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# BATTLING THE VOICES OF UNREASON: HUD PLAYS FOUL IN ITS FIGHT TO UPHOLD THE FHA

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Amanda Stakem Conn

## INTRODUCTION

The history of the First Amendment is in no small measure a history of social pathology of anarchists and Klansmen, of neo-Nazis and hatemongers of all stripes. A more genteel bigotry has recently found its voice, the voice of baseless stereotypes about people with disabilities. This voice of unreasoning fear seeks to prevent people with disabilities or unpopular characteristics from living where they want, a right guaranteed by federal law. However unreasonable this message may be, the First Amendment offers protection for speech and speech-related activities, even if tainted by prejudice and irrational fear.

The federal government, ignoring seven decades of First Amendment jurisprudence, has sought to suppress this voice of unreason. Once again the government has forgotten that its role is to stop illegal acts, not to quash reprehensible speech.

For example, in 1993, Alexandra White, her husband, and their neighbor, Joseph Deringer, were concerned when a motel located near their homes in Berkeley, California, was to be turned into rooms for the homeless.<sup>1</sup> They were worried about the possible negative effects that an influx of drug addicts, alcoholics and mentally ill persons might have on their neighborhood.<sup>2</sup> Dubbed the "Berkeley Three," they began speaking out at public hearings and published a newsletter.<sup>3</sup>

A local fair housing group filed a fair housing complaint against the "Berkeley Three" with the United States Department of Housing and Urban Development ("HUD").<sup>4</sup> HUD then began a seven-month investigation of the group.<sup>5</sup> HUD subpoenaed letters and articles they had written in local papers, as well as tapes of public hearings.<sup>6</sup> At one point HUD threatened to fine the group \$50,000 for what they had already said and done.<sup>7</sup> HUD also threatened additional fines if the three did not turn over all files concerning the project and the minutes of neighborhood meetings.<sup>8</sup> The "Berkeley Three" alleged that, at

one point, HUD offered to drop the investigation if the group would "just shut up."<sup>9</sup>

In another example in New York City, the Irving Place Community Coalition opposed the establishment of housing for the mentally ill in their neighborhood because they believed that the neighborhood already had too many social service programs.<sup>10</sup> The Coalition held meetings, made phone calls, and circulated petitions -- the usual actions of community activists.<sup>11</sup> The developers of the project filed a fair housing complaint against the Coalition.<sup>12</sup> Investigators from HUD demanded that the Coalition and its members turn over membership lists, personal diaries, petitions, and phone messages and threatened to fine them if they did not comply.<sup>13</sup> Arlene Harrison, a leader of the group, said that after the investigation began, "[t]he whole group disappeared. People said: 'I wrote to the Governor. Can I be investigated?' It really frightened people and they never came back to another meeting."<sup>14</sup> The Coalition dissolved completely shortly thereafter.<sup>15</sup>

In yet another instance, a neighborhood association in Richmond, Virginia, objected to the placement of two facilities for AIDS patients in the middle of their neighborhood and questioned the legality of the zoning.<sup>16</sup> The local chapter of the American Civil Liberties Union ("ACLU"), acting on behalf of the Richmond AIDS Ministry, filed a fair housing complaint with HUD requesting an investigation.<sup>17</sup> The ACLU complained in its letter to HUD that opponents of the AIDS facility "had made public statements designed to foster opposition to the . . . home . . . based on irrational prejudice, fear and animus towards those who reside there."<sup>18</sup> Moreover, the ACLU stated that the opponents of the project "have made statements to the press."<sup>19</sup>

When asked to respond to charges that HUD had trampled over the First Amendment rights of neighbors and associations, HUD spokesperson John Phillips said "there is a legal difference between asking questions about a [housing] project and advocating that housing not be provided to somebody because of attributes they have."<sup>20</sup>

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The three scenarios described above are not isolated incidents; similar events have taken place in many cities and communities across the country. HUD has admitted it has investigated thirty-four groups that have engaged in speech-related activities.<sup>21</sup> This article will attempt to resolve the question of whether the speech-related activities of neighborhood associations can form the basis of a Fair Housing Act violation. The article will focus on three main categories of activities that neighborhood associations tend to engage in when voicing opposition to housing for protected classes: (1) communications with public officials; (2) leafletting; and (3) meetings with other neighbors. This article will analyze whether any of these activities can form the basis of a Fair Housing Act violation.

## I. BACKGROUND

### A. Fair Housing Act of 1968

The Fair Housing Act of 1968 ("FHA") was intended to eradicate housing discrimination against people because of their "race, religion, color, sex or national origin."<sup>22</sup> The Act made it unlawful to refuse to sell, rent, or otherwise make unavailable a dwelling to any person because of such discrimination.<sup>23</sup> The Act was designed to prohibit conduct with discriminatory consequences, as well as practices motivated by discrimination.<sup>24</sup>

While the FHA was intended to end discriminatory practices, several factors limited its scope. A series of court cases established that the Department of Justice, the enforcing entity, could not obtain money damages for victims of discrimination.<sup>25</sup> Further, while HUD could investigate discriminatory practices and seek resolution of complaints through conciliation agreements, it had no authority to take any enforcement action against violators in front of an administrative law judge or in court.<sup>26</sup> Thus, the Department of Justice and HUD's authority under the Act was limited.<sup>27</sup>

### B. Fair Housing Act Amendments of 1988

The purpose behind the 1988 Fair Housing Act Amendments ("FHAA") was twofold. First, the FHAA was to rectify the lack of an effective enforcement scheme by creating an administrative enforcement system.<sup>28</sup> The new enforcement system gave HUD greater authority to investigate discrimination complaints and charge persons with violations of the Act.<sup>29</sup> During the investigatory period, HUD has, among other things, broad subpoena powers to facilitate the investigation.<sup>30</sup> If a person

or group refuses to comply with a HUD subpoena, they can be fined "\$100,000 or imprisoned not more than one year or both."<sup>31</sup> In order to conserve judicial resources, HUD also has a duty to attempt to reach a conciliation agreement with the group or person being investigated.<sup>32</sup> If no conciliation agreement can be reached, the Department must make a determination that "reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur."<sup>33</sup> If the Department has decided there was discrimination, a charge is issued and, if proven, a fine of \$50,000 can be assessed against the violator (where two or more discriminatory practices are proven).<sup>34</sup> If the Department finds no discrimination, then the Secretary must dismiss the complaint.<sup>35</sup>

The second, and perhaps best known, purpose of the FHAA was to expand the FHA's coverage to discrimination against handicapped persons.<sup>36</sup> A handicap is defined as "a physical or mental impairment which substantially limits one or more life activities, a record of having such impairment, or being regarded as having such impairment."<sup>37</sup> Under this broad definition, the Act now covers housing discrimination against the physically disabled, drug addicts, alcoholics, mentally ill persons, and AIDS patients.<sup>38</sup> In order to ensure that handicapped persons are not discriminated against, state and local governments must make "reasonable accommodations" in rules, policies, practices and services, such as zoning regulations, that may be necessary to afford handicapped persons accommodations.<sup>39</sup>

## II. SPEECH ACTIVITIES AS A BASIS FOR FHA VIOLATIONS

Judicial interpretations of the 1968 FHA reveal that it was not enforced or directed at speech activities. Specifically, no prior cases were brought against community groups for engaging in speech-related activities that advocated the denial of housing for groups covered under the FHA. FHA violations were generally brought against neighbors whose objections to housing for protected classes went beyond speech to conduct, which is not protected by the First Amendment.<sup>40</sup>

It was not until the implementation of the 1988 amendments that speech-related activities of neighborhood associations were targeted as potential FHA violations. Neighbors and neighborhood associations were targeted for several reasons.

First, neighborhood protests to new groups that

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were covered under the FHA became more frequent.<sup>41</sup> While opposition to housing for the original groups covered -- minorities, religious groups, etc. -- does still occur, it is more difficult for groups to oppose them publicly for fear of being labeled as bigots or racists. On the other hand, groups that oppose housing for recovering drug addicts, alcoholics and the mentally ill are generally not labeled in such pejorative terms.<sup>42</sup> Indeed, many people would sympathize with a group's concern for the safety of their children when housing for recovering drug addicts or alcoholics is located nearby.

Second, the 1988 amendments require HUD to investigate all complaints which allege FHA violations.<sup>43</sup> Thus, HUD officials have argued that the Department has no choice in deciding whether to investigate neighborhood associations engaged in speech activities once a complaint has been received from fair housing groups or housing developers.

Also, the current Secretary of HUD, Henry Cisneros, and the former Assistant Secretary for Fair Housing, Roberta Achtenberg, vowed upon assuming office to enforce the FHA vigorously.<sup>44</sup> Their aggressive pursuit of housing discrimination complaints has raised substantial controversy. The Department has been criticized for trampling on the First Amendment rights of community associations and activists.<sup>45</sup> However, HUD's enforcement of the FHA against neighborhood groups that engage in speech-related activities is bolstered by the legislative history of the 1988 amendments, which states that "generalized perceptions about disabilities and unfounded speculations about threats to safety" may not serve as a ground for exclusion of the handicapped.<sup>46</sup>

Finally, HUD and other advocates have broadly interpreted an important section of the FHA. Section 3617 makes it unlawful to "[c]oerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right protected by § 3603, § 3605, or § 3606 of this title."

HUD officials have interpreted section 3617 to apply to neighbors and neighborhood organizations since their speech-related activities may "coerce, intimidate, or interfere" with the rights of protected groups in obtaining housing. Regardless of the reasons for targeting neighborhood associations, the goal of HUD investigations of associations is to determine whether FHA violations have

occurred.

### A. Communications with Public Officials

Neighbors and neighborhood organizations will often express their opposition to housing for the handicapped or other protected classes to local governments who may have the power, through zoning regulations, to deny that housing. The communications to public officials may take the form of petitions, telephone calls, complaints, letters, and testimony at public hearings. While these activities are certainly regarded as "speech," and can be analyzed under a free speech framework, they are more commonly included in the First Amendment's right to petition government for redress of grievances.<sup>47</sup>

In *United Mine Workers of A. District 12 v. Illinois State Bar Ass'n*, the Supreme Court stated that "the rights to assemble peaceably and to petition for a redress [of] grievances are among the most precious of the liberties safeguarded in the Bill of Rights."<sup>48</sup> The right of petition is implicit in "the very idea of a government, republican in form [and] implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."<sup>49</sup> The Supreme Court has created very few exceptions to the right to petition.<sup>50</sup>

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, a trucking company sued a group of railroads to restrain them from continuing an alleged conspiracy to monopolize, which included attempts to lobby for laws that favored the railroads and secure their enforcement by the executive department.<sup>51</sup> The Court explained that the railroads' attempt to influence laws through contacts with public officials was protected by the First Amendment's petition clause unless it was established that the activity "is a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationship of a competitor."<sup>52</sup> Consequently, the Court held that the "sham" exception did not apply even though the railroads' sole purpose in petitioning the government was to destroy their competition.<sup>53</sup> Although the railroads were deceptive in their campaign to the government, the Court stated that "the right of people to petition cannot depend on their intent for doing so."<sup>54</sup>

In a more recent case, the Supreme Court held that petitions that contain "intentional or reckless falsehoods" do not enjoy constitutional protection.<sup>55</sup> Petitions that contain libelous statements are subject to the

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same standards set out in *New York Times v. Sullivan*.<sup>56</sup>

Only the lower federal courts have explored more thoroughly the application of the right to petition. Courts have generally held that there can be no tort liability based on petition activities. For example, in *Hotel St. George Associates v. Morgenstern*, members of a community association in New York met with government officials and persuaded them to limit the number of AIDS patients that could be housed in the Hotel St. George.<sup>57</sup> The hotel alleged that the organization tortiously interfered with the hotel's business relations and its ability to provide housing for AIDS patients.<sup>58</sup> The court rejected the hotel's claim, stating that while the organization's activities in seeking the cap were not "laudable," they were "nonetheless protected by the petition clause."<sup>59</sup>

In the area of civil rights actions, the lower federal courts have consistently upheld the right of petition. In *Christian Gospel Church, Inc. v. City & County of San Francisco*, a church alleged a violation of its free exercise of religion rights when a civic organization petitioned a local government to deny the church's zoning permit.<sup>60</sup> The Court of Appeals for the Ninth Circuit found that the organization's actions were "fully protected by the First Amendment[is petition clause] when it campaigned against the granting of the permit . . . The neighbors were doing exactly what citizens should be encouraged to do, taking an active role in the decisions of government."<sup>61</sup>

*Weis v. Willow Tree Civic Ass'n* concerned a Jewish organization which wanted to develop a tract of land for a community center.<sup>62</sup> A civic organization assembled at public meetings, distributed pamphlets, and petitioned the executive and legislative authorities of the town to deny the zoning permit.<sup>63</sup> The Jewish group filed a civil rights action against the civic organization asserting that the civic organization's First Amendment rights were irrelevant because the "'real motivation' for defendant's activities was to pressure town officials and harass [the] plaintiffs."<sup>64</sup> The Southern District Court for New York dismissed the plaintiff's civil rights action, stating:

[t]he protection of the First Amendment does not depend on 'motivation'; it depends on the nature of defendant's conduct. Defendant's activities described in the complaint fall squarely under the protection of the First Amendment's guaran-

tees of citizens' rights 'peaceably to assemble and to petition the Government for a redress of grievances.'<sup>65</sup>

In the recent HUD investigations, neighbors and neighborhood associations are petitioning on a matter of public concern, housing that may have a negative effect on their neighborhoods. Thus, the "sham" exception to the right to petition would not apply since it pertains only to private individuals or companies petitioning to destroy their competition. A libel action could be initiated if the petitions contained libelous statements. However, petitions to public officials tend to contain statements such as "group homes for the handicapped cause a drop in property values," or "housing for drug addicts would cause an increase in drug related crimes in the neighborhood." These types of statements would not be subject to a libel action because they are protected by the First Amendment.<sup>66</sup> Even if a libel action could be maintained, a libelous statement is not a violation of the FHA.

In essence, most neighbors and neighborhood organizations are petitioning their public officials to do something unlawful--deny housing to protected classes. Even though their motive is certainly not "laudable" or "praiseworthy," their petitioning activities are protected by the First Amendment and cannot form the basis of an FHA violation. The Supreme Court and other federal courts have stated repeatedly that "motive" is unimportant when evaluating petitioning activities.<sup>67</sup>

Furthermore, even though these neighborhood groups are advocating a course of action that is unlawful, their petitions cannot be the basis of an FHA violation on the theory that they are "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," which is unprotected by the First Amendment.<sup>68</sup> Petitions from neighborhood organizations may advocate "lawless action," but the action -- denying protected classes housing -- is not "imminent" and the petitions are not "likely to incite or produce such actions."<sup>69</sup> While citizens have a right to petition the government in various manners, the government is under no constitutional obligation to act upon those petitions.<sup>70</sup> The government can completely ignore them and is not required to grant citizens a forum in which they can publicly express the grievances. In fact, public officials who take action in response to citizens' complaints may be found to have engaged in

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discrimination under the FHA on that basis.<sup>71</sup> Moreover, laws requiring citizen input on the placement of group homes in neighborhoods have been held to have violated the FHA.<sup>72</sup> Since the government is not required to deny protected classes housing on the basis of the petitions, an association's advocacy of "lawless action" is certainly not "imminent," nor is it "likely to produce" a lawless action.

### B. Leafletting

Community groups will often engage in leafletting or distributing pamphlets in order to inform other neighbors about the perceived dangers of group homes for the handicapped (including recovering alcoholics, drug addicts, etc.), to inform them of public meetings and urge them to call their public officials in opposition to the proposed housing. Leafletting concerning both public and private issues has long been afforded First Amendment protection. Indeed, protection is even afforded to leaflets which are intended to coerce and intimidate protected class members, as well as the developers of group homes or a homeowner who intends to sell the house to a protected class member.

In *Organization for a Better Austin v. Keefe*, the Supreme Court considered the validity of an injunction against a group distributing leaflets intended to coerce and intimidate a real estate broker.<sup>73</sup> The neighborhood association was distributing the leaflets, which were critical of the broker's business, near the broker's home in an attempt to force him into signing an agreement with the group not to sell real estate in their neighborhood.<sup>74</sup> The association was opposed to the broker's willingness to sell homes in their neighborhood to African-Americans.<sup>75</sup>

The state appellate court affirmed the injunction on the ground that the activities were coercive and intimidating, rather than informative, and were not entitled to First Amendment protection.<sup>76</sup> The Supreme Court reversed, reasoning:

[t]his Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intend to influence respondent's conduct by their activities; this is not fundamentally different

from the function of a newspaper. . . . [S]o long as the means are peaceful, the communications need not meet standards of acceptability.<sup>77</sup>

Therefore, leaflets that are informative, and even those that are intended to coerce or intimidate people into denying housing for protected classes, are protected by the First Amendment and cannot form the basis of an FHA violation.

On the other hand, leaflets that contain threats of violence or physical harm are not protected by the First Amendment. Thus, leaflets that contain violent threats against the occupants, developers or owners of housing for the handicapped can form the basis of an FHA violation.<sup>78</sup>

### C. Neighborhood Meetings

Neighbors and neighborhood associations will often assemble to discuss proposed housing for protected classes that may be located in their neighborhood.<sup>79</sup> These meetings tend to be informational because they include discussions about the perceived dangers of group homes for the handicapped or other facilities for protected classes. There may also be discussion of how the group can influence governments or developers into denying the proposed housing.

Neighborhood meetings implicate the First Amendment "right of the people peaceably to assemble." The Supreme Court has said that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."<sup>80</sup> Consequently, "peaceable assembly for lawful discussion cannot be made a crime."<sup>81</sup> The Court, explaining the boundaries of the right to assembly, stated that:

[t]he question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. . . . [I]t is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.<sup>82</sup>

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There is no evidence that neighborhood meetings regarding housing for protected classes tend to disrupt the peace, even though the topic of discussion may evoke some strong opinions concerning the proposed housing. Thus, HUD cannot base an FHA violation against the group simply because a neighborhood meeting has taken place and a discussion of housing for protected classes has occurred.<sup>83</sup>

Neighborhood meetings also encompass the right of association. The right to associate is more than just the right to attend a meeting, "it includes the right to express one's attitudes or philosophies by membership in a group, or affiliation with it or by other lawful means."<sup>84</sup> Indeed, the Supreme Court has recognized that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."<sup>85</sup> Government actions that may unconstitutionally infringe upon this freedom can take a number of forms including imposing penalties on individuals for membership in a disfavored group,<sup>86</sup> or requiring disclosure of membership lists.<sup>87</sup>

However, the right to associate is not absolute and the state may impose liability on an association if the group engages in illegal aims.<sup>88</sup> According to HUD, a neighborhood association may have both legal and potentially illegal aims. For instance, the group may be discussing the possible consequences of proposed housing and advocating housing discrimination. Nonetheless, the Supreme Court has held that the government cannot punish association with a group that has both legal and illegal aims unless there is clear proof that the group or individual "specifically intend[s] to accomplish [the aims of the organization] by resorting to violence."<sup>89</sup> Therefore, HUD cannot charge the association, or any of its members, with a violation of the FHA for only meeting and advocating housing discrimination. Moreover, a charge cannot be issued because advocacy of housing discrimination is not illegal if it takes the form of petitioning or leafletting, both of which are protected by the First Amendment.<sup>90</sup>

If, on the other hand, the neighborhood meetings result in violence or threats of violence by the group or individuals against protected classes or anyone involved in the proposed housing, then the group and individual members who participated may be charged with FHA violations. It is well established that the protections of the First Amendment do not extend to violence or physical harm, or threats of violence or

physical harm.<sup>91</sup>

### III. CONCLUSION

The speech-related activities in which neighbors and neighborhood organizations generally engage concerning housing for protected classes -- petitioning government officials, leafletting, and attending community meetings -- cannot form the basis of an FHA violation filed by HUD or any other person.<sup>92</sup> As stated earlier, HUD has not yet charged any organization with a violation for these activities.

However, HUD's failure to charge the organizations with violations has not lessened the chilling effect on their First Amendment rights. HUD has subpoenaed telephone messages, personal diaries and minutes of community meetings and threatened the groups with fines of up to \$100,000 if they did not comply. In the Berkeley case, the HUD investigator told the group that if they would "just shut up" they would not be investigated. One attorney in Seattle who represented an organization being investigated stated that "HUD sends out investigators who are extremely heavy handed. They knock on doors and flash badges and the intimidation factor is very substantial."<sup>93</sup> Indeed, some neighborhood groups stopped meeting once the investigations began. There can be no doubt that the actions of HUD investigators have "chilled" the First Amendment rights of community organizations.

Enforcing the FHA, or any other civil rights act, is an important government function. However, the FHA's goal of ending housing discrimination, laudable though it may be, must not be allowed to take precedence over First Amendment rights. HUD and Congress must take certain steps to ensure that these rights are not being trampled in the overzealous quest to end housing discrimination.

First, in cases where a community group has engaged only in speech-related activities, which is evident on the face of the fair housing complaint, HUD should not investigate the group. Although HUD is required to investigate every allegation, since the actions of the groups are protected by the First Amendment, they are simply outside the scope of the statute.<sup>94</sup> Thus, a complaint which alleges only First Amendment activities is defective on its face and no investigation is required.

Second, when there is a complaint, one which involves speech-related activities and unprotected ac-

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tions, or a complaint in which speech activities are not evident on the face of the complaint, HUD should narrow its interpretation of section 3611 of Title 42 of the United States Code. Section 3611 makes it unlawful to “coerce, intimidate or interfere” with the housing rights of protected classes. HUD should interpret this section to exclude First Amendment activities of community organizations. In addition, HUD should apply the interpretation of past case law which concludes that this section applies only to those activities that involve force, physical harm, or a clear threat of force or physical harm.<sup>95</sup> Furthermore, the statute does not prescribe the level of investigation that should occur, only that HUD “shall investigate.” Indeed, the investigation of the petitioning, leafletting, and meetings should end once the investigator sees that these activities do not advocate violence.<sup>96</sup>

Moreover, HUD investigators who investigate community groups must be sensitive to First Amendment guarantees. The investigators should be trained by lawyers who specialize in civil liberties to recognize housing-related activities that are protected by the First Amendment. Also, in a complaint involving both protected speech and unprotected activities, HUD investigators should explain that while the law requires investigation of the unprotected actions, the protest activities will not be considered an FHA violation. In addition, the investigators should inform the groups that they are free to continue these activities without fear of fines or prosecution.

Additionally, HUD should inform state and local fair housing groups, civil rights organizations and advocacy groups for the homeless not to submit complaints against neighborhood organizations that engage in petitioning, leafletting, and community meetings, even though these acts may advocate housing discrimination.<sup>97</sup> Similarly, HUD should clarify its new interpretation of section 3611 to outline the activities that would potentially violate the FHA.

Ultimately, Congress should amend the FHA to make it clear that First Amendment activities are not within the scope of the FHA. Such an amendment would effectively prevent HUD from continuing to harass community groups that exercise their First Amendment rights. HUD’s actions have demonstrated that the goal of fair housing has caused the Department to disregard the Bill of Rights.<sup>98</sup> These simple steps would enable Congress and HUD to make significant strides toward allowing neighbors and neighborhood

organizations, the FHA, and the First Amendment to coexist.

#### IV. AFTERWORD

Because of adverse publicity, HUD has since retreated from its practice of aggressively pursuing investigations of community associations.<sup>99</sup> HUD has dropped eleven of the thirty-four cases it had identified involving First Amendment activities.<sup>100</sup> The remaining cases are currently under review by HUD.<sup>101</sup> HUD has issued guidelines to its field investigators outlining when free speech activities prevail over FHA claims.<sup>102</sup> These guidelines included directing investigators to review public records, rather than interviewing speakers or reviewing private correspondence, requiring investigators to submit investigative plans to HUD headquarters for approval before proceeding with cases involving speech, and requiring approval from HUD headquarters before any FHA complaint involving speech may be investigated.<sup>103</sup> These guidelines, however, have not satisfied the American Alliance for Rights and Responsibilities, which represents the “Berkeley Three” and other neighborhood organizations involved in similar cases.<sup>104</sup> The Alliance argues that “[g]uidelines, after all, can be changed at the whim of HUD officials, are not subject to [public] notice and comment, and are not enforceable in court.”<sup>105</sup>

Until HUD’s new guidelines are codified in federal law, the free speech rights of neighborhood associations and community groups will be at risk once the latest outcry subsides, and the next crusade against the voices of unreason is launched.

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attributed to the Department of Legislative Reference.

## ENDNOTES

<sup>1</sup>Janet Wells, *Fair Housing and Free Speech at Issue in Berkeley*, S.F. Chron., July 22, 1994.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>Lisa W. Foderaro, *Protests of Housing Plan Lead to HUD Inquiry, and Debate*, N.Y. Times, Sept. 1, 1994.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Nat Hentoff, *HUD's Attack on the First Amendment*, Wash. Post, Sept. 17, 1994.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>Reynolds Holding, *Berkeley Housing Dispute: When Speech Isn't Necessarily Free*, S.F. Chron., July 29, 1994.

<sup>21</sup>*HUD Gets the Message*, Wash. Post, Sept. 3, 1994.

<sup>22</sup>42 U.S.C. § 3604(a)(1968).

<sup>23</sup>42 U.S.C. § 3604(a)(1968).

<sup>24</sup>*United States v. Grooms*, 348 F. Supp. 1130, 1133-34 (M.D. Fla. 1972).

<sup>25</sup>See *United States v. Rent-a-Home Sys.*, 602 F.2d 795, 798 (7th Cir. 1979); *United States v. Mitchell*, 580 F.2d 789, 793 (5th Cir. 1978); *United States v. Long*, 537 F.2d 1151, 1155 (4th Cir. 1975).

<sup>26</sup>42 U.S.C. §§ 3601-3617(1968).

<sup>27</sup>See generally, James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 Vand. L. Rev. 1049(1989).

<sup>28</sup>U.S.C.C.A.N. 1988 at 2174.

<sup>29</sup>42 U.S.C. §§ 3608-3612(1995).

<sup>30</sup>42 U.S.C. § 3611(a)(1995).

<sup>31</sup>42 U.S.C. § 3611(c)(1995).

<sup>32</sup>42 U.S.C. § 3610(b)(1995).

<sup>33</sup>42 U.S.C. § 3610(g)(1)(1995).

<sup>34</sup>42 U.S.C. § 3610(g)(2)(a)(1995); 42 U.S.C. § 3612(g)(3)(c)(1995).

<sup>35</sup>42 U.S.C. 3610(g)(7). The incidents in which neighborhood groups were threatened with fines and offered conciliation agreements took place during the investigatory phase of HUD's enforcement authority. I am unaware of any association that was actually charged with an FHA violation. See Part III *supra*.

<sup>36</sup>The FHAA also prohibits discrimination against families. 42 U.S.C. § 3604(1995).

<sup>37</sup>42 U.S.C. § 3602(h)(1995).

<sup>38</sup>While the FHA specifically excludes from its coverage drug addicts that are currently engaging in these activities, neighborhood associations are still concerned that "recovering" drug

addicts may cause problems if they begin to use drugs again. 42 U.S.C. § 3602(h) (1995) (handicapped "does not include current, illegal use of or addiction to a controlled dangerous substance").  
<sup>39</sup>42 U.S.C. § 3604(f)(3)(1995).

<sup>40</sup>See *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991)(neighbor spit on owner of house and sent physically threatening notes); *United States v. Johns*, 615 F.2d 672 (5th Cir.), *cert. denied*, 449 U.S. 829 (1980)(neighbors shot at home to discourage interracial living arrangements); *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989)(black woman's home firebombed by neighbors).

<sup>41</sup>For the sake of clarity, I will refer to the 1968 FHA and the FHAA as simply the FHA. See Tamar Lewin, *Volatile Mix in Housing; Elderly and Mentally Ill*, N.Y. Times, Aug. 3, 1992.

<sup>42</sup>People who oppose housing for handicapped persons are called NIMBYS, which stands for "not in my back yard."

<sup>43</sup>42 U.S.C. § 3610(a)(1)(B)(iv) (1995).

<sup>44</sup>See Bradley Inman, *Fair-housing Chief on the Warpath Against Discrimination*, San Diego Union-Trib., Oct. 2, 1994.

<sup>45</sup>It appears that HUD's investigations of neighborhood organizations began during the Clinton administration. Bud Albright, former Deputy Counsel for HUD during the Bush administration recently stated that he was surprised to learn that HUD investigators were still "trammeling First Amendment rights" in housing discrimination probes. Joyce Price, *Progress Aggressive at HUD; New Policies, Programs Hit for 'Big Brother' Pushiness*, Wash. Times, Sept. 27, 1994. Mr. Albright also stated that he and former HUD General Counsel told HUD "investigators and lawyers we didn't want investigations when people were just exercising their First Amendment rights." *Id.*

<sup>46</sup>U.S.C.C.A.N. 1988 at 2179.

<sup>47</sup>The Supreme Court has stated that the "right to petition is cut from the same cloth as other guarantees of the [First Amendment] and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

<sup>48</sup>*United Mine Workers of A. Dist. 12 v. Illinois St. B. Ass'n*, 389 U.S. 221, 222 (1967).

<sup>49</sup>*United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

<sup>50</sup>See generally, Norman B. Smith, "Shall Make No Law Abridging..." *An Analysis of the Neglected But Nearly Absolute, Right To Petition*, 54 U. Cin. L. Rev. 1153 (1986).

<sup>51</sup>365 U.S. 127(1961).

<sup>52</sup>*Id.* at 144.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*McDonald v. Smith*, 472 U.S. 479, 485 (1985).

<sup>56</sup>376 U.S. 254, 272(1964). As statements in petitions regard a matter of public concern, the location of housing for the disabled, in order to be libelous, the author must have acted with "malice," which is "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

<sup>57</sup>819 F. Supp. 310 (S.D.N.Y. 1993).

<sup>58</sup>*Id.* at 320.

<sup>59</sup>*Id.*

<sup>60</sup>896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1990).

<sup>61</sup>*Id.* at 1226.

<sup>62</sup>467 F. Supp. 803 (S.D.N.Y. 1979).

<sup>63</sup>*Id.* at 816.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 817 (citations omitted). See also, *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980)(civil rights action challenging the petitioning of an allegedly unconstitutional zoning regulation dismissed); *Sawmill Products, Inc. v. Town of Cicero*, 477 F. Supp. 636 (N.D. Ill. 1979)(civil rights action against person protesting sawmill in community dismissed to avoid chilling right to petition).

<sup>66</sup>See *Bond v. Floyd*, 385 U.S. 116 (1966)(statement that had racial overtones protected by First Amendment); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978)(falsehoods of Nazi dogma and its promotion of hatred on basis of heritage did not justify suppression).

<sup>67</sup>*Noerr Motor Freight*, 365 U.S. at 418 (intent in petitioning unimportant); *Weis*, 476 F. Supp. at 817 (protection of petition clause does not depend on motive); *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972)(right to seek to influence government does not rest on motive).

<sup>68</sup>*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>69</sup>In *Michigan Protection & Advoc. Serv. v. Babin*, a local fair housing group brought an FHA action against a group of neighbors who opposed a group home for the developmentally disabled. 799 F. Supp. 695 (E.D. Mich. 1992), aff'd, on other grounds, 18 F.3d 337 (6th Cir. 1994). The plaintiffs alleged that the neighbors petitions, meetings, and leaflets were not protected by the First

Amendment because they were "intended to incite and encourage violation of the law." *Id.* at 721. The Eastern District Court for Michigan summarily dismissed the plaintiff's claim stating that the activities that the neighbors engaged in were protected by the First Amendment because they did not "rob the listener of rational thought by demanding immediate action." *Id.*

<sup>70</sup>*Smith v. Arkansas St. Highway Employees*, 441 U.S. 463, 465 (1979)("[t]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, . . . to recognize an association"). See also, *Minnesota v. Knight*, 465 U.S. 271, 263 (1984)("[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy").

<sup>71</sup>See *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993)(town officials violated FHA by applying zoning ordinance to group home after complaints from neighbors); *Support Ministries v. Village of Waterford, N.Y.*, 808 F. Supp. 120 (N.D.N.Y. 1992)(village officials violated FHA by enacting zoning ordinance prohibiting group homes after petitioning bycommunity leaders).

<sup>72</sup>*Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993)(county code which requires public input before establishment of group homes violates FHA).

<sup>73</sup>402 U.S. 415 (1971).

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<sup>74</sup>*Id.* at 417.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 418.

<sup>77</sup>*Id.* at 419 (citations omitted).

<sup>78</sup>See Part IIC *infra*.

<sup>79</sup>Since HUD has not charged any neighborhood associations with an FHA violation, it is difficult to determine whether HUD viewed the membership in a group that advocated discrimination as a violation or whether HUD perceived the views that were being advocated at the meetings as the potential violation. Because HUD subpoenaed the membership lists of some of the organizations and the minutes of their meetings, it seems that HUD perceived membership as well as the contents of the meeting as potential violations. See Part IIA *supra*.

<sup>80</sup>*De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

<sup>81</sup>*Id.* at 365.

<sup>82</sup>*Id.* at 365. See also *Thomas v. Collins*, 323 U.S. 516 (1945)(right to discuss and inform people of the merits of labor union is protected as free assembly); *Hague v. CIO*, 307 U.S. 496 (1939)(right to assemble to discuss a labor statute is protected).

<sup>83</sup>See *Weis*, 467 F. Supp at 817 (civic association which organized for the purpose of petitioning against Jewish community center protected by right of assembly).

<sup>84</sup>*Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>85</sup>*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

<sup>86</sup>See *Healy v. James*, 408 U.S. 169, 180-84 (1972).

<sup>87</sup>See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-2 (1982).

<sup>88</sup>See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)(state interest in ending discrimination against females justifies sanctions against men's organizations).

<sup>89</sup>*Scales v. United States*, 367 U.S. 203, 229 (1961)(quoting *Noto v. United States*, 367 U.S. 290, 300 (1961)).

<sup>90</sup>See Parts III A and B above.

<sup>91</sup>See *Watts v. United States*, 394 U.S. 705, 707 (1969); *United States v. Mitchell*, 463 F.2d 187, 191 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973).

<sup>92</sup>Accord David A. Stone, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colo. L. Rev. 334 (1991)("bad consequences that come about because speech persuades people to do certain things

cannot justify suppression").

<sup>93</sup>Reynolds Holding, "*Berkeley Housing Dispute: When Speech Isn't Necessarily Free*," S.F. Chron., July 29, 1994.

<sup>94</sup>42 U.S.C. § 3610(a)(1)(B)(iv) (1995)(the Department "shall make an investigation of the alleged discriminatory housing practice").

<sup>95</sup>See, e.g., *Sofarelli*, 931 F.2d at 722 (neighbor left note on black homeowner's car threatening "to break [him] in half" if he did not leave neighborhood).

<sup>96</sup>HUD is only required to engage in conciliation during the investigation "to the extent feasible." 42 U.S.C. § 3610(b)(1) (1995). Thus, HUD could determine that conciliation is not "feasible" during the investigations because of First Amendment protections.

<sup>97</sup>An amendment to the FHA that would make investigations discretionary is likely to be controversial and opposed by advocates of fair housing. In fact, some advocates have refused to acknowledge that HUD has been "chilling" the First Amendment rights of community organizations. Jim Morales, a housing expert with the National Center for Youth Law, recently stated that "[t]he law has recognized that there is a harm when somebody makes statements that result in the denial of housing to a protected class of people. There are significant civil rights on the other side of this story (the 'Berkeley Three' controversy), and I think the cries of free speech are premature." Reynolds Holding, *Berkeley Housing Dispute: When Speech Isn't Necessarily Free*, S.F. Chron., July 29, 1994.

<sup>98</sup>An amendment to the FHA that would prohibit investigations of groups engaged in protected activities is also likely to be controversial and opposed by advocates of fair housing. *Id.*

<sup>99</sup>*HUD Moves to Protect Speech Rights in Probe*, Wash. Post, Sept. 3, 1994.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*HUD to Drop Investigations Involving Free Speech Rights*, Rocky Moun. News, Sept. 3, 1994.

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



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