

**Testimony before the
House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

“Protecting the American Dream: A Look at the Fair Housing Act”

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“Protecting the American Dream: A Look at the Fair Housing Act”

Good afternoon. My name is Shanna Smith and I am the President and CEO of the National Fair Housing Alliance (NFHA). Thank you for inviting me to testify today about the Fair Housing Act and housing discrimination.

I have spent my entire career combating housing discrimination in its many forms as well as promoting residential integration, beginning in 1975 as the Executive Director of the Toledo Fair Housing Center. I have lead NFHA’s office in Washington, DC since it was established in 1988. The National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

The Fair Housing Act was passed in 1968 and amended in 1988 with strong bi-partisan support. Congress designed the Fair Housing Act to create a better a America and offer everyone equal access to the American Dream to own a home and live in the neighborhood of his or her choice free from discrimination. For myriad reasons, we have failed to come close to achieving the goals of the Act. The 1968 law clearly articulated the dual purpose of the Act: to eliminate housing discrimination and to promote residential integration. It did not include, at the time, an effective administrative remedy. Congress corrected this problem with the 1988 amendments by significantly strengthening the administrative enforcement process. Still, we fall dramatically short of reaching the actual goals of the Fair Housing Act.

Our failure as a nation to effectively address both individual and systemic housing, lending and insurance discrimination means discrimination is still pervasive and residential segregation remains the norm. This is important in contrast to the diversity achieved by many corporations in America. Yet, while people are working together in greater numbers than ever before—many go home each night to racially segregated neighborhoods.

My testimony explores the nature and extent of housing discrimination as it is manifested today, how enforcement action is moving from the individual case by case format to addressing systemic segregation and discrimination, albeit slowly, and why systemic enforcement actions using disparate impact arguments can make important and needed progress in achieving the Congressional intent of the law. I also discuss how the Fair Housing Act could still be improved to fight discrimination against additional protected classes and to address other issues that have arisen since 1968. Finally, I discuss the recommendations necessary to make enforcement of the law effective.

I. Coverage under the federal Fair Housing Act

- A. Coverage:** Currently, the Fair Housing Act provides protections based on race, color, religion, national origin, sex, disability and/or familial status. The Fair Housing Act was designed to address both individual complaints of housing discrimination and also to

challenge institutionalized, systemic policies or practices of discrimination. When Congress passed the Fair Housing Act in 1968 and amended it in 1988, it established two goals to be achieved:

1. To eliminate housing discrimination; and
2. To promote residential integration.

B. State and Local Fair Housing Coverage: Many states and localities have expanded the protections under their state or local fair housing laws. For example, fourteen states and the District of Columbia have additional protections based on sexual orientation¹ and four states² and the District of Columbia include gender identify or expression. Two hundred forty municipalities prohibit discrimination because or sexual orientation and approximately 60 localities include protection for gender identity or expression. Other states/localities have protections based on marital status, survivors of domestic violence, source of income, Section 8 Voucher holders, military status, matriculation and personal appearance.

C. Who can file a complaint under the Fair Housing Act? An aggrieved person has been broadly defined in the regulations and by the courts. Individuals or families who have experienced discrimination are covered under the law, but the courts have also given standing to bring administrative or legal action to the following groups as well:

Municipalities to challenge discriminatory practices such as racial steering by real estate companies [*City of Evanston v. Baird Warner, Inc.*, No. 89 C 1098 (ND IL 10-23-89; *Gladstone Realtors v. Village of Bellwood*, 429 U.S. 91, 114 (1979)]; denying apartments to people with disabilities (*United States v. Southern Management Corp.*, 955 F.2d 914 4th Cir. 1992-Fairfax-Falls Church Community Social Services Board); and reverse redlining.

Interracial and Minority Neighborhoods to challenge racial steering by real estate companies, redlining by lenders or appraisal companies: [*Old West End Association (OWE) v Buckeye Federal Savings and Loan; Steptoe (OWE) v. Savings of Am.*, 800 F. Supp. 1542 (N.D. Ohio 1992); *Harrison (OWE) v. Otto G. Heinzeroth Mortgage Co.*, 430 F. Supp. 893 (N.D. Ohio 1977); *Laufman v. Oakley Building and Loan Co.*, 408 F. Supp. 489, 492-93 (S.D. Ohio 1977)]. The last two cases were filed by white families living in the interracial communities and experiencing discrimination because of the racial composition of their neighborhood.

Whites harassed or evicted because they have visitors of another race/national origin or living in predominately white apartment complexes, neighborhoods or communities IF they can show that managers, owners, real estate agents or lenders are engaging in practices to deny people of color and others access, thereby, perpetuating residential segregation. [*Trafficante et al v Metropolitan Life Insurance Company*, 409 U.S. 205 (1972) *Harp v Ward, Moonlight Mobile Home Park*]

¹ California Connecticut Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin

² California, Minnesota, New Mexico and Rhode Island

Non-profit Organizations such as Oxford House and Independent Living Centers to challenge discrimination against people with disabilities (*Memphis Center for Independent Living and the United States v. Milton and Richard Grant Co. et al.* (W.D. Tenn.) *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Tsombanidis v. City of West Haven*, 180 F. Supp. 2d 262 (D. Conn. 2001); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993); *United States v. Town of Garner* (E.D.N.C.) (complaint filed in May of 2009).

Faith-based Organizations to challenge landlords for refusing to rent to people with disabilities or families with children moving from transitional housing. (St. Paul's Community Center in Toledo, Ohio filed a HUD administrative complaint against a landlord refusing to rent to families with children—conciliation agreement provided 2 and 3 bedroom apartments rent free for three years to St Paul's to place families in housing making the transition from homeless shelters.)

Real Estate Agents who challenge other agents or brokers for refusing to schedule showings for homes when their clients are members of the protected groups or restricting African American agents to only working with African American buyers, and Black agents who lose listings because a seller states she doesn't want a Black agent listing her home.³ [*State of Arizona, Edington, Grimm Buyer Brokers Realty of Sedona v Feliks and Bozena Mlynarczyk* 2006; *Alice Payne v Coldwell Banker Residential Real Estate, Inc, Byrd, Humes v First Real Estate Corporation*; *Hall v. Lowder Realty Co.* (M.D. Ala. 1997) 2005CV0094 *Ohio Civil Rights Commission v. Limes, Keith RK*].

Rental Managers who refuse to implement policies or practices of the owner to deny units to people of color, families with children or people with disabilities. In most situations, former rental managers testify on behalf of victims explaining the policy or practice the owner instituted to keep them from renting apartments.

Fair Housing Organizations to challenge rental, sales, lending or insurance discrimination as well as design and construction issues [*Havens Realty Corp. v. Coleman*, 455 U.S. (1982). *United States v. Arlington Park Racecourse, LLC and Churchill Downs, Inc.*, (N.D. Ill. 2005); *Toledo Fair Housing Center and Ohio Civil Rights Commission v. Farmers Insurance Group of Companies*] *National Fair Housing Alliance, et al. v. AG Spanos Companies, et al.*, F. Supp. 2d 1054 (N.D. Cal. 2008); *United States v. Coldwell Banker Joe T. Lane Realty* (N.D. Ga.) (consent decree filed February 2010); *United States v. S&S Group, Ltd. d/b/a ReMax East-West (DeJohn)*(N.D. Ill.) (consent decree entered February 2009); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46 (D.D.C. 2002); *Briceno, et al. v. United Guaranty* (N.D. Ohio) (settlement December 1989).

Testers to challenge discrimination because of receiving untruthful information about availability. This was decided in the U.S. Supreme Court decision *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

³ www.democratandchronicle.com/apps/pbcs.dll/article?AID=/20070713/NEWS0203/70710352/-1/COLUMNS#storychat#storychat

II. How Prevalent is Housing Discrimination?

A. Complaints Investigated by Private Non-Profit Fair Housing Organizations

The Numbers: In 2008 the total number of complaints filed with government and private fair housing organizations was 30,758.⁴ (2009 numbers are not yet available.) It is estimated that more than 4 million incidents of housing discrimination occur annually, so you can see we are barely addressing housing discrimination in America. In 2008, private, non-profit fair housing organizations reported investigating 20,173 complaints alleging housing, lending, insurance discrimination or racial or sexual harassment in housing. HUD reported processing 2,123 complaints and State/local government agencies reported receiving 8,429 complaints. There is some overlap in the government numbers because fair housing organizations refer complaints or file complaints with a government agency.

Fair housing organizations receive far more calls to their offices than the 20,173 complaints, but these landlord-tenant issues, housing counseling or referrals for apartment are not counted in these numbers. The 20,173 complaints reported in NFHA's Trends Report documents allegations of violations of federal and/or state fair housing laws.

DISCRIMINATION BY PROTECTED CLASS 2008				
Basis	NFHA Members	HUD	FHAP	DOJ
Race	18.5%	31%	36%	39%
Disability	31.3%	49%	43%	36%
Family Status	17.5%	17%	16%	21%
National Origin	9.5%	9%	14%	6%
Sex	3.9%	9%	11%	9%
Religion	1.5%	2%	3%	6%
Color	0.6%	1%	3%	n/a
Other*	17.1%	4%	6%	n/a

* The "other" category for NFHA complaints represents complaints arising from categories protected at the state or local level including sexual orientation, source of income, marital status, medical condition, age, or student status. The "other" category for HUD and FHAP complaints represents complaints of retaliation. HUD, FHAP, and DOJ data are for Fiscal Year 2008. Totals may exceed 100 percent, because a single complaint may have multiple bases. Other than NFHA's data, percentages are rounded to the nearest whole number.

⁴ National Fair Housing Alliance, *Fair Housing Enforcement: Time for a Change, 2009 Fair Housing Trends Report*, May 1, 2009.

B. How the Internet Fosters Housing Discrimination

Email Profiling: While some advertising for apartments, homes for sale, mortgage loans and homeowners insurance can still be found in local newspapers, the majority of advertising for housing, loans and insurance takes place over the Internet. The first point of contact is through email. The name used in the email address can have positive or negative consequences. One study found that if your email address name is racially or ethnically identifiable as African American, Latino, Asian American, Arab American, you may not get a response from the manager, real estate agent, lender or insurer.⁵ There were differences in responses about apartment availability when the names Patrick McDougall, Tyrell Washington, and Said Al-Rahman were used. Patrick McDougall received a 79% positive reply to housing inquires while Tyrell Washington and Said Al-Rahman received a positive reply to their email inquires only 40% of the time.

Discriminatory Advertisements: From June 2008- July 2009, the National Fair Housing Alliance and 27 of our member fair housing organizations reviewed craigslist rental ads. We identify more than **7,500 discriminatory rental advertisements** stating a preference, limitation or denial of housing to families with children.⁶ Ads on craigslist stated, “2 Bedroom-NO kids”, “Adults only” or “No teenagers.” Illegal advertising was identified in every state. NFHA and our members filed more than 1,000 complaints with the U.S. Department of Housing and Urban Development (HUD). The majority of complaints were ultimately withdrawn because neither the fair housing groups nor HUD had the staff resources necessary to identify and charge everyone who posted these illegal advertisements. The Seventh Circuit Court of Appeals ruled that craigslist is not liable for the discriminatory ads published on the site stating that craigslist is protected under Section 230 of the Communications Decency Act, 47 U.S.C., which provides interactive computer service providers with immunity from claims based on third-party content. However, all print media is held liable under the Fair Housing Act.⁷

What is disheartening and wholly unacceptable is families with children reading these ads must believe that is it legal to discriminate against them. Additionally, NFHA asked a number of people who posted the ads if they knew they were violating the law and many responded that they thought it was fine to deny or limit the number of children because they were “just cutting and pasting from other ads on craigslist.” Craigslist is one of the top ten most viewed sites in the world with more than 30 million views each month, including 25 million in the United States.

⁵ Journal of Applied Social Psychology, 2006 pages 934-952, 36, 4 Rental Discrimination and Ethnicity in Names Adrian G. Carpusor and William E. Loges Laboratory studies have demonstrated the ability of names to prime stereotypes. To apply these theories and test the effect of name-based ethnic stereotypes on housing discrimination, 1,115 inquiry e-mail messages were sent to landlords advertising apartment vacancies in Los Angeles County over 10 weeks (6 weeks before the conflict with Iraq began in March 2003 and 4 weeks during the conflict). One of three names that implied either Arab, African American, or White ethnicity was randomly assigned to each of the messages sent. African American and Arab names received significantly fewer positive responses than the White name, and the African American name fared worst of all. This pattern held true in all rent categories, in corporate and privately owned apartment complexes, and before and during the war in Iraq.

⁶ National Fair Housing Alliance. *For Rent: NO KIDS! How Internet Housing Advertisements Perpetuate Discrimination*, August 11, 2009.

⁷ *Ragin v. The New York Times Co.*, 923 F.2d 995 (2d Cir.), cert. denied, 502 U.S. 821 (1991), *Spann v. Colonial Village Inc.*, 899 F.2d 24 (D.C. Cir. 1990), *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) cert denied, 409 U.S. 934 (1972)

With millions of families turned out of their homes through foreclosure, one must wonder how they secure housing free from discrimination.

Roomates.com, another Internet advertiser, was sued by two of NFHA's members, the Fair Housing Councils of San Fernando Valley and San Diego, for publishing discriminatory advertisements and employing a system that allowed users to deny housing because of children, gender or sexual orientation. The court said because Roomates.com allowed posters to make selections on a drop down menu that would illegally exclude children, and allowed the case to proceed to trial. This case is still pending.

C. Types of Discrimination Today

Linguistic Profiling: Our brains filter information constantly and we make split second judgments and decisions that affect the lives of others. At some point in time during the process of securing housing, an applicant speaks with a landlord, real estate agent, loan officer or insurance agent. People, consciously or unconsciously, evaluate the caller and sometimes make judgments and decisions based on their voice. This is not a problem unless the listener uses his/her assumptions to discriminate.

For example, if someone with an accent calls to inquire about an apartment and the landlord lies about the availability because the person is Latino, he has violated the law. Testing will document if linguistic profiling was used as a basis for the denial. Testing over the telephone has documented thousands of cases of discrimination over the past 42 years. Juries have listened to the plaintiff and the testers and decided that truthful information about available units was only given to people who sounded White. Sometimes the apartment manager, real estate agent, loan originator or insurance agent will screen calls and return only those calls from people who "sound White." When a person is looking for an apartment, home, a loan or insurance, it is unlikely they make more than one or two calls to the business because they believe if some one wants their business they will return the messages. Linguistic profiling and message screening can be a very effective way to reject some one without ever talking to them or seeing them face to face.

Rental Markets: The chart above indicates that people with disabilities, African Americans and families with children have the highest percentage of reported allegations of discrimination. The reports may be so high because discrimination against people with disabilities and families with children tends to be blatant. For example, in 2008 the Fair Housing Partnership of Greater Pittsburgh used disabled and non-disabled testers to document how people who are deaf would be treated when inquiring about renting an apartment. Twenty five testers using a relay system contacted apartment owners and twelve (48%) of the deaf testers experienced discrimination. Sometimes the landlord would abruptly hang up when the relay operator explained this was a call for over the phone. In addition, deaf people were discriminated against at a rate of 10% in person.⁸ Hundreds of complaints are also filed annually because newly constructed buildings are not accessible to people who use wheelchairs or have other mobility challenges. Veterans returning with disabilities including traumatic brain injuries are also facing discrimination when

⁸ www.healthbridges.info/wp/wp-content/uploads/.../sept08-newsletter.pdf

seeking rental housing or trying to have a reasonable modification made to the apartment to accommodate the physical disability.

Builders, Architects and Developers: When the Fair Housing Act was amended in 1988, Congress gave builders, developers and architects until March 13, 1991 to follow the design and construction requirements of the Act. In addition, HUD and Justice created educational programs to teach housing developers how to design and construct accessible housing. In spite of the millions of dollars spent by HUD and Justice to teach the industry how to comply, too many builders continue to construct multi-family housing that is not accessible to people with disabilities. The Justice Department and private fair housing agencies have brought many lawsuits resulting in builders' having to spend hundreds of thousands and even millions of dollars to retrofit apartments. NFHA believed that the messaging and litigation from the government must have had a significant impact. However, NFHA has settled two lawsuits in the past six months with builders who should have known better. Ovation Company, a builder in the Las Vegas area, was sued by NFHA when we found 368 buildings (1512 units) out of compliance. After identifying violations, NFHA learned that the principal in the company had been caught before by the Justice Department for building apartments out of compliance with the Fair Housing Act. NFHA sued and settled with the builder agreeing to retrofit the buildings and paying \$750,000 in damages and attorney fees.

NFHA and four of its member organizations tested multi-family buildings developed by the A.G. Spanos Companies, the nation's fifth largest builder, for design and construction flaws that render buildings inaccessible to people with disabilities. During their investigation, and in the course of litigation filed against the builder, NFHA and its members identified 123 apartment complexes built since 1991 that did not meet the law's standards. Fortunately, the Spanos Companies worked closely and cooperatively with NFHA to address the design and construction problems found in the buildings and to address broader accessibility problems found throughout the nation. A stipulated judgment was filed in November 2009, in which the Spanos Companies agreed to retrofit 12,300 units, establish a \$4.2 million National Accessibility Fund through NFHA to provide grants to people to compensate for "lost housing opportunities" for about 3,800 out-of-compliance units that could not be retrofitted, provide \$150,000 to each plaintiff to establish a local grant fund to make existing housing accessible and \$40,000 to NFHA and its Atlanta member to establish a coalition to draft a white paper to look at future housing needs for people with disabilities. The landmark settlement is valued at approximately \$15 million and covers apartment complexes built since March 1991.

Sales Markets, Lenders and Foreclosures: With so many homes on the market because of the foreclosure crisis you might think there would be minimal discrimination—after all real estate agents need to sell homes to have an income. Of course, many agents do follow the law. However, NFHA still receives reports of racial steering, preferential treatment toward investors versus single family homebuyers, and denial of the opportunity to rent a foreclosed home because of children, race or national origin.

Even in this difficult market, NFHA has reports of African Americans being steered away from homes or denied the right to purchase homes in predominately White neighborhoods. Good deals

on foreclosed homes appear to be marketed to Whites in white neighborhoods and to investors in minority communities.

Real Estate Owned Properties (REO): There are allegations by fair housing organizations that servicers are not maintaining homes in minority or integrated neighborhoods while they make sure lawns are mowed, side walks cleared of snow, routine maintenance completed and renovations completed to make homes in highly marketable White neighborhoods. It is inevitable that some foreclosures will take place, but how we deal with those properties and help those families will have substantial fair lending implications. For example, recent matched pair testing conducted by NFHA has uncovered blatant racial steering among real estate agents. Such discrimination must not be perpetuated in the disposition of foreclosed properties.

Lending Discrimination -- Scams and Tight Credit Markets: Foreclosure and mortgage delinquency scams are out of control. So many people are being scammed every day because they find themselves in desperate situations with their servicers threatening foreclosure and the inability to have their current loans modified. In addition, there simply are not enough certified housing counselors available to provide immediate help. Scammers promise immediate help for a fee from \$800 to \$5,000 and, of course, no help is provided and the money disappears into the scammers' accounts. Everyone involved in enforcement feels like we are playing "whack-a-mole" when we attempt to stop these scammers.

I have personally been conducting testing to try to identify the corporate entities behind the larger scam operations. I began my investigation in August and scammers are still contacting me because the original website captured my test identity information and continues to sell it. These scammers use various methods to try to get me to give them money. They promise or guarantee to stop a foreclosure. They promise or guarantee they can lower my monthly payment with a loan modification or refinancing. They state that they have the inside track to servicers and when I suggest that I may call a free housing counselor first, they berate the counselors and laugh saying, "Good luck—when they don't help you—you call me back if you haven't lost your house by then." Others try to sound like a friend when they say for just \$800 they can begin the process of saving my house.

NFHA received a HUD Fair Housing Initiatives Program (FHIP) grant to conduct investigations, but we will need to work closely with law enforcement so when a scammer removes money from our tester's checking account, law enforcement will be able to follow the money to identify the scammer and his boss. If federal and state law enforcement can bring down large companies with hundreds of scammers, it might have the impact we are seeking.

Tight Credit and Fair Lending: In the early 1980s when interest rates were 17%, fair housing organizations still found banks and mortgage companies denying loans to qualified African American buyers.⁹ In late 2008, NFHA conducted lending testing of banks and found that qualified African American and Latino applicants were provided information about loans with higher rates and fees than the less qualified White testers. In some situations, African Americans were even denied the information about applying for a loan and told they had to return in two weeks because the person working with first time homebuyers was on vacation. However, the

⁹ *McMililan v. Huntington National Bank.*

similarly situated White tester speaking to the same bank employee just a day later was provided assistance and information for a loan. When credit is tight qualified women and people of color get squeezed.

Race Discrimination: African Americans continue to report high rates of discrimination in rental, sale and lending arenas. Rental discrimination continues in the same vein as years ago only more subtle. In the past, an apartment manager would simply refuse to return telephone calls or say nothing is available. Now the landlord often says, "There are three applications ahead of your application, but if they fall through I promise to call you. Leave your name and number." This kind of statement sounds believable until the African American renter sees that the unit remains advertised or a white friend from work calls the apartment manager and learns the unit is available right now.

More and more fair housing agencies have to conduct full application rental testing to uncover the internal process used to screen out or deny units to people of color. Too often a management company will say that the applicant's credit score is the reason for the denial, but an investigation indicates no credit inquiry was made. Some apartment management companies say they require the applicant to make 3 times the rent, but they do not apply the "rule" equally. Full application testing is necessary to document discrimination that can occur during the application process.

Sexual, Religious and Racial Harassment: All three of these areas are under-reported because most people have no idea the Fair Housing Act protects them from harassment in housing. People of color will often decide not to report harassment for fear it will escalate. Following the September 11 attacks, Arab Americans, Muslims and South Asians found themselves targets of harassment in their homes or apartments. When they called the police, it was reported as possible criminal violations and few complaints made it to fair housing organizations or the government for enforcement. Again, we found that people were afraid to report vandalism because they hoped it might just stop if they ignored it.

Sexual harassment in housing is seriously under reported because women do not know they have protections under the fair Housing Act. For example, on February 1, 2010 the *New York Post* carried a story about an apartment superintendent of several Upper West Side buildings in New York City where women were being evicted because they refused to engage in sexual activity with the superintendent.¹⁰ One victim, Carol Engle explained: "He said, 'If we were friends, I could help you out, and I could pay.' "I said, 'You mean if I had sex with you? That's what you're trying to say?' And he said, 'Yes and . . . not just once. I'd come over a couple of times a week, and I could help you out.' "

The newspaper reported that the super, a convicted sex offender who spent time in prison: "September 1987, -- already in prison for sexually abusing a 5-year-old girl -- was sentenced to 10 to 20 years after pleading guilty to rape, sodomy and sexual-abuse charges related to an attack on three Suffolk County girls between ages 5 and 7... he was denied parole four times before his

¹⁰ http://www.nypost.com/p/news/local/manhattan/resident_evil_fhucKFMAxrRvfmJAtyewiL#ixzz0eOuEoxjl

2001 release – he made other children watch him abuse the girls, a Suffolk County prosecutor said at the time.”

D. Disparate Impact

Evidence of disparate impact can be documented when a housing, lending or insurance provider applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity. Disparate impact is covered by the Fair Housing Act; however, challenges to disparate impact continue to be made. NFHA urges HUD to issue a regulation clarifying how disparate impact cases in housing ought to be made and distinguishing the differences between fair housing and employment cases.

In 1974, the Eighth Circuit became the first federal appellate court to find a Fair Housing Act violation based on the discriminatory effect (impact) of the defendant’s actions.¹¹ All eleven appellate courts agree that the Fair Housing Act covers both intentional housing discrimination as well housing actions, policies or practices that have a disparate impact.

It is difficult if not impossible to prove intent in all housing discrimination cases. For example, prior to 1997, the homeowners insurance industry used “moral hazard” as justification to deny replacement cost coverage to homes built before 1970 and valued below an arbitrary number such as \$200,000 in Washington, DC, \$50,000 in Ohio and Virginia. The industry had no data to support its conclusion that a homeowner would have an incentive to burn down his home if it was insured for its replacement cost rather than its current market value. This policy based on age and value had a disparate impact on homeowners living in integrated and minority neighborhoods across America. The policy was challenged first through the HUD administrative process. State Farm became the first company to eliminate the policy and notify all of its policy holders that they were entitled to purchase replacement cost coverage for their home. Allstate followed shortly thereafter signing a conciliation agreement with HUD and NFHA. However, litigation was required to get Liberty Mutual, Prudential, Travels, Aetna, and American Family insurance companies to change policies that had a disparate impact because of the racial composition of neighborhoods or race or ethnicity of homeowners.

In the rental context, disparate impact is played out by owners who have occupancy policies stating “one heartbeat” per bedroom. This has a disparate impact on families with children, especially since the rule of thumb is two people per bedroom. Landlords who have a policy to evict people who have an incident of domestic violence, even when the occupant has a restraining order against the perpetrator and apartment owners who refuse to accept alimony or child support as income in computing income eligibility for an apartment. These policies have a disparate impact on female headed households.

¹¹ *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85, 1188 (8th Cir. 1974) (holding, in exclusionary land-use case brought by the Justice Department, that the defendant-municipality violated the FHA’s § 3604(a) and § 3617 and commenting that in order “[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . Effect, and not motivation, is the touchstone . . .”).

In the lending context disparate impact manifested in minimum loan amount policies for mortgage loans and mortgage insurance. In the Midwest, lenders refused to write loans under \$50,000 or \$30,000 and mortgage insurance companies refused to insure loans under \$30,000. Countrywide, for example, had an advertisement in St. Louis for special loans programs but the home had to be valued at more than \$75,000. However, the majority of the homes in Black neighborhoods were valued at less than \$75,000.

III. Recommendations for Amendments to the Fair Housing Act

The Fair Housing Act is one of the strongest civil rights laws we have on the books. One of the main reasons we do not have a more integrated nation today is because the law has not been enforced properly or to any great extent. We need to use the strength of the existing Act to promote integration and fight discrimination.

But times have changed since 1968, and even since 1988, and there are amendments that should be made to the Fair Housing Act to bring it up to date and to make it stronger.

Expand the Groups Protected: The National Fair Housing Alliance supports expanding coverage based on source of income, marital status, sexual orientation and gender identity or expression.

Create an Independent Agency for Fair Housing Education and Enforcement: I have been engaged in fair housing education and enforcement for 35 years. I have tried during this time to help make the administrative enforcement mechanism work by filing hundreds of complaints, working with investigators and HUD FHEO headquarters. Effective enforcement is a hit or miss proposition.

The creation of a new agency was the top recommendation of the bipartisan National Commission on Fair Housing and Equal Opportunity, co-chaired by former HUD Secretaries Henry Cisneros and the late Jack Kemp. This Commission toured the country in 2008 and heard testimony on the state of fair housing, HUD's and DOJ's enforcement record, and other issues. In December 2008, the Commission issued a report entitled, "The Future of Fair Housing" with nine recommendations for improving the state of fair housing in the nation.¹²

Fair housing enforcement has never been a priority at HUD. HUD has too many conflicts of interest to be able to effectively enforce the law. For example, HUD wants to work closely with landlords so they will accept Section 8 Vouchers or real estate companies so they will market FHA REO properties or manage foreclosed multi-family apartments. HUD is invested in CDBG recipients so it is unlikely to penalize a city that engages in housing discrimination. Zanesville, Ohio and St. Bernard Parish are examples of HUD allowing these cities to receive CDBG funds in spite of overt actions of discrimination under the Fair Housing Act. It should be noted by both Republican and Democratic administrations have failed in this respect. Showe Builders was found by federal jury to have violated the Fair Housing Act in the 1980s and the jury decision

¹² The National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing*. December 2008. Available at www.nationalfairhousing.org.

was upheld by the 6th Circuit Court of Appeals, but never sanctioned the builder who was one of the largest recipients of Section 8 subsidies. The list goes on and on.

It is NFHA's position that enforcement of the law must be removed from HUD and placed in an independent agency along with the Fair Housing Initiatives Program (FHIP) and the Fair Housing Assistance Program (FHAP). Congress will have better oversight for enforcement of this important law and be able to measure the actual effectiveness of enforcement efforts. HUD would retain an Office of Fair Housing to address equal opportunity in its own programs.

NFHA also recommends reviving the President's Fair Housing Council according to Executive Order 12892 issued by President Clinton in 1994. The order requires all federal agencies to cooperate with the HUD Secretary to "review the design and delivery of all federal programs to ensure they support a coordinated strategy to affirmatively further fair housing;"

IV. Other Legislative Recommendations

Amend the Communications Decency Act in order to eliminate discriminatory advertising and place the same publishing standards on Internet providers as is placed on newspaper publishers. In order to comply with the Fair Housing Act, newspapers utilize screening systems to keep advertisements containing discriminatory statements from being printed. However, a legal interpretation of the Communications Decency Act holds that interactive Internet providers, like craigslist, are not publishers and, therefore, are not liable for violating the Fair Housing Act if discriminatory housing ads are published on their sites. A simple amendment to the Communications Decency Act could be made to hold entities like craigslist responsible for the discriminatory ads found on the website and uphold the Fair Housing Act, which makes it illegal to make, print, or publish or cause to be made, printed, or published any advertisements that discriminate, limit, or deny equal access to apartments or homes because of race, color, national origin, sex, religion, familial status and disability.

Allow Full Application Testing in Mortgage Lending: As shown by countless studies, discrimination in lending occurs throughout the entire process of applying for a loan. Brokers and lenders may accept loan applications for protected borrowers, but may violate the Fair Housing Act by offering borrowers discriminatory terms or conditions throughout the process. Fair housing organizations would like to investigate lenders through testing to determine the extent of these practices and to enforce the law when it is broken.

However, it is currently is a felony to provide false information on loan application—even for an organization using a tester with no intention of accepting the loan. Fair housing advocates have been asking the DOJ since 1990 to work with us to assure that legitimate testing be conducted. We have suggested that they establish lender tester profiles in the credit bureau system so that we may test and investigate lending practices all the way through the loan process. We also asked for immunity from prosecution to conduct full application lending testing. In the past, the DOJ replied that it would be up to the local US Attorney to decide whether or not to prosecute the tester. Currently, we have asked the Department to revisit this request; however, I believe the best approach would be narrowly construed legislation that provides an exemption from

prosecution for full application lending testing conducted by qualified fair housing agencies approved by the DOJ. Credit reporting companies must also be given the legal authority to work with qualified fair housing organizations approved by DOJ so that they can assist the fair housing agencies in creating credit reports for fair lending testers.

Thank you once again for the invitation to testify before you today. I look forward to working with you to enhance the Fair Housing Act and to promote fair housing and inclusive communities throughout our nation.

