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**TEETH IN THE TIGER: ORGANIZATIONAL
STANDING AS A CRITICAL COMPONENT OF
FAIR HOUSING ACT ENFORCEMENT**

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Since the passage of the Civil Rights Act of 1964,¹ Congress has recognized the need for strong laws that protect the right to equal treatment and access to goods and services and the pivotal role that private litigation plays in enforcing these rights. Congress emphasized the critical role of fair housing through the passage of Title VIII of the Civil Rights Act, also known as the Fair Housing Act, in 1968. However, whether due to a lack of knowledge about their rights and the avenues for relief, unawareness that they have been subject to discrimination, fear of retaliation or distrust in the process, victims of housing discrimination rarely report these civil rights violations.² In light of these barriers to eradicating discrimination and the value to all of society in protecting civil rights, Congress recognized that organi-

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¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

² For example, there are an estimated 4 million fair housing violations across the country each year, only a small fraction of these discriminatory acts being reported. *Modernizing the Fair Housing Act for the 21st Century: 2013 Fair Housing Trends Report*, NAT'L FAIR HOUSING ALLIANCE Apr. 11, 2013, at 16, http://www.nationalfairhousing.org/Portals/33/2013_Fair_Housing_Trends_Report.pdf [hereinafter NFHA, TRENDS REPORT].

zations, not just individuals, are injured by housing discrimination and other civil rights violations and that they can recover from these injuries through private enforcement.

Enforcement by civil rights organizations (in the role of “private attorneys general”) has been critical to ensuring compliance with a host of civil rights laws – and the Fair Housing Act (FHA) is no exception.³ Of the 25,000 to 30,000 fair housing complaints filed each year with governmental and private fair housing organizations, more than two-thirds are investigated by non-profit organizations.⁴ Fair housing organizations are able to efficiently and effectively conduct investigations with little of the bureaucracy and overhead costs that may be associated with governmental agencies. Further, they are able to gain the trust of disenfranchised community members who may not feel comfortable lodging a complaint with a government entity. These organizations remain steadfast in their enforcement and on the cutting edge of identifying and addressing the changing targets and modes of discrimination regardless of current political sentiment.

The Fair Housing Act provides for two avenues of enforcement: an administrative procedure through the U.S. Department of Housing and Urban Development (HUD) and judicial proceedings through litigation. Studies increasingly show that administrative mechanisms are insufficient to “remove the walls of discrimination,”⁵ while litigation efforts by private fair housing organizations have helped bring about significant incremen-

³ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972); *See also* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 441-44 (2007) (discussing the rise of private enforcement).

⁴ NFHA, *TRENDS REPORT*, *supra* note 2, at 17. In 2012, 19,680 fair housing complaints were filed with private fair housing groups; 6,986 claims and complaints were filed with state and local government agencies, 1,817 claims and complaints were filed with the U.S. Department of Housing and Urban Development; and 36 cases were filed by the Department of Justice. *Id.* Many of the cases filed with HUD and the local housing agencies also originated with a private fair housing organization. *Id.* at 18.

⁵ 114 CONG. REC. 9563 (1968) (statement of Rep. Celler).

tal improvements. Nonetheless, in recent years, courts have chipped away at organizational standing in a range of civil rights contexts. Contrary to Congress' intent, some courts have added requirements beyond those needed under Article III of the U.S. Constitution.

This Article discusses the importance of organizational standing with respect to enforcement of the Fair Housing Act. Part I briefly summarizes relevant provisions of the Fair Housing Act and the enforcement mechanisms in the law. Part II provides a history of organizational standing in Fair Housing cases, including the recent trend toward erecting new barriers to standing under civil rights statutes, and explains how such narrow approaches conflict with the intent and history of the Fair Housing Act. Part III discusses the practical importance of organizational standing and describes how the Article III standing requirements effectively balance the need for strong enforcement mechanisms without opening the floodgates to frivolous litigation. Finally, Part IV recommends that principles underlying the need for broad standing for FHA enforcement generally be expanded to encompass violations of the affirmatively further fair housing requirement of 42 U.S.C. § 3608.

I. THE FAIR HOUSING ACT AND ITS ENFORCEMENT MECHANISMS

The right to choose where to live is one of the most significant rights for all adults, impacting employment and education opportunities, proximity to family and other resources, and access to transportation, groceries and other necessities. Title VIII of the Civil Rights Act of 1968,⁶ commonly referred to as the Fair Housing Act, was intended to secure that right for everyone in the United States. The FHA required sellers, real estate agents, landlords and property managers to treat all prospective buyers

⁶ Pub. L. No. 100-430 (codified as amended at 42 USC §§ 3601-3619, 3631 (1988)).

and tenants equally.⁷ Initially passed to combat segregation and address overt discrimination against African American renters and homebuyers,⁸ the FHA protects against discrimination in the sale, rental or financing of dwellings.⁹ It also protects against discrimination in the provision of brokerage services in connection with the sale or rental of housing based on race, color, religion, sex or national origin.¹⁰ Recognizing that the federal government and local entities had perpetuated segregated living patterns and housing discrimination,¹¹ Congress also required federal agencies, and the housing-related programs and activities that they fund, to operate “in a manner affirmatively to further” fair housing.¹²

⁷ 114 CONG. REC. S3421-22 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale); See NFHA, TRENDS REPORT, *supra* note 2, at 3.

⁸ NFHA, TRENDS REPORT, *supra* note 2, at 3-4 (discussing the FHA in context of the civil rights movement of the 1960's); Tracey McCartney & Sara Pratt, *The Fair Housing Act: 35 Years of Evolution* (2003), available at <http://www.fairhousing.com/include/media/pdf/35years.pdf>; see also Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969) (legislative assistant to Senator Mondale discussing passage of the Fair Housing Act of 1968).

⁹ 42 U.S.C. §§ 3604-3606.

¹⁰ *Id.*

¹¹ 114 CONG. REC. 2278 (1968) (statement of Sen. Mondale) (“Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in [the post-WWII era] is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.”); 114 CONG. REC. 2281 (1968) (statement of Sen. Brooke) (“Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph – even as he ok’s public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred”).

¹² Fair Housing Act, 42 U.S.C. § 3608(d),(e)(5) (2006); See also Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994); Exec. Order No. 12,259, 3 C.F.R. 307 (1981).

The FHA, as passed in 1968, included weak mechanisms to enforce the law's anti-discrimination provisions – specifically, sanctionless administrative conciliation and private rights of action with only nominal relief¹³ – and no direct means of enforcing the affirmatively furthering fair housing provision. Unsurprisingly, these mechanisms did not effectively curb discriminatory acts.¹⁴ A study by the U.S. Department of Housing and Urban Development (“HUD”) a decade after the FHA was enacted found that, when visiting four apartments in a housing search, 72% of prospective African American tenants and 48% of prospective African American homebuyers were subject to discrimination.¹⁵ By the late 1980s, members of Congress from both sides of the aisle recognized that the FHA's enforcement mechanisms were too weak to meaningfully impact the housing market.¹⁶ Making matters worse, federal agencies responsible for enforcement had dismal records: while by 1979 the U.S. Department of Justice (“DOJ”) was handling about 30 FHA cases per year, no such cases were filed in the early years of the Rea-

¹³ *Id.* at § 3612(c) (limiting the remedies for private civil enforcement to injunctive relief, actual damages, and \$1,000 in punitive damages; providing attorneys' fees only to prevailing plaintiffs who are indigent).

¹⁴ Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADM. L.J. AM. U. 59, 62 (1993).

¹⁵ Ronald E. Wienk et al., *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey*, DEP'T OF HOUS. & URBAN DEV. (1979), <http://eric.ed.gov/PDFS/ED182397.pdf>.

¹⁶ *See, e.g.*, 134 CONG. REC. S10454-5 (daily ed. Aug. 1, 1988) (statement of Sen. Edward Kennedy) (The existing fair housing law is a toothless tiger. It recognizes a fundamental right; but it fails to provide a meaningful remedy.); 134 CONG. REC. S10467 (daily ed. Aug. 1, 1988) (statement of Sen. Robert Dole) (“In my view a major reason the fair housing law has not been more effective is that it relies on voluntary conciliation and persuasion. In other words, a law without its teeth.”). *See also* *Trafficante*, 409 U.S. at 210-11 (“HUD has no power of enforcement. So far as federal agencies are concerned only the Attorney General may sue; yet, as noted, he may sue only to correct ‘a pattern or practice’ of housing discrimination [which] creates some limiting factors in his authority . . .”).

gan administration and only 17 in 1987.¹⁷ Recognizing the limits of the FHA's effectiveness, Congress passed the Fair Housing Amendments Act in 1988 ("the 1988 Amendments")¹⁸ "to fulfill the 'empty promise' of fair housing offered by the Fair Housing Act."¹⁹ The 1988 Amendments added two new protected classes: people with disabilities and families with children.²⁰ Most importantly for the purposes of this Article, the 1988 Amendments overhauled the law's enforcement mechanism so that it would no longer be a "toothless tiger."²¹

With respect to enforcement, the 1988 Amendments added an administrative enforcement procedure – in accordance with the Administrative Procedure Act (APA) – with an administrative law judge empowered to impose civil penalties of up to \$10,000 for a first offense, \$25,000 for a second offense within 5 years, and \$50,000 after two or more offenses within the last seven years.²² Far beyond trying to limit the extent to which judicial relief was available for fair housing enforcement, some members of Congress feared that strengthening the administrative enforcement provisions could infringe upon the Seventh Amendment

¹⁷ James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 Yale L. & Pol'y Rev. 348 (1988); See also Martin E. Sloan, *Federal Housing Policy and Equal Opportunity*, in A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES, 133 (1983).

¹⁸ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

¹⁹ WARE, *supra* note 14, at 82 (citing 134 Cong. Rec. S10,454) (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy)).

²⁰ 42 U.S.C. §§ 3604-3606 (2006).

²¹ 134 CONG. REC. S10454-5 (Aug. 1, 1988) (statement of Sen. Edward Kennedy); See also Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. Pa. J. Const. L. 1191, 1193 (2011) ("Improving public and private capacity to resolve discrimination claims was the theory driving Congress's Fair Housing Amendments Act of 1988").

²² 42 U.S.C. § 3612 (g)(3) (2006).

right to a jury trial.²³ An amendment offered by Representative Hamilton Fish, which allowed parties to select whether to proceed administratively or in district court, offered the needed compromise to get the 1988 Amendments passed.²⁴

The 1988 Amendments also expanded the potential of judicial enforcement. Congress eased the burden on complainants exercising private rights of action by removing the \$1,000 cap on punitive damages, requiring no exhaustion for judicial review and authorizing the award of attorneys' fees for all successful plaintiffs.²⁵ Finally, Congress expanded DOJ's enforcement power to include pattern or practice cases as well as "issues of general public importance,"²⁶ with increased civil penalties available.²⁷

While the protections against discrimination based on disability and familial status were urgently needed, these provisions significantly increased HUD's caseload and further slowed down an already protracted investigation process, such that many cases brought administratively are not processed within the 100 days allotted by statute.²⁸ Thus, despite a more comprehensive administrative enforcement process, judicial relief remained the key means of enforcement, significantly aided by the 1988 Amendments.

²³ WARE, *supra* note 14, at 84-85 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-55 (1970); *Cortis v. Loether*, 415 U.S. 189 (1974)).

²⁴ WADE, *supra* note 14, at 86 (citing 134 CONG. REC. H4677-78).

²⁵ See 42 U.S.C. § 3613 (a), (c) (2006).

²⁶ 42 U.S.C. § 3614 (a) (2006).

²⁷ 42 U.S.C. § 3614 (d) (2006).

²⁸ 42 U.S.C. § 3610 (a)(1)(B)(iv). See also WARE, *supra* note 14, at 63. (describing that in Fiscal Year 2012, there were 1,132 "aged" matters that passed the 100 statutory deadline without an outcome pending before HUD, and 3,665 aged matters pending before state and local Fair Housing Assistance Programs); NFHA, TRENDS REPORT, *supra* note 2, at 25.

II. ORGANIZATIONAL STANDING IN FAIR HOUSING CASES

In any lawsuit, including housing discrimination cases, plaintiffs must have standing to bring the case. Article III of the Constitution imposes basic limits on who has standing to bring a lawsuit to ensure that the plaintiff has an actual injury that can be remedied by judicial action. Often, parties must also meet the additional requirements of prudential standing, a set of judge-made limitations on who can bring a lawsuit.²⁹ Where prudential standing limits apply, three general principles must be met. First, the plaintiff should raise his own rights, not the rights of someone not involved in the litigation.³⁰ Second, the court should refrain from deciding “abstract questions of wide public significance” or “generalized grievances” that are better addressed by the President or Congress.³¹ Third, the plaintiff’s complaint should “fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”³² The Supreme Court has explained that these additional requirements apply because:

Without such limitations – closely related to Art. III concerns but essentially matters of judicial self-governance – the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.³³

²⁹ See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (describing prudential standing as judicially self-imposed limits on the exercise of federal jurisdiction).

³⁰ See *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

³¹ *Id.* at 499-500.

³² *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982).

³³ *Warth*, 422 U.S. at 500, (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004)).

Nonetheless, prudential standing limits are not applicable in cases where Congress has designated a private right of action to parties that may be barred under prudential standing rules or where “countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power.”³⁴

Even before the 1988 Amendments, the Supreme Court recognized that Congress intended standing in FHA cases to be “as [broad] as is permitted by Article III of the Constitution” and not include prudential limitations.³⁵ In light of the limited administrative enforcement mechanisms in the original law, the Court noted that “[i]t is apparent . . . that complaints by private persons are the primary method of obtaining compliance with the Act.”³⁶ Under this rubric, a wide range of individual and institutional plaintiffs have been found to have standing under the Act – including fair housing organizations,³⁷ municipalities,³⁸ civil rights testers (individuals who pose as prospective customers to gather information that may be used to determine whether or not a housing provider is engaged in discrimination),³⁹ residents of a neighborhood,⁴⁰ people confronted by dis-

³⁴ *Warth*, 422 at 500-01.

³⁵ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (quoting *Gladstone, Realtors v. Vill. Of Bellwood*, 441 U.S. 91, 109 (1979)); *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

³⁶ *Trafficante*, 409 U.S. at 209; *see also id.* at 211 (“Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits . . .”).

³⁷ *Havens Realty Corp.*, 455 U.S. 363.

³⁸ *Gladstone, Realtors*, 441 U.S. 91.

³⁹ *Havens Realty Corp.*, 455 U.S. at 374.

⁴⁰ *Id.*

crimatory advertising⁴¹ and even housing developers denied the opportunity to build multi-racial housing.⁴²

Organizations can have first-party standing on their own behalf or associational standing on behalf of their members.⁴³ To establish standing on its own behalf, an organization must demonstrate a “concrete and demonstrable injury to the organization’s activities.”⁴⁴ The injury need not be pecuniary or physical in nature⁴⁵ but must be more than a special interest in a particular matter.⁴⁶ The Supreme Court has held that fair housing organizations may establish organizational standing when they show a diversion of resources and/or a frustration of mission fairly traceable to the acts of housing providers.⁴⁷

Even outside of its jurisprudence regarding organizational standing, the Court has recognized that civil rights violations cause widespread injuries that confer standing on persons or entities beyond those who were the direct targets of the discrimination. Thus, organizations whose harm comes from actions intended to identify, address and remedy discrimination have been found to have standing in fair housing and other civil rights contexts.⁴⁸

⁴¹ *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2nd Cir. 1993); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1987); *Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990). *But see* *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590 (10th Cir. 1996); *Ricks v. Beta Dev. Co.*, No. 95-15334, 1996 U.S. App. LEXIS 19743, at *1 (9th Cir. Aug. 1, 1996).

⁴² *Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988).

⁴³ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977); *Havens Realty Corp.*, 455 U.S. 363.

⁴⁴ *Havens Realty Corp.*, 455 U.S. at 379; *See generally* *Lujan v. Defenders of Wildlife*, 504 US 555, 560-61 (1992) (requiring a concrete and particularized injury in fact for Article III standing).

⁴⁵ *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.* 429 U.S. 252, 262-63(1977); *see also* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-10 (1972).

⁴⁶ *See* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

⁴⁷ *Havens Realty Corp.*, 455 U.S. at 379.

⁴⁸ *Id.* at 374 (holding that a tester meets the injury requirement for standing, even though the tester may have approached with expectation of receiving

A. *Why Organizational Standing Matters*

Standing matters because housing discrimination continues across the nation, and the nature of housing discrimination today makes it difficult to detect by individuals. HUD recently published the results of its fourth testing-based study intended to “measure the incidence and forms of discrimination experienced by black, Hispanic, and Asian renters and homebuyers.”⁴⁹ Through more than 8,000 tests in 28 metropolitan areas across the country, the study found that housing discrimination remains a national problem, as neither the incidence nor severity of discrimination was substantially different across different parts of the country.⁵⁰

HUD’s study also found that housing discrimination has changed over time, as blatant door-slamming has given way to less easily detectable discrimination, such as providing information about fewer units to African American and Latino homeseekers than to whites.⁵¹ The discrimination most prevalent today generally requires more sophisticated investigations and comparisons of treatment to detect, resulting in HUD concluding that “enforcement strategies should not rely primarily on individual complaints of suspected discrimination.”⁵² One of the study’s recommendations is that fair housing groups should conduct more testing investigations in an effort to “reveal discriminatory practices that would otherwise go unpunished” and to encourage housing providers to comply with the law for fear

false information, without an intention of purchasing or renting); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (in challenge to segregated buses, plaintiff still had standing even though he “may have boarded this particular bus for the purpose of instituting this litigation”).

⁴⁹ *Housing Discrimination Against Racial and Ethnic Minorities 2012: Executive Summary*, U.S. DEP’T OF HOUS. & DEV., June 2013, at 1-2. [hereinafter HDS 2012].

⁵⁰ HDS 2012, *supra* note 49, at 8.

⁵¹ *Id.* at 12.

⁵² *Id.* at 13.

of being tested.⁵³ To eradicate housing discrimination and segregation, HUD's study recommends a "multipronged strategy that includes vigorous enforcement of anti-discrimination protections along with education. . .neighborhood reinvestment. . .and new incentives to encourage and nurture stable diversity."⁵⁴

Fair housing organizations play a unique role because they both take the laboring oar in fair housing investigations and enforcement and do much of the education and outreach on fair housing issues nationwide. This combination enables them to learn quickly about the changing face of discrimination in the communities in which they work and redress that discrimination. They have made a profound impact on fair housing law because they have been able to file lawsuits on their own behalf and to recover for their own injuries. Fair housing organizations can undertake systemic investigations and uncover larger scale discrimination than individuals could, and, as a result, they can have a broader impact on the market. While many housing providers want to comply with the law and remedy any discrimination they or their agents perpetrate, the ability of fair housing organizations to pursue litigation on their own behalf ensures that fair housing organizations can shoulder the lion's share of enforcement with the law, as Congress intended them to do.

For example, for the past decade, the Equal Rights Center (ERC)⁵⁵ has investigated multi-family housing units and buildings to determine whether they were built in compliance with the Fair Housing Act's design and construction provisions.⁵⁶ As a result of negotiated resolutions and litigation, the ERC has

⁵³ *Id.*

⁵⁴ *Id.* at 14.

⁵⁵ The Equal Rights Center is a national civil rights organization headquartered in Washington, DC. While it engages in a multifaceted civil rights practice with the mission of promoting equal opportunity in housing employment, access to public accommodations, and government services, it is also the private fair housing organization responsible for investigating housing discrimination complaints in the metro DC area.

⁵⁶ 42 U.S.C.A. § 3604 (3)(c), (4) (West 2014).

ensured that more than 60,000 housing units comply with the accessibility requirements of the Fair Housing Act. While housing developers generally want to ensure that their buildings are accessible to people with disabilities, remediating inaccessible units can be very expensive. As a result, purely voluntary remediation on a large-scale would have been unlikely if the courthouse doors had been closed to the ERC. While the DOJ also files lawsuits alleging design and construction violations,⁵⁷ fair housing organizations such as the ERC do the bulk of the investigating and remedying this type of discrimination to ensure that housing providers comply with the law and make their units accessible to people with disabilities.

The ERC has also made a profound difference in ensuring fair housing for low-income residents in the District of Columbia, largely as a result of its ability to enforce fair housing laws in court. The District of Columbia has a robust Human Rights Act, which prohibits, among other things, discrimination in housing based on source of income.⁵⁸ While all legal sources of income are protected under the law, participants in the Housing Choice Voucher Program (more commonly known as Section 8) have been especially targeted for discrimination, despite clear protections by the D.C. Human Rights Act.⁵⁹ The ERC has conducted both systemic and targeted investigations of housing providers throughout the District and, during the last decade, has successfully resolved over 75 source-of-income discrimination matters, resulting in the opening of 15,000 units to voucher holders in the D.C. metro area.

B. Jurisprudential Trends

While the 1970s were arguably a ‘golden era’ for private enforcement of civil rights generally, “[t]he private attorney gen-

⁵⁷ NFHA, TRENDS REPORT, *supra* note 2, at 31-32.

⁵⁸ D.C. Code § 2-1402.21(a) (2009).

⁵⁹ *See also* D.C. Code § 2-1402.21(e) (2009).

eral soon faced a multilevel assault by the courts and Congress.”⁶⁰ In 1992, the Supreme Court decided *Lujan v. Defenders of Wildlife*, which held in an environmental law “citizens’ suit” that Congress could only grant standing to plaintiffs who had an injury in fact.⁶¹ In 1996, Congress restricted the ability of legal services offices that receive federal funding from participating in impact litigation.⁶² In 2001, the Supreme Court decided *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, which limited the availability of attorneys’ fees in civil rights cases that are resolved without a court order.⁶³ Finally, in 2005, Congress limited class action litigation through legislation called the Class Action Fairness Act.⁶⁴ Collectively, these measures erected unprecedented barriers to enforcing all types of civil rights laws, including fair housing laws.

Lujan dramatically impacted standing jurisprudence and not just in the civil rights context.⁶⁵ Nonetheless, post-*Lujan* courts have continued to uniformly recognize that organizations have standing to enforce FHA violations. However, the lack of clarity in organizational standing jurisprudence generally has resulted in some variation between courts on the type and extent to which resources need to be diverted in order to establish harm to the organization. In some cases, a diversion of any resources

⁶⁰ Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 443 (2007).

⁶¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁶² 42 U.S.C. § 2996e(d)(5) (2006).

⁶³ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

⁶⁴ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 114 Stat. 4.

⁶⁵ Cass Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) (“[T]he decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.”).

was found sufficient for standing;⁶⁶ in others, the court required an expenditure of resources on organizational activities independent of litigation costs;⁶⁷ and still other courts have chosen a middle ground in which resources expended on legal efforts were considered but not decisive.⁶⁸

Further complicating matters is the varying case law regarding standing in other civil rights cases, some of which include dicta regarding the Fair Housing Act. In a recent Title VII employment discrimination case, the Supreme Court curtailed standing to parties within that law's "zone of interest," thus bringing prudential standing limitations back into the discussion. In *Thompson v. North American Stainless*,⁶⁹ in which the plaintiff was fired after the defendant discovered that plaintiff's coworker/financée had filed a sex discrimination complaint with the Equal Employment Opportunity Commission, the Court concluded third party retaliation could violate Title VII and that, as an employee and an intentional victim of retaliation, Thompson was a "person aggrieved" within the zone of interest that Title VII protected. While, in *Trafficante v. Metropolitan Life Insurance Co.*,⁷⁰ the Court had stated that the FHA's "person aggrieved" provision eliminated prudential limitations and suggested in dictum that "person aggrieved" was the same in the Title VII context. In *Thompson*, the Court characterized this dictum as "too

⁶⁶ See, e.g., *Ragin v. MacKlowe Real Estate Co.*, 6 F.3d 898, 903-05 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

⁶⁷ See *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 74 (3rd Cir. 1998); *Ass'n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241 (5th Cir. 1994); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

⁶⁸ See *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490, 493-94 (D.Md. 1996); *Saunders v. Gen. Servs. Corp.*, 659 F.Supp. 1042, 1051-52 (E.D. Va. 1986); see also Dash Douglas, *Standing on Shaky Ground Under the Fair Housing Act*, Akron L. Rev. (2001).

⁶⁹ *Thompson v. North Am. Stainless, LP*, 131 S.Ct. 863, 870 (2011).

⁷⁰ *Trafficante*, 409 U.S. 205, 209 (1972).

expansive” and “ill considered,” looking instead to the zone of interest standard in the APA for Title VII standing.⁷¹

Given the legislative and judicial history of the FHA and the FHA Amendments, it is clear that an expansive view of standing – one that “extend[s] to the full limits of Art. III”⁷² – is appropriate in FHA actions. Regardless, fair housing organizations are unquestionably within the zone of interest that the FHA protects. For example, unlike employment discrimination, fair housing violations have a broader impact, and Congress recognized the interest of organizations and others in having a diverse community.⁷³ Looking to the APA for guidance as the *Thompson* Court does, civil rights organizations have successfully brought APA actions against HUD for failing to affirmatively further fair housing in violation of 42 U.S.C. § 3608(d).⁷⁴

Notably, the federal agencies with FHA enforcement powers have consistently recognized the importance and value of private enforcement, including through organizational standing.⁷⁵

⁷¹ *Thompson*, 131 S.Ct. at 870.

⁷² *Havens Realty Corp.*, 455 U.S. at 372.

⁷³ *Trafficante*, 409 U.S. at 210 n. 10 (“While members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.” (citing Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, S. 1358, S. 2114, and S. 2280, 90th Cong., 1st Sess. (1967))).

⁷⁴ See *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154-55 (1st Cir. 1987); See also *infra* Part IV at 12 (discussing the APA as mechanism to enforce § 3608) (discussing the APA as a mechanism to enforce § 3608).

⁷⁵ See, e.g., Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Reversal, *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136 (D.C. Cir. 2011) (No. 09-5359), available at <http://www.justice.gov/crt/about/app/briefs/equalrightscenter.pdf>; Brief of the United States as Amicus Curiae in Opposition to the District of Columbia’s Motion to Dismiss, *2922 Sherman Avenue Tenants’ Ass’n v. District of Columbia*, Civ. No. 1:00-CV-00862 (D.D.C. June 12, 2001) (arguing that four tenant associations had standing to bring claims on their own behalf as well as on behalf of their members), available at http://www.justice.gov/crt/about/hce/documents/amicus_sherman.php; Brief of the United States as Amicus Curiae in Support of

As Congress recognized when passing the Act, the federal government simply lacks the resources to effectively enforce the FHA on its own.⁷⁶

Moreover, Congress has recently reiterated its intent to provide for strong enforcement of the Fair Housing Act, including that the law's application be "broad and inclusive."⁷⁷ In a resolution to honor the 40th anniversary of the Fair Housing Act in 2008, Congress noted that "fair housing education and enforcement play a pivotal role in increasing housing choice and minority home ownership and combating predatory lending" and encourages "all people and levels of government to rededicate themselves to the enforcement and ideals of fair housing laws."⁷⁸

III. ARTICLE III STANDING ALLOWS FOR EFFECTIVE IMPLEMENTATION AND MONITORING OF FHA COMPLIANCE

Identifying and addressing housing discrimination requires ongoing monitoring by entities with appropriate expertise. Mod-

Appellee, *Fair Hous. of Marin v. Combs*, 285 F.3d 899 (9th Cir. 2002) (Nos. 00-15925 & 00-17040) (arguing that Fair Housing of Marin had organizational standing, stating that the United States has "an interest in ensuring the availability of such private enforcement actions, consistent with the statute and the Constitution"), available at <http://www.justice.gov/crt/about/app/briefs/marin.htm>; see also Thomas E. Perez, Assistant Attorney Gen. for Civil Rights, Remarks at the National Fair Housing Policy Conference (July 20, 2010), available at http://www.justice.gov/crt/speeches/perez_fairhousingpolicyconf_speech.php ("Last week we filed an amicus brief in the DC Circuit in *ERC v. Post Properties* to make clear that fair housing groups who divert resources to combat discrimination they have discovered do meet Article III standing to sue. The Justice Department understands the importance of supporting the legal principle that fair housing groups have standing to sue.").

⁷⁶ In 2012, the Department of Justice filed 36 fair housing cases and 1,817 claims and complaints were filed with HUD only 6% of the complaints or claims filed that year. NFHA, Trends Report, *supra* note 2, at 17.

⁷⁷ H.R. Res. 1095, 110th Cong. (2008).

⁷⁸ *Id.*

ern discriminatory housing practices rarely involve blatant “no ___ allowed” statements. However, through actions such as offering different rates or terms of lease or sale, steering and misrepresentations of availability, housing discrimination remains pervasive. Judicial action has been the most effective means of addressing this societal ailment, primarily through organizations that have the knowledge and capacity to gather evidence, propose effective remedies and monitor compliance.

The predominant insidious modes of discrimination make it nearly impossible for individuals to discern, on their own, whether they were treated differently because of a protected characteristic. Rather, the most effective means of identifying discrimination and the most compelling evidence of discrimination in enforcement actions are civil rights tests.⁷⁹ Civil rights testing is an investigatory tool used by fair housing organizations and government agencies to identify differences in treatment accorded to home seekers who are similar in every material respect except the variable being tested (*e.g.*, race, color, national origin, disability). As one court noted, “the evidence provided by testers is frequently valuable, if not indispensable” to proving a fair housing violation.⁸⁰

Fair housing organizations regularly conduct civil rights tests both to investigate complaints that are lodged by individuals and to identify discriminatory practices that are less likely to be reported. As discrimination is most commonly endured by members of marginalized or disenfranchised communities, the individuals at the greatest risk are also among those least likely to report, particularly to a government entity. Moreover, victims of emerging forms of discrimination – such as people with limited English proficiency (a proxy for national origin discrimination) – are less likely to understand that the discrimination they experienced may be illegal. Thus, discrimination they endure

⁷⁹ See NHFA, TRENDS REPORT, *supra* note 4, at 5-7.

⁸⁰ Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983), *See also* Hamilton v. Miller, 477 F.2d 908, 910 n.1 (10th Cir. 1973).

may remain unchecked until an advocacy group identifies and enforces their rights.

Article III requirements for organizational standing effectively balance the need for strong enforcement mechanisms with protections against opening the floodgates to frivolous litigation. The organizational injury required – whether a diversion of resources, a frustration of mission or something else – will inherently involve documenting and/or confirming discrimination with a higher level of evidentiary support than most individual complainants can gather, often coupling testing with outreach to individuals who have been or are at risk of being discriminated against by the alleged wrongdoer.

Article III standing without prudential limits enables organizations to enforce fair housing laws and to encourage more proactive remedial action, as well as weed out inappropriate cases. The ERC and other fair housing organizations' efforts to secure reasonable accommodations for people with disabilities illustrate this practice. Reasonable accommodations can take a variety of forms such as a guide dog or therapy animal in a “no pets” building or an accessible parking spot in the garage. As long as there is a nexus between the accommodation and the person's disability, and providing that the accommodation does not impose an undue financial or administrative burden, a housing provider must grant the accommodation. While in many instances a fair housing organization can secure the accommodation for a resident simply by providing sufficient information and advocacy informally, refusing to grant a reasonable accommodation is also one of the most powerful ways that housing providers discriminate against people with disabilities and effectively refuse to rent to them. Fair housing organizations and disability advocacy groups are uniquely equipped with the expertise and resources to counteract dismissive responses by housing providers and to ensure that enforcement efforts result in policies and practices that provide equal access for both current and prospective tenants.

Whether due to a discriminatory intent or a more innocuous resistance to change, housing providers are sometimes reluctant to modify policies or to invest in the training and supervision needed to implement fair housing practices. The power of fair housing organizations to seek enforcement of civil rights laws without prudential limits on standing encourages housing providers to remediate discrimination when discovered, avoiding the likelihood of litigation and additional damages for ongoing violations.

IV. CONGRESS SHOULD SUPPLEMENT THE BROAD STANDING FOR ENFORCEMENT ACTIONS UNDER THE FHA TO INCLUDE A PRIVATE RIGHT OF ACTION FOR FAILING TO AFFIRMATIVELY FURTHER FAIR HOUSING

Maintaining a broad standing requirement for FHA enforcement is an important tool in the fight to end housing discrimination. However, to foster “truly integrated and balanced living patterns,”⁸¹ organizations and individuals should be granted a private right of action to address failures to affirmatively further fair housing.

The FHA requires federal agencies and the housing-related programs and activities that they fund to operate “in a manner affirmatively to further fair housing.”⁸² Regulations implementing this provision specify that local jurisdictions receiving federal funds must conduct an analysis to identify impediments to fair housing choice, take appropriate actions to overcome the impediments identified, and maintain records reflecting the analysis and actions taken.⁸³

⁸¹ 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

⁸² 42 U.S.C. § 3608(d), (e)(5) (2006); *See also* Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994); Exec. Order No. 12,259, 3 C.F.R. 307 (1981).

⁸³ 24 C.F.R. §§ 91.225, 570.601 (2010); *See also* U.S. DEP'T HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE, VOL. I (1996), available at www.disasterhousing.gov/offices/fheo/images/fhpg.pdf.

Nevertheless, similar to FHA compliance generally before the 1988 Amendments, enforcement of the affirmatively furthering provision remains ineffectual in practice.⁸⁴ Some federal programs not only fail to affirmatively further fair housing but also exacerbate the problem by creating or maintaining segregated housing patterns.⁸⁵ Local governments and public housing authorities continue to develop low income housing in places that encourage racial segregation and that increase majority-minority populations in high poverty areas, which in turn negatively impacts the private housing market and metropolitan communities as a whole.⁸⁶

HUD's policing of the use of federal funds to ensure that they comply with § 3608(e)(5) relies primarily on certifications made by the federal fund recipient, often resulting in deference to local governments and agencies that have been part of the problem.⁸⁷ A 2010 report from the Government Accountability Office estimated that 29% of all analyses of impediments are outdated and that most lack needed and required accountability measures, such as time frames for implementing recommendations or the signature of top elected officials.⁸⁸

The FHA contains no administrative procedure for HUD to accept a private complaint based on a failure to comply with the

⁸⁴ Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2136 (2010); NAT'L COMM. ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 37 (2008), available at http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf.

⁸⁵ NAT'L COMM. ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 84 at 37; See also NFHA, TRENDS REPORT, *supra* note 4, at 12.

⁸⁶ COLLINS, *supra* note 84, at 2147-48.

⁸⁷ *Id.* at 2149-50; NAT'L COMM. ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 84, at 44.

⁸⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), available at www.gao.gov/new.items/d10905.pdf.

FHA's affirmatively furthering requirement, nor does the law provide the Department of Justice with authority to enforce this provision. Private fair housing organizations, which understand the problems in their communities and know the extent to which local agencies are trying to fulfill their affirmatively furthering fair housing obligations, are the best suited to identify and address affirmatively furthering violations.

Without any private right of action in the affirmatively furthering provision, fair housing organizations have looked to three other federal laws to enforce affirmatively furthering violations: the APA,⁸⁹ the False Claims Act (FCA) and 42 U.S.C § 1983. Using these statutory provisions to enforce fair housing obligations, however, has presented significant and sometimes insurmountable barriers.

APA claims are limited to the review of federal agencies' actions or inactions and therefore provide for no relief directly against state or local government agencies or public housing authorities. Even when reviewing a federal agency's activities, the standard of review is highly deferential, generally limited to acts that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁹⁰ "HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII's goals."⁹¹ Even when an abuse of this discretion is found – typically in cases where HUD continues to fund a housing authority that it knows is maintaining segregated projects⁹² – the waiver of sovereign immunity in APA cases is limited to actions seeking relief other than monetary damages.⁹³

⁸⁹ 5 U.S.C. §§ 701-706 (2006).

⁹⁰ 5 U.S.C. § 706(2)(a) (2006).

⁹¹ N.A.A.C.P., Boston Chapter v. HUD, 817 F.2d 149, 158 (1st Cir. 1987).

⁹² Robert G. Schwemm, HOUSING DISCRIMINATION LAW AND LITIGATION § 21:7 (2010).

⁹³ 5 U.S.C. § 706 (2006).

The FCA also imposes an unduly high evidentiary burden, requiring a private party to establish that the fraud was knowingly committed⁹⁴ and to rely on evidence not readily available to the public.⁹⁵ The first, and most successful, private suit regarding the failure to affirmatively further fair housing was brought under the FCA against Westchester County, New York.⁹⁶ In that case, the plaintiff Anti-Discrimination Center of Metropolitan New York had obtained whistleblower information from County employees,⁹⁷ something rarely available. Enforcing affirmatively furthering obligations using the FCA is further limited because a municipality may be liable under the FCA, but FCA claims cannot be brought against a state.⁹⁸

On its face, private enforcement actions against local governments and public housing authorities under 42 U.S.C. § 1983 do not appear to pose the same problems as actions brought under the APA or the FCA. Section 1983 was created to “provide[] a powerful private cause of action, which courts have broadly interpreted as extending to multiple levels of state and local bodies, and conferring a right to a jury trial and attorney fees” as well as the flexibility to provide monetary, punitive, injunctive and declarative relief.⁹⁹ However, recent case law has limited

⁹⁴ 31 U.S.C. § 3729(a) (2006).

⁹⁵ 31 U.S.C. § 3730(e)(4) (2006).

⁹⁶ *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F.Supp. 2d 538 (S.D.N.Y. 2009) (denying summary judgment). The government ultimately intervened and entered a consent decree with the county, dismissing the FCA claim. Stipulation & Order of Settlement & Dismissal, *Westchester County*, 688 F. Supp. 2d 548 (No. 06-cv-2860-DLC), available at <http://www.hud.gov/content/releases/settlement-westchester.pdf>.

⁹⁷ False Claims Act Complaint and Demand for Jury Trial at ¶¶ 47-49, *Westchester Cnty.*, 688 F.Supp. 2d 548 (No. 06-cv-2860-DLC), available at http://www.antibiaslaw.com/sites/default/files/files/WestchesterFCAcomplaint_0.pdf.

⁹⁸ *Compare* *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) *with* *Cook County Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 128-29 (2003).

⁹⁹ COLLINS, *supra* note 84, at 2153.

Section 1983 enforcement to statutory provisions with an “unambiguously conferred right.”¹⁰⁰ Whether 42 U.S.C. § 3608(e)(5), the affirmatively furthering fair housing provision, provides such a right is an unresolved question among the courts. While some have argued that a pragmatic textual analysis supports enforceability under Section 1983,¹⁰¹ courts adopting a strict textual inquiry have held that Section 3608(e)(5) is not enforceable through Section 1983.¹⁰²

Amending the Fair Housing Act to expressly provide a private right of action for those aggrieved by a failure to affirmatively further fair housing in violation of 42 U.S.C. § 3608(e)(5) – or otherwise altering the language of § 3608(e)(5) to unambiguously provide for Section 1983 enforcement – would enable fair housing organizations to consistently hold local governments and public housing authorities accountable in their duty to redress policies and practices that create or maintain the status quo of segregated and discriminatory housing.

V. CONCLUSION

While housing discrimination based on race and other protected characteristics remains unconscionably high, the fair housing community has made notable strides in improving equal access to housing. According to the U.S. Census Bureau, between 1980 and 2000, racial segregation of African Americans decreased by at least 1% each decade, a “slow, but steady” rate that was considered substantive.¹⁰³ This progress can be attrib-

¹⁰⁰ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

¹⁰¹ *See, e.g., Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 718 (N.D. Ill. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002); *See also COLLINS, supra* note 84, at 2175-80.

¹⁰² *See, e.g., S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 WL 4595369, at *49-52 (D. Mass. Sept. 30, 2008); *Thomas v. Butzen*, No. 04 C 5555, WL 2387676, at *16-17 (N.D. Ill. Sept. 26, 2005).

¹⁰³ John Iceland, Daniel H. Weinberg & Erika Steinmetz, U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED

uted in large part to the availability of private enforcement mechanisms.¹⁰⁴ Even in HUD fair housing investigations where the FHA allows a party to elect whether to have the case heard before an administrative law judge or a federal district judge, the majority of complainants and respondents choose federal court because of its increased effectiveness.¹⁰⁵

Congress has recognized, and more than four decades of case law has confirmed, that it is only through private enforcement that the promise of equal housing opportunity for all will become a reality. “There are fewer private fair housing organizations than federal, state and local government agencies, yet these private fair housing organizations continue to investigate nearly twice as many complaints with far less money.”¹⁰⁶ Without strong avenues for these organizations to enforce FHA violations, countless acts of discrimination will go unredressed, and few wrongdoers will be held accountable for their discriminatory practices.

STATES: 1980-2000 72 (2002). *See also* Margery A. Turner et al., REPORT TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 (2002) (finding 22% rate of housing discrimination against African Americans in 2000, a 4% decrease since 1989).

¹⁰⁴ Stephen L. Ross & George C. Galster, *Fair Housing Enforcement and Changes in Discrimination between 1989 and 2000: An Exploratory Study* 13 (Univ. of Conn., Dep’t of Econ., Working Paper No. 200516, 2005), available at http://digitalcommons.uconn.edu/econ_wpapers/200516 (“In sum, it appears that more effective enforcement of fair housing laws does have a measurable impact. Indeed, we therefore conclude that at least part of the observed general reduction in housing market discrimination against blacks 1989-2000 may be attributed to such enhancements”).

¹⁰⁵ NFHA, TRENDS REPORT, *supra* note 2, at 22 (showing that between 2005 and 2012, HUD issued 357 charges following investigations in which it was determined that there was reasonable cause to believe discrimination had occurred); NFHA, TRENDS REPORT, *supra* note 2, at 24-25 (illustrating that during that same period, only 51 matters have resulted in ALJ consent orders following administrative hearings).

¹⁰⁶ *Id.* at 34.

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