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TESTIMONY OF JOHN P. RELMAN, ESQ.

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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ENFORCING THE FAIR HOUSING ACT

Testimony of
John P. Relman, Esq.
Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
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Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee: My name is John Relman, and I am the managing partner of Relman & Dane, PLLC, a civil rights law firm based here in Washington, D.C. Our firm litigates discrimination cases across the country. We are known for our representation of victims of housing and lending discrimination, but our practice includes cases involving discrimination in employment, places of public accommodation, racial profiling, police misconduct, and other areas covered by federal and state civil rights laws. Before founding Relman & Dane, I served as Director of the Fair Housing Project at the Washington Lawyer's Committee for Civil Rights and Urban Affairs, and as a staff attorney at the National office of the Lawyers' Committee for Civil Rights.

At a time of turmoil in the housing markets, with unprecedented numbers of foreclosures devastating minority communities in cities across the country, it is particularly important that Congress hears from fair housing advocates and those familiar with the operation of the Fair Housing Act to determine how this important civil rights law can be strengthened to better serve all protected groups and classes. These hearings further that purpose, and I thank you both for convening these proceedings and for the opportunity to testify before the Subcommittee.

My testimony addresses two topics: (1) discriminatory housing practices directed towards the disability community; and (2) the role of private firms in recent, large fair housing enforcement actions.

Disability Issues

A. Making Government Enforcement a True "National Commitment"

The Fair Housing Act ("FHA") has prohibited disability discrimination for 22 years, yet hundreds of thousands of people with disabilities remain stranded in institutional or inaccessible settings because of architectural and attitudinal barriers.

When it passed the Fair Housing Amendments Act of 1988, Congress boldly proclaimed that the new law was:

> [A] clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.Rpt. 100-711, at p. 18, reprinted at 1988 U.S.C.C.A.N 2173, 2179.

Just as the FHA was a powerful force for racial integration in America, it was also intended to promote the integration of people with disabilities. For people with disabilities, "integration" means being part of the "American mainstream," and not being treated unfavorably because of a housing provider's biases or stereotypes about disability. Vigorous and timely enforcement of the FHA is especially important in the context of disability because a single discriminatory act (whether it be disparate treatment, the refusal to accommodate, or inaccessible design and construction) can be the difference between someone being housed in an integrated setting and being relegated to a more institutional setting like a nursing home, assisted living, group home, or other segregated housing set aside for people with disabilities.

Twenty-two years after the Amendments, governmental enforcement of the FHA's disability provisions still does not begin to approach the level of a "national commitment." The

Obama Administration inherited a bureaucratic environment from the last Administration that has left a backlog of complaints languishing on the desks of investigators, some of whom clearly do not understand the basic elements of a disability discrimination claim and have not been told to prioritize these claims for people who find themselves living unnecessarily in institutional settings or in housing that is inaccessible.

Under the leadership of Assistant Attorney General Tom Perez and HUD Secretary Shaun Donovan, the Obama Administration is taking important steps to improve enforcement of the FHA's disability protections. But because discrimination against people with disabilities remains rampant—more fair housing complaints allege disability discrimination than any other protected class—the Administration needs private civil rights firms as enforcement partners.

Relman & Dane, for example, has just fourteen lawyers running a national civil rights practice, yet we have – for ten years now – prosecuted complicated and cutting edge cases involving disability and all other protected classes. Last November we settled one of the largest design and construction accessibility cases under the FHA.[1] The case was filed in 2007, on behalf of the National Fair Housing Alliance and four of its member agencies, against the A.G. Spanos Companies for accessibility violations at 123 apartment complexes in 14 states. After vigorous and successful litigation, we won a stipulated judgment providing for retrofits of 12,300 units and accessibility funds of nearly $5 million to provide greater accessibility for people living in their own homes or units not built by Spanos. Together with similar litigation by the Equal Rights Center and the U.S. Department of Justice, the Spanos litigation alerted the design and building industries that noncompliance with the FHA's accessibility requirements will not be tolerated.

B. Revising the FHA and Regulations to Address Other Areas of Concern for People with Disabilities

Beyond problems with design and construction, people with disabilities also face a rash of other problems, including differential treatment, facially neutral rules that have a harsher (disparate) impact on them, and refusals by owners to grant "reasonable accommodations" in rules and policies, or to permit "reasonable modifications" of units and common areas to increase accessibility. In addition, we have seen a growing number of cases involving retirement housing providers imposing rules and policies that discriminate on the basis of disability in the application and screening, assignment and transfer of residents. There also appears to be widespread use of advertisements for "active adults" and those capable of "living independently without assistance." Policies and practices such as these discourage people with disabilities from applying and living in communities with people who do not have disabilities.

Another area of significant concern is widespread noncompliance with accessibility requirements in housing built with federal funds. Despite high-profile enforcement actions in recent years against public housing authorities in Baltimore, Washington, D.C. and Philadelphia, we continue to receive reports of major cities deploying millions of dollars of Community Development Block Grant and HOME funds without enforcing accessibility requirements. We are currently investigating a matter where the city's failure to enforce these obligations has resulted in wheelchair users living in nursing homes and homeless shelters.

In many of these situations, the FHA already provides sufficient substantive protections, and the principal question is one of enforcement. There are, however, a number of areas in which the Fair Housing Act or the HUD regulations that govern its enforcement could be clarified and strengthened. For instance:

- The U.S. Court of Appeals for the Ninth Circuit has adopted a cramped view of the FHA's statute of limitations provision, barring litigation of design and construction violations that are identified more than two years after the date of the final occupancy permits. *Garcia v. Brockway*, 526 F.3d 456 (11th Cir. 2008). The effect of this interpretation is to let designers and developers off the hook for blatant violations (that will be in place for many decades and prevent access for people with disabilities) so long as they can avoid detection in the first two years of operation. By correcting this interpretation, Congress can significantly expand the number of apartment and condo units in which people with mobility impairments are able to live.

- People in recovery from drug and alcohol addiction still face widespread opposition to the presence of recovery group homes in residential neighborhoods. This often takes the form of discriminatory enforcement of zoning, land use and building ordinances. Discriminatory enforcement by municipalities that receive federal funds may be in violation of the municipalities' certifications that they will "affirmatively further fair housing." 42 U.S.C. §3608. The FHA, however, does not provide a private cause of action to enforce §3608. This in turn limits the ability of private parties to hold violators responsible for their actions. Congress can improve enforcement of this and other FHA obligations by amending the definition of "discriminatory housing practice" provided in 42 U.S.C. §3602 to include "a failure to comply with the obligations of section 3608(e)(5)."

- Financial condition is often affected by disability because the latter may limit one's ability to work. As a consequence, many people with disabilities depend on rental subsidies, such as the Housing Choice Voucher program to live in decent, safe, affordable and accessible housing. But the FHA does not explicitly prohibit a landlord from simply refusing to accept vouchers. Congress can end this practice by adopting a prohibition on "source of income" discrimination similar to the one in the Low Income Housing Tax Credit program administered by the Department of the Treasury.

C. Joint Statements

HUD and DOJ should expand their use of "Joint Statements" on enforcement policy. The Joint Statements on group homes, reasonable accommodation, and reasonable modification have proven enormously helpful. They have been used by thousands of advocates and people with disabilities to secure rights protected under the FHA, without the need to hire a lawyer or file a complaint. It is all the more puzzling, therefore, why HUD has not taken a similar approach in other areas, particularly with issues of limitations and continuing violations theory in new

construction, and the application of the FHA's disability provisions to assisted living and continuing care retirement communities.

The Role of Private Firms in Fair Housing Enforcement

Over the past few years, private law firms have played an important role in securing landmark fair housing judgments and settlements across the country. Relman & Dane has been involved in a number of these important cases. Since 2008, the decisions and settlements include:

- A $10.8 million jury verdict on behalf of an African American community in Zanesville, Ohio that had been denied access to public water for more than 50 years;[2]
- A summary judgment ruling in a fair housing case in Westchester County, New York that led to a $52 million settlement requiring Westchester to satisfy its duty to affirmatively further fair housing by building affordable housing in areas of the County that are less than 3 percent African American;[3]
- Three findings of contempt against St. Bernard Parish in Louisiana for denying an affordable housing provider the right to build multi-family housing that would serve African American renters;[4]
- Lawsuits against Wells Fargo for targeting African American neighborhoods in Baltimore and Memphis for unfair and predatory loans;[5] and
- The landmark Spanos design and construction settlement discussed above.[6]

The questions may fairly be posed, why has so much recent important fair housing litigation been the product of private enforcement efforts, and how, if at all, is this development related to current

or past enforcement efforts by the federal government?

Historically, the Housing and Civil Enforcement Section of the Civil Rights Division at the Department of Justice has taken the lead in bringing fair housing cases in federal courts around the country. Relying on the skill and expertise of career litigators in the Civil Rights Division, DOJ's enforcement efforts remained fairly constant and effective through both Democratic and Republican Administrations alike, until 2001.

All of this changed for the worse during the last Republican Administration. Enforcement efforts eroded significantly, not due to the lack of effort or commitment by career attorneys in the Civil Rights Division who managed to stay, but due to the departure of many other experienced career attorneys who found the environment no longer hospitable to the principles they had committed to. The result was both a lack of resources needed to identify and litigate new cases, and an absence of leadership needed to conceive and develop new litigation strategies. From 2001 to 2008, this responsibility fell increasingly to private civil rights firms, like Relman & Dane, which possessed the expertise and resources needed to take on difficult and complex cutting edge fair housing cases.

In one sense, this development simply reinforced what both Congress and the Supreme Court understood to be the role of private parties in enforcing the Fair Housing Act. As Justice Douglas stated in one of the first fair housing cases decided by the High Court after passage of the Fair Housing Act, "[C]omplaints by private persons are the primary method of obtaining compliance with the Act. . . . [T]he enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, [and] the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorneys

general in vindicating a policy that Congress considered to be of the highest priority.'" *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-11 (1972).

The reality in the years that followed Justice Douglas's opinion in *Trafficante* proved both prescient and understated – prescient, because private parties and firms played an important role in enforcing the Act; understated, because the role of the Department of Justice proved to be far more important than either Justice Douglas or Congress might have imagined.

The good news is that the Obama Administration has renewed the federal government's commitment to fair housing enforcement in significant and vital ways. Assistant Attorney General Tom Perez and Secretary Shaun Donovan have committed their departments to agendas that incorporate many of the issues at the heart of the cases listed above. The affirmatively furthering fair housing claims that underlay the Westchester County and St. Bernard Parish cases have become a central focus of Secretary Donovan's efforts; and the Obama Justice Department played an important role in securing the $52 million Westchester County settlement last fall. Assistant Attorney General Perez has opened 45 new lending discrimination investigations, and announced that predatory lending targeted at minority communities will be a priority enforcement area for his Civil Rights Division. Perhaps most important, the Civil Rights Division has begun hiring new attorneys to fill the void left by the last administration, and has received funding for a substantial number of new positions.

Recent experience demonstrates that, sadly, discrimination in housing remains a persistent and inveterate problem in American life. There is more than enough work to be done by both the federal government and private civil rights firms. The challenge remains in figuring out how best to coordinate private and government enforcement efforts so that each makes the task of the other

easier. Going forward, certain things are clear:

First, Congress must provide the Department of Justice and HUD with the funding needed to fully staff its enforcement work.

Second, Congress must adequately fund the Fair Housing Initiatives Program to ensure that fair housing organizations have sufficient resources to investigate and test to determine whether housing providers are violating the law.

Third, the Civil Rights Division must redouble its efforts to coordinate federal, state, and municipal efforts to enforce fair housing laws, working closely wherever possible with experienced, private civil rights law firms to investigate and prosecute fair housing cases. The promise and purpose that Congress envisioned for the Fair Housing Act will not be fulfilled by either the public or private side working alone – this undertaking requires a true collaboration in all respects.

Thank you for allowing me to share these views with the Subcommittee.

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[1] *See Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., Inc.*, No. 4:07-cv-3255-SBA (N.D. Cal. Nov. 20, 2009) (Stipulated Judgment).

[2] *See Kennedy v. City of Zanesville*, No. 2:03-cv-01047 (S.D. Ohio Aug. 27, 2008) (Amended Clerk's Judgment).

[3] *See United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County*, No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009) (Stipulation and Order of Settlement and Dismissal).

[4] *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish,* No. 06-7185, 2009 WL 2177241 (E.D. La. July 22, 2009); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish,* 648 F. Supp. 2d 805 (E.D. La. 2009); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 06-7185, 2009 WL 2969502 (E.D. La. Sept. 11, 2009).

[5] *See Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-cv-00062 (D. Md. July 2, 2009) (First Amended Complaint); *City of Memphis v. Wells Fargo Bank, N.A.*, No. 2:09-cv-02857 (W.D. Tenn. Dec. 30, 2009) (Complaint).

[6] *See Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., Inc.*, No. 4:07-cv-3255-SBA (N.D. Cal. Nov. 20, 2009) (Stipulated Judgment).