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# The Fair Housing Act (FHA): A Legal Overview

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## Summary

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.” The original 1968 act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services. In 1974, the act was amended to add sex discrimination to the list of prohibited activities. The last major change to the act occurred in 1988 when it was amended to prohibit discrimination on the additional grounds of physical and mental handicap, as well as familial status. However, legislation that would amend the FHA is routinely introduced in Congress, including S. 1858/H.R. 3185, H.R. 501, and H.R. 3145 in the 114<sup>th</sup> Congress.

### Key Takeaways

- The FHA prohibits discrimination on the basis of “race, color, religion, sex, handicap, familial status, or national origin...”
- In general, the FHA applies broadly to all sorts of housing, public and private, including single family homes, apartments, condominiums, mobile homes, and others. The act’s coverage also extends to the secondary mortgage market.
- However, the act includes some exemptions. For example, the FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”
- While the FHA prohibits discrimination based on sex, the FHA does not prohibit discrimination on the basis of sexual orientation or gender identity. However, certain forms of discrimination against members of the LGBT (lesbian, gay, bisexual, transgender) community can violate the FHA.
- In June 2015, the Supreme Court held in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that, in addition to intentional discrimination, disparate impact claims are cognizable under the FHA—a view previously espoused by HUD and the 11 U.S. Courts of Appeals to render opinions on the issue.
- Although plaintiffs historically have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation, much less succeeding on the merits, the “cautionary standards” stressed by the *Inclusive Communities* Court might result in even fewer successful disparate impact claims being raised in the courts and swifter disposal of claims that are raised.
- In July 2015, HUD issued final regulations designed to implement an FHA mandate that executive agencies administering HUD programs, as well as HUD-grantees and other recipients of HUD funding, affirmatively further the FHA’s goals of reducing segregation and housing barriers.
- The FHA may be enforced in varying ways by the Attorney General, by the Department of Housing and Urban Development (HUD), and by victims of discrimination. Potential remedies available under the act include actual damages, punitive damages, equitable relief, and reasonable legal costs. Violators also may be assessed civil penalties.

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## Introduction

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>1</sup> The original 1968 act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services.<sup>2</sup> In 1974, the act was amended to add sex discrimination to the list of prohibited activities.<sup>3</sup> The last major change to the act occurred in 1988 when it was amended to prohibit discrimination on the additional grounds of physical and mental handicap, as well as familial status.<sup>4</sup> However, legislation that would amend the FHA is routinely introduced in Congress, including proposals to extend the act’s anti-discrimination provisions to prohibit discrimination based on sexual orientation, gender identity, marital status, source of income, and status as a military servicemember or veteran; and to make clear that the act does not support disparate impact discrimination claims.<sup>5</sup>

This report provides an overview of the types of discriminatory practices barred by the FHA, as well as certain activities that are exempted from the act’s coverage. It also analyzes various legal tests applied by courts to assess both intentional (a.k.a., disparate treatment) discrimination and disparate impact discrimination claims brought under the act. Additionally, the report addresses several specific types of discrimination that have been the source of fair housing litigation, including how the act’s proscription on discriminating against families with children interplays with housing communities for older persons; how the prohibition against discriminating on the basis of sex can provide protections to lesbian, gay, bisexual, and transgender (LGBT) individuals who are not expressly protected under the act; and the intersection of local zoning laws, group homes, and the FHA’s protections against discrimination on the basis of mental and physical disabilities. The report concludes with an overview of how the act can be enforced, as well as the potential remedies available to victims of unlawful discrimination and potential penalties that can be assessed against violators.

## Housing Practices in Which Discrimination Is Prohibited

The FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the sale or rental of housing, the financing of housing, the provision of brokerage services, or in residential real estate-related transactions. In general, the FHA applies to a broad assortment of housing, both public and private, including single family homes, apartments, condominiums, mobile homes, and others. The act’s coverage extends to “residential real estate-related transactions,” which include both the “making [and] purchasing of loans ...

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<sup>1</sup> 42 U.S.C. §3601. The FHA, 42 U.S.C. §§3601 *et seq.*, was originally enacted as Title VIII of the Civil Rights Act of 1968.

<sup>2</sup> 42 U.S.C. §§3604-06.

<sup>3</sup> P.L. 93-383

<sup>4</sup> P.L. 100-430.

<sup>5</sup> *See* S. 1858/H.R. 3185 114<sup>th</sup> Cong.; H.R. 501, 114<sup>th</sup> Cong.; H.R. 2479/S. 1242, 113<sup>th</sup> Cong. (2013); H.R. 2654/S. 1281, 113<sup>th</sup> Cong. (2013); H.R. 3030, 112<sup>th</sup> Cong. (2011); S. 1605, 112<sup>th</sup> Cong. (2011); H.R. 6500, 111<sup>th</sup> Cong. (2010); H.R. 4988, 111<sup>th</sup> Cong. (2010); H.R. 4828, 111<sup>th</sup> Cong. (2010); H.R. 4820, 111<sup>th</sup> Cong. (2010).

secured by residential real estate [and] the selling, brokering, or appraising of residential real property.”<sup>6</sup> Thus, the provisions of the FHA extend to the secondary mortgage market.<sup>7</sup>

HUD regulations elaborate upon the types of housing practices in which discrimination is prohibited and provide illustrations of such practices.<sup>8</sup> Under the regulations, the housing practices in which discrimination is prohibited include the sale or rental of a dwelling;<sup>9</sup> the provision of services or facilities in connection with the sale or rental of a dwelling;<sup>10</sup> other conduct which makes dwellings unavailable to persons;<sup>11</sup> steering;<sup>12</sup> advertising or publishing notices with regard to the selling or renting of a dwelling;<sup>13</sup> misrepresentations as to the availability of a dwelling;<sup>14</sup> blockbusting;<sup>15</sup> and the denial of “access to membership or

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<sup>6</sup> 42 U.S.C. §3605.

<sup>7</sup> See 24 C.F.R. §100.125.

<sup>8</sup> 24 C.F.R. Part 100.

<sup>9</sup> 24 C.F.R. §100.60. Prohibited actions under this section include: “(1) [f]ailing to accept or consider a bona fide offer ... (2) [r]efusing to sell or rent a dwelling [], or to negotiate for a sale or rental ... (3) [i]mposing different sales prices or rental charges for the sale or rental of a dwelling ... (4) [u]sing different qualification criteria or applications ... or (5) [e]victing tenants because of their race, color, religion, sex, handicap, familial status, or national origin....”

<sup>10</sup> 24 C.F.R. §100.65. Such discriminatory conduct includes: “(1) [u]sing different provisions in leases or contracts of sale ... (2) [f]ailing or delaying maintenance or repairs of ... dwellings; (3) [f]ailing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately ... (4) [l]imiting the use of privileges, services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin ... or (5) denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.”

<sup>11</sup> 24 C.F.R. §100.70(d). Such discriminatory conduct includes: “(1) [d]ischarging or taking other adverse action against an employee, broker, or agent because he or she refused to participate in a discriminatory practice [or] ... (2) [e]mploying codes or other devices to segregate or reject applicants, purchasers or renters ... or refusing to deal with certain real estate brokers or agents ... (3) [d]enying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium ... [or] (4) [r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.”

<sup>12</sup> 24 C.F.R. §100.70(c). Prohibited steering practices include: “(1) [d]iscouraging any person from inspecting, purchasing, or renting a dwelling ... (2) [d]iscouraging the purchase or rental of a dwelling ... by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development ... (3) [c]ommunicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development ... [or] (4) [a]ssigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.”

<sup>13</sup> 24 C.F.R. §100.75. Discriminatory advertisements or notices include: “(1) [u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons ... (2) [e]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter ... (3) [s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities ... [or] (4) [r]efusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.”

<sup>14</sup> 24 C.F.R. §100.80. Illustrations of this prohibited activity include: “(1) [i]ndicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented ... (2) [r]epresenting that [a person cannot rent or purchase a dwelling because] covenants or other deed, trust, or lease provisions which purport to restrict the sale or rental of a dwelling ... (3) [e]nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person ... (4) [l]imiting information, by word or conduct, regarding suitably priced dwellings ... [or] (5) [p]roviding false or inaccurate information regarding the availability of a dwelling for sale or rental to any person ... because of race, color, religion, sex, handicap, familial status, or national origin.”

<sup>15</sup> 24 C.F.R. §100.85(b). The HUD regulations define “blockbusting” to mean “for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap.” (continued...)

participation in any multiple-listing service, real estate brokers association, or other service ... relating to the business of selling or renting dwellings.”<sup>16</sup>

Yet another provision makes it unlawful to “coerce intimidate, threaten, or interfere with” individuals for exercising, or aiding others in the exercise of their rights under the FHA.<sup>17</sup>

Finally, as noted above, the FHA applies to public as well as private housing. As a result, a number of lawsuits over the years have challenged the fair housing practices of state and local housing authorities and even HUD itself, particularly with respect to discrimination in low-income public housing.<sup>18</sup> For example, in one 2005 case, African American residents of public housing in Baltimore sued HUD and various local agencies on race discrimination grounds. The court ultimately held that HUD had violated the FHA “by failing adequately to consider regional approaches to ameliorate racial segregation in public housing in the Baltimore Region.”<sup>19</sup>

## Exemptions from Coverage

Although the FHA is broadly applicable, it includes some exemptions. For one, the FHA does not apply to single family homes that are rented or sold without the use of a real estate agent by a private owner who owns no more than three single family homes at the same time, provided that certain other conditions are met.<sup>20</sup>

In addition, neither a religious group nor a nonprofit entity run by a religious group is prevented by the act “from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preferences to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”<sup>21</sup> The act also does not prevent a private club “from limiting the rental or occupancy of [] lodgings to its members or from giving preference to its members” if those

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(...continued)

24 C.F.R. §100.85(a). For blockbusting to be established, profit does not have to be realized, as long as profit was a factor for engaging in the activity. 24 C.F.R. §100.85(b).

<sup>16</sup> 24 C.F.R. §100.90. Such prohibited actions include: “(1) [s]etting different fees for access to or membership in a multiple listing service ... (2) [d]enying or limiting benefits accruing to members in a real estate brokers’ organization ... (3) [i]mposing different standards or criteria for membership in a real-estate sales or rental organization ... [or] (4) [e]stablishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers’ organization or other service ... because of race, color, religion, sex, handicap, familial status, or national origin.”

<sup>17</sup> 42 U.S.C. §3617. Violations of this section include: “(1) coercing a person ... to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction ... (2) [t]hreatening, intimidating, or interfering with persons in their enjoyment of a dwelling ... (3) [t]hreatening an employee or agent with dismissal or adverse action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction ... (4) [i]ntimidating or threatening any person because that person is engaging in activities designed to make other persons aware of [their fair housing rights, or] ... (5) [r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in a proceeding under the Fair Housing Act.” 24 C.F.R. §100.400.

<sup>18</sup> *See, e.g.*, *N.A.A.C.P. v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149 (1<sup>st</sup> Cir. 1987).

<sup>19</sup> *Thompson v. U.S. Dep’t of Hous. and Urban Dev.*, 348 F. Supp.2d 398, 524 (D. Md. Jan. 6, 2005).

<sup>20</sup> 42 U.S.C. §3603(b)(1). Other requirements include the condition that the house be sold or rented without a broker and without advertising. However, HUD regulations that implement the FHA provide that the exemptions specified in 42 U.S.C. §3603(b) do not apply to advertising. In other words, advertising that indicates a discriminatory preference or limitation is prohibited under the act even when such discrimination itself is not. 24 C.F.R. §100.10(c).

<sup>21</sup> 42 U.S.C. §3607(a).

lodgings are not being run for a commercial purpose.<sup>22</sup> “Housing for older persons,” as the term is defined by the act, is exempted from the FHA’s proscription of discrimination on the basis of familial status. In other words, “housing for older persons” may exclude families with children.<sup>23</sup>

The FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>24</sup> In 1995, the Supreme Court considered the issue of zoning restrictions in the context of group homes for the handicapped. In *City of Edmonds v. Oxford House, Inc.*,<sup>25</sup> a group home for 10 to 12 adults recovering from alcoholism and drug addiction was cited for violating a city ordinance because it was located in a neighborhood zoned for single-family residences. The ordinance that Oxford House, Inc. was charged with violating defined “family” as “persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons.”<sup>26</sup>

The Supreme Court held that the city’s zoning ordinance did not qualify for this exemption because the ordinance’s definition of family was not a restriction regarding “the maximum number of occupants’ a dwelling may house.”<sup>27</sup> According to the Court, the FHA:

does not exempt prescriptions of the family-defining kind, i.e., provisions designed to foster the family character of a neighborhood. Instead, §3607(b)(1)’s absolute exemption removes from the FHA’s scope only total occupancy limits, i.e., numerical ceilings that serve to prevent overcrowding in living quarters.<sup>28</sup>

Because the ordinance in question set a numerical ceiling for unrelated occupants but not related occupants, the Court concluded that it was designed to preserve the “family character of [] neighborhood[s],” not to place overall occupancy limits on residences. As a result, the Court held that the ordinance was not exempt from the FHA’s prohibition against disability discrimination.<sup>29</sup> The Court did not decide whether or not this ordinance actually violated the FHA.<sup>30</sup>

Additionally, in response to concerns that occupancy limits could conflict with the prohibition against familial status discrimination, Congress enacted Section 589 of the Quality Housing and Work Responsibility Act of 1998.<sup>31</sup> This legislation required HUD to adopt the standards specified in the March 20, 1991, *Memorandum from the General Counsel*,<sup>32</sup> which states that housing owners and managers have discretion to “implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the housing unit.”<sup>33</sup> HUD concluded that “an occupancy policy of two persons in a bedroom, as a general rule, is reasonable” under the FHA.<sup>34</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> 42 U.S.C. §3607(b).

<sup>24</sup> 42 U.S.C. §3607(b)(1).

<sup>25</sup> 514 U.S. 725 (1995).

<sup>26</sup> *Id.* at 728.

<sup>27</sup> *Id.* (quoting 42 U.S.C. §3607(b)(1)).

<sup>28</sup> *Id.* at 728.

<sup>29</sup> *Id.* at 736-37. The FHA does not prevent zoning ordinances that restrict group homes occupied by individuals who are not of a protected class, such as fraternity students.

<sup>30</sup> *Id.* at 738.

<sup>31</sup> P.L. 105-276, §589.

<sup>32</sup> *Id.*

<sup>33</sup> See 63 Fed. Reg. 70,982, 70,984 (Dec. 18, 1998), which adopted the 1991 Memorandum.

<sup>34</sup> *Id.*

## Affirmatively Furthering Fair Housing Regulations

In July 2015, HUD issued final regulations<sup>35</sup> designed to implement an FHA mandate that executive agencies administering HUD programs, as well as HUD-grantees and other recipients of HUD funding, further the FHA's goals of reducing segregation and housing barriers.<sup>36</sup> The rule was issued in response to recommendations expressed in a Government Accountability Office (GAO) report on HUD's oversight of grantees' compliance with these mandates.<sup>37</sup> Among other things, HUD's Affirmatively Furthering Fair Housing rule requires covered entities to "identify and evaluate fair housing issues" in a standardized fashion through an "Assessment of Fair Housing" (AFH) plan; incorporate housing data accumulated and publicly disseminated by HUD, when establishing housing-related goals, plans, and decisions; and allow members of the public "to provide input about fair housing issues, goals, priorities, and the most appropriate use of HUD funds ...."<sup>38</sup> The rule went into effect on August 17, 2015; however, participants will have at least one year to submit their first AFH plan, with smaller participants being given more time.<sup>39</sup>

## Evaluating Discrimination Claims

FHA discrimination claims fall into two broad categories: intentional, also referred to as disparate treatment discrimination, and disparate impact discrimination. Courts apply different legal tests to assess the validity of intentional versus disparate impact discrimination claims. Disparate treatment claims allege that a defendant made a covered housing decision based on "a discriminatory intent or motive."<sup>40</sup> Disparate impact claims, on the other hand, involve allegations that a covered practice has "a disproportionately adverse effect on [a protected class] and [is] otherwise unjustified by a legitimate rationale."<sup>41</sup> These two categories of discrimination are explored in turn.

### Disparate Treatment Discrimination

Intentional discrimination claims under the FHA can be supported either through (1) direct evidence of discrimination or (2) indirect/circumstantial evidence. Courts apply different legal tests to assess claims involving direct and indirect evidence. Additionally, courts apply a different legal framework to assess a subset of disparate treatment claims in which statutes or local ordinances that discriminate on their face against a protected class are challenged.<sup>42</sup>

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<sup>35</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271 (July 16, 2015).

<sup>36</sup> 42 U.S.C. §3608.

<sup>37</sup> GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans, Gov't Accountability Off. (Sept. 2010), available at <http://www.gao.gov/new.items/d10905.pdf>.

<sup>38</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271, 42,273 (July 16, 2015).

<sup>39</sup> 24 C.F.R. §5.160.

<sup>40</sup> Texas Dept. of Hous. & Cmnty Affairs v. Inclusive Communities Project, 135 S. Ct. 2507, 2513 (2015) (internal quotations omitted).

<sup>41</sup> *Id.* (internal quotations omitted).

<sup>42</sup> Larkin v. Michigan Protection and Advocacy Service, 89 F.3d 285, 289 (6<sup>th</sup> Cir. 1996); Bangarter v. Orem City Corp. 46 F.3d 1491, 1501 (10<sup>th</sup> Cir. 1995). *See also* Internat'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson, 499 U.S. 187, 199 (1991) (holding the same in the Title VII employment discrimination context). Some courts treat this as a distinct category of discrimination. *See, e.g.,* Potomac Group Home Corp. v. Montgomery Cnty, 823 F. Supp. 1285, 1295 (D. Md. 1993).



“Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision sufficient to support a finding ... that an illegitimate criterion actually motivated the adverse ... decision.”<sup>43</sup> When a plaintiff provides sufficient direct evidence to support an intentional discrimination claim, the defendant generally has the burden of proving, by a preponderance of the evidence,<sup>44</sup> that it would have denied or revoked the housing benefit regardless of the impermissible motivating factor in order to avoid liability under the FHA.<sup>45</sup>

FHA disparate treatment claims based on circumstantial evidence from which discrimination may be inferred generally are evaluated under the so-called *McDonnell Douglas*<sup>46</sup> burden-shifting scheme. Under *McDonnell Douglas*, the initial burden rests with the plaintiff to establish a *prima facie* case of intentional discrimination by a preponderance of the evidence.<sup>47</sup> A plaintiff can establish a *prima facie* case by evidencing that (a) she is a member of a protected class; (b) she qualified for a covered housing-related service or activity (e.g., housing rental or purchase); (c) the defendant denied an application for or revoked use of the plaintiff’s housing benefit; and (d) the relevant housing-related service or activity remained available after it was revoked from or denied to the plaintiff.<sup>48</sup>

If a plaintiff is able to establish a *prima facie* case, then the burden shifts to the defendant to provide evidence that the revocation or denial of the housing benefit furthered a legitimate, nondiscriminatory purpose. The Supreme Court has explained that “[t]he explanation provided must be legally sufficient to justify a judgment for the defendant.”<sup>49</sup> The justification requires actual evidence and must be more than “an answer to the complaint or [an] argument by counsel.”<sup>50</sup> If the defendant is able to meet this burden, then the plaintiff can still prevail on her disparate treatment claim if she is able to show, by a preponderance of the evidence, that the stated purpose for the denial or revocation was really just a pretext for discrimination.<sup>51</sup>

Laws that explicitly differentiate between a protected class and unprotected groups are generally “characterized as claims of intentional discrimination.”<sup>52</sup> (These types of claims frequently come up in the context of local zoning laws that impact group homes, which are discussed in the “Group Homes and Zoning Restrictions” of this report.) As the Supreme Court has explained in the Title VII employment context, “the absence of a malevolent motive does not convert a facially

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<sup>43</sup> Gallagher v. Magner, 619 F.3d 823 (8<sup>th</sup> Cir. 2010) (internal citations omitted). See also Kormoczy v. Sec’y, Dept. of Housing and Urban Dev., 53 F.3d 821, 824 (7<sup>th</sup> Cir. 1995) (“Direct evidence is that which can be interpreted as an acknowledgment of the defendant’s discriminatory intent.”).

<sup>44</sup> Preponderance of evidence, “[a]s standard of proof in civil cases, is evidence which is of greater weight or more convincing that the evidence for which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990).

<sup>45</sup> See, e.g., *supra* n. 43.

<sup>46</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* is a Title VII of the Civil Rights Act of 1964 employment discrimination case, but it has been applied to the Fair Housing Act, as well. See, e.g., 2922 Sherman Avenue Tenants’ Assn. v. District of Columbia, 444 F.3d 673, 682 (D.C. Cir. 2006); Sanghvi v. City of Claremont, 328 F.3d 532, 536-38 (9<sup>th</sup> Cir. 2003); Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48-52 (2<sup>nd</sup> Cir. 2002); Kormoczy v. HUD, 53 F.3d 821, 823-24 (7<sup>th</sup> Cir. 1995).

<sup>47</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>48</sup> *Id.*

<sup>49</sup> Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981).

<sup>50</sup> *Id.* at 256 n. 9 (“An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.”)

<sup>51</sup> *McDonnell Douglas*, 411 U.S. at 804.

<sup>52</sup> *Bangerter*, 46 F.3d at 1500-01.

discriminatory policy into a neutral policy with a discriminatory effect.”<sup>53</sup> Plaintiffs, therefore, establish a *prima facie* case of intentional discrimination by simply proving that the law in question treats an FHA-protected class differently.<sup>54</sup>

Upon meeting this burden, the U.S. courts of appeals are split as to which of two disparate treatment tests defendants must meet. A minority of courts, including the Eighth Circuit, applies a rational basis test, which merely requires the defendant town or city to show there is a legitimate, nondiscriminatory purpose for classification (or denial from a variance) on the basis of a FHA protected class.<sup>55</sup> This is a relatively low burden to meet. The majority rule, which is followed by the Sixth, Ninth, and Tenth Circuits, on the other hand, requires the defendant to meet a more exacting test—to show that the justification for the facial discrimination is (1) beneficial to the members of the protected class; or (2) reasonably related to a matter of public safety that is “tailored to the particularized concerns [of the] individual residents” that are targeted by the law in question.<sup>56</sup>

## Disparate Impact Discrimination

In June 2015, the Supreme Court, in the 5-4 decision in *Texas Department of Housing Community Affairs v. Inclusive Communities Project*,<sup>57</sup> confirmed the long-held interpretation that, in addition to outlawing intentional discrimination, the FHA also prohibits certain housing-related decisions that have a discriminatory effect<sup>58</sup> on a protected class.<sup>59</sup>

Historically, courts have generally recognized two types of disparate impacts resulting from “facially neutral decision[s]” that can result in liability under the FHA.<sup>60</sup>

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<sup>53</sup> *Johnson Controls*, 499 U.S. at 199.

<sup>54</sup> *Bangerter*, 46 F.3d at 1500-01.

<sup>55</sup> *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251-52 (8<sup>th</sup> Cir. 1996). This test is adopted from one applicable to constitutional claims under the Equal Protection Clause. The Eighth Circuit’s rational basis test has been criticized by some courts because: FHA claims are based in statute, not the Constitution; the FHA protects classes that are not protected under the Equal Protection Clause (e.g., individuals with disabilities, families with children); and it seems at odds with the Supreme Court’s treatment of analogous claims in the Title VII context (*Johnson Controls*, 499 U.S. at 1501). See, e.g., *Cnty. House v. City of Boise*, 490 F.3d 1041, 1050 (9<sup>th</sup> Cir. 2007).

<sup>56</sup> Quoting *Bangerter*, 46 F.3d at 1503. See also *Cnty. House*, 490 F.3d at 1050 (“The Sixth and Tenth Circuits employ a more searching method of analysis. To allow the circumstance of facial discrimination under the Sixth and Tenth Circuits’ approach, a defendant must show either: (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. We will follow the standard adopted by the Sixth and Tenth Circuits, which standard is, we believe, more in line with the Supreme Court’s analysis in *Johnson Controls*.”); *Larkin*, 89 F.3d at 291 (“Therefore, in order for facially discriminatory statutes to survive a challenge under the FHAA [i.e., the Fair Housing Amendments Act of 1988], the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply.” (internal quotations omitted)).

<sup>57</sup> 135 S. Ct. 2504 (2015). The Supreme Court had granted *certiorari* in two similar disparate impact cases in each of the prior two terms; however, in both those cases, the parties reached settlement agreements before the Court had the opportunity to issue an opinion on whether disparate impact claims are cognizable under the FHA. See *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) and *Twp. of Mt. Holly v. Mt. Holly Garden Citizens in Action, Inc.*, 134 S. Ct. 636 (2013). See also CRS Legal Sidebar WSLG1151, *Supreme Court Set to Review Fair Housing Case: Third Time’s the Charm?*, by (name redacted)

<sup>58</sup> The term “discriminatory effect” is used interchangeably with the term “disparate impact.”

<sup>59</sup> *Inclusive Communities*, 135 S. Ct. at 2525. For a more in-depth analysis of disparate impact discrimination and the *Inclusive Communities* decision, see CRS Report R44203, *Disparate Impact Claims Under the Fair Housing Act*, by (name redacted)

<sup>60</sup> *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7<sup>th</sup> Cir. 1977).

The first occurs when that decision has a greater adverse impact on one [protected] group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.<sup>61</sup>

The Supreme Court's holding in *Inclusive Communities* that "disparate-impact claims are cognizable under the [FHA]" mirrors previous interpretations of the Department of Housing and Urban Development<sup>62</sup> (HUD) and all 11 federal courts of appeals<sup>63</sup> that had ruled on the issue. However, HUD and the 11 courts of appeals had not all applied the same criteria for determining when a neutral policy that causes a disparate impact violates the FHA. In a stated attempt to harmonize disparate impact analysis across the country, HUD finalized regulations in 2013 that established uniform standards for determining when such practices violate the act.<sup>64</sup>

The *Inclusive Communities* Court did not expressly adopt the standards established in HUD's disparate impact regulations. Rather, the Court adopted a three-step burden-shifting test that shares some similarities with these standards. At step one, the plaintiff has the burden of establishing evidence that a housing decision or policy caused a disparate impact on a protected class.<sup>65</sup> At step two, defendants can counter the plaintiff's *prima facie* showing by establishing that the challenged policy or decision is "necessary to achieve a valid interest."<sup>66</sup> The defendant will not be liable for the disparate impact resulting from a "valid interest" unless, at step three, the plaintiff proves "that there is an available alternative practice that has less disparate impact and serves the entity's legitimate needs."<sup>67</sup>

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<sup>61</sup> *Id.* The FHA's protections are not limited to race. *Inclusive Communities*, 135 S. Ct. at 2522 ("Rather, the FHA aims to ensure that those [valid governmental] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.").

<sup>62</sup> Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>63</sup> *Vill. of Arlington Heights*, 558 F.2d at 1290; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149-50 (3<sup>rd</sup> Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4<sup>th</sup> Cir. 1984); *Keith v. Volpe*, 858 F.2d 467, 484 (9<sup>th</sup> Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), judgment aff'd, 488 U.S. 15 (1988); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11<sup>th</sup> Cir. 1994); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5<sup>th</sup> Cir. 1996); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1<sup>st</sup> Cir. 2000); *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 740-41 (8<sup>th</sup> Cir. 2005); *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6<sup>th</sup> Cir. 2007); *Reinhart v. Lincoln Conty*, 482 F.3d 1225, 1229 (10<sup>th</sup> Cir. 2007). The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has never ruled on the issue. *2922 Sherman Ave. Tenants' Assoc. v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) ("Given that only one side of the issue has been briefed, however, instead of simply adopting the approach of our respected sister circuits, we think it more appropriate to assume without deciding that the tenants may bring a disparate impact claim under the FHA.").

<sup>64</sup> 78 Fed. Reg. at 11,460. HUD's regulations were subsequently vacated by the U.S. District Court for the District of Columbia, in a ruling that was issued prior to, and that is at odds with, the Supreme Court's *Inclusive Communities* decision. *Am. Ins. Assoc. v. Dept. of Hous. and Urban Dev.*, 74 F. Supp. 3d 30 (D.D.C. 2014) (interpreting the FHA as only prohibiting intentional discrimination, not discriminatory effects, and vacating HUD's Disparate Impact Rule). The district court's decision was subsequently vacated and remanded for reconsideration in accordance with the Supreme Court's *Inclusive Communities* ruling. *Am. Ins. Assoc. v. Dept. of Hous. and Urban Dev.* No. 14-5321, Sept. 23, 2015 (D.C. Cir.) (*per curiam*). As of the publication date of this report, the district court has not issued a subsequent ruling.

<sup>65</sup> *Inclusive Communities*, 135 S. Ct. at 2523.

<sup>66</sup> *Id.* at 2522-23.

<sup>67</sup> *Id.* at 2517-18 (*citing* and *quoting* Title VII and ADEA cases). The Court did not expressly state that the burden should be on the plaintiff to prove the existence of a less discriminatory alternative in the FHA context. Instead, it stated that the plaintiff carries the burden of the third step in the burden-shifting tests applied in Title VII and ADEA cases, and that "[t]he cases interpreting Title VII and the ADEA provide essential background and instruction in the (continued...)

In addition, the Court outlined a number of limiting factors that lower courts and HUD should apply when assessing disparate impact claims. The Court made clear that, before a plaintiff can establish a *prima facie* case of discriminatory effect based on a statistical disparity, courts should apply a “robust causality requirement” that requires the plaintiff to prove that a policy or decision led to the disparity.<sup>68</sup> The Court stressed that a careful examination of the plaintiff’s causality evidence should be made at preliminary stages of litigation to avoid “the inject[ion of] racial considerations into every housing decision”; the erection of “numerical quotas” and similar constitutionally dubious outcomes; the imposition of liability on defendants for disparities that they did not cause; and unnecessarily protracted litigation that might dissuade the development of housing for the poor, which would “undermine [the FHA’s] purpose as well as the free-market system.”<sup>69</sup>

It likely will take years to gain a strong understanding of how the *Inclusive Communities* decision will affect future disparate impact litigation under the FHA (and other laws such as Title VII of the Civil Rights Act of 1964).<sup>70</sup> While plaintiffs historically have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation, much less succeeding on the merits of those claims,<sup>71</sup> it is possible that the “cautionary standards” stressed by the *Inclusive Communities* majority might result in even fewer successful disparate impact claims and swifter disposal of claims that are raised.

## Selected Types of Housing Discrimination

This section addresses several different types of discrimination that have been the source of a significant number of legal disputes or otherwise raise unique legal issues under the FHA.

### Discrimination Based on Sex, Sexual Orientation, and Gender Identity

While the FHA prohibits discrimination based on sex, the act does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity.<sup>72</sup> Bills that would extend the FHA’s anti-discrimination provisions to prohibit discrimination based on sexual orientation or gender identity, however, have been frequently introduced in Congress in recent years.<sup>73</sup> Nevertheless, certain forms of discrimination against members of the LGBT community can violate the FHA. For instance, a landlord who harasses or otherwise discriminates against an

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(...continued)

case now before the Court.” *Id.*

<sup>68</sup> *Id.* at 2523.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., *Abril-Rivera v. Dept. of Homeland Sec.*, 795 F.3d 245, 255-46 (1<sup>st</sup> Cir. 2015) (applying aspects of *Inclusive Communities* to “affirm the district court’s dismissal of plaintiffs’ [Title VII] disparate impact claims....”).

<sup>71</sup> See the “Disparate Impact Analysis Before *Inclusive Communities*” section of CRS Report R44203, *Disparate Impact Claims Under the Fair Housing Act*, by (name redacted).

<sup>72</sup> However, approximately 20 states, the District of Columbia, and numerous localities have implemented housing discrimination laws that do prohibit discrimination based on sexual orientation. See, e.g., Minn. Laws §363 A.02 (prohibiting discrimination “in housing and real property because of ... sexual orientation ...”). See also *Non-Discrimination Laws: Housing*, Movement Advancement Project, available at [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws).

<sup>73</sup> *Supra* note 5.

LGBT individual because of his or her failure to conform to stereotypes regarding gender roles could, under certain circumstances, be held liable under the FHA for discriminating on the basis of sex.<sup>74</sup>

Additionally, HUD has recommended that Congress amend the FHA to provide protections based on sexual orientation; issued guidance explaining that most discrimination suffered by transgender individuals will violate the FHA's prohibition on sex discrimination; and taken steps to ensure that its programs are open to all families regardless of sexual orientation by requiring that grant applicants seeking HUD funding comply with local and state anti-discrimination laws.<sup>75</sup>

In 2012, HUD issued new regulations that prohibit discrimination on the basis of sexual orientation, gender identity, or marital status in specified HUD programs.<sup>76</sup> Notably, the regulations were issued pursuant to HUD's authority under Section 2 of the Housing Act of 1949<sup>77</sup>—*not the FHA*. Section 2 charges HUD to pursue “the goal of a decent home and a suitable living environment for every American family” and to seek equal housing opportunity for all. The scope of the 2012 regulations is limited to specified HUD programs, and does not extend to cover the wide array of entities that are prohibited from engaging in housing discrimination under the FHA.

## Discrimination Based on Handicap<sup>78</sup>

In addition to prohibiting discrimination on the grounds discussed above, the FHA also prohibits discrimination in housing on the basis of handicap. The act defines “handicap” as “(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”<sup>79</sup>

The definition of handicap expressly precludes the current, illegal use of or addiction to a controlled substance.<sup>80</sup> However, because this exclusion does not apply to *former* drug users, the definition of handicap could encompass individuals who have had drug or alcohol problems that are severe enough to substantially impair a major life activity, but who are not *current* illegal users or addicts. As a result, recovering alcoholics and drug addicts can fall within the definition of “handicap.”<sup>81</sup>

Discrimination on the basis of handicap under the FHA includes not allowing handicapped individuals to make reasonable changes to a housing unit that will “afford [them] the full

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<sup>74</sup> Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662, 5666-67 (Feb. 3, 2012).

<sup>75</sup> HUD Press Release, *HUD Issues Guidance on LGBT Housing Discrimination Complaints*, July 1, 2010, available at [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-139](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-139); *The State of Fair Housing: Annual Report on Fair Housing FY2009*, July 14, 2010, available at <http://www.hud.gov/content/releases/fy2009annual-rpt.pdf>.

<sup>76</sup> Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662 (Feb. 3, 2012).

<sup>77</sup> 42 U.S.C. §1441.

<sup>78</sup> The generally accepted term is “individual with a disability.” However, since the FHA uses the term “handicapped,” that term is used here in the discussion of the FHA.

<sup>79</sup> 42 U.S.C. §3602(h).

<sup>80</sup> 42 U.S.C. §3602(h). The regulations also state that “an individual shall not be considered to have a handicap solely because that individual is a transvestite.” 24 C.F.R. §100.201.

<sup>81</sup> *See, e.g., Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8<sup>th</sup> Cir. 1996).

enjoyment of the premises.”<sup>82</sup> However, a landlord can premise the changes on the handicapped individual’s promise to return the unit to its original state. A landlord may not increase a required security deposit to cover these changes, but can require handicapped persons to, in certain circumstances, make payments into an escrow account to cover restoration costs.<sup>83</sup>

Discrimination against a handicapped person also includes “refus[ing] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy the dwelling.”<sup>84</sup> In addition, all “covered multifamily dwellings”<sup>85</sup> built after March 13, 1991, must meet certain design and construction specifications that ensure they are readily accessible to and usable by handicapped persons.<sup>86</sup> The FHA’s protection for handicapped persons does not require “that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”<sup>87</sup>

It also is unlawful to ask about the handicaps of an applicant for housing, or someone with whom the applicant is associated. However, the regulations do allow raising certain questions that may have some bearing on one’s handicap, as long as they are posed to all applicants. For example, all applicants could be asked whether they would be able to mow the lawn, if required in a rental agreement.<sup>88</sup>

## **Intersection Between the FHA and Other Federal Disability Laws**

Several other federal laws also protect individuals with disabilities from various forms of housing discrimination. The Americans with Disabilities Act (ADA), which broadly prohibits discrimination against individuals with disabilities, generally does not apply to housing.<sup>89</sup> However, it does cover “public accommodations,” which includes “an inn, hotel, motel, or other place of lodging except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.”<sup>90</sup>

The ADA also covers “commercial facilities,” which it defines as “facilities intended for nonresidential use ... whose operations affect commerce.” The term excludes, however, “facilities

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<sup>82</sup> 42 U.S.C. §3604(f)(3)(A).

<sup>83</sup> 24 C.F.R. §100.203(a). Payments required to be made into escrow must be reasonable and must be for no more than restoration costs.

<sup>84</sup> 42 U.S.C. §3604(f)(3)(B). As examples of reasonable accommodations required by the act, the regulations state that seeing eye dogs must be permitted even if a building otherwise prohibits pets, and handicapped parking spaces must be made available even if spaces are otherwise assigned on a first-come-first-served basis. 24 C.F.R. §100.204(b).

<sup>85</sup> “Covered multifamily dwellings” have four or more living units. 24 C.F.R. §100.201.

<sup>86</sup> 42 U.S.C. §3604(f)(3)(C). In 1991, HUD published final Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance with these accessibility requirements. 56 Fed. Reg. 9,472 (Mar. 6, 1991). HUD supplemented these guidelines in 1994. 59 Fed. Reg. 33,362 (June 28, 1994).

<sup>87</sup> 42 U.S.C. §3604(f)(9).

<sup>88</sup> 24 C.F.R. §100.202(c). Examples that are provided in the regulations are: “(1) Inquiry into an applicant’s ability to meet the requirements of ownership or tenancy, (2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps ... (4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance.... ”

<sup>89</sup> 42 U.S.C. §§12101, et seq. For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted)

<sup>90</sup> 42 U.S.C. §12181(7)(A).

that are covered or expressly exempted from coverage under the Fair Housing Act.” In other words, the ADA leaves to the FHA the determination as to which statute applies to any particular facility.<sup>91</sup>

Under Section 504 of the Rehabilitation Act of 1973, discrimination against individuals with disabilities is prohibited in any federally funded or federally conducted program or activity.<sup>92</sup> Finally, under the Architectural Barriers Act of 1968, certain publicly owned residential buildings and facilities, must be accessible to individuals with physical disabilities.<sup>93</sup>

## Group Homes and Zoning Restrictions

The FHA’s prohibition against discrimination on the basis of handicap extends to protect group homes for the disabled from discrimination by certain types of state or local zoning laws. While the FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling,”<sup>94</sup> it does generally prohibit “[l]ocal zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities.”<sup>95</sup>

Nevertheless, some municipalities have attempted to restrict the location of group homes for disabled individuals by enacting zoning ordinances that establish occupancy limits for group homes.<sup>96</sup> Typically justified as a way to maintain the residential character of certain neighborhoods, such occupancy limits frequently operate to restrict group homes for recovering drug users or other disabled individuals. It is also possible that a city could violate the FHA’s reasonable accommodation requirement for refusing to authorize a variance from such an occupancy ordinance under certain circumstances.<sup>97</sup> As a result, these limits are the subject of

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<sup>91</sup> The Department of Justice’s comments on its ADA rules address mixed use facilities, such as hotels that also have separate accommodations for apartments. The comments explain that the residential wing would be covered by the FHA even though the rest of the hotel would be covered by the ADA. However:

[i]f a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis.... A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. 56 Fed. Reg. 35,552 (July 26, 1991).

<sup>92</sup> 29 U.S.C. §794(a).

<sup>93</sup> 42 U.S.C. §§4151-57.

<sup>94</sup> 42 U.S.C. §3607(b)(1).

<sup>95</sup> Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, available at <http://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>.

<sup>96</sup> Discrimination against group homes for the disabled is prohibited not only by the FHA, but by the Constitution, to the extent that such discrimination is found to be irrational. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held unconstitutional a zoning ordinance that allowed group homes generally, but prohibited them for mentally disabled individuals. The basis for the decision was that the ordinance was based on irrational prejudice; that is, the discrimination failed a “rational basis” test under the Equal Protection Clause of the Fourteenth Amendment.

<sup>97</sup> A city could be subject to a disparate impact discrimination claim based on all of its denials for variances. For more information on disparate impact analysis, see the “Disparate Impact Discrimination” section of this report.

controversy and legal challenges under the FHA,<sup>98</sup> and the Department of Justice and HUD have issued joint guidance on the issue.<sup>99</sup>

Determining whether zoning ordinances violate the FHA requires a case-by-case assessment, based on the ordinance language and the specific facts surrounding the alleged violation and/or the city's denial of a variance from the ordinance.<sup>100</sup> This makes predicting how a court will rule on a particular ordinance difficult. This is especially true in light of the fact that, as mentioned in the "Disparate Treatment Discrimination" section above, the lower courts do not apply a single, uniform test. If a plaintiff is able to establish a *prima facie* case by showing that a state or local law is facially discriminatory, then a minority of courts, notably the Eighth Circuit, merely requires that the defendant's show that the ordinance is rationally related to a legitimate, nondiscriminatory purpose.<sup>101</sup> Most courts, such as the Sixth, Ninth, and Tenth circuit courts of appeal require defendants to meet a more exacting standard—to show that the justification for the facial discrimination is (1) beneficial to the disabled; or (2) reasonably related to a matter of public safety that is "tailored to the particularized concerns [of the] individual residents" that are targeted by the law in question.<sup>102</sup>

The group home joint guidance states that "[t]he Department of Justice and HUD take the position, and most courts that have addressed the issue agree that density restrictions are generally inconsistent with the Fair Housing Act."<sup>103</sup> For example, the Sixth Circuit Court of Appeals, in *Larkin v. Department of Social Services*, addressed a state licensing requirement that group homes for the handicapped may not be spaced within a 1,500 foot radius of other such group homes and must notify the communities in which the group homes are to be located.<sup>104</sup> The court ruled that these spacing and notification requirements discriminated on their face by "singl[ing] out for regulation group homes for the handicapped...."<sup>105</sup> Once the court ruled that these non-uniform conditions were facially discriminatory, the court applied the more demanding test employed by the majority of courts that required the defendant to "demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply."<sup>106</sup> The Sixth Circuit held that the state had failed to meet this burden

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<sup>98</sup> Michael J. Davis, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 Kan. L. Rev. 777 (1998).

<sup>99</sup> Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, available at <http://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>.

<sup>100</sup> *See id.*

<sup>101</sup> *See supra* n. 55 and surrounding text.

<sup>102</sup> *Quoting Bangerter*, 46 F.3d at 1503. *See also Cmty. House*, 490 F.3d at 1050 ("The Sixth and Tenth Circuits employ a more searching method of analysis. To allow the circumstance of facial discrimination under the Sixth and Tenth Circuits' approach, a defendant must show either: (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. We will follow the standard adopted by the Sixth and Tenth Circuits, which standard is, we believe, more in line with the Supreme Court's analysis in *Johnson Controls*."); *Larkin*, 89 F.3d at 291 ("Therefore, in order for facially discriminatory statutes to survive a challenge under the FHAA [i.e., the Fair Housing Amendments Act of 1988], the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply." (internal quotations omitted)).

<sup>103</sup> Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, available at <http://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>.

<sup>104</sup> *Larkin*, 89 F.3d at 285.

<sup>105</sup> *Id.* at 290.

<sup>106</sup> *Id.* *See also* *Marbrunak, Inc. v. City of Stow*, 974 F.2d 45, 47 (6<sup>th</sup> Cir. 1992).



because the ordinance “is too broad, and is not tailored to the specific needs of the handicapped.”<sup>107</sup>

The group home joint guidance also addresses claims that localities failed to make “reasonable accommodations” for group homes. It explains:

Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is “yes,” the requested accommodation is unreasonable.<sup>108</sup>

One example of a necessary reasonable accommodation might be allowing a deaf tenant to have a hearing dog in an apartment complex that normally prohibits pets.<sup>109</sup> Another example might be the provision of a variance from an ordinance that bars five or more unrelated people from living in a single family home, for a group home of five handicapped individuals, where it is shown that such a home would “have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an ‘ordinary family.’” In contrast, it likely would not be unreasonable to deny a variance from this ordinance for a group home of 35 handicapped individuals.<sup>110</sup>

## Familial Discrimination and Housing for Older Persons

The Fair Housing Amendments Act of 1988 added “familial status,” which generally means living with children under 18, to the grounds upon which discrimination in housing is prohibited.<sup>111</sup> One exception to the 1988 law barring familial status discrimination, however, is that “housing for older persons” may discriminate against families with children. The committee report that accompanied the 1988 amendments explains the purpose of this exemption:

In many parts of the country families with children are refused housing despite their ability to pay for it. Although 16 states have recognized this problem and have proscribed this type of discrimination to a certain extent, many of these state laws are not effective.... The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizen[s] in retirement type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs.<sup>112</sup>

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<sup>107</sup> *Id.* at 292.

<sup>108</sup> *Id.*

<sup>109</sup> See *Bronk v. Ineichen*, 54 F.3d 425 (7<sup>th</sup> Cir. 1995).

<sup>110</sup> See Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, available at <http://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>.

<sup>111</sup> The statute (42 U.S.C. §3602(k)) and the regulation (24 C.F.R. §100.20) both define “familial status” as follows:

“Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with—

- (1) a parent or another individual having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

<sup>112</sup> H.Rept. 100-711 at 19, 21.

“Housing for older persons” is defined as housing that is (1) provided under any state or federal housing program for the elderly; (2) “intended for and solely occupied by persons 62 years of age or older”; or (3) “intended and operated for occupancy by persons 55 years of age or older” and that meets several other requirements such as having at least 80% of units occupied by a minimum of one individual 55 or older.<sup>113</sup>

An individual who believes in good faith that his or her housing facility qualifies for the familial status exemption will not be held liable for money damages, even if the facility does not in fact qualify as housing for older persons.<sup>114</sup>

## **Enforcement of the Fair Housing Act**

The Secretary of HUD, the Attorney General, and victims of discrimination may each take action to enforce the FHA’s protections against discrimination. HUD has primary administrative enforcement authority of the act, which it typically fulfills through administrative adjudications. However, the Department of Justice may also bring actions in federal court under certain circumstances.

### **Enforcement by the Secretary**

Within one year of the occurrence or end of an alleged discriminatory housing action, a harmed party may file a complaint with the Secretary, or the Secretary may file a complaint on his own initiative. When a complaint is filed, the Secretary must, within 10 days, serve the respondent—the party charged with committing a discriminatory practice—with notice of the complaint. The respondent must then answer the complaint within 10 days.<sup>115</sup>

From the filing of the complaint, the Secretary has 100 days, subject to extension, to complete an investigation of the alleged discriminatory actions.<sup>116</sup> During this time, the Secretary must, “to the extent feasible, engage in conciliation with respect to” the complaint and, as warranted, the Secretary may enter into a conciliation agreement, which can include binding arbitration and the harmed party being awarded monetary damages or other relief.<sup>117</sup>

At the completion of the investigation, the Secretary must determine whether “reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur.”<sup>118</sup> If he

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<sup>113</sup> 42 U.S.C. §3607(b)(2). The remaining requirements for the third category of housing for older persons are that “the housing facility or community publish[] and adhere[] to policies and procedures that demonstrate the intent required [to be a housing for older persons]” and that the facility comply with HUD rules for occupancy verification. 42 U.S.C. §3607(b)(2)(C) and 24 C.F.R. §§100.304-07.

<sup>114</sup> 42 U.S.C. §3607(b)(5).

<sup>115</sup> 42 U.S.C. §3610(a)(1).

<sup>116</sup> 42 U.S.C. §3610(a)(1)(B)(iv). If the Secretary discovers that the complaint is within the jurisdiction of either a state or local public agency that the Secretary has certified, he must refer the complaint to that agency prior to pursuing the action. If the agency does not pursue the action within 30 days of the referral, or otherwise does not pursue “such proceedings with reasonable promptness, or the Secretary determines that the agency no longer qualifies for certification ...”, then the Secretary may take further action. 42 U.S.C. §3610(f). The rules regarding the certification and funding of state and local housing enforcement agencies are provided in 24 C.F.R. §110.

<sup>117</sup> 42 U.S.C. §3610(b). “The Secretary may authorize a civil action for appropriate temporary or preliminary relief, pending final disposition of the complaint.” 42 U.S.C. §3610(e)(1). “Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed ... [to] enforce [the] agreement.” 42 U.S.C. §3610(c).

<sup>118</sup> 42 U.S.C. §3610(g)(2).

finds no reasonable cause, then he must dismiss the complaint.<sup>119</sup> If he finds reasonable cause, then he must file a charge on behalf of the harmed party in the absence of a conciliation agreement.<sup>120</sup> If a charge is filed, then the Secretary or any party to the dispute may elect to have the case heard in a federal district court. Otherwise, the case shall be heard by an administrative law judge (ALJ).<sup>121</sup> In such a hearing, parties may appear with legal representation, have subpoenas issued, cross examine witnesses, and submit evidence.<sup>122</sup>

The ALJ must initiate a hearing within 120 days of a charge being issued, unless adhering to that time frame is impracticable.<sup>123</sup> He also must “make findings of fact and conclusions of law within 60 days after the end of the hearing ... unless it is impracticable to do so.”<sup>124</sup> “If the [ALJ] finds that a respondent has engaged or is about to engage in a discriminatory housing practice,” the ALJ is to order the harmed party relief, which can include monetary damages, civil penalties, and injunctive or other equitable relief.<sup>125</sup> The ALJ may also impose a civil penalty of up to \$10,000 for a first offense or more if it is not a first offense.<sup>126</sup>

The ALJ’s orders, findings of fact, and conclusions of law may be reviewed by the Secretary.<sup>127</sup> Parties also are authorized to appeal administrative orders to the federal courts.<sup>128</sup> The Secretary may seek enforcement of an administrative order in a federal court of appeals.<sup>129</sup> Such court may “affirm, modify, or set aside, in whole or in part, the order, or remand” it to the ALJ for additional proceedings. The court also may grant any party “such temporary relief, restraining order, or other order as the court deems just and proper.”<sup>130</sup>

Reasonable attorney’s fees also may be awarded to a prevailing party, except where the United States is the prevailing party.<sup>131</sup>

## Enforcement by the Attorney General

The Attorney General (AG) may bring a civil action in federal district court if (1) the AG has reasonable cause to think that an individual or a group is “engaged in a pattern or practice” of denying one’s rights under the FHA and “such denial raises an issue of general public importance”; or (2) the Secretary refers to him a case involving a violation of a conciliation

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<sup>119</sup> 42 U.S.C. §3610(g)(3).

<sup>120</sup> 42 U.S.C. §3610(g)(2).

<sup>121</sup> 42 U.S.C. §3612(a). Upon such an election, the Secretary must authorize a civil action, which the Attorney General (within 30 days) must commence and maintain on behalf of the harmed party, who may intervene as of right in that civil action. If the federal court finds a discriminatory practice took place, it may award actual and punitive damages to the extent it would in a civil action commenced by a private person. 42 U.S.C. §3612(o).

<sup>122</sup> 42 U.S.C. §3612(c).

<sup>123</sup> 42 U.S.C. §3612(g).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 42 U.S.C. §3612(h).

<sup>128</sup> 42 U.S.C. §3612(i).

<sup>129</sup> 42 U.S.C. §3612(j).

<sup>130</sup> 42 U.S.C. §3612(k).

<sup>131</sup> 42 U.S.C. §3612(p). *See also* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Resources, 532 U.S. 598, 605 (2001) (denying attorneys’ fees to plaintiffs who tried to claim “prevailing party” status where there was no “alteration in the legal relationship of the parties.”).

agreement or of housing discrimination.<sup>132</sup> In such a civil action, the court may issue preventive relief, such as an injunction or a restraining order; provide monetary damages; issue civil penalties; or provide some other appropriate relief. In some instances, prevailing parties may be able to recover reasonable legal costs and fees.<sup>133</sup>

Individuals who use force or the threat of force to “willfully injur[e], intimidate[] or interfere[] with ...” a person’s ability to own, rent, sell, or otherwise engage in housing-related activities because that person’s race, color, national origin, handicap, sex, religion, or familial status also could be subject to criminal penalties.<sup>134</sup>

## Enforcement by Private Persons

An “aggrieved person”<sup>135</sup> may initiate a civil action, in either a federal district or a state court, within two years of “the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement.”<sup>136</sup> If the Secretary has filed a complaint, an aggrieved person may still bring a private suit, unless a conciliation agreement has been reached or an administrative hearing has begun.<sup>137</sup> The AG may intervene in a private suit if he determines that the suit is of “general public importance.” If the court determines that discrimination has occurred or is going to occur, it may award punitive damages, actual damages, equitable relief (e.g., restraining order, injunction), or other appropriate relief.<sup>138</sup> In some instances, prevailing parties may be able to recover reasonable legal costs and fees.<sup>139</sup>

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<sup>132</sup> 42 U.S.C. §§3614(a)-(b). “Upon timely application, any person may intervene in a civil action commenced by the Attorney General.” 42 U.S.C. §3614(e).

<sup>133</sup> 42 U.S.C. §3614(e).

<sup>134</sup> 42 U.S.C. §3631.

<sup>135</sup> “An ‘aggrieved person’ includes any person who claims to have been injured by a discriminatory housing practice or believes that such person will be injured by a discriminatory housing practice that is about to occur.” 42 U.S.C. §3602(i).

<sup>136</sup> 42 U.S.C. §3613(a)(1). The calculation of the two-year period does not include the time that an administrative proceeding is pending. *Id.*

<sup>137</sup> 42 U.S.C. §§3613(a)(2)-(3).

<sup>138</sup> 42 U.S.C. §3613(c).

<sup>139</sup> 42 U.S.C. §3613(c)(2).

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