



DEPARTMENT OF JUSTICE

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December 17, 2018

Catherine E. Lhamon, Chair
United States Commission on Civil Rights
1331 Pennsylvania Avenue, NW Suite 1150
Washington DC 20425

Re: *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*

Dear Chair Lhamon and Esteemed Commissioners:

Thank you for the opportunity to submit written comments in connection with your recent public briefing on November 2, 2018: *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*. We request that the Commission consider these comments submitted on behalf of the undersigned state Attorneys General.

State Attorneys General form the backbone of civil and criminal enforcement in their respective states. Although historically unflinching advocates for consumer protection, child protection and victims and survivors of crime, state Attorneys General have not previously had to shoulder the mantle of federal civil rights enforcement in their states. In recent decades, civil rights enforcement has been the primary purview of the US Department of Justice (USDOJ) and its specialized Offices of Civil Rights as well as the civil rights offices in various federal agencies. Other key civil rights enforcement agencies include the Equal Opportunity Employment Commission, as well as the departments of Housing and Urban Development, Education, Health and Human Services, and Labor.

In recent months, federal agencies have scaled back or eliminated their civil rights divisions, reducing their civil rights work consistent with the hostile policies of the current administration. Indeed, the administration has simultaneously launched attacks on entire classes of individuals traditionally protected by agency regulations and laws. Examples include: roll-backs of protections for transgender individuals; policies targeting immigrants based on national origin, religion and immigration status; undermining the rights of sexual assault victims; disputing the right of some of the undersigned states to be sanctuary states to protect people in their states; and

repealing rules and programs that protect reproductive rights and provide access to health care.¹ As the administration deliberately turns away from helping and protecting our most vulnerable people, state AGs are standing up. In many states, we have stepped forward even though we have no additional resources to fund the work. This drastic shift in civil rights enforcement obligations highlights a number of important questions:

- What does effective civil rights enforcement look like?
- What resources are necessary to carry out effective civil rights enforcement?
- Is local control of civil rights enforcement a better approach?
- Where is federal enforcement vital, even with an involved state Attorney General?
- What happens when a federal agency fails to timely respond to a complaint of a civil rights violation?

To assist the Commission in considering these and other questions, we offer a variety of examples of federal retreat from civil rights enforcement, and explain the effects those federal choices have had on our states and on civil rights enforcement.

Immigration and Asylum

Overt federal threats to the well-being of immigrants in our states have required immediate and swift action by state Attorneys General. When the first Muslim Travel Ban was issued, state Attorneys General obtained an immediate nationwide injunction due to the order's blatant discrimination on the basis of religion.² These challenges forced the administration to revise the travel ban twice, until it was able to pass constitutional muster over a year later.³ Similarly, when US Attorney General Jeff Sessions announced he would end the Deferred Action for Childhood Arrivals (DACA) program, state Attorneys General filed suits and obtained nationwide injunctions preventing the end of the program.⁴ As a result, thousands of young people continue to lawfully work, live, go to college, raise families and pay taxes in our states. When the Commerce Secretary sought to add a citizenship question to the census without supporting research or data, state Attorneys General filed a suit seeking to block this addition.⁵ The census bureau has long taken the position that the question would depress census participation, particularly from hard-to-count immigrant communities. If census participation suffers, some of the most significant effects would be reduction of services to communities who need it most.

¹ *Texas v. United States*, N.D. Tex., Case No. 4:18-cv-00167-O

² *Washington v. Trump et al.*, W.D. Wash., Case No. 2:17-cv-00141-jlr.

³ *Trump v. Hawaii*, 585 U.S. ____ (June 26, 2018).

⁴ *New York v. Trump et al.*, E.D.N.Y., Case No. 17-CV-5228; *State of California, et al. v. Dep't of Homeland Security, et al.*, N.D. Cal., Case No. 17-cv-5235.

⁵ *New York v. U.S. Dept. of Commerce*, S.D.N.Y., Case No. 1:18-cv-02921-JMF; *State of California v. Ross, et al.*, N.D. Cal., Case No. 18-cv-01865.

State Attorneys General have joined and filed other suits, including challenges to the family separation policies,⁶ amicus briefs defending Temporary Protected Status for immigrants from countries including Haiti, El Salvador and Honduras,⁷ and protections for asylum seekers.⁸ And attorneys general from a number of states just submitted extensive comments regarding proposed changes to the “public charge” rule, which would severely harm the most vulnerable immigrants by punishing them for using public benefits when they apply for permanent immigration status.⁹ A large group also submitted a comment letter last month opposing the Administration’s plans to roll back protections for children held in immigrant detention facilities, protections that were created in the *Flores* settlement agreement.¹⁰ Each of these actions by state AGs have been in direct response to a coordinated set of policies intended to diminish the basic human and civil rights of immigrants. As a nation, we include immigrants seeking a better life, a safe place to practice religion without persecution and a place to pursue the American dream of liberty and prosperity, we believe we must show common respect and humanity as we welcome new communities of immigrants into the fabric of our communities.

Housing

On January 5, 2018, the US Department of Housing and Urban Development announced it was suspending implementation of the Affirmatively Furthering Fair Housing rule. That rule provided necessary data and tools to reduce racial disparities and concentrations of poverty in HUD’s housing and community development initiatives. State AGs filed letters opposing suspension of that rule, joined in an amicus brief supporting a preliminary injunction to prevent suspension of the rule, and in October 2018, 16 state AGs submitted a comment letter opposing the HUD action. The letter notes that “racial segregation of our communities is a troubling and visible reflection of the racial and economic inequality in our country. For too long, communities across the country have been made up of two separate and unequal societies divided along racial and ethnic lines.”

April 2018 marked the 50th anniversary of the federal Fair Housing Act, yet there is troubling evidence that discrimination in the housing market - particularly in mortgage lending - still denies people of color equal access to the American dream. In February 2018, the Center for Investigative Reporting published a report exposing “modern-day redlining.”¹¹ The report

⁶ *Washington v. United States*, S.D. Cal., Case No. 3:18-cv-1979 (originally W.D. Wash).

⁷ See https://oag.ca.gov/system/files/attachments/press_releases/Amicus%20Brief%20-%20Ramos%20TPS%20%28ND%20Cal.%29%20corrected%20FILED%2009.20.2018.pdf

⁸ See https://oag.ca.gov/system/files/attachments/press_releases/EBSC%20States%27%20Amicus%20FINAL%20file-stamped%2012.05.18.pdf

⁹ See <https://oag.ca.gov/system/files/attachments/press-docs/ltr-sec.nielsen-and-chief-deshommes-re-proposed-rule-inadmissibilit....pdf>

¹⁰ See

https://oag.ca.gov/system/files/attachments/press_releases/2018.11.06%20Multistate%20Comment%20Letter_DHS%20Docket%20No.%20ICEB-2018-0002%20and%20HHS%20Docket%20No.%20HHS-OS-2018-0023.pdf

¹¹ Aaron Glantz & Emmanuel Martinez, *Kept Out: For People of Color, Banks are Shutting the Door to Homeownership*, *Reveal* (Feb. 18, 2018) <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.

triggered an investigation by the Pennsylvania Attorney General's office, among other government responses.¹²

While state AGs are ready to act, states still need the U.S. Department of Justice (USDOJ) to meaningfully enforce federal fair housing laws. Indeed, U.S. Senator Bob Casey and Pennsylvania State Senator Vincent Hughes wrote then-U.S. Attorney General Jeff Sessions to seek an immediate federal investigation into the Center for Investigative Reporting's findings.¹³ USDOJ, which can file pattern or practice suits under the federal Fair Housing Act, is uniquely positioned to remedy nationwide patterns and practices of mortgage discrimination. Despite these direct requests to AG Sessions, it is unclear whether USDOJ has launched an investigation. To date, we are aware of no Fair Housing Act suits filed against lenders by the current USDOJ.

Consumer Financial Protection Bureau and the Home Mortgage Disclosure Act

In response to Center for Investigative Reporting article about redlining, Attorneys General turned to federal data seeking information necessary to protect their residents. Unfortunately, the data available to the public under the Home Mortgage Disclosure Act (HMDA) did not paint a clear picture. Instead of helping root out discrimination in mortgage lending, the Consumer Financial Protection Bureau (CFPB) has been working to roll back reporting requirements under the HMDA. In addition, the federal government has the authority to subpoena the books and records of national banks to investigate discriminatory mortgage lending practices. This unique federal power represents a vital tool to adequately prevent discrimination in mortgage lending across the board.

After the home mortgage crisis in 2008, the HMDA was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Among other changes, the amendments expanded information collection, reporting, and disclosure under the HMDA.¹⁴ The CFPB enacted regulations requiring banks and other lending institutions to report more data under the HMDA that would be made available to the public and public officials.¹⁵ Had the expanded reporting requirements been enforced, the data could have helped state Attorneys General enforce laws against discrimination in housing and lending. But instead, CFPB Director Mick Mulvaney excused banks and other lenders for HMDA data collection errors, and relieved them from reporting requirements.¹⁶

¹² See <https://www.revealnews.org/blog/we-exposed-modern-day-redlining-in-61-cities-find-out-whats-happened-since/>.

¹³ See http://www.senatorhughes.com/wp-content/uploads/2018/04/CaseyHughesLettertoDOJonMortgageLending_March2018.pdf.

¹⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376, section 2097-101 (2010).

¹⁵ Home Mortgage Disclosure (Regulation C); 80 FR 66128 (Oct. 28, 2015) (October 2015 HMDA Final Rule).

¹⁶ Consumer Fin. Protection. Bureau, *Statement with respect to HMDA implementation*, Dec. 21, 2017 at https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf

Subsequently, the CFPB backed, and the President signed into law, a statute exempting 85% of banks and almost 50% of other mortgage lenders from reporting requirements.¹⁷ The lack of this data limits the federal government’s ability to uncover disparities in mortgage lending based on race or national origin. And it impedes AGs efforts to ensure fair mortgage lending in their states.

Transgender Rights

Our states have seen an increase in complaints from transgender patients and students. State Attorneys General have authored and joined multiple letters to federal agencies advocating for equal rights and treatment of transgender individuals, including objecting to a potential new definition of “sex” that is based upon sex assigned at birth,¹⁸ and arguing for the equality of transgender servicemembers.¹⁹ State AGs have also sought to improve and increase the protections afforded by their individual state laws, and to provide guidance internally to state agencies and executive officers to better protect transgender persons.

Disappointingly, federal agencies are becoming increasingly unhelpful. Transgender rights advocates report that they now must advise mistreated transgender people that complaints filed with the office of civil rights at either the US Department of Health and Human Services or Department of Education are unlikely to be investigated or prosecuted. These agencies have made clear their intent to exclude transgender people from the protection of statutes they enforce. The federal decision to turn a blind eye to discrimination against transgender people leads to a strain on the state and local agencies that must fill the gap.

Equal Employment Opportunity Commission

The EEOC has special “pattern or practice” authority to remedy employment discrimination under Title VII of the Civil Rights Act of 1964.²⁰ For purposes of enforcement, USDOJ has primary authority to investigate and remedy most violations. For example, USDOJ has pattern or practice authority to remedy housing discrimination under Title VIII of the Civil Rights Act of 1968²¹. USDOJ has pattern or practice authority under the Equal Credit Opportunity Act²², and Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of public accommodation.²³ USDOJ also has exclusive enforcement authority under the federal police misconduct statute.²⁴ The federal government—through the specific agency funders—enjoys the exclusive ability to enforce the many provisions of Title VI of the Civil Rights Act of 1964.²⁵

¹⁷ Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law 115-174, section 104 (2018).

¹⁸ See <https://oag.ca.gov/system/files/attachments/press-docs/11-9-18-letter-white-house-cabinet-re-federal-actions-threatening-non-discrimination-transgender.pdf>

¹⁹ See https://oag.ca.gov/system/files/attachments/press_releases/Doe%20v%20Trump%20-%20Amicus%20Brief%20of%20Massachusetts%20et%20al%20AS%20FILED.pdf

²⁰ 42 U.S.C. s 2000e-6.

²¹ 42 U.S.C. s 3614.

²² 15 U.S.C. s 1691e(h).

²³ 42 U.S.C. s 2000a-6(a).

²⁴ 42 U.S.C. s 14141.

²⁵ See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

These causes of action, with powerful remedies to redress and prevent violations that affect many people, are reserved to the federal government. If the federal government declines to enforce these laws, the states are not positioned to pick up the slack. These matters were largely committed to federal enforcement authorities by Congress.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws prohibiting employment discrimination. It does this by investigating, conciliating, and litigating cases, but also by interpreting the law and informing the public of its views. While EEOC's informal guidance is not binding, it analyzes key cases and provides helpful examples that assist employees, employers, practitioners, and the courts. State agencies that enforce fair employment practices, and even state courts, often look to EEOC guidance as persuasive authority.

Even as the #MeToo movement has placed sexual harassment at the top of the nation's consciousness, the Office of Management and Budget (OMB) has blocked the EEOC from issuing comprehensive guidance on the subject. Almost two years ago, in January 2017, the EEOC posted for public input a draft enforcement guidance on harassment in the workplace.²⁶ After receiving public comments and revising the draft accordingly, the EEOC submitted the draft guidance to OMB for clearance in November 2017.²⁷ One year later, OMB still has not cleared the guidance.²⁸ This obstruction has deprived workers, employers, and law enforcement agencies of an important tool at a critical time.

Impact on State Attorneys General Offices

Some state Attorneys General offices, depending on resources, legal authority and size, have civil rights divisions or sections dedicated to civil rights enforcement. Under the Trump Administration, many have seen a marked increase in work directly linked to the federal government's abandonment of civil rights enforcement.

Here are some examples: When the federal government ended its collaborative relationship with the San Francisco Police Department, the California AG's office agreed to monitor the department's reform efforts.²⁹ When the federal government moved to restrict the collection of data related to violence against LGBTQ+ youth, and indicated that it would step back from its guidance regarding discriminatory school discipline, the California AG's office led a coalition of state Attorneys General opposing these proposals.³⁰ When the President issued a discriminatory directive prohibiting

²⁶ See <https://www.regulations.gov/docket?D=EEOC-2016-0009>.

²⁷ See <https://www.bna.com/sexual-harassment-guidelines-n73014471940/>.

²⁸ See <https://www.fastcompany.com/90247310/on-metoo-anniversary-the-white-house-has-yet-to-approve-obama-era-guidelines-on-sexual-harassment-in-the-workplace>.

²⁹ See SFPD, CA DOJ, SF Mayor Mark Farrell Announce Independent Evaluation of SFPD Reforms, City and County of San Francisco, Feb. 5, 2018, <https://sanfranciscopolice.org/article/sfpd-ca-doj-sf-mayor-mark-farrell-announce-independent-evaluation-sfpd-reforms>.

³⁰ See Attorney General Becerra: Data Collection on Violence Against LGBTQ Youth is Critical for the Safety and Welfare of Our Students, State of California Department of Justice, May 11, 2018, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-data-collection-violence-against-lgbtq-youth-critical>. See also

transgender individuals from serving in the military, the Washington Attorney General successfully intervened in a legal challenge, securing a court order to block the discriminatory action.³¹

In addition, the work of state AGs offices has expanded because of the federal government's assault on vulnerable populations. For example, although every court to consider this issue has ruled against the federal government, the U.S. Department of Justice has nevertheless insisted on including immigration enforcement conditions on federal grant funds that state and local law enforcement agencies have depended on for years.³² Recently, the U.S. Department of Justice has even moved to attach immigration enforcement conditions to Office of Juvenile Justice and Delinquency Prevention Title II grant funds, which are focused on rehabilitation and keeping youth out of justice systems.³³

On January 13, 2017, USDOJ issued a landmark report detailing its extensive investigation into the Chicago Police Department (CPD). USDOJ found that CPD had consistently engaged in a pattern of unconstitutional use of force, among several systemic problems. Yet USDOJ subsequently declined to follow through on its own conclusions and seek a consent decree to reform CPD, as it had done previously in many other cities. Because USDOJ refused to act, the Illinois Attorney General filed a lawsuit in federal court against the City of Chicago in August 2017 to achieve the same remedy. Over the past year and a half, the Illinois AG's office has expended tremendous attorney hours and funds to step into the void left by USDOJ's failure to follow through on its findings and recommendations, seeking the input of the community, negotiating a consent decree with Chicago, and employing experts to guide the process. USDOJ has not provided any assistance in those efforts; indeed, USDOJ recently filed a formal objection to the Illinois AG's draft consent decree with Chicago.

Most recently, state AGs have been working diligently to submit formal comments objecting to the US Department of Education's proposed rule permitting some schools to refuse to act on sexual violence allegations, even when the school concludes the allegations are likely true. In addition, state AG offices are fielding questions from their state agencies about the possible

https://oag.ca.gov/system/files/attachments/press_releases/Federal%20School%20Discipline%20Guidance%20multi%20state%20AG%20Letter%20v.6%2008.24.2018.pdf

³¹ See Federal Judge Blocks Transgender Military Ban in Lambda Legal Case, AG Ferguson Case, December 11, 2017, <http://www.atg.wa.gov/news/news-releases/federal-judge-blocks-transgender-military-ban-lambda-legal-case-ag-ferguson-case>

³² See Order re: Mots. for Summ. Judg., *California, ex rel Becerra v. Sessions*, No. 17-cv-4701 (N.D. Cal. Oct. 5, 2018) ECF No. 137; see also *Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018); Order Granting Pl.'s Appl. for Prelim. Inj., *Los Angeles v. Sessions*, No. 17-cv-7215 (Sept. 13, 2018) ECF No. 93, *appeal docketed*, 18-56292 (9th Cir. Oct. 1, 2018); *Chicago v. Sessions*, No. 17-cv-5720, ---F. Supp. 3d---, 2018 WL 3608564, at *12 (N.D. Ill. July 27, 2018), *appeal docketed*, 18-2885 (7th Cir. Aug. 28, 2018); *Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018), *appeal docketed*, 18-2648 (3d Cir. July 26, 2018).

³³ The grant solicitation did not reference the immigration enforcement condition. See U.S. Dep't of Justice, OJJDP FY 2018 Title II Formula Grants Program: FY 2018 State Solicitation (2018), <https://www.ojjdp.gov/grants/solicitations/FY2018/TitleII.pdf>. After applications were due, the federal government told jurisdictions that an immigration enforcement condition related to 8 U.S.C. § 1373 would be included in grant award documents.

impact of this proposed rule and questions from state legislatures and other statewide executives about what might be done to afford those protections to crime victims at the state level.

Finally, in addition to the overt executive orders, federal agency rule changes and new policies of the administration, the divisive, nationalistic and racially-charged rhetoric of the federal administration and its top executive have accompanied an uptick in hate crimes and hate speech in our states, towns and neighborhoods across the nation. As state Attorneys General, we seek to build legal and social structures that support equality, diversity, and opportunity for all. We are also prosecutors who seek to hold criminals accountable for bias-motivated attacks. When the President of the United States publicly supports people “on both sides” of a hate crime like the murderous riot in Charlottesville, it erodes our ability to build safe and supportive communities and to hold offenders accountable. The Virginia Attorney General’s office responded by establishing a hate crimes website with definitions, hate crime statistics and resources for victims, and by seeking to strengthen Virginia’s hate crime laws. In Oregon, the Attorney General has convened a hate crimes task force and is conducting listening sessions across the state to identify additional steps the state can take to protect Oregon from the increasing scourge of hate.

As the chief law officers of our states, we urge this commission to report with impartiality the tangible threat to civil rights enforcement in America today. We stand ready to take action when and wherever we are needed to protect the rights of the people in our states from assaults on their freedoms and civil rights. But without the genuine partnership of the federal government, the tools we have to conduct that enforcement are limited. To put an even finer point on it: The federal government should partner with us in protecting civil rights, rather than posing a constant and dangerous threat to them.

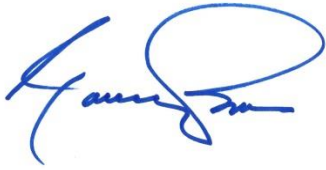
As a nation founded on the promises of liberty and justice, with guarantees of freedom interwoven throughout our Constitution and its amendments, we must insist that the protection of our civil rights remains a shared responsibility between the federal government and the states.

Sincerely,

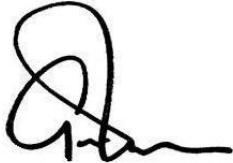


ELLEN F. ROSENBLUM
Oregon Attorney General


(Signatures Follow)



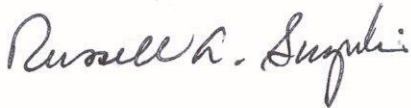
Xavier Becerra
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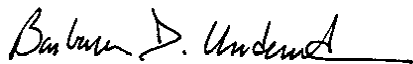
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Gurbir S. Grewal
New Jersey Attorney General



Hector Balderas
New Mexico Attorney General



Barbara D. Underwood
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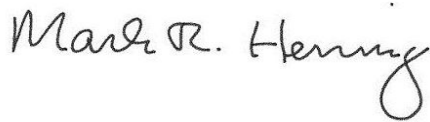
Josh Shapiro
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Handwritten signature of Peter F. Kilmartin in black ink.

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Mark R. Herring
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Bob Ferguson
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