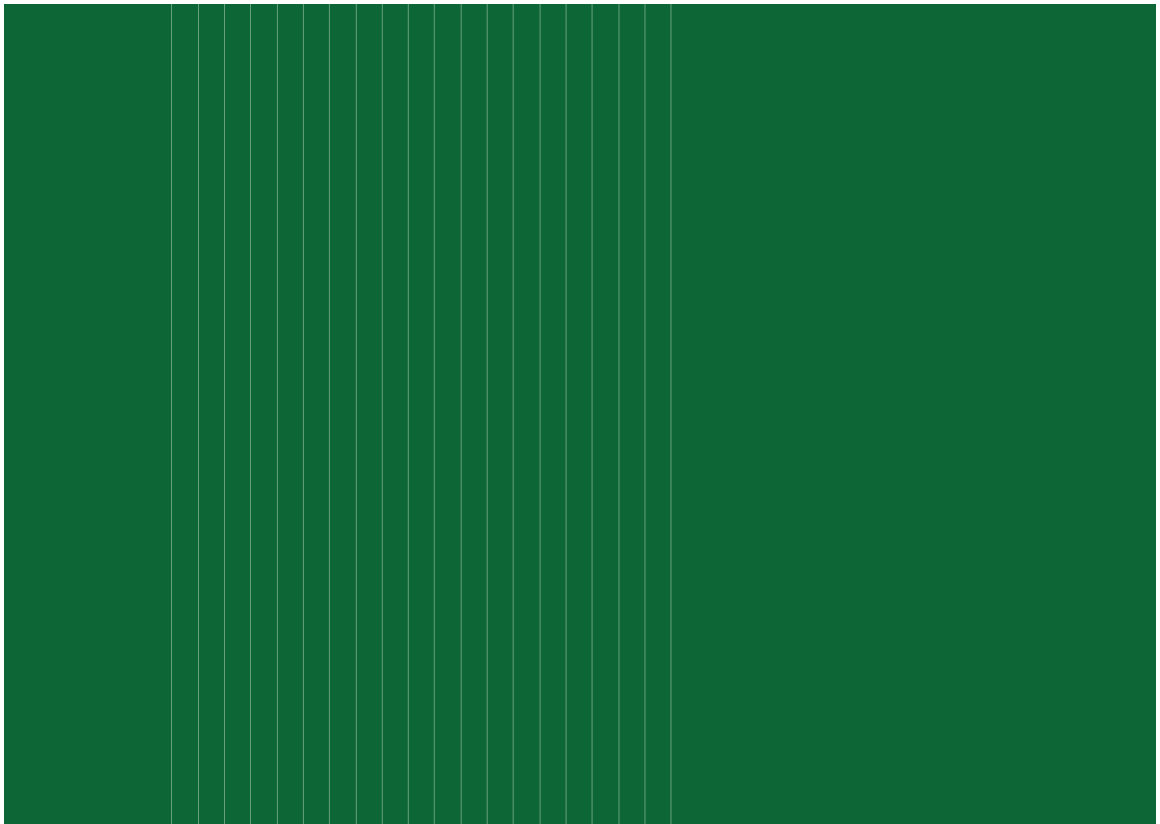




State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General



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Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

Courtesy Chapter

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CHAPTER 19

Civil Rights

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Nearly half of state attorneys general offices have affirmative civil rights enforcement programs.¹ These programs operate independently from each other and vary within the individual state offices. Even in states that do not have a dedicated enforcement program, attorneys general may engage in affirmative activities on a case-by-case basis.

Federal civil rights laws have evolved over time through acts of Congress, court judgments, and administrative rules and decisions. Civil rights laws in many states have similarly evolved, resulting in great variation in available protections. Many state civil rights laws mirror their federal counterparts, while others provide broader protections. As in most areas of law, the authority of each state attorney general differs from state to state, so state attorneys general use a variety of methods to enforce state and federal civil rights.

OFFICE STRUCTURE AND ORGANIZATION

The structure and size of each affirmative civil rights enforcement program differs significantly among the states. For example, the Massachusetts Civil Rights Division comprises a dozen employees, including attorneys and para-legals, and shares investigators with other divisions within the office. Oregon

¹ Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and West Virginia, among others, have such programs.

has a dedicated Civil Rights Director who oversees its civil rights program, and California's Civil Rights Enforcement Section has close to thirty staff working on issues ranging from the underground economy to children's justice.

LEGAL AUTHORITY

As discussed in Chapters 3 and 4, the powers of state attorneys general include authority and discretion to act in the public interest based on common law as well as individual state constitutional and statutory mandates. For many states, protection against discrimination is a civil right and a matter of public health and welfare.² Some state attorneys general are specifically authorized through state law to participate in federal civil rights enforcement.³

Federal Laws

All three branches of the federal government influence federal civil rights protections. The U.S. Constitution, federal statutes, and administrative agency actions protect the civil rights of members of protected classes engaged in certain protected activities.

The Constitution guarantees a baseline of civil rights protections, including through the Bill of Rights, the Fourteenth Amendment and multiple voting rights amendments.⁴ In addition, federal statutes dating back to the Civil War have established and expanded civil rights protections.⁵

2 See, e.g., ALASKA STAT. § 18.80.200; CAL. CONST. art. I, § 4; HAW. REV. STAT. § 368-1; IDAHO CODE § 67-5901; Elliott-Larson Civil Rights Act, MICH. COMP. LAWS § 37.2102; Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 952; Washington Law Against Discrimination, WASH. REV. CODE § 49.60.010, § 49.60.030(1).

3 See, e.g., 42 R.I. GEN. LAWS § 42-9.3-2; OR. REV. STAT. § 659A.885 amended by 2017 OR. LAWS ch. 197.

4 U.S. CONST. amends. I-X, XIV, XV, IXX, XXIV, XXV, XXVI.

5 See, e.g., Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)) (Congress' first legislated protection against certain discriminatory practices); Civil Rights Act of 1871, Ch. 22, 17 Stat. 13 (codified as amended at 18 U.S.C. § 241 and 42 U.S.C. § 1983, § 1985(3), § 1988) (enforcing the Civil Rights Act of 1866, providing criminal and civil penalties for conspiracy to commit violence and authorizing the President expanded enforcement authority including suspension of the privileges the writ of habeas corpus); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (prohibiting different pay wages between men and women co-workers who perform equal work); Robert T. Stafford Disaster Relief & Emergency Assistance Act ("Stafford Act"), Pub. L. No. 93-288, § 308, 88 Stat. 150 (codified as amended at 42 U.S.C. § 5151

The best known federal civil rights statute is the Civil Rights Act of 1964, which provided groundbreaking civil rights protections against discrimination in voter registration, places of public accommodation, public facilities, public schools, employment, and federal grant programs.⁶ For example, Title II prohibits discrimination based on race, color, religion, or national origin in places of public accommodation like hotels, restaurants, and theaters, and Title VII prohibits discriminatory employment practices based on race, color, sex, religion, or national origin.⁷

The 1964 Civil Rights Act also serves as a foundation for subsequent civil rights statutes, such as the 1965 Voting Rights Act (“VRA”), 1967 Age Discrimination in Employment Act (“ADEA”), 1968 Fair Housing Act (“FHA”), 1972 Education Amendments (“Title IX”), and 1990 Americans with Disabilities Act (“ADA”).⁸

Although the Civil Rights Act of 1964 was a landmark civil rights law, earlier federal civil rights statutes still play a critical role in the civil rights landscape. For example, the Civil Rights Act of 1871 contained a provision, now codified at 42 U.S.C. § 1983, which provides a cause of action for any person who is deprived the “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Likewise, the rights of all people to make and enforce contracts was

(2000) (requiring nondiscrimination regulations for equitable and impartial delivery of disaster relief operations); Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 3, 110 Stat. 1392 (1988) (codified as amended at 18 U.S.C. § 247) (criminally prohibiting damage of religious real property based on the religious, racial or ethnic characteristics of the property).

6 Pub. L. No. 88-354, 78 Stat. 241 (July 2, 1964).

7 42 U.S.C. §§ 2000a, 2000e-2.

8 52 U.S.C. §§ 10101-10702 (amended 1970, 1975, 1982, 1992, 2006) (enforcing the Fifteenth amendment by addressing discrimination impacting voting rights); 29 U.S.C. § 621, *et seq.* (prohibiting discrimination in employment based on age); 42 U.S.C. §§ 3601-3619 (amended 1988, 1995) (prohibiting discrimination in housing); 20 U.S.C. §§ 1681-1688 (prohibiting discrimination based on sex in education programs and activities receiving federal funding); 42 U.S.C. §§ 12101-12213 (1990) (amended 2008) (prohibiting discrimination based on disability in employment, public services, public accommodations, and services operated by private entities). *See also* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (extending civil rights protections to members of federally recognized Indian tribes); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (prohibiting age discrimination in programs or activities receiving federal funding); Civil Rights of Institutionalized Persons Act of 1990, 42 U.S.C. § 1997 (protecting the rights of people in public correctional institutions and treatment facilities); Civil Rights Act of 1991 Sections 102 and 103, 42 U.S.C. § 1981a(c) (permitting jury trials and compensatory and punitive damage awards for intentional discrimination under Title VII of the Civil Rights Act of 1964 and the ADA); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff (prohibiting discrimination against employees based on genetic information).

granted through the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1981, and remains an important tool for civil rights enforcement.

Judicial review and interpretation of federal civil rights laws guide the scope of the federal protections that state attorneys general may enforce. For example, the U.S. Supreme Court interprets the Fourteenth Amendment as protecting the right to marry for same-sex couples.⁹ On the other hand, federal courts have limited the meaning of “protected activity” in a place of public accommodation under the Civil Rights Acts of 1866 and 1964, by holding that protection “does not extend to the mere expectation of being treated without discrimination while shopping.”¹⁰

As exemplified in *Gregory v. Dillard’s, Inc.*, federal courts are not always in agreement regarding the scope of the protection or the method for analyzing discrimination cases.¹¹ On a case-by-case basis, judicial interpretations serve to both broaden and place limits on federal civil rights protections. Executive orders and agency implementation also influence federal civil rights laws.¹² For example, President Nixon signed Executive Order 11,478 in 1969, prohibiting discrimination based on protected classes for federal employees, including the armed forces.¹³

In 2015, the Secretary of Defense began allowing women to serve in combat positions and, in 2016, lifted the ban on transgender people serving in the military.¹⁴ The Equal Employment Opportunity Commission (“EEOC”) enforces

9 *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (the right to marry is a fundamental liberty right that couples of the same-sex may not be deprived of).

10 *Gregory v. Dillard’s, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) citing *Hampton v. Dillard Dep’t Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001) accord *Garrett v. Tandy Corp.*, 295 F.3d 94, 101 (1st Cir. 2002).

11 See, e.g., *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 868-873 (6th Cir. 2001) (discussing the differing standards applied by courts for establishing intentional racial discrimination under 42 U.S.C. § 1981).

12 See, e.g., Exec. Order No. 12,250, 28 C.F.R. Part 41 app. A (1980) (requiring federal government agencies to coordinate in implementing and enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972).

13 Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969).

14 Memorandum from Sec’y of Def. Ash Carter on Implementation Guidance for the Full Integration of Women in the Armed Forces to Secretaries of the Military Departments Acting Under Sec’y of Def. for Pers. & Readiness, Chiefs of the Military Servs., U.S. Special Operations Commander (Dec. 3, 2015) (announcing Secretary of Defense’s determination “that no exceptions are warranted to the full implementation of the rescission of the ‘1994 Direct Ground Combat Definition and Assignment Rule.’ Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position.”); Press Release, Sec’y of Def. Ash Carter Announces Policy for Transgender Service Members (June 30,

federal anti-discrimination laws in employment and is responsible for issuing regulations and guidelines that interpret provisions of Title VII of the Civil Rights Act of 1964.¹⁵ As part of its interpretive responsibility, the EEOC has ruled that “allegations of discrimination on the basis of [] sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII.”¹⁶ Similarly, the Office for Civil Rights of the U.S. Department of Education is an office within that cabinet department responsible for enforcing numerous anti-discrimination laws in education, including Title IX of the Education Amendments Act of 1972.¹⁷ The Office issues guidance based on its interpretations of those laws, thereby providing information and examples of compliance by covered entities.¹⁸

Proving Discrimination

Different legal structures govern federal civil rights actions depending on the protected activity at issue and protected class impacted. For many claims, there may be more than one method of proving that unlawful discrimination occurred.

A prime example of different theories of proof in civil rights claims is sexual harassment in employment. Sexual harassment is a form of illegal sex discrimination. To prove sexual harassment in employment, a plaintiff must show that the conduct was (i) “directly linked to the grant or denial of an economic *quid pro quo*,” or (ii) created “an intimidating, hostile or otherwise offensive working environment.”¹⁹ In other words, there are two types of actionable sexual harassment in the workplace: hostile work environment and *quid pro quo*, an element for both being the conduct was intentional or resulted in interference with work performance.

Conversely, employment discrimination based on other protected classes is generally assessed through the framework established in *McDonnell Douglas*

2016). *But see also*, Presidential Memorandum for the Sec’y of Def. & the Sec’y of Homeland Sec. (Aug. 25, 2017).

15 42 U.S.C. § 2000e-14; 29 C.F.R. § 1601.1.

16 *Baldwin v. Dep’t of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Notably, in July 2017, the Department of Justice filed an amicus brief in a pending Second Circuit appeal arguing contrary to the position of the EEOC. *See* Brief of United States as Amicus Curiae, *Zarda v. Altitude Express*, No. 15 -3775 (2d Cir. filed July 26, 2017).

17 20 U.S.C. §§ 1681-1688; 34 C.F.R. Part 106.

18 *See, e.g.*, U.S. DEP’T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE LETTER ON HARASSMENT AND BULLYING (2010).

19 *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

Corp. v. Green.²⁰ To prove employment discrimination, a plaintiff must first establish a prima facie case of discrimination.²¹ In *McDonnell Douglas*, the elements of a prima facie case included: (i) membership in a protected class; (ii) application and qualification for the position sought; (iii) rejection despite being qualified; and (iv) after rejection, the position remained open and the employer continued to seek similarly qualified applicants. Since the *McDonnell Douglas* decision, the test for establishing a prima facie employment discrimination case has evolved to cover broader factual circumstances, but courts “ha[ve] applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*” in employment discrimination cases under various statutes.²² When a plaintiff successfully establishes a prima facie case of discrimination, the burden shifts “to the employer to articulate some legitimate, nondiscriminatory reason” for the decision.²³ It is then up to the plaintiff to prove that the employer’s reason was pretext for discrimination.²⁴

In addition to disparate treatment cases where the actor’s intent is an element that must be proven, discrimination may also exist where practices not intended to discriminate nevertheless have an adverse, disproportionate effect on protected classes.²⁵ Practices are unlawful based on their discriminatory effect when they have (i) a disparate impact on a protected group because of membership in that protected group; and (ii) lack a substantial, legitimate, non-discriminatory basis, or (iii) a less discriminatory alternative is available.²⁶ The process for establishing each of these elements involves shifting the burden of proof between the plaintiff and defendant similar to the *McDonnell Douglas* framework; the plaintiff carries the burden to show the disparate impact, then the defendant must prove the necessity of the practice for nondiscriminatory reasons, and the final step falls to the plaintiff to show that the nondiscriminatory interest could be served by another practice.²⁷

20 411 U.S. 792 (1973) (claiming violation of Title VII of the Civil Rights Act of 1964).

21 *McDonnell Douglas Corp.*, 411 U.S. at 802 (1973).

22 *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996).

23 *Id.*

24 *Id.* at 804-805.

25 24 C.F.R. § 100.500 (“Discriminatory effect prohibited”); *See, e.g., Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2525 (2015) (disparate impact theory applies to discrimination claims brought under the FHA “considering its results-oriented language, Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”); *Ricci v. DeStefano*, 577 U.S. 557, 577 (2009).

26 24 C.F.R. § 100.500(c).

27 *Id.*

Finally, retaliation against a person for exercising protected civil rights is unlawful discrimination. Under various civil rights statutes, a retaliation claim involves three elements: (i) engagement in protected activity, (ii) an adverse action against the claimant; and (iii) a causal connection between the adverse employment action and the protected activity.²⁸

State Laws

State laws protecting civil rights may be constitutional and/or statutory. For example, New York's constitution guarantees equal protection of the law and prohibits discrimination based on protected classes while the West Virginia Human Rights Act establishes state public policy to "provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in . . . housing accommodations or real property."²⁹

Many states' civil rights laws afford more protections than federal law. For example, the term "disability" as used in Washington statutes is broader than the federal definition under the Americans with Disabilities Act.³⁰ As another example, more than half of the states had already recognized same-sex marriage as a civil right prior to the U.S. Supreme Court's decision in *Obergefell*.³¹ Protection against discrimination based on gender identity and/or expression currently exists in nineteen states and the District of Columbia.³² And in many states, discrimination based on the source of a prospective tenant's income constitutes unlawful disparate treatment in housing.³³ For example, North Dakota's

28 *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 833 (7th Cir. 2015) (citing *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1029 (7th Cir. 2013) and *Chaib v. Indiana*, 744 F.3d 974, 986-87 (7th Cir. 2014)).

29 See, e.g., N.Y. CONST. art. I, § 11 (amended 2001) (Equal protection of laws; discrimination in civil rights prohibited.); W. VA. CODE § 5-11-2.

30 Compare 42 U.S.C. § 12102(1) with WASH. REV. CODE § 49.60.040(7) and 2007 WASH. SESS. LAWS ch. 317, § 1 (state legislature finding that the state law against discrimination "affords to state residents protections that are wholly independent" of the ADA, which *McClarty v. Totem Electric*, 157 Wash. 2d 214 (2006), failed to recognize).

31 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); MD. OFF. OF THE ATT'Y GEN., THE STATE OF MARRIAGE EQUALITY IN AMERICA, STATE-BY-STATE SUPPLEMENT (2015) (providing detailed information about the status of marriage equality based on data from the Williams Institute at the University of California, Los Angeles).

32 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia.

33 See, e.g., CONN. GEN. STAT. § 46a-64c; N.J. REV. STAT. § 10:5-12g; OKLA. STAT. tit. 25, § 1452; UTAH CODE ANN. § 57-21-5; VT. STAT. ANN. tit. 9, § 4503.

policy against source of income discrimination in housing dates back to 1983 and became a specific statutory prohibition in 1999.³⁴

Some states have explicitly authorized their attorneys general to enforce civil rights laws through statute or through recognition by the courts.³⁵ New Jersey's Division on Civil Rights is part of its Attorney General's Department of Law and Public Safety and the Arizona Civil Rights Advisory Board is housed within the Arizona Attorney General's Civil Rights Division.³⁶ The Vermont Attorney General's Civil Rights Unit enforces the state's hate crimes and employment discrimination laws.³⁷ The Massachusetts Attorney General prosecutes civil violations of the Massachusetts Civil Rights Act, which protects the right to be free from bias-motivated threats, intimidations, and coercion that interfere with the public's civil rights.³⁸ Similarly, the Illinois Attorney General may commence a civil action after conducting a preliminary investigation and having reasonable cause to believe that a pattern and practice of discrimination has occurred.³⁹

ENFORCEMENT

State civil rights programs are set up to perform enforcement in different ways, depending on factors including the attorney general's authority and subject

34 N.D. CENT. CODE § 14-02.4-01; N.D. CENT. CODE § 14-02.5-07.

35 See, e.g., MASS. GEN. LAWS ch. 12, § 11H; S.C. CODE ANN. § 45-9-40; *City of Seattle v. McKenna*, 259 P.3d 1087, 1091-12 (Wash. 2011) (Washington Attorney General's powers and duties include discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern) with Wash. Rev. Code § 49.60.010 (Legislative finding that discrimination "threatens not only the rights and proper privileges of state inhabitants but menaces the institutions and foundation of a democratic state."); *Don Wilson Builders v. Superior Court for Los Angeles County*, 220 Cal.App.2d 77, 82-83 (1963) (California Attorney General has authority to maintain a civil action to enforce Unruh Civil Rights Act); CAL. CIV. CODE § 52 (attorney general may enforce Gender Tax Repeal Act and Ralph Civil Rights Act); CAL. CIV. CODE § 52.1 (attorney general may enforce Bane Civil Rights Act); CAL. CIV. CODE § 52.3(b) (attorney general may bring a civil action to eliminate a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California); CAL. CIV. CODE § 55.1 (attorney general may enforce Disabled Persons Act).

36 N.J. REV. STAT. § 10:5-6, 5-8, 5-14.3; ARIZ. REV. STAT. § 41-1401.

37 13 VT. STAT. ANN. 1354, *et seq.* (hate crimes); 21 VT. STAT. ANN. 495-496 (employment discrimination).

38 MASS. GEN. LAWS ch. 12, § 11H.

39 775 ILL. COMP. STAT. 5/10-04.

matter jurisdiction within the state, ability to identify civil rights issues, resources and more.

Standing

Federal civil rights laws generally do not explicitly grant enforcement authority to state attorneys general. Rather, state attorneys general rely upon their *parens patriae* authority and proprietary interests to establish their standing to enforce federal civil rights laws.

As discussed in more detail in Chapter 6, attorneys general utilize the doctrine of *parens patriae* in litigation to protect their quasi-sovereign interests in the people's health, comfort and welfare.⁴⁰ In many states, the protection of civil rights is considered an issue of public welfare, which is an area falling squarely within the duty and power of attorneys general to protect.⁴¹

State attorneys general also establish standing through proprietary interests by showing direct economic harms to the state.⁴² For example, Massachusetts established standing to challenge the constitutionality of the federal Defense of Marriage Act (“DOMA”) by showing financial injury.⁴³ In *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, the court found that Massachusetts’s allegations of additional tax liability and lost federal funding were sufficient to allege “past and ongoing injuries to the Commonwealth as a result of the government’s adherence to the strictures of DOMA.”⁴⁴

The tools for demonstrating federal standing can also be used to establish standing in state courts. In addition, many state attorneys general have statutory authority to bring actions to enforce the state civil rights law.⁴⁵

40 See, e.g., *New York v. Utica City School District*, 177 F. Supp. 3d 739 (2016).

41 See, e.g., N.J. REV. STAT. § 10:5-2 (New Jersey’s enactment of its Law Against Discrimination intended as an exercise of the state’s police power “for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provision of the Constitution of this State guaranteeing civil rights.”); ARIZ. REV. STAT. § 41-1491.35.

42 See, e.g., *Washington v. Trump*, 2:17-CV-00141-JLR (W.D. Wash. filed Jan. 30, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017) (harm to states’ proprietary interests provided one basis for standing).

43 *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 245 (D. Mass. 2010).

44 *Id.* (In determining that Massachusetts had standing, the court also recognized that “a plaintiff is not required ‘to expose himself to liability before bringing suit to challenge the basis for the threat,’ particularly where, as here, it is the government that threatens to impose certain obligations.”) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 119 (2007)).

45 See, e.g., S.C. CODE ANN. § 45-9-40.

Identifying Issues

Members of the public have multiple ways to contact state attorneys general affirmative civil rights enforcement programs. Many states' websites include contact information and online complaint forms for reporting civil rights violations. Some civil rights programs accept complaints directly from members of the public. For example, Delaware's Office of Civil Rights and Public Trust and Washington State's Civil Rights Unit have online platforms for submission of complaints.⁴⁶ Other methods for submitting complaints or notifying programs of civil rights issues include electronic and regular mail as well as telephone intakes and hotlines.

Community stakeholders and legal aid professionals often provide referrals to state attorneys general when enforcement through their programs warrants.⁴⁷

Some federal agencies responsible for civil rights enforcement have work-share agreements with attorneys general. For example, the Vermont Attorney General handles employment discrimination matters through a work-sharing agreement with the EEOC. Similar agreements also exist between federal and state agencies, most of whom are represented by the attorney general.⁴⁸

In many states, the attorney general has authority to track and prosecute hate crimes. For example, California has maintained a Rapid Response Protocol to assist in identifying, investigating and prosecuting hate crimes.⁴⁹ Vermont's Civil Rights Unit, through its Public Protection Division, enforces laws that protect victims of hate crimes and instructs police officers regarding hate crime investigations.⁵⁰

46 Delaware's program attorneys review and evaluate complaints for a vast array of issues to determine whether a sufficient basis exists for action by the attorney general. Washington's program addresses civil rights protections for pregnant employees. *See also* Arizona's Civil Rights Intake Questionnaire for discrimination in employment and public accommodation.

47 *See, e.g.*, Press Release, Mass. Attorney General's Office, New Bedford Liquor Store Settles Minimum Wage, Overtime, and Anti-Retaliation Violations (June 11, 2012) (case resolved by Massachusetts Attorney General's Fair Labor Division was referred from workers' rights group the Centro Comunitario de Trabajadores); Press Release, Washington Attorney General's Office, Ferguson Files Federal Civil Rights Case Over Sexual Harassment of Agricultural Workers (April 26, 2017) (case filed by Washington Attorney General's Civil Rights Unit was referred by the Northwest Justice Project).

48 The EEOC's website lists its State and Local Agency partnerships by district office. *See, e.g.*, U.S. EEOC, Field Offices, St. Louis District Office, State & Local Agencies, <https://www.eeoc.gov/field/stlouis/fepa.cfm> (last visited August 29, 2017).

49 *See* CAL. DEP'T OF JUST., ATT'Y GEN. BILL LOCKYER, THE ATT'Y GEN.'S HATE CRIME RAPID RESPONSE TEAM PROTOCOL FOR DEPLOYMENT OF DEP'T OF JUST. RESOURCES (2012).

50 Vt. Off. of the Att'y Gen., Budget at 4 (FY 2015).

Delaware's Office of Civil Rights and Public Trust investigates law enforcement officer involved shootings to determine whether use of force constitutes a criminal act.⁵¹

In certain situations, state attorneys general may enter into other civil rights related matters by request from elected officials, such as the governor.⁵²

Types of Enforcement

State attorneys general have many available methods to enforce civil rights protections. Factors that may influence which method they choose include cooperation by the implicated individuals, available state and federal legal authority, and office resources. The approach taken in any particular situation may depend on strategic considerations focused on achieving the best outcome for the people of that state.

Many states' civil rights programs work closely with their consumer protection divisions and use tools such as Civil Investigative Demands to investigate acts that violate consumer protection and civil rights laws. The tools available to attorneys general through consumer protection laws are discussed in more detail in Chapter 13.

Affirmative Plaintiff Litigation on Behalf of the State

Many state attorneys general engage in affirmative plaintiff litigation on behalf of their citizens and residents. In these suits, the state attorneys general appear on behalf of their states in their official capacity or as the legal representative of other state officials.⁵³ These cases may be brought in either federal or state court.⁵⁴

State attorneys general file lawsuits against the federal and local governments on constitutional and statutory civil rights grounds.⁵⁵ They also bring

51 See <http://attorneygeneral.delaware.gov/publictrust/>.

52 Letter from Gov. Jay Inslee to Att'y Gen. Ferguson on Investigation of the shooting death of Mr. Zambrano-Montes (Sept. 9, 2015).

53 See, e.g., *Hawai'i v. Trump*, 1:17-CV-00050-DKW-KJM (D. Haw. filed Feb. 3, 2017) (affirmative lawsuit filed by attorney general of Hawai'i in the name of the State of Hawai'i); *Schneiderman v. Evans Bancorp Inc.*, 1:14-CV-00726-RJA, ECF No. 1 (W.D.N.Y. filed Sept. 2, 2014) (affirmative lawsuit filed by attorney general of New York in his official capacity).

54 *Id.* (cases filed by Hawai'i and New York Attorneys General in federal court); *Washington v. Arlene's Flowers*, 187 Wash. 2d 804 (2017) (affirmative lawsuit filed by Washington Attorney General in state court).

55 See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (challenging constitutionality of Section 3 of the Defense Of Marriage Act, 1 U.S.C. § 7, denying federal benefits to same-sex couples lawfully married under Massachusetts law based on laws including

independent actions against private parties such as employers, housing providers, or businesses that qualify as places of public accommodation.⁵⁶

Representation of Civil Rights Agencies in Enforcement Proceedings

A primary role in civil rights enforcement for state attorneys general is representing the state agencies responsible for enforcement of antidiscrimination laws.⁵⁷ These agencies respond to claimed violations of state and local laws. Many agencies also have agreements with federal enforcement agencies identifying which entity will handle cases that have both state and federal civil rights implications.⁵⁸ When a state civil rights agency receives a complaint and determines through its investigation that discrimination has occurred, state attorneys general often step in to enforce the agency's determination.⁵⁹ Notably, in states like

Fourteenth amendment Equal Protection Clause); *Washington v. Trump*, 2:17-CV-00141-JLR (W.D. Wash. filed Jan. 30, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017) (challenging the constitutionality of Exec. Order Nos. 13769 and 13780 based on federal civil rights laws including First amendment Establishment Clause, Fourteenth amendment Due Process and Equal Protection); *New York v. Cty. of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (*parens patriae* suit against county seeking compliance with accessibility of polling places based on the ADA and state law); *California v. Cty. of Santa Cruz*, 416 F. Supp. 2d 797 (N.D. Cal. 2006) (seeking writ of mandate against county and its clerk to comply with state law regarding accessibility of polling places for persons with disabilities based on Title II of the ADA).

56 See, e.g., *Arizona v. Sullivan Motor Company, Inc.*, No. CV 2016-015051 (Maricopa Cty. Superior Ct. filed September 20, 2016) (public enforcement action to correct unlawful employment practices); *Washington v. Arlene's Flowers*, 187 Wash. 2d 804 (2017) (requiring equal treatment in places of public accommodation including the sale of wedding flowers to all customers without discrimination based on sexual orientation). See also *People v. Rizzo*, 154 Cal. Rptr.3d 443 (2013) (holding that California Attorney General had standing to bring action on city's behalf).

57 See, e.g., *Sasco Elec. v. Cal. Fair Emp't & Hous. Comm'n*, 97 Cal. Rptr.3d 482 (2009) (case brought by California Attorney General on behalf of the California Fair Employment and Housing Commission); MASS. GEN. LAWS ch. 151B, § 5 (Massachusetts's Attorney General prosecutes housing discrimination cases when the Massachusetts Commission Against Discrimination finds probable cause of discrimination and the case has been removed to Superior Court).

58 For example, the FHA allows the U.S. Department of Housing and Urban Development to refer complainants to state and local agencies that administer local laws that provide substantially equivalent rights as those provided under federal law. 42 U.S.C. § 3610(f).

59 See, e.g., W. VA. CODE § 5-11-7; *Tafoya v. Wash. St. Human Rts. Comm'n*, 311 P.3d 70 (2013) (Washington state sex discrimination case involving sexual harassment by property owner against residential tenant); *Sasco Elec. v. Cal. Fair Emp't & Hous. Comm'n*, 97 Cal. Rptr. 3d 482 (2009) (California state pregnancy discrimination case involving employee terminated based on pregnancy).

Washington, the attorney general presents the case in support of the complaint, but does not represent the complainant.⁶⁰

Some state attorneys general cooperate directly with federal enforcement agencies to handle enforcement of federal laws. For example, the Vermont Attorney General contracts directly with the EEOC as a “deferral agency” and handles employment discrimination cases based on state and federal law.⁶¹

Attorneys General as Amici Curiae

State attorneys general also participate in civil rights enforcement by filing amicus curiae briefs.⁶² While typically used at the appellate level, amicus briefs are sometimes filed at the trial court level.⁶³ States have also come together to file multi-state amicus briefs on civil rights issues with national implications.⁶⁴ Acting as amicus curiae allows state attorneys general to weigh in on important legal questions even though they are not participating as a party in the case.

60 WASH. ADMIN. CODE § 162-08-261(4).

61 See Vt. Att’y Gen., C.R. Div., Employment Law (May 27, 2014); U.S. EEOC, Field Offices, New York District Office, State & Local Agencies).

62 For example, California filed an amicus brief with the California First Appellate District in *Californians for Disability Rights v. Mervyn’s LLC*, a case involving disability discrimination due to merchandise being inaccessible to persons who use wheelchairs. 81 Cal.Rptr.3d 144 (2008).

63 See, e.g., Amicus Curiae Brief of the Att’y Gen. of Wash., *Coffey v. Pub. Hosp. Dist. No. 1*, No. 15-2-00217-4 (2016), *appeal docketed*, No. 75769-5-1 (analyzing right to access abortion under state law); Amicus Curiae Brief of the Att’y Gen. of Wash., *Yakima Neighborhood Health Servs. v. City of Yakima*, No. 1:16-CV-03030-TOR (E.D. Wash. 2016) (discussing housing discrimination protections under state law).

64 For example, New York and Washington, joined by California, Connecticut, Delaware, Hawai’i, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and the District of Columbia filed an amicus brief with the U.S. Supreme Court in *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (No. 16-273), *cert. vacated and remanded to Fourth Circuit* (asserting sex discrimination under Title IX includes gender identity); Washington, joined by California, Connecticut, Hawaii, Illinois, Massachusetts, New York, Oregon, Vermont and the District of Columbia filed an amicus brief in *Fulcher v. Sec. of Veterans Affairs*, 17-1460 (Fed. Cir. filed June 28, 2017).

Attorney General Opinions, Policy, Outreach and Other Activities

As discussed in Chapter 5, state attorneys general issue legal opinions on topics including civil rights.⁶⁵ Although not binding on a court, opinions of a state attorney general are entitled to considerable weight in most states.⁶⁶

State attorneys general also perform outreach, including issuing guidance and publishing educational materials on civil rights laws.⁶⁷ In 2015, for example, the Washington Attorney General published a Civil Rights Resource Guide to provide Washingtonians with education on their rights and help identify the resources that are available when discrimination occurs.⁶⁸ The Ohio Attorney General publishes guides that provide an overview of the state's laws and tips for avoiding problems that could lead to lawsuits.⁶⁹

In addition, the Ohio Attorney General's Civil Rights Section conducts free presentations to help keep property owners and employers apprised of fair housing and employment laws.⁷⁰ In 1996, Maine's Civil Rights Team Project launched a pilot project in 18 schools focused on education about civil rights laws and increasing communication and collaboration between schools and law enforcement.⁷¹ In 2016, California's Civil Rights Enforcement Section collaborated with community groups to host a series of statewide public forums, presenting information on avoiding immigration frauds and wage theft to individuals applying for U.S. citizenship.⁷²

65 See, e.g., 2013 Op. Wash. St. Att'y Gen. No. 3 (Washington's Attorney General formal opinion on the application of the Reproductive Privacy Act to public hospital districts).

66 *Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 177 Wash. 2d 718, 725 (2013).

67 See, e.g., CRIME & VIOLENCE PREVENTION CTR., CAL. ATTY. GEN.'S OFF., PREVENTING HATE CRIME, B13-9119 (2006), <https://oag.ca.gov/civil>; N.Y. STATE ATT'Y GEN. ERIC T. SCHNEIDERMAN, GUIDANCE TO LAW ENFORCEMENT OFFICIALS & PROSECUTORS IN THE INVESTIGATION & PROSECUTION OF HATE CRIMES IN N.Y. ST. (2016).

68 WING LUKE C.R. UNIT, WASH. ST. OFF. OF THE ATT'Y GEN. BOB FERGUSON, C.R. RESOURCE GUIDE (2015).

69 MIKE DEWINE, OHIO ATT'Y GEN., FAIR HOUSING GUIDE FOR LANDLORDS; MIKE DEWINE, OHIO ATT'Y GEN., FAIR EMPLOYMENT GUIDE FOR BUSINESS OWNERS.

70 *Id.*

71 MAINE ATT'Y GEN., HISTORY & PHILOSOPHY OF THE CIVIL RIGHTS TEAM PROJECT (2014).

72 Press Release, Cal. Att'y Gen., UPDATE: Att'y Gen. Kamala D. Harris, Univision Los Angeles, SEIU CA to Hold Statewide Public Forums on How to Avoid Immigration Services Scams and Apply for Citizenship (Jan. 27, 2016).

In New Jersey, all licensed brokers or salespeople who list properties must provide their property owners with a memorandum from the attorney general that notifies them of federal and state housing discrimination laws.⁷³

State civil rights programs also provide proposals and advice on legislation relating to civil rights. For example, California's Racial and Identity Profiling Act of 2015 required law enforcement agencies to provide the attorney general with annual reports on all police stops and directed the attorney general to issue regulations for the collection and reporting of the data.⁷⁴ Thus, in August 2017, the California Attorney General released for public comment the revised proposed Stop Data Regulations.⁷⁵ In Washington and Vermont, members of the Civil Rights Unit have testified before the Legislature on bills with potential civil rights impacts. In Vermont, the Civil Rights Unit often works with the Office of Vermont Legislative Counsel on drafting the language of proposed civil rights bills or amendments.

Relief

Forms of relief sought by attorneys general include restitution, public reparations, damages for humiliation and suffering, injunctions and more.⁷⁶ For example, when prosecuting hate crimes in Massachusetts, the attorney general may seek awards of compensatory damages for any aggrieved person or entity, litigation costs, and reasonable attorneys' fees.⁷⁷ In addition, a monetary penalty per violation may be added when there has been interference with a federally protected constitutional right.⁷⁸

In Rhode Island, when a person uses force, violence, or property damage (or threat thereof) to interfere with federal or state constitutional or statutory rights, the attorney general may bring a civil action on behalf of the aggrieved person(s) and seek an injunction and monetary penalty up to \$5,000.⁷⁹ In Maine, the attorney general may bring a civil action for injunctive or "other appropriate

73 Memorandum from John J. Hoffman, Acting Att'y Gen., St. of N.J., Craig Sashihara, Dir., N.J. Div. on C.R. on Hous. Discrimination Laws to Prop. Owners (August 2013).

74 CAL. GOV. CODE § 12525.5.

75 See OAL Register Z-2016-1129-03, Proposed Regs. as Modified (Aug. 1, 2017); CAL. ATT'Y GEN., STOP DATA REGS., CAL. RACIAL & IDENTITY PROFILING ACT OF 2015 (AB 953).

76 See, e.g., WASH. REV. CODE § 49.60.250.

77 MASS. GEN. LAWS ch. 12, § 11H.

78 *Id.*

79 42 R.I. GEN. LAWS § 42-9.3-3.

equitable relief” in order to protect “the peaceable exercise or enjoyment of the rights secured” by the federal and state constitutions and laws.⁸⁰

Importantly, state attorneys general often require formal changes in policy and employee training as remedies for anti-discrimination law violations.⁸¹ For example, in housing discrimination cases, the Washington Attorney General has required providers to “include the following phrase in the rental application(s) and the rental agreement(s) used for rental dwelling units in boldface type, using letters of equal or greater size to those of the text in the body of the document:

We do not discriminate in any term, condition, or privilege of rental on the basis of race, color, religion (creed), gender, gender expression, age, national origin (ancestry), disability, marital status, familial status, sexual orientation, or military status, in any of our activities or operations, which include the marketing and rental of residential dwellings.”⁸²

Finally, state attorneys general monitor compliance of their consent decrees as well as the relief ordered by the courts.

80 Maine Civil Rights Act, 5 M.R.S. § 4681.

81 See, e.g., Consent Decree, *State of Washington v. Electroimpact, Inc.*, No. 17-2-02704-31, Secs. 3, 5 (Snohomish Cty. Super. Ct. filed March 23, 2017); Assurance of Discontinuance, *In re Investigation of Syracuse City School District*, No. 14-159, Part 7-38d, Part 9 (July 10, 2014).

82 Assurance of Discontinuance, *State of Washington v. K.P.S. Realty, LLC*, No. 17200564-3, Sec. 4.3.3. (Spokane Cty. Super. Ct. filed Feb. 15, 2017).