No. 13-1371

In The Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL.,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* HENRY G. CISNEROS, former Secretary of the United States Department of Housing and Urban Development; ANTONIO MONROIG, JUDITH Y. BRACHMAN, EVA PLAZA, KIM KENDRICK, and JOHN TRASVIÑA, former Assistant Secretaries for the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development; JUDGE NELSON A. DIAZ, former General Counsel, Department of Housing and Urban Development; HARRY L. CAREY, former Associate General Counsel for Fair Housing; and LAURENCE PEARL, former Acting Deputy Assistant Secretary for Program Operations and Compliance IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The *Amici* are former Presidential appointees from Republican and Democratic administrations and career employees of the United States Department of Housing and Urban Development ("HUD"). During their respective tenures at HUD, each was responsible for various aspects of the administration and enforcement of the Fair Housing Act ("FHA" or the "Act") from as early as 1981 through 2013. These officials file this *amicus* brief to state that the final rule promulgated by HUD regarding the implementation of the FHA's discriminatory effects standard is consistent with HUD's long-standing application of such an analysis. In the exercise of their statutory responsibilities to investigate and adjudicate housing discrimination complaints, the *Amici* consistently used an analysis focusing on the unjustified discriminatory effects of a practice, as well as a disparate treatment analysis, in determining whether a violation of the FHA had occurred or was about to occur.

The Presidential appointees are as follows, by title and dates of tenure: *Secretary, Department of Housing and Urban Development*, Henry G. Cisneros (1993-1997); *Assistant Secretary for Fair Housing and*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the undersigned counsel contributed financially to its preparation or submission. The parties have consented to the filing of this brief.

Equal Opportunity, *Department of Housing and Urban Development*, Antonio Monroig (1981-1987), Judith Y. Brachman (1987-1989), Eva Plaza (1997-2001), Kim Kendrick (2005-2009), and John Trasviña (2009-2013); and *General Counsel, Department of Housing and Urban Development*, Judge Nelson A. Diaz (1993-1997).

The additional *Amici* are Harry L. Carey, who retired as Associate General Counsel for Fair Housing in 2007 after more than thirty-five years at HUD, and Laurence Pearl, who retired as Acting Deputy Assistant Secretary for Program Operations and Compliance in 1998 after thirty years in the HUD Office of Fair Housing and Equal Opportunity.

SUMMARY OF ARGUMENT

HUD is the chief administrative agency charged with administering, interpreting, and enforcing the FHA. Since the original enactment of the FHA in 1968, Congress has vested HUD with the statutory authority to administer the FHA, including by investigating discrimination complaints. Since the 1988 amendments to the FHA, effective March 1989, HUD has also been charged with the responsibility of conducting formal adjudications and making final agency decisions in administering and enforcing the FHA. HUD's consistent interpretation of the FHA to encompass a discriminatory effects theory of liability, most recently reflected in the final rule promulgated

in 2013 after notice and comment, is reasonable and entitled to deference. *See* Final Rule, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013), codified at 24 C.F.R. pt. 100 ("Final Rule"). The Final Rule codifies HUD's long-standing interpretation of the FHA to reach the unjustified effects of housing discrimination. Moreover, in final agency decisions, such as final orders, HUD has repeatedly found actions unlawful under the FHA based on evidence of unjustified discriminatory effects since Congress first authorized HUD in 1988 to conduct administrative hearings.

Well before the 2013 Final Rule, HUD had recognized the disparate impact theory in other regulations issued, in part, based on its authority under the FHA; in joint statements of policy with other federal agencies; in internal guidance memoranda issued by the Assistant Secretary for Fair Housing and Equal Opportunity ("FHEO") and/or the HUD Office of General Counsel; and in internal training materials for HUD investigators. As early as 1980, the Secretary of Housing and Urban Development (the "HUD Secretary" or "Secretary") expressly recognized the agency's efforts to address the effects of discrimination. *See, e.g.*, 126 Cong. Rec. 31,166-67 (1980) (statement of Sen. Charles Mathias) (reading into the record a letter by the HUD Secretary describing the "effects test" as a "rational, thoughtful mode of analyzing evidence [that] is imperative to the success of civil rights law enforcement"). For over thirty years,

HUD has embraced disparate impact analysis as a central part of its administration and enforcement of the FHA.

HUD's Final Rule, its formal adjudications, and its long-standing and well-reasoned pronouncements are all entitled to deference pursuant to the principles set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). The Court has previously deferred to HUD's reasonable interpretations of the FHA. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 287-89 (2003). There is no reason to treat HUD's 2013 Final Rule any differently in light of the specific statutory authority granted by the FHA to HUD to promulgate regulations. *See Smith v. City of Jackson*, 544 U.S. 228 (2005); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Petitioners offer a parade of horribles purporting to illustrate the consequences of adopting a disparate effects theory of liability. Pets.' Br. 42-51. These dire predictions ring hollow where, as here, an effects theory of liability has been recognized and applied by HUD for decades and adopted by eleven courts of appeals without any adverse consequences. While Petitioners warn darkly of government-imposed "racial outcomes," *id.* at 44, in reality HUD and the courts agree that the FHA prohibits numeric quotas in housing. Far from imposing *restrictions* on access to housing, the Act is explicitly focused on expanding

housing opportunities for all, 42 U.S.C. § 3604(a), in furtherance of its "goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups." *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973). Regardless, this Court need not concern itself with Petitioners' arguments of what *might* occur should it affirm the viability of a disparate effects theory under the Fair Housing Act. Instead, it can look to HUD's long history of enforcing and promoting such an interpretation and give that history the deference to which it is entitled.

ARGUMENT

I. HUD'S FINAL DISCRIMINATORY EFFECTS RULE IS ENTITLED TO *CHEVRON* DEFERENCE BECAUSE IT IS A REASONABLE INTERPRETATION OF THE FAIR HOUSING ACT AND WAS ISSUED PURSUANT TO FORMAL NOTICE-AND-COMMENT RULEMAKING

HUD's Final Rule reflects its long-standing and reasonable interpretation of the FHA to encompass liability for practices having unjustified discriminatory effects. According to the Final Rule, liability may be established under the FHA based on a practice's unjustified discriminatory effect, even if the practice was not motivated by discriminatory intent. *See* 24 C.F.R. § 100.500. A practice has a "discriminatory effect" where it "actually or predictably results in a

disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 100.500(a). The practice will still be lawful if supported by a legally sufficient justification. *Id.* § 100.500. A "legally sufficient justification" may exist for the challenged practice if the practice "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests," and "[t]hose interests could not be served by another practice that has a less discriminatory effect." *Id.* § 100.500(b).

The 1988 FHA Amendments explicitly granted HUD the "authority and responsibility for administering" the Act, including issuing regulations necessary to carry out the Act. 42 U.S.C. §§ 3608(a), 3614a. HUD is the sole agency with authority to promulgate regulations implementing the FHA. *Id.* HUD's Final Rule, issued pursuant to this explicit delegation of authority, should therefore be accorded deference under *Chevron,* 467 U.S. 837. *See also Meyer*, 537 U.S. at 287-89 (observing that this Court ordinarily defers to HUD's reasonable interpretation of the FHA); *Smith*, 544 U.S. at 243-47 (Scalia, J., concurring in part and in the judgment) (deferring to an agency's reasonable views). An "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the

exercise of that authority." *Mead*, 533 U.S. at 226-27. Congressional delegation of such authority can be demonstrated by an agency's power to adjudicate or engage in notice-and-comment rulemaking, *id.* at 227, and HUD has this authority under the FHA, 42 U.S.C. §§ 3612, 3614a. To date, there has not been a single case "in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013); *see also Mead*, 533 U.S. at 230 ("overwhelming" number of Supreme Court cases applying *Chevron* deference have involved "the fruits of notice-and-comment rulemaking or formal adjudication").

In promulgating the Final Rule, HUD acted pursuant to its statutory grant of general rulemaking authority, using full notice-and-comment procedures to promulgate the rule. HUD focused fully upon the rights of the parties and the issue of whether a practice's unjustified discriminatory effects can be the basis for liability under the FHA. HUD adopted a reasonable interpretation of the statute based on the agency's consistent and long-standing pronouncements that the FHA contemplates such liability. Thus, the Final Rule is entitled to deference. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007).

A. HUD's Interpretation of the FHA to Encompass Liability for Unjustified Discriminatory Effects Is Reasonable

The Secretary's interpretation of the FHA to encompass liability for housing practices with unjustified discriminatory effects, regardless of intent, is reasonable.

First, Congress enacted the FHA in 1968 to promote achievement of fair housing, combat discrimination, and eliminate segregation in housing. The FHA's "Declaration of Policy" states, in no uncertain terms, that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; 114 Cong. Rec. 3422 (1968) (Senator Mondale, principal sponsor of the FHA, stated that the purpose of the Act was to replace segregated neighborhoods with "truly integrated and balanced living patterns"). Accordingly, the HUD Secretary is required to administer housing and urban development programs and activities "in a manner affirmatively to further the policies of [the FHA]." 42 U.S.C. § 3608(e)(5). When Congress enacted the FHA in 1968, it had a broad remedial intent that is "embodied in the Act." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). As early as 1980, then Secretary Moon Landrieu sent a letter to Congress describing the discriminatory "effects test" as a "rational, thoughtful mode of analyzing evidence [that] is imperative to the success of civil rights law enforcement." 126 Cong. Rec. 31,166-67 (1980). The Secretary commented that unsuccessful

Congressional efforts to amend the FHA to include an intent requirement in certain land use and zoning cases were "attempts to pull back from established case law." *Id*. The Secretary recognized that "racial discrimination may be determined by proof of racially disparate effect, but only in circumstances where a defendant fails to show adequate non-racial reasons for his or her actions." *Id*.

Given the purpose of the FHA and the entrenched nature of housing discrimination and residential segregation in the United States, the HUD Secretary's interpretation of the Act is reasonable. *See Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (Congressional policy instructing agency to encourage deployment of technology "underscores the reasonableness of the FCC's interpretation"); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-18 (1993) (where agency's interpretation is as plausible as competing ones, courts should be especially reluctant to reject agency's view that closely fits "design of the statute as a whole and . . . its object and policy" (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990))).

Second, HUD has engaged in "consistent administrative construction of the Act" that is, consequently, "entitled to great weight." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972). In 1988, Congress expanded HUD's authority to administer and enforce the FHA, by, among other things, enabling HUD to issue charges of discrimination based on complaints, administratively adjudicate the charges, and initiate

its own complaints of discrimination. 42 U.S.C. §§ 3610, 3612. Since then, HUD has repeatedly used a discriminatory effects theory of liability to carry out these responsibilities. *See infra* Parts II, IV.B.

Since the 1988 FHA Amendments, many of HUD's charges of discrimination have served as the basis of complaints filed in federal court by the Department of Justice, pursuant to the Secretary's authority to authorize the Attorney General to commence a civil action upon the election of a complainant. 42 U.S.C. § 3612(o). For nearly twenty years, the United States has alleged violations based on discriminatory effects after referral from the HUD Secretary. For example, in 1997, the United States alleged in a complaint filed after HUD issued a charge of discrimination, that neutral occupancy standards violated Section 3604(a) of the FHA because they had an unjustified discriminatory effect against families with children. Compl., *United States v. Hagadone*, No. 97 Civ. 0603 (D. Idaho filed Dec. 24, 1997); *see also, e.g.*, Compl., *United States v. Landings Real Estate Grp.*, No. 11 Civ. 1965 (D. Conn. filed Dec. 20, 2011) (alleging neutral occupancy standard had an unjustified discriminatory effect on families with children in violation of 42 U.S.C. § 3604(a)); Compl., *United States v. Candlelight Manor Condo. Ass'n*, No. 03 Civ. 248 (W.D. Mich. filed Apr. 10, 2003) (alleging neutral occupancy standard had an unjustified discriminatory effect based on familial status and in violation of 42 U.S.C. § 3604(a), (b)); Compl., *United States v. C.B.M. Group, Inc.*, No. 1 Civ. 857 (D.

Or. filed June 8, 2001) (alleging that a landlord's policy of evicting any tenant who commits an act of violence or who controls another who commits an act of violence had a disparate impact on victims of domestic violence and constituted discrimination on basis of sex).

Third, HUD acted reasonably in its consideration and ultimate rejection of an interpretation of the FHA that does not include liability under a discriminatory effects theory. Final Rule, 78 Fed. Reg. at 11,465-67. HUD reviewed the text of the FHA and case law interpreting the statute's text. Specifically, HUD considered Sections 804(a) and 804(f)(1), which prohibit various practices relating to the sale or rental of a dwelling, including those that "otherwise make unavailable" a dwelling, 42 U.S.C. §§ 3604(a). HUD interpreted the phrase "otherwise make unavailable" as one focusing on the effects of a challenged action rather than the motivation of the actor, thereby providing a basis in the statute for disparate impact liability. Such an interpretation finds support in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and *Smith v. City of Jackson*, 544 U.S. 235 & 240, which held that analogous text in Title VII and the ADEA, respectively, provides for disparate impact liability. Similarly, HUD's interpretation of the phrase "to discriminate" in sections of the FHA that prohibit discrimination in housing-related transactions to encompass unjustified discriminatory effects claims is based on HUD's extensive experience administering the statute, including the investigation of

fair housing complaints and formal agency adjudications. HUD's determination that the phrases "because of" and "on account of" in Sections 804 and 805 of the FHA do not limit the FHA's scope to intentional conduct is reasonable given case law interpreting similar language in Title VII and the ADEA to encompass liability for discriminatory effects without regard to intent. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

As part of its review, HUD also considered other provisions of the FHA, including three exemptions that would have no meaning without a discriminatory effects theory of liability under the FHA. First, 42 U.S.C. § 3605(c) specifies that real-estate appraisers may "take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." If the FHA prohibited only intentional discrimination, there would be no need to explicitly state that the law permits appraisers to consider non-protected characteristics. Second, § 3607(b)(1) exempts from the FHA's prohibition on familial status discrimination local governmental restrictions regarding occupancy limits in dwellings. As HUD explained in its proposed rules implementing the 1988 FHA Amendments, the provision "is intended to allow reasonable governmental limitations on occupancy to continue as long as they are applied to all occupants, and do not operate to discriminate on the basis" of a protected characteristic. Proposed Rule, *Implementation of the Fair Housing*

Amendments Act of 1988, 53 Fed. Reg. 44,992-01, 44,995 (Nov. 7, 1988) (citing H.R. Rep. No. 711, 100th Congress, 2d Sess. 31 (1988)). Since the number of occupants in a dwelling "is not a protected classification under the Act, this provision makes sense only as authorizing occupancy limits that would otherwise violate the Act based on an effects theory." 78 Fed. Reg. at 11,466. Finally, § 3607(b)(4) specifies that the FHA does not bar housing decisions made because of a person's controlled substance convictions. Again, given that convicted felons are not a protected group under the FHA, this provision is necessary to exempt conduct that would otherwise create an unlawful disparate impact. If the FHA prohibited only intentional discrimination, and not actions that have a discriminatory effect, these exemptions would not be necessary. Indeed, they would not even make sense.[2]

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[2] Petitioners argue that Congress adopted these exemptions to provide "safe harbors" from disparate impact liability – thereby conceding that Congress ratified the availability of disparate effects liability under the FHA. As Petitioners point out, these exemptions were added to the FHA in 1988 "against the backdrop of lower-court decisions that had . . . [interpreted] the Fair Housing Act to establish disparate impact liability." Pets.' Br. 36. These exemptions, according to Petitioners, reflected Congress's effort to protect these specific categories from being "forced to litigate in courts that had adopted" the disparate effects standard under the FHA. *Id*. Of course, Petitioners do not explain why, if Congress never intended for the FHA to bar conduct with disparate effects, Congress exempted a specific subset of potential claims rather than explicitly rejecting disparate impact liability *in toto*.

Fourth, the Final Rule embodies the course laid by the eleven circuit courts of appeal holding that liability under the FHA may be established based on a showing that a neutral policy or practice has a discriminatory effect even if such policy or practice was not adopted for a discriminatory purpose. *See, e.g.*, *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290-92 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974). The Fifth Circuit, the only Court of Appeals to examine the Final Rule, adopted it in full. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs,* 747 F.3d 275, 282-83 (5th Cir. 2014). Indeed, it adopted the Final Rule's burden-shifting approach at the urging of Petitioners – who argued that HUD's Final Rule "deserve[d] deference." Appellants' Br. at 25-26, 29, *Inclusive Communities Project, Inc. v. Texas Dep't of*

Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014) (No. 12-11211).

The only other court, besides the Fifth Circuit, to have examined the Final Rule to date is the District Court for the District of Columbia, in *American Insurance Association v. United States Department of Housing and Urban Development*, No. 13 Civ. 966, 2014 WL 5802283 (D.D.C. Nov. 7, 2014). That court refused to grant *Chevron* deference after determining that the FHA did not permit disparate impact claims. The court gave little weight to the holdings of eleven courts of appeals, finding that the FHA permitted disparate impact claims, because, in part, they were decided before *Smith v. City of Jackson*, 544 U.S. 228. *Am. Ins. Assoc.* 2014 WL at *12.[3] But far from barring HUD's interpretation of the FHA, *Smith* reaffirms that agency interpretation is accorded great weight. *Smith*, 544 U.S. at 243 (existence of

[3] The court ignored the fact that the Sixth Circuit upheld the disparate impact theory of liability after examining *Smith*. *Graoch Associates # 33, L.P. v. Louisville/Jefferson Cnty. Metro. Human Relations Comm'n*, 508 F.3d 366, 392 (6th Cir. 2007). And the court did not address the many district courts that have reaffirmed, in the wake of *Smith*, that the FHA permits disparate impact claims, including the D.C. District Court itself. *See Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co*., 573 F. Supp. 2d 70, 79 (D.D.C. 2008); *see also, e.g., NAACP v. Ameriquest Mortg. Co*., 635 F. Supp. 2d 1096, 1105 (C.D. Cal. 2009), as amended (Jan. 13, 2009); *Miller v. Countrywide Bank, N.A*., 571 F. Supp. 2d 251, 257 (D. Mass. 2008); *Hoffman v. Option One Mortg. Corp*., 589 F. Supp. 2d 1009, 1011 (N.D. Ill. 2008).

agency interpretation is "a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views" of the agency) (Scalia, J., concurring).[4]

Finally, the Solicitor General's amicus brief in 1987 to the Court asserting that a violation of the FHA requires a finding of intentional discrimination, *see* Brief for the United States as *Amicus Curiae*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961) (filed June 1988), does not reflect HUD's longstanding interpretation of the FHA and should be given no weight. Though *Amici* for Petitioners emphasize this lone brief by the Solicitor General,[5] the Department of Justice has never had rulemaking authority under the FHA and

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[4] Indeed, *Smith* is an application of traditional modes of statutory interpretation; the Court examined not just the text of the specific provision at question but the language of the statute as a whole, *id*. at 238-30 (plurality), "the history of the enactment," *id*. at 238, and the "congressional goals" of the enactment, *id*. at 235 n.5.

Justice Scalia, who provided the fifth vote to hold that the ADEA prohibits disparate impact discrimination, emphasized the need to defer to the agency interpretation of the statute, relying on the structure of the statute as a whole. *Id*. at 243, 246 (explaining, *inter alia*, that the "reasonable factors other than age" defense "is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA," *i.e.,* those that have "an adverse impact on individuals within the protected age group") (internal quotation marks omitted) (emphasis in original).

[5] *See* Brief for Am. Financial Servs. Assoc. as *Amicus Curiae* 17, *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 13-1371 (filed Nov. 24, 2014).

filed its brief before Congress amended the FHA to give HUD, not Justice, the authority to adjudicate FHA complaints and promulgate rules. Moreover, both before and after 1987, the Department of Justice has advanced the position that the FHA encompasses a discriminatory effects theory of liability. As early as 1971, the Department of Justice began filing lawsuits successfully challenging municipalities' exercise of zoning powers based on the actions' unjustified discriminatory effects. *See United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974); *United States v. City of Parma,* 661 F.2d 562, 567 (6th Cir. 1981); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987). The Department of Justice has continued to file lawsuits challenging land use and zoning decisions that have a discriminatory effect. *See* Compl., *United States v. Town of Oyster Bay*, No. 14 Civ. 2317 (E.D.N.Y. filed Apr. 10, 2014) (alleging predominately white town's affordable housing zoning with preference for current Town residents had discriminatory effect on African Americans and would perpetuate residential segregation, in violation of 42 U.S.C. § 3604(a) & (b)). *See also* Compl., *Consumer Fin. Prot. Bureau v. Nat'l City Bank*, No. 13 Civ. 1817 (W.D. Pa. filed Dec. 23, 2013) (alleging that bank's residential lending policies had discriminatory effect against African Americans and Hispanics, in violation of 42 U.S.C. § 3604(a) & (b)). During the past twelve years, in both Republican and Democratic administrations, the Department of Justice has filed amicus briefs in support of private parties challenging housing practices based on a discriminatory effects theory

of liability. *See* Brief for the United States as *Amicus Curiae*, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 569 (Oct. 29, 2013) (No. 11-1507), 2013 WL 5798699; Brief for the United States as *Amicus Curiae*, *Magner v. Gallagher*, 132 S. Ct. 548 (Nov. 7, 2011) (No. 10-1032), 2011 WL 6851347; Brief for the United States as *Amicus Curiae* in Opposition to District of Columbia's Motion to Dismiss, *2922 Sherman Avenue Tenants' Ass'n v. Dist. of Columbia*, No. 00 Civ. 00862 (D.D.C. June 12, 2001), *available at* http://www.justice.gov/crt/about/hce/documents/amicus_sherman.php.

The Final Rule is the product of considered, careful attention by HUD to an issue of national importance, has been promulgated after notice-and-comment procedures, and is consistent with the FHA's legislative intent and HUD's long-standing adjudication and enforcement actions applying a discriminatory effects theory of liability. It should be accorded full deference.

B. HUD Promulgated the Final Rule Pursuant to Its Rulemaking Authority and After Public Notice and Comment

HUD promulgated the Final Rule after full notice-and-comment procedures undertaken by the HUD Secretary pursuant to his rulemaking authority under the FHA. Section 808(a) of the FHA gives the Secretary the "authority and responsibility for administering this Act." 42 U.S.C. § 3608(a). Section 815 of

the FHA provides that "[t]he Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section." 42 U.S.C. § 3614a. In addition to rulemaking authority, Congress provided the Secretary with adjudicative authority under the FHA to accept and investigate housing discrimination complaints, to issue determinations of reasonable cause and charges of discrimination, to conduct formal adjudications, and to make final agency decisions. 42 U.S.C. §§ 3610(g)(1), 3610(g)(2)(A), 3612(h)(1); 24 C.F.R. §§ 103.400(a), 180.675(g).

On November 16, 2011, HUD published a Notice of Proposed Rule-Making ("NPRM") regarding the *Implementation of the Fair Housing Act's Discriminatory Effects Standard*. 76 Fed. Reg. 70,922. After a period of public comment on the proposed rule, HUD reviewed the comments, revised the rule, and promulgated the Final Rule. Final Rule, 78 Fed. Reg. 11,460 (Feb. 15, 2013). The Final Rule reflects HUD's careful consideration of the various public comments for and against the proposed rulemaking; explains why the Final Rule is a reasonable interpretation of the FHA; describes how the Final Rule is consistent with HUD's long-standing interpretation of the FHA to encompass claims premised upon unjustified discriminatory effects; and notes that the Final Rule is consistent with the rulings of all federal courts of appeal that have addressed the question of whether

claims under the FHA can be based upon a practice's unjustified discriminatory effects. *Id.* at 11,461-79.

In issuing the NPRM and promulgating the Final Rule, the Secretary focused fully on determining whether a practice with a discriminatory effect violates the FHA, and on the standards necessary to establish liability for a housing practice with discriminatory effects. The Secretary first determined that there was a need for a formal rule: "to formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the [FHA], and to provide nationwide consistency in the application of that form of liability." *Id*. at 11,460. The Secretary examined HUD's prior interpretations of the FHA – as expressed in formal adjudications, letters and policy statements, formal rules regarding the Federal Housing Enterprises Financial Safety and Soundness Act, and internal guidance and enforcement handbooks for HUD staff – concluding "that the [FHA] is violated by facially neutral practices that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent." *Id.* at 11,461-62. Further, the Secretary examined decisions of the federal courts of appeal addressing the question of whether the FHA encompasses liability based on unjustified discriminatory effects, as well as the manner in which evidence has been analyzed in order to prove liability based on discriminatory effects. *Id.* at 11,462-63. Ultimately, the Secretary adopted a rule that served the identified need: The Formal Rule confirms HUD's and the federal courts' long-standing

interpretation of the FHA to encompass liability based on unjustified discriminatory effects. *Id.* at 11,460.

II. EVEN BEFORE THE FINAL RULE, HUD CONSISTENTLY APPLIED A DISPARATE IMPACT THEORY OF LIABILITY WHEN CARRYING OUT ITS FORMAL ADJUDICATION AUTHORITY UNDER THE FHA

As part of its enforcement mandate, the FHA, as amended in 1988, provides HUD with the statutory authority to make final agency decisions through Administrative Law Judge ("ALJ") determinations, reviewable by the HUD Secretary. Since 1988, HUD ALJs have repeatedly and consistently applied a discriminatory effects test to a variety of housing discrimination cases, reflecting HUD's long-standing interpretation of the FHA. Because these final determinations operate pursuant to statutory authority, they should be given deference.

A. After a Thirty-Day Statutory Review Period, HUD Administrative Law Judge Orders Are Final Agency Decisions Entitled to *Chevron* Deference

As amended in 1988, the FHA mandates that HUD ALJs commence hearings, "make findings of fact and conclusions of law," and "promptly issue" orders of relief. 42 U.S.C. § 3612(g). The Secretary may review any ALJ finding, conclusion, or order

within thirty days of its issuance; "otherwise the finding, conclusion, or order becomes final." *Id.* § 3612(h)(1). Any party aggrieved by a final order may appeal directly to the judicial circuit in which the discriminatory housing practice is alleged to have occurred. *Id.* at § 3612(i). The FHA provides the Secretary with the right to petition the relevant judicial circuit for the enforcement of an ALJ order. *Id.* § 3612(j).

Given HUD's legislative mandate to make final agency decisions and enforce them through United States courts of appeals, HUD ALJ decisions that become final are entitled to the full measure of *Chevron* deference. *See City of Arlington*, 133 S. Ct. at 1874; *Mead*, 533 U.S. at 230 & n.12 (*Chevron* deference is applied to formal adjudications).

B. HUD Final Agency Decisions Have Applied an Effects Test to a Variety of Discrimination Claims

Final determinations issued by HUD have repeatedly interpreted the FHA's prohibition on discriminatory housing practices to encompass claims challenging the effects of otherwise neutral housing policies and practices. In *HUD v. Mountain Side Mobile Estates Parternship*, 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), for instance, the HUD Secretary, upon review of an initial ALJ decision, applied a disparate impact analysis to a

complaint alleging familial status discrimination. Using this framework, the Secretary determined that a three-person-per-dwelling maximum occupancy policy in a mobile home community had a discriminatory effect on families with children. When the final agency decision was appealed to the Tenth Circuit, the HUD Secretary, as the respondent, submitted a brief in support of this position and cited statistics that the policy would exclude families with children at more than four times the rate of households without minor children. Brief for HUD Secretary as Respondent, *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243 (10th Cir. 1995) (No. 94-9509). Although the Tenth Circuit reversed the Secretary's determination, it affirmed that housing discrimination prohibited by the FHA "may occur either by disparate treatment or disparate impact." 56 F.3d at 1250.

HUD took a similar position in *HUD v. Pfaff,* No. 10-93-0084-8, 1994 WL 592199, at *17 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996), where an ALJ determined, based in part on statistical evidence regarding household size, that a four-person maximum occupancy policy for three-bedroom dwellings had a disparate impact on families with children. Upon appeal to the circuit court, the Secretary filed a brief discussing the legislative history and text of the FHA, as well as prior HUD pronouncements that a showing of discriminatory intent is not required to establish liability under the FHA. Brief for HUD Secretary as Respondent,

Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996) (No. 94-70898), 1995 WL 17017239.

In addition to *Mountainside* and *Pfaff*, HUD has issued other final agency decisions under the FHA based on a disparate impact theory, including in familial status, sex, and disability discrimination cases. *See, e.g.*, *HUD v. Carlson*, No. 08-91-0077-1, 1995 WL 365009 (HUD ALJ June 12, 1995), *rev'd on other grounds sub nom. Carlson v. U.S. Dep't of Hous. and Urban Dev.*, No. 95 Civ. 2980, 1996 WL 156704 (8th Cir. March 13, 1996) (HUD ALJ final order holding that a facially neutral four-occupant-maximum rule has a disparate impact on families with children); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) (HUD ALJ final order noting that "the application of the discriminatory effects standard in cases under the Fair Housing Act is well established").

Likewise, HUD ALJ orders have recognized the disparate impact theory in the disability discrimination context. For instance, a HUD ALJ relied on the disparate impact theory of liability to analyze a policy that required tenants to purchase renters' liability insurance before the landlord would permit physical modifications to an apartment complex. HUD concluded the policy violated the FHA in part because it had a disparate impact on tenants with disabilities who used wheelchairs and needed ramps installed for access. *See, e.g.*, *HUD v. Twinbrook Vill. Apts.*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001). These determinations reflect

HUD's long-standing interpretation and enforcement of the FHA, an interpretation that is embodied in the Final Rule.

III. EARLIER HUD REGULATIONS APPLYING A DISCRIMINATORY EFFECTS STANDARD ARE ALSO ENTITLED TO *CHEVRON* DEFERENCE

Even before the 2013 Final Rule, HUD issued regulations in 1994, 1995, and 1999 that expressly recognized the applicability of a discriminatory effects test under the FHA to government sponsored enterprises and local recipients. *See Meyer*, 537 U.S. at 288 (noting HUD's consistent interpretation of an analogous statutory provision).[6] These regulations are also entitled to *Chevron* deference.

In 1994, HUD promulgated regulations implementing the Housing and Community Development Act of 1992 that included standards for admitting tenants to federally assisted housing. *Preferences for Admission to Assisted Housing*, 59 Fed. Reg. 36,616 (July 18, 1994) (codified at 24 C.F.R. pt. 880 *et seq.*).

[6] HUD has never promulgated a rule interpreting the Act to require a finding of intentional discrimination. The 1989 final rule implementing the 1988 FHA amendments was neutral on the issue of disparate impact. *See* Final Rule, *Implementation of the Fair Housing Amendments Act of 1988*, 54 Fed. Reg. 3,232 (Jan. 23, 1989). As demonstrated throughout this brief, HUD explicitly and repeatedly interpreted and implemented the FHA to include discriminatory effects liability.

In them, HUD clarified that, although housing agencies and private housing owners could use preferences for working families, the "preference may not be administered in a way that will violate the legal prohibitions against discrimination." *Id.* at 36,619. HUD offered as a permissible example a preference for working families that did not violate provisions protecting against discrimination on the basis of disability. *Id.* In explaining this example, HUD noted that preferences for working families could have a disparate impact on the eligibility of disabled individuals for housing and could thereby violate the FHA.

In 1995, HUD issued regulations that expressly recognize the applicability of an effects theory of liability under the FHA to the practices of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two Government Sponsored Enterprises ("GSEs"). Specifically, the Secretary promulgated regulations to implement its authority under the Federal Housing Enterprises Financial Safety and Soundness Act. *See The Sec. of HUD's Regulation of the Fed. Nat'l Mort. Assoc. (Fannie Mae) and the Fed. Home Loan Mort. Corp. (Freddie Mac),* 60 Fed. Reg. 61,846 (Dec. 1, 1995) (codified at 24 C.F.R. pt. 81). The regulations prohibit the GSEs from discriminating in their mortgage purchases "in a manner that has a discriminatory effect." 24 C.F.R. § 81.42. In the preamble to the final rule, HUD stressed the importance of the disparate impact theory by stating

that "the disparate impact (or discriminatory effect) theory is firmly established by [FHA] case law. That law is applicable to all segments of the housing marketplace, including the GSEs." 60 Fed. Reg. at 61,867.

As part of the rulemaking process, HUD cited a joint statement that it previously issued with nine other federal agencies that recognized disparate impact as one of the methods of proof of a violation of the FHA in lending discrimination cases. *Id.* at 61,866-67 (citing *Interagency Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266 (Apr. 15, 1994) (the "Policy Statement")). HUD explained the importance of the Policy Statement, stating that "[a]ll the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending" and have accordingly "jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act." 60 Fed. Reg. at 61,867.

The Policy Statement was intended by the federal agencies, including HUD, to be consistent with "the Fair Housing Act for purposes of administrative enforcement." 59 Fed. Reg. at 18,266. Concerned with discrimination faced by prospective home buyers in obtaining loans, the Policy Statement stated that "[p]olicies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit." *Id.* at 18,269. One example

provided in the Policy Statement was a lender's facially neutral policy of refusing to extend loans for home purchases below a minimum loan amount, which could "disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live." *Id.* A lender with such a policy would be required to justify the "business necessity" for the policy. *Id.* at 18,268.

In 1999, HUD promulgated a final rule regarding the use of local preferences in admissions to Section 8 Housing Choice Voucher Programs administered by public housing authorities ("PHAs"). *See Section 8 Tenant-Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs*, 64 Fed. Reg. 56,894 (Oct. 21, 1999) (to be codified at 24 C.F.R. pts. 888, 982). The regulation specifies that PHAs may use preferences for current residents of a community only in accordance with the FHA and other federal anti-discrimination statutes. 24 C.F.R. § 982.207(b)(1)(i) (citing to 24 C.F.R. § 5.105(a)). The regulation incorporates a disparate impact standard by requiring that every PHA policy governing eligibility, selection, and admission to the program specify that the use of residency preferences "will not have the purpose or *effect* of delaying or otherwise denying admission to the program based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family." *Id*. at § 982.207(b)(1)(iii) (emphasis added).

IV. HUD HAS CONSISTENTLY USED A DISCRIMINATORY EFFECTS TEST IN INVESTIGATING VIOLATIONS OF AND ENFORCING THE FAIR HOUSING ACT

A. Guidance From the HUD Assistant Secretary for Fair Housing and Equal Opportunity and/or the HUD General Counsel Is Entitled to Deference

HUD's numerous other pronouncements, including over two decades of guidance in the form of departmental directives, notices, general counsel memoranda, handbooks, and other training materials that have recognized and applied a disparate impact theory, are also entitled to deference as persuasive and informed agency pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Meacham*, 554 U.S. at 102-03 (2008) (Scalia J., concurring in the judgment) (noting that deference to the views of the Equal Employment Opportunity Commission ("EEOC") is warranted "[b]ecause administration of the ADEA has been placed in the hands of the Commission, and because the agency's positions on the questions before us are unquestionably reasonable," and deferring to a brief submitted by the U.S. Solicitor General and signed by the EEOC's general counsel).

As part of its authority to implement the FHA, HUD has issued a wealth of guidance to ensure that its personnel are uniformly applying the FHA. In this guidance, HUD has consistently recognized a discriminatory effects test. For instance, in a memorandum

from HUD General Counsel providing guidance to all HUD regional counsel in 1991 following the 1988 amendments to the FHA, HUD made clear that enforcement of the FHA encompassed facially neutral policies and practices that had discriminatory effects, such as unreasonable occupancy standards that operated to disproportionately exclude families with children. *See* HUD, Office of Gen. Counsel, *Fair Housing Enforcement Policy: Occupancy Cases* (Mar. 20, 1991), *published at Fair Housing Enforcement – Occupancy Standards; Notice of Statement of Policy*, 63 Fed. Reg. 70,982, 70,983-87 (Dec. 22, 1998), *available at* http://www.hud.gov/offices/fheo/library/occupancystds.pdf. The general counsel stated his expectation that all regional counsel would "continue their vigilant efforts to proceed to formal enforcement in all cases in which there is reasonable cause to believe that a discriminatory housing practice under the Act has occurred or is about to occur," and stated that the memorandum was being circulated because it was "imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases." *Id.* at 70,984. The general counsel stated that vigilant enforcement of the FHA was "particularly important in cases where occupancy restrictions are used to exclude families with children or to unreasonably limit the ability of families with children to obtain housing." *Id*. The memorandum confirms that "the reasonableness of any occupancy policy is rebuttable" and provides examples of factors that HUD would consider, such as

size of bedrooms, age of children, and configuration of units, when reviewing cases involving occupancy policies. *Id*.

In 1993, the HUD Assistant Secretary for FHEO issued a memorandum titled "The Applicability of Disparate Impact Analysis to Fair Housing Cases," which stated that housing discrimination complaints should be analyzed by FHEO investigators under a disparate impact theory of liability. *See* HUD, Office of Fair Housing & Equal Opportunity, *The Applicability of Disparate Impact Analysis to Fair Housing Cases* (Dec. 17, 1993), *available at* http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid7. The memorandum outlined the reasoning in HUD's final administrative decision in *Mountain Side Mobile Estates*, *see supra* Part II.B, and instructed HUD Regional Directors to investigate all business necessity justifications proffered by respondents for facially neutral policies as part of evaluating whether the policies operate to disproportionately disadvantage persons in violation of the FHA. *Id*.

One year later, HUD's General Counsel and Assistant Secretary for FHEO issued a joint memorandum regarding the issue of whether the facially neutral policy of imposing a fee based on the number of occupants in a dwelling constituted unlawful familial status discrimination. *See* HUD, Office of General Counsel and Office of Fair Housing & Equal Opportunity, *Occupancy Fees & Familial Status Discrimination Under the Fair Housing Act* (Mar. 29,

1994), HUD *Amici* App. 1. The memorandum stated that "[o]ccupancy fees which are structured to apply equally to all households with a certain number of occupants, regardless of the familial status of the occupants, may violate the Act, even if the fees are enforced in an even handed manner against all households of a certain size." *Id.* at 8-9. The memorandum discussed, for instance, how a policy of imposing fees based on the number of occupants in a unit would be expected to have a disparate impact on families with children, given that larger households are more likely to contain children, and cited to several decisions discussing HUD litigation involving facially neutral occupancy standards. *Id*. at 12, 18-23.

In 1996, in a notice circulated to all FHEO directors, multifamily housing directors, and owners/managers in HUD-assisted housing, HUD stated that the FHA applies to all programs receiving federal financial assistance and prohibits "disparate impact in provision of housing based on certain prohibited bases." HUD, Office of Fair Housing & Equal Opportunity, *Discretionary Preferences for Admission to Multifamily Housing Projects* (Oct. 28, 1996), *available at* http://www.hud.gov/offices/adm/hudclips/notices/fheo/96-4fheo.txt. The notice stated that "FHEO is concerned that a preference which appears neutral on its face could result in violations of various Civil Rights requirements," including those contained in the Fair Housing Act. *Id.*

And more recently, in a memorandum from the FHEO Deputy Assistant Secretary for Enforcement

and Programs to FHEO offices and regional directors, HUD discussed how facially neutral "zero-tolerance" rental policies regarding domestic violence could have a disparate impact on women. *See* HUD, Office of Fair Housing & Equal Opportunity, *Assessing Claims of Housing Discrimination Against Victims of Domestic Violence Under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA)* (Feb. 9, 2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf. HUD noted that "[d]isparate impact cases often arise in the context of 'zero-tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. The theory is that, even when consistently applied, women may be disproportionately affected by these policies" because they are overwhelmingly the victims of domestic violence. *Id.* at 5. As examples, HUD discussed cases in which a "zero-tolerance" crime policies resulted in women being evicted after presenting landlords with temporary restraining orders or contacting the police during domestic violence incidents. *Id.* at 6-9.

B. HUD's Secretary-Initiated Complaints Have Relied on a Discriminatory Effects Theory of Liability

The FHA provides the Secretary with the authority to investigate and file complaints alleging discriminatory housing practices on the Secretary's own initiative and in the absence of an aggrieved person filing a complaint with HUD. 42 U.S.C.

§ 3610(a)(1)(A)(i) ("The Secretary, on the Secretary's own initiative, may also file such a complaint."). HUD's exercise of its authority to initiate complaints is entitled to "respectful consideration." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496-97 (2002) (stating that the position of the Secretary of Health and Human Services "who possesses the authority to prescribe standards relevant to the issue here . . . warrants respectful consideration").

HUD has consistently used its investigatory and enforcement authority to file complaints based on discriminatory effects. For example, in 2006, HUD filed a Secretary-initiated complaint against Manassas, Virginia alleging that a local ordinance limiting the number of unrelated people who could live together in a dwelling unlawfully discriminated against Hispanic households and families with children. HUD, *FY 2006 Annual Report to Congress on Fair Housing* 38 (Mar. 29, 2007); *see also* HUD, *FY 2010 Annual Report to Congress on Fair Housing* 39 (Aug. 29, 2011) (Secretary-initiated complaint against Countrywide FSB alleging a policy classifying certain metropolitan areas as high risk for decline and subjecting those areas to a 5 percent reduction on maximum financing caused a discriminatory effect on minorities); Compl., *HUD v. Cornerstone Residential Mgmt.*, FHEO No. 04-08-1085-8 (filed June 9, 2008) (Secretary-initiated complaint alleging that a rental management company's three-person occupancy limit for two-bedroom apartments discriminated against families with children); HUD, *FY 2007 Annual Report*

to Congress on Fair Housing 39 (Mar. 21, 2008) (Secretary-initiated complaint against Iberville Parish, Louisiana alleging that a facially neutral resolution adopted after Hurricane Katrina that restricted the placement of FEMA trailer parks in the Parish was racially discriminatory). HUD's Secretary-initiated complaints further demonstrate the agency's application of the effects theory of liability in enforcing the FHA.

C. HUD Has Consistently Recognized a Disparate Impact Theory in Other Agency Documents

In carrying out its statutory responsibility to investigate complaints, 42 U.S.C. § 3610, conduct formal adjudications, 42 U.S.C. § 3612, and administer the FHA, 42 U.S.C. § 3608, HUD originally published a Title VIII Complaint, Investigation, and Conciliation Handbook ("the Handbook") in 1995 to instruct HUD personnel on how to investigate and evaluate housing discrimination complaints. HUD, No. 8024.1, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* (May 11, 2005). As per HUD's policy, the Handbook was subjected to departmental review and clearance prior to being issued. *See* HUD, Handbook No. 000.2 REV-3, *HUD Directives System* 7, 11 (Mar. 2012) (describing handbook as a "comprehensive document of current and applicable information on a specific HUD program [that] may include clarification of policies, instructions, guidance, procedures, forms, and reports").

The 1995 edition of the Handbook sets forth HUD's guidelines for investigating and resolving FHA complaints. The Handbook specifically recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases. The Handbook states that the FHA is violated by an "action or policy [that] has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status." Handbook at 3-25.

In 1998, HUD modified the Handbook and expanded it to include a chapter titled "Theories of Discrimination" that incorporates disparate impact as one theory of discrimination under the FHA. *Id*. at 2-27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *id.* at 2-27 to 2-45 (HUD guidelines for investigating a disparate impact claim and establishing its elements). The Handbook, which has provided definitive guidance to HUD investigators for nearly twenty years, is another example of HUD's application of the disparate impact theory in carrying out its statutory responsibility to enforce the FHA.

As required by the FHA, HUD reports to Congress annually regarding the "nature . . . of discriminatory housing practices in representative communities . . . throughout the United States." 42 U.S.C. § 3608(e)(1). These annual reports have included reference to the many Secretary-initiated complaints alleging discrimination based on unjustified discriminatory effects.

See supra Part IV.B (sampling HUD annual reports to Congress). In addition, the reports inform Congress about other fair housing activities by HUD during the past fiscal year, such as receiving complaints, issuing discrimination charges, entering into conciliation agreements, promulgating guidance, reviewing studies, and providing technical assistance. These activities periodically involve the application of a disparate impact analysis to housing practices throughout the country. For example, in its Annual Report on Fair Housing for Fiscal Year 2010, HUD reported to Congress that it was working to assist state attorneys general and local officials to provide guidance to landlords about the FHA in light of newly enacted rental registration ordinances that may have disparate effects based on national origin. *See* HUD, *FY 2010 Annual Report to Congress on Fair Housing* 10 (Aug. 29, 2011). HUD also reported during the same year that it was taking steps to address rental policies that exclude renters receiving Section 8 Rental Assistance and Social Security Disability Insurance, thereby disproportionately affecting persons who belong to protected classes under the FHA. *Id*. at 11.

In investigative handbooks, training curricula, and annual reports to Congress, HUD has consistently studied, reported on, and trained its own staff and local agencies enforcing fair housing laws about intentional discrimination, as well as policies that

have unjustified discriminatory effects in housing. This consistent interpretation is entitled to deference.

CONCLUSION

For the foregoing reasons, this Court should hold that disparate impact claims are cognizable under the FHA.

Respectfully submitted,

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U. S. Department of Housing
and Urban Development
Washington, D.C. 20410-0000

MAR 29 1994

MEMORANDUM FOR: All Regional Counsel

All Regional Directors of
Fair Housing and Equal
Opportunity

/s/ Nelson Diaz
FROM: Nelson A. Diaz, General Counsel, G

/s/ Roberta Achtenberg
Roberta Achtenberg, Assistant Secretary for
Fair Housing and Equal Opportunity, E

SUBJECT: Occupancy Fees and Familial Status Discrimination under the Fair Housing Act

This memorandum is designed to facilitate your review of complaints under the Fair Housing Act (the Act). The Department has received a number of complaints involving allegations that housing providers who impose additional fees on households based on the number of occupants in the dwelling discriminate because of familial status. This memorandum outlines the principles applicable to analyzing such complaints and discusses the experiences of the Office of General Counsel's Fair Housing Division with such cases.

The complaints that the Fair Housing Division has reviewed involving occupancy fees have thus far arisen in the rental context. However, the principles

for analyzing complaints involving occupancy based fees are equally applicable whether housing is rented, sold, or made available through other means. For example, if a condominium or home owners association were to assess fees based on the number of occupants in a dwelling, such a policy would be analyzed in the same manner as where landlords impose additional fees based on the number of occupants in a unit.

In some cases in which housing providers charge occupancy fees, the fees are only imposed on households in which children under the age of 18 are present. It has been the experience of the Fair Housing Division, however, that more often the fees are imposed on any households which contain more than a specified number of occupants, regardless of familial status. This memorandum discusses the discriminatory nature of each type of occupancy fee structure.

I. Occupancy Fees Imposed Only On Families With Children

Singling out families with children for additional occupancy fees is sometimes a product of an express policy, which on its face may make the fee applicable only where children are present. In other cases, uneven enforcement of a facially neutral policy by the housing provider may result in the fee, in practice, only being collected where children are present.

Whether by policy or enforcement practice, such fee practices violate the Act by treating families with

children less favorably because of the presence of children in the family. Therefore, it will be appropriate to issue charges of discrimination in cases where the evidence supports such a claim.

A. Disparate Treatment Standard

Occupancy fees applicable by policy or practice only where children are present in a household single out families with children for disparate treatment by increasing the cost of the dwelling unit to such families. Subsection 804(b) of the Act prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of . . . familial status. . . ." 42 U.S.C. § 3604(b); 24 C.F.R. § 100.65(a). The Department has implemented this statutory provision through regulations which provide, "Prohibited actions under this section include, but are not limited to: (1) Using different provisions in leases . . . , such as those relating to rental charges . . . and the terms of a lease . . . , because of . . . familial status. . . ." 24 C.F.R. § 100.65(b) (1993). Such occupancy fees violate these prohibitions by imposing a different term or condition (i.e., higher rent or charges) based on familial status in violation of subsection 804(b) of the Act.

In addition, especially in cases where the fees are high in absolute terms or relative to the base rent, the fees may discourage occupancy by families with children and result in their exclusion by making rental at the housing facility prohibitively expensive

or out of line with market rents for similarly sized units at other housing facilities in the area. Fees which operate in this manner may violate not only subsection 804(b), as discussed, *supra,* but subsection 804(a) of the Act as well. Subsection 804(a) prohibits making unavailable or denying a dwelling because of familial status. The Department has implemented subsection 804(a) through regulations which prohibit "Imposing different sales prices or rental charges for the sale or rental of a dwelling . . . because of familial status," 24 C.F.R. § 100.60(b)(3) (1993), and which prohibit "discouraging" persons from "inspecting, purchasing, or renting a dwelling because of . . . familial status," 24 C.F.R. § 100.70(c)(1) and (2) (1993). Fees targeted at families with children may violate both of these regulatory prohibitions.

B. Case Studies

The Fair Housing Division has issued determinations of reasonable cause and charges of discrimination in at least four cases that involved additional occupancy fees that were imposed differently depending upon the familial status of the household. In one case, the Department entered into a Consent Order resolving the matter. In the other three, an election was made to have the claims adjudicated in Federal district court and the Department of Justice ("Justice") entered into Consent Orders or Stipulated Judgments resolving the matters. All these cases are summarized below:

1. *HUD v. Wellington d/b/a Wellington Arms Apartments*, Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 05-89-0528-1 (May 12, 1992). In this case the Department alleged that the respondent discriminated because of familial status by charging the complainant, whose household consisted of one adult and three minor children, a higher rent than the respondent charged to households composed of two adults and two children. The Department alleged that the complainant was charged a base rent of $675 and additional occupancy fees of $100 per child for a total rent of $875, whereas the respondent generally rented two bedroom apartments for approximately $570 to $580. The Department alleged that the respondent imposed the additional charge to compel the complainant to rent a three bedroom apartment instead of a two bedroom apartment and in retaliation for the complainant having filed a fair housing complaint.

The Department entered into a Consent Order which required the respondents to compensate the complainant $8,500, to pay a $1,500 civil penalty, and which imposed a variety of record keeping, reporting, and employee education requirements. Most importantly, the Consent Order also required the respondent to revise its occupancy policies so as to allow at least two persons per bedroom regardless of whether the persons are adults or children, and to allow as many as two adults and three children in a two bedroom apartment under certain circumstances without subjecting such households to an additional

occupancy fee. *HUD v. Wellington d/b/a Wellington Arms Apartments*, HUDALJ 05-89-0528-1 (HUD Office of Admin. Law Judges 11-30-92) (Initial Decision and Consent Order).

2. *HUD v. Alfaya*, Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 05-89-0766-1 (Feb. 11, 1991). In this case, the Department alleged that the respondents discriminated because of familial status against the complainant, a family composed of a couple and a minor child. The respondent maintained a policy of charging $55 extra per month over a base rent of $395 per month if a unit were occupied by more than two persons, but only charged the extra fee if there were children present in the unit.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which required the respondents to pay $3,000 to compensate the complainant and which imposed a variety of reporting and record keeping requirements. Moreover, the Consent Order explicitly enjoined the respondents from "discriminating in the terms or conditions of rental on the basis of familial status, including imposing on families with children any charges in addition to the normal rent fixed for each apartment." *United States v. Alfaya,* No. C-1-91-229 (S.D. Ohio 1992) (Consent -Order).

3. *HUD v. Mahroom,* Determination of Reasonable Cause and Charge of Discrimination, HUDALJ

09-90-1257-1 (July 10, 1991). In this case, the Department alleged that the respondents discriminated because of familial status against the complainant, a family composed of one adult and six children. The respondent maintained a policy of charging $1,200 per month rent for the rental of a house if a husband and wife rented it, $1,300 if a husband, wife, and one child rented it, and $1,400 if a husband, wife, and two children rented it.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which required the respondents to pay $9,000 to compensate the complainants and which imposed employee education, advertising, and outreach requirements. The Consent Order also enjoined the respondents from "imposing different terms and conditions in the rental of dwelling on account of familial status." The Consent Order did not, however, specifically require a change in the rental fee structure. Indeed, the Consent Order categorized the case as one involving a refusal to rent due to the number of children without making reference to the discriminatory rent fee structure. *United States v. Mahroom,* No. C91-20538 JW (PVT) (N.D. Cal. 1992) (Consent Order).

4. *HUD v. Spann d/b/a Valle Grande Mobile Home Park,* Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 06-89-0372-1 (Oct. 15, 1990). In this case, the Department alleged that the respondents maintained several policies which discriminated because of familial status by

excluding families with children. One such policy involved charging $10 extra per month "if a baby is born after moving into the park." Another policy required residents to move out of the park once their children reached two years of age.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Stipulated Judgment in which the respondents agreed to pay $5,000 to compensate the complainants. The Stipulated Judgment did not include any provision requiring the respondents to eliminate their occupancy fee policy. *United States v. Valle Grande Mobile Home Park, Inc,. et al.,* No. 90-1149 JP (D.N.M. 1992) (Stipulated Judgment).

II. Fees that Apply Regardless of Familial Status

More common than fees which only apply to families with children are fees that are structured to apply to any household which contains more than a specified number of occupants, regardless of familial status. As housing providers continue to become more aware of the familial status protections of the Act and more subtle in their discriminatory practices, one would expect the incidence of this type of fee to remain more prevalent than fees which on their face apply only to families with children.

Occupancy fees which are structured to apply equally to all households with a certain number of occupants, regardless of the familial status of the occupants, may violate the Act, even if the fees are

enforced in an even handed manner against all households of a certain size. It is important to emphasize, however, that occupancy fees structured and enforced in this type of facially neutral manner do not necessarily violate the Act. Even in cases where, in practice, a disproportionate percentage of the households subject to the fees are families with children (due to the fact that larger-sized households tend disproportionately to be composed of families with children), the fees would not necessarily violate the Act. In order to determine if the fees violate the Act, consideration would have to be given not only to whether the fee structure imposes a disproportionate burden on families with children, but would also have to be given to whether the fee structure was compelled by business necessity and, if so, whether there were less discriminatory alternatives that would meet that business necessity.

In the preamble to its regulation, the Department discussed the application of 24 C.F.R. § 100.65(b), the regulation discussed, *supra,* that prohibits the use of different rental charges and terms of a lease because of familial status:

> [A] commenter indicated that charges for the provision of water, electricity, refuse collection and other services have been based on the number of persons who occupy a dwelling and asked whether such a policy would be permissible. In order to determine whether such a policy is permissible, it would be necessary to understand more fully why it was

> implemented and how it operates. . . . [P]olicies such as this would require review on a case by case basis. . . .

24 C.F.R. Subtitle B, Ch. I, Subch. A, App. I at 921 (1993).

Where there is evidence that an additional occupancy fee was implemented with a discriminatory intent, e.g., with the intent to discourage occupancy by families with children through an unfavorable rent structure, the fees violate the Act. Such fees violate the Act for much the same reasons as would fees imposed by rule or practice only upon families with children, as discussed, *supra*. Absent evidence of discriminatory intent, whether or not the occupancy fees violate the Act depends on the effect of the policy.

A. Discriminatory Effect Standard

Where the fee policy has an adverse discriminatory effect on families with children, the fee policy violates the Act unless there is a compelling business necessity for the fee policy and less discriminatory alternatives that would meet the housing provider's business necessity are not available.

1. Demonstrating Discriminatory Effect

Census statistics demonstrate what common sense suggests – that generally, households with more members are more likely than households with fewer members to contain one or more children under

age 18. The Appendix to this memorandum summarizes pertinent national census bureau statistics and provides relevant definitions. The Bureau of the Census does not maintain statistics that directly address the precise question applicable to determining if a disparate impact exists under the Act, i.e., what percentage of dwelling units of various numbers of occupants contain families with children. The Bureau does, however, provide data that are extremely helpful to estimating this answer. The Bureau provides data on the percentage of "families" of varying sizes in which children are domiciled with a parent, custodian, or designee.

The data show that families with three or more members are more likely to contain one or more children, as compared to two member families; families with four or five members are even more likely than three member families to contain children. Whereas only about 11 percent of two person families contain children, about 63 percent of three person families contain children, about 84 percent of four person families contain children, and about 88 percent of five person families contain children. Moreover, a policy that imposes additional charges only on families with 3 or more persons, will have no adverse consequences for about 73 percent of those families without children, whereas it will adversely affect about 91 percent of families with children, meaning that most families with children will be negatively affected, whereas most families without children will not be negatively affected. Even an occupancy fee

policy that only imposes a surcharge on families with 5 or more people, which would only adversely affect about 24 percent of families with children, will still have a disproportionate adverse effect on families with children. While 76 percent of families with children would suffer no negative consequences under such a policy, about 96 percent of families without children will suffer no adverse effect.

Thus, a policy of imposing occupancy fees based on the number of occupants in the unit would be expected to have a disproportionate adverse impact upon families with children. The discrepancy between the adverse effect on families with children and families without children would be expected to be most significant when the occupancy fee is one that imposes an additional surcharge for households with 3 or more, 4 or more, or 5 or more occupants. In contrast, if the occupancy fee only applies when households contain 6 or more persons or seven or more persons, relatively few families with or without children would be adversely affected, so the policy would have minimal adverse impact.

The statistics summarized in the Appendix that are available from the Bureau are nationwide statistics. Breakdowns for specific locales, states, or regions are not maintained or available from the Bureau. While it is possible that in any given locale large households may be disproportionately composed of unrelated adults (which the Bureau does not categorize as "families"), rather than families with children, national statistics may be used to prove disparate

impact. National statistics are used to prove discriminatory impact in employment discrimination cases. *E.g., Dothard v. Rawlinson,* 433 U.S. 321, 339 (1977). The Secretary's July 19, 1993 Decision and Order in *HUD v. Mountain Side Mobile Estates,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,053 (HUD Secretary 7-19-93), is strong precedent for applying national statistics to prove discriminatory impact in fair housing cases.

HUD v. Mountain Side Mobile Estates involved the legality of an occupancy limit, an issue closely related to the legality of occupancy fees. As the Secretary's decision held:

> It is possible that there may be greater variation among local populations with respect to percentage of households with children (even where the local and national percentage of households with four or more individuals that are families are virtually identical) than there is among local populations with respect to height and weight characteristics. However, in the absence of any showing of a large variation from the national statistics in the case of the locality in question, and where the economist discussing the statistics testified that the likelihood of finding a family household in the four-or-more-person household category in Jefferson County is apparently virtually identical to the national average, I believe that the possibility of such a significant variation is more speculative and unsupported than a supposition of its absence. As the Charging Party

> argues, if a party "discerns fallacies or deficiencies in the data offered by the plaintiff, [the party] is free to adduce countervailing evidence of his own." *Dothard, supra,* 433 U.S. at 331. In these circumstances, then, I conclude that the Charging Party established a prima facie case of disparate impact.

HUD v. Mountain Side Mobile Estates, supra, ¶ 25,053 at 25,493.

Therefore, national statistics may be used to determine if a disparate impact exists, when making a determination of reasonable cause. Such statistics, however, should be considered in the context of other evidence which may have been provided by the respondent or uncovered by the investigator during the course of the investigation that would bear on whether household composition in the locale reflects the national statistics for families.

2. Demonstrating Business Necessity and Lack of Less Discriminatory Alternatives

Once it is determined that an occupancy fee policy creates a discriminatory adverse impact for families with children, consideration should then turn to whether the need for the occupancy fee policy is compelled by business necessity. The Secretary's October 20, 1993 Decision and Order in *HUD v. Mountain Side Mobile Estates,* reflects that establishing a business necessity is a rigorous standard. It is *not* sufficient that a challenged practice bears a demonstrable relationship to a housing provider's

legitimate business interests. *HUD v. Mountain Side Mobile Estates,* HUDALJs 08-92-0010-1 and 08-920011-1 (HUD Secretary 10-20-93), *slip op.* at 10. Rather, "[T]he standard for a business necessity can only be met by establishing compelling need or necessity." *Id.* As the Secretary's decision held:

> As with current Title VII law, under Title VIII law, the need for a true necessity is also required. In *Betsy [v. Turtle Creek Associates,* 736 F.2d 983 (4th Cir. 1984)], the court held that when confronted with a showing of discriminatory impact, "defendants must prove a business necessity *sufficiently compelling* to justify the challenged practice." *Id*. at 988 (emphasis added). In *United States v. City of Black Jack, Mo*., 508 F.2d 1179, 1186 (8th Cir. 1974), the court held that after the finding of a prima facie case, the defendant was required to "demonstrate a *compelling* . . . interest." (Emphasis added.) Clearly, the word "compelling" correlates to the word "necessary."

HUD v. Mountain Side Mobile Estates, supra, slip op. at 9.

As the Secretary also held, under Title VIII, as under Title VII, only objective evidence, as opposed to mere speculation or subjective opinion, can establish a legal rebuttal demonstrating that a practice is compelled by business necessity. *HUD v. Mountain Side Mobile Estates, supra, slip op.* at 9 and 11 (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 428 n.23 (1975) and *Keith v. Volpe,* 858 F.2d 467 (9th Cir.

1988)). In addition, *post hoc* rationalizations for a practice are to be accorded little weight. *HUD v. Mountain Side Mobile Estates, supra, slip op.* at 9 and 11 (citing *Huntington Branch, NAACP v. Town of Huntington, NY*, 844 F.2d 926 (2d Cir. 1988)).

The type of information that housing providers most commonly provide to attempt to justify their occupancy fees is information on the housing facility's variable costs. For example, housing providers may attempt to demonstrate that the amount of the fee is based on the amount that charges or taxes for water, sewage, or garbage collection increase for each additional occupant who is added to a unit. Whatever information the housing provider provides should be analyzed to determine if the increased costs are truly variable costs or are in actuality fixed costs that the housing provider would incur regardless of the number of residents in a unit. The figures provided should also be scrutinized to assess whether the occupancy fee charge is limited to the amount which variable costs increase based on the number of occupants in a unit, or whether the fee exceeds that amount, even factoring in a reasonable profit margin.

Housing providers may also assert that the occupancy fee is justified by the increased wear and tear on a unit from each additional occupant. As with claims concerning increased variable costs, housing providers should be asked for information demonstrating the link between costs such as repairs to units or replacement of parts per unit and the number

of occupants in the dwelling, rather than mere speculation.

Even if an occupancy fee policy were determined to be compelled by business necessity, consideration must also be given to whether less discriminatory alternatives exist which would meet the respondents' business necessity with less discriminatory impact. *HUD v. Carter,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,029 at 25,317 (HUD Office of Admin. Law Judges 5-1-92) (citing *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978)). As part of the investigation of such complaints, the respondents should be asked to explain whether alternatives were considered, and, if so, why such alternatives would not meet their business necessity.

For example, housing providers could raise the base rent for all units rather than imposing additional fees based on the number of occupants. Housing providers could meter utilities and bill each dwelling unit based on actual usage of utilities, rather than charging households based on speculative concepts of how usage may vary depending on the number of occupants. Housing providers could recoup the costs of repairs and replacements based on actual wear and tear on a unit caused by the unit's occupants through neutrally imposed and enforced maintenance surcharges assessed per call or through security deposits-(as is more common). Where respondents assert that alternatives are not feasible, they should be asked for credible and objective evidence to support

their position. Exploring the availability of alternatives with respondents is not only relevant to determining whether an occupancy fee policy is compelled by business necessity, but may also be useful in facilitating conciliation.

B. Case Studies

The Fair Housing Division has issued charges in at least five cases which contained an allegation that a facially neutral occupancy fee discriminated because of its discriminatory effect on families with children. In one case, the Department litigated the issue and lost that claim before an administrative law judge ("ALJ"). In another, the Department entered into a Consent Order resolving the matter. In the other three, an election was made to have the claims adjudicated in Federal district court. In one of these cases, Justice litigated the issue and won an injunction against the practice. *In* the other two, Justice entered into Consent Orders resolving the matters. These cases are summarized below:

1. *HUD v. Murphy,* HUDALJs 02-89-0202-1, 0203-1, 0204-1, 0205-1, 0206-1, 0209-1, 0212-1, 0213-1, 0243-1, Determination of Reasonable Cause and Charge of Discrimination (Nov. 15, 1989). In this case, the Department alleged that the respondents had discriminated against families with children through a variety of policies and practices. Among the policies which the Department alleged were discriminatory was a policy of charging $5 per person for each occupant

in excess of one person (if a single person) or in excess of two persons (if a married couple). The complainants included households which in addition to base rents of approximately $200 per month were also charged either $5 or $10 per month in additional occupancy fees depending on the number of occupants in the unit.

While the main focus of the case was the respondent's failure to qualify its mobile home park as housing for older persons age 55 or older, the ALJ decision briefly addressed the Department's allegation that the $5 fee discriminated. The ALJ ruled that while the respondent had discriminated in a number of other respects, the Department had failed to demonstrate that this particular policy was discriminatory. Rather, the ALJ indicated that the rule served legitimate purposes, such as maintaining the condition of existing facilities. *HUD v. Murphy,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,002 at 25,020 and 25,053 (HUD Office of Admin. Law Judges 7-13-90).

This allegation, however, was not central to the Department's case and the issue was not fully litigated. The Department did not make a disparate impact argument against the policy. Thus, the challenge to the practice proceeded solely on the disparate treatment theory. The decision did not address directly whether such a policy could violate the Act due to its disparate impact and should not be taken as precluding this type of claim in other cases.

2. *HUD v. Reyes*, HUDALJ 09-91-1699-1, Determination of Reasonable Cause and Charge of Discrimination (Aug. 3, 1992). In this case, the Department alleged that the respondent discriminated because of familial status by imposing an occupancy fee of $100 per person for each person in excess of two persons in a two bedroom apartment. The complainant was a single woman who sought to rent a two bedroom apartment for herself, her live in companion, one child, and an additional child who would reside part time in the unit. Both children were under age 18.

The Department entered into a Consent Order that required the respondent to pay the complainant $1,500 and imposed a variety of record keeping and reporting requirements. In addition, the Consent Order required the respondent to reduce the occupancy fee for families with children from $100 per person to $15 per person. While the justification for the $15 per person occupancy fee is not stated in the Consent Order, the basis for the fee was supported by evidence that this portion of the fee was related to variable casts (for water usage and garbage collection) that increased on average approximately $15 for each occupant over two. The Consent Order did not, however, require the respondents to abandon the occupancy fee entirely and adopt less discriminatory alternatives, such as recouping these costs by raising the basic apartment rent for all units. *HUD v.* Reyes, HUDALJ 09-91-1699-1 (HUD Office of Admin. Law Judges 4-30-93) (Initial Decision and Consent Order).

3. *HUD v. Dickinson,* HUDALJ 10-89-0402-1, Determination of Reasonable Cause and Charge of Discrimination (Dec. 5, 1990). In this case, the Department alleged that the respondents discriminated because of familial status through a policy of charging an occupancy fee of $85 for each person in excess of two persons for the rental of a townhouse. The complainant was a woman who sought to rent a unit for herself, her husband, and a minor child.

An election was made in this case to have the claims adjudicated in Federal district court. Justice filed suit in Federal district court. Prior to trial, the respondents made a motion for summary judgment. Justice responded to the summary judgment motion by arguing that the case involved disparate treatment, without making a disparate impact argument. The judge denied summary judgment on the ground that there was a genuine issue of fact as to whether the defendants intended to discriminate and whether the fee was reasonable. Justice proceeded to litigate the case on the disparate treatment-theory before a jury. The jury returned a verdict in favor of the complainant, but awarded only $5 in damages. After the jury verdict, the judge ordered "that the defendants shall discontinue Imposing and shall not impose on families with children any per-person rental or other per-person charge connected with the rental of an apartment . . . in excess of the basic rental rate for an apartment." *United States v. Dickinson,* No. C91-73Z (W.D. Wash. 1992), *slip op*. at 2 (Order).

4. *HUD v. McMahan,* HUDALJ 05-91-0430-1, Determination of Reasonable Cause and Charge of Discrimination (Aug. 3, 1992). In this case, the Department alleged that the respondents discriminated because of familial status through a policy of imposing an additional $15 per month fee for each occupant in excess of two persons per mobile home lot. The complainant was a woman who rented a lot in which she, her husband, and four minor children resided. They were charged occupancy fees of $60 per month in addition to a basic lot rent which varied from $105 to $115 per month over the course of their residency. The evidence submitted by the respondents to support its necessity for an occupancy fee arguably supported a claim that variable costs for items such as water and sewage increased $8 to $9 for each additional occupant added to a unit, but did not support the $15 fee charged, nor did the respondents explain why alternative methods of increasing revenues, such as raising the basic lot rent for all units, or installing water saving devices or water meters to charge units based on actual usage were not available alternatives that would have a less discriminatory effect.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which ordered the respondents to compensate the complainant $1,605. The Consent Order also enjoined the respondents from discriminating because of familial status in any aspect of the ownership or management of the mobile

home park, but did not specifically state that respondents were enjoined from charging an occupancy fee. The Consent Order did make clear, however, that the allegation in the case was that the additional occupancy fee policy discriminated because of familial status. *United States v. McMahan,* No. C-3-92-389 (S.D. Ohio 1993) (Consent Order).

5. *HUD v. Colonial Inn Mobile Home Park and Guccini,* HUDALJ 08-89-0146-1, Determination of Reasonable Cause and Charge of Discrimination (Nov. 2, 1990). In this case, the Department alleged that the respondents discriminated because of familial status through a variety of policies, including charging a $50 per month occupancy fee for each occupant in excess of two persons per mobile home lot, in addition to a basic lot rent of $215 per month.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which ordered the respondents to compensate the complainant $10,000 and imposed a variety of reporting and record keeping requirements. In addition, the Consent Order required the respondents to change their rules in order to ensure that all spaces would be available on a nondiscriminatory basis. The required rules deleted reference to a charge of any additional occupancy fees. *United States v. Guccini d/b/a Colonial Inn Mobile Home Park,* No. 90 N 2278 (D. Colo. 1991) (Consent Order).

III. Conclusion

While this memorandum focuses on the experience of the Fair Housing Division, Regional Counsels and Regional Directors of Fair Housing and Equal Opportunity (FHEO) no doubt have additional valuable experiences handling occupancy fee cases. Sharing this information with headquarters and the regions would benefit all involved. Therefore, the regions are encouraged to contact the Fair Housing Division to share their insights and experiences in investigating, reviewing, and litigating these cases and to provide their reaction to the framework set forth in this memorandum. Supplementary guidance may be provided based on the comments received from the regions.

If you wish to comment on this memorandum, relate your experiences or insights, or pose questions directly related that you believe could be addressed in supplementary guidance, please write or call the Fair Housing Division or headquarters FHEO within 30 days of the date of this memorandum. The contact person in the Fair Housing Division is Richard Bennett, Attorney, tel. (202) 708-0340. The contact person in FHEO is Waite H. Madison, III, Deputy Director of Investigations, tel. (202) 708-4211.

Attachment (Appendix)

APPENDIX

Note: The statistics used to compile these table are taken from in: Bureau of the Census, U.S. Department of Commerce, Pub. No. P20-467, Current Population Reports – Population Characteristics – Household and Family Characteristics 85 (March 1992), relevant pages of which follow this Appendix

TABLE 1

Family Size (# of people)	# of Families	# with Own/Adopted Children under 18	% with Own/Adopted Children under 18
2	28,202,000	3,100,000	10.99
3	15,594,000	9,836,000	63.08
4	14,162,000	11,844,000	83.63
5	6,030,000	5,287,000	87.68
6	1,986,000	1,698,000	85.50
7 or more	1,200,000	980,000	81.67
Total	67,173,000	32,746,000	

Note: Columns may not compute due to rounding.

TABLE 2

A policy of imposing an occupancy fee on all households with A or more members would not adversely affect B percent of families with children, would adversely affect C percent of families with children, would not adversely affect D percent of families without children, and would adversely affect E percent of families without children where A, B, C, D, and E are:

A # in household	B % Families w/ Children No Effect	C % Families w/ Children Neg. Effect	D % Families w/o Children No Effect	E % Families w/o Children Neg. Effect
2 or more	0.0	100.0	0.0	100.0
3 or more	9.5	90.5	72.9	27.1
4 or more	39.5	60.5	89.6	10.4
5 or more	75.7	24.3	96.4	3.6
6 or more	91.8	8.2	98.5	1.5
7 or more	97.0	3.0	99.4	0.6