No. 11-1507

In The
Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, ET AL.,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third 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, ELIZABETH K. JULIAN, EVA PLAZA, KIM KENDRICK, and JOHN TRASVIÑA, former Assistant Secretaries for the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development; JUDGE NELSON A. DIAZ, former General Counsel, Department of Housing and Urban Development; RAPHAEL BOSTIC, former Assistant Secretary for Policy Development and Research, 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 from Republican and Democratic presidential administrations 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" or the "Act") from as early as 1981 through 2013. These officials file this amicus brief to state that the final rule promulgated by HUD regarding the implementation of the FHA's discriminatory effects standard is consistent with HUD's long-standing application of such an analysis. In the exercise of their statutorily-provided responsibilities to investigate and adjudicate housing discrimination complaints, the *Amici* consistently used an analysis focusing upon the unjustified discriminatory effects of a practice, as well as a disparate treatment analysis, in determining whether a violation of the FHA had occurred or was about to occur.

The Presidential appointees are as follows, by title and dates of tenure: *Secretary of the Department*

[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.

of Housing and Urban Development, Henry G. Cisneros (1993-1997); *Assistant Secretary for Fair Housing and Equal Opportunity*, *Department of Housing and Urban Development*, Antonio Monroig (1981-1987), Judith Y. Brachman (1987-1989), Elizabeth K. Julian (1995-1997), Eva Plaza (1997-2001), Kim Kendrick (2005-2009), and John Trasviña (2009-2013); *General Counsel of the Department of Housing and Urban Development*, Judge Nelson A. Diaz (1993-1997); and *Assistant Secretary for Policy Development and Research*, *Department of Housing and Urban Development*, Raphael Bostic (2009-2012).

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

SUMMARY OF ARGUMENT

HUD is the chief administrative agency charged with administering, interpreting, and enforcing the FHA. Since the original enactment of the FHA in 1968, Congress has vested HUD with the statutory authority to administer the FHA, including by investigating discrimination complaints. Following the 1988 amendments to the FHA, effective March 1989, HUD has also been charged with the responsibility of conducting

formal adjudications and making final agency decisions in administering and enforcing the FHA. HUD's consistent interpretation of the FHA to encompass a discriminatory effects theory of liability, most recently reflected in the Final Rule promulgated after notice and comment, is reasonable and entitled to deference. *See* Final Rule, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) ("Final Rule"). The Final Rule codifies HUD's long-standing interpretation of the FHA to reach the unjustified effects of housing discrimination. Moreover, in final agency decisions, such as final orders, HUD has repeatedly found actions unlawful under the FHA based on evidence of discriminatory effects since Congress first authorized HUD in 1988 to conduct administrative hearings.

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 federal agencies; in internal guidance memoranda issued by the Assistant Secretary for Fair Housing and Equal Opportunity ("FHEO") and/or the HUD Office of General Counsel; and in internal training materials for HUD investigators. As early as 1980, the HUD Secretary expressly recognized the agency's efforts to address the effects of discrimination. *See*, *e.g.*, 126 Cong. Rec. 31,166-67 (1980) (statement of Sen. Charles Mathias) (reading into the record a letter by the Secretary of Housing and Urban Development describing the "effects test" as a "rational, thoughtful mode of analyzing evidence

[that] is imperative to the success of civil rights law enforcement."). For over thirty years, HUD has embraced disparate impact analysis as a central part of its administration and enforcement of the FHA. HUD's Final Rule, its formal adjudications, and its long-standing and well-reasoned pronouncements are entitled to deference.

ARGUMENT

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

HUD's Final Rule reflects its long-standing and reasonable interpretation of the FHA to encompass liability for practices having an unjustified discriminatory effect.[2] According to the Final Rule, liability may be established under the FHA based on a practice's discriminatory effect, even if the practice was

[2] HUD published the Final Rule at Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 on February 15, 2013, with an effective date of March 18, 2013. The rule will be codified at 24 C.F.R. pt. 100. The Final Rule formally establishes a three-part burden-shifting test for determining when a practice with a discriminatory effect violates the FHA. *Id.*

not motivated by intent. *See* 24 C.F.R. § 100.500. A practice has a "discriminatory effect" where it "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 100.500(a). The practice may still be lawful if supported by a legally sufficient justification. *Id.* § 100.500. A "legally sufficient justification" may exist for the challenged practice if the practice "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests," and "[t]hose interests could not be served by another practice that has a less discriminatory effect." *Id.* § 100.500(b).

The Final Rule also codifies the burden of proof necessary to establish a violation based on the discriminatory effects standard. First, the plaintiff or charging party has the burden of proving that a practice has caused or will predictably cause a discriminatory effect. *Id.* § 100.500(c)(1). If the plaintiff or charging party satisfies this burden, then the defendant or respondent has the burden of demonstrating that the practice will achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent. *Id.* § 100.500(c)(2). If the defendant or respondent satisfies this burden, then the plaintiff or charging party may still prevail by proving that the substantial, legitimate, nondiscriminatory interests could be served by another

practice that has a less discriminatory effect. *Id.* § 100.500(c)(3).[3]

HUD's regulations should be accorded deference under *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); *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 243-47 (2005) (Scalia, J., concurring in part and in the judgment) (deferring to an agency's reasonable views). An "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Congressional delegation of such authority can be demonstrated by an agency's power to adjudicate or engage in notice-and-comment rulemaking. *Id.* To date, there has not been a single case "in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington, Tx. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013); *see also Mead*,

[3] The Court expressly declined to grant certiorari on the question of what evidentiary test should be used to analyze such claims. *See Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013).

533 U.S. at 230 ("overwhelming" number of Supreme Court cases applying *Chevron* deference have involved "the fruits of notice-and-comment rulemaking or formal adjudication").

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

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

HUD promulgated the Final Rule after full notice-and-comment procedures undertaken by the Secretary of HUD (the "Secretary") pursuant to his rulemaking authority under the FHA. Section 808(a) of the FHA gives the Secretary the "authority and responsibility for administering this Act." 42 U.S.C. § 3608(a). Section 815 of the FHA provides that "[t]he Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with

respect to all rules made under this section." 42 U.S.C. § 3614a. In addition to rulemaking authority, Congress provided the Secretary with adjudicative authority under the FHA to accept and investigate housing discrimination complaints; to issue determinations of reasonable cause and charges of discrimination; to conduct formal adjudications; and to make final agency decisions. 42 U.S.C. §§ 3610(g)(1), 3610(g)(2)(A), 3612(h)(1); 24 C.F.R. §§ 103.400(a), 104.930.

On November 16, 2011, HUD published a Notice of Proposed Rule-Making ("NPRM") regarding the "Implementation of the Fair Housing Act's Discriminatory Effects Standard." 76 Fed. Reg. 70,922 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100). After a period of public comment on the proposed rule, HUD reviewed the comments, revised the rule, and promulgated the Final Rule. 78 Fed. Reg. 11,460. The Final Rule reflects HUD's careful consideration of the various public comments for and against the proposed rulemaking; carefully explains why the Final Rule is a reasonable interpretation of the FHA; describes how the Final Rule is consistent with HUD's long-standing interpretation of the FHA to encompass claims premised upon unjustified discriminatory effects; and notes that the Final Rule is consistent with all federal courts of appeals that have addressed the question of whether claims under the FHA can be based upon a practice's unjustified discriminatory effects. *Id.* at 11,461-79.

In issuing the NPRM and promulgating the Final Rule, the Secretary focused fully upon determining whether a practice with a discriminatory effect

violates the FHA, and upon the standards necessary to establish liability for a housing practice with discriminatory effects. The Secretary first determined that there was a need for a formal rule: "to formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the [FHA], and to provide nationwide consistency in the application of that form of liability." Final Rule, 78 Fed. Reg. at 11,460. The Secretary examined HUD's prior interpretations of the FHA – as expressed in formal adjudications, letters and policy statements, formal rules regarding the Federal Housing Enterprises Financial Safety and Soundness Act, and internal guidance and enforcement handbooks for HUD staff – concluding that the FHA is violated by facially neutral policies that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent. *Id.* at 11,461-62. Further, the Secretary examined decisions of the federal courts of appeals addressing the question of whether the FHA encompasses liability based upon unjustified discriminatory effects, as well as the manner in which evidence has been analyzed in order to prove liability based upon discriminatory effects. *Id.* at 11,462-63. Ultimately, the Secretary adopted a rule that served the identified need: the Final Rule confirms HUD's and the federal courts' long-standing interpretation of the FHA to encompass liability based upon unjustified discriminatory effects, and adopts the three-part burden-shifting analysis currently used by HUD and the majority of courts of appeals to prove such a claim. *Id.* at 11,460.

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

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

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

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

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

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

liability to issue charges of discrimination, make findings of discrimination through administrative law judge orders that become final agency decisions, and initiate its own complaints of discrimination. *See infra* Part II, IV.A. Many of HUD's charges of discrimination have formed the jurisdictional basis for complaints filed in federal court by the Department of Justice, pursuant to the Secretary's authority to authorize the Attorney General to commence a civil action upon the filing of a notice of election. 42 U.S.C. § 3612(o). Since the 1988 amendments, the United States has alleged violations based on discriminatory effects after referral from the Secretary. *See*, *e.g.*, Compl., *United States v. Landings Real Estate Grp.*, No. 11-cv-1965 (D. Conn. Dec. 20, 2011) (alleging neutral occupancy standard had an unjustified discriminatory effect on families with children in violation of 42 U.S.C. § 3604(a)); Compl., *United States v. Candlelight Manor Condo. Ass'n*, No. 1:03-cv-248 (W.D. Mich. Apr. 10, 2003) (alleging neutral occupancy standard had an unjustified discriminatory effect based on familial status and in violation of 42 U.S.C. § 3604(a), (b)); Compl., *United States v. C.B.M. Grp., Inc.*, No. 1-cv-857-PA (D. Or. June 8, 2001) (alleging that a landlord's policy of evicting any tenant who commits an act of violence or who controls another who commits an act of violence had a disparate impact on victims of domestic violence and constituted discrimination on basis of sex); Compl., *United States v. Hagadone*, No. 97-0603-N-RHW (D. Idaho Dec. 24, 1997) (alleging neutral occupancy standard had an unjustified discriminatory effect based on

familial status and in violation of 42 U.S.C. § 3604(a)).

HUD has never promulgated a rule interpreting the Act to require a finding of intentional discrimination. Contrary to Petitioners' characterization, HUD's 1989 rule implementing the Fair Housing Amendments Act of 1988 (the "1989 Final Rule") does not reflect an inconsistent position. *See* Petr.'s Br. at 36; Brief for the American Financial Services Association, et al., as Amici Curiae Supporting Petitioners at 29-30 (filed Sept. 2013) ("AFSA Br."). In the preamble to the 1989 Final Rule, HUD addressed the public comments that four illustrations in the proposed rule could be misinterpreted to limit the type of activity that would constitute unlawful conduct, or to imply that intentional discriminatory conduct was necessary to establish discrimination under the FHA. *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234 (Jan. 23, 1989) (to be codified at 24 C.F.R. pt. 14 *et seq.*). HUD responded by saying, "[w]hile the Department believes that the cited illustrations do not in any way imply the standard for determining the liability of persons, these regulations are not designed to resolve the question of whether intent is or is not required to show a violation and in order to assure that there will be no confusion as to the scope of Part 100," HUD revised three of the illustrations. *Id.* at 3234-35. The fourth was deleted entirely in response to different concerns raised by commenters. *Id.* HUD's revised illustrations did not require discriminatory intent. Nor did they

reject a standard of liability based on discriminatory effects. Thus, the 1989 Final Rule does not contradict HUD's discriminatory effects Final Rule. *See Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742-43 (1996).[4]

Third, HUD acted reasonably in its consideration and ultimate rejection of an interpretation of the FHA that does not include liability under a discriminatory effects theory. Final Rule, 78 Fed. Reg. at 11,465-67. HUD reviewed the text of the FHA and case law interpreting the meaning of the statute's text. Specifically, HUD considered Sections 804(a) and 804(f)(1) which prohibit various practices relating to the sale or rental of a dwelling, including those that "otherwise make unavailable" a dwelling on the basis of a protected characteristic. 42 U.S.C. §§ 3604(a), (f)(1). HUD interpreted the phrase "otherwise make unavailable" as one that focuses upon the effects of a

[4] To the extent the 1989 Final Rule may represent a prior inconsistent HUD interpretation, it is well-established that "'[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'" *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011) (omitting internal citation). The touchstone remains whether the agency's current interpretation is reasonable. *Id.* Further, where an agency's interpretative changes "create no unfair surprise," such as when an agency uses notice-and-comment rulemaking to codify its new interpretation, "the change in interpretation alone presents no separate ground for disregarding the [agency's] present interpretation." *Long Island Care at Home, Ltd.*, 551 U.S. at 170-71. Indeed, as the Court observed in *Smiley*, contradictory statements demonstrate "good reason" for an agency to promulgate new regulations "in order to eliminate uncertainty and confusion." 517 U.S. at 743.

challenged action rather than the motivation of the actor, thereby providing a basis for disparate impact liability in the statute. Such an interpretation finds support in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 235, 240 (2005), which held that analogous text in Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), respectively, provide for disparate impact liability. Similarly, HUD's interpretation of the phrase "to discriminate" in sections of the FHA that prohibit discrimination in housing-related transactions on the basis of protected characteristics to encompass unjustified discriminatory effects claims is based upon HUD's extensive experience administering the statute, including the investigation of fair housing complaints and formal agency adjudications. HUD's rejection of the argument that the phrases "because of" and "on account of" within Sections 804 and 805 limit the FHA's scope to intentional conduct is reasonable given case law interpreting similar language in Title VII and the ADEA to encompass liability for discriminatory effects without regard to intent. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

As part of its review, HUD also considered other provisions of the FHA, including three exemptions that would have no meaning without a discriminatory effects theory of liability under the FHA. *See* 42 U.S.C. § 3605(c) (exemption for real estate appraisers

to take into account factors other than protected characteristics); 42 U.S.C. § 3607(b)(1) (exempting governmental restrictions regarding occupancy limits in dwellings); 42 U.S.C. § 3607(b)(4) (exempting FHA-covered actions taken because of a person's controlled substance convictions).

Fourth, the Final Rule embodies the course laid by the eleven circuit courts of appeals holding that liability under the FHA may be established based on a showing that a neutral policy or practice has a discriminatory effect even if such policy or practice was not adopted for a discriminatory purpose. *See*, *e.g.*, *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Mountain Side Mobile Estate P'ship v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Smith v. Town of Clarkston*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290-92 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974).

Finally, the Solicitor General's amicus brief in 1987 to the Court asserting that a violation of the

FHA requires a finding of intentional discrimination, *see* Brief for the United States as Amicus Curiae, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961) (U.S. filed June 1988), does not reflect HUD's longstanding interpretation of the FHA and should be given extremely limited weight. Though Petitioners and their *Amici* emphasize this lone brief by the Solicitor General, *see* Petr.'s Br. at 36; AFSA Br. at 28-29, the Department of Justice has never had rulemaking authority under the FHA and filed its brief before Congress amended the FHA to give HUD, not the Department of Justice, the authority to adjudicate FHA complaints and promulgate rules. Moreover, both before and after 1987, the Department of Justice has advanced the position that the FHA encompasses a discriminatory effects theory of liability. As early as 1971, the Department of Justice began filing lawsuits successfully challenging municipalities' exercise of zoning powers based on the actions' unjustified discriminatory effects. *See United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974); *United States v. City of Parma, Ohio*, 661 F.2d 562, 567 (6th Cir. 1981); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987). The Department of Justice has continued to file lawsuits challenging land use and zoning decisions that have a discriminatory effect, including as recently as 2011. *See* Compl., *United States v. City of Joliet*, No. 11-cv-5305 (N.D. Ill. Aug. 4, 2011) (alleging City's designation of federally subsidized apartment complex as blighted and attempt to use eminent domain had discriminatory effect on African-Americans and would perpetuate

residential segregation, in violation of 42 U.S.C. § 3604(a)).[5] During the past twelve years, in both Republican and Democratic administrations, the Department of Justice has filed amicus briefs in support of private parties challenging housing practices based on a discriminatory effects theory of liability. *See* Brief for the United States as Amicus Curiae, *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (No. 10-1032) (U.S. filed Dec. 2011); Brief of the United States as Amicus Curiae in Opposition to District of Columbia's Motion to Dismiss, *2922 Sherman Avenue Tenants' Ass'n v. Dist. of Columbia*, No. 1:00CV00862 (D. D.C. June 12, 2001), *available at* http://www.justice.gov/crt/about/hce/documents/amicus_sherman.php.[6]

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[5] As *Amici* in support of Petitioners have noted, the current Department of Justice has characterized the use of disparate impact theories as "dormant," because "disparate impact claims were not allowed" or "next to impossible" to file in previous administrations. *See* AFSA Br. at 32. Far from disclaiming an interpretation of the FHA to include claims based on discriminatory effects, these statements demonstrate that prior administrations chose not to use the effects theory even though it had been applied by circuit courts across the country.

[6] Nor, as Petitioners and their *Amici* urge, should President Reagan's 1988 FHAA signing statement be considered in determining whether the Act encompasses liability for discriminatory effects. *See* Petr.'s Br. at 35-36; AFSA Br. at 29 (citing Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988)). The legislative and administrative record as a whole since 1968 are not consistent with the signing statement. To the extent that the signing statement may be attributed to HUD as of 1988, it is clear that an agency is "entitled to consider alternative interpretations before settling on the view it considers most sound," and thus HUD's

(Continued on following page)

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

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 ALJs commence hearings, "make findings of fact and conclusions of law," and "promptly issue" orders of relief. 42 U.S.C. § 3612(g). The Secretary may review any

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current position, as reflected in the Final Rule, controls. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986).

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

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

Final 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).

HUD took a similar position in *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *17 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996), where an ALJ determined, based in part on statistical evidence regarding household size, that a four-person maximum occupancy policy for 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 a 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. 08-91-0077-1, 1995 WL 365009 (HUD ALJ June 12, 1995), *rev'd on other grounds sub nom. Carlson v. United States Dep't of Hous. and Urban Dev.*, 81 F.3d 165 (8th Cir. 1996) (HUD ALJ final order holding that a facially neutral four-occupant maximum 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. 01-92-0466-8, 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 in 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.* at *5.

Likewise, HUD ALJ orders have recognized the disparate impact theory in the disability discrimination context. For instance, a HUD ALJ utilized the disparate impact theory of liability to analyze a policy

that required tenants to purchase renters' liability insurance before the landlord would permit any physical modifications. HUD concluded the policy violated the FHA because, in part, it had a disparate impact on tenants with disabilities who used wheelchairs and needed ramps installed for access. *See*, *e.g.*, *HUD v. Twinbrook Vill. Apts.*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001).

III. HUD'S APPLICATION OF A DISCRIMINATORY EFFECTS STANDARD, AS CODIFIED BY OTHER REGULATIONS, IS ENTITLED TO *CHEVRON* DEFERENCE.

HUD's repeated interpretations, as reflected in regulations it issued in 1994, 1996, and 1999, expressly recognizing the applicability of a discriminatory effects test to government sponsored enterprises and local recipients of federal housing funds are also entitled to *Chevron* deference. *See Meyer*, 537 U.S. at 288 (noting HUD's consistent interpretation of an analogous statutory provision).

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

preferences for working families, the "preference may not be administered in a way that will violate the legal prohibitions against discrimination." *Id.* at 36,619. HUD offered as a permissible example a preference for working families that did not violate provisions protecting against discrimination on the basis of disability. *Id.* Through this example, HUD noted that preferences for working families could have a disparate impact on the eligibility of disabled individuals for housing, which could violate the FHA.

In 1995, HUD issued regulations that prohibited the two Government Sponsored Enterprises ("GSEs"), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), from engaging in conduct that has a discriminatory effect. Specifically, the Secretary promulgated regulations to implement its authority under the Federal Housing Enterprises Financial Safety and Soundness Act. *See* The Secretary of HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 Fed. Reg. 61,846 (Dec. 1, 1995) (to be codified at 24 C.F.R. pt. 81). The regulations prohibit the GSEs from discriminating in their mortgage purchases "in a manner that has a discriminatory effect." 24 C.F.R. § 81.42. In the preamble to the final rule, HUD stressed the importance of the disparate impact theory by stating that "the disparate impact (or discriminatory effect) theory is firmly established by [FHA] case law. That law is applicable to all segments of the housing

marketplace, including the GSEs." 60 Fed. Reg. at 61,867.

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

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

minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live." *Id.* Lenders, in such a case, would be required to justify the "business necessity" for the policy. *Id.* at 18,268.

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

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

A. HUD's Secretary-Initiated Complaints Recognize an Effects Test and Are Entitled to Deference.

The FHA provides the Secretary with the authority to investigate and file complaints alleging discriminatory housing practices on the Secretary's own initiative and in the absence of an aggrieved person filing a complaint with HUD. 42 U.S.C. § 3610(a)(1)(A)(i) ("The Secretary, on the Secretary's own initiative, may also file such a complaint."). HUD's exercise of its authority to initiate complaints is entitled to deference. *Dada v. Mukasey*, 554 U.S. 1, 20-20 (2008) ("Although not binding in the present case, the [Department of Justice's] proposed interpretation of the statutory and regulatory scheme . . . warrants respectful consideration.") (internal quotation omitted); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496-97 (2002) (stating that the position of the Secretary of Health and Human Services "who possesses the authority to prescribe standards relevant to the issue here . . . warrants respectful consideration.").

HUD has consistently used its investigatory and enforcement authority to file complaints based on discriminatory effects. For example, in 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. Compl., *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 2010 Annual Report to Congress on Fair Housing* 39 (Aug. 29, 2011) (Secretary-initiated complaint in April 2010 against Countrywide FSB alleging a policy classifying certain metropolitan areas as high risk for decline and subjecting those areas to a 5 percent reduction on maximum financing, thereby causing a discriminatory effect on minorities); 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, *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's Secretary-initiated complaints further demonstrate the agency's application of the effects theory of liability in enforcing the FHA.

B. Guidance from HUD Assistant Secretary for FHEO and/or HUD General Counsel Is Entitled to Deference.

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

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 a discriminatory effects test. For instance, in a Memorandum from General Counsel providing guidance to all HUD Regional Counsel in 1991 following the 1988 amendments to the FHA, HUD made clear that enforcement of the FHA encompassed facially neutral policies that had a discriminatory effect, such as unreasonable

occupancy standards that operate to disproportionately exclude families with children. *See* HUD, Office of General Counsel, *Fair Housing Enforcement Policy: Occupancy Cases* (Mar. 20, 1991), *published at* Fair Housing Enforcement – Occupancy Standards; Notice of Statement of Policy, 63 Fed. Reg. 70,982, 70,983-87 (Dec. 22, 1998), HUD Amici App. 1. 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," and stated that the Memorandum was being circulated because it was "imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases." *Id.*, HUD Amici App. 2, 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 confirms that "the reasonableness of any occupancy policy is rebuttable" and provides examples of factors that HUD would consider such as size of bedrooms, age of children, and configuration of unit when reviewing cases involving occupancy policies. *Id.*, HUD Amici App. 3.

In 1993, the HUD Assistant Secretary for FHEO issued a memorandum titled "The Applicability of

Disparate Impact Analysis to Fair Housing Cases," which stated that housing discrimination complaints should be analyzed by FHEO investigators under a disparate impact theory of liability. *See* HUD, Office of Fair Housing & Equal Opportunity, *The Applicability of Disparate Impact Analysis to Fair Housing Cases* (Dec. 17, 1993), HUD Amici App. 9. The Memorandum outlined the reasoning in HUD's final administrative decision in *Mountain Side Mobile Estates*, *see supra* Part II.B, and instructed HUD Regional Directors to investigate all business necessity justifications proffered by respondents for facially neutral policies as part of evaluating whether the policies operate to disproportionately disadvantage persons in violation of the FHA. *Id*., HUD Amici App. 10-11.

One year later, HUD's General Counsel and Assistant Secretary for FHEO issued a joint memorandum regarding the issue of whether the facially neutral policy of imposing a fee based on the number of occupants in a dwelling constituted unlawful familial status discrimination. *See* HUD, Office of General Counsel and Office of Fair Housing & Equal Opportunity, *Occupancy Fees & Familial Status Discrimination Under the Fair Housing Act* (Mar. 29, 1994), HUD Amici App. 49. 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. 56-57.

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. 60, 66-71.

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. 74. 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. 75.

And more recently, in a Memorandum from the FHEO Deputy Assistant Secretary for Enforcement and Programs to FHEO Offices and Regional Directors, HUD discussed how facially neutral "zero-tolerance" rental policies regarding domestic violence could have a disparate impact on women. *See* HUD, Office of Fair Housing & Equal Opportunity, *Assessing Claims of Housing Discrimination Against Victims of Domestic Violence Under the Fair Housing Act*

& the Violence Against Women Act (Feb. 9, 2011), HUD Amici App. 77. HUD noted that "[d]isparate impact cases often arise in the context of 'zero-tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. The theory is that, even when consistently applied, women may be disproportionately affected by these policies" because they are overwhelmingly the victims of domestic violence. *Id.*, HUD Amici App. 87. As examples, HUD 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.*, HUD Amici App. 90-96 (discussing cases arising under, *inter alia*, 42 U.S.C. § 3604(b)).

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

In carrying out its statutory responsibility to investigate complaints, 42 U.S.C. § 3610, conduct formal adjudications, 42 U.S.C. § 3612, and administer the FHA, 42 U.S.C. § 3608, HUD originally published a Title VIII Complaint, Investigation, and Conciliation Handbook ("the Handbook") in 1995 to instruct HUD personnel on how to investigate and evaluate housing discrimination complaints. HUD, Handbook No. 8024.1, *Title VIII Complaint Intake, Investigation & Conciliation Handbook* (May 11, 2005). As per HUD's policy, the Handbook was subjected to Departmental review and clearance prior to being issued. HUD, Handbook

No. 000.2 REV-3, *HUD Directives System* 7, 11 (Mar. 2012) (describing handbooks as a "comprehensive document of current and applicable information on a specific HUD program and may include clarification of policies, instructions, guidance, procedures, forms, and reports").

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

In 1998, HUD modified the Handbook and expanded it to include a chapter titled "Theories of Discrimination" that incorporates disparate impact as one theory of discrimination under the FHA. *Id*. at 2-27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *id.* at 2-27 to 2-45 (HUD guidelines for investigating a disparate impact claim and establishing its elements). The Handbook also sets forth a burden-shifting framework for proving claims of unjustified disparate impact. *Id.* at 2-30 to 2-44. The Handbook, which has provided definitive guidance to

HUD investigators for over seventeen years, is another example of HUD's application of the disparate impact theory in carrying out its statutory responsibility to enforce the FHA.

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 local fair housing laws that have been certified as substantially equivalent by HUD under Section 3610(f)(3) of the FHA. *About NFHTA*, National Fair Housing Training Academy ("NFHTA"), *available at* http://www.nfhta.org/about.htm (last visited Oct. 22, 2013). As with the Handbook, the training curriculum includes both the disparate treatment and discriminatory effects theories of liability. *Courses*, NFHTA, *available at* http://www.nfhta.org/courses.htm (last visited Oct. 22, 2013).

As required by the FHA, HUD reports to Congress annually regarding the "nature . . . of discriminatory housing practices in representative communities . . . throughout the United States." 42 U.S.C. § 3608(e)(2). These annual reports have included reference to the many Secretary-initiated complaints alleging discrimination based on unjustified discriminatory effects. *See supra* Part IV.A (sampling HUD annual reports to Congress). In addition, the reports inform Congress about other fair housing activities by HUD during the past fiscal year, such as receiving complaints, issuing discrimination charges, entering into conciliation agreements, promulgating guidance,

reviewing studies, and providing technical assistance. These activities periodically involve the application of a disparate impact analysis to housing practices throughout the country. For example, in its Annual Report for Fiscal Year 2010, HUD reported to Congress that it was working to assist state attorneys general and local officials to provide guidance to landlords about the FHA in light of newly enacted rental registration ordinances that may have a disparate impact based on national origin. *See* HUD, *FY 2010 Annual Report to Congress on Fair Housing* 10 (Aug. 29, 2011). HUD also reported during the same year that it was taking steps to address rental policies that exclude renters receiving Section 8 Rental Assistance and Social Security Disability Insurance, thereby disproportionately affecting persons who belong to protected classes under the FHA. *Id*. at 11.

HUD also periodically makes "studies with respect to the nature and extent of discriminatory housing practices." 42 U.S.C. § 3608(e)(1). In 1977, 1989, 2000, and 2012, HUD conducted national studies using testers who visited rental and sales offices in response to specific real estate advertisements to collect and evaluate information about differential treatment received by those testers. Since the paired testing methodology, by its very nature, is a tool used to identify differences in treatment, as opposed to neutral policies, these studies have not focused on housing practices with discriminatory effects. *See* U.S. Dep't of Hous. and Urban Dev. Office of Policy Dev. and Research, *Housing Discrimination Against Racial and Ethnic Minorities 2012* xii n.3 (June 2013)

(study "focuses on differential treatment discrimination – when equally qualified homeseekers receive unequal treatment from housing providers," though federal law also prohibits practices that have "a disparate impact on minority homeseekers.").

At the same time, HUD has conducted other studies that do not use testing, including those that have identified the potential discriminatory effect of certain real estate and housing practices. For example, in 2000, HUD commissioned a study to examine whether the GSEs' underwriting standards in the multifamily mortgage market had a "disproportionate adverse impact" on one or more groups protected against discrimination by the FHA. Abt Associates, *Study of Multifamily Underwriting and the GSEs' Role in the Multifamily Market: Expanded Version* at v, Contract No. C-OPC-18571 (Aug. 2001). The report found that GSE guidelines, particularly those regarding loans on small multifamily properties, appeared to have an adverse disproportionate impact on minority-owned properties. *Id.* at xii. The study recommended additional research on whether the guidelines have a business necessity. *Id.* at xiii.

In investigative handbooks, training curriculum, annual reports to Congress, and research studies, HUD has consistently studied, reported on, and trained its own staff and local agencies enforcing fair housing laws about intentional discrimination, as well as policies that have a discriminatory effect in housing.

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CONCLUSION

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

Respectfully submitted,

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