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COMMENTS

WE HAVE MET THE ENEMY AND THEY ARE US: SAVING HUD FROM THEMSELVES AND PROTECTING THE VIABILITY OF THE FAIR HOUSING AMENDMENTS ACT

Democracy is the form of government that gives every man the right to be his own oppressor.¹

I. INTRODUCTION

Once again Berkeley, California is the center of attention involving a dispute about the freedom of speech guaranteed by the First Amendment.² Thirty years ago, the young, intellectual elite protested parochial restrictions on speech that were an impediment to the articulation of their societal vision.³ Ironically, thirty years later, one of the mechanisms designed to bring about that societal vision is now ominously chilling that very freedom.

In the summer of 1994, three Berkeley residents began organizing political opposition to what they perceived to be an egregious conflict of interest.⁴ The local zoning board approved the conversion of a thirty-five room hotel into a permanent shelter for the homeless.⁵ The residents felt that the lack of public oversight, poor design, and conception of the project were due to a conflict of interest on the zoning board.⁶

1. JAMES R. LOWELL, *AMERICAN IDEAS FOR ENGLISH READERS* 11 (Boston, J.G. Couples 1882).

2. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

3. Michelle Locke, *Free Speech Movement, the Spark for a Decade of Upheaval*, *Turns* 30, L.A. TIMES, Dec. 11, 1994, at B1.

4. *Fair Housing Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1994) [hereinafter *Fair Housing Issues*] (prepared testimony of Joseph J. Deringer, Resident of Berkeley, Cal.).

5. *Id.*

6. *Id.*

A member of the zoning board was also a board member of the nonprofit group that was developing the project.⁷ Although she did not vote on the project, she argued vigorously for its approval in front of her colleagues on the zoning board.⁸

The residents' political organizing consisted of "attending meetings and public hearings."⁹ It also consisted of distributing leaflets, submitting petitions to local government officials, publishing a local newsletter, and writing letters to the editor.¹⁰ The group also filed suit in Alameda County to require a new zoning board vote.¹¹

Shortly after filing suit, a social service provider, who was not associated with the controversial project, filed a one sentence Fair Housing Complaint with the Department of Housing and Urban Development (HUD) against the three Berkeley homeowners.¹² The complaint alleged that the homeowners were "blocking the project because they perceive[d] the primary residents of the facility [would] be the mentally disabled or the disabled through substance abuse."¹³ Upon receipt of the complaint, HUD began a ten month investigation, in which the Berkeley residents were subjected to threats, intimidation, and an intractable federal bureaucracy.¹⁴

HUD initiated its investigation with a letter stating that a complaint had been lodged against the Berkeley residents; the letter did not include any specifics to substantiate the complaint.¹⁵ Additionally, the letter threatened legal action if the activities were not ceased immediately.¹⁶ Finally, the letter concluded with a request for all documents, correspondence, and membership lists associated with the protest.¹⁷

7. *Id.*

8. *Id.*

9. *Id.*

10. Telephone Interview with Joseph J. Deringer, Resident of Berkeley, California, and Defendant in Recent HUD Investigation (Nov. 16, 1994).

11. *Id.*

12. *Fair Housing Issues*, *supra* note 4.

13. *Id.*

14. *Id.*

15. Telephone Interview with Roger Conner, Executive Director, American Alliance for Rights and Responsibilities, Amicus, Recent HUD Investigation (Nov. 17, 1994).

16. *Fair Housing Issues*, *supra* note 4.

17. *Id.*

The Berkeley residents were frightened by the references to heavy civil and criminal penalties for failure to comply with HUD's requests.¹⁸

HUD never provided any indication that the Berkeley residents had broken any laws, or even what their potential offense was under the Fair Housing Act.¹⁹ HUD did not respond to repeated requests for clarification.²⁰ The residents, prompted by fear and anger over the apparent callous and willful trampling of their constitutional rights, attempted to publicize their treatment in the media.²¹ The subsequent firestorm in the national media, which was in part due to the existence of over thirty similar investigations across the country, forced HUD to drop the investigation and issue new guidelines for investigations.²²

The experience of the Berkeley residents is not unique. HUD's current enforcement procedures allow abusive filings of housing discrimination complaints to chill legitimate public discourse. This comment addresses HUD's apparent trampling of First Amendment rights of free speech and petition while enforcing the Fair Housing Act.²³ Part II examines: (1) the history and changes in the Fair Housing Act, including the new enforcement provisions; (2) HUD's interpretation and implementation of the Act; and (3) how current implementation results in unacceptable chilling of First Amendment rights of free speech and petition.

Additionally, part II discusses how HUD's administration and implementation of the Act allows housing discrimination complaints to become strategic lawsuits that prevent public participation in the policy making, democratic process. Part II discusses the primacy of the First Amendment and

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See Lisa W. Foderaro, *Protests of Housing Plan Lead to HUD Inquiry, and Debate*, N.Y. TIMES, Sept. 1, 1994, at B1; *Intimidating Political Protest*, WASH. POST, Aug. 22, 1994, at A16; Heather MacDonald, *HUD Continues Its Assault on the First Amendment*, SACRAMENTO BEE, Sept. 19, 1994, at B13; Mike Rosen, *Seniors Added to HUD's Hit List*, DENVER POST, Sept. 30, 1994, at B11.

23. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

how the Supreme Court, using the *Noerr-Pennington*²⁴ doctrine, established a test to balance constitutional rights and important legislative goals.

Part III examines how HUD's enforcement of the Fair Housing Amendments Act, both in the past and under its current guidelines, allows unacceptable encroachment upon constitutionally protected rights. It details how the administrative enforcement process, by imposing costs upon the defendant, discourages free speech.

Part IV proposes several changes in HUD's administrative procedures that will implement the amended Act in a way that allows both respect for the exercise of constitutionally protected activities, and vigorous enforcement of the fair housing laws.

II. BACKGROUND

A. *Fair Housing Enforcement Before the 1988 Amendments*

In 1968, on the heels of other sweeping civil rights legislation²⁵ and in the midst of domestic upheaval,²⁶ Congress passed the Fair Housing Act of 1968.²⁷ The Act was designed to prevent racial segregation in housing and provided several mechanisms to achieve that goal.²⁸ The Act provided for: (1) administrative proceedings within HUD; (2) administrative proceedings by a state or local agency; (3) civil actions filed by an aggrieved party in United States district court; and (4)

24. The term "*Noerr-Pennington doctrine*" refers to a pair of Supreme Court cases wherein the Court fashioned a way to make the important public policy goals of the Sherman Antitrust Act not conflict with the First Amendment. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

25. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1993)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified as amended at 42 U.S.C. §§ 1971-1974e (1993)).

26. See NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF MAR. 1, 1968 1-10 (1968).

27. Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801-901, 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

28. The 1968 Fair Housing Act prohibited discrimination based upon race, color, religion, sex, or national origin in connection with the sale or rental of residential housing. Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 81, 83 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)). It extended to housing owned or operated by the federal government, dwellings supported in whole or in part with federal loans, advances or grants, and residences purchased or rented with federal funds. *Id.* § 803(2)(1).

civil enforcement in pattern and practice actions by the Attorney General of the United States.²⁹

1. *Administrative Proceedings*

The aggrieved person³⁰ suffering a discriminatory housing practice³¹ was entitled to file a complaint with the Secretary of HUD.³² The alleged victim had to file the complaint within 180 days from the date of the alleged discrimination.³³ Upon receipt of the complaint, the Secretary was compelled to conduct an investigation and attempt to resolve the dispute informally through conciliation, conferences, and persuasion.³⁴ The Secretary had fairly broad power to investigate complaints, including subpoenaing witnesses and submitting interrogatories.³⁵

Under the 1968 legislation, state and local agencies were charged with much of the enforcement effort.³⁶ If state law provided substantially equivalent rights and remedies as federal law, HUD was required to refer all complaints of housing discrimination to the state or local agency.³⁷ Once the complaint was referred, HUD was not allowed to take further action unless the Secretary determined that the state or local agency was not protecting the rights of the parties.³⁸

29. *Id.* § 810(c). See also *infra* text accompanying note 48.

30. Courts have given the statutory definition of "aggrieved person" broad interpretation. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 96-97 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (holding that standing under the Fair Housing Act should be as broad as is consistent with Article III); see also *Housing Auth. v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991) (finding that Congress intended that the definition of a "person" should be liberally defined to effectuate an important policy).

31. Any discrimination based upon race, color, religion, sex, familial status, handicap, or national origin in the sale, rental, advertising, or refusal to make reasonable modifications in the residential real estate market is prohibited by the Act, e.g., the refusal to rent an apartment because of the prospective renter's race. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (1988 & Supp. V 1993).

32. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(a), 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

33. *Id.* § 810(b).

34. *Id.* § 810(a).

35. *Id.* § 811(a).

36. See *id.* § 810(c) (directing that HUD refer all complaints of housing discrimination to state and local agencies if state laws provided remedies that were substantively equivalent to those in the federal statute).

37. *Id.*

38. *Id.*

If the Secretary was not able to convince the parties to reconcile within thirty days, the aggrieved party was entitled to file a lawsuit in United States district court.³⁹ Under the provisions of the 1968 legislation, HUD could attempt to informally mediate the dispute and provide the parties with information regarding their respective rights and responsibilities under the Act.⁴⁰ Without providing HUD a more active role in enforcement, the original law relied upon private litigation as the primary enforcement mechanism.⁴¹

2. *Private Litigation in District Court*

The 1968 Act gave an aggrieved person essentially two choices if he or she wanted to pursue private litigation. The aggrieved party could bypass HUD's administrative process altogether and file an action in United States district court directly.⁴² Alternatively, the person could take the more circuitous route and file an administrative complaint with HUD, or a corresponding state or local agency, and then file a lawsuit in district court if the administrative process was not satisfactory.⁴³

If the aggrieved person filed an administrative complaint, the district court was required to delay the proceeding if conciliation efforts were likely to succeed.⁴⁴ The statute also gave the court the power to appoint attorneys and com-

39. *Id.* § 810(d).

40. The original bill introduced by then Senator Walter Mondale (D-Minn.) gave HUD significant enforcement power. H.R. 2516, 90th Cong., 1st Sess. (1967). The bill provided for conciliation. *Id.* If conciliation failed, the Secretary could independently issue a complaint, hold hearings, and enforce orders upon a finding of discrimination. *Id.* These provisions prompted serious criticism concerning potential infringement upon constitutional rights. See 114 CONG. REC. 2984-94 (1968). In an effort to save the bill, Senator Everett Dirksen (R-Ill.) offered an amendment that removed the offending enforcement provisions. *Id.* at 4570-78.

41. Many critics of the original law saw this as the primary weakness of the original legislation. See James A. Kushner, *Symposium: The State of the Union: Civil Rights: The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989); Minna J. Kotkin, *The Fair Housing Amendments Act of 1988: New Strategies for New Procedures*, 17 N.Y.U. REV. L. & SOC. CHANGE 755 (1989-1990); Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

42. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812, 82 Stat. 81, 88 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

43. *Id.* § 810.

44. *Id.* § 812(a).

mence actions without payment of costs upon a showing of financial need.⁴⁵ Despite the generous provisions, which allowed needy plaintiffs to commence and prosecute an action, the statute only provided limited relief if the aggrieved person prevailed. An adjudicatory body finding discrimination was limited to providing injunctive relief, actual damages, and not more than \$1000 in punitive damages.⁴⁶ Additionally, the court could provide attorney fees and costs if the plaintiff was not able to pay.⁴⁷

In unique circumstances, the Attorney General was authorized to initiate enforcement actions.⁴⁸ However, for the most part, the protection and preservation of fair housing rights was the domain of the injured party.⁴⁹ In the years following the legislation's enactment, private actions developed a significant body of precedent that expanded and defined the statute's potential for combating various forms of housing discrimination.⁵⁰ Nevertheless, fair housing advocates became increasingly disenchanted with the barriers imposed by the lack of any meaningful enforcement authority at HUD, and the severe limitations on the relief available to prevailing plaintiffs.⁵¹

Advocates of stronger enforcement were frustrated with the current scheme.⁵² They articulated their frustration to Congress, which in turn repeatedly attempted to strengthen the administrative enforcement abilities of HUD.⁵³ Congress-

45. *Id.* § 812(b).

46. *Id.* § 812(c).

47. *Id.* § 810(c).

48. *See id.* § 813. The Attorney General was authorized to file civil actions in cases of pattern or practice discrimination and in cases where issues of general public importance were raised. *See id.* Pattern and practice is defined as a discriminatory practice that affects groups of people rather than just one individual. F. Willis Caruso & William H. Jones, *Fair Housing in the 1990's: An Overview of Recent Developments and Prognosis of Their Impact*, 22 J. MARSHALL L. REV. 421, 524-25 (1989).

49. Immediately after the enactment of the 1968 legislation, the Department of Justice established a section within the Civil Rights Division that was in charge of enforcing the Act. Caruso & Jones, *supra* note 48, at 429. However, over a twelve-year period, only 300 suits were filed. JAMES KUSHNER, *FAIR HOUSING* § 10.01 n.2 (1984).

50. *See generally* Kushner, *supra* note 41, at 1070-80.

51. Ware, *supra* note 41, at 79.

52. *See supra* note 42.

53. Almost every year since 1977, Congress attempted to strengthen the enforcement procedures of the Fair Housing Act by establishing a significant federal enforcement mechanism. Kushner, *supra* note 41, at 1086.

sional efforts resulted in passage of the amended Act, which significantly enhanced the enforcement mechanisms, dramatically increased HUD's role in the entire process, and expanded the protected categories to include the handicapped and families with children.⁵⁴

B. *Fair Housing Amendments Act of 1988*

The new enforcement mechanisms of the amended Act gave HUD a powerful new tool to combat discrimination.⁵⁵ Former critics heralded the new procedures and were ecstatic because "[a]fter twenty years with almost no enforcement authority, HUD now [had] what is likely the most comprehensive civil enforcement mechanism of any of the various federal agencies."⁵⁶

1. *New Administrative Enforcement Provisions*

The most important changes to the law came in terms of the administrative enforcement powers given to HUD.⁵⁷ Both the old and amended Acts allow the aggrieved party to file a complaint with HUD alleging discrimination.⁵⁸ However, under the old Act, HUD could only attempt voluntary conciliation.⁵⁹ If that failed, or if the respondent failed to participate, HUD could only inform the aggrieved party of his or her right to initiate private action.⁶⁰

The amended Act provides the alleged victim with a powerful ally. Now, upon receipt of a complaint, the Secretary, utilizing the comparatively inexhaustible resources available to HUD,⁶¹ becomes the alleged victim's proxy in prosecuting

54. Ware, *supra* note 41, at 80.

55. *Id.* at 87.

56. *Id.*

57. *Id.*

58. See *supra* text accompanying notes 30-33.

59. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810, 82 Stat. 81, 85-86 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

60. *Id.*

61. HUD's resources are only limited by its appropriations from the federal government and its internal decisions on how to utilize those resources. HUD's resources are considerable, and are certainly considered "inexhaustible" compared to those of an average wage earner. HUD's budget for fiscal 1988 was \$29,193,000. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: REPORT TO THE CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT (1989).

the complaint.⁶² Once an aggrieved person⁶³ suffers discrimination, or a third party⁶⁴ believes that such person will suffer discrimination, a complaint can be lodged with HUD.⁶⁵

The amended Act also allows complaints to be based upon claims of interference, coercion, or intimidation.⁶⁶ The Act not only protects the person who is seeking the benefits of fair housing, but it also protects anyone who aided or encouraged such person to seek fair housing.⁶⁷ Coercion, interference, and intimidation have traditionally only encompassed overt acts designed to further exclusion.⁶⁸ However, that interpretation is evolving and expanding under the current administration.⁶⁹

The present interpretation is similar to the tort of intentional interference with economic advantage. Briefly, the elements of the tort of intentional interference with prospective economic advantage are: (1) an existing economic relationship between the plaintiff and a third party that will economically benefit the plaintiff in the future; (2) the defendant's knowledge of this relationship; (3) the defendant's intentional

62. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

63. The Act of 1988 expands the definition to anyone claiming to be injured by housing discrimination, and any other third party who believes that such person will be injured by a discriminatory housing practice that is about to occur. *See id.* § 3602(i).

64. A "third party" can literally be anyone. The only statutory requirement is that the third party either (1) witnesses the housing discrimination, or (2) believes that housing discrimination will occur in the future. The third party subset includes anyone from an interested housing developer, or housing advocate, to an ordinary person of good will. *Id.*

65. *Id.* § 3610(a).

66. *Id.* § 3618.

67. *Id.*

68. *See South-Suburban Hous. Ctr. v. Greater South-Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991) (refusal of Board of Realtors to allow multiple listing for homes being offered through nonprofit corporation intended to encourage whites to integrate neighborhood does not violate coercion section of the act); *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989) (firebombing a house to intimidate and force the occupants to move violates the act); *Delano Village Co. v. Orridge*, 553 N.Y.S.2d 938 (Sup. Ct. 1990) (attempting to coerce property owners into selling to only a particular racial group violates act).

69. *Fair Housing Issues*, *supra* note 4. The current administration seems comfortable with a rather broad interpretation of interference. *Id.* The application of such a broad standard led to considerable outcry when it was applied to a peaceful protest of city housing plans and zoning decisions. *See supra* note 21. The subsequent HUD investigation of the protest, on the grounds that it was a violation of the Fair Housing Act, led to allegations that HUD was infringing on First Amendment rights of free speech. *See MacDonald, supra* note 22, at B13.

and successful disruption of this relationship; and (4) damage proximately caused by the actions of the defendant.⁷⁰

HUD deviated from the conventional interpretation of interference as it was used in the fair housing context.⁷¹ Formerly, the interpretation was an amalgam of coercion, interference, and intimidation that usually had a physical element.⁷² Under the old Act, HUD remained true to the spirit of the legislation which envisioned interference as a physical act that prohibited a person from exercising constitutional rights.⁷³

HUD shifted its interpretation, allowing claims to be made based upon speech alone, not in conjunction with any physical element.⁷⁴ By switching from the old interpretation to one that closely resembles economic interference, and by focusing upon the communicative aspect of interference, HUD significantly expanded the range of conduct prohibited by the Act.

Upon receipt of a complaint, HUD is required to initiate a thorough investigation of all the facts surrounding the complaint.⁷⁵ The amended Act now authorizes HUD to be an independent actor. HUD is no longer required to passively receive complaints; rather, the agency can initiate them itself.⁷⁶ No longer is HUD required to stand by and watch the action; it is now a full fledged participant.⁷⁷

Additionally, HUD or an individual now has up to a full year to file a complaint, as opposed to 180 days under the old

70. John C. Barker, *Common Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 420 (1993) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 129-30 (5th ed. 1984)).

71. See *supra* note 68.

72. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3618 (1988 & Supp. V 1993).

73. Fair Housing Act of 1968, Pub. L. No. 90-284, § 811, 82 Stat. 81, 87 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)); see also 1968 U.S.C.A.N. (82 Stat.) 195.

74. See *supra* note 17 and accompanying text.

75. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3610(a)(1)(A)(i) (1988 & Supp. V 1993).

76. *Id.* § 3610(a)(1)(A)(i).

77. *Id.* § 3610(f). Under the amended Act, HUD can still refer the complaint to a state or local government agency if that agency's program has been certified by HUD. *Id.* HUD is only required to refer complaints to the agencies it has certified and HUD can step in if the agency does not prosecute the action quickly and to the satisfaction of HUD. *Id.*

Act.⁷⁸ During the 100 days that HUD has to complete its investigation, it has extraordinary power.⁷⁹ It can issue subpoenas, compel witnesses to testify, issue interrogatories, request the turnover of documents, inspect property, and compel physical or mental examinations.⁸⁰ HUD can use all the tools of discovery that would be available to any party in a civil action in the district where the action was filed.⁸¹

Under the old Act, the breadth of HUD's discovery was limited. Although HUD could issue subpoenas or interrogatories, it did not have the power to independently enforce those requests.⁸² If the respondent resisted HUD's discovery efforts, HUD had to go to district court to seek enforcement.⁸³ The additional procedural step of having to go to district court and justify discovery requests increased the cost of discovery and limited its attractiveness as a litigation tactic. Additionally, the lack of significant statutory penalties for failure to comply with discovery requests limited the leverage that could be gained by hanging stiff penalties over the heads of recalcitrant respondents.⁸⁴

The amended Act significantly enhances HUD's ability to conduct discovery. Willful failure to comply with HUD's requests during the investigation results in stiff civil and criminal penalties.⁸⁵ Attempts to mislead through false statements, destruction of documents, or making less than full, true, and correct entries in reports or records can result in fines of \$100,000 and imprisonment of up to one year, or both.⁸⁶

78. *Id.* § 3610.

79. *Id.*

80. HUD had these same powers under the old Act. However, it could not independently enforce the subpoenas, rather it had to go to the United States district court to seek enforcement. Additionally, the civil fines under the old Act were limited to \$1000, whereas under the amended Act the maximum penalty is \$100,000. Fair Housing Act of 1968, Pub. L. No. 90-284, § 811, 82 Stat. 81, 87 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

81. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3611 (1988 & Supp. V 1993). *See also* 24 C.F.R. § 104.00 (1994).

82. Fair Housing Act of 1968, Pub. L. No. 90-284, § 811(e), 82 Stat. 81, 87 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

83. *Id.*

84. *See supra* text accompanying note 18.

85. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3611(c) (1988 & Supp. V 1993).

86. *Id.*

Commentators have generally applauded the new, stringent enforcement mechanisms, especially because they relieve potential victims of the burden of prosecuting their own actions.⁸⁷ However, there has been scant notice of the potential for abuse. Any person legitimately concerned enough about housing development, and who plans to speak out on the issue, runs the risk of a HUD investigation.⁸⁸

At the conclusion of an investigation, HUD determines if there is reasonable cause to believe that housing discrimination occurred or is about to occur.⁸⁹ If the Secretary finds reasonable cause to believe that discrimination occurred, HUD will issue a charge on behalf of the aggrieved person.⁹⁰

At this juncture, either a complainant, respondent, or an aggrieved person on whose behalf the complaint was filed can elect⁹¹ to have the dispute heard in United States district court.⁹² If that election is made, the Attorney General will commence and maintain an action on behalf of the aggrieved person in district court.⁹³ This provision relieves the aggrieved person from having to contribute to the prosecution of the claim, regardless of the person's actual ability or inability to pay.⁹⁴

87. Ware, *supra* note 41, at 75-77.

88. *Id.* at 75. The amended Act's procedures are without precedent and they are as of yet untested by experience and judicial construction. *Id.*

89. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3610(g) (1988 & Supp. V 1993). Prior to 1990, the Office of General Counsel to the Assistant Secretary for Fair Housing and Equal Opportunity would make cause determinations. In 1990 that task was delegated to the individual attorneys in each of the regional offices. After the issuance of new guidelines in 1994, any cause determinations relating to certain aspects of the First Amendment are once again referred to the Assistant Secretary's Office of General Counsel. See Letter from Henry Cisneros, Secretary, Department of Housing and Urban Development, to Robert F. Hoyt, Esq., of Wilmer, Cutler & Pickering, on behalf of American Alliance for Rights and Responsibilities (Nov. 3, 1994) (on file with author) [hereinafter Letter to Robert F. Hoyt].

90. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3610(g)(2)(A) (1988 & Supp. V 1993).

91. This provision was inserted to protect the legislation from challenges based upon the Seventh Amendment's right to a jury trial. See Craig Sloan, *Constitutional Challenges to Section 812 of the Fair Housing Act*, 79 Ky. L.J. 585 (1991).

92. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3612(a) (1988 & Supp. V 1993).

93. *Id.* § 3612(o)(1).

94. The aggrieved party can intervene as a matter of right in HUD's case. *Id.* § 3612.

If the election is not made, then the dispute will be heard before an administrative law judge.⁹⁵ The administrative law judge will hold a hearing where the parties may be represented by counsel, introduce evidence,⁹⁶ and examine and cross-examine witnesses.⁹⁷ Essentially, the proceeding before the administrative law judge is a full civil trial.⁹⁸ Once again, discovery may be conducted as if the hearing was a civil trial in the district court where the action was filed.⁹⁹ As in the preliminary investigation, HUD represents and assumes the costs of representation for the aggrieved person.¹⁰⁰

2. *Damages Under the Amended Act*

If the administrative law judge finds that the aggrieved person suffered unlawful discrimination, he or she is authorized to award compensatory damages, injunctive and other equitable relief,¹⁰¹ and fines of up to \$10,000 for the first offense, \$25,000 for the second, and \$50,000 for the third.¹⁰² If the discrimination occurred in the course of a business that is subject to a governmental licensing agency, HUD is required to send a copy of the findings of fact and law to that agency and recommend disciplinary action.¹⁰³

If the election is made to have the dispute heard in U.S. district court, and the case proceeds as a civil action, the aggrieved person is entitled to punitive damages, even after HUD litigates the action.¹⁰⁴ Although not entitled to have HUD representation, an aggrieved person can bring a civil

95. *Id.* § 3612(b).

96. The Federal Rules of Evidence govern rules of testimony and documentary evidence. *Id.* § 3612(d).

97. 24 C.F.R. § 104 (1992).

98. *Id.*

99. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3612(d) (1988 & Supp. V 1993).

100. *Id.* § 3612.

101. *Id.* § 3610(d). Injunctive relief under this section is fairly broad. As long as the remedy furthers the twin goals of insuring that the Act is not violated in the future and that it removes any lingering effects of past discrimination, the court's discretion will not be questioned. *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983).

102. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3612(g) (1988 & Supp. V 1993).

103. *Id.* § 3612(g)(5).

104. *Id.* § 3612(o)(3).

suit independently and will have counsel provided if he or she is not able to pay.¹⁰⁵

Regardless of whether the case proceeds as a civil or administrative action, the prevailing party is entitled to reasonable attorney fees and costs.¹⁰⁶ If the aggrieved person does not prevail, HUD will still be responsible for all costs, regardless of the relative merit of the initial complaint.¹⁰⁷

The Secretary is authorized to review any findings issued by the administrative law judge.¹⁰⁸ However, that review is discretionary, and the statute states that review will only occur in extraordinary circumstances.¹⁰⁹ Unsatisfied parties can bring their request for review to the United States court of appeals for the circuit in which the action occurred.¹¹⁰

C. HUD's Application of the Amended Act

In 1989, 7174 fair housing complaints were filed.¹¹¹ HUD had jurisdiction in 3952 cases, while the remaining cases fell under state and local jurisdictions.¹¹² Three times as many complaints were filed with HUD in 1989 as the previous year, while state and local agencies did not experience an appreciable increase.¹¹³ Ninety-five percent of all complaints filed in 1989 were filed after the amended Act became effective.¹¹⁴ During 1989, HUD reported an extraordinary increase in the number of conciliations. A total of 862 cases were successfully conciliated, representing a 420% increase in the number of conciliations over the previous year.¹¹⁵

Despite a significant increase in the number of complaints filed with HUD, only a small number of cases were submitted to the Office of General Counsel to the Assistant Secretary for Fair Housing¹¹⁶ for determination of cause.¹¹⁷

105. *Id.* § 3613.

106. *Id.* § 3612(p).

107. *Id.*

108. *Id.* § 3612(h)(1).

109. *Id.* § 3614.

110. *Id.* § 3612(j)(1).

111. Ware, *supra* note 41, at 100.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 101.

116. Prior to 1990, the Office of General Counsel would make "no cause" determinations. That is, after reviewing all the factual data acquired in the preliminary investigation, a determination would be made whether the facts sup-

Ninety-one cases were submitted to the General Counsel, and in only nineteen cases did the Counsel determine that there was reasonable cause to believe that there was a violation of the Act.¹¹⁸

HUD's volume of complaints increased slightly in 1990. A total of 7675 complaints were filed, of which HUD handled 4457.¹¹⁹ Of the 1740 complaints HUD resolved, 1709 were resolved through conciliation.¹²⁰ Interestingly, 769 cases were referred for cause determinations, and only eighty were determined to have cause sufficient to believe that there had been a violation of the Act.¹²¹

In 1990, the task of cause determination was delegated from the General Counsel to the Assistant Secretary for Fair Housing.¹²² In 1991, the authority to make cause determinations was delegated to the ten regional HUD offices.¹²³ Although the delegation only involved claims based upon race, sex, or national origin,¹²⁴ it nonetheless demonstrated that HUD was comfortable with this crucial determination being made at a relatively low level.

1. *First Amendment Conflict with the Act's Administration*

Late in 1993 and 1994, several stories from the wire services sensationally detailed alleged abuses of private citizens' First Amendment rights by HUD while HUD was attempting to enforce the amended Act.¹²⁵

ported a charge of housing discrimination. In 1990, that duty was delegated from the Office of General Counsel to the regional attorneys in each of the regional offices. *Id.* at 103 (citing an interview with Harry L. Carey, Assistant General Counsel for Fair Housing, Office of the General Counsel, HUD, in Washington, D.C. (June 11, 1991)).

117. *Id.* at 100 (quoting DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: REPORT TO THE CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT (1989)).

118. *Id.* at 102.

119. *Id.* at 100 (quoting DEP'T OF HOUS. & URBAN DEV., 1990 COMPLAINT PROCESSING DATA 1 (Apr. 25, 1991)).

120. *Id.*

121. *Id.* at 107.

122. *Id.* at 103.

123. *Id.* at 104.

124. *Id.* (citing an interview with Harry L. Carey, Assistant General Counsel for Fair Housing, Office of the General Counsel, HUD, in Washington, D.C. (June 11, 1991)).

125. *See supra* note 22.

Public outcry forced HUD to issue new guidelines.¹²⁶ These guidelines were purportedly designed to protect the First Amendment rights of the possible subjects of HUD investigations.¹²⁷ The guidelines¹²⁸ state that "absent force, physical harm or threat of either, HUD will not accept for filing or investigate any complaint based on public activities that are directed toward achieving action by a governmental activity."¹²⁹ Examples of protected public activities include distributing flyers, holding community meetings, writing articles in the newspaper, peaceful demonstrations, testifying at public hearings, and communicating directly with a governmental entity concerning official governmental activity.¹³⁰

HUD's perfunctory recitation of its respect for First Amendment freedoms, however, is tempered by the number of exceptions to its new guidelines.¹³¹

2. HUD's Version of the SLAPP Suit

SLAPP is an acronym that stands for "strategic lawsuits against public participation."¹³² SLAPPs are civil lawsuits designed to prevent citizens from exercising their political rights, or punish those who have done so.¹³³ Essentially, they are punitive lawsuits which punish activists for exercising their constitutional right to speak and petition the government for redress of grievances.¹³⁴ Although traditionally used by private interests like developers to discourage environmental activism,¹³⁵ HUD's procedures for resolving fair

126. See Letter to Robert F. Hoyt, *supra* note 89, at 1.

127. See *id.*

128. These are not formal rules and can be revised or repealed by the issuing agency without notice or comment. See 5 U.S.C. § 533(c) (1988).

129. Letter to Robert F. Hoyt, *supra* note 89, at 2.

130. Memorandum from Roberta Achtenburg, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, to FEHO Office Directors (Sept. 2, 1994) (on file with author).

131. *Id.*

132. *Id.*

133. George Canan & Penelope A. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988).

134. Thomas A. Waldman, *SLAPP Suits: Weakness in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 981-82 (1992) (quoting U.S. CONST. amend. I).

135. See Note, *Counterclaim and Countersuit and Harassment of Environmental Plaintiffs: The Problem, Its Implications and Proposed Solutions*, 74 MICH. L. REV. 106, 107 (1975).

housing complaints bear a striking and frightening resemblance to SLAPPs as they have evolved in other areas.

Typically, an environmental activist petitions the government to stop some form of development.¹³⁶ Petitioning usually involves some form of political activity such as circulating a petition, writing a letter to the editor, testifying at a public hearing, filing a public interest lawsuit, or communicating views attempting to influence government action.¹³⁷ Hoping to exploit its tremendous relative advantage in terms of resources to prosecute the litigation, the developer then sues the activist to discourage further action, divert the activist's scarce resources, and subsequently stifle political protest.¹³⁸

Legal scholars have identified several characteristics of SLAPPs.¹³⁹ One of the most frequently alleged claims is interference.¹⁴⁰ The second most common characteristic is the request for large damage awards in comparison with the resources of the defendant.¹⁴¹ The plaintiff will usually try to get an injunction against the defendant.¹⁴² Additionally, defendants will usually sustain considerable legal expenses even if the action is eventually dropped, or if the defendant prevails on the merits.¹⁴³ Finally, most SLAPPs are frivolous.¹⁴⁴ In the majority of cases, the defendant wins a favorable legal judgment.¹⁴⁵ Therefore, the primary threat to the defendant is the cost and strain involved in defending the lawsuit.¹⁴⁶

136. *Id.*

137. George Canan & Penelope A. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation in Government*, C935 A.L.I.-A.B.A. 1, 4 (1994).

138. *Id.*

139. *Id.*

140. Interference in this context refers to the tort of interference with economic advantage. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 129-130 (5th ed. 1984).

141. See Canan & Pring, *supra* note 133, at 512.

142. *Id.*

143. See George Canan, *The SLAPP from a Sociological Perspective*, 7 *PAGE ENVTL. L. REV.* 23, 26 (1992) (detailing the financial burdens on a SLAPP defendant).

144. Waldman, *supra* note 134, at 984.

145. Canan and Pring found that defendants won favorable legal judgment in 83% of the cases they had studied. *Id.* at 981-82 (citing Canan & Pring, *supra* note 133, at 515).

146. Canan & Pring, *supra* note 133, at 514.

The controversy over the use of SLAPPs is the result of a conflict of values. As a society, we want to provide injured parties with a convenient, nonviolent forum in which they can air their grievances and potentially be made whole. That forum should be accessible so as to increase its use as a method of resolving disputes. Consequently, we have established rules making the courts as accessible as possible.¹⁴⁷

Ease of access, however, should not encourage frivolous charges. Therefore, persons bringing frivolous actions can be sanctioned.¹⁴⁸ The difficulty is that the time lag between the complaint and the determination that the action is without merit can still result in enormous legal expenses. Of course, that assumes the successful determination of what constitutes a frivolous suit; the line between a frivolous and non-frivolous claim is not always distinct.¹⁴⁹

3. *Statutory Attempts to Protect Individuals Against SLAPPs*

In the early 1990s, several states attempted to pass legislation making the prosecution of SLAPPs more difficult.¹⁵⁰ The proposed laws attacked the proliferation of SLAPPs on two fronts. First, they raised the level of pleading required

147. Pleading rules require only a short, plain statement showing the pleader is entitled to relief. FED. R. CIV. P. 8(a).

148. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading . . . ; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading

FED. R. CIV. P. 11.

149. One potential defense to frivolous actions is a countersuit for malicious prosecution. However, there are many drawbacks to fighting frivolous actions this way, namely, the necessity of resolving the first action before filing the malicious prosecution action, high evidentiary hurdles and the necessity of incurring more legal expenses to prosecute the second action. *See, e.g.*, Babb v. Superior Court, 479 P.2d 379 (Cal. 1971).

150. *See, e.g.*, S.B. 2313, 1989-1990 Cal. Leg., Reg. Sess.; A.B. 440, 1991-1992 Cal. Leg., Reg. Sess.; NYCRR §§ 130-1.1 (1994).

for quick dismissals of SLAPPs.¹⁵¹ Second, they either increased penalties for frivolous filings or, in appropriate circumstances, provided attorney's fees to the prevailing defendants.¹⁵² Although the early California laws were vetoed by then Governor Deukmejian,¹⁵³ the procedures in the legislation¹⁵⁴ provided models to build on, and they also illustrated the courts' failure to develop a coherent doctrine to protect the right to petition the government and prevent SLAPPs.¹⁵⁵

Early attempts by reformers in California at introducing anti-SLAPP legislation were unsuccessful.¹⁵⁶ However, their diligence was rewarded in 1992, when Governor Wilson signed into law essentially the same law that had been first

151. *Id.* The statutes raise the pleading level by providing defendants with a special motion to strike. *Id.* The special motion considers the likelihood of the case succeeding on the merits, if the pleading is not specific enough to support a reasonable belief that the case will succeed on the merits, it will be dismissed. *Id.*

152. See S.B. 2313, 1989-1990 Cal. Leg., Reg. Sess.; A.B. 440, 1991-1992 Cal. Leg., Reg. Sess.

153. The legislature attempted to pass S.B. 2313, 1989-1990 Cal. Leg., Reg. Sess., but it was vetoed by Governor Deukmejian. See A.B. 440, 1991-1992 Cal. Leg., Reg. Sess. Another attempt to pass the legislation was vetoed by Governor Wilson. *Id.*

154. The following are pertinent parts of the proposed legislation:

Section 1. Section 425.16 is added to the Code of Civil Procedure, to read:

425.16(a) No cause of action against a person arising from any act of the person in furtherance of his or her first amendment right of petition or free speech in connection with a public issue, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading after the court determines that the party seeking to file the pleading has established that there is a substantial probability that the plaintiff will prevail on the claim. The court may allow the filing of a pleading that includes that claim following the filing of a verified petition therefore accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination.

If the court determines that the plaintiff has established substantial probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case

(b) In any action subject to subdivision (a), a prevailing defendant shall be entitled to recover his or her attorney's fees and costs.

S.B. 2313, 1989-1990 Cal. Leg., Reg. Sess.

155. See Waldman, *supra* note 134, at 1038-39.

156. See *supra* notes 150-55 and accompanying text.

proposed in 1989.¹⁵⁷ The most important change was the provision for more stringent pleading.¹⁵⁸ The legislature was attempting to balance plaintiffs' rights to have access to the courts, with defendants' rights to not have to mount expensive defenses when exercising First Amendment rights.¹⁵⁹ The change created another layer of procedure between the plaintiff and the court.¹⁶⁰

California had already experimented with increased pleading requirements prior to introducing legislation to curb the abuse of SLAPPs.¹⁶¹ Punitive damage claims for medical malpractice,¹⁶² punitive damage claims against religious organizations,¹⁶³ and claims against directors of nonprofit corporations¹⁶⁴ all possess heightened pleading requirements.¹⁶⁵

The anti-SLAPP statute¹⁶⁶ and the other heightened pleading statutes restrict particular causes of action under particular circumstances.¹⁶⁷ However, the statutes appear to require different levels of specificity in pleading.¹⁶⁸ The non-profit provision requires that a plaintiff prove that there is evidence "that substantiates the claim."¹⁶⁹ The anti-SLAPP provision requires "probability that the plaintiff will prevail on the claim."¹⁷⁰

On the surface, the two statutes certainly demand that different evidentiary standards be met before the plaintiff satisfies the pleading conditions. However, the California Supreme Court's interpretation of the statute did not find this distinction meaningful.¹⁷¹ The court found that although the legislature used different phraseology, the general intent

157. CAL. CIV. PROC. CODE § 425.16 (West Supp. 1994) (added by 1992 Cal. Legis. Serv. 726 (S.B. 1264) and amended by 1993 Cal. Legis. Serv. 1239 (S.B. 9)).

158. See *supra* note 151.

159. See *supra* note 152.

160. See Waldman, *supra* note 134, at 1038.

161. See *infra* notes 162-65 and accompanying text.

162. CAL. CIV. PROC. CODE § 425.13 (West Supp. 1994) (adopted in 1987).

163. *Id.*

164. *Id.*

165. See discussion *infra* text accompanying notes 168-70.

166. CAL. CIV. PROC. CODE § 425.16 (West Supp. 1994).

167. See *College Hosp. Inc. v. Superior Court*, 882 P.2d 894, 902 (Cal. 1994).

168. See *infra* text accompanying notes 169-70.

169. CAL. CIV. PROC. CODE § 425.15(a) (West Supp. 1994).

170. *Id.* § 425.16(b).

171. *College Hosp. Inc.*, 882 P.2d at 901.

behind the statutes was to shift the procedural burden in determining the merit of an action.¹⁷²

The court stated that because the language of the statutes created an ambiguous standard, it would use the legislative intent and a common sense reading of the language to determine its meaning.¹⁷³ The court's research into the legislative intent revealed that the purpose of the provision was to provide procedural protection against frivolous claims, while allowing legitimate claims.¹⁷⁴ The common sense interpretation was that the statute did not require the court to weigh the relative merits of a claim in determining its potential outcome at trial.¹⁷⁵ Rather, the statute simply operated like a summary judgment motion in "reverse."¹⁷⁶

The statute did not force the court to weigh the relative merits of the competing claims. The statute's main function was to shift the burden of proof in an initial challenge to the action's validity.¹⁷⁷ Rather than requiring the defendant to defeat the plaintiff's pleading by showing that it was legally or factually meritless, the statute required the plaintiff to demonstrate that there was a legally sufficient claim which was supported by competent, admissible evidence.¹⁷⁸

D. *Primacy of the First Amendment*

Legislative efforts to stem the proliferation of frivolous lawsuits are motivated by a desire to protect an individual's ability to exercise constitutional rights of freedom of speech and petition for the redress of grievances.¹⁷⁹ Finding that it is in the public interest to encourage participation in matters of public significance, the legislature sought to protect the valid exercise of constitutional rights from the chilling effects of costly and destructive litigation.¹⁸⁰ This legislative movement to solve abusive litigation's corrosive effects on public

172. *Id.* at 902.

173. *Id.* at 901.

174. *Id.* at 902 (quoting Letter from John T. Doolittle, Senate Committee Chair, Senate Bill No. 1, 1987-1988 Reg. Sess., to Governor George Deukmajian (Jan. 26, 1988)).

175. *Id.*

176. *College Hosp. Inc.*, 882 P.2d at 903.

177. *Id.* at 902.

178. *Id.* at 903.

179. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1994).

180. *Id.*

discourse, reflects the current belief in the primacy of the First Amendment.¹⁸¹

1. *Early Applications of the First Amendment*

The First Amendment did not always enjoy such popular support, either in the judiciary or the legislature. In its early application, the First Amendment did not prevent a loyalty oath for lawyers,¹⁸² interfere with the federal government's prohibition on the distribution of off-color books or information about abortion,¹⁸³ create a general right of assembly,¹⁸⁴ or protect a political activist from receiving a substantial prison sentence for political speech.¹⁸⁵

Additionally, the First Amendment did not apply to the states until 1925, when the United States Supreme Court stated that, "[f]or present purposes we may and do assume that freedom of speech . . . — which [is] protected by the First Amendment from abridgment by Congress — [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."¹⁸⁶

The right to petition the government had only been recognized in one isolated instance¹⁸⁷ prior to the turn of the century, and it had never been applied by the Supreme Court.¹⁸⁸ Given the overall conception of the First Amendment at the time, even if the Supreme Court had upheld the right to petition, it most likely would have held that any right to engage in political speech would be construed as forbidding only prior restraints, not subsequent punishment.¹⁸⁹

The Court's interpretation of the First Amendment changed radically after 1930. Louis Brandeis became a member of the Court, bringing a more sensitive perspective to the

181. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1736-37 (1991).

182. See *Ex parte Garland*, 71 U.S. 333 (1867).

183. See *Ex parte Jackson*, 96 U.S. 727 (1878).

184. See *United States v. Cruikshank*, 92 U.S. 542 (1876).

185. See *Debs v. United States*, 249 U.S. 211 (1919).

186. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

187. See *United States v. Cruikshank*, 92 U.S. 542 (1876).

188. Robert P. Faulkner, *The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a "Clear and Convincing" Standard*, 28 U.S.F. L. REV. 681, 704 (1994) (citing *Ex parte Curtis*, 106 U.S. 371 (1882)).

189. *Id.* (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

issue of individual liberty.¹⁹⁰ Justice Holmes capitulated, departed from the substantive due process camp, and adopted a more congenial attitude toward speech issues.¹⁹¹ The First Amendment was applied to the states via the Fourteenth Amendment,¹⁹² and there was a fundamental shift in the jurisprudence caused by the New Deal.¹⁹³ This combination of factors led to the complete reversal in the Court's application of the First Amendment.¹⁹⁴

A complete examination of First Amendment jurisprudence from the turn of the century to the present is beyond the scope of this comment. However, suffice it to say that the rise of the First Amendment directly coincided with the decline of property and economic liberty interests that was the hallmark of the era of substantive due process.¹⁹⁵

Scholars have noted that the rise of free speech was in part a reaction to the erosion of the laissez faire stance of the *Lochner*¹⁹⁶ era Court.¹⁹⁷ Fearing a misallocation of political resources in favor of an interventionist government, the Court's post-New Deal jurisprudence prohibited the government from interfering with citizens' political rights.¹⁹⁸ The creation of the regulatory state, inherent in much of the New Deal legislation, gave the states power that required an attendant check upon their exercise to prevent abuse.¹⁹⁹ Consequently, First Amendment jurisprudence prohibited the government from countering public attempts to enforce government accountability.²⁰⁰

2. *Balancing Regulatory Goals with First Amendment Rights*

The decline of economic rights, the rise of the regulatory state, and the subsequent ascendancy of First Amendment

190. *Id.* at 707 (quoting Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59, 99 (1986)).

191. *Id.*

192. *Id.*

193. *Id.* at 704.

194. *Id.*

195. *Id.*

196. *Lochner v. New York*, 198 U.S. 45 (1905).

197. Yassky, *supra* note 181, at 1736.

198. *Id.* at 1736-37.

199. Faulkner, *supra* note 188, at 704.

200. *Id.*

freedoms reflect a precarious balancing of individual and institutional power. The regulatory state attempts to achieve collective goals by controlling certain aspects of individual behavior. The shift in First Amendment jurisprudence chronicles the belief that if the individual surrenders liberty in order to facilitate collective goals, there should be a concurrent increase in the ability to inform the government as to the content and implementation of those rules.

The Court, shifting from outcome-based jurisprudence in the *Lochner* era to process-based jurisprudence, occasionally had difficulty in maintaining the primacy of the First Amendment in the face of challenges from the regulatory state.²⁰¹ One of the first important governmental goals was the prevention of unfair economic competition that resulted from the creation of monopolies.²⁰² The Sherman Antitrust Act²⁰³ declared that "[e]very contract, combination in form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."²⁰⁴ The Act likewise made any attempt to combine or to monopolize trade with another person a felony.²⁰⁵

Predictably, the Court soon encountered cases where an individual's actions would be prohibited by the Sherman Antitrust Act²⁰⁶ and yet protected by the First Amendment.²⁰⁷ The clash of conflicting values forced the Court to fashion an interpretation of the statute that did not impinge upon the primacy of the First Amendment.

3. *The Noerr-Pennington Doctrine*

At issue in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*²⁰⁸ was an illegal railroad industry publicity campaign designed to influence public policies that would be harmful to the trucking industry.²⁰⁹ The campaign was aimed at securing the passage of state legislation that would

201. See *supra* note 26; see also *infra* notes 206-07 and accompanying text.

202. See William L. Letwin, *Congress and the Sherman Anti-Trust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 226 (1956).

203. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993).

204. *Id.* § 1.

205. *Id.*

206. *Id.*

207. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

208. *Id.*

209. *Id.* at 129.

maintain the railroad's hegemony in the freight hauling industry.²¹⁰ The campaign was deceptive because the railroads used a third party to implement the campaign, thereby making it appear as though their views were the spontaneously expressed views of the general public.²¹¹

The trial court rejected the railroads' constitutional arguments and found that they had violated the Sherman Antitrust Act.²¹² The court of appeals affirmed the trial court's holding.²¹³ The dissenting judge noted that he "had not hitherto imagined that a constitutional guarantee could be avoided because of the bad conduct of the individual asserting the constitutional right."²¹⁴ Additionally, he asserted that constraining an individual's ability to petition the government to protect economic interests was a threat to the very foundations of republican government.²¹⁵ He concluded by saying that he could not conceive that Congress intended to make the Sherman Act a barrier to an individual's exercise of First Amendment rights.²¹⁶

The Supreme Court reversed the court of appeals, stating that at least insofar as the railroads' activities were merely designed to solicit governmental action, they could not have been in violation of the Sherman Act.²¹⁷ The Court equivocated and did not declare that any attempts to influence legislation would be constitutional. Rather, it stated that in this

210. *Id.* at 128-30.

211. *Id.* at 130.

212. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 827-28 (E.D. Pa. 1957), *rev'd*, 365 U.S. 127 (1961). The trial court held that: (1) there was no prior restraint; (2) the speech used was only to apply the greater resources of one group to accomplish an illegal objective; (3) the illegal objective created an illegal conspiracy that was not protected by the First Amendment; and (4) the First Amendment did not allow individuals to violate valid laws designed to protect important and legitimate interests of society. *See id.* at 812-31.

213. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 273 F.2d 218, 221 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961). Chief Justice Biggs' dissent was a harbinger of the Supreme Court's eventual holding that the Sherman Antitrust Act could not be interpreted as eradicating the constitutional right to petition the government. *Id.* (Biggs, C.J., dissenting).

214. *Id.* at 227 (Biggs, C.J., dissenting).

215. *Id.* at 227-30 (Biggs, C.J., dissenting).

216. *Id.* at 228 (Biggs, C.J., dissenting).

217. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

instance, the railroads' actions were not typical of what the Sherman Act prohibited.²¹⁸

However, later in the opinion, the Court emphasized the axiomatic role that the freedom of speech plays within the context of representative democracy, stating, "[I]n a representative democracy . . . government act[s] on behalf of the people and . . . the whole concept of representati[ve govern-ment] depends upon the ability of the people to make their wishes known to their representatives" ²¹⁹ The Court then reiterated its interpretation of the proper balance between the goals of legitimate legislation and constitutional rights, stating:

To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity . . . [and] such a construction . . . would raise important constitutional questions.²²⁰

The Court established that economic regulation did not usurp the individual's ability to freely exercise constitutional rights.

4. *The Sham Exception*

The Supreme Court protected the railroads' ability to petition the government, but it did not state categorically that all activities under the aegis of petitioning were protected.²²¹ Unspecified activity designed to petition the government could be prohibited under the Sherman Act.²²²

Speaking for the Court, Justice Black said, "[T]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."²²³ The Court did not specify what activities would be

218. *Id.* at 136.

219. *Id.* at 137.

220. *Id.* at 137-38.

221. *Id.* at 144.

222. *Eastern R.R. Presidents Conference*, 365 U.S. at 144.

223. *Id.*

prohibited, thereby introducing an ambiguous standard that has defied definition.

The Court somewhat reduced the ambiguity surrounding the "sham" exception when it decided *California Motor Transport v. Trucking Unlimited*.²²⁴ There, the Court extended the *Noerr-Pennington* doctrine to all departments of the government.²²⁵ The Court used a broad definition of government, which included all channels of state and federal agencies and the courts.²²⁶

In clarifying the sham exception, the Court distinguished between attempts to influence the actions of governmental agencies, and monopolizing the avenues of redress to the point where the agencies have been captured by the group.²²⁷ The Court focused upon the use of superior resources to overwhelm the channels of communication, thereby becoming the de facto arbiter of rights and privileges.²²⁸ Although ostensibly clarifying the sham exception, the Court merely used a normative analysis that focused upon a standard that counted the number of times an individual petitioned, motioned, or appealed to an agency, and arbitrarily drew a line at the point of abuse.

However, the important point to emphasize for this discussion is that the Court once again reasserted the primacy of the First Amendment when in conflict with a legitimate regulation to achieve an important social goal. Once again, the Court found that unfettered speech is the foundation of representative democracy, and that to attempt to curb speech to achieve another goal would only represent a Pyrrhic advance in policy, because it would undermine the structure and process by which the goals are articulated.

III. ANALYSIS

A. *Identification of the Problem*

Ostensibly, an effective housing discrimination statute should provide incentives that encourage a person to sue every time he or she is discriminated against while seeking

224. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

225. *Id.* at 510.

226. *Id.*

227. *Id.* at 511.

228. *Id.* at 511-12.

housing. In other words, the statute should provide a framework for a cost-benefit analysis that will always reward a lawsuit against a person who discriminates.

However, the statute should not be so broad as to prohibit legitimate behavior. Consequently, an effective statute will force a person engaging in discrimination to bear all the costs that society, through the statute, has decided are sufficient to discourage discrimination, yet it will be narrowly tailored to impose costs only upon the unwanted behavior.

Under the old Act,²²⁹ when a person displayed unwanted behavior, the statute gave the injured party a cause of action, defined possible sanctions, and assisted any attempts to resolve the dispute without litigation.²³⁰ The old Act discouraged unwanted behavior by imposing costs on culpable persons in the form of time and energy needed to defend the action, social opprobrium, legal fees, damages, and penalties.²³¹ However, the old Act imposed some costs on the aggrieved person bringing the action.²³² Therefore, it forced the aggrieved person to carefully balance the perceived injury against the potential cost of seeking redress.

The amended Act²³³ radically reduced the costs of bringing an action. The extensive administrative enforcement mechanism reduced the cost significantly by allowing HUD to be a proxy for the aggrieved person.²³⁴ Consequently, the aggrieved person's calculation used to determine the benefit of bringing an action changed considerably. There is no longer a need to consider the nature and severity of the perceived injury, since because of the negligible cost, any perceived injury is worth prosecuting.

The difficulty arises at the point of equilibrium. Equilibrium is the point where all conduct deemed serious enough to warrant sanction is prosecuted. Presumably, the first step in writing a statute is to determine what type of behavior is intended to be discouraged. The statute is then written so that the enforcement mechanism will focus directly on that level

229. Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801-901, 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

230. See *supra* text accompanying notes 27-47.

231. See *supra* text accompanying notes 27-47.

232. See *infra* text accompanying notes 244-59.

233. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

234. See *supra* text accompanying notes 61-65.

of behavior one is trying to discourage. If the statute is too broad, it will discourage behavior that was not intended to be affected. If it is too narrow, the statute will not reach all the instances of the unwanted behavior.

The statute defines the conduct that society wants to eradicate, the penalties for engaging in the conduct, damages, and the procedural hurdles that must be met prior to bringing the action. If the statute is written correctly, it will discourage all instances of the unwanted behavior.

If a private suit is the enforcement mechanism in the statute, the goal would be to provide sufficient incentives for a person to bring a suit every time he or she encounters the target behavior. Equilibrium is achieved when the aggrieved person, balancing the seriousness of the injury with the costs and benefits of seeking redress, concludes that it is worthwhile to bring an action. The problem is that HUD's interpretation and implementation of the amended Act set the point of equilibrium so low that it punishes constitutionally protected activity.

B. *The Old Act and Implicit Respect for the First Amendment*

Before the Fair Housing Act²³⁵ was amended in 1988, HUD had an ancillary role in most enforcement actions.²³⁶ HUD used its powers to investigate, inform, and advise. Additionally, it could mediate and conciliate between the parties.²³⁷ However, HUD did not directly litigate most actions.²³⁸

HUD's detachment from direct prosecution was not explicitly designed to protect the First Amendment rights of in-

235. Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801-901, 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

236. Under the old Act, HUD could prosecute "pattern and practice" actions, but did not become directly involved in individual actions. *Id.* § 813(a) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)). Pattern and practice was construed to mean discriminatory practices or policies that affected groups or classes of people rather than isolated episodes that affected individuals. Caruso & Jones, *supra* note 48, at 524-25. Additionally, if state or local authorities were substantively equivalent, HUD was required to refer all complaints there first. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(c), 82 Stat. 81, 86 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

237. See Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801-901, 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

238. See *supra* note 41.

dividuals. Legislative compromise was the primary reason for HUD's limited role in direct prosecution.²³⁹ HUD's enforcement power was the source of most criticism. Senator Allen J. Ellender (D-La.) was critical of HUD's proposed power.²⁴⁰ Although his motivation may have been to forestall racial equality and maintain a segregated society, Senator Ellender accurately foreshadowed the potential abuse of First Amendment freedoms by giving HUD an expansive enforcement mechanism.²⁴¹

The compromise²⁴² that gave life to the first Act implicitly recognized the potential for abuse by vesting so much power in an administrative agency. Giving HUD an ancillary role ensured that the person with the direct vested interest in the outcome of the dispute would be primarily responsible for advancing the claim.

1. *Costs of Filing an Action under the Old Act*

When a person suffers housing discrimination,²⁴³ there are several alternative courses of action. Each course of action has an attendant cost associated with it.²⁴⁴ A person could ignore the perceived discrimination and live elsewhere, but he or she may have to pay the price of not being able to live where he or she desires, in addition to suffering the psychological costs associated with discrimination. Hypothetically, a person could lash out physically against the injustice, but, in addition to the limited certainty of winning the skir-

239. The initial bill contained many of the enforcement mechanisms that the amended bill instituted. See 114 CONG. REC. 3134-35 (1968) (statement of Sen. Ellender).

240. *Id.*

241. *Id.* Senator Ellender was concerned that too many personal liberties guaranteed by the Bill of Rights would be infringed if too much power was vested in the enforcement mechanism. *Id.*

242. The Dirksen Amendment removed most of the offending provisions that gave HUD broad enforcement power. *Id.* at 4570-73.

243. This comment assumes that a person realizes they are being discriminated against. However, this is not always the case. Subtle forms of discrimination such as "steering" are not readily observable. Steering is when a person is only shown a portion of the available housing units, mostly in an area where his or her race is the majority.

244. The term "cost" is used broadly. The term does not necessarily directly have to correspond with a specific outlay of actual funds. Rather, it is broad enough to encompass the costs of hiring competent legal representation, time and energy used to execute the lawsuit, and the psychological costs in self-esteem and self-image of suffering injustice and being powerless to seek redress.

mish, one would have to risk incurring the potential costs of civil and criminal penalties. Alternatively, one could file a lawsuit against the alleged discriminator under the law of the relevant anti-discrimination law.

Filing a lawsuit has its own set of costs that must be weighed carefully against the perceived injustice. The degree of discrimination, the cost and likelihood of winning a lawsuit, and the potential for recovery all play into the calculus that determines the course of action. The law that prohibits discrimination, orients the parties, and provides sanctions for prohibited conduct is the equation by which a person calculates the potential costs and benefits accrued by filing a lawsuit. The law establishes the potential rewards for prevailing, the penalties for failing, and the hurdles that must be overcome to transport the dispute to a forum where it can be heard and adjudicated.

Prior to the passage of fair housing legislation, there was no legal mechanism to combat housing discrimination.²⁴⁵ In that era, theoretically, the costs of bringing a lawsuit for housing discrimination were infinite because there was no cause of action. Compared to life without fair housing statutes, the old Act considerably reduced the costs associated with a discrimination case.

Initially, the old Act provided a cause of action to combat housing discrimination.²⁴⁶ It also limited costs by providing an administrative forum where the dispute could be settled without formal legal action.²⁴⁷ However, the administrative forum had provisions that increased costs for the plaintiff because it did not have adequate incentives for the alleged per-

245. Using the Civil Rights Act of 1866, the Supreme Court declared that it was unconstitutional for cities to enact ordinances that restricted the rights of blacks to move into certain neighborhoods. See *Buchanan v. Warley*, 245 U.S. 60 (1917). However, it was not until 1948 that racially restrictive covenants were declared unconstitutional. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). Furthermore, until 1968 when Congress enacted a legislative remedy for private discrimination, housing discrimination was widespread and relatively unchecked. Kushner, *supra* note 41, at 1086.

246. The Supreme Court had already declared racially restrictive covenants unenforceable, *Shelley v. Kraemer*, 334 U.S. 1 (1948), but the Fair Housing Act of 1968 made it illegal to discriminate in any aspect of the sale or rental of real property. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(d), 82 Stat. 81, 86 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

247. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810, 82 Stat. 81, 85-86 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

petrator to resolve the dispute.²⁴⁸ Without incentives for the defendant to resolve the dispute, the alleged victim was forced to expend more resources, in terms of time, energy, and money, to bring the case to another forum for resolution.²⁴⁹

The lack of incentives to resolve the dispute at the administrative, conciliatory phase should not be construed as meaning that the alleged perpetrator did not incur costs. The alleged discriminator incurs costs at every phase. Indeed, there is a parallel cost-benefit analysis that is part of the defendant's decisionmaking process. If the charge against the defendant is supported by competent evidence, it makes the defense more expensive and less likely to prevail. There is an increased incentive to settle the action prior to incurring the costs of defense, in addition to the piling on of penalties and damages. Alternatively, if the evidence is weak and unsubstantiated, the incentive to settle is reduced because the costs of a successful defense are reduced below what a settlement would cost.

Under the old Act, the only alternative if the administrative forum failed was to go to district court.²⁵⁰ At this juncture, the cost-benefit analysis became critical. If the alleged discriminatory conduct was serious enough, the perceived benefit of vindication, injunctive relief, compensatory damages, punitive damages not in excess of \$1000,²⁵¹ and potential attorney fees²⁵² would have to be adequate to convince a person that it was worthwhile to move forward with the district court action. However, if the perceived injury was not sufficient to overcome the anticipated costs of pursuing the

248. Kushner, *supra* note 41, at 1082 & n.142.

249. *See id.* at 1087.

250. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 810, 812, 82 Stat. 81, 85-86, 88 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

251. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, § 812, 82 Stat. 81, 88 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

252. The old Act had a provision that allowed the appointment of counsel and waiver of fees based upon need. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812, 82 Stat. 81, 88 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)). Additionally, even if such a waiver was not made, the limitation could be circumvented by concurrently filing a 42 U.S.C. § 1982 claim, which was covered by the Civil Rights Attorney's Fees Act of 1976, and which had no income qualification. *See* 42 U.S.C. § 1988 (1993).

action, the person would have to either internalize those costs, or not pursue the action.

What most critics of the old Act purported to resent, was not the alleged victim's limitations upon access to remedies, but rather what was perceived as the prohibitive cost of access.²⁵³ However, most of the frequently noted shortcomings of the old Act could easily be circumvented. The limitation upon punitive damages²⁵⁴ could be neutralized by the joinder of a claim under 42 U.S.C. § 1982 with a Title VII claim, thus making full punitive damages available.²⁵⁵ The provision limiting attorney fees on the basis of financial need could be similarly neutralized.²⁵⁶

The ability to file concurrent claims radically reduced many of the attendant costs of privately pursuing a fair housing claim. Despite the criticism²⁵⁷ of the old Act's shortcomings, it still left the alleged victim in a relatively secure position.

The amended Act further reduced the costs by having HUD prosecute the case as a proxy.²⁵⁸ With the threshold of cost reduced, the alleged victim of discrimination no longer has to wait for an ironclad case of blatant discrimination to pursue redress. The cost-benefit analysis now allows prosecution of even the most subtle forms of discrimination which may be difficult to prove. Under the amended Act, the cost to the prospective plaintiff is relatively small compared with the potential for recovery, even when the vagaries of litigation are considered.

The Fair Housing Amendments Act's²⁵⁹ goal is the removal of bias in the sale and rental of real property. Like most statutes, it achieves that goal by making some behavior more expensive than other behavior. The amended Act reduces the cost of successfully prosecuting a housing discrimination complaint and allows the full weight of HUD's

253. See Kushner, *supra* note 41, at 1088.

254. The old Act limited punitive damages to \$1000. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812, 82 Stat. 81, 88 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

255. Kotkin, *supra* note 41, at 760-61.

256. *Id.* at 761.

257. See *supra* note 41 and accompanying text.

258. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3610 (1988 & Supp. V 1993).

259. 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

administrative power to come to bear on the defendant, which correspondingly increases the costs for those who discriminate.

The amended Act influences behavior from both directions, providing a disincentive in the form of legal costs, damages, time, energy, and societal opprobrium for the person who discriminates. It provides an incentive for bringing an action in the form of damages, vindication and choice of housing. However, the amended Act, as it is currently enforced by HUD, may have lowered the threshold to the point where it provides severe disincentives for constitutionally protected behavior.

2. *The Amended Act and the Elimination of All Costs for Plaintiffs*

The amended Act essentially removes all costs associated with prosecuting a housing discrimination action.²⁶⁰ While all or most of the costs are removed for the potential plaintiff, the potential defendant remains vulnerable because the choice is either incurring the costs of a defense, which even if meritorious will still be quite costly, or conciliating and agreeing to stop the perceived offending behavior. This is precisely the goal of the drafters and supporters of the amended Act.²⁶¹ However, the difficulty is that under current enforcement policy, the web is cast too broadly, thereby forcing the defendant to undertake a time-consuming and costly defense, or cease to exercise a constitutionally guaranteed right, that of free speech.

Costs for the potential plaintiff are reduced, and the concurrent costs for the potential defendant are increased by a variety of measures. The amended Act defines an aggrieved person as "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."²⁶² Not only can the victim of discrimination bring an action, but a third party²⁶³ also has standing to file

260. See *supra* text accompanying note 61.

261. See *supra* note 55 and accompanying text.

262. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(i)(1)-(2) (1988 & Supp. V 1993).

263. The term "third party" defines a diverse group. It could be a person with a vested interest in the sale of real estate, a housing advocacy group, a

suit.²⁶⁴ By allowing third parties to sue because of discrimination or in anticipation of discrimination, the statute sought to broaden the means used to effectuate an important public policy.

By allowing third parties to file suit,²⁶⁵ the statute broadened the class of persons who would be able to shift to the potential defendant the costs associated with any conduct which could be construed as discriminatory. The expanded pool of potential plaintiffs increases the chances that offending conduct will be observed. Increased observation provides more opportunities to file actions to stop such behavior. Ostensibly, this seems like a sensible way to reduce the instances of discrimination. However, if the conduct which is prohibited is loosely defined, and if there is no requirement for investment of any resources to prosecute a claim, there is tremendous potential for abuse.

The amended Act allows claims to be brought alleging "interference."²⁶⁶ The tort of interference requires a showing of intentional disruption of potential economic advantage.²⁶⁷ There is no requirement to show that the defendant harbored ill will towards the plaintiff.²⁶⁸ Courts have expanded the liability for tortious interference,²⁶⁹ and HUD adopted that broad interpretation in its prosecution of cases of housing discrimination.²⁷⁰

Traditionally, the courts have seen interference in terms of denial, or de facto denial of housing to certain groups by another more powerful group.²⁷¹ This denial usually had a physical component, where discriminators would not only attempt to coercively disrupt the purchase or sale, but would

disabled persons advocacy group, or a person of good will who witnesses discrimination.

264. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

265. See *supra* note 64 and accompanying text.

266. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3618 (1988 & Supp. V 1993).

267. See generally *KEETON ET AL.*, *supra* note 140, at §§ 129-130.

268. *Id.*

269. See generally D. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980).

270. See *supra* note 73 and accompanying text.

271. See *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725 (E.D. Va. 1992) (defining coercion as a situation where the full weight of the city is brought to bear and where criminal and other types of investigations are threatened in order to discourage third parties from helping minorities find suitable housing).

also physically threaten potential buyers or sellers.²⁷² HUD's recent cases illustrate that it has accepted a broad definition of interference that only has a verbal component.²⁷³ HUD ignored the potential First Amendment conflicts and allowed claims to be filed using the broad definition of interference that included competitive bidding on property²⁷⁴ and political activism.²⁷⁵

Allowing such broad claims effectively reduced the cost of filing a complaint for the prospective plaintiff to the point where it invites abuse. Imposing some costs upon the plaintiff serves as a means to weed out meritless claims. By entertaining broad claims of interference, HUD is used as a vehicle to chill the First Amendment rights of individuals. For instance, a homeowner legitimately protesting the over-concentration of facilities for recovering substance abusers can have the threat of a HUD investigation and eventual litigation imposed by literally anyone in the community, which can subsequently stifle the otherwise legitimate protest.²⁷⁶

Conciliation is most often the result of housing discrimination claims, because a defendant who resists faces an expensive and protracted legal battle with a large federal bureaucracy, in which the best possible outcome would be a victory on the merits. The worst outcome would be to lose on the merits and face damage awards, fines, and extraordinary legal expenses. Few individuals can afford the expense and time that such litigation entails.

Therefore, even when convinced that they are in the right, conciliation is often the only practical alternative for defendants. The threat is effective because all the costs are shifted to the defendant. The prospective plaintiff, undeterred by procedural hurdles, can file a complaint with HUD and let HUD use a variety of coercive tactics to force the defendant to conciliate.

HUD's enforcement data to some extent illustrates the effect that the amended Act's enforcement procedures had on

272. See *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991).

273. See *supra* note 22.

274. See *Foderaro*, *supra* note 22, at B1 (A coalition of homeowners proposed to buy a building that was slated to become a homeless shelter. Competitive bidding with a housing advocacy group led to HUD investigation.).

275. See *MacDonald*, *supra* note 22, at B13.

276. See *supra* note 22.

potential defendants.²⁷⁷ In 1988, the year prior to the amended Act's implementation, 4658 cases of housing discrimination were reported to HUD, which in turn referred 3308 to state and local agencies.²⁷⁸ Of the 1350 complaints handled by HUD, 214, or approximately fifteen percent of the complaints, settled by conciliation.²⁷⁹

In 1989, the first year the amended Act was implemented, 7174 complaints were filed, 3952 were handled by HUD, and the remainder of the complaints were sent to state and local jurisdictions.²⁸⁰ There was a significant rise in the number of conciliations. Over 860, or twenty-five percent, of the complaints handled by HUD conciliated. However, only nineteen of the ninety-one, approximately twenty percent, of the cases sent to the Office of General Counsel for cause determinations were determined to have reasonable cause to believe that discrimination occurred.²⁸¹

In 1990, 7675 complaints were filed, of which 4457 were handled by HUD.²⁸² HUD again reported a significant rise in the number of cases successfully conciliated.²⁸³ Of the complaints handled by HUD, over 1700, or thirty-eight percent, conciliated. Meanwhile, the number of cause determinations dropped to approximately ten percent.²⁸⁴

There is a significant correlation between the behavior of both defendants and plaintiffs and the implementation of the amended Act. Over ninety-five percent of all the complaints filed in 1989 were filed after the amended Act's effective

277. The data is raw and there is no attempt to establish a direct correlation between HUD's new enforcement procedures and the tendency for defendants to capitulate. There are many factors that could affect the rate of conciliation. However, the increase in conciliation correlates with the passage of the amended Act, but the data is not conclusive enough to prove causation. To prove causation would require a regression analysis that would hold constant variables that could affect the correlation between enforcement procedures and the subsequent increase in conciliation. Such an analysis is beyond the scope of this comment. See DEP'T OF HOUS. & URBAN DEV., *THE STATE OF FAIR HOUSING: REPORT TO THE CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT* (1989).

278. HUD Releases *FY 1988 Complaint Statistics*, 4 Fair Hous.-Fair Lending Rep. (P-H) ¶ 8.11 (1989).

279. *Id.*

280. DEP'T OF HOUS. AND URBAN DEV., *supra* note 61, at 15.

281. *Id.*

282. Ware, *supra* note 41, at 107.

283. *Id.* at 103, 107-08.

284. Of the 769 cases referred to the General Counsel for cause determinations, only 80 were determined to have cause. *Id.* at 107-08.

date.²⁸⁵ Certainly, there was strong motivation to take advantage of either the strengthened enforcement provisions or the expanded classes of protection in the amended Act. However, what is disturbing is that while the number of conciliations continues to rise, the number of corresponding cause determinations continues to decrease.

The steady increase in conciliations and the accompanying steady decrease in the number of cause determinations should be cause for concern. What this may mean is that defendants, realizing the possible expense of resisting a complaint, are merely capitulating to the demands of the plaintiffs via HUD's enforcement mechanism. The quick resolution of a dispute is advantageous if the plaintiff encountered bona fide discrimination. However, if defendants are exercising constitutionally protected rights and are merely capitulating to government demands to cease and desist, the number of conciliations should cause alarm.

3. *The HUD SLAPP*

The amended Act and its subsequent implementation, while well-intentioned, has combined with certain forces in the fair housing community to chill legitimate debate upon important subjects of public policy. Housing advocates, with HUD as an accomplice, have seized upon provisions in the Act that allow extraordinary costs to be imposed upon dissenting views within the community. The absence of meaningful pleading or procedural hurdles, the employment of HUD's enormous resources, and the broad interpretation of "interference" can work in combination to allow SLAPPs to be filed against persons otherwise exercising free speech.

Housing advocates soon gave in to the irresistible temptation to initiate a HUD action upon encountering any community resistance to a proposed housing development.²⁸⁶ The resistance offered by members of the community was not typically the kind that the statute was designed to combat.²⁸⁷

285. DEPT OF HOUS. & URBAN DEV., *supra* note 16, at 13.

286. *See Fair Housing Issues, supra* note 4.

287. *See supra* notes 68-73 and accompanying text. The statute was ostensibly passed to stop the physical, organized, or state sponsored terrorism designed to prevent a certain class of persons from enjoying constitutionally protected rights. Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 81, 81 (1968) (current version at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

Courts have held that although interference, along with coercion or intimidation do not have to involve physical threats,²⁸⁸ they must at least involve illegitimate and forceful efforts to deny a person housing, based solely based upon membership in a protected class.²⁸⁹

However, HUD's acceptance of a much broader interpretation of interference allowed complaints to be filed without evidence or substantiation.²⁹⁰ By allowing such complaints, HUD has unwittingly allowed aggressive housing advocates to impose costs upon persons merely exercising the right to free speech, thereby chilling public debate. The imposition of these costs in the form of time, energy, legal fees, and deterioration of community standing are made with impunity. Although the conciliation process involves extensive legal costs for the defendant, the process does not involve a formal complaint being filed and therefore, frivolous allegations are not sanctioned.²⁹¹

What is revealing is that of the thirty-four cases that HUD identified as involving First Amendment issues, twenty-three were dismissed for no cause.²⁹² The remaining eleven complaints did not involve protected speech and were not considered.²⁹³ Essentially, 100% of the cases involving free speech did not have the factual basis to conclude that discrimination occurred.

Allowing these claims soon led to adverse publicity.²⁹⁴ Trying to blunt charges of insensitivity to the First Amendment, HUD issued new guidelines that purportedly protected free speech while still affording HUD the opportunity to attack housing discrimination.²⁹⁵

288. *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992).

289. Richmond's use of police and other agencies to threaten criminal and other sanctions, without basis in law or fact, was determined to fall within the category of coercion, interference, and intimidation. *Id.*

290. *Fair Housing Issues*, *supra* note 4.

291. Sanctions only apply to the filing of an actual complaint. See FED. R. CIV. P. 11.

292. Letter to Robert F. Hoyt, *supra* note 89, at 1.

293. *Id.*

294. See *Intimidating Political Protest*, WASH. POST, Aug. 22, 1994, at A16; Foderaro, *supra* note 22; MacDonald, *supra* note 22; Rosen, *supra* note 22.

295. See Memorandum from Roberta Achtenburg, *supra* note 130.

C. *Weaknesses of the New Guidelines*

The new guidelines assert HUD's belief in the primacy of the First Amendment. The guidelines state that HUD will not accept complaints of coercion, interference, and intimidation if they involve public activities designed to achieve governmental action, and if they do not involve force or threats of force.²⁹⁶ Additionally, any complaints based upon coercion, interference, or intimidation will not be accepted without prior approval from HUD headquarters.²⁹⁷ Regardless of the emphatic statements about respect for free speech, the exceptions to the guidelines eviscerate the protection that they are purportedly designed to promote.

The guidelines only apply to a very narrow subset of the public that could theoretically become involved in housing issues within their town or city. Specifically, the guidelines only apply to third parties not directly involved with any real estate transactions.²⁹⁸ Therefore, under the new guidelines, any attempt to directly intervene in any real estate transaction that could tangentially affect a protected class could be cause for a HUD investigation. Of course, this leaves the possibility that HUD could become involved in any free market transaction involving a protected class of individuals and a third party. Former actions by HUD illustrate that any attempt to outbid an organization who plans to use the subject property for housing a protected class could be construed as interference.²⁹⁹

Under the broad definition of interference adopted by HUD, any social service or housing advocacy providers wishing to acquire real estate could merely threaten any other bidder with HUD action and effectively raise the cost of property beyond the normal market cost for the third party. The cost for the third party would increase because, in addition to the cost of the property, the third party would have to balance the defense costs against a potential fair housing complaint as a transaction cost.

HUD also makes it clear that although it will not personally prosecute actions based upon alleged third party viola-

296. *Id.*

297. *Id.*

298. *Id.*

299. See Foderaro, *supra* note 22.

tions of section 3618,³⁰⁰ it still encourages persons to exercise the option of a private action.³⁰¹ However, no mention is made of the availability of attorney fees and costs for plaintiffs bringing such actions, while the presumption is that under the statute they are still available.³⁰²

The most important exception is that all of the protections presumably provided by the guidelines are null and void if an individual files a lawsuit.³⁰³ For example, assume there has been some irregularity on the zoning board, such as an apparent conflict of interest. If a person files a lawsuit trying to compel another zoning board vote on the proposed sale of city-owned property to a housing advocacy group, the mere filing of a lawsuit can result in a HUD investigation. HUD carefully crafted the guidelines so that all public actions that are acceptable under First Amendment jurisprudence (e.g., peaceful public demonstrations, letters to the editor, circulating petitions, and participating in town meetings) are protected, unless that public action involves a lawsuit.³⁰⁴ Essentially, HUD said that free speech is acceptable, but petitioning the government via the courts is not.

HUD allows the cost-shifting mechanism of the amended Act to effectively prohibit public interest lawsuits by forcing potential public interest plaintiffs to fight a two-front war.³⁰⁵ When a person files a public interest lawsuit, he or she must not only try to win the initial action, but must also try to fend off a housing discrimination complaint prosecuted by a well-funded, professional federal agency. By radically increasing the cost of litigation, HUD places the last — and most realistic — line of defense³⁰⁶ an individual has against government

300. See Fair Housing Amendments Act of 1988, 42 U.S.C. § 3618 (1988 & Supp. V 1993).

301. See Memorandum from Roberta Achtenburg, *supra* note 130.

302. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(b) (1988 & Supp. V 1993).

303. See Memorandum from Roberta Achtenburg, *supra* note 130.

304. See *id.*

305. The plaintiff is the party that initially filed the public interest lawsuit only to have a HUD complaint filed against him, almost as a countersuit. The HUD complaint thereby forces the plaintiff to prosecute two lawsuits, one as a plaintiff and one as a defendant.

306. It is unrealistic to think that individual protest, or even small community protest, could garner the influence to deter legislative action through conventional means. Assuming sufficient protest could be mounted to get the attention of elected officials, there is still most likely the problem of time lag between the controversial action and an election. Without access to the courts,

collusion, violations of valid zoning restrictions, and dumping,³⁰⁷ beyond most people's means.³⁰⁸

Additionally, municipalities are not covered by the guidelines, so presumably any protest actions that occur in the city could subject the managers and elected officials to time consuming and expensive litigation with HUD.³⁰⁹ For example, if a citizens group organizes a peaceful protest or petition drive, activities that are protected under the guidelines, HUD could hold the city managers responsible for the protest and file a housing discrimination complaint against the city. Essentially, HUD allows the individuals in the city to exercise their First Amendment rights, but it construes that exercise as housing discrimination and holds the city where the protest took place responsible.

Once the city or city managers are implicated in the HUD investigation, the individual protections offered by the new guidelines are easily circumvented. Using the generous complaint amendment provisions of the amended Act, a potential complainant could amend the complaint and allege that the city managers conspired with the individual protesters. By using conspiracy and impleading individuals, the HUD investigation and subsequent chilling effect could be "bootstrapped" upon a person exercising constitutionally protected rights.

Even if HUD decides not to investigate persons filing public interest lawsuits, there is no protection if those lawsuits fail. The guidelines make no reference to HUD's ability

individuals can only stop offending actions by electing someone more sympathetic to their views. The more distant an election, the more diminished the political power of the individual becomes. In other words, by the time the individual's protest can be translated into action, the offending development will most likely be operating and the individual's protest moot.

307. "Dumping" is used to describe situations in which one neighborhood is forced to accept a disproportionate share of group homes and other residential treatment facilities.

308. Attempting to litigate against HUD with its multi-million dollar budget and cadre of experienced attorneys would be extraordinarily expensive.

Housing cases are, in essence, the federal government against the defendant. The government is represented by its elite litigation corps — DOJ [Department of Justice]. The attorneys at DOJ are specialists recruited in a highly selective process. Moreover, there is no fair housing bar comparable to the employment and labor bars at HUD.

Ware, *supra* note 41, at 112.

309. See Memorandum from Roberta Achtenburg, *supra* note 130.

to investigate retroactively and prosecute.³¹⁰ Even if HUD postpones its investigation, there is no prohibition on a subsequent investigation and prosecution if the person's lawsuit does not prevail. HUD could, after the fact, assert that the lawsuit itself was discrimination, proof of which would be the fact that it failed on the merits. HUD could chill the right to petition merely by suggesting that any lawsuits that do not prevail will be construed as frivolous and will subject the person who filed it to an investigation.³¹¹

Finally, the guidelines issued by HUD are not administrative rules. Issuance of rules requires notice and comment, pursuant to the Administrative Procedure Act,³¹² and cannot be changed or modified unilaterally. However, guidelines do not have those procedural protections and can be changed at any time and for any reason.³¹³

Admittedly, the guidelines provide a modicum of protection for the freedom of speech. Unfortunately, they create a minor, but easily circumvented, procedural hurdle against the imposition of a SLAPP action against free speech. However, there are several other alternatives that would protect the freedom of speech and allow for vigorous prosecution of bona fide instances of housing discrimination.

IV. PROPOSAL

Allowing aggressive housing advocates to steamroll public discourse should be neither the objective nor practice of HUD's administration of this country's fair housing laws. The difficulty is that the conflict pits two fundamental constitutional rights against each other: (1) the defendant's right of free speech and petition, and (2) the plaintiff's right to seek housing free from invidious discrimination.

A significant part of the problem lies in trying to determine if a complaint filed with HUD is bona fide, or just an attempt to stifle public discourse. That determination by its nature is fact-dependent and would require a preliminary investigation just to determine the merit of the claim. The investigation could be chilling in itself, thereby ironically sti-

310. *Id.*

311. See Telephone Interview with Roger Conner, *supra* note 15.

312. See 5 U.S.C. § 553(c) (1988).

313. See Telephone Interview with Roger Connor, *supra* note 15.

fling protest in an attempt to determine whether that was the motivation behind the initial complaint.

Manipulating the definition of a SLAPP runs the risk of being too broad and thereby eliminating some legitimate discrimination suits. Alternatively, using a narrow definition allows too many SLAPPs to be brought. Consequently, the only way to control SLAPPs and maintain a vigorous anti-discrimination policy is to narrow access to HUD's enforcement machinery and expedite dismissal of meritless claims.

A. *Narrowing Access to HUD*

These solutions to HUD SLAPPs are designed to filter access to HUD's enforcement machinery. They are relatively minor and must be used in conjunction with a revised set of administrative rules based upon the sham exception under the *Noerr-Pennington* doctrine.

1. *Specific Pleading of Complaints*

Historically, courts have been hesitant to require a heightened standard for pleading.³¹⁴ However, it has been suggested that pleadings should be more specific when First Amendment rights are involved.³¹⁵ HUD currently seems to allow an even more liberal standard than the short and plain statement showing that the pleader is entitled to relief that is required by the Federal Rules of Civil Procedure.³¹⁶

If HUD were to require more specificity in the initial complaint, it would have a two-fold benefit. First, it would allow most meritless claims to be dismissed and avoid the SLAPP controversy. Second, it would allow HUD to preserve resources to better prosecute legitimate claims.

2. *Noerr-Pennington as a Filtering Device*

HUD should interpret the statute using *Noerr-Pennington* as a lens. Traditionally, courts use *Noerr-Pennington* to protect the rights of individuals to petition the government without running afoul of antitrust legislation.³¹⁷ However, HUD could use *Noerr-Pennington* in the same manner, allowing individuals in the community to petition the govern-

314. See *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981).

315. *Id.* at 47 (Neely, J., dissenting).

316. FED. R. CIV. P. 8.

317. See *supra* notes 209-20 and accompanying text.

ment, including by filing suit without running afoul of fair housing legislation. HUD would refrain from investigating the actions of the group or individual petitioning the government unless the petition was merely a sham to camouflage discriminatory conduct.

HUD should define the conduct that is protected by First Amendment rights more broadly to include filing suit. Under the *Noerr-Pennington* exception, filing suit would be allowed as long as the litigation did not operate as a sham to mask discriminatory conduct.

The sham exception articulated in *California Motor Transport v. Trucking Unlimited*³¹⁸ extended *Noerr-Pennington* to all departments of the government, including the courts.³¹⁹ Although critics have been quick to point out that the sham exception articulated in *California Motor Transport* is not significantly more clear than when it was first articulated in *Noerr*,³²⁰ it is valuable as part of an overall strategy to limit frivolous lawsuits.

The sham exception “encompasses situations in which person use the governmental process — as opposed to the outcome of the process — as an anti-competitive weapon.”³²¹ For example, frivolous objections that are repeatedly filed solely to clog the judicial apparatus through added delay and expense, are not protected under *Noerr*.³²²

Similarly, HUD could use the same standard to determine whether filing suit in objection to a housing initiative is merely an exercise of a person’s right of petition, or an attempt to deny housing to a protected class. Of course, a sham determination is a question of degree, and to some extent a factual question. However, using its current investigatory tactics, HUD could investigate serial filings less obtrusively than it could investigate generalized accusations of housing discrimination.

The sham exception as applied is not a mathematical determinant. It merely allows the presumption of legitimacy to reside with the citizen who files the lawsuit. Allowing that

318. *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972).

319. *Id.* at 515

320. *See* Waldman, *supra* note 134, at 1004-05.

321. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

322. *California Motor Transp.*, 404 U.S. at 511-12.

presumption does not unfairly disadvantage the individual, advocate, or governmental body who had the suit filed against them. First, the person objecting to the housing development must undertake the costs of filing the suit, and he or she must file the suit in good faith or face sanctions.³²³ Second, the person must prevail on the merits.

Of course, HUD could step in if the person filing the suits is just using the right to petition to impose expense and delay in order to effectuate illegal discrimination. *Noerr's* sham exception provides a convenient rule of thumb that separates the well-meaning person exercising constitutional rights, from the culpable person attempting to use the governmental process to discriminate. Forcing HUD to use *Noerr* as a guide for when to step in, allows a person of good faith to participate in public discourse without having to fight a two-front war.

B. *Accelerated Dismissals*

1. *In General*

In response to the proliferation of SLAPP suits and their corrosive effect upon public discourse, California recently passed an anti-SLAPP bill.³²⁴ The bill does not limit access to the courts, but instead provides a mechanism to dismiss these actions early in the contest to avoid imposing unnecessary costs on the defendant.³²⁵ By preventing the plaintiff from imposing costs upon the defendant, the primary weapon of the SLAPP has been eliminated. HUD could establish a formal rule pursuant to its statutory rule-making authority that would allow for rapid dismissal prior to a potentially chilling HUD investigation.

2. *HUD Anti-SLAPP Rule*

The HUD rule should be based upon a modified California anti-SLAPP statute.³²⁶ The California statute states that any cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech in connection with a public issue, shall be subject

323. See FED. R. CIV. P. 11.

324. CAL. CIV. PROC. CODE § 425.16 (West Supp. 1996).

325. *Id.*

326. *Id.*

to a special motion to strike.³²⁷ The proposed rule could read as follows:

Proposed Rule for Dealing With Housing Discrimination
Complaints that Have First Amendment Implications

....

(a) The Department of Housing and Urban Development finds and declares that there has been a disturbing increase in housing discrimination complaints brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances.

(b) A housing discrimination complaint arising from any act of that person in furtherance of the person's right of free speech or petition shall be subject to a special motion to strike, unless the Secretary determines that there is a substantial probability that the complainant will prevail on the claim. In making the determination, the Secretary will consider the complaint, and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(1) The Secretary's ruling in subsection (b) is subject to judicial review by the district court in the district where the action is filed.

(c) As used in this section, "act in the furtherance of a person's right of petition or free speech" includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law. It shall not include any act that includes a physical element and that is intended to intimidate or coerce.

(d) All discovery proceedings in the action shall be stayed upon the filing of a motion made pursuant to this section. A hearing shall be noticed not more than thirty days after service.³²⁸

Critics will point out that, without a preliminary investigation, there is no way to determine whether a housing discrimination complaint will have a "substantial probability" of success. There is some validity to that criticism, and it is addressed by using several procedural devices that expedite determination of a claim's merit.

327. *Id.*

328. This model code is based loosely on California's anti-SLAPP statute. *See id.*

The difficulty with dismissing the complaint at the pleading stage is that the complaint, no matter how cursory or general, usually states some claim that should at least be investigated. Additionally, courts usually only dismiss complaints at this stage if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief."³²⁹ The requirement for more specific pleading will eliminate some of the frivolous complaints, but there is still a problem with complaints on the margin.

Complaints that have some possibility of being bona fide will have to be investigated. However, HUD's investigations have already been shown to have a chilling effect upon free speech and the right of petition.³³⁰ Giving the person who is subjected to a HUD complaint the ability to make a special motion to strike would protect against illegitimate complaints spawning full-fledged HUD investigations. Additional protection would be provided by the automatic stay of discovery upon filing the special motion to strike.³³¹

The protection from frivolous complaints would come from HUD adopting a summary judgment "in reverse" standard for dismissal at this stage. Summary judgment "in reverse," rather than requiring the defendant (in this case the person against whom the HUD complaint was filed) to defeat the plaintiff's pleading by showing it is legally or factually meritless, requires that the plaintiff (the person who filed the complaint) demonstrate that he or she possess a legally sufficient claim.³³²

V. CONCLUSION

The Fair Housing Amendments Act is a valuable tool to combat discrimination. It provides a variety of enforcement options, realistic penalties, and sufficient remedies. However, if HUD continues to abuse its enforcement mechanisms, allowing the Act to bludgeon and stifle legitimate, nonviolent political discourse on important public issues, portions of the Act may be declared unconstitutional.

329. *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978).

330. *Foderaro*, *supra* note 22; *MacDonald*, *supra* note 22; *Rosen*, *supra* note 22.

331. CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 1996).

332. *College Hosp. v. Superior Court*, 882 P.2d 890, 903 (Cal. 1994).

Ultimately, what could occur would be the least attractive option. The courts, fearing the backlash from vested interests and lacking the moral courage to confront an issue that falls under "civil rights," would not declare the Act unconstitutional. The Act would continue to be implemented as is, skillfully avoiding the media spotlight, but still indiscriminately punishing the innocent as well as the culpable. Finally, as the numbers of innocent persons caught in its web grow, the Act would lose its high moral ground.

The historic struggle of those who established this legislation would be irrevocably tarnished and their noble legacy lost. The Act would no longer stand for the maxim that all Americans deserve to be judged on the content of their character and not on the color of their skin. Instead, a disenchanted public would view it as simply another bureaucratic tool used by the apparatchiks to stifle dissent.

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