

National Commission on Fair Housing & Equal Opportunity

Written Testimony Submitted By:

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Introduction

We are pleased to provide the National Commission on Fair Housing and Equal Opportunity with the following comments regarding efforts undertaken by the Civil Rights Division of the U.S. Department of Justice and the Fair Housing and Equal Opportunity Office (FHEO) of the Department of Housing and Urban Development (HUD) to enforce the Fair Housing Act during the past twenty years.

Our comments are based on our personal experiences working at the Justice Department between 1991 and 2004 in the Housing and Civil Enforcement Section (Housing Section) of the Civil Rights Division. In addition, we draw from our experiences since 2004 of developing the new Fair Housing Justice Center (FHJC), a non-profit fair housing organization based in New York City. The New York Open Housing Center, which had operated for more than 32 years in New York City, closed its doors in 2003.

While at the Justice Department, Diane Houk served as a Senior Trial Attorney and then Special Litigation Counsel in the Housing Section. As a Senior Trial Attorney, Ms. Houk created the Division's School and Housing Opportunity (SHOI) Initiative and in 2000 was named Special Litigation Counsel. In this role, Ms. Houk led the Housing Section's efforts to challenge discrimination on the basis of race and national origin in land use and zoning by local governments. She also spearheaded the Division's initial efforts to enforce the Memorandum of Understanding between the Departments of HUD, Treasury, and Justice regarding fair housing compliance under the Low Income Housing Tax Credit Program. The Division has not brought any new race or national origin discrimination cases involving land use or zoning since 2004 when Ms. Houk left the Justice Department.

In 1991, Fred Freiberg assisted the Housing Section at the Justice Department to create an internal testing capability and then supervised the testing program until 1998. During the next four years, Mr. Freiberg consulted on various research projects including serving as the Field Implementation Director

for a national HUD-funded testing study of mortgage lending practices¹ and the third and largest national Housing Discrimination Study (HDS) conducted in the United States.² Mr. Freiberg briefly returned to the Department of Justice in 2002 and continued to direct the Housing Section's testing program until he resigned his position in May 2004. As will be described in greater detail below, the number of cases filed by the Division based on evidence gathered by the Housing Section's testing program fell dramatically during the current administration.

Failure By Justice Department to Fulfill Unique and Critical Responsibility to Bring Systemic Race Discrimination Cases

Under amendments to the Fair Housing Act enacted twenty years ago, the role of the Justice Department was expanded to include filing cases based on individual housing discrimination complaints referred by HUD. In addition, the Justice Department's traditional authority to file systemic suits for injunctive relief alleging a pattern or practice of housing discrimination was expanded to enable the Department to seek compensatory and punitive damages, as well as civil penalties. During the administrations of Presidents George H. W. Bush and William Jefferson Clinton, the Civil Rights Division increased the number of attorneys dedicated to this important enforcement role, implemented a lending discrimination program, developed a testing program, and created the School and Housing Opportunity (SHOI) Initiative.

Regrettably, during the past eight years, the Division has filed fewer pattern or practice housing discrimination cases based on race or national origin, filed fewer cases based on its own testing investigations, filed fewer lending discrimination cases, and for all practical purposes, suspended the SHOI Initiative.

A comparison of the last four years of the Clinton administration with the first four years of President George W. Bush's administration illustrates the sharp contrast in the Division's commitment to eliminating race and national origin discrimination in housing. Between FY97 and FY00, 50% of the pattern or practice housing discrimination cases filed by the Housing Section alleged discrimination based on race and/or national origin.³ In contrast, between FY01 and FY04, only 30% of the Housing Section's pattern or practice housing discrimination case filings included allegations of race and/or national

¹ Turner, Margery Austin, Fred Freiberg, et al, "All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions," Urban Institute (2002).

² "Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000," Prepared by Urban Institute for HUD (2002).

³ "FY" represents the fiscal year beginning October 1 and ending September 30 each year. Thus, "FY97" includes the time period of October 1, 1996 to September 30, 1997.

discrimination. This disturbing downward trend continued in FY05, when only 20% of the pattern or practice housing discrimination cases filed by the Housing Section included allegations of race and/or national origin discrimination.⁴

In addition to the dramatic decrease in systemic race discrimination case filings, the Division imposed several internal procedural changes that hindered the ability of Housing Section attorneys to develop and bring pattern or practice discrimination cases. For example, the current administration implemented a requirement that Housing Section attorneys could not open pattern or practice investigations without receiving approval from a political appointee in the office of the Assistant Attorney General for Civil Rights. Throughout its prior history and across several administrations, Housing Section attorneys routinely initiated discrimination investigations after obtaining the approval of career attorney managers in the Housing Section who had extensive knowledge of fair housing law and the Division's goals and responsibilities. This change in procedure alone resulted in many months of delay and, as a practical matter, made it more difficult for Housing Section attorneys to interview witnesses and to obtain relevant documents in a timely manner. Furthermore, unnecessary delays in initiating investigations served to permit discriminatory housing practices to continue unabated and discouraged private fair housing organizations from referring information about discrimination to the Housing Section since its attorneys were unable to respond promptly.

Second, even though the process for obtaining authorization to file a housing discrimination lawsuit remained the same under the Bush Administration, the amount of time taken by political appointees in the Office of the Assistant Attorney General for Civil Rights to decide whether to authorize a suit lengthened dramatically after 2001. During the 1990s, Housing Section attorneys could expect a decision regarding whether to authorize the filing of a housing discrimination lawsuit from the Assistant Attorney General for Civil Rights within one to three months depending on the complexity of the case. During the past eight years, this decision making process has lengthened into a more than six to nine month wait, with some instances taking more than a year for the Housing Section to obtain a decision.

For example, a year ago, in October 2007, the Fair Housing Justice Center (FHJC) provided the United States Attorney's Office (E.D.N.Y.) with information obtained from a testing investigation FHJC conducted into the practices of a Brooklyn real estate company. In March 2008, FHJC was informed that the matter had been assigned to the Civil Rights Division in Washington, DC to review. Now, more than seven months later, the Division remains unable to

⁴ All references in this paragraph to pattern or practice case filings are based on written testimony submitted by Assistant Attorney General for Civil Rights Wan Kim to the Senate Judiciary Committee in October 2005. For FY97-FY00, 36 of 71 pattern or practice housing discrimination case filings alleged race and/or national origin discrimination; for FY01-FY05, 25 of 81 case filings, and for FY05, 4 of 20.

decide whether to file a pattern or practice case alleging race discrimination. The Division's continued delay in deciding how to handle a case involving a pattern of refusing to provide service to African Americans by a licensed real estate company is troubling. Here, where the tests were recorded, all the testers have been interviewed by the Division, and FHJC has given the Division its investigative records regarding this matter, the Division's failure to take enforcement action sends several messages. First, it permits those who discriminate to continue to deny housing opportunities in violation of federal civil rights laws. Second, it signals to the victims of such discrimination that the U.S. Department of Justice is not able to secure their civil rights in a timely manner. Finally, it weakens everyone's belief that the federal government is committed to the elimination of racial discrimination in housing.

Justice Department Testing Program: Increased Activity with Diminished Results

The Justice Department's testing program was developed as an investigative unit within the Housing Section. The first testing investigations were commenced by March 1992. Throughout the 1990's, with limited resources and personnel, the HCE testing program proved beyond all doubt that a federal civil rights agency could effectively use testing as an investigative tool to identify and document patterns and practices of illegal housing discrimination. While the program never reached its full potential due largely to limitations of resources, the testing program amply demonstrated that it was capable of collecting credible, objective, and admissible evidence of systemic housing discrimination.

In February 2006, the Department announced a "new initiative" called "Operation Home Sweet Home." The key components of this initiative were to improve the way that the Department targeted areas and sites for testing investigations, expand the quantity of testing conducted, increase resources for the testing program, concentrate testing on areas where displaced persons from Hurricane Katrina had been relocated, and create a new website devoted to fair housing enforcement.⁵

After nearly three years, it is now possible to assess the effectiveness of this initiative. Operation Home Sweet Home appears to have been nothing more than a clever attempt to cosmetically reinvent the testing program. This "makeover" may have distracted public attention away from the fact that it took the Civil Rights Division more than six months to fashion any type of response to the catastrophic events of Hurricane Katrina in August 2005. But did it do anything to enhance or strengthen the effectiveness of the testing program or the ability of the Justice Department to vigorously enforce fair housing laws?

⁵ *Fact Sheet: Department of Justice Initiative to Combat Housing Discrimination "Operation Home Sweet Home"*, News Release, U.S. Department of Justice (February 15, 2006)

Compare the Department's reaction to Hurricane Katrina in 2005 to its response to Hurricane Andrew in 1992. Within a few days following Hurricane Andrew in 1992, HUD and the Justice Department were coordinating fair housing enforcement activities in response to housing discrimination complaints from displaced persons who were looking for housing in South Florida. Emergency command centers were established and Housing Section attorneys were deployed to Florida to work closely with HUD personnel and to be available to seek "prompt judicial action" for complainants in the event it was deemed necessary. Public announcements were made by federal officials through the media warning housing providers not to discriminate or take advantage of those families who were trying to locate temporary housing. In addition, systemic investigations were commenced in South Florida following Hurricane Andrew that ultimately resulted in the filing of eight (8) pattern and practice fair housing cases alleging race discrimination in Dade, Broward, and Palm Beach County.

Following Hurricane Katrina, there was no immediate response from the Civil Rights Division. No Housing Section attorneys or test coordinators were deployed to the Gulf region and no public warnings came from high ranking Justice Department officials admonishing housing providers not to discriminate or take advantage of the relocating families. Nationally, only three (3) pattern and practice testing cases alleging race discrimination have been filed to date in the entire Operation Home Sweet Home initiative since it was announced in early 2006. None of these cases stemmed from testing in areas of the Gulf region most affected by Hurricane Katrina.⁶

Although the Housing Section testing program under Operation Home Sweet Home has apparently conducted more testing in 2006 than in any previous year, this testing was accomplished with nearly twice the personnel and resources than were available during most of the 1990's. It is, of course, reasonable to ask...to what end? It appears that all of this testing and the added resources resulted in the filing of very few pattern and practice cases to date. The chart below details the number of Justice Department generated testing cases by year, administration, and protected category.

⁶ The cases were brought in Detroit, Michigan; Lowell, Massachusetts; and Davie, Florida.

PATTERN AND PRACTICE HOUSING CASES FILED WITH EVIDENCE GATHERED BY THE DIVISION'S TESTING PROGRAM

Administration	Year	Total Testing Cases Filed*	Breakdown of Testing Cases by Protected Characteristic		
			Race/National Origin	Disability	Family Status
Bush Sr.	1992	5	5	0	1
	(Subtotal)	(5)	(5)	(0)	(1)
Clinton	1993	7	7	0	1
	1994	7	7	0	3
	1995	11	11	0	9
	1996	4	4	0	1
	1997	12	7	5	3
	1998	8	2	6	1
	1999	5	1	4	0
	2000	6	2	3	2
	(Subtotal)	(60)	(41)	(18)	(20)
Bush	2001	3	0	3	0
	2002	5	3	1	4
	2003	1	0	1	0
	2004	1	1	0	0
	2005	1	1	0	0
	2006	2	0	1	1
	2007	3	1	1	1
	2008	3	2	0	1
	(Subtotal)	(19)	(8)	(7)	(7)
	TOTAL	84	54 ⁷	25	28

* Some testing cases alleged unlawful discrimination based on more than one protected characteristic.

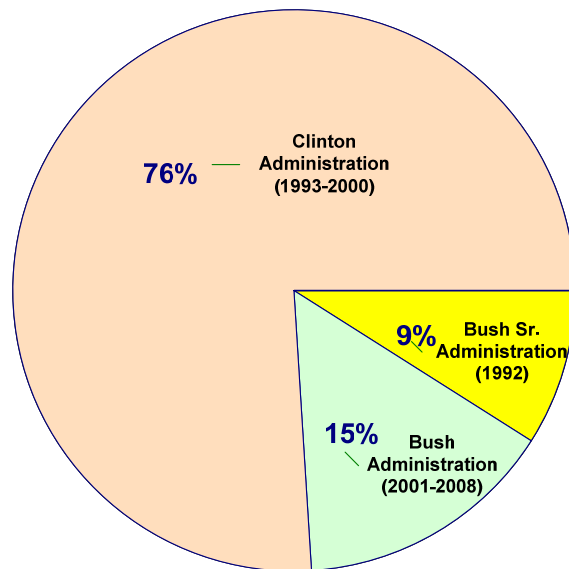
Operation Home Sweet Home may well have resulted in a record number of tests being conducted, but to date, these investigations have resulted in very few testing cases of any kind being filed. Since “improved targeting” was one of the primary goals trumpeted when the initiative was unveiled in 2006, it is not at all clear that these new targeting methods improved the ability of the Department to identify violators of fair housing laws. In fact, Operation Home Sweet Home replaced what had been a more strategic and surgical approach to targeting with a less reliable “scatter gun” approach relying upon, as the 2006 news release stated, information stemming from tips, calls to a hot line, outreach to organizations, and concentrating testing in areas where there is “a significant

⁷ An additional two testing cases were filed alleging race discrimination in places of public accommodation and not housing; one in 2001 and one in 2003.

volume of bias-related crimes such as cross-burnings.”⁸ It is difficult to imagine and somewhat vexing that anyone thought these methods represented an improvement in the targeting techniques previously employed by the testing program.

To the extent that discrimination in housing based on race and national origin remains a persistent, pervasive, and pernicious reality in our metropolitan areas, Operation Home Sweet Home has done little to address this problem. It has done even less to assist the challenges faced by survivors of Hurricane Katrina. More testing cases alleging race and/or national origin discrimination were filed in the first nine months of the testing program in 1992 than during the entire three years of the initiative known as Operation Home Sweet Home.

The following pie chart illustrates the breakdown of the 54 housing discrimination testing cases filed alleging race and/or national origin discrimination throughout the history of the testing program:



**DOJ Testing Cases Filed Alleging
Discrimination in Housing Based on
Race/National Origin By Administration
1992-2008**
(Total = 54 Housing Cases)

⁸ *Fact Sheet: Department of Justice Initiative to Combat Housing Discrimination “Operation Home Sweet Home,”* News Release, U.S. Department of Justice (February 15, 2006)

During Operation Home Sweet Home, the diminished effectiveness of the testing program resulted from the worst type of politicization. Sound and proven law enforcement techniques were compromised in favor of a shallow and deceptive public relations campaign. Fortunately, the harm to the testing program is not permanent and the program can be re-tooled and realigned to effectively aid the Civil Right Division with enforcing fair housing and fair lending laws. Going forward, the use of testing by the Civil Rights Division should be expanded. Resources available to the testing program should be increased and strategically targeted to identify and document systemic housing discrimination in the rental, sale, and financing of housing.

Abandonment by Justice Department of Traditional Role Challenging Discriminatory Land Use and Zoning Practices Based on Race and National Origin by Local Governments

Since its inception, the Civil Rights Division has had a tradition of securing access to housing opportunities for racial and ethnic minorities by filing suit under the Fair Housing Act challenging discriminatory land use and zoning practices by local governments.⁹ Following enactment of the 1988 amendments to the Fair Housing Act, the Division continued this practice throughout the 1990s, by regularly filing many lawsuits alleging race and/or national origin discrimination involving local land use and zoning practices.¹⁰ In addition, the Division added land use and zoning cases based on disability and familial status discrimination to its docket during this time period.

Whether the Division brings land use and zoning cases alleging race or national origin discrimination is critically important, because HUD specifically does not have the authority to do so under the Fair Housing Act. HUD may receive and investigate complaints alleging discrimination involving local land use or zoning practices, but is prohibited under the Fair Housing Act from issuing charges of discrimination in such instances.¹¹ Thus, where voluntary compliance is not an option, enforcement rests solely within the discretion of the Justice Department.¹² Under the direction of Assistant Attorney General for Civil Rights

⁹ See United States v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y. 1986) *judgment aff'd*, 837 F.2d 1181 (2nd Cir. 1987); United States v. City of Birmingham, Michigan, 538 F.Supp. 819 (E.D. Mich. 1982) *aff'd as modified*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1982); United States v. City of Parma, Ohio, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd as modified*, 881 F.2d. 562 (6th Cir. 1981) *cert. denied*, 456 U.S. 926 (1982); United States v. City of Black Jack, Missouri, 508 F.2d 1170 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

¹⁰ A partial list of cases brought by the Division against local governments alleging race and/or national origin discrimination during the 1990s includes: Addison, IL; Cicero, IL; Fairview Heights, IL; Hatch, NM; Jacksonville, FL; Lake Station, IN; Milford, CT; Milwaukee, WI; Montezuma County, CO; Waukegan, IL; and Wildwood, NJ.

¹¹ 42 U.S.C. §3610(g)(2)(C).

¹² 42 U.S.C. §3614(a) and (b)(1)(A).

Bill Lann Lee, a supervisory attorney position dedicated to addressing discrimination by local governments based on race and national origin was created in the Housing Section. Even the current Administration initially maintained some minimal commitment to addressing racial discrimination by local governments by filing five zoning or land use cases between 2001 and 2004 alleging race or national origin discrimination.¹³

However, not a single case challenging land use or zoning practices based on race or national origin has been filed by the Housing Section since 2004. In contrast, during this same time period in the New York metropolitan area alone, private plaintiffs have filed two zoning cases alleging race or national origin discrimination by local governments.¹⁴ In addition, a class action suit was filed in 2007 against a suburban New York community alleging both race and national origin discrimination in the operation of its federally funded Section 8 rent assistance program.¹⁵ To the best of our knowledge, the Civil Rights Division has not intervened in any of these lawsuits, filed amicus briefs, or even commenced investigations into the allegations made by the plaintiffs.

The Housing Section also is responsible for the Division's implementation of the Memorandum of Understanding (MOU) signed by the Departments of HUD, Treasury, and Justice in 2000 regarding the federal Low Income Housing Tax Credit Program. Initially, the Housing Section regularly provided fair housing training workshops with HUD and Treasury to state housing finance agencies, affordable housing developers, tax credit syndicators, and others involved in the development of low-income tax credit housing. Also, pursuant to the MOU the Housing Section regularly reported to Treasury and HUD whenever it filed suit or resolved discrimination cases involving housing constructed under the LIHTC program. These efforts have fallen by the wayside since 2004 and should be renewed.

Improving the Effectiveness of HUD's Fair Housing Initiatives Program

The Fair Housing Initiatives Program (FHIP) Private Enforcement Initiative (PEI) is a vital and innovative program designed to aid the federal government to enforce fair housing laws. However, the program is in need of reform. The manner in which FHIP PEI funds are currently allocated must be re-evaluated and changed to make the process less cumbersome, more equitable, and results-oriented.

¹³ Proll, Leslie, Testimony before Commission on Fair Housing & Equal Opportunity, October 17, 2008, p. 4, ftnt. 8.

¹⁴ Long Island ACORN, et al. v. Nassau County and Village of Garden City, 2006 U.S. Dist. LEXIS 50217 (E.D.N.Y. 2006); Rivera et al. v. Village of Farmingdale, 2008 WL 3367585 (E.D.N.Y. 2008)

¹⁵ Vargas et al. v. Town of Smithtown, (E.D.N.Y. 2007).

Deciding which private fair housing groups should receive FHIP PEI funds has always been a formidable challenge for HUD for several reasons.

First, HUD personnel, with few exceptions, lack expertise on testing as a tool to enforce fair housing laws. Unlike the Justice Department, HUD has never developed an internal testing capability. Therefore, expecting HUD to effectively evaluate the activities and performance of over a hundred private testing organizations across the nation is a dubious proposition or wishful thinking. As a result, the quality and performance of FHIP-funded fair housing programs is very uneven. This unevenness periodically gives rise to calls for tighter program standards and greater accountability.

Second, HUD has not demonstrated an ability to enforce the minimum criteria for what constitutes a “qualified fair housing enforcement organization” (QFHO) or a “fair housing enforcement organization” (FHO). In the past, multiple years of FHIP PEI funding have been provided to organizations that have never had a testing capability even though HUD requires at least one year of experience conducting fair housing tests to be considered an FHO and two years to be considered a QFHO.¹⁶ It is also common knowledge that some FHIP-funded groups do not serve all of the protected classes as defined by the Fair Housing Act and/or only serve a subset of members of a protected class based on income. Such practices do not comply with threshold program requirements for receipt of FHIP PEI funding established by HUD.¹⁷ Inadequate oversight by HUD to ensure that FHIP-funded groups are complying with current program requirements and standards continues to be a concern.

Third, because HUD has little experience with fair housing litigation, its grant application criteria and process has often included factors and requirements that could actually undermine fair housing enforcement activity. For instance, HUD currently requires applicants to submit a “logic model” for the purpose of tracking performance on contracts. To aid applicants, HUD provides some possible “outcomes” from which applicants must choose (applicants may add up to three of their own but otherwise must select from those on a prepared list). Many of HUD outcomes for intake, testing activities, and enforcement ask applicants to quantify the number of outcomes that will indicate discrimination or unfavorable treatment. It is irrational and irresponsible for an applicant to identify as a goal to be achieved, quantifiable outcomes indicating discrimination prior to investigations being conducted. We can already hear a defense counsel raising the question: Isn’t it true that you found discrimination in this case because you had to meet a numeric goal or achieve an outcome in order to assure future funding from HUD? While a fair housing group may honestly answer “no” to such a question, there is a document that has been created for HUD which suggests

¹⁶ 24 CFR 125.103.

¹⁷ FY08 HUD Notice of Funding Availability, FR-5200-N-11.Section III(C)(1)(a).

otherwise. At best, it provides a defendant an issue with which to create a distraction and one that was entirely avoidable had the funding agency not encouraged the group to state predetermined outcomes in the first place. There are many ways to quantitatively state outcomes in an enforcement context without referring to findings of liability or discrimination.

Fourth, given the amount of funding made available on a competitive basis for FHIP PEI grants, we believe that there is considerable consensus among fair housing organizations that the application process established by HUD is cumbersome, time-consuming, and onerous. In recent years, a number of prominent and well-established fair housing groups have permanently closed their doors leaving major metropolitan areas largely un-served by any testing organization. Many other fair housing organizations are teetering on the brink of closing at any given time due to inadequate funding. There must be a better way to fund fair housing organizations that are providing essential intake and testing services to government agencies charged with enforcing the fair housing laws. We should not accept as inevitable that fair housing groups must struggle annually to spend weeks diverting limited staff resources to complete an application and gather documents from public sources to request funding that is extremely uncertain given the competitive nature of the process, wholly inadequate in view of the needs, and that fails to provide any long-term financial stability.

One cure for this problem is to ensure that those within the funding allocation agency who are required to evaluate proposals, monitor programs, assess program performance, etc. receive better training on the use of testing as an investigative tool. Although HUD refers to FHIP-funded groups as “partners,” in many parts of the country there is little evidence that this partnership is taken seriously by local or regional HUD officials. The relationship between the funding agency and the grantee should be more interactive, regularized, and substantive so that it becomes clear the partnership is mutual and essential to the effective enforcement of fair housing laws.

Some equity must be infused into the FHIP program. Presently, an annual award of \$275,000 is the maximum that a private fair housing group may receive and most groups apply for the maximum. It is widely understood that it costs much more to operate a private fair housing organization in New York City or Los Angeles than it does in smaller metropolitan areas like Lexington, Kentucky or Worcester, Massachusetts. Yet, all groups are eligible to receive the same amount of funding. This is patently unfair because the costs associated with operating effective fair housing enforcement programs and the needs to be met are not equal. We believe that fairness requires the agency dispensing FHIP resources to develop a formula that takes into account three factors when deciding the amount of funding to be awarded to qualified fair housing organizations:

1. Total Population of Service Area

Consideration should be given to the total population to be served by a FHIP grant. As the FHIP program is currently operated, the same amount of federal funding is available to conduct fair housing testing in New York City with a population of 8.3 million as is available to metropolitan Little Rock, Arkansas with a population of less than 600,000.

2. Cost of Living in Service Area

New York City has the highest cost of living in the nation and yet a fair housing group in New York City is entitled to receive no more funding than a group based in Little Rock, Arkansas. The current maximum FHIP grant award is \$275,000 which represents approximately one third of the funds required to operate a full-service fair housing organization in New York City on an annual basis.

3. Geography or Scope of the Service Area

Private fair housing organizations that serve sprawling metropolitan areas, whole states, or multiple states should receive some consideration for higher travel and personnel costs than those incurred by a group that elects to serve only a small geographic area.

In addition, to promote and reward innovation, effective implementation of complex investigations, and use of appropriate technology, the FHIP program should hold aside some funds and make them available as “bonus” grants to organizations that demonstrate exceptional performance in these areas. We are not referring to outcomes here (e.g., findings of liability, number of charges/cases filed, number of tests conducted, etc.), but providing incentives for groups for their creativity, development of investigative resources, and contributions to the field of fair housing testing which can serve as national models.

Finally, the paucity of funds made available in the past for FHIP PEI grants is shameful. While Congress recently and commendably proposed making more funds available to this program, action should be taken to increase the resources available for this vital fair housing enforcement activity. The estimated cost for constructing the now infamous (and defunct) “bridge to nowhere” would have funded the FHIP PEI program at its current level for more than 22 years! As expressed by the original drafters of the Fair Housing Act, the need to reduce and eliminate housing discrimination must be a national priority. While HUD’s slogan of “Fair Housing is Not an Option, It’s the Law” is admirable, an average annual budget of less than \$20 million nationally for private enforcement activities

has sent a different message. It is tantamount to telling every person in America that their right to have equal access to housing opportunities is optional.

Underutilization by HUD of Secretary-Initiated Complaint Authority

In 2006, the FHJC conducted a testing investigation to determine whether the developers and architects of apartments in Manhattan designed and constructed new elevator buildings in conformance with the accessibility requirements of the Fair Housing Act. The testing was done under a HUD-funded FHIP grant. The FHJC briefed HUD on the information obtained through the investigation and offered to make available all the testing evidence for twelve sites that FHJC found not to be accessible. Unfortunately, HUD only requested the testing information for one site and has not yet, to FHJC's knowledge, commenced an investigation into this site or any of the other eleven investigated by FHJC. Subsequently, in 2007, the FHJC referred the information obtained from its testing investigation of a Brooklyn real estate company described above to HUD. To the best of FHJC's knowledge, HUD also has not commenced a Secretary-initiated investigation into these allegations of race discrimination.

Information regarding the number of Secretary-initiated housing discrimination investigations commenced by HUD is not readily available at HUD's website. Currently listed are three Secretary-initiated investigations which have each led to the issuance of a charge of discrimination.¹⁸ Additionally, HUD has posted its annual fair housing reports for FY04, FY05, and FY07. These reports indicate that nationally HUD did not commence any Secretary-initiated investigations in FY04, opened 1 investigation in FY05, and 5 in FY07.¹⁹ While we do not know how many other fair housing organizations have attempted to refer systemic matters to HUD during the past eight years or the total number of Secretary-initiated investigations HUD has commenced during this time, the numbers reported by HUD for three of the eight years is discouraging, to say the least. Moreover, we are greatly troubled by HUD's failure to initiate any systemic investigations in New York City after being informed by the FHJC of thirteen testing investigations that revealed discrimination based on disability or race.

Future of Title VIII Enforcement and FHIP/FHAP Programs²⁰

We have interacted with FHEO since the late 1970s as advocates working at fair housing organizations, as plaintiff's counsel in Title VIII cases, as Justice Department employees, and/or working on HUD-sponsored fair housing research projects. Our experiences include working with the HUD FHEO office in

¹⁸ http://www.hud.gov/offices/ftheo/enforcement/sec_initiated.cfm

¹⁹ <http://www.hud.gov/offices/ftheo/library/index.cfm#studies>

²⁰ FHIP is the Fair Housing Initiatives Program and FHAP is the Fair Housing Assistance Program.

Washington, D.C. as well as many of the HUD regional offices, and most recently with the New York/New Jersey regional office. Also, we both have experience working with state FHAP agencies as contractors, as well as when we worked at the Justice Department. The FHJC was started with funding under the FHIP program and was recently awarded a FY08 FHIP enforcement grant by HUD.

Based on these experiences, we have reached the conclusion that HUD's Title VIII fair housing enforcement responsibilities and operation of the FHIP and FHAP programs should no longer reside within HUD. We have arrived at this conclusion because HUD has a conflicted mission. There are too many internal structural conflicts between HUD's responsibility to enforce Title VIII and its role to fund public housing authorities and multi-family housing developments, provide Community Development Block Grants (CDBG) to local governments, and operate or finance other housing programs. As already described in greater detail by testimony provided to this Commission by other witnesses, HUD has a long history of adopting facially discriminatory housing policies, failing to meet its duty to affirmatively further fair housing, and failing to ensure that recipients of HUD funds comply with the Fair Housing Act and other civil rights laws. This internal conflict between HUD FHEO and other housing program offices at HUD is not one that can be resolved with organizational, procedural or even personnel changes; it is deeply rooted within the structure and institution of HUD.²¹

We know that other fair housing advocates share our view that HUD has proved to be less than effective in enforcing the Fair Housing Act. Some have suggested a separate, independent agency, like the Equal Employment Opportunity Commission (EEOC), be established to exclusively handle housing discrimination complaints. We have a different view. We recommend that serious consideration be given to shifting Title VIII enforcement responsibility and the operation of the FHIP and FHAP programs to the Justice Department. Despite the recent politicization that infected and compromised the Civil Rights Division, the Justice Department is still viewed by most Americans as the premier civil rights law enforcement agency in the nation. It is generally understood that when enforcement action is taken by the Justice Department, it is a very serious matter. Also, fair housing compliance issues can often involve large real estate interests, major lending institutions, as well as state or local government agencies. It is our experience that the Justice Department is not easily deterred or distracted from its enforcement mission by powerful, politically well-connected, or heavily resourced defendants.

First, the Justice Department has U.S. Attorney's offices in every state which could employ intake staff and investigators to receive and investigate FHA complaints filed by aggrieved persons. Each U.S. Attorney's office has

²¹ We recommend that an Office of Fair Housing and Equal Opportunity remain at HUD to focus exclusively on ensuring that HUD and HUD funded programs comply with fair housing and other civil rights laws.

experience investigating alleged violations of federal law and deciding whether to file criminal charges or civil suits. With appropriate training, guidance, and coordination provided by the Civil Rights Division's Housing Section, discrimination complaint intake, investigations, and conciliation efforts, could be handled within each U.S. Attorney's office. Consideration should also be given to the need for state-wide and regional coordination of complaint-responsive enforcement efforts by the Civil Rights Division, including use of testing investigations.

The U.S. Attorney's office would be responsible for issuing charges of discrimination if reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. Complainants and respondents would retain the same right to elect to have the claims asserted in a civil action or through an administrative law judge hearing.

Second, there would no longer be a need for HUD Secretary-initiated investigations because the Justice Department would retain its authority under Section 3614 of Title VIII to file lawsuits alleging a pattern or practice of discrimination, or a denial of rights to a group of persons. Responsibility for the investigation and litigation of allegations involving local and state governments would continue to rest with the Civil Rights Division's Housing Section and carried out in conjunction with U.S. Attorney's offices.

Of course, appropriate financial resources for increased staff based upon complaint volume would need to be allocated to the U.S. Attorney's offices and additional attorneys and paralegals would be needed in the Housing Section. Federal funding currently allocated for staff at HUD's state and regional offices would be reduced since HUD would no longer have these enforcement responsibilities under the FHA.

Finally, the Justice Department's Office of Justice Programs (OJP) could administer the FHIP and FHAP grant programs with oversight by the Civil Rights Division's Housing Section. Authority to determine whether a state or local fair housing law is substantially equivalent would rest with the Housing Section, but for those state and local government agencies eligible for FHAP funding, annual grants, and contracts could be administered by OJP. Similarly, with FHIP grants made to private non-profit organizations, the OJP could issue annual Notice of Funding Availability announcements and make grant award decisions, as well as oversee compliance with FHIP/FHAP grant requirements. State-wide and regional efforts, such as training for grantees and a complaint-based testing capacity, could be established by the Division in conjunction with certain U.S. Attorney's offices. A close working relationship between the Housing Section and FHIP recipients would positively impact the effectiveness of the Department's testing program and enhance the capabilities of FHIP funded groups. The Housing Section would establish program goals and oversee the grant-making process administered by OJP. As already mentioned, additional

program staff will be needed in OJP and the Housing Section to carry out these new responsibilities.

Precedence for this model can be found in the Americans with Disabilities Act (ADA) and the work of the Disability Rights Section of the Civil Rights Division since 1991. The Disability Rights Section has promulgated regulations, issued agency guidance, investigated and conciliated individual discrimination complaints, provided grants, and brought enforcement actions in court, where appropriate. Under the ADA, the Disability Rights Section works with local U.S. Attorney's Offices on both individual and systemic investigations and litigation.

Thus, we urge as a first step that Congress evaluate how HUD's current FHA enforcement responsibilities could be carried out by the Department of Justice.

Conclusion

Unfortunately, illegal housing discrimination persists nearly 40 years after the passage of the federal Fair Housing Act.²² Most metropolitan areas remain racially and economically segregated.²³ And the federal government continues to act with *all deliberate lethargy* to enforce fair housing laws. An uneven and minimalist approach to fair housing law enforcement will never eliminate housing discrimination or repair the harm that has been inflicted on our communities.

No longer is our nation segregated by law as it was in the first half of the last century when race restrictive covenants, federally mandated redlining policies, de jure segregation in schools, and a panoply of other government actions worked in concert with private real estate interests to segregate our communities by race. The civil rights movement dismantled the legal foundation on which segregation was built and secured passage of civil rights laws that now prohibit discrimination in public accommodations, voting, employment, housing and most areas of community life. The laws provided great hope to millions of Americans and a promise of expanded opportunities, a promise that has *not yet* been fulfilled to this day. This *no longer/not yet* is a useful way to describe where we are today.

²² Turner, Margery Austin, Todd M. Richardson, and Stephen Ross. "Housing Discrimination in Metropolitan America: Unequal Treatment of African Americans, Hispanics, Asians, and Native Americans." In Fragile Rights Within Cities: Government, Housing, and Fairness, edited by John Goering (2007); Turner, Margery Austin, Carla Herbig, et al. "Discrimination Against Persons with Disabilities: Barrier at Every Step" Urban Institute (2005); Turner, Margery Austin, Fred Freiberg, et al., "All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions," Urban Institute (2002).

²³ Logan, John, "Ethnic Diversity Grows, Neighborhood Integration Lags Behind," Appendix A, Lewis Mumford Center for Comparative Urban and Regional Research, University at Albany, SUNY (2001); Swanstrom, Todd, Colleen Casey, et al. "Pulling Apart: Economic Segregation Among Suburbs and Central Cities in Major Metropolitan Areas," The Brookings Institution, (2001).

Today, we still have a choice. We could change nothing, continue with the status quo, and retain the current level of fair housing enforcement activity. If we chart this course, violators of fair housing laws will find comfort in the fact that their discriminatory practices will elude detection and their risk of facing enforcement action will be miniscule. This path will continue to permit housing choice to be restricted and populations to be balkanized and isolated by race and national origin. We know this separation limits opportunities for inter-group contact that can reduce bias, stereotypes, and prejudices. We know that the spatial mismatch between populations needing work and areas of high job growth severely limits access to employment opportunities. We know that residential racial isolation frequently results in segregated schools. We know that unequal access to employment and educational opportunities reinforces disparities in income and wealth accumulation. And in New York City, where we are witnessing a growing influx of minority families with children into the homeless shelter system, we know that residential racial isolation fuels a vicious, self-sustaining cycle of inequality while contributing to the further racialization of poverty. With this knowledge, we can ill afford to make such an unwise choice.

Alternatively, we could choose to expand and invest enforcement resources in a smarter, more coordinated, and vigorous fair housing enforcement strategy. Testing should be the centerpiece, not a public relations piece, of this strategy. This fair housing enforcement strategy should serve all populations, while placing a strong emphasis on eliminating systemic housing discrimination based on race, national origin, and disability in the private market, as well as by local and state governments. We offer the recommendations contained in this testimony for your consideration as a possible way to move fair housing enforcement in a new and better direction. An effective and coordinated national fair housing law enforcement strategy developed and implemented by our federal government can protect the fair housing rights of all people, reduce inequalities in our metropolitan areas, and foster more open and inclusive communities. In our view, the choice we make should reflect our collective commitment to keeping the promise of the Fair Housing Act by expanding opportunity for everyone.

Thank you very much.