

CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Fall 2018

From the Desk of the Chairperson

It is with a deep sense of gratitude and excitement that I assume the responsibilities of the Chair of the Civil Rights Section. Gratitude, first of all, for the amazing work Wylie Stecklow, our outgoing chair, has done building this Section into the active organization it is today. Ever since that first Section conference call with Wylie two years ago, I have had the good fortune of working with him on a variety of projects, including most importantly our CLE program, the Civil Rights Étouffée, which was entirely Wylie's brainchild. Though he will candidly admit that the genesis of the Étouffée was his great love of visiting my home town, New Orleans, and that he wanted yet another good excuse to do it, Wylie poured tremendous energy into organizing a first-rate conference in 2017. But he didn't stop there. During the course of 2018, he helped organize a series of Etouffee CLEs on the road, in Detroit, Boston, Salt Lake City, and New York City (proving he wasn't doing it just for the New Orleans cuisine). And in addition to the CLE, Wylie initiated our Section newsletter, grew the Section

membership, and created an amicus committee. All impressive accomplishments of which Wylie can justifiably be proud.

But of course Wylie didn't achieve this progress alone. One of the things I've learned from him, and the second source of my gratitude, is that people will step up when given a platform from which to do it. I won't get into listing names for fear of missing someone, but various members of our Section have put in a great deal of time and effort helping Wylie build up our organization. I am very grateful to be inheriting a team of active members who will continue to help build on our past success.

Which brings me to the excitement. With momentum on our side, we can push the Section on towards new goals. I've just returned from the FBA annual convention in New York, where I had the pleasure of spending time not just with Wylie but also Eileen Rosen (past chair), Robin Wagner (our secretary), and Rob Sinsheimer (our membership

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Supreme Court Preview – Fall 2018

by Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Madison v. Alabama, op. of January 16, 2018, Mobile County Circuit Court Case CC-1985-001385.80, *cert. granted*, 138 S. Ct. 1172 (2018) (granting review of an otherwise unreviewable opinion of the state trial court denying a petition to suspend execution based on incompetency). No. 17-7505; argued October 2, 2018.

The Court will review an Alabama trial court's determination that Alabama may execute a prisoner whose strokes and vascular dementia have left him unable to remember his crime and with limited understanding of his circumstances. Alabama tried Vernon Madison three times for the 1985 shooting and killing of off-duty police officer Julius Schulte: the first conviction was overturned on *Batson* grounds; the second after prosecutors introduced inadmissible evidence; and the third time proved the State's charm.

The parties debate both the applicability of precedent—namely *Ford v. Wainwright* (holding that the Eighth Amendment prohibits execution of the insane) and *Panetti v. Quarterman* (describing the necessity of a prisoner's rational understanding of the reasons for execution as opposed to mere awareness of the fact that those reasons exist)—and whether evolving standards of decency bar the execution.

Bucklew v. Precythe, 883 F.3d 1087 (8th Cir. 2018) (2-1 decision), *cert. granted*, 138 S. Ct. 1706 (2018). No. 17-8151; set for argument November 6, 2018.

The Court has the opportunity to clarify whether prisoners mounting as-applied challenges to execution methods must propose an alternative—or whether that requirement is limited to facial challenges—and to define the applicable presumptions and burdens.

Missouri plans to execute Russell Bucklew via lethal injection, but he argues that his extremely rare medical condition, which “causes inoperable, blood-filled tumors to grow in his throat,” makes the usual injection protocol inappropriate. Specifically, Bucklew argues that the tumors might rupture and/or block his airway while technicians search for a vein, especially if he is forced to lie flat. Missouri urges that he will not be forced to lie flat, and that pentobarbital will render him insensate within thirty seconds, whereas Bucklew's proposed alternative method—nitrogen gas—has attracted research attention but never been implemented by any State.

A variety of *amici* have contributed briefs, including: the AMA, reminding the Court that physicians cannot ethically help a State design an execution protocol by testifying as to the comparative pain prisoners might experience; the ACLU, citing international law in arguing that Bucklew's likely suffocation in his own blood is cruel and that Missouri should bear the burden of proposing an alternative; pharmacists, insisting that States create serious risks when they obtain new execution drugs from unregulated sources; and seventeen death-penalty States, writing in support of Missouri and of holding as-applied

challengers to the same burden as facial challengers.

Gamble v. United States, 694 F. App'x 750 (11th Cir. 2018) (unpublished per curiam), *cert. granted*, 138 S. Ct. 2707 (2018).

No. 17-646; set for argument December 5, 2018.

The “separate sovereigns” exception to the double jeopardy clause allows both a State and the federal government to prosecute, contemporaneously or in either sequence, a single defendant for a single criminal act. Mr. Gamble pleaded guilty, in both proceedings, to being a felon in possession of a firearm, but reserved his right to challenge his federal sentence (somewhat longer than his Alabama sentence) on double jeopardy grounds.

Gamble points out that the separate sovereigns doctrine is judge-made—not found in the text of the Fifth Amendment itself and not imported from English common law, which held the other way—and emerged “well over half a century after the founding, and then only in dicta under ignominious circumstances,” namely an 1852 fugitive slave case. Gamble also analogizes from the rejection of the silver platter doctrine and similar precedents to indicate a principle that the dual sovereigns may not cooperate so as to achieve what neither could do on its own. Given this weak foundation, Gamble urges the Court to overturn its precedents.

At the time of this writing, the government has not yet submitted its brief, which is due October 25. But in opposing Gamble's petition for certiorari, the acting solicitor general insisted that Gamble's arguments had largely been considered and rejected, whether in opinions or denials of petitions, over the last several decades. English precedents have no relevance, he continued, where the uniquely American dual-sovereigns approach broke with English tradition and in the words of Justice Kennedy “split the atom of sovereignty,” creating co-equal spheres of rights and responsibilities. The parties disagree about the doctrinal consequences of incorporation of the Fifth Amendment and the increased power and range of federal law enforcement.

Timbs v. Indiana, 84 N.E.3d 1179 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (2018).

No. 17-1091; set for argument November 28, 2018.

In the context of criminal asset forfeiture—a Land Rover allegedly used to transport four grams of heroin—Indiana courts disagreed over whether the Eighth Amendment's prohibition of excessive fines is or should be incorporated against the states under the Fourteenth Amendment. That disagreement reflects a broader nationwide controversy that includes a circuit split. Tyson Timbs and several *amici* urge the Court to rein in fines and forfeitures because they disproportionately affect the poor and because powerful financial incentives necessarily pervert the administration of justice.

In opposing the petition, Indiana's attorney general apparently could not resist punning that "[Timbs'] Rover provides an unsound vehicle" for deciding the question, both because the question was not briefed in the lower courts and because State constitutions already prohibit excessive fines.

Nieves v. Bartlett, 712 F. App'x 613 (9th Cir. 2017) (mem.), cert. granted, 138 S. Ct. 2709 (2018). No. 17-1174; set for argument November 26, 2018.

The Court has already made clear that a § 1983 claim for retaliatory prosecution fails where the charges are supported by probable cause, but the Ninth Circuit has held that retaliatory arrests are another matter: "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action."

Russell Bartlett admits that he was too intoxicated to drive when he initially refused to talk to, and was later arrested by, state troopers Luis Nieves and Bryce Weight outside a trailer at the Arctic Man festival in the mountains of interior Alaska. The trial court's summary judgment dismissed all of Bartlett's claims, holding that, although Bartlett's refusal to talk to Nieves was protected by the First Amendment, the subsequent arrest was supported by probable cause and thus did not make the officers liable even if it was retaliatory. The Ninth Circuit affirmed the dismissal of Bartlett's claims of false arrest, excessive force, and malicious prosecution, but reversed on the remaining retaliatory arrest claim.

The United States as *amicus* argues that a damages remedy is unnecessary to deter retaliatory arrests because they are rare, adequately covered by criminal law, and cause no compensable injury. The brief includes a floodgates argument: under the Ninth Circuit's rule, retaliatory arrest claims will almost always survive Rule 12 motions and summary judgment motions because they hinge on the arresting officer's subjective intent.

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officer). The convention was a lot of fun, but it was also quite inspiring. The FBA announced that it had adopted a formal statement on the importance of the Rule of Law, which is reprinted in full below. Now more than ever, I am proud to be a member of an organization committed to the principles described in the statement.

Going forward, I have both short and long term goals for our Section. In the short term, we are gearing up for our second Civil Rights Etouffee CLE in New Orleans, on February 15, 2019. The program is taking shape but we are always interested in people getting involved to help make it the most interesting and informative CLE it can be. Please contact me or Wylie if you would like to be looped in on the next conference call. And on the topic of calls, we plan to continue our monthly conference calls on the third Wednesday of each month (see schedule below) but we're going to add a little something to spice them up. During each call we will have someone do a short presentation on an interesting civil rights case from one of the Circuits. I hope learning about what's going on in various parts of the country will enrich everyone's perspective on their own local practices.

Mount Lemmon Fire District v. Guido, 859 F.3d 1168 (9th Cir. 2017), cert. granted, 138 S. Ct. 1165 (2018). No. 17-587; argued October 1, 2018.

The Court may resolve a circuit split created when the Ninth Circuit held that the Age Discrimination in Employment Act applies to small state agencies, whereas the Sixth, Seventh, Eighth, and Tenth Circuits have enforced in the state agency context the twenty-employee minimum that applies to private employers. The debate hinges on the meaning of "also" in the phrase "also means"—whether the "also" denotes an entirely separate definition or merely a modification of the first definition by the terms that follow. The Ninth Circuit held that "also" denotes a separate definition and that the statute is unambiguous. Although in doing so it created the split, it does not stand alone insofar as its reading was proffered by the EEOC as *amicus* below—and is now supported by the United States as *amicus* to the Supreme Court. ■

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

Please let me know if you'd like to present on a case, either one of your own or something you've read.

In the longer term, I hope to explore ways that we as a Section can partner with both local FBA chapters and other organizations to share the civil rights expertise of our Section members. As I learned at the convention, some of the local chapters are establishing programs to assist pro se litigants in federal court, something which I believe our Section should be assisting with. Recently retired Seventh Circuit Judge Richard Posner, who is likely to be a speaker at the CLE in February, has been writing extensively on the challenges faced by pro se litigants, many of them prisoners, who attempt to vindicate their rights in federal court. If there's one thing I think all of us can agree on, it is that everyone—the innocent and the guilty, the right or the wrong—deserves a lawyer. As the Civil Rights Section of the Federal Bar Association, I believe we have both a unique capacity and a moral duty to help those who can't help themselves.

Thank you for being a part of this Section, and I look forward to working with everyone to keep the momentum going over the next two years. ■

The ADA, Credit Unions, and Mobile Apps

by Eve Hill, Brown Goldstein & Levy, LLP, Washington, D.C.

Not long ago, I wrote a demand letter to Boeing Employees' Credit Union (BECU) on behalf of the National Federation of the Blind and 3 blind credit union members, informing BECU that we were prepared to sue under the Americans with Disabilities Act (ADA) and the State of Washington's Law Against Discrimination because its mobile app was inaccessible. I thought BECU might fight with me. After all, this wasn't just a website case (although the website also had some issues). We were challenging the mobile app – something that hasn't been extensively litigated. In addition, I knew some in the credit union industry were in the process of going to war with disability rights advocates over web accessibility lawsuits. That war has escalated, with the credit unions publishing articles, filing motions to dismiss and amicus briefs, and lobbying Congress and the Department of Justice to limit enforcement of the ADA for websites.

Despite that background, as described in a recent article in the Credit Union Times, "BECU Shows ADA Disputes Don't Have to Be Acrimonious," <https://www.cujournal.com/news/becu-shows-ada-disputes-dont-have-to-be-acrimonious>, we reached an agreement with BECU without litigation. Under the agreement, BECU has committed to make both its website and its mobile app accessible, has adopted substantive accessibility policies and processes for maintaining accessibility, and will ensure that any content or software it purchases for the website or app is made accessible by the vendor. They did the right thing and they are continuing to do the right thing in this area as they learn more about accessibility and examine how their business affects people with other disabilities.

My contribution to this result was 1) to make sure my clients – both the organizations and the individual members – got to speak, directly and in person, with leaders at BECU, and 2) to have a clear legal theory about why both the BECU website and the BECU mobile app had to be accessible under the ADA.

The in-person meeting with BECU in Seattle was essential to the attitude change at BECU that is now playing out positively in the company's implementation of our agreement. And having my clients at that meeting and able to talk about their experiences was the key. My clients talked about how they actually used the BECU website, how they wanted to use the mobile app, and how far they had to travel (by bus) to get to a BECU branch. They also talked about how the accessibility of the BECU website in past years was one reason they chose BECU, how their disappointment about the inaccessible mobile app was making them consider changing banks, and how they tried to raise the issue with BECU customer service and were dismissed.

I recognize that this level of engagement of a client is not always possible, but it makes a huge difference -- in the negotiation process, in the settlement, and in the actual on-the-ground outcome -- of an ADA case. A lack of client involvement is what feeds the perception that disability rights lawyers are not really representing anyone, but are just looking for a payout.

It is what feeds the perception that people with disabilities are just suing to make a point or a buck, without really caring about access. In this case, it was helpful to put that perception behind us right away.

Regarding the legal theory, it seems obvious that both websites and mobile apps should be accessible under the ADA. After all, the ADA requires covered entities to "ensure effective communication with individuals with disabilities," and a mobile app is one way a business communicates with its customers, prospective customers, and the public. However, it is possible that in a contested case a court could rule that the ADA does not require every format in which information is communicated, or by which goods and services are offered, to be accessible. For example, if a store makes the same announcement on paper, on a sign, and through its public address system, it likely does not also have to provide the paper in Braille and post a staff person by the sign to repeat what it says aloud, and provide sign language interpretation each time the public address announcement is made. So if a business' website is accessible, but its mobile app is not, does that violate the ADA?

Cases addressing website accessibility have, unfortunately, mostly focused on whether a business is a "place" of public accommodation and whether a website has a "nexus" to that place. Most courts have not made factual comparisons of the content and effectiveness of in-store versus on-line communications. So courts have not established a framework for addressing the multiple ways businesses communicate with their customers and how effective communication under the ADA should be assessed across those formats.

For a business with both a mobile app and a website, whether both will be required to be accessible should depend on whether they provide the same information and services and whether they are equally effective in terms of convenience, ease of use, and independence. For example, if a mobile app is simply a subset of the information available on a website, and if the website is also useable on a mobile device, then a court might conclude that the mobile app would not need to be accessible as long as the website is accessible. However, if a mobile app offers additional information, services, or benefits the website does not offer, or offers more convenient and easy access, a covered entity must make the app accessible. And if both the app and website offer different information and services or benefits, both must be accessible.

Most credit union and bank mobile apps offer services and information, such as mobile deposit, that are not available through the website. In addition, many websites offer information, such as past transactions, that are not available through the app. Therefore, the mobile apps of banks and credit unions most clearly have to be accessible in addition to accessibility of their websites. ■

Will HUD Reconsider Its Disparate Impact Rule? A Case for Why the Rule Should Be Enforced, Not Changed.

by Morgan Williams, General Counsel, National Fair Housing Alliance,
Washington, D.C.

In August 2018, the U.S. Department of Housing and Urban Development (“HUD”) received public comments on an Advance Notice of Proposed Rulemaking (“Notice”)¹ regarding possible amendments to HUD’s 2013 final rule implementing the Fair Housing Act’s disparate impact standard (“the DI Rule”).² Disparate impact liability involves a three-part burden shifting framework that functions to eliminate facially-neutral policies that have a discriminatory effect and operate without a legitimate purpose, for which there is no less discriminatory means to achieve that purpose. The stated reason for issuing the Notice was to solicit comment on whether the DI Rule is consistent with the 2015 U.S. Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities*.³

Our nation’s shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics, is embedded in HUD’s mission and the Fair Housing Act itself, which established “the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States.”⁴ Many civil rights, consumer advocacy, housing, and community development organizations submitted comments in response to the Notice, proposing that HUD should not amend the DI Rule, but instead, should vigorously enforce the Rule to remove unnecessary barriers to housing choice and give everyone a fair shot throughout our housing markets.

The Disparate Impact Rule is Critical to Ensuring Fair Housing Act Compliance and Recourse for Victims of Systemic Discrimination.

The disparate impact standard, as detailed in the DI Rule and affirmed by the Supreme Court, is critical to ensuring optimal compliance with the federal Fair Housing Act and providing victims of wide-spread discrimination with appropriate recourse. The disparate impact doctrine helps maintain open markets free from arbitrary and unjustified discrimination—a critical component to America’s future prosperity. Discrimination disrupts our economy, causing inefficiency and instability by constraining the full economic participation of all Americans.

The disparate impact doctrine allows victims of discrimination to challenge policies and practices that limit their housing opportunities or worse, put them in danger. For example, a landlord or municipality that adopts a policy that penalizes people who call emergency services for assistance more than once can cause eviction for victims of domestic violence. A lender’s policy to not originate loans under \$100,000 restricts housing opportunities for thousands of hard-working families and disproportionately impacts people with disabilities, female-headed households, and communities of color. Additionally, an apartment complex that only allows people with full-time jobs, despite how much income they have, may bar veterans or elders with disabilities who cannot work, even if they can afford the apartment. These practices can

be easily tailored to promote best practices in industry policy, and the burden-shifting framework, involving an assessment of less discriminatory alternative policies, encourages housing providers to adopt less restrictive practices.⁵

Cases brought by HUD and the Department of Justice (“DOJ”) show how important disparate impact claims are to maintaining an open housing market.⁶ For example, in the case of *Mountain Side Mobile Estates P’ship v. HUD*,⁷ the HUD Secretary, upon review of a decision by a HUD Administrative Law Judge, applied a disparate impact analysis to determine that a three-person-per-dwelling maximum occupancy policy in a mobile home community had an unjustified discriminatory effect on families with children. In *United States of America v. Countrywide Financial Corporation*⁸ and *United States of America v. Wells Fargo*,⁹ DOJ pursued disparate impact claims on behalf of African-American and Hispanic borrowers who were targeted with toxic, sub-prime loans and steered to pay more than similarly-situated White borrowers for the same products. These and many other cases demonstrate the importance of disparate impact liability under the Fair Housing Act.

The Disparate Impact Rule Was Validated in the Inclusive Communities Decision, which Adopted Its Reasoning.

The U.S. Supreme Court implicitly adopted the current DI Rule in the *Inclusive Communities* decision. The decision—holding that disparate impact is cognizable under the federal Fair Housing Act—adopts the construction of the Fair Housing Act that underlies the DI Rule, including statutory interpretation and four decades of jurisprudence in the lower federal courts. Nothing in the *Inclusive Communities* decision—in its holding or dicta—necessitates HUD’s reconsideration of the current Disparate Impact Rule.

Since *Inclusive Communities*, courts have found that the Rule is consistent with the Supreme Court’s decision. The Second Circuit held in *MHANY Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* “[t]he Supreme Court] implicitly adopted HUD’s approach.”¹⁰ The Northern District of Illinois issued a decision analyzing the relationship between the Rule and the Supreme Court decision and concluded that, “[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD’s burden-shifting approach that requires correction.”¹¹ The Massachusetts Supreme Judicial Court also found that *Inclusive Communities* adopted the Rule’s burden-shifting framework.¹² Further, on remand from the Supreme Court and the Fifth Circuit, the district court in *Inclusive Communities* noted that the Supreme Court had affirmed “the Fifth Circuit’s [prior] decision adopting the HUD regulations.”¹³

When defending the DI Rule in a challenge by an insurance trade group subsequent to *Inclusive Communities* in August

2016, HUD itself argued that the Supreme Court's decision is "fully consistent with the standard that HUD promulgated," relying on existing jurisprudence.¹⁴ Again in March 2017, in response to the insurance trade group's motion to file an amended complaint, HUD stated that its DI Rule is wholly in line with the *Inclusive Communities* decision: "[N]othing in *Inclusive Communities* casts any doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice in support of its analysis. *See* 135 S. Ct. at 2522-23."¹⁵

Leading fair housing scholars echo the consensus in the courts that *Inclusive Communities* is consistent with the current DI Rule. Tulane University Law School Professor Stacy Seicshnaydre, whose scholarship on the subject was cited by Justice Kennedy in the *Inclusive Communities* decision,¹⁶ looking to both the language of the opinion and its overarching message about the integration imperative of the Fair Housing Act, writes that the decision is in concert with the HUD rule.¹⁷ Additionally, University of Kentucky School of Law Professor Robert Schwemm summarized, "the fact that HUD described [the Disparate Impact Rule] as analogous to the Title VII-Griggs standard suggests that it is consistent with the Court's views in *Inclusive Communities*."¹⁸

The Disparate Impact Rule Was Originally Adopted After Extensive Notice and Comment.

Prior to issuing the DI Rule in 2013, HUD sought comments and considered concerns from stakeholders across the country, including from both housing industry and consumer interests. Additionally, HUD considered decades of federal court jurisprudence applying the Fair Housing Act in considering how to appropriately fashion a rule that provides a uniform standard. In 2016, HUD considered further federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. To disregard the extensive record and the plain import of *Inclusive Communities* by retreating from the DI Rule now would be arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.¹⁹ After the *Inclusive Communities* decision effectively adopted the HUD rule,²⁰ HUD would lack a reasoned basis for pulling back from a regulation.

Conclusion

Any reconsideration of HUD's implementation of the Fair Housing Act's disparate impact standard should not put at risk the Department's critical obligation to achieve the goals of the Fair Housing Act. Achieving truly fair and equitable housing in all neighborhoods is one of the greatest challenges our nation faces. Ratifying disparate impact liability, Justice Anthony Kennedy wrote, "Much progress remains to be made in our Nation's continuing struggle against racial isolation. ... The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."²¹ HUD's current DI Rule serves as a valuable tool for victims of housing discrimination, communities, fair housing practitioners, and the housing industry in the ongoing struggle to achieve open housing markets, free from discrimination.

HUD therefore should proceed with vigorous enforcement of the current Disparate Impact Rule. The Rule provides clarity and consistency under a single standard of liability for housing

industry professionals when faced with disparate impact claims and gives the public a greater understanding of their rights. With the Supreme Court reaffirmation of disparate impact and subsequent lower courts' application of the Rule, HUD has a strong legal foundation on which to pursue robust disparate impact enforcement. ■

Endnotes:

¹Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Federal Register Docket No. FR-6111-A-01.

²Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

³Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015).

⁴42 U.S. Code § 3601.

⁵The Potential Impact of Texas Department of Housing and Community Affairs v. Inclusive Communities Project on Future Civil Rights Enforcement and Compliance, *The Federal Lawyer*, Vol. 63, No. 5 (July 2016).

⁶See e.g., Brief amici curiae Henry G. Cisneros, et al. filed, available at: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_resp_cisneros.authcheckdam.pdf.

⁷HUD v. Mountain Side Mobile Estates Partnership, No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec'y July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).

⁸United States of America v. Countrywide Financial Corporation, No. 2: 11-CV-10540-PSG-AJW (C.D. Cal. 2011).

⁹United States of America v. Wells Fargo, No. 1:12-cv-01150-JDB (D.D.C. 2012).

¹⁰MHANY Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 618 (2d Cir. 2016).

¹¹Prop. Cas. Insurers Ass'n of Am. v. Carson, 2017 WL 2653069 at *8 (N.D. Ill. June 20, 2017).

¹²Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107, 126-27 (D. Mass. 2016).

¹³Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, 2015 WL 5916220 at *3 (N.D. Tex. October 8, 2015).

¹⁴Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 65, at 33, AIA v. Dep't of Hous. & Urb. Dev., No. 1:13-cv-00966-RJL (D.D.C.).

¹⁵Defendants' Opposition to Plaintiff's Motion for Leave to Amend Complaint, ECF No. 122, at 9, PCIA v. Carson, No. 1:13-cv-08564 (N.D. Ill.).

¹⁶Stacy Seicshnaydre, Disparate Impact and the Limits of Local Discretion after *Inclusive Communities*, 24 *Geo. Mason L. Rev.* 663 (2017).

¹⁷Robert Schwemm, Fair Housing Litigation After *Inclusive Communities*: What's New and What's Not, 115 *Colum. L. Rev. Sidebar* 106 [now: CLR Online] (2015).

¹⁸Id.

¹⁹5 U.S.C. § 706(2)(A).

²⁰See, e.g., *Mhany Mgmt., Inc.*, 819 F.3d at 618.

²¹ *Inclusive Communities*, 135 S.Ct. 2507, 2525-26 (2015) (majority opinion).

Statement approved September 13, 2018, by the FBA Board of Directors:

The rule of law is the enduring principle that all persons, institutions, and entities should be governed by and held accountable to laws that are just, publicly promulgated, equally enforced and independently adjudicated. This is a foundational principle of our nation's Constitution and its declaration that government derives its power from the governed to protect individual liberty.

In the United States, the Department of Justice plays a fundamental role in the equal enforcement of our nation's laws and the preservation of public respect for the rule of law. The oath of office administered to the Attorney General, as the head of the Department of Justice, and to all other employees of the Department of Justice commits them to faithfully protect the Constitution, which guarantees to every American equal justice

under the law. At all times, the client of the Attorney General and the attorneys within the Department of Justice remains the United States of America, not any government official, agency, party or person.

Public confidence in the Department of Justice as faithful executors of the law rests in the assurance that the Department's law enforcement and prosecutorial actions are grounded in facts and the law, without regard to the political party or political affiliation of the accused. Any suggestion that the Department's actions should arise from or reach a different outcome based on partisan interests is inconsistent with a proper understanding and respect for the rule of law and public trust in its faithful enforcement.

Section Conference Calls

All members of the Civil Rights Law Section are invited to participate in monthly conference calls where Section business is discussed. Calls are scheduled for the following dates. All calls being at 12 PM CST. Dial-in instructions are emailed to Section members in advance of each call.

Dates:
11/21/18
12/19/18
1/16/19
2/20/19
3/20/19



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Insider!**

Call for Articles for the Civil Rights Insider

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane of Relman, Dane & Colfax PLLC, at sdane@relmanlaw.com.

CIVIL RIGHTS INSIDER

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