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Committee on Financial Services
Subcommittee on Oversight and Investigations

Hearing on "General Overview of Disparate Impact Theory"

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Hon. Kenneth L. Marcus[1]

Chairman McHenry, Ranking Member Green, Distinguished Committee Members, I am honored to appear before this committee again today. My name is Kenneth L. Marcus. I am the President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law. In addition, I am a former Staff Director of the U.S. Commission on Civil Rights and former General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity. The pursuit of fair housing for all Americans is a matter of serious concern, and I commend this subcommittee for its continuing oversight to ensure that the duty to secure fair housing is honored by this administration, by state and local governments, and by the whole housing community. The use of disparate impact theories to enforce fair housing laws is sometimes promoted as a means of accomplishing this goal. In my view, as I will further explain below, the use of disparate impact in fair housing has risks as well as benefits and carries significant legal and policy disadvantages when misapplied.

[1] President and General Counsel, The Louis D. Brandeis Center for Human Rights Under Law (www.brandeiscenter.com); former Staff Director, U.S. Commission on Civil Rights; author, *Jewish Identity and Civil Rights in America* (Cambridge University Press, 2010). Mr. Marcus submits this testimony on his own behalf. It may not represent the views of the Louis D. Brandeis Center.

The Continuing Evil of Housing Discrimination

The issue of housing discrimination remains a serious problem in the United States, although we have made dramatic and significant progress against it over the years. This is also true of discrimination in other areas, such as the workplace and education. At its worst, however, housing discrimination is uniquely harmful, since it literally hits its victims where they live. That is to say, housing discrimination harms people in a place of peculiar vulnerability, where whole families rather than just particular individuals are at risk. When I had the privilege of directing the U.S. Department of Housing and Urban Development's (HUD) Office of Fair Housing and Equal Opportunity, we faced deplorable cases of conscious, intentional discrimination and bigotry. Sad to say, these cases continue to arise, and it is vital that civil rights enforcement officials pursue them vigorously.

Just last year, HUD settled Fair Housing Act claims against the Ecklin Group, a Lancaster, Pennsylvania real estate development group that they found had refused to rent to Burmese refugee families. The agreement came about after company staff allegedly refused to renew the leases of three Burmese families because of their national origin, and told various people that the group would no longer accept rental referrals for refugees referred by Lutheran Refugee Services. Needless to say, the company denied the allegation, which is not unusual in such settlements. In the twenty-first century, it is sobering to think that such blatant national origin discrimination persists. Unfortunately, this Lancaster case was not the only such case of blatant alleged discrimination.

The year before, a HUD Administrative Law Judge found that Phillip and Opal Maze, respectively the rental manager and owner of a Marshall County, Alabama mobile home, had unlawfully discriminated against a white family and an African American man because one of the family members was dating the African American man. Phillip Maze had kicked the African American man off of the premises because of his race. According to HUD, Maze actually told the woman who was dating the African American man that they would have to move out because he did not believe in interracial dating. He then turned off the water to the family's home after observing the African American visitor. When the white female tenant asked what she would have to do to have the water turned back on, Mr. Maze told her to "get rid of the black boyfriend."

Subtle, Covert Discrimination and Disparate Impacts

We know, however, that in the twenty-first century, those who harbor racial bias are seldom so explicit about it. As racism has become socially stigmatized and legally barred, most people who harbor racial prejudice have learned to conceal their bias in ways that are difficult to identify or to prove in a court of law. The disparate impact doctrine can be used to identify intentional discrimination that is hard to demonstrate under the doctrine of differential treatment. Used judiciously, disparate impact can be a useful enforcement tool for identifying intentional or unconscious discrimination in circumstances where the discriminators' motivations are otherwise difficult to ascertain. Used improperly, however, it creates real problems of law and public policy and may

entail violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In the fair housing context, the most obvious problem is that the applicable statute does not explicitly authorize it. The Fair Housing Act, unlike Title VII of the Civil Rights Act of 1964, does not expressly provide a disparate impact cause of action. Nor does it contain language regarding "adverse affects" of the sort that has bolstered a disparate impact claim in other statutory contexts. Instead, its statutory language speaks in terms of discrimination "because of," "based on," or "on account of" various enumerated classifications. The Supreme Court has previously interpreted such terms as providing an intent requirement. In this sense, reliance upon HUD's fair housing regulations unavoidably raises the prospect – absent legislation to incorporate a disparate impact theory – that its prosecutions exceed its statutory mandate. Indeed, President Ronald Reagan's signing statement for the 1988 Amendments insists "that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that Title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." In short, President Reagan admonished, "Title 8 speaks only to intentional discrimination." While HUD has long pursued disparate impact claims under Title VIII, the Supreme Court has not yet evaluated the conformity of those regulations with the underlying legislation. Several federal circuit courts have found disparate impact claims to be viable under the Fair Housing Act, but their determinations must be considered provisional until the Supreme Court settles the matter. Recent judicial challenges to the regulations have been settled out of court. If Congress believes that

Title VIII should cover disparate impact, and wants to protect government officials from accusations that their prosecutions are *ultra vires*, it can of course amend the statute to provide an explicit basis for the use of this doctrine. If it chooses to do so, however, it should beware the broader risks posed by misuse of this doctrine.

The Supreme Court's decision in the so-called New Haven firefighters' case, *Ricci v. DeStefano*, raises the deeper problem that current disparate impact doctrine may violate the Equal Protection Clause of the U.S. Constitution. In that case, Justice Scalia observed that the Court's narrow opinion "merely postpones the evil day" the Court will have to decide the central, looming question: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" The same question arises with respect to the Fair Housing Act to the extent that it is interpreted to support disparate impact claims. In a nutshell, the problem is that disparate impact doctrine, as it has evolved over the years, has come to encompass more than just intentional and unconscious discrimination. This broad doctrine has come to include a wide range of actions which have unintended adverse impacts on certain groups which are merely difficult to explain on non-racial grounds. This can lead housing providers or lenders to avoid legitimate criteria such as credit-worthiness or employment status which have legitimate (if difficult-to-prove) non-discriminatory rationales but adverse impacts on some racial groups. These potential defendants would be forced to demonstrate a business "necessity" for the policy, and such demonstrations are hard to mount even when their validity is intuitively obvious. Some have argued that this has had a destabilizing influence on certain markets. Worse, the doctrine is sometimes used to pressure

regulated entities – employers, for example, but perhaps also lenders or housing providers – to engage in quota-like behavior to avoid the prospect of disparate impact liability. In other words, they are forced to use surreptitious means to 'get their numbers right" in order to avoid disparate impact liability.

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

While I have framed my remarks largely in terms of legal considerations, I should also observe that there are questions of equity and policy that also constrain proper uses of the disparate impact doctrine. As I have noted, the problem of actual, intentional discrimination remains a pressing one even today. It is my belief that the civil rights

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