal authorities imposed upon local law enforcement agencies by state sanctuary laws.

C. Labor and Fiscal Impacts

Immigration laws play an important role in regulating the supply of labor in the United States, so as to protect job opportunities for American citizens and legal immigrants, and to help prevent labor market distortions that suppress wages. This is especially important to those Americans who have not had the benefit of higher education or may not have finished high school, who often are competing directly with illegal immigrants for employment in occupations such as construction, manufacturing, restaurant and hotel work, and many others.

A large body of research has documented the adverse economic impacts of the recent immigration experience of the United States. The most compelling of these reports was done by the National Academies of Sciences, Engineering, and Medicine[7]. It found that immigration, legal and illegal, does create an economic benefit for some native-born Americans, but this benefit is generated by reducing the wages of native-born workers, often the least-educated and poorest. The report catalogued a litany of studies finding negative effects on the wages of different groups of Americans and immigrants, with the largest effects on those without high school diplomas, African-American men, and non-Hispanic men.[8] Sixteen other studies published since the National Academies report also document the wage-depressing effects of immigration on Americans and prior legal immigrants.[9]

This effect is due in substantial part to illegal immigration, which adds hundreds of thousands of new workers to the American labor market annually. Most of these arriving workers compete directly with Americans and legal immigrants who are seeking jobs that do not require advanced education or training. This effect has been documented in numerous academic studies, including one studying the

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[7] *The Economic and Fiscal Consequences of Immigration*, National Academies of Sciences, Engineering, and Medicine, 2017, https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration.

[8] The most widely known of these is by George J. Borjas, et al, "Immigration and the Economic Status of African American Men," in *Economica,* Volume 77, Issue 306, April 2010, https://gps.ucsd.edu/_files/faculty/hanson/hanson_publication_immigration_men.pdf.

[9] See Jason Richwine, "An Abundance of New Academic Studies Find Negative Impacts of Immigration," Center for Immigration Studies, June 4, 2020, https://cis.org/Richwine/Abundance-New-Academic-Studies-Find-Negative-Impacts-Immigration.

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transformation of the janitorial occupations in Los Angeles, which once provided relatively well-paying jobs but are now dominated by contractors who hire illegal workers.[10] Another study looked at how the arrival of the Cuban Marielitos in south Florida affected local workers of the same educational levels, and found that wages for those without high school diplomas dropped 10 to 30 percent.[11]

It should go without saying that when American and legal immigrant heads of households are displaced from jobs or experience wage stagnation, there are harmful effects on their ability to support their families and on the health, well-being, and academic achievement of their children.

Publicly funded welfare programs, too, are inevitably limited by the scope of government resources. Accordingly, schools and health care institutions are strained when growth of the population needing the services exceeds the resources available. Adding to the total needy population by tolerating illegal immigration makes it more difficult to provide adequately for the large number of American citizens and legal immigrants in need of assistance and support.

II. The Committee's Majority Report and Where It Goes Astray

A. Immigration enforcement policies and trends.

The Committee's project proposal, at the outset, embraced numerous assertions that law enforcement by United States Immigration and Customs Enforcement (ICE) is traumatizing California children, disrupting their educational progress, and might constitute an abuse of statutory or constitutional authority. The proposal hypothesized that ICE was violating its own policies by making arrests at or near schools, separating families to the detriment of children, and intimidating or threatening children and families to the point where they cannot gain access to benefits and rights to which they are entitled, as U.S. citizens or otherwise. These claims are not supported by the testimony that was presented by representatives of ICE and the Border Patrol and by other experts.

It was clearly established in testimony and supporting research papers that ICE's enforcement actions are only rarely directed at minors (typically when they are arrested for serious crime), rarely take place where children are present, and include protocols to avoid creating additional caregiving problems for the family

[10] "Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers," U.S. Government Accounting Office, March 1988, https://www.gao.gov/assets/80/76971.pdf

[11] George J. Borjas, "The Wage Impact of the Marielitos: A Reappraisal," *ILR Review*, October 2017, https://scholar.harvard.edu/files/gborjas/files/ilrr2017.pdf.

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members of those targeted for enforcement. While immigration advocates implied repeatedly in the SAC proceedings that ICE is likely to lurk around schools and would pressure school officials for information on illegal residents, the Committee was told explicitly by ICE Field Office Director David Marin that ICE "would never seek information from the schools about students or parents."

When asked if ICE would ever conduct surveillance on a school, Marin answered that such an operation would only take place in the case of a known or suspected terrorist at the school, or an individual on ICE's 10 Most Wanted list: in other words, extremely rarely and only in the case of a very serious public safety threat. In fact, as many of the experts on both sides agreed, ICE policy has long designated schools as off-limits for enforcement actions, along with daycare centres, churches, hospitals and other designated "sensitive" locations.[12] Marin also stated that ICE officers "never" ask children about their immigration status, nor their parents' immigration status. He said that in 2019 ICE removed about 37,000 aliens from California (including both border and "interior" – i.e. away from the border -- apprehensions), of whom 357 were non-citizen juveniles, or less than one percent of all removals, typically as part of a family unit who departed the country together.

In the absence of a direct threat to children from immigration enforcement, the committee majority relies on a narrative that enforcement has been dramatically ramped up by the Trump Administration, and therefore settled families headed by illegal aliens and including US-citizen children are now at much greater risk of deportation under federal policies.

This too is a myth. While the Trump administration has scrapped the rigid prioritization scheme of the previous administration, which exempted all but the most serious criminal offenders from deportation, in reality, for a variety of reasons, enforcement activity in the "interior" actually declined from 2018 to 2019, and remains well below the peak in interior enforcement under the Obama administration from 2010 to 2013. Nevertheless, to bolster its narrative, the Committee report chose to highlight ICE enforcement statistics that cover only the last four years, without showing how enforcement under the Trump Administration compares to the previous administration.

By all major metrics, immigration enforcement in the community has declined significantly since the peak years of the Obama Administration, and even declined from the beginning of the Trump Administration, according to ICE's enforcement statistics, presented in the graph below.[13]

[12] "FAQ on Sensitive Locations and Courthouse Arrests, US Immigration and Customs Enforcement, https://www.ice.gov/ero/enforcement/sensitive-loc.
[13] See ICE annual statistics reports: https://www.ice.gov/statistics.

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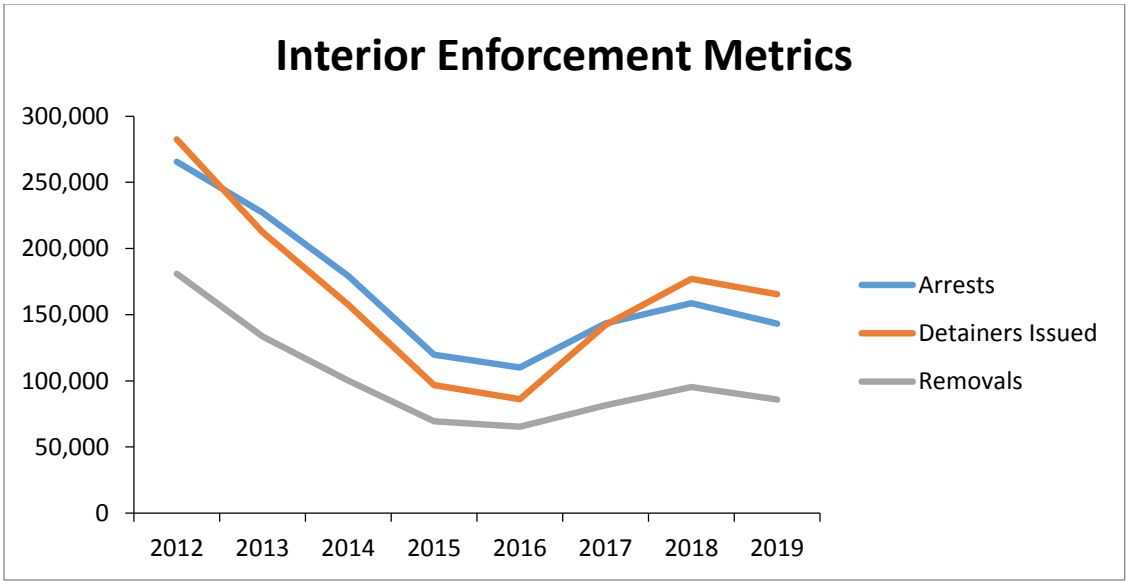

This means that in reality the vast majority of illegal aliens in the country face a small risk of deportation. As former acting ICE director John Sandweg told the *Los Angeles Times* in 2014, when enforcement activity was about the same level as today, "If you are a run-of-the-mill immigrant here illegally, your odds of getting deported are close to zero — it's just highly unlikely to happen."[14] The total population of illegal residents in the United States is generally estimated to be 11 to 12 million[15] or more, and annual deportations from the interior have been less than 100,000 for the last several years.

This is especially true in states like California, where strict state-law sanctuary policies and other state rules shield illegal aliens from detection, including allowing illegal aliens to obtain driving licences, to receive publicly-funded health care and other welfare benefits, to receive scholarships for higher education, to qualify for professional licences, and to be provided legal services. Most notably, under California state law, law enforcement agencies are not permitted to cooperate with ICE in transferring custody of deportable aliens who have been arrested, convicted, or served jail or prison time for crimes, except in certain extreme cases. Since nearly all of ICE's targets are criminal aliens, this mandated non-cooperation makes it especially difficult for ICE to make arrests and carry out deportations in California.

[14] Brian Bennett, "High deportation figures are misleading," *Los Angeles Times,* April 1, 2014, https://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html.
[15] Jynnah Radford and Luis Noe-Bustamante, "Facts on Immigrants: 2017," Pew Research Center, June 3, 2019, https://www.pewresearch.org/hispanic/2019/06/03/facts-on-u-s-immigrants/.

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B. Advocacy Research on Effects on Children

The Committee Report gives much weight to several academic studies that are said to establish that there are serious adverse effects on the health, well-being and academic performance of California children from the alleged increase in immigration enforcement under the Trump Administration. Several of the studies' authors and supporters appeared in person before the Committee.

A closer examination of these reports reveals that in fact they offer very thin support for the Committee's thesis on the impacts of enforcement on children. The marquee report, "U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools," by Patricia Gandara and Jongyeon Ee of the Civil Rights Project of UCLA, claims to be a comprehensive national survey of teachers that reveals pervasive and profound fear and anxiety in millions of children nationwide who are undocumented or live in households with close or extended family members who are undocumented. [16] The SAC gleaned from the study that "Nearly 80 percent of educators surveyed reported observing emotional and behavioral problems among their immigrant students that many described as interfering with student's ability to attend to lessons."

It sounds like a national crisis in the schools. But the Committee's summary does not give a true picture. First, the survey that allegedly generated that finding was skewed in several ways. Only half of the school districts that were initially approached for the survey even agreed to participate by forwarding the survey to educators in their system. Half of the districts that did participate chose which educators were to be surveyed, according to which schools they thought would be most "interested." There was very uneven geographic representation of respondents, with 44 percent from California, but none from New York and Illinois, and only 6 percent from Texas, 1.5 percent from Florida, and 0.6 percent from Georgia – all states with large immigrant populations. Ninety percent of the schools surveyed were Title I "low income" schools. Then, if respondents answered "no" to the first question asking if they had observed any impact of immigration enforcement on their students (27% said "no" and 9% said "I don't know"), the survey was ended as to them.[17]

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[16] Patricia Gandara & Jongyeon Ee, "US. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools," University of California Los Angeles Civil Rights Project, February 28, 2018, https://www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools.

[17] Patricia Gandara & Jongyeon Ee, "U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools," Civil Rights Project of the University of California, Los Angeles, February 28, 2018, https://www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools/Immigration-enforcement-on-schools-093018.pdf.

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Even after rigorous filtering out of the respondents that would be most likely to disagree with the survey's premise of harm to the children from enforcement, still the results showed only a lukewarm indication of perceived problems. For each and every question asked of the most concerned educators who completed the entire survey, a majority always answered either "No" or "A Little/Somewhat" when asked if they perceived negative effects of immigration enforcement on their students. Less than one-third of respondents said they perceived "A lot/Extensive" negative effects of immigration enforcement on the students. The study authors administered the survey primarily between October, 2017 and January, 2018.

The authors actually published two different tabulations of their data, once in February, 2018 and again in April, 2020. The second tabulation -- of 121 fewer total responses, but with about 100 new respondents added -- given in red below, produced a slightly different result, as indicated below.[18]

In both analyses, the results demonstrate that a majority of educators surveyed perceived little to no indications of behavioral/emotional problems, increased absenteeism, academic decline, or increased bullying among students due to fear or anxiety about immigration enforcement.

Results for four of the dozen survey questions are as follows:

Have you noticed any behavioral and/or emotional problems with any of your students that appear to be related to concerns about immigration enforcement? [Number in black is 2018, red is 2020]

No –	21%	20%
A Little/Somewhat –	55%	48%
A lot/Extensive –	24%	32%

Have you noticed any increase in absences that may be related to concerns about immigration enforcement?

No –	43%	42%
A little/Somewhat –	47%	38%
A lot/Extensive –	11%	20%

Have you noticed a decline in student academic performance that may be related to concerns about immigration issues?

No –	39%	39%

[18] Jongyeon Ee and Patricia Gandara, "The Impact of Immigration Enforcement on the Nation's Schools," *American Educational Research Journal*: April 2020, Volume 57, No. 2, pp. 840-857.

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A little/Somewhat – 48% 39%

A lot/Extensive – 13% 22%

Have you noticed any increase in bullying (verbal or physical) related to the perceived immigration status of students or their parents over the last year?

No – 63% 62%

A little/Somewhat – 28% 13%

A lot/Extensive – 9% 25%

If anything, even the results this second survey, which was skewed to elicit concerns about allegedly widespread fear and anxiety, demonstrate that a large proportion of educators actually do *not* perceive extensive adverse effects. Further, when asked what should be done about the perceived fear and anxiety, a large majority (88 percent) of the educators said that there should be more forums for school-community communication to address rumours, concerns, and explain school policies and certain immigration policies. They did not, notably, recommend amnesty, nor did they recommend any of the changes to immigration policy that the Committee report recommends after considering this research.

Advocates who appeared before the Committee dwelt on claims about the children of that small cohort of undocumented immigrants who actually encounter immigration enforcement, to the effect that these children would suffer emotional trauma stemming from a brief or a prolonged separation from their parent. It is important to remember that unauthorized immigrants are typically aware that they may be subject to enforcement, and choose to remain in the country despite the risk, usually knowing that only a small fraction of the illegal population is actually subject to enforcement. For the small number that do experience enforcement, separation of the family is not inevitable, but is the choice then made by the heads of the household.

Advocates cited studies estimating that about 750,000 children in California live with a parent who is in the country illegally, of whom 250,000 children are themselves in the country illegally. The total number of illegal aliens settled in California is estimated to be 2.2 million.[19]

According to David Marin, Los Angeles ICE Field Office Director, in 2019 ICE removed 37,000 aliens from California, including 357 juveniles. The total number of removals from California thus represents 1.7 percent of the total unauthorized population in the state, and the number of juveniles removed

[19] "U.S. unauthorized immigrant population estimates by state, 2016," Pew Research Center: https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/.

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represents 0.1 percent of the unauthorized juvenile population. These figures indicate that the number of children actually affected by enforcement in California is small, compared to the total size of the illegally present population.

One of the studies cited by advocates who testified, done by a team from the Urban Institute, which examined the effects of enforcement on the children of illegal workers arrested in several worksite raids in the late 2000s, noted that families who are directly affected by immigration enforcement make different choices on how to deal with the prospect of deportation, and these choices do not always result in separation of children from parents.[20] Some families choose to return to their home country together if one parent is ordered removed. Others split up voluntarily, with some children remaining in the United States with one parent while the other parent returns to the home country alone or with one or more of the children. Others choose to leave their child or children in the United States with other non-parental guardians.

Ultimately, the situation of the children is under the control of the parents and is a result of the choices that they make. As Peter K. Nunez, former U.S. Attorney in San Diego, testified:

> Whenever any person breaks the law, the violator is not the only person to suffer the consequences. Innocent family members, relatives, friends, neighbors, coworkers, all may suffer collateral consequences as a result of the arrest and punishment of the violator.

Therefore, Mr. Nunez added, U.S. policies should be dedicated to "discouraging law breakers from initiating this chain of events that can only end in serious problems for their families."[21]

C. Due Process Concerns

One stated goal of the Committee was to explore concerns about alleged denials of due process to non-citizens who are in immigration proceedings or who are seeking other benefits, or who are seeking police services after victimization. The SAC's public meeting in Los Angeles included several invited experts and advocates who claimed that there is widespread unfair denial of due process in the immigration system. This testimony underlies several findings expressing the Committee majority's assertions about denial of due process.

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[20] Ajay Chaudry, et al, "Facing Our Future: Children in the Aftermath of Immigration Enforcement," Urban Institute, February 2, 2010, https://www.urban.org/research/publication/facing-our-future/view/full_report.

[21] Testimony of Peter K. Nunez before the committee at the Chula Vista Community Forum, March 4, 2020.

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Like the findings on immigration enforcement's alleged harm to the health, well-being and academic performance of children, the findings about alleged due process denial are built on a misleading and one-sided narrative. This narrative is really based on what attorneys who defend immigrants *wish* the law provided, not on what the law actually says, nor on what has been established through case law. Further, the committee did not focus on the relevant legal principles, nor upon the facts of how the complex immigration enforcement system operates, and how it both resembles and differs from other criminal and civil justice systems. It is basic to the constitutional framework of immigration law that statutory due process – so long as it is within constitutional bounds - is determined by Congress, primarily through the Immigration and Nationality Act and Title 8 of the U.S. Code. The law has established different levels of due process for different classes of aliens; the law also establishes the powers and procedures of immigration officers; and especially of the immigration courts, which fall under the U.S. Department of Justice.[22] The Committee was evidently not well enough informed to probe the allegations of the invited advocates or to make informed recommendations on this subject: the Committee simply seems to have accepted the advocates' assertions at face value, even when challenged by other experts.

1. Due Process in Immigration Matters Generally

Under the federal Immigration and Nationality Act and other relevant federal statutes, immigration courts within the United States Department of Justice adjudicate immigration cases, including claims for relief by immigrants against possible deportation. The Committee Report suggests, at least by implication, that there is widespread deprivation of due process in the immigration courts, and that aliens in proceedings are left to fend for themselves in a hostile setting.

In fact, the Executive Office of Immigration Review (EOIR), which is the agency within the Department of Justice that runs the immigration court system, administers several programs to assist both detained and non-detained aliens who are challenging their deportation. These programs are administered by EOIR's Office of Legal Access.[23]

The largest of these programs is the Legal Orientation Program. This program provides detained aliens with group orientation sessions on the removal process and options for relief; intensive individual orientations; self-help workshops on obtaining voluntary departure, relief from removal and seeking release on bond; and referrals to pro bono legal representation. In the 2020 fiscal year, this office

[22] See W.D. Reasoner, *Deportation Basics: How Immigration Enforcement Works (Or Doesn't) in Real Life*, Center for Immigration Studies, July 18, 2011, https://cis.org/Report/Deportation-Basics.
[23] See https://www.justice.gov/eoir/office-of-legal-access-programs.

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received an initial appropriation of $18 million, followed by a supplemental emergency appropriation of $10 million. The program operates in 45 ICE detention facilities in 12 states.

In addition, the Office of Legal Access Programs runs a special program for custodians of unaccompanied minors who have entered illegally and who are being released to parents or other caregivers. This program operates in 16 cities across the country, including Los Angeles and San Francisco. The program provides information on the immigration court process, scheduling hearings, consequences for skipping out on proceedings, options for relief, and caregiver responsibilities. There is also a National Call Center for those located far from one of the 16 program locations.

In addition, there is an Immigration Court Help Desk for aliens who are not detained and seeking assistance. The Office of Legal Access maintains an accreditation program for NGOs wishing to assist aliens in proceedings, so that the petitioners can be assured of consistently qualified pro bono assistance. Finally, there is a program that offers enhanced due process protections and representation to aliens who are referred by an immigration judge due to mental competency problems: the National Qualified Representative Program.

The Committee notes "with concern" the lengthy duration of immigration proceedings and recommends that the immigration courts should be required to complete all cases, including those involving children, within 180 days. The truth is that the government would like nothing better than to complete these cases in a shorter time frame, but Congress has not provided the funding to do so while still honoring the due process that Congress established in the law. Further, immigration judges in many cases grant repeated continuances for the purpose of obtaining counsel so that advocates can explore various avenues of humanitarian relief, such as asylum applications, trafficking and crime victim visas, and Special Immigrant Juvenile (SIJ) green cards. To address this problem, the Trump administration has created a special docket for children's cases, and before the 2020 pandemic shutdown, had made some progress in reducing the backlog. In addition, the Trump administration recently proposed a new regulation that is designed to assist immigration judges in meeting the 180-day deadline for asylum application adjudications.[24]

2. Due Process for Juveniles

[24] See 85 Federal Register No. 185, Sept 23, 2020 p. 59692: https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-21027.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list

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Immigration law and policy has established additional protections for children. The vast majority of these cases involve either minors whose parents placed them in the hands of criminal smugglers to cross into the United States illegally, often to join other family members residing here illegally, or teenagers who came of their own volition, often with siblings or friends, to seek employment. Although most eventually are found to be ineligible to remain here legally, under current practice and federal court order, so-called unaccompanied minors are released to the custody of the Office of Refugee Resettlement and eventually to a parent or other adult custodian. They are allowed to apply for asylum under more lenient rules than adults must follow[25], and there are special interviewing procedures and a special legal assistance program for them, as mentioned above. Under the landmark law establishing these protections, the Trafficking Victims Protection Reauthorization Act:

> "Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases." [26]

For example, minors are not subject to so-called "safe third country "rules and, unlike adults, face no deadline on when they may file an application. [27] Further, Congress recently imposed special confidentiality rules so that ICE may not access information on the minor or the minor's family members except in the case of criminal investigations.[28] Besides asylum, minors are able to apply for other special forms of relief, including the Special Immigrant Juvenile green card, T visas for victims of trafficking, and U visas for victims of crimes.

3. Immigration Courts and Due Process

The Committee has determined, based on a few hours of testimony from advocates for illegal aliens, that the immigration court system, currently administered by the Department of Justice, inadequately serves

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[25] Immigration and Nationality Act Section 208(b)(3)(C), https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1158&num=0&edition=prelim.

[26] Trafficking Victims Protection Reauthorization Act of 2008, Section 235(d)(8), https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf.

[27] Immigration and Nationality Act Section 208(a)(2)(E), loc cit.

[28] See Consolidated Appropriations Act 2019, Division A, Title II, Section 224 (Public Law No 115-6) ("None of the funds provided by this act…may be used by the Secretary of Homeland Security to place in detention, remove, refer for a decision whether to initiate removal proceedings, or initiate removal proceedings against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child… based on information shared by the Secretary of Health and Human Services").

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the needs of those wishing to contest their deportation and secure permanent residency and citizenship in the United States. It recommends that this system should be replaced by a new system that is independent of the Department of Justice.

Even if Congress could agree on such legislation, it would raise significant constitutional issues due to the courts' long-standing decisions that adjudications of immigration cases are a matter of foreign relations, which fall squarely under the authority of the executive branch, not the judiciary.[29]

The constitutional implications of moving the adjudication of immigration cases out of the executive branch, were set forth clearly in the Supreme Court's decision in *INS v. Aguirre-Aguirre* 330, where the Court stated:

> [W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." . . . The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.[30]

In fact, under existing law and practice, the decisions of trial-level immigration judges can be appealed to the Board of Immigration Appeals. The Board's decisions can be reviewed in turn by the Attorney General, and either the Board's decision or the Attorney General's may be subject to judicial review in the United States Circuit Court of Appeals.[31] Neither the Committee nor the advocates upon whom the Committee relies have established that due process is stinted or denied in the immigration court system.

4. Enforcement Delayed and Defied

The real problem in our immigration system is not that there is too little "due process" but that there is too much. Cases languish for years on the immigration court and enforcement dockets, and those who enter illegally or violate their immigration status have multiple bites at the apple to try to qualify for relief from deportation. They can apply for asylum and other humanitarian programs, receive Temporary Protected

[29] Andrew R. Arthur, Testimony before the U.S. House of Representatives Committee on the Judiciary hearing entitled "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" January 29, 2020, https://cis.org/sites/default/files/2020-01/Arthur-EOIR-testimony-1-29-20.pdf.

[30] INS v Aguirre-Aguirre, 526 US 315, 425 (1999). See also Arizona v US, 567 US 387, (2012) ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities").

[31] See Expanding the Size of the Board of Immigration Appeals, Federal Register, April 20 2020 ("Background"): https://www.federalregister.gov/documents/2020/04/01/2020-06846/expanding-the-size-of-the-board-of-immigration-appeals

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Status, Deferred Action, Suspension of Deportation, Cancellation of Removal, Special Immigrant Juvenile Status, U visas for crime victims, T visas for victims of trafficking, VAWA green cards for victims of domestic violence; they can marry someone with legal status, obtain repeated continuances of their cases in court, or ask for their cases (if unlikely to succeed) to be administratively closed.

At the present time, nearly 3.3 million aliens are currently on ICE's enforcement docket and eligible for due process in the immigration court system.[32] This includes approximately 1.2 million cases already on the immigration court dockets.[33] Nearly all of these individuals are living at large in the United States, often with a work permit. Only about 1.6 percent (51,000) are detained in ICE custody, and another 3 percent (96,000) have been released and are enrolled and monitored under an "alternative to detention" supervision program, according to ICE statistics.

Many illegal aliens are able to exploit the very generous due process they receive once they have made it past border patrol agents and settled in the United States. They take full advantage of overwhelmed and backlogged immigration courts: these delays operate to the advantage of unqualified applicants, because the longer it takes for an immigration case to be heard in court and then for all appeals to be exhausted, the longer the illegal resident can stay here and acquire "equities", such as spouses and children, that can be used to argue for permission to remain.

There is probably no other court system in the world in which the orders of judges are so infrequently complied with. On paper, as far as formal results are concerned, most cases seeking relief from deportation are doomed to fail. According to immigration court statistics, about 70 percent of all cases completed are found to be unqualified and rejected by judges.[34] This rejection rate has remained consistent for the last 22 years, except for the years 2012-2018. Nevertheless, it is to the alien's advantage to demand a court hearing, because the huge volume of cases and resulting backlogs guarantee that even those with entirely frivolous cases can remain in the country for years. Currently, the average time to case completion is 759 days.[35]

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[32] US Immigration and Customs Enforcement, "Fiscal Year 2019 Enforcement and Removal Operations Report" page 7.

[33] "Backlog of Pending Cases in Immigration Courts as of April 2020," immigration court statistics through Aprils 2020 compiled by the Transactional Records Access Clearinghouse project of Syracuse University, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

[34] "Outcomes of Deportation Proceedings in Immigration Court," showing immigration court statistics through April 2020, compiled by the Transactional Records Access Clearinghouse, Syracuse University, https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

[35] "Immigration Court Backlog Tool," immigration court cases through April 2020 compiled by the Transactional Records Access Clearinghouse of Syracuse University, https://trac.syr.edu/phptools/immigration/court_backlog/.

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A shockingly large number (and proportion) of those petitioning for relief from deportation and notified to appear in court do not show up for their hearings, especially compared to other state and federal criminal and civil courts.[36] Among those seeking asylum, the rate is even lower. According to statistics from the Department of Justice, only about half of those who have been apprehended at the border and then released into the country after claiming a fear of return actually file an application for asylum. Of those who do, nearly half do not show up for their court hearings. Of those who do complete their proceedings, only about 20 percent qualify for asylum, and most of those who do not qualify fail to appear for deportation as ordered. [37]

As a result, the number of unenforced orders of removal now stands at more than one million cases.[38] This may represent 10 percent of the entire illegally-present population – meaning some 10 percent of the illegal population have had their day in court, have exhausted all appeals, and ignored orders to depart.

D. The Myth of "Chilling Effect" on Crime Reporting

Advocates consulted by the Committee repeatedly alleged that fear of immigration enforcement causes immigrants to refrain from reporting crimes, which leaves immigrants vulnerable to continual victimization and skews the nation's crime statistics.

These assertions are unsupported in fact; on the contrary, the most credible information indicates the opposite, which is that immigration enforcement does not have a "chilling effect" on crime reporting; that if some immigrants do not report crimes it is not primarily or even secondarily due to fear of immigration enforcement; and that what many immigrants actually do fear is the regular release of criminal aliens back into their communities due to sanctuary policies.

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[36] Mark Metcalf, "Skipping Court: U.S. Immigration Courts & Aliens Who Disappear Before Trial," Center for Immigration Studies, January 24, 2019, https://cis.org/Report/Immigration-Courts-Aliens-Disappear-Trial.

[37] U.S. Department of Justice, Executive Office of Immigration Review, "Credible Fear in the U.S. Immigration System: Overview of Fiscal Year 2006 to Present," May 24, 2018.

[38] According to ICE records, in September 2014 the number of unexecuted final orders of removal stood at 897,572. This number refers to those aliens who had been ordered removed from the country by an immigration judge and had exhausted all due process and appeals, but who had not been removed by ICE; most of these individuals are considered fugitives and absconders. By 2016, this number had risen to 953,000, according to figures obtained by the Judiciary Committee of the U.S. House of Representatives and cited in sworn testimony: (https://docs.house.gov/meetings/JU/JU01/20170328/105787/HHRG-115-JU01-Wstate-ArthurA-20170328.pdf, p. 2). According to ICE officials cited in news accounts, by mid-2019 this number had reached approximately one million non-departed aliens under removal orders: https://www.miamiherald.com/news/local/immigration/article231687048.html.

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Encouraging the reporting of crimes is an issue for many law enforcement agencies around the country, and it is not confined to any one segment of the population. In fact, most crimes are not reported, regardless of the victim's immigration status or ethnicity. According to the most recent data from the periodic Crime Victimization Survey of the Bureau of Justice Statistics (BJS), in 2018, only 43 percent of all violent victimizations were reported to police.[39]

The BJS data show no meaningful differences among ethnic groups in crime reporting, and this has been the case consistently for at least the last 10 years. Overall, Hispanics are slightly more likely than others to report crimes. Hispanic females especially are slightly more likely than white females and more likely than Hispanic and non-Hispanic males to report violent crimes.[40] This is consistent with several academic surveys finding Hispanic females to be more trusting of police than other groups.[41]

A number of other studies refute the notion that local-federal cooperation in immigration enforcement causes immigrants to refrain from reporting crimes:

- A major study completed in 2009 by researchers from the University of Virginia and the Police Executive Research Forum (PERF) found no decline in crime reporting by Hispanics after the implementation of a local police program to screen offenders for immigration status and to refer illegals to ICE for removal. This examination of Prince William County, Virginia's "287(g)" program is the most comprehensive study to refute the "chilling effect" theory. The study also found that the county's tough immigration policies likely resulted in a decline in certain violent crimes.[42]
- The most reputable academic survey of immigrants on crime reporting found that by far the most commonly mentioned reason for not reporting a crime was a language barrier (47 percent), followed by cultural differences (22 percent), and a lack of understanding of the U.S. criminal

[39] Rachel E. Morgan, Ph.D. and Barbara A. Oudekerk, Ph.D., "Crime Victimization: 2018," U.S. Department of Justice, Bureau of Justice Statistics, NCJ253043, September, 2019, https://www.bjs.gov/content/pub/pdf/cv18.pdf.
[40] See additional data from the National Crime Victimization Survey: http://www.bjs.gov/content/pub/pdf/cvus0805.pdf.
[41] Lynn Langton, Marcus Berzofsky, Christopher Krebs, and Hope Smiley-McDonald, Bureau of Justice Statistics report, "Victimizations Not Reported to the Police, 2006-2010," http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf.
[42] Thomas M. Gutterbock et al., *Evaluation Study of Prince William County's Illegal Immigration* Enforcement Policy: *FINAL REPORT 2010*, prepared for the Prince William County (Va.) Board of Supervisors, November 2010, see page 96, Figure 8-7 : http://www.pwcgov.org/government/dept/police/Documents/13185.pdf.

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justice system (15 percent) — not fear of being turned over to immigration authorities. (Davis, Erez, and Avitable, 2001).[43]

- The academic literature reveals varying attitudes and degrees of trust toward police within and among immigrant communities. Some studies have found that Central Americans may be less trusting than other groups, while others maintain that the most important factor is socio-economic status and feelings of empowerment within a community, rather than the presence or level of immigration enforcement. (See Davis and Henderson 2003 study of New York; Menjivar and Bejarano 2004 study of Phoenix).[44]
- A 2009 study of calls for service in Collier County, Fla., found that the implementation of the 287(g) partnership program with ICE enabling local sheriff's deputies to enforce immigration laws, resulting in significantly more removals of criminal aliens, did not affect patterns of crime reporting in immigrant communities. (Collier County Sheriff's Office).[45]

A better understanding the true reasons that immigrants and others in the community sometimes do not report crimes has enabled law enforcement agencies across the country to adopt effective ways to encourage crime reporting. These include: engaging in community outreach, hosting public events to foster communication and information-sharing with community groups, hiring personnel who speak the languages of the community, establishing anonymous tip lines, and setting up community sub-stations with non-uniformed personnel to take inquiries and reports.

Most law enforcement agencies have not found it helpful to public safety or to community relations to suspend cooperation with federal immigration enforcement efforts. Senior Justice Department official Kenneth Blanco summed it up for the Senate Judiciary Committee members in testimony in June, 2017:

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[43] Robert C. Davis et al, "Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and Prosecutors," *Criminal Justice Policy Review*, Volume 12, Number 3, September 2001, p. 190: https://www.researchgate.net/profile/Edna_Erez/publication/245158456_Access_to_Justice_for_Immigrants_Victimized_by_Crime_The_Perspectives_of_Police_and_Prosecutors/links/587404ea08ae6eb871c67b68/Access-to-Justice-for-Immigrants-Victimized-by-Crime-The-Perspectives-of-Police-and-Prosecutors.pdf.

[44] Robert C. Davis and Nicole J. Henderson, "Willingness to Report Crimes: The Role of Ethnic Group Membership and Community Efficacy," in *Crime and Delinquency*, October 2003, https://journals.sagepub.com/doi/10.1177/0011128703254418, and Cecilia Menjívar and Cynthia L. Bejarano, "Latino immigrants' perceptions of crime and police authorities in the United States: A case study from the Phoenix Metropolitan area," in *Ethnic and Racial Studies*, January 2004, https://asu.pure.elsevier.com/en/publications/latino-immigrants-perceptions-of-crime-and-police-authorities-in-.

[45] The study, by the Collier County, Fla. Sheriff's Department, surveyed public calls for service, comparing geographic areas with larger and smaller numbers of foreign-born residents, and is described by the commanding officer in this webinar: https://cis.org/Web-Program/287g-Law-Enforcement-Group-Moderated-CIS-Analyst.

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> I've been in law enforcement for 28 years. I can tell you that it is very important to have trust and respect with our immigrant communities and for our immigrant communities to have trust and respect for the police. There are a host of reasons why a person may not call the police, and much of it has to do with the fear they have of the violent crime gangs, not so much of the police**.** And that really, in my 28 years, that has been the fear that they have of perhaps calling the police, not the other way around."[46]

Finally, it is neither true nor even possible that reluctance or unwillingness on the part of immigrants to report crimes is significantly skewing the nation's crime statistics. First, immigrants do not make up a large enough share of the population to affect national statistics in a meaningful way, especially when their crime reporting rates are nearly identical to those of the larger population, as the Department of Justice has found.[47] Second, the Bureau of Justice Statistics research has established that there is are no significant discrepancies between the number of violent crimes that are reported by victims in the annual Crime Victimization Survey, which counts crimes claimed by victims, whether or not reported to police, and the number of crimes reported by law enforcement agencies in the official Unified Crime Reporting system. This indicates strongly that the incidents of crimes that immigrants are allegedly afraid to report -- as highlighted by the advocates who testified to the Committee -- are not representative of the situation at large, and that any access problems should be dealt with at the community level, not through an across-the-board nationwide reduction in immigration enforcement.

Conclusion

Americans cherish our tradition of a generous legal immigration system that welcomes newcomers from around the globe who wish to join our nation to find economic opportunity, freedom, and safe haven from oppression. But when the rules are not enforced and illegal immigration is tolerated, or actually

[46] Testimony of Kenneth Blanco, Acting Assistant Attorney General, Criminal Division, U.S. Department of Justice, before the U.S. Senate Judiciary Committee hearing entitled "The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat," June 26, 2017, https://www.judiciary.senate.gov/meetings/the-ms-13-problem-investigating-gang-membership-its-nexus-to-illegal-immigration-and-federal-efforts-to-end-the-threat.

[47] See aforementioned DOJ annual Crime Victimization Study. Illegal residents make up 6% of the population, non-citizens are 7.2%, and the foreign born are 13.6% of the population.

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encouraged by sanctuary policies -- or by procedural excess that invites frivolous applications or even fraud -- then the integrity of this system is undermined.

Peter Nunez, the former U.S. Attorney for the Southern District of California, made this point at the SAC's public hearing in Chula Vista:

> Congress has passed a set of immigration laws to determine who and how many people are allowed to immigrate to the United States. These immigration laws contain penalties both civil, criminal and administrative for those who violate the law. …. This includes the statutory requirement to locate, arrest and deport those who have violated our immigration laws. Any country that passes laws and then refuses to enforce those or implement those laws, is violating the most basic concepts of democracy and the concept of a rule of law which we try to convey around the world.

If we accept the concept that there must be limits on immigration, then out of fairness to the millions of immigrants who have been sponsored by their family members or employers or sought legal immigration on their own, who have completed extensive forms and paperwork, shown they are qualified, paid application fees, and are now awaiting their turn, then we must enforce the rules – not out of malice or contempt for those who do not qualify, but to honor both the rule of law and those we are welcoming through a lawful and democratically established process.

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October 28, 2020

To The Honorable Members of the United States Commission on Civil Rights:

The California State Advisory Committee has prepared an impactful report – "Understanding the Impact of Immigration Enforcement on California Children in K-12 Schools" – that offers new perspectives on one of the most important issues of our time: immigration and the impact of ICE enforcement on U.S. communities including and especially children who are U.S. citizens with one or more undocumented parents. The report is the product of extensive input and testimony from many viewpoints, and the Committee considered the various opinions on the subject from a variety of stakeholders including the federal Customs and Border Protection, the California Department of Justice, academics, national and state advocacy organizations, school districts, legal experts, and individuals speaking on their own behalf or on behalf of interested organizations. The Committee was provided with thousands of pages of materials to consider as part of this process, including academic research, surveys, information and analyses made available by Customs and Border Protection and Immigration and Customs Enforcement (ICE), prepared written statements of concerned individuals, and the transcripts of testimony provided by witnesses. By and through its Report, the Committee brings to light certain key findings made through the review, testimony and investigation process, among them that:

(1) There are approximately 4.5 million U.S. citizen children in the United States with at least one undocumented parent. The manner in which the federal government and law enforcement pursue, surveil, detain and arrest and/or deport parents adversely affects their children as does the continual fear of arrest and deportation.

(2) The harmful effects on children resulting from they and their parents/guardians living under the constant fear of arrest and deportation may include an increase in absenteeism among students, a decline in parent participation in school events, an increase in bullying of students because of their perceived national origin and/or citizenship status, and a decline in school participation and willingness to seek higher education.

(3) ICE's Sensitive Locations policy limits ICE enforcement actions at schools, hospitals, places of worship, public religious ceremonies and during public demonstrations but notably does not limit or restrict enforcement actions in or around courthouses. As noted by Chief Justice Tani Cantil-Sakauye of the California Supreme Court in her March 16, 2017, letter to (then) Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly, "[immigration] enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair . . . [and they] not only compromise our core value of fairness but they undermine the judiciary's ability to provide equal access to justice." The Chief Justice and several witnesses expressed serious concern that the method of enforcement actions was impacting the willingness of crime victims, victims of sexual abuse and domestic violence, witnesses to crimes who are aiding law enforcement, limited-English speakers, unrepresented litigants, and children and families from all "[coming} to our courts seeking justice and due process of law."

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(4) ICE's Sensitive Locations policy does not prohibit ICE from conducting enforcement actions *near or around* schools or hospitals or places of worship and Customs and Border Protection representatives acknowledged that, indeed, enforcement actions are carried out near and around schools and other sensitive locations.

(5) ICE asserts that California's and other states' "sanctuary" laws have caused ICE to resort to more public enforcement in "targeted" actions to apprehend dangerous criminals. Notably, however, ICE representatives acknowledged in their testimony that ICE has significant gaps in its data on enforcement actions relevant to this report because it does not collect the data or information in the first place. For example: (i) ICE does not track or release information on the detention of U.S. children swept up in its enforcement actions, or how many of those children are legal U.S. residents; (ii) ICE does not track how many immigration enforcement actions have occurred at schools or other locations where children are regularly present in substantial numbers in the last five years, and (iii) ICE does not track or maintain data on persons who have been arrested or detained, then released, and then reoffend or commit other offenses. These data are key to understanding the full effect of the activities of one of the largest law enforcement agencies in the U.S. on millions of U.S. citizen children including, especially, Latino children.

While we concur in and support and recognize the importance of these key findings and all other findings and recommendations in the Report, the undersigned do not support specific statements and a portion of Finding #5 in the Report (described below), and we therefore submit this dissent on that basis and for the reasons outlined below.

We are concerned that the weight and importance of this information and findings in the Report may be overshadowed by other information included in the body of the report which we believe lacks foundational support. Namely, the report (*see* Impact of Immigration Enforcement and K-12 Students: *Health and Well-Being*) includes the testimony of at least one witness proffering the assertion *as fact* that immigrants (i.e., undocumented immigrants) are primarily responsible for "importing" diseases such as the Polio-like virus, EVD-68, drug-resistant Tuberculosis, Chagas disease, Leprosy, Chicken pox, Mumps, Measles, Whooping Cough and other respiratory diseases into the United States and, further, that the Centers for Disease Control has "admitted" that undocumented immigrants are responsible for "importing" dangerous diseases such as Malaria, Dengue fever, Scabies, and other historically uncommon illnesses. The witness proffering those claims was provided every opportunity to provide data and other information (beyond the witness's mere testimony) to support those serious and far-reaching claims. No such evidence or data was ever provided linking primary responsibility for the resurgence or spread of these diseases to undocumented immigrants – or immigrants of any origin or status -- was ever provided to the Committee. While persons have every right to appear before the Committee to assert their own respective opinions and beliefs (and the work of the Committee benefits from the consideration of a broad range of viewpoints), we believe that the Committee should exercise caution and discretion in receiving such information for inclusion in any official actions unless such information is supported by scientific review and validation, peer-reviewed academic studies, or other means to verify the authenticity and accuracy of the claim. When it cannot be so authenticated then the Committee should appropriately exercise its discretion to relegate such testimony to the official transcript of the proceeding where the testimony was provided, and nothing more. In these COVID-19 times

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especially, such statements and assertions stoke the worst kind of xenophobia and racism and, we believe, deserve no countenance in any official report of the Committee. For that reason, we DISSENT to the portions of the Report including those unsupported claims.

The last sentence in Finding #5 in the Report includes that "Although the sanctuary laws were intended to protect undocumented immigrants, they may be doing more harm than good and primarily protecting undocumented immigrants who commit crimes." We take two separate exceptions to this portion of Finding #5. First, with respect to the California Values Act (SB 54), that law was and is intended to protect *all* persons – i.e., citizens, residents, visitors and documented and undocumented immigrants alike -- from the overreach of law enforcement in the name of federal immigration enforcement. It was not and is not intended for the sole or exclusive benefit or protection of undocumented immigrants. Second, from a review of the entire record of all material, information and testimony presented to the Committee, we do not believe that the weight of information provided and considered supports a finding that the California Values Act and similar legislation "may be doing more harm than good and primarily protecting undocumented immigrants who commit crimes." Third, there are a number of social science studies that, using an array of different data and statistical methods, have not been able to find any evidence that the passage of SB54 and the adoption of local "sanctuary" laws in California have led to increases in crime rates.[1] While we are certain that continued study and analysis of the implementation and impact of that legislation would be helpful and appropriate, the record simply does not support this broad and unsupported condemnation of the California Values Act in the Report. On these bases, we DISSENT from this portion of Finding #5 in the Report.

Respectfully submitted,

Rogelio M. Ruíz, Committee Member
Rachel Sigman, Committee Member
Robin S. Toma, Committee Member

[1] See, for example, Kubrin, Charis E., and Bradley J. Bartos. "Sanctuary Status and Crime in California: What's the Connection?." *Justice Evaluation Journal* (2020): 1-19; Martínez, Daniel E., Ricardo D. Martínez-Schuldt, and Guillermo Cantor. "Providing Sanctuary or Fostering Crime? A Review of the Research on "Sanctuary Cities" and Crime." *Sociology compass* 12, no. 1 (2018): e12547.

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Statement of Concurrence with Findings 2 and 3C

The California State Advisory Committee to the United States Civil Rights Commission has produced a report entitled "Understanding the Impact of Immigration Enforcement on California Children in K-12 Schools." The Report calls attention to a number of important issues, among which are the impacts of U.S. immigration enforcement activities on K-12 students in California. Although we have voted in support of this Report, there are several sections of the report that warrant further discussion and consideration. We focus on two such areas: 1) additional social scientific evidence on the impacts of immigration enforcement on K-12 students; and 2) the absence of data to assess Immigration and Customs Enforcement's (ICE) claims that they conduct their enforcement and removal operations to minimize impacts on the community.

The Report includes testimony from a number of experts about the academic and psychological impacts of immigration enforcement on K-12 students in California (Finding #2). In particular, it highlights ways that immigration enforcement actions and rhetoric negatively impact students' abilities to attend school and learn. This Committee's findings are bolstered by a wide range of academic and policy research that was not considered by the Committee. The findings from this body of research are particularly relevant to the Committee's Report and, more broadly, to the rights of all California children, irrespective of their immigration status, to attend school as affirmed by the Supreme Court decision in Plyler v. Doe.

Numerous studies have found that immigration enforcement has negative impacts on school enrollment and attendance. One study, published in 2020 in the *American Educational Research Journal*, found that when local jurisdictions established partnerships with ICE, the enrollment of Hispanic students in public schools declined by 10% within two years, displacing a total of over 300,000 Hispanic students from public schools across the country.[1] In an in-depth study one California school district, each ICE raid that was conducted between 2014 and 2018 within the school district's boundaries was associated with a statistically significant increase in student absence from their courses, amounting to about two class absences per student.[2] Enforcement actions that involved larger numbers of arrests resulted in a sustained 2% decline in the district's attendance rate, with a more severe drop in attendance for Latinx students. Yet another study found that school districts that had a greater numbers of deportations within 25 miles of a high school are associated with larger gaps in absenteeism and math achievement between white and Latinx students.[3]

These research findings raise important questions about whether immigration enforcement is conducted in ways that seek to balance the equal protection rights of millions of children and minimize the impacts on all California childrens' rights to attend school. Although representatives of ICE testified to the Committee that they seek to minimize the impacts of their activities on communities and children, they also acknowledged that there is no effort to track compliance with,

[1] Dee, Thomas S., and Mark Murphy. "Vanished classmates: The effects of local immigration enforcement on school enrollment." *American Educational Research Journal* 57, no. 2 (2020): 694-727.
[2] Kirksey, Jacob. "The Ripple Effects of Immigration Enforcement in K-12." PhD diss., UC Santa Barbara, 2020.
[3] Kirksey, J. Jacob, Carolyn Sattin-Bajaj, Michael A. Gottfried, Jennifer Freeman, and Christopher S. Ozuna. "Deportations near the schoolyard: Examining immigration enforcement and racial/ethnic gaps in educational outcomes." *AERA Open* 6, no. 1 (2020): 2332858419899074.

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or violations of, their sensitive locations policy (Finding #3c). Yet, a number of accounts suggest that, since 2017, ICE has ramped up the number of arrests of undocumented immigrant parents occurring near school grounds as well as in other locations, that were once considered "sensitive" by ICE policy, such as hospitals and court houses.[4] Additionally, as the research cited above suggests, deportations need not be conducted in or around schools in order to have adverse impacts on student access to education, or on their ability to remain engaged in educational programs.

For these reasons, we encourage Commissioners to focus particular attention on Findings #2 and #3c, as well as their associated recommendations, outlined in the California SAC's Report.

Concurring Members:

Rachel Sigman
Rogelio Ruiz
Robin Toma

[4] J. Burnett, Border patrol arrests parents while infant awaits serious operation. All Things Considered/NPR, September 20, 2017. https://www.npr.org/2017/09/20/552339976/borderpatrol-arrests-parents-while-infant-awaits-serious-operation ; Olga Rodriguez and Juliet Williams, ICE ignores California Law in Courthouse Arrests, Prompting Outcry from Local Officials, USA Today, February 20, 2020, https://www.usatoday.com/story/news/nation/2020/02/20/immigration-arrests-ice-ignores-california-law-courthouse-arrests/4823356002/; Ray Sanchez, Ice Arrests Undocumented Father Taking Daughter to California School, CNN, March 3, 2017, https://www.cnn.com/2017/03/03/us/california-father-ice-arrest-trnd/index.html.

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California Advisory Committee to the
United States Commission on Civil Rights

U. S. Commission on Civil Rights

Contact: Regional Programs Coordination Unit
U.S. Commission on Civil Rights
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This report is the work of the California Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government. For more information please contact the Regional Programs Coordination Unit.

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Curriculum Vitae
June 2019

TRAVIS L. LETELLIER

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EDUCATION

2012	Ph.D., Economics	Florida International University (Miami, Florida)
2007	M.A., Economics	Florida International University
2002	B.A., International Business *In Honoribus*, summa cum laude	Northern State University (Aberdeen, South Dakota)
2002	B.S., Finance *In Honoribus*, summa cum laude	Northern State University

EMPLOYMENT

2015 – present	The University of South Dakota, Beacom School of Business (AACSB) *Visiting Professor of Economics*
2014 – 2015	Washington College, Department of Economics *Visiting Teaching Fellow and Academic Advisor*
2013 – 2014	Public-sector Consultant, Washington, D.C. *Policy Analyst*
2009 – 2012	The Pennsylvania State University, Department of Economics *Lecturer of Economics*
2009	Federal Energy Regulatory Commission, Office of Enforcement *Energy Industry Regulatory Economist*
2004 – 2009	Florida International University, Department of Economics *Instructor and Instructor of Record*

LGBTQ, CIVIL RIGHTS, AND INCLUSIVE EXCELLENCE

The University of South Dakota

American Economic Association LGBTQ Research and Policy Working Group, Member

Equality South Dakota and Equality South Dakota Institute

· Chair of Board of Directors (2018 – 2019) and Board Member (2016 – 2019)
· Oversee the educational and outreach missions of the c(3) and c(4) non-profit arms
· Implemented a diverse committee structure to leverage the volunteer nature of our organization
· Serve as South Dakota's representative to the national Equality Federation Board, as well as at national conferences and meetings

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- Coordinate strategies between ACLU and Equality Federation to successfully defeat 14 anti-Equality or anti-transgender bills introduced in four prior South Dakota Legislative sessions
- Field media requests (print and television interviews) from State and national outlets on behalf of Equality South Dakota

City of Vermillion, South Dakota

- Founding Commissioner and Chair, Vermillion Human Relations Commission
- Chair of Young Professionals' Network Steering Committee (VermillionNEXT)
- City of Vermillion Young Professional of the Year (2018)
- Coordinated efforts between elected city officials and HRC representatives to successfully raise Vermillion's Municipal Equality Index (MEI) by over 100 % during a two-year window
- University representative for the City of Vermillion's Governmental Affairs Committee

President's Council on Diversity and Inclusive Excellence (2015 – 2019)

- Authored USD policy on Gender-Inclusive Facilities, including best practices, short-term and long-term milestones, and strategic goals
- Currently overseeing the conversion of 150 university restrooms from gender-specific to all-gender
- Project Leader to update SafeZone training for all students, faculty, and staff, including comprehensive coverage of LGBTQ legal rights and transgender-specific issues

Beacom School of Business Inclusive Excellence Committee, Chair (2017 – 2018)

- Created an online "Diversity and Inclusiveness Repository for Business Faculty" which aggregates diversity-related journals, articles, and case studies for faculty to include in syllabi and course outlines
- Coordinate with Senior colleagues to structure workshops and symposia for current Business faculty focused on promoting recruitment and retention of diverse faculty, staff, and students
- Develop the graphic design and publication of promotional materials to showcase USD resources, professional development opportunities, and the USD Center for Diversity and Community

Washington College

- Founding member of the "Queer-to-Queer" faculty workshop designed for peer mentoring and discussion of classroom experiences and best practices
- Faculty representative to the EROS student group (Students of Color, Women, and LGBT students)
- Academic Advisor for the Division of Social Sciences
- Designed and delivered courses in Multicultural and Generational Differences

The Pennsylvania State University

Presidential Commission on LGBT Equity

- Executive Committee Full Member, three-year term
- Chair of Curricular Integration Committee
- Liaison to the Commission on Racial and Ethnic Diversity and the Commission for Women

The Human Sexuality and Gender Studies program (College of the Liberal Arts)

- Interim Faculty-in-Charge of Minor
- Ensured course curriculum aligned with established accreditation standards for Diversity and the rubrics of Penn State's strategic plan
- Served on Advisory Committee which significantly expanded student enrollments

PSU LGBT Resource Center

- Assisted in the collection and analysis of data used for two publications: "A Framework to Foster Diversity at Penn State 2010 – 2015" and the "Pulse" survey (Division of Student Affairs)

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· Implemented policies for coordinating unified crisis-response messages
· Named Schreyer Institute for Teaching Excellence's "Penn State's Outstanding Teacher"

PAPERS

In Progress	*The Generation of Transition—Our Bright Future*. Manuscript in preparation.
2016	"The Economic Impact of the South Dakota Public University System." Co-Authored with Michael Allgrunn. The University of South Dakota
2015	"A State-by-State Comparison of ENDA Laws on Average Incomes of Gay Men." Washington College
2013	"An Evaluation of The Pennsylvania State University's Human Sexuality and Gender Studies minor." Pennsylvania State University
2013	"Educating the Generation of Transition: Future expectations and economic crises." Pennsylvania State University
2011	"Behavioral Economics and Risk Taking." **Principles of Microeconomics**, edited by Dirk Mateer and Lee Coppock, W. W. Norton & Company, 2013 (Contributor)
2010	"From Media Control to Voting for President: Extending the Media Politics Theory." Florida International University

PRESENTATIONS AND MEDIA

2019	"The Role of LGBTQ Students in the Generation of Transition." First Annual USD Lavender Graduation Program; The University of South Dakota (April)
2019	"Equality South Dakota and the Importance of Allyship." USD School of Law Lavender Lecture; The University of South Dakota (March)
2019	"South Dakota Lawmakers Voted Down Four Anti-Trans Bills—But the Fight Isn't Over Yet" *NewNowNext* (February)
2019	"South Dakota's House Just Passed an Anti-Trans Bill. It Could Be Coming to Your State Next" ReWire News (February)
2018	"USD Professor Crunches Tobacco Tax Measure Numbers" KELOLand News (September)
2018	"Defeating the Fallacy of Contradiction" Equality Federation Leadership Conference (July)
2018	"Vermillion reflects on Pride Month, moves toward Human Relations Commission" Sioux City Journal (July)
2018	"Vermillion Establishes Human Relations Commission" Sioux City Journal (June)
2018	"Beacom Professor Awarded VCDC Young Professional of the Year" University of South Dakota (April)
2018	"South Dakota Lawmakers Defeat Anti-Transgender Bathroom Policy Bill" Washington D.C. *MetroWeekly* (February)
2017	"Travis Letellier Speaks to the 'Generation of Transition'" SDPB Radio *In The Moment* (December)

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2017	"The Human Rights Campaign Municipal Equality Index: Its Impact on Vermillion." Vermillion City Council and Elected Officials; Vermillion, South Dakota (June)
2017	"Into OZ: The Political and Economic History of the Wizard of Oz." The Center for Diversity and Community; The University of South Dakota (February)
2015	"U.S. Policy on the Federal Budget Deficit and the National Debt." Organization for Political Economy; The University of South Dakota (November)
2013	"Educating the Generation of Transition: Future expectations and economic crises." Schreyer Institute for Teaching Excellence; Pennsylvania State University (April)
2012	"Teaching Millennials: Engaging our Students with Instructional Strategies." Schreyer Institute for Teaching Excellence; Pennsylvania State University (Discussant, January)
2010	"From Media Control to Voting for President: Extending the Media Politics Theory." Department of Economics; Florida International University (April)
2009	"Extending the Media Politics Theory: Results and Implications." Department of Economics; Florida International University (May)
2009	"Intertie Bidding Practices in the California ISO's Supplemental Energy Market." Office of Oversight and Investigation; Federal Energy Regulatory Commission (August)

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[COVID-19, the Digital Divide, and Education]
Concept Paper for Fiscal Year 2022
Chairwoman Cantu
August 2021

I. Introduction

This concept paper proposes to 1) investigate whether federal programs that seek to provide increased access to ~~Internet~~internet, telecom and digital resources for schools (chiefly the E-Rate Program) actively work to bridge the digital divide address the "homework gap" disparities experienced by students of color and students with disabilities, and 2) investigate what affect COVID-19 had on the distribution and/or use of said funds.

II. Issue

The dawn of the Digital Age has seen a wide implementation of information and communication technologies in many areas of daily life for Americans. Nevertheless, while advancements in ~~Internet~~ internet and digital information have transformed the way in which Americans work, learn, and operate, it is well documented that the availability and reliance on such is not ~~nearly~~ as accessible to all. This ~~perceivable~~ gap in equity of access to technology is known as the "digital divide.~~", a concept~~The digital divide was originally brought ~~prominently~~ to ~~light~~ prominence during the Clinton administration~~, at a time where~~ when personal computer sales ~~had~~ were ~~risen~~ rising steeply~~, while~~ but costs were preventing a great amount of access. At the time, the Department of Commerce undertook a review of how the digital divide was manifesting itself~~,~~ and found significant disparities based ~~in~~ on race, socioeconomic status, and geographic location between those who had readily available access to ~~Internet~~ internet technologies ~~as opposed to~~and those who did not. Even today, about a quarter of a century later, disparities have persisted. ~~—f~~For example, white adults are more likely to have both ~~home~~ broadband and a traditional computer at home than black and Hispanic adults. Disparities also often present themselves with regards to people with disabilities~~—S~~: studies ~~have shown~~show that ~~those~~ individuals with ~~various types of~~ disabilities ~~having~~ have less access to, and less skill in using,~~pertaining to use of~~ the ~~Internet~~ internet in comparison with the rest of the general population.

One of the areas in which the effects of the digital divide are compounded is in education. In an increasingly digital education landscape marked with online homework submissions and research assignments, students without regular access to internet at home face incredible difficulty completing and submitting schoolwork ~~that requires such~~. This is commonly referred to as the "homework gap,"— and prior to the pandemic, it affected between 8.5 to 12 million students in elementary and secondary school in the United States. In addition, this homework gap ~~he's~~ is experienced much more acutely by students of color and students with disabilities – with matters of accessibility presenting an additional challenge to overcome in the digital space.

To address ~~the concerns of access to Internet that~~internet access issues many students face (~~specifically~~ and to address the digital divide at large), the federal government has a number of programs and funding avenues in place ~~with the intent~~ to expand broadband access for more Americans. Among these programs ~~in the education space~~ is the Schools and Libraries Program

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of the Universal Service Fund, commonly referred to as the "E-rate" program. This program ~~is~~ was authorized under the Telecommunications Act of 1996 during President Clinton's initial push to address the digital divide~~,~~ and provided schools and libraries discounted access to ~~Internet~~ internet and telecom services from providers after a competitive bidding process. The program is administered by the Universal Service Administrative Company under direction of the Federal Communications Commission~~,~~ and has an annual cap of $4.276 billion. Discounts provided to schools are ~~determined~~ based off of area poverty levels, as well as the character of the area (i.e.~~,~~ urban or rural), and range anywhere from 20% to 90% coverage of the costs of eligible ~~Internet~~ internet services.

While ~~provision under~~ the E-rate program has ~~allowed~~ enabled ~~for~~ schools to ~~broader~~ broaden access to telecom services for students in the building, the COVID-19 pandemic changed the landscape ~~so vastly~~ and forced students to return home for an extended amount of time. ~~, while also a~~This ~~dding~~ added the additional challenge of online classes and coursework taught and completed through telecommuting software and online services, which ~~amplifying~~ amplified already existing disparities ~~in the process~~. A number of senators called for the FCC to extend ~~utilize~~ the E-Rate program to Wi-Fi hotspots and other connective devices to help close the homework gap~~, and to expand so that students could be provided with Wi-Fi hotspots and connectivity devices~~ (at the time E-Rate did not provide in-home funding~~,~~ as it was argued that the statute did not provide the authority to do so). Under the American Rescue Plan, $7.1 billion was provided for E-rate to expand its resources to serve students.

III. Proposed Methodology

The commission could undertake a survey of school systems that received funding from the ~~right~~ E-Rate program ~~in the wake of~~ from the American ~~rescue~~ Rescue ~~plan~~Plan~~,~~ and investigate how funds were distributed and used to support students of color, as well as how funds were used to implement and adapt existing technologies and remote teaching models to best serve students with disabilities.

IV. Jurisdiction

This proposal falls under the Commission's jurisdiction to examine discrimination or the denial of equal protection under the law on the basis of color, race~~,~~ and national origin.

The E-Rate Program is a provision of federal financial assistance under the Telecommunications Act of 1996, thus falling under Title VI of the Civil Rights Act of 1964, dictating that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

V. Proposed Panels

- Panel 1: Explaining the Digital Divide and the Homework Gap
    - Education stakeholders

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        - American Federation of ~~Teahcers~~Teachers
        - National Education Association
        - National Rural Education Association
    - Academic scholars
        - E.g., Center on Reinventing Public Education (CPRE) – University of Washington
    - Elected officials
        - Federal (Congress, Dep't of Ed.)
        - State and local (including potentially school boards)
    - Agency representatives
        - FCC (including administrators of E-Rate program)
        - Department of Commerce

- Panel 2: The Compounding Effects of COVID-19
    - Educational organizations
    - Members of Congress
    - Agency representatives
    - Personal testimony (parents, teachers, students, etc.)
- Panel 4: E-Rate Overview
    - Representatives from past legislative sessions and administrations who oversaw development and passage of E- program
    - FCC (current and former administrators over E-Rate program)
    - Universal Service Administrative Company
    - Past recipients of funds/discounts
    - Private sector stakeholders (i.e. Internet service providers who provide a discounted services under E-rate)
- Panel 3: Other Reforms/ in the Wake of COVID-19
        - Members of Congress or (legislative directors/policy representatives from their offices) who proposed legislation under American Rescue Plan for Emergency Connectivity Fund, as well as other legislation aimed toward homework gap
        - Education advocates
    - Government
        - US Dept. of Education
        - US Dept. of Agriculture
        - US Department of Commerce
        - Federal Communications Commission
        - Congress
            - Legislators (or legislative directors/policy representatives from their offices) who proposed legislation under American Rescue Plan for Emergency Connectivity Fund, as well as other legislation aimed toward homework gap:
                - Senator Chris Van Hollen (D-MD)
                - Senator Ed Markey (D-MA)
                - Congresswoman Grace Meng (D-NY-06)

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In 2020, Americans experienced a nearly 30 percent year-over-year increase in homicides.[1] Violent crime (murder, non-negligent manslaughter, rape, robbery, and aggravated assault) increased by 5.6 percent, and property crime (burglary, larceny-theft, motor vehicle theft, and arson) declined by 7.8 percent.[2]

This increase in homicides fell most heavily on black Americans. In 2019, the FBI reported there were 13,927 total homicide victims in the United States.[3] 7,484 of those victims were black, 5,787 were white, 422 were "other" and 234 were "unknown". [4] In 2020, 9,941 homicide victims were black, 7,043 were white, 320 were "unknown," 240 were American Indian or Alaska Native, 236 were Asian, and 35 were Native Hawaiian.[5] This represents a 32 percent increase in black homicide victims versus a 21 percent increase in white homicide victims. Furthermore, in both 2019 and 2020, black Americans were over 50 percent of the total number of homicide victims, despite being only 13 percent of the total U.S. population.

In other words, in 2019 black Americans died by homicide at a rate of 16.8 per 100,000, whereas white Americans died by homicide at a rate of 2.28 per 100,000. In 2020, black Americans died by homicide at a rate of 22.3 per 100,000, and white Americans died by homicide at a rate of 2.78 per 100,000.[6]

This is a staggering disparity, both in terms of percentages and sheer numbers. The Commission just finished examining racial disparities in maternal mortality rates, an area in which racial disparities are smaller in size and in which the overall number of deaths is a tiny fraction of the number of homicide deaths per year. The Commission is charged with examining issues pertaining to race and to the administration of justice. Crime implicates both these considerations.

This project would examine crime statistics in the major crime categories tracked by the FBI (e.g., homicide, felonious assault, burglary, larceny-theft, burglary) for ten U.S. cities from 2004-2021. By limiting the examination to crime categories tracked by the FBI, the Commission will avoid the pitfall of attempting to correlate crimes across jurisdictions. Further responding to concerns expressed by staff and Commissioners, the time period has been extended to 2004 rather than 2012. This will allow the Commission to examine policies pursued by the Department of Justice under the Bush Administration, Obama Administration, Trump

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[1] Ryan Lucas, "FBI Data Shows An Unprecedented Spike in Murders Nationwide in 2020," NPR, Sept. 27, 2021, https://www.npr.org/2021/09/27/1040904770/fbi-data-murder-increase-2020.
[2] "FBI Releases 2020 Crime Statistics," FBI, Sept. 27, 2021, https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2020-crime-statistics.
[3] Expanded Homicide Data Table 2, Murder Victims by Age, Sex, Race, and Ethnicity, 2019, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-2.xls.
[4] *Id.*
[5] "Offender vs. Victim demographics," Expanded homicide data, Crime Data Explorer, FBI, https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/shr.
[6] See "QuickFacts," U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/RHI125219; anded Homicide Data Table 2, Murder Victims by Age, Sex, Race, and Ethnicity, 2019, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-2.xls; "Offender vs. Victim demographics," Expanded homicide data, Crime Data Explorer, FBI, https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/shr..

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Administration, and Biden Administration and compare whether policy differences appear to contribute to increases or decreases in crime.

Violent crime does not appear to have declined to 2019 levels, although there are signs violent crime may not dramatically increase over 2020 levels. According to Washington, D.C.'s Metropolitan Police Department (MPD), for example, homicides are up11% compared to this time last year.[7] Chicago thus far has a 4 percent increase in homicides over 2020.[8] Homicides in New York City are 2.5% lower than at this time last year.[9]

The Commission should also examine the extent to which other violent crimes may have a disparate impact based on race. This can be done, at least in part, by using data from the National Crime Victimization Survey.

Violent crimes are not the only crimes worthy of attention, of course. It is heartening that property crimes declined during 2020. Increases and decreases in the property crimes tracked by the FBI will also be included in the Commission's study. The Commission should examine whether property crimes have a disparate impact. The Commission can do this by using Census tracts to determine the demographic composition of where property crimes occur. The Commission can likely accomplish this by obtaining CompStat data from cities that are being examined.

An important part of this survey will be identifying cities whose police departments entered into consent decrees with the Civil Rights Division of DOJ during the relevant period. Baltimore is one such city, having entered into a consent decree with DOJ on April 7, 2017.[10] New Orleans entered into a consent decree on July 24, 2012.[11] Warren, Ohio, entered into a consent decree on January 13, 2012.[12] Chicago is a unique case, in that DOJ initially pursued a consent decree during the Obama Administration. The agreement was later dropped by then-Attorney General Jeff Sessions, and then a consent decree was reinstated by the Illinois attorney general.[13] This is not an exhaustive list of cities that have entered into consent decrees with DOJ, nor would the Commission necessarily examine these particular cities. Cities that entered into consent decrees during the relevant time period should, however, be among those selected by the Commission for study.

OCRE staff indicated that a fifty-city survey is beyond its capabilities. The lead SA will work with OCRE staff to identify ten cities or metropolitan statistical areas that represent a cross-section of the country in terms of size, demographic composition, and region. The final selection

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[7] *District Crime Data at a Glance*, Metropolitan Police Department, Sept. 29, 2021, https://mpdc.dc.gov/page/district-crime-data-glance.
[8] Compstat, Report Covering the Week of 20-Sep-21 Through 26-Sep-21, Chicago Police Department, https://home.chicagopolice.org/wp-content/uploads/1_PDFsam_CompStat-Public-2021-Week-39.pdf.
[9] CompStat, Report Covering the Week 9/20/2021 Through 9/26/2021, New York Police Department, https://www1.nyc.gov/assets/nypd/downloads/pdf/crime_statistics/cs-en-us-city.pdf.
[10] City of Baltimore Consent Decree, https://consentdecree.baltimorecity.gov.
[11] NOPD Consent Decree, https://www.nola.gov/nopd/nopd-consent-decree/.
[12] "Justice Department Settles with Warren, Ohio, Police Department, January 13, 2012, https://www.nola.gov/nopd/nopd-consent-decree/.
[13] Chicago Police Consent Decree, http://chicagopoliceconsentdecree.org/resources/.

AMERICAN OVERSIGHT

will be made by Commissioners when they vote on the discovery materials. This portion of the project will attempt to determine if there were inflection points (such as bail reform or imposition of consent decrees) at which crime began to rise or decline in various cities.

The primary task of OCRE staff will be to create a graph for each studied city that tracks longitudinal increases or decreases in crime for that city. Each graph will begin in 2006 and end in 2021. The briefing for this report will be held in late spring 2022, at which point crime data for 2021 should be available from local jurisdictions, even though FBI data will not be available until September 2022. It is anticipated that this report will be published in late 2022 or early 2023 so that FBI crime data from 2021 can be incorporated into the report. Each graph will include the homicides and non-negligent manslaughters for each year, violent crime (in general) for each year, and property crime for each year. As mentioned above, the Commission will use the FBI's crime categories. Each graph will also include indications of when important events occurred. For example, if a city experienced a high-profile police shooting (such as the 2014 Laquan McDonald shooting in Chicago), that date will be included in the graph as well. If the city was subjected to a consent decree, that date will be included as well. The goal is to produce new research that is accessible to policymakers and the public.

Staff suggest that other social factors (economic downturns, spikes in drug use, etc.) be examined. This is consonant with the project's goal of identifying inflection points when crime increased and is accepted. Staff also suggest that the project examine which demographics (juveniles, repeat offenders, etc.) are responsible for spikes in crime. This is a useful suggestion and is accepted. However, staff's primary role will be quantitative, not qualitative. This report will make an original contribution by providing data presented in a new way and relying upon the expert testimony provided at the briefing.

The other portion of the project will be a briefing at which academics, researchers, law enforcement, and current and former government officials will be invited to testify. This is envisioned as something more in the nature of an academic conference than the Commission's usual briefings. The purpose of this briefing is to discuss possible causes of the increase in crime, and ways for the Department of Justice (perhaps through the Office of Justice Programs) to support local law enforcement in combating this increase.

Over the past several years, the Commission has examined a number of topics involving law enforcement. These reports include *Police Use of Force: An Examination of Modern Policing Practices*, *Examining the Race Effects of Stand Your Ground Laws and Related Issues*, and *Targeted Fines and Fees Against Communities of Color*. This report would follow in this tradition.

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Many studies have been conducted regarding the difficulty of business startups, and particularly minority business startups, in attracting sufficient capital investment. However, President Biden's recent assertion that minority businesses' success is inhibited by an inability to hire lawyers and accountants raises the issue of what impediments are faced by minority business entrepreneurs beyond finding sufficient capital investment, government contracting opportunities, and other economic impediments. An area that has not been explored, as alluded to by the President, is whether there are federal, state, or local impediments via regulations, licensing, permits, fees, taxes, health and safety requirements, etc. that make it more difficult for minority entrepreneurs to start a small business.

The Commission should conduct a survey of what regulatory and other government-imposed requirements minority and other entrepreneurs face in setting up a new business and whether such requirements place a disproportionate burden on minority entrepreneurs. A nationwide survey is beyond the scope of what the Commission could do, but the Commission can examine what is required to start new businesses in a few representative urban, suburban, and rural jurisdictions to explore the difficulties entrepreneurs face in starting new businesses and whether such government requirements unduly burden minorities looking to start businesses.

The Commission conducted similar examinations of a few jurisdictions instead of nationwide surveys in its recent reports on Bail Reform, Maternal Health, and other reports to weigh in on those issues in the nation as a whole. Is it more difficult for minorities to start businesses in inner city Philadelphia than it is in say rural Utah? And if so, is the heightened inner-city regulation of small businesses necessary or does it unfairly prevent minorities and others living in the inner city from starting their own businesses?

Federal, state and local regulations faced by startups in addition to tax, workers comp, employment law issues include: state and local business registration requirements and fees; business and occupational licensing requirements, permits, and fees; building, construction, and inspection requirements, permits and fees;; business insurance and bonding requirements; and myriad other government requirements depending on the industry and location of a small business.

The federal government offers many forms of assistance for minority businesses but most of the assistance is targeted to minority enterprises that already exist, very little assistance is offered to entrepreneurs trying to start a business. The Commerce Department's Minority Business Development Agency (MBDA) is focused on providing access to capital, government contracts, and markets for existing minority businesses, SBA primarily provides loans and grants for existing businesses, and almost every major federal agency has an office dedicated to assisting existing minority businesses in receiving federal contracts from their agency. While the Opportunity Zone initiative passed by Congress in 2017 provides tax incentives for businesses to locate and invest in economically distressed census tracts, it does not directly assist entrepreneurs themselves to create businesses in economically distressed areas.

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Just as the Commission looks to ensure that federal, state, and local policies do not discriminate against and impact Americans' civil rights in education, employment, health, and other spheres of American life, the Commission should also ensure that federal, state, and local government policies regulating business startups do not discriminate against minority entrepreneurs who seek to set up small businesses of their own.

AMERICAN OVERSIGHT

Social Media and Uncivil Discourse: Does ~~social~~ Social ~~media~~ Media ~~amplify~~ Amplify ~~racist~~ Racist ~~activity~~ Activity and ~~hate~~ Hate ~~crimes~~Crimes?

For the past decade, there continues to be made an association with the proliferation of social media and the rise in hate speech and hate crimes.[i] Some say it is more than an association – that there is a causal link between the two.[1] Whether it is fanning the flames of the alleged Rohingya genocide in Myanmar,[2] ~~or~~ a mass ~~murdered~~ murderer live-streaming his attack on a mosque in New Zealand,[3] ~~of~~ or the alleged "call to arms" that brought Kyle Rittenhouse to Kenosha,[4] social media has been implicated.

This briefing would examine the role that social media plays in amplifying racism, hate speech, and hate crimes in America. In this examination, we will necessarily implicate a federal law – the oft-cited but not clearly understood Section 230 of the Communication Decency Act (47 U.S.C. § 230). Advocates say that it protects free speech and ensures that the voices of all, including those under the jurisdiction of this Commission, are protected.[5] Others say that it should be modified or repealed because social media uses it as a shield to allow the amplification of hate speech.[6]

Witnesses would include representatives of social media, third party advocates like the Electronic Freedom ~~foundation~~Foundation, and representatives of civil rights organizations that believe Section 230 should be amended, all to answer the question: What role should federal laws like Section 230 and the federal government play, if any, in the regulation of social media to turn down the volume on hate speech?

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[1] Fanning the Flames of Hate: Social Media and Hate Crime, Journal of the European Economic Association, https://academic.oup.com/jeea/article-abstract/19/4/2131/5917396?redirectedFrom=fulltext; How Online Hate Turns into Real-Life Violence, Washington Post, https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/.

[2] Genocide Incited on Facebook, With Posts from Myanmar's Military, New York Times, https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

[3] New Zealand Mosque Shooter Broadcast Slaughter on Facebook, AP News, https://apnews.com/article/shootings-ap-top-news-international-news-arrests-immigration-ce9e1d267af149dab40e3e5391254530.

[4] Vigilante Calls on Social Media Before Deadly Kenosha Attack, AP News, https://apnews.com/article/ap-top-news-il-state-wire-shootings-wi-state-wire-us-news-64ff4770fe1f1daca001b2fbaae0933b.

[5] *See e.g.*, Electronic Frontier Foundation, CDA 230: The Most Important Law Protecting Internet Speech, https://www.eff.org/issues/cda230.

[6] Failure to Protect: How Tech Giants Fail to Act on User Reports of Antisemitism, Center for Countering Digital Hate, https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_cac47c87633247869bda54fb35399668.pdf; Study shows social media platforms have been derelict in policing hate speech, Las Vegas Sun, https://lasvegassun.com/news/2021/aug/04/study-shows-social-media-platforms-have-been-derel/; *see generally* Hate Thrives on Social Media — But Who Should Police It?, News@Northeastern, https://news.northeastern.edu/2021/01/12/hate-thrives-on-social-media-but-who-should-police-it/ (discussing the pros and cons of government regulation of online speech).

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[i] *See generally* Stopping America's Next Hate-Crime Killers on Social Media Is No Easy Task, Reuters, https://www.reuters.com/article/us-usa-shooting-internet/stopping-americas-next-hate-crime-killers-on-social-media-is-no-easy-task-idUSKCN1UZ10S (referencing the correlation between hateful internet manifestos with hate crimes); *see generally* Racism, Hate Speech, and Social Media: A Systematic Review and Critique, Sage Journals, https://doi.org/10.1177/1527476420982230 (examining the rise of hate speech between 2014 and 2018); *see generally* Social Media Hate Speech, Harassment 'Significant Problem' For LGBTQ Users: Report, NPR, https://www.npr.org/2021/05/10/995328226/social-media-hate-speech-harassment-significant-problem-for-lgbtq-users-report (rise of anti-LGBTQ hate speech on social media platforms).

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STAFF DIRECTOR REPORT

October 4, 2021 through October 29, 2021

OFFFICE OF THE GENERAL COUNSEL

During this reporting period, OGC worked on the following:

I. Legal Sufficiency Reviews

a. Nevada Educational Digital Divide Report
b. Connecticut Voting Rights Report
c. Maine Statement of Concern Regarding Use of General Assistance Funds

II. Legal Advice and Counsel

a. Provided legal review of the script for the first meeting of the Commission on the Social Status of Black Men and Boys (CBMB). (Client: CBMB)
b. Reviewed and help draft the Commission's DEIA Self-Assessment and Cover Letter as required by Executive Order 14035, Advancing Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce. (Client: Office of Management)
c. Researched the legislative history of Territorial Advisory Committees. (Client: Regional Programs)
d. Provided review of the draft Administrative Instruction for voting procedures for the first meeting of the CBMB. (Client: CBMB)
e. Provided legal research into whether 508 accommodations needed to be provided in Spanish for the Commission Housing field briefing. (Client: Office of Management).

III. Federal Records Management

a. Drafted two (2) FOIA initial request responses/decisions.
b. Completed review of potential trainings to provide to staff and managers prior to implementation of the Commission's confidential unclassified information (CUI) policy.
c. Met with NARA to discuss the Commission's annual CUI Report.
d. Engaged in settlement negotiations with the Plaintiff in D.D.C. Civil Action No. 21-2237 (RDM), Agency Appeal No. 2021-18, *Bader v. USCCR,* and reviewed emails related to the underlying FOIA request.
e. Drafted a System of Records Notice (SORN) for the Commission's reasonable accommodation program to collect medical and religious information for OIRA review and mailed a paper copy to Congressional committees in the House as required by OMB Circular A-108.

IV. Management

a. Regularly met with the CBMB Program Manager and USCCR's Executive Team to offer legal guidance and support.

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b. Attended CBMB first meeting planning meetings.
c. Submitted the Commission's Foreign gifts report to State Department.
d. Attended weekly calls with OMB concerning Covid-19 vaccination requirements and reopening.
e. Ongoing work with the Office of Management to finalize the Commission's return to work plan.
f. Reviewed the Commission's FY 2021 Performance and Accountability Report.
g. Updated OGC's final FY 2021 Legal Representation Letter.
h. Attended governmentwide America 250 meeting.

V. Ethics

a. October 2021 OGC Ethics Newsletter.
b. Reviewed Special Assistant's OGE Form 278 for potential conflicts of interest.
c. Entered new Special Assistant into system for completion of a Form 278.
d. Scheduled new employees for initial ethics training as required by OGE regulations.

MEDIA AND COMMUNCIATIONS

Social Media Analytics

During the time period, October 1, 2021 through November 1, the following engagement was seen on USCCR Social Media platforms:

Platform	*Impressions*	*Engagement*	*New Followers*	*Page Views*
Facebook	3,433	95	15	159
Twitter	18,000	176	93	5,553
TOTALS	**21,433**	**271**	**108**	**5,712**

Data Point of Interest

The most interesting piece of data during this time period was the increase in page views. The page views for this month increased by 14% and the data reveals an uptick in our social mediapresence. We can appropriately attribute this to two critical factors such as the first top tweet gaining 1,500 impressions regarding Staff Director Mauro Morales, joined by his wife Janet Murguia and Union Station Kansas City President & CEO, George Guastello at the KC Missouri Exhibition. Plus the announcement of alignment with the Momnibus Act and the Commission recently released report titled: Racial Disparities in Maternal Health.

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The report showed an increased federal funding could help save lives and decrease disparities in maternal Health. The tweet garnered a total of 309 impressions and 23 engagements. Ma- ternal health is a pressing issue at the forefront of women's right specifically during the banningof particular choices involving women bodies in America's political arena. Our social media visibility is increasing as we gained our top follower and mention from Pennsylvania Governor Tom wolf. Governor Wolf mentioned his maternal health advocacy by tweeting, "Three years ago today I started a Maternal Mortality Committee to address PA's startling number of maternal deaths. Today's U.S. woman is 50% more likely to die in childbirth than her mother, according to a September @USCCRgov report. We must prioritize the health of women."

Our efforts were successful as we were able to obtain more engagement on Facebook. The platform algorithm truly hinders our ability to engage with followers. The data consistently lags in comparison with the Twitter data. However, our audience were fond of the New York City State Advisory Committee to USCCR recommendation from the report titled, Education Equity in New York, A. Forgotten Dream, implemented to fully fund the Foundation Aid. This month social media analytics illustrated an all-time high, increase throughout every platform category especially in page views.

OFFICE OF CIVIL RIGHTS EVALUATION

Complaints Processing: On Friday, March 13, 2020, after the telework announcement due to the COVID-19, OCRE has also changed the outgoing phone and email referral messages and continues to respond to and refer complaints despite the logistical challenges. However, at this time, staff has no access to general mail and will not be able to respond to letters remotely.

During this reporting period, OCRE received 0 written complaints, 0 congressional complaints, 0 walk-in complaints, 26 e-mail complaints, 0 facsimile complaints, and 60 telephonic complaints. In total, staff received and processed 86 complaints during this reporting period.

FY 2020

Maternal Mortalities: The report was successfully released on September 15, 2021. OCRE continues to work with the lead SA and the Director of Communications to promote the report with Congress and other outlets.

Bail Reform: OCRE received Commissioners' rebuttals on October 20, 2021. OCRE finalized the report cover and hired a desktop publisher that began working on October 25, 2021, to format the report. OCRE will distribute the final and formatted report to Commissioners on November 5, 2021, for technical edits in preparation of the report release on November 17, 2021. Planning for report release will soon begin.

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FY 2021:

FEMA: OCRE distributed the first round of the FEMA draft to Commissioners on September 27, 2021 per the voted upon timeline. Commissioner comments on the draft were due to OCRE on October 27, 2021. The Texas virtual briefing was successfully held on October 21, 2021.Weekly planning meetings for Puerto Rico are still ongoing. After assessing the conditions and speaking with community stakeholders, each office recommends that the planning for the Puerto Rico briefing continue to be in-person. ASCD and OM Directors traveled to San Juan to confirm logistics and location for the briefing that remains on December 10, 2021. OCRE requested panelists recommendations from Commissioners on October 4, 2021, and after vetting all received suggestions, first round invitations went out on October 27, 2021. OCRE will continue to work with the co-leads to keep Commissioners informed on the status of the panelists.

Monitoring Activities: The OCRE Director continues to monitor major civil rights developments, particularly those arising in the wake of COVID-19. OCRE staff continues to monitor new developments in the current areas of research discussed above. OCRE completed the review of the FY 2022-23 concept papers and submitted comments and suggestions to Commissioners on July 9, 2021.

Staffing News: OCRE has completed the interview process for the new social scientist to replace the vacancy of the Lead Social Scientist position. OCRE staffer, Nicholas Bair accepted another position at DHS and the OCRE Director also conducted interviews to fill the vacancy left by Mr. Bair. All interviews were completed, and two offers have been extended. OCRE continues to have regular team meetings and check-ins, and continues to produce significant, substantive work for the Commission, despite working remotely.

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Attachment A

U.S. COMMISSION ON CIVIL RIGHTS
OFFICE OF CIVIL RIGHTS EVALUATION
COMPLAINT REPORT

REPORTING MONTH:
October 2021
BREAKDOWN OF COMPLAINTS PROCESSED

By subject		By basis of complaint	
Employment	7	Race and ethnic origin	1
Housing	0	Black	7
Education	0	Hispanic	0
Federal programs	10	American Indian/Alaskan Native	0
Administration of justice	0	Asian	0
Voting	0	Other national origin, race	2
Health care	9	Religion	1
Human rights	0	Sex/Gender	0
Police brutality	0	Disability	12
Public accommodations	3	Age	2
Hate crimes	1	Inmates	1
Other	37	Sexual harassment	0
No jurisdiction	11	Reprisal	0
Unknown	7	Basis not stated	0
Affirmative Action	0	Unknown	11
Police Misconduct	1	Other	50
Prisoners' Rights	0		
Prison Conditions	0		
Campus Anti-Semitism	0		
Anti-Semitism	0		

Backlog at the beginning of reporting period	0
New complaints received in month:	
Correspondence (regular):	0
Complaints in Spanish:	0
Congressional:	0
Walk-ins:	0
Telephone calls:	60
E-mail:	26
Facsimile	0
Total new complaints:	86
Total workload:	86
Total complaints processed in month:	86
Total backlog of telephone calls:	0
Total backlog of written complaints:	0

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U.S. COMMISSION ON CIVIL RIGHTS
OFFICE OF CIVIL RIGHTS EVALUATION

REPORTING MONTH:
October 2021

REFERRAL AGENCIES FOR CORRESPONDENCE

Department of Agriculture	0
Department of Defense	0
Department of Education	0
Department of Health and Human Services	15
Department of Housing and Urban Development	0
Department of Justice	38
Attorney General's Office	0
Federal Bureau of Investigation	0
Department of Labor	0
Department of State	0
Department of Transportation	0
Department of the Treasury	
Internal Revenue Service	0
Customs Service	0
Department of Veterans Affairs	0
Environmental Protection Agency	0
Equal Employment Opportunity Commission	2
Executive Office of U.S. Trustees	0
Federal Communications Commission	0
Federal Trade Commission	0
Merit Systems Protection Board	0
National Labor Relations Board	0
Small Business Administration	0
Postal Service	0
Other agencies, State and non-Federal	0

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U.S. COMMISSION ON CIVIL RIGHTS
OFFICE OF CIVIL RIGHTS EVALUATION
COMPLAINT BREAKDOWN BY STATE

(WRITTEN & TELEPHONE COMPLAINTS)

REPORTING MONTH:
October 2021

ALABAMA	1
ALASKA	0
ARIZONA	2
ARKANSAS	0
CALIFORNIA	5
COLORADO	0
CONNECTICUT	0
DELAWARE	0
DISTRICT OF COLUMBIA	0
FLORIDA	8
GEORGIA	0
HAWAII	1
IDAHO	1
ILLINOIS	3
INDIANA	1
IOWA	1
KANSAS	1
KENTUCKY	1
LOUISIANA	1
MAINE	0
MARYLAND	3
MASSACHUSETTS	0
MICHIGAN	1
MINNESOTA	0
MISSISSIPPI	0
MISSOURI	0
MONTANA	1
NEBRASKA	0
NEVADA	1
NEW HAMPSHIRE	0
NEW JERSEY	2
NEW MEXICO	0
NEW YORK	4
NORTH CAROLINA	1
NORTH DAKOTA	0
OHIO	1
OKLAHOMA	0
OREGON	1
PENNSYLVANIA	17
RHODE ISLAND	0
SOUTH CAROLINA	
SOUTH DAKOTA	0
TENNESSEE	1
TEXAS	4
UTAH	0
VERMONT	0
VIRGINIA	2
WASHINGTON	1
WEST VIRGINIA	1
WISCONSIN	1
WYOMING	0
OUTSIDE USA	1
NO STATE*	17
PUERTO RICO	0

* Generally, e-mail complaints do not indicate a state.

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OFFICE OF MANAGEMENT

Administrative Services and Clearinghouse Division

Commission Meeting/Briefing. This reporting period staff spent time devoted to planning the logistical arrangements for the commission meeting on September 10th. In addition, staff spent time devoted to planning the logistical arrangements for the FEMA Briefing set for October 2nd.

Invoice Payments. Staff spent time processing procurement requests. Staff continues to process invoices for payment and working with GSA to rectify any outstanding payment issues. Staff continued to process requisitions and other paperwork to modify purchase orders for the remainder of the fiscal year due to the passing of the budget for annual purchases order.

End of Year Closeout Activity. During this reporting period staff spent the majority of its time related to close out of the fiscal year. Staff activities for end of year include processing of PRs, tracking of PRs related to several SOWs projects and or contractors; staff participation in division meetings to discuss a variety of issues such as completing year end purchases, de-obligation of funds on unused requisitions, de-obligating unused funds on purchase orders, completion of receiving reports, etc. Staff is in the process of revising tracking logs for procurement transactions

COVID-19. Staff continues to monitor the situation and expend time related to working on tasks related to COVID-19. Staff attended various teleconference meetings, video meetings and webinars with executive staff, landlords, various GSA entities, other Federal government agencies, contractors, etc. Staff continues to provide guidance and input and provide updates as available related to COVID-19.

EIS (Enterprise Infrastructure Solutions). Staff continued work on the process of transferring the agency from the expiring Networx contract to the new EIS contract for Telephone and IT services. Staff attends meetings with the GSA on the transition and provided additional information to GSA on the draft solicitation which has passed GSA scope review. Staff completed revising the original solicitation and reposted the solicitation on GSA eBuy again which will close next month.

FEMA Site Briefing. Staff attended planning meetings with the briefing committee for logistical planning for the two FEMA site briefings. More time spent on the FEMA TX briefing logistics.

Maternal Health Briefing Report. Staff spent time planning and supporting the release of the Maternal Health Briefing Report on September 15th.

BMB. Staff has attended weekly staff meetings with the program manager for CSSBMB. Staff continues progress on arranging services as requested. Staff will meet with

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Program Manager to begin work on SOW for contract staff after needs have been defined.

Return-to-Work. Staff continues to participate in the discussions regarding returning to the office and beginning plans for staff and what it will take to be prepared for the agency's return.

HQ Space. Staff continues to contact the Landlord to keep abreast of office and building issues during this time the agency is teleworking full time. There were no issues reported.

CCR IT Modernization Plan. Staff continues work towards completing the agency's IT modernization Plan. We currently have just 3 more laptops to issue from our previous list and one new staff person to issue a laptop.

Publication Distribution. We have resumed responding to request for publication with the assistance of a contract. This reporting period we were able to clear 75% of backlog request.

Highlight of IT Operations

- Staff activated IT accounts for the agency Fall Intern program.
- Staff worked to onboard and activate accounts new staff and contractors.
- Staff managed IT Help Desk to resolve complex IT Issues.
- Staff worked with the SAC staff on the Skype to Teams Transition.

Website Updates

- Staff completed content updates per OSD and SAC.

Management and Training

- Staff attended Small Agency Council CIO, CISO, CDO Data Meetings.
- Staff responded and completed tasks associated with Emergency Directives for the High Value Asset Program.
- Staff worked continued to source IT initiatives for End of Year Closeout.

Cybersecurity Breaches

During this reporting period there was one agency laptop that was compromised. A FTE gave login information via a phishing email. The laptop was replaced. The report was filed per FISMA Requirements.

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Upcoming Upgrades and Projects Status

- Staff launched the New Website Phase I: Technology Refresh. As of September 2021, USCCR is compliant with 21st Century Integrated Digital Experience Act.
- Staff continues to research CUI marking technologies.
- Staff is working with FISMA Auditors for the agency FISMA Report due October 27, 2021.

- Staff has started migration of files and pages for the Phase I of the agency website to the new server installed by ASCD/IT. ASCD continues to work for OSD for basic changes and content implementation for Phase I.
- Staff has begun Phase I of the e-waste project preparing for IT property removal and security sanitation.

Human Resources Division

Staffing: A vacancy was announced for a Temporary Lead (Supervisor) Social Scientist position in the Office of Civil Rights Evaluation, the vacancy closed, a selection was made and the incumbent will start in the position on June 6, 2021. A vacancy was announced for a Pathways Recent Grad position in the regional office, the vacancy is set to close on June 8, 2021. Staff is working to announce a vacancy to fill two (2) Pathways Recent Grad positions in the Office of Management. An offer has been made to the fill the Civil Rights Analyst position in the Honolulu Regional office; staff is awaiting candidate's response. A selection was made for the Pathways Student Intern position in the Office of the General Counsel, staff is awaiting candidate's decision. The Contract Specialist position in the Administrative Services Division was announced and closed on December 4, 2020, a certificate of eligible has been issued to the Selecting official and interviews are being scheduled.

Employee Counseling: Staff members counseled several employees in areas of health benefits, thrift savings, -up TSP contributions, retirement and leave and pay administration. Staff counseled employee in the area of reasonable accommodations.

Other: Staff continues to assist with paycheck8 issues. Staff is working with NFC on systems migration.

Reporting: Staff submitted reports to OPM as required by regulations.

Budget and Finance

FY 2022 Budget Execution: Staff is working with USDA, headquarters staff, and regional offices to execute the budget.

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FY 2021 Financial Statement Audit: Staff is working with our auditors on the FY 2021 Financial Statement Audit.

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PERSONNEL REPORT

PERIOD May 3, 2021 to June 4, 2021

Permanent appointments	42
Intermittent schedules	8
Pathways Program	1

ACCESSIONS

Robert Amartey - BFD
Marvin Williams - CSSBMB
Kiyana Akins - PAU
Victoria Moreno - Regional Office

SEPARATIONS

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REGIONAL PROGRAMS UNIT

Please see the EXCEL file: Copy of Regional Programs Monthly Advisory_Committees_Status_Report_11_5_2021.pdf

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COMMISSION ON CIVIL RIGHTS

Sunshine Act Meetings

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission public business meeting.

DATES: Friday, November 19, 2021, 12:00 pm EST.

ADDRESSES: Meeting to take place by telephone and is open to the public by telephone: 866-556-2513, Conference ID #: 7517508.

FOR FURTHER INFORMATION CONTACT: Angelia Rorison: 202-376-7700; publicaffairs@usccr.gov.

SUPPLEMENTARY INFORMATION:

In accordance with the Government in Sunshine Act (5 U.S.C. 552b), the Commission on Civil Rights is holding a meeting to discuss the Commission's business for the month. This meeting is open to the public. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, November 19, 2021, is https://www.streamtext.net/player?event=USCCR. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript. Schedule subject to change, for updates visit the USCCR Twitter at www.twitter.com/usccrgov.

Meeting Agenda

I. Approval of Agenda

II. Business Meeting

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A. Presentations from Advisory Committees to the Commission on Recent Reports/Memo Releases

B. Discussion and Vote on Advisory Committee Appointments

C. Vote to Appoint Travis Letellier as New Chair of South Dakota Advisory Committee

D. Vote to Confirm USCCR Representative to the EAC

E. Vote to Amend January 2022 Business Meeting Date

F. Discussion and Vote on Fiscal Year 2022 Concept Papers and Fiscal Year 2023 Statutory Enforcement Report

G. Management and Operations

- Staff Director's Report

III. Adjourn Meeting

Dated: November 9, 2021

Angelia Rorison,

USCCR Media and Communications Director.

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Mississippi Demographics					
	State	SAC		State	SAC
Political (Gallup, 2018)[1]			**Gender (Census, 2018)[2]**		
Democratic/Lean	42%	46.1% (6/13)	Male	48.5%	53.9% (7/13)
Republican/Lean	44%	46.1% (6/13)	Female	51.5%	46.1% (6/13)
Independent/Non-Affiliated	14%	7.7% (1/13)	Prefer not to answer	--	--
Race/Ethnicity (Census, 2018)[3]			**Religion (Pew, 2014)[4]**		
Non-Hispanic White	56.4%	61.5% (8/13)	Christian	83%	84.6% (11/13)
Black	37.8%	38.5% (5/13)	Jewish	<1%	--
Latino/Hispanic	3.4%	--	Muslim	<1%	--
Asian	1.1%	--	Buddhist	<1%	--
AIAN	0.6%	--	Hindu	<1%	--
NHPI	0.1%	--	Atheist	1%	--
Two or More Races	1.3%	--	Agnostic	3%	--
Prefer not to answer	--	--	Unaffiliated (No Religion)	14%	--
			Prefer not to answer	--	15.4% (2/13)
LGBT (MAP, 2018)[5]	3.5%	7.7% (1/13)	**Age (SAC Only)***		
Prefer not to answer			<35	--	23.1% (3/13)
Veteran (Census, 2015-19)[6]	5.6%	7.7% (1/13)	35-39	--	23.1% (3/13)
Disability (2019)[7]	35%	7.7% (1/13)	40-60	--	46.1% (6/13)
Prefer not to answer		7.7% (1/13)	>60	--	7.7% (1/13)
			No answer	--	--

[1] ""Party affiliation among adults in Mississippi," Pew, 2021, https://www.pewforum.org/religious-landscape-study/state/mississippi/party-affiliation/

[2] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/MS/PST045219.

[3] *Ibid.*

[4] "Religious Landscape Study," Pew Research Center, 2014, https://www.pewforum.org/religious-landscape-study/state/mississippi/.

[5] Equality Profile, Movement Advancement Project, https://www.lgbtmap.org/equality_maps/profile_state/ms.

[6] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/MS/PST045219.

[7] CDC Disability and Health U.S. State Profile, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/mississippi.html.

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Name	SAC Status	Profession/ Skills	Political Affiliation	Age[8]	Gender Identity	Race/ Ethnicity	Religion	Sexual Orientation	Disability?	Veteran	Notes/Flag?
Ronald Rychlak	Returning; Nominated for Chair	Professor of Law, Chair of Law and Government & Faculty Athletic Representative, University of Mississippi	R	64	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Returning chair of the Mississippi SAC. Published in areas of criminal law, constitutional law, gaming law, environmental issues, and religious history. Active on Twitter, no red flags.
Rhonda Bailey	New	Project Manager, Rowan Strategies	D	36	F	Black/African American	Protestant	Heterosexual/ straight	N/A	N	10 years of experience in political organizing and advocacy. Active on Facebook and LinkedIn, no red flags
Brittany Barbee	New	Assistant Dean of Students & Adjunct Professor, University of Mississippi School of Law	I (leans D)	36	F	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Prior to UMiss, worked as a law fellow in Children's Rights Division of Southern Poverty Law Center. Semi-active on Facebook and Instagram, no red flags.
Zeb (Zeke) Baucum	New	Attorney/Owner, Baucum Law Firm, PLLC	R	31	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Keeps social media profiles on private, otherwise no red flags

[8]May not be exact, extrapolated from 2021-(birth year).

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Jessica Carter	New	Associate Director of Organizing, NARAL Pro Choice America	I (leans D)	34	F	Black/African American	Prefer not to answer	Heterosexual/ straight	Prefer not to answer	N	Years of experience in organizing, campaign advocacy, legislative advocacy, etc. Active on various social media pages, though some accounts have been kept on private, otherwise no red flags.
Charles Cowan	New	Attorney/Shareholder, Wise, Carter, Child & Caraway, P.A.	R	33	M	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Has done defense work on voting rights claims for Mississippi elected officials and the state of Mississippi. Active on Facebook, Twitter, and LinkedIn, no red flags.
Macey Edmondson	Returning	Clinical Professor & Graduate Program Coordinator, The University of Mississippi School of Education	I (equal lean)	45	F	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Addition to service on Mississippi SAC, has also served on local Literacy Council in Lafayette Co., MS. Active on various social media pages, No red flags.
Lisette Gushiniere	New	Independent Consultant, LG Consulting	D	58	F	Black/African American	Prefer not to answer	Heterosexual/ straight	N/A	N	Brings years of communications and public relations experience, also has a J.D. Active on Facebook, no red flags.
Russ Latino	New	President, Empower Mississippi	R	40	M	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Public policy and legal strategist, has worked in government affairs and policy since 2015, past president of Federalist Society of MS. Active on Twitter, no red flags.

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Nicholas Lott	Returning	Director of Disaster Recovery & Special Compliance Operations, Mississippi Development Authority	I (leans R)	42	M	Black/African American	Protestant	Heterosexual/ straight	N/A	N	Career focus in civic engagement, returning member of the Mississippi SAC, Active on Facebook, Twitter, and Instagram.
Michael Oropeza	New	Program Director, El Pueblo	D	57	F	White/Caucasian	A mixture of Catholic and Protestant	Heterosexual/ straight	N/A	N	Program director at El Pueblo, organization in MS that provides legal assistance, community outreach, and advocacy on behalf of immigrants. Former board member on MS boards on mental health, behavioral and environmental health equity. Active on Facebook, no red flags.
Aaron Rice	New	Director, Mississippi Justice Institute	R	38	M	White/Caucasian	Protestant	Heterosexual/ straight	A mobility impairment	Y	The Mississippi Justice Institute "litigate[s] public interest constitutional challenges to state and local laws in order to foster liberty and prosperity in Mississippi"; Active on Facebook and Twitter, no red flags.

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Darein Spann	New	Principal, Technology, Engineering, and Construction House, Starkville High School	D	45	M	Black/African American	Baptist	Gay	N/A	N	Also serves as Vice President of Mississippi Association of Educators and former member of Board of Directors of National Education Association. Active on Facebook and Twitter, no red flags.

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Indiana Demographics					
	State	SAC		State	SAC
Political (Gallup, 2018)[1]			**Gender (Census, 2018)[2]**		
Democratic/Lean	42%	44.4% (8/18)	Male	49.3%	61.1% (11/18)
Republican/Lean	37%	50% (9/18)	Female	50.7%	38.9% (7/18)
Independent/Non-Affiliated	20%	5.6% (1/18)	Prefer not to answer		
Race/Ethnicity (Census, 2018)[3]			**Religion (Pew, 2014)[4]**		
Non-Hispanic White	78.4%	61.1% (11/18)	Christian	72%	83.3% (15/18)
Black	9.9%	27.8% (5/18)	Jewish	1%	--
Latino/Hispanic	7.3%	--	Muslim	<1%	--
Asian	2.6%	5.6% (1/18)	Buddhist	<1%	--
AIAN	0.4%	--	Hindu	<1%	--
NHPI	0.1%	--	Atheist	3%	--
Two or More Races	2.2%	--	Agnostic	4%	--
Prefer not to answer	--	5.6% (1/18)	Unaffiliated (No Religion)	26%	11.1% (2/18)
			Prefer not to answer	--	5.6% (1/18)
LGBT (MAP, 2018)[5]	4.5%	5.6% (1/18)	**Age (SAC Only)***		
Prefer not to answer			<35	--	--
Veteran (Census, 2015-19)[6]	5.7%	5.6% (1/18)	35-39	--	22.2% (4/18)
Disability (2019)[7]	28%	16.7% (3/18)	40-60	--	66.7% (12/18)
Prefer not to answer		16.7% (3/18)	>60	--	11.1% (2/18)
			No answer	--	--

[1] ""Party affiliation among adults in Indiana," Pew, 2021, https://www.pewforum.org/religious-landscape-study/state/indiana/party-affiliation/
[2] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/IN/PST045219.
[3] *Ibid.*
[4] "Religious Landscape Study," Pew Research Center, 2014, https://www.pewforum.org/religious-landscape-study/state/indiana/.
[5] Equality Profile, Movement Advancement Project, https://www.lgbtmap.org/equality_maps/profile_state/in.
[6] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/IN/PST045219.
[6] *Ibid.*
[7] CDC Disability and Health U.S. State Profile, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/indiana.html.

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Name	SAC Status	Profession/ Skills	Political Affiliation	Age[8]	Gender Identity	Race/ Ethnicity	Religion	Sexual Orientation	Disability?	Veteran	Notes/Flag?
Diane Clements-Boyd	Returning; Nominated for Chair	Executive Director, City of Evansville Human Relations Commission	I (leans D)	60	F	Black/African American	Protestant	Heterosexual/ straight	N/A	N	Active on Facebook and LinkedIn. No red flags.
Dawn Adams	New	Fmr. Executive Director, Indiana Disability Rights[9]	D	52	F	White/Caucasian	No religion	Heterosexual/ straight	A mental health disorder	N	Active on Facebook, Instagram, LinkedIn, and Twitter (No another number of these accounts seem to be inactive.) No red flags.
Jeannine Bell	New	Professor of Law, Indiana University Maurer School of Law	D	52	F	Black/African American	Inter/Non-denominational	Heterosexual/ straight	N/A	N	Active on Twitter and LinkedIn. No red flags.
Christopher Douglas	Returning	Managing Director, C.H. Douglas & Gray Wealth Management	R	56	M	White/Caucasian	Protestant	Gay	N/A	Y	Active on Facebook, Instagram, and Twitter. No red flags.
Jason Fertig	New	Associate Professor, University of Southern Indiana	R	43	M	White/Caucasian	Prefer not to answer	Heterosexual/ straight	N/A	N	Active on LinkedIn. No red flags.

[8]May not be exact, extrapolated from 2021-(birth year).
[9] Indiana Disability Rights currently has Melissa Keyes (see below) listed as current Executive Director, which contradicts with some of the information provided for Ms. Adams.

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Terri Jett	New	Professor, Political Science/Peace and Conflict Studies Department, Faculty Director of the Hub for Black Affairs and Community Engagement, and Special Assistant to the President, Butler University	D	58	F	Black/African American	Protestant	Heterosexual/ straight	N/A	N	Active on Facebook, Instagram, and Twitter (tweets on private). No red flags.
David Johnson	New	Chief Counsel, Advisory Division, Office of the Indiana Attorney General	R	39	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Not active on social media. No red flags.
Zachary Kester	New	Executive Director and Managing Attorney at Charitable Allies; Consulting Exec. Vice President of Programming, Kendrick Foundation	R	39	M	Prefer not to answer	Protestant	Heterosexual/ straight	N/A	N	Not active on social media. No red flags.
Melissa Keyes	New	Executive Director, Indiana Disability Rights	I (leans D)	40	F	White/Caucasian	No religion	Heterosexual/ straight	A learning disability and a long term medical illness	N	Active on Facebook and Instagram, but uses private accounts. No red flags.
Tony Kirkland	Returning	Fmr. Special Assistant to Governor Mike Pence	R	60	M	Black/African American	Baptist	Heterosexual/ straight	Prefer not to answer	N	Not active on social media. No red flags.

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Bill McGill	Returning	Senior Pastor, Imani Baptist Temple	I (equal lean)	65	M	Black/African American	Protestant	Heterosexual/ straight	Prefer not to answer	N	Active on Facebook and Twitter. No red flags.
Patti O'Callaghan	Returning	Retired, last served as Director of Social Justice Ministries, Lafayette Urban Ministry	D	68	F	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Not active on social media. No red flags.
Michael Padgett	New	Partner, Jackson Lewis PC	D	59	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Not active on social media. No red flags.
Travis Phillips	New	Owner and Operator, Fear Not Studios, L.L.C	R	39	M	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Not active on social media. No red flags.
Jonathan Watson	New	Professor of Law, St. Francis Law School	R	44	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Active on Facebook, no red flags.
Thomas Wheeler	New	Member; Principal, Government Services and Appellate Practice Groups, Frost Brown Todd	R	59	M	White/Caucasian	Protestant	Heterosexual/ straight	Unspecified disability	N	Active on LinkedIn. No red flags.
Ellen Wu	Returning	Associate Professor, History, Indiana University Bloomington	I (leans D)	47	F	Asian/Asian American	Protestant	Heterosexual/ straight	N/A	N	Active on Twitter. No red flags.
Seth Zirkle	New	Member, Jackson Kelly PLLC	R	39	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	Prefer not to answer	N	Not active on social media. No red flags.

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Nebraska Demographics					
	State	SAC		State	SAC
Political (Gallup, 2018)[1]			**Gender (Census, 2018)[2]**		
Democratic/Lean	36%	42.9% (6/14)	Male	50%	64.3% (9/14)
Republican/Lean	47%	42.9% (6/14)	Female	50%	35.7% (5/14)
Independent/Non-Affiliated	17%	14.3% (2/14)	Prefer not to answer		--
Race/Ethnicity (Census, 2018)[3]			**Religion (Pew, 2014)[4]**		
Non-Hispanic White	78.2%	50% (7/14)	Christian	75%	78.6% (11/14)
Black	5.2%	7.1% (1/14)	Jewish	<1%	--
Latino/Hispanic	11.4%	21.4% (3/14)	Muslim	<1%	--
Asian	2.7%	7.1% (1/14)	Buddhist	1%	--
AIAN	1.5%	21.4% (3/14)	Hindu	1%	--
NHPI	0.1%	--	Atheist	1%	--
Two or More Races	2.3%	21.4% (3/14)	Agnostic	4%	7.1% (1/14)
Prefer not to answer		--	Unaffiliated (No Religion)	20%	14.3% (2/14)
			Prefer not to answer		
LGBT (MAP, 2018)[5]	3.8%	14.3% (2/14)	**Age (SAC Only)***		
Prefer not to answer			<35	--	21.4% (3/14)
Veteran (Census, 2015-19)[6]	6.1%	14.3% (2/14)	35-39	--	14.3% (2/14)
Disability (2019)[7]	35%	14.3% (2/14)	40-60	--	42.9% (6/14)
Prefer not to answer		--	>60	--	21.4% (3/14)
			No answer	--	--

[1] ""Party affiliation among adults in Nebraska," Pew, 2021, https://www.pewforum.org/religious-landscape-study/state/nebraska/party-affiliation/

[2] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/NE/PST045219.

[3] *Ibid.*

[4] "Religious Landscape Study," Pew Research Center, 2014, https://www.pewforum.org/religious-landscape-study/state/nebraska/.

[5] Equality Profile, Movement Advancement Project, https://www.lgbtmap.org/equality_maps/profile_state/ne.

[6] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/NE/PST045219.

[6] *Ibid.*

[7] CDC Disability and Health U.S. State Profile, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/mississippi.html.

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Name	SAC Status	Profession/ Skills	Political Affiliation	Age[8]	Gender Identity	Race/ Ethnicity	Religion	Sexual Orientation	Disability?	Veteran	Notes/Flag?
Judi Gaiashkibos	Returning (nominated for chair)	Executive Director, Nebraska Commission on Indian Affairs	D	68	F	American Indian/Alaskan Native	Episcopalian	Heterosexual/ straight	N/A	N	From bio: "She has worked with the government and private sector to provide opportunities for Nebraska Indians, fostered diversity and cultural sensitivity in the Nebraska State Legislature, promoted state and federal legislation, and advanced sovereignty issues." Not active on social media in a personal fashion.
Jennfier Creager	New	Vice President, Public Policy, Greater Omaha Chamber	R	46	F	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Years of experience in public policy and government affairs at the state & federal level Active on Twitter, Instagram, and Facebook. No red flags.
Janet Eckerson	Returning	Assistant Professor, Department of Modern Languages, University of Nebraska-Kearney	D	39	F	White/Caucasian	No religion	Heterosexual/ straight	N/A	N	Returning member; Has also served in the leadership of the Nebraska International Language Association Active on Facebook. No red flags.

[8]May not be exact, extrapolated from 2021- (birth year).

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Edmund Hamaan	Returning	Professor, Dept. of Teaching, Learning, and Teacher Education, University of Nebraska	D	53	M	White/Caucasian	Agnostic	Heterosexual/ straight	N/A	N	Returning member; Has extensive publication in the intersection between education and the Latino diaspora. Also serves as an equity fellow for the Midwest and Plains Equity Assistance Center (Indiana University). Active on Twitter. No red flags.
Jason Hayes	Returning	Director of Govt. Relations, Nebraska State Education Association	R	52	M	White/Caucasian	Protestant	Heterosexual/ straight	N/A	N	Returning member, Also member of the judicial nominating commission for the Nebraska Court of Appeals, 1st District. Has published on the Nebraska equal protection clause. Active on LinkedIn. No red flags.
John Icenogle	New	Associate Attorney, Bruner Frank Schumacher Husak L.L.C.	R	30	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	Y	Also has involvement with a library advisory board, the United Way Board, and a leadership committee with the Kearney Area Chamber of Commerce. Active on Facebook. No red flags.
Nikitah Imani	Returning	Professor, University of Nebraska at Omaha	I (leans R)	54	M	Black/African American	Protestant	Heterosexual/ straight	N/A	N	Active on Facebook and Twitter (not able to be tracked, but no red flags otherwise).
Andrew La Grone	New	Attorney & Founder, La Grone Law, LLC	R	31	M	White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Recently served as a State Senator in district 49 of Nebraska. No social media provided.

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David Lopez	New	Attorney, Husch Blackwell LLP	R	36	M	Hispanic/Latino; White/Caucasian	Roman Catholic	Heterosexual/ straight	N/A	N	Also former Deputy Solicitor General and Assistant AG in Nebraska AG Office. Active on Twitter. No red flags.
Margie Nichols	New	Semi-Retiired, Former Senior Civil Rights Investigator, City of Lincoln Commission on Human Rights	D	60	F	White/Caucasian	Protestant	Lesbian	Long term medical illness & mental health disorder	N	"Specialized knowledge of Title II and Title VII of the Civil Rights Act of 1964, as Amended, the Americans with Disabilities Act of 1990, as Amended, the Fair Housing Act, the Age Discrimination in Employment Act, and Title 11 of the Lincoln Municipal Code" Active on Twitter, Instagram, and Facebook. No red flags.
Jose Soto	Returning	Vice President, Access/Equity/ Diversity at Southeast Community College	I (equal lean)	72	M	Hispanic/Latino; White/Caucasian	No religion	Heterosexual/ straight	N/A	Y	Also has taught sociology in addition to his equity and access work in higher ed. Not active on social media.
Peter Szto	Returning	Professor of Social Work, University of Nebraska at Omaha	I (equal lean)	66	M	Asian/Asian American	Orthodox Christian	Heterosexual/ straight	N/A	N	Has written/presented on social work, social welfare, mental health, etc. Not active on social media.

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Edward Ventura	New	School Librarian, Kindergarten - 6th Grade, Chandler View Elementary School	D	51	M	American Indian/Alaskan Native; Hispanic/Latino	Roman Catholic	Heterosexual/ straight	N/A	N	Serves/has served on various education boards. Presented to the Nebraska SAC for their "Civil Rights and the Impact of Native American Names, Symbols, and Imagery in School Mascots" report. Active on various social media platforms. No red flags.
Alexandrea Lee Walker	New	Office Assistant, Multicultural Affairs, UNO	D	21	F	American Indian/Alaskan Native	Native American Church	Bisexual	Sensory impairment	N	Has had involvement in a number of community and civic engagement ventures in NE. Active on Twitter, Instagram, and Facebook. No red flags.

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Arizona Demographics					
	State	SAC		State	SAC
Political (Gallup, 2018)[1]			**Gender (Census, 2018)[2]**		
Democratic/Lean	39%	40% (6/15)	Male	49.7%	20% (3/15)
Republican/Lean	40%	40% (6/15)	Female	50.3%	73.3% (11/15)
Independent/Non-Affiliated	21%	20% (3/15)	Prefer not to answer	--	6.7% (1/15)
Race/Ethnicity (Census, 2018)[3]			**Religion (Pew, 2014)[4]**		
Non-Hispanic White	54.1%	40% (6/15)	Christian	67%	46.7% (7/15)
Black	5.2%	13.3% (2/15)	Jewish	2%	13.3% (2/15)
Latino/Hispanic	31.7%	--	Muslim	1%	--
Asian	3.7%	13.3% (2/15)	Buddhist	1%	--
AIAN	5.3%	20% (3/15)	Hindu	1%	--
NHPI	0.3%	--	Atheist	3%	13.3% (2/15)
Two or More Races	2.9%	6.7% (1/15)	Agnostic	4%	6.7% (1/15)
Prefer not to answer	--	6.7% (1/15)	Unaffiliated (No Religion)	27%	--
			Other	--	6.7% (1/15)
			Prefer not to answer	--	13.3% (2/15)
LGBT (MAP, 2018)[5]		6.7% (1/15)	**Age (SAC Only)***		
Prefer not to answer	--	13.3% (2/15)	<35	--	--
Veteran (Census, 2015-19)[6]	6.7%	--	35-39	--	20% (3/15)
Prefer not to answer	--	6.7% (1/15)	40-60	--	66.7% (10/15)
Disability (2019)[7]		6.7% (1/15)	>60	--	6.7% (1/15)
Prefer not to answer	--	13.3% (2/15)	No answer	--	6.7% (1/15)

[1] ""Party affiliation among adults in Nebraska," Pew, 2021, https://www.pewforum.org/religious-landscape-study/state/arizona/party-affiliation/

[2] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/AZ/PST045219.

[3] *Ibid.*

[4] "Religious Landscape Study," Pew Research Center, 2014, https://www.pewforum.org/religious-landscape-study/state/arizona/.

[5] Equality Profile, Movement Advancement Project, https://www.lgbtmap.org/equality_maps/profile_state/az.

[6] QuickFacts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/AZ/PST045219.

[6] *Ibid.*

[7] CDC Disability and Health U.S. State Profile, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/arizona.html.

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Name	SAC Status	Profession/ Skills	Political Affiliation	Age[8]	Gender Identity	Race/ Ethnicity	Religion	Sexual Orientation	Disability?	Veteran	Notes/Flag?
Leslie Ross	New; Nominated for Chair	Unit Chief Counsel/Senior Litigation Counsel, Arizona Attorney General, Civil Rights Division	I (leans D)	45	F	White/Caucasian	Jewish	Bisexual	Undisclosed disability	N	Not active on social media. No red flags.
Angela Banks	New	Professor of Law, Arizona State University	D	48	F	Black/African American	Protestant	Heterosexual/straight	N/A	N	Active on Twitter, Instagram, and Facebook. No red flags.
Rebekah Browder	Returning	Section Chief Counsel, Civil Rights Division, Maricopa County Attorneys' Office	R	Prefer not to answer	F	Prefer not to answer	Prefer not to answer	Prefer not to answer	Prefer not to answer	Prefer not to answer	Active on Instagram (private account).
Tessa Dysart	New	Assistant Director of Legal Writing & Clinical Professor of Law, University of Arizona, James E. Rogers College of Law	R	42	F	American Indian/Alaskan Native; White/Caucasian	Protestant	Heterosexual/straight	N/A	N	Active on Facebook, Twitter, and Instagram. No red flags.
Patty Ferguson-Bohnee	Returning	Faculty Director, Indian Legal Program Director, Indian Legal Clinic, and Clinical Professor of Law, Sandra Day O'Connor College of Law	D	46	F	American Indian/Alaskan Native	Protestant	Heterosexual/straight	N/A	N	Active on LinkedIn. No red flags.
Melissa Ho	Returning	Attorney & Shareholder, Polsinelli PC	I (leans D)	41	F	Asian/Asian American	Agnostic	Heterosexual/straight	N/A	N	Active on Facebook. No red flags.

[8]May not be exact, extrapolated from 2021-(birth year).

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David Kim	Returning	Corporate Vice President & Head of U.S. Legal, also Vice Chairman of U.S. Management Team, ASML US	R	52	M	Asian/Asian American	Protestant	Heterosexual/straight	N/A	N	Not active on social media. No red flags.
Theresa Rassas	Returning	Chief Counsel of Drug and Racketeering Enforcement, Office of the Attorney General for the State of Arizona	R	42	F	White/Caucasian	Roman Catholic	Heterosexual/straight	N/A	N	Active on Facebook, inactive Twitter profile.
Emma Robbins	New	Founder, The Chapter House LA (arts space for indigenous peoples); Executive Director, Navajo Water Project, DIGDEEP Water	Other (see notes)	35	F	American Indian/Alaskan Native	Traditional Diné	Heterosexual/straight	N/A	N	Classifies herself as a Democratic Socialist/progressive. Active on LinkedIn, Instagram, and Facebook. No red flags.
Jonathan Rose	Returning	Retired; Emeritus Professor of Law & Willard H. Pedrick Distinguished Research Scholar, Sandra Day O'Connor College of Law	D	83	M	White/Caucasian	Jewish	Heterosexual/straight	N/A	N	Not active on social media. No red flags.
Christina Sandefur	New	Executive Vice President, Barry Goldwater Institute for Public Policy Research	I (equal lean)	36	F	White/Caucasian	Atheist	Prefer not to answer	N/A	N	Not active on social media. No red flags.
Beverly Traver	New	Compliance & Equity Investigator,	Other (depends on the issues)	41	F	Black/African American	Christian	Heterosexual/straight	Prefer not to answer	N	Not active on social media. No red flags.

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Heather Whiteman Runs Him	New	Director, Tribal Justice Clinic and Professor of Practice, University Of Arizona, Rogers College of Law	D	47	F	American Indian/Alaskan Native	Prefer not to answer	Heterosexual/straight	N/A	N	Active on Instagram and Facebook. No red flags
Henry Whitmer	Returning	Deputy County Attorney IV, Yavapai County Attorney's Office	R	36	M	White/Caucasian	Atheist	Heterosexual/straight	N/A	N	Not active on social media. No red flags.
Eric Yordy	Returning	Associate Professor, The W. A. Franke College of Business, Northern Arizona University	R	50	Prefers not to answer	White/Caucasian	Mormon	Heterosexual/straight	N/A	N	Active on Twitter, Instagram, and Facebook. No red flags.

AMERICAN OVERSIGHT

Date : 11/18/2021 9:22:58 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : Re: [EXTERNAL] RE: Reuters query

i'll touch base first thing but these seem to track very well with the previous answers. Thanks Ang

--
Juana Silverio *(she/her/ella)*
Special Assistant to Commissioner Norma V. Cantú
U.S. Commission on Civil Rights
E: jsilverio@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425
Follow Us on Twitter & Facebook:
Twi FB
#USCCR

From: Angelia Rorison
Sent: Thursday, November 18, 2021 5:04:04 PM
To: Norma Cantu
Cc: Juana Silverio; Mauro Morales
Subject: FW: [EXTERNAL] RE: Reuters query

Good afternoon Chair Cantu,

A reporter from Reuters sent over the following fact check and a couple of interview questions that can be answered by looking at transcripts. I based or repurposed items on the approved interview responses for yesterday's interview.

Here are draft answers to get the ball rolling, let me know if you have any edits:

Dear Madam Chair, is it accurate that:

- Immediately after your designation by President Biden, the Republican caucus demanded that each of the two caucuses be allowed to nominate one person to EAC or other entities, and said they would not ratify you unless their demands were granted. The republican side wanted Mr. Christian Adams as their nominee.
    - The conservative caucus had blocked ratifying my appointment as Chair by President Joseph R. Biden for several months and to get a majority of votes, conservatives presented three procedural changes… one being appointments to other entities like the EAC. At this point the Commission had been without a Chair for three months.

        The conservative commissioners on the USCCR chose Ms. Mitchell and Commissioner J. Christian Adams as their nominees. The Progressive caucus

AMERICAN OVERSIGHT

ranked Ms. Mitchell slightly more suitable for a bipartisanship appointment.

- The democratic side declined, and initial meetings therefore didn't occur because the Republicans said they wouldn't ratify you as Chair and began to delay the commission's work, including on discovery, for instance.
    - My previous answer covers this question as well.
- The two sides began negotiating. One of the issues was around witness appointments; as part of the negotiations you pushed back and removed a proposal that would have commissioners, not staffers, designate witnesses. If this is accurate, would you be able to shed more light on these negotiations? What did the Republican side ask for, what did you respond, and what was the tenor of those conversations?
    - Yes, this was also an administrative policy that was put forth by conservative members at the Commission's April 30th business meeting. A transcript of everything discussed can be found on our website at usccr.gov.
- As part of negotiations, you agreed to the current nominations process.
    - Yes, this discussion can be found in transcripts for our business meeting as well.
- One commissioner has characterized what the Republicans side did as "hostage" taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?
    - Personally, I am not pleased with the appointment and would have welcomed another choice. However, it is my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth by USCCR.

      As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC.

Deadline is tomorrow by 9 am

From: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Sent: Thursday, November 18, 2021 4:38 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

> CAUTION: This email is from outside USCCR.

Thanks Angelia! Here goes:

Dear Madam Chair, is it accurate that:

AMERICAN OVERSIGHT

- Immediately after your designation by President Biden, the Republican caucus demanded that each of the two caucuses be allowed to nominate one person to EAC or other entities, and said they would not ratify you unless their demands were granted. The republican side wanted Mr. Christian Adams as their nominee.
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Many thanks.
Bests,
Alexandra

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 1:30 PM
To: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Subject: [EXT] RE: [EXTERNAL] RE: Reuters query

External Email: Use caution with links and attachments.

I can send her questions to answer, but I can't guarantee she will grant interview.

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To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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Hi Angelia,

Is Chair Cantu available for an interview? Or will she answer written questions?

Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 8:34:53 AM
From : "Norma Cantu" ncantu@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Bullet one—change several months to from February until the end of April 2021.
New sentence—To comply with rules regarding public meetings, and to be bipartisan, a group of three Commissioners met with me to discuss the concessions the Conservative Caucus wanted; one of the changes the Conservative placed as a condition to ratifying me as the Chair was the create a process for bipartisan nominations to the board of advisors of Elections Assistance Commission. I did not hear from Commissioner Adams during these negotiations, but I separately called him to introduce myself and he appeared eager to discuss voting rights. Commissioner Adams described his case involving the defense of a white male who had not been treated fairly; he also commented positively on my co-counsel role very late in the White v. Register voting rights case.

Suggest adding to last bullet. Personally, I expected some negotiations because my addition as a Commissioner in February brought the Commission to a 4-4 split between progressives and conservatives. Including me, the political distribution was 4 Democrats, 3 Republicans, and 1 Independent who has voted 100% with the Republicans this year. I am proud that the Commissioners have attempted various tools to unify as a Commission, including having the meeting where I was approved as a Chair being led by co-moderators representative both the Democrats and the Republicans, and have both conservatives and progressives involved in the negotiations. During the negotiations about the EAC appointment, I saw some problems ahead, but I have long been a fan of the USCCR and was confident we would find a solution. Due to my belief in USSCR's mission which includes bipartisanship, I acted during the negotiations to foster teamwork. For example, when the Commissioners were informed that the first Democratic nominee could not serve after all, I chose we start all over without changing the agreed-upon nomination process. Also, when the Conservative Caucus missed its deadline for selecting the new progressive nominee, I called them and accepted the late nomination, which was delivered with an apology to me for the late delivery. We are meeting on Friday, November 19, 2021 to vote on the progressive candidate. In short, both of the conservative nominees presented conflicts with the USCCR civil rights mission, and Ms. Cleta Mitchell won the vote.

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 4:04 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: FW: [EXTERNAL] RE: Reuters query
Importance: High

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AMERICAN OVERSIGHT

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- The democratic side declined, and initial meetings therefore didn't occur because the Republicans said they wouldn't ratify you as Chair and began to delay the commission's work, including on discovery, for instance.
    - My previous answer covers this question as well.

- The two sides began negotiating. One of the issues was around witness appointments; as part of the negotiations you pushed back and removed a proposal that would have commissioners, not staffers, designate witnesses. If this is accurate, would you be able to shed more light on these negotiations? What did the Republican side ask for, what did you respond, and what was the tenor of those conversations?
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- As part of negotiations, you agreed to the current nominations process.
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- One commissioner has characterized what the Republicans side did as "hostage" taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?
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        As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing

AMERICAN OVERSIGHT

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Deadline is tomorrow by 9 am

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Sent: Thursday, November 18, 2021 4:38 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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Alexandra

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To: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
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AMERICAN OVERSIGHT

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Hi Angelia,

Is Chair Cantu available for an interview? Or will she answer written questions?

Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 9:52:31 AM
From : "Angelia Rorison" arorison@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Thank you! Sent responses over by deadline.

From: Norma Cantu <ncantu@usccr.gov>
Sent: Friday, November 19, 2021 8:35 AM
To: Angelia Rorison <arorison@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

Bullet one—change several months to from February until the end of April 2021.
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From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 4:04 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>

AMERICAN OVERSIGHT

Subject: FW: [EXTERNAL] RE: Reuters query
Importance: High

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- The democratic side declined, and initial meetings therefore didn't occur because the Republicans said they wouldn't ratify you as Chair and began to delay the commission's work, including on discovery, for instance.
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- As part of negotiations, you agreed to the current nominations process.
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- One commissioner has characterized what the Republicans side did as "hostage" taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?

AMERICAN OVERSIGHT

- Personally, I am not pleased with the appointment and would have welcomed another choice. However, it is my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth by USCCR.

  As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC.

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Sent: Thursday, November 18, 2021 4:38 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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Many thanks.
Bests,
Alexandra

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 1:30 PM
To: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>

AMERICAN OVERSIGHT

Subject: [EXT] RE: [EXTERNAL] RE: Reuters query

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I can send her questions to answer, but I can't guarantee she will grant interview.

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Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 2:18:04 PM
From : "Norma Cantu" ncantu@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

I;m available
Norma

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 4:04 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: FW: [EXTERNAL] RE: Reuters query
Importance: High

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Thank you Chair Cantu – I have not had any follow up requests for interview. But if I do, I will notify you and Juana asap.

Good job today ☐ Ang

From: Norma Cantu <ncantu@usccr.gov>
Sent: Friday, November 19, 2021 2:18 PM
To: Angelia Rorison <arorison@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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Norma

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Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
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AMERICAN OVERSIGHT

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- The two sides began negotiating. One of the issues was around witness appointments; as part of the negotiations you pushed back and removed a proposal that would have commissioners, not staffers, designate witnesses. If this is accurate, would you be able to shed more light on these negotiations? What did the Republican side ask for, what did you respond, and what was the tenor of those conversations?
    - Yes, this was also an administrative policy that was put forth by conservative members at the Commission's April 30th business meeting. A transcript of everything discussed can be found on our website at usccr.gov.
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    - Yes, this discussion can be found in transcripts for our business meeting as well.
- One commissioner has characterized what the Republicans side did as "hostage" taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?
    - Personally, I am not pleased with the appointment and would have welcomed another choice. However, it is my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth by USCCR.

      As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC.

Deadline is tomorrow by 9 am

From: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Sent: Thursday, November 18, 2021 4:38 PM
To: Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

> CAUTION: This email is from outside USCCR.

Thanks Angelia! Here goes:

Dear Madam Chair, is it accurate that:

AMERICAN OVERSIGHT

- Immediately after your designation by President Biden, the Republican caucus demanded that each of the two caucuses be allowed to nominate one person to EAC or other entities, and said they would not ratify you unless their demands were granted. The republican side wanted Mr. Christian Adams as their nominee.
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Many thanks.
Bests,
Alexandra

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 1:30 PM
To: Ulmer, Alexandra (Reuters) <Alexandra.Ulmer@thomsonreuters.com>
Subject: [EXT] RE: [EXTERNAL] RE: Reuters query

External Email: Use caution with links and attachments.

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Subject: RE: [EXTERNAL] RE: Reuters query

CAUTION: This email is from outside USCCR.

Hi Angelia,

Is Chair Cantu available for an interview? Or will she answer written questions?

Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 2:28:57 PM
From : "Norma Cantu" ncantu@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Mauro Morales" mmorales@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Hey, I have some work ahead of me to stave off the idea about changing the strategic plan. Mauro will get back to both of us.
Norma

From: Angelia Rorison <arorison@usccr.gov>
Sent: Friday, November 19, 2021 1:27 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

Thank you Chair Cantu – I have not had any follow up requests for interview. But if I do, I will notify you and Juana asap.

Good job today ☐ Ang

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To: Angelia Rorison <arorison@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

I;m available
Norma

From: Angelia Rorison <arorison@usccr.gov>
Sent: Thursday, November 18, 2021 4:04 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: FW: [EXTERNAL] RE: Reuters query
Importance: High

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Here are draft answers to get the ball rolling, let me know if you have any edits:

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AMERICAN OVERSIGHT

The republican side wanted Mr. Christian Adams as their nominee.

- The conservative caucus had blocked ratifying my appointment as Chair by President Joseph R. Biden for several months and to get a majority of votes, conservatives presented three procedural changes… one being appointments to other entities like the EAC. At this point the Commission had been without a Chair for three months.

  The conservative commissioners on the USCCR chose Ms. Mitchell and Commissioner J. Christian Adams as their nominees. The Progressive caucus ranked Ms. Mitchell slightly more suitable for a bipartisanship appointment.

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- As part of negotiations, you agreed to the current nominations process.

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- One commissioner has characterized what the Republicans side did as "hostage" taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?

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    As members of the USCCR, we [Commissioners] were all very familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC.

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AMERICAN OVERSIGHT

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Subject: RE: [EXTERNAL] RE: Reuters query

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Hi Angelia,

AMERICAN OVERSIGHT

Is Chair Cantu available for an interview? Or will she answer written questions?

Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 2:53:33 PM
From : "Mauro Morales" mmorales@usccr.gov
To : "Norma Cantu" ncantu@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Angelia Rorison" arorison@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Chair,

Changes to the strategic plan are just that. It is not an AI or other requirement that has to be followed. More importantly, their changes will not prevent us prevent us from using social media; it just takes it out of the strategic plan. We just won't report on it. Not everything we do needs to be in the strategic plan. Public affairs in the strategic plan was a decision to put focus on an area the we didn't do a good job at. Many strategic plans do not mention public affairs. Now that we are doing a good job, we can focus on other goals.

Mauro

From: Norma Cantu
Sent: Friday, November 19, 2021 2:29 PM
To: Angelia Rorison <arorison@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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To: Norma Cantu <ncantu@usccr.gov>
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Good job today ☐ Ang

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I;m available
Norma

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

- One commissioner has characterized what the Republicans side did as “hostage” taking. Is this an assessment you share? Was your ratification contingent on negotiating some of these positions? Do you feel you got a good deal, or would you do it differently now?

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AMERICAN OVERSIGHT

Bests,
Alexandra

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Alexandra

AMERICAN OVERSIGHT

Date : 11/19/2021 2:56:16 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Mauro Morales" mmorales@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Angelia Rorison" arorison@usccr.gov
Subject : RE: [EXTERNAL] RE: Reuters query

Thanks Mauro, that is a fair way to look at it. In retrospect- giving it as much wind (and thankfully not on the record) may have indicated we gave it more attention than it merited but at least we explored all sides of what can be good or bad.

From: Mauro Morales <mmorales@usccr.gov>
Sent: Friday, November 19, 2021 2:54 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Angelia Rorison <arorison@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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To: Angelia Rorison <arorison@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: RE: [EXTERNAL] RE: Reuters query

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To: Norma Cantu <ncantu@usccr.gov>
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AMERICAN OVERSIGHT

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Norma

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To: Norma Cantu <ncantu@usccr.gov>
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AMERICAN OVERSIGHT

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Thanks.
Alexandra

AMERICAN OVERSIGHT

Date : 11/22/2021 12:10:46 PM
From : "Joshua Dansby" jdansby@usccr.gov
To : "David Kladney" dkladney@usccr.gov
Subject : Re: Assisting Commissioner Adegbile & Irena
Attachment : Conflict of Interest Inquiry.docx;

Dave,

Irena reached out to me to ask for help constructing a written request to the Staff Director and General Counsel to follow-up on his request during the Nov. 19 meeting that the General Counsel issue a written statement to the Commissioners opining whether any conflict of interest or ethics rules/policies were breached. Attached is what I drafted up. Irena asked for what I had by COB today, but I wanted to run this by you to 1: Get you're okay to assist; and 2. See if you had any edits before I sent it over to them.

-Joshua

Joshua W. Dansby (he/him)
Special Assistant to Commissioner David Kladney
U.S. Commission on Civil Rights
E: jdansby@usccr.gov
http://usccr.gov/
1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

AMERICAN OVERSIGHT

To: Staff Director Mauro Morales ,
cc: General Counsel David Ganz

From: Commissioner Debo Adegbile

Re: Request for Written Statement from General Counsel Regarding Possible Ethics/Conflict of Interest Rules

Following the media response to the announcement of Ms. Cleta Mitchell's appointment to the EAC Board of Advisors, a number of outlets reported that, in addition to the many projects that Ms. Mitchell and Commissioner Adams have shared throughout the years, Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, employs Commissioner Adams as General Counsel; he also serves as a Director for the organization and as an officer through his status as President.

At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams' financial and business relationships with Ms. Mitchell, through PILF, were not disclosed to the other Commissioners prior to the vote on Ms. Mitchell's appointment. I asked for a written statement from the General Counsel as to whether any ethical laws or policies were violated as a result of this non-disclosure, and, if so, what the impact was not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors.

Specifically, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests, and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts to the other Commissioners raise serious doubts as to the propriety of Commissioner Adams participating in a vote regarding Ms. Mitchell.

Please undertake a review of the relevant ethical and conflict of interests rules and policies and report your findings to the Commissioners. As indicated above, please include in your analysis a determination as to whether a rule or policy was breached, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

AMERICAN OVERSIGHT

Thank you for your time addressing this important matter.

Respectfully,

Commissioner Debo P. Adegbile

AMERICAN OVERSIGHT

Date : 11/4/2021 5:15:04 PM
From : "Norma Cantu" ncantu@usccr.gov
To : "Irena Vidulovic" ividulovic@usccr.gov
Cc : "Juana Silverio" jsilverio@usccr.gov, "Debo P. Adegbile" dadegbile@usccr.gov
Subject : RE: Commissioner Appointments to the Election Assistance Commission

Thank you, Irena.
I am relieved the Commission delivered two peerless choices.
Norma

From: Irena Vidulovic <ividulovic@usccr.gov>
Sent: Thursday, November 4, 2021 3:30 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Debo P. Adegbile <dadegbile@usccr.gov>
Subject: Fw: Commissioner Appointments to the Election Assistance Commission

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Sent: Tuesday, August 3, 2021 4:30 PM
To: Irena Vidulovic; Mauro Morales; Norma Cantu
Cc: Debo P. Adegbile; Michael Yaki; David Kladney; Alec Deull
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AMERICAN OVERSIGHT

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To: Norma V. Cantú <normavcantu@gmail.com>; Juana Silverio <jsilverio@usccr.gov>
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Date: Wednesday, July 28, 2021 at 11:30 AM
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Cc:
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Mauro Morales

Staff Director

U.S. Commission on Civil Rights

P: 202-376-7796| F: 202-376-7672

Mmorales@usccr.gov

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Washington D.C. 20425

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<image002.gif>

#USCCR

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Date : 11/9/2021 4:02:53 PM
From : "Joshua Dansby" jdansby@usccr.gov
To : "Juana Silverio" jsilverio@usccr.gov
Cc : "David Kladney" dkladney@usccr.gov
Subject : RE: Commissioner Appointments to the Election Assistance Commission

Juana,

Commissioner Kladney is fine with this. Thank you.

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Washington D.C. 20425

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<image002.gif>

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Date : 11/9/2021 4:18:59 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Joshua Dansby" jdansby@usccr.gov
Cc : "David Kladney" dkladney@usccr.gov
Subject : RE: Commissioner Appointments to the Election Assistance Commission

Thank you!

From: Joshua Dansby <jdansby@usccr.gov>
Sent: Tuesday, November 9, 2021 4:03 PM
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#USCCR

AMERICAN OVERSIGHT

AMERICAN OVERSIGHT

Date : 11/23/2021 3:50:21 PM
From : "David Ganz" dganz@usccr.gov
To : "Irena Vidulovic" ividulovic@usccr.gov, "Debo P. Adegbile" dadegbile@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : RE: Conflict of Interest

Hello Commissioner Adegbile and Irena,

As the agency's DAEO, I take compliance with federal ethics laws and OGE regulations seriously and OGC is looking into this matter. Kind regards,

David

From: Irena Vidulovic <ividulovic@usccr.gov>
Sent: Tuesday, November 23, 2021 3:15 PM
To: Mauro Morales <mmorales@usccr.gov>; David Ganz <dganz@usccr.gov>
Cc: Debo P. Adegbile <dadegbile@usccr.gov>
Subject: Conflict of Interest

Staff Director Morales and General Counsel Ganz,

I write to follow up on a potential conflict issue I raised during the Friday business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, appears to employ Commissioner Adams as General Counsel, it also appears he serves as a Director for the organization and as an officer through his status as President.

At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams appears to have financial and business relationships with Ms. Mitchell, through PILF, which as far as I am aware he failed to disclose to the General Counsel's office prior to the nomination and vote on Ms. Mitchell's appointment. I asked for a written opinion from the General Counsel as to whether any ethical rules, policies or laws were violated as a result of this apparent non-disclosure, and, if so, what the impact of any breach is not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors. In other words, if Commissioner Adams should have disclosed and recused but did neither are the nomination and the vote itself tainted. Other Commissioners may have thought differently about the

AMERICAN OVERSIGHT

nomination and their vote had they been aware of ethical issues.

Specifically, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts if true raise serious questions as to the propriety and validity of Commissioner Adams participation in matters regarding Ms. Mitchell.

Please undertake a review of the relevant ethical and conflict of interests policies, and laws, including but not limited to those I have identified and report your findings to the Commissioners. If it is determined that a violation occurred or that this matter is more appropriately investigated by a separate independent third-party, a referral to Office of Inspector General of the Department of Justice may be appropriate, consistent with 5 CFR 2638.502)

As indicated above, please include in your analysis a determination as to whether any rule, policy or law was violated, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible

AMERICAN OVERSIGHT

conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Thank you,
Debo P. Adegbile

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
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1331 Pennsylvania Avenue, NW Suite 1150
Washington D.C. 20425

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AMERICAN OVERSIGHT

Date : 11/22/2021 5:08:44 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Re: Conflict of Interest email

One more edit was made. Please see highlighted below.

Staff Director Mauro Morales and General Counsel David Gantz,

Regarding the conflict of issue I raised during Friday, business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, employs Commissioner Adams as General Counsel; he also serves as a Director for the organization and as an officer through his status as President.
At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams has financial and business relationships with Ms. Mitchell, through PILF, which he failed to disclose to the other Commissioners prior to the vote on Ms. Mitchell's appointment. I asked for a written statement from the General Counsel as to whether any ethical laws and/or policies were violated as a result of this non-disclosure, and, if so, what the impact was not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors.

Specifically, though not limited to, I would direct the General Counsel to 5 CFR § 2635.402, Disqualifying financial interests (and related statute, 18 U.S.C. 208(a)), and 5 CFR § 2635.502, Personal and business relationships (also known as the impartiality rule). As the titles of these regulations imply, the first deals with conflicts of interest that stem from financial interest and the second deals with a more general duty of an employee to act and appear in a way that is impartial. I would also direct the General Counsel to PILF's IRS 2018 990 statement (attached). This document indicates that, in the relevant filing year J. Christian Adams was the highest paid employee of PILF, with a salary of $120,000.00 (page 7), and it indicates that compensation is approved by the organizations independent Board members, of which Ms. Mitchell is one (page 29). In short, Ms. Mitchell serves as Chair of the Board on which Commissioner Adams serves, she Chairs the Board of an organization that employs Commissioner Adams as General Counsel and President, and Ms. Mitchell participates in approving his compensation. The failure to disclose these facts to the other Commissioners raise serious doubts as to the propriety and validity of Commissioner Adams participation in matters regarding Ms. Mitchell.

Please undertake a review of the relevant ethical and conflict of interests rules and policies and report your findings to the Commissioners. (or we could use this language If it is determined a violation did occur, or it is decided that this matter is more appropriately investigated by a separate independent third-party, a referral to Office of Inspector General of the

AMERICAN OVERSIGHT

Department of Justice may be appropriate, consistent with 5 CFR 2638.502)

As indicated above, please include in your analysis a determination as to whether a rule or policy was breached, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

From: Irena Vidulovic
Sent: Monday, November 22, 2021 2:55:17 PM
To: Debo P. Adegbile; Adegbile, Debo
Subject: Conflict of Interest email

Adegbile,

Joshua and I worked on the email to send to Mauro and General Counsel today. Joshua reviewed the legal citations and we included PILF's 990 form.

Staff Director Mauro Morales and General Counsel David Gantz,

Regarding the conflict of issue I raised during Friday, business meeting. Ms. Mitchell serves as Chair on the Board of the Public Interest Law Foundation. This organization, PILF, employs Commissioner Adams as General Counsel; he also serves as a Director for the organization and as an officer through his status as President.
At the November 19, 2021 business meeting, I raised, on the record, the point that Commissioner Adams has financial and business relationships with Ms. Mitchell, through PILF, which he failed to disclose to the other Commissioners prior to the vote on Ms. Mitchell's appointment. I asked for a written statement from the General Counsel as to whether any ethical laws and/or policies were violated as a result of this non-disclosure, and, if so, what the impact was not only for Commissioner Adams, but also for the August 2021 vote appointing Ms. Mitchell to the EAC Board of Advisors.

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Please undertake a review of the relevant ethical and conflict of interests rules and policies and report your findings to the Commissioners. Also, when reviewing 5 CFR 2638.502, please address its mandatory notice and disclosure provisions.

As indicated above, please include in your analysis a determination as to whether a rule or policy was breached, if so, in what way, as well as an opinion as to the appropriate remedy for such a violation for the individual(s) involved and an appropriate way to remedy a potentially tainted Commission action. Lastly but importantly, please also include guidance for how the process should work to identify, provide notice of, and deal with possible conflicts of interests arising from financial, business, and personal relationships so we do not have any similar issues in the future.

Thank you for your time addressing this important matter.

Irena Vidulovic
Special Assistant to Commissioner Debo P. Adegbile
U.S. Commission on Civil Rights
M: 202-591-9969
ividulovic@usccr.gov
http://usccr.gov/
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Washington D.C. 20425

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Date : 11/17/2021 5:26:04 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : RE: Interview Answers for your Review and Edits
Attachment : Huseman Interview Questions_edits Cantu JPS 11.17.2021.docx;

From: Angelia Rorison <arorison@usccr.gov>
Sent: Wednesday, November 17, 2021 3:55 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
Subject: Interview Answers for your Review and Edits

Hi Chair Cantu – please see the interview questions and corresponding answers attached. You will see two responses to the first questions – please choose which ne you think is best.

If possible, please return document asap.

Thanks so much!
Ang

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FOIA Public Liaison
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1. **Who made the decision to hold Mitchell's nominating vote as a notional vote, and why was that decision made?**

There are two instances when the Commissioners will take a procedural vote or notational (written) vote. The first is if the item/s that are not controversial because it has been clear in deliberation – and a public final vote will be taken. The second is "press of time" which is used to get a vote done expeditiously with out having to wait a month or more for the next public business meeting. The decision was made by all Commissioners to take this vote in the interest of time.

Recommended Response:

In the interest of time, all Commissioners agreed to the procedural/notational vote to avoid waiting a month or more till the next public business meeting to ~~make a decision~~decide. The conservative caucus had blocked ratifying my appointment as Chair by President Joseph R. Biden for several months and to get a majority of votes ~~to be ratified~~, conservatives presented three procedural changes~~.~~... o~~O~~ne being appointments to other entities like the EAC. At this point the Commission had been without a Chair for three months. You can see this in transcripts from Commission public business meetings on April 16 & April 30,~~ which~~ can be found at usccr.gov.

2. **Does the commission believe Ms. Mitchell is qualified to serve in this role, and will professionally and appropriately carry out her duties**?

Both caucuses had wide latitude to nominate an advisor from among our own commissioners or from outside the agency. Other than a request for bipartisanship, t~~T~~he EAC does not have criteria for individuals appointed to the Board of Advisors. The US Commission on Civil Rights (USCCR) did not add any requirements of eligibility. The conservative commissioners on the USCCR chose Ms. Mitchell and ~~was one of two choices put forth by conservative Commissioners of the Commission, one being Ms. Mitchell and the other USCCR~~ Commissione~~r~~r~~,~~ J. Christian Adams. The Progressive caucus ranked Ms. Mitchell slightly more suitable for a bipartisanship appointment. Personally, I am not pleased with the appointment and would have welcomed ~~any other~~another choice~~. by my conservative colleagues .~~ However, it is ~~also~~ my responsibility as the Chair of the Commission to follow the rules, regulations and procedures set forth ~~by the Commission~~by USCCR.~~, as a federal agency.~~

3. **Please confirm that J. Christian Adams initially proposed Mitchell, and also that he was the second Republican nominee.**

Yes, I can confirm J. Christian Adams and Mitchell were the two conservative choices presented to Commissioners. I was not a part of the conservative caucus' deliberation on their choices, so I am not sure he nominated~~proposed~~ her. However, as she is a board member of his organization *(PILF, please confirm)*, he would be the closest contact at USCCR ~~the Commission to~~ to Ms. Mitchell.

4. **Can you please outline the commission's decision making around selecting Mitchell over Adams?**

Commented [AR1]: I took these notes from our meeting as a response but I would recommend the alternative bc the reporters will jump on this one bc they would consider Cleta as controversial and that since her nomination was sent over in November that there was plenty of time to have a public vote. I want o keep us from having to answer too many follow ups or give the media something to run with.

Commented [JS2]:

Commented [JS3R3]: We want this one

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~~"~~As ~~a~~ member~~s~~ of the USCCR~~,same Commission,~~ we were all very ~~f~~familiar with his work with the Public Interest Legal Foundation and Election Law Center, PLLC. Ms. Mitchell was more of an unknown variable than Commissioner Adams and a decision had to be made for us to fulfill our duty as an appointing agency to the EAC. ~~Unfortunately for the Commission either choice would have been controversial.~~

The ~~Commission~~ USCCR ~~has been impacted greatly~~had heard from many members of the public of their disappointment with the USCCR's nomination of ~~by~~ Ms. Mitchell~~'s appointment, we want to assure the American public we have heard you~~. I would like to end by clarifying, the Commission's conservative caucus were the ones who limited the pool to either J. Christian Adams or ~~appoin~~Cleta ~~ted Ms.~~ Mitchell. Our Progressive ~~democratic~~ appointee wi~~l~~l~~th~~ be voted on at our November 19, 2021 business meeting."

Date : 11/17/2021 5:39:15 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : RE: Interview Answers for your Review and Edits

Ok sorry I just didn't know if I had the name/initials right. The Chair would like to use the name as well or instead of "organization.

From: Angelia Rorison <arorison@usccr.gov>
Sent: Wednesday, November 17, 2021 5:38 PM
To: Juana Silverio <jsilverio@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Mauro Morales <mmorales@usccr.gov>
Subject: RE: Interview Answers for your Review and Edits

Thank you so much!

FYI – I can confirm Cleta is board member of PILF – she is actually listed as the Chairman of the Board.

From: Juana Silverio <jsilverio@usccr.gov>
Sent: Wednesday, November 17, 2021 5:26 PM
To: Angelia Rorison <arorison@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Mauro Morales <mmorales@usccr.gov>
Subject: RE: Interview Answers for your Review and Edits

From: Angelia Rorison <arorison@usccr.gov>
Sent: Wednesday, November 17, 2021 3:55 PM
To: Norma Cantu <ncantu@usccr.gov>
Cc: Juana Silverio <jsilverio@usccr.gov>; Mauro Morales <mmorales@usccr.gov>
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Thanks so much!
Ang

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Date : 11/17/2021 5:37:41 PM
From : "Angelia Rorison" arorison@usccr.gov
To : "Juana Silverio" jsilverio@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
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Date : 11/17/2021 5:41:55 PM
From : "Angelia Rorison" arorison@usccr.gov
To : "Juana Silverio" jsilverio@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : RE: Interview Answers for your Review and Edits

Gotcha – will make that change before I send. Thanks!

From: Juana Silverio <jsilverio@usccr.gov>
Sent: Wednesday, November 17, 2021 5:39 PM
To: Angelia Rorison <arorison@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Mauro Morales <mmorales@usccr.gov>
Subject: RE: Interview Answers for your Review and Edits

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To: Juana Silverio <jsilverio@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Mauro Morales <mmorales@usccr.gov>
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Date : 11/17/2021 5:47:17 PM
From : "Juana Silverio" jsilverio@usccr.gov
To : "Angelia Rorison" arorison@usccr.gov, "Norma Cantu" ncantu@usccr.gov
Cc : "Mauro Morales" mmorales@usccr.gov
Subject : RE: Interview Answers for your Review and Edits

You and the Chair are the stars here ☐

Happy we got it out.

OK let's hope we can get to bail reform SOON ☐

From: Angelia Rorison <arorison@usccr.gov>
Sent: Wednesday, November 17, 2021 5:46 PM
To: Juana Silverio <jsilverio@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
Cc: Mauro Morales <mmorales@usccr.gov>
Subject: RE: Interview Answers for your Review and Edits

Can confirm your responses were sent – thanks for the great edits, really tightened it up. -Ang

---

From: Juana Silverio <jsilverio@usccr.gov>
Sent: Wednesday, November 17, 2021 5:39 PM
To: Angelia Rorison <arorison@usccr.gov>; Norma Cantu <ncantu@usccr.gov>
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Date : 12/10/2021 8:18:26 AM
From : "Gail Heriot" gheriot@usccr.gov
To : "Alexander Heideman" aheideman@usccr.gov
Cc : "Gail Heriot" gheriot@me.com, "Alexander Heideman" alexanderheideman@gmail.com
Subject : Re: Testimony
Attachment : Sergio Marxuach Written Statement - US Commision on Civil Rights.docx;2021.12.10 La Liga CMMP statement FEMA US CCR.pdf;US CIVIL RIGHTS COMMISSION TESTIMONY (1).docx;Diane Yentel Testimony to US Commission on Civil Rights 12.3.21.pdf;Testimony _ USCRC _ AriadnaGodreauAubert.pdf;FINAL 2021_Institucional_12_December_United States Commission on Civil Rights_ Government Response to Hurricane María_December 10.pdf;Statement USCCR.docx;Testimony USCCR US Commission on Civil Rights FEMA .pdf;

Can you dig up the original concept paper?

Gail Heriot
Professor of Law
University of San Diego

> On Dec 9, 2021, at 4:27 PM, Alexander Heideman <aheideman@usccr.gov> wrote:
>
> Attached.

AMERICAN OVERSIGHT

CNE
Puerto Rico's Think Tank

Written Testimony

by
Sergio M. Marxuach
Policy Director
Center for a New Economy

Submitted to the United States Commission on Civil Rights
San Juan, PR
10 December 2021

AMERICAN OVERSIGHT

Introduction

Good morning distinguished members of the U.S. Commission on Civil Rights, fellow witnesses, and all those who are following these proceedings. We have received your letter of October 27, 2021 inviting us to testify today about the U.S. federal government response to Hurricane Maria. We thank you for the opportunity to participate in this important public debate. We at the Center for a New Economy believe it is important to bear witness about the way Hurricane Maria's victims were (mis)treated by some agencies of the federal government. It is a moral obligation we owe to those who suffered in the immediate aftermath of the storms, to those who are still living with their consequences, and to people who, unfortunately, will become victims of natural disasters in the future.

On September 20, 2017, Hurricane María wreaked havoc on Puerto Rico and the U.S. Virgin Islands by unleashing the power of nature with a fury unseen in these parts in almost a century. According to data from the Federal Emergency Management Agency ("FEMA"), within hours of Hurricane María's landfall in Puerto Rico, 100 percent of the clients of the Puerto Rico Electric Power Authority ("PREPA") were without electric power service; 80 percent of all PREPA infrastructure was destroyed; 80 percent of the clients of the Puerto Rico Aqueduct and Sewer Authority ("PRASA") were without water service; between 80 and 85 percent of communication towers were not operational; hundreds of miles of roads were closed off by landslides and several dozen bridges collapsed; maritime ports and airports were closed, and remained so for at least five days; and satellite phones were not working at all.[1]

In addition, 92% of hospitals were severely impacted; between 23 and 31 million trees were destroyed or damaged; approximately 527,000 households reported some kind of damage; thousands of small and medium business were closed for months and many went out of business; several hotels and resorts suffered serious damage; and economic activity, as measured by the government's Economic Activity Index, declined by approximately 12% over the three months immediately following the hurricane.[2] According to estimates made by Moody's Analytics, the decrease in real GDP could have been as deep as 15% during the last calendar quarter of 2017, while approximately 35,000 jobs were lost. Furthermore, Moody's estimates that Hurricane María caused about $80 billion in damages to the island's already withered capital stock and at least $25 billion in lost output, which has adversely affected business and household balance sheets.[3]

FEMA, using a model designed by NOAA, estimated total damages add up to approximately $90 billion in Puerto Rico and the USVI, while the government of Puerto Rico estimated total damages at around $139 billion.[4] The ineffective initial response from both the Puerto Rico and federal governments, exposed long-existing economic, political, and social inequalities, as well as Puerto Rico's subordinated standing in the United States' political system. Eventually, Congress approved part of the funding required for Puerto Rico's reconstruction, but in many cases with highly prescriptive conditions and requirements that have unduly delayed and burdened the reconstruction process.

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[1] United States Government Accountability Office, *2017 Hurricanes and Wildfires: Initial Observations on the Federal Response and Key Recovery Challenges*, GAO-18-472, (Washington, DC: September 2018), p. 29.
[2] Government of Puerto Rico, *Transformation and Innovation in the Wake of Devastation: An Economic and Disaster Recovery Plan for Puerto Rico,* (San Juan, PR: August 2018), pp. 41-44.
[3] Bernard Yaros, *The Economics of Puerto Rico's Post María Recovery*, Moody's Analytics, September 2018, pp. 1-4.
[4] The FEMA estimate is taken from the *2017 Hurricane Season FEMA After-Action Report*, (Washington, DC: July 12, 2018), p. 1; the estimate from the Government of Puerto Rico is set forth in *Transformation and Innovation in the Wake of Devastation*, supra, n. 2, p. 159.

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In the case of appropriations for disaster assistance for Puerto Rico, the federal government operates through two principal "master accounts" and four main agencies: the Disaster Relief Fund managed by FEMA, which works with the Puerto Rico Central Office of Recovery, Reconstruction, and Resiliency ("COR3") to manage its assistance programs in the island; and the Community Development Fund, managed by HUD, which finances the Community Development Block Grant-Disaster Recovery ("CDBG-DR") program and works with the Puerto Rico Department of Housing ("PRDOH") to administer CDBG-DR programs in Puerto Rico.

FEMA

In general, FEMA spending on disaster assistance can be divided into (1) assistance for emergency work, which covers both individual and public assistance; and (2) spending on permanent work, which is usually earmarked for public assistance for both reconstruction of infrastructure and hazard mitigation projects.

The initial disbursement of emergency assistance for individuals after Hurricane Maria was marred by bureaucratic bungling and mismanagement. For example, a year after Hurricane Maria, the portion of total funds obligated for individual assistance programs for Hurricane María's disaster victims (17%) was significantly lower than the portion obligated for individual assistance for the victims of Hurricane Harvey (47%) or Hurricane Irma (32%). The relatively low share of obligations is partly explained by FEMA insistence that potential beneficiaries produce "clear" title to the property they inhabited, even though its regulations did not set forth that requirement. As one or more of my fellow panelists will testify, this situation resulted in the unjustified denial by FEMA of most applications for individual assistance.

It is however in the area of spending for permanent public works where FEMA has consistently underperformed. According to the GAO this lag is largely due to the requirement that FEMA and the government of Puerto Rico use alternative procedures under Section 428 of the Stafford Act for all large Public Assistance permanent work projects, after an amendment to the presidential disaster declaration for Hurricane Maria, dated November 2, 2017, required that FEMA obligate all large project funding for Public Assistance permanent work through alternative procedures.[5] These alternative procedures:

> …are designed to give jurisdictions more flexibility in determining how, where, and what to rebuild, particularly after incurring significant damage. Applicants may choose to combine multiple critical facilities and rebuild them in a manner that makes them less likely to incur future disaster damages. In 2013 FEMA began a pilot program to utilize the alternative procedures for debris removal and permanent work projects in the recovery from Hurricane Sandy in New York and New Jersey, as of April 2018, FEMA reported that 29 percent of New York's permanent work projects are under the alternate procedures—approximately $8.6 billion. **However, no state or territory has used alternative procedures for 100 percent of their permanent work projects. According to Puerto Rico's Draft Recovery Plan issued in July 2018, the Commonwealth estimated costs for permanent work projects ranges from $26.7 billion to $37.4 billion**.[6]

The requirement to use Section 428 alternative procedures for all large Public Assistance permanent work projects meant that the recovery process in Puerto Rico would flow according to a different schedule than that applicable to other jurisdictions and entailed both potential costs and benefits for the island:

> According to FEMA officials, in the U.S. Virgin Islands and in the states, participation in the pilot program for permanent work alternative procedures will occur for select projects, by applicant request…They added that this approach will provide the flexibility Puerto Rico requires to achieve

[5] United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 14.
[6] GAO, *2017 Hurricanes and Wildfires*, supra n. 1., at p. 18 (emphasis by the author).

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> its post-disaster recovery goals while limiting risk to the federal government…**However, it is unclear whether such flexibilities will eliminate other challenges associated with the PA program, such as reducing delays from challenges to eligibility determinations and supporting a timely recovery…**although the front end of the PA alternative procedures pilot program may take longer than the standard PA procedures, once project formulation (including any identified hazard mitigation measures) and cost agreements are made, the entire sum of the agreed-upon funding level is obligated and made available to the recipient at a quicker rate due to the entire amount of the project being obligated from the outset. [Internal footnotes omitted.][7]

For Puerto Rico, the advantage of using these alternative procedures is that federal money will be obligated in full once there is agreement between the parties on the cost estimate for a particular project. The downside is that if the project is over-budget, it will be up to the government of Puerto Rico, which is undergoing a bankruptcy process, to fund the cost overrun. However, if there are any savings, the government of Puerto Rico could use those savings for other recovery-related activities. The advantage for the federal government is that it limits its exposure to the pre-agreed fixed cost estimate amount.

Given the magnitude of the damage caused by Hurricane Maria, it was foreseeable that the use of these alternative procedures would present implementation challenges and delays in developing fixed cost estimates. First, "since Puerto Rico is responsible for any costs that exceed fixed cost estimates for large permanent work projects under the alternative procedures, FEMA and Puerto Rico had to agree on guidance to develop the fixed cost estimates." In February 2020, the GAO reported that FEMA had developed guidance for developing fixed cost estimates. However, it also found that the guidance did not meet all of the GAO's best practices for estimating costs and the GAO recommended that FEMA revise the guidance to adhere more closely to best practices. As of January 2021, FEMA was working to address this recommendation. Second, the "use of alternative procedures can delay a project's obligation because more time is required to develop a fixed estimate."[8]

To be fair to FEMA, since 2019 it has implemented several changes to its Public Assistance Program in Puerto Rico. These changes include: (1) applying a new program delivery model; (2) instituting an accelerated award strategy for certain recipients; and (3) making the use of Public Assistance **optional** for certain projects.[9] These changes have expedited the obligation of funds. According to the GAO, as of January 15, 2021, FEMA had obligated $17.5 billion for 4,793 Public Assistance permanent work projects (See Exhibit A). However, the actual expenditure of funds remains painfully slow. According to the same GAO report, of the $17.5 billion obligated for permanent work projects, only $157.7 million, or 0.9%, had been spent as of January 15, 2021 (See Exhibit B). Finally, we note that as of early this year, more than three years after Hurricane Maria, FEMA was still developing cost estimates for 5,279 projects related to the 2017 hurricanes.[10]

HUD

Between September 2017 and June 2019, Congress appropriated approximately $20.3 billion in CDBG-DR (Disaster Recovery) and CDBG-MIT (Mitigation) funds for disaster reconstruction and mitigation activities related to Hurricanes Irma and Maria in Puerto Rico through three supplemental appropriation acts:

- **P.L. 115-56**: $1,507,179,000 for unmet needs;

[7] Id. at p. 56 (emphasis by the author).
[8] GAO, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects,* supra n. 5, p. 18 and p. 22.
[9] Id. at p. 19.
[10] Id. at p. 25.

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- **P.L. 115-123**: $10,153,130,000 for unmet needs (including $1.9 billion to enhance and modernize the electric grid) and an additional $8,285,284,000 for mitigation activities; and
- **P.L. 116-20**: $304,000,000 for unmet needs.

The usual process for disbursing these funds is somewhat cumbersome. As shown in Exhibit C, after Congress appropriates the money, OMB issues an apportionment document to HUD, and then HUD has to publish a notification in the Federal Register. The intended beneficiary then proceeds to draft an Action Plan for the use of the funds, in accordance with the published regulations. If and when the Action Plan is approved by HUD, then the parties need to execute a Grant Agreement to allow the expenditure of funds in accordance with the terms of the Action Plan.

However, as shown in Exhibit D, this process has been particularly, some would suspiciously, slow in the case of funds allocated for disaster relief and mitigation activities in Puerto Rico. A report issued by HUD's Office of Inspector General (the "OIG Report") on April 20, 2021 found that the Trump administration set up several bureaucratic obstacles that substantially slowed down the process for disbursing these funds.[11]

The OIG Report sets forth some particularly concerning findings regarding (1) the process prior to the publication of the Federal Registration notice for the use of $8.3 billion of mitigation funds and (2) revisions made to the CDBG-DR grant agreement which delayed the disbursement of $8.2 billion of disaster recovery funding for Puerto Rico's unmet needs.

With respect to the Federal Register notice for the use of the $8.3 billion tranche for mitigation activities, the OIG Report describes months of negotiations between HUD and OMB, which resulted in several revisions of the notice's text, mostly at the request of OMB. Several HUD officials found some of these OMB requests to be unreasonable or outside the scope of the normal administrative process. For example, Deputy Secretary Montgomery, during his OIG interview:

> …characterized OMB's revisions as containing "poison pills" because they would impose unworkable criteria and he was not sure it was "even legal" to insist upon grantees meeting the conditions as a prerequisite to receiving mitigation funding. For example, Montgomery said he did not believe that HUD could coerce Puerto Rico to fix its property-tax system to receive mitigation funding because the property-tax system was not related to mitigation activities. He also indicated that HUD did not put these types of conditions on other disaster-recovery grantees.[12]

According to the OIG Report, HUD had both legal concerns as well as concerns regarding the structural (policy) changes that OMB wanted grant recipients to make. (See Exhibit E for a summary of the legal concerns and Exhibit F for a summary of the concerns regarding structural changes).

Furthermore, OMB requested the Office of Information and Regulatory Affairs to review the proposed Federal Register notice, which a "HUD Attorney" described as "unheard of" for a disaster-related notice and stated that "HUD officials questioned whether the notice 'truly qualified' for OIRA review."[13] Another senior HUD official described "OIRA's comments as "kind of like Groundhog Day, just keeps coming back."

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[11] Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021. See also, Tracy Jan and Lisa Rein, "Investigation suppressed by Trump administration reveals obstacles to hurricane aid for Puerto Rico", *Washington Post*, April 22, 2021, available at https://www.washingtonpost.com/business/2021/04/22/puerto-rico-hurricane-trump-hud/ .

[12] HUD OIG Report, p. 25.

[13] Id. at p. 30.

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The net result of loading the Federal Register notice text with "poison pills" and submitting it to unnecessary review by OIRA was that the mitigation notice for Puerto Rico was not filed until January 27, 2020 — "**23 months and 19 days after the corresponding appropriation and 146 days after the statutory deadline**."[14] In contrast, "HUD published a notice for the other 14 eligible CDBG-MIT grantees 150 days earlier, on August 30, 2019, and a notice for the USVI 139 days earlier, on September 10, 2019, (dated September 4, 2019)."[15]

With respect to the revisions made to the CDBG-DR grant agreement for the disbursement of $8.2 billion of disaster recovery funding for Puerto Rico's unmet needs:

> The OIG also found that HUD's decision to revise its template for CDBG-DR grant agreements was a factor in delaying disbursement of this second tranche of funding for unmet needs to PRDOH. In early 2019, HUD decided to substantially revise the content of its standard disaster-grant agreements, which at the time consisted of a brief three-to-six-page document that HUD considered to not have appropriately mitigated risk. While some senior HUD officials believed that these revisions were necessary, **the revisions stemmed at least in part from OMB concerns related to PRDOH.** During the grant-agreement revision process, it became clear to HUD staff that the agreement conditions needed to have parity with the CDBG-MIT notice conditions taking shape at the same time, thus making the obligation of the second tranche of funding for unmet needs dependent on completion of the Puerto Rico CDBG mitigation-notice negotiations. Accordingly, the protracted process for publishing the Puerto Rico CDBG-MIT notice contributed to a delay in finalizing the Department's grant agreement with PRDOH for the second tranche of funding for unmet needs.[16]

The result was that HUD and Puerto Rico did not sign a grant agreement regarding this tranche of funds until February 21, 2020, while "**Texas signed its grant agreement relating to second tranche funds 178 days earlier, on August 27, 2019, and Florida signed its agreement 150 days earlier, on September 24, 2019**."[17]

While all the circumstantial evidence points to OMB as the principal cause of the delays regarding the disbursement of CDBG funds to Puerto Rico, the OIG Report stops short of doing so, perhaps because senior OMB officials refused to cooperate with the investigation, while OMB itself denied requests for information made by the OIG. Nonetheless, former OMB head and then Acting Chief of Staff Mick Mulvaney said the quiet parts at loud when, on an October 17, 2019 press conference regarding the Trump's administration withholding of military aid to Ukraine, he stated the following:

> Sure. I'll - let's deal with the second one first, which is - look, it should come as no surprise to anybody - the last time I was up here - I haven't done this since I was Chief of Staff, right? The last time I was up here, some of you folks remember, it was for the budget briefings, right? And one of the questions y'all always asked me about the budget is, "What are you all doing to the foreign aid budget?" Because we absolutely gutted it, right? President Trump is not a big fan of foreign aid. Never has been; still isn't. Doesn't like spending money overseas, especially when it's poorly spent. And that is exactly what drove this decision. I've been in the office a couple times with him, talking about this. And he said, "Look, Mick, this is a corrupt place." Everybody knows it's a corrupt place. By the way, put this in context: This is on the heels of what happened in ***Puerto Rico***, when we took

[14] Id. at p. 21.
[15] Id. at p. 43.
[16] Id. at p. 42.
[17] Id.

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> a lot of heat for not wanting to give a bunch of aid to ***Puerto Rico*** because we thought that place was corrupt... [18]

This statement is problematic in several ways. First, even if we take as valid the highly controversial proposition that the president can simply refuse to spend money legally appropriated by Congress for foreign assistance, the argument does not apply to Puerto Rico, which is under the domestic jurisdiction of the United States. Second, domestic disaster assistance is very different from foreign aid or military assistance. The primary purpose of the former is to affirmatively help people who have been adversely and directly impacted by a natural disaster, while the latter is primarily a tool to protect U.S. interests abroad and to further U.S. foreign policy objectives. Finally, we must note that as of the date of this hearing and to the best of our knowledge, no Puerto Rican government official has been indicted, much less convicted, of malfeasance regarding the use of federal disaster assistance funds. Ironically, the only persons or corporations implicated in corrupt activities with regard to Hurricane Maria's reconstruction efforts, so far, are either federal government employees or incorporated in the mainland.

In addition to being wrong, it is also mind boggling that, consciously or not, the former head of OMB publicly admitted that what OMB had done in Puerto Rico, in withholding assistance to the victims of a natural disaster, was a direct precedent in support of the Trump's administration decision to withhold assistance to Ukraine, **in direct violation of duly enacted appropriations laws in both cases**. And we all know how that Ukraine episode ended.

Conclusion

Nearly four years and three months after Hurricane Maria, the totality of the circumstances surrounding the federal government's response to that natural disaster strongly suggests that it was arbitrary and capricious and that Puerto Rico was unreasonably treated in a different way relative to other jurisdictions affected by the 2017 natural disasters. However, we cannot conclude, with the information we have available at this moment (with the exception, perhaps, of Mr. Mulvaney's rather candid statement), that it was the express intent of federal officials to discriminate against Puerto Rico in the disbursement of disaster assistance. But we can affirm with confidence that the impact and effects of the federal government's actions have certainly been discriminatory, to the detriment and harm of thousands of Puerto Ricans.

The use of "poison pills", unnecessary administrative reviews, and the imposition of unprecedented conditions on grant recipients, in the words of both the GAO and HUD's OIG, resulted in undue delays in delivering assistance to disaster victims in Puerto Rico. These delays are not without cost, as the longer the reconstruction process takes, the harder it is to return to a pre-disaster normality. We must remember that we are dealing with human beings that have a natural desire, in many cases, to return to "the way things used to be."

That, unfortunately, may not be possible in Puerto Rico, due to these unfair delays affecting the recovery process. As time goes by after a disaster, old neighbors may decide to move to other parts of Puerto Rico; the widow who used to live in the house down the street may have relocated to the mainland to live with one of her children; the convenience store down by the corner may have gone bankrupt; families may have separated; friendships lost; students transferred to other schools; little league teams disbanded; budding love affairs broken; businesses large and small closed forever, and so on and so forth.

[18] White House Acting Chief of Staff Mick Mulvaney Press Briefing, October 17, 2019, available at https://www.c-span.org/video/?465446-1/mick-mulvaney-defends-withholding-military-aid-ukraine-pending-investigation, the quoted segment begins at minute 19:41 of the video.

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We must note that both FEMA and HUD have undertaken important actions to speed up the obligation of funds and to improve their working relationship with the Puerto Rican government over the last year or so. These are welcome developments. However, difficult questions remain unanswered: Who and how do we decide to spend this federal windfall? What do we preserve, what do we leave to waste, and who decides? Who is deemed "worthy" of help, why, what kind, and from whom? For instance, Which coastal community gets a seawall and which community is relocated to a "safer area"?; Whose neighborhood gets razed to the ground, displaced, or gentrified in the name of "redevelopment"?; Where do we build new public schools, hospitals, and electric, water, and telecommunications infrastructure, and who decides?

These are only some of the thorny questions we will face as we move forward with the reconstruction of the island. It is good to keep them in mind because they remind us that these are political decisions in no way preordained or inevitable in the wake of Hurricane Maria. As Horowitz reminds us: "The etymology of the word *disaster* refers to stars out of alignment; but if the changes in Louisiana after Hurricane Katrina seemed to some to proceed with the force of destiny, it is well to remember as Shakespeare cautioned, 'The fault…is not in our stars, But in ourselves, that we are underlings'."[19]

In the end, then, the shape of Puerto Rico after Hurricane Maria will depend to a large extent on how we address long-standing issues of class, race, segregation, poverty, inequality, and political power that we have ignored for far too long.

We thank once again the United States Commission on Civil Rights for the opportunity to participate in these hearings and look forward to answering any questions Commission members may have at this time.

Respectfully submitted,

Sergio M. Marxuach
Policy Director
Center for a New Economy

[19] Andy Horowitz, *Katrina: A History, 1915-2015*, (Harvard University Press: Cambridge, MA, 2020), p. 5.

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Exhibit A

Table 1: Federal Emergency Management Agency (FEMA) Public Assistance Permanent Work Obligations to Puerto Rico for Hurricanes Irma and Maria by Category of Work as of January 15, 2021.

Dollars in millions

Public Assistance Work Category	Standard Public Assistance		Alternative Procedures		Total	
	Number of projects	Obligated amount	Number of projects	Obligated amount	Number of projects	Obligated amount
C- Roads and Bridges	1,124	359.43	884	555.72	**2008**	**915.14**
D- Water Control Facilities	11	0.73	9	4.14	**20**	**4.87**
E- Public Buildings	529	98.49	650[a]	2,635.24	**1,179**	**2,733.73**
F- Public Utilities	46	183.14	116[a]	13,131.08	**162**	**13,314.22**
G- Recreational or Other	678	141.90	746	407.14	**1,424**	**549.04**
Total	**2,388**	**783.70**	**2,405**	**16,733.32**	**4,973**	**17,517.01**

Source: GAO analysis of FEMA data. | GAO-21-264

Note: The obligated amount represents the federal share for the project's costs.

[a]The number of projects under this category is likely to increase as Puerto Rico's Electric Power Authority, Aqueduct and Sewer Authority, and Department of Education develop projects to execute obligations under their fixed cost estimates.

Source: United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 27.

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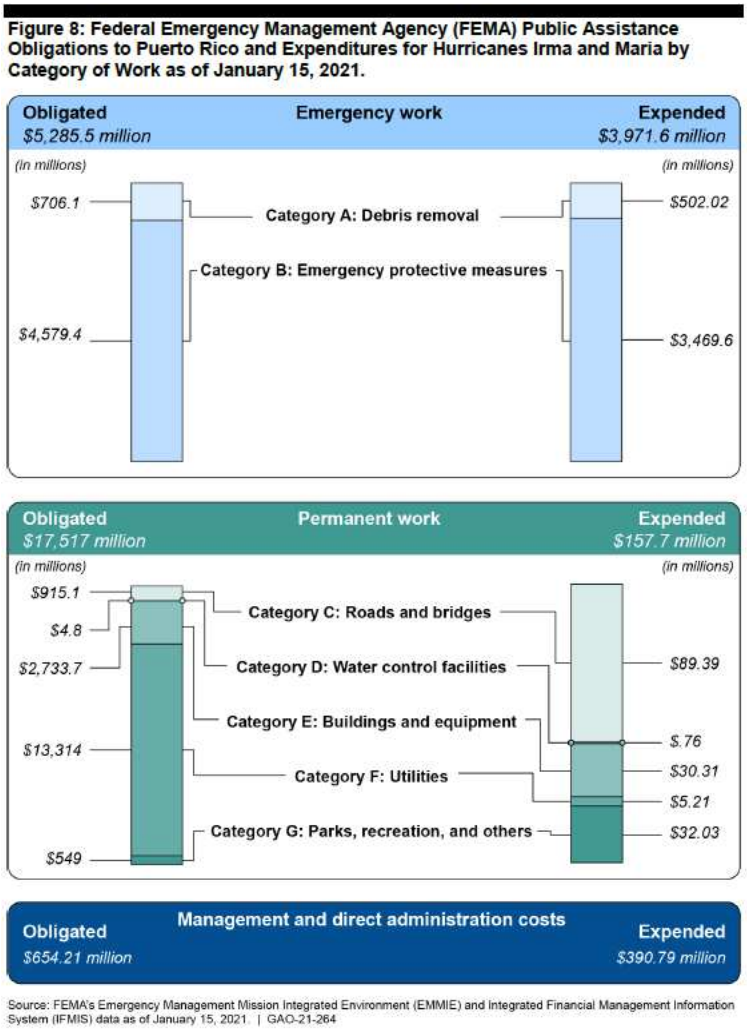
Exhibit B



Source: United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 29.

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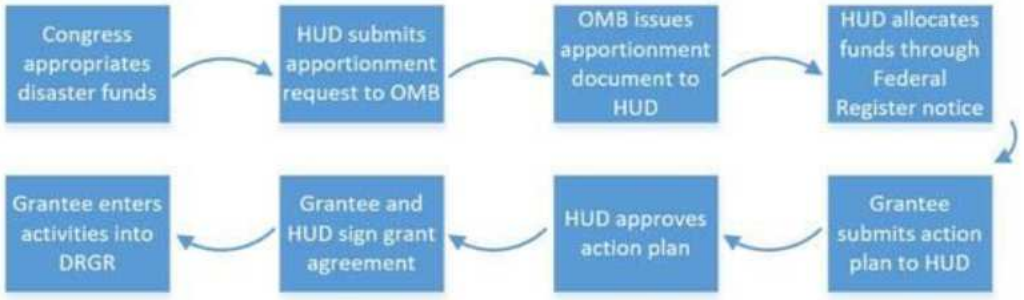
Exhibit C

Image 1: Disaster Recovery Obligation Process



Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 10.

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USCCR-21-1814-B-000905

Exhibit D

	2018 Cont. Apprps Act (P.L. 115-56)	Bipartisan Budget Act of 2018 (Pub. L. 115-123)			Supplemental Appropriation (Pub. L. 116-20)
Appropriation	**$1.507 billion** Housing & Economy September 8, 2017	**$8.221 billion** Infrastructure February 9, 2018	**$8.285 billion** Mitigation February 9, 2018	**$1.9 billion** Electric Power February 9, 2018	**$277.85 million** Infrastructure[1] June 6, 2019
Federal Register Notice	**Published** February 9, 2018	**Published** August 14, 2018	**Published** January 27, 2020	---	**Published** January 27, 2020
Action Plan and Action Plan Amendments	**Submitted to HUD for approval** June 14, 2018 **Approved by HUD** July 29, 2018	**1st Amendment Submitted** Nov 16, 2018 (Approved Nov 18, 2018) **2nd Amendment submitted** Aug. 15, 2019 (Approved Aug 23, 2019) **3rd Amendment submitted** February 24, 2020 (Approved Feb 24, 2020)	**Action Plan submitted to HUD** December 4, 2020 (Approved April 19, 2021)	---	**4th Amendment submitted** July 9, 2020 (Approved Aug 17, 2020) **5th Amendment submitted** December 8, 2020 (Approved Feb 5, 2021) **6th Amendment submitted** March 8, 2021 (Approved March 15, 2021)
Grant Agreement	**Executed** September 20, 2018	**Partially Executed** Divided in 4 disbursements with first being $1.7 billion February 4, 2020	---	---	---
	19 programs being rolled out $500 mm+ spent	--- (Adds 8 programs, so 27 total)	---	---	---

Source: Fiscal Oversight and Management Board for Puerto Rico, *Disclosure Statement for the Seventh Amended Title III Joint Plan of Adjustment for the Commonwealth of Puerto Rico et. al.,* July 30, 2021, p. 147.

We note that HUD published the Federal Register notice for the use of the $1.9 billion allocated by Congress for work on Puerto Rico's grid on June 22, 2021. The Puerto Rico Housing Department has published a first draft of the Action Plan for the use of those funds, which is currently subject to public review and comment.

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Exhibit E

Table 4: HUD's Legal Concerns to OMB Comments on Mitigation Notice

HUD Concern	Description of HUD Concern
HUD's Power to Issue Requirements Limited to the Authority Delegated by Congress	"As a general matter . . . there must be a reasonable relationship between the HUD imposed condition or requirement for obtaining access to funds and the effective administration of disbursement and use, within the confines of the statutory authority, of the funds. In particular, waivers and alternative requirements must be for good cause and must be not inconsistent with the purposes of title I [of the HCDA]."
10th Amendment Federalism Concerns	"In this regard, there are 10th amendment federalism concerns regarding grants to states. Conditions on the use of Federal grant funds must be related to the purpose of the funds, clear and unambiguous, and not coercive. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987). While the 10th amendment does not afford the same protections to Puerto Rico as it does to CDBG-MIT grantees that are states, *see* United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 82 (2016) (territorial governments are a creation of Congress and owe their powers to the statutes of the United States) . . . . Puerto Rico and the United States Virgin Islands are defined as a 'state' under title I of the HCD Act. Thus, the discussions herein are equally applicable to all jurisdictions. . . ."
The Impoundment Control Act[101]	"Particularly when considered as a collection of requirements, the structural reform requirements also raise issues under the Impoundment Control Act (ICA). To the extent the structural reform requirements, as implemented, cause substantial difficulty or delay in accessing funds, the basis for the conditions is likely to be more closely scrutinized under the principles set forth above. More fundamentally, undue delay in disbursing appropriated funds may result in a determination of 'impoundment' . . . . It should be noted that HUD staff are unaware of any deferral or rescission requests related to the mitigation funds appropriated by Public Law 115-123. If funds are delayed beyond ordinary processing timelines or subjected to unusual conditions or requirements, the question of impoundment may arise, either in a litigation or political context."

Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 26.

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Exhibit F

Table 5: HUD's Concerns to OMB's Structural Comments on Mitigation Notice

OMB Structural Reform	Excerpts of HUD Concerns
Property Management	"Most HUD programs do not require proof of ownership but instead are targeted merely to 'occupants[.]' *See* HCDA 105(a)(4) (42 U.S.C. Sec. 5305 (a)(4)) and 24 CFR 570.208(a)(3). This weakens the relationship to requirements for a property management system. In contrast, FEMA does often look to ownership."[102] "Property tax assessments clearly would appear to be outside the reasonable relationship to grant administration."
Revenue Maintenance	"Insofar as tax matters are legislative in nature, HUD would generally have no authority to impose statutory changes as a precondition to funding. Congress has previously directed HUD, across a range of issues, not to mandate local law changes as a condition to making grants." (Citation omitted).
Permitting, Enforcement and Inspection	"HUD would have no authority to impose requirements outside of projects using grant funds. We also note that many jurisdictions would be found to have significant deficiencies in this area if standards were consistently applied. HUD currently has no available means of specifically assessing this or resource capacity to do so. Instead, HUD's current financial certification requirements are based on uniform federal administrative requirements."
Cost Reasonableness	"OMB regulations at 2 CFR 200.420 through 200.475 address cost reasonableness in significant detail." "The appropriations act specifically prohibits HUD from establishing alternative requirements to federal labor standards. Insofar as Federally imposed Davis-Bacon wage rates are the principal driver of additional labor costs with respect to Federal grants, focusing on locally imposed minimum wage rates may have relatively little impact, particularly in the construction area, and raises a potentially potent public policy paradox." "HUD has no statutory authority to apply remedies against the personnel of a grantee except in cases of fraud, waste and abuse. Principles of federalism . . . would also impede such action. Further, applying discipline against grantee employees . . . would likely be deemed an indirect violation of the express restrictions against waivers of labor law provisions."
Timely Payments	"There seems to be little proximate relationship between these factors [ensuring that contracts and bills will be paid in a timely manner], especially given the difficult of measuring this. Further, this objective seems to be at cross-purposes with other provisions aimed at ensuring all payments to vendors are thoroughly reviewed and vetted. It seems highly likely that if requirements were imposed in this area, it would result in cross-claims against the federal government for delays in disbursing grant funds."

Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 27.

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LIGA DE CIUDADES DE PUERTO RICO

Testimony of Cristina M. Miranda – Palacios, MCP, CHO
Executive Director
League of Puerto Rican Cities

To: U.S. Commission on Civil Rights

Re: Federal Emergency Management Agency (FEMA)'s role in disaster preparedness and response to Hurricane Maria in Puerto Rico

Date: December 10, 2021

Buenos días and special greetings to the members of the US Commission on Civil Rights, my fellow panelists, and members of the audience.

I am honored to be here today to provide insight into FEMA's role in disaster preparedness and response to Hurricane María in Puerto Rico, as well as on the role of our central government.

I want to start by providing a brief description of the organization that I am honored to lead, the League of Puerto Rican Cities, La Liga. La Liga is a not-for-profit organization, founded in 2019, that unites local governments (municipalities) on the island in a non-partisan, but political, effort to improve the quality of life of the Puerto Rican people. As an entity, we aim to strengthen the capacity of local governments and communities on the island in the face of social, structural, fiscal, and governmental challenges.

After the dramatic impact of Hurricanes Irma and María in 2017, mayors united in a collaborative effort to identify best practices and lessons learned, as well as to develop collaborations to inform and guide them in their reconstruction processes. From 2017 till 2019, the mayors of over 46 municipalities united in a technical assistance and capacity building process, supported by several key partners.[1] Two years after the first convening, La Liga was incorporated as a non-profit non-partisan organization, a grand achievement in Puerto Rico's highly politized environment.

When I say that I am honored to lead La Liga I really mean it. I believe in the power and the importance of municipalities. And I am convinced that change will come thru these important units of local government. After the devastating impact of Hurricane María, and after all natural disasters, it has been municipalities the ones that have been at the forefront, providing the essential

[1] Key partners included: Ford Foundation, Center for a New Economy, Open Spaces, Open Society, and others. Seed funding was provided by Ford Foundation.

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services needed by the communities, many times without the required allocation of resources.

I can anticipate that many of the things that I will share with you today are similar, or even the same, as my fellow panelists. 4 years have passed since Hurricane María; to be precise, 4 years, 2 months, and 20 days... or 1,542 days.... But who is counting? And while over 4 years have passed, our reconstruction and recovery process seem to be stagnant. Hurricane María's force was extremely destructive. And so has been the response.

Let's look at some important points about the recovery process in Puerto Rico:

1. María was a category 4 hurricane, that decimated our electrical grid and caused historical damage, known by all.
2. Hurricane María, or the lack of preparation for it and the state of our infrastructure, killed more than 4,600 people in Puerto Rico, 70 times the official toll, according to estimates in a Harvard University study.
3. Neither the Federal government, nor the Puerto Rico government were prepared for the magnitude of the disaster. As an example of this, the Harvard study found that a third of deaths after the hurricane were due to interruptions in medical care caused by power cuts and broken road links.
4. A report published on September 25, 2020 (OIG-20-76), by the Office of the Inspector General of the Department of Homeland Security confirmed what we all knew: that the federal government was unprepared for the management of the disaster. The report establishes that FEMA mismanaged the distribution of commodities in response to Hurricanes Irma and María in Puerto Rico. That FEMA lost visibility of about 38 percent of its commodity shipments to Puerto Rico, worth an estimated $257 million. And, adding insult to injury, that the commodities that were successfully delivered to Puerto Rico took an average of 69 days to reach their final destinations. The report concluded that "FEMA [could not] ensure it provided commodities to Puerto Rico disaster survivors as needed to sustain life and alleviate suffering as part of its response and recovery mission." Let that sink in. FEMA could not ensure that it provided what was need in our communities to sustain life and alleviate suffering. Let that sink in. The report also establishes that inadequate FEMA contractor oversight contributed to the lost visibility and delayed commodity shipments.
5. When it comes to spending, and a word that we prefer in La Liga is investing, the reality is not better. Recent reports establish that only 1% of the funds have been disbursed for permanent works projects. (CPI[2]). Other reports state that only 18% of the overall approved FEMA funds have been disbursed.(Noticel[3]) How, one may wonder, with so much need and with the available resources, how can we be so behind in our reconstruction process? FEMA's delay in damage inspections, too many changes or lack of staff from COR3 and FEMA, and confusion over federal

[2] Como suero de brea los proyectos de envergadura que se harían con fondos de recuperación - Centro de Periodismo InvestigativoCentro de Periodismo Investigativo

[3] Notices. A cuatro años de María solo se ha desembolsado el 18% de los fondos de FEMA

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processes[4] have caused this unforgivable man-made delay. To this we must add, of course, the impact that the unilateral and ill-informed austerity measures imposed by the Fiscal Control Board have caused municipalities.

6. It is important to note that funds that were directly allocated to local governments (funds a & b), were promptly disbursed and used, evidencing that local units of government can be more agile than the Central Government.
7. There is widespread discomfort with the management of the FEMA funds by the central government, specifically with the company contracted by COR3, ICF Incorporated. As an example, the mayor of Jayuya, the municipality with the most FEMA funds allocated, recently stated: "These people [ICF Incorporated] do not work, and if they work, they change their minds and instructions every day." Summarizing his discontent and frustration the mayor shared the following about ICF: "It does not work. It is a great stone on the road ". It is important to note that since 2018 ICF has signed contracts with COR3 that surpass the sum of $406 million dollars, in part to advise and give administrative consultancy to the municipalities and government agencies to obtain funds. Has it been worth it? Have the funds reached their intended destination? Have the projects been completed or commenced? And, even more importantly, have the people been served? We know the answer to these questions. And the answer is a solid no.
8. The complaints expressed by the Mayor of Jayuya are shared, and amplified, by other mayors, that have stated that they face similar obstacles with ICF and with the burdensome and bureaucratic process established by the COR3. It almost feels as if there were remaining winds from María impeding the recovery. To these obstacles we must add the dramatic increase in material costs, the absence of labor, the lawsuits related to the lack of compliance from insurance companies, the compounding effects of other disasters, and of course, the pandemic. All of this is further complicated by the delays caused by the COR3 in the approval of documentation previously approved by FEMA. It is important to note that Section 428 of the Stafford Act establishes that if costs increase after estimates are approved, municipal governments are responsible for the extra expenses incurred. It does not mention anything about assigning responsibilities for the delays that lead to increases in construction costs.
9. Further complicating the reconstruction process it's the fact that FEMA funds must be reimbursed. As stated before, Municipalities are facing a multiplicity of constraints imposed, unilaterally, by the Fiscal Control Board, as well as the Central Government. Municipal budgets are facing drastic reductions while the needs of their constituents increase. As an example, from 2015 to 2018 municipal budgets recorded a reduction of almost 15%. It is expected that by fiscal year 2023 - 2024 43 municipalities in Puerto Rico will be fiscally unviable. If funds must be spent to be reimbursed, but the available funds are extremely limited, municipalities must be strategic on how to invest their reduced

[4] CPI

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resources. A task that would be easier to manage if the reimbursement process was not as slow as it is. Initially, COR3 had an eight-stage process that they established could take an average of 240 days. They have recently announced that this was reduced to four stages, with an average of 60 days. Will it work? Hopefully, but we must wait to see if it does.

As you can see, bureaucracy and a rampant lack of capacity have impeded the recovery process in Puerto Rico. Much has been said about the lack of capacity of municipalities to access the required funds. Nothing is said about the causes of that loss of capacity. And not much is said about the lack of capacity at the Central Government.

But there is more impeding the recovery process. And this is, an incapacity to understand the consequences of decisions made at the Central Government. An example of this is the adoption by the Central Government of the *advisory maps* completed by FEMA. These advisory maps are incorrect, misleading, and dangerous. They do not consider previous mitigation projects, funded with federal funds, and they also exclude many potential beneficiaries by identifying many communities as being in a floodplain. This is particularly impactful for many disadvantaged and economically disenfranchised communities, who will not be able to receive the required funding, ending in displacement.

Time constraints do not allow me to delve into the topics that I have brought up in a general way. However, we are hopeful about this public briefing. Hopeful that it will result, not only in the identification of all the things that have gone wrong, but in actions to correct them and to prevent them from ever happening again. Changes that advance our recovery process and that guarantee equitable and just access to our most at need and disadvantaged communities. Changes that reduce disparities and inequities associated with access to relief aid. Changes that improve the planning, coordination and execution of disaster recovery and the effective administration of disaster relief to our communities. Changes that foster a more equitable and just recovery.

Changes that can start with the adoption of these recommendations:

1. Decentralize recovery funds to ensure a more expeditious, equitable and just recovery.
2. Coordinate a task force, composed of representatives of the government, as well as non-profit sector, to discuss recommendations on how to streamline processes at COR3, specifically related to performance, compliance, and payment and reimbursement processes, to ensure that these are faster.
3. Reduce the risk of disaster recovery spending at the local level thru the allocation of funding to increase the capacity of municipalities. This can be achieved thru technical assistance that is tailored made and culturally competent, and that also focuses on the transfer and creation of knowledge to ensure that these important units of local government are better prepared for the next disaster.
4. Adapt to the reality that reimbursements are not necessarily viable for municipalities.

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5. Complete an assessment about disparity in regulations to access funds imposed by our own government, and that have a negative impact on the most disadvantaged and at need communities. (Ex. R-3 / CDBG-MIT)
6. Communicate to the Central Government that FEMA's advisory maps are precisely that, advisory, and that these should not be adopted without the proper confirmation of their correctness.
7. Complete an assessment on the impact of federal impositions that are focused on formalized communities and that do not adapt to the legal framework or the reality of Puerto Rico.
8. Continue, and expand, this important conversation to identify key stakeholders, areas of improvement and lessons learned that, if adopted and scaled up, could result in a more just and equitable recovery process.

For additional information please feel free to reach us. We hope to continue the conversation with you to improve the recovery process, but above all, to be able to work towards a fairer and more equitable recovery.

Cordially,

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US COMMISSION ON CIVIL RIGHTS BRIEFING

CIVIL RIGHTS IMPLICATIONS OF DISASTER RELIEF:
HURRICANE MARIA IN PUERTO RICO

CARMEN YULIN CRUZ SOTO

WEISSMAN FELLOW IN LEADERSHIP, MOUNT HOLYOKE COLLEGE

FORMER MAYOR OF SAN JUAN, PUERTO RICO 2013-2020

DECEMBER 10, 2021
SAN JUAN, PUERTO RICO

Distinguished members of the Commission and fellow panelists:

Thank you, for the opportunity to shine a light on the negligent acts perpetrated by FEMA, under the Trump Administration, in the aftermath of Hurricanes Irma and Maria. Approximately, three thousand Puerto Ricans died, after a botched relief effort denied us lifesaving support. These deaths could have been prevented if our suffering had been met with urgency and efficiency.

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Earlier this year, two reports from the Inspector General's Office concluded, what we knew all along, FEMA was unprepared and mismanaged relief efforts. (April 20, 2021 – Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery & Mitigation Activities in Puerto Rico, September 25, 2021, FEMA's Management of Commodities after Hurricane Irma & Maria)

One of the reports stated it took an average of 69 days, more than two months, for aid to arrive. On its Executive Summary it said "…FEMA cannot ensure it provided commodities to Puerto Rico disaster victims, as needed to sustain live and alleviate suffering…".

Under the veil of political neutrality, FEMA's highest managerial levels turned a blind eye to the unequal treatment that cost so many lives. Two data points paint a clear picture of neglect:

1. Nine days after Harvey, there were 30,000 FEMA personnel in Texas: in Puerto Rico, nine days later, 10,000.

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2. It took FEMA 10 days to approve disaster work after Harvey; it took them 43 days to approve the same work in Puerto Rico.

FEMA was unable to adapt its *Standard Operating Procedures* and get their relief operations of the ground on a timely fashion; they kept asking for reports to be filled out on the internet, when they knew we had we no electrical power and thus no internet.

There was also no consistency in the instructions provided to us: one day we were told to use one form, or one system and a few days later we were told to use another form and input the data on another system. A new FEMA employee arrived, and we had to start again for there was no hand off, no knowledge of what happened before, only new instructions with no explanations.

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Language was another barrier: not only was the information initially in English, disregarding our first language is Spanish; but FEMA's personnel was incapable or servicing the deaf community and did not take into consideration that people have different levels of internet proficiency and access.

And when relief finally arrived it added insult to injury. This is a picture of the food distributed by FEMA about 3 weeks after the crisis began.

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Shameful! Not only was this food not suitable, but FEMA was incapable of setting up, or help us set up, a robust, consistent, and adequate supply chain of aid.

In the Municipality of San Juan, we were prepared to make breakfast, lunch, and dinner for our employees for four months. In the end, we provided meals for them, food for 26 community soup kitchens;

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we provided food, water, emergency management help for approximately 65 elderly homes and elderly care type organizations. New York City Emergency Management, which arrived a week after Maria, established for us a robust distribution system built on the strength of our relationships with religious, community and recreational leaders; thus we were able to provide food and water to 34 communities. With the help of Goya, Hispanic Federation, Chobani, Suiza Dairy, Tres Monjitas, Chocolate Cortes and food and water purchased at the municipal level, we were able to meet local nutritional needs.

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We also focused our aid distribution on those living with HIV/Aids, immigrants, elderly, homeless, those with children/adults with physical and emotional challenges.

Where FEMA was incapable, we stepped in; we figured it out. FEMA should have had a road map, a blueprint for how to do this and precious time would have been saved. Our first aid came from Chicago, from the Boricuas of the Diaspora; I remember thinking how they could,

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do this on their own, while FEMA was incapable of doing the most basic part of their job: get to us the live saving relief we needed to survive.

The violation of our civil rights had an immediate and lasting effect. Today, you will hear testimony from organizations who had to deal with FEMA's fallout in almost every single aspect of our lives. Most of them are still fighting today for the same things.

In my written testimony, I have included recommendations on what can be done so FEMA is always able to respond appropriately. No doubt we were treated differently, and it had devastating consequences. Think about this: Hurricane Harvey impacted about 13 million people and 88 people died. Maria affected 3.5 million people and 3,000 died. One live is not more important than other; but negligence no doubt, took a toll.

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Why the inequity? For those in power we were less important because we are colonial subjects. Black and brown people, 60% below the poverty line.

Today, December 10th, the world commemorates Human Rights Day. We have the duality of being United States citizens and Puerto Rican nationals. Two nations: where one colonized the other; in 1917 we were made American citizens by birth. Yes, our civil rights were violated but so were our human rights as a nation invaded, colonized, and exploited. They were violated while the island of Vieques was used by the US navy as target practice; violated while the effects of contraceptives, 20 times more potent than those finally approved, were tried on Puerto Rican women; violated today, when a fiscal control board reduces the hopes of our current and future generations by decreasing pensions and increasing the cost of education at the university level.

While the violation of our Human Rights is addressed in other forums, we can move forward, and together, to ensure what happened

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in Puerto Rico in 2017 does not happen again. NEVER MUST a live be lost because FEMA, or any other agency, is incapable of putting action plans into place treating people with urgency, dignity, and respect. Never again must the price of incompetence be the lives of so many.

I am hopeful, and confident, we can move forward in this common endeavor. Thank you. ###

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Testimony of Diane Yentel,
President and CEO, National Low Income Housing Coalition
Presented to the United States Commission on Civil Rights
"**Government Response to Hurricane Maria"**
December 10, 2021

I. Introduction

On behalf of the National Low Income Housing Coalition and the Disaster Housing Recovery Coalition (DHRC), I would like to thank the Commission for the opportunity to provide testimony on how the government response to Hurricane Maria and other disasters have neglected the needs of the lowest-income and most marginalized survivors, including people of color, people with disabilities, people experiencing homelessness, and others.

The National Low Income Housing Coalition (NLIHC) is dedicated solely to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. NLIHC leads the DHRC of more than 850 national, state, and local organizations, including many working directly with disaster-impacted communities and with first-hand experience recovering after disasters. Together, we work to ensure that federal disaster recovery efforts prioritize the housing needs of the lowest-income and most marginalized people in impacted areas. The DHRC has published comprehensive disaster housing recovery recommendations for Congress,[i] the Federal Emergency Management Agency (FEMA),[ii] and the U.S. Department of Housing and Urban Development (HUD).[iii]

NLIHC has worked on disaster housing issues since Hurricane Katrina struck New Orleans in 2005 and worked closely with Puerto Rican advocates and partners after Hurricane Maria in 2017. From these and other experiences, we have concluded that America's disaster housing recovery system is fundamentally broken and in need of major reform. The current system was designed for middle-class and predominantly white people and communities; it does not address the unique needs of the lowest-income and most marginalized people and the communities in which they live. As a result, these households are consistently left behind in recovery and rebuilding efforts and their communities are left less resilient to future disasters. The federal disaster recovery system exacerbates many of the pre-disaster challenges these communities faced: worsening the housing crisis, solidifying segregation, and deepening inequality.

Federal, state, and local governments' inequitable disaster recovery efforts disproportionately harm Black, Indigenous, Latino, and other survivors of color and their communities. Recovery efforts tend to prioritize higher-income and disproportionately white homeowners over lower-income and disproportionately Black and brown renters and people experiencing homelessness. In doing so, disaster recovery exacerbates racial wealth disparities and pushes more low-income renters of color into long-term housing instability and, in worst, cases homelessness. While Black and brown communities are often located in areas at higher risk of disaster and have less resilient infrastructure to protect residents from harm, long-term recovery resources tend to go to white communities that face lower risks. Rather than dismantling racial segregation that is the

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direct result of intentional federal, state, and local policy, rebuilding efforts tend to entrench racial disparities.

This inequitable disaster recovery was exemplified by the federal government's response to Hurricane Maria. Puerto Rico was already experiencing a housing crisis before Maria devastated the island. Forty-five percent of the territory's population lived in poverty – more than triple the fifteen percent U.S. national rate. Three out of four of the lowest-income families paid more than thirty percent of their income on housing, and the existing housing stock was often in poor condition, with more than 110,000 homes lacking basic kitchens and plumbing. In the immediate aftermath of the storm, FEMA denied nearly two-thirds (60%) of the nearly 1.2 million individual assistance applications filed in Puerto Rico – twice the denial rate in Texas after Hurricane Harvey. Congress was slow to approve badly needed long-term recovery funds, which were further impaired by arbitrary requirements, a lack of transparency, and lack of protections for low-income disaster survivors.

In this testimony, I discuss key barriers to equitable and comprehensive disaster housing recovery and opportunities to reform FEMA and HUD programs to ensure that resources are deployed quickly, equitably, and effectively. These barriers[iv] and opportunities for reform[v] are included in "Fixing America's Broken Disaster Housing Recovery System," a two-part report published by NLIHC and Fair Share Housing Center of New Jersey.[vi]

Our policy recommendations are grounded in nine core principles that should guide the country's disaster housing recovery and mitigation efforts:

1. Recovery and mitigation must be centered on survivors with the greatest needs and ensure equity among survivors, especially for people of color, low-income people, people with disabilities, immigrants, LGBTQ people, and other marginalized people and communities.
2. Everyone should be fairly assisted to recover through transparent and accountable programs and strict compliance fully and promptly with civil rights laws, with survivors directing the way assistance is provided.
3. Securing help from government must be accessible, understandable, and timely.
4. Everyone in need should receive safe, accessible shelter and temporary housing where they can reconnect with family and community.
5. Displaced people should have access to all the resources they need for as long as they need to safely and quickly recover housing, personal property and transportation.
6. Renters and anyone experiencing homelessness before the disaster must quickly get quality, affordable, accessible rental property in safe, quality neighborhoods of their choice.
7. All homeowners should be able to quickly rebuild in safe, quality neighborhoods of their choice.
8. All neighborhoods should be free from environmental hazards, have equal quality and accessible public infrastructure, and be safe and resilient; and
9. Disaster rebuilding should result in local jobs and contracts for local businesses and workers.

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These core principles and the following policy recommendations should serve as a guidepost for this commission, Congress, and other federal policymakers as we work to reform our nation's disaster housing recovery framework.

II. FEMA Related Barriers to Equitable Housing Recovery

After a disaster, displaced families must have a safe, accessible, and affordable place to live while they recover. FEMA programs can provide crucial assistance to help survivors recover from a disaster through temporary shelter and financial assistance and making basic structural repairs to homes. However, FEMA creates unnecessary and often insurmountable barriers to accessing these programs, leaving many low-income survivors at increased risk of displacement, eviction, and, in worst cases, homelessness.

FEMA programs are not designed to serve lower-income people with the greatest needs; such households are consistently denied assistance. For example, After Hurricane Maria, a full 60% of all applicants were denied FEMA Individual Assistance (IA).[vii] After Hurricane Harvey, nearly half of disaster survivors with the lowest incomes were denied; the vast majority of higher-income households were approved[viii].

FEMA's Failure to Address Housing Needs

FEMA programs neglect the housing needs of America's lowest income disaster survivors and exacerbate housing insecurity. Without the affordable and accessible homes survivors need, many return to uninhabitable homes, sleep in cars or tents, stay at shelters, double- or triple-up with other low-income families, or pay more than half of their limited incomes on rent.

Research demonstrates that disasters exacerbate the existing rental housing crisis for households with the lowest incomes.[ix] After 2012's Hurricane Sandy, households already dealing with housing instability were further destabilized through displacement and increased rents. Two years after Sandy, few new affordable homes had been completed yet survivors were no longer eligible for federal rental assistance.[x]

The impact of disasters on low-income people's housing needs is made worse by FEMA's recent refusal to activate the Disaster Housing Assistance Program (DHAP), rendering some survivors homeless.[xi] During past disasters, both Republican[xii] and Democratic[xiiixiv] administrations upheld DHAP as a best practice for disaster housing recovery. DHAP was created after hard-won lessons from Hurricane Katrina, and it has been used successfully in some major disasters since that time. Under DHAP, displaced families receive longer-term direct rental assistance and case management services provided by local housing professionals with extensive knowledge of the local housing market. This assistance helps families find permanent housing solutions, secure employment, and connect to public benefits as they rebuild their lives.[xv]

After Hurricane Maria and other 2017 hurricanes, FEMA instead relied on its Temporary Shelter Assistance (TSA) program and other programs that are inaccessible to many low-income survivors. TSA is intended to reduce the number of survivors in congregate shelters by covering the cost of staying in an approved hotel or motel for an initial period of up to 14 days. The program has multiple barriers to participation for low-income people, many of them insurmountable.

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Low-income families are often unable to access TSA motels due to financial and other barriers, including the practice of motels charging daily "resort" fees and requiring security deposits or credit cards. Because TSA must be renewed every 14 days, disaster survivors who do access the program face regular, arbitrary deadlines that require them to resubmit required paperwork or leave the motel before finding a permanent housing solution.

While FEMA is authorized to provide TSA for eight months, after Hurricane Maria the Trump administration abruptly terminated[xvi] the program for nearly 2,000 Puerto Rican families displaced to the continental US, forcing them to find alternative housing or to return to their uninhabitable homes on the island with very little notice. DHRC member LatinoJustice PRLDEF filed a lawsuit challenging FEMA's decision to prematurely end TSA, but a federal judge denied the request. In his order, the judge made clear that this was not his preference. He stated that "while this is the result that I am compelled to find, it is not necessarily the right result. However, the Court cannot order that Defendants do that which in a humanitarian and caring world should be done – it can only order the Defendants to do that which the law requires."[xvii]

Many disaster survivors whose TSA was terminated without alternate housing assistance became homeless. Homelessness increased in states with large numbers of displaced Puerto Rican survivors - by 14 percent in Massachusetts and by 17 percent in Connecticut[xviiixix] - an extraordinary failure of the federal government's disaster recovery response.

FEMA's other temporary housing assistance programs – Rental Assistance and Direct Temporary Housing Assistance –are also problematic for low-income families. Through its Rental Assistance program, FEMA provides financial assistance to survivors to rent temporary housing. The amount of assistance provided to survivors is based on the impacted area's Fair Market Rent (FMR) which is often considerably less than rental costs in the area to which survivors have been displaced, particularly after major disasters like Hurricane Maria. Moreover, FEMA rental assistance covers rent and utilities for only two months, which is too short a timeframe for many of the lowest-income survivors. Many landlords are unwilling to enter into leases with survivors when only two months of rental assistance is assured.

Under FEMA's Direct Lease program, FEMA enters into lease agreements with property owners to provide rent assistance for survivors. A similar program, the Multi-Family Lease and Repair program, allows FEMA to enter into lease agreements with multifamily housing property owners and to make repairs to provide temporary housing. Both programs, however, have extremely low rates of participation by property owners and are inadequate to meet post-disaster rental needs.[xx]

FEMA Neglects the Needs of Marginalized Populations

People Experiencing Homelessness

People experiencing homelessness are often most at risk during a disaster and have the fewest resources to recover. People who are homeless are unlikely to have the resources needed to adequately prepare for or evacuate prior to a disaster, and their unique needs are often overlooked by emergency managers when planning for disasters. During the recovery, resources meant to address a community's pre-disaster homelessness become stretched thin to accommodate those households that became housing insecure because of the disaster.

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Communities are often unable to return to the level of care provided to people experiencing homelessness before the disaster.

People experiencing homelessness are often excluded from or face additional barriers to FEMA resources, including mass shelters and individual assistance. In the immediate aftermath of Hurricane Maria, individuals with disabilities – including many experiencing homelessness – put in shelters unable to meet their needs. There was only one fully accessible centralized shelter for people with disabilities on the island, which was immediately evacuated after Hurricane Maria. Those survivors who arrived at the location were often involuntarily committed to hospitals.[xxi]

After 2017's Hurricane Irma hit Florida, FEMA required people experiencing homelessness to wear armbands and be separated from other disaster survivors.[xxii] Pre-disaster homeless populations are often denied FEMA assistance even if all their belongings were destroyed in the disaster.[xxiii] These actions further stigmatize people experiencing homelessness and often prevent them from accessing the resources they need to stay safe.

People with Disabilities

People with disabilities also face barriers to assistance. They are two to four times more likely to die or sustain a critical injury during a disaster than people without disabilities.[xxiv] Despite an increased risk of death and injury, many emergency plans do not address how local officials can reach those with disabilities during a disaster. People with disabilities are often diverted to "special needs" or "medical shelters," even if they do not require the level of care provided there. This practice fosters forced institutionalization and places people with disabilities at greater risk of injury or death.

Individuals with disabilities in Puerto Rico were particularly vulnerable to the effects of Hurricane Maria due to a lack of support for their needs prior to the storm and the failure of the federal government to ensure equitable access to programs, such as Supplemental Security Income and the Supplemental Nutrition Assistance Program.[xxvxxvi] In the immediate aftermath of Hurricane Maria, response efforts concentrated on central locations within each municipality. Individuals with disabilities unable to travel went without food and water for lengthy periods.

Individuals with Limited English Proficiency

Individuals with limited English proficiency often face difficulty in accessing FEMA resources. In Puerto Rico, FEMA struggled to find translators or provide basic information in Spanish, the predominant language on the island.[xxvii] When documents were translated into Spanish, the translations were often inaccurate and confusing. Housing inspectors employed by FEMA also often only spoke English, resulting in disaster survivors receiving little to no information on whether the damage to their homes allowed them to access assistance.[xxviii] While FEMA's regulations require that such documents be produced, advocates commonly express concern that the agency and its grantees regularly distribute forms only in English or with limited translated versions.

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FEMA's Onerous Title Documentation Requirements

Eligible applicants often do not receive FEMA assistance due to inflexible and arbitrary requirements, rigid interpretations of rules, and confusing and bureaucratic processes. FEMA's rigid title documentation requirements, for example, have for decades barred low-income survivors from FEMA assistance.

Until very recently, FEMA required disaster survivors to provide title documentation to prove eligibility for the Individual Assistance (IA)[xxix] program and other recovery aid, even though its own guidance on Individual and Household Assistance allows alternative documentation of ownership. Low-income homeowners, residents of manufactured housing, renters without written leases, and other individuals frequently lack such documentation or the ability to quickly procure proper documents. FEMA's rigid and unnecessary policy has harmed low-income disaster survivors since at least 1995.

After Hurricane Maria, FEMA denied assistance to at least 77,000 survivors due to title documentation issues.[xxx] For months, NLIHC and the DHRC pushed FEMA to remove this unnecessary obstacle to low-income Puerto Ricans receiving needed assistance. DHRC member and NLIHC partner Ayuda Legal engaged and worked with FEMA's Office of Chief Counsel to create a "sworn statement" to allow Puerto Rican homeowners without title documents to prove ownership of their homes and receive the assistance to which they are entitled. Because FEMA refused to notify survivors of the form's availability or to make the statement available online or on social media, few survivors were able to use this process to access FEMA assistance.

These same issues occurred in the continental U.S. after other disasters. In North Carolina and other parts of the American South, rural, historically Black communities often do not use title systems, instead implementing informal systems like those used in Puerto Rico. After Hurricane Katrina, thousands of poor Alabamians were denied assistance due to lack of formal titles on their damaged homes. After Hurricane Michael, FEMA denied assistance to as many as 50% of applicants in certain parts of the panhandle largely due to elderly households and mobile homeowners lacking FEMA-required title documentation.[xxxi] After California's wildfires, FEMA denied assistance to 70% of applicants due to title issues.[xxxii] Those denied were predominantly rural mobile homeowners, many of them farmworkers or other low-income workers, who do not have title to their homes. In all cases, FEMA refused to modify its programs to accommodate the situation, choosing instead to deny eligible applicants needed assistance to which they were entitled.

Disincentives to apply for assistance, such as title documentation requirements, and resulting high denial rates not only limit immediate assistance for low-income survivors but also distort the broader recovery; IA application data are used to make funding determinations throughout the federal disaster recovery process.

Work to reform FEMA's harmful title-requirement policy began with efforts by NLIHC, disaster survivors, and partners in Louisiana, Alabama, and Mississippi after Hurricane Katrina, and they were continued by the DHRC and advocates in Texas and Florida after Hurricanes Harvey and

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Michael, in California after several wildfires, and in Puerto Rico in the aftermath of Hurricane Maria by our partners Ayuda Legal..

As a result of this advocacy, in September of 2021, FEMA issued substantial improvements to how it conducts verification for occupancy and ownership of disaster damaged homes.[xxxiii] Under FEMA's new policy, these survivors can now self-certify ownership of their homes when they do not have other documentation, overcoming a major hurdle to recovery. FEMA will also allow all survivors to submit a broader array of documents to prove occupancy and ownership of their homes.

These changes are much needed and long overdue, but they are incomplete. Puerto Rico disaster survivors previously denied FEMA assistance must be provided the opportunity to reopen their cases and receive the assistance to which they are entitled. Careful attention must be given to the implementation of these rules, which have not been applied evenly in response to more recent disasters such as in Louisiana after this year's Hurricane Ida. And Congress must make permanent this improved policy to protect against future administrations reverting to previous practice.

FEMA's Systemic Lack of Transparency

Convoluted Application Process

FEMA has consistently refused to clarify or make public important information about its aid application process. By not releasing this information, FEMA makes it difficult, if not impossible, to determine who is eligible to receive assistance and why assistance is denied. A confusing appeals process leads to higher denial rates for low-income disaster survivors.

In Puerto Rico, a lack of transparency and inadequate descriptions of the FEMA process, non-existent or inadequate translations of FEMA documents, and prolonged outages of internet and phone service led to increased difficulty in applying for assistance. As a result, rumors and misinformation were widespread about what FEMA assistance was available and what survivors were required to do to receive help. While volunteer lawyers and community-based organizations attempted to fill this gap, a lack of clear information further delayed recovery and response efforts.[xxxiv]

Basic information on FEMA program eligibility is not made publicly available. Without it, disaster survivors often apply to programs at FEMA, SBA, and HUD with the hopes that at least some assistance will be provided. For low-income individuals who may lack internet or phone access or who may need special accommodations to apply, completing multiple applications can be especially problematic. Many disaster survivors with the lowest incomes forgo applying for assistance altogether, despite their need.

The FEMA appeals process is also confusing and difficult. A denied applicant must first submit a form explaining the dispute and providing supporting documentation. FEMA denial letters, however, provide only very vague reasons for the initial denial of assistance. The denied applicant must refute all possible interpretations of the reason, or they will lose their appeal. The

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lack of clarity makes it more difficult for legal aid organizations attempting to inform and assist low-income survivors after a disaster. As a result, appeals take longer and are more costly, and low-income survivors with little access to legal representation or the money for a protracted legal fight simply do not appeal at all.

It is extremely difficult to access basic data about FEMA programs and processes. Freedom of Information Act (FOIA) requests to FEMA often go months or years without being answered. NLIHC filed a FOIA request in December 2018 requesting basic materials, including FEMA's application for assistance, procedure manuals for determining eligibility, and data sharing agreements with HUD and other federal agencies. To date, FEMA has not provided these materials. In other cases, FEMA refuses to provide basic information by claiming grounds of privilege.

Faulty Damage and Needs Assessments

Damage assessments are the foundation of many federal, state, and local recovery decisions, including decisions about how to allocate resources and set priorities. FEMA's assessments, however, frequently underestimate the needs of the lowest-income survivors, leading to fewer resources in communities where they are needed most.[xxxv]

Data from FEMA's Individual Assistance (IA) program are frequently used to shape long-term rebuilding efforts. Low-income survivors, however, struggle to access FEMA programs,[xxxvi] and as a result, the agency provides far fewer benefits to renters than to homeowners. Recent reports indicate that FEMA approval rates have plummeted overall from 63% in 2010 to 13% in 2021.[xxxvii] Relying primarily on FEMA data to make recovery decisions overlooks the needs of renters who were found by FEMA to be ineligible for aid, but who remain in desperate need of recovery funds.

FEMA's Inflexibility and Inability to Adjust to New Conditions

Climate change means disasters are more destructive and more frequent, and they impact a broader geography, posing new challenges for FEMA and disaster recovery efforts. FEMA is not adapting its thinking or its programs to respond to these challenges, instead sticking to a rigid system of disaster aid and recovery based on responding to contained local disasters. FEMA has little capacity to effectively deal with both large, regional disasters and the unique circumstances and needs of a specific community impacted by a disaster.

FEMA systems are not designed to adapt to situations on the ground, creating predictable and repeated challenges. The agency has a rigid allegiance to protocol over outcomes, a stubborn reliance on programs inaccessible to low-income survivors, and the agency repeatedly refuses to release important data on recovery outcomes. FEMA relies heavily on protocol written in Washington, D.C. and not on what the agency hears from local survivors, advocates, FEMA employees, and other stakeholders.

Perhaps the perfect example of this problem is the agency's response to Hurricane Maria. FEMA attempted to apply rules for aiding predicated on a system of land title ownership not practiced in

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Puerto Rico, resulting in tens of thousands of denials of assistance. FEMA's failure to offer simplified application information in languages other than English needlessly complicated the assistance process. FEMA failed to recognize and respond to the needs of individuals with disabilities and those experiencing homelessness prior to the Hurricane Maria. FEMA's ignorance of local law, needs, and vulnerability resulted in an unnecessarily long and ineffective response.

FEMA has consistently failed to learn lessons from past disasters and apply them to future disaster recovery efforts. FEMA's own internal watchdog, the Department of Homeland Security Office of the Inspector General, removed criticisms from reports on the agency's disaster response and replaced them with success stories, praising FEMA's work.[xxxviii] As a result of this lack of internal critique and self-correction, FEMA repeats the same mistakes and does similar harm, disaster after disaster.

III. FEMA Solutions Needed for an Equitable Housing Recovery

Equitable Solutions Centered on the Needs of Survivors

A reformed disaster housing recovery system centered on the needs of the lowest-income and most marginalized survivors and their communities must ensure opportunities for resident and public engagement, systemic transparency, full accountability and due process, robust equity and civil rights enforcement, fair mitigation practices, and a focus on increased local capacity and benefit. These priorities must be reflected in every stage of disaster recovery and response, from pre-disaster emergency planning through long-term recovery and post-recovery mitigation, to help address the systemic racism and classism that have resulted in our broken current disaster housing system.

Robust Equity and Civil Rights Enforcement

Equity must be a central and explicit goal of federal disaster housing response and recovery efforts, and each stage of the response and recovery must be examined and reformed to ensure that federal, state, and local efforts actively dismantle systems of oppression. All emergency response, long-term recovery, and mitigation actions must be designed and pursued in a manner that addresses and prioritizes the needs of the lowest-income survivors, people of color, seniors, people with disabilities, immigrants, and other protected classes. All such actions must also be explicitly anti-racist: analyzed to determine if they exacerbate, leave in place, or ameliorate existing or historic patterns of segregation and discrimination in housing and infrastructure, and remedied accordingly.

Resident and Public Participation

Current disaster housing response and recovery efforts effectively limit opportunities for impacted residents to meaningfully engage and contribute to the rebuilding of their communities after a disaster. State officials are under enormous pressure to respond and rebuild as quickly as possible, often making any public input process rushed and ineffective. Engagement is often limited because residents are unaware of emergency response, rebuilding, and mitigation plans,

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whether because state officials fail to announce public meetings or because materials are provided only in English or in formats that are not accessible, including to people with disabilities. Moreover, plans often do not include essential information – including about how funds will be spent and who will be eligible for which funds – that is needed for the public to engage effectively. Opportunities for engagement are limited and irregular, and they occur too late in the process.

A reformed disaster housing recovery and response framework must ensure robust, ongoing, and timely opportunities for public engagement through structured collaboration with stakeholders beginning with emergency planning and response and continuing through the closeout of recovery and mitigation programs. Residents must be empowered to make decisions for themselves and their communities, and their input must be given substantial weight.

Systemic Transparency

The current federal disaster response and recovery suffers from a systemic lack of data transparency. After past disasters, this failure to provide basic transparency – ranging from damage assessments, determination of unmet needs, program design and implementation, grantee and subgrantee performance, and how federal dollars are spent – has hampered efforts to effectively target and distribute aid to those most in need.

Basic, essential information about federal disaster response and recovery efforts must be made publicly available in a timely manner. This transparency must be systemized, so that it is not provided on an ad hoc basis. Data transparency is critical to ensuring informed public policy decisions, allowing greater public participation in disaster recovery efforts, and helping public and private entities better recognize gaps in services and identify reforms needed for future disaster recovery efforts.

Full Accountability and Due Process

The daunting application process for disaster aid discourages survivors from applying for assistance. The application and appeals processes are confusing, time-consuming, and frustrating. As a result, low-income survivors – especially seniors, people with disabilities, and people with limited English proficiency, and other individuals – face high, unnecessary, and counterproductive barriers to receiving federal disaster housing recovery assistance, and many forgo applying for assistance altogether. By not providing full accountability, transparency, and due process to applicants, the federal government has made it difficult – if not impossible – to determine who is eligible to receive assistance and why assistance was denied, leading to higher denial rates for low-income disaster survivors.

Accountability and due process must be central in any reformed disaster housing recovery and response framework. Federal efforts must ensure that all eligible survivors receive the assistance needed to get back on their feet.

Fair Mitigation Practices

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All emergency response, long-term recovery, and mitigation efforts must be designed and pursued in a manner that gives survivors the choice to relocate or rebuild their communities resiliently, minimizing displacement. As the climate changes, disasters will be both more frequent and more destructive. In response, local and state officials have begun to focus on mitigation and infrastructure improvement. Too often, such upgrades go to more affluent communities, while the needs of lower-income people and people of color are ignored. Moreover, federal, state, and local recovery efforts may actively contribute to displacement by failing to provide survivors with meaningful choices to rebuild resiliently, relocate, or improve infrastructure (such as storm drainage, floodplain management, and other common mitigation measures) in their disaster-affected communities, leaving low-income survivors at greater risk for future disasters than they were prior to the disaster.

Increased Local Capacity and Benefit

All emergency response, long-term recovery and mitigation efforts must maximize the engagement of local contractors and workers and build the capacity of local community-based organizations, putting as much federal resources as possible into the impacted economy and impacted survivors.

Local community-based organizations and networks are in the best position to engage with and have intimate awareness of the unique needs of the lowest-income survivors. These local organizations often do not receive the support needed to build capacity to scale up efforts quickly after a disaster. By relying on out-of-town contractors for everything from debris removal to repair of electrical grids, state and local governments miss an opportunity provide employment, job training, and contracting opportunities to low-income local workers and small- and minority-controlled businesses, which often are in severe need of work because of disasters' disruption to local business.

Immediate Steps to Improve FEMA Response

Congress and the Biden administration should immediately address some of the greatest challenges to a complete and equitable recovery and ensure that FEMA's disaster housing recovery framework is centered on the needs of the lowest-income and most marginalized survivors.

Permanently Authorize and Automatically Activate the Disaster Housing Assistance Program (DHAP)

Congress should permanently authorize DHAP and automatically activate it after every major disaster to provide longer-term housing assistance and wrap-around services to low-income survivors. Such assistance should be provided to eligible survivors until the long-term housing recovery – including the rebuilding of affordable rental housing stock – is complete.

Enact the "Housing Survivors of Major Disasters Act"

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Congress should enact the "Housing Survivors of Major Disasters Act," (H.R. 3037)[xxxix] introduced by Representatives Adriano Espaillat (D-NY) and Jennifer Gonzalez-Colon (R-PR). The bill, which passed unanimously out of the House Transportation and Infrastructure Committee in February 2020, contains critically needed reforms to ensure that the lowest-income and most marginalized survivors can access the housing assistance they need to rebuild their lives.

The "Housing Survivors of Major Disasters Act" would address the significant title-documentation challenges that have resulted in tens of thousands of eligible disaster survivors being wrongfully denied FEMA assistance. The bill would codify and expand upon in statute the recent FEMA application process reforms while also extending the benefits of the new policy to those denied assistance in the past. It would provide a new framework to make it easier for disaster survivors to prove residency in disaster-impacted areas, either by completing a "declarative statement" form or by submitting a broader range of acceptable documents such as utility bills, credit card statements, pay stubs, and school registration in lieu of a formal title to property or leases. The bill also allows survivors in Puerto Rico and across the nation who were previously denied FEMA assistance to reopen their cases to access the assistance to which they are entitled.

Require Full Transparency

Congress should require that FEMA provide basic, essential information about federal disaster response and recovery efforts, including damage assessments, determination of unmet needs, program design and implementation, grantee and subgrantee performance, and how federal dollars are spent. Congress should require FEMA to provide full transparency on program eligibility, the aid application process, and reasons for denials of assistance. Data collected by the government must be open and accessible at the most granular and comprehensive level, while protecting personally identifiable information. This information must be made publicly available in a timely manner and this transparency must be systemized so that it is not provided only on an ad hoc basis.

Data transparency allows policymakers and advocates to be informed about program results and make policy improvements and incorporate best practices into future activities. Issues of equity clearly exist in the disaster recovery process, and Congress must require FEMA to implement better transparency practices so the problems can be identified and rectified.

Ensure Survivor-Centered Approaches to Assistance

Congress must ensure that every survivor receives assistance to which they are entitled. Congress should require FEMA to prioritize categorical eligibility, simplify the application and appeals processes, and track and report on outcomes to ensure recovery aid reaches those in need.

Rather than creating and implementing numerous categories of ineligibility, disaster assistance programs should employ broad-based categories of eligibility, with the aim that every survivor receives the recovery assistance to which they are entitled. Through the use of damage

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assessments, geographic information, and other data, a reformed federal disaster housing recovery system can provide categorical eligibility to survivors in disaster-impacted areas. With a shift in emphasis to categorical eligibility, many of the convoluted rules and requirements employed by recovery assistance programs will no longer be necessary, allowing for an easier, quicker, and more flexible application process.

FEMA should allow for a flexible system of documentation for distributing disaster recovery assistance. Applying the least restrictive guidance regarding alternative documentation – and doing so consistently across all jurisdictions – would cut down on wasted time and confusion on the parts of both applicants and advocates alike. In order to employ full categorical eligibility, there must be a system in place that permits alternative documentation to ensure all survivors can receive assistance.

Address the Unique Needs of People Experiencing Homelessness

FEMA has interpreted current law to deny assistance to people experiencing homelessness prior to a disaster, despite their exceptional needs. Congress should enact clarifying legislation to ensure that people experiencing homelessness prior to the disaster have access to the same emergency shelter and disaster relief assistance as other survivors, including rental assistance.

IV. HUD Related Barriers to Equitable Housing Recovery

The Community Development Block Grant–Disaster Recovery (CDBG-DR) and CDBG–Mitigation (CDBG-MIT) programs are vital tools that provide states and communities with the flexible, long-term recovery, rebuilding and mitigation resources needed to rebuild affordable housing and infrastructure after a disaster and to prepare for future harm. These resources are particularly critical for the lowest-income disaster survivors and their communities. Too often, however, these resources are diverted away from the people and communities with the greatest needs and for whom the program was designed to serve.

Unnecessary Delays

Congressional Inaction

Federal funding for long-term recovery through the CDBG-DR program is often delayed by congressional inaction. CDBG-DR funds must be approved by Congress through a disaster supplemental appropriation act. Frequently, disaster relief funds can be swept up into other political debates, delaying much-needed rebuilding and recovery resources from reaching disaster-impacted communities. These delays prevent communities from formally proceeding with many recovery activities that cannot be accomplished without a commitment of federal funds. The timeline for Congress to approve disaster-recovery funding has ranged from several weeks after the terrorist attack on September 11 to more than eight months after Hurricane Michael.[xl] It was not until February 9, 2018, that Congress approved $16.5 billion for Puerto Rico's recovery from Hurricane Maria – nearly six months after the storm devastated the island.

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The lack of formal authorization of the CDBG-DR and CDBG-MIT programs contribute to further delays. Without authorization, HUD operates program funding through separate Federal Register notices after every major disaster, causing uncertainty for grantees. While some of the allocation notice is repeated from disaster to disaster, some of it is different after each disaster. Because grantees cannot anticipate the details in the allocation notice, they are often delayed in creating action plans. According to an audit by HUD's Office of Inspector General, between 2005 and 2018, HUD issued 60 Federal Register Notices for grantees to consult when developing CDBG-DR action plans, slowing down and over complicating the process.[xli]

After a HUD allocation notice is issued, an impacted jurisdiction must develop a disaster recovery action plan to receive funding. While jurisdictions often begin work on the plan in expectation of the allocation notice, the plan is not formally released until the notice is out. Once submitted, the approval process typically has been quick, but there are exceptions. HUD's approval period has ranged from nine weeks after the allocation notice for Hurricane Katrina and five weeks after Superstorm Sandy to more than eight months after Hurricane Maria.

The impact of delays in the CDBG-DR program are worsened when FEMA prematurely ends its response and recovery assistance. While FEMA programs are authorized for 18 months following a major disaster declaration, in recent years, FEMA has ended programs well before the statutory expiration and before CDBG-DR assistance programs are operational. Many of the lowest-income and most marginalized disasters survivors lose access to urgently needed FEMA assistance before their homes and communities have been rebuilt.

State and Local Capacity Issues

State and local grantees struggle to administer and oversee disaster recovery funds. The amount of CDBG-DR funds that state and local grantees receive after a disaster is often many times over what they typically administer. Following Hurricane Irma and Maria, Congress passed three supplemental appropriations acts that included a total of $35.4 billion in CDBG-DR assistance. Puerto Rico received $20.2 billion of these funds – or around a fifth of the island's total GDP in 2020.

While other states, such as Texas and Florida, similarly struggled to manage disaster grants in the aftermath of the destructive 2017 Atlantic hurricane season, Puerto Rico was uniquely identified by the White House and HUD officials for additional procurement controls and requirements.[xlii] While Puerto Rico was unjustly targeted by these bureaucratic delays and additional requirements, the island's inability to distribute CDBG-DR assistance funds, including the Home Repair, Reconstruction, or Relocation Program (R3), continues to be a source of concern.

The R3 Program has been slow moving and marked by unclear guidelines protecting against the displacement of low- and moderate-income communities. Other concerns include requiring survivors to enter into a title clearance process as a pre-requisite for receiving assistance, the lack of public participation, and a lack of data transparency.[xliiixliv] These issues can be linked to capacity issues within the territorial government and a failure of HUD to adequately oversee and

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correct such issues as they arise. These issues are not wholly unique to Puerto Rico; they have occurred in some form during nearly every implementation of CDBG-DR funds.

Recovery and Mitigation Challenges Exacerbate Racial and Economic Inequities

Reinforcing Racial Segregation

Research has shown that race and income often determine the neighborhoods in which we live, and where we live influences everything from education and health outcomes to economic mobility and opportunity. Housing segregation is the predictable result of intentional public policy. Because federal disaster recovery efforts seek to restore communities back to the pre-disaster "normal," these efforts often work to restore and entrench racial inequities and segregation.

Structural racism and disinvestment leaves communities of color with less access to basic services, such as hospitals, banks, grocery stores, social services offices, and fire departments, which slows economic growth and prosperity and makes community members less able to prepare for disasters and participate equally in recovery.

Communities of color are often located in areas with greater risk of disasters. Compounding this vulnerability, many communities of color have historically been denied adequate infrastructure due to systemic discrimination.[xlv] As a result, low-income people, often low-income people of color, endure disproportionate flooding compared with their affluent neighbors.

Inequitable Infrastructure

Due to a combination of segregation, exclusionary zoning, and disinvestment in infrastructure for economically depressed communities and communities of color, 450,000 of the nation's affordable homes are in flood-prone areas.[xlvi] Federally assisted affordable housing continues to be in at-risk areas, forcing the lowest-income households into areas with the highest risk of disasters. Not only does this pattern needlessly place people in harm's way, but it ensures that more federal dollars are needed to repair and reconstruct homes and fund emergency services.

The location of federally assisted affordable housing also shows a higher natural hazard risk than market-rate housing. A recent report by NLIHC and the Public and Affordable Housing Research Corporation (PAHRC) found that nearly one-third of federally assisted housing stock is located in areas with very high or relatively high risk of negative impacts from natural hazards compared to one-quarter of all renter-occupied homes and 14% of owner-occupied homes.[xlvii] The households residing in these higher-risk units are predominantly people of color, with the Public Housing program having the largest share of units (40%) in areas of very high or relatively high risk of natural hazards.

Affordable housing is frequently surrounded by underfunded infrastructure that exacerbates the impact of disasters. In Houston, 88% of the city's open-ditch sewage system lies in historically Black neighborhoods. During Hurricane Harvey, the open ditches overflowed, spreading sewage waste into streets and homes. Similar events occurred in North Carolina and Puerto Rico, where

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the lowest-income individuals often live in areas at high risk of environmental damage or flooding during disasters. State and local governments will often meet only the minimum program requirements and direct funds to mitigation projects in higher-income communities.

For example, in Puerto Rico, CDBG-DR and CDBG-MIT funds are provided only to those able to ensure their homes will comply with flood protection standards. The program does not aid lower-income disaster survivors to implement mitigation measures, nor does the program ensure that low-income residents are served by mitigation projects.[xlviii] Those people who choose to repair their homes on their own will repeatedly suffer from the effects of flooding due to this inequity.

Increased Displacement

Black, Latino, and immigrant communities face increased disaster-caused displacement from the dual threats of disinvestment and speculation, which build on the wealth disparities resulting from decades of intentional public policy to provide different resources and opportunities based on race. Moreover, recovery programs themselves can actively contribute to displacement.

In Puerto Rico, a large portion of the island is now considered a flood zone. This policy change may lead to widespread displacement among the lowest-income and most marginalized communities on the island. Puerto Rico's CDBG-DR action plan requires that neighborhoods most at risk of flooding be relocated. Lower-income and predominantly Black communities, such as Loiza, were designated for such relocation, while the nearby, similarly situated, tourist towns, such as Condado, were rated as safe.[xlix] NLIHC partner Ayuda Legal Puerto Rico identified nearly 100 similar communities at risk for displacement under the new standard.[l]

Barriers to Access

<u>Language barriers</u>

Language access to federal- or state-funded programs is required under civil rights laws.[li] While regulations and HUD allocation notices are provided only in English, the documents that create and implement disaster response and recovery programs must be published in all languages spoken by significant numbers of residents in impacted communities. Despite this requirement, CDBG-DR grantees have consistently failed to assess the primary languages of impacted communities and have failed to provide translations of critical materials. Applicant-intake offices often lack staff translators. Even when materials are translated, they sometimes provide incorrect information, such as application deadlines.

HUD guidance released in 2016 makes it clear that federal language access requirements apply to disaster recovery activities.[lii] Practices have yet to fully implement these requirements, however. For example, in a particularly egregious recent episode, housing policies for a Puerto Rico CDBG-DR program aimed at homeowners were released only in English, and then translated into Spanish only after advocates complained.

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Discrimination Against Individuals with Disabilities

People with disabilities need physical, program, and communication access but it is not consistently provided. If a community has no accessible housing, people with disabilities must remain in shelters until there is accessible housing available. Parents of children with disabilities who are unable to return to a school with disability resources must care for their children instead of working, remaining dependent on public systems. Full recovery cannot occur until everyone, including those with disabilities, are in accessible homes and back at work and school.

The specific characteristics of a disability and the impacts on a disaster survivor are often fluid. The effects of a natural disaster can be intensified not only by specifics of a disability, but also by other forms of societal inequality and marginalization, such as race, class, gender, sexual identity, and legal status. Some disabilities can also be temporary or changing, especially during the stress and connected health risks that accompany a disaster. Disability-disaster response requires understanding the many kinds of disabilities and societal inequities.[liii]

Fair Housing Violations

Federal statute, regulation and HUD Federal Register notices require that activities and programs funded through the Community Development Act of 1964 operate in ways that "affirmatively further fair housing." HUD CDBG-DR Federal Register notices have specifically required that the grantee "certifies that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.[liv]

HUD has underenforced these laws and regulations for decades. This same neglect has carried through to HUD approval of CDBG-DR state action plans that have been blind to impacts on housing access, housing availability, mobility, and racial, ethnic, and economic integration. The current top-down, non-participatory nature of CDBG-DR action plan development allows HUD and grantees to ignore fair housing considerations.

HUD often approves CDBG-DR action plans that have violations of civil rights law built into their structure. Plans have been approved that provide assistance to homeowners based upon discriminatory property values, that underassess the number of renters affected by a disaster, or that favor homeowners. HUD has the authority to reject CDBG-DR action plans that do not provide for implementation of civil rights protections.[lv] Yet HUD has repeatedly failed to exercise such authority, relying instead on certifications rather than the actual language and substance of the grantee draft plans.[lvi]

Moreover, local and state governments involved in disaster recovery often have very little experience administering recovery programs fairly. Historically, HUD has provided little training on fair housing responsibilities or monitoring to ensure fair housing requirements are met, even though such requirements apply to recovery programs. As a result, it has been the job of advocates already overburdened with assisting disaster-stricken communities to attempt to enforce fair housing laws and hold HUD accountable.

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The largest ever federal fair housing settlement came about through a complaint brought by Fair Share Housing Center, the New Jersey Latino Action Network, and the New Jersey State Conference of the NAACP, creating a more than half-billion-dollar program to rebuild or replace approximately 7,000 affordable rental homes impacted by Superstorm Sandy, which disproportionately impacted Black and Latino communities in New Jersey. Advocates after Hurricanes Katrina, Ike, and Dolly have also achieved major fair housing victories.

Relying on local advocates to ensure compliance with federal protections rather than clear rules enforced by HUD, however, assumes that resources exist for prolonged legal battles and further delays the recovery process while cases are litigated.

Impact on the Housing Crisis

According to NLIHC's annual report, *The Gap: A Shortage of Affordable Rental Homes,* there is shortage of 7 million affordable and available rental homes in the U.S. for households with the lowest incomes.[lvii] In certain metropolitan areas, the supply of affordable, available rental housing can be as low as 1 home for every 10 extremely low-income renter households. When a disaster exacerbates the already severe shortage of affordable rental homes, the consequences can be devastating for the lowest-income survivors.

Rental prices often increase dramatically after a major disaster. This rise has been attributed to a combination of the rapid loss in available housing stock due to the disaster, as well as a simultaneous increase in demand for rental housing for households seeking temporary shelter as their damaged or destroyed homes are replaced. For example, some ZIP codes in the Houston area saw rent increases of 50% after Hurricane Harvey. These rapid increases in rent can rapidly displace low-income households. The 2018 California wildfires destroyed a large amount of northern California's housing stock – 14% of Butte County California's housing supply was destroyed by the Camp Fire alone. As a result, rents have increased rapidly in areas already experiencing an affordable housing crisis. Rents doubling or tripling after an area wildfire led to communities enacting emergency ordinances limiting increases to just 10%.[lviii]

The increased cost of rental housing is also sometimes attributed to price gouging by landlords seeking to take advantage of the immediate increase in demand. Advocates report landlords evicting tenants without cause to make room for new tenants willing to pay much higher rents. Such practices lead to further destabilization and displacement.

Affordable and accessible homes are often the most vulnerable to disasters, but they are less likely to be rebuilt after the disaster strikes. When naturally occurring rental housing stock is damaged, the cost to repair and rehabilitate the property leads to higher rents. The slow pace and complications of federal disaster recovery efforts often mean that federally assisted affordable housing is rebuilt many years after a disaster, if at all.

In the aftermath of disasters, the failure of communities to rebuild without considering their ongoing obligations to construct accessible housing and public buildings in accord with civil rights law leaves many people with disabilities more isolated than before.

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Lack of Community Feedback and Participation

Limited Opportunities for Public Input in State Action Plans

CDBG-DR grantees often limit the opportunities for impacted residents to contribute their expertise on local needs to the state action plans. Due to substantial bureaucratic delays, state officials are pressured to release action plans as quickly as possible, often making any public input process rushed and ineffective. Grantees have failed to provide adequate notice of the draft action plan's publication, failed to properly announce public meetings, and provided the draft or related documents only in English.

Worsening this problem, HUD has historically waived standard CDBG participation requirements of 30-day comment periods and instead allowed comment periods of as short as one week. While grantees suggest these efforts are aimed at releasing funds more quickly, most delays in the disaster allocation process occur well before an action plan's public comment period. Without public comment, the action plan becomes a tool for those with political or economic power.

Often, the action plans themselves include little information about how the CDBG-DR funds will be spent, with HUD allowing states to fill in spending details over time with regional Methods of Distribution and local program and project selections. Interested members of the public must follow a long process to keep track of the evolving plan, with only limited and sporadic opportunities for public comment.

Failure to Provide Survivors with the Choice to Rebuild or Relocate

Decisions about the future use of land in flood plains or other at-risk areas, including the relocation of residents, have been made by CDBG-DR grantees without input from residents directly impacted by those decisions.

In Puerto Rico, any homes with substantial damage in the floodplain are currently not permitted to receive CDBG-DR assistance for rebuilding, potentially displacing tens of thousands of low-income residents. Yet private developers in Puerto Rico may be able to use federal Opportunity Zone tax breaks to build in the same flood zones that low-income survivors will be forced to leave. Government officials have ignored calls by advocates for deed restrictions barring redevelopment on properties acquired through the island's relocation program and for mitigation to be an option before relocation.[lix]

Funding for buyouts have historically been based on property values, giving wealthier families a realistic opportunity to relocate but leaving low-income families to choose between flood risk and relocating with payments insufficient to obtain housing in safer areas. HUD has taken an important step by allowing buyout incentives to be paid for with federal funds, but the resulting programs are difficult to coordinate, making it likely that some neighborhoods will receive adequate funding to move while others receive only minimal funding insufficient to cover the costs of relocation.

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Inaccurate Data

HUD has a policy to use the "best available data" when developing the needs assessment used by CDBG-DR grantees to develop their draft action plans, but these data are often inaccurate. There is an overreliance on data from FEMA that systematically undercount renters, exclude people denied FEMA benefits, and do not account for the full extent of damage to public and assisted housing or the cost to rebuild resiliently. Despite these concerns, CBDG-DR grantees have frequently resisted consultation with residents and advocates who attempt to correct such data, and HUD has not created a needs-assessment formula that accounts for inaccurate data. Without such corrections, action plans continue to underestimate the needs of the most vulnerable survivors.

Lack of Data Transparency

It is often difficult and sometimes impossible for the public and community groups to access the data on which a state action plan was created. After Hurricane Maria, the territorial government withheld mortality data from public view.[lx] Information on the number of repaired homes, applications being processed, and other important data was similarly difficult to access as recovery progressed. The lack of transparency prompted advocates to file Freedom of Information Act requests and urge the territory to make disaggregate data available to the public.[lxi] While the territorial government has since implemented an information dashboard accessible to the public, crucial information such as the number of blue tarp roofs left on the island is vague.[lxii]

Local Contractors and Workers Left Behind

Overreliance on Outsourcing Contracts

Because of the extraordinary challenges faced by local governments during the recovery, CDBG-DR grantees rely on out-of-state contractors that specialize in certain aspects of recovery. There is often no connection between the contractor and the community recovering from a disaster and, as a result, there is little incentive for contractors to follow local practices and standards.

Time after time, contractors who were dismissed or even sued by prior CDBG-DR grantees apply for and are awarded contracts in subsequent events because the grantees could not find or did not trust local companies. In Puerto Rico, four companies have been awarded multimillion-dollar contracts to administer recovery programs, including ones with staff under investigation by the FBI for corruption and others previously fined for failing to meet recovery goals. At the same time, because Puerto Rico is using a reimbursement-based model, very few small, local construction companies have the resources they would need to participate in recovery efforts.[lxiii]

Missed Opportunities for Local Job Creation

Section 3 of the Housing and Urban Development Act of 1968 directs a portion of federally funded employment, training opportunities, and contracts to low- and very low-income people, as well as local minority-controlled businesses.[lxiv] The effect of the provisions is very limited,

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however, because grantees, sub-grantees, and contractors are only required to use their "best efforts" to comply. Further, the grantee can exempt projects or contracts below a certain size or cost. Entities purportedly subject to Section 3 almost always simply submit an annual statement to HUD stating they have done their best with very limited results. Disaster recovery brings large amounts of funding into communities struggling with unexpected job losses; there is a significant missed opportunity in not more stringently enforcing Section 3 or other local-hire requirements.

V. HUD Solutions Needed for an Equitable Housing Recovery

Rebuilding Equitable Communities

Dismantling Segregation and Inequity

During disaster recovery, communities of color and other marginalized communities either return to their segregated "normal" or the residents are displaced to other areas, often destroying familial and social ties. It is critical for disaster recovery planning to go hand-in-hand with fair housing compliance so that rebuilding efforts explicitly acknowledge and address the impact of racism, segregation, and inequality. Case management services and housing counselors can support displaced households that wish to relocate into neighborhoods of their choice, including neighborhoods connected to resources, good-paying jobs, good-performing schools, and other benefits. These services can provide assistance in finding available housing and in moving.

Local organizations situated in and/or serving marginalized communities must be involved in long-term recovery efforts to ensure that recovery programs recognize and address the needs of these communities. This involvement pertains not only to the accessibility of programs, but also to decisions on rebuilding and reconstruction. Construction of new housing and infrastructure investments should be done in a manner that protects against harm by future disasters and allows communities themselves to direct how best to fight inequality and segregation.

Given the widespread nature of segregation and inequality in the U.S., it is not enough to state the equitable intent of a disaster recovery program. Explicit requirements for desegregation and adherence to civil rights law must be included in both contractor regulations and agreements with states, local governments, and federal agencies. Making equity explicit strengthens the ability of protected classes to seek legal redress at times when recovery is less than equitable. Federal law should require compliance.

Desegregating Infrastructure

Federal, state, and local governments have underinvested in the infrastructure of marginalized communities for decades. State and local government continue to divert infrastructure recovery resources away from poorer communities of color toward higher-income, white communities..[lxv] Infrastructure projects should be prioritized to improve and protect lower-income communities, communities of color and people with disabilities, and to compensate for the lack of effective infrastructure. All communities should have at least the minimum amount of infrastructure needed to protect residents.

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Rebuilding Homes

Equitable Approaches to Rebuilding Homes

Because of the growing affordable housing crisis, America's lowest-income households are put in danger of homelessness and displacement after a disaster as rental housing supply is lost. For this reason, long-term housing recovery programs should first prioritize the housing needs of people with the lowest incomes, including those individuals who have been displaced or involuntarily institutionalized. Congress should provide special allocations of funding targeted to serve the lowest-income people, including to the national Housing Trust Fund, DHAP, and repairs to damaged public housing stock to ensure a minimum affordability period of 30 years, and target resources to those most in need as much as possible. Homes created or substantially rebuilt through the long-term recovery process must be made accessible to individuals with disabilities in accordance with applicable disability rights law, ensuring that the disaster recovery will fully include everyone.

New affordable housing must meet the challenges of the next disaster. Housing rehabilitation, rebuilding, and new construction, as well as related infrastructure projects, must meet resilience and mitigation standards to withstand the increasing frequency and intensity of disasters due to climate change. Ensuring that housing can meet the challenges of future disasters also depends on where it is built. A significant amount of newly constructed housing must be located outside of areas susceptible to disaster damage and be made available first to households displaced by the disaster.

Ensuring Continuity for Housing Assistance Programs

Many federal agencies have disaster recovery programs. The complexity and overlapping nature of these programs can make it difficult to ensure continuity for disaster survivors as they navigate these programs. Under the current disaster housing recovery framework, a substantial lag exists between when FEMA disaster assistance programs end and when HUD's long-term recovery programs begin.[lxvi]

Without access to temporary housing, many low-income disaster survivors are forced into homelessness. To prevent this occurrence, disaster housing assistance must be provided to survivors for as long as it is needed, continuously and without a gap in service due to arbitrary deadlines.

Given HUD's expertise and infrastructure, the agency should operate all disaster housing recovery programs. FEMA has a poor track record of addressing the housing needs of low-income survivors and has demonstrated little interest in improving its programs. Consolidating disaster housing programs into HUD would streamline efforts, simplify the process for survivors, and result in better outcomes for the lowest income people.

Disaster survivors are susceptible to trauma, and a lapse of program assistance, even if just for a few days, can cause significant mental harm to households that have already been displaced by a disaster.[lxvii] Should there exist separate short-term and long-term housing assistance programs in

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the future, better coordination is required to ensure that disaster survivors transitioning from one program to another do not experience a housing disruption in the process.

"Reforming Disaster Recovery Act"

NLIHC and its DHRC support the "Reforming Disaster Recovery Act," introduced by Senators Brian Schatz (D-HI), Susan Collins (R-ME), Todd Young (R-IN), Patrick Leahy (D-VT), Bill Cassidy, MD (R-LA), and Representative Al Green (D-TX).

If enacted, the Reforming Disaster Recovery Act would permanently authorize the Community Development Block Grant-Disaster Recovery (CDBG-DR) program, which provides states, tribes, and communities with flexible, long-term recovery resources needed to rebuild affordable housing and infrastructure after a disaster. The bill also provides important safeguards and tools to help ensure that federal disaster recovery efforts reach all impacted households, including the lowest-income and most marginalized survivors who are often hardest-hit by disasters and have the fewest resources to recover. Permanent authorization of the CDBG-DR program is supported by HUD leadership[lxviii], HUD's Office of Inspector General (OIG),[lxix] and the Government Accountability Office (GAO).[lxx]

Quickly Targeting Resources to Those with the Greatest Needs

While CDBG-DR is often one of the only recovery tools available to the lowest-income disaster survivors, vital resources have been diverted after past disasters from the people and communities with the greatest needs and for whom the program was designed to serve. The Reforming Disaster Recovery Act would help ensure that limited disaster recovery funds reach the most vulnerable survivors.

Key reforms:

- Creating a standing disaster recovery fund that can quickly disperse initial recovery funding to disaster-stricken areas without waiting for congressional approval.
- Developing a formula to allocate assistance to the most impacted and distressed areas resulting from a catastrophic major disaster.
- Requiring that the use of federal recovery funds is balanced between rebuilding infrastructure and housing.
- Ensuring that housing funds are spent proportionally between homeowners and renters unless HUD determines that there is a compelling need.
- Requiring states to prioritize activities that help extremely low-, low-, and moderate-income survivors recover, address pre- and post-disaster housing needs, and prepare for future disasters; and
- Maintaining the current requirement that 70 percent of the federal recovery funds benefit low- and moderate-income people and providing clearer direction to HUD on when it can adjust this requirement.

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Prioritizing Data Transparency & Oversight

After past disasters, the lack of federal data transparency at hampered efforts to effectively target and distribute aid to those most in need. The Reforming Disaster Recovery Act would allow all federal agencies involved to access the full breadth of data needed to make informed public policy decisions, allow greater public participation in disaster recovery efforts, and help public and private entities better recognize gaps in services and identify reforms needed for future disaster recovery efforts.

Key reforms:

- Requiring federal agencies to share all data to help coordinate disaster recovery.
- Requiring HUD to make available a public facing dashboard summarizing project data.
- Ensuring that state action plans receive at least 14 days for public comment and requiring states to engage with residents of the most impacted and distressed areas: and
- Requiring states to include detailed plans outlining how it will use CDBG-DR funds to serve low- and moderate-income households and how these dollars will address relief, resiliency, long-term recovery, and restoration of housing and infrastructure in the most impacted and distressed areas.

Protecting Civil Rights and Fair Housing

The Reforming Disaster Recovery Act would help protect fundamental civil rights and fair housing rights and ensure that all communities and community members – regardless of race, disability, sex, age, color, religion, familial status, national origin, and other protected classes – receive full access to disaster recovery resources, free from discrimination.

Key reforms:

- Requiring state and local governments to certify that funds will be administered in compliance with fair housing and civil rights laws.
- Requiring HUD to release information regarding disaster recovery efforts, disaggregated by race, geography, and all protected classes of individuals under federal civil rights and nondiscrimination laws, as well as existing disaster assistance laws; and
- Authorizing the release of data to academic institutions to conduct research on the equitable distribution of recovery funds, adherence to civil rights protections, and other disaster recovery-related topic.

Encouraging Mitigation and Resiliency

With disasters increasing in frequency and intensity, at-risk communities must better prepare housing and infrastructure to withstand future disasters. By promoting mitigation and resiliency, the Reforming Disaster Recovery Act will help ensure that communities are better able to maintain vital services during and directly after a disaster and recover more efficiently.

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Key reforms:

- Establishing an Office of Disaster Recovery and Resilient Communities at HUD to coordinate with other federal agencies, develop and share best practices, and provide training to state and local agencies on disaster recovery.
- Creating specific minimum construction standards for areas designated as Hazard-Prone by HUD and FEMA.
- Providing grantees with additional resources for mitigation; and
- Encouraging states to better align federal recovery funding with existing state and local infrastructure investments.

VI. Conclusion

Our country must develop a new disaster housing recovery system that centers the housing needs of the lowest-income and most marginalized survivors, including people of color, people with disabilities, and others. Congress must address our nation's pervasive structural and racial inequities and reform federal disaster rebuilding and mitigation efforts to be inclusive and intersectional. We must reform existing programs by centering racial equity and equity for other historically marginalized people to ensure that affordable housing investments and federal disaster recovery resources reach impacted households with the greatest needs.

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AYUDA LEGAL PUERTO RICO

December 3, 2021

Mr. Marik Xavier-Brier, Ph.D.
Director, Office of Civil Rights Evaluation
U.S. Commission on Civil Rights

Re: **Testimony of Ariadna Godreau Aubert, Founder and Director**
Ayuda Legal Puerto Rico

Director Marik Xavier-Brier and distinguished members of the Commission, thank you for your invitation to present this testimony. My name is Ariadna Godreau Aubert, founder and executive director of Ayuda Legal Puerto Rico (ALPR), a nonprofit organization that provides free legal support to low-income families in Puerto Rico. Since Hurricane María made landfall on September 20, 2017, ALPR has led legal support and advocacy efforts around disaster assistance and recovery funds in Puerto Rico. We provide support to thousands of disaster survivors each year and nurture this work with policy analysis and recommendations to transform housing and recovery processes that are fundamentally unequal. Although and because the colonial condition of Puerto Rico threatens to distance our people from fundamental rights and authentic participation,

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human and civil rights practices and indicators are at the center of our legal defense work.

Federal and local governments share the responsibility to lead survivors to resiliency. We need disaster assistance to arrive quickly, with clear guidelines and standards of use, accessibility, assessment, and compliance. We need the flexibility to address regional challenges. We need accountability to ensure coherent planning, equitable access to funds, displacement minimization, and real and effective public participation throughout the entire process. FEMA, CDBG-DR, CDBG-MIT, and other recovery funding programs should never be a blind bet on possible outcomes but a strategized road towards a long-term sustainable, just recovery. We also demand accountability and action from those who have hindered recovery from reaching so many.

Through this testimony, I would emphasize on the following:

1. Civil rights in Puerto Rico have been in peril, a situation worsened by multiple disasters and by cumulative impact of governmental failure to comply with its duty to address and mitigate the consequences of catastrophic events. Civil right violations against historically vulnerable populations and groups remain unaccounted for.
2. First response, application processes and eligibility criteria set the ground for equitable and just recovery. Addressing civil rights protection require revising how these instances comply with principles of non-discrimination, accountability, and participation.

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3. We are in a position to elaborate clear cross cutting guidelines and good practices to respect, protect and promote civil rights amidst disasters. While the time of hurricanes, earthquakes and pandemic are unforeseeable

I. Introduction

A. Puerto Rico's context

Hurricanes, earthquakes, and pandemics do not occur in a vacuum. Puerto Rico has been affected by unsustainable public debt and austerity since 2006. Socioeconomic fragility has a direct impact on the plausibility of resilience amidst disasters. High poverty rates (+44%), together with a low labor force participation rate (<40%) mean that families have no reserves to prepare, mitigate, and address housing insecurity in the aftermath of a catastrophic event. Added to the shutdown of schools, health services, and the privatization of essential services, the looming housing and land insecurity is a backdrop to disasters. Nearly half of those who rent or have a mortgage use at least 30% of their income to afford their house [1]. Between 2017 and 2020 – throughout three catastrophic events– 12,800 houses were foreclosed[2]. According to the PRDOH, nearly 16,000 people are waitlisted to access public housing and another

[1] American Community Survey, 1-year estimates (2019)
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10,000 families await Section 8 vouchers. At least 2,535 people are homeless[3]. As per the American Community Survey, 388,523 houses remain vacant[4] and the most recent Census data shows, nearly 12% of our population has left in the last decade[5].

Lack of adequate attention to emergencies have a cumulative effect on the rights of historically marginalized identities and groups. Inexistent and flawed statistics and a pervading systemic racism permits discrimination against women, black and darker skinned inhabitants through the recovery process in Puerto Rico to remain unaccounted for.[6] Yet, our experience serving thousands of families during and after disasters, signal an unequivocal major impact on these groups. Legal empowerment efforts, as well as fair housing complaints presented during the last four years address how official recovery processes left behind low income and black communities, elders, people with disabilities and women-led households[7].

B. Puerto Rico's difficult road to recovery

Hurricane María destroyed 786,000 houses in Puerto Rico. According to the government, the infrastructure costs related to the impact of this major disaster add up to nearly $100 billion. More than 1.1 million requests for assistance were submitted to

[3] Puerto Rico Department of Family, Homeless People Census (2019), available through Instituto de Estadísticas de Puerto Rico, https://estadisticas.pr/en/inventario-de-estadisticas/conteo-de-personas-sin-hogar-e-inventario-de-camas (Last visit Dec. 3, 2021).
[4] American Community Survey, 1 year estimates (2019)
[5] Census Bureau, Preliminary Results (2020).
[6] Revista Étnica, Ser una mujer negra en una pandemia y otras interseccionalidades, https://www.revistaetnica.com/blogs/news/ser-una-mujer-negra-en-una-pandemia-y-otras-interseccionalidades (Last visit Dec. 3, 2021)
[7] See FHEO Complaints 02-19-3535-8, 02-19-3736-8, 02-19-3737-8.

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FEMA. Nearly 58% of applications and 75% of the appeals were denied. Two thirds of the families that received assistance to repair their homes received awards of less than $3,000. Grounds for denial ranged from insufficient damage to lack of proof of ownership, an issue that barred thousands of families from receiving aid and that will be discussed thoroughly in the next section.

In October 2017, FEMA inaugurated their Sheltering and Temporary Essential Power (STEP) Program in Puerto Rico. The STEP Program, called Tu Hogar Renace, proposed to invest $1,680,000,000 to assist 75,000 houses in the Island. After many public complaints regarding inadequate repair, corruption schemes that involved contractors overcharging for their services, the program ended. According to a monitoring report published by the Puerto Rico Comptroller in May 2021, between 43–80% of the works commissioned to companies were left unfinished[8].

On February 23, 2018, the government of Puerto Rico appointed the Puerto Rico Department of Housing (PRDOH) to manage almost $20 billion in CDBG-DR funds[9]. Several public officials, entities, and organizations, including ALPR, reacted to this decision by pointing out the agency's incapacity to manage these funds and the need to incorporate municipal governments as decision makers and fund managers in the

[8] Contralora y Vivienda reconocen en vista pública programa Tu Hogar Renace no cumplió con las expectativas propuestas por el gobierno federal, https://www.ocpr.gov.pr/articulos/contralora-y-vivienda-reconocen-en-vista-publica-programa-tu-hogar-renace-no-cumplio-con-las-expectativas-propuestas-por-el-gobierno-federal/ (May 28, 2021) (Last visit Dec. 3, 2021)

[9] Allocation Notices available at PRDOH CDBG-DR, Resources, Federal Register, https://cdbg-dr.pr.gov/en/resources/federal-register/ (last visit Dec. 3, 2021)

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recovery process, among other concerns. The first version of the Draft Action Plan[10] as well as a faulty participation process forebode a complicated recovery process.

Families who were not able to access FEMA repair assistance, who were turned down or neglected by Tu Hogar Renace had to apply to the Repair, Rebuild and Relocate (R3) CDBG-DR program as a last resort to secure housing assistance. With an allocation of $3,289 million, R3 is the biggest and probably most significant program within the CDBG-DR Action Plan. Between its opening date in July 2019 and the closing of the application process, 27,070 families requested R3 assistance. As of today, the outcomes of this program are disheartening and expose bigger systemic federal and local flaws. A small portion of the applicants have received a written determination on their cases. Only 1,500 homes have been repaired and 199 houses have been rebuilt[11]. In February 2020, it was estimated that between 15,000 to 18,000 families were still living under blue tarps[12]. This is still an accepted estimate.

Survivors' unmet needs were exacerbated by the seismic events that occurred between December 2019 and the first half of 2020 and later, COVID-19. These seismic events affected 52,370 houses. At least 630 of those were severely damaged or destroyed. Stakeholders estimate that FEMA denied nearly 70% of the assistance applications submitted by earthquake survivors. It must be noted that these events mostly impacted the Southern coast of Puerto Rico. Some of the municipalities in this

[10] Puerto Rico Disaster Recovery Action Plan, Draft for Public Comment (May 10, 2018)
[11] Ayuda Legal Puerto Rico, Request for Public Information (20 April, 2021)
[12] CDBG-MIT Action Plan, p. 333 available at: https://cdbg-dr.pr.gov/en/download/cdbg-mit-action-plan-effective-on-april-19th-2021/?ind=1619459603916&filename=CDBG_MIT_ACTION_PLAN_APPROVED_Apr%2019%202021_EN.pdf&wpdmdl=18594&refresh=61a95730babcc1638487856 (Last visit Dec. 3, 2021)

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zone are part of coastal and mountainous geographies besieged by high poverty rates, some of the highest unemployment rates, housing insecurities, and environmental harms. COVID-19 increased the vulnerability of families already stricken by economic and housing instability[13].

II. Accessibility barriers, eligibility criteria and disparate impact on low-income black communities

A. First response, access to application processes and limited language proficiency

The first response was marked by abuse of force, inadequate supplies provided to survivors, a delay in the establishment of Disaster Relief Centers, officials who spoke solely English, and a militarization of response[14]. It is important to highlight that one of the official actions of the government was the implementation of a curfew that limited citizens' capacity to move.[15] Grounded on lack of supplies – including water and gas–, dangerous conditions of housing, and the precarity of the infrastructure, many criticized the restrictive measure that promoted a chilling effect on a solidarity that, absent governmental response, was saving lives. A black man, employed by the Electric Power

[13] Doctors Without Borders, La pandemia de COVID-19 debilita aún más a un Puerto Rico frágil tras varios huracanes y terremotos (Mar. 7, 2020) https://www.msf.es/actualidad/puerto-rico/la-pandemia-covid-19-debilita-aun-mas-puerto-rico-fragil-varios-huracanes-y (Last visit Dec. 3, 2021)
[14] These findings were thoroughly discussed in the report presented before the Inter-American Commission on Human Rights in December 2017. See ICADH. Justicia Ambiental, Desigualdad y Pobreza en Puerto Rico, (2017) https://noticiasmicrojuris.files.wordpress.com/2018/05/final-informe-cidh-audiencia-pr-dic-2017.pdf (Last visit Dec. 3, 2021)
[15] Executive Order 2017-49 (September 23, 2017)

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Authority of Puerto Rico (PREPA) was killed by the police after being arrested for violating the curfew.[16]

Our legal support brigades attested the supposedly "nutritional" boxes handed down by recovery officers. **See Figure 1.** They also witnessed the absence of Disaster Relief Centers accessible for communities in black and low-income communities of Maunabo and Loíza, inspections carried out by officials without proper identification and unable to communicate in Spanish, as well as armed officials guarding the entrance to DCRs.

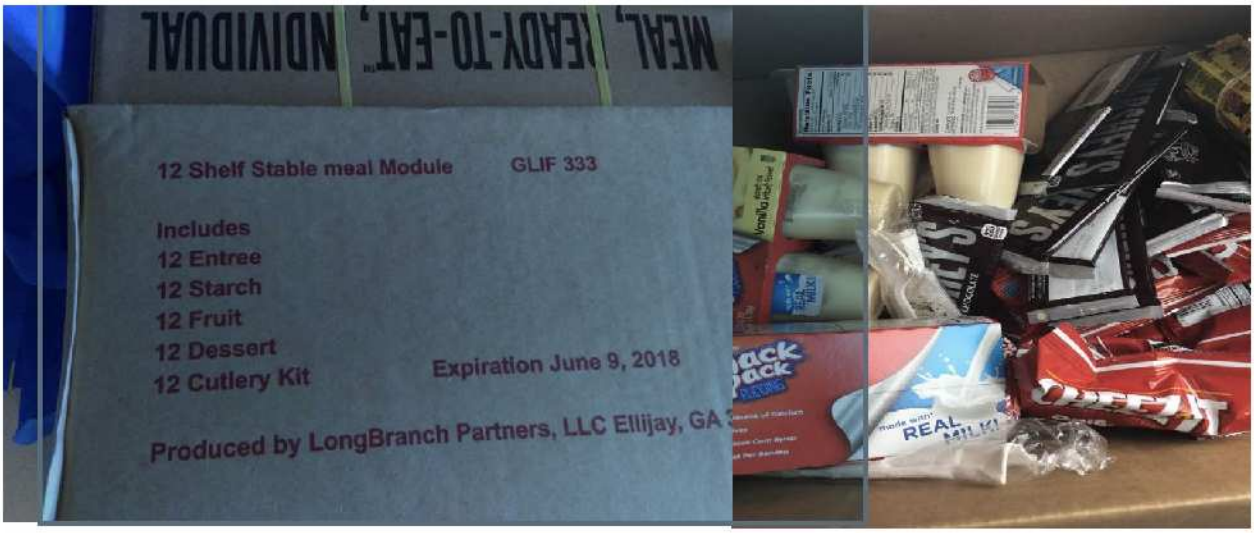

Figure 1. Meals received by disaster survivors post-María

Despite the major power outage that lasted for a year throughout the Island – and its impact in communications– FEMA insisted on having disaster applications filed through

[16] Periódico La Perla, "Toque de queda en Puerto Rico da paso a muerto y uso de taser empleado de la AEE" https://www.periodicolaperla.com/toque-de-queda-en-puerto-rico-da-paso-a-muerte-y-uso-de-taser-contra-empleado-de-la-aee/ (Last visit Dec. 3, 2021)

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hotlines or internet platforms. Lack of transportation and access to justice increased the vulnerability of low income, elders, and survivors with mobility challenges who could not reach help to present their applications. Ayuda Legal Puerto Rico joined efforts carried out by community leaders who designed paper versions of the appeals. We went to communities, interviewed affected individuals, traveled back to areas with internet access, uploaded applications, and later returned to the communities to hand down their registration numbers. This burdensome process could have been avoided if FEMA had adopted the necessary policies and protocols to adopt a paper application.

B. Discrimination against people formal titles

As we have reiterated on several occasions, a title deed cannot be a condition to safe housing and recovery. Such practice impacts impoverished and historically vulnerable survivors. In the aftermath of Hurricane María, FEMA applied a restrictive and incorrect interpretation of federal disaster regulations that defined "owner" broadly[17]. Consequently, nearly 77,000 families were excluded from receiving assistance because of their inability to prove ownership[18]. Nothing in Puerto Rico's laws and regulations require homeowners to register their properties. Lack of formal documentation also responds to socioeconomic elements such as lack of access to justice, insecurity of

[17] 44 CFR 206.111
[18] Testimony of Ms. Diane Yentel, President, National Low Income Housing Coalition at Experiences Of Vulnerable Populations During Disaster (116–62), Remote Hearing Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure, July 28, 2020.

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tenure, and land rescues grounded on the unmet need for housing. Moreover, it responds to a system grounded on racial oppression which forbade black and darker skinned individuals from becoming owners of their land. Lack of clear ownership eligibility criteria has also been an obstacle for black and POC disaster survivors in New Orleans, California, and North Carolina[19].

Through several community brigades celebrated throughout the Island, we witnessed FEMA officials' lack of preparation regarding alternative proof of ownership, conflicting instruction, and a broad lack of understanding of Puerto Rico social and economic reality. Depending on who answered the phone at FEMA's hotline, instructions for survivors varied. In the summer of 2018, as appeals because of denials and insufficient assistance piled up, ALPR researched and drafted a sworn statement form to allow owners without title to prove their ownership through alternate documentation that did not require notarization. In Puerto Rico, a notary is a specialized attorney and thus, notarization translates into a costly process for low-income individuals. Almost eight months after Hurricane María, a group of advocates were able to finally move FEMA to accept the sworn statement. It was too late. FEMA's reluctance to notify applicants about their right to appeal and use the sworn statement, placed on the backs of nonprofits the responsibility to let applicants know and provide them with the tools. Thousands of families lost the possibility of receiving immediate and much needed assistance for their homes.

[19] Fixing America's Broken Disaster Housing Recovery System, p. 9.

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Recently, our proposal became part of FEMA guidelines[20]. Although we celebrate the impact that this will have on survivors of Ida and other subsequent disasters, we censure that this will not have retroactive effects on applicants that were deemed incorrectly ineligible for assistance. Also, FEMA actions created an awful precedent. We soon realized that the CDBG-DR Action Plan included exactly the same requirement: repair, rebuild, and relocation assistance was conditioned to formal ownership. The Government of Puerto Rico, through the PRDOH decided to incorporate title requirements for the main housing recovery program funded with CDBG-DR funds. It took more than three years of advocacy for the PRDOH to change these policies of exclusion. Meanwhile, thousands still await dignified housing.

FEMA and other disaster recovery funds should abide by policies that promote access. Non-compliance with the existing regulations hinders people's rights. We must also warn against attempts to condition federal funds to Puerto Rico to changes on the property management systems, real property assessments, and title clearance. It is our position that individual legal strategies do not offer an effective solution to this issue. It can take years to solve a title through the courts. Addressing informal titles in Puerto Rico requires structural policy changes and it is the role of the local legislature to act to identify real solutions.

As of September 30th, 2021 FEMA had sent 3692 notices of potential debt for disaster declaration for Hurricane María. Most of the people we help through our legal

[20] FEMA Fact Sheet, Update to FEMA's Individual Assistance Program and Policy Guide, Version 1.1, https://www.fema.gov/sites/default/files/documents/fema_updated-iappg-version-1.1.pdf (Aug. 2021) (Last visit Dec. 3, 2021)

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support hotline undergoing recoupment processes from FEMA indicate that their recoupment process is due to lack of proof of ownership. Since FEMA has not published detailed recoupment data, we have a pending FOIA request, which aims to expand on the demographic profiles of the people affected by these notices, including data on gender, age, income, and persons with disabilities.

III. The right to stay, return and participation within disaster recovery process

A. Climate justice considerations, flooding and anti-displacement policies

The impact of a global climate crisis in our geography means more severe weather events, sea-level rise, severe flooding, and droughts. With 24% of our population living in high to high/medium risk zones[21] and at least 245,586 houses located on flood plains[22], addressing the need for effective disaster planning, response, and recovery, as well as the urgent demand for affordable and resilient housing infrastructure is crucial. The government has an outstanding debt to ensure safe dwelling and resilient communities to survivors of multiple disasters.

Flooding is the most frequent and costly natural hazard in the United States. Identifying diverse, sustainable, and cost-effective mitigation alternatives is essential for communities' resilience in the face of future disasters, achieve economic development,

[21] CDBG-MIT Action Plan, p. 332.
[22] PRDOH estimates, based on FEMA applicants located in the 100-year flood plain. CDBG-DR Action Plan, p. 34.

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and ensure a just recovery. Within a climate-crisis and as experience in the geography of an island in the Caribbean, mitigation of flood zones needs to be a transversal. While several communities and groups have challenged the adequacy of FEMA flood maps, relocation or no assistance cannot be the only options for families living in these geographic areas. This without further consideration of the possibility to mitigate. While under no circumstances we would like to have people living in risk zones, yet absent a mitigation assessment, a sensible relocation plan, an adequate, affordable housing inventory, and a participatory process, relocation should always be the last option.

These relocations are not always voluntary. Almost four years after the disaster, a low-income family without a safe dwelling would have no choice but to relocate if the only alternative is to receive no aid at all. We should also keep in mind that relocation would only be an option if the family has a "perfect" title. If that is not the case, and most times it is for low-income families in coastal flood-prone areas, there is no alternative for them.

While the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (URA)[23] may protect displaced individuals, the limited scope of its protection demands further actions. ALPR reiterated the need to adopt internationally acknowledged standards to mitigate displacements. These criteria include access to information, consultation and participation. We also demand a sensible and human rights-based relocation policy that accounts for the needs of individuals and families, as well as to the threat posed by checkerboarding of communities, the lack of essential

[23] 42 USC 5301, et seq.

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services in different municipalities, and destruction of already fragile social tissues. While prohibiting rebuilding in flood prone areas would leave thousands of low-income families in insecure dwellings or forcibly displaced, other measures such as new construction moratoriums on coastal and flood zones could be a measure of adaptation and mitigation sensible to housing needs and climate change.

Mitigation strategies are effective, maximize recovery plans[24], and provide a unique opportunity to be in a better position to face climate change. Wrongly applied, these initiatives may worsen the impact of an already inequitable recovery on low-income, black, and other historically vulnerable communities. Transparency and participation in planning may lead the way to integrate mitigation plans at community, municipal and regional levels, as well as to ensure a coherent use of diverse sources of mitigation funds, such as projects from the US Army Corps of Engineers and FEMA's Hazard Mitigation Assistance Grants. President Biden's Executive Order on the Climate Crisis[25], as well as the administration's disposition to incorporate Puerto Rico and to collaborate with international efforts to address climate change, are an affirmative step in the right direction. The population of Puerto Rico needs their right to return and stay to be safeguarded and that is only possible by addressing the climate crisis as experienced in an Island based scenario. Relocation practices must also account for this context.

[24] Multi-Hazard Mitigation Council (2019). Natural Hazard Mitigation Saves: 2019 Report. Porter, K. et. al. National Institute of Building Sciences. Washington, DC. https://www.nibs.org/files/pdfs/NIBS_MMC_MitigationSaves_2019.pdf (Last visit Dec. 3, 2021)
[25] Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, January 27, 2021

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B. **Accountability is key**

Since Hurricane María made landfall in Puerto Rico, we have voiced concerns about the lack of accountability of contractors hired to manage the recovery program. The OIG has gathered findings regarding misuse of federal funds that include inadequate management of supplies, price gouging and negligence[26]. The recovery process has become a revolving door for contractors that generate wealth because of emergencies. For example, companies hired and signaled during the Tu Hogar Renace scheme are now contractors under the CDBG-DR housing programs. **See Figure 2.**

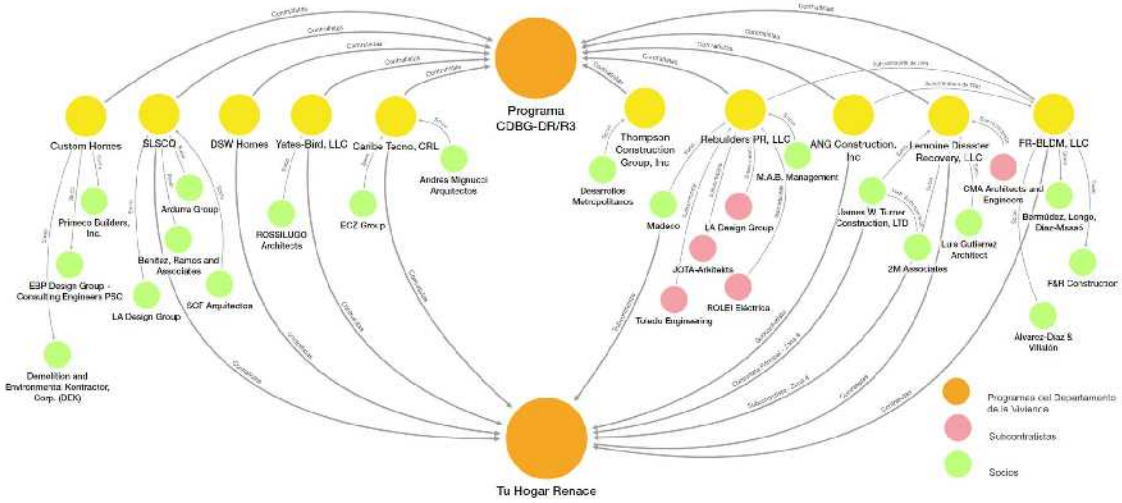

Figure 2. Contractor shared by both Tu Hogar Renace and the CDBG-DR R3 Program (created by Ayuda Legal Puerto Rico)

[26] US Department of Homeland Security Office of the Inspector General, FEMA Mismanaged the Commodity Distribution Process in Response to Hurricanes Irma and Maria, OIG-20-76, https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-76-Sep20.pdf (September 25, 2020) (Last visit Dec. 3, 2021)

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Reports from people who have never received a single notification on their cases, project managers being constantly replaced, of non-responsive officers, of people made to sign English-language and/or complicated contracts in 24 hours or less without having a chance to read them carefully or seek legal advice, are constant for applicants served by all of the companies contracted by the PRDOH. When we recommended adopting best practices for contractors, and to make them visible and available for the general public's consultation, we were answered with a social media post mandating "values." **See figure 3.** As legal responders who attest to the multiple harms committed by negligent disaster assistance services providers and aware of the millions of dollars invested on this endeavor, we were appalled.

C. Participation, coherent planning, and the respect of local decision-making capacity

Public participation is essential for the success of mitigation and resilient housing infrastructure efforts. Ensuring local and regional solutions requires acknowledging the agency to local stakeholders – particularly community-based organizations- to influence the recovery process. Because it is a long-term process that extends well beyond the grant's timeline, capacity development and engagement of local actors such as community-based organizations and nonprofits is necessary.

ALPR, together with other groups, advocated for Regional Civilian Oversight Committees able to ensure participation throughout the planning, approval, and implementation of CDBG-DR and CDBG-MIT funds. One year and a half after the

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allocation of funds, a version of this Committee was acknowledged by the PRDOH, one lacking actual engagement, guidelines, or participatory standards. Moreover, the Committee is facilitated by a PRDOH official who also assesses contractors' compliance. We celebrate the inclusion of Citizen Advisory Committees in the CDBG-MIT Allocation Notice. Yet, it is our position, in accordance with HUD and Enterprise Community Partners recommendations, that the Committee must be facilitated by an independent person able to communicate with impartiality. The impartial facilitator, the acknowledgement of the capacity of this Committee to serve as watchdogs of the recovery process, and the need to produce periodic reports could be part of model guidelines.

Lastly, participation is intimately related to planning and data. Coherent, participatory, and transparent planning is essential. Planning should be the basis of other critical decisions such as the integration of programs, the evaluation of housing plans on historically vulnerable communities, relocation plans, the need for temporary measures to protect survivors through rental assistance, and budget and compliance assessment. Similarly, open data is needed to be segregated to include race, gender, disability, age, and other demographic information that could help develop a real profile of who is benefiting from recovery and who is left behind. Recovery core guidelines should instruct grantees to publish timelines, progress reports, and to prioritize participatory planning as a basis for recovery.

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Figure 3. PRDOGH Good Practices

Thank you again for the opportunity to participate in this hearing.

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TALLER SALUD

Statement for the United States Commission on Civil Rights: Government Response to Hurricane Maria

Friday, December 10, 2021

By Tania Rosario-Méndez, Executive Director, Taller Salud

Thank you to Chairwoman Norma V. Cantú and all members of the Commission for this opportunity to speak about the Federal Emergency Management Agency's (FEMA) role in disaster preparedness and response to Hurricane Maria in Puerto Rico.

Taller Salud is a feminist grassroots organization, founded in 1979 dedicated to improving women's access to health care, reducing violence in community settings, and fostering economic growth in Loíza, Puerto Rico. For more than 40 years we've addressed health disparities that are often rooted in social, racial, and economic inequalities. The following statement is based on expertise, first hand experience, and data driven insights.

On September 20th, 2017, Puerto Rico changed forever. A growling, Category 4 hurricane devastated our island, completely wiping out power and water supply, destroying critical infrastructure and housing, severely damaging our telecommunications systems, and stranding us from the entire world. But while the storm was devastating, the federal

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preparedness and response to the catastrophe was deadly.

In the aftermath of Hurricane Maria, Puerto Rico was on its own with limited capacity and resources to guarantee subsistence needs and social protection. It should be recalled that a Major Disaster Declaration was signed by former President Donald Trump, but a sense of urgency and a commitment to robust actions was missing. After days without assistance, it became evident that the emergency situation was evolving into a major humanitarian crisis—there was no electricity, no food, no water, no cellphone service or internet; our entire infrastructure had collapsed and our most vulnerable people were left to die in their homes. I want to be very clear: federal preparedness and response to Hurricane Maria was at best mediocre; at worst, genocidal. This tragedy cannot go unnoticed by legislative bodies and government agencies must be held accountable. Before this body, Taller Salud would like to denounce FEMA's lack of planning and coordination, coupled with discriminatory practices that cost thousands of lives in our archipelago.

It's worth pointing out that this tragedy didn't occur in a vacuum: Puerto Rico's colonial status, coupled with our crippling debt, and the austerity measures imposed by the Fiscal Oversight Management Board undoubtedly contributed to the severity of the catastrophe and the deaths of thousands of Puerto Ricans. In Loíza, a town that is majority Black and majority women, 53% of the people live under the poverty line. Gender inequality manifests itself in a variety of ways, including poverty and lack of economic access, lack of housing, underemployment, lack of support systems, and a high rate of gender-based violence. When emergency

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strikes, women are always at the forefront of recovery and rebuilding. But they also bear the brunt of calamity and are the most vulnerable at the hands of austerity, physical abuse, institutional violence, and lack of access to proper healthcare and safe housing. After the storm, 5 of the 7 domestic violence shelters in Puerto Rico had to close due to infrastructure damage, lack of electricity, and absence of support by the central government. Because police officers were acting mostly as traffic and supply guards, women were unable to denounce violent situations and were forced to stay in dangerous environments. Local news reports have counted seven women murdered by partners or ex-partners during the aftermath of the catastrophe, but to this date, the Puerto Rico Women's Advocate Office, has not assessed nor published validated data regarding violence against women after Hurricane Maria. All of these constitute a violation of women's rights.

The decisions made by FEMA in the first 30 days after the hurricane had consequences we are still dealing with 4 years after the storm made landfall. According to 2020 Census data, Loíza has experienced a 21% reduction in its population—a 13% increase from the American Community Survey's 2017 estimate. This displacement has, in part, happened as a direct result of FEMA's inability or unwillingness to expedite the relief aid process. More than 3,000 homes in Loíza were left without roofs or were so severely damaged that they were rendered unsafe to live in. Yet FEMA has repeatedly rejected federal assistance requests from residents because of regulatory requirements that aren't tailored to the geographic and social realities of Puerto Rico. In 2018, FEMA published flood mapping declaring

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that 95% of Loíza is in a flood zone, making it impossible for our communities to rebuild post-emergency as FEMA requires flood insurance in order to reimburse for damages. Yet those same lands can be swiftly picked up by private capital, contributing to gentrification, resource depletion and even more displacement down the line. On an island where 30% of the population doesn't have broadband access, and after the storm completely ravaged our telecommunications infrastructure, FEMA Assistance requests were required to be processed through online websites or apps - only available in English, oblivious to the fact that a vast majority of our population has limited proficiency in English. This bureaucratic chain is not only deficient, but it is downright cruel and discriminatory.

However, the immediate needs in Loíza were met with an immediate response from the community. Women, specifically, organized themselves, surveyed the destruction and quickly got to work to ensure the safety and wellbeing of those around them. They rolled up their sleeves and set up community kitchens across Loíza to cook for hundreds of people. Our approach to human rights and the facilitation of participatory processes within and outside of our community allowed us to promptly address the magnitude of the needs and evaluate the necessary adjustments to the best of our abilities. We did community censuses around town to better understand the urgent needs of women, men, children, senior citizens, and people with disabilities. After all, nobody knows communities better than community members themselves. The Puerto Rican diaspora was vocal about the human rights violations occurring on the island. And with the

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help from hundreds of volunteers, we got aid where it belongs: in people's hands and homes.

Undeniably, since 2017, Puerto Rico's history has been divided in two chapters: Before María and After Maria. The atrocities witnessed after this tragedy serve as a reminder of our colonial status and the severe impact it has on the lives of Puerto Ricans on the island and across the globe. One thing is crystal clear: when the government doesn't do its job, people lose their lives. Since September 2017, inequities have harshened. Personal and professional opportunities are now much more fleeting. Social and well-being programs are even more deficient and lacking. Our communities and younger generations face the choice of leaving their hometowns at a rate much higher than before. The mismanagement and political abandonment in emergencies create an inhospitable environment for growth and health, leaving progress and aid at the hands of community and nonprofit organizations that have taken responsibility for what state and federal governments have left undone. Without a doubt, COVID-19 has exacerbated these circumstances. But the beatings our island took from the hurricane winds do not compare to the governmental abuse our people faced immediately after and to this day. It is imperative that the government learn from Taller Salud's feminist strategy and listens to community-led coalitions as it develops disaster preparedness and recovery plans. Our work demonstrates the power of community resilience and the importance of feminism as a principle in disaster relief. Long-term recovery efforts require investing in the women leaders of the communities. That's the way forward: alongside our communities with our

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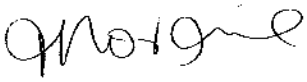
women on the front lines, prioritizing the collective over the interests of a foreign few. Centering the voices of those most affected by the issues, looking for solutions and answers *within* our peoples, not without. The solution has always been and will always be collective.

Thank you.



Tania Rosario-Méndez
Executive Director
Taller Salud

AMERICAN OVERSIGHT

FUNDACIÓN
FONDO DE ACCESO A LA JUSTICIA, INC.

December 3, 2021

Marik Xavier-Brier, Ph.D.
Director
Office of Civil Rights Evaluation
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW
Washington DC, 20425

Dear Mr. Xavier-Brier:

On November 8, 2021, we received an invitation to participate in the U.S. Commission on Civil Rights' public briefing on the Federal Emergency Management Agency (FEMA)´s role in disaster preparedness and response to Hurricane María in Puerto Rico as well as the civil rights protection before, during and after a natural disaster.

Fundación Fondo de Acceso a la Justicia (FFAJ) is a non-profit foundation in Puerto Rico that provides funding to diverse non-profit organizations to offer free legal services on civil matters to low-income and vulnerable communities. Our Foundation´s objective is to promote access to justice in Puerto Rico through direct legal aid.

After the impact of hurricanes Irma and María (September 2017), FFAJ created the Legal Emergency Fund with the purpose of providing free legal assistance to disaster survivors, particularly low-income families that were in imminent need of the housing assistance. We subsidized twenty (20) non-profit organizations with more than sixty-five (65) attorneys and notaries at law working in legal brigades throughout hundreds of communities in Puerto Rico. ***See attachment 1***.

It was during our legal aid projects that we encountered thousands of people, especially poor and vulnerable people, living under extreme conditions, with lack of basic needs, such as food, water, and housing. With no telecommunication system or internet on the island, our legal brigades helped many fill out the Individual FEMA Assistance and later, affidavits and the letters of appeal. After hurricane María, 85,000 Individual Assistance applications -with an impacted household estimate of 300,000 people- were denied because alleged lack of home ownership. As of today, it is unclear why and how so many cases were denied because

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of the reason "cannot prove ownership". After legal evaluation from our projects our attorneys concluded it was an arbitrary decision-making process.

The Individual and Household Program Unified Guidance as of September 2016 defined ownership as

"one where the applicant is:

- *The legal owner; or*
- *Does not hold a formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence; or*
- *Has lifetime occupancy right with formal title vested in another"*

The Guidance also expressed an exception as follows:

"FEMA may accept a written statement from the applicant indicating how long they lived in the disaster-damaged residence prior to the Presidential disaster declaration, and an explanation of the circumstances that prevent standard ownership verification".

Even though the Guidance provided for an exemption when a person does not have a formal property title, there was a disproportionate denial rate after Hurricane María because of the alleged lack of documentation that proved ownership. Facing this challenge, organizations such as Ayuda Legal Puerto Rico, Servicios Legales de Puerto Rico and ours helped developed a Sworn Statement which contemplated several legal scenarios that validated the right to ownership according to Puerto Rican law. This document was created to simplify the process, as it was not necessary to be notarized by an attorney-notary at law and was supposed to be distributed to the survivors, as well as to FEMA personnel. Nevertheless, many representatives from FEMA did not know about the document or did not inform effectively to the survivors the existence of this Statement. In fact, after FEMA´s Office of the Chief Counsel approved the document, FEMA did not agree to notify the document as an alternative to appeal, as well as the distribution and availability of the document in the Disaster Recovery Centers. Effective communication with FEMA officials has been a constant challenge.

As a result of the denial of thousands of applications in Puerto Rico and the refusal to make available the Sworn Statement approved by FEMA's Office of the Chief Counsel, our Foundation rushed to seek funds and stated a new campaign across the island to inform disaster survivors about this new document, the possibility to appeal and receive free legal assistance. Sadly, many survivors created great distrust toward FEMA's procedures and the constant expression from residents of different communities was that they felt discriminated. Still, our Foundation kept working in favor of the survivors, particularly with the appeals needed to receive the assistance and we implemented psychological services in our projects to emotionally affected survivors.

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We had to implement Title Clearance Legal Aid Projects as a response to FEMA's constant "ownership not verified" denial letters. We encountered disaster survivors that had submitted to FEMA between 3 to 5 appeals. The frustration, distrust, emotional deterioration, and sense of discrimination were the main factors presented by our participants. Still, FFAJ worked – and still works - with title clearance and ownership projects in Puerto Rico. We have subsidized two title clearance projects, impacting more than 3,000 people. This legal work has helped countless survivors to provide legal documentation so that they can support their current or future assistance application. At this time, we are working on our third title clearance project with the objective to help our participants obtain their title or documentation that will aid in the process of obtaining a property title.

Notwithstanding the challenges, we continued our mission and as of today, we have provided emergency legal services to more than **15,000 people**, which **65%** are woman and **78%** are people of the age of 50 and older. FFAJ has identified and summarized the experiences and struggles faced by the communities and the lawyers that provided legal aid to disaster survivors. ***See attachment 2 and 3***. Some experiences and challenges are described below.

After the impact of hurricane Irma and María, we notice that the FEMA inspectors and personnel had:

- Insufficient training
- Discrepancy and inconsistencies in damage assessments
- Requested legal documents without knowledge of local law
- Language barrier between FEMA personnel and survivors

We have recommended FEMA to emphasize the training of their personnel and inspectors. The inspectors should not make legal evaluations. Also, they should be trained and informed on relevant information about Puerto Rican law and other important cultural aspects, such as: ownership verification or, in some cases, there could be the same physical addresses due to lack of land segregation. Civil law in Puerto Rico includes legal dispositions that allow ownership without having a formal property title. The personnel should also be able to speak Spanish or have a translator when talking to a survivor.

The application process and additional document request should be accessible and obstacle-free. Many of the people that we attended had difficulty submitting the Individual Assistance Application, particularly because of lack of equipment and broadband internet access in disaster zones, added to the reality that Puerto Rico is the jurisdiction with the highest poverty rate, as well as other social and demographic factors, such as lack of knowledge to read or write, lack of transportation, as many of our participants were elders.

FEMA REPEATS SAME DISCRIMINATORY PRACTICES

Unfortunately, in December 2019 a series of earthquakes began to shake the south-western part of the island of Puerto Rico. On January 7th, 2020, a magnitude 6.4 earthquake stroke

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the island, followed by replicas that increased the damages. On January 16th, 2020, the President issued a Major Disaster Declaration in Puerto Rico that included thirty-three (33) municipalities. The earth in the south-western part of the island still trembles as people and families lose their houses and property.

Among the municipalities included in the Declaration of Disaster, there are municipalities with the highest poverty rate in Puerto Rico. According to data from the Census Information Center of the University of Puerto Rico, Cayey Campus (2020), the municipality of Guánica, which was the epicenter of the most intense earthquake, boasts a poverty rate of 65%. That is, about 20% more than the poverty rate of all of Puerto Rico.

As of June 23rd, 2020 FEMA reported the following information regarding the Individuals and Households Program in Puerto Rico:

Individual and Household Program - 33,993 requests
Approved - 12,898 (38%)
Ineligible - 21,096 (62%)

Household Assistance - 33,048 requests
Approved - 11,212 (34%)
Ineligible - 21,836 (66%)

Other Needs Assistance - 12,876 requests
Approved - 4,055 (31%)
Ineligible - 8,821 (69%)

Fundación Fondo de Acceso a la Justicia subsidized a Legal Aid Hotline for earthquake survivors. Sixty percent (60%) of the people that called the hotline were women out of which forty eight percent (48%) are above the age of sixty (60). Sixty three percent (63%) of the people that called had an income of less than $20,000.00 a year. Among the calls, twenty percent (20%) informed us that FEMA denied their initial assistance application primarily because of the following reasons:

- Insufficient damage
- Cannot prove ownership
- Conflict with the address of the applicant

We raised our concern of this very low approval rate and that, like post-hurricane María, FEMA was denying on issues of ownership and/or there is conflict with the address of the applicant. The reality in Puerto Rico is that a home can be identified by different addresses

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as the physical address, the postal address, the property tax address and the property registry description.

We also expressed our concern of how earthquake survivors could submit their documentation so that the application or appeal can be completed with all the necessary documents and the process could run easily, particularly because the twenty (20) Disaster Recovery Centers (DRCs) that were opened as of March 2020, were closed for four (4) consecutive months and only two (2) were opened as of July 2020. We were aware of the COVID-19 pandemic and local government restriction but opening two DRC's was insufficient. Because we were aware of the pandemic and wanted to guarantee disaster survivors rights we suggested FEMA to enable an email address so the attorneys providing legal services could send important documents about a case, taking into consideration that most of the DRCs were closed. We have also asked for the approval of a three-way call where applicant and attorney could both be present. Many of the applicant did not understand the process and they reported communication problems regarding the language and accents of FEMA representatives. Our requests and recommendations were denied or never implemented.

Regarding the access to information and transparency, we have requested FEMA to allow us access to general information about Individual Assistance Program summary in Puerto Rico so we can target the people that need our legal assistance on their individual assistance applications, appeals and/or remote inspections. Without the information it is harder to locate the affected communities and most vulnerable people. This information was also denied or made inaccessible. **The lack of transparency and access to information has been a constant issue since hurricane María**.

We requested to the FEMA's regional assigned attorney and Puerto Rico FEMA staff to adopt guidelines for the implementation of Remote Inspections. We were not aware of how the remote inspections take place as well as the rights of the applicants through the process. It is important to consider that these inspections are fundamental in the award or rejection of an application and the rights of survivors need to be taken into account. The Office of the Chief Counsel did not provide the Guidelines. It is important to consider that our due process of law guarantees its citizens a just and fair process when the government makes any determination regarding people's property. One of the guarantees of such due process is the adequate notification of procedures to a person that will receive a remote inspection.

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FINAL REMARKS

Four years later after hurricane María, FEMA finally announced certain flexibility and assistance to ensure equity across all communities, particularly in accepting a broader range of ownership and occupancy documentation to assist those typically in low-income populations. Also, we recently were aware that FEMA is encouraging real-time feedback to applicants, and to have trained staff to verify documentation on site while conducting home inspections. This decreases the burden on survivors to appeal a FEMA decision in writing by verifying documents at the time of inspection. However, it is important to be accessible, hear the survivors and be attentive, especially to the most vulnerable.

With this brief we attach a document titled "Best Practices Guide" (***See attachment 4***) created by FFAJ for the better performance of FEMA considering the experience from Puerto Rico. This Guide has been provided since 2018 to FEMA personnel, FEMA high ranking officials, governmental representatives in Puerto Rico, Rear Admiral Peter J. Brown, Trump´s designated special representative for Puerto Rico disaster recovery as well as to several Congressmen and Congresswomen. Even though we have made multiple efforts to emphasize our message with the "Best Practices Guide" we have not seen much progress with FEMA to put in effect our recommendations.

We appreciate the opportunity to express our testimony for the US Commission on Civil Rights and we hope it will be useful to guarantee disaster survivors in Puerto Rico a just and dignified recovery.

Cordially,

Amaris Torres Rivera
Executive Director

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December 6, 2021

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Testimony for Public Briefing on the Civil Rights Implications of Disaster Relief: Hurricane María in Puerto Rico

Dear Mr. Xavier-Brier,

I appreciate the opportunity provided by the United States Commission on Civil Rights to testify and submit written comments on the civil rights implications of the federal response to the impacts of Hurricane María in Puerto Rico. This testimony will focus on the multiple efforts that numerous community and environmental groups have made to provide input to the Federal Emergency Management Agency ("FEMA") and other government agencies on the necessary transformation of the Puerto Rico electric system to address the disproportionate burdens that centralized, fossil-fired, import-dependent energy generation exert on poor and majority afro-descendent communities in Salinas, Guayama, Penuelas, Guayanilla and other municipalities where the infrastructure is located and civil society proposals to achieve environmental and climate justice.

I. Introduction

In September 2017, Hurricane Maria took down 80% of Puerto Rico's centralized transmission and distribution grid resulting in a complete power outage that extended for nearly a year in some areas.[1]Most communities, businesses, schools and other essential institutions were shut down for months. Living without electric service can be life-threatening for people who

[1] Puerto Rico's Hurricane Maria Power Outage Is Now the World's Second Largest Blackout (newsweek.com). Electric power lines are sometimes igniting or aggravating wildfires in other places such as California. PG&E Power Lines Blamed For Northern California Wildfires : NPR. A few months ago, Hurricane Ida tore down the T&D system in NOLA. Most recently, Hurricane Nicholas wreaked havoc on the electric grid in Texas. Nicholas leaves more than 100,000 Texas electricity customers without power | The Texas Tribune. The more frequent and intense hurricanes, storms, wildfires and other climatic events increasingly are disabling delivery of energy through electric transmission and distribution (T&D) systems. From the Caribbean to the Gulf Coast, the eastern seaboard and along the West Coast of the United States communities are increasingly contending with power outages provoked by downed T&D infrastructure, i.e. lines, poles, towers, transformers, substations etc. Civil society groups are increasingly holding rogue utilities like Entergy in Louisiana to account Energy & Justice in New Orleans: Power to People! - Deep South Center for Environmental Justice (dscej.org),

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depend on medical equipment like nebulizers, asthma therapy, dialysis treatment or require refrigerated medication. For others, the lack of essential electric service can make simple everyday tasks like meal preparation, food storage, hygiene, maintenance, commercial transactions, banking, transportation and many other routine activities very difficult. Water and sewer systems often depend on pumps that run on electricity, so in many places in Puerto Rico power outages are accompanied by lack of access to potable water and sewage treatment. More than 3000 people perished in the aftermath of Hurricane Maria, many of those deaths were attributable to the extended power outage. High poverty rates exacerbate the impacts and burdens of disaster events. After Hurricane Maria, over 150,000 people left Puerto Rico and have not returned.[2] Those who remained have developed a heightened interest in energy issues and renewable generation, especially rooftop solar and battery energy storage systems and other alternatives to fossil-fired generation plants that depend on centralized transmission and distribution lines, poles, towers, transformers, substations, systems etc, known as the grid.

More than four years after the passage of Hurricane Maria, a cursory view of the electric system casts a disappointing and potentially lethal tally. After the hurricane, the centralized grid with its poles, towers, wires and substations largely running from the big fossil-fired plants in southern Puerto Rico through the central mountain range to the north, especially the San Juan metropolitan area was stood up amid scandals of companies like Whitefish and Cobra profiting handsomely from dubious work. Another company, New Fortress Energy/NFEnergia built a liquefied natural gas terminal to import highly volatile methane gas, that is frequently inoperable and was constructed without the necessary authorization from the Federal Energy Regulatory Commission ("FERC") or an environmental justice analysis of how nearby communities would be impacted by this new threat; the Punta Lima Wind Farm was blown away by the hurricane as was a utility-scale, land-based solar array near where the storm made landfall; the AES coal-fired power plant in Guayama, Puerto Rico continues to spew toxins and contaminate the South Coast Aquifer and adversely impact the largely afro-descendent population. The new grid operator, a joint venture created by Quanta Services and ATCO Canadian Utilities called LUMA Energy is lobbying to rebuild the existing centralized, fossil-enabling energy grid that perpetuates environmental injustice with a historic amount of federal funds. The government of Puerto Rico and the local Energy Bureau, while paying lip service to renewable energy, continue to push the business-as-usual reconstruction of the 20th century electric system that overburdens nearby communities and has failed after each hurricane in the past thirty years and sometimes during lesser storms too.

Governor Pedro Pierluisi, who took power with barely 32% of the vote and the Puerto Rico Energy Bureau are asking FEMA, to hand over a whopping $9.6B that has been allocated for the electric system to rebuild the centralized transmission and distribution grid and add new methane gas-fired, import-dependent plants and not one penny for renewables. In 2005, Congress determined that rebuilding these lines over and over was not a cost-effective strategy: "…electric power transmission and distribution lines in insular areas [including Puerto Rico] are inadequate to withstand damage caused by the hurricanes and typhoons which frequently occur in insular

[2] Puerto Rican Exodus: One Year Since Hurricane Maria, RB2018-05_SEPT2018 (1).pdf (cuny.edu)

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areas and such damage often costs millions of dollars to repair;" [3]In contrast, civil society proposals put forward by community, environmental, labor and professional organizations, academia and religious congregations are calling on FEMA and the Puerto Rico Electric Power Authority ("PREPA") to invest the historic amount of federal funds allocated for the electric system to provide life-saving distributed renewable energy, primarily on-site or rooftop solar and battery energy storage systems to enable Puerto Rico residents, businesses and institutions access to resilient power as set out in the We Want Sun/Queremos Sol (queremossolpr.com) proposal. The proposed transformation of the electric system would alleviate the load on poor and largely afro-descendent communities that are overburdened by the centralized fossil-fired electric system in Salinas, Guayama, Penuelas, Guayanilla, and parts of the San Juan metro area. But Puerto Rico civil society proposals have thus far, fallen on deaf ears.

While various community groups and philanthropic organizations have carried out a few distributed renewable energy rooftop solar and battery storage projects throughout Puerto Rico, the pace and scale of these alternatives is dwarfed by the proposed rebuild of the centralized transmission and distribution grid and the rollout of new methane gas plants. Higher income individuals are seeing an uptick in rooftop solar and storage installations but with close to a 44% poverty rate, most people in Puerto Rico cannot access the life-saving essential electric service and resiliency that these systems can provide. In Puerto Rico and in other hurricane-prone places like the Gulf Coast and beyond, the investment of FEMA funds in distributed renewables and batteries is a matter of equity and environmental and climate justice.

The Biden-Harris administration and FEMA and the Department of Housing and Urban Development ("HUD"), in particular have a unique opportunity to make good on the administration's commitment to tackle the climate crisis and center environmental justice by showcasing Puerto Rico as an example of what recovery funds can do to transform the electric system. In addition, using FEMA and HUD funds to rebuild the Puerto Rico grid would be a terrible waste of taxpayer money.

II. Abbreviated Chronology of Civil Society Outreach to FEMA

- **July 10, 2020** – Ten environmental and community groups in Puerto Rico: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg – Enlace Latino de Acción Climática, Inc., Comité Yabucoeño Pro-Calidad de Vida, Inc., Campamento Contra las Cenizas en Peñuelas, Coalición Organizaciones Anti-Incineración, Amigos del Río Guaynabo, Alianza Comunitaria del Sureste, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., , Sierra Club Puerto Rico, Inc., CAMBIO PR represented by a team of lawyers including Earthjustice sent a letter to FEMA stating that "FEMA's funding would be best spent on cost-effective projects that align with Puerto Rico's goals to transition away from imported fossil fuels and to renewables and storage, and especially distributed renewables and storage." They also asked "FEMA to review expert testimony from the Integrated Resource Plan ("IRP") proceeding, which clearly demonstrated that distributed solar and storage are far more cost-effective, reliable, and resilient for the island than large, centralized fossil fuel plants." And requested a meeting to further discuss the transition to an affordable and

[3] 48 U.S.C.A. § 1492(5).

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resilient distributed renewable energy system in Puerto Rico such as the We Want Sun Proposal (queremossolpr.com).[4]

- **August 13-14, 2020** – FEMA issued a Notice of Availability[5] of the Programmatic Environmental Assessment for the Commonwealth of Puerto Rico Utility Repair, Replacement, and Realignment from Hurricane María Island-Wide, Puerto Rico which proposes rebuilding of the centralized transmission and distribution grid that connects the fossil-fired power plants in southern Puerto Rico with the energy demand centers.[6]
- **August 24, 2020** – The Energy Bureau issued a Final Resolution and Order that: (i) approved in part and rejected in part PREPA's IRP; (ii) modified the Action Plan proposed by PREPA; and (iii) ordered PREPA to adopt and implement the Modified Action Plan. Also, the Energy Bureau ordered PREPA to engage in an aggressive renewable deployment and embrace distributed solar + storage to comply with Law 17-2019 and Law 33-2019 renewable energy targets (20% by 2022; 40% by 2025; 60% by 2040, and 100% by 2050; and Puerto Rico is at 2-3%currently).[7] The ten community and environmental groups listed above were active participants and were granted intervenor status in the IRP process.
- **September 18, 2020** - FEMA allocated $9.6 billion for the Puerto Rico electric system to "repair and replace thousands of miles of transmission and distribution lines, electrical substations, power generation systems, and other grid improvements."[8]
- **September 23, 2020** – Comité Diálogo Ambiental, Inc. issued an open letter to FEMA urging that the "federal funds assigned for the Puerto Rico electric system should be used for the installation of photovoltaic systems sited on rooftops or near existing structures, coupled with battery energy storage systems (BESS) and energy conservation, education and efficiency programs."[9]
- **September 24, 2020**- FEMA responded to Earthjustice's correspondence dated July 10, 2020, stating that, "many of the opportunities discussed in the letter are directly tied to decisions made by the Commonwealth of Puerto Rico and PREPA in determining the type of power grid operational platforms. FEMA does not play a role in determining what that decision is nor authorizes the use of funding for projects outside the eligible parameters adopted in FEMA policy."

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[4] The letter was endorsed by Pedro Saadé, Esq., Ruth Santiago, Esq. and the following environmental justice organizations and community groups: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., CAMBIO PR, and Campamento Contra las Cenizas en Peñuelas, Inc.

[5] According to FEMA, the Utilities PEA was available for agency and public review and comment for a period of 60 days from October 24 concluding on December 22, 2020. The public information process included a public notice in both Spanish and English with information about the proposed action in the Primera Hora newspaper. https://www.fema.gov/disaster-federal-register-notice/dr-4339-pr-environmental-assessment-public-notice-002

[6] https://www.fema.gov/sites/default/files/2020-08/fema_ea_puerto-rico_utility-repair-replacement-realignment_guidedbook_august-2020.pdf

[7] https://energia.pr.gov/wp-content/uploads/sites/7/2020/08/AP20180001-IRP-Final-Resolution-and-Order.pdf

[8] White House authorizes $9.6B to rebuild Puerto Rico's grid, but how can it be spent? | Utility Dive.

[9] The letter was also endorsed by several organizations: Diáspora en Resistencia , Alianza for Progress, Respeta Mi Gente, Sane Energy, Nobody Leaves Mid-Hudson, Labor Council for Latin American, 350BK, Safe Energy Rights Group, Alliance for a Green Economy, Nuclear Information and Resource Service, New York Communities for Change, Long Island Progressive Coalition, Food & Water Watch Action, NYC Democratic Socialists of America Ecosocialist Working Group, 4 Solstice, PhillyBoricuas, the Samuel Lawrence Foundation.

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- **November 11, 2020** – Letter from the co-founders of Queremos Sol to PREPA requesting "the opportunity to coordinate the details that will ensure effective public participation in the confection and implementation of PREPA's 10-Year Infrastructure Plan to be submitted to the COR3 and FEMA." [10]
- **November 17, 2020:** Letter from Senator Chuck Schumer and Representative Nydia Velazquez to FEMA seeking answers on how the grant to Puerto Rico ensures rebuilding a stronger and environmentally friendly electrical grid. "The decentralization of Puerto Rico's grid, as well as the adoption of clean and renewable energy, should be the focus of any recovery and reconstruction effort. Moreover, the grid's reconstruction should be conducted through a community-centric approach."[11]

- **November 18, 2020**- Earthjustice[12] requested that FEMA grant a 90-day extension of the November 22, 2020 deadline for comments to the Draft PEA for the Utility Repair, Replacement, and Realignment of the Commonwealth of Puerto Rico, since the environmental justice organizations and community groups that Earthjustice represented did not receive notice as required in Section 7.0 of the PEA.
- **November 18 and 23, 2020**- The Rincón chapter of Surfrider Foundation submitted comments regarding the FEMA Draft PEA: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR.
- **December 7, 2021** - PREPA submitted a plan to FEMA that included both Section 428 proposed projects and Section 404 Hazard Mitigation projects to rebuild the centralized transmission and distribution system. According to PREPA, it also intends to use Section 406 funds for "public assistance mitigation" which includes "infrastructure hardening work."
- **December 21, 2020**- Alianza de Energía Renovable Ahora[13] submitted comments to the FEMA Draft PEA: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR, stating their "concerns about the inadequacies of the PEA, the failure to address safety issues, risks, and significant adverse environmental impacts and repercussions of not preparing an Environmental Impact Assessment."; requested that FEMA not approve the PEA or issue a FONSI, but rather, draft a full Environmental Impact

[10] The letter was signed by Abraham García Román, Asociación de Empleados Gerenciales de la Autoridad de Energía Eléctrica Adriana González, Sierra Club de Puerto Rico Dr. Agustín Irizarry Rivera, Catedrático Dept. Ingeniería Eléctrica, UPR Mayagüez, Ángel Figueroa Jaramillo, UTIER Federico Cintrón Moscoso, El Puente Ing. Ingrid M. Vila Biaggi, CAMBIO PR Myrna Conty, Amigos Río Guaynabo, Coalición de Organizaciones Anti-incineración Lcdo. Pedro Saadé, profesor Clínica de Asistencia Legal, Escuela Derecho UPR Lcda. Ruth Santiago, Comité Diálogo Ambiental Víctor de Castro, Asociación de Empleados Gerenciales de la Autoridad de Energía Eléctrica and Laura Arroyo, Earthjustice.

[11] https://www.schumer.senate.gov/newsroom/press-releases/schumer-velzquez-announce-94-billion-fema-grant-recently-awarded-to-puerto-rico-electric-power-authority-prepa-can-be-used-to-build-micro-grids-underground-transmission-lines-and-power-grid-that-supports-clean-renewable-electricity-clean_reliable-energy-can-be-part-islands-ongoing-recovery--reconstruction-efforts

[12] Earthjustice represented the following environmental justice organizations and community groups: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., and Campamento Contra las Cenizas en Peñuelas, Inc.

[13] This environmental justice alliance was formed by the same environmental justice organizations and community groups listed in the November 18, 2020 letter to FEMA, and also includes Cambio, PR, Inc.

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Statement to correct the inadequacies and legal errors in the environmental analysis for the extensive projects proposed and reconsider its conclusions on the basis of the corrected information. The extensive comments to the FEMA PEA proposed the investment of FEMA funds for widescale on-site rooftop solar and battery energy storage systems on homes, businesses, industries, and institutions to provide life-saving resiliency to Puerto Rico residents.

- **December 30, 2020** - The Energy Bureau issued an Order requiring PREPA to file a copy of the 10 Year Plan it had submitted to FEMA.
- **January 25, 2021** - The Energy Bureau determined that the 10 Year Plan was inconsistent with the approved Integrated Resource Plan ("IRP") and Modified Action Plan primarily because it did not include solar or battery energy storage systems and included new fossil fuel generation.
- **February 8, 2021 –** Letter from David I. Maurstad, Regional Administrator, FEMA Region 2, responded to the Schumer/Velázquez letter to Peter Gaynor dated November 17, 2020, stating that "[i]t is important to note that renewable generation and storage assets were not included in the recent obligation, as they were either not owned by the Subrecipient, not damaged from the event, or did not exist as part of the power grid infrastructure. However, as mentioned above, due to the unique flexibility associated with FEMA funding under the BBA and the PAAP, PREPA may pursue projects beyond merely restoring the facilities damaged as they were prior to hurricanes Irma and Maria." He further stated that per FEMA's governing statutes, regulations, and/or guidance, Puerto Rico or PREPA could "pursu[e] and propos[e] power grid projects that support renewable generation and storage in their recovery solutions and "pursu[e] and propos[e] underground transmission lines as their actual recovery solution" if the projects complied with the Environmental and Historic Preservation (EHP) laws, regulations, and executive orders. Maurstad further stated that "FEMA expects and encourages PREPA to incorporate and integrate additional funds via the FEMA PA Program for mitigation, and any other available funding," and that "FEMA believes that some portions of the electric grid will have projects proposed to coincide with operationally transformative platforms, driven by Integrated Resource Plan initiatives and policies at both the Commonwealth and Utility levels. The Interagency Group, known as the Energy Technical Coordination Team (TCT) and made up of Federal, State, and Local governmental stakeholders, works to collaborate and coordinate the different funding streams as part of the project development, review and implementation process." He noted that "[t]he primary industry standards informing FEMA, COR3, and PREPA's recovery efforts for the electrical grid are set by the USDA Rural Utilities Service (RUS), which PREPA had previously been a member of until 2011." Finally, Maurstad stated that FEMA has no requirement to ensure public/community participation in how funds are allocated, although "FEMA Environmental and Historic Preservation staff EHP staff do review requirements set forth by [NEPA] that encourage public and community involvement in activities to be funded by federal agencies."
- **February 16, March 19 and June 2021** - PREPA updated the 10 Year Plan which proposes to use over $12B in FEMA funds to repair existing centralized transmission, distribution and generation facilities. PREPA mentions the construction of "renewable generation and battery storage projects by third-party developers who will enter into power purchase and operating agreements with PREPA" but no FEMA funds would be used for renewables.

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- **February 25, 2021 –** Reps. Alexandria Ocasio-Cortez and Nydia Velázquez and Sen. Charles Schumer, in a letter signed by 14 other Members of Congress, wrote to FEMA Administrators, Deanne B. Criswell and Robert Fenton, Jr., stating that PREPA's current plan for rebuilding the grid would reinforce Puerto Rico's dependence on fossil fuels and indeed runs counter to the 2019 Puerto Rican law, the Energy Public Policy Act. They further stated that PREPA's plan violates the IPR approved by the Puerto Rico Energy Board. The congressional members called on the agency to require PREPA to "promote the installation of distributed energy generation capacity using renewable energy sources" and to "[earmark] federal funds to transition to distributed renewable energy systems." [14]

- **February 26, 2021**- Earthjustice sent a letter to FEMA requesting a meeting to discuss urgent concerns regarding the 10-Year Plan submitted by PREPA to FEMA for electric system work, stating that, "PREPA's 10-Year Plan fundamentally violates Puerto Rico law, frustrates the Biden Administration's recent executive order on tackling the climate crisis, and fails to implement the changes necessary to create a resilient and equitable energy grid", and that FEMA should act to prevent these violations.[15] The letter was sent to FEMA designated administrator, Ms. Deanne Criswell, Mr. Fenton, and Mr. Fargione.
- **March 26, 2021**- the Energy Bureau issued a Resolution and Order determining that the modified 10 Year Plan was consistent with the IRP and noting that the FEMA programs 404, 406 and 428 did not prevent PREPA from requesting funds for renewable energy or battery energy storage projects.[16]
- **March 30, 2021**- Comité Diálogo Ambiental, Inc., *et al*.[17] sent a letter to FEMA requesting a meeting with FEMA regarding a communication that FEMA sent to PREPA dated February 5, 2021, about the Energy Bureau determination to halt spending on projects that violate the approved Integrated Resource Plan and questioning the feasibility of these projects under the Puerto Rico regulatory framework.
- **June 16, 2021**- FEMA issued a Finding of No Significant Impact (FONSI) that determined that "the comments do not substantively change the analysis or outcomes" and "that the evaluated actions will have no significant adverse impact on the quality of human health and the environment within the constraints evaluated."[18] The FEMA FONSI paves the way for the rebuilding of the centralized transmission and distribution system that enables the operation of the fossil-fired power plants that overburden poor and majority afro-descendent communities, mostly in southern Puerto Rico.
- Subsequent meetings with the Department of Energy ("DOE"), the Council on Environmental Quality ("CEQ") and the FEMA Office of Congressional Affairs in

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[14] https://twitter.com/RepAOC/status/1365046143047127044

[15] This letter was also endorsed by the same environmental justice organizations and community groups mentioned in the first footnote.

[16] https://energia.pr.gov/wp-content/uploads/sites/7/2021/03/20210326-MI20210002-RO-Response-to-Revised-10-yr-Plan.pdf

[17] El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., CAMBIO PR, Campamento Contra las Cenizas en Peñuelas, Inc., and Earthjustice

[18] FEMA did not hold public hearings for the Draft PEA or prior to issuing the FONSI. https://www.fema.gov/sites/default/files/documents/fema_oehp-fonsi-utilities-repair_06-17-21.pdf

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Puerto Rico requesting a meeting with the FEMA decisionmakers, and documents long requested under the Freedom of Information Act ("FOIA") are pending.

- **October 30, 2021** - Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc. – Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti Incineración, Inc., Amigos del Río Guaynabo, Inc., and Campamento Contra las Cenizas en Peñuelas, Inc., collectively known as Alianza Energía Renovable Ahora ("AERA"),[19] together with the Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER"), formally requested that FEMA reconsider its highly flawed decision to issue a Finding of No Significant Impact ("FONSI") for the Programmatic Environmental Assessment: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR ("PEA"), finalized in August, 2021.

III. LUMA Energy Control Over FEMA and Other Federal Funds, Conflicts of Interests and Potential Self-Dealing

The Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement dated June 22, 2020 between the Puerto Rico Electric Power Authority as Owner, the Puerto Rico Public-Private Partnerships Authority as Administrator, Luma Energy, LLC as ManagementCo, and Luma Energy Servco, LLC as ServCo (the LUMA contract)[20] is a long, expensive and exclusive scheme that creates a private monopoly over energy transmission, distribution, generation dispatch, customer service, planning and other electric system functions and perpetuates the operation of the fossil-fired generation plants that overburden poor and majority afro-descendent communities. The LUMA contract grants LUMA Energy control over FEMA and other federal funds assigned for the Puerto Rico electric system as detailed below.

1. LUMA participates and has veto power in the selection of the federal funds grant manager. Contract Section 1.1, page 17.

2. LUMA can request changes or modifications to the federal funding, including modifications to, or reallocations between, the project worksheets related to the T&D System prepared by FEMA pursuant to Section 428 of the Stafford Act or the Integrated Resource Plan. Contract Section 4.3 (j) Pages 50-1.

3. LUMA, in conjunction with the Administrator determines that capital improvements are done to maximize the potential realization of the federal funding anticipated or received. Contract Section 5.9, Page 70.

4. LUMA has "complete flexibility, subject to compliance with the Contract Standards and prior consultation with, but not subject to approval by, Administrator or PREB, to (i) reallocate, accelerate or postpone expenditures within the approved Operating Budget, (ii) reallocate, accelerate or postpone expenditures within the

[19] The environmental and community organizations on behalf of which this Request for Reconsideration is submitted make up the majority of the organizations forming the AERA.

[20] executed-consolidated-om-agreement-td.pdf (pr.gov)

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approved Capital Budget – Federally Funded, subject to the Federal Funding Requirements,"…Section 7.3, Page 89.

5. LUMA and its subcontractor will "deal with federal funds management" to manage "longterm recovery using federal funding on behalf of the Owner". Page Annex II-39, Page (pdf) 207.

6. LUMA Energy, LLC, was created by Quanta Services and ATCO, an affiliate of Canadian Utilities these companies are expected to benefit from the billions of dollars in federal funds. LUMA's parent company, Quanta Services plans to "compete for work associated with Puerto Rico's electric T&D system modernization efforts that are separate from its ownership interest in LUMA", "expected to be funded by U.S. federal disaster relief agencies and managed by LUMA." [21]

7. The contract states that the Operator (LUMA) will work with IEM (as its subcontractor) to manage federal funds.

8. LUMA establishes a governance framework to manage long term recovery using federal funds on behalf of PREPA. (VII. Federal Funds Procurement Manual).

9. LUMA may request changes or modifications to federal funding (including modifications or reassignments between project worksheets related to the T&D system prepared by FEMA pursuant to Section 428 of Stafford Act) or the Integrated Resource Plan. (LUMA contract page II-39, pdf 207).

10. Luma Energy objects to PREPA using funds allocated for the electric system by FEMA and other federal agencies to install rooftop solar systems and batteries. LUMA and its affiliated companies Quanta and ATCO plan to use the funds for transmission projects. In a proceeding before the Energy Bureau, one of the LUMA Energy representatives, Lee Wood, falsely alleged that FEMA would not allow the use of funds for behind the meter generation, that is, located in the residence or business of the consumer, mainly rooftop solar. [22]

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[21] "Quanta believes there is opportunity for it to compete for work associated with Puerto Rico's electric T&D system modernization efforts that are separate from its ownership interest in LUMA. Puerto Rico's electric T&D system is at a critical juncture after the destruction caused by Hurricanes Maria and Irma. As a result, the government of Puerto Rico, through the P3 and in collaboration with PREPA, have embarked on a plan to rebuild, modernize, harden and "green" its power grid, a majority of which is expected to be funded by U.S. federal disaster relief agencies and managed by LUMA. The P3 estimates that more than $18 billion of electric T&D capital investment could be required through 2028 for this initiative." Quanta Services and ATCO-Led Consortium Selected by the Puerto Rico Public-Private Partnership Authority for the Operation and Maintenance of Puerto Rico's Electric Power Transmission and Distribution System, https://investors.quantaservices.com/news-events/pressreleases/detail/277/quanta-services-and-atco-led-consortium-selected-by-the.

[22] In the recording of the proceedings before the Energy Bureau, Luma's representative tries to argue that PREPA cannot use the FEMA funds assigned to it to install solar systems with batteries for its subscribers. See, https://www.youtube.com/watch?v=oGYujWJ8S7s (minute

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IV. Applicable Legal Framework

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by states on the basis of race.[23] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[24] The Environment Protection Agency ("EPA") Title VI implementing regulations bar disproportionate impact, in addition to intentional discrimination, in the administration of environmental programs, such as siting and enforcement. Executive Order 12898 requires each federal agency, "to the greatest extent practicable and permitted by law, … [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[25]

The National Environmental Policy Act ("NEPA") provides that a purpose and need statement under NEPA must allow for consideration of all reasonable alternatives that fall within the statutory authority for a project – that is, it must not frustrate Congressional intent and the objectives of federal laws by evaluating only some of the ways a project could be accomplished, rather than the full scope of options available under the law. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); s*ee also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245-1246 (9th Cir. 2005). Similarly, and for similar reasons, a purpose and need statement may not be limited to what applicants propose. *Nat'l Parks & Conservation Asss'n v. Bureau of Land Mgmt.*, 586 F.3d 735, 747-748 (9th Cir. 2009).

The FONSI issued by FEMA for electric system work in Puerto Rico falls short of NEPA's demands and is contrary to President Biden's Executive Orders on Climate and Environmental Justice. On January 27, 2021, President Biden issued Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, which declared that this Administration's policy is to:

> organize and deploy the *full capacity of its agencies to combat the climate crisis* to implement a Government-wide approach that reduces climate pollution in every sector of the economy; *increases resilience to the impacts of climate change*; protects public health; conserves our lands, waters, and biodiversity; *delivers environmental justice*; and *spurs well-paying union jobs* and economic growth,

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1:49). See also, José Delgado, Alexandria Ocasio Cortez, Nydia Velázquez y Charles Schumer reclaman priorizar la energía renovable en Puerto Rico, Feb. 25, 2021, https://www.elnuevodia.com/corresponsalias/washingtondc/notas/alexandria-ocasio-cortez-nydia-velazquez-y-charles-schumer-reclaman-priorizar-la-energia-renovable-enpuerto-rico/

[23] U.S. CONST. amend. XIV.

[24] 42 U.S.C. § 2000d.

[25] 9 Exec. Order No. 12,898, 32 C.F.R. § 651.17, http://www.archives.gov/federal-register/executiveorders/pdf/12898

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especially through innovation, commercialization, and *deployment of clean energy technologies and infrastructure*.[26]

The Order further provides that "[t]he Federal Government must drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy, marshaling the creativity, courage, and capital necessary to make our Nation resilient in the face of this threat."[27] It establishes a National Climate Task Force and specifies that "[t]o the extent permitted by law, Task Force members shall prioritize action on climate change in their policy-making and budget processes…and in their engagement with State, local, Tribal, and territorial governments; workers and communities…."[28] In addition, the Order directs agency heads to "identify opportunities for Federal funding to spur…deployment of clean energy technologies and infrastructure…and then take steps to ensure that, to the extent consistent with applicable law, Federal funding is used to spur…deployment of clean energy technologies and infrastructure."[29]

V. Discussion

The operation of large, centralized fossil-fired power plants emit pollutants regulated under the Clean Air Act ("CAA") and the National Ambient Air Quality Standards ("NAAQS"), that harm the health of the communities near these plants in the municipalities of Salinas, Guayama, Penuelas, Guayanilla, and parts of the San Juan metro area.[30] The additional methane gas-fired power plants and Liquefied Natural Gas "LNG" imports proposed by PREPA would impose air-polluting emissions of Volatile Organic Compounds ("VOCs") and impacts on communities near the power plants, whereas customer-sited rooftop solar and storage systems would remove these impacts. The negative effects of LNG and "Natural" (Methane) Gas which in its liquid state is a highly flammable material poses hazards to human health and the environment. Burning methane gas at multiple facilities throughout Puerto Rico would increase public health risks. Methane gas combustion emits increased VOCs such as formaldehyde, benzene, toluene, hexane, and styrene. Renewables avoid the multiple public health and safety risks of fossil fuel combustion including fuel releases that increase during disasters. Community and environmental groups, with the help of allies have advocated not only for the decarbonization of the Puerto Rico electric system but also the decentralization, democratization and decolonization.[31] Centralized transmission and distribution grid infrastructure perpetuates the operation of the fossil-fired plants in southern

[26] *Id.* (emphasis added).
[27] *Id*. at 7622.
[28] *Id*. at 7623.
[29] *Id*. at 7625.
[30] *See* U.S. Envtl. Prot. Agency, Green Book, Puerto Rico Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants (data current as of Nov. 30, 2021), https://www3.epa.gov/airquality/greenbook/anayo_pr.html.
[31] Onís, C.M. de. (2021). Energy islands: Metaphors of power, extractivism, and justice in Puerto Rico. Berkeley: University of California Press.

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Puerto Rico, making it a sacrifice zone for the San Juan metropolitan area and what has been called the "periphery of the periphery."[32]

Multiple studies have shown the viability, reliability and economic benefits of rooftop solar and storage in Puerto Rico.[33] Last year, the U.S. Department of Energy ("DOE") National Renewable Energy Laboratory ("NREL") highlighted the rooftop solar potential in Puerto Rico, stating that solar energy generation sited on rooftops are offsets and reduce the overall amount of energy needing transmission and distribution. According to the NREL study, Puerto Rico has the potential to produce four to five times as much solar energy than is needed to meet its current residential demand. More than a decade ago, faculty at the University of Puerto Rico found that rooftop solar is "the least environmentally intrusive" to generate energy in Puerto Rico. The report recommended generating power locally with solar energy and, in certain cases, creating microgrids, such as for high-rise buildings. More recently, Cambio PR and the Institute for Energy, Economics and Financial Analysis set out a plan to achieve 75 percent renewable power generation in 15 years. Solar energy deployment in Puerto Rico is expected to create nearly 20,000 jobs by 2030.[34]

Because PREPA and the Commonwealth of Puerto Rico are in bankruptcy, FEMA and other federal funds are the only viable way in which Puerto Rico can achieve its Renewable Portfolio Standard, renewable energy goals, and attain accessible electric rates. Financing of new power purchase agreements with PREPA as a credit counterparty would entail prohibitively high interest rates and financing costs that would lead to skyrocketing of the already astronomical electric rates that are currently about double the average U.S. rate.[35]

FEMA was obligated to consider environmental justice in drafting the FONSI. As EPA has explained, "Federal agencies must consider environmental justice in their activities under

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[32] Lloréns, H. (2021). Toxic racism in Puerto Rico's Sacrifice Zone. NACLA Report on the Americas 53(3), 275-280. doi: 10.1080/10714839.2021.1961447

[33] Meghan Mooney & Katy Waechter, Puerto Rico Low-to-Moderate Income Rooftop PV and Solar Savings Potential, National Renewable Energy Laboratory (2020), https://www.nrel.gov/docs/fy21osti/78756.pdf; Estudio de Integración de Recurso Solar Distribuido en Puerto Rico, Sol + Techos, Cambio PR (2021), https://cambiopr.org/solmastechos/#downloads; Ingrid M.Vila Biaggi et al., We Want Sun and We Want More (Summary) (2021), https://cambiopr.org/wp-content/uploads/2021/03/Modeling-Study-Fact-Sheet-03_21.pdf; Puerto Rico Distributed Energy Resource Integration Study: Archieving a Renewable, Reliable, and Resilient Distributed Grid, Telos Energy (December 2020), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-RicoDistributed-Energy-Resource-Integration-Study-Telos-Energy.pdf; Puerto Rico Distribution Modeling, EE Plus (2021), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-Rico-Distribution-Modeling-EE-Plus.pdf; Puerto Rico Distributed Energy Resource Integration Study: Load, Energy Efficiency, and System Cost, Energy Futures Group (2021), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-Rico-Distributed-Energy-ResourceIntegration-Study-Energy-Futures-Group.pdf; Achievable Renewable Energy Targets ("ARET") ch. 4 Solar Resource, https://www.uprm.edu/aret/docs/Ch_4_Solar_resource_and_solar_thermal.pdf), Agustín A. IrizarryRivera et al., Achievable Renewable Energy Targets ("ARET") (2008), https://bibliotecalegalambiental.files.wordpress.com/2013/12/achievable-renewable-energy-targets-fo-p-r.pdf. 2

[34] Interstate Renewable Energy Council (IREC), Solar Workforce Development (2021), https://irecusa.org/programs/puerto-rican-solar-business-accelerator/solar-workforce-development

[35] https://www.eia.gov/state/print.php?sid=RQ

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NEPA."[36] EJ Executive Order (EO) 12898 specifically calls for agencies to address significant adverse environmental effects on minority and low-income communities in mitigation measures outlined or analyzed in EAs and FONSIs.[37] Indeed, CEQ issued an Environmental Justice (EJ) guidance document, including 6 principles for agency EJ analyses.[38]

PREPA's 10-year plan and its funding requests to FEMA call for spending at least $853 million on multiple new natural gas-fired power plants. Moreover, the plan would funnel over $8 billion for transmission and distribution system work that would perpetuate the existing long-distance, south to north, transmission of energy, as well as the environmental injustice experienced by fence line communities located near heavily contaminating power plants in southern Puerto Rico. Rebuilding and hardening the existing transmission and distribution system perpetuates reliance on fossil fuels, centralized generation and transmission would condemn these communities — comprised of a majority of impoverished afro-descendent communities[39] — to continued disproportionate adverse health effects caused by air, water and land pollution.

PREPA's plan, currently being evaluated by FEMA, fails to adequately consider the rooftop/on-site solar and storage alternatives that could have positive, enduring multiplier effects in environmental justice communities, the local economy and employment rates. Moreover, wide scale rooftop/on-site solar and storage would not rely on the system of overhead wires whose collapse in Hurricane Maria led to blackouts[40] that were linked to hundreds of deaths because life-saving medical equipment lacked energy supply.

The LUMA contract establishes that the grid work must "align" with the Grid Modernization Plan, which is the Puerto Rico government's proposal to rebuild the existing grid rather than transform the electric system to provide the resilience that would make the difference between life and death in the face of disaster and shock events. PREPA's Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy promotes the operation of centralized generation that lacks the life-saving resiliency of distributed renewable energy and storage and perpetuates environmental injustice. Rebuilding the T&D system to connect to these plants perpetuates their operation. In addition to Executive Order 12,898 on Environmental Justice, the Biden Administration's Executive Order, "Tackling the Climate Crisis at Home and Abroad" provides further support for environmental justice claims.

The communities near the existing fossil-fired power plants, most of which are located in southern Puerto Rico, are overburdened by the operation of the plants. The Guayama region is an environmental justice community with high poverty rates and where the majority of residents are

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[36] U.S. Envtl. Prot. Agency, *Environmental Justice and National Environmental Policy Act*, https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act.

[37] Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[38] https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act

[39] Afro-descendants

[40] blackouts

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Afro-Puerto Ricans.[41] According to the Toxic Release Inventory this region suffers the greatest contamination of any region in Puerto Rico. The Guayama region also has among the highest poverty, unemployment, and school dropout rates in Puerto Rico. Simultaneously, the region has experienced a sharp decrease in medical services available to this environmental justice community with the closure of two hospitals and only one hospital currently in operation.

The Applied Energy System (AES) Corporation coal-fired power plant and the Aguirre Power Complex, located in southeastern Puerto Rico are the two primary sources of toxic emissions in Puerto Rico and disproportionately impact some of the poorest communities. These two plants also extract large amounts of freshwater from the South Coast Aquifer and have contributed to the water scarcity that led to water rationing in summer 2019 and in previous years. The AES coal burning power plant in Guayama transmits electricity to northern Puerto Rico, including the San Juan metro area and accumulates hundreds of thousands of tons of coal ash waste at its plant site. The facility and its polluting practices already contaminated part of the South Coast Aquifer, the sole source of potable water for tens of thousands of people in Puerto Rico.

The Costa Sur and EcoElectrica plants in southwestern Puerto Rico both burn imported methane gas and also transmit energy long distance. Gas combustion is the substitution of one group of contaminants for others. The myth that methane gas is a cleaner energy source is a fallacy. The LNG imported to Puerto Rico must be stored under cryogenic conditions and revaporized/regasified before it can used at the plants. These additional processes add to the total emissions of LNG use in a way that can exceed the CO2 emissions of other fossil fuels. Methane gas combustion also emits increased VOCs such as formaldehyde, benzene, toluene, hexane, and styrene.

Multiple scientific studies, including a Harvard University report found that, "A small increase in long-term exposure to PM2.5 leads to a large increase in COVID-19 death rate, with the magnitude of increase 20 times that observed for PM2.5 and all-cause mortality. to air pollution and COVID-19 mortality in the United States. The study results underscore the importance of continuing to enforce existing air pollution regulations to protect human health both during and after the COVID-19 crisis." [42]The specific findings demonstrate that, an increase of only 1 ug/m3 in PM2.5 is associated with a 15% increase in the COVID-19 death rate, at a 95% confidence interval. Particulate matter is emitted by electric power plants, motor vehicles

[41] Hilda Lloréns, In Puerto Rico, Environmental Injustice and Racism Inflame Protests over Coal Ash, December 8, 2016. http://theconversation.com/in-puerto-rico-environmental-injustice-and-racism-inflame-protests-over-coal-ash 69763; Hilda Lloréns, Puerto Rico's Coal-Ash Material Publics and the Summer 2019 Boricua Uprising, February 25, 2020. https://www.societyandspace.org/articles/puerto-ricos-coal-ash-material-publics-and-the-summer-2019- boricua-uprising; Catalina De Onis, Energy Islands, Metaphors of Power, Extractivism, and Justice in Puerto Rico, June 2021, https://www.ucpress.edu/book/9780520380622/energy-islands.

[42] Public Comments by Pediatric Environmental Health Specialty Unit (PEHSU), Mount Sinai Medical School, FERC Docket CP13-193-000 at 1-2. https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01c6d80b-66e2-5005-8110-c31fafc91712. 26 Wu, X., Nethery, R. C., Sabath, M. B., Braun, D. and Dominici, F., Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis Science advances, 6(45), p.eabd4049, (2020), https://projects.iq.harvard.edu/covid-pm. 14

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and other sources of air contamination. Continued reliance on fossil-fired plants for energy transmission to San Juan and northern Puerto Rico is another climate disaster in the making.

VI. Conclusion

We ask this Commission to urge the Federal Government to earmark the historic amount of FEMA funds allocated for the electric system for on-site and rooftop solar and battery systems and similar alternatives that will provide life-saving electric service to the residents of Puerto Rico and alleviate the burden of poor and largely afro-descendant communities close to the fossil-fired power plants mostly in southern Puerto Rico. The Commission should include an inquiry on the proposed use of FEMA funds for electric system work to ensure that they are invested in a cost-effective manner to provide accessible, affordable, renewable, reliable and resilient electric energy. We urge the Commission to investigate PREPA's Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy, LLC and the role of the Fiscal Oversight and Management Board in the imposition of the LUMA contract and the Puerto Rico electric crisis. The use of the historic amount of FEMA funds allocated for the electric system will determine the viability of Puerto Rico for generations to come and could be instrumental in achieving environmental and climate justice in the archipelago.

In Salinas, Puerto Rico.

Sincerely,

s/ Ruth Santiago
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To : "Gail Heriot" gheriot@me.com, "Gail Heriot" gheriot@usccr.gov
Cc : "Alexander Heideman" alexanderheideman@gmail.com
Subject : Testimony
Attachment : Sergio Marxuach Written Statement - US Commision on Civil Rights.docx;2021.12.10 La Liga CMMP statement FEMA US CCR.pdf;US CIVIL RIGHTS COMMISSION TESTIMONY (1).docx;Diane Yentel Testimony to US Commission on Civil Rights 12.3.21.pdf;Testimony _ USCRC _ AriadnaGodreauAubert.pdf;FINAL 2021_Institucional_12_December_United States Commission on Civil Rights_ Government Response to Hurricane María_December 10.pdf;Statement USCCR.docx;Testimony USCCR US Commission on Civil Rights FEMA .pdf;

Attached.

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CNE
Puerto Rico's Think Tank

Written Testimony

by
Sergio M. Marxuach
Policy Director
Center for a New Economy

Submitted to the United States Commission on Civil Rights
San Juan, PR
10 December 2021

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Introduction

Good morning distinguished members of the U.S. Commission on Civil Rights, fellow witnesses, and all those who are following these proceedings. We have received your letter of October 27, 2021 inviting us to testify today about the U.S. federal government response to Hurricane Maria. We thank you for the opportunity to participate in this important public debate. We at the Center for a New Economy believe it is important to bear witness about the way Hurricane Maria's victims were (mis)treated by some agencies of the federal government. It is a moral obligation we owe to those who suffered in the immediate aftermath of the storms, to those who are still living with their consequences, and to people who, unfortunately, will become victims of natural disasters in the future.

On September 20, 2017, Hurricane María wreaked havoc on Puerto Rico and the U.S. Virgin Islands by unleashing the power of nature with a fury unseen in these parts in almost a century. According to data from the Federal Emergency Management Agency ("FEMA"), within hours of Hurricane María's landfall in Puerto Rico, 100 percent of the clients of the Puerto Rico Electric Power Authority ("PREPA") were without electric power service; 80 percent of all PREPA infrastructure was destroyed; 80 percent of the clients of the Puerto Rico Aqueduct and Sewer Authority ("PRASA") were without water service; between 80 and 85 percent of communication towers were not operational; hundreds of miles of roads were closed off by landslides and several dozen bridges collapsed; maritime ports and airports were closed, and remained so for at least five days; and satellite phones were not working at all.[1]

In addition, 92% of hospitals were severely impacted; between 23 and 31 million trees were destroyed or damaged; approximately 527,000 households reported some kind of damage; thousands of small and medium business were closed for months and many went out of business; several hotels and resorts suffered serious damage; and economic activity, as measured by the government's Economic Activity Index, declined by approximately 12% over the three months immediately following the hurricane.[2] According to estimates made by Moody's Analytics, the decrease in real GDP could have been as deep as 15% during the last calendar quarter of 2017, while approximately 35,000 jobs were lost. Furthermore, Moody's estimates that Hurricane María caused about $80 billion in damages to the island's already withered capital stock and at least $25 billion in lost output, which has adversely affected business and household balance sheets.[3]

FEMA, using a model designed by NOAA, estimated total damages add up to approximately $90 billion in Puerto Rico and the USVI, while the government of Puerto Rico estimated total damages at around $139 billion.[4] The ineffective initial response from both the Puerto Rico and federal governments, exposed long-existing economic, political, and social inequalities, as well as Puerto Rico's subordinated standing in the United States' political system. Eventually, Congress approved part of the funding required for Puerto Rico's reconstruction, but in many cases with highly prescriptive conditions and requirements that have unduly delayed and burdened the reconstruction process.

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[1] United States Government Accountability Office, *2017 Hurricanes and Wildfires: Initial Observations on the Federal Response and Key Recovery Challenges*, GAO-18-472, (Washington, DC: September 2018), p. 29.
[2] Government of Puerto Rico, *Transformation and Innovation in the Wake of Devastation: An Economic and Disaster Recovery Plan for Puerto Rico,* (San Juan, PR: August 2018), pp. 41-44.
[3] Bernard Yaros, *The Economics of Puerto Rico's Post María Recovery*, Moody's Analytics, September 2018, pp. 1-4.
[4] The FEMA estimate is taken from the *2017 Hurricane Season FEMA After-Action Report*, (Washington, DC: July 12, 2018), p. 1; the estimate from the Government of Puerto Rico is set forth in *Transformation and Innovation in the Wake of Devastation*, supra, n. 2, p. 159.

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In the case of appropriations for disaster assistance for Puerto Rico, the federal government operates through two principal "master accounts" and four main agencies: the Disaster Relief Fund managed by FEMA, which works with the Puerto Rico Central Office of Recovery, Reconstruction, and Resiliency ("COR3") to manage its assistance programs in the island; and the Community Development Fund, managed by HUD, which finances the Community Development Block Grant-Disaster Recovery ("CDBG-DR") program and works with the Puerto Rico Department of Housing ("PRDOH") to administer CDBG-DR programs in Puerto Rico.

FEMA

In general, FEMA spending on disaster assistance can be divided into (1) assistance for emergency work, which covers both individual and public assistance; and (2) spending on permanent work, which is usually earmarked for public assistance for both reconstruction of infrastructure and hazard mitigation projects.

The initial disbursement of emergency assistance for individuals after Hurricane Maria was marred by bureaucratic bungling and mismanagement. For example, a year after Hurricane Maria, the portion of total funds obligated for individual assistance programs for Hurricane María's disaster victims (17%) was significantly lower than the portion obligated for individual assistance for the victims of Hurricane Harvey (47%) or Hurricane Irma (32%). The relatively low share of obligations is partly explained by FEMA insistence that potential beneficiaries produce "clear" title to the property they inhabited, even though its regulations did not set forth that requirement. As one or more of my fellow panelists will testify, this situation resulted in the unjustified denial by FEMA of most applications for individual assistance.

It is however in the area of spending for permanent public works where FEMA has consistently underperformed. According to the GAO this lag is largely due to the requirement that FEMA and the government of Puerto Rico use alternative procedures under Section 428 of the Stafford Act for all large Public Assistance permanent work projects, after an amendment to the presidential disaster declaration for Hurricane Maria, dated November 2, 2017, required that FEMA obligate all large project funding for Public Assistance permanent work through alternative procedures.[5] These alternative procedures:

> …are designed to give jurisdictions more flexibility in determining how, where, and what to rebuild, particularly after incurring significant damage. Applicants may choose to combine multiple critical facilities and rebuild them in a manner that makes them less likely to incur future disaster damages. In 2013 FEMA began a pilot program to utilize the alternative procedures for debris removal and permanent work projects in the recovery from Hurricane Sandy in New York and New Jersey, as of April 2018, FEMA reported that 29 percent of New York's permanent work projects are under the alternate procedures—approximately $8.6 billion. **However, no state or territory has used alternative procedures for 100 percent of their permanent work projects. According to Puerto Rico's Draft Recovery Plan issued in July 2018, the Commonwealth estimated costs for permanent work projects ranges from $26.7 billion to $37.4 billion**.[6]

The requirement to use Section 428 alternative procedures for all large Public Assistance permanent work projects meant that the recovery process in Puerto Rico would flow according to a different schedule than that applicable to other jurisdictions and entailed both potential costs and benefits for the island:

> According to FEMA officials, in the U.S. Virgin Islands and in the states, participation in the pilot program for permanent work alternative procedures will occur for select projects, by applicant request…They added that this approach will provide the flexibility Puerto Rico requires to achieve

[5] United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 14.
[6] GAO, *2017 Hurricanes and Wildfires*, supra n. 1., at p. 18 (emphasis by the author).

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> its post-disaster recovery goals while limiting risk to the federal government…**However, it is unclear whether such flexibilities will eliminate other challenges associated with the PA program, such as reducing delays from challenges to eligibility determinations and supporting a timely recovery…**although the front end of the PA alternative procedures pilot program may take longer than the standard PA procedures, once project formulation (including any identified hazard mitigation measures) and cost agreements are made, the entire sum of the agreed-upon funding level is obligated and made available to the recipient at a quicker rate due to the entire amount of the project being obligated from the outset. [Internal footnotes omitted.][7]

For Puerto Rico, the advantage of using these alternative procedures is that federal money will be obligated in full once there is agreement between the parties on the cost estimate for a particular project. The downside is that if the project is over-budget, it will be up to the government of Puerto Rico, which is undergoing a bankruptcy process, to fund the cost overrun. However, if there are any savings, the government of Puerto Rico could use those savings for other recovery-related activities. The advantage for the federal government is that it limits its exposure to the pre-agreed fixed cost estimate amount.

Given the magnitude of the damage caused by Hurricane Maria, it was foreseeable that the use of these alternative procedures would present implementation challenges and delays in developing fixed cost estimates. First, "since Puerto Rico is responsible for any costs that exceed fixed cost estimates for large permanent work projects under the alternative procedures, FEMA and Puerto Rico had to agree on guidance to develop the fixed cost estimates." In February 2020, the GAO reported that FEMA had developed guidance for developing fixed cost estimates. However, it also found that the guidance did not meet all of the GAO's best practices for estimating costs and the GAO recommended that FEMA revise the guidance to adhere more closely to best practices. As of January 2021, FEMA was working to address this recommendation. Second, the "use of alternative procedures can delay a project's obligation because more time is required to develop a fixed estimate."[8]

To be fair to FEMA, since 2019 it has implemented several changes to its Public Assistance Program in Puerto Rico. These changes include: (1) applying a new program delivery model; (2) instituting an accelerated award strategy for certain recipients; and (3) making the use of Public Assistance **optional** for certain projects.[9] These changes have expedited the obligation of funds. According to the GAO, as of January 15, 2021, FEMA had obligated $17.5 billion for 4,793 Public Assistance permanent work projects (See Exhibit A). However, the actual expenditure of funds remains painfully slow. According to the same GAO report, of the $17.5 billion obligated for permanent work projects, only $157.7 million, or 0.9%, had been spent as of January 15, 2021 (See Exhibit B). Finally, we note that as of early this year, more than three years after Hurricane Maria, FEMA was still developing cost estimates for 5,279 projects related to the 2017 hurricanes.[10]

HUD

Between September 2017 and June 2019, Congress appropriated approximately $20.3 billion in CDBG-DR (Disaster Recovery) and CDBG-MIT (Mitigation) funds for disaster reconstruction and mitigation activities related to Hurricanes Irma and Maria in Puerto Rico through three supplemental appropriation acts:

- **P.L. 115-56**: $1,507,179,000 for unmet needs;

[7] Id. at p. 56 (emphasis by the author).
[8] GAO, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects,* supra n. 5, p. 18 and p. 22.
[9] Id. at p. 19.
[10] Id. at p. 25.

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- **P.L. 115-123**: $10,153,130,000 for unmet needs (including $1.9 billion to enhance and modernize the electric grid) and an additional $8,285,284,000 for mitigation activities; and
- **P.L. 116-20**: $304,000,000 for unmet needs.

The usual process for disbursing these funds is somewhat cumbersome. As shown in Exhibit C, after Congress appropriates the money, OMB issues an apportionment document to HUD, and then HUD has to publish a notification in the Federal Register. The intended beneficiary then proceeds to draft an Action Plan for the use of the funds, in accordance with the published regulations. If and when the Action Plan is approved by HUD, then the parties need to execute a Grant Agreement to allow the expenditure of funds in accordance with the terms of the Action Plan.

However, as shown in Exhibit D, this process has been particularly, some would suspiciously, slow in the case of funds allocated for disaster relief and mitigation activities in Puerto Rico. A report issued by HUD's Office of Inspector General (the "OIG Report") on April 20, 2021 found that the Trump administration set up several bureaucratic obstacles that substantially slowed down the process for disbursing these funds.[11]

The OIG Report sets forth some particularly concerning findings regarding (1) the process prior to the publication of the Federal Registration notice for the use of $8.3 billion of mitigation funds and (2) revisions made to the CDBG-DR grant agreement which delayed the disbursement of $8.2 billion of disaster recovery funding for Puerto Rico's unmet needs.

With respect to the Federal Register notice for the use of the $8.3 billion tranche for mitigation activities, the OIG Report describes months of negotiations between HUD and OMB, which resulted in several revisions of the notice's text, mostly at the request of OMB. Several HUD officials found some of these OMB requests to be unreasonable or outside the scope of the normal administrative process. For example, Deputy Secretary Montgomery, during his OIG interview:

> …characterized OMB's revisions as containing "poison pills" because they would impose unworkable criteria and he was not sure it was "even legal" to insist upon grantees meeting the conditions as a prerequisite to receiving mitigation funding. For example, Montgomery said he did not believe that HUD could coerce Puerto Rico to fix its property-tax system to receive mitigation funding because the property-tax system was not related to mitigation activities. He also indicated that HUD did not put these types of conditions on other disaster-recovery grantees.[12]

According to the OIG Report, HUD had both legal concerns as well as concerns regarding the structural (policy) changes that OMB wanted grant recipients to make. (See Exhibit E for a summary of the legal concerns and Exhibit F for a summary of the concerns regarding structural changes).

Furthermore, OMB requested the Office of Information and Regulatory Affairs to review the proposed Federal Register notice, which a "HUD Attorney" described as "unheard of" for a disaster-related notice and stated that "HUD officials questioned whether the notice 'truly qualified' for OIRA review."[13] Another senior HUD official described "OIRA's comments as "kind of like Groundhog Day, just keeps coming back."

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[11] Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021. See also, Tracy Jan and Lisa Rein, "Investigation suppressed by Trump administration reveals obstacles to hurricane aid for Puerto Rico", *Washington Post*, April 22, 2021, available at https://www.washingtonpost.com/business/2021/04/22/puerto-rico-hurricane-trump-hud/ .

[12] HUD OIG Report, p. 25.

[13] Id. at p. 30.

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The net result of loading the Federal Register notice text with "poison pills" and submitting it to unnecessary review by OIRA was that the mitigation notice for Puerto Rico was not filed until January 27, 2020 — "**23 months and 19 days after the corresponding appropriation and 146 days after the statutory deadline**."[14] In contrast, "HUD published a notice for the other 14 eligible CDBG-MIT grantees 150 days earlier, on August 30, 2019, and a notice for the USVI 139 days earlier, on September 10, 2019, (dated September 4, 2019)."[15]

With respect to the revisions made to the CDBG-DR grant agreement for the disbursement of $8.2 billion of disaster recovery funding for Puerto Rico's unmet needs:

> The OIG also found that HUD's decision to revise its template for CDBG-DR grant agreements was a factor in delaying disbursement of this second tranche of funding for unmet needs to PRDOH. In early 2019, HUD decided to substantially revise the content of its standard disaster-grant agreements, which at the time consisted of a brief three-to-six-page document that HUD considered to not have appropriately mitigated risk. While some senior HUD officials believed that these revisions were necessary, **the revisions stemmed at least in part from OMB concerns related to PRDOH.** During the grant-agreement revision process, it became clear to HUD staff that the agreement conditions needed to have parity with the CDBG-MIT notice conditions taking shape at the same time, thus making the obligation of the second tranche of funding for unmet needs dependent on completion of the Puerto Rico CDBG mitigation-notice negotiations. Accordingly, the protracted process for publishing the Puerto Rico CDBG-MIT notice contributed to a delay in finalizing the Department's grant agreement with PRDOH for the second tranche of funding for unmet needs.[16]

The result was that HUD and Puerto Rico did not sign a grant agreement regarding this tranche of funds until February 21, 2020, while "**Texas signed its grant agreement relating to second tranche funds 178 days earlier, on August 27, 2019, and Florida signed its agreement 150 days earlier, on September 24, 2019**."[17]

While all the circumstantial evidence points to OMB as the principal cause of the delays regarding the disbursement of CDBG funds to Puerto Rico, the OIG Report stops short of doing so, perhaps because senior OMB officials refused to cooperate with the investigation, while OMB itself denied requests for information made by the OIG. Nonetheless, former OMB head and then Acting Chief of Staff Mick Mulvaney said the quiet parts at loud when, on an October 17, 2019 press conference regarding the Trump's administration withholding of military aid to Ukraine, he stated the following:

> Sure. I'll - let's deal with the second one first, which is - look, it should come as no surprise to anybody - the last time I was up here - I haven't done this since I was Chief of Staff, right? The last time I was up here, some of you folks remember, it was for the budget briefings, right? And one of the questions y'all always asked me about the budget is, "What are you all doing to the foreign aid budget?" Because we absolutely gutted it, right? President Trump is not a big fan of foreign aid. Never has been; still isn't. Doesn't like spending money overseas, especially when it's poorly spent. And that is exactly what drove this decision. I've been in the office a couple times with him, talking about this. And he said, "Look, Mick, this is a corrupt place." Everybody knows it's a corrupt place. By the way, put this in context: This is on the heels of what happened in ***Puerto Rico***, when we took

[14] Id. at p. 21.
[15] Id. at p. 43.
[16] Id. at p. 42.
[17] Id.

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> a lot of heat for not wanting to give a bunch of aid to ***Puerto Rico*** because we thought that place was corrupt... [18]

This statement is problematic in several ways. First, even if we take as valid the highly controversial proposition that the president can simply refuse to spend money legally appropriated by Congress for foreign assistance, the argument does not apply to Puerto Rico, which is under the domestic jurisdiction of the United States. Second, domestic disaster assistance is very different from foreign aid or military assistance. The primary purpose of the former is to affirmatively help people who have been adversely and directly impacted by a natural disaster, while the latter is primarily a tool to protect U.S. interests abroad and to further U.S. foreign policy objectives. Finally, we must note that as of the date of this hearing and to the best of our knowledge, no Puerto Rican government official has been indicted, much less convicted, of malfeasance regarding the use of federal disaster assistance funds. Ironically, the only persons or corporations implicated in corrupt activities with regard to Hurricane Maria's reconstruction efforts, so far, are either federal government employees or incorporated in the mainland.

In addition to being wrong, it is also mind boggling that, consciously or not, the former head of OMB publicly admitted that what OMB had done in Puerto Rico, in withholding assistance to the victims of a natural disaster, was a direct precedent in support of the Trump's administration decision to withhold assistance to Ukraine, **in direct violation of duly enacted appropriations laws in both cases**. And we all know how that Ukraine episode ended.

Conclusion

Nearly four years and three months after Hurricane Maria, the totality of the circumstances surrounding the federal government's response to that natural disaster strongly suggests that it was arbitrary and capricious and that Puerto Rico was unreasonably treated in a different way relative to other jurisdictions affected by the 2017 natural disasters. However, we cannot conclude, with the information we have available at this moment (with the exception, perhaps, of Mr. Mulvaney's rather candid statement), that it was the express intent of federal officials to discriminate against Puerto Rico in the disbursement of disaster assistance. But we can affirm with confidence that the impact and effects of the federal government's actions have certainly been discriminatory, to the detriment and harm of thousands of Puerto Ricans.

The use of "poison pills", unnecessary administrative reviews, and the imposition of unprecedented conditions on grant recipients, in the words of both the GAO and HUD's OIG, resulted in undue delays in delivering assistance to disaster victims in Puerto Rico. These delays are not without cost, as the longer the reconstruction process takes, the harder it is to return to a pre-disaster normality. We must remember that we are dealing with human beings that have a natural desire, in many cases, to return to "the way things used to be."

That, unfortunately, may not be possible in Puerto Rico, due to these unfair delays affecting the recovery process. As time goes by after a disaster, old neighbors may decide to move to other parts of Puerto Rico; the widow who used to live in the house down the street may have relocated to the mainland to live with one of her children; the convenience store down by the corner may have gone bankrupt; families may have separated; friendships lost; students transferred to other schools; little league teams disbanded; budding love affairs broken; businesses large and small closed forever, and so on and so forth.

[18] White House Acting Chief of Staff Mick Mulvaney Press Briefing, October 17, 2019, available at https://www.c-span.org/video/?465446-1/mick-mulvaney-defends-withholding-military-aid-ukraine-pending-investigation, the quoted segment begins at minute 19:41 of the video.

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We must note that both FEMA and HUD have undertaken important actions to speed up the obligation of funds and to improve their working relationship with the Puerto Rican government over the last year or so. These are welcome developments. However, difficult questions remain unanswered: Who and how do we decide to spend this federal windfall? What do we preserve, what do we leave to waste, and who decides? Who is deemed "worthy" of help, why, what kind, and from whom? For instance, Which coastal community gets a seawall and which community is relocated to a "safer area"?; Whose neighborhood gets razed to the ground, displaced, or gentrified in the name of "redevelopment"?; Where do we build new public schools, hospitals, and electric, water, and telecommunications infrastructure, and who decides?

These are only some of the thorny questions we will face as we move forward with the reconstruction of the island. It is good to keep them in mind because they remind us that these are political decisions in no way preordained or inevitable in the wake of Hurricane Maria. As Horowitz reminds us: "The etymology of the word *disaster* refers to stars out of alignment; but if the changes in Louisiana after Hurricane Katrina seemed to some to proceed with the force of destiny, it is well to remember as Shakespeare cautioned, 'The fault…is not in our stars, But in ourselves, that we are underlings'."[19]

In the end, then, the shape of Puerto Rico after Hurricane Maria will depend to a large extent on how we address long-standing issues of class, race, segregation, poverty, inequality, and political power that we have ignored for far too long.

We thank once again the United States Commission on Civil Rights for the opportunity to participate in these hearings and look forward to answering any questions Commission members may have at this time.

Respectfully submitted,

Sergio M. Marxuach
Policy Director
Center for a New Economy

[19] Andy Horowitz, *Katrina: A History, 1915-2015*, (Harvard University Press: Cambridge, MA, 2020), p. 5.

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Exhibit A

Table 1: Federal Emergency Management Agency (FEMA) Public Assistance Permanent Work Obligations to Puerto Rico for Hurricanes Irma and Maria by Category of Work as of January 15, 2021.

Dollars in millions

Public Assistance Work Category	Standard Public Assistance		Alternative Procedures		Total	
	Number of projects	Obligated amount	Number of projects	Obligated amount	Number of projects	Obligated amount
C- Roads and Bridges	1,124	359.43	884	555.72	**2008**	**915.14**
D- Water Control Facilities	11	0.73	9	4.14	**20**	**4.87**
E- Public Buildings	529	98.49	650[a]	2,635.24	**1,179**	**2,733.73**
F- Public Utilities	46	183.14	116[a]	13,131.08	**162**	**13,314.22**
G- Recreational or Other	678	141.90	746	407.14	**1,424**	**549.04**
Total	**2,388**	**783.70**	**2,405**	**16,733.32**	**4,973**	**17,517.01**

Source: GAO analysis of FEMA data. | GAO-21-264

Note: The obligated amount represents the federal share for the project's costs.

[a]The number of projects under this category is likely to increase as Puerto Rico's Electric Power Authority, Aqueduct and Sewer Authority, and Department of Education develop projects to execute obligations under their fixed cost estimates.

Source: United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 27.

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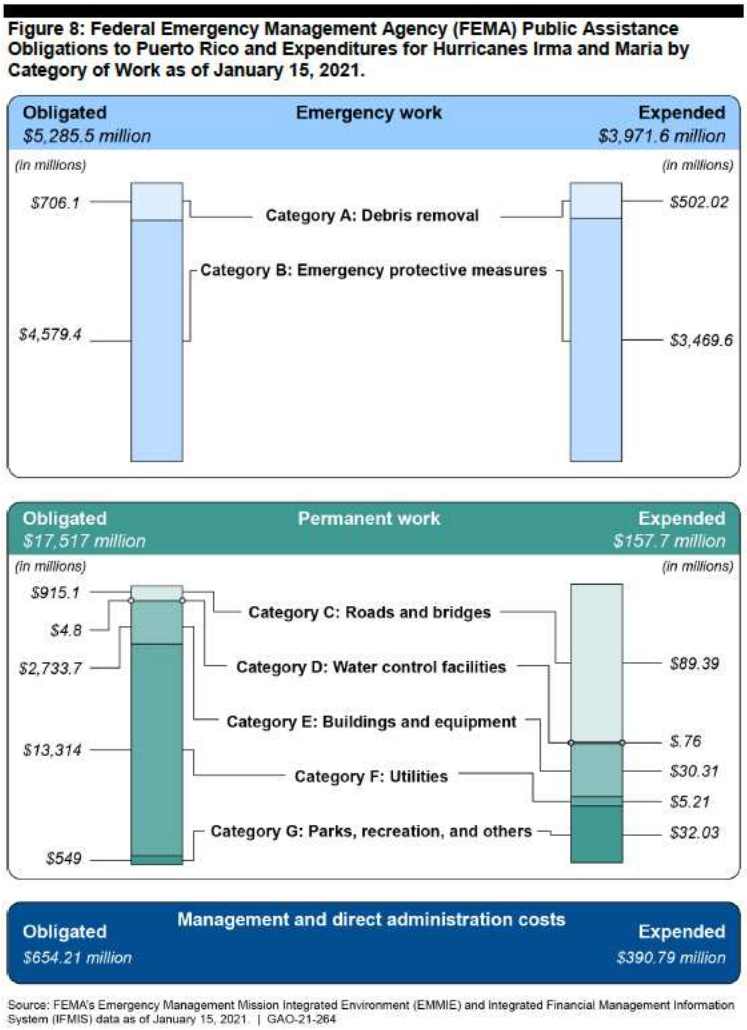
Exhibit B



Source: United States Government Accountability Office, *Puerto Rico Recovery: FEMA Made Progress in Approving Projects, But Should Identify and Assess Risks to the Recovery*, GAO-21-264, (Washington, DC: May 2021), p. 29.

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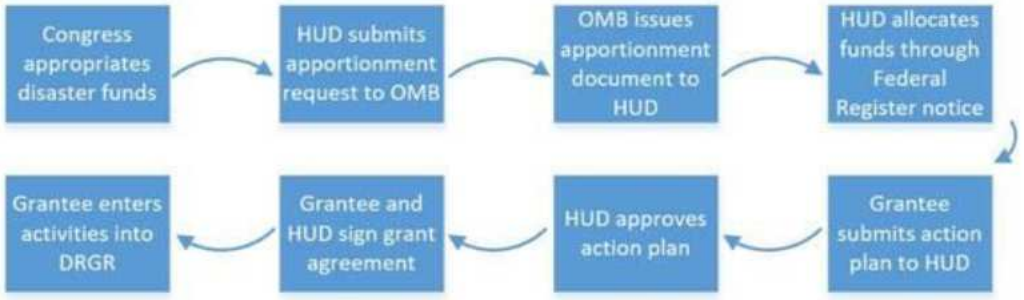
Exhibit C

Image 1: Disaster Recovery Obligation Process



Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 10.

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Exhibit D

	2018 Cont. Apprps Act (P.L. 115-56)	Bipartisan Budget Act of 2018 (Pub. L. 115-123)			Supplemental Appropriation (Pub. L. 116-20)
Appropriation	**$1.507 billion** Housing & Economy September 8, 2017	**$8.221 billion** Infrastructure February 9, 2018	**$8.285 billion** Mitigation February 9, 2018	**$1.9 billion** Electric Power February 9, 2018	**$277.85 million** Infrastructure[1] June 6, 2019
Federal Register Notice	**Published** February 9, 2018	**Published** August 14, 2018	**Published** January 27, 2020	---	**Published** January 27, 2020
Action Plan and Action Plan Amendments	**Submitted to HUD for approval** June 14, 2018 **Approved by HUD** July 29, 2018	**1st Amendment Submitted** Nov 16, 2018 (Approved Nov 18, 2018) **2nd Amendment submitted** Aug. 15, 2019 (Approved Aug 23, 2019) **3rd Amendment submitted** February 24, 2020 (Approved Feb 24, 2020)	**Action Plan submitted to HUD** December 4, 2020 (Approved April 19, 2021)	---	**4th Amendment submitted** July 9, 2020 (Approved Aug 17, 2020) **5th Amendment submitted** December 8, 2020 (Approved Feb 5, 2021) **6th Amendment submitted** March 8, 2021 (Approved March 15, 2021)
Grant Agreement	**Executed** September 20, 2018	**Partially Executed** Divided in 4 disbursements with first being $1.7 billion February 4, 2020	---	---	---
	19 programs being rolled out $500 mm+ spent	--- (Adds 8 programs, so 27 total)	---	---	---

Source: Fiscal Oversight and Management Board for Puerto Rico, *Disclosure Statement for the Seventh Amended Title III Joint Plan of Adjustment for the Commonwealth of Puerto Rico et. al.,* July 30, 2021, p. 147.

We note that HUD published the Federal Register notice for the use of the $1.9 billion allocated by Congress for work on Puerto Rico's grid on June 22, 2021. The Puerto Rico Housing Department has published a first draft of the Action Plan for the use of those funds, which is currently subject to public review and comment.

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Exhibit E

Table 4: HUD's Legal Concerns to OMB Comments on Mitigation Notice

HUD Concern	Description of HUD Concern
HUD's Power to Issue Requirements Limited to the Authority Delegated by Congress	"As a general matter . . . there must be a reasonable relationship between the HUD imposed condition or requirement for obtaining access to funds and the effective administration of disbursement and use, within the confines of the statutory authority, of the funds. In particular, waivers and alternative requirements must be for good cause and must be not inconsistent with the purposes of title I [of the HCDA]."
10th Amendment Federalism Concerns	"In this regard, there are 10th amendment federalism concerns regarding grants to states. Conditions on the use of Federal grant funds must be related to the purpose of the funds, clear and unambiguous, and not coercive. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987). While the 10th amendment does not afford the same protections to Puerto Rico as it does to CDBG-MIT grantees that are states, *see* United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 82 (2016) (territorial governments are a creation of Congress and owe their powers to the statutes of the United States) . . . . Puerto Rico and the United States Virgin Islands are defined as a 'state' under title I of the HCD Act. Thus, the discussions herein are equally applicable to all jurisdictions. . . ."
The Impoundment Control Act[101]	"Particularly when considered as a collection of requirements, the structural reform requirements also raise issues under the Impoundment Control Act (ICA). To the extent the structural reform requirements, as implemented, cause substantial difficulty or delay in accessing funds, the basis for the conditions is likely to be more closely scrutinized under the principles set forth above. More fundamentally, undue delay in disbursing appropriated funds may result in a determination of 'impoundment' . . . . It should be noted that HUD staff are unaware of any deferral or rescission requests related to the mitigation funds appropriated by Public Law 115-123. If funds are delayed beyond ordinary processing timelines or subjected to unusual conditions or requirements, the question of impoundment may arise, either in a litigation or political context."

Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 26.

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Exhibit F

Table 5: HUD's Concerns to OMB's Structural Comments on Mitigation Notice

OMB Structural Reform	Excerpts of HUD Concerns
Property Management	"Most HUD programs do not require proof of ownership but instead are targeted merely to 'occupants[.]' *See* HCDA 105(a)(4) (42 U.S.C. Sec. 5305 (a)(4)) and 24 CFR 570.208(a)(3). This weakens the relationship to requirements for a property management system. In contrast, FEMA does often look to ownership."[102] "Property tax assessments clearly would appear to be outside the reasonable relationship to grant administration."
Revenue Maintenance	"Insofar as tax matters are legislative in nature, HUD would generally have no authority to impose statutory changes as a precondition to funding. Congress has previously directed HUD, across a range of issues, not to mandate local law changes as a condition to making grants." (Citation omitted).
Permitting, Enforcement and Inspection	"HUD would have no authority to impose requirements outside of projects using grant funds. We also note that many jurisdictions would be found to have significant deficiencies in this area if standards were consistently applied. HUD currently has no available means of specifically assessing this or resource capacity to do so. Instead, HUD's current financial certification requirements are based on uniform federal administrative requirements."
Cost Reasonableness	"OMB regulations at 2 CFR 200.420 through 200.475 address cost reasonableness in significant detail." "The appropriations act specifically prohibits HUD from establishing alternative requirements to federal labor standards. Insofar as Federally imposed Davis-Bacon wage rates are the principal driver of additional labor costs with respect to Federal grants, focusing on locally imposed minimum wage rates may have relatively little impact, particularly in the construction area, and raises a potentially potent public policy paradox." "HUD has no statutory authority to apply remedies against the personnel of a grantee except in cases of fraud, waste and abuse. Principles of federalism . . . would also impede such action. Further, applying discipline against grantee employees . . . would likely be deemed an indirect violation of the express restrictions against waivers of labor law provisions."
Timely Payments	"There seems to be little proximate relationship between these factors [ensuring that contracts and bills will be paid in a timely manner], especially given the difficult of measuring this. Further, this objective seems to be at cross-purposes with other provisions aimed at ensuring all payments to vendors are thoroughly reviewed and vetted. It seems highly likely that if requirements were imposed in this area, it would result in cross-claims against the federal government for delays in disbursing grant funds."

Source: Office of Inspector General, U.S. Department of Housing and Urban Development, *Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico*, April 20, 2021, p. 27.

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LIGA DE CIUDADES DE PUERTO RICO

Testimony of Cristina M. Miranda – Palacios, MCP, CHO
Executive Director
League of Puerto Rican Cities

To: U.S. Commission on Civil Rights

Re: Federal Emergency Management Agency (FEMA)'s role in disaster preparedness and response to Hurricane Maria in Puerto Rico

Date: December 10, 2021

Buenos días and special greetings to the members of the US Commission on Civil Rights, my fellow panelists, and members of the audience.

I am honored to be here today to provide insight into FEMA's role in disaster preparedness and response to Hurricane María in Puerto Rico, as well as on the role of our central government.

I want to start by providing a brief description of the organization that I am honored to lead, the League of Puerto Rican Cities, La Liga. La Liga is a not-for-profit organization, founded in 2019, that unites local governments (municipalities) on the island in a non-partisan, but political, effort to improve the quality of life of the Puerto Rican people. As an entity, we aim to strengthen the capacity of local governments and communities on the island in the face of social, structural, fiscal, and governmental challenges.

After the dramatic impact of Hurricanes Irma and María in 2017, mayors united in a collaborative effort to identify best practices and lessons learned, as well as to develop collaborations to inform and guide them in their reconstruction processes. From 2017 till 2019, the mayors of over 46 municipalities united in a technical assistance and capacity building process, supported by several key partners.[1] Two years after the first convening, La Liga was incorporated as a non-profit non-partisan organization, a grand achievement in Puerto Rico's highly politized environment.

When I say that I am honored to lead La Liga I really mean it. I believe in the power and the importance of municipalities. And I am convinced that change will come thru these important units of local government. After the devastating impact of Hurricane María, and after all natural disasters, it has been municipalities the ones that have been at the forefront, providing the essential

[1] Key partners included: Ford Foundation, Center for a New Economy, Open Spaces, Open Society, and others. Seed funding was provided by Ford Foundation.

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services needed by the communities, many times without the required allocation of resources.

I can anticipate that many of the things that I will share with you today are similar, or even the same, as my fellow panelists. 4 years have passed since Hurricane María; to be precise, 4 years, 2 months, and 20 days... or 1,542 days.... But who is counting? And while over 4 years have passed, our reconstruction and recovery process seem to be stagnant. Hurricane María's force was extremely destructive. And so has been the response.

Let's look at some important points about the recovery process in Puerto Rico:

1. María was a category 4 hurricane, that decimated our electrical grid and caused historical damage, known by all.
2. Hurricane María, or the lack of preparation for it and the state of our infrastructure, killed more than 4,600 people in Puerto Rico, 70 times the official toll, according to estimates in a Harvard University study.
3. Neither the Federal government, nor the Puerto Rico government were prepared for the magnitude of the disaster. As an example of this, the Harvard study found that a third of deaths after the hurricane were due to interruptions in medical care caused by power cuts and broken road links.
4. A report published on September 25, 2020 (OIG-20-76), by the Office of the Inspector General of the Department of Homeland Security confirmed what we all knew: that the federal government was unprepared for the management of the disaster. The report establishes that FEMA mismanaged the distribution of commodities in response to Hurricanes Irma and María in Puerto Rico. That FEMA lost visibility of about 38 percent of its commodity shipments to Puerto Rico, worth an estimated $257 million. And, adding insult to injury, that the commodities that were successfully delivered to Puerto Rico took an average of 69 days to reach their final destinations. The report concluded that "FEMA [could not] ensure it provided commodities to Puerto Rico disaster survivors as needed to sustain life and alleviate suffering as part of its response and recovery mission." Let that sink in. FEMA could not ensure that it provided what was need in our communities to sustain life and alleviate suffering. Let that sink in. The report also establishes that inadequate FEMA contractor oversight contributed to the lost visibility and delayed commodity shipments.
5. When it comes to spending, and a word that we prefer in La Liga is investing, the reality is not better. Recent reports establish that only 1% of the funds have been disbursed for permanent works projects. (CPI[2]). Other reports state that only 18% of the overall approved FEMA funds have been disbursed.(Noticel[3]) How, one may wonder, with so much need and with the available resources, how can we be so behind in our reconstruction process? FEMA's delay in damage inspections, too many changes or lack of staff from COR3 and FEMA, and confusion over federal

[2] Como suero de brea los proyectos de envergadura que se harían con fondos de recuperación - Centro de Periodismo InvestigativoCentro de Periodismo Investigativo

[3] Notices. A cuatro años de María solo se ha desembolsado el 18% de los fondos de FEMA

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processes[4] have caused this unforgivable man-made delay. To this we must add, of course, the impact that the unilateral and ill-informed austerity measures imposed by the Fiscal Control Board have caused municipalities.

6. It is important to note that funds that were directly allocated to local governments (funds a & b), were promptly disbursed and used, evidencing that local units of government can be more agile than the Central Government.
7. There is widespread discomfort with the management of the FEMA funds by the central government, specifically with the company contracted by COR3, ICF Incorporated. As an example, the mayor of Jayuya, the municipality with the most FEMA funds allocated, recently stated: "These people [ICF Incorporated] do not work, and if they work, they change their minds and instructions every day." Summarizing his discontent and frustration the mayor shared the following about ICF: "It does not work. It is a great stone on the road ". It is important to note that since 2018 ICF has signed contracts with COR3 that surpass the sum of $406 million dollars, in part to advise and give administrative consultancy to the municipalities and government agencies to obtain funds. Has it been worth it? Have the funds reached their intended destination? Have the projects been completed or commenced? And, even more importantly, have the people been served? We know the answer to these questions. And the answer is a solid no.
8. The complaints expressed by the Mayor of Jayuya are shared, and amplified, by other mayors, that have stated that they face similar obstacles with ICF and with the burdensome and bureaucratic process established by the COR3. It almost feels as if there were remaining winds from María impeding the recovery. To these obstacles we must add the dramatic increase in material costs, the absence of labor, the lawsuits related to the lack of compliance from insurance companies, the compounding effects of other disasters, and of course, the pandemic. All of this is further complicated by the delays caused by the COR3 in the approval of documentation previously approved by FEMA. It is important to note that Section 428 of the Stafford Act establishes that if costs increase after estimates are approved, municipal governments are responsible for the extra expenses incurred. It does not mention anything about assigning responsibilities for the delays that lead to increases in construction costs.
9. Further complicating the reconstruction process it's the fact that FEMA funds must be reimbursed. As stated before, Municipalities are facing a multiplicity of constraints imposed, unilaterally, by the Fiscal Control Board, as well as the Central Government. Municipal budgets are facing drastic reductions while the needs of their constituents increase. As an example, from 2015 to 2018 municipal budgets recorded a reduction of almost 15%. It is expected that by fiscal year 2023 - 2024 43 municipalities in Puerto Rico will be fiscally unviable. If funds must be spent to be reimbursed, but the available funds are extremely limited, municipalities must be strategic on how to invest their reduced

[4] CPI

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resources. A task that would be easier to manage if the reimbursement process was not as slow as it is. Initially, COR3 had an eight-stage process that they established could take an average of 240 days. They have recently announced that this was reduced to four stages, with an average of 60 days. Will it work? Hopefully, but we must wait to see if it does.

As you can see, bureaucracy and a rampant lack of capacity have impeded the recovery process in Puerto Rico. Much has been said about the lack of capacity of municipalities to access the required funds. Nothing is said about the causes of that loss of capacity. And not much is said about the lack of capacity at the Central Government.

But there is more impeding the recovery process. And this is, an incapacity to understand the consequences of decisions made at the Central Government. An example of this is the adoption by the Central Government of the *advisory maps* completed by FEMA. These advisory maps are incorrect, misleading, and dangerous. They do not consider previous mitigation projects, funded with federal funds, and they also exclude many potential beneficiaries by identifying many communities as being in a floodplain. This is particularly impactful for many disadvantaged and economically disenfranchised communities, who will not be able to receive the required funding, ending in displacement.

Time constraints do not allow me to delve into the topics that I have brought up in a general way. However, we are hopeful about this public briefing. Hopeful that it will result, not only in the identification of all the things that have gone wrong, but in actions to correct them and to prevent them from ever happening again. Changes that advance our recovery process and that guarantee equitable and just access to our most at need and disadvantaged communities. Changes that reduce disparities and inequities associated with access to relief aid. Changes that improve the planning, coordination and execution of disaster recovery and the effective administration of disaster relief to our communities. Changes that foster a more equitable and just recovery.

Changes that can start with the adoption of these recommendations:

1. Decentralize recovery funds to ensure a more expeditious, equitable and just recovery.
2. Coordinate a task force, composed of representatives of the government, as well as non-profit sector, to discuss recommendations on how to streamline processes at COR3, specifically related to performance, compliance, and payment and reimbursement processes, to ensure that these are faster.
3. Reduce the risk of disaster recovery spending at the local level thru the allocation of funding to increase the capacity of municipalities. This can be achieved thru technical assistance that is tailored made and culturally competent, and that also focuses on the transfer and creation of knowledge to ensure that these important units of local government are better prepared for the next disaster.
4. Adapt to the reality that reimbursements are not necessarily viable for municipalities.

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5. Complete an assessment about disparity in regulations to access funds imposed by our own government, and that have a negative impact on the most disadvantaged and at need communities. (Ex. R-3 / CDBG-MIT)
6. Communicate to the Central Government that FEMA's advisory maps are precisely that, advisory, and that these should not be adopted without the proper confirmation of their correctness.
7. Complete an assessment on the impact of federal impositions that are focused on formalized communities and that do not adapt to the legal framework or the reality of Puerto Rico.
8. Continue, and expand, this important conversation to identify key stakeholders, areas of improvement and lessons learned that, if adopted and scaled up, could result in a more just and equitable recovery process.

For additional information please feel free to reach us. We hope to continue the conversation with you to improve the recovery process, but above all, to be able to work towards a fairer and more equitable recovery.

Cordially,

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US COMMISSION ON CIVIL RIGHTS BRIEFING

CIVIL RIGHTS IMPLICATIONS OF DISASTER RELIEF:
HURRICANE MARIA IN PUERTO RICO

CARMEN YULIN CRUZ SOTO

WEISSMAN FELLOW IN LEADERSHIP, MOUNT HOLYOKE COLLEGE

FORMER MAYOR OF SAN JUAN, PUERTO RICO 2013-2020

DECEMBER 10, 2021
SAN JUAN, PUERTO RICO

Distinguished members of the Commission and fellow panelists:

Thank you, for the opportunity to shine a light on the negligent acts perpetrated by FEMA, under the Trump Administration, in the aftermath of Hurricanes Irma and Maria. Approximately, three thousand Puerto Ricans died, after a botched relief effort denied us lifesaving support. These deaths could have been prevented if our suffering had been met with urgency and efficiency.

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Earlier this year, two reports from the Inspector General's Office concluded, what we knew all along, FEMA was unprepared and mismanaged relief efforts. (April 20, 2021 – Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery & Mitigation Activities in Puerto Rico, September 25, 2021, FEMA's Management of Commodities after Hurricane Irma & Maria)

One of the reports stated it took an average of 69 days, more than two months, for aid to arrive. On its Executive Summary it said "…FEMA cannot ensure it provided commodities to Puerto Rico disaster victims, as needed to sustain live and alleviate suffering…".

Under the veil of political neutrality, FEMA's highest managerial levels turned a blind eye to the unequal treatment that cost so many lives. Two data points paint a clear picture of neglect:

1. Nine days after Harvey, there were 30,000 FEMA personnel in Texas: in Puerto Rico, nine days later, 10,000.

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2. It took FEMA 10 days to approve disaster work after Harvey; it took them 43 days to approve the same work in Puerto Rico.

FEMA was unable to adapt its *Standard Operating Procedures* and get their relief operations of the ground on a timely fashion; they kept asking for reports to be filled out on the internet, when they knew we had we no electrical power and thus no internet.

There was also no consistency in the instructions provided to us: one day we were told to use one form, or one system and a few days later we were told to use another form and input the data on another system. A new FEMA employee arrived, and we had to start again for there was no hand off, no knowledge of what happened before, only new instructions with no explanations.

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Language was another barrier: not only was the information initially in English, disregarding our first language is Spanish; but FEMA's personnel was incapable or servicing the deaf community and did not take into consideration that people have different levels of internet proficiency and access.

And when relief finally arrived it added insult to injury. This is a picture of the food distributed by FEMA about 3 weeks after the crisis began.

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Shameful! Not only was this food not suitable, but FEMA was incapable of setting up, or help us set up, a robust, consistent, and adequate supply chain of aid.

In the Municipality of San Juan, we were prepared to make breakfast, lunch, and dinner for our employees for four months. In the end, we provided meals for them, food for 26 community soup kitchens;

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we provided food, water, emergency management help for approximately 65 elderly homes and elderly care type organizations. New York City Emergency Management, which arrived a week after Maria, established for us a robust distribution system built on the strength of our relationships with religious, community and recreational leaders; thus we were able to provide food and water to 34 communities. With the help of Goya, Hispanic Federation, Chobani, Suiza Dairy, Tres Monjitas, Chocolate Cortes and food and water purchased at the municipal level, we were able to meet local nutritional needs.

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We also focused our aid distribution on those living with HIV/Aids, immigrants, elderly, homeless, those with children/adults with physical and emotional challenges.

Where FEMA was incapable, we stepped in; we figured it out. FEMA should have had a road map, a blueprint for how to do this and precious time would have been saved. Our first aid came from Chicago, from the Boricuas of the Diaspora; I remember thinking how they could,

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do this on their own, while FEMA was incapable of doing the most basic part of their job: get to us the live saving relief we needed to survive.

The violation of our civil rights had an immediate and lasting effect. Today, you will hear testimony from organizations who had to deal with FEMA's fallout in almost every single aspect of our lives. Most of them are still fighting today for the same things.

In my written testimony, I have included recommendations on what can be done so FEMA is always able to respond appropriately. No doubt we were treated differently, and it had devastating consequences. Think about this: Hurricane Harvey impacted about 13 million people and 88 people died. Maria affected 3.5 million people and 3,000 died. One live is not more important than other; but negligence no doubt, took a toll.

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Why the inequity? For those in power we were less important because we are colonial subjects. Black and brown people, 60% below the poverty line.

Today, December 10th, the world commemorates Human Rights Day. We have the duality of being United States citizens and Puerto Rican nationals. Two nations: where one colonized the other; in 1917 we were made American citizens by birth. Yes, our civil rights were violated but so were our human rights as a nation invaded, colonized, and exploited. They were violated while the island of Vieques was used by the US navy as target practice; violated while the effects of contraceptives, 20 times more potent than those finally approved, were tried on Puerto Rican women; violated today, when a fiscal control board reduces the hopes of our current and future generations by decreasing pensions and increasing the cost of education at the university level.

While the violation of our Human Rights is addressed in other forums, we can move forward, and together, to ensure what happened

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in Puerto Rico in 2017 does not happen again. NEVER MUST a live be lost because FEMA, or any other agency, is incapable of putting action plans into place treating people with urgency, dignity, and respect. Never again must the price of incompetence be the lives of so many.

I am hopeful, and confident, we can move forward in this common endeavor. Thank you. ###

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Testimony of Diane Yentel,
President and CEO, National Low Income Housing Coalition
Presented to the United States Commission on Civil Rights
"**Government Response to Hurricane Maria"**
December 10, 2021

I. Introduction

On behalf of the National Low Income Housing Coalition and the Disaster Housing Recovery Coalition (DHRC), I would like to thank the Commission for the opportunity to provide testimony on how the government response to Hurricane Maria and other disasters have neglected the needs of the lowest-income and most marginalized survivors, including people of color, people with disabilities, people experiencing homelessness, and others.

The National Low Income Housing Coalition (NLIHC) is dedicated solely to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. NLIHC leads the DHRC of more than 850 national, state, and local organizations, including many working directly with disaster-impacted communities and with first-hand experience recovering after disasters. Together, we work to ensure that federal disaster recovery efforts prioritize the housing needs of the lowest-income and most marginalized people in impacted areas. The DHRC has published comprehensive disaster housing recovery recommendations for Congress,[i] the Federal Emergency Management Agency (FEMA),[ii] and the U.S. Department of Housing and Urban Development (HUD).[iii]

NLIHC has worked on disaster housing issues since Hurricane Katrina struck New Orleans in 2005 and worked closely with Puerto Rican advocates and partners after Hurricane Maria in 2017. From these and other experiences, we have concluded that America's disaster housing recovery system is fundamentally broken and in need of major reform. The current system was designed for middle-class and predominantly white people and communities; it does not address the unique needs of the lowest-income and most marginalized people and the communities in which they live. As a result, these households are consistently left behind in recovery and rebuilding efforts and their communities are left less resilient to future disasters. The federal disaster recovery system exacerbates many of the pre-disaster challenges these communities faced: worsening the housing crisis, solidifying segregation, and deepening inequality.

Federal, state, and local governments' inequitable disaster recovery efforts disproportionately harm Black, Indigenous, Latino, and other survivors of color and their communities. Recovery efforts tend to prioritize higher-income and disproportionately white homeowners over lower-income and disproportionately Black and brown renters and people experiencing homelessness. In doing so, disaster recovery exacerbates racial wealth disparities and pushes more low-income renters of color into long-term housing instability and, in worst, cases homelessness. While Black and brown communities are often located in areas at higher risk of disaster and have less resilient infrastructure to protect residents from harm, long-term recovery resources tend to go to white communities that face lower risks. Rather than dismantling racial segregation that is the

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direct result of intentional federal, state, and local policy, rebuilding efforts tend to entrench racial disparities.

This inequitable disaster recovery was exemplified by the federal government's response to Hurricane Maria. Puerto Rico was already experiencing a housing crisis before Maria devastated the island. Forty-five percent of the territory's population lived in poverty – more than triple the fifteen percent U.S. national rate. Three out of four of the lowest-income families paid more than thirty percent of their income on housing, and the existing housing stock was often in poor condition, with more than 110,000 homes lacking basic kitchens and plumbing. In the immediate aftermath of the storm, FEMA denied nearly two-thirds (60%) of the nearly 1.2 million individual assistance applications filed in Puerto Rico – twice the denial rate in Texas after Hurricane Harvey. Congress was slow to approve badly needed long-term recovery funds, which were further impaired by arbitrary requirements, a lack of transparency, and lack of protections for low-income disaster survivors.

In this testimony, I discuss key barriers to equitable and comprehensive disaster housing recovery and opportunities to reform FEMA and HUD programs to ensure that resources are deployed quickly, equitably, and effectively. These barriers[iv] and opportunities for reform[v] are included in "Fixing America's Broken Disaster Housing Recovery System," a two-part report published by NLIHC and Fair Share Housing Center of New Jersey.[vi]

Our policy recommendations are grounded in nine core principles that should guide the country's disaster housing recovery and mitigation efforts:

1. Recovery and mitigation must be centered on survivors with the greatest needs and ensure equity among survivors, especially for people of color, low-income people, people with disabilities, immigrants, LGBTQ people, and other marginalized people and communities.
2. Everyone should be fairly assisted to recover through transparent and accountable programs and strict compliance fully and promptly with civil rights laws, with survivors directing the way assistance is provided.
3. Securing help from government must be accessible, understandable, and timely.
4. Everyone in need should receive safe, accessible shelter and temporary housing where they can reconnect with family and community.
5. Displaced people should have access to all the resources they need for as long as they need to safely and quickly recover housing, personal property and transportation.
6. Renters and anyone experiencing homelessness before the disaster must quickly get quality, affordable, accessible rental property in safe, quality neighborhoods of their choice.
7. All homeowners should be able to quickly rebuild in safe, quality neighborhoods of their choice.
8. All neighborhoods should be free from environmental hazards, have equal quality and accessible public infrastructure, and be safe and resilient; and
9. Disaster rebuilding should result in local jobs and contracts for local businesses and workers.

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These core principles and the following policy recommendations should serve as a guidepost for this commission, Congress, and other federal policymakers as we work to reform our nation's disaster housing recovery framework.

II. FEMA Related Barriers to Equitable Housing Recovery

After a disaster, displaced families must have a safe, accessible, and affordable place to live while they recover. FEMA programs can provide crucial assistance to help survivors recover from a disaster through temporary shelter and financial assistance and making basic structural repairs to homes. However, FEMA creates unnecessary and often insurmountable barriers to accessing these programs, leaving many low-income survivors at increased risk of displacement, eviction, and, in worst cases, homelessness.

FEMA programs are not designed to serve lower-income people with the greatest needs; such households are consistently denied assistance. For example, After Hurricane Maria, a full 60% of all applicants were denied FEMA Individual Assistance (IA).[vii] After Hurricane Harvey, nearly half of disaster survivors with the lowest incomes were denied; the vast majority of higher-income households were approved[viii].

FEMA's Failure to Address Housing Needs

FEMA programs neglect the housing needs of America's lowest income disaster survivors and exacerbate housing insecurity. Without the affordable and accessible homes survivors need, many return to uninhabitable homes, sleep in cars or tents, stay at shelters, double- or triple-up with other low-income families, or pay more than half of their limited incomes on rent.

Research demonstrates that disasters exacerbate the existing rental housing crisis for households with the lowest incomes.[ix] After 2012's Hurricane Sandy, households already dealing with housing instability were further destabilized through displacement and increased rents. Two years after Sandy, few new affordable homes had been completed yet survivors were no longer eligible for federal rental assistance.[x]

The impact of disasters on low-income people's housing needs is made worse by FEMA's recent refusal to activate the Disaster Housing Assistance Program (DHAP), rendering some survivors homeless.[xi] During past disasters, both Republican[xii] and Democratic[xiiixiv] administrations upheld DHAP as a best practice for disaster housing recovery. DHAP was created after hard-won lessons from Hurricane Katrina, and it has been used successfully in some major disasters since that time. Under DHAP, displaced families receive longer-term direct rental assistance and case management services provided by local housing professionals with extensive knowledge of the local housing market. This assistance helps families find permanent housing solutions, secure employment, and connect to public benefits as they rebuild their lives.[xv]

After Hurricane Maria and other 2017 hurricanes, FEMA instead relied on its Temporary Shelter Assistance (TSA) program and other programs that are inaccessible to many low-income survivors. TSA is intended to reduce the number of survivors in congregate shelters by covering the cost of staying in an approved hotel or motel for an initial period of up to 14 days. The program has multiple barriers to participation for low-income people, many of them insurmountable.

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Low-income families are often unable to access TSA motels due to financial and other barriers, including the practice of motels charging daily "resort" fees and requiring security deposits or credit cards. Because TSA must be renewed every 14 days, disaster survivors who do access the program face regular, arbitrary deadlines that require them to resubmit required paperwork or leave the motel before finding a permanent housing solution.

While FEMA is authorized to provide TSA for eight months, after Hurricane Maria the Trump administration abruptly terminated[xvi] the program for nearly 2,000 Puerto Rican families displaced to the continental US, forcing them to find alternative housing or to return to their uninhabitable homes on the island with very little notice. DHRC member LatinoJustice PRLDEF filed a lawsuit challenging FEMA's decision to prematurely end TSA, but a federal judge denied the request. In his order, the judge made clear that this was not his preference. He stated that "while this is the result that I am compelled to find, it is not necessarily the right result. However, the Court cannot order that Defendants do that which in a humanitarian and caring world should be done – it can only order the Defendants to do that which the law requires."[xvii]

Many disaster survivors whose TSA was terminated without alternate housing assistance became homeless. Homelessness increased in states with large numbers of displaced Puerto Rican survivors - by 14 percent in Massachusetts and by 17 percent in Connecticut[xviiixix] - an extraordinary failure of the federal government's disaster recovery response.

FEMA's other temporary housing assistance programs – Rental Assistance and Direct Temporary Housing Assistance –are also problematic for low-income families. Through its Rental Assistance program, FEMA provides financial assistance to survivors to rent temporary housing. The amount of assistance provided to survivors is based on the impacted area's Fair Market Rent (FMR) which is often considerably less than rental costs in the area to which survivors have been displaced, particularly after major disasters like Hurricane Maria. Moreover, FEMA rental assistance covers rent and utilities for only two months, which is too short a timeframe for many of the lowest-income survivors. Many landlords are unwilling to enter into leases with survivors when only two months of rental assistance is assured.

Under FEMA's Direct Lease program, FEMA enters into lease agreements with property owners to provide rent assistance for survivors. A similar program, the Multi-Family Lease and Repair program, allows FEMA to enter into lease agreements with multifamily housing property owners and to make repairs to provide temporary housing. Both programs, however, have extremely low rates of participation by property owners and are inadequate to meet post-disaster rental needs.[xx]

FEMA Neglects the Needs of Marginalized Populations

People Experiencing Homelessness

People experiencing homelessness are often most at risk during a disaster and have the fewest resources to recover. People who are homeless are unlikely to have the resources needed to adequately prepare for or evacuate prior to a disaster, and their unique needs are often overlooked by emergency managers when planning for disasters. During the recovery, resources meant to address a community's pre-disaster homelessness become stretched thin to accommodate those households that became housing insecure because of the disaster.

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Communities are often unable to return to the level of care provided to people experiencing homelessness before the disaster.

People experiencing homelessness are often excluded from or face additional barriers to FEMA resources, including mass shelters and individual assistance. In the immediate aftermath of Hurricane Maria, individuals with disabilities – including many experiencing homelessness – put in shelters unable to meet their needs. There was only one fully accessible centralized shelter for people with disabilities on the island, which was immediately evacuated after Hurricane Maria. Those survivors who arrived at the location were often involuntarily committed to hospitals.[xxi]

After 2017's Hurricane Irma hit Florida, FEMA required people experiencing homelessness to wear armbands and be separated from other disaster survivors.[xxii] Pre-disaster homeless populations are often denied FEMA assistance even if all their belongings were destroyed in the disaster.[xxiii] These actions further stigmatize people experiencing homelessness and often prevent them from accessing the resources they need to stay safe.

People with Disabilities

People with disabilities also face barriers to assistance. They are two to four times more likely to die or sustain a critical injury during a disaster than people without disabilities.[xxiv] Despite an increased risk of death and injury, many emergency plans do not address how local officials can reach those with disabilities during a disaster. People with disabilities are often diverted to "special needs" or "medical shelters," even if they do not require the level of care provided there. This practice fosters forced institutionalization and places people with disabilities at greater risk of injury or death.

Individuals with disabilities in Puerto Rico were particularly vulnerable to the effects of Hurricane Maria due to a lack of support for their needs prior to the storm and the failure of the federal government to ensure equitable access to programs, such as Supplemental Security Income and the Supplemental Nutrition Assistance Program.[xxvxxvi] In the immediate aftermath of Hurricane Maria, response efforts concentrated on central locations within each municipality. Individuals with disabilities unable to travel went without food and water for lengthy periods.

Individuals with Limited English Proficiency

Individuals with limited English proficiency often face difficulty in accessing FEMA resources. In Puerto Rico, FEMA struggled to find translators or provide basic information in Spanish, the predominant language on the island.[xxvii] When documents were translated into Spanish, the translations were often inaccurate and confusing. Housing inspectors employed by FEMA also often only spoke English, resulting in disaster survivors receiving little to no information on whether the damage to their homes allowed them to access assistance.[xxviii] While FEMA's regulations require that such documents be produced, advocates commonly express concern that the agency and its grantees regularly distribute forms only in English or with limited translated versions.

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FEMA's Onerous Title Documentation Requirements

Eligible applicants often do not receive FEMA assistance due to inflexible and arbitrary requirements, rigid interpretations of rules, and confusing and bureaucratic processes. FEMA's rigid title documentation requirements, for example, have for decades barred low-income survivors from FEMA assistance.

Until very recently, FEMA required disaster survivors to provide title documentation to prove eligibility for the Individual Assistance (IA)[xxix] program and other recovery aid, even though its own guidance on Individual and Household Assistance allows alternative documentation of ownership. Low-income homeowners, residents of manufactured housing, renters without written leases, and other individuals frequently lack such documentation or the ability to quickly procure proper documents. FEMA's rigid and unnecessary policy has harmed low-income disaster survivors since at least 1995.

After Hurricane Maria, FEMA denied assistance to at least 77,000 survivors due to title documentation issues.[xxx] For months, NLIHC and the DHRC pushed FEMA to remove this unnecessary obstacle to low-income Puerto Ricans receiving needed assistance. DHRC member and NLIHC partner Ayuda Legal engaged and worked with FEMA's Office of Chief Counsel to create a "sworn statement" to allow Puerto Rican homeowners without title documents to prove ownership of their homes and receive the assistance to which they are entitled. Because FEMA refused to notify survivors of the form's availability or to make the statement available online or on social media, few survivors were able to use this process to access FEMA assistance.

These same issues occurred in the continental U.S. after other disasters. In North Carolina and other parts of the American South, rural, historically Black communities often do not use title systems, instead implementing informal systems like those used in Puerto Rico. After Hurricane Katrina, thousands of poor Alabamians were denied assistance due to lack of formal titles on their damaged homes. After Hurricane Michael, FEMA denied assistance to as many as 50% of applicants in certain parts of the panhandle largely due to elderly households and mobile homeowners lacking FEMA-required title documentation.[xxxi] After California's wildfires, FEMA denied assistance to 70% of applicants due to title issues.[xxxii] Those denied were predominantly rural mobile homeowners, many of them farmworkers or other low-income workers, who do not have title to their homes. In all cases, FEMA refused to modify its programs to accommodate the situation, choosing instead to deny eligible applicants needed assistance to which they were entitled.

Disincentives to apply for assistance, such as title documentation requirements, and resulting high denial rates not only limit immediate assistance for low-income survivors but also distort the broader recovery; IA application data are used to make funding determinations throughout the federal disaster recovery process.

Work to reform FEMA's harmful title-requirement policy began with efforts by NLIHC, disaster survivors, and partners in Louisiana, Alabama, and Mississippi after Hurricane Katrina, and they were continued by the DHRC and advocates in Texas and Florida after Hurricanes Harvey and

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USCCR-21-1814-B-001032

Michael, in California after several wildfires, and in Puerto Rico in the aftermath of Hurricane Maria by our partners Ayuda Legal..

As a result of this advocacy, in September of 2021, FEMA issued substantial improvements to how it conducts verification for occupancy and ownership of disaster damaged homes.[xxxiii] Under FEMA's new policy, these survivors can now self-certify ownership of their homes when they do not have other documentation, overcoming a major hurdle to recovery. FEMA will also allow all survivors to submit a broader array of documents to prove occupancy and ownership of their homes.

These changes are much needed and long overdue, but they are incomplete. Puerto Rico disaster survivors previously denied FEMA assistance must be provided the opportunity to reopen their cases and receive the assistance to which they are entitled. Careful attention must be given to the implementation of these rules, which have not been applied evenly in response to more recent disasters such as in Louisiana after this year's Hurricane Ida. And Congress must make permanent this improved policy to protect against future administrations reverting to previous practice.

FEMA's Systemic Lack of Transparency

Convoluted Application Process

FEMA has consistently refused to clarify or make public important information about its aid application process. By not releasing this information, FEMA makes it difficult, if not impossible, to determine who is eligible to receive assistance and why assistance is denied. A confusing appeals process leads to higher denial rates for low-income disaster survivors.

In Puerto Rico, a lack of transparency and inadequate descriptions of the FEMA process, non-existent or inadequate translations of FEMA documents, and prolonged outages of internet and phone service led to increased difficulty in applying for assistance. As a result, rumors and misinformation were widespread about what FEMA assistance was available and what survivors were required to do to receive help. While volunteer lawyers and community-based organizations attempted to fill this gap, a lack of clear information further delayed recovery and response efforts.[xxxiv]

Basic information on FEMA program eligibility is not made publicly available. Without it, disaster survivors often apply to programs at FEMA, SBA, and HUD with the hopes that at least some assistance will be provided. For low-income individuals who may lack internet or phone access or who may need special accommodations to apply, completing multiple applications can be especially problematic. Many disaster survivors with the lowest incomes forgo applying for assistance altogether, despite their need.

The FEMA appeals process is also confusing and difficult. A denied applicant must first submit a form explaining the dispute and providing supporting documentation. FEMA denial letters, however, provide only very vague reasons for the initial denial of assistance. The denied applicant must refute all possible interpretations of the reason, or they will lose their appeal. The

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lack of clarity makes it more difficult for legal aid organizations attempting to inform and assist low-income survivors after a disaster. As a result, appeals take longer and are more costly, and low-income survivors with little access to legal representation or the money for a protracted legal fight simply do not appeal at all.

It is extremely difficult to access basic data about FEMA programs and processes. Freedom of Information Act (FOIA) requests to FEMA often go months or years without being answered. NLIHC filed a FOIA request in December 2018 requesting basic materials, including FEMA's application for assistance, procedure manuals for determining eligibility, and data sharing agreements with HUD and other federal agencies. To date, FEMA has not provided these materials. In other cases, FEMA refuses to provide basic information by claiming grounds of privilege.

Faulty Damage and Needs Assessments

Damage assessments are the foundation of many federal, state, and local recovery decisions, including decisions about how to allocate resources and set priorities. FEMA's assessments, however, frequently underestimate the needs of the lowest-income survivors, leading to fewer resources in communities where they are needed most.[xxxv]

Data from FEMA's Individual Assistance (IA) program are frequently used to shape long-term rebuilding efforts. Low-income survivors, however, struggle to access FEMA programs,[xxxvi] and as a result, the agency provides far fewer benefits to renters than to homeowners. Recent reports indicate that FEMA approval rates have plummeted overall from 63% in 2010 to 13% in 2021.[xxxvii] Relying primarily on FEMA data to make recovery decisions overlooks the needs of renters who were found by FEMA to be ineligible for aid, but who remain in desperate need of recovery funds.

FEMA's Inflexibility and Inability to Adjust to New Conditions

Climate change means disasters are more destructive and more frequent, and they impact a broader geography, posing new challenges for FEMA and disaster recovery efforts. FEMA is not adapting its thinking or its programs to respond to these challenges, instead sticking to a rigid system of disaster aid and recovery based on responding to contained local disasters. FEMA has little capacity to effectively deal with both large, regional disasters and the unique circumstances and needs of a specific community impacted by a disaster.

FEMA systems are not designed to adapt to situations on the ground, creating predictable and repeated challenges. The agency has a rigid allegiance to protocol over outcomes, a stubborn reliance on programs inaccessible to low-income survivors, and the agency repeatedly refuses to release important data on recovery outcomes. FEMA relies heavily on protocol written in Washington, D.C. and not on what the agency hears from local survivors, advocates, FEMA employees, and other stakeholders.

Perhaps the perfect example of this problem is the agency's response to Hurricane Maria. FEMA attempted to apply rules for aiding predicated on a system of land title ownership not practiced in

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Puerto Rico, resulting in tens of thousands of denials of assistance. FEMA's failure to offer simplified application information in languages other than English needlessly complicated the assistance process. FEMA failed to recognize and respond to the needs of individuals with disabilities and those experiencing homelessness prior to the Hurricane Maria. FEMA's ignorance of local law, needs, and vulnerability resulted in an unnecessarily long and ineffective response.

FEMA has consistently failed to learn lessons from past disasters and apply them to future disaster recovery efforts. FEMA's own internal watchdog, the Department of Homeland Security Office of the Inspector General, removed criticisms from reports on the agency's disaster response and replaced them with success stories, praising FEMA's work.[xxxviii] As a result of this lack of internal critique and self-correction, FEMA repeats the same mistakes and does similar harm, disaster after disaster.

III. FEMA Solutions Needed for an Equitable Housing Recovery

Equitable Solutions Centered on the Needs of Survivors

A reformed disaster housing recovery system centered on the needs of the lowest-income and most marginalized survivors and their communities must ensure opportunities for resident and public engagement, systemic transparency, full accountability and due process, robust equity and civil rights enforcement, fair mitigation practices, and a focus on increased local capacity and benefit. These priorities must be reflected in every stage of disaster recovery and response, from pre-disaster emergency planning through long-term recovery and post-recovery mitigation, to help address the systemic racism and classism that have resulted in our broken current disaster housing system.

Robust Equity and Civil Rights Enforcement

Equity must be a central and explicit goal of federal disaster housing response and recovery efforts, and each stage of the response and recovery must be examined and reformed to ensure that federal, state, and local efforts actively dismantle systems of oppression. All emergency response, long-term recovery, and mitigation actions must be designed and pursued in a manner that addresses and prioritizes the needs of the lowest-income survivors, people of color, seniors, people with disabilities, immigrants, and other protected classes. All such actions must also be explicitly anti-racist: analyzed to determine if they exacerbate, leave in place, or ameliorate existing or historic patterns of segregation and discrimination in housing and infrastructure, and remedied accordingly.

Resident and Public Participation

Current disaster housing response and recovery efforts effectively limit opportunities for impacted residents to meaningfully engage and contribute to the rebuilding of their communities after a disaster. State officials are under enormous pressure to respond and rebuild as quickly as possible, often making any public input process rushed and ineffective. Engagement is often limited because residents are unaware of emergency response, rebuilding, and mitigation plans,

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whether because state officials fail to announce public meetings or because materials are provided only in English or in formats that are not accessible, including to people with disabilities. Moreover, plans often do not include essential information – including about how funds will be spent and who will be eligible for which funds – that is needed for the public to engage effectively. Opportunities for engagement are limited and irregular, and they occur too late in the process.

A reformed disaster housing recovery and response framework must ensure robust, ongoing, and timely opportunities for public engagement through structured collaboration with stakeholders beginning with emergency planning and response and continuing through the closeout of recovery and mitigation programs. Residents must be empowered to make decisions for themselves and their communities, and their input must be given substantial weight.

Systemic Transparency

The current federal disaster response and recovery suffers from a systemic lack of data transparency. After past disasters, this failure to provide basic transparency – ranging from damage assessments, determination of unmet needs, program design and implementation, grantee and subgrantee performance, and how federal dollars are spent – has hampered efforts to effectively target and distribute aid to those most in need.

Basic, essential information about federal disaster response and recovery efforts must be made publicly available in a timely manner. This transparency must be systemized, so that it is not provided on an ad hoc basis. Data transparency is critical to ensuring informed public policy decisions, allowing greater public participation in disaster recovery efforts, and helping public and private entities better recognize gaps in services and identify reforms needed for future disaster recovery efforts.

Full Accountability and Due Process

The daunting application process for disaster aid discourages survivors from applying for assistance. The application and appeals processes are confusing, time-consuming, and frustrating. As a result, low-income survivors – especially seniors, people with disabilities, and people with limited English proficiency, and other individuals – face high, unnecessary, and counterproductive barriers to receiving federal disaster housing recovery assistance, and many forgo applying for assistance altogether. By not providing full accountability, transparency, and due process to applicants, the federal government has made it difficult – if not impossible – to determine who is eligible to receive assistance and why assistance was denied, leading to higher denial rates for low-income disaster survivors.

Accountability and due process must be central in any reformed disaster housing recovery and response framework. Federal efforts must ensure that all eligible survivors receive the assistance needed to get back on their feet.

Fair Mitigation Practices

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All emergency response, long-term recovery, and mitigation efforts must be designed and pursued in a manner that gives survivors the choice to relocate or rebuild their communities resiliently, minimizing displacement. As the climate changes, disasters will be both more frequent and more destructive. In response, local and state officials have begun to focus on mitigation and infrastructure improvement. Too often, such upgrades go to more affluent communities, while the needs of lower-income people and people of color are ignored. Moreover, federal, state, and local recovery efforts may actively contribute to displacement by failing to provide survivors with meaningful choices to rebuild resiliently, relocate, or improve infrastructure (such as storm drainage, floodplain management, and other common mitigation measures) in their disaster-affected communities, leaving low-income survivors at greater risk for future disasters than they were prior to the disaster.

Increased Local Capacity and Benefit

All emergency response, long-term recovery and mitigation efforts must maximize the engagement of local contractors and workers and build the capacity of local community-based organizations, putting as much federal resources as possible into the impacted economy and impacted survivors.

Local community-based organizations and networks are in the best position to engage with and have intimate awareness of the unique needs of the lowest-income survivors. These local organizations often do not receive the support needed to build capacity to scale up efforts quickly after a disaster. By relying on out-of-town contractors for everything from debris removal to repair of electrical grids, state and local governments miss an opportunity provide employment, job training, and contracting opportunities to low-income local workers and small- and minority-controlled businesses, which often are in severe need of work because of disasters' disruption to local business.

Immediate Steps to Improve FEMA Response

Congress and the Biden administration should immediately address some of the greatest challenges to a complete and equitable recovery and ensure that FEMA's disaster housing recovery framework is centered on the needs of the lowest-income and most marginalized survivors.

Permanently Authorize and Automatically Activate the Disaster Housing Assistance Program (DHAP)

Congress should permanently authorize DHAP and automatically activate it after every major disaster to provide longer-term housing assistance and wrap-around services to low-income survivors. Such assistance should be provided to eligible survivors until the long-term housing recovery – including the rebuilding of affordable rental housing stock – is complete.

Enact the "Housing Survivors of Major Disasters Act"

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Congress should enact the "Housing Survivors of Major Disasters Act," (H.R. 3037)[xxxix] introduced by Representatives Adriano Espaillat (D-NY) and Jennifer Gonzalez-Colon (R-PR). The bill, which passed unanimously out of the House Transportation and Infrastructure Committee in February 2020, contains critically needed reforms to ensure that the lowest-income and most marginalized survivors can access the housing assistance they need to rebuild their lives.

The "Housing Survivors of Major Disasters Act" would address the significant title-documentation challenges that have resulted in tens of thousands of eligible disaster survivors being wrongfully denied FEMA assistance. The bill would codify and expand upon in statute the recent FEMA application process reforms while also extending the benefits of the new policy to those denied assistance in the past. It would provide a new framework to make it easier for disaster survivors to prove residency in disaster-impacted areas, either by completing a "declarative statement" form or by submitting a broader range of acceptable documents such as utility bills, credit card statements, pay stubs, and school registration in lieu of a formal title to property or leases. The bill also allows survivors in Puerto Rico and across the nation who were previously denied FEMA assistance to reopen their cases to access the assistance to which they are entitled.

Require Full Transparency

Congress should require that FEMA provide basic, essential information about federal disaster response and recovery efforts, including damage assessments, determination of unmet needs, program design and implementation, grantee and subgrantee performance, and how federal dollars are spent. Congress should require FEMA to provide full transparency on program eligibility, the aid application process, and reasons for denials of assistance. Data collected by the government must be open and accessible at the most granular and comprehensive level, while protecting personally identifiable information. This information must be made publicly available in a timely manner and this transparency must be systemized so that it is not provided only on an ad hoc basis.

Data transparency allows policymakers and advocates to be informed about program results and make policy improvements and incorporate best practices into future activities. Issues of equity clearly exist in the disaster recovery process, and Congress must require FEMA to implement better transparency practices so the problems can be identified and rectified.

Ensure Survivor-Centered Approaches to Assistance

Congress must ensure that every survivor receives assistance to which they are entitled. Congress should require FEMA to prioritize categorical eligibility, simplify the application and appeals processes, and track and report on outcomes to ensure recovery aid reaches those in need.

Rather than creating and implementing numerous categories of ineligibility, disaster assistance programs should employ broad-based categories of eligibility, with the aim that every survivor receives the recovery assistance to which they are entitled. Through the use of damage

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assessments, geographic information, and other data, a reformed federal disaster housing recovery system can provide categorical eligibility to survivors in disaster-impacted areas. With a shift in emphasis to categorical eligibility, many of the convoluted rules and requirements employed by recovery assistance programs will no longer be necessary, allowing for an easier, quicker, and more flexible application process.

FEMA should allow for a flexible system of documentation for distributing disaster recovery assistance. Applying the least restrictive guidance regarding alternative documentation – and doing so consistently across all jurisdictions – would cut down on wasted time and confusion on the parts of both applicants and advocates alike. In order to employ full categorical eligibility, there must be a system in place that permits alternative documentation to ensure all survivors can receive assistance.

Address the Unique Needs of People Experiencing Homelessness

FEMA has interpreted current law to deny assistance to people experiencing homelessness prior to a disaster, despite their exceptional needs. Congress should enact clarifying legislation to ensure that people experiencing homelessness prior to the disaster have access to the same emergency shelter and disaster relief assistance as other survivors, including rental assistance.

IV. HUD Related Barriers to Equitable Housing Recovery

The Community Development Block Grant–Disaster Recovery (CDBG-DR) and CDBG–Mitigation (CDBG-MIT) programs are vital tools that provide states and communities with the flexible, long-term recovery, rebuilding and mitigation resources needed to rebuild affordable housing and infrastructure after a disaster and to prepare for future harm. These resources are particularly critical for the lowest-income disaster survivors and their communities. Too often, however, these resources are diverted away from the people and communities with the greatest needs and for whom the program was designed to serve.

Unnecessary Delays

Congressional Inaction

Federal funding for long-term recovery through the CDBG-DR program is often delayed by congressional inaction. CDBG-DR funds must be approved by Congress through a disaster supplemental appropriation act. Frequently, disaster relief funds can be swept up into other political debates, delaying much-needed rebuilding and recovery resources from reaching disaster-impacted communities. These delays prevent communities from formally proceeding with many recovery activities that cannot be accomplished without a commitment of federal funds. The timeline for Congress to approve disaster-recovery funding has ranged from several weeks after the terrorist attack on September 11 to more than eight months after Hurricane Michael.[xl] It was not until February 9, 2018, that Congress approved $16.5 billion for Puerto Rico's recovery from Hurricane Maria – nearly six months after the storm devastated the island.

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The lack of formal authorization of the CDBG-DR and CDBG-MIT programs contribute to further delays. Without authorization, HUD operates program funding through separate Federal Register notices after every major disaster, causing uncertainty for grantees. While some of the allocation notice is repeated from disaster to disaster, some of it is different after each disaster. Because grantees cannot anticipate the details in the allocation notice, they are often delayed in creating action plans. According to an audit by HUD's Office of Inspector General, between 2005 and 2018, HUD issued 60 Federal Register Notices for grantees to consult when developing CDBG-DR action plans, slowing down and over complicating the process.[xli]

After a HUD allocation notice is issued, an impacted jurisdiction must develop a disaster recovery action plan to receive funding. While jurisdictions often begin work on the plan in expectation of the allocation notice, the plan is not formally released until the notice is out. Once submitted, the approval process typically has been quick, but there are exceptions. HUD's approval period has ranged from nine weeks after the allocation notice for Hurricane Katrina and five weeks after Superstorm Sandy to more than eight months after Hurricane Maria.

The impact of delays in the CDBG-DR program are worsened when FEMA prematurely ends its response and recovery assistance. While FEMA programs are authorized for 18 months following a major disaster declaration, in recent years, FEMA has ended programs well before the statutory expiration and before CDBG-DR assistance programs are operational. Many of the lowest-income and most marginalized disasters survivors lose access to urgently needed FEMA assistance before their homes and communities have been rebuilt.

State and Local Capacity Issues

State and local grantees struggle to administer and oversee disaster recovery funds. The amount of CDBG-DR funds that state and local grantees receive after a disaster is often many times over what they typically administer. Following Hurricane Irma and Maria, Congress passed three supplemental appropriations acts that included a total of $35.4 billion in CDBG-DR assistance. Puerto Rico received $20.2 billion of these funds – or around a fifth of the island's total GDP in 2020.

While other states, such as Texas and Florida, similarly struggled to manage disaster grants in the aftermath of the destructive 2017 Atlantic hurricane season, Puerto Rico was uniquely identified by the White House and HUD officials for additional procurement controls and requirements.[xlii] While Puerto Rico was unjustly targeted by these bureaucratic delays and additional requirements, the island's inability to distribute CDBG-DR assistance funds, including the Home Repair, Reconstruction, or Relocation Program (R3), continues to be a source of concern.

The R3 Program has been slow moving and marked by unclear guidelines protecting against the displacement of low- and moderate-income communities. Other concerns include requiring survivors to enter into a title clearance process as a pre-requisite for receiving assistance, the lack of public participation, and a lack of data transparency.[xliiixliv] These issues can be linked to capacity issues within the territorial government and a failure of HUD to adequately oversee and

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correct such issues as they arise. These issues are not wholly unique to Puerto Rico; they have occurred in some form during nearly every implementation of CDBG-DR funds.

Recovery and Mitigation Challenges Exacerbate Racial and Economic Inequities

Reinforcing Racial Segregation

Research has shown that race and income often determine the neighborhoods in which we live, and where we live influences everything from education and health outcomes to economic mobility and opportunity. Housing segregation is the predictable result of intentional public policy. Because federal disaster recovery efforts seek to restore communities back to the pre-disaster "normal," these efforts often work to restore and entrench racial inequities and segregation.

Structural racism and disinvestment leaves communities of color with less access to basic services, such as hospitals, banks, grocery stores, social services offices, and fire departments, which slows economic growth and prosperity and makes community members less able to prepare for disasters and participate equally in recovery.

Communities of color are often located in areas with greater risk of disasters. Compounding this vulnerability, many communities of color have historically been denied adequate infrastructure due to systemic discrimination.[xlv] As a result, low-income people, often low-income people of color, endure disproportionate flooding compared with their affluent neighbors.

Inequitable Infrastructure

Due to a combination of segregation, exclusionary zoning, and disinvestment in infrastructure for economically depressed communities and communities of color, 450,000 of the nation's affordable homes are in flood-prone areas.[xlvi] Federally assisted affordable housing continues to be in at-risk areas, forcing the lowest-income households into areas with the highest risk of disasters. Not only does this pattern needlessly place people in harm's way, but it ensures that more federal dollars are needed to repair and reconstruct homes and fund emergency services.

The location of federally assisted affordable housing also shows a higher natural hazard risk than market-rate housing. A recent report by NLIHC and the Public and Affordable Housing Research Corporation (PAHRC) found that nearly one-third of federally assisted housing stock is located in areas with very high or relatively high risk of negative impacts from natural hazards compared to one-quarter of all renter-occupied homes and 14% of owner-occupied homes.[xlvii] The households residing in these higher-risk units are predominantly people of color, with the Public Housing program having the largest share of units (40%) in areas of very high or relatively high risk of natural hazards.

Affordable housing is frequently surrounded by underfunded infrastructure that exacerbates the impact of disasters. In Houston, 88% of the city's open-ditch sewage system lies in historically Black neighborhoods. During Hurricane Harvey, the open ditches overflowed, spreading sewage waste into streets and homes. Similar events occurred in North Carolina and Puerto Rico, where

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the lowest-income individuals often live in areas at high risk of environmental damage or flooding during disasters. State and local governments will often meet only the minimum program requirements and direct funds to mitigation projects in higher-income communities.

For example, in Puerto Rico, CDBG-DR and CDBG-MIT funds are provided only to those able to ensure their homes will comply with flood protection standards. The program does not aid lower-income disaster survivors to implement mitigation measures, nor does the program ensure that low-income residents are served by mitigation projects.[xlviii] Those people who choose to repair their homes on their own will repeatedly suffer from the effects of flooding due to this inequity.

Increased Displacement

Black, Latino, and immigrant communities face increased disaster-caused displacement from the dual threats of disinvestment and speculation, which build on the wealth disparities resulting from decades of intentional public policy to provide different resources and opportunities based on race. Moreover, recovery programs themselves can actively contribute to displacement.

In Puerto Rico, a large portion of the island is now considered a flood zone. This policy change may lead to widespread displacement among the lowest-income and most marginalized communities on the island. Puerto Rico's CDBG-DR action plan requires that neighborhoods most at risk of flooding be relocated. Lower-income and predominantly Black communities, such as Loiza, were designated for such relocation, while the nearby, similarly situated, tourist towns, such as Condado, were rated as safe.[xlix] NLIHC partner Ayuda Legal Puerto Rico identified nearly 100 similar communities at risk for displacement under the new standard.[l]

Barriers to Access

<u>Language barriers</u>

Language access to federal- or state-funded programs is required under civil rights laws.[li] While regulations and HUD allocation notices are provided only in English, the documents that create and implement disaster response and recovery programs must be published in all languages spoken by significant numbers of residents in impacted communities. Despite this requirement, CDBG-DR grantees have consistently failed to assess the primary languages of impacted communities and have failed to provide translations of critical materials. Applicant-intake offices often lack staff translators. Even when materials are translated, they sometimes provide incorrect information, such as application deadlines.

HUD guidance released in 2016 makes it clear that federal language access requirements apply to disaster recovery activities.[lii] Practices have yet to fully implement these requirements, however. For example, in a particularly egregious recent episode, housing policies for a Puerto Rico CDBG-DR program aimed at homeowners were released only in English, and then translated into Spanish only after advocates complained.

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Discrimination Against Individuals with Disabilities

People with disabilities need physical, program, and communication access but it is not consistently provided. If a community has no accessible housing, people with disabilities must remain in shelters until there is accessible housing available. Parents of children with disabilities who are unable to return to a school with disability resources must care for their children instead of working, remaining dependent on public systems. Full recovery cannot occur until everyone, including those with disabilities, are in accessible homes and back at work and school.

The specific characteristics of a disability and the impacts on a disaster survivor are often fluid. The effects of a natural disaster can be intensified not only by specifics of a disability, but also by other forms of societal inequality and marginalization, such as race, class, gender, sexual identity, and legal status. Some disabilities can also be temporary or changing, especially during the stress and connected health risks that accompany a disaster. Disability-disaster response requires understanding the many kinds of disabilities and societal inequities.[liii]

Fair Housing Violations

Federal statute, regulation and HUD Federal Register notices require that activities and programs funded through the Community Development Act of 1964 operate in ways that "affirmatively further fair housing." HUD CDBG-DR Federal Register notices have specifically required that the grantee "certifies that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.[liv]

HUD has underenforced these laws and regulations for decades. This same neglect has carried through to HUD approval of CDBG-DR state action plans that have been blind to impacts on housing access, housing availability, mobility, and racial, ethnic, and economic integration. The current top-down, non-participatory nature of CDBG-DR action plan development allows HUD and grantees to ignore fair housing considerations.

HUD often approves CDBG-DR action plans that have violations of civil rights law built into their structure. Plans have been approved that provide assistance to homeowners based upon discriminatory property values, that underassess the number of renters affected by a disaster, or that favor homeowners. HUD has the authority to reject CDBG-DR action plans that do not provide for implementation of civil rights protections.[lv] Yet HUD has repeatedly failed to exercise such authority, relying instead on certifications rather than the actual language and substance of the grantee draft plans.[lvi]

Moreover, local and state governments involved in disaster recovery often have very little experience administering recovery programs fairly. Historically, HUD has provided little training on fair housing responsibilities or monitoring to ensure fair housing requirements are met, even though such requirements apply to recovery programs. As a result, it has been the job of advocates already overburdened with assisting disaster-stricken communities to attempt to enforce fair housing laws and hold HUD accountable.

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The largest ever federal fair housing settlement came about through a complaint brought by Fair Share Housing Center, the New Jersey Latino Action Network, and the New Jersey State Conference of the NAACP, creating a more than half-billion-dollar program to rebuild or replace approximately 7,000 affordable rental homes impacted by Superstorm Sandy, which disproportionately impacted Black and Latino communities in New Jersey. Advocates after Hurricanes Katrina, Ike, and Dolly have also achieved major fair housing victories.

Relying on local advocates to ensure compliance with federal protections rather than clear rules enforced by HUD, however, assumes that resources exist for prolonged legal battles and further delays the recovery process while cases are litigated.

Impact on the Housing Crisis

According to NLIHC's annual report, *The Gap: A Shortage of Affordable Rental Homes,* there is shortage of 7 million affordable and available rental homes in the U.S. for households with the lowest incomes.[lvii] In certain metropolitan areas, the supply of affordable, available rental housing can be as low as 1 home for every 10 extremely low-income renter households. When a disaster exacerbates the already severe shortage of affordable rental homes, the consequences can be devastating for the lowest-income survivors.

Rental prices often increase dramatically after a major disaster. This rise has been attributed to a combination of the rapid loss in available housing stock due to the disaster, as well as a simultaneous increase in demand for rental housing for households seeking temporary shelter as their damaged or destroyed homes are replaced. For example, some ZIP codes in the Houston area saw rent increases of 50% after Hurricane Harvey. These rapid increases in rent can rapidly displace low-income households. The 2018 California wildfires destroyed a large amount of northern California's housing stock – 14% of Butte County California's housing supply was destroyed by the Camp Fire alone. As a result, rents have increased rapidly in areas already experiencing an affordable housing crisis. Rents doubling or tripling after an area wildfire led to communities enacting emergency ordinances limiting increases to just 10%.[lviii]

The increased cost of rental housing is also sometimes attributed to price gouging by landlords seeking to take advantage of the immediate increase in demand. Advocates report landlords evicting tenants without cause to make room for new tenants willing to pay much higher rents. Such practices lead to further destabilization and displacement.

Affordable and accessible homes are often the most vulnerable to disasters, but they are less likely to be rebuilt after the disaster strikes. When naturally occurring rental housing stock is damaged, the cost to repair and rehabilitate the property leads to higher rents. The slow pace and complications of federal disaster recovery efforts often mean that federally assisted affordable housing is rebuilt many years after a disaster, if at all.

In the aftermath of disasters, the failure of communities to rebuild without considering their ongoing obligations to construct accessible housing and public buildings in accord with civil rights law leaves many people with disabilities more isolated than before.

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Lack of Community Feedback and Participation

Limited Opportunities for Public Input in State Action Plans

CDBG-DR grantees often limit the opportunities for impacted residents to contribute their expertise on local needs to the state action plans. Due to substantial bureaucratic delays, state officials are pressured to release action plans as quickly as possible, often making any public input process rushed and ineffective. Grantees have failed to provide adequate notice of the draft action plan's publication, failed to properly announce public meetings, and provided the draft or related documents only in English.

Worsening this problem, HUD has historically waived standard CDBG participation requirements of 30-day comment periods and instead allowed comment periods of as short as one week. While grantees suggest these efforts are aimed at releasing funds more quickly, most delays in the disaster allocation process occur well before an action plan's public comment period. Without public comment, the action plan becomes a tool for those with political or economic power.

Often, the action plans themselves include little information about how the CDBG-DR funds will be spent, with HUD allowing states to fill in spending details over time with regional Methods of Distribution and local program and project selections. Interested members of the public must follow a long process to keep track of the evolving plan, with only limited and sporadic opportunities for public comment.

Failure to Provide Survivors with the Choice to Rebuild or Relocate

Decisions about the future use of land in flood plains or other at-risk areas, including the relocation of residents, have been made by CDBG-DR grantees without input from residents directly impacted by those decisions.

In Puerto Rico, any homes with substantial damage in the floodplain are currently not permitted to receive CDBG-DR assistance for rebuilding, potentially displacing tens of thousands of low-income residents. Yet private developers in Puerto Rico may be able to use federal Opportunity Zone tax breaks to build in the same flood zones that low-income survivors will be forced to leave. Government officials have ignored calls by advocates for deed restrictions barring redevelopment on properties acquired through the island's relocation program and for mitigation to be an option before relocation.[lix]

Funding for buyouts have historically been based on property values, giving wealthier families a realistic opportunity to relocate but leaving low-income families to choose between flood risk and relocating with payments insufficient to obtain housing in safer areas. HUD has taken an important step by allowing buyout incentives to be paid for with federal funds, but the resulting programs are difficult to coordinate, making it likely that some neighborhoods will receive adequate funding to move while others receive only minimal funding insufficient to cover the costs of relocation.

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Inaccurate Data

HUD has a policy to use the "best available data" when developing the needs assessment used by CDBG-DR grantees to develop their draft action plans, but these data are often inaccurate. There is an overreliance on data from FEMA that systematically undercount renters, exclude people denied FEMA benefits, and do not account for the full extent of damage to public and assisted housing or the cost to rebuild resiliently. Despite these concerns, CBDG-DR grantees have frequently resisted consultation with residents and advocates who attempt to correct such data, and HUD has not created a needs-assessment formula that accounts for inaccurate data. Without such corrections, action plans continue to underestimate the needs of the most vulnerable survivors.

Lack of Data Transparency

It is often difficult and sometimes impossible for the public and community groups to access the data on which a state action plan was created. After Hurricane Maria, the territorial government withheld mortality data from public view.[lx] Information on the number of repaired homes, applications being processed, and other important data was similarly difficult to access as recovery progressed. The lack of transparency prompted advocates to file Freedom of Information Act requests and urge the territory to make disaggregate data available to the public.[lxi] While the territorial government has since implemented an information dashboard accessible to the public, crucial information such as the number of blue tarp roofs left on the island is vague.[lxii]

Local Contractors and Workers Left Behind

Overreliance on Outsourcing Contracts

Because of the extraordinary challenges faced by local governments during the recovery, CDBG-DR grantees rely on out-of-state contractors that specialize in certain aspects of recovery. There is often no connection between the contractor and the community recovering from a disaster and, as a result, there is little incentive for contractors to follow local practices and standards.

Time after time, contractors who were dismissed or even sued by prior CDBG-DR grantees apply for and are awarded contracts in subsequent events because the grantees could not find or did not trust local companies. In Puerto Rico, four companies have been awarded multimillion-dollar contracts to administer recovery programs, including ones with staff under investigation by the FBI for corruption and others previously fined for failing to meet recovery goals. At the same time, because Puerto Rico is using a reimbursement-based model, very few small, local construction companies have the resources they would need to participate in recovery efforts.[lxiii]

Missed Opportunities for Local Job Creation

Section 3 of the Housing and Urban Development Act of 1968 directs a portion of federally funded employment, training opportunities, and contracts to low- and very low-income people, as well as local minority-controlled businesses.[lxiv] The effect of the provisions is very limited,

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however, because grantees, sub-grantees, and contractors are only required to use their "best efforts" to comply. Further, the grantee can exempt projects or contracts below a certain size or cost. Entities purportedly subject to Section 3 almost always simply submit an annual statement to HUD stating they have done their best with very limited results. Disaster recovery brings large amounts of funding into communities struggling with unexpected job losses; there is a significant missed opportunity in not more stringently enforcing Section 3 or other local-hire requirements.

V. HUD Solutions Needed for an Equitable Housing Recovery

Rebuilding Equitable Communities

Dismantling Segregation and Inequity

During disaster recovery, communities of color and other marginalized communities either return to their segregated "normal" or the residents are displaced to other areas, often destroying familial and social ties. It is critical for disaster recovery planning to go hand-in-hand with fair housing compliance so that rebuilding efforts explicitly acknowledge and address the impact of racism, segregation, and inequality. Case management services and housing counselors can support displaced households that wish to relocate into neighborhoods of their choice, including neighborhoods connected to resources, good-paying jobs, good-performing schools, and other benefits. These services can provide assistance in finding available housing and in moving.

Local organizations situated in and/or serving marginalized communities must be involved in long-term recovery efforts to ensure that recovery programs recognize and address the needs of these communities. This involvement pertains not only to the accessibility of programs, but also to decisions on rebuilding and reconstruction. Construction of new housing and infrastructure investments should be done in a manner that protects against harm by future disasters and allows communities themselves to direct how best to fight inequality and segregation.

Given the widespread nature of segregation and inequality in the U.S., it is not enough to state the equitable intent of a disaster recovery program. Explicit requirements for desegregation and adherence to civil rights law must be included in both contractor regulations and agreements with states, local governments, and federal agencies. Making equity explicit strengthens the ability of protected classes to seek legal redress at times when recovery is less than equitable. Federal law should require compliance.

Desegregating Infrastructure

Federal, state, and local governments have underinvested in the infrastructure of marginalized communities for decades. State and local government continue to divert infrastructure recovery resources away from poorer communities of color toward higher-income, white communities..[lxv] Infrastructure projects should be prioritized to improve and protect lower-income communities, communities of color and people with disabilities, and to compensate for the lack of effective infrastructure. All communities should have at least the minimum amount of infrastructure needed to protect residents.

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Rebuilding Homes

Equitable Approaches to Rebuilding Homes

Because of the growing affordable housing crisis, America's lowest-income households are put in danger of homelessness and displacement after a disaster as rental housing supply is lost. For this reason, long-term housing recovery programs should first prioritize the housing needs of people with the lowest incomes, including those individuals who have been displaced or involuntarily institutionalized. Congress should provide special allocations of funding targeted to serve the lowest-income people, including to the national Housing Trust Fund, DHAP, and repairs to damaged public housing stock to ensure a minimum affordability period of 30 years, and target resources to those most in need as much as possible. Homes created or substantially rebuilt through the long-term recovery process must be made accessible to individuals with disabilities in accordance with applicable disability rights law, ensuring that the disaster recovery will fully include everyone.

New affordable housing must meet the challenges of the next disaster. Housing rehabilitation, rebuilding, and new construction, as well as related infrastructure projects, must meet resilience and mitigation standards to withstand the increasing frequency and intensity of disasters due to climate change. Ensuring that housing can meet the challenges of future disasters also depends on where it is built. A significant amount of newly constructed housing must be located outside of areas susceptible to disaster damage and be made available first to households displaced by the disaster.

Ensuring Continuity for Housing Assistance Programs

Many federal agencies have disaster recovery programs. The complexity and overlapping nature of these programs can make it difficult to ensure continuity for disaster survivors as they navigate these programs. Under the current disaster housing recovery framework, a substantial lag exists between when FEMA disaster assistance programs end and when HUD's long-term recovery programs begin.[lxvi]

Without access to temporary housing, many low-income disaster survivors are forced into homelessness. To prevent this occurrence, disaster housing assistance must be provided to survivors for as long as it is needed, continuously and without a gap in service due to arbitrary deadlines.

Given HUD's expertise and infrastructure, the agency should operate all disaster housing recovery programs. FEMA has a poor track record of addressing the housing needs of low-income survivors and has demonstrated little interest in improving its programs. Consolidating disaster housing programs into HUD would streamline efforts, simplify the process for survivors, and result in better outcomes for the lowest income people.

Disaster survivors are susceptible to trauma, and a lapse of program assistance, even if just for a few days, can cause significant mental harm to households that have already been displaced by a disaster.[lxvii] Should there exist separate short-term and long-term housing assistance programs in

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the future, better coordination is required to ensure that disaster survivors transitioning from one program to another do not experience a housing disruption in the process.

"Reforming Disaster Recovery Act"

NLIHC and its DHRC support the "Reforming Disaster Recovery Act," introduced by Senators Brian Schatz (D-HI), Susan Collins (R-ME), Todd Young (R-IN), Patrick Leahy (D-VT), Bill Cassidy, MD (R-LA), and Representative Al Green (D-TX).

If enacted, the Reforming Disaster Recovery Act would permanently authorize the Community Development Block Grant-Disaster Recovery (CDBG-DR) program, which provides states, tribes, and communities with flexible, long-term recovery resources needed to rebuild affordable housing and infrastructure after a disaster. The bill also provides important safeguards and tools to help ensure that federal disaster recovery efforts reach all impacted households, including the lowest-income and most marginalized survivors who are often hardest-hit by disasters and have the fewest resources to recover. Permanent authorization of the CDBG-DR program is supported by HUD leadership[lxviii], HUD's Office of Inspector General (OIG),[lxix] and the Government Accountability Office (GAO).[lxx]

Quickly Targeting Resources to Those with the Greatest Needs

While CDBG-DR is often one of the only recovery tools available to the lowest-income disaster survivors, vital resources have been diverted after past disasters from the people and communities with the greatest needs and for whom the program was designed to serve. The Reforming Disaster Recovery Act would help ensure that limited disaster recovery funds reach the most vulnerable survivors.

Key reforms:

- Creating a standing disaster recovery fund that can quickly disperse initial recovery funding to disaster-stricken areas without waiting for congressional approval.
- Developing a formula to allocate assistance to the most impacted and distressed areas resulting from a catastrophic major disaster.
- Requiring that the use of federal recovery funds is balanced between rebuilding infrastructure and housing.
- Ensuring that housing funds are spent proportionally between homeowners and renters unless HUD determines that there is a compelling need.
- Requiring states to prioritize activities that help extremely low-, low-, and moderate-income survivors recover, address pre- and post-disaster housing needs, and prepare for future disasters; and
- Maintaining the current requirement that 70 percent of the federal recovery funds benefit low- and moderate-income people and providing clearer direction to HUD on when it can adjust this requirement.

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Prioritizing Data Transparency & Oversight

After past disasters, the lack of federal data transparency at hampered efforts to effectively target and distribute aid to those most in need. The Reforming Disaster Recovery Act would allow all federal agencies involved to access the full breadth of data needed to make informed public policy decisions, allow greater public participation in disaster recovery efforts, and help public and private entities better recognize gaps in services and identify reforms needed for future disaster recovery efforts.

Key reforms:

- Requiring federal agencies to share all data to help coordinate disaster recovery.
- Requiring HUD to make available a public facing dashboard summarizing project data.
- Ensuring that state action plans receive at least 14 days for public comment and requiring states to engage with residents of the most impacted and distressed areas: and
- Requiring states to include detailed plans outlining how it will use CDBG-DR funds to serve low- and moderate-income households and how these dollars will address relief, resiliency, long-term recovery, and restoration of housing and infrastructure in the most impacted and distressed areas.

Protecting Civil Rights and Fair Housing

The Reforming Disaster Recovery Act would help protect fundamental civil rights and fair housing rights and ensure that all communities and community members – regardless of race, disability, sex, age, color, religion, familial status, national origin, and other protected classes – receive full access to disaster recovery resources, free from discrimination.

Key reforms:

- Requiring state and local governments to certify that funds will be administered in compliance with fair housing and civil rights laws.
- Requiring HUD to release information regarding disaster recovery efforts, disaggregated by race, geography, and all protected classes of individuals under federal civil rights and nondiscrimination laws, as well as existing disaster assistance laws; and
- Authorizing the release of data to academic institutions to conduct research on the equitable distribution of recovery funds, adherence to civil rights protections, and other disaster recovery-related topic.

Encouraging Mitigation and Resiliency

With disasters increasing in frequency and intensity, at-risk communities must better prepare housing and infrastructure to withstand future disasters. By promoting mitigation and resiliency, the Reforming Disaster Recovery Act will help ensure that communities are better able to maintain vital services during and directly after a disaster and recover more efficiently.

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Key reforms:

- Establishing an Office of Disaster Recovery and Resilient Communities at HUD to coordinate with other federal agencies, develop and share best practices, and provide training to state and local agencies on disaster recovery.
- Creating specific minimum construction standards for areas designated as Hazard-Prone by HUD and FEMA.
- Providing grantees with additional resources for mitigation; and
- Encouraging states to better align federal recovery funding with existing state and local infrastructure investments.

VI. Conclusion

Our country must develop a new disaster housing recovery system that centers the housing needs of the lowest-income and most marginalized survivors, including people of color, people with disabilities, and others. Congress must address our nation's pervasive structural and racial inequities and reform federal disaster rebuilding and mitigation efforts to be inclusive and intersectional. We must reform existing programs by centering racial equity and equity for other historically marginalized people to ensure that affordable housing investments and federal disaster recovery resources reach impacted households with the greatest needs.

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AYUDA LEGAL PUERTO RICO

December 3, 2021

Mr. Marik Xavier-Brier, Ph.D.
Director, Office of Civil Rights Evaluation
U.S. Commission on Civil Rights

Re: **Testimony of Ariadna Godreau Aubert, Founder and Director**
Ayuda Legal Puerto Rico

Director Marik Xavier-Brier and distinguished members of the Commission, thank you for your invitation to present this testimony. My name is Ariadna Godreau Aubert, founder and executive director of Ayuda Legal Puerto Rico (ALPR), a nonprofit organization that provides free legal support to low-income families in Puerto Rico. Since Hurricane María made landfall on September 20, 2017, ALPR has led legal support and advocacy efforts around disaster assistance and recovery funds in Puerto Rico. We provide support to thousands of disaster survivors each year and nurture this work with policy analysis and recommendations to transform housing and recovery processes that are fundamentally unequal. Although and because the colonial condition of Puerto Rico threatens to distance our people from fundamental rights and authentic participation,

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human and civil rights practices and indicators are at the center of our legal defense work.

Federal and local governments share the responsibility to lead survivors to resiliency. We need disaster assistance to arrive quickly, with clear guidelines and standards of use, accessibility, assessment, and compliance. We need the flexibility to address regional challenges. We need accountability to ensure coherent planning, equitable access to funds, displacement minimization, and real and effective public participation throughout the entire process. FEMA, CDBG-DR, CDBG-MIT, and other recovery funding programs should never be a blind bet on possible outcomes but a strategized road towards a long-term sustainable, just recovery. We also demand accountability and action from those who have hindered recovery from reaching so many.

Through this testimony, I would emphasize on the following:

1. Civil rights in Puerto Rico have been in peril, a situation worsened by multiple disasters and by cumulative impact of governmental failure to comply with its duty to address and mitigate the consequences of catastrophic events. Civil right violations against historically vulnerable populations and groups remain unaccounted for.
2. First response, application processes and eligibility criteria set the ground for equitable and just recovery. Addressing civil rights protection require revising how these instances comply with principles of non-discrimination, accountability, and participation.

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3. We are in a position to elaborate clear cross cutting guidelines and good practices to respect, protect and promote civil rights amidst disasters. While the time of hurricanes, earthquakes and pandemic are unforeseeable

I. Introduction

A. Puerto Rico's context

Hurricanes, earthquakes, and pandemics do not occur in a vacuum. Puerto Rico has been affected by unsustainable public debt and austerity since 2006. Socioeconomic fragility has a direct impact on the plausibility of resilience amidst disasters. High poverty rates (+44%), together with a low labor force participation rate (<40%) mean that families have no reserves to prepare, mitigate, and address housing insecurity in the aftermath of a catastrophic event. Added to the shutdown of schools, health services, and the privatization of essential services, the looming housing and land insecurity is a backdrop to disasters. Nearly half of those who rent or have a mortgage use at least 30% of their income to afford their house [1]. Between 2017 and 2020 – throughout three catastrophic events– 12,800 houses were foreclosed[2]. According to the PRDOH, nearly 16,000 people are waitlisted to access public housing and another

[1] American Community Survey, 1-year estimates (2019)
[2] Puerto Rico Office Financial Institutions Commissioner, 2018-2021 Mortgage Delinquency Report, available at: https://ocif.pr.gov/DatosEstadisticos/Datos%20Estadisticos/Mortgage%20Delinquency%20Report.pdf (Last visit Dec. 3, 2021)

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10,000 families await Section 8 vouchers. At least 2,535 people are homeless[3]. As per the American Community Survey, 388,523 houses remain vacant[4] and the most recent Census data shows, nearly 12% of our population has left in the last decade[5].

Lack of adequate attention to emergencies have a cumulative effect on the rights of historically marginalized identities and groups. Inexistent and flawed statistics and a pervading systemic racism permits discrimination against women, black and darker skinned inhabitants through the recovery process in Puerto Rico to remain unaccounted for.[6] Yet, our experience serving thousands of families during and after disasters, signal an unequivocal major impact on these groups. Legal empowerment efforts, as well as fair housing complaints presented during the last four years address how official recovery processes left behind low income and black communities, elders, people with disabilities and women-led households[7].

B. Puerto Rico's difficult road to recovery

Hurricane María destroyed 786,000 houses in Puerto Rico. According to the government, the infrastructure costs related to the impact of this major disaster add up to nearly $100 billion. More than 1.1 million requests for assistance were submitted to

[3] Puerto Rico Department of Family, Homeless People Census (2019), available through Instituto de Estadísticas de Puerto Rico, https://estadisticas.pr/en/inventario-de-estadisticas/conteo-de-personas-sin-hogar-e-inventario-de-camas (Last visit Dec. 3, 2021).
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[6] Revista Étnica, Ser una mujer negra en una pandemia y otras interseccionalidades, https://www.revistaetnica.com/blogs/news/ser-una-mujer-negra-en-una-pandemia-y-otras-interseccionalidades (Last visit Dec. 3, 2021)
[7] See FHEO Complaints 02-19-3535-8, 02-19-3736-8, 02-19-3737-8.

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FEMA. Nearly 58% of applications and 75% of the appeals were denied. Two thirds of the families that received assistance to repair their homes received awards of less than $3,000. Grounds for denial ranged from insufficient damage to lack of proof of ownership, an issue that barred thousands of families from receiving aid and that will be discussed thoroughly in the next section.

In October 2017, FEMA inaugurated their Sheltering and Temporary Essential Power (STEP) Program in Puerto Rico. The STEP Program, called Tu Hogar Renace, proposed to invest $1,680,000,000 to assist 75,000 houses in the Island. After many public complaints regarding inadequate repair, corruption schemes that involved contractors overcharging for their services, the program ended. According to a monitoring report published by the Puerto Rico Comptroller in May 2021, between 43–80% of the works commissioned to companies were left unfinished[8].

On February 23, 2018, the government of Puerto Rico appointed the Puerto Rico Department of Housing (PRDOH) to manage almost $20 billion in CDBG-DR funds[9]. Several public officials, entities, and organizations, including ALPR, reacted to this decision by pointing out the agency's incapacity to manage these funds and the need to incorporate municipal governments as decision makers and fund managers in the

[8] Contralora y Vivienda reconocen en vista pública programa Tu Hogar Renace no cumplió con las expectativas propuestas por el gobierno federal, https://www.ocpr.gov.pr/articulos/contralora-y-vivienda-reconocen-en-vista-publica-programa-tu-hogar-renace-no-cumplio-con-las-expectativas-propuestas-por-el-gobierno-federal/ (May 28, 2021) (Last visit Dec. 3, 2021)

[9] Allocation Notices available at PRDOH CDBG-DR, Resources, Federal Register, https://cdbg-dr.pr.gov/en/resources/federal-register/ (last visit Dec. 3, 2021)

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recovery process, among other concerns. The first version of the Draft Action Plan[10] as well as a faulty participation process forebode a complicated recovery process.

Families who were not able to access FEMA repair assistance, who were turned down or neglected by Tu Hogar Renace had to apply to the Repair, Rebuild and Relocate (R3) CDBG-DR program as a last resort to secure housing assistance. With an allocation of $3,289 million, R3 is the biggest and probably most significant program within the CDBG-DR Action Plan. Between its opening date in July 2019 and the closing of the application process, 27,070 families requested R3 assistance. As of today, the outcomes of this program are disheartening and expose bigger systemic federal and local flaws. A small portion of the applicants have received a written determination on their cases. Only 1,500 homes have been repaired and 199 houses have been rebuilt[11]. In February 2020, it was estimated that between 15,000 to 18,000 families were still living under blue tarps[12]. This is still an accepted estimate.

Survivors' unmet needs were exacerbated by the seismic events that occurred between December 2019 and the first half of 2020 and later, COVID-19. These seismic events affected 52,370 houses. At least 630 of those were severely damaged or destroyed. Stakeholders estimate that FEMA denied nearly 70% of the assistance applications submitted by earthquake survivors. It must be noted that these events mostly impacted the Southern coast of Puerto Rico. Some of the municipalities in this

[10] Puerto Rico Disaster Recovery Action Plan, Draft for Public Comment (May 10, 2018)
[11] Ayuda Legal Puerto Rico, Request for Public Information (20 April, 2021)
[12] CDBG-MIT Action Plan, p. 333 available at: https://cdbg-dr.pr.gov/en/download/cdbg-mit-action-plan-effective-on-april-19th-2021/?ind=1619459603916&filename=CDBG_MIT_ACTION_PLAN_APPROVED_Apr%2019%202021_EN.pdf&wpdmdl=18594&refresh=61a95730babcc1638487856 (Last visit Dec. 3, 2021)

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zone are part of coastal and mountainous geographies besieged by high poverty rates, some of the highest unemployment rates, housing insecurities, and environmental harms. COVID-19 increased the vulnerability of families already stricken by economic and housing instability[13].

II. Accessibility barriers, eligibility criteria and disparate impact on low-income black communities

A. First response, access to application processes and limited language proficiency

The first response was marked by abuse of force, inadequate supplies provided to survivors, a delay in the establishment of Disaster Relief Centers, officials who spoke solely English, and a militarization of response[14]. It is important to highlight that one of the official actions of the government was the implementation of a curfew that limited citizens' capacity to move.[15] Grounded on lack of supplies – including water and gas–, dangerous conditions of housing, and the precarity of the infrastructure, many criticized the restrictive measure that promoted a chilling effect on a solidarity that, absent governmental response, was saving lives. A black man, employed by the Electric Power

[13] Doctors Without Borders, La pandemia de COVID-19 debilita aún más a un Puerto Rico frágil tras varios huracanes y terremotos (Mar. 7, 2020) https://www.msf.es/actualidad/puerto-rico/la-pandemia-covid-19-debilita-aun-mas-puerto-rico-fragil-varios-huracanes-y (Last visit Dec. 3, 2021)
[14] These findings were thoroughly discussed in the report presented before the Inter-American Commission on Human Rights in December 2017. See ICADH. Justicia Ambiental, Desigualdad y Pobreza en Puerto Rico, (2017) https://noticiasmicrojuris.files.wordpress.com/2018/05/final-informe-cidh-audiencia-pr-dic-2017.pdf (Last visit Dec. 3, 2021)
[15] Executive Order 2017-49 (September 23, 2017)

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Authority of Puerto Rico (PREPA) was killed by the police after being arrested for violating the curfew.[16]

Our legal support brigades attested the supposedly "nutritional" boxes handed down by recovery officers. **See Figure 1.** They also witnessed the absence of Disaster Relief Centers accessible for communities in black and low-income communities of Maunabo and Loíza, inspections carried out by officials without proper identification and unable to communicate in Spanish, as well as armed officials guarding the entrance to DCRs.

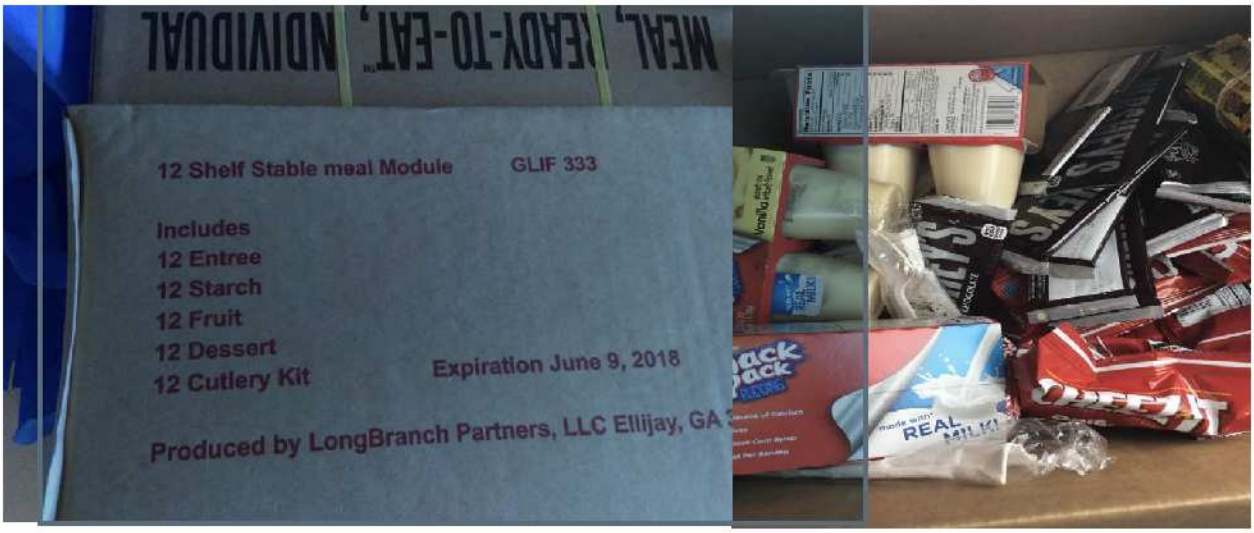

Figure 1. Meals received by disaster survivors post-María

Despite the major power outage that lasted for a year throughout the Island – and its impact in communications– FEMA insisted on having disaster applications filed through

[16] Periódico La Perla, "Toque de queda en Puerto Rico da paso a muerto y uso de taser empleado de la AEE" https://www.periodicolaperla.com/toque-de-queda-en-puerto-rico-da-paso-a-muerte-y-uso-de-taser-contra-empleado-de-la-aee/ (Last visit Dec. 3, 2021)

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hotlines or internet platforms. Lack of transportation and access to justice increased the vulnerability of low income, elders, and survivors with mobility challenges who could not reach help to present their applications. Ayuda Legal Puerto Rico joined efforts carried out by community leaders who designed paper versions of the appeals. We went to communities, interviewed affected individuals, traveled back to areas with internet access, uploaded applications, and later returned to the communities to hand down their registration numbers. This burdensome process could have been avoided if FEMA had adopted the necessary policies and protocols to adopt a paper application.

B. Discrimination against people formal titles

As we have reiterated on several occasions, a title deed cannot be a condition to safe housing and recovery. Such practice impacts impoverished and historically vulnerable survivors. In the aftermath of Hurricane María, FEMA applied a restrictive and incorrect interpretation of federal disaster regulations that defined "owner" broadly[17]. Consequently, nearly 77,000 families were excluded from receiving assistance because of their inability to prove ownership[18]. Nothing in Puerto Rico's laws and regulations require homeowners to register their properties. Lack of formal documentation also responds to socioeconomic elements such as lack of access to justice, insecurity of

[17] 44 CFR 206.111
[18] Testimony of Ms. Diane Yentel, President, National Low Income Housing Coalition at Experiences Of Vulnerable Populations During Disaster (116–62), Remote Hearing Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure, July 28, 2020.

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tenure, and land rescues grounded on the unmet need for housing. Moreover, it responds to a system grounded on racial oppression which forbade black and darker skinned individuals from becoming owners of their land. Lack of clear ownership eligibility criteria has also been an obstacle for black and POC disaster survivors in New Orleans, California, and North Carolina[19].

Through several community brigades celebrated throughout the Island, we witnessed FEMA officials' lack of preparation regarding alternative proof of ownership, conflicting instruction, and a broad lack of understanding of Puerto Rico social and economic reality. Depending on who answered the phone at FEMA's hotline, instructions for survivors varied. In the summer of 2018, as appeals because of denials and insufficient assistance piled up, ALPR researched and drafted a sworn statement form to allow owners without title to prove their ownership through alternate documentation that did not require notarization. In Puerto Rico, a notary is a specialized attorney and thus, notarization translates into a costly process for low-income individuals. Almost eight months after Hurricane María, a group of advocates were able to finally move FEMA to accept the sworn statement. It was too late. FEMA's reluctance to notify applicants about their right to appeal and use the sworn statement, placed on the backs of nonprofits the responsibility to let applicants know and provide them with the tools. Thousands of families lost the possibility of receiving immediate and much needed assistance for their homes.

[19] Fixing America's Broken Disaster Housing Recovery System, p. 9.

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Recently, our proposal became part of FEMA guidelines[20]. Although we celebrate the impact that this will have on survivors of Ida and other subsequent disasters, we censure that this will not have retroactive effects on applicants that were deemed incorrectly ineligible for assistance. Also, FEMA actions created an awful precedent. We soon realized that the CDBG-DR Action Plan included exactly the same requirement: repair, rebuild, and relocation assistance was conditioned to formal ownership. The Government of Puerto Rico, through the PRDOH decided to incorporate title requirements for the main housing recovery program funded with CDBG-DR funds. It took more than three years of advocacy for the PRDOH to change these policies of exclusion. Meanwhile, thousands still await dignified housing.

FEMA and other disaster recovery funds should abide by policies that promote access. Non-compliance with the existing regulations hinders people's rights. We must also warn against attempts to condition federal funds to Puerto Rico to changes on the property management systems, real property assessments, and title clearance. It is our position that individual legal strategies do not offer an effective solution to this issue. It can take years to solve a title through the courts. Addressing informal titles in Puerto Rico requires structural policy changes and it is the role of the local legislature to act to identify real solutions.

As of September 30th, 2021 FEMA had sent 3692 notices of potential debt for disaster declaration for Hurricane María. Most of the people we help through our legal

[20] FEMA Fact Sheet, Update to FEMA's Individual Assistance Program and Policy Guide, Version 1.1, https://www.fema.gov/sites/default/files/documents/fema_updated-iappg-version-1.1.pdf (Aug. 2021) (Last visit Dec. 3, 2021)

support hotline undergoing recoupment processes from FEMA indicate that their recoupment process is due to lack of proof of ownership. Since FEMA has not published detailed recoupment data, we have a pending FOIA request, which aims to expand on the demographic profiles of the people affected by these notices, including data on gender, age, income, and persons with disabilities.

III. The right to stay, return and participation within disaster recovery process

A. Climate justice considerations, flooding and anti-displacement policies

The impact of a global climate crisis in our geography means more severe weather events, sea-level rise, severe flooding, and droughts. With 24% of our population living in high to high/medium risk zones[21] and at least 245,586 houses located on flood plains[22], addressing the need for effective disaster planning, response, and recovery, as well as the urgent demand for affordable and resilient housing infrastructure is crucial. The government has an outstanding debt to ensure safe dwelling and resilient communities to survivors of multiple disasters.

Flooding is the most frequent and costly natural hazard in the United States. Identifying diverse, sustainable, and cost-effective mitigation alternatives is essential for communities' resilience in the face of future disasters, achieve economic development,

[21] CDBG-MIT Action Plan, p. 332.
[22] PRDOH estimates, based on FEMA applicants located in the 100-year flood plain. CDBG-DR Action Plan, p. 34.

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and ensure a just recovery. Within a climate-crisis and as experience in the geography of an island in the Caribbean, mitigation of flood zones needs to be a transversal. While several communities and groups have challenged the adequacy of FEMA flood maps, relocation or no assistance cannot be the only options for families living in these geographic areas. This without further consideration of the possibility to mitigate. While under no circumstances we would like to have people living in risk zones, yet absent a mitigation assessment, a sensible relocation plan, an adequate, affordable housing inventory, and a participatory process, relocation should always be the last option.

These relocations are not always voluntary. Almost four years after the disaster, a low-income family without a safe dwelling would have no choice but to relocate if the only alternative is to receive no aid at all. We should also keep in mind that relocation would only be an option if the family has a "perfect" title. If that is not the case, and most times it is for low-income families in coastal flood-prone areas, there is no alternative for them.

While the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (URA)[23] may protect displaced individuals, the limited scope of its protection demands further actions. ALPR reiterated the need to adopt internationally acknowledged standards to mitigate displacements. These criteria include access to information, consultation and participation. We also demand a sensible and human rights-based relocation policy that accounts for the needs of individuals and families, as well as to the threat posed by checkerboarding of communities, the lack of essential

[23] 42 USC 5301, et seq.

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services in different municipalities, and destruction of already fragile social tissues. While prohibiting rebuilding in flood prone areas would leave thousands of low-income families in insecure dwellings or forcibly displaced, other measures such as new construction moratoriums on coastal and flood zones could be a measure of adaptation and mitigation sensible to housing needs and climate change.

Mitigation strategies are effective, maximize recovery plans[24], and provide a unique opportunity to be in a better position to face climate change. Wrongly applied, these initiatives may worsen the impact of an already inequitable recovery on low-income, black, and other historically vulnerable communities. Transparency and participation in planning may lead the way to integrate mitigation plans at community, municipal and regional levels, as well as to ensure a coherent use of diverse sources of mitigation funds, such as projects from the US Army Corps of Engineers and FEMA's Hazard Mitigation Assistance Grants. President Biden's Executive Order on the Climate Crisis[25], as well as the administration's disposition to incorporate Puerto Rico and to collaborate with international efforts to address climate change, are an affirmative step in the right direction. The population of Puerto Rico needs their right to return and stay to be safeguarded and that is only possible by addressing the climate crisis as experienced in an Island based scenario. Relocation practices must also account for this context.

[24] Multi-Hazard Mitigation Council (2019). Natural Hazard Mitigation Saves: 2019 Report. Porter, K. et. al. National Institute of Building Sciences. Washington, DC. https://www.nibs.org/files/pdfs/NIBS_MMC_MitigationSaves_2019.pdf (Last visit Dec. 3, 2021)
[25] Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, January 27, 2021

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B. **Accountability is key**

Since Hurricane María made landfall in Puerto Rico, we have voiced concerns about the lack of accountability of contractors hired to manage the recovery program. The OIG has gathered findings regarding misuse of federal funds that include inadequate management of supplies, price gouging and negligence[26]. The recovery process has become a revolving door for contractors that generate wealth because of emergencies. For example, companies hired and signaled during the Tu Hogar Renace scheme are now contractors under the CDBG-DR housing programs. **See Figure 2.**

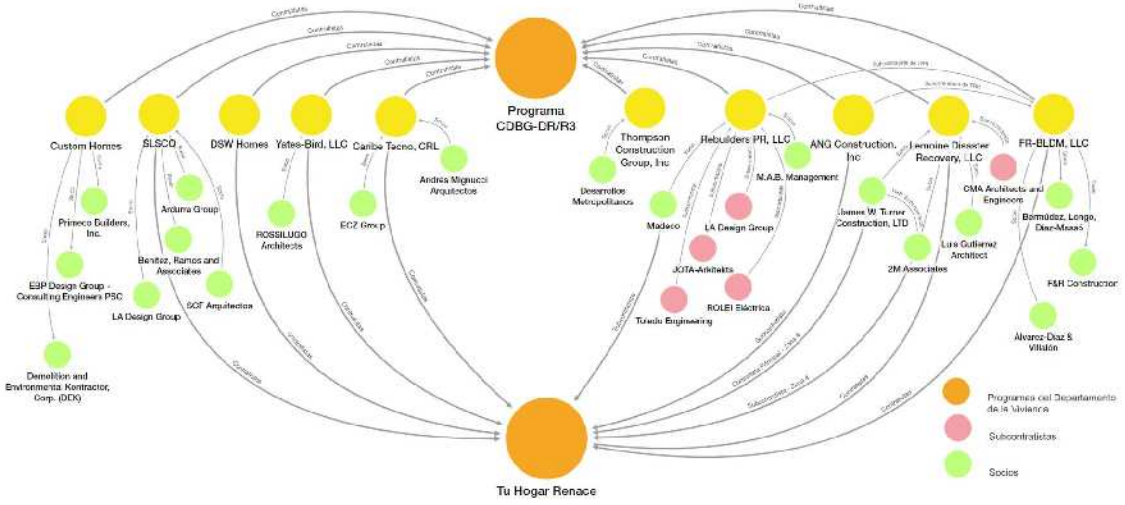

Figure 2. Contractor shared by both Tu Hogar Renace and the CDBG-DR R3 Program (created by Ayuda Legal Puerto Rico)

[26] US Department of Homeland Security Office of the Inspector General, FEMA Mismanaged the Commodity Distribution Process in Response to Hurricanes Irma and Maria, OIG-20-76, https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-76-Sep20.pdf (September 25, 2020) (Last visit Dec. 3, 2021)

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Reports from people who have never received a single notification on their cases, project managers being constantly replaced, of non-responsive officers, of people made to sign English-language and/or complicated contracts in 24 hours or less without having a chance to read them carefully or seek legal advice, are constant for applicants served by all of the companies contracted by the PRDOH. When we recommended adopting best practices for contractors, and to make them visible and available for the general public's consultation, we were answered with a social media post mandating "values." **See figure 3.** As legal responders who attest to the multiple harms committed by negligent disaster assistance services providers and aware of the millions of dollars invested on this endeavor, we were appalled.

C. Participation, coherent planning, and the respect of local decision-making capacity

Public participation is essential for the success of mitigation and resilient housing infrastructure efforts. Ensuring local and regional solutions requires acknowledging the agency to local stakeholders – particularly community-based organizations- to influence the recovery process. Because it is a long-term process that extends well beyond the grant's timeline, capacity development and engagement of local actors such as community-based organizations and nonprofits is necessary.

ALPR, together with other groups, advocated for Regional Civilian Oversight Committees able to ensure participation throughout the planning, approval, and implementation of CDBG-DR and CDBG-MIT funds. One year and a half after the

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allocation of funds, a version of this Committee was acknowledged by the PRDOH, one lacking actual engagement, guidelines, or participatory standards. Moreover, the Committee is facilitated by a PRDOH official who also assesses contractors' compliance. We celebrate the inclusion of Citizen Advisory Committees in the CDBG-MIT Allocation Notice. Yet, it is our position, in accordance with HUD and Enterprise Community Partners recommendations, that the Committee must be facilitated by an independent person able to communicate with impartiality. The impartial facilitator, the acknowledgement of the capacity of this Committee to serve as watchdogs of the recovery process, and the need to produce periodic reports could be part of model guidelines.

Lastly, participation is intimately related to planning and data. Coherent, participatory, and transparent planning is essential. Planning should be the basis of other critical decisions such as the integration of programs, the evaluation of housing plans on historically vulnerable communities, relocation plans, the need for temporary measures to protect survivors through rental assistance, and budget and compliance assessment. Similarly, open data is needed to be segregated to include race, gender, disability, age, and other demographic information that could help develop a real profile of who is benefiting from recovery and who is left behind. Recovery core guidelines should instruct grantees to publish timelines, progress reports, and to prioritize participatory planning as a basis for recovery.

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Figure 3. PRDOGH Good Practices

Thank you again for the opportunity to participate in this hearing.

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TALLER SALUD

Statement for the United States Commission on Civil Rights: Government Response to Hurricane Maria

Friday, December 10, 2021

By Tania Rosario-Méndez, Executive Director, Taller Salud

Thank you to Chairwoman Norma V. Cantú and all members of the Commission for this opportunity to speak about the Federal Emergency Management Agency's (FEMA) role in disaster preparedness and response to Hurricane Maria in Puerto Rico.

Taller Salud is a feminist grassroots organization, founded in 1979 dedicated to improving women's access to health care, reducing violence in community settings, and fostering economic growth in Loíza, Puerto Rico. For more than 40 years we've addressed health disparities that are often rooted in social, racial, and economic inequalities. The following statement is based on expertise, first hand experience, and data driven insights.

On September 20th, 2017, Puerto Rico changed forever. A growling, Category 4 hurricane devastated our island, completely wiping out power and water supply, destroying critical infrastructure and housing, severely damaging our telecommunications systems, and stranding us from the entire world. But while the storm was devastating, the federal

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preparedness and response to the catastrophe was deadly.

In the aftermath of Hurricane Maria, Puerto Rico was on its own with limited capacity and resources to guarantee subsistence needs and social protection. It should be recalled that a Major Disaster Declaration was signed by former President Donald Trump, but a sense of urgency and a commitment to robust actions was missing. After days without assistance, it became evident that the emergency situation was evolving into a major humanitarian crisis—there was no electricity, no food, no water, no cellphone service or internet; our entire infrastructure had collapsed and our most vulnerable people were left to die in their homes. I want to be very clear: federal preparedness and response to Hurricane Maria was at best mediocre; at worst, genocidal. This tragedy cannot go unnoticed by legislative bodies and government agencies must be held accountable. Before this body, Taller Salud would like to denounce FEMA's lack of planning and coordination, coupled with discriminatory practices that cost thousands of lives in our archipelago.

It's worth pointing out that this tragedy didn't occur in a vacuum: Puerto Rico's colonial status, coupled with our crippling debt, and the austerity measures imposed by the Fiscal Oversight Management Board undoubtedly contributed to the severity of the catastrophe and the deaths of thousands of Puerto Ricans. In Loíza, a town that is majority Black and majority women, 53% of the people live under the poverty line. Gender inequality manifests itself in a variety of ways, including poverty and lack of economic access, lack of housing, underemployment, lack of support systems, and a high rate of gender-based violence. When emergency

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strikes, women are always at the forefront of recovery and rebuilding. But they also bear the brunt of calamity and are the most vulnerable at the hands of austerity, physical abuse, institutional violence, and lack of access to proper healthcare and safe housing. After the storm, 5 of the 7 domestic violence shelters in Puerto Rico had to close due to infrastructure damage, lack of electricity, and absence of support by the central government. Because police officers were acting mostly as traffic and supply guards, women were unable to denounce violent situations and were forced to stay in dangerous environments. Local news reports have counted seven women murdered by partners or ex-partners during the aftermath of the catastrophe, but to this date, the Puerto Rico Women's Advocate Office, has not assessed nor published validated data regarding violence against women after Hurricane Maria. All of these constitute a violation of women's rights.

The decisions made by FEMA in the first 30 days after the hurricane had consequences we are still dealing with 4 years after the storm made landfall. According to 2020 Census data, Loíza has experienced a 21% reduction in its population—a 13% increase from the American Community Survey's 2017 estimate. This displacement has, in part, happened as a direct result of FEMA's inability or unwillingness to expedite the relief aid process. More than 3,000 homes in Loíza were left without roofs or were so severely damaged that they were rendered unsafe to live in. Yet FEMA has repeatedly rejected federal assistance requests from residents because of regulatory requirements that aren't tailored to the geographic and social realities of Puerto Rico. In 2018, FEMA published flood mapping declaring

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that 95% of Loíza is in a flood zone, making it impossible for our communities to rebuild post-emergency as FEMA requires flood insurance in order to reimburse for damages. Yet those same lands can be swiftly picked up by private capital, contributing to gentrification, resource depletion and even more displacement down the line. On an island where 30% of the population doesn't have broadband access, and after the storm completely ravaged our telecommunications infrastructure, FEMA Assistance requests were required to be processed through online websites or apps - only available in English, oblivious to the fact that a vast majority of our population has limited proficiency in English. This bureaucratic chain is not only deficient, but it is downright cruel and discriminatory.

However, the immediate needs in Loíza were met with an immediate response from the community. Women, specifically, organized themselves, surveyed the destruction and quickly got to work to ensure the safety and wellbeing of those around them. They rolled up their sleeves and set up community kitchens across Loíza to cook for hundreds of people. Our approach to human rights and the facilitation of participatory processes within and outside of our community allowed us to promptly address the magnitude of the needs and evaluate the necessary adjustments to the best of our abilities. We did community censuses around town to better understand the urgent needs of women, men, children, senior citizens, and people with disabilities. After all, nobody knows communities better than community members themselves. The Puerto Rican diaspora was vocal about the human rights violations occurring on the island. And with the

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help from hundreds of volunteers, we got aid where it belongs: in people's hands and homes.

Undeniably, since 2017, Puerto Rico's history has been divided in two chapters: Before María and After Maria. The atrocities witnessed after this tragedy serve as a reminder of our colonial status and the severe impact it has on the lives of Puerto Ricans on the island and across the globe. One thing is crystal clear: when the government doesn't do its job, people lose their lives. Since September 2017, inequities have harshened. Personal and professional opportunities are now much more fleeting. Social and well-being programs are even more deficient and lacking. Our communities and younger generations face the choice of leaving their hometowns at a rate much higher than before. The mismanagement and political abandonment in emergencies create an inhospitable environment for growth and health, leaving progress and aid at the hands of community and nonprofit organizations that have taken responsibility for what state and federal governments have left undone. Without a doubt, COVID-19 has exacerbated these circumstances. But the beatings our island took from the hurricane winds do not compare to the governmental abuse our people faced immediately after and to this day. It is imperative that the government learn from Taller Salud's feminist strategy and listens to community-led coalitions as it develops disaster preparedness and recovery plans. Our work demonstrates the power of community resilience and the importance of feminism as a principle in disaster relief. Long-term recovery efforts require investing in the women leaders of the communities. That's the way forward: alongside our communities with our

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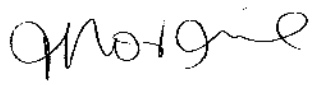
women on the front lines, prioritizing the collective over the interests of a foreign few. Centering the voices of those most affected by the issues, looking for solutions and answers *within* our peoples, not without. The solution has always been and will always be collective.

Thank you.



Tania Rosario-Méndez
Executive Director
Taller Salud

AMERICAN OVERSIGHT

FUNDACIÓN
FONDO DE ACCESO A LA JUSTICIA, INC.

December 3, 2021

Marik Xavier-Brier, Ph.D.
Director
Office of Civil Rights Evaluation
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW
Washington DC, 20425

Dear Mr. Xavier-Brier:

On November 8, 2021, we received an invitation to participate in the U.S. Commission on Civil Rights' public briefing on the Federal Emergency Management Agency (FEMA)´s role in disaster preparedness and response to Hurricane María in Puerto Rico as well as the civil rights protection before, during and after a natural disaster.

Fundación Fondo de Acceso a la Justicia (FFAJ) is a non-profit foundation in Puerto Rico that provides funding to diverse non-profit organizations to offer free legal services on civil matters to low-income and vulnerable communities. Our Foundation´s objective is to promote access to justice in Puerto Rico through direct legal aid.

After the impact of hurricanes Irma and María (September 2017), FFAJ created the Legal Emergency Fund with the purpose of providing free legal assistance to disaster survivors, particularly low-income families that were in imminent need of the housing assistance. We subsidized twenty (20) non-profit organizations with more than sixty-five (65) attorneys and notaries at law working in legal brigades throughout hundreds of communities in Puerto Rico. ***See attachment 1***.

It was during our legal aid projects that we encountered thousands of people, especially poor and vulnerable people, living under extreme conditions, with lack of basic needs, such as food, water, and housing. With no telecommunication system or internet on the island, our legal brigades helped many fill out the Individual FEMA Assistance and later, affidavits and the letters of appeal. After hurricane María, 85,000 Individual Assistance applications -with an impacted household estimate of 300,000 people- were denied because alleged lack of home ownership. As of today, it is unclear why and how so many cases were denied because

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of the reason "cannot prove ownership". After legal evaluation from our projects our attorneys concluded it was an arbitrary decision-making process.

The Individual and Household Program Unified Guidance as of September 2016 defined ownership as

"one where the applicant is:

- *The legal owner; or*
- *Does not hold a formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence; or*
- *Has lifetime occupancy right with formal title vested in another"*

The Guidance also expressed an exception as follows:

"FEMA may accept a written statement from the applicant indicating how long they lived in the disaster-damaged residence prior to the Presidential disaster declaration, and an explanation of the circumstances that prevent standard ownership verification".

Even though the Guidance provided for an exemption when a person does not have a formal property title, there was a disproportionate denial rate after Hurricane María because of the alleged lack of documentation that proved ownership. Facing this challenge, organizations such as Ayuda Legal Puerto Rico, Servicios Legales de Puerto Rico and ours helped developed a Sworn Statement which contemplated several legal scenarios that validated the right to ownership according to Puerto Rican law. This document was created to simplify the process, as it was not necessary to be notarized by an attorney-notary at law and was supposed to be distributed to the survivors, as well as to FEMA personnel. Nevertheless, many representatives from FEMA did not know about the document or did not inform effectively to the survivors the existence of this Statement. In fact, after FEMA´s Office of the Chief Counsel approved the document, FEMA did not agree to notify the document as an alternative to appeal, as well as the distribution and availability of the document in the Disaster Recovery Centers. Effective communication with FEMA officials has been a constant challenge.

As a result of the denial of thousands of applications in Puerto Rico and the refusal to make available the Sworn Statement approved by FEMA's Office of the Chief Counsel, our Foundation rushed to seek funds and stated a new campaign across the island to inform disaster survivors about this new document, the possibility to appeal and receive free legal assistance. Sadly, many survivors created great distrust toward FEMA's procedures and the constant expression from residents of different communities was that they felt discriminated. Still, our Foundation kept working in favor of the survivors, particularly with the appeals needed to receive the assistance and we implemented psychological services in our projects to emotionally affected survivors.

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We had to implement Title Clearance Legal Aid Projects as a response to FEMA's constant "ownership not verified" denial letters. We encountered disaster survivors that had submitted to FEMA between 3 to 5 appeals. The frustration, distrust, emotional deterioration, and sense of discrimination were the main factors presented by our participants. Still, FFAJ worked – and still works - with title clearance and ownership projects in Puerto Rico. We have subsidized two title clearance projects, impacting more than 3,000 people. This legal work has helped countless survivors to provide legal documentation so that they can support their current or future assistance application. At this time, we are working on our third title clearance project with the objective to help our participants obtain their title or documentation that will aid in the process of obtaining a property title.

Notwithstanding the challenges, we continued our mission and as of today, we have provided emergency legal services to more than **15,000 people**, which **65%** are woman and **78%** are people of the age of 50 and older. FFAJ has identified and summarized the experiences and struggles faced by the communities and the lawyers that provided legal aid to disaster survivors. ***See attachment 2 and 3***. Some experiences and challenges are described below.

After the impact of hurricane Irma and María, we notice that the FEMA inspectors and personnel had:

- Insufficient training
- Discrepancy and inconsistencies in damage assessments
- Requested legal documents without knowledge of local law
- Language barrier between FEMA personnel and survivors

We have recommended FEMA to emphasize the training of their personnel and inspectors. The inspectors should not make legal evaluations. Also, they should be trained and informed on relevant information about Puerto Rican law and other important cultural aspects, such as: ownership verification or, in some cases, there could be the same physical addresses due to lack of land segregation. Civil law in Puerto Rico includes legal dispositions that allow ownership without having a formal property title. The personnel should also be able to speak Spanish or have a translator when talking to a survivor.

The application process and additional document request should be accessible and obstacle-free. Many of the people that we attended had difficulty submitting the Individual Assistance Application, particularly because of lack of equipment and broadband internet access in disaster zones, added to the reality that Puerto Rico is the jurisdiction with the highest poverty rate, as well as other social and demographic factors, such as lack of knowledge to read or write, lack of transportation, as many of our participants were elders.

FEMA REPEATS SAME DISCRIMINATORY PRACTICES

Unfortunately, in December 2019 a series of earthquakes began to shake the south-western part of the island of Puerto Rico. On January 7th, 2020, a magnitude 6.4 earthquake stroke

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the island, followed by replicas that increased the damages. On January 16th, 2020, the President issued a Major Disaster Declaration in Puerto Rico that included thirty-three (33) municipalities. The earth in the south-western part of the island still trembles as people and families lose their houses and property.

Among the municipalities included in the Declaration of Disaster, there are municipalities with the highest poverty rate in Puerto Rico. According to data from the Census Information Center of the University of Puerto Rico, Cayey Campus (2020), the municipality of Guánica, which was the epicenter of the most intense earthquake, boasts a poverty rate of 65%. That is, about 20% more than the poverty rate of all of Puerto Rico.

As of June 23rd, 2020 FEMA reported the following information regarding the Individuals and Households Program in Puerto Rico:

Individual and Household Program - 33,993 requests
Approved - 12,898 (38%)
Ineligible - 21,096 (62%)

Household Assistance - 33,048 requests
Approved - 11,212 (34%)
Ineligible - 21,836 (66%)

Other Needs Assistance - 12,876 requests
Approved - 4,055 (31%)
Ineligible - 8,821 (69%)

Fundación Fondo de Acceso a la Justicia subsidized a Legal Aid Hotline for earthquake survivors. Sixty percent (60%) of the people that called the hotline were women out of which forty eight percent (48%) are above the age of sixty (60). Sixty three percent (63%) of the people that called had an income of less than $20,000.00 a year. Among the calls, twenty percent (20%) informed us that FEMA denied their initial assistance application primarily because of the following reasons:

- Insufficient damage
- Cannot prove ownership
- Conflict with the address of the applicant

We raised our concern of this very low approval rate and that, like post-hurricane María, FEMA was denying on issues of ownership and/or there is conflict with the address of the applicant. The reality in Puerto Rico is that a home can be identified by different addresses

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as the physical address, the postal address, the property tax address and the property registry description.

We also expressed our concern of how earthquake survivors could submit their documentation so that the application or appeal can be completed with all the necessary documents and the process could run easily, particularly because the twenty (20) Disaster Recovery Centers (DRCs) that were opened as of March 2020, were closed for four (4) consecutive months and only two (2) were opened as of July 2020. We were aware of the COVID-19 pandemic and local government restriction but opening two DRC's was insufficient. Because we were aware of the pandemic and wanted to guarantee disaster survivors rights we suggested FEMA to enable an email address so the attorneys providing legal services could send important documents about a case, taking into consideration that most of the DRCs were closed. We have also asked for the approval of a three-way call where applicant and attorney could both be present. Many of the applicant did not understand the process and they reported communication problems regarding the language and accents of FEMA representatives. Our requests and recommendations were denied or never implemented.

Regarding the access to information and transparency, we have requested FEMA to allow us access to general information about Individual Assistance Program summary in Puerto Rico so we can target the people that need our legal assistance on their individual assistance applications, appeals and/or remote inspections. Without the information it is harder to locate the affected communities and most vulnerable people. This information was also denied or made inaccessible. **The lack of transparency and access to information has been a constant issue since hurricane María**.

We requested to the FEMA's regional assigned attorney and Puerto Rico FEMA staff to adopt guidelines for the implementation of Remote Inspections. We were not aware of how the remote inspections take place as well as the rights of the applicants through the process. It is important to consider that these inspections are fundamental in the award or rejection of an application and the rights of survivors need to be taken into account. The Office of the Chief Counsel did not provide the Guidelines. It is important to consider that our due process of law guarantees its citizens a just and fair process when the government makes any determination regarding people's property. One of the guarantees of such due process is the adequate notification of procedures to a person that will receive a remote inspection.

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FINAL REMARKS

Four years later after hurricane María, FEMA finally announced certain flexibility and assistance to ensure equity across all communities, particularly in accepting a broader range of ownership and occupancy documentation to assist those typically in low-income populations. Also, we recently were aware that FEMA is encouraging real-time feedback to applicants, and to have trained staff to verify documentation on site while conducting home inspections. This decreases the burden on survivors to appeal a FEMA decision in writing by verifying documents at the time of inspection. However, it is important to be accessible, hear the survivors and be attentive, especially to the most vulnerable.

With this brief we attach a document titled "Best Practices Guide" (***See attachment 4***) created by FFAJ for the better performance of FEMA considering the experience from Puerto Rico. This Guide has been provided since 2018 to FEMA personnel, FEMA high ranking officials, governmental representatives in Puerto Rico, Rear Admiral Peter J. Brown, Trump´s designated special representative for Puerto Rico disaster recovery as well as to several Congressmen and Congresswomen. Even though we have made multiple efforts to emphasize our message with the "Best Practices Guide" we have not seen much progress with FEMA to put in effect our recommendations.

We appreciate the opportunity to express our testimony for the US Commission on Civil Rights and we hope it will be useful to guarantee disaster survivors in Puerto Rico a just and dignified recovery.

Cordially,

Amaris Torres Rivera
Executive Director

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December 6, 2021

Marik Xavier-Brier, Ph.D.
Director
Office of Civil Rights Evaluation
U.S. Commission on Civil Rights
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Testimony for Public Briefing on the Civil Rights Implications of Disaster Relief: Hurricane María in Puerto Rico

Dear Mr. Xavier-Brier,

I appreciate the opportunity provided by the United States Commission on Civil Rights to testify and submit written comments on the civil rights implications of the federal response to the impacts of Hurricane María in Puerto Rico. This testimony will focus on the multiple efforts that numerous community and environmental groups have made to provide input to the Federal Emergency Management Agency ("FEMA") and other government agencies on the necessary transformation of the Puerto Rico electric system to address the disproportionate burdens that centralized, fossil-fired, import-dependent energy generation exert on poor and majority afro-descendent communities in Salinas, Guayama, Penuelas, Guayanilla and other municipalities where the infrastructure is located and civil society proposals to achieve environmental and climate justice.

I. Introduction

In September 2017, Hurricane Maria took down 80% of Puerto Rico's centralized transmission and distribution grid resulting in a complete power outage that extended for nearly a year in some areas.[1]Most communities, businesses, schools and other essential institutions were shut down for months. Living without electric service can be life-threatening for people who

[1] Puerto Rico's Hurricane Maria Power Outage Is Now the World's Second Largest Blackout (newsweek.com). Electric power lines are sometimes igniting or aggravating wildfires in other places such as California. PG&E Power Lines Blamed For Northern California Wildfires : NPR. A few months ago, Hurricane Ida tore down the T&D system in NOLA. Most recently, Hurricane Nicholas wreaked havoc on the electric grid in Texas. Nicholas leaves more than 100,000 Texas electricity customers without power | The Texas Tribune. The more frequent and intense hurricanes, storms, wildfires and other climatic events increasingly are disabling delivery of energy through electric transmission and distribution (T&D) systems. From the Caribbean to the Gulf Coast, the eastern seaboard and along the West Coast of the United States communities are increasingly contending with power outages provoked by downed T&D infrastructure, i.e. lines, poles, towers, transformers, substations etc. Civil society groups are increasingly holding rogue utilities like Entergy in Louisiana to account Energy & Justice in New Orleans: Power to People! - Deep South Center for Environmental Justice (dscej.org),

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depend on medical equipment like nebulizers, asthma therapy, dialysis treatment or require refrigerated medication. For others, the lack of essential electric service can make simple everyday tasks like meal preparation, food storage, hygiene, maintenance, commercial transactions, banking, transportation and many other routine activities very difficult. Water and sewer systems often depend on pumps that run on electricity, so in many places in Puerto Rico power outages are accompanied by lack of access to potable water and sewage treatment. More than 3000 people perished in the aftermath of Hurricane Maria, many of those deaths were attributable to the extended power outage. High poverty rates exacerbate the impacts and burdens of disaster events. After Hurricane Maria, over 150,000 people left Puerto Rico and have not returned.[2] Those who remained have developed a heightened interest in energy issues and renewable generation, especially rooftop solar and battery energy storage systems and other alternatives to fossil-fired generation plants that depend on centralized transmission and distribution lines, poles, towers, transformers, substations, systems etc, known as the grid.

More than four years after the passage of Hurricane Maria, a cursory view of the electric system casts a disappointing and potentially lethal tally. After the hurricane, the centralized grid with its poles, towers, wires and substations largely running from the big fossil-fired plants in southern Puerto Rico through the central mountain range to the north, especially the San Juan metropolitan area was stood up amid scandals of companies like Whitefish and Cobra profiting handsomely from dubious work. Another company, New Fortress Energy/NFEnergia built a liquefied natural gas terminal to import highly volatile methane gas, that is frequently inoperable and was constructed without the necessary authorization from the Federal Energy Regulatory Commission ("FERC") or an environmental justice analysis of how nearby communities would be impacted by this new threat; the Punta Lima Wind Farm was blown away by the hurricane as was a utility-scale, land-based solar array near where the storm made landfall; the AES coal-fired power plant in Guayama, Puerto Rico continues to spew toxins and contaminate the South Coast Aquifer and adversely impact the largely afro-descendent population. The new grid operator, a joint venture created by Quanta Services and ATCO Canadian Utilities called LUMA Energy is lobbying to rebuild the existing centralized, fossil-enabling energy grid that perpetuates environmental injustice with a historic amount of federal funds. The government of Puerto Rico and the local Energy Bureau, while paying lip service to renewable energy, continue to push the business-as-usual reconstruction of the 20th century electric system that overburdens nearby communities and has failed after each hurricane in the past thirty years and sometimes during lesser storms too.

Governor Pedro Pierluisi, who took power with barely 32% of the vote and the Puerto Rico Energy Bureau are asking FEMA, to hand over a whopping $9.6B that has been allocated for the electric system to rebuild the centralized transmission and distribution grid and add new methane gas-fired, import-dependent plants and not one penny for renewables. In 2005, Congress determined that rebuilding these lines over and over was not a cost-effective strategy: "…electric power transmission and distribution lines in insular areas [including Puerto Rico] are inadequate to withstand damage caused by the hurricanes and typhoons which frequently occur in insular

[2] Puerto Rican Exodus: One Year Since Hurricane Maria, RB2018-05_SEPT2018 (1).pdf (cuny.edu)

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areas and such damage often costs millions of dollars to repair;" [3]In contrast, civil society proposals put forward by community, environmental, labor and professional organizations, academia and religious congregations are calling on FEMA and the Puerto Rico Electric Power Authority ("PREPA") to invest the historic amount of federal funds allocated for the electric system to provide life-saving distributed renewable energy, primarily on-site or rooftop solar and battery energy storage systems to enable Puerto Rico residents, businesses and institutions access to resilient power as set out in the We Want Sun/Queremos Sol (queremossolpr.com) proposal. The proposed transformation of the electric system would alleviate the load on poor and largely afro-descendent communities that are overburdened by the centralized fossil-fired electric system in Salinas, Guayama, Penuelas, Guayanilla, and parts of the San Juan metro area. But Puerto Rico civil society proposals have thus far, fallen on deaf ears.

While various community groups and philanthropic organizations have carried out a few distributed renewable energy rooftop solar and battery storage projects throughout Puerto Rico, the pace and scale of these alternatives is dwarfed by the proposed rebuild of the centralized transmission and distribution grid and the rollout of new methane gas plants. Higher income individuals are seeing an uptick in rooftop solar and storage installations but with close to a 44% poverty rate, most people in Puerto Rico cannot access the life-saving essential electric service and resiliency that these systems can provide. In Puerto Rico and in other hurricane-prone places like the Gulf Coast and beyond, the investment of FEMA funds in distributed renewables and batteries is a matter of equity and environmental and climate justice.

The Biden-Harris administration and FEMA and the Department of Housing and Urban Development ("HUD"), in particular have a unique opportunity to make good on the administration's commitment to tackle the climate crisis and center environmental justice by showcasing Puerto Rico as an example of what recovery funds can do to transform the electric system. In addition, using FEMA and HUD funds to rebuild the Puerto Rico grid would be a terrible waste of taxpayer money.

II. Abbreviated Chronology of Civil Society Outreach to FEMA

- **July 10, 2020** – Ten environmental and community groups in Puerto Rico: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg – Enlace Latino de Acción Climática, Inc., Comité Yabucoeño Pro-Calidad de Vida, Inc., Campamento Contra las Cenizas en Peñuelas, Coalición Organizaciones Anti-Incineración, Amigos del Río Guaynabo, Alianza Comunitaria del Sureste, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., , Sierra Club Puerto Rico, Inc., CAMBIO PR represented by a team of lawyers including Earthjustice sent a letter to FEMA stating that "FEMA's funding would be best spent on cost-effective projects that align with Puerto Rico's goals to transition away from imported fossil fuels and to renewables and storage, and especially distributed renewables and storage." They also asked "FEMA to review expert testimony from the Integrated Resource Plan ("IRP") proceeding, which clearly demonstrated that distributed solar and storage are far more cost-effective, reliable, and resilient for the island than large, centralized fossil fuel plants." And requested a meeting to further discuss the transition to an affordable and

[3] 48 U.S.C.A. § 1492(5).

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resilient distributed renewable energy system in Puerto Rico such as the We Want Sun Proposal (queremossolpr.com).[4]

- **August 13-14, 2020** – FEMA issued a Notice of Availability[5] of the Programmatic Environmental Assessment for the Commonwealth of Puerto Rico Utility Repair, Replacement, and Realignment from Hurricane María Island-Wide, Puerto Rico which proposes rebuilding of the centralized transmission and distribution grid that connects the fossil-fired power plants in southern Puerto Rico with the energy demand centers.[6]
- **August 24, 2020** – The Energy Bureau issued a Final Resolution and Order that: (i) approved in part and rejected in part PREPA's IRP; (ii) modified the Action Plan proposed by PREPA; and (iii) ordered PREPA to adopt and implement the Modified Action Plan. Also, the Energy Bureau ordered PREPA to engage in an aggressive renewable deployment and embrace distributed solar + storage to comply with Law 17-2019 and Law 33-2019 renewable energy targets (20% by 2022; 40% by 2025; 60% by 2040, and 100% by 2050; and Puerto Rico is at 2-3%currently).[7] The ten community and environmental groups listed above were active participants and were granted intervenor status in the IRP process.
- **September 18, 2020** - FEMA allocated $9.6 billion for the Puerto Rico electric system to "repair and replace thousands of miles of transmission and distribution lines, electrical substations, power generation systems, and other grid improvements."[8]
- **September 23, 2020** – Comité Diálogo Ambiental, Inc. issued an open letter to FEMA urging that the "federal funds assigned for the Puerto Rico electric system should be used for the installation of photovoltaic systems sited on rooftops or near existing structures, coupled with battery energy storage systems (BESS) and energy conservation, education and efficiency programs."[9]
- **September 24, 2020**- FEMA responded to Earthjustice's correspondence dated July 10, 2020, stating that, "many of the opportunities discussed in the letter are directly tied to decisions made by the Commonwealth of Puerto Rico and PREPA in determining the type of power grid operational platforms. FEMA does not play a role in determining what that decision is nor authorizes the use of funding for projects outside the eligible parameters adopted in FEMA policy."

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[4] The letter was endorsed by Pedro Saadé, Esq., Ruth Santiago, Esq. and the following environmental justice organizations and community groups: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., CAMBIO PR, and Campamento Contra las Cenizas en Peñuelas, Inc.

[5] According to FEMA, the Utilities PEA was available for agency and public review and comment for a period of 60 days from October 24 concluding on December 22, 2020. The public information process included a public notice in both Spanish and English with information about the proposed action in the Primera Hora newspaper. https://www.fema.gov/disaster-federal-register-notice/dr-4339-pr-environmental-assessment-public-notice-002

[6] https://www.fema.gov/sites/default/files/2020-08/fema_ea_puerto-rico_utility-repair-replacement-realignment_guidedbook_august-2020.pdf

[7] https://energia.pr.gov/wp-content/uploads/sites/7/2020/08/AP20180001-IRP-Final-Resolution-and-Order.pdf

[8] White House authorizes $9.6B to rebuild Puerto Rico's grid, but how can it be spent? | Utility Dive.

[9] The letter was also endorsed by several organizations: Diáspora en Resistencia , Alianza for Progress, Respeta Mi Gente, Sane Energy, Nobody Leaves Mid-Hudson, Labor Council for Latin American, 350BK, Safe Energy Rights Group, Alliance for a Green Economy, Nuclear Information and Resource Service, New York Communities for Change, Long Island Progressive Coalition, Food & Water Watch Action, NYC Democratic Socialists of America Ecosocialist Working Group, 4 Solstice, PhillyBoricuas, the Samuel Lawrence Foundation.

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- **November 11, 2020** – Letter from the co-founders of Queremos Sol to PREPA requesting "the opportunity to coordinate the details that will ensure effective public participation in the confection and implementation of PREPA's 10-Year Infrastructure Plan to be submitted to the COR3 and FEMA." [10]
- **November 17, 2020:** Letter from Senator Chuck Schumer and Representative Nydia Velazquez to FEMA seeking answers on how the grant to Puerto Rico ensures rebuilding a stronger and environmentally friendly electrical grid. "The decentralization of Puerto Rico's grid, as well as the adoption of clean and renewable energy, should be the focus of any recovery and reconstruction effort. Moreover, the grid's reconstruction should be conducted through a community-centric approach."[11]

- **November 18, 2020**- Earthjustice[12] requested that FEMA grant a 90-day extension of the November 22, 2020 deadline for comments to the Draft PEA for the Utility Repair, Replacement, and Realignment of the Commonwealth of Puerto Rico, since the environmental justice organizations and community groups that Earthjustice represented did not receive notice as required in Section 7.0 of the PEA.
- **November 18 and 23, 2020**- The Rincón chapter of Surfrider Foundation submitted comments regarding the FEMA Draft PEA: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR.
- **December 7, 2021** - PREPA submitted a plan to FEMA that included both Section 428 proposed projects and Section 404 Hazard Mitigation projects to rebuild the centralized transmission and distribution system. According to PREPA, it also intends to use Section 406 funds for "public assistance mitigation" which includes "infrastructure hardening work."
- **December 21, 2020**- Alianza de Energía Renovable Ahora[13] submitted comments to the FEMA Draft PEA: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR, stating their "concerns about the inadequacies of the PEA, the failure to address safety issues, risks, and significant adverse environmental impacts and repercussions of not preparing an Environmental Impact Assessment."; requested that FEMA not approve the PEA or issue a FONSI, but rather, draft a full Environmental Impact

[10] The letter was signed by Abraham García Román, Asociación de Empleados Gerenciales de la Autoridad de Energía Eléctrica Adriana González, Sierra Club de Puerto Rico Dr. Agustín Irizarry Rivera, Catedrático Dept. Ingeniería Eléctrica, UPR Mayagüez, Ángel Figueroa Jaramillo, UTIER Federico Cintrón Moscoso, El Puente Ing. Ingrid M. Vila Biaggi, CAMBIO PR Myrna Conty, Amigos Río Guaynabo, Coalición de Organizaciones Anti-incineración Lcdo. Pedro Saadé, profesor Clínica de Asistencia Legal, Escuela Derecho UPR Lcda. Ruth Santiago, Comité Diálogo Ambiental Víctor de Castro, Asociación de Empleados Gerenciales de la Autoridad de Energía Eléctrica and Laura Arroyo, Earthjustice.

[11] https://www.schumer.senate.gov/newsroom/press-releases/schumer-velzquez-announce-94-billion-fema-grant-recently-awarded-to-puerto-rico-electric-power-authority-prepa-can-be-used-to-build-micro-grids-underground-transmission-lines-and-power-grid-that-supports-clean-renewable-electricity-clean_reliable-energy-can-be-part-islands-ongoing-recovery--reconstruction-efforts

[12] Earthjustice represented the following environmental justice organizations and community groups: Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., and Campamento Contra las Cenizas en Peñuelas, Inc.

[13] This environmental justice alliance was formed by the same environmental justice organizations and community groups listed in the November 18, 2020 letter to FEMA, and also includes Cambio, PR, Inc.

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Statement to correct the inadequacies and legal errors in the environmental analysis for the extensive projects proposed and reconsider its conclusions on the basis of the corrected information. The extensive comments to the FEMA PEA proposed the investment of FEMA funds for widescale on-site rooftop solar and battery energy storage systems on homes, businesses, industries, and institutions to provide life-saving resiliency to Puerto Rico residents.

- **December 30, 2020** - The Energy Bureau issued an Order requiring PREPA to file a copy of the 10 Year Plan it had submitted to FEMA.
- **January 25, 2021** - The Energy Bureau determined that the 10 Year Plan was inconsistent with the approved Integrated Resource Plan ("IRP") and Modified Action Plan primarily because it did not include solar or battery energy storage systems and included new fossil fuel generation.
- **February 8, 2021 –** Letter from David I. Maurstad, Regional Administrator, FEMA Region 2, responded to the Schumer/Velázquez letter to Peter Gaynor dated November 17, 2020, stating that "[i]t is important to note that renewable generation and storage assets were not included in the recent obligation, as they were either not owned by the Subrecipient, not damaged from the event, or did not exist as part of the power grid infrastructure. However, as mentioned above, due to the unique flexibility associated with FEMA funding under the BBA and the PAAP, PREPA may pursue projects beyond merely restoring the facilities damaged as they were prior to hurricanes Irma and Maria." He further stated that per FEMA's governing statutes, regulations, and/or guidance, Puerto Rico or PREPA could "pursu[e] and propos[e] power grid projects that support renewable generation and storage in their recovery solutions and "pursu[e] and propos[e] underground transmission lines as their actual recovery solution" if the projects complied with the Environmental and Historic Preservation (EHP) laws, regulations, and executive orders. Maurstad further stated that "FEMA expects and encourages PREPA to incorporate and integrate additional funds via the FEMA PA Program for mitigation, and any other available funding," and that "FEMA believes that some portions of the electric grid will have projects proposed to coincide with operationally transformative platforms, driven by Integrated Resource Plan initiatives and policies at both the Commonwealth and Utility levels. The Interagency Group, known as the Energy Technical Coordination Team (TCT) and made up of Federal, State, and Local governmental stakeholders, works to collaborate and coordinate the different funding streams as part of the project development, review and implementation process." He noted that "[t]he primary industry standards informing FEMA, COR3, and PREPA's recovery efforts for the electrical grid are set by the USDA Rural Utilities Service (RUS), which PREPA had previously been a member of until 2011." Finally, Maurstad stated that FEMA has no requirement to ensure public/community participation in how funds are allocated, although "FEMA Environmental and Historic Preservation staff EHP staff do review requirements set forth by [NEPA] that encourage public and community involvement in activities to be funded by federal agencies."
- **February 16, March 19 and June 2021** - PREPA updated the 10 Year Plan which proposes to use over $12B in FEMA funds to repair existing centralized transmission, distribution and generation facilities. PREPA mentions the construction of "renewable generation and battery storage projects by third-party developers who will enter into power purchase and operating agreements with PREPA" but no FEMA funds would be used for renewables.

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- **February 25, 2021 –** Reps. Alexandria Ocasio-Cortez and Nydia Velázquez and Sen. Charles Schumer, in a letter signed by 14 other Members of Congress, wrote to FEMA Administrators, Deanne B. Criswell and Robert Fenton, Jr., stating that PREPA's current plan for rebuilding the grid would reinforce Puerto Rico's dependence on fossil fuels and indeed runs counter to the 2019 Puerto Rican law, the Energy Public Policy Act. They further stated that PREPA's plan violates the IPR approved by the Puerto Rico Energy Board. The congressional members called on the agency to require PREPA to "promote the installation of distributed energy generation capacity using renewable energy sources" and to "[earmark] federal funds to transition to distributed renewable energy systems." [14]

- **February 26, 2021**- Earthjustice sent a letter to FEMA requesting a meeting to discuss urgent concerns regarding the 10-Year Plan submitted by PREPA to FEMA for electric system work, stating that, "PREPA's 10-Year Plan fundamentally violates Puerto Rico law, frustrates the Biden Administration's recent executive order on tackling the climate crisis, and fails to implement the changes necessary to create a resilient and equitable energy grid", and that FEMA should act to prevent these violations.[15] The letter was sent to FEMA designated administrator, Ms. Deanne Criswell, Mr. Fenton, and Mr. Fargione.
- **March 26, 2021**- the Energy Bureau issued a Resolution and Order determining that the modified 10 Year Plan was consistent with the IRP and noting that the FEMA programs 404, 406 and 428 did not prevent PREPA from requesting funds for renewable energy or battery energy storage projects.[16]
- **March 30, 2021**- Comité Diálogo Ambiental, Inc., *et al*.[17] sent a letter to FEMA requesting a meeting with FEMA regarding a communication that FEMA sent to PREPA dated February 5, 2021, about the Energy Bureau determination to halt spending on projects that violate the approved Integrated Resource Plan and questioning the feasibility of these projects under the Puerto Rico regulatory framework.
- **June 16, 2021**- FEMA issued a Finding of No Significant Impact (FONSI) that determined that "the comments do not substantively change the analysis or outcomes" and "that the evaluated actions will have no significant adverse impact on the quality of human health and the environment within the constraints evaluated."[18] The FEMA FONSI paves the way for the rebuilding of the centralized transmission and distribution system that enables the operation of the fossil-fired power plants that overburden poor and majority afro-descendent communities, mostly in southern Puerto Rico.
- Subsequent meetings with the Department of Energy ("DOE"), the Council on Environmental Quality ("CEQ") and the FEMA Office of Congressional Affairs in

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[14] https://twitter.com/RepAOC/status/1365046143047127044

[15] This letter was also endorsed by the same environmental justice organizations and community groups mentioned in the first footnote.

[16] https://energia.pr.gov/wp-content/uploads/sites/7/2021/03/20210326-MI20210002-RO-Response-to-Revised-10-yr-Plan.pdf

[17] El Puente de Williamsburg, Inc.-Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., CAMBIO PR, Campamento Contra las Cenizas en Peñuelas, Inc., and Earthjustice

[18] FEMA did not hold public hearings for the Draft PEA or prior to issuing the FONSI. https://www.fema.gov/sites/default/files/documents/fema_oehp-fonsi-utilities-repair_06-17-21.pdf

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Puerto Rico requesting a meeting with the FEMA decisionmakers, and documents long requested under the Freedom of Information Act ("FOIA") are pending.

- **October 30, 2021** - Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc. – Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club Puerto Rico, Inc., Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti Incineración, Inc., Amigos del Río Guaynabo, Inc., and Campamento Contra las Cenizas en Peñuelas, Inc., collectively known as Alianza Energía Renovable Ahora ("AERA"),[19] together with the Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER"), formally requested that FEMA reconsider its highly flawed decision to issue a Finding of No Significant Impact ("FONSI") for the Programmatic Environmental Assessment: Utility Repair, Replacement, and Realignment in the Commonwealth of Puerto Rico, DR-4339-PR ("PEA"), finalized in August, 2021.

III. LUMA Energy Control Over FEMA and Other Federal Funds, Conflicts of Interests and Potential Self-Dealing

The Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement dated June 22, 2020 between the Puerto Rico Electric Power Authority as Owner, the Puerto Rico Public-Private Partnerships Authority as Administrator, Luma Energy, LLC as ManagementCo, and Luma Energy Servco, LLC as ServCo (the LUMA contract)[20] is a long, expensive and exclusive scheme that creates a private monopoly over energy transmission, distribution, generation dispatch, customer service, planning and other electric system functions and perpetuates the operation of the fossil-fired generation plants that overburden poor and majority afro-descendent communities. The LUMA contract grants LUMA Energy control over FEMA and other federal funds assigned for the Puerto Rico electric system as detailed below.

1. LUMA participates and has veto power in the selection of the federal funds grant manager. Contract Section 1.1, page 17.

2. LUMA can request changes or modifications to the federal funding, including modifications to, or reallocations between, the project worksheets related to the T&D System prepared by FEMA pursuant to Section 428 of the Stafford Act or the Integrated Resource Plan. Contract Section 4.3 (j) Pages 50-1.

3. LUMA, in conjunction with the Administrator determines that capital improvements are done to maximize the potential realization of the federal funding anticipated or received. Contract Section 5.9, Page 70.

4. LUMA has "complete flexibility, subject to compliance with the Contract Standards and prior consultation with, but not subject to approval by, Administrator or PREB, to (i) reallocate, accelerate or postpone expenditures within the approved Operating Budget, (ii) reallocate, accelerate or postpone expenditures within the

[19] The environmental and community organizations on behalf of which this Request for Reconsideration is submitted make up the majority of the organizations forming the AERA.

[20] executed-consolidated-om-agreement-td.pdf (pr.gov)

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approved Capital Budget – Federally Funded, subject to the Federal Funding Requirements,"…Section 7.3, Page 89.

5. LUMA and its subcontractor will "deal with federal funds management" to manage "longterm recovery using federal funding on behalf of the Owner". Page Annex II-39, Page (pdf) 207.

6. LUMA Energy, LLC, was created by Quanta Services and ATCO, an affiliate of Canadian Utilities these companies are expected to benefit from the billions of dollars in federal funds. LUMA's parent company, Quanta Services plans to "compete for work associated with Puerto Rico's electric T&D system modernization efforts that are separate from its ownership interest in LUMA", "expected to be funded by U.S. federal disaster relief agencies and managed by LUMA." [21]

7. The contract states that the Operator (LUMA) will work with IEM (as its subcontractor) to manage federal funds.

8. LUMA establishes a governance framework to manage long term recovery using federal funds on behalf of PREPA. (VII. Federal Funds Procurement Manual).

9. LUMA may request changes or modifications to federal funding (including modifications or reassignments between project worksheets related to the T&D system prepared by FEMA pursuant to Section 428 of Stafford Act) or the Integrated Resource Plan. (LUMA contract page II-39, pdf 207).

10. Luma Energy objects to PREPA using funds allocated for the electric system by FEMA and other federal agencies to install rooftop solar systems and batteries. LUMA and its affiliated companies Quanta and ATCO plan to use the funds for transmission projects. In a proceeding before the Energy Bureau, one of the LUMA Energy representatives, Lee Wood, falsely alleged that FEMA would not allow the use of funds for behind the meter generation, that is, located in the residence or business of the consumer, mainly rooftop solar. [22]

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[21] "Quanta believes there is opportunity for it to compete for work associated with Puerto Rico's electric T&D system modernization efforts that are separate from its ownership interest in LUMA. Puerto Rico's electric T&D system is at a critical juncture after the destruction caused by Hurricanes Maria and Irma. As a result, the government of Puerto Rico, through the P3 and in collaboration with PREPA, have embarked on a plan to rebuild, modernize, harden and "green" its power grid, a majority of which is expected to be funded by U.S. federal disaster relief agencies and managed by LUMA. The P3 estimates that more than $18 billion of electric T&D capital investment could be required through 2028 for this initiative." Quanta Services and ATCO-Led Consortium Selected by the Puerto Rico Public-Private Partnership Authority for the Operation and Maintenance of Puerto Rico's Electric Power Transmission and Distribution System, https://investors.quantaservices.com/news-events/pressreleases/detail/277/quanta-services-and-atco-led-consortium-selected-by-the.

[22] In the recording of the proceedings before the Energy Bureau, Luma's representative tries to argue that PREPA cannot use the FEMA funds assigned to it to install solar systems with batteries for its subscribers. See, https://www.youtube.com/watch?v=oGYujWJ8S7s (minute

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IV. Applicable Legal Framework

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by states on the basis of race.[23] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[24] The Environment Protection Agency ("EPA") Title VI implementing regulations bar disproportionate impact, in addition to intentional discrimination, in the administration of environmental programs, such as siting and enforcement. Executive Order 12898 requires each federal agency, "to the greatest extent practicable and permitted by law, … [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[25]

The National Environmental Policy Act ("NEPA") provides that a purpose and need statement under NEPA must allow for consideration of all reasonable alternatives that fall within the statutory authority for a project – that is, it must not frustrate Congressional intent and the objectives of federal laws by evaluating only some of the ways a project could be accomplished, rather than the full scope of options available under the law. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); s*ee also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245-1246 (9th Cir. 2005). Similarly, and for similar reasons, a purpose and need statement may not be limited to what applicants propose. *Nat'l Parks & Conservation Asss'n v. Bureau of Land Mgmt.*, 586 F.3d 735, 747-748 (9th Cir. 2009).

The FONSI issued by FEMA for electric system work in Puerto Rico falls short of NEPA's demands and is contrary to President Biden's Executive Orders on Climate and Environmental Justice. On January 27, 2021, President Biden issued Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, which declared that this Administration's policy is to:

> organize and deploy the *full capacity of its agencies to combat the climate crisis* to implement a Government-wide approach that reduces climate pollution in every sector of the economy; *increases resilience to the impacts of climate change*; protects public health; conserves our lands, waters, and biodiversity; *delivers environmental justice*; and *spurs well-paying union jobs* and economic growth,

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1:49). See also, José Delgado, Alexandria Ocasio Cortez, Nydia Velázquez y Charles Schumer reclaman priorizar la energía renovable en Puerto Rico, Feb. 25, 2021, https://www.elnuevodia.com/corresponsalias/washingtondc/notas/alexandria-ocasio-cortez-nydia-velazquez-y-charles-schumer-reclaman-priorizar-la-energia-renovable-enpuerto-rico/

[23] U.S. CONST. amend. XIV.

[24] 42 U.S.C. § 2000d.

[25] 9 Exec. Order No. 12,898, 32 C.F.R. § 651.17, http://www.archives.gov/federal-register/executiveorders/pdf/12898

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especially through innovation, commercialization, and *deployment of clean energy technologies and infrastructure*.[26]

The Order further provides that "[t]he Federal Government must drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy, marshaling the creativity, courage, and capital necessary to make our Nation resilient in the face of this threat."[27] It establishes a National Climate Task Force and specifies that "[t]o the extent permitted by law, Task Force members shall prioritize action on climate change in their policy-making and budget processes…and in their engagement with State, local, Tribal, and territorial governments; workers and communities…."[28] In addition, the Order directs agency heads to "identify opportunities for Federal funding to spur…deployment of clean energy technologies and infrastructure…and then take steps to ensure that, to the extent consistent with applicable law, Federal funding is used to spur…deployment of clean energy technologies and infrastructure."[29]

V. Discussion

The operation of large, centralized fossil-fired power plants emit pollutants regulated under the Clean Air Act ("CAA") and the National Ambient Air Quality Standards ("NAAQS"), that harm the health of the communities near these plants in the municipalities of Salinas, Guayama, Penuelas, Guayanilla, and parts of the San Juan metro area.[30] The additional methane gas-fired power plants and Liquefied Natural Gas "LNG" imports proposed by PREPA would impose air-polluting emissions of Volatile Organic Compounds ("VOCs") and impacts on communities near the power plants, whereas customer-sited rooftop solar and storage systems would remove these impacts. The negative effects of LNG and "Natural" (Methane) Gas which in its liquid state is a highly flammable material poses hazards to human health and the environment. Burning methane gas at multiple facilities throughout Puerto Rico would increase public health risks. Methane gas combustion emits increased VOCs such as formaldehyde, benzene, toluene, hexane, and styrene. Renewables avoid the multiple public health and safety risks of fossil fuel combustion including fuel releases that increase during disasters. Community and environmental groups, with the help of allies have advocated not only for the decarbonization of the Puerto Rico electric system but also the decentralization, democratization and decolonization.[31] Centralized transmission and distribution grid infrastructure perpetuates the operation of the fossil-fired plants in southern

[26] *Id.* (emphasis added).
[27] *Id*. at 7622.
[28] *Id*. at 7623.
[29] *Id*. at 7625.
[30] *See* U.S. Envtl. Prot. Agency, Green Book, Puerto Rico Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants (data current as of Nov. 30, 2021), https://www3.epa.gov/airquality/greenbook/anayo_pr.html.
[31] Onís, C.M. de. (2021). Energy islands: Metaphors of power, extractivism, and justice in Puerto Rico. Berkeley: University of California Press.

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Puerto Rico, making it a sacrifice zone for the San Juan metropolitan area and what has been called the "periphery of the periphery."[32]

Multiple studies have shown the viability, reliability and economic benefits of rooftop solar and storage in Puerto Rico.[33] Last year, the U.S. Department of Energy ("DOE") National Renewable Energy Laboratory ("NREL") highlighted the rooftop solar potential in Puerto Rico, stating that solar energy generation sited on rooftops are offsets and reduce the overall amount of energy needing transmission and distribution. According to the NREL study, Puerto Rico has the potential to produce four to five times as much solar energy than is needed to meet its current residential demand. More than a decade ago, faculty at the University of Puerto Rico found that rooftop solar is "the least environmentally intrusive" to generate energy in Puerto Rico. The report recommended generating power locally with solar energy and, in certain cases, creating microgrids, such as for high-rise buildings. More recently, Cambio PR and the Institute for Energy, Economics and Financial Analysis set out a plan to achieve 75 percent renewable power generation in 15 years. Solar energy deployment in Puerto Rico is expected to create nearly 20,000 jobs by 2030.[34]

Because PREPA and the Commonwealth of Puerto Rico are in bankruptcy, FEMA and other federal funds are the only viable way in which Puerto Rico can achieve its Renewable Portfolio Standard, renewable energy goals, and attain accessible electric rates. Financing of new power purchase agreements with PREPA as a credit counterparty would entail prohibitively high interest rates and financing costs that would lead to skyrocketing of the already astronomical electric rates that are currently about double the average U.S. rate.[35]

FEMA was obligated to consider environmental justice in drafting the FONSI. As EPA has explained, "Federal agencies must consider environmental justice in their activities under

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[32] Lloréns, H. (2021). Toxic racism in Puerto Rico's Sacrifice Zone. NACLA Report on the Americas 53(3), 275-280. doi: 10.1080/10714839.2021.1961447

[33] Meghan Mooney & Katy Waechter, Puerto Rico Low-to-Moderate Income Rooftop PV and Solar Savings Potential, National Renewable Energy Laboratory (2020), https://www.nrel.gov/docs/fy21osti/78756.pdf; Estudio de Integración de Recurso Solar Distribuido en Puerto Rico, Sol + Techos, Cambio PR (2021), https://cambiopr.org/solmastechos/#downloads; Ingrid M.Vila Biaggi et al., We Want Sun and We Want More (Summary) (2021), https://cambiopr.org/wp-content/uploads/2021/03/Modeling-Study-Fact-Sheet-03_21.pdf; Puerto Rico Distributed Energy Resource Integration Study: Archieving a Renewable, Reliable, and Resilient Distributed Grid, Telos Energy (December 2020), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-RicoDistributed-Energy-Resource-Integration-Study-Telos-Energy.pdf; Puerto Rico Distribution Modeling, EE Plus (2021), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-Rico-Distribution-Modeling-EE-Plus.pdf; Puerto Rico Distributed Energy Resource Integration Study: Load, Energy Efficiency, and System Cost, Energy Futures Group (2021), https://cambiopr.org/wp-content/uploads/2021/03/Puerto-Rico-Distributed-Energy-ResourceIntegration-Study-Energy-Futures-Group.pdf; Achievable Renewable Energy Targets ("ARET") ch. 4 Solar Resource, https://www.uprm.edu/aret/docs/Ch_4_Solar_resource_and_solar_thermal.pdf), Agustín A. IrizarryRivera et al., Achievable Renewable Energy Targets ("ARET") (2008), https://bibliotecalegalambiental.files.wordpress.com/2013/12/achievable-renewable-energy-targets-fo-p-r.pdf. 2

[34] Interstate Renewable Energy Council (IREC), Solar Workforce Development (2021), https://irecusa.org/programs/puerto-rican-solar-business-accelerator/solar-workforce-development

[35] https://www.eia.gov/state/print.php?sid=RQ

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NEPA."[36] EJ Executive Order (EO) 12898 specifically calls for agencies to address significant adverse environmental effects on minority and low-income communities in mitigation measures outlined or analyzed in EAs and FONSIs.[37] Indeed, CEQ issued an Environmental Justice (EJ) guidance document, including 6 principles for agency EJ analyses.[38]

PREPA's 10-year plan and its funding requests to FEMA call for spending at least $853 million on multiple new natural gas-fired power plants. Moreover, the plan would funnel over $8 billion for transmission and distribution system work that would perpetuate the existing long-distance, south to north, transmission of energy, as well as the environmental injustice experienced by fence line communities located near heavily contaminating power plants in southern Puerto Rico. Rebuilding and hardening the existing transmission and distribution system perpetuates reliance on fossil fuels, centralized generation and transmission would condemn these communities — comprised of a majority of impoverished afro-descendent communities[39] — to continued disproportionate adverse health effects caused by air, water and land pollution.

PREPA's plan, currently being evaluated by FEMA, fails to adequately consider the rooftop/on-site solar and storage alternatives that could have positive, enduring multiplier effects in environmental justice communities, the local economy and employment rates. Moreover, wide scale rooftop/on-site solar and storage would not rely on the system of overhead wires whose collapse in Hurricane Maria led to blackouts[40] that were linked to hundreds of deaths because life-saving medical equipment lacked energy supply.

The LUMA contract establishes that the grid work must "align" with the Grid Modernization Plan, which is the Puerto Rico government's proposal to rebuild the existing grid rather than transform the electric system to provide the resilience that would make the difference between life and death in the face of disaster and shock events. PREPA's Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy promotes the operation of centralized generation that lacks the life-saving resiliency of distributed renewable energy and storage and perpetuates environmental injustice. Rebuilding the T&D system to connect to these plants perpetuates their operation. In addition to Executive Order 12,898 on Environmental Justice, the Biden Administration's Executive Order, "Tackling the Climate Crisis at Home and Abroad" provides further support for environmental justice claims.

The communities near the existing fossil-fired power plants, most of which are located in southern Puerto Rico, are overburdened by the operation of the plants. The Guayama region is an environmental justice community with high poverty rates and where the majority of residents are

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[36] U.S. Envtl. Prot. Agency, *Environmental Justice and National Environmental Policy Act*, https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act.

[37] Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[38] https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act

[39] Afro-descendants

[40] blackouts

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Afro-Puerto Ricans.[41] According to the Toxic Release Inventory this region suffers the greatest contamination of any region in Puerto Rico. The Guayama region also has among the highest poverty, unemployment, and school dropout rates in Puerto Rico. Simultaneously, the region has experienced a sharp decrease in medical services available to this environmental justice community with the closure of two hospitals and only one hospital currently in operation.

The Applied Energy System (AES) Corporation coal-fired power plant and the Aguirre Power Complex, located in southeastern Puerto Rico are the two primary sources of toxic emissions in Puerto Rico and disproportionately impact some of the poorest communities. These two plants also extract large amounts of freshwater from the South Coast Aquifer and have contributed to the water scarcity that led to water rationing in summer 2019 and in previous years. The AES coal burning power plant in Guayama transmits electricity to northern Puerto Rico, including the San Juan metro area and accumulates hundreds of thousands of tons of coal ash waste at its plant site. The facility and its polluting practices already contaminated part of the South Coast Aquifer, the sole source of potable water for tens of thousands of people in Puerto Rico.

The Costa Sur and EcoElectrica plants in southwestern Puerto Rico both burn imported methane gas and also transmit energy long distance. Gas combustion is the substitution of one group of contaminants for others. The myth that methane gas is a cleaner energy source is a fallacy. The LNG imported to Puerto Rico must be stored under cryogenic conditions and revaporized/regasified before it can used at the plants. These additional processes add to the total emissions of LNG use in a way that can exceed the CO2 emissions of other fossil fuels. Methane gas combustion also emits increased VOCs such as formaldehyde, benzene, toluene, hexane, and styrene.

Multiple scientific studies, including a Harvard University report found that, "A small increase in long-term exposure to PM2.5 leads to a large increase in COVID-19 death rate, with the magnitude of increase 20 times that observed for PM2.5 and all-cause mortality. to air pollution and COVID-19 mortality in the United States. The study results underscore the importance of continuing to enforce existing air pollution regulations to protect human health both during and after the COVID-19 crisis." [42]The specific findings demonstrate that, an increase of only 1 ug/m3 in PM2.5 is associated with a 15% increase in the COVID-19 death rate, at a 95% confidence interval. Particulate matter is emitted by electric power plants, motor vehicles

[41] Hilda Lloréns, In Puerto Rico, Environmental Injustice and Racism Inflame Protests over Coal Ash, December 8, 2016. http://theconversation.com/in-puerto-rico-environmental-injustice-and-racism-inflame-protests-over-coal-ash 69763; Hilda Lloréns, Puerto Rico's Coal-Ash Material Publics and the Summer 2019 Boricua Uprising, February 25, 2020. https://www.societyandspace.org/articles/puerto-ricos-coal-ash-material-publics-and-the-summer-2019- boricua-uprising; Catalina De Onis, Energy Islands, Metaphors of Power, Extractivism, and Justice in Puerto Rico, June 2021, https://www.ucpress.edu/book/9780520380622/energy-islands.

[42] Public Comments by Pediatric Environmental Health Specialty Unit (PEHSU), Mount Sinai Medical School, FERC Docket CP13-193-000 at 1-2. https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01c6d80b-66e2-5005-8110-c31fafc91712. 26 Wu, X., Nethery, R. C., Sabath, M. B., Braun, D. and Dominici, F., Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis Science advances, 6(45), p.eabd4049, (2020), https://projects.iq.harvard.edu/covid-pm. 14

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and other sources of air contamination. Continued reliance on fossil-fired plants for energy transmission to San Juan and northern Puerto Rico is another climate disaster in the making.

VI. Conclusion

We ask this Commission to urge the Federal Government to earmark the historic amount of FEMA funds allocated for the electric system for on-site and rooftop solar and battery systems and similar alternatives that will provide life-saving electric service to the residents of Puerto Rico and alleviate the burden of poor and largely afro-descendant communities close to the fossil-fired power plants mostly in southern Puerto Rico. The Commission should include an inquiry on the proposed use of FEMA funds for electric system work to ensure that they are invested in a cost-effective manner to provide accessible, affordable, renewable, reliable and resilient electric energy. We urge the Commission to investigate PREPA's Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy, LLC and the role of the Fiscal Oversight and Management Board in the imposition of the LUMA contract and the Puerto Rico electric crisis. The use of the historic amount of FEMA funds allocated for the electric system will determine the viability of Puerto Rico for generations to come and could be instrumental in achieving environmental and climate justice in the archipelago.

In Salinas, Puerto Rico.

Sincerely,

s/ Ruth Santiago
Ruth Santiago
RUA No. 8589
P.O. Box 518 Salinas,
Puerto Rico 00751
T: (787) 312-2223
E: rstgo@gmail.com

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Date : 11/18/2021 1:49:20 PM
From : "Irena Vidulovic" ividulovic@usccr.gov
To : "Debo P. Adegbile" dadegbile@usccr.gov, "Adegbile, Debo" Debo.Adegbile@wilmerhale.com
Subject : Voting Rights Covid Report Transcript
Attachment : 0821USCCR COVID Voting RIghts Transcript.pdf;

Adegbile,

Here are some of the highlights from the transcript on the COVID-Voting rights vote. The Transcript is on our website and available to the public. The debate starts on page 44.

COMMISSIONER ADEGBILE: I want to take this report in context. The United States Civil Rights Commission was founded in part to address the issue of voting rights and the barriers to voting rights in the United States. That was part of the founding notion of the Commission in '57. And, indeed, our first report in ' was on this topic. And we have returned to the topic more than 25 times in the ensuing years.

Most recently, in 2018 we issued a report that examined voting rights and DOJ's enforcement of the Voting Rights Act before and after the Supreme Court's consequential decision in Shelby County v. Holder. This report is an update to that report with the focus, as the title suggests, being on the challenges that we face in this year's national elections as a result of the COVID-19 pandemic. As we note in the report, and as one of the witnesses testified, this election may fairly be regarded as the most logistically challenging since the nation voted during the Civil War in light of the health-related challenges that we face due to the pandemic. It's important to note, also, that the country is very focused on this election. Everybody believes that it's important to exercise one's right to vote. And we know that there is a experience in America of two approaches to voting. In a sense, there are two paths to winning elections. On the one hand, candidates can choose to mobilize and galvanize more voters to support their leadership and vision, and do the hard work of building that support through engaging messages and policies and with a focus on access and participation. This is American democracy's high road. But the high road is not the only road. There's another proven path to attempting to win elections, and that path is a path rather than extending voting and expanding access is an effort to erect barriers that diminish voter participation and voter access, and can adversely affect election outcomes. That I'll regard as democracy's low road. They're two paths, both with historical roots in our country, one high and one low, as I've written in other contexts, but both deeply familiar. This report is a mini-report in a sense, not so much in that it is not voluminous -- it is -- but in a sense that we didn't have the same amount of time that we ordinarily have, in part because we wanted to do it in a window that

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would make it available before the election. And so, there are a number of things in the report, a number of proposed findings and recommendations. And it perhaps is helpful to focus on some of those. Among other things, the proposed findings in the report suggest that the November 2020 election will be the most logistically complicated, as I said. The findings note that voters lining up to vote indoors on election day, especially in high volumes, could pose health risks during a pandemic, exacerbating risks of the virus transmission due to people in close proximity to each other. And this is a special concern in crowds. Many states have voting mechanisms that allow ways for voters to vote that could reduce 8 familiar election day voting lines. And people of color face disproportionately high risks of contracting and dying from COVID-19. The CDC data shows that the rate of COVID-19 is roughly three times higher among Black and Latino people than White people. Latino and Native American communities have been hard hit by the COVID-19 pandemic because 20 percent of the deaths in those communities between early March and July have been related to COVID-19. With respect to access to mail-in voting options, interest in voting by mail, including from voters of color, has increased in 2020 due to the health risks of voting in person imposed by the pandemic. Prior to the COVID-19 pandemic, 10 percent of states conducted their elections entirely by mail. Nearly 70 percent of states had no excuse absentee 25 voting, effectively mail-in voting, at the start of the pandemic. Of the 17 states that specifically require voters to provide an excuse to vote by mail, all but three waived or created a COVID-specific exception to the requirement during the primaries, though some only changed the requirements after litigation, and the status of those changes to the general election is still uncertain in many of those states. The three states that denied no excuse mail-in voting -- Louisiana, Mississippi, and Texas -- were all formerly covered states under the pre clearance provision of the Voting Rights Act under which covered jurisdictions were required to seek approval of voting changes due to their history of voting discrimination. Twelve states currently require voters to obtain a witness signature or notarization for their absentee ballots. This requirement creates increased health risks during a COVID-19 pandemic, especially for those individuals who are not living with others and who would have to break social distancing guidelines to meet the requirement. A witness requirement poses a disproportionate risk to voters of color who are disproportionately impacted by the pandemic.

Voters of color are disproportionately impacted by restrictions on absentee balloting that do not allow for exceptions due to COVID-19 because these populations are already disproportionately impacted by and empirically are at heightened risk from the virus. Absentee voter excuse requirements are especially restrictive for low income and minority voters, many of whom may be essential workers and may, therefore, lack the flexibility in their work and child care schedules to vote at the polls because they still lack a legally valid excuse while applying for an absentee ballot. Use of mail-in ballots increased dramatically across the country for the 2020 primaries, accounting for a majority of ballots cast in some states. In contrast, in the 2018 general election, only a quarter of all ballots were cast by mail. Based on evidence from primary elections, states were

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not prepared for the drastic influx of absentee ballots as compared to the amount of absentee ballots submitted in prior elections. States did not make advance preparation for increased -- for the increase, found themselves unable to properly and efficiently mail out and count ballots.

Native American voters are disproportionately impacted by restrictions on third party ballot elections where individuals or organizations collect and deliver completed ballots to election officers, as rural and native communities often lack consistent and reliable access to the Postal Service, and driving to the post office can be an hours-long commute. I note parenthetically that that assumes that driving is the way that you could get to a Post Office. I know in some remote parts of our country, including Alaska, there are other means, including planes, that you might need to do so. The lack of broadband access across tribal lands make it difficult for Native American voters living on reservations to register to vote or apply for absentee ballots. Mail-in ballots for voters of color are disproportionately rejected at a higher rate than mail-in ballots of White voters, sometimes as high as two times higher for Black voters compared with White voters. This high rate of rejection is especially prevalent among young Black and Latino voters who are likely using mail-in ballots for the first time. Discretionary signature matching policies

lead to a wide variation in how ballots are rejected across the states. And only 19 states require that voters be given notice of an opportunity to clear discrepancies in signatures. Absentee ballots are often inaccessible to those with limited English proficiency, as the ballots are often only mailed out in English. In those jurisdictions that fall under the language requirements of Section 203 of the Voting Rights Act, translating some but not all election documents did not satisfy the requirements of the section. Only 16 states and the District of 13 Columbia currently accept absentee ballots postmarked by election day but received after. Thousands of ballots were rejected from primaries in states with strict election day deadlines. During the 2020 primary election conducted in the midst of the COVID18 pandemic, election officials too often failed to send out ballots and election materials in a timely manner, challenging an overburdened, underfunded Postal Service, particularly in rural locations. The process of applying for and receiving absentee ballots often poses unnecessary barriers to voters with disabilities. Photo identification laws especially pose significant difficulty for many individuals with disabilities who do not have I.D. Many voters with disabilities are forced to vote in person, as absentee ballots are inaccessible to them without assistance. Many people with disabilities are at heightened risk for COVID-19 due to individual health conditions and also as a result of their membership in a high risk community. Instances of voter fraud in mail-in voting are exceedingly rare, appearing at less than .00006 11 percent of instances in a Heritage Foundation database tracking allegations between the years 1982 and 2020. With regard to access to safe and accessible in-person voting in the 2020 primary elections, in-person polling locations often face issues with crowds, lack of proper personal protective equipment, broken voting equipment, and untrained workers. These

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deficiencies were most acute in heavily minority areas.

COVID-19 has exacerbated the issues of polling place closures, as polling places typically located in schools or in churches are operating out of use and poll workers typically are older Americans, who are at risk of COVID-19 and are choosing not to participate, leading to a shortage of poll workers. There are a number of other challenges that are contained in the findings and recommendations in the context of in-person voting challenges, including that black voters face disproportionate closure and consolidation of polling places, while counties that were majority White or do not have large Black populations had close to their regular number of precincts. And these closures have exacerbated the historically disproportionate wait times for voters of color. We have alluded to and there are several findings about the access issues for limited English proficient voters in the context of these elections and the challenges associated with inadequate assistance at the polls. Access to early voting is another issue

that we identified and we are concerned that DOJ in two VRA cases relating to COVID-19, where they filed statements of interest, as cited, which states over private litigants challenging absentee ballot witness and notary requirements. They did not follow any statements of interests that supported VRA claims brought by private litigants. So, in closing, as I turn it back to you Madam Chair, there are a number of recommendations that go to expansions of early voting, of access to absentee voting in ways that could ameliorate and reduce the crowds on election day. There are issues that contemplate the deadline, so that mailing back changes that would extend the deadline of mailing-back ballots in light of the concerns that we have about the postal service and the ability of the postal service and states in jurisdictions to get out absentee ballots, mail-in ballots in a timely fashion. And we make specific recommendations, some of which are directed at the jurisdictions that are administering elections in the states, some of which are directed at Congress, including that Congress would pass legislation to provide financial health and security of the Postal Service, to ensure full and efficient access to verified mail opportunities. And then we speak to DOJ as well, asking for DOJ to use its powers to enforce access. And with that Madam Chair, I turn it back to you.

CONTINUED ON PAGE 64 after the VOTE FAILED:

COMMISSIONER ADEGBILE: I had the opportunity to share the context and import of the findings and recommendations that our Staff worked hard on in very short order for the purpose of trying to add to the national conversation about a very consequential election. Every election is consequential, special attention is paid to national elections, but in this context, as we've already described, there are a lot of challenges. And one of the things that was evident in the testimony,

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that regrettably this body decided not

to release and thus distribute actively to make it available, is that there was a fair degree of support across the political continuum that there are some modifications that are necessary at this time to facilitate the twin goals of good health and good 6 access for the American people at the time of this election. And the findings and recommendations are pointed in that direction of understanding that there's complexity, that this is not easy to do, that there are a lot of pieces that have to be addressed, as Commissioner Heriot points out, specifically because elections are very complex aspects of our democracy. That's what we signed up for, that's what we try and hold ourselves out to as an example for the world. And I think that we would benefit by releasing the findings and recommendations associated with this report.

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U.S. COMMISSION ON CIVIL RIGHTS

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BUSINESS MEETING

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FRIDAY, AUGUST 21, 2020

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The Commission convened via Teleconference at 12:00 p.m. EDT, Catherine Lhamon, Chair, presiding.

PRESENT:

CATHERINE E. LHAMON, Chair

J. CHRISTIAN ADAMS, Commissioner

DEBO P. ADEGBILE, Commissioner

STEPHEN GILCHRIST, Commissioner

GAIL HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner

MAURO MORALES, Staff Director

MAUREEN RUDOLPH, General Counsel

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STAFF PRESENT:

DIANE CITRINO, Ohio SAC Chair

PAMELA DUNSTON, Chief, ASCD

ALVINA EARNHART, Colorado SAC Chair

TINALOUISE MARTIN, Director, OM

DAVID MUSSATT, Director, RPCU

COMMISSIONER ASSISTANTS PRESENT:

ALEC DUELL

ALEXANDER HEIDEMAN

CARISSA MULDER

AMY ROYCE

THOMAS SIMUEL

RUKKU SINGLA

IRENA VIDULOVIC

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P R O C E E D I N G S

(12:02 p.m.)

OPEN SESSION

OPERATOR: Good afternoon, everyone. Welcome to the Commission's telephonic business meeting. As a reminder, this call is being recorded. And at this time I would like to turn the conference over to Chairman Catherine Lhamon.

Please go ahead.

CHAIR LHAMON: Thank you, Operator.

This meeting of the U.S. Commission on Civil Rights comes to order at 12:02 p.m. Eastern Time on August 21, 2020. This meeting takes place over the phone.

I'm Chair Catherine Lhamon. I'd like to confirm each of the Commissioners is on the line, so I'll take a roll call here at the outset. I note that the composition of the Commission had recently changed. And following confirmation of our quorum, I'll take a moment to identify and congratulate the new appointees to the Commission.

Commissioners, please confirm your presence when I say your name.

Commissioner Adams.

COMMISSIONER ADAMS: Present.

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CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: Present.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: Present.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: I'm here.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Here.

CHAIR LHAMON: Commissioner Kladney.

COMMISSIONER KLADNEY: Here.

CHAIR LHAMON: Commissioner Yaki.

COMMISSIONER YAKI: Here.

CHAIR LHAMON: Thank you. Based on that roll call, a quorum of the Commissioners is present.

Is the court reporter present?

COURT REPORTER: I'm here.

CHAIR LHAMON: Thank you.

Is the staff director present?

MR. MORALES: I am present.

CHAIR LHAMON: Thank you. The meeting will now come to order.

Before we begin with the agenda and our business this morning, we have three new presidential appointees among us whom I congratulate.

First, I congratulate Commissioner J.

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Christian Adams on his appointment to the Commission. President Trump appointed Commissioner Adams to serve as a Commissioner on August 6, 2020. I witnessed when the staff director swore Commissioner Adams in virtually, because of the pandemic we continue to live in, on August 13th, 2020.

In addition to serving on this Commission, J. Christian Adams is the President and General Counsel of the Public Interest Legal Foundation. President Trump previously appointed Commissioner Adams to be a member of the Presidential Advisory Commission on Election Integrity established in 2017.

Before then, Commissioner Adams was an attorney from 2005 to 2010 in the voting section at the United States Department of Justice. Prior to his time at the Justice Department he served as general counsel to the South Carolina Secretary of State. He has a law degree from the University of South Carolina School of Law.

Commissioner Adams, welcome to one of the finest federal institutions in this country. I look forward to the work this Commission will do now that we are again fully appointed.

We have some time for my fellow Commissioners to offer their own congratulations to

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our newest member.

We're showing unusual restraint. We can just move on to our other new appointments.

COMMISSIONER HERIOT: Madam Chair. Madam Chair.

CHAIR LHAMON: Go ahead, Commissioner Heriot.

COMMISSIONER HERIOT: Sorry, I'm having a hard time hearing everything from here.

I have already congratulated Commissioner Adams, but let me do so again.

Welcome, Commissioner Adams.

COMMISSIONER ADAMS: Thank you.

CHAIR LHAMON: Perfect. Thank you.

In addition to Commissioner Adams' recent appointment, President Trump also recently appointed special assistants for Commissioner Gilchrist and for Commissioner Heriot.

Alexander Heideman, special assistant to Commissioner Heriot, is a graduate of Emory University and the University of Mississippi School of Law. He previously clerked for The Honorable Jim Greenlee at the Mississippi Court of Appeals, and worked at the EPA's Office of the Administrator.

Thomas Simuel, special assistant to

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Commissioner Gilchrist, is a graduate of Winthrop University with a degree in history and is a certified mediator. He has 20 years of experience in the fields of business, public relations, and political campaigns.

Welcome to the newest special assistants.

I know that my work on this Commission has been better informed and more effective because President Obama appointed the incomparable and truly phenomenal Rukku Singla to be my special assistant. I wish for Commissioners Gilchrist and Heriot similar delight with your working relations.

And with that we'll turn to our agenda for today.

1. APPROVAL OF AGENDA

CHAIR LHAMON: Is there a motion to approve the agenda for this business meeting?

COMMISSIONER KIRSANOW: So moved, and amended to remove the discussion vote on AI 5-9 and the discussion vote on project planning.

COMMISSIONER HERIOT: Second.

CHAIR LHAMON: Thank you for your volunteering. But let's, first let's move to approve the agenda, or I'll just make that motion to approve the agenda for the meeting.

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Is there a second to that?

COMMISSIONER HERIOT: I think there's already a motion pending.

CHAIR LHAMON: But we need to move to approve the agenda before we can get to our motions for amendment.

COMMISSIONER HERIOT: Well, the motion is made, you know, as that. And that's not, I don't think that's true.

CHAIR LHAMON: Is there a motion? I have made a motion to approve the agenda. Is there a second?

COMMISSIONER HERIOT: Kirsanow's motion is pending. Point of order.

COMMISSIONER KIRSANOW: I had moved to amend the -- I had moved to approve and amend.

CHAIR LHAMON: Well, there will be other amendments as well.

So, let's move first to approve the agenda so we can just move on.

COMMISSIONER HERIOT: Point of order. Point of order. There's a motion pending.

CHAIR LHAMON: Okay. Commissioner Kirsanow, please state your motion again.

COMMISSIONER KIRSANOW: Yes. I move to

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approve the agenda and amend it to remove the discussion and vote on AI 5-9, and the discussion and vote on project planning.

CHAIR LHAMON: Thank you.

COMMISSIONER HERIOT: Second.

CHAIR LHAMON: Thank you. And with that friendly amendment, I call for additional amendments to the agenda.

I move to add consideration of a public comment regarding a HUD proposed rule on shelters and a letter to USCIS regarding the backlog of naturalization applications.

Is there a second for that friendly amendment?

COMMISSIONER KIRSANOW: I don't consider that a friendly amendment.

CHAIR LHAMON: Is there a second to that amendment?

COMMISSIONER YAKI: Second.

COMMISSIONER ADEGBILE: Second.

CHAIR LHAMON: Thank you.

Is there another amendment?

(No response.)

CHAIR LHAMON: Thank you.

If there's no further amendments, let's

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vote to approve the agenda as amended.

All those in favor, say aye.

COMMISSIONER HERIOT: No. No, no, no, no, no, no, no, no. No. You are moving to approve or not approve your motion to amend. And that is all that is on the table right now.

CHAIR LHAMON: Okay. Let's vote to approve my amendment --

COMMISSIONER HERIOT: We've got to get back to the (telephonic interference) before the Commission. So, the only thing we are voting on is the chair's motion to amend Commissioner Kirsanow's motion, not the whole thing.

COMMISSIONER ADEGBILE: Point of order, Madam Chair.

CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: I would like to suggest that maybe a way that we could proceed which might lead to greater clarity is if we could first move the agenda by itself, and then make the motions to amend the agenda in the various ways that the Commissioners intend.

COMMISSIONER HERIOT: That's essentially what we're doing, just in a different order. You know, we're doing it in accordance with the Robert's

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Rules.

You know, the original motion was made. That is a motion that is still, you know, is pending, but it's behind now the motion to amend that the chair made. So, you vote first on the chair's motion, and then you get back to the main motion.

You know, we've been sloppy about this in the past because it's always been obvious, you know, how things are going to come out. But it's not obvious now. So, we ought to try to stick to Robert's Rules. You know, it's something that, you know, I'm not quite sure how we got this tradition, it's wrong tradition, it's not just Chair Lhamon, of messing up on this. So, let's try to do it right now.

CHAIR LHAMON: I think there's a motion pending that is to add consideration of the public comments regarding the HUD proposed rule on shelters and a letter to USCIS regarding the backlog of naturalization applications. And that motion has been seconded.

Let's take a vote for approval of those additions to the agenda.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: I pass right now.

CHAIR LHAMON: That is an abstention.

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Commissioner Adegbile.

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: I'm abstaining.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: I'm sorry, did you vote no? Commissioner Kirsanow, I couldn't hear you vote.

COMMISSIONER KIRSANOW: Yes, no. No. I voted no.

CHAIR LHAMON: Thank you.

Commissioner Kladney.

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki.

(No response.)

CHAIR LHAMON: Commissioner Yaki.

COMMISSIONER YAKI: I vote aye.

CHAIR LHAMON: Thank you.

And I vote yes.

The motion passes. Two Commissioners abstained, two Commissioners opposed, four in favor.

We'll turn back to --

COMMISSIONER HERIOT: I thought there was

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a pass. And you have to go back to the pass.

CHAIR LHAMON: I think that actually, that was an abstention. We count the votes as I call on each of the Commissioners.

COMMISSIONER HERIOT: I thought Commissioner Adams passed.

CHAIR LHAMON: Thank you, Commissioners.

COMMISSIONER GILCHRIST: He did.

CHAIR LHAMON: Thank you. And as I said, I treat that as an abstention.

We're going back now. We've had a motion on the agenda to approve it.

We'll vote on the approved agenda, as amended.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: Okay. Just to be clear, are we voting on Commissioner Kirsanow's amendments?

CHAIR LHAMON: We are voting on Commissioner Kirsanow's motion to approve the agenda as he stated it with the addition that I've added. And that motion has passed.

COMMISSIONER ADAMS: With the addition that -- the amendment that he proposed?

CHAIR LHAMON: No. Including his

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additions and with the additions that I added.

COMMISSIONER ADAMS: Okay. I vote yes, as long as that is with Commissioner Kirsanow's amendment. I wasn't clear.

CHAIR LHAMON: Yes. Thank you.

Commissioner Adegbile.

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: Aye.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: Yes.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Yes.

CHAIR LHAMON: Commissioner Kladney.

(No response.)

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Sorry. Yes.

CHAIR LHAMON: Thank you.

Commissioner Yaki.

COMMISSIONER YAKI: Aye.

CHAIR LHAMON: Thank you.

And I vote yes.

The motion passes unanimously.

We will now hear from our Ohio Advisory Committee Chair Diane Citrino on the Committee's

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recently-released report titled "Education Funding and Civil Rights in Ohio."

Chair Citrino.

III. BUSINESS MEETING

A. PRESENTATION BY DIANE CITRINO, CHAIR OF OHIO ADVISORY COMMITTEE ON THE COMMITTEE'S REPORT, EDUCATION FUNDING AND CIVIL RIGHTS IN OHIO

MS. CITRINO: Thank you.

Good afternoon. Thank you so much for the privilege of discussing the Ohio Advisory Committee's Report on Education Funding and Civil Rights in Ohio.

Our report examined the civil rights implications of our state's education funding allocations, including fulfillment of Ohio's obligation to provide equal participation in a thorough and efficient system of common schools, as set forth in Ohio's Constitution.

From a civil rights perspective, questions of adequacy in educational funding are salient, particularly in Ohio, where the Ohio Supreme Court held in a series of cases from 1991 to 2003, known as DeRolph v. State of Ohio, that the state's educational funding system is unconstitutional because it fails to provide adequate funding, particularly for low income

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districts.

While the Ohio Supreme Court has -- excuse me -- the U.S. Supreme Court has stated that poverty is not a protected class, lack of school funding or grossly disproportionate allocation of funds between school districts may have a disproportionate impact on certain communities whose members largely represent a protected class.

And, unfortunately, Ohio's General Assembly has failed to remedy the flaws in Ohio's educational funding identified by our highest court.

Significant disparities persist in educational access and outcomes across the country generally, and Ohio is no exception. Gaps in educational outcomes between White and Black students, as well as White and Hispanic students have persisted. We've heard compelling testimony that children facing challenges with disabilities do not have adequate funding and resources to thrive.

Teachers noted that some students cost more to educate than others. Inadequate resources have the biggest impact on impoverished districts, districts predominantly serving students of color and students with disabilities, and may contribute to cross-generational poverty and inequality.

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Speakers who testified before us identified specific areas in need of improvement. Many of the speakers lamented the lack of a base cost figure: what does it take to educate students in Ohio based on an objective assessment of the needs of each particular student?

One speaker pointed out that Ohio may require more funding per student than is average across the U.S. because Ohio has challenging demographics. We have more large urban areas than any state except California and Texas. And it also has a very large, poor rural area in Appalachia.

Regardless of the specific funding approach or priorities, nearly all the speakers agreed that using evidence to determine student needs, then funding that need at an adequate level that isn't overly reliant on property taxes was needed.

Ohio offers a mosaic of education opportunities to our students, including students from disadvantaged backgrounds. They include traditional public schools; private schools, including religious schools; community or charter schools; magnet schools; and schools with special educational programs. Nonetheless, despite improvement, disparities continue to exist, and they need to be addressed.

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The Ohio Advisory Committee acknowledges that funding is but one component in the quest to improve student outcomes, but it remains an essential element in providing the constitutionally-required thorough and efficient system of common schools.

The state of Ohio did implement funding reforms recently, in 2009 and 2011, that reduced dependence on property taxes while fully funding and implementing a series of research space interventions in the schools. The reforms correlated with significant improvements in student achievement. However, the initiative was not continued.

A comparable initiative implemented in Wyoming did show similar success to what we briefly had in Ohio.

Our report was released in February 2020, shortly before COVID-19 pandemic upended schooling across the country. It may be, therefore, the perfect time for initiatives to support evidence-based interventions that help all of our children receive the education they deserve.

I urge review of our committee's thoughtful recommendations, including but not limited to a request that the U.S. Commission on Civil Rights urge our Ohio legislature to commission an independent

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study to more accurately evaluate the amount of funding needed to meet all students' needs, particularly those in underperforming districts, to seek reliance on -- to reduce reliance on property taxes for public education funding in any funding formula the legislature established, and further urge the legislature to commission an independent study to determine the impact of directing public funds to private schools and community schools in a variety of different methods.

We really appreciate the Commission's help in moving forward on this urgent issue. And I would like to thank the staff of the Commission, in particular Melissa Mirowski, as well as all of the members of our Ohio Committee who worked hard to complete this report.

I'm happy to take any and answer any questions the Commissioners may have.

CHAIR LHAMON: Thanks so much, Chair Citrino.

We'll now open up for Commissioner questions.

While folks are queuing, I'll start some of my own. I thought it was interesting that the report included information about the funding reforms

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that the state had implemented between 2009 and 2011, and what evidence those reforms show about effective school funding. And appreciated your committee's decision to shine a light on that important information.

And, also, I imagine you know that the U.S. Commission on Civil Rights took up a national version of this question recently.

So, I'm pleased that the recommendations that your committee makes to the U.S. Commission on Civil Rights for national steps the Commission has taken, and I believe that the recommendations also have made sure that you know, Chair Citrino, and will share with your committee members, that it is the Commission's practice to forward on the recommendations from the advisory committees to state and local entities that the Advisory Committee makes recommendations to.

So, we will also send those recommendations on as well.

MS. CITRINO: Thank you.

CHAIR LHAMON: Of course. Are there other questions or comments for Chair Citrino on this report?

(No response.)

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CHAIR LHAMON: Well, hearing none, Chair Citrino, thank you very much for taking time out of your day and for your expertise and your service and leadership on the Ohio Advisory Committee.

Thank you so much.

MS. CITRINO: Thank you.

CHAIR LHAMON: So, next -- of course -- we'll next hear from our Colorado Advisory Committee Chair Alvina Earnhart on the committee's report titled "Citizenship Delayed: Civil Rights and Voting Rights Implications of the Backlog in Citizenship and Naturalization Applications."

Chair Earnhart.

B. PRESENTATION BY ALVINA EARNHART,
CHAIR OF COLORADO ADVISORY COMMITTEE
ON THE COMMITTEE'S REPORT,
CITIZENSHIP DELAYED: CIVIL RIGHTS AND
VOTING RIGHTS IMPLICATIONS OF THE BACKLOG
IN CITIZENSHIP AND NATURALIZATION APPLICATIONS

MS. EARNHART: Good afternoon and thank you, Chairwoman Lhamon and Commissioners.

In September 2019, the Colorado State Advisory Committee published its report on U.S. Citizenship and Immigration Service, commonly known as CIS, Naturalization Backlog in Colorado.

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In September 2018, our staff voted to study the civil rights implications of the CIS' naturalization backlog, and hosted a hearing on February 22, 2019. Our staff selected this topic in an effort to understand how the backlog developed.

We sought to understand the consequences of the backlog for civil rights and the fair administration of law, as well as how any identified institutional failures might be remedied, specifically, how the backlog might be reduced and naturalization processing times restored to the six-months timeframe set by Congress.

We concluded that the naturalization backlog is a particularly pressing civil rights concern because naturalization is required for voting. The Commission was created to address the disenfranchisement of Black Americans, and voting rights remains a core concern for the Commission.

It is also worth noting that the backlog disproportionately impacts the voting rights of individuals based on national origin, racial, and religion, all protected by the Equal Protection clause in civil rights laws.

Consequently, the naturalization backlog potentially has significant effects on future

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elections. Additionally, withholding the benefits of citizenship to those who have otherwise earned them is a violation of due process and the administration of law.

The work on the report, the topic of which was recommended and driven by committee member Ling Su Chen, could not have been concluded without the strong staff leadership from Barbara De La Viez, and the support of Evelyn Rojas and the University of Colorado Law School staff and students who provided research and event support.

So, I would like to acknowledge and thank each of them in this public forum.

The resulting report determined that the CIS' national backlog in naturalization applications as of September 2019 was over 738,000. And the national average wait times ranged from 10 months to nearly 3 years.

In the Denver Field Office, which receives and processes applications for Colorado and Wyoming, the backlog in naturalization applications was 9,325. And the wait times ranged from 10 to 19.5 months.

Since our report was issued last year, the backlog has grown again by 7 percent nationally, and 17 percent in the Denver Field Office. The most

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recent data indicates that 700,885 naturalization applications are still pending nationally, and almost 7,000 in the Denver Field Office.

Our SAC commends the CIS for working to reduce the backlog over the 2019 fiscal year. In 2019, 833,000 new citizens were naturalized nationally. Such efforts resulted in a decrease in the backlog by 12 percent nationally and 36 percent in the Denver Field Office.

However, these processing times still far exceed the statutory timeframe of 6 months and impede voting in a presidential election year. The substantial delays to naturalization created by the backlog negatively impacts voting rights, civil rights, and the administration of justice.

The effect on voting rights is obvious: the right to vote depends on completing the naturalization process. As time passes, an increasingly large number of otherwise eligible voters will find themselves disenfranchised and unable to participate in the political process. This means that individual voting rights are suppressed, and legal permanent residents are caught in the naturalization backlog.

Panelists testified that at the present

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processing times, individuals who would otherwise be able to vote but were not naturalized in time to vote in upcoming elections for 2019 and 2020. Effect on voting rights has been further exacerbated due to closures that occurred following the COVID-19 pandemic. This fact is outlined in a statement our SAC released last month as a follow-up to this report.

To limit exposure risks of COVID-19, CIS offices were closed for nearly 2 months. As a result, oath of allegiance ceremonies, the final step in the naturalization process, were postponed. Approximately 126,000 eligible immigrants were unable to naturalize.

Upon reopening, the CIS has commenced in-person oath ceremonies in small groups that only allow for one-tenth of the original capacity to conform with social distancing precautions. The Denver Field Office is resuming administration of the oath in the office's oath ceremony room which can only accommodate nine applicants at a time. At this reduced rate, it is likely 189,000 otherwise eligible permanent residents will be unable to vote in the November 2020 election.

Our recent SAC statement of concern encourages the Commission to urge the CIS to take affirmative measures that would expedite the process

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of naturalization.

First, the CIS should consider changes to the oath ceremony and allow the oath of allegiance ceremony to be held remotely, outdoors, in drive-throughs, or by using remote conferencing technology, just as the Denver Field Office did when it naturalized approximately 500 citizens in the parking lot between May and June 2020.

Alternatively, the CIS could permit administrative naturalization and waive the oath of allegiance. Such authority to expedite the naturalization process is granted under the statute.

Finally, CIS could partner with federal courts in order to empower them to expand and expedite oath ceremonies that can be administered judicially. There are a number of options available to the CIS to conduct the oath of allegiance, including waiving the requirements to allow individuals awaiting the last step to obtain citizenship to become citizens and participate in the upcoming election.

Citizenship also carries many civil rights, such as eligibility for employment, housing, and other public benefits. These rights are impeded by delaying acquiring citizenship.

Available data is insufficient to

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determine whether specific populations of applicants are disproportionately impacted by the backlog. The apparent extent of the backlog in every group suggests that civil rights are being infringed upon for each subgroup, including protected subgroups such as race, religion, and national origin.

The naturalization backlog gives rise to other concerns about discrimination in the administration of justice related to violations of the statutory or due process rights of applicants. Naturalization by eligible persons is a statutory right and is not subject to agency discretion. If an individual meets the eligibility requirements, it has the right to be naturalized within 6 months.

As I conclude my remarks, I want to note that the Colorado SAC recognizes that the causes of the national and Colorado backlog are complex and likely multifaceted. Based on the testimony from the briefings, the SAC report offers some explanations for the backlog.

First, CIS adopted policies and practices increasing scrutiny of N-400 applications;

Second, CIS' insufficient response to fluctuations in receipts;

Third, inefficient CIS operations, and;

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Fourth, inadequate resources and funding allocations for CIS.

Findings were made about each of these hypothesized causes to the extent possible with existing information outlined in our report. The SAC believes that the backlog can potentially be reduced by allowing impacted individuals to pursue administrative and judicial remedies; Congress increase funding for the CIS and encourage CIS leadership to develop internal processes that use technology and other adjudication procedures to increase effectiveness, and provide greater accessibility for applicants.

The CIS should also examine the efficacy of fraud detection programs and operate with greater transparency.

I would like to thank you all for giving me this chance to present this report, and also for the opportunity that I have had over the last several years to chair the Colorado SAC.

Thank you.

CHAIR LHAMON: Chair Earnhart, thanks so much for that presentation. And, of course, thank you for your service and leadership on the Advisory Committee as well.

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I'll open for Commissioner questions.

COMMISSIONER YAKI: Commissioner Yaki. I'd like to ask a question.

CHAIR LHAMON: Go ahead, Commissioner Yaki.

COMMISSIONER YAKI: Hi. Well, thank you very much for your report. I have a couple questions.

What is the -- if you have it -- what is the average, what is the backlog or average wait time of people who have been approved but not yet sworn for citizenship in Colorado?

MS. EARNHART: I'm going to try to repeat that question. You want to know what the average wait time is for the individuals that are just awaiting the oath of allegiance; is that correct?

COMMISSIONER YAKI: Yes. Yes.

MS. EARNHART: I don't believe we have those specific percentages. But in my statement I did allude to -- let me find the number I had referenced here. We anticipated at least the production was 126,000 eligible immigrants would not be able to naturalize because they're not able to perform that last step of taking the oath of allegiance.

COMMISSIONER YAKI: And the -- I mean, I've been involved in a lot of mass swearing-in

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ceremonies. Even with COVID there can certainly be alternatives that can be looked at.

What has been the response of the agency with regard to utilizing parking lots, auditoriums where everyone is spaced, even, well, even ZOOM or DocuSign, or something like that? What has been their response to trying to just get these folks who have met all the requirements done rather than knowing the requirements you mentioned earlier?

MS. EARNHART: It varies, Commission Member, based on the field office. Unfortunately, there is not a uniform approach that CIS has adopted to provide options for each of the field offices.

We've looked at other options that have been practiced. Like, for example, in California I believe they were moving towards the drive-through option, or holding ceremonies outdoors. So, they really varied.

And it appears from our vantage point that the field office is the one that is determining what they could do based on with regards to other states with respect to mandatory, you know, precautions that are taken for these individuals, and limiting the number of people that can be in one area.

So, there is no uniform approach to

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determining how best to ensure that these individuals are given the opportunity to take the oath of allegiance. I am not aware of any of them adopting a technology approach the way they would allow them to be doing. But it is certainly something that they are able to do.

But it is one of our recommendations that we outlined in our statement to supplement this report where we encouraged the Commission to make o the recommendations to CIS, so that they can hopefully adopt some uniform approach or one way to just encourage the field offices to think outside the box, essentially to increase those numbers.

I think the best approach would be for them just to waive the requirement. These individuals have complied with all other requirements expected of them under the statute. And the final step is just to take this oath of allegiance. That is in the way of their opportunities to vote and participate in this upcoming presidential election.

COMMISSIONER YAKI: Thank you. And thank you for your leadership on this issue.

MS. EARNHART: Thank you.

CHAIR LHAMON: Thank you.

Are there other questions or comments from

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Commissioners?

(No response.)

CHAIR LHAMON: I'll note that we have started to pick up a letter that I will propose later today to USCIS that incorporates much of the information in your committee's report. So, I very much appreciate the very careful review and the committee's decision to draw attention to this important issue.

And I hope that you will share with your committee members that the Commission will take the topic up as a topic to consider sending over to USCIS as well.

Thank you very much for your presentation today.

MS. EARNHART: Thank you, Chair. Thank you very much for that. I will pass the information on to my fellow committee members. And thank you, again, to all Commission members for the opportunity to present this.

CHAIR LHAMON: Thank you.

C. DISCUSSION AND VOTE ON COMMISSION ADVISORY COMMITTEES

VERMONT ADVISORY COMMITTEE

IDAHO ADVISORY COMMITTEE

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KANSAS ADVISORY COMMITTEE

CHAIR LHAMON: And we'll now move to our next agenda item which is a discussion and vote on the Vermont Advisory Committee.

Given the nature of the discussion, I move to enter into a closed session to discuss appointments to both the Vermont and the Idaho Advisory Committees.

Do I have a second?

COMMISSIONER KLADNEY: Kladney. Second.

CHAIR LHAMON: Thank you. Commissioner Kladney seconds.

Madam General Counsel, per the Commission's regulations could you please provide us your opinion as to whether the meeting may be closed for the reasons specified in the motion?

MS. RUDOLPH: Yes, Madam Chair. As general counsel, I certify that this meeting can be closed, and the information may be withheld pursuant to the exemptions provided in the Commission's regulations at 45 CFR 702.53.

As the anticipated discussion concerns the appointment of Advisory Committee members, I find that the discussion falls within the exemption 2, when discussion is likely to disclose information related to internal personnel rules and practices of the

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Commission; and exemption 6 where information is of a personal nature, disclosure of which may be an unwarranted invasion of personal privacy.

Further, in accordance with the Commission's regulations, if the vote is in favor of a closed session, a written copy of my certification will be kept on file with the written transcript.

Thank you.

CHAIR LHAMON: Thank you. I'll call the question and take a roll call vote.

COMMISSIONER HERIOT: Madam Chair.

COMMISSIONER YAKI: I'm sorry. This is Commissioner Yaki. I have a question for the general counsel.

CHAIR LHAMON: Go ahead, Commissioner Yaki.

COMMISSIONER YAKI: General Counsel, what are the rules inside of the closed session to end the closed session?

MS. RUDOLPH: I believe that during your discussion you guys can, obviously, discuss whatever sort of options you think makes the most sense in terms of the discussion and how to move forward.

Any sort of vote should be done back on the public record. But --

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COMMISSIONER YAKI: That's not the question. That's not the question, Madam General Counsel. But the question is how do you end a closed session? Does it just go on forever?

MS. RUDOLPH: Oh, I apologize, Commissioner Yaki. No. I believe you all can agree to end the closed session and go back into the open session.

COMMISSIONER YAKI: We have to agree. Does it require a vote? And, if so required to vote, how many votes? It takes four to go into a closed session, does it take four to get out?

MS. RUDOLPH: I don't believe that the regulations speak directly to this point. This is my first closed session so I'm not sure what the Commission's practice has been in the past. You may have more information depending on the Commission (telephonic interference).

I'm new to the regulations. (Telephonic interference) to go into closed session and conditioned upon out of closed session.

COMMISSIONER HERIOT: Madam Chair.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: I'm not certain that we need to do this. I think that at least some of us

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are prepared to just vote.

CHAIR LHAMON: Well, there is a motion pending. I appreciate that motion but we may not need it. We can have a brief closed session.

Why don't we take the vote on it and go into --

COMMISSIONER HERIOT: Well, I just would argue --

(Simultaneous speaking.)

CHAIR LHAMON: Terrific. Appreciate the information. And I think folks can take it into consideration as they choose how to vote. And I'm also happy now to take a roll call vote.

Okay. I call the question, take a roll call vote whether to move into a closed session.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No.

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CHAIR LHAMON: Commissioner Kladney.

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki.

COMMISSIONER YAKI: No.

CHAIR LHAMON: And I'll vote no as well.

So, my own motion fails. Six Commissioners opposed, no Commissioner abstained, all others were in favor, and we will stay in the public call.

Given that, moving forward I move the Commission appoint the following individuals to the Vermont Advisory Committee based on the recommendations by the staff director: Natasha Chang, Tracy Ballysingh, Luther Brown, Keegan Callanan, James Diaz, Thomas Little, Tabitha Moore, Guy Page, Michelle Paya, Sherwood Smith, and Julio Thomson.

With this motion, the Commission will also appoint Nathasha Chang as the Chair of the Vermont Advisory Committee.

All of these members will serve as uncompensated government employees.

If the motion passes, the Commission will authorize the staff director to execute the appropriate paperwork for the appointments, which will begin immediately.

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Do I have a second to this motion?

COMMISSIONER YAKI: Second. Commissioner Yaki.

CHAIR LHAMON: Thank you.

I now open the floor for discussion.

(No response.)

CHAIR LHAMON: Hearing none, I'll call the question and take a roll call vote.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney.

COMMISSIONER KLADNEY: I'm going to pass for a minute.

CHAIR LHAMON: And I'm going to take that as an abstention.

COMMISSIONER HERIOT: No. You have to take it as a pass.

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CHAIR LHAMON: Commissioner Yaki.

COMMISSIONER KLADNEY: Please don't.

CHAIR LHAMON: So, Commissioner Kladney, what was your vote?

COMMISSIONER KLADNEY: I will vote yes.

CHAIR LHAMON: All right. Commissioner Yaki.

COMMISSIONER YAKI: Aye.

CHAIR LHAMON: And I vote yes.

The motion fails. Four Commissioners opposed, no Commissioner abstained, four Commissioners were in favor.

Next we will take up appointments by the Idaho Advisory Committee.

I move that the Commission appoint the following individuals to the Idaho Advisory Committee based on the recommendation of the staff director:

Shakirra Sanders, Patricia Carter-Goodheart, Dina Flores-Brewer, Edward Kammerer, Shin Kue Ryu, Monique Lillard, Kathryn McConnell, Ronald Nate, and Carole Valderrama-Echevarria.

With this motion, the Commission will also appoint Shakirra Sanders as the Chair of the Idaho Advisory Committee.

All of these members will serve as

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uncompensated government employees.

If the motion passes, the Commission will authorize the staff director to execute the appropriate paperwork for the appointments, which will begin immediately.

Do I have a second for this motion?

COMMISSIONER YAKI: Second. Commissioner Yaki.

CHAIR LHAMON: Thank you.

No further discussion for the public record, I'll call the question and take the roll call vote.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney.

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki.

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COMMISSIONER YAKI: Aye.

CHAIR LHAMON: And I vote yes.

The motion fails. Four Commissioners opposed, no Commissioner abstained, four Commissioners were in favor.

Our next agenda item to begin discussion, I move that the Commission appoint the following individuals to the Kansas Advisory Committee based on the recommendations of the supervisory chief of the regional program's coordination unit, as designated by the staff director:

Mildred Edwards, Michael Austin, Kenya Cox, Moussa Elbayoumy, Marche Flemming-Randle, John Fliter, Steven Gieber, Mary Lehoczky, Sally Murguia, Phyllis Nolan, Kir Perucca, and Carla Pratt.

With this motion, the Commission will also appoint Mildred Edwards as the Chair of the Kansas Advisory Committee. All of these members will serve as uncompensated government employees.

If the motion passes, the Commission will authorize the staff director or his designee to execute the appropriate paperwork for the appointments, which will begin after the current committee expires.

Do I have a second for this motion?

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COMMISSIONER HERIOT: Second. Heriot.

CHAIR LHAMON: Thank you.

I'll open the floor for discussion.

(No response.)

CHAIR LHAMON: Hearing none, I'll call the question and take a roll call vote.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: Yes.

CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist.

COMMISSIONER GILCHRIST: Aye.

CHAIR LHAMON: Commissioner Heriot.

COMMISSIONER HERIOT: Yes. The staff tried on this one.

CHAIR LHAMON: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney.

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki.

COMMISSIONER YAKI: Aye.

CHAIR LHAMON: And I vote yes.

The motion passes. One Commissioner opposed, no Commissioner abstained, all others were in favor.

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We move on. I will thank the staff for their work on recruiting members for our advisory committees and their efforts that we appreciate for all these appointments.

D. DISCUSSION AND VOTE ON THE COMMISSION'S REPORT, NAVIGATING VOTING DURING THE COVID-19 PANDEMIC: CONSIDERATIONS IN ACCESS FOR MINORITY VOTERS

CHAIR LHAMON: The next item on the agenda is a discussion and vote on the Commission's report titled "Navigating Voting During the COVID-19 Pandemic: Considerations in Access for Minority Voters."

We'll hold two votes. First, we will consider the report and; second, we will consider findings and recommendations.

Open the floor for discussion. Is there a motion?

COMMISSIONER YAKI: So moved. Commissioner Yaki.

CHAIR LHAMON: Thank you.

And is there a second?

COMMISSIONER ADEGBILE: Second. Adegbile.

CHAIR LHAMON: Thank you. Hearing no discussion, I'll turn it over to Commissioner Adegbile

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who is the lead sponsor for this project.

Commissioner Adegbile.

COMMISSIONER ADEGBILE: Thank you, Madam Chair.

I move that we adopt the report "Navigating Voting During the COVID-19 Pandemic: Considerations in Access for Minority Voters report that was shared by my special assistant Irena Vidulovic yesterday -- sorry, Wednesday, August 19th.

CHAIR LHAMON: Thank you. That motion has already preceded, Commissioner Adegbile. Commissioner Yaki moved that we approve it, and you seconded it.

So, is there now any discussion of the project itself? Did you have any points you wanted to make about the report?

COMMISSIONER ADEGBILE: Indeed I did, Madam Chair. Thank you.

I want to take this report in context. The United States Civil Rights Commission was founded in part to address the issue of voting rights and the barriers to voting rights in the United States. That was part of the founding notion of the Commission in '57. And, indeed, our first report in '59 was on this topic. And we have returned to the topic more than 20 times in the ensuing years.

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Most recently, in 2018 we issued a report that examined voting rights and DOJ's enforcement of the Voting Rights Act before and after the Supreme Court's consequential decision in Shelby County v. Holder.

This report is an update to that report with the focus, as the title suggests, being on the challenges that we face in this year's national elections as a result of the COVID-19 pandemic.

As we note in the report, and as one of the witnesses testified, this election may fairly be regarded as the most logistically challenging since the nation voted during the Civil War in light of the health-related challenges that we face due to the pandemic.

It's important to note, also, that the country is very focused on this election. Everybody believes that it's important to exercise one's right to vote. And we know that there is a experience in America of two approaches to voting. In a sense, there are two paths to winning elections.

On the one hand, candidates can choose to mobilize and galvanize more voters to support their leadership and vision, and do the hard work of building that support through engaging messages and

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policies and with a focus on access and participation. This is American democracy's high road.

But the high road is not the only road. There's another proven path to attempting to win elections, and that path is a path rather than extending voting and expanding access is an effort to erect barriers that diminish voter participation and voter access, and can adversely affect election outcomes. That I'll regard as democracy's low road.

They're two paths, both with historical roots in our country, one high and one low, as I've written in other contexts, but both deeply familiar.

This report is a mini-report in a sense, not so much in that it is not voluminous -- it is -- but in a sense that we didn't have the same amount of time that we ordinarily have, in part because we wanted to do it in a window that would make it available before the election. And so, there are a number of things in the report, a number of proposed findings and recommendations. And it perhaps is helpful to focus on some of those.

Among other things, the proposed findings in the report suggest that the November 2020 election will be the most logistically complicated, as I said. The findings note that voters lining up to vote

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indoors on election day, especially in high volumes, could pose health risks during a pandemic, exacerbating risks of the virus transmission due to people in close proximity to each other. And this is a special concern in crowds.

Many states have voting mechanisms that allow ways for voters to vote that could reduce familiar election day voting lines. And people of color face disproportionately high risks of contracting and dying from COVID-19. The CDC data shows that the rate of COVID-19 is roughly three times higher among Black and Latino people than White people.

Latino and Native American communities have been hard hit by the COVID-19 pandemic because 20 percent of the deaths in those communities between early March and July have been related to COVID-19.

With respect to access to mail-in voting options, interest in voting by mail, including from voters of color, has increased in 2020 due to the health risks of voting in person imposed by the pandemic. Prior to the COVID-19 pandemic, 10 percent of states conducted their elections entirely by mail. Nearly 70 percent of states had no excuse absentee voting, effectively mail-in voting, at the start of

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the pandemic.

Of the 17 states that specifically require voters to provide an excuse to vote by mail, all but three waived or created a COVID-specific exception to the requirement during the primaries, though some only changed the requirements after litigation, and the status of those changes to the general election is still uncertain in many of those states.

The three states that denied no excuse mail-in voting -- Louisiana, Mississippi, and Texas -- were all formerly covered states under the pre-clearance provision of the Voting Rights Act under which covered jurisdictions were required to seek approval of voting changes due to their history of voting discrimination.

Twelve states currently require voters to obtain a witness signature or notarization for their absentee ballots. This requirement creates increased health risks during a COVID-19 pandemic, especially for those individuals who are not living with others and who would have to break social distancing guidelines to meet the requirement. A witness requirement poses a disproportionate risk to voters of color who are disproportionately impacted by the pandemic.

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Voters of color are disproportionately impacted by restrictions on absentee balloting that do not allow for exceptions due to COVID-19 because these populations are already disproportionately impacted by and empirically are at heightened risk from the virus.

Absentee voter excuse requirements are especially restrictive for low income and minority voters, many of whom may be essential workers and may, therefore, lack the flexibility in their work and child care schedules to vote at the polls because they still lack a legally valid excuse while applying for an absentee ballot.

Use of mail-in ballots increased dramatically across the country for the 2020 primaries, accounting for a majority of ballots cast in some states.

In contrast, in the 2018 general election, only a quarter of all ballots were cast by mail.

Based on evidence from primary elections, states were not prepared for the drastic influx of absentee ballots as compared to the amount of absentee ballots submitted in prior elections. States did not make advance preparation for increased -- for the increase, found themselves unable to properly and efficiently mail out and count ballots.

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Native American voters are disproportionately impacted by restrictions on third party ballot elections where individuals or organizations collect and deliver completed ballots to election officers, as rural and native communities often lack consistent and reliable access to the Postal Service, and driving to the post office can be an hours-long commute.

I note parenthetically that that assumes that driving is the way that you could get to a Post Office. I know in some remote parts of our country, including Alaska, there are other means, including planes, that you might need to do so.

The lack of broadband access across tribal lands make it difficult for Native American voters living on reservations to register to vote or apply for absentee ballots.

Mail-in ballots for voters of color are disproportionately rejected at a higher rate than mail-in ballots of White voters, sometimes as high as two times higher for Black voters compared with White voters. This high rate of rejection is especially prevalent among young Black and Latino voters who are likely using mail-in ballots for the first time.

Discretionary signature matching policies

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lead to a wide variation in how ballots are rejected across the states. And only 19 states require that voters be given notice of an opportunity to clear discrepancies in signatures.

Absentee ballots are often inaccessible to those with limited English proficiency, as the ballots are often only mailed out in English. In those jurisdictions that fall under the language requirements of Section 203 of the Voting Rights Act, translating some but not all election documents did not satisfy the requirements of the section.

Only 16 states and the District of Columbia currently accept absentee ballots postmarked by election day but received after. Thousands of ballots were rejected from primaries in states with strict election day deadlines. During the 2020 primary election conducted in the midst of the COVID-19 pandemic, election officials too often failed to send out ballots and election materials in a timely manner, challenging an overburdened, underfunded Postal Service, particularly in rural locations.

The process of applying for and receiving absentee ballots often poses unnecessary barriers to voters with disabilities. Photo identification laws especially pose significant difficulty for many

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individuals with disabilities who do not have I.D. Many voters with disabilities are forced to vote in person, as absentee ballots are inaccessible to them without assistance.

Many people with disabilities are at heightened risk for COVID-19 due to individual health conditions and also as a result of their membership in a high risk community.

Instances of voter fraud in mail-in voting are exceedingly rare, appearing at less than .00006 percent of instances in a Heritage Foundation database tracking allegations between the years 1982 and 2020.

With regard to access to safe and accessible in-person voting in the 2020 primary elections, in-person polling locations often face issues with crowds, lack of proper personal protective equipment, broken voting equipment, and untrained workers. These deficiencies were most acute in heavily minority areas.

Last minute --

CHAIR LHAMON: Commissioner Adegbile.

COMMISSIONER ADEGBILE: Yes?

CHAIR LHAMON: I apologize. I'm going to ask you to speed up just in the interests of time so that we can move forward with our discussion and vote

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on this report.

COMMISSIONER ADEGBILE: Sure, Madam Chair. COVID-19 has exacerbated the issues of polling place closures, as polling places typically located in schools or in churches are operating out of use and poll workers typically are older Americans, who are at risk of COVID-19 and are choosing not to participate, leading to a shortage of poll workers.

There are a number of other challenges that are contained in the findings and recommendations in the context of in-person voting challenges, including that black voters face disproportionate closure and consolidation of polling places, while counties that were majority White or do not have large Black populations had close to their regular number of precincts.

And these closures have exacerbated the historically disproportionate wait times for voters of color.

We have alluded to and there are several findings about the access issues for limited English proficient voters in the context of these elections and the challenges associated with inadequate assistance at the polls.

Access to early voting is another issue

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that we identified and we are concerned that DOJ in two VRA cases relating to COVID-19, where they filed statements of interest, as cited, which states over private litigants challenging absentee ballot witness and notary requirements.

They did not follow any statements of interests that supported VRA claims brought by private litigants.

So, in closing, as I turn it back to you Madam Chair, there are a number of recommendations that go to expansions of early voting, of access to absentee voting in ways that could ameliorate and reduce the crowds on election day.

There are issues that contemplate the deadline, so that mailing back changes that would extend the deadline of mailing-back ballots in light of the concerns that we have about the postal service and the ability of the postal service and states in jurisdictions to get out absentee ballots, mail-in ballots in a timely fashion.

And we make specific recommendations, some of which are directed at the jurisdictions that are administering elections in the states, some of which are directed at Congress, including that Congress would pass legislation to provide financial health and

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security of the Postal Service, to ensure full and efficient access to verified mail opportunities.

And then we speak to DOJ as well, asking for DOJ to use its powers to enforce access.

And with that Madam Chair, I turn it back to you.

CHAIR LHAMON: Thank you, Commissioner Adegbile.

Thank you for your leadership on this project and I'll also offer thanks to our Staff, particularly Catherine Gonzalez, Nick Baaer, and Xavier Guire, as well as all of the other members of our Staff who pitched in during the research and developments of this project.

I'll open the floor for further discussion. And then I'll call questions and take a roll call.

COMMISSIONER YAKI: I'm sorry.

CHAIR LHAMON: Go ahead, Commissioner Yaki.

COMMISSIONER YAKI: Yes, I just wanted to thank the Staff and Commissioner Adegbile for the leadership on this.

I just wanted to bring up that the importance of this topic is made even more clear by

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the recent developments regarding the United States Postal Service.

I had thought about doing a letter but I thought I'd wait to see what happens with the Congressional hearings in order to go further with it. But it just goes to show that we know that the error rate, Commissioner Yaki, log signatures, those kinds of things, aside from the delay, which is another issue, are disproportionately felt by voters in the black American, Asian American community.

The only way that, and where 19 states do have the ability for voters to go in and correct their ballots, there must be sufficient time to respond to, check, respond, notice, and for the voter to come and cure.

And this situation right now with the United States Postal Service, where it is unsure whether they have the capability and certainly did not have the capability in limiting the primary elections to deal with the fact that we live in a different world than we did six months ago.

I think it's terrible, it's shameful, and points out further the need for the kinds of remedies and alternatives mentioned in this report, whether it's the expansion of growth or early voting, whether

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it's the ability to create driving voting and other kinds of alternatives that protect people's health but allow them to exercise the franchise, rather than engage in using COVID-19 as a cover to suppress the votes, which is contrary to the spirit of American democracy, is important.

So, I wholeheartedly support and commend Commissioner Adegbile and the Staff for this update on the report, and how timely it is in this very different world in which we live in.

And I would encourage our Commissioners to support it given the fact that it goes to our core mission and our core right, and that is the ability of people to vote.

And at this time, those are the people that vote during the pandemic.

CHAIR LHAMON: Thank you, Commissioner Yaki. It sounds like there's someone else on the phone?

COMMISSIONER HERIOT: Madam Chair?

CHAIR LHAMON: Go ahead, Commissioner Heriot.

COMMISSIONER HERIOT: I just want to go on the record a bit on this one, and that is that I do plan to vote no.

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There's a lot in this report and so much so that it's very difficult to be able to vote what's on it, I would think, given there are just so many, many issues covered in the report itself, and in the findings and recommendations.

To me, some of them are conflicting. There's one point at which the recommendation -- the point is made that putting a polling place in the Sheriff's Office is intimidating to some.

And then on the other hand, it recommends that tribal buildings be used for polling places.

And as I stand up to matters listed number 10, the motion here is that you give them very small policies and sometimes those are not the best places.

People can be intimidated by their local governments, including the tribal governments.

And so, I have a problem with that, I have a problem with the deadlines and such, so I'm going to have to vote no on this report, and on the findings and recommendations. I just wanted to be able to put that on the record.

CHAIR LHAMON: Thank you. Is there any other discussion?

COMMISSIONER KLADNEY: Madam Chair,

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Commissioner Kladney, I would just like to point out that I believe it was an excellent report, well done, and I commend Commissioner Adegbile for the work and the Staff.

I think it's an important subject, especially since we are receiving no help regarding alternative needs for voting during this pandemic or guidance from the Federal Government. Thank you.

CHAIR LHAMON: Thank you, Commissioner Kladney. Any further discussion?

(Simultaneous speaking.)

CHAIR LHAMON: Go ahead, Commissioner Gilchrist.

COMMISSIONER GILCHRIST: I just wanted to commend Commissioner Lhamon for the report. I too looked at the report on a number of items in the report that some I agreed with and some I did not.

But one of the things that I wanted to just point out, many of the issues raised in the report were issues that were very consistent prior to COVID.

And more specifically, the fact that now that we see options to find other ways to deliver ballots to the American people, I just want to make sure that we don't disregard the fact that prior to

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the COVID-19 situation that there were many of these issues outlined in the report prior to that.

So I want to commend you, Commissioner, for the work on the report, and the Staff, and I too will be voting no both for the recommendations and the findings in the report.

CHAIR LHAMON: Thank you. Any further discussion? That's all the questions so I'll take roll.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile?

COMMISSIONER ADEGBILE: Yes.

CHAIR LHAMON: Commissioner Gilchrist?

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: Absolutely aye.

CHAIR LHAMON: And I vote yes. Election failed. 12 Commissioners opposed, no Commissioner

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abstained, 12 Commissioners were in favor.

I continue to think that we would be best served with approving a full topical report, and in the absence of that possibility, I believe it is important that we missed out the expert testimony that we received and issue Commissioner statements for the public benefit from our collective expertise on the topic, and in lieu of the report, release the written statements we received from efforts, a company by Commissioner statements written on the same timeline as we had approved unanimously in June.

Commissioner statements due on Friday September 11, 2020, with rebuttal due Friday September 25, 2020, and no surrebuttal time period.

Do I have a second?

COMMISSIONER YAKI: Second.

(Simultaneous speaking.)

CHAIR LHAMON: Thank you. Enthusiastic seconds. Any discussion? Hearing none, I'll call questions and take a roll call vote.

Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist?

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COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: Well, I would just kind of note that this makes it very personal, how we've done it before with these kinds of reports, but we've only done exactly what Commissioner Lhamon has suggested.

So, if we don't want even testimony in the hearing record to be allowed, that's to me is interesting. I vote aye.

CHAIR LHAMON: As far as interrupting your vote, I'm sorry and I vote yes. The motion failed. Four Commissioners opposed, no Commissioner abstained, four Commissioners were in favor.

We can next consider findings and recommendations for the report. I have in anticipation of this broad outcome confirmed with our General Counsel that we can publish findings and recommendations as a report.

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So, I will open the floor for discussion for a motion to approve the findings and recommendations to the report.

Is there such a motion?

COMMISSIONER YAKI: So moved, Commissioner Yaki.

CHAIR LHAMON: Thank you. Is there a second?

COMMISSIONER ADEGBILE: Adegbile seconds.

CHAIR LHAMON: Thank you. If there's no discussion I'll turn it over to Commissioner Adegbile who is, again, the lead sponsor for this project.

Commissioner Adegbile?

COMMISSIONER ADEGBILE: I had the opportunity to share the context and import of the findings and recommendations that our Staff worked hard on in very short order for the purpose of trying to add to the national conversation about a very consequential election.

Every election is consequential, special attention is paid to national elections, but in this context, as we've already described, there are a lot of challenges.

And one of the things that was evident in the testimony, that regrettably this body decided not

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to release and thus distribute actively to make it available, is that there was a fair degree of support across the political continuum that there are some modifications that are necessary at this time to facilitate the twin goals of good health and good access for the American people at the time of this election.

And the findings and recommendations are pointed in that direction of understanding that there's complexity, that this is not easy to do, that there are a lot of pieces that have to be addressed, as Commissioner Heriot points out, specifically because elections are very complex aspects of our democracy.

That's what we signed up for, that's what we try and hold ourselves out to as an example for the world.

And I think that we would benefit by releasing the findings and recommendations associated with this report.

CHAIR LHAMON: Thank you. Is there any further discussion?

(Simultaneous speaking.)

CHAIR LHAMON: Go ahead, Commissioners.

COMMISSIONER HERIOT: I just wanted to say

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there are some findings and recommendations that I'm perfectly happy with on this list but there are others that aren't.

So, in the end, it's very, very one-sided and, alas, that has been the case with lots of the voting rights issues in the last few years, not just with this Commission but just generally within the public debate.

I can't support it the way it is. I am not necessarily against trying to hammer out something that is not so one-sided, but it'll take time.

And that's where I am on this, this is like a behemoth set of recommendations and they all go in the same direction. And that won't work so I'm going to have to vote no.

CHAIR LHAMON: Thank you, and it sounded like Commissioner Kirsanow, you were trying to get in as well?

COMMISSIONER KIRSANOW: No.

(Simultaneous speaking.)

CHAIR LHAMON: Thank you, Commissioner, I apologize.

COMMISSIONER YAKI: Commissioner Yaki. How dare you all confuse my voice with Commissioner Kirsanow?

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(Laughter.)

(Simultaneous Speaking.)

COMMISSIONER YAKI: Commissioner Kirsanow can hear his own voice.

(Simultaneous speaking.)

COMMISSIONER YAKI: I would just like to say that we are going to have to adjust to a new normal on the Commission today. What we just did in not releasing the testimony of this project I think goes against that.

Because if you think about it and if you think about it for more than a second, our goal may be things you would agree on in terms of having a hearing or a briefing on, where we may not agree on what could be produced, we may not agree on probably what the report may say, but we would have an opportunity to have people to testify and bring evidence and witness subjects that we care about on both sides of the issue.

And by taking this presently today, I am telling you right now that my inclination to allow the records to be released in the future, that might have some stuff that you might want in the public record, is going to be looked at with a very jaundiced eye based on the vote here today.

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This report has contained a lot of testimony, there's a lot of information that people went to great lengths to provide to this Commission, and to simply bury it as if it never occurred is contrary to transparency, contrary to what we have done in the past, contrary to just the spirit of open debate and discussion.

So, I would just ask those of you who voted no to reconsider your vote in light of the fact that there may be something in the future down the line where you would want the record to be open, you would want to be able to give comments on the record in the statement.

But now with this vote today, you made it clear that that's not going to happen.

COMMISSIONER HERIOT: Madam Chair?

CHAIR LHAMON: Go ahead, Commissioner Heriot.

COMMISSIONER HERIOT: I just want to say I respect there's going to be something salvageable from all of this but we've got to regroup and figure out exactly what that's going to be, that's all I can say at this point.

COMMISSIONER ADEGBILE: Madam Chair?

CHAIR LHAMON: Commissioner Adegbile? Go

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ahead, Mr. Adegbile.

COMMISSIONER ADEGBILE: Thank you. Commissioner Heriot, I believe you made a good suggestion that some aspect of the report or the findings was very one-sided.

And I would just like to come back to my opening remarks in which I point out that there are sort of two ways to go about the elections.

One is trying to expand access as people vote, their conscience and their views have access, and then live with the result on, which is what democracy requires and what we commit ourselves to and hold ourselves out to, on both constitutionally and by 300 years of practice in the ways they have evolved through a painful history, including some that we will recount later in this meeting.

The other is to not fully commit to the democracy that our country is hopefully aspiring to at every turn, and to put barriers in the way of folks.

And so I just would like to caution that, while people can have different views about policy issues and approaches, we should not create a false equivalency that those who are trying with positive intention and in reasonable ways to expand access for

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people who might face barriers. In this case, barriers that could have deadly consequences, approximately 175,000 Americans are not with us now and won't be able to vote on the account of the pandemic, the name of which we had never heard when the clock struck 12:00 a.m. on December 31, 2019, heralding this year.

And so we are in a serious time and we are a serious body, and we are a body that is committed to the civil rights of the people of the United States of America.

And so this is not about Robert's rules, though they apply, this is not about two sides, this is about what this body stands for, what the Constitution stands for, and what democracy requires.

And shrinking from that obligation is a mark on a hallowed history of an important body.

COMMISSIONER HERIOT: Madam Chair?

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: I just want to point out that there aren't just two ways that these elections can go.

We hear that Commissioner Adegbile talks about the two ways and it's true, it's a thing, there are those two ways.

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But there's a third way and the third way is also something this country has suffered in the past, and that is voter fraud, corruption in elections.

And those things are hard to detect. And that's why it's important to have procedures in place that will adjust corruption in elections, will lead against that kind of disenfranchisement that comes from votes that are inappropriate votes coming from people who are not eligible voters, or perhaps don't exist at all.

And that's what all this is all about. It's evidently the case that the progressive caucus in this Commission thinks that the threat of voter fraud is very low and other people don't.

What's interesting is the original progressive viewpoint in the late 19th and early 20th centuries was utterly flipped from what it seems to be now.

They were combating inactive voter fraud, particularly in urban areas, and not just in urban areas, and somehow progressives have forgotten that history.

But that's an important history and voter fraud is a serious problem because it's one that's

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hard to detect. And that's why procedures are put in place.

People are going to disagree about how likely it is that voter fraud is taking place now, took place yesterday, or will take place tomorrow. I would say it's a moving target and unless you have procedures in place that lean against it, make it less likely to occur, you'll get more of it.

And when we're talking to you about what procedures should be in place, we need stable procedures.

And that's what I'm talking about, there's not two ways to win elections but three, and we need to be very careful in that.

CHAIR LHAMON: Sorry, was there discussion on the motion?

COMMISSIONER ADEGBILE: I yield to Commissioner Yaki.

CHAIR LHAMON: Go ahead, Commissioner Yaki.

COMMISSIONER YAKI: I've been on this Commission a long time. I have been through more voting rights hearings, briefings, discussions than Commissioner Kirsanow.

In all those hearings, in all those

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briefings, it was seen as fantasy, the idea that there is large-scale voter fraud in the mail.

And throughout this, there has been this assertion that there is somehow undetectable voter fraud that are local, state, and federal enforcement is incompetent to crack down. And that's actually not the case.

They do find it. There has been and continues to be widespread fraud in voter registration. I think that's something that I will not disagree with.

But the idea that you conflate that to people voting is a wholly separate inquiry, and one where study after study shows that there is no widespread -- certainly, enough to make a difference -- voter fraud.

The one case that we had in North Carolina with that one person who was harvesting ballots on behalf of the Republican candidate at the time and they had to redo the entire election.

Aside from that, it is rare and to institute procedures to guard against a phantom is a cover. It is a centrifuge, it is a means to stop people from being able to vote who should be able to vote.

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I yield back.

COMMISSIONER ADEGBILE: Madam Chair, Commissioner Adegbile.

CHAIR LHAMON: Go ahead, Commissioner Adegbile.

COMMISSIONER ADEGBILE: In the report that was circulated to the Commission and I think in the findings as well, there are a couple of significant facts and I'd like to think that sometimes facts matter.

One fact is that, as I said earlier, ten percent of states conducted elections entirely by mail before the pandemic. Five states in our union had done it that way, long traditions.

When you look at the states that have no excuse, absentee voting, which is in effect an option to vote entirely by mail, the percentage gets up to over 70 percent I believe.

And so we were in a situation where states have been conducting elections, in some substantial measure, by mail over a long period of time, where that access still exists for some.

And that this report had as its aim to figure out how we could make additional adjustments in the interest of trying to create maximum flexibility

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for people who may face serious risks of what we all regard, all eight of us, as a dreadful disease that is having tremendous consequences in this country and having serious consequences globally.

And yet, it is unchecked. And so I conclude by saying that in addition to those facts, we had the finding that according to the Heritage Foundation's database, 0.0006 of the instances are mail-in voting fraud.

And if you look for voting fraud more broadly, you will probably wind up somewhere along the lines of a recent presidential commission that got nowhere on it, not that it never happens, it's just that it doesn't happen to the degree that people who like to hide behind it and try and use it as a tactic to erect barriers to the polls say it does.

And that's why they can't demonstrate it. And so this is serious business, it goes to the core of the democracy and the mission of this body and we owe it to the people of the United States to be serious about it and not to make things up.

COMMISSIONER ADAMS: Madam Chair?

CHAIR LHAMON: Is this Commissioner Gilchrist?

COMMISSIONER ADAMS: No, it's Commissioner

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Adams.

CHAIR LHAMON: I'm sorry, Commissioner.

COMMISSIONER ADAMS: I'm going to be voting no because this report has been overcome by events.

We now have data that vote by mail disenfranchises people at astonishing rates. From hundreds of thousands of rejected ballots in Nevada to a five percent error rate according to the U.S. postal Inspector General.

So, the report gives no attention whatsoever to the disenfranchising effect when voters vote by mail. That's all they have.

I call the question.

CHAIR LHAMON: Thank you, I'll call the question to be sure that there's no further discussion, so I'll give one more opportunity for any other Commissioner.

Hearing none, Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: No.

CHAIR LHAMON: Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist?

COMMISSIONER GILCHRIST: No.

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CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: Absolute aye.

CHAIR LHAMON: And I vote yes. Commission failed. Four Commissioners opposed, no Commissioner abstained, four Commissioners were in favor.

G. DISCUSSION AND VOTE ON COMMISSION STATEMENT ON THE PASSING OF C.T. VIVIAN

Next thing, we'll move to consideration of a Commission statement on the passing of C.T. Vivian, which we are considering. I'll ask Commissioner Adegbile to read the statement.

COMMISSIONER ADEGBILE: Madam Chair, I'm happy to read this statement, proposed statement, for counting the light in sacrifice of the late, great Reverend C.T. Vivian, whose death we noted during our last Commission meeting as bad luck.

And history would have it, I believe, that the late, great John Lewis died on the same day, a fact that we didn't know at the time of our meeting.

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But John, later that day, after we had adjourned and we had released a statement of memorial recognizing John Lewis's contribution, I say before I read this statement that it is with some irony that we remember the life of C.T. Vivian, who fought so valiantly and literally at the risk of his life for our democracy to make it better. And I propose that we remember him with the following words and I believe that at our last Commission meeting, Commissioner Heriot suggested that we try and recall this officially, with a statement of memorial.

During the Civil Rights Movement, many Americans bravely urged our nation to keep its promise of equality for all but very few in the face of racism, violence, and fear with a clarion call for justice that remains feared in the national memory.

We are willing to be beaten for democracy and you misuse democracy in the streets, once said a young Cordy Tindell, C.T., Vivian in Selma, Alabama to share with Jim Clark as Vivian led a peaceful black voter registration march in 1965.

Reverend Vivian offered these words after Sheriff Clark, acting under color of law, punched Vivian in the mouth on the Selma Courthouse steps in

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front of television cameras with such force or with force so great that it both made Vivian bleed and broke Clark's hand.

This moment crystallized the contest and the cost of gaping segregation, injustice, and brutality with courage, fortitude and selflessness.

Sheriff Clark became the face of injustice and Vivian the face of Americans seeking justice. C.T. Vivian was an unrelenting advocate for non-violent change, to which he was inalterably committed throughout his life.

Recalling the courthouse confrontation, Vivian recounted, and I quote, with Jim Clark it was a clear engagement; you don't walk away from that, you continue to answer it. Closed quote.

In his words, we had proven that we could solve social problems without violence if we choose. C.T. Vivian spoke of Black Americans' aspiration for equality and, as we would learn, he spoke of destiny.

He was a fearless fighter for equality in a cause that was paved with his sacrifices and those of many others. Sheriff Clark later would lead the assault on John Lewis and the burning lights marchers on the Edmund Pettus Bridge.

Clark's resort to violence, however, could

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not stop the unrelenting calls to let Black Americans vote.

For nearly 100 years, Vivian, who began his life of advocacy for racial equality as a child in Illinois, fought to make America realize its constitutional promises.

He was a legendary civil rights advocate, who served as one of the Reverend Martin Luther King Jr.'s chief allies and strategists. He led with his words and his deeds and made the country better.

Once called the greatest preacher who ever lived by the Reverend Martin Luther King Jr., Vivian, freedom rider and leading Southern Christian Leadership conference organizer, who studied with John Lewis, was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, by President Obama in 2013.

Honoring the will of the people as expressed through their votes is the first principle of democracy. It is the principle that C.T. Vivian never forgot.

You are made by the struggles you choose, Vivian once said, and his struggle was to deliver on America's promise.

On this courthouse steps on that day in

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Selma, C.T. Vivian declared you cannot turn your back on the idea of justice.

As we remember his contributions to the nation, we recognize that C.T. Vivian never did. And today, the United States Commission on Civil Rights pays tribute to his lifelong commitment as an effective advocate for the non-violent pursuit of equality and justice.

CHAIR LHAMON: Thank you, Commissioner Adegbile. I'll open the floor for discussion and to hear our motion.

COMMISSIONER HERIOT: So moved.

CHAIR LHAMON: Sounds like, Commissioner Heriot, you're moving to approve the statement and it sounds like, Commissioner Yaki, you're prepared to second, is that correct?

COMMISSIONER YAKI: Sure, why not?

CHAIR LHAMON: Commissioner Heriot, was that correct for you?

COMMISSIONER HERIOT: Absolutely, anyone can second, I'd be happy to second too.

CHAIR LHAMON: Okay, thank you. I'll open the floor for discussion, beginning with Commissioner Adegbile.

COMMISSIONER ADEGBILE: I've done my best

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to capture it with the words I just read.

I will only add that I had the great pleasure to meet C.T. Vivian in connection with some of the work that I've done at an earlier stage in support of voting rights. And it was an honor.

Some people are athletes and want to see the greats and the Hall-of-Famers. For me, being in the presence of somebody who so fully committed themselves to the cause of the nation and equality and democracy with such personal risk was one of my proudest moments, to just be in his presence.

And I'm grateful for all he gave us through all his years.

CHAIR LHAMON: Thank you. If there's no further discussion I'll call the question and take a roll call vote. Commissioner Adams, how do you vote?

COMMISSIONER ADAMS: Yes. And as a point of personal privilege, I'm going to have to exit the call for a few moments.

So, I will try to call back in.

CHAIR LHAMON: Thank you. Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist?

COMMISSIONER GILCHRIST: Aye.

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CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: I want to thank Commissioner Adegbile for his beautiful statement. Aye.

CHAIR LHAMON: I vote yes. The motion passes unanimously. Next we will move to the consideration of the public comment in opposition to the HUD's proposed rule about shelter.

Because the comment is too lengthy to read into the record here, I will summarize its main points as follows so you know what you're considering.

HUD has issued a notice of proposed rulemaking to allow hard grant recipients to operate single-sex shelters to establish policies that place and accommodate individuals on the basis of biological sex without regard to gender identity.

In this comment, we recommend but HUD not implement the proposed rule and instead retain the existing 2016 rule, which protects transgender

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people's access to emergency shelters.

The comment discusses strong concerns that HUD's proposed rule is a significant step backwards in protecting the rights and wellbeing of transgender individuals and is inconsistent with the relative law.

This proposed rule violates the safeguards in the Fair Housing Act against discrimination on the basis of sex in all housing-related activities.

It's the same core HUD justice term, lengthy, that statutory language barring discrimination on the basis of sex, protects against discrimination on the basis of sex orientation and gender identity.

The proposed rule, however, is flatly inconsistent with the Supreme Court's recognition of that quote, that it is impossible to discriminate against a person for being homosexual or transgender, without discriminating against that individual based on sex, end quote.

The Commission reiterates our call to the Trump Administration to, quote, drop its repeated and ongoing efforts to perpetuate discrimination on the basis of sex with respect to sexual orientation and gender identity, end quote. To open the floor for discussion, I move that the Commission approves the

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public comments, as articulated by my special assistant on Thursday, August 20th.

Do I have a second?

COMMISSIONER KLADNEY: Kladney seconds.

CHAIR LHAMON: Thank you. Now I'll open the floor for discussing, beginning with a few points of my own.

The transgender community is acutely vulnerable in terms of house-related, social, and economic barriers.

With respect to housing access, transgender individuals are more likely than cisgender individuals to experience poverty and homelessness during their lives.

Transgender individuals already face significant challenges in accessing shelters, sex segregation in shelters on the basis of biological sex, excluding the individual's gender identity.

This causes many transgender individuals to go unsheltered and if they do go to be sheltered, many transgender individuals face harassment and physical and sexual violence from residents and staff.

The proposed rule's proposed remedy requiring the shelter to further deny an individual to an alternative shelter or a accommodation is not a

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viable or safe option for many transgender individuals.

The United States is in a time of unprecedented national crisis due to COVID-19 pandemic, and this period particularly impacts low-income and vulnerable people.

During this crisis, HUD should not be promulgating rules that exclude, deny, and disenfranchise transgender people from accessing emergency shelters they need for survival and safety.

Is there any further discussion?

COMMISSIONER ADEGBILE: Madam Chair, I just wanted to say briefly that whatever one's views are, to think that there are human beings that would be put at increased risk of being unsheltered at this moment in time and in light of what the nation has experienced recently is something that is beyond thinking about the law.

It goes to the core of just basic humanity and human dignity, and the idea that our government would be participating in some way in exposing vulnerable individuals to unnecessary risks or heightened risks is something that it is my great hope

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we can come back from.

Thank you for your leadership on this issue, Madam Chair.

CHAIR LHAMON: Thank you. So, now our votes.

COMMISSIONER YAKI: Chair Lhamon? Thank you for this. This is an issue that I confronted years ago when I was both working at Congress and as a member of the Board of Supervisors. Having a robust and vibrant LGBTQ community we found first, before any other community, the kinds of difficulties, challenges, and hardships faced especially by those in the transgender community with regard to inclusion just in homeless shelters, emergency shelters after earthquakes, after fires.

These are things that we've had to deal with. And what's kind of tempting to do is, again, to sort of turn back the clock on the progress we've made as a society and in understanding and accepting and truly validating the rights of the LGBTQ community in situations such as this. So I commend you for this letter and fully support it.

CHAIR LHAMON: Thank you. Any other discussion? Okay, Commissioner Adams, it's your turn to vote.

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Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist?

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: Aye.

CHAIR LHAMON: And I vote yes.

The motion fails. Three Commissioners opposed, no Commissioner abstained, all others were in favor.

Next we will move to consideration of a letter to U.S. Citizenship and Immigration services about the significant backlog of naturalization applications.

Because the letter is too lengthy to read into the record here, I will summarize its main points as follows so you know what you're considering.

With this letter the Commission calls on USCIS to take necessary measures to address the backlogs of naturalization applications.

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The backlog of citizenship applications has consequences for the civil rights of eligible lawful residents including the right to vote as naturalized citizens.

Recent data indicates that there is still a substantial backlog of naturalization applications of 700,885 applications still pending, despite notable efforts from USCIS in prioritizing completion of the oaths of over 100,000 people whose naturalization process was halted by the pandemic with only one step remaining, the allegiance and oath ceremony.

The right of naturalized citizens to vote depends on their completion of the naturalization process prior to voter registration deadlines.

As we approached the 2020 general election, the backlog of applications risks disenfranchising thousands of individuals who would otherwise be eligible to vote and participate in the our political system.

As we heard this morning, our Palo Alto Advisory Committee found that at the reduced rate of naturalization, approximately 189,000 otherwise eligible permanent residents will be disenfranchised.

We ask that USCIS prioritize the processing of applications of citizens to decrease the

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current backlog and continue to prioritize the speedy administration of oaths and allegiance ceremonies.

Additionally, we ask that USCIS take all necessary measures, including waiving limiting requirements as needed during the current pandemic, and expanding small in person ceremonies in accordance with the Centers for Disease Control's guidelines in remotely administering oaths using videoconferencing technology in order to address the backlog of applications amid the unprecedented COVID-19 public health crisis.

USCIS should also consider partnering with federal courts in order to administer oath ceremonies judicially, expanding and expediting access to these ceremonies.

To open the floor for discussion, I move that the Commission approve the public comment as circulated by my Special Assistant on Thursday August 20th.

Do I have a second?

COMMISSIONER YAKI: I second.

CHAIR LHAMON: Thank you. And now I'll open the floor for discussion, beginning with a few points of my own.

I'll point out that that were bipartisan

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letters from both Senators and Congressional Members calling on USCIS to ensure eligible applicants have an opportunity to participate in oath and allegiance ceremonies, either by remote administration of oaths or expanding small, in-person ceremonies consistent with CDC's public health guidelines.

Thousands of residents remain at earlier stages of the citizenship process, resulting in a legal limbo.

These lawful residents also face the risk of USCIS limiting its operations in the event of an Agency furlough, which may still occur at the end of August.

Taking the steps we call for in this letter would ensure that eligible applicants have access to the full benefits and privileges of citizenship, including voting in upcoming elections.

It would strengthen our national fabric and importantly, safeguard civil rights, allowing these residents to contribute fully to the timing of their communities and our diverse nation.

Is there any other discussion?

Hearing none, I'll call the question --

COMMISSIONER YAKI: Commissioner? I'm

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sorry, Madam Chair, thank you.

This is merely one of the literal no-brainers of what we were doing here today.

All of us agree, whatever your position on immigration is or is not, these are individuals who play by the rules, have done everything correctly, passed a rigorous test, and have demonstrated their desire to be loyal citizens of the United States.

And that I can tell you from my own experience in working with and attending and presiding over many of these citizenship ceremonies in my lifetime is the excitement of privileges of citizenship that come with it, and that's one privilege that many of them talk about, is the right to vote.

This is not partisan, this is not Democrat or Republican or liberal or conservative, this is about giving individuals who have placed their faith and trust and willingness to work within the rules to be citizens of our United States to complete the final step.

And think about what it says as a country for us to make these individuals who have waited years, and as I said, played by the rules, done their homework, stood in line, and now they have been told,

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well, we'd like you to be citizens but we need you to wait.

We don't know when we're going to get to you.

That's not how America should be working.

CHAIR LHAMON: Thank you, I quite agree. Is there any further discussion?

COMMISSIONER HERIOT: Madam Chair?

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: I'd just like to say there's quite a lot, actually, that I would agree with Yaki on what he just said. I'm not going to be able to vote for this letter.

There are things in it that I disagreed with but I suspect that we can work out a letter later on after the meeting.

I bet we can do this one but not the way it's written now.

CHAIR LHAMON: Thank you. We have a motion pending so why don't we take a vote on this motion?

And if this motion fails, I'll be delighted to work with you on an alternate.

COMMISSIONER HERIOT: Yes, I'm not going to be able to do it right after we get off the phone,

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I'm afraid.

COMMISSIONER YAKI: Chair Lhamon? I would just say in the spirit of Commissioner Heriot's bipartisanship, I would just ask that if this vote does not go the way it should but we try to work together on additional language, given the exigency of time, if we can agree to do it by notational vote. That's all I want to say.

CHAIR LHAMON: Does anyone object to Commissioner's notational vote? Hearing none, perfect.

Why don't I call the question on this vote and we can see if we even need to do more. Commissioner Adams, did you return to vote? Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

CHAIR LHAMON: Commissioner Gilchrist?

COMMISSIONER GILCHRIST: No.

CHAIR LHAMON: Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIR LHAMON: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIR LHAMON: Commissioner Kladney?

COMMISSIONER KLADNEY: Yes.

CHAIR LHAMON: Commissioner Yaki?

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COMMISSIONER YAKI: Aye.

CHAIR LHAMON: I vote yes. The motion fails, three Commissioners opposed, no Commissioners abstained, four Commissioners were in favor.

Commissioner Heriot, I would welcome having our special assistant meet with the expert to see how we can move forward with the applicants to work with them to open this.

And thank you very much for the idea. I think we can work together on this, thank you.

Next we can turn to our Staff Directors.

COMMISSIONER YAKI: Hang on, Madam Chair? Madam Chair?

CHAIR LHAMON: Commissioner Yaki?

COMMISSIONER YAKI: A quorum is -- at this time, the Commissioners are voting with seven. Isn't four a majority of seven?

CHAIR LHAMON: The General Counsel shared information shortly before this meeting about our voting rules and, as I read the General Counsel rule, even if a Commissioner is absent, the denominator remains, and the denominator changes only if a Commissioner is recused or abstaining.

COMMISSIONER YAKI: Okay.

CHAIR LHAMON: Thank you. So, with that

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we can turn to the monthly report, Mr. Staff Director's.

MR. MORALES: Thank you, Madam Chair. Madam Chair, in the interest of time, I have nothing further to add than what's already contained in the report.

As always, I am available to discuss any specific item contained in the report with any Commissioner at their pleasure.

Thank you.

CHAIR LHAMON: Thank you Mr. Staff Director. That concludes the business on the agenda for today's business meeting. And if there is nothing further, I hereby adjourn the meeting at 1:56 p.m. Eastern Time. Thank you all.

(Whereupon, the above-entitled matter went off the record at 1:56 p.m.)

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In the matter of: Business Meeting

Before: USCCR

Date: 08-21-20

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Neal R. Gross

Court Reporter

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