

**In The
Supreme Court of the United States**

—◆—
STEVE MAGNER, et al.,

Petitioners,

v.

THOMAS J. GALLAGHER, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit**

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

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INTEREST OF *AMICI*¹

The *Amici* are former Presidential appointees and career employees of the United States Department of Housing and Urban Development (“HUD”). During their tenure at HUD, each was responsible for various aspects of the administration and enforcement of the Fair Housing Act (“FHA”) from as early as 1981 through 2009. These officials file this *amicus* brief to indicate that in the exercise of their responsibilities in connection with the investigation and adjudication of housing discrimination complaints they consistently used a disparate impact analysis, as well as a disparate treatment analysis, in determining whether a violation of the FHA had occurred or was about to occur.

The Presidential appointees are as follows, by title and dates of tenure: *Secretary of the Department of Housing and Urban Development*, Henry G. Cisneros (1993-1997); *Assistant Secretary for the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development*, Antonio Monroig (1981-1987), Judith Y. Brachman (1987-1989), Roberta Achtenberg (1993-1995), Elizabeth K. Julian (1995-1997), Eva Plaza (1997-2001), and Kim Kendrick

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

(2005-2009); *General Counsel of the Department of Housing and Urban Development*, J. Michael Dorsey (1987-1989) and Judge Nelson A. Diaz (1993-1997).

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



SUMMARY OF ARGUMENT

As the chief administrative agency charged with enforcing the FHA, HUD has a broad legislative mandate. Since the original enactment of the FHA in 1968, HUD has been vested by Congress with the statutory authority to administer and enforce the FHA, including by investigating discrimination complaints. With the 1988 Amendments to the FHA, HUD became charged with the responsibility of conducting formal adjudications and making final agency decisions in administering and enforcing the FHA. HUD has consistently recognized a discriminatory effects theory of liability when carrying out its statutory authority. In final agency decisions, such as final orders issued after hearings before administrative law judges, for instance, HUD has repeatedly made findings of discrimination based on evidence of discriminatory effects. HUD has also recognized the

disparate impact theory in regulations issued, in part, based on its authority under the FHA; in joint statements of policy with other administrative agencies; in internal guidance memoranda issued by the Assistant Secretary for the Office of Fair Housing and Equal Opportunity (“FHEO”) and/or the HUD Office of General Counsel; in internal training materials for HUD investigators; and most recently in the Notice of Proposed Rule-Making that reiterates and codifies the agency’s long-standing recognition that the FHA reaches the effects of discrimination. As early as 1980, the HUD Secretary expressly recognized the agency’s efforts to address the effects of discrimination. *See, e.g.*, 126 Cong. Rec. 31166-67 (1980) (statement of Sen. Charles Matthias) (reading into the record a letter from the Secretary of Housing and Urban Development describing the “so-called ‘effects test’” as a “rational, thoughtful mode of analyzing evidence [that] is imperative to the success of civil rights law enforcement.”) For over thirty years, HUD has unambiguously made the disparate impact theory a central part of its administration and enforcement of the FHA. HUD’s long-standing and well-reasoned pronouncements are entitled to deference.



ARGUMENT

I. HUD'S LONG-STANDING AND AUTHORITATIVE INTERPRETATION OF THE FHA AS ENCOMPASSING DISPARATE IMPACT LIABILITY IS ENTITLED TO DEFERENCE

HUD's long-standing and authoritative pronouncements regarding the disparate impact theory of liability are entitled to deference. In 1968, Congress expressly gave HUD broad authority to administer and enforce the FHA. 42 U.S.C. 3608, 3610. The Fair Housing Act, as amended in 1988, provides the Secretary of HUD ("the Secretary") with the authority to accept and investigate housing discrimination complaints; to issue determinations of reasonable cause and charges of discrimination; to conduct formal adjudications; and to make final agency decisions. 42 U.S.C. 3610(g)(1), 3610(g)(2)(A), 3612(h)(1); 24 C.F.R. 103.400(a), 104.930. The 1988 Amendments also expressly vested the Secretary with the statutory authority to promulgate rules necessary for carrying out the FHA. 42 U.S.C. 3614a.

Given its broad legislative mandate, HUD's well-reasoned interpretation of the FHA as encompassing disparate impact claims is entitled to deference. HUD's formal adjudications and regulations are entitled to the full measure of deference pursuant to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *see also Meyer v. Holley*, 537 U.S. 280, 287-89 (2003) (observing that this Court ordinarily defers to HUD's reasonable interpretation of the FHA); *United States*

v. Mead Corp., 533 U.S. 218, 230 & n. 12 (2001) (*Chevron* deference is applied to formal adjudications); *Smith v. City of Jackson*, 544 U.S. 228, 243-47 (2005) (Scalia, J., concurring in part and in the judgment) (deferring to an agency's reasonable views). HUD's exercise of its authority to initiate complaints pursuant to 42 U.S.C. 3610 based on a disparate impact theory of liability is also entitled to deference. *Dada v. Mukasey*, 554 U.S. 1, 20-21 (2008) ("Although not binding in the present case, the [Department of Justice's] proposed interpretation of the statutory and regulatory scheme . . . warrants respectful consideration.") (citations omitted); *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496 (2002) (stating that the position of the Secretary of Health and Human Services "who possess the authority to proscribe standards relevant to the issue here . . . warrants respectful consideration.") HUD's numerous other pronouncements, including over two decades of guidance in the form of departmental directives, notices, General Counsel memoranda, handbooks, and other training materials that have recognized and applied a disparate impact theory, are also entitled to deference as persuasive and informed agency pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see also *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 102-03 (2008) (Scalia, J., concurring in the judgment) (noting that deference to the views of the Equal Employment Opportunity Commission ("EEOC") is warranted "[b]ecause administration of the ADEA has been placed in the hands of the Commission, and because the agency's positions

on the questions before us are unquestionably reasonable” and deferring to a brief submitted by the Solicitor General of the United States and signed by the EEOC’s General Counsel).

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

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

As part of its enforcement mandate, the FHA, as amended in 1988, provides HUD with the statutory authority to make final agency decisions through administrative law judge (“ALJ”) determinations that the Secretary has the opportunity to review. 42 U.S.C. 3612(h). The FHA mandates that HUD administrative law judges commence hearings, “make findings of fact and conclusions of law,” and “promptly issue” orders of relief. 42 U.S.C. 3612(g). The Secretary may review any ALJ finding, conclusion, or order within thirty days of its issuance; “otherwise, the finding conclusion, or order becomes final.” *Id.* 3612(h). Any party aggrieved by a final order may appeal directly to the judicial circuit in which the discriminatory housing practice is alleged to have occurred. *Id.* The FHA provides the Secretary with the right to petition the relevant judicial circuit for

the enforcement of an ALJ order. *Id.* 3612(j). Given HUD's legislative mandate to make final agency decisions and enforce them through U.S. courts of appeals, HUD ALJ decisions that become final are entitled to the full measure of *Chevron* deference.

B. HUD Final Agency Decisions Have Applied An Effects Test To A Variety Of Discrimination Claims

Final orders issued by HUD have repeatedly interpreted the FHA's prohibition on discriminatory housing practices to encompass claims challenging the effects of otherwise neutral housing policies. In *HUD v. Mountain Side Mobile Estates P'ship*, No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec'y July 19, 1993) *aff'd* in relevant part, 56 F.3d 1243 (10th Cir. 1995), for instance, the HUD Secretary, upon review of an initial ALJ decision, applied a disparate impact analysis to a complaint alleging familial status discrimination. Using this framework, the Secretary determined that a three-person-per-dwelling maximum occupancy policy in a mobile home community had a discriminatory effect on families with children. When the final agency decision was appealed to the Tenth Circuit, the HUD Secretary, as the respondent, submitted a brief in support of this position, and cited statistics that the policy would exclude families with children at more than four times the rate of households without minor children. Brief for HUD Secretary as Respondent in *Mountain*

Side Mobile Estates P'ship v. HUD, No. 94-9509 (10th Cir. 1994).

Mountainside is also consistent with HUD's position in *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *17 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996), where a HUD ALJ determined, based in part on statistical evidence regarding household size, that a four-person maximum occupancy policy for a three-bedroom dwelling had a disparate impact on families with children. Upon appeal to the circuit court, the Secretary filed a brief discussing the legislative history and text of the FHA, as well as prior HUD pronouncements that a showing of discriminatory intent is not required to establish liability under the FHA. Brief for HUD Secretary as Respondent in *Pfaff v. HUD*, No. 94-70898 (9th Cir. 1996) 1995 WL 17017239.

In addition to *Mountainside* and *Pfaff*, HUD has issued other final agency decisions under the FHA based on disparate impact theory, including in familial status, sex, and disability cases. *See, e.g., HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5, (HUD ALJ May 1, 1992) (HUD ALJ final order noting that "the application of the discriminatory effects standard in cases under the Fair Housing Act is well established"); *HUD v. Carlson*, No. 08-91-0077, 1995 WL 365009 (HUD ALJ June 12, 1995) (HUD ALJ final order holding that a facially neutral four-occupant rule has a disparate impact on families with children).

In adjudicating sex discrimination claims, HUD has found that policies such as a landlord's refusal to accept tenants receiving public assistance violate the FHA. For instance, in *HUD v. Ross*, No. 01-92-0466-1, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994), a HUD ALJ issued a final order holding that a landlord's "no welfare" policy had a disparate impact on women, based in part on statistics showing that the overwhelming percentage of public assistance recipients in the landlord's county were women. In keeping with other HUD ALJ adjudications of housing discrimination complaints, the decision noted that "[a]bsent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act." *Id.*

Likewise, HUD ALJ orders have recognized the disparate impact theory in the disability discrimination context. For instance, HUD utilized the disparate impact theory of liability to analyze whether a policy that required tenants to purchase renters' liability insurance before the landlord would permit physical modifications to an apartment complex, such as the installation of ramps, violated the FHA and concluded that such a policy constituted discrimination based on disability. *See, e.g., HUD v. Twinbrook Vill. Apts.*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001).

C. Secretary-Initiated Complaints Have Recognized An Effects Test

The FHA provides the Secretary with the authority to investigate and file complaints alleging discriminatory housing practices on the Secretary's own initiative, even in the absence of an aggrieved person filing a complaint with HUD. 42 U.S.C. 3610(a) ("The Secretary, on the Secretary's own initiative, may also file such a complaint"). HUD has used this authority to commence investigations, and if there is sufficient evidence, to file complaints based on discriminatory effects. For instance, in 2008, HUD filed a Secretary-initiated complaint against a rental management company alleging that its three-person occupancy limit for two-bedroom apartments discriminated against families with children. Complaint, *HUD v. Cornerstone Residential Mgmt.*, FHEO No. 04-08-1085-8 (June 9, 2008). The Complaint alleged that the policy either denied housing to families with children or caused them to incur higher housing costs by requiring families to rent larger apartments. *Id.*; see also HUD, *FY 2006 Annual Report to Congress on Fair Housing* 38 (Mar. 29, 2007) (Secretary-initiated complaint against the City of Manassas, Virginia alleging that a local ordinance limiting the number of unrelated people who could live together in a dwelling unlawfully discriminated against Hispanic households and families with children); HUD, *FY 2007 Annual Report to Congress on Fair Housing* 39 (Mar. 21, 2008) (Secretary-initiated complaint against Iberville Parish, Louisiana alleging that a facially

neutral resolution adopted after Hurricane Katrina that restricted the placement of FEMA trailer parks in the Parish was racially discriminatory). HUD's Secretary-initiated complaints further demonstrate the agency's use of the effects standard in enforcing the FHA.

III. HUD'S APPLICATION OF A DISPARATE IMPACT ANALYSIS TO GOVERNMENT SPONSORED ENTERPRISES AS CODIFIED BY REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

In issuing regulations based, in part, on its authority under the FHA to exercise administrative oversight over two Government Sponsored Enterprises ("GSEs") – the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) – HUD has expressly recognized the applicability of an effects test. *See* Prohibitions Against Discrimination, 24 C.F.R. 81.42 (prohibiting the GSEs from discrimination in "any manner that has a discriminatory effect"). In pronouncements leading to the issuance of 24 C.F.R. 81.42, HUD stressed the importance of the disparate impact theory. For instance, HUD cited to a joint statement it issued with nine other federal agencies that recognized disparate impact as one of the methods of proof of a violation of the FHA in lending discrimination cases. Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18266 (Apr. 15, 1994) ("the Policy Statement").

The Policy Statement was issued with the intent of being consistent with “the Fair Housing Act for purposes of administrative enforcement.” *Id.* The agencies, including HUD, which issued the Policy Statement were concerned with discrimination faced by prospective home buyers in obtaining loans, and discussed how “[p]olicies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person’s access to credit.” *Id.* The Policy Statement recognized that activities, such as a lender’s facially neutral policy of refusing to extend loans for home purchases below a minimum loan amount, could be “shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live.” *Id.* In which case, according to the Policy Statement, the lenders would be required to justify the “business necessity” for the policy. *Id.*

In issuing the GSE regulation applying the effects test, HUD explained the importance of the Policy Statement, stating that “[a]ll the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending” and have “jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act.” HUD’s Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie

Mac) 60 Fed. Reg. at 61846, 61867 (Dec. 1, 1995). HUD's stated intent in issuing a regulation that addresses the effects of discrimination in lending is entitled to deference. *Meyer*, 537 U.S. at 288 (analyzing HUD's intent in passing another regulation pursuant to the FHA).

IV. GUIDANCE FROM HUD ASSISTANT SECRETARY FOR FHEO AND/OR HUD GENERAL COUNSEL IS ENTITLED TO DEFERENCE

As part of its authority to implement the FHA, HUD has issued a variety of guidance to ensure that its personnel are uniformly applying the FHA. In this guidance, HUD has consistently recognized an effects test. For instance, in a memorandum from General Counsel providing guidance to all HUD Regional Counsel in 1991, HUD made clear that enforcement of the FHA encompassed facially neutral policies that had a discriminatory effect, such as occupancy standards that operate to disproportionately exclude families with children. HUD, Office of General Counsel, *Fair Housing Enforcement Policy: Occupancy Cases 2-3* (Mar. 20, 1991), HUD *Amici* App. 1-9. The General Counsel stated his expectations that all Regional Counsel "continue their vigilant efforts to proceed to formal enforcement in all cases in which there is reasonable cause to believe that a discriminatory housing practice under the Act has occurred or is about to occur." *Id.*, HUD *Amici* App. 2. The memorandum was circulated expressly because it was

“imperative to articulate more fully the Department’s position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases.” *Id.*, HUD *Amici* App. 3. The General Counsel stated that vigilant enforcement of the FHA was “particularly important in cases where occupancy restrictions are used to exclude families with children or to unreasonably limit the ability of families with children to obtain housing.” *Id.*, HUD *Amici* App. 2-3. The memorandum provided hypothetical examples of how a “two person per bedroom” policy could have a disparate impact on families with children. *Id.*, HUD *Amici* App. 4-8.

In 1993, the HUD Assistant Secretary for FHEO issued a memorandum titled “The Applicability of Disparate Impact Analysis to Fair Housing Cases,” which stated that housing discrimination complaints should be analyzed by FHEO investigators under a disparate impact theory of liability. HUD, Office of Fair Housing & Equal Opportunity, *The Applicability of Disparate Impact Analysis to Fair Housing Cases* (Dec. 17, 1993). The memorandum outlined the reasoning in HUD’s final administrative decision in *Mountain Side Mobile Estates*, *see supra* Section II. B, and instructed HUD Regional Directors to investigate all justifications proffered by respondents for facially neutral policies that may operate to disproportionately disadvantage persons in violation of the FHA.

In 1994, HUD’s General Counsel and Assistant Secretary for FHEO issued a memorandum regarding the issue of whether the facially neutral policy of

imposing a fee based on the number of occupants in a dwelling constituted unlawful familial status discrimination. HUD, Office of General Counsel and Office of Fair Housing & Equal Opportunity, *Occupancy Fees & Familial Status Discrimination Under the Fair Housing Act* (Mar. 29, 1994), HUD *Amici* App. 9-33. The memorandum stated that “[o]ccupancy fees which are structured to apply equally to all households with a certain number of occupants, regardless of the familial status of the occupants, may violate the Act, even if the fees are enforced in an even handed manner against all households of a certain size.” *Id.*, HUD *Amici* App. 16-17. The memorandum discussed, for instance, how a policy of imposing fees based on the number of occupants in a unit would be expected to have a disparate impact on families with children, given that larger households are more likely to contain children, and cited to several decisions discussing HUD litigation involving facially neutral occupancy standards. *Id.*, HUD *Amici* App. 26-31.

In 1996, in a notice circulated to all FHEO Directors, Multifamily Housing Directors, and Owners/Managers in HUD-Assisted Housing, HUD stated that the FHA applies to all programs receiving federal financial assistance and prohibits “disparate impact in provision of housing based on certain prohibited bases.” HUD, Office of Fair Housing & Equal Opportunity, *Discretionary Preferences for Admission to Multifamily Housing Projects* (Oct. 28, 1996), HUD *Amici* App. 34. The notice stated that “FHEO is concerned that a preference which appears

neutral on its face could result in violations of various Civil Rights requirements,” including those contained in the Fair Housing Act. *Id.*, HUD *Amici* App. 35.²

And recently, in a memorandum from the FHEO Deputy Assistant Secretary for Enforcement and Programs to FHEO Offices and Regional Directors, HUD discussed how facially neutral “zero-tolerance” rental policies regarding domestic violence could have a disparate impact on women. HUD, Office of Fair Housing & Equal Opportunity, *Assessing Claims of Housing Discrimination Against Victims of Domestic Violence Under the Fair Housing Act & the Violence Against Women Act* 5-6 (Feb. 9, 2011). HUD noted that “[d]isparate impact cases often arise in the context of ‘zero-tolerance’ policies, under which the entire household is evicted for the criminal activity of one household member. The theory is that, even when

² Three years later, HUD promulgated a final rule regarding the use of local preferences in admissions to Section 8 Housing Choice Voucher Programs administered by public housing authorities (“PHAs”). *Section 8 Tenant Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs*, 64 Fed. Reg. 56894 (Oct. 21, 1999). Pursuant to the regulation, PHAs may only use local residency preferences in accordance with the FHA and other federal anti-discrimination statutes. 24 C.F.R. 982.207(b)(1)(i) (citing to 24 C.F.R. 5.105(a)). HUD specifically incorporated a disparate impact standard into the regulation by requiring that local residency preferences “will not have the purpose or *effect* of delaying or otherwise denying admissions to the program based on race, color, ethnic origin, gender, religion, disability, or age of any member of the applicant family.” *Id.* at 982.207(b)(1)(iii) (emphasis supplied).

consistently applied, women may be disproportionately affected by these policies” because they are the overwhelming victims of domestic violence. *Id.* As examples, the memorandum discussed cases where a “zero-tolerance” crime policy resulted in women being evicted after presenting landlords with temporary restraining orders or contacting the police during a domestic violence incident. *Id.* at 6-9 (discussing cases arising under, *inter alia*, 42 U.S.C. 3604(b)).

V. HUD FAIR HOUSING ACT INVESTIGATIVE HANDBOOKS HAVE CONSISTENTLY INCORPORATED A DISPARATE IMPACT THEORY

In carrying out its statutory responsibility to investigate complaints, 42 U.S.C. 3610, conduct formal adjudications, 42 U.S.C. 3612, and administer the FHA, 42 U.S.C. 3608, HUD published a Title VIII Complaint, Investigation, and Conciliation Handbook (“the Handbook”) that provides instructions for HUD personnel on how to investigate and evaluate housing discrimination complaints. HUD, No. 8024.1, *Title VIII Complaint Intake, Investigation & Conciliation Handbook* (1995). As per HUD’s policy, the Handbook was subjected to departmental review and clearance prior to being issued. HUD, No. 002. REV-2, *HUD Directives System* (Apr. 18, 2001) (describing handbooks as designed to “communicate information of a permanent nature (including clarification of policies, instructions, guidance, procedures, forms and reports) for HUD staff and/or program participants”).

The original edition of the Handbook, issued in 1995, set forth HUD's guidelines for investigating and resolving FHA complaints. The Handbook specifically recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases. The Handbook states that the FHA is violated by an "action or policy [that] has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status." HUD, No. 8024.1, *Title VIII Complaint Intake, Investigation & Conciliation Handbook* at 3-25.

In 1998, the Handbook was modified and expanded to include a chapter titled "Theories of Discrimination" that incorporates disparate impact as one theory of discrimination under the FHA. *Id.* at 2-27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *Id.* at 2-27 to 2-45 (HUD guidelines for investigating a disparate impact claim and establishing its elements). The Handbook, which has provided definitive guidance to HUD investigators for over fifteen years, is another example of HUD's application of the disparate impact theory in carrying out its statutory responsibility to enforce the FHA.³

³ In 2004, HUD established the Patricia Roberts Harris National Fair Housing Training Academy that provides a five-week fair housing enforcement program for investigators, attorneys, and others from agencies that administer state and

(Continued on following page)

VI. HUD'S CURRENT PROPOSED RULE- MAKING CODIFIES NEARLY TWO DECADES OF HUD PRACTICE, GUIDANCE, AND FORMAL ADJUDICATIONS IN RECOGNIZING LIABILITY BASED ON AN EFFECTS THEORY

HUD's current Notice of Proposed Rule-Making (NPRM) reiterates HUD's consistent view that the FHA encompasses a disparate impact theory, and establishes a uniform standard for determining when a housing practice with a discriminatory effect violates the FHA. The NPRM cites to the text of the FHA, its legislative history, as well as HUD's prior policy statements and ALJ decisions, to demonstrate HUD's long-standing view that its legislative mandate includes enforcing the FHA against housing-related policies with discriminatory effects. The NPRM explains that HUD "has long interpreted the Act to prohibit housing practices with a discriminatory effect." 76 Fed. Reg. at 70921. Although a final rule has not yet been issued, HUD's NPRM should be recognized as a codification of long-existing policy and accorded deference.



local fair housing laws that have been certified as substantially equivalent by HUD under Section 3610(f)(3) of the FHA. National Fair Housing Training Academy, *About NFHTA*, <http://www.nfhta.org/about.htm> (last visited Jan. 22, 2012). As with the Handbook, the training curriculum includes both the disparate treatment and effects theories of liability. *Id.*

CONCLUSION

For the foregoing reasons, this Court should hold that disparate impact claims are cognizable under Section 804(a) of the FHA.

Respectfully submitted,

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