

# **Using Local and State Legislation To Preserve and Expand the Ability of Fair Housing Organizations to Prosecute the Discrimination They Uncover**

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## **Introduction**

Almost 40 years after the passage of the Fair Housing Act, we remain far from achieving the Act's goal of creating "truly integrated and balanced living patterns."<sup>2</sup> Many metropolitan areas are still plagued by high levels of residential segregation.<sup>3</sup> Nevertheless, the housing market experiences much less conscious, intentional discrimination than it once did—a change due in no small measure to the consistent efforts of not-for-profit fair housing organizations to initiate investigations of housing providers and real estate brokers.

Those efforts were both powerfully facilitated and too narrowly channeled by *Havens Realty Corp. v. Coleman*, the 1982 case in which the Supreme Court announced what seemed like very broad standing rules in fair housing cases.<sup>4</sup> However, experience has shown that two of the *Havens* rules have actually created unexpected difficulties for some fair housing organizations, and there is ample reason to fear that the Supreme Court will undercut *Havens* entirely when it next faces a fair housing standing case. Thus, there is a pressing need to explore state and local legislative means by which to codify even more expansive standing rules.

The best way to proceed is for states and localities to adopt a simplified "private attorney general" model. This article explores the reasons for doing so, suggests a prototype "Fair Housing Defense Act,"<sup>5</sup> and recounts the successful effort to incorporate the private attorney general model into the comprehensive fair housing ordinance enacted by Nassau County, New York in 2006.

## **The indispensability of testing as a fair housing enforcement tool**

No serious effort to combat housing discrimination can rely solely on individual victims of housing discrimination stepping forward. First, many victims are understandably more interested

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<sup>2</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting statement of Sen. Mondale at 114 Cong. Rec. 3422 (1968)); see 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

<sup>3</sup> See, e.g., John Iceland, Daniel H. Weinberg, & Erika Steinmetz, *Racial and Ethnic Residential Segregation in the United States: 1980-2000* (U.S. Census Bureau 2002), available at <http://www.antibiaslaw.com/Segregation2000.pdf>.

<sup>4</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

<sup>5</sup> The full text of the proposal is available at <http://www.antibiaslaw.com/FHDA.pdf>.

in solving the immediate problem of finding a place to live than in commencing what may be long and difficult litigation. Second, the fact of residential segregation sends a message to members of groups not currently living in a neighborhood that they are not wanted, and, accordingly, many people are deterred from seeking homes in such segregated neighborhoods. Lastly, many individuals who have been turned down or steered away from an available unit may not even know that a housing opportunity has been withheld as there is often no way to know what one has not been shown.

Testing, by contrast, allows a fair housing organization to ferret out hidden—and often entrenched—discrimination. The technique of testing typically involves providing individuals trained to act as apartment or home seekers with profiles that are equivalent except for protected class status. These testers are sent separately to a housing provider or real estate broker. By assessing how people with equivalent profiles are treated, the fair housing organization can determine whether a turndown occurs for a prohibited or a legitimate reason. Testing thus allows fair housing organizations to develop rock-solid evidence of discrimination. But if the fair housing organization cannot meet the standing requirements, the systemic housing violator will remain free to discriminate.<sup>6</sup>

### **Organizational standing-based investigative or remedial efforts**

Under *Havens*, an organization can achieve standing in two ways. First, an organization can obtain standing by showing that it expended resources to investigate and uncover housing discrimination but only if those expenditures of time or money represent a diversion from activities, such as housing counseling, that the organization would otherwise have performed. The “consequent drain on the organization’s resources,” gives rise to “a concrete and demonstrable injury to the organization’s activities.”<sup>7</sup> *Havens* also grants standing if an organization can demonstrate a frustration of its mission. To satisfy this requirement, the organization must have attempted to counteract or remedy the discrimination it has uncovered (through educational programs, for example). This path to standing also depends on a showing that the remedial efforts impose a “consequent drain” on the organization’s other activities, thereby frustrating those activities.<sup>8</sup> As such, whereas the first *Havens* path to standing, though, might be described as “diversion of resources to investigate,” the second path might be described as “diversion of resources to remedy.”

Fair housing organizations have been successful using both of these paths, but each poses unnecessary, and sometimes insurmountable, hurdles. Diverting resources to investigate means that the fair housing organization has to have been engaged in other activities from which resources can be diverted. However, it may neither be possible as a matter of funding, nor desirable as a matter of policy, for the organization to do anything other than focus all of its limited resources on investigation. Moreover, many fair housing organizations have funding that is specifically designated for conducting testing and other investigative activities (particularly

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<sup>6</sup> There would be no standing problem if those entities at all levels of government with authority to initiate fair housing investigations on their own motion did so consistently. Examples of such commitment to enforcing the law are, unfortunately, few and far between.

<sup>7</sup> *Havens*, 455 U.S. at 379.

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

HUD “Private Enforcement Initiative” funds). Although claims of diversion based on the use of personnel or testers already funded to investigate can be constructed, such claims will likely face increasing skepticism at the summary judgment, trial, and post-trial stages.<sup>9</sup>

Another hurdle for organizations is that a minority of circuits have held that standing cannot be grounded exclusively on litigation-related expenses incurred in respect to the defendant being sued.<sup>10</sup> The Supreme Court has not resolved the split.

The “diversion of resources to remedy” route can also be fraught with difficulty. Fair housing organizations may not have funds available to begin remedial efforts, and the remedial efforts may not involve the “significant resources” that were alleged to have been expended in *Havens*. Also, the fact remains that this method requires diversion from some other activity.

An alternative to the *Havens* standing rules might be found in the analogy provided by the federal False Claims Act. The federal False Claims Act allows private parties who themselves have not been injured to commence actions on behalf of the government to remedy certain injuries to the federal government.<sup>11</sup>

Fair housing violations are easily conceptualized as injuries to the government. Indeed, they are an injury to a national goal that “Congress consider[s] to be of the highest priority.”<sup>12</sup> As Senator Javits said when the FHA was being considered in the Senate, fair housing violations are injuries to “the whole community.”<sup>13</sup> Furthermore, fair housing organizations are appropriate vehicles for the defense of this national interest. Congress already recognizes that “the proven efficacy of private nonprofit fair housing enforcement organizations and community-based efforts makes support for these organizations a necessary component of the fair housing enforcement system.”<sup>14</sup> A federal law granting automatic standing to fair housing organizations would be consistent with Congress’ articulated goals. But the chances of such a law being enacted seem almost non-existent. States and localities need to step in to fill that void.

When a fair housing organization uncovers discrimination, it acts in the public interest and it does so whether or not its investigative or remedial efforts have caused the organization to divert any resources from other activities. The organization has a genuine interest in addressing the problem (as evidenced both by its stated corporate purposes and its activities). This interest is not that of the casual observer, but of an entity that has taken concrete action and devoted

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<sup>9</sup> See, e.g., *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) (holding that, while the organization may have proved that it expended resources to test, it had not proved that the testing had diverted its resources from other activities).

<sup>10</sup> See, e.g., *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (“An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.”).

<sup>11</sup> 31 U.S.C. § 3730(b).

<sup>12</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

<sup>13</sup> *Id.* (quoting statement of Senator Javits at 114 Cong. Rec. 2706 (1968)).

<sup>14</sup> P.L. 102-550, § 905(a)(9).

resources to attacking the problem.<sup>15</sup> Finally, it is clear that maximizing standing for an organization that initiates fair housing investigations will maximize the prosecution of violations that otherwise would go unreported.<sup>16</sup> A state or local private attorney general provision, therefore, should deem an “eligible civil rights organization”<sup>17</sup> to be injured when the organization discovers through an investigation involving the use of testers that a covered entity is engaging or has engaged in an unlawful discriminatory practice, provided that the organization has either: (i) expended funds to conduct the investigation, or (ii) expended funds to begin to attempt to remedy the covered entity’s unlawful discriminatory practice, regardless of whether the expended funds represented a diversion of resources from other activities. The provision should specify that the injury exists regardless of whether the organization’s investigative or remedial work represented a diversion of resources from other activities.

### **Organizational standing based on deprivation of a statutorily protected right**

In *Havens*, the Supreme Court recognized that even a tester who had no interest in renting or purchasing the housing accommodations about which the tester inquired nevertheless could have standing because section 3604(d) of the Fair Housing Act provides that it is illegal to falsely represent to any person (the Court emphasized this statutory phrase) that a dwelling is unavailable if the misrepresentation is because of protected class.<sup>18</sup> The Court found that the fact that the tester had no true interest in actually residing in the housing in question was immaterial; by creating a private right of action to enforce the prohibition on status-based misrepresentations, “Congress has thus conferred on all ‘persons’ a legal right to truthful information about available housing.”<sup>19</sup>

One might have thought that not-for-profit fair housing corporations would have seized on this language as a basis for their own standing. After all, they are persons under the FHA,<sup>20</sup> and, like any corporation, they can only act through their agents. A tester is unquestionably the agent of the fair housing organization, and thus, each time a tester is deprived of truthful information due to protected class basis, the organization is itself so deprived.<sup>21</sup> Moreover, as the fair housing

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<sup>15</sup> Cf. *Sierra Club v. Morton*, 405 U.S. 727, 757-58 (1972) (Blackmun, J., dissenting) (calling for an “imaginative expansion of our traditional concepts of standing” to allow organizations with pertinent and bona fide purposes and interests to litigate on behalf of environmental protection).

<sup>16</sup> A sobering 2002 Urban Institute study found that eighty-three percent of people who believed they had been the victims of housing discrimination took no action to vindicate their rights. Martin D. Abravanel, *Public Knowledge of Fair Housing Law: Does It Protect against Housing Discrimination?*, 13 Housing Policy Debate 469, 497 (Fannie Mae Foundation 2002).

<sup>17</sup> To be defined as “any not-for-profit organization that is recognized as exempt from taxation pursuant to section 501(c) of the Internal Revenue Code and whose primary mission is fighting discriminatory practices made unlawful under local, state, or federal anti-discrimination law.”

<sup>18</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

<sup>19</sup> *Id.* at 373.

<sup>20</sup> 42 U.S.C. § 3602(d) includes corporations in the definition of “person.”

<sup>21</sup> The fact that a fair housing organization might get truthful information when it deploys a white tester does not change the fact that there are instances where it is deprived of truthful information because of race. The entitlement to truthful information regardless of race is not framed as a right to get such information “sometimes,” or “so long as you use agents of the protected class preferred by the housing

organization is the person that has the ongoing, institutional interest in identifying, punishing, and remedying violations of the FHA, it is the party whose interest is most substantial.

Unfortunately, because *Havens* presented fair housing organizations with the seemingly ready-made diversion of resources and frustration of mission avenues for standing, it is those models that have been followed, while the easier approach of claiming deprivation of a statutory right to truthful information has gone largely unexplored.<sup>22</sup> The provision in a state or local statute that specifies when a fair housing organization has standing should include those circumstances where the organization is not given full and accurate information by a covered entity about the availability of housing or other real estate, employment, or services that the covered entity in fact has available because of the actual or perceived protected basis of the organization, its agents, or those persons with whom it associates or serves.

## **Damages**

In the same way that discriminators should not be the beneficiaries of the low wages paid to public interest lawyers in the attorney's fees context, they should not be the beneficiaries of the low wages paid to the personnel of fair housing organizations in the context of awarding compensatory damages. When a private attorney general provision sets a measure for those damages, one element should be the fair market value of the organization's efforts to investigate and remedy.

A second element needs to be recognized as well. If one person tortiously damages the property of another, the victim need not affect a repair prior to seeking redress. The victim, armed with an estimate from an appropriate contractor, is able to recover a damage award based not only on what the victim has already spent, but also on the prospective costs attributable to repairing the damage. Likewise, compensatory damages under a private attorney general provision should include not only that which the organization has already expended, but also that which it demonstrates remains necessary to expend in order to remedy the discriminatory practice.

Finally, the provision should disclaim any limitations on the other types of damages and relief that may be available under the statute.

## **Incorporating a private attorney general provision into Nassau County's new fair housing law**

Civil rights advocates accustomed to a generation of setbacks may find my proposal to be no more than wishful thinking. In fact, it has been adopted largely in one of the two jurisdictions in which it has been pressed. In 2005, both Nassau and Suffolk counties appeared willing to discuss the adoption of comprehensive fair housing ordinances in the wake of a report concerning housing discrimination and segregation on Long Island that had been published by

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provider.”

<sup>22</sup> While *Havens* is still the law, fair housing organizations should attempt this approach. See, e.g., the consent decree in *Anti-Discrimination Ctr. of Metro New York v. Omni, Inc.*, 06-CV-0552 (E.D.N.Y. Aug. 1, 2006) (reciting as the sole basis of the suit the fact that the Center was deprived of truthful information on some occasions because of the race of the testers it used on those occasions).

the civil rights organization ERASE Racism.<sup>23</sup> I was privileged to act as legislative counsel for ERASE Racism in the lobbying effort that followed, and we submitted draft legislation that included a private attorney general provision.

Suffolk ultimately passed a law that contained some improvements but resisted the private attorney general provision. Nassau, on the other hand, was prepared to go further. It took several significant steps forward, including one that rejects recent judicial rulings purporting to exclude discriminatory harassment of tenants in occupancy from the coverage of the FHA and another rejecting New York's incomprehensibly narrow caselaw interpreting the proscription against "marital status" discrimination (that state's highest court does not consider intentional discrimination against unmarried couples to fall within the meaning of the proscription).

And, yes, Nassau enacted a private attorney general provision, adopting both the "investigative expenditure without diversion" prong of the proposal and the "standing when one's agent is deprived of truthful information" prong as well. Indeed, Nassau went further than the proposal by codifying these rights for all "persons," not just eligible fair housing organizations.<sup>24</sup>

## Conclusion

Some may say that, insofar as this article is anticipating a rollback of *Havens*, its premise is too alarmist. *Havens* has now been the law for twenty-five years. The 1988 Fair Housing Amendments Act was passed with full knowledge of *Havens*, and the FHA's language invoking the full scope of Congressional authority, subject only to constitutional limitations, was not limited. These are good reasons why the Supreme Court should not overturn *Havens*, but hardly adequate assurance that a Court that has turned the clock back in so many other ways will not do so in this way as well. Notwithstanding the difficulties and limitations of state and local campaigns, I believe we must embark on them, both so that a federal rollback in this area can be blunted before it begins and so that we can adjust the standing rules so that those best situated to prove concealed housing discrimination are not unnecessarily hindered from getting the opportunity to prove their cases.

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<sup>23</sup> See ERASE Racism, Long Island Fair Housing: A State of Inequity, *available at* <http://www.antibiaslaw.com/ERASERacismReport.pdf>.

<sup>24</sup> The full text of the Nassau law is available at <http://www.antibiaslaw.com/NassauLaw.pdf>. The private attorney general provision is codified at Nassau County Admin. Code § 21-9.7(d)(3)(vi).